The Impact of *Brnovich* and Georgia's Election Integrity Act of 2021 (S.B. 202) on Voting Rights & Redistricting

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We have just witnessed a triple doozy in the Voting Rights arena, and this rodeo is just getting started. At stake is how our Nation will enforce voting access in the face of what challengers call voter suppression laws enacted in 2021 by dozens of state legislatures. Also at stake is how our Nation will assure equally open access to voting in the face of legislatively imposed restrictions on that access predicated by concerns over rampant voter fraud, *absent credible evidence of such fraud*.

First, on March 25, 2021, on the heels of the 2020 Presidential Election and in the aftermath of election challenges adjudicated in over 63 lawsuits, Georgia's General Assembly enacted and Governor Kemp signed the Georgia Election Integrity Act of 2021, S.B. 202, comprehensively revising its laws relating to elections and voting. The 98-page omnibus bill contained a host of new restrictions on absentee voting, early voting, mail ballot drop-boxes, vote counting, local election officials, election administration funding for local election offices, along with provisions for greater political control by the State Election Board and a diminished role on the part of local election officials and the Secretary of State.

Second, on June 25, 2021, the United States challenged S.B. 202 in the first major action from the Biden administration to combat what it calls one of the first of a series of new restrictive voting measures passed by Republican-led state legislatures. *United States v. State of Georgia* was filed on the eighth anniversary of *Shelby County v. Holder*, the decision that effectively eliminated Section 5 preclearance by holding that its coverage trigger was fatally out of date.

Third, on July 1, 2021, in what some see as the sequel to *Shelby County*, the U.S. Supreme Court crippled and came close to gutting Section 2 of the Voting Rights Act in *Brnovich v. Democratic National Committee.* In this case two of Arizona's voting policies, one banning ballot harvesting and another throwing out ballots cast in the wrong precinct, were alleged to have disproportionately affected minority citizens' right to vote. The *en banc* Ninth Circuit and a 6-3 majority led by Justice Alito reached opposite conclusions because the 6-3 majority, according to dissenting Justice Kagan, "closed its eyes to the facts on the ground." *Brnovich*, slip op. at 30 (Kagan, dissenting op.)

We will address the relevant underlying circumstances and impact of these three events which created the perfect storm for Voting Rights and Redistricting. That storm will likely grow in intensity once the 2020 Redistricting data is transmitted to states, municipalities and other local governments after September 30, 2021.

The Georgia Election Integrity Act of 2021

The Georgia Election Integrity Act was drafted and enacted with lightning speed. It emerged less than three months after a mob of insurrectionists stormed the Nation's capital and four months after the nation and Georgia witnessed record voter turnout and participation in the 2020 Presidential Election, all transpiring in the face of a nationwide pandemic that killed over 600,000 in our country alone.

Dissemination of "Best Practices": The Role of ALEC and Heritage

This major overhaul of election laws was not unique to Georgia, but contained elements similar to model "best practices" developed by the American Legislative Exchange Council (ALEC) and Heritage Action for America, the political arm of The Heritage Foundation. These "best practices" were drafted and shared with a group of Georgia Republican legislators in late January 2021, following which the Georgia General Assembly fast-tracked the legislation that became the Georgia Election Integrity Act of 2021.

It included restrictions on mail ballot drop-boxes, criminalized conduct of election officials who send absentee ballot request forms to voters, made it easier for partisan workers to monitor the polls, prevented the collection of mail ballots, imposed additional ID requirements for absentee voting, criminalized conduct of volunteers who hand out water or food within 150 feet of polling precincts, and restricted the ability of counties to accept donations from nonprofit groups seeking to aid in election administration. Similar legislation was introduced in other Republican-dominated state legislatures in Arizona, Michigan, Florida, Iowa, Nevada, Wisconsin, and Texas.

Ari Berman and Nick Surgey, *Leaked Video: Dark Money Group Brags About Writing GOP Voter Suppression Bills Across the Country,* Mother Jones, May 13, 2021, https://www.motherjones.com/politics/2021/05/heritage-foundation-dark-money-voter-suppression-laws/

Igor Derysh*, Conservative groups are writing GOP voter suppression bills — and spending millions to pass them - Right-wing groups like Heritage and ALEC are crafting model legislation as GOP pushes over 250 restrictions,* Salon, March 27, 2021, https://www.salon.com/2021/03/27/conservative-groups-are-writing-gop-voter-suppression-bills---and-spending-millions-to-pass-them/

Challenges to S.B. 202

The Georgia Election Integrity Act was attacked by an array of civil rights organizations as a voter suppression measure, including the legal challenge filed against the State of Georgia by the United States Department of Justice on June 25, 2021.

Shelby County v. Holder had already nuked Section 5 preclearance in 2013 by holding its coverage provision was outdated. This left only Section 2 as the remaining powerful weapon in the federal civil rights arsenal for Voting Rights plaintiffs and the United States through the DOJ's Civil Rights Division.

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that has either the purpose or the result of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

Section 2 claims may be based on purposeful racial discrimination or on the "results test" enacted in 1982. As discussed below, the United States made a strategic decision in drafting its complaint in *United States of America v. State of Georgia* to allege purposeful discrimination under Section 2 and did not invoke the "results test" of Section 2.

Aside from DOJ's lawsuit which is strategically tailored to assert that the Georgia Election Integrity Act of 2021 is based on purposeful and intentional race discrimination in violation of Section 2 of the Voting Rights Act, each of the seven other pending cases focuses on specific provisions of S.B. 202, collectively challenging the Georgia Election Integrity Act of 2021 as racially discriminatory, adopted with the purpose of denying or abridging the right to vote on account of race, unconstitutional and disproportionately negatively impacting minority voters in violation of Section 2 of the Voting Rights Act. To add more pressure to this pressure cooker is how *Brnovich* has impacted the effectiveness, meaning and enforceability of Section 2 in vote denial cases as well as vote dilution cases, as explained below.

Text of Section 2 of the Voting Rights Act of 1965, as amended

Since the following discussion focuses largely on the text and meaning of Section 2, it is helpful to see what the statute says.

Section 2 has two interlocking parts.

Section 2 (a) sets forth the basic prohibition:

"No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which

results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U. S. C. §10301(a).

Section 2 (b) then prescribes how that bar is to be applied by the courts and when to find that an infringement of the voting right has occurred:

"A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a given race] in that [those] members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." §10301(b)

Up until the 2013 decision in *Shelby County v. Holder*, Section 2 and Section 5 worked in tandem. Section 2 was and is nationwide in scope and application. Section 5 with its preclearance mechanism and scope limited to specific states with a lengthy history of racial discrimination in voting and elections, exacted more federalism costs and was much more intrusive from a state-federal standpoint, to say the least. B. Griffith and D. O'Donnell, *Sections Two and Five as Amended by the Voting Rights Act Reauthorization and Amendments Act of 2006, at 147*, in America Votes! A Guide to Modern Election Law and Voting Rights (ABA 2008) (this chapter focused on two key provisions of the Voting Rights Act, Section 2 and Section 5, considered the most effective weapons in the fight to "attack the blight of voting discrimination" in our nation, with an examination of the relationship between these provisions, which "differ in structure, purpose and application" and which have been called "two of the weapons in the Federal Government's formidable arsenal," and their interplay with the 14th Amendment. Many who have smelled the smoke of the battle in litigation under the VRA would also agree these sections have been the most potent weapons in that arsenal.")

Brnovich v. Democratic National Committee

Brnovich places significant limits on Section 2, one of the strongest voting rights tools in the federal government's arsenal since 2013. *Brnovich* was a vote denial case focused primarily on Section 2's "results test" enacted in 1982, and squarely presented the issue of whether Arizona's out-of-precinct (OOP) policy, which requires election officials to discard in their entirety ballots casts outside a voter's designated precinct (except for those cast after 5:00 pm on election day), and its ballot collection law, which criminalizes what is known as ballot harvesting, the collection and delivery of another person's ballot by other than certain persons, such as family and household members, caregivers, mail carriers, and election officials.

Brnovich alters the legal and political landscape for Georgia and the rest of the nation. Let's find out why.

Long considered the crown jewel of the Voting Rights Act, Section 2 applies nationwide. The two cases before the Court, *Brnovich v. Democratic National Committee* and *Arizona Republican Party v. Democratic National Committee* [collectively "*Brnovich*"], involved challenges to two different Arizona voting provisions, an OOP voting restriction and prohibition barring third parties from collecting ballots, a practice pejoratively called "ballot harvesting."

The Ninth Circuit Court of Appeals, sitting *en banc*, held that the OOP policy and the ban on ballot harvesting violated Section 2 of the Voting Rights Act. It applied a two part "results test" to reach this outcome: first, whether a policy results in a disparate burden on minority voters; and second, whether that policy interacts with social and historical conditions to cause that disparate burden. According to the *en banc* Ninth Circuit, this test was consistent with Section 2's text and purpose, as well as with the Circuit's prior decisions. The OOP policy was shown to "result[] in a denial or abridgement" of the right to vote "on account of race," within Section 2's plain meaning. As to the state law banning ballot collection by third parties, the *en banc* Ninth Circuit found that it violated not only Section 2's results test but also the intent test that applies under both the Fifteenth Amendment and Section 2.

