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I. INTRODUCTION

There was nothing normal about the year 2020. For just the third time in history, an American president was impeached, world icons John Lewis and Kobe Bryant passed away, the country of Australia was devastated by brushfires that burned some forty-six million acres of land, and The United States faced a racial reckoning the likes of which had been unseen since the Civil Rights era.[1] All of this took place on the heels of a global pandemic that has killed more than 4.3 million people to date and has infected 10% of the global population.[2] These events of the year 2020 left visible scars that will be felt for a generation; however the presidential election that ensued at the end of the year and the aftermath of it, has the potential to change the fabric of America forever.

The buildup to the 2020 Presidential election was in a lot of ways overshadowed by the COVID-19 pandemic. COVID-19 is the disease caused by SARS-CoV-2 and is a respiratory illness that spreads through

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1. *2020: The Year in Events*, HISTORY.COM (Dec. 21, 2020), https://www.history.com/topics/21st-century/2020-events.

2. Cecilia Smith-Schoenwalder, *WHO Estimates Coronavirus Has Infected 10% of Global Population*, U.S. NEWS (Oct. 5, 2020), https://www.usnews.com/news/health-news/articles/2020-10-05/who-estimates-coronavirus-has-infected-10-of-global-population; *COVID-19 Dashboard*, CENTER FOR SYSTEMS SCIENCE AND ENGINEERING (CSSE) AT JOHNS HOPKINS UNIVERSITY (Aug. 9, 2021) https://coronavirus.jhu.edu/map.html .

droplets and virus particles that are "released into the air when an infected person breathes, talks, laughs, sings, coughs or sneezes."[3] Infectious particles from the virus can linger in the air and accumulate in indoor places, which necessitates precautions such as social distancing, and mask wearing.[4]

The virus was extremely contagious, and during the 2020 election season a vaccine had yet to become available to the American public. Thus, as the world started to learn these things about the virus, governments began to require citizens to stay home and, in the event that they did need to leave their homes for household essentials, wear a mask. The ever-shifting narrative from the government on the pandemic caused mistrust in some quarters of the public sphere. All of a sudden public health became a polarized issue and the 2020 election was viewed through that lens. Everything from how debates would be held to how votes would be cast became politicized and polarized.

As such, when the world collectively shut down as death tolls and case numbers rose, gone were the traditional politicking and mud-slinging that typically accompany an election year, and the national focus shifted to stopping the spread of COVID while campaigns largely moved online. However, during the dog days of summer the President of the United States posted a tweet that changed the course of voting rights in America: "[m]ail-[i]n [b]allots will lead to massive electoral fraud and a rigged 2020 [e]lection."[5]

Mail-in ballots have long been a staple of the election process in America. As far back as the Civil War, Americans have been filing absentee ballots for reasons ranging from military deployment to illness, for the most part without issue.[6] Over the years, states grew confident in their ability to handle absentee voting on a larger and larger scale. For this reason, as the pandemic continued to ravage the United States of America into the fall of 2020, states began examining how they could expand mail-in balloting to avoid massive spreads of COVID during the election season.

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3. Lauren M. Sauer, M.S., *What is Coronavirus?*, HOPKINS MEDICINE (May 19, 2021), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus.

4. *Id*.

5. Salvador Rizzo, *Trump's Fusillade of Falsehoods on Mail Voting*, THE WASHINGTON POST (Sept. 11, 2020), https://www.washingtonpost.com/politics/2020/09/11/trumps-fusillade-falsehoods-mail-voting/.

6. Olivia B. Waxman, *Voting by Mail Dates Back to America's Earliest Years. Here's How It's Changed Over the Years*, TIME (Sept. 28, 2020), https://time.com/5892357/voting-by-mail-history/.

The primary season was the perfect test ground for expanded mail-in voting, however an explosion of lawsuits was berthed out of this experimentation, in hopes to prevent enhanced mail-in voting from ever seeing implementation in the general election.[7] The subject of the lawsuits varied, but the overarching theme was the same: Democratic law makers pressing to make it easier to cast and count mail in ballots, and Republican lawmakers resisting, claiming that this expansion would lead to voter fraud.[8]

The polarization on this issue led to traditional "blue" states having more voters signed up for absentee ballots while "red" states saw lower numbers. By the fall, President Trump was progressively more likely to have an early advantage in the election that would correlate to the immediate counting of in-person votes, and then badly lose the mail-in vote (in which counting was more laborious) and potentially, the presidency along with it.[9]

Predictions of a red mirage and subsequent blue wave became true on election night, as before 11:00 PM EST the President held what looked like a commanding lead.[10] As such, despite a substantial number of mail-in votes to be counted, President Trump declared victory and falsely asserted election fraud in anticipation of an influx of mail-in ballots that would likely count against him.[11] Over the next three days of counting mail-in ballots, the Trump legal team launched an all-out assault against the American voting system, pledging intensified legal efforts as they watched their lead dissipate. The legal theories, though shallow, revolved around three issues: "alleged barriers to observing the counting of mail-in ballots, alleged votes cast by the deceased and alleged backdated ballots."[12] However, the evidence of these claims was scant and thus all of the claims that the Trump team presented in court ultimately failed.

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7. Jim Rutenberg & Nick Corsaniti, *Behind Trump's Yearslong Effort to Turn Losing Into Winning*, THE NEW YORK TIMES (Nov. 23, 2020), https://www.nytimes.com/2020/11/15/us/politics/trump-voter-fraud-claims.html.

8. *Id.*

9. *Id.*

10. Colby Itkowitz et. al., *Trump falsely asserts election fraud, claims victory*, THE WASHINGTON POST (Nov. 4, 2020), https://www.washingtonpost.com/elections/2020/11/03/trump-biden-election-live-updates/.

11. *Id.*

12. Deanna Paul et. al. *Election 2020: What Are the Trump Legal Claims?,* THE WALLSTREET JOURNAL (Nov. 8, 2020), https://www.wsj.com/articles/election-2020-what-are-the-trump-legal-claims-11604876612.

The blue wave swept away any hopes of victory, and Joseph R. Biden was eventually elected as the nation's 46th President.[13]

The months that followed the 2020 Presidential election continued to be tumultuous. President Trump refused to concede and instead publicly asserted baseless allegations of election fraud. His legal team opened up legal challenges in six states on various grounds, however in each of the six states were unsuccessful, losing on more than sixty claims.[14] With every mounting loss, frustration clearly continued to build for the outgoing President. He demanded recounts in multiple states, told officials in the state of Georgia to find some more votes, and took a scorched earth approach to anyone who dare tell him that he should concede. As fall turned into winter a growing faction of the country not only believed that there were irregularities about the election, but that it was intentionally stolen from Donald Trump.