Unfortunately, among voting rights groups as well as the incoming Biden Administration, there was concern that the Ninth Circuit did not correctly apply existing law interpreting Section 2. To add to this slow-motion train wreck, the Biden Administration did not agree with the en banc Ninth Circuit. It did disagree with position taken by the outgoing Trump Administration in its brief, however, that called for a dramatic and stingy limitation that would confine the Section 2 results test to intentional discrimination and replace the test with an enhanced "proximate causation" requirement that would drain Section 2 of all of its powers to be used in the vote denial context.

The Supreme Court reversed the Ninth Circuit, upheld Arizona's Out-of-Precinct policy and ban on ballot collection by third parties (other than family, household members, mail carriers, election officials or caregiver). In a 6-3 opinion by Justice Alito, the conservative majority did not exactly deal a death blow to Section 2 but engaged in what might be called a death by a thousand cuts in its textualist approach to statutory construction. Justice Alito said Section 2's core requirement was that voting be "equally open" to members of protected groups and that when reviewing a voting procedure or rule, the totality of circumstances should be considered.

Five Guideposts for Determining a Section 2 Violation

The majority rejected the disparate impact analysis advanced by the *en banc* Ninth Circuit and applied a much broader "totality of circumstances" test for determining what could give rise to a Section 2 violation. This test included several important

circumstances nowhere mentioned in the text of the statute, referred to by Justice Alito as "guideposts":

(1) the size of the voting burden imposed by a challenged voting rule or practice, noting that "mere inconvenience" is not enough to show a Section 2 violation;

(2) the degree to which a voting rule departs from what has been standard practice at the time Section 2 was amended in 1982;

(3) the size of any racial disparities from the election rule's impact on members of different racial or ethnic groups, noting that "to the extent that minority and non-minority groups differ with respect to employment, wealth and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules [,] but the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open";

(4) the ease of voting under and the opportunities provided by the state's entire electoral system;

(5) the strength of a state's interests served by the challenged voting rule or underlying a challenged practice, noting that "one strong and entirely legitimate state interest is the prevention of fraud."

Practical Consequences of Applying the Guideposts

Under this more lax standard, few challenges to early voting and mail-in voting rules and regulations will likely find success. Moreover, it will now be possible for a state to assert an interest in preventing fraud as a justification for a voting rule without having to prove such fraud has even taken place and is in fact a serious risk. Minority voters now have a higher burden when they challenge suppressive voting rules and must show that a state has imposed more than the "usual burdens of voting." According to the standard advanced by Justice Alito and his five conservative colleagues, rather than focus on whether a voting rule has a disparate impact on minority voters, the Supreme Court appears to have effectively put its thumb on the scale in favor of restrictive state voting rules in a way that hollows out the promise of Section 2's guarantee that assured minority voters would enjoy the same opportunity as other voters to participate in the political process and elect representatives of their choice.

Under the *Brnovich* majority's lax test, as long as there are still some opportunities for minority citizens - somehow, somewhere - to vote, few laws could be deemed so burdensome that they would flunk the test, whether they are in the form of

~a ban on Sunday voting that just happens to eliminate minority voters from participating in "souls to the polls" voting drives after church, or

~more frequent voter purges, or

~strict voter identification requirements (complete with verification before a notary public and strict signature verification) for minority citizens who vote by mail.

Less Guideposts and More Roadblocks?

One of the foremost scholars and Election Law experts in the country, Professor Richard L. Hasen, anguished over "how much of the public does not realize what a hit American democracy has taken," and ominously predicted that "states can put up roadblocks to minority voting and engage in voter suppression with few legal consequences once a state has raised tenous and unsupported concerns about the risk of voter fraud." Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion is Even Worse That It Seems*, Slate, July 8, 2021, https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html.

Hasen noted that the 6-3 majority in Brnovich has offered a "new and impossible test" that plaintiffs must now meet to establish a Section 2 vote denial claim, and that the five guideposts offered by Justice Alito for evaluating such claims were "less guideposts and more roadblocks looking to stop plaintiffs at every turn when they assert their Section 2 claims." Id.

Comparison with 1982 Benchmark

One guidepost directs courts to compare voting restrictions challenged in a Section 2 case to the burdens of voting as they existed in 1982, which in essence tells states they can roll back restrictions to a time when registration was onerous, and early voting and absentee voting were rare, the flip side of the non-retrogression principle under now-gutted Section 5. As an example, consider a state that passes a law barring early voting on Sunday before Election Day, because white Republican legislators know that reliably Democratic black voters often run "souls to the polls" where they take church-going voters straight to vote after services. Hasen asks "how could it survive the 1982 benchmark now, when Sunday voting, and early voting as a whole, was rare?"

Strength of State's Interest

Another guidepost is the strength of the state's interests underlying an election rule, which turns Section 2's "tenuousness" Senate Report factor on its head. Under Section 2 as it was intended, if a state enacted a restrictive voting law and claimed it was necessary to stop voter fraud, the state would have had to prove this was a real justification and not a pretext for voting discrimination, but under Justice Alito's formulation, voter fraud is a risk, even though Arizona could not point to any fraud to justify its challenged voting rules. In short, states do not have to prove fraud at all. "It is a license to give tenuous excuses, excuses Republican legislatures

are increasingly likely to give in the era of the 'Big Lie' that the 2020 election was stolen from Trump." As Hasen concludes, Brnovich gives a pass to states by not requiring them to provide evidence of fraud while requiring plaintiffs to show much more that the "usual burdens of voting." Id.

Textualist Reading of *Brnovich*

Professor Nicholas Stephanopoulos has noted several potential consequences of the *Brnovich* majority's "textualist" reasoning, much of which was almost entirely divorced from the statutory text of Section 2. *Strong and Weak Claims After Brnovich*, July 1, 2021, https://electionlawblog.org/?p=123090.

1. Very few challenges to early voting and mail-in voting rules will succeed, and any burden imposed by states' EV or mail-in voting regulations will likely be seen as light.
2. Challenges to relatively novel restrictions will more likely prevail.
3. Future suits will almost certainly include detailed quantification of the magnitude of a voting practice's disparate racial impact, since the size of the disparity matters.
4. Challenges should be stronger in states with lower turnout and/or higher costs of voting, since states' entire electoral systems are now relevant.

Blueprint for Partisan Control of Election Administration?

Rather than just create new election rules, the Georgia General Assembly appears to have changed who gets to determine how those rules are implemented, resulting in a massive overhaul of state laws and handing significant power to Republican legislators who control the General Assembly.

Fulton County, with a disproportionate number of Black voters, appeared to be targeted from the outset, with Republicans alleging without evidence that this Democratic bastion was a major site of fraud, ballot-stuffing and all sorts of election-related misdeeds. Official investigations, a giant's share of litigated cases, and independent fact-checks, however, revealed no evidence of such fraud, but the claim of massive voter fraud and a stolen Presidential election persisted. The myth persists that fraud happened.

The new bill would allow Republicans to seize control of how elections are administered in Fulton County and other heavily Democratic areas, disqualifying voters and ballots as they see fit.

S.B. 202's provision for state takeover of local election processes "is a natural choice for a party whose election policy is driven by Trump's 'big lie,'" according to Josh McLaurin, a Democratic representative in the Georgia House of Representatives,

and "by centralizing control over those processes, Republicans make their own manipulation easier while also removing a principal barrier" without scrutiny.

S.B. 202 is seen by some as a blueprint for Republicans to gain control of how elections are administered in heavily Democratic areas, with broad discretion to disqualify votes and invalidate ballots at whim. It is also a reflection of a nationwide effort in which Republican lawmakers in at least eight states controlled by the GOP are angling to pry power over elections from secretaries of state, governors and nonpartisan election boards. Some critics have complained that S.B.202 is anti-democratic and a naked attempt to undermine the one-person, one-vote principle. Whether it will lead to a further hollowing out of democracy in Georgia remains to be seen. At a minimum, the new law makes election administration even more partisan, especially now that the Supreme Court has given the green light for Republican-controlled state legislatures to pursue even more restrictions, limitations and "common-sense" protections for election integrity and voter confidence in the aftermath of the most secure election in American history. B. Griffith, *What Went Right: Addressing Claims of Widespread Voter Fraud in One of the Most Secure Elections in American History,* January 19, 2021, ABA Standing Committee on Election Law & ABA Cybersecurity Legal Task Force, https://static1.squarespace.com/static/530d48bce4b097f846417f0b/t/600847eb73c39b3f521058f9/1611155435982/What+Went+Right.pdf

Changes to Absentee Voting

Mail-in absentee voting will look the most different, especially for the 1.3 million people who used that method to vote in the November 2020 general election. Under the lax standard announced by the conservative majority in *Brnovich,* any voting burdens imposed by Georgia's changes in absentee voting rules outlined below will likely be perceived as light, not unduly burdensome and not violative of Section 2. In any event, Section 2 plaintiffs will be sure to quantify the magnitude of the disparate racial impact wrought by these changes in the absentee ballot rules. The size of the disparity matters.