Those tensions boiled over on January 6 2021. That Wednesday was significant because it marked the day in which the election results would be certified by Congress, effectively ending any sliver of hope Trump and his supporters had at returning to the White House. The day began with the President of the United States again doubling down on his claims that the election had been stolen:

> All of us here today do not want to see our election victory stolen by emboldened radical-left Democrats, which is what they're doing. And stolen by the fake news media. That's what they've done and what they're doing. We will never give up, we will never concede. It doesn't happen. You don't concede when there's theft involved. Our country has had enough. We will not take it anymore and that's what this is all about. And to use a favorite term that all of you people really came up with: We will stop the steal. Today I will lay out just some of the evidence proving that we won this election and we won it by a landslide. This was not a close election.[15]

On the heels of those words from Donald Trump, a crowd that had gathered in Washington D.C. to hear him speak and to take place in a march around Capitol Hill turned violent. Mob mentality took hold and hundreds of protestors stormed the Capitol, overflowing security and eventually making it all the way to the floor where the election results

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13. Jonathan Lemire et. al., *Biden Defeats Trump for White House, Says time to heal,"* AP NEWS (Nov. 7, 2020), https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9.

14. Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, THE WASHINGTON POST (Mar. 11, 2021), https://www.washingtonpost.com/elections/interactive/2020/election-integrity/.

15. President Donald J. Trump, *January 6th Address at Capitol Hill* (Jan. 6, 2021).

were being certified—sending congressmen and women from around the country into hiding to avoid harm. Offices were destroyed, people were killed, and the country was embarrassed.

In the weeks that would follow, the election was indeed certified, and the national conversation shifted to why a group of people was so angered that they would storm one of the most sacred buildings in America. Of course, both sides of the political spectrum condemned the acts of those involved, however the reasoning behind each party's condemnation was a snapshot of the core of the real problem. While the Democratic party blamed President Trump's remarks and his continuous unfounded claims that the election was stolen, the Republican party blamed a flawed electoral system that left a large swath of the country dissatisfied, and in their mind, disenfranchised.

Whereas the Democrats focused on putting together an investigatory team to ensure those involved in the January 6th insurrection were held responsible, the Republicans shifted their focus to tightening voting laws in ways that had not been seen since the Jim Crow era. Unable to convince courts that there were any indicia of election fraud that affected the outcome of the 2020 Presidential Election, the Republican focus shifted to what caused them to lose an election they believed they were so certain to win.

For Republicans, the answer boiled down to two issues: historic voter turnout; and unprecedented vote by mail usage. The strategy to address the issues is nothing short of voter suppression. States around the country turned to efforts to eliminate at-will absentee voting and dramatically decrease the number of ballot drop boxes.[16] At least twelve states have issued new restrictions on mail-in voting.[17] At least eight states have enacted eleven laws that make in-person voting more difficult. These laws enact provisions such as requiring harsher ID requirements, eliminating election day registration, limiting availability of polling places, and reducing early voting.[18] If the efforts to restrict voting rights are not curbed—and soon—the next chapter of American history is doomed to look a lot like some of the first chapters.

II. A BRIEF OVERVIEW OF VOTING RIGHTS LAWS AND MEASURES IN THE

16. Jane C. Timm, *Georgia Republicans Vow Legislation to Limit Mail Voting Despite No Evidence of Fraud*, NBC NEWS (Dec. 8, 2020), https://www.nbcnews.com/politics/donald-trump/georgia-republicans-vow-legislation-limit-mail-voting-despite-no-evidence-n1250431.

17. *Voting Law Round Up: May 2021*, THE BRANNAN CENTER (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.

18. *Id.*

UNITED STATES AFTER THE PASSING OF THE FIFTEENTH AMENDMENT.

A. False Dawn: The Fifteenth Amendment and the First Big Push for Voting Rights in America.

The Fifteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[19] However, in the decades that followed the passing of the Fifteenth Amendment, former slave states utilized various vehicles to limit who exactly could vote. The spectrum of acts to accomplish these aims included measures such as literacy tests to literal voter intimidation at the hands of the KKK. The Fifteenth Amendment was interpreted extremely narrowly in the Reconstructionist Era, especially by the conservative Democratic party who launched a strategy of imposing discriminatory electoral structures and policies that disfranchised those with personal traits that at the time were believed to be synonymous with being an African American.[20]

> Southern Democrats gerrymandered election districts, instituted at-large elections, annexed or deannexed land as it fit their racial and partisan interests, and required huge bonds of officeholders. Seizing temporary legislative majorities through violence and ballot-box stuffing, they passed literacy tests or their equivalents, the "eight-box" or secret-ballot laws, which disproportionately disadvantaged ex-slaves, who had been prohibited by law from learning how to read. Democrats also instituted property tests or poll taxes, which especially penalized blacks for their disproportionate poverty.[21]

B. A New Hope: The Voting Rights Act and the Shield of Preclearance.

It was the aforementioned suppression tactics that served the purpose and the back drop of the landmark Voting Rights Act of 1965 (VRA).[22] When the VRA was originally passed the focus was primarily on removing barriers to registration and voting that were faced by minorities, and there were some immediate successes and victories. Gone were disenfranchisement tools such as literacy tests and poll taxes, and while voter dilution was still a real fear and possibility, the overt

19. U.S. Const. amend. XV, § 1.

20. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 678–79 (2008).

21. *Id.*

22. 52 U.S.C. § 10101.

discrimination that was faced by minority populations since the original passing of the Fifteenth Amendment had effectively disappeared.

In order to avoid the same perils of statutory interpretation bastardizing their newly passed law the way it did the Fifteenth Amendment, the framers of the 1965 VRA implemented a section of the law known as preclearance. Section five of the VRA has been interpreted to require covered jurisdictions to obtain prior approval or "preclearance" from the U.S. Attorney or the U.S. District Court for the District of Columbia before implementing any voting changes.[23]

Covered jurisdictions are those with a history of discriminatory practices and low minority voting records.[24] Jurisdictions that were affected by preclearance included Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, as well as certain counties in California, Florida, New York, South Dakota, Michigan and North Carolina.[25] Over the years, the Supreme Court has interpreted preclearance to cover a litany of voting changes to include: changes in election systems,[26] changes in the manner in which votes are cast,[27] revising candidate qualifications,[28] annexing neighboring districts,[29] and redrawing district lines.[30]

The effects of VRA and preclearance have been undeniable. Since 1965, black registration and voter turnout in former confederate states have rebounded from being almost thirty percent lower than that of whites, to being almost equal.[31] In 1965 there were only five African Americans in the House of Representatives and the Senate combined, today there are 124.[32] Nationwide, African Americans have gone from holding fewer than 1,000 offices nationwide before the VRA to over

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23. 52 U.S.C. § 10304.

24. *Id*.

25. *Jurisdictions Previously Covered by Section 5*, THE UNITED STATES DEPARTMENT OF JUSTICE (Sept. 11, 2020), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

26. Allen v. State Bd. of Educ., 393 U.S. 544 (1969).

27. *Id*.

28. *Id*.

29. City of Pleasant Grove v. United States, 479 U.S. 462 (1987).

30. Georgia v. United States, 411 U.S. 526 (1973); Terrye Conroy, *The Voting Rights Act of 1965: A Selected Annotated Bibliography*, 98 L. LIB. J. 663, 666 (2006).

31. Danielle Lang, *Five Decades of Section Five: Key Provision of the Voting Rights Act Protected Our Democracy*, CAMPAIGN LEGAL CENTER (June 22 2016) https://campaignlegal.org/update/five-decades-section-5-how-key-provision-voting-rights-act-protected-our-democracy.

32. *Id*.; Katherine Schaeffer, *Racial Ethnic Diversity Increases Yet Again With the 177th Congress*, PEW RESEARCH CENTER (Jan. 28, 2021) https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/.

10,000 today.[33] Moreover, between 1982 and 2006 the DOJ blocked over 700 voting changes, finding that there was discriminatory intent suggesting that "the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy."[34] Preclearance brought more diversity to positions of power across the country, and removed barriers to voting in the places around the country that insisted otherwise.

However, preclearance was not a bi-partisan effort and was not popular in the states and counties that were required to submit to it. The law was constantly under fire from conservatives who saw it as nothing more than big government flexing its muscle on the states and forcing them to "plead," "beg" and "entreat" to the federal government before they could do their job in creating policy.[35] These feelings of discontent pervaded the late 20th century as various judicial attacks on the VRA began to take place. Due to the broad scope of the VRA, courts were able to wield wide discretion in how they would frame interpretations on the issue of preclearance.[36] This led to conflicting decisions and inconsistently applied law. However, despite consistent challenges to its constitutionality, preclearance was reauthorized four times: in 1970, 1975, 1982, and 2006.[37] The law was renewed because it was successful.[38]

C. The Empire Strikes Back: Shelby County and the End of Preclearance.

The challenges to preclearance came to a head in 2013 in *Shelby County, Ala. v. Holder*.[39] The petitioner, Shelby County, sought declaratory judgment that preclearance was facially unconstitutional and sought an injunction against its enforcement.[40] Chief Justice Roberts in delivering the opinion of the Court stated that preclearance in and of itself, while necessary and upheld as constitutional due to the circumstances at the time, was a step outside the norm in order to contain a problem.[41] By proclaiming that these sections of the VRA were temporary fixes to a temporary problem, the Court was then able to usher in a whole new era of voting rights in America. The Supreme Court in

33. Lang, *supra* note 31.
34. Shelby County, Ala. v. Holder, 570 U.S. 529, 571–73 (2013).
35. South Carolina v. Katzenbach, 383 U.S. 301, 359–60 (1966).
36. Kousser, *supra* note 20, at 698.
37. *See Shelby County,* 570 U.S. at 564.
38. *Id*.
39. *Id*. at 529.
40. *Id*.
41. *Id*. at 546.

Shelby County held that the preclearance sections of the VRA were unconstitutional and would be done away with:

> Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time . . . . Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress.[42]

Chief Justice Roberts concluded his opinion in *Shelby County* by claiming that voter discrimination was still illegal and that advocates for preclearance, essentially, should rest in that fact.[43] However, the success of preclearance was being used to show why it was unconstitutional. The problems cited by the petitioner in *Shelby County* no longer existed because of the success of the VRA. Moreover, racial discrimination in voting had evolved. The Court spent an inordinate amount of time talking about how overt racial discrimination was no longer an issue that prevented access to the ballot box, without addressing the covert ways in which race was still an active barrier to suffrage for a large swath of the country.

For the dissent, the dissolution of overt racism in the voting systems of America did not mean the disappearance of racism as a whole, and the majority was missing the fact that voter suppression had taken on a new form. In a prophecy of sorts, Justice Ginsburg in her dissent predicted the aftermath of the 2020 election almost eight years before it occurred:

> Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an "avalanche of case studies of voting rights violations in the covered jurisdictions," ranging from "outright intimidation and violence against minority voters" to "more subtle forms of voting rights deprivations." This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

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42. *Id*. at 554 (quoting *Katzenbach*, 383 U.S. at 308, 315, 331; Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. 193, 201 (2009)).

43. *Id*. at 557.

> True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§ 2(b)(2), (9).[44]

A large part of Justice Ginsberg's distaste for the holding in *Shelby County* was the lack of recourse for any future discrimination. The majority in *Shelby County* cited to Section Two of the VRA as future recourse, but Justice Ginsberg rebuffed that idea claiming that Section Two was weaker than preclearance not only because of the high hurdle that challenges under Section Two must clear, but also because Section Two is a reactionary maneuver versus the proactive measure of the preclearance sections.[45] A problem that the United States now stares down the barrel of, as conservative states begin to change their election laws.

When the story of the laws passed in reaction to the 2020 election is told in history books, the starting point has to be *Shelby County* and the Court's failure to foresee what was to come. States that were prevented from making unchecked changes to their election laws are now creating barriers to the ballot box that overwhelmingly affect minorities—the exact result that preclearance was designed to prevent. As Justice Ginsberg poignantly stated, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[46]

III. A WHOLE NEW WORLD: POST-PRECLEARANCE VRA IN THE WAKE OF THE 2020 ELECTION

As the reality of the 2020 election results finally began to take hold, Republicans went to the drawing board to figure out two questions: The first was what happened? This general election was supposed to be another relatively easy win for the conservatives. The Democrats again selected a nominee who was not popular with their own increasingly progressive base, and the Republicans had the incumbent, who no matter how embattled, always holds the advantage. The second question was

44. *Id*. at 575–76 (citation omitted).

45. *Id*. at 572.