(a) VOTERS OVER 65: Voters over 65, voters with a disability, in voters in the military or who live overseas are still allowed to apply once for an absentee ballot and automatically receive one the rest of an election cycle.

(b) 11 WEEK LIMIT: The earliest voters can request a mail-in ballot will be 11 weeks before an election instead of 180 days. That is less than half as much time and risks placing unnecessary additional pressure on the ability of voters to make absentee ballot requests in sufficient time for those ballots to be mailed to voters and then arrive at election offices with the required Election Day postmark. That pressure is exacerbated by the U.S. Postal Service's 2020 and 2021 cost-cutting measures, elimination of overtime for

postal employees, removal and decommissioning of one in seven mail-sorting machines at postal facilities across the country.

(c) APPLICATION DEADLINE: The deadline for completing an application is earlier: instead of returning an application by the Friday before election day, the new law now backs it up to two Fridays before. The rationale for this change, according to Republican sponsors and local elections officials, is that this will cut down on the number of ballots rejected for coming in late because of the tight turnaround.

(d) 4 WEEKS BEFORE ELECTION: Starting four weeks before the election, counties will begin mailing out absentee ballots about three weeks later than before.

(e) NEW ID RULES: New ID rules govern requesting and returning a ballot ahead of the general election. Voters must submit either a driver's license number, state ID number or a copy of acceptable voter ID if the other alternatives are not available. Applications must to be returned online, using an online request portal that requires a driver's license number or state ID number. Photographic proof of ID is not required in all cases, but is only necessary as part of the application if the voter lacks a state ID number or driver's license ID number.

(f) POLL WORKERS SWORN VERIFICATION: Poll workers will use that information, plus the voter's name, date of birth and address, to verify the voter's identity, and must sign an oath swearing that everything is correct. This changes the earlier procedure that would check a voter's signature on the application with those on file.

(g) UNSOLICITED APPLICATIONS: Unsolicited applications can no longer be sent by state and local governments, and new rules are imposed for third-party groups that send applications: their applications must be clearly marked "NOT an official government publication" and "NOT a ballot," and must identify the group sending the blank request must be clearly stated.

(h) THIRD-PARTY GROUPS: Third-party groups are only allowed to send applications to voters who have not already requested or voted an absentee ballot, subject to a penalty for each duplicate sent.

(i) SPECIAL SECURITY PAPER: The absentee ballot and envelopes are required to be printed on special security paper (hopefully free of Thai bamboo residue), with the voter's precinct name included along with precinct ID printed at the top. Once an absentee voter fills out his or her choices by filling in the circles for those choices, the ballot will be placed in an envelope with the voter's name, signature, driver's license or state ID number, or last four digits of the voter's Social Security number and date of birth. The envelope must be designed so that sensitive personal information is hidden once it is sealed.

(j) MILITARY AND OVERSEAS VOTERS/RANKED CHOICE BALLOTS: For military and overseas voters, an additional set of absentee ballots, for ranked choice instant-runoff ballots, will be mailed to them with their regular ballots. Georgia's runoff elections will be four weeks long instead of nine weeks, but for federal elections, ballots must be sent out to those voters by 45 days before the election. Those voters will be given ranked choice ballots, ranking their choices for certain races in the event they head to a runoff, and send them back with their primary or general election ballots.

(k) BALLOT DROP BOXES: Secure absentee ballot drop boxes are now officially part of state law, but with several changes: all 159 counties must have at least one drop box, the number of boxes is capped at the smaller of one per 100,000 active voters or one for every early voting site, and the drop boxes are moved inside early voting sites instead of outside on government property. The drop boxes will only be accessible during early voting days and hours instead of 24/7.

(l) STATE ELECTION BOARD: The State Election Board must provide more notice of proposed emergency rules and has a more limited scope for enactment of such rules.

Changes to Early Voting

Early voting barely existed in 1982, the benchmark against which these new changes to early voting rules will be measured, and any burdens those rules impose will likely be seen as light and permissible.

(a) EARLY VOTING ACCESS: The new law expands early voting access for most counties, with an additional mandatory Saturday added and formally codifying Sunday voting hours as optional. Counties can have early voting open as long as 7 a.m. to 7 p.m., or 9 a.m. to 5 p.m. at minimum. Voters living in larger metropolitan counties might not notice a change, and voters in most other counties will have an extra weekend day, and weekday early voting hours will likely be longer.

(b) FULTON COUNTY VOTERS: Voters residing in Fulton County will no longer be able to use one of two mobile voting buses the county purchased in 2020 to help with long lines. Although 2019 legislation allowed early voting sites in more locations, including places that are normally election day polls, the Georgia legislature has now prohibited a mobile poll except during an emergency declared by the governor.

(c) POLLING PLACE CHANGES: Better notice is now required for polling place changes or closures, including a 4-by-4-foot sign showing where the new location is.

(d) LINE-WARMING: For in-person voting as well as early voting, the new law prohibits anyone except poll workers from handing out water to voters in

line, and prohibits passing out food and water to voters within 150 feet of the building that serves as a poll, inside a polling place or within 25 feet of any voter standing in line. These practices were known as line-warming. It may still be possible for third-party groups to have food and water available and for lines to extend beyond 150 feet. Some critics have complained that this law criminalizes the provision of food and water to voters waiting in line, in a state where lines are notoriously long in heavily nonwhite precincts.

(e) DAILY REPORTS ON IN-PERSON AND ABSENTEE VOTING: During early voting, counties are required to publicly report daily how many people have voted in person, how many absentee ballots have been issued, returned, accepted and rejected. Early voting sites and times must be published publicly ahead of time.

(f) RUNOFF ELECTIONS: For runoff elections, early voting must start "as soon as possible" after a primary or general election, and in-person early voting must take place the Monday through Friday before the election. Counties consequently may not be able to offer weekend early voting depending on how quickly it takes them to finish the first election and prepare for the second.

Changes to Vote Counting

(a) PROCESSING ABSENTEE BALLOTS: As a result of complaints during the 2020 election about how long it took for some counties to release their final vote totals, complaints about how other counties missed batches of ballots the first time and general confusion about why the process was not completely over on election night, local election officials are now allowed to begin processing, but not tabulating, absentee ballots starting two weeks before the election. Counties must count all of the ballots nonstop as soon as polls close and finish by 5 p.m. the next day or potentially face investigation. Local officials are also required to post and report the total number of ballots cast on election day, during early voting, via absentee voting and provisional ballots, all by 10:00 p.m. on election night, thereby providing the public with a denominator to understand the total possible outstanding as results trickle in.

(b) OOP BALLOTS: Out of precinct provisional ballots will no longer be counted unless cast after 5:00 pm and the voter signs a statement saying they could not make it to their home precinct in time.

(c) 5:00 PM COMPLETION OF TABULATION: Counties must finish tabulating all votes by 5 p.m. the day after the election, and the election certification deadline has been moved up to six days after polls close instead of 10 days.

(d) ID INFORMATION ON OUTSIDE ENVELOPES: In a departure from previous policy and practice, absentee voters will be checked using the ID

information voters write on the outside envelopes instead of their signatures, another departure from previous policy.

Changes Affecting Local Election Offices

(a) SMALLER AND LOWER TURNOUT RACES: County election officials are now given greater flexibility with voting equipment for races that are smaller and lower-turnout. Under prior law, one ballot-marking device was required for every 250 active voters, but in elections other than statewide general elections, that ratio is subject to local elections officials' discretion, based on such factors as expected turnout, the type of election, and number of people among other factors.

(b) PUBLIC LOGIC AND ACCURACY TESTING: Counties are now required to provide better notice of public logic and accuracy testing of voting machines and equipment, by which officials calibrate every piece of technology used in the election. The dates and times for this testing must be posted on the county's website, if it has one, in a local newspaper and in a prominent place within the county, with the Secretary of State's office keeping a master list and make it public.

(c) FUNDING FROM PHILANTHROPIC OUTLETS: While many rural and urban counties in the 2020 election received grant funding from philanthropic outlets such as the Center for Tech and Civic Life and the Schwarzenegger Institute, those elections offices can no longer directly receive funding, and by October 2021 the State Election Board is supposed to propose a method to receive donations and distribute them equitably.

(d) LARGE POLLING PLACES WITH LONG LINES: Over 1500 of Georgia's precincts have over 2000 voters, and the new law addresses this by requiring large polling places with long lines to take action if wait times exceed one hour at certain times during the day. Large polling places with over 2,000 voters and wait times longer than an hour must hire more staff, add more workers or split up the precinct after that election.

(e) PARTISAN POLL WATCHERS TRAINING: To address the problem during the 2020 election cycle of a large influx of partisan poll watchers who sometimes interfered with vote counting, the new law requires poll watchers to be trained before allowing them to work, and local officials are authorized to set the location from which those poll watchers can observe.

(f) POLL WATCHERS/ADJOINING COUNTIES: To address the problem of poll watchers being in short supply for the June 2020 primary due to the pandemic, poll workers may now serve in adjoining counties.

(g) SCANNED BALLOT IMAGES: Scanned ballot images are now subject to public records disclosures, and the secretary of state's office is required to create a pilot program for posting those images online.

Changes Affecting the State Election Board

(a) LOCAL ELECTION OFFICES AND SOS: The new law made several changes that can have an impact on local election officers. The Secretary of State no longer chairs the State Election Board, but will be a non-voting ex-officio member. S.B. 202 removes Georgia Secretary of State Brad Raffensperger, a Republican who stood up to Trump's attempts to overturn the election results in Georgia, from his role as both chair and voting member of the board, and spells out quite clearly that the new chair would be appointed by and controlled by the General Assembly, which already appoints two members of the five-person board, so that a full majority of the board will now be appointed by the Republican-dominated body.

(b) NONPARTISAN CHAIR OF STATE ELECTION BOARD: The chair of the State Election Board is required to be nonpartisan and will be appointed by a majority of the state House and Senate. The chair cannot have been a candidate, participate in a political party organization or campaign or made campaign contributions for two years before being appointed. If that position becomes vacant while the legislature is not in session, the governor should appoint someone as chair.

(c) INTERVENTION IN UNDERPERFORMING COUNTY ELECTION BOARDS: The five-member State Election Board is given greater authority to intervene in county elections boards deemed underperforming. The State Election Board, in addition to its legislature-appointed chair, is made up of one member appointed by the House, one appointed by the Senate and one appointed by the Democratic and Republican state parties.

(d) PERFORMANCE REVIEWS: The State Election Board, county commissions or a certain number of state House and Senate members representing a county, can request an independent group to conduct a performance review of the appointed elections board or the probate judge (defined by state law as the "election superintendent") who supervises elections. The State Election Board is empowered to suspend the multi-person elections board or probate judge and replace them with a single individual for at least nine months.

(e) ELECTION SUPERINTENDENT UNLIMITED CHALLENGES: The election superintendent's responsibilities include certifying results, handling polling place changes and hearing in a timely manner an unlimited number of challenges to voters' eligibilities.

(f) STATE ELECTION BOARD TEMPORARY SUSPENSION OF UP TO FOUR ELECTION SUPERINTENDENTS: The State Election Board can only temporarily suspend up to four election superintendents at a time. Nonetheless, some critics complain that this shifting of responsibility has given state-level officials the authority to usurp the powers of county

election boards and has allowed the Republican-dominated state government to potentially disqualify voters in Democratic-leaning areas. Rather than have election management decisions on disqualifying ballots and voter eligibility made by county boards of election as was the practice under pre-2021 state law, moreover, S.B.202 empowers the State Board of Elections to determine that county boards are performing poorly, replacing the entire board with an administrator chosen at the state level.

Other Changes

(a) HOTLINE FOR COMPLAINTS: The Georgia Attorney General is authorized to establish a hotline for people to file complaints about voter intimidation and illegal election activities, including anonymous tips. The Attorney General's office then reviews the complaints within three business days or as expeditiously as possible and determine if the complaint should be investigated.

(b) SETTLEMENT AGREEMENTS FOR ELECTION LAWSUITS: Neither the State Election Board nor the Secretary of State's office are allowed to enter into any settlement agreements for election lawsuits without first notifying the state legislature. Provisions are made for certain judicial vacancies or candidates who die before election day, and the new law reiterates that the state should be part of a multi-state voter registration database.

(c) NO MORE JUNGLE PRIMARY: "Jungle Primary" special elections have been eliminated, requiring a special primary before a special election.

(d) MUNICIPAL BOUNDARY LINE DRAWING: As a result of delays in cities and counties receiving the 2020 Redistricting Data until September 30, 2021, the new law allows some of the municipal boundary line redrawing to wait until after upcoming elections.

(e) POLITICAL CONTROL: Some critics have complained that this massive piece of legislation, coming on the heels of President Trump's well-publicized efforts to pressure Georgia's election officials into flipping the state into his column, evidences a clear intent to wrest political control of a state that is increasingly trending blue back toward Republicans. At a minimum, this may well be a partisan power-grab over election administration. While it may not signal the end of democracy in this historically important southern state, S.B. 202 gives the Republican Party in Georgia a structural advantage disproportionate to its actual strength among Georgia voters. Some may be prone to call this Jim Crow with a suit and tie, but it is painfully clear that S.B. 202 creates barriers to voting that will most likely impact low income and minority voters who have neither the time nor the resources to navigate them. In Georgia those voters are disproportionately Democratic groups.

See Stephen Fowler, *What does Georgia's new voting law SB 202 do?* Online Athens/Athens Banner-Herald, April 7, 2021, *https://www.onlineathens.com/story/news/state/2021/03/28/new-georgia-voting-law-what-does-sb-202-change-elections/7038406002/* and Zack Beauchamp, *Georgia's restrictive new voting law, explained,* Vox, Mar 26, 2021, https://www.vox.com/22352112/georgia-voting-sb-202-explained

The Eight Pending Challenges to S.B. 202

Including the DOJ's recent civil action, eight challenges to S.B. 202 have been assigned to U. S. District Judge Jean-Paul "J.P." Boulee, a 1996 graduate of the University of Georgia School of Law (J.D. cum laude), partner in Jones Day from 2001 to 2015, former judge of the DeKalb Superior Court from 2015 to 2019, and a Trump appointee confirmed on June 19, 2019 by the Senate on a vote of 85 -11. The ABA unanimously rated Judge Boulee well qualified for the position.

In one of those cases, Judge Boulee invoked the Purcell principle in denying eleventh hour injunctive relief with regard to an imminent runoff election, as discussed *infra* at 32-33.

The eight cases include:

New Georgia Project v. Raffensperger, No. 1:21-cv-01229-JPB (N.D. Ga.)

Georgia NAACP v. Raffensperger, No. 1:2021-cv-01259-JPB (N.D. Ga.)

AME Church v. Kemp, No. 1:21-cv-01284-JPB (N.D. Ga.)

Asian Americans Advancing Justice – Atlanta v. Raffensperger, No. 1:21-cv-1333-JPB (N.D. Ga.)

Vote America v. Raffensperger, No. 1:21-cv-1390-JPB (N.D. Ga.)

Concerned Black Clergy v. Raffensperger, No. 1:21-cv-01728-JPB (N.D. Ga.)

Coalition for Good Governance v. Raffensperger, No. 1:21-cv-02070-JPB (N.D. Ga.)

United States v. The State of Georgia, No. 1:21-cv-02575-JPB (N.D. Ga.)

Brief Overview of Current Challenges to S.B. 202

1. *New Georgia Project v. Raffensperger*

The New Georgia Project, Black Voters Matter Fund, and Rise, Inc. sued the Georgia secretary of state and the vice chair and members of the State Election Board, challenging a newly enacted law—Senate Bill 202—that, among other things, imposes new voter identification requirements when requesting absentee ballots, prohibiting the use of mobile polling facilities except in an emergency, limits

the number of locations and availability of ballot drop boxes, prohibits election officials from affirmatively mailing absentee applications to voters, restricts organizations from sending absentee applications to voters who may desire not to cast their ballot in person, and from returning voters' completed absentee ballots on their behalf, prohibits anyone from handing out water and snacks to persons waiting in line to vote, wholly discards any ballot cast at the wrong precinct before 5:00 p.m. on election day, permits people to file an unlimited number of challenges to voters' qualifications, thus subjecting such voters to a mandatory hearing on short notice, and dramatically reduces the timeframe for runoff elections and the mandatory early voting period therefor. The complaint alleges violations of Section 2 of the Voting Rights Act and the 1st and 14th Amendments to the U.S. Constitution, in that the law has the effect of discriminating against voters on account of race or color and unduly burdens the fundamental right to vote.

Motion to intervene filed by Republican National Committee, National Republican Senatorial Committee, and Georgia Republican Party March 31, 2021

2. Georgia NAACP v. Raffensperger

The Georgia State Conference of the NAACP, the Georgia Coalition for the People's Agenda, Inc., the League of Women Voters of Georgia, and others sued the Georgia secretary of state and the members of the State Election Board, challenging a newly enacted law—Senate Bill 202—that, among other things, imposes new voter identification requirements when requesting and returning absentee ballots, prohibits election officials from affirmatively mailing absentee ballot applications to voters, imposes fines on other individuals or organizations if they inadvertently send an application to someone not yet registered, limits the locations of absentee ballot drop boxes and the times that they are available, reduces the window for requesting and returning absentee ballots, permits local election boards to limit early voting, including elimination of Sunday voting, requires wholesale rejection of any ballot cast in the wrong precinct before 5pm on election day, shortens the runoff period, imposes criminal penalties for handing out water and snacks to those waiting in line to vote, strips the secretary of state of authority over elections, and allows the State Election Board and members of the legislature to take over county election offices and take action to suspend local election officials. The complaint alleges violations of Section 2 of the Voting Rights Act and the 1st, 14th, and 15th Amendments to the U.S. Constitution, in that the law is intended to discriminate and has the effect of discriminating against voters on account of race or color, unduly burdens the right to vote and unduly abridges the freedom of speech and association.