46. *Id*. at 590.

how to prevent this sort of devastating loss from ever happening again. The answer to the first question was relatively easy for the Republican party to answer—they believed the election was stolen. In a poll conducted in December of 2020, seven out of ten Republicans believed that the election was stolen.[47]

The answer to the second question was less straight forward. Those that subscribed to the belief that the election results should be overturned did so on the premise of increased absentee voting was susceptible to fraud, which was the party line touted by President Trump. Nevertheless, courts around the country (to include the Supreme Court) determined otherwise, leaving Republican lawmakers without recourse in the American judicial system. However, because of *Shelby County* there was a new avenue that Republican strategists could take to ensure an election like 2020 never happened again.

Most of the states that the Trump legal team launched lawsuits alleging election fraud in were states that were formerly subjected to preclearance under sections four and five of the VRA. Now that preclearance was no longer a factor though, state legislation seemed the best avenue in order to effectuate change in the wake of the 2020 election.

A. Texas

While the state of Texas was won by President Trump during the 2020 election and was not the subject of one of his numerous lawsuits, the state still decided to address imaginary voting fraud. Texas Republicans decided that the best legislative avenue to respond to the 2020 general election was to tighten the time frames and venues in which votes could be cast. For example, Harris County set up drive-thru voting where voters would pull up to movable tents, show their ID and vote all without exiting their vehicle.[48] The option proved popular in the county as one out of every ten early voters opted to do so via the drive-thru.[49] However, one of the first things addressed in the proposed voting law overhaul before the Texas legislature is the prohibition of drive-thru voting.[50]

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47. Michael Ruiz, *Clear Majority of Republicans (7 out of 10) Believe November Election Not AccuratelyCcertified*, FOX NEWS (Jan. 5, 2021), https://www.foxnews.com/politics/republicans-7-out-of-10-believe-november-election-not-accurately-certified.

48. Alexa Ura, *What's In the New Voting Restriction Legislation in the Texas House and Senate*, THE TEXAS TRIBUNE (July 8, 2021), https://www.texastribune.org/2021/07/08/texas-voting-bill-special-session/.

49. *Id*.

50. S. 1, 2021 LEG., 87th SESS. (Tex. 2021).

Further, Harris County also introduced twenty-four-hour voting in order to provide voting access to those who could not take time off of work, or who worked more of a night shift schedule.[51] Despite its popularity, the Texas legislature is also pushing for this expansion in voting hours to be prohibited as well.[52] Included in Texas Senate Bill One are also provisions that would prevent counties from sending out unsolicited voting applications, new ID requirements, and enhanced protections for those who volunteer as poll watchers giving them unprecedented access to the voting process.[53]

B. Michigan

One of the largest firestorms from the former President when it came to allegations of voter fraud was against the state of Michigan. While the state's Republican party launched an investigation and could not substantiate the president's claims, the legislature still decided that alleged voter fraud clouded the general election in Michigan.[54] Bills that focused on adding restrictive ID requirements for voters were the legislative tool of choice for the Great Lakes State.[55] Requiring ID is a popular modern suppression tactic. Conservative lawmakers focus on the wide range of things that require an ID, from buying alcohol to driving a car. However, what gets lost in their argument is that almost none of the activities included in that spectrum are constitutional rights.

In Michigan, if a voter for whatever reason requests an absentee ballot, then they must submit their driver's license number or a state identification number.[56] Moreover, ID is now also required to vote in person, and if a citizen shows up to vote without it, then they will only be able to submit a provisional ballot which for various reasons could be tossed.[57]

IV. THE GEORGIA ELECTION INTEGRITY ACT

Arguably the most expansive overhaul to a state's voting system took place in the state of Georgia. Georgia's electoral system was on national display during the 2020 election as the presidential race was decided by

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51. Ura, *supra* note 49.

52. S. 1, 2021 LEG., 87th SESS. (Tex. 2021).

53. Ura, *supra* note 49.

54. Richard J. Epstein, *Michigan Republicans Debunk Voter Fraud Claims in Unsparing Report*, THE NEW YORK TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/politics/michigan-2020-election.html.

55. S. 285, 101st Sess. (Mich. 2021).

56. *Id.*

57. *Id.*

less than 12,000 votes.[58] After the election, the Trump legal team filed a litany of lawsuits around the state with the aim of nullifying President Biden's win.[59] Every single one of those lawsuits was either withdrawn or rejected by courts at every level of the judiciary, from county level all the way to the U.S. Supreme Court with judges across the ideological spectrum in lockstep.[60] The former president did not stop at just the lawsuits however; Trump at one point made national news by imploring the embattled secretary of state of Georgia to "find" the nearly 12,000 votes he needed to win.[61] The results of the election in the state did not change, but the drama surrounding the events of the 2020 election foretold the story of the changing landscape of voting laws in the state.

While the leadership in Georgia did not partake in the false narrative of election fraud, they instead made wide- and far-reaching changes to their election systems that made other changes done in states like Michigan and Texas look modest. The Georgia Voting Integrity Act would have almost certainly been denied under preclearance, and is such a "breathtaking assertion of partisan power" that the Department of Justice has filed suit in order to overturn the law.[62] Georgia's new law focuses on creating restrictions and hurdles to ballot access for voters in the more populous counties in the state as well as the suburban counties—both of which tend to be home to the densest populations of the state's Democrats.[63]

The changes in law have familiar refrains of voter suppression such as requiring voter ID and making absentee voting harder as well as novel, harsher restrictions such as criminalizing the act of offering water to voters waiting in line—something that tends to happen in the longer lines in densely populated communities.[64]

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58. *Presidential Results*, CNN, (Dec. 2, 2020), https://www.cnn.com/election/2020/results/president.

59. Stephen Fowler, *Newly Revealed Call Details How Trump Pressed Georgia Investigator to Find Vote Fraud*, NPR (Mar. 11, 2021), https://www.npr.org/2021/03/11/976030079/newly-revealed-call-details-how-trump-pressed-georgia-investigator-to-find-vote-.

60. *Id*.

61. *Id*.

62. Nick Corasaniti, *What Georgia's Voting Law Really Does*, THE NEW YORK TIMES (Apr 2, 2021), https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html; Joyce White Vance, *The Justice Department is Suing Georgia. Don't Expect Garland to End There*, THE WASHINGTON POST (June 29, 2021), https://www.washingtonpost.com/outlook/2021/06/29/merrick-garland-suing-georgia-voting/.

63. Corasaniti, *supra* note 63.

64. *Id*.