Motion to intervene filed by Republican National Committee, National Republican Senatorial Committee, and others April 12, 2021; Motion to dismiss filed May 14, 2021

3. AME Church v. Kemp

The Plaintiffs in *AME Church v. Kemp* charged that the Georgia General Assembly in enacting S.B. 202 made it harder for certain Georgians to vote. They did so without justification, curtailing the voting rights of Black voters at every stage of the process.

They leveled their attack on a sweeping series of provisions that are "purported solutions in search of a problem," including

(a) an unnecessary restriction on the use of mobile voting units;

(b) new and burdensome identification requirements that force a voter to provide identification or sensitive personal information when requesting and casting an absentee ballot ("ID Requirements");

(c) a delayed and compressed time period for requesting absentee ballots;

(d) limitations on the use of secure drop boxes as a means of returning absentee ballots;

(e) a drastic reduction in early voting in runoff elections;

(f) a cruel and inhumane ban—with criminal penalties—on anyone who provides free food and water or other assistance, known as "line warming," to Georgians who wait in line to vote; and

(g) the complete disenfranchisement of some voters who cast out-of-precinct provisional ballots.

Taken individually, each challenged provision of S.B. 202 makes it more difficult for historically disenfranchised communities to vote, but their cumulative burden is even more severe. By restricting absentee voting, limiting the availability of drop boxes, and shortening early voting, S.B. 202 will force more voters to the polls on Election Day.

According to the AME Plaintiffs, these provisions are an attack on democracy itself.

In the aggregate, they deny voters of color a full and equal opportunity to participate in the political process, violate Section 2 of the Voting Rights Act and violate the rights of voters of color under the Fourteenth and Fifteenth Amendments to the United States Constitution.

Further, they violate the right to vote of all Georgia voters protected by the First and Fourteenth Amendments. S.B. 202's line warming ban violates the constitutional right of Georgians to political speech and expression, as protected by the First Amendment, since the acts of Plaintiffs in providing water and other resources is the very type of interactive communication concerning political change that is 'core political speech,'" *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988), protected under the First Amendment.

Further, the Plaintiffs charge that S.B. 202's restrictions on absentee voting places unlawful burdens on the rights of more than 1.2 million Georgia voters with disabilities, doing so by erecting hurdles that impair, if not preclude, these voters from Georgia's absentee voting program, denying them the benefits of this opportunity and subjecting them to discrimination as a result of their disability.

The AME Plaintiffs articulate with precision the burdens that S.B. 202 imposes upon minority voters. By severely restricting mobile voting units for advance voting and Election Day, placing additional ID Requirements and restrictions on requesting and casting an absentee ballot, severely limiting the number and use of drop boxes, reducing the early voting period in runoff elections, restricting and penalizing groups for distributing food and water to voters waiting in line to cast a ballot, and disenfranchising otherwise eligible voters who cast a provisional ballot in their county but outside their precinct, S.B. 202 makes it substantially more difficult for these plaintiffs to engage in meaningful civic engagement in their communities and meaningful participation in the electoral and political process.

Like many of its sister states in the Deep South, the state of Georgia has a history of racially discriminatory voting practices, segregation practices, and laws that is well-established and judicially-recognized, a history at all levels that has been "rehashed so many times that the Court can all but take judicial notice thereof." *Johnson v. Miller*, 864 F. Supp. 1354, 1379-1380 (S.D. Ga. 1994), aff'd and remanded, 515 U.S. 900 (1995) ("[W]e have given formal judicial notice of the State's past discrimination in voting, and have acknowledged it in the recent cases.")

The AME Plaintiffs allege that S.B. 202 creates another form of burdensome intimidation by subjecting Georgia voters to the risk of having to defend their vote against an unlimited number of public challenges by any person who wishes to disenfranchise them, with or without merit. Baseless allegations of voter fraud, historically and into the present, have been used to deter Black voters and other minority voters from exercising their right to vote.

According to the AME Plaintiffs, S.B. 202 places needless and critical burdens on the right of minority voters by exposing those voters—particularly voters of color and poor voters —to a process that requires them to expend additional time and

resources after casting a ballot, forcing them to rebut abusive and potentially duplicative, frivolous, and unlimited challenges to their eligibility before a government review board. This burden is disparately felt by Plaintiffs and the communities they live in, represent, and serve. Because S.B. 202 codifies the right to bring unlimited challenges without any standards of what constitutes probable cause, the potential for abuse and conversely for harm to individual voters, is unlimited.

S.B. 202's out-of-precinct provision engrafts onto the law a new practice that will disproportionately affect Black voters and other historically disenfranchised communities, who are proven to be more likely than white voters to cast an out-of-precinct ballot since they are more likely to have moved within their county than white voters, and thus more likely to arrive at an incorrect precinct.

With respect to S.B. 202's reduction of both the timeframe for runoff elections and the early voting period available during those elections, it eliminates the guarantee of an opportunity to vote early on the weekend. This impacts minority voters in a specific way, since advance voting opportunities and particularly weekend voting opportunities are essential to ensuring voters can safely, securely, and freely participate in our democracy. As the AME Plaintiffs allege, these opportunities are important mechanisms that give voters the option to cast their ballots without facing the crowds and long lines on Election Day, as well as the flexibility to balance family and work obligations that make voting on Election Day untenable for thousands of Georgians.

Restricting the early vote period imposes another burden by forcing voters who need to vote early to do so on fewer days, functionally preventing some voters from voting altogether, adding to the long lines, overcrowding and wait times at the early voting polls on fewer days, deterring, burdening, and in some cases functionally eliminating those voters' right to vote.

With respect to the criminalizing of line warming, the practice of providing voters with the supplies they need in order to encourage them to stay in line where the waiting periods can range from five to eleven hours, the AME Plaintiffs allege that line warmers create a sense of community, reminding voters that voting is a joyful thing and a civic responsibility. For the AME Plaintiffs, providing support to voters in line is critical to their speech, including conveying the message of the importance of staying in line, the importance of voting, and underscoring each person's value. This practice of line warming, far from being a prelude to criminal fraud, bribery and electioneering, helps reaffirm the dignity of Black voters, who are disproportionately affected by longer lines, and who should not be forced to wait in long lines without necessities like food and water.

4. Asian Americans Advancing Justice – Atlanta v. Raffensperger

Asian Americans Advancing Justice-Atlanta sued the Georgia secretary of state, the vice chair and members of the Georgia State Election Board, challenging a newly enacted law—Senate Bill 202—that dramatically reduces the time during which voters may request, receive, and return absentee ballots, eliminates ballot drop box locations and reduces the number of days they are available, prohibits election officials from affirmatively mailing absentee applications, imposes new voter identification requirements in connection with absentee ballots, and makes it a crime for any person or entity to handle or return another voter's completed absentee ballot application, subject to limited exceptions, even if the voter requests assistance. The complaint alleges violations of Section 2 of the Voting Rights Act and the 1st, 14th, and 15th Amendments to the U.S. Constitution, in that the law is intended to discriminate and has the effect of discriminating against voters on account of race or color and unduly burdens the right to vote.

Amended complaint filed April 27, 2021; Motion to intervene filed by Republican National Committee, Republican Senatorial Committee, and others granted June 4, 2021

Plaintiffs in *Asian Americans Advancing Justice – Atlanta v. Raffensperger* allege that Asian American and Pacific Islander ("AAPI") voters personified Georgia's successes in the 2020 election, with a turnout in Georgia that nearly doubled between the 2016 and 2020 elections. With widespread availability of absentee ballots, or mail-in ballots as they are also known, AAPI voters played a key role in this record 2020 turnout, voting by mail at a higher rate than any other ethnic group in Georgia. Advancing Justice-Atlanta led many local election officials and civic groups by playing a key role in helping AAPI voters exercise their rights to participate in the democratic process.

The AAAJ Plaintiffs allege that S.B. 202 systematically undermines or outright prohibits the very election procedures that helped facilitate this historic level of AAPI participation in the 2020 Presidential Election and the 2021 U.S. Senate runoffs. The new law does this by perpetrating explicit and per se voter suppression, erecting new obstacles to voting that burden the rights of AAPI voters and other voters of color. It dramatically reduces the time during which AAPI voters may request and return absentee ballots, eliminates drop-off locations, bars local and state officials from proactively mailing absentee applications, imposes burdensome new voter identification requirements, and criminalizes certain handling and return of completed absentee ballot applications. Illustrative of the burdens imposed by these restrictions placed on absentee voting, the AAAJ Plaintiffs allege that the Asian American community has a higher proportion of foreign-born residents compared to other racial groups in the United States, and

limited English proficiency ("LEP") remains common in the Georgia Asian American community. Newly naturalized citizens, first time voters, and LEP voters often need more time to review their ballot materials and/or seek assistance during the voting period from persons authorized under Georgia law. Absentee voting allows these voters crucial time and resources that may be less available or accessible through in-person voting. The new law's imposition of restricted and compressed time frames for requesting and receiving absentee ballots unnecessarily restricts absentee voting for these voters, and discriminates against and disproportionately impedes and burdens the franchise of AAPIs, who vote by mail more than any other racial group in Georgia.

In light of the current climate of anti-AAPI violence, exacerbated by a Commander in Chief with a penchant for trumpeting his message about Kung-Flu and the China Virus, and in light of the historical record of threats of violence and unspeakable acts of violence most recently directed against Asian-Americans and other people of color in Georgia, AAPIs are disproportionately harmed by the restriction of this voting option under S.B. 202.

Further, with respect to drop boxes, there is no justification for the truncated time limits, numerical restrictions and burdens that S.B. 202 disproportionately imposes on voters of color, including AAPI voters. These voters were more likely to cast their vote in drop boxes during the 2020 election cycle, and restricting their right to do so particularly in light of the absence of any evidence that drop boxes have ever been unsafe, ineffective, or prone to voter fraud, places an impermissible burden on their right to vote. The burdens imposed by these provisions of SB 202 are unnecessary to achieve, let alone be reasonably related to, any sufficiently weighty legitimate state interest, and lack any constitutionally adequate justification.

5. Vote America v. Raffensperger

VoteAmerica, Voter Participation Center, and Center for Voter Information sued the Georgia secretary of state and the vice-chair and members of the Georgia State Election Board, challenging Senate Bill 202, a newly enacted law that, among other things, prohibits organizations from prefilling absentee ballot applications, even when voters provide that information themselves, mandates a "misleading disclaimer" be attached to any absentee ballot application distributed by a non-governmental entity, imposes an "affirmative requirement to monitor an ever-changing list from the Secretary of State to avoid sending duplicate application forms to voters who have already requested, received or cast an absentee ballot", and imposes a $100 penalty per duplicate application for violations. The complaint alleges violations of the 1st and 14th Amendments to the U.S. Constitution, in that the law abridges the plaintiffs' rights of speech, expression, and association, unlawfully compels speech, and is unjustifiably overbroad.

Motion to intervene filed by Republican National Committee, National Republican Senatorial Committee, and others April 14, 2021; Motion to dismiss filed May 17, 2021

6. Concerned Black Clergy v. Raffensperger

The Concerned Black Clergy of Metropolitan Atlanta, Inc., the Justice Initiative, Inc., Samuel Dewitt Proctor Conference, Inc., and others sued the Georgia secretary of state and the vice chair and members of the Georgia State Election Board, challenging a newly enacted law—Senate Bill 202—that, among other things, severely reduces the amount of time during which voters may request absentee ballots, imposes new voter identification requirements in connection with absentee ballots, eliminates ballot drop box locations, reduces the hours they are available and mandates that they be constantly under in-person surveillance by an election official, licensed security guard or law enforcement official, prohibits mobile voting units, restricts early voting in runoff elections, criminally prohibits anyone from providing water and snacks to persons waiting in line to vote, wholly rejects any ballots cast in the wrong precinct before 5:00 p.m. on Election Day, allows Georgians to bring an unlimited number of challenges to the validity of other Georgians' votes, and permits the State Election Board to take over county election administration. The complaint alleges violations of Section 2 of the Voting Rights Act, the 1st, 14th, and 15th Amendments to the U.S. Constitution, and Title II of the Americans with Disabilities Act, in that the law was intended to discriminate and has the result of discriminating on the basis of race or color, unduly burdens the right to vote, abridges the freedom of speech and expression, and discriminates against voters with disabilities.

Motion to intervene filed by Republican National Committee, National Republican Senatorial Committee and others May 4, 2021

7. Coalition for Good Governance v. Raffensperger

The Coalition for Good Governance, members of county elections boards, individual voters, election workers and others sued the Georgia secretary of state and members of the Georgia State Election Board, challenging provisions of a newly enacted law— S.B. 202—that, among other things, permits the State Election Board (SEB) to suspend—or in some cases permanently remove— county and municipal superintendents and appoint individuals of the Board's choosing to serve in their place, to remove a county's board of registrars, requires the processing and scanning of absentee ballots to be "open to the view of the public," while simultaneously imposing criminal penalties for taking photographs of ballots, despite the fact that such ballots are public records under other provisions of Georgia law. The suit also challenges provisions of the law that reduce the amount of identifying information that a voter must supply in order to apply for an absentee ballot, and shorten the

period for applying for absentee ballots. The complaint alleges violations of the 1st and 14th Amendments to the U.S. Constitution, in that the challenged provisions are void for vagueness, deprive election board members of their procedural and substantive due process rights, disenfranchise voters who live in counties where the SEB has decided to remove, but not replace, the board of registration, expose voters and members of the press to the risk of committing a felony by observing another person's vote, increase the risk of voter intimidation, penalize protected speech and petitioning of the government, and treat identifiable classes of voters differently than other, similarly-situated voters.

The Complaint in this case was filed May 17, 2021. On July 7, 2021, U.S. District Judge J.P. Boulee denied Plaintiffs' Motion for a Preliminary Injunction barring implementation of the several sections of S.B. 202 in a rapidly approaching runoff election. Plaintiffs had alleged these sections of the Georgia Election Integrity Act of 2021 violated the First and Fourteenth Amendments to the U.S. Constitution and Section 2 of the Voting Rights Act:

1. The "Observation Rule" which prohibits a person from intentionally observing an elector while casting a ballot in a manner that would allow such person to see for whom or what the elector is voting. This rule became effective March 25, 2021.

2. The "Photography Rule" which prohibits the use of photographs or other electronic monitoring or recording devices to photograph or record the face of an electronic ballot marker while a ballot is being voted or while an elector's votes are displayed on such electronic ballot marker or photograph or record a voted ballot. This rule also became effective March 25, 2021.

3. The "Communication Rule", referred to by some as the Gag Rule, which prohibits election monitors and observers from communicating while they are viewing or monitoring the absentee ballot opening and scanning process any information that they see about any ballot, vote, or selection to anyone other than an election official. This rule became effective July 1, 2021.

4. The "Tally Rule" which prohibits a person from tallying, tabulating, estimating, or attempting to tally, tabulate, or estimate or cause the ballot scanner or any other equipment to produce any tally or tabulate, partial or otherwise, of the absentee ballots cast until the closing of the polls on the day of the election. Monitors and observers are similarly prohibited from taking such action while they are viewing or monitoring the absentee ballot opening and scanning process. This rule became effective July 1, 2021.

5. The "Ballot Application Rule" which provides that an application for an absentee ballot must be make not earlier than 78 days or less than 11 days prior to the date

of the primary or election, or runoff election, in which the elector desires to vote. This rule became effective July 1, 2021.

The underlying elections occurred on June 15, 2021, and runoff elections were scheduled for July 13, 2021, prompting Judge Boulee to invoke as a principle of restraint the *Purcell* principle that a court should ordinarily decline to issue an injunction, especially one that changes existing election rules, when an election is imminent, or as in this case, when the underlying elections have already occurred, and Plaintiffs seek an order that would mandate different rules for the related runoff elections. According to Judge Boulee, election administrators had prepared to implement the challenged rules and had "implemented them to some extent and now would have to grapple with a different set of rules in the middle of an election." The proposed injunction thus conflicted with *Purcell*'s guidance because it would change the election administration rules for elections that are already underway.

With respect to the July 13, 2021 runoff elections, Judge Boulee found that the Plaintiffs waited almost three months after S.B. 202 passed and until the eve before the underlying elections to file their Motion, and that risks and concerns under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), including the risk of disrupting the administration of an ongoing election, outweighed the alleged harm to Plaintiffs at this time. He reasoned that "an injunction would not merely preserve the status quo; rather, it would change the law in the ninth inning." Slip op. at 8. Thus, while Judge Boulee acknowledged the gravity of the First and Fourteenth Amendment harms alleged by Plaintiffs, and the noted the fundamental significance of voting under our constitutional system, the Plaintiffs could not satisfy the third and fourth prongs of the preliminary injunction test with respect to the July 13, 2021 runoff election, insofar as the Defendants' interests in conducting an orderly and efficient election and preserving the integrity of the electoral process did not outweigh the threat of injury to the plaintiffs and an injunction at the eleventh hour would be adverse to the public's identical interests in an orderly and fair election with the fullest voter participation possible and an accurate count of the ballots cast. Slip op. at 9. Judge Boulee reserved judgment regarding the propriety of relief as to future elections, with a separate order on that question to be issued at a later date.

8. United States v. The State of Georgia

The U.S. Justice Department filed this lawsuit against the State of Georgia, the Georgia Secretary of State, and the Georgia State Election Board over voting procedures adopted by S.B. 202.

In the United States' complaint, it challenged provisions of Senate Bill 202 under the discriminatory purpose prong of Section 2 of the Voting Rights Act. These provisions included banning government entities from distributing unsolicited absentee ballot applications; the imposition of costly and onerous fines on civic

organizations, churches and advocacy groups that distribute follow-up absentee ballot applications; the shortening of the deadline to request absentee ballots to 11 days before Election Day; the requirement that voters who do not have identification issued by the Georgia Department of Driver Services photocopy another form of identification in order to request an absentee ballot without allowing for use of the last four digits of a social security number for such applications; significant limitations on counties' use of absentee ballot drop boxes; the prohibition on efforts by churches and civic groups to provide food or water to persons waiting in long lines to vote; and the prohibition on counting out-of-precinct provisional ballots cast before 5 p.m. on Election Day. The complaint also asks the court to prohibit Georgia from enforcing these requirements.