A. Absentee Applications

As was the case in the majority of the country due to the COVID-19 pandemic, voting by absentee ballot skyrocketed across the state of Georgia in 2020.[65] After the pandemic hit and ahead of the primary elections, Georgia's Secretary of State, Brad Raffensperger, mailed absentee ballot applications out to every single registered voter in the state, which led to record absentee voting in the primaries.[66] Raffensperger did not do the same thing in the general election, however local government agencies in Georgia's large urban counties followed the secretary of state's example in the primary election.[67]

The boom in absentee voting caused an initial Trump lead on election night to be overcome and eventually ended in the state being won by the Democrats for the first time since 1992.[68] Per the new law, the practice of sending out mass applications is now illegal in the state of Georgia:

> A blank application for an absentee ballot shall be made available online by the Secretary of State and each election superintendent and registrar, but neither the Secretary of State, election superintendent, board of registrars, other governmental entity, nor employee or agent thereof shall send absentee ballot applications directly to any elector except upon request of such elector or a relative authorized to request an absentee ballot for such elector.[69]

Invariably, this measure by the legislature will lead to fewer absentee ballots being requested. The argument that this promotes election integrity is, at best, a stretch. If an application is made available through the internet, it is just as accessible as it would be if it was sent through the mail.

B. Mobile Voting Centers

As in Harris County, Texas the larger counties in the state of Georgia took advantage of mobile voting centers during the 2020 election.[70] These mobile centers would traverse populous parts of the state, bringing polling sites to people at places such as parks, public libraries, and

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65. *Id*.

66. *Id*.

67. *Id*.

68. Myrydd Wells, *Georgia Goes Blue for the First Time Since 1992*, ATLANTA MAGAZINE (Nov. 13, 2020), https://www.atlantamagazine.com/news-culture-articles/georgia-goes-blue-for-the-first-time-since-1992/.

69. S.B. 202, 156th GEN. ASSEMB., REG. SESS. (Ga. 2021).

70. Corasaniti, *supra* note 63.

churches.[71] More than 11,200 people (conveniently close to the number of votes Trump lost Georgia by) voted at the mobile sites across Georgia's largest counties. However, these mobile voting centers have been deemed a threat to voting integrity and have essentially been banned by the new law:

> The superintendent of a county or the governing authority of a municipality shall have discretion to procure and provide portable or movable polling facilities of adequate size for any precinct; provided, however that buses and other readily movable facilities shall only be used in emergencies declared by the Governor pursuant to Code Section 38-3-51 to supplement the capacity of the polling place where the emergency circumstance occurred.[72]

At the height of the pandemic, these mobile voting centers provided an opportunity to spread out overly populated voting centers. Why would the Republican legislature want to remove something that makes it easier and safer (particularly in the midst of a global pandemic) to vote? Because it only made it easier to vote in a state that they lost.

C. Absentee Voting Identification

Previously, the only identification that was required when simply applying for an absentee ballot was the signature of the applicant. Now, however, voters are required to provide either a driver's license number or an equivalent stated ID.[73] If any small step is missed on the absentee ballot application, then the new law enables the state to simply toss the ballot rather than to seek a cure.[74] Moreover, the legislature also cut in half the period of time that voters may request an absentee ballot stating that the request cannot be made sooner than 78 days before the election.[75] These changes will almost certainly reduce the number of absentee ballots requested in future elections, which was the aim of the overwhelmingly Republican Georgia legislature. Why? "In the last presidential election 1.3 million Georgians—about 26 percent of the state's electorate – voted with absentee ballots. Of those who returned absentee ballots in 2020, 65 percent voted for Joseph R. Biden Jr. and 34 percent chose Donald J. Trump."[76]

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71. *Id*.
72. S.B. 202, 156th GEN. ASSEMB., REG. SESS. (Ga. 2021).
73. *Id*.
74. *Id*.
75. *Id*.
76. Corasaniti, *supra* note 63.

D. United States v. Georgia—The DOJ's Attempt to Thwart Georgia

These select provisions from the Georgia Election Integrity Act show the overarching purpose of the law[77]—to implement additional barriers to voting in larger counties in hopes of dissuading the historic turn out that was experienced during the 2020 election. Each of the sections mentioned disproportionately affects the larger counties in the state of Georgia, which coincidently were all won by the Democratic candidate for president, and are disproportionately black. The staunchly partisan law caught the attention of Attorney General Merrick Garland in the summer of 2021 as the Department of Justice filed suit in the case *United States v. Georgia*. The claim is made under Section Two of the VRA which prevents states from adopting laws or practices that deny or interfere with the right to vote based on race or color.[78] Because of the holding in *Shelby County* the state of Georgia was not required to seek approval from the Justice Department before enacting its law. Now, as predicted by Justice Ginsberg's dissent in *Shelby County*, the only recourse is suit under Section Two.

Section Two of the VRA was established to incorporate not only the blatant discrimination practices of the past, but also any practice that would tend to dilute the votes of a particular group of people. A claim under Section Two can only be established if:

> Based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[79]

Prior to 2021, Section Two claims turned on what courts referred to as the results test. The results test requires those bringing the complaint to establish that the provision has a discriminatory result on minorities. Results of discrimination can be difficult to make out, but it is not impossible. For instance, in *United States v. Georgia*, the Department of Justice alleges that from 1968 to 2013, while Georgia fell under preclearance and had to submit proposed changes to ensure they were nondiscriminatory, Georgia had 177 changes denied.[80] That is sufficient

77. Complaint, United States v. Georgia, (N.D.G.A. 2021) (No. 1:21-cv-02575-JPB).

78. *Id*. at 42.

79. 52 U.S.C. § 10301.

80. Vance, *supra* note 63.

proof of the intent of the state of Georgia to achieve discriminatory results according to the DOJ complaint.

However, remember Justice Ginsburg's prophetic words in *Shelby County*? Remember how she stated that the loss of preclearance would risk the gains made by the VRA? Remember how she characterized Section Two as a weak remedy for preventing states from adopting discriminatory voting legislation? The 2021 Supreme Court decision in *Brnovich v Democratic National Committee*[81] fulfilled Justice Ginsburg's prophecy and created an almost insurmountable barrier between those hoping to stop intentional voter suppression and those whose focus is staying in power.