At the time of filing, Assistant Attorney General Kristen Clarke, Chief of the Civil Rights Division, stated:

"The right to vote is one of the most central rights in our democracy and protecting the right to vote for all Americans is at the core of the Civil Rights Division's mission. The Department of Justice will use all the tools it has available to ensure that each eligible citizen can register, cast a ballot, and have that ballot counted free from racial discrimination. Laws adopted with a racially motivated purpose, like Georgia Senate Bill 202, simply have no place in democracy today."

The United States' complaint alleged that several provisions of S.B. 202 were adopted with the purpose of denying or abridging the right to vote on account of race. The lawsuit alleges that the cumulative and discriminatory effect of these laws—particularly on Black voters—was known to lawmakers and that lawmakers adopted the law despite this.

Supporters of S.B. 202, most notably Governor Kemp, accused the Biden Administration of playing politics and "weaponizing the Department of Justice" in an effort to enact an agenda that "undermines election integrity." Brakkton Booker, *It's The United States v. Georgia*, June 29, 2021, Politico – The Recast, https://www.politico.com/newsletters/the-recast/2021/06/29/justice-department-georgia-voting-rights-race-493414

As noted above, among the provisions of S.B. 202 challenged in the United States' complaint are the following:

a. a provision banning government entities from distributing unsolicited absentee ballot applications;
b. the imposition of costly and onerous fines on civic organizations, churches and advocacy groups that distribute follow-up absentee ballot applications;
c. the shortening of the deadline to request absentee ballots to 11 days before Election Day;

d. the requirement that voters who do not have identification issued by the Georgia Department of Driver Services photocopy another form of identification in order to request an absentee ballot without allowing for use of the last four digits of a social security number for such applications;
e. significant limitations on counties' use of absentee ballot drop boxes;
f. the prohibition on efforts by churches and civic groups to provide food or water to persons waiting in long lines to vote; and
g. the prohibition on counting out-of-precinct provisional ballots cast before 5 p.m. on Election Day.

Professor Rick Hasen pointed out in his Election Law Blog [Analysis: DOJ's Savvy, Strategic, and Very Ambitious Complaint Against Georgia's New Voting Law (Includes Link to Complaint) | Election Law Blog] on the day the DOJ brought this lawsuit under Section 2 of the Voting Rights Act that it raised only a Section 2 discriminatory purpose claim and did not sue directly for intentional voting rights constitutional violations under the 14th and 15th Amendments.

It is generally an easier standard to prove discriminatory effect, Hasen explained, rather than racially discriminatory purpose. "In fact, Section 2 was amended in 1982 (over the objections of now-Chief Justice John Roberts, then working for the Reagan Administration) to allow claims for discriminatory effects. The Supreme Court has weighed in many times on how discriminatory effects work in the redistricting context, but never for vote denial claims where a state has made it harder to register and vote."

It may have been because of the uncertainty of *Brnovich* that the DOJ made the strategic decision to claim only discriminatory purpose, since, as Hasen has opined, "[t]his insulates it from an adverse ruling in *Brnovich* as well as doesn't give the courts another opportunity to water down the Section 2 effects test. It is highly unusual to see a section 2 case that raises only discriminatory purpose." An important caveat at this juncture is that the *Brnovich* majority concluded that the *en banc* Ninth Circuit erred in holding that Arizona's ballot collection prohibition was enacted with a discriminatory purpose, and that the district court's view of the evidence on discriminatory purpose vel non was one of two permissible views of the evidence, had ample support in the record, and its choice as the factfinder was not clearly erroneous. *Brnovich*, slip op. at 35. This was so even though the district court recognized that a "racially tinged" video helped spur the legislative debate about ballot collection.

Hasen also points out, "The use of intentional discrimination also allows the DOJ to ask for Georgia to get observers and be "bailed" back into coverage under the preclearance rules that used to apply through Section 5 to Georgia (until the Supreme Court's Shelby County decision). It's a tough road: earlier attempts to bail

in Texas and North Carolina have failed, despite court findings of intentional discrimination. But it shows DOJ on the offense."

Section 2's "Results Test" in light of *Brnovich*

As noted above, the meaning, scope and application of Section 2 of the Voting Rights Act was squarely in the crosshairs of a majority of the U.S. Supreme Court when it heard argument in *Brnovich* on March 2, 2021 and when it rendered its decision on July 1, 2021.

Let's back up briefly to the legal landscape as it existed before the Supreme Court's 2013 decision in *Shelby County v. Holder.* Before that time, most Section 2 cases were vote dilution challenges and involved redistricting, the drawing of district lines at the state and local government level, and these cases turned on how those lines affected the weight of votes. Section 2 applies to any "voting qualification or prerequisite to voting or standard, practice or procedure" that results in discrimination. This is embodied in 52 U.S.C. §10301(a), which provides a discriminatory results standard that applies to voter eligibility qualifications as well as other voting practices that comprise the voting process. Section 2 is not limited to "denial" but also applies to discriminatory "abridgement" of the right to vote, as set forth in 52 U.S.C. §10301(a).

Following *Shelby County v. Holder*, a landslide of restrictions on registration and ballot access swept through dozens of state legislatures, and most of these restrictions were litigated in the election cycles of 2014 and 2016, in cases involving early voting cutbacks in Ohio, voter identification requirements in Wisconsin, Texas and Virginia, restrictions on absentee ballots in Arizona, elimination of straight ticket voting in Michigan and a range of restrictions on early voting, registration and voter identification requirements in North Carolina. See Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation since Shelby County*, 127 Yale L. J. F. 799, 801(Feb. 8, 2018), http://www.yalelawjournal.org/forum/the-new-vote-denial-litigation-since-shelby-county

Rejection of Disparate Impact Test

What emerged in the lower courts was a consensus to apply a two-part test for determining liability for vote denial under Section 2, an approach used by the lower appellate courts, but rejected by the U.S. Supreme Court. The *Brnovich* majority opinion took another road and trumpeted that it was concerned with equal application of a facially neutral rule specifying the time, place or manner of voting, *Brnovich*, slip op. at 6, that this was its first occasion to consider how Section 2 applies to generally applicable time, place and manner voting rules, *Brnovich*, slip op. at 7 and 14, and that no fewer than 10 tests had been proposed by the parties and Amici for analysis of Section 2 of the Voting Rights Act, *Brnovich*, slip op. at 13.

The Alito-led conservative majority rejected the disparate impact model, accused the dissent of an extended effort at misdirection and an underlying secret agenda of imposing on the states a freewheeling disparate-impact regime, slip op. at 22. The majority found less direct relevance in the *Gingles* preconditions and the Senate Report factors, which grew out of and were designed for use in *vote dilution* cases. Slip op. at 19. Indeed, for the majority, only a few of the Senate Report factors were relevant to a vote denial scenario, i.e., Senate factor one showed that minority group members suffered discrimination in the past and Senate factor five showed that effects of discrimination persist. *Brnovich,* slip op. at 20.

Pre-*Brnovich* Analytical Framework

It is nonetheless instructive to consider the analytical framework developed and articulated by a total of five circuits – the Fourth, Fifth, Sixth, Seventh and Ninth – which, prior to the *Brnovich* decision, generally agreed to this approach to evaluate vote denial claims:

First, courts look at whether the challenged policy, standard, practice or procedure results in a disparate burden on members of a protection class.

Second, if it does, courts then look to how that policy interacts with social and historical circumstances to cause that disparate burden.

Specifically, up until *Brnovich* was decided on July 1, 2021, these circuits applied the two-part test for Section 2 liability in vote denial claims:

League of Women Voters v. North Carolina, 769 F. 3d 224 (4th Cir. 2014), *stayed*, *North Carolina v. League of Women Voters*, 135 S. Ct. 1735 (2015)

Veasey v. Abbott, 830 F. 3d 216 (5th Cir. 2016)

Ohio State Conf. NAACP v. Husted, 768 F. 3d 524 (6th Cir. 2014), *stayed*, *Husted v. Ohio State Conf. NAACP*, 135 S. Ct. 42 (2014)

Frank v. Walker, 768 F. 3d 744 (7th Cir. 2014)

Feldman v. AZ Secretary of State's Office, 843 F. 3d 366 (9th Cir. 2016), *stayed*, 137 S. Ct. 446 (2016)

The test asks whether a challenged voting policy, practice, standard, procedure, qualification or prerequisite to voting imposed a discriminatory burden on minority voters. To meet this first part of the test, the plaintiff must show a causal connection between the challenged policy or practice and the prohibited discriminatory result that imposes a disparate material burden on voting in a manner that falls more heavily on minority voters.