V. A LOST HOPE: BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE

The most recent chapter of the dismantling of the 1965 Voting Rights Act was written in the summer of 2021. Arizona became the latest prior preclearance jurisdiction to take advantage of the Court's decision in *Shelby* to change its voting laws. The Democratic National Committee filed suit based on two election laws in Arizona. The first was based on the law in Arizona that calls for ballots cast in the wrong precinct to be thrown out. The state of Arizona provides the options for counties to choose whether they will fall under a traditional precinct system, where a voter must vote in the precinct to where they are assigned, or a voting center in the county that allows voters to vote anywhere there is a center within their county.[82] Precincts are assigned based on addresses, and if a voter does not vote in their registered precinct, then the vote is not counted.[83]

The second law that was contested in *Brnovich* was a house bill that made it a crime for "any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed."[84] The significance of this law is felt in low income, minority areas of the state. In the state of Arizona, polling places are often changed between elections, and even more so in lower income neighborhoods.[85]

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81. Brnovich v. Democratic Natl. Comm., 141 S. Ct. 2321, 2325 (2021).

82. *Id*.

83. *Id*.

84. *Id*.

85. Pete Williams, *Supreme Court Upholds Restrictive Arizona Voting Laws in Test of Voting Rights Act*, NBC NEWS, (July 1, 2021), https://www.nbcnews.com/politics/supreme-court/supreme-court-upholds-restrictive-arizona-voting-laws-test-voting-rights-n1272892?cid=eml_nbn_20210701&user_email=0e83ab62d74e254ef5fa4eaaf9b992d4dda4

Additionally, minority voters are more likely to need assistance turning in their ballot. This is where third party vote collection comes into play. Third-parties, often volunteer groups, collect ballots in certain neighborhoods and ensure that they get to the correct polling place, avoiding the confusion of new polling locations and the possibility of a vote not getting counted.

Prior to *Shelby County*, it is likely that neither of these laws would have ever been passed. As one of the previous preclearance jurisdictions, the state of Arizona would have had to seek permission from the Department of Justice in order to enact the law, and due to the disparate impact on minorities, it is relatively easy to predict that the law would have been shot down. Arizona would have had the burden of showing that the law did not illegally affect minorities and that is a burden that they would not have been able to overcome. Similarly, to the DOJ in *U.S. v. Georgia*, and Justice Ginsburg's dissent in *Shelby*, the only actionable claim for the Democratic National Committee to stop these laws was Section Two of the VRA.

The court in *Brnovich* did not opt for a test that would govern all Section Two claims that have to do with time, place, or manner of casting ballots. Instead, in deference to the totality of circumstances requirement laid out in Section Two(b), Justice Alito announced a five factor guidepost for future courts to consider in determining the validity of similar claims: (1) the size of the burden imposed by a challenged voting rule (2) the degree to which a voting rule departs from standard practice when the VRA was amended in 1982 3) the size of any disparities in a rule's impact on members of different racial or ethnic groups 4) the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision and 5) the strength of the state interests served by a challenged voting rule. [86]

Utilizing the Justice Alito five-factor guidepost, the Court decided to uphold the Arizona laws.[87] However, the guideposts are a departure from congressional intent of the Voting Rights Act. For example, the first guidepost is to determine the size of the burden imposed by a proposed voting rule. Nevertheless, the size of an abridgement of voting was not a decision point when the VRA was passed. In fact, as the dissent points out, the days of blatant discrimination are far behind us, especially when it comes to voting. The biggest threat to voting rights remains the quickly multiplying number of subtle "inconveniences" that prevent people from

14cbe4016c7ee19a8b6e34390417&%243p=e_sailthru&_branch_match_id=889325923444058804&utm_medium=Email%20Sailthru.

86. *Brnovich*, 141 S. Ct. at 2338—39.

87. *Id.* at 2350.

voting.[88] The subtle nature of discrimination was pointed out by Justice Kagan in her dissent:

> [C]ategorical exclusion, for seemingly small (or "[un]usual" or "[un]serious") burdens, is nowhere in the provision's text. To the contrary (and as this Court has recognized before), Section Two allows no "safe harbor[s]" for election rules resulting in disparate voting opportunities. The section applies to *any* discriminatory "voting qualification," "prerequisite to voting," or "standard, practice, or procedure"—even the kind creating only (what the majority thinks of as) an ordinary burden. . .Congress, recall, was intent on eradicating the "subtle, as well as the obvious," ways of suppressing minority voting. One of those more subtle ways is to impose "inconveniences," especially a collection of them, differentially affecting members of one race. The certain result—because every inconvenience makes voting both somewhat more difficult and somewhat less likely—will be to deter minority votes. In countenancing such an election system, the majority departs from Congress's vision, set down in text, of ensuring equal voting opportunity. It chooses equality-lite.[89]

Essentially, Justice Kagan is arguing that majority is simply saying that a "truly discriminatory policy [can] stand as long as it does not disenfranchise too many voters."[90] Where is the bright line? How many people "inconvenienced" is too many? Take the ballot collection rule that was challenged in *Brnovich* for example. Only 18 percent of Native American voters in the state have access to simple mail services as opposed to 86 percent of white voters.[91] Most Native American voters must travel 45 minutes to two hours just to get to a mailbox.[92] It was for these reasons that the third-party collection services were popular amongst Native Americans in Arizona. With those services now being illegal, the two hour "inconvenience" disenfranchises a large swath of a population.

In sum, the *Brnovich* guideposts make challenging the modern-day approach to voter suppression more difficult than before *Brnovich*. Simply put, in *Brnovich* the Court decided that the claims of the DNC

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88. *Hearing on the Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*, Before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties In the United States House of Representatives (2021) (statement of Sean Morales-Doyle Acting Director, Voting Rights and Elections Program Brennan Center for Justice at NYU School of Law).

89. *Brnovich*, 141 S. Ct. at 2362 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994); *Allen v. State Bd. of Elections*, 393 U.S. 544 at 565 (1969)).

90. Morales-Doyle, *supra* note 90.

91. *Brnovich*, 141 S. Ct. at 2370.

92. *Id.*

were not strong enough to merit a system change. It recognized the changes as inconveniences, but diminished their impact by stating that every law provides some level of inconvenience.[93] However, even if the Court failed to view the changes in the voting law as impacting enough voters, the petitioner made it known that their belief was that these laws would gain more votes for the Republican party.[94] When Justice Barrett asked the petitioner during oral arguments what their interest in upholding one of the Arizona laws was, he responded with remarkable candor that doing otherwise would put his party at a "competitive disadvantage."[95]

While Section Two of the VRA was not completely dismantled in *Brnovich*, the law was significantly weakened. The Supreme Court traded in the results test for a complicated and over broad guideposts analysis that leaves ample room for interpretation in prior preclearance jurisdictions. As debates continue to swirl around election fraud in the 2020 election, the Republican party can utilize subtle changes in their voting systems to add "inconveniences" that serve as barriers to the ballot box.

VI: A COMMENT ON THE FUTURE OF VOTING RIGHTS IN AMERICA

The Department of Justice filed its lawsuit against Georgia without knowing how the Supreme Court would rule in *Brnovich*. How courts end up ruling in *U.S. v. Georgia* will be an effective barometer in predicting what challenges to election laws in the wake of *Shelby*, *Brnovich*, and the 2020 election will look like. It may also have a bearing on the success of any future legislation passed on this topic. As discussed previously, Georgia has passed arguably the most stringent of the new voting laws in response to alleged voter fraud in 2020. For this reason, the most effective place to start when looking at the future of voting rights in America is to examine how the guideposts provided by the Court in *Brnovich* will apply to the DOJ's lawsuit against Georgia.

A. The size of the burden imposed by the challenged voting rule in Georgia.

An important focus for the Court throughout *Brnovich* was to keep the proper perspective on the problem at hand. When discussing the first element of the five guideposts test, Justice Alito lays out a foundational belief that is important when future courts are examining this issue:

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93. *See Id*. at 2338.

94. Morales-Doyle, *supra* note 90.

95. Transcript of Oral Argument at 37—38, *Brnovich*, 141 S. Ct. 2321.

> [E]very voting rule imposes a burden of some sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules. But because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is "equally open" and that furnishes an equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting."[96]

Here, the Court seems to suggest that some barriers to voting are acceptable and should be expected. The problem with this statement by Justice Alito is where to draw the line: at what point do the trivial inconveniences to voting become intentional suppression? The Court offers no solutions. The best predictor here would be to compare the Arizona laws at issue in *Brnovich* to the law passed in Georgia in response to the 2020 election.

The laws in Georgia, while more expansive in scope, do not seem to be any more restrictive than the Arizona laws. For comparison, in Arizona if someone attempts to vote in the wrong precinct, their vote is automatically thrown out (if the district follows the precinct system, which most do).[97] However, while in Georgia a vote cast in the wrong district is typically thrown out just as in Arizona, if the vote is cast after 5 p.m. and before the regular time for the closing of the polls on the day of the primary, regular, or runoff, and the voter signs a sworn statement that they are unable to vote at the correct polling place prior to closing, their vote will be counted.[98]

Further, while the Georgia laws are suppressive in their own right, it is hard to see how any of the provisions that were passed would reach the levels of the law banning third party collection in Arizona. While each provision in the Georgia Voting Integrity Act in and of itself creates barriers to voting for minority and low income voters, none of them seem to rise to the level of any of the laws in *Brnovich* which would seem to suggest that this guidepost would be satisfied.

B. The degree to which a voting rule departs from standard practice when the VRA was amended in 1982.

The Court decided to utilize the VRA amendments in 1982 as the benchmark for comparison to future voting law changes. The reasoning behind the decision to use 1982 as the benchmark is unclear, other than

96. *Brnovich*, 141 S. Ct. at 2338 (citing Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008)).

97. *Id.* at 2325.

98. S.B. 202, 156th GEN. ASSEMB., REG. SESS. (Ga. 2021).

that was the last time that the VRA was amended.[99] The problem here is clear: choosing a point in time that is almost 40 years in the past as a point of comparison is both futile and asinine. Voting looks different in so many ways now than it ever has and some of the issues that came up in the 2020 election were not even on the radar of Congress when the VRA was amended in 1982. Regardless, the Court in *Brnovich* strikes a death blow to almost any challenge to the Georgia Voting Integrity Act when it states:

> [I]n 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots. . . We doubt that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States.[100]

If the standard for the Court is that only narrow and tightly defined categories call for absentee ballots, then it is likely that Georgia will be successful against the Department of Justice. Not just that, but a lot of the issues that are addressed in the Georgia Voting Integrity Act are those of first impression. If the gold standard for the Court is 1982 and the policy objective for the Court is to shrink superfluous voting issues then Georgia's voting law is exactly the type of law that will be passed going forward. It does not matter what novel issues the Court may face, if the standard is to be stuck in 1982.

C. The size of any disparities in a rule's impact on members of different racial or ethnic groups.

By implementing this guidepost, the Court is looking to how the changes in the voting system affect other minority groups. Seemingly, Justice Alito in writing the majority opinion is suggesting that just because there exists a disparity in impact amongst minority groups, that does not mean that they do not have an equal opportunity to vote.[101] Moreover, the court looks at disparate impact amongst groups when it comes to things such as employment, wealth, and education. If there are uneven impacts in those categories then it is predictable that there will be in voting rules as well and the Court seems unconcerned that it would be purposeful suppression. The majority seems more concerned about

99. *Brnovich*, 141 S. Ct. at 2339.

100. *Id.*

101. *Id.*

"small differences" becoming "artificially magnified" than they do about the actual affects that are felt by minority voters.[102]

With that, it is almost certain that the challengers to the Georgia Voting Integrity law will not be able to overcome this guidepost. All of the changes contained in the law are just small enough to be viewed as inconveniences, or as the Court puts it, "small differences." If the Supreme Court was unwilling to strike down laws that affect 82% of a minority group in Arizona, it seems highly unlikely that it would even grant cert on a challenge to the law in Georgia.[103]

The Georgia Voting Integrity Act has a disparate impact on minorities especially in urban populations. Most, if not all, of the provisions included in the law are aimed at major population centers throughout the state. The largest of those population centers being the counties that encompass the Atlanta-metro area which is predominantly black. Utilizing this guidepost, a future Court would look at that disparate impact and compare it across similarly situated races. However, the analysis would not get very far, because the presence of disparities in other areas. Focusing again on Atlanta, there are well documented disparities in employment and education, conveniently two of the factors under this guidepost pointed out by Justice Alito. Thus, because there are natural differences in opportunities provided to the varying races within the state, the Court likely would deem that the law is sufficient enough to pass this guidepost.

D. Opportunities provided by the state's entire system of voting.

Justice Alito includes this guidepost as a way of ensuring that future courts consider the entire set of voting laws in a particular state. While a noble aim, his reasoning falls short of ensuring that it is met. The Court mentions that where a state offers multiple avenues for voting "any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means."[104] Looking at the Georgia Voting Integrity act, it is likely that it will pass this guide post, as suppressive provisions do indeed offer what could be considered alternative ways to counteract any alleged discrimination. However, the problem is deeper than the surface.

What the Court seemingly leaves out of its evaluation though is the fact that sometimes what may look like options to legislatures, really turn out to be politicians limiting constituents based on social status,

102. *Id*.
103. *Id*. at 2370.
104. *Id*. at 2339.

location, and race. Voter suppression in one area of the law is not okay, even if a viable alternative is available in the eyes of the legislature. The voter whose provisional ballot is thrown out because of an arbitrary barrier put into place in the spirit of "voting integrity" does not suffer any less because she could have voted early.[105] Further, just because the option is available in the eyes of legislature, that does not mean it is available in practice.

To take the provisional ballot example further, say that a person who missed out on voting early works two jobs to make ends meet for their family. The new provision of the Georgia Voting Integrity Act strikes the old language saying that early voting times are up to the county and instead mandates weekday hours of 9 a.m. to 5 p.m. and counties can only extend the time as much as twelve hours from 7 a.m. to 7 p.m.[106] In American culture, especially in large urban populations, 80-hour work weeks are not unheard of. When does that person vote early? The answer is they probably do not. If then, their only opportunity to vote is out of precinct on a late-night drive home someday, do they really have an alternative the way the legislature deems they do?

E. The strength of the state interests served by a challenged voting rule.

This guidepost will almost certainly end any challenge to any voting law brought in the name of voting integrity. The first thing Justice Alito mentions when outlining this final factor is that "[t]he strength of the state interests—such as the strong and entirely legitimate state interest in preventing election fraud—served by a challenged voting rule is an important factor."[107] As previously demonstrated, countless courts around the country have stated that the there is no substantial evidence of voter fraud. However, if the highest court in the country is identifying preventing voter fraud (no matter how imaginary) as a main aim when deciphering the legality of new legislation then it seems as if any law passed in that spirit will stand. Justice Alito and the majority seem to put more emphasis on stopping a made-up problem, than ensuring equal access to the ballot box.

The aims of the legislature in Georgia are in lock-step with the reasoning behind this fifth and final guidepost. Georgia was the most tightly contested state during the 2020 election and was the epicenter of the Republican voter fraud accusations. There were claims of 30,000 fake

105. Morales-Doyle, *supra* note 90.

106. S.B. 202, 156th GEN. ASSEMB., REG. SESS. (Ga. 2021).

107. *Brnovich*, 141 S. Ct. at 2325.

ballots, irregularities at polling places and more.[108] Although almost all of those claims were proven false, the state continued pressing for the Georgia Voting Integrity Act.[109] The Supreme Court did not even have any allegations of voter fraud to consider in *Brnovich* and still touted election integrity as a "strong and entirely legitimate" state interest.[110] The fact that Georgia dealt with actual claims of fraud (no matter how outlandish or unproven) would likely be enough for the Court to decide that the state is only trying to advance an entirely appropriate aim. Voter suppression be damned.

VII: CONCLUSION

Voting rights have without a doubt taken a massive hit over the last eight years. From *Shelby County* to *Brnovich* an increasingly conservative Supreme Court has allowed for more restrictive voting policies and has intentionally suppressed the vote of minority and underprivileged communities. It is difficult to look at the last decade and not come away with the conclusion that the chances of any successful attempts at changing the direction of voting rights are slim to none. If there was an opportunity it would come in holes left in the interpretation of Section Two in *Brnovich* as well as possible future legislation curtailing recent Supreme Court interpretations of the VRA.

While the guideposts set out in *Brnovich* certainly heighten the hurdles to be cleared in order to bring an actionable Section Two claim, the Court stopped short of overturning the entire section. Moreover, the Court also opted not to formulate a test for Section Two that would require strict adherence.[111] To that end, the Court also stated that the lists of guideposts were not exhaustive, leaving the door open for future courts to shrink (or expand) the list created by Justice Alito and the majority.[112] Whereas the Court's ruling in *Shelby County* ended preclearance, the decision in *Brnovich* does not do the same for Section Two, meaning all hope is not lost on that front.

The main tool for voting rights advocates to turn the tide in the fight against voter suppression however is the John Lewis Voting Rights Advancement Act of 2021 (H.R. 4).[113] Aimed at softening the blow caused

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108. Daniel Funke, *Fact Check: No Evidence of Fraud in Georgia Election Results*, USA TODAY (June 1, 2021), https://www.usatoday.com/story/news/factcheck/2021/06/01/fact-check-georgia-audit-hasnt-found-30-000-fake-ballots/5253184001/.

109. *Id*.

110. *Brnovich*, 141S. Ct. at 2325.

111. *Id*. at 2336.

112. *Id*. at 2338.

113. John Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021).

by *Shelby County* and *Brnovich*, H.R. 4 reinstates and updates the preclearance formula as well as attempts to circumvent the five guideposts to an effective Section Two claim.[114] H.R. 4 is the consequence of the Supreme Court opinions being based on statutory interpretation. Congress has the ability through this bill to clarify the VRA so as to nullify the Court's interpretation. Realistically, however, the law faces an uphill battle to passage due to a sharply divided congress and the radical nature of the bill.

The unfortunate conclusion is that the future remains bleak for voting rights. It seems likely—shy a brazen discriminatory policy—that a state legislature will be able to continue to create barriers to voting in order to quell fears of election fraud. The fact of the matter is that more accessible voting is an existential threat to the continuance of a Republican party that is further and further out of touch from the majority of the American public. Moreover, with the appointment of Justice Amy Coney Barrett cementing a conservative super majority on the Supreme Court, it is more likely that the number of laws across the country that suppress the vote of Republican opponents will only continue to increase. Why? Because the true focus appears not to be free and fair elections, but rather staying in power.

This has always been the pattern, though. Going back to the passing of the 15th Amendment, the conservative party has always viewed equal access to the ballot as a negative. The only difference now is that today, the discrimination is more discreet because an increasingly cognizant American citizenry is attune to overt discrimination. This is why Justice Ginsberg was so resolute in her dissent in *Shelby* County. For her, it was never the big obvious acts of discrimination that would affect the VRA or the institutions of elections—it was the smaller, more subtle discriminatory acts that would continue to set the United States back decades.[115]

Minor inconveniences compound and become reasons that keep people from voting and create a chasm between those who may have easier means of voting and those who do not. Which is precisely the goal. It's always been the goal. Just ask the attorney representing the state of Arizona in *Brnovich* what overturning restrictive voting laws does to Republicans: "it puts us at a competitive disadvantage relative to Democrats. Politics is a zero-sum game, and every extra vote they get through unlawful interpretations of Section Two hurts us. It's the

114. *Id*.

115. *Shelby County*, 570 U.S. at 576.

difference between winning an election 50 to 49 and losing."[116] #VoterSuppression.

116. Transcript of Oral Argument at 37—38, *Brnovich*, 141 S. Ct. 2321.