When assessing the nature of that disparate burden, the courts must then consider whether the minority voters have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

To be sure, a Section 2 challenge must be based on more than a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity. *Smith v. Salt River Project Agric. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). In *Ohio Democratic Party v. Husted*, the Sixth Circuit clarified that at the first step of the test, plaintiffs' burden is to show that "the challenged standard or practice causally contributes to the alleged discriminatory impact." 834 F.3d 620, 637–38 (6th Cir. 2016). In so holding, the Sixth Circuit cited the very same Ninth Circuit rule that the en banc court applied in this case.

Similarly, in *League of Women Voters of North Carolina*, the Fourth Circuit identified and applied the identical operative test: whether the challenged measures themselves "disproportionately impact" minority voters—that is, whether they cause the discriminatory burden that Section 2 was designed to prevent. 769 F.3d at 245.

The Fifth Circuit is in accord with the Fourth, Sixth, and Ninth Circuits. The Fifth Circuit describes the test's first element as causal, "inquir[ing] about the nature of the burden imposed and whether it creates a disparate effect." *Veasey v. Abbott*, 830 F.3d at 244. In applying the test, the Fifth Circuit, like the Fourth and Sixth Circuits, as well as the *en banc* Ninth Circuit, analyzed the causal connections between the law at issue and the disparate adverse impact. See id. at 264.

The Seventh Circuit denied a Section 2 claim challenging Wisconsin's voter-ID law after finding that the plaintiffs had not furnished particularized evidence that minority voters faced a disparate burden due to the challenged requirement, but otherwise applies the same two-part test. *Frank v. Walker*, 768 F.3d at 755.

These circuits have uniformly held that to prevail on a Section 2 vote-denial claim, plaintiffs must furnish sufficient evidence that the challenged practices "caused" a discriminatory burden. The *en banc* Ninth Circuit, like its sister circuits, held that a mere statistical disparity was not enough to satisfy the test's first prong.

In light of *Brnovich* and its five "guideposts" – size of the burden, degree of departure from standard practice (the landscape and pedigree of voting rules) in 1982 and in the present, size of disparities of impact, opportunities provided by state's entire electoral system (availability of other ways to vote), and strength of the state's interest – that collectively have a bearing on a Section 2 determination, the newly minted standard for evaluating and analyzing vote denial cases under

Section 2 will necessarily be applied against overriding federalism-based principles. These include principles of *state justification* to which deference must be accorded, *equal state sovereignty* in the field of establishing non-discriminatory voting rules, and a constant fear that a stronger and more robust Voting Rights Act with a stronger and more robustly applied Section 2, in all of its vitality, would lead to the invalidation of "too many state voting laws." *Brnovich*, slip op. at 2 (Kagan, dissenting op.)

Realistically, after *Brnovich*, the only way to challenge a voter suppression law based on vote denial under Section 2 is to prove that it was enacted with discriminatory purpose or discriminatory intent. That burden has been transformed into a daunting evidentiary barrier when one considers Justice Alito's taking offense at the *en banc* Ninth Circuit's "insulting" conclusion that Arizona legislators acted with racial animus and enacted these two challenged statutes based on purposeful discrimination.

Redistricting, *Brnovich* and the Redistricting Reform Act of 2021

The 6-3 majority in *Brnovich* came close to crippling Section 2 of the Voting Rights Act as applied to vote denial claims, but it appears to have spared a separate and distinct type of claim routinely asserted in redistricting litigation: vote dilution claims. As least for the present, *Brnovich* did not directly address vote dilution claims, which are still one of the remaining weapons in the federal civil rights arsenal to deal with redistricting by states and local governments.

Speaking for the 6-3 majority, Justice Alito made it clear that the *Gingles* preconditions and Senate Report factors, discussed *infra* at 40-41, "were designed for use in vote-dilution cases," including such redistricting and election procedures as majority vote requirements, anti-single shot provisions, candidate slating processes, and such race-related factors as racially polarized voting, racial appeals in campaigns, and election of minority-group candidates. Slip op. at 19. These have long been interpreted and applied as the staples of redistricting litigation, but according to the *Brnovich* majority were "less helpful in a case like the ones at hand" and "plainly inapplicable in a case involving a challenge to a facially neutral time, place or manner voting rule". Slip op. at 19. In a vote denial case, in other words, these factors "should not be disregarded" but "their relevance is much less direct." Slip op. at 20.

Vote dilution claims, however, are not out of the woods yet and received what some might deem a shot over the bow in a terse one-page concurring opinion by Justice Gorsuch, joined by Justice Thomas, in which these two justices flagged the "open question" of whether the Voting Rights Act of 1965 furnishes an implied cause of action under Section 2 and whether plaintiffs in this case lacked a cause of action. Slip op. at 1 (Gorsuch, conc. op.)

Redistricting Reform Act

The Redistricting Reform Act of 2021 is one component of *The For The People Act*, H.R. 1/S.R.1, https://www.congress.gov/bill/117th-congress/house-bill/1. See Elizabeth Hira, *The For the People Act is America's Next Great Civil Rights Bill*, Brennan Center for Justice, March 1, 2021, https://www.brennancenter.org/our-work/analysis-opinion/people-act-americas-next-great-civil-rights-bill.

The Redistricting Reform Act includes a mandate for independent redistricting commissions and a prohibition against partisan gerrymandering. Recall that in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Supreme Court held that partisan gerrymandering claims are nonjusticiable in that they present political questions beyond the reach of Article III courts. In so doing, the Court drew a bright line between partisan gerrymandering and racial gerrymandering, arguably allowing white Republicans to dilute the political power of minority Democrats. As Professor Richard L. Hasen has suggested, moreover, *Rucho* may force Article III judges to make logically impossible determinations about whether a gerrymander is driven by race or party. See J. Palandroni and D. Watson, *Systemic Inequality, Racial Gerrymandering, The For The People Act and Brnovich: Systemic Racism and Voting Rights in 2021*, 89 Fordham L. Rev. 124, 128 (2021).

Section 2 of the Voting Rights Act does not prescribe different legal standards for vote dilution and vote denial claims. Challenges to racially discriminatory redistricting under Section 2 typically and historically includes the core allegation that minority citizens' votes are diluted. In *Brnovich*, the Ninth Circuit was confronting outright vote denial through which votes were denied if cast in violation of the state's OOP policy and ballot collection policy. The Ninth Circuit's two-part test for evaluating these two voting policies was derived from *Thornburg v. Gingles,* 478 U.S. 30, 36-37 (1986), an analysis that is context-focused and embodied in the three "*Gingles* preconditions" of geographic compactness, minority political cohesion and legally significant white racial bloc voting.

Gingles Preconditions as Standing Requirement

The *Gingles* preconditions have served as a kind of standing requirement for Section 2 vote dilution claims. Luke P. McLoughlin, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y. Univ. L. Rev. 312, 313 (April 2005) ("Each of the *Gingles* prongs has served as a de facto standing requirement for vote dilution claims brought under the VRA. Growe v. Emison, 507 U.S. 25, 40-41 (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy."). The *Gingles* prongs comprise a prudential test, judicially grafted onto the Voting Rights Act of 1965, which targeted myriad barriers to voting. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of

racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.").

Senate Report Factors

Once these threshold criteria are met by minority voters, the courts in turn address the merits of the vote dilution claim by applying Section 2's totality-of-circumstances test, employing a list a nine context-specific "Senate Report factors" enumerated in the 1982 Senate Report that accompanied the 1982 amendments to the Voting Rights Act. These Senate Report factors are considered by the courts when determining if, within the totality of the circumstances in the jurisdiction under challenge, the electoral device or policy being challenged results in a denial or abridgement of the right of any citizen to vote on account of race or color, or is the product of intentional discrimination on account of race or color, by giving voters of one racial group less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Include in these factors are:

1. the history of official 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 of 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, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of 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; and
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

The court can also consider additional factors, such as whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members or where the policy underlying the state or political subdivision's use of the challenged standard, practice, or procedure is tenuous. This list of factors, moreover, is neither exclusive nor comprehensive, and a plaintiff need not prove any particular number or a majority of these factors in order to succeed in a vote dilution claim.

Oral Argument in *Brnovich*

This artificial divide between race and politics was explored in a withering examination by Justice Elena Kagen of counsel for the Arizona Republican Party, Michael Carvin, a leading appellate and trial lawyer and constitutional expert, who had argued in his brief that states have broad power to enact laws restricting the "time, place, or manner" where voters cast their ballots. Justice Kagan suggested that this proposed rule would allow a state to require all voters to cast their ballots at, say, country clubs with a history of racist policies, locations which are facially neutral but have a racially disparate impact.

Race or Politics?

Another hypothetical voting restriction about which Justice Kagen quizzed Carvin was whether a state could require everyone to vote between 10 am and 2 pm on a particular day. When Carvin advanced the Republican argument that Section 2 only requires that voters be given equal opportunity to vote—not that they actually use that opportunity in a manner proportional to whites – and that minority voters had not really been denied their right to vote, Justice Sonia Sotomayor interrupted: "If you can't vote because you're a Native American or Hispanic in areas where car ownership rates are very small, where you don't have mail pickup or delivery, where your post office is at the edge of town, so that you require either a relative to pick up your vote or you happen to vote in the wrong precinct, because your particular area has a confusion of precinct assignments — if you just can't vote for those reasons and your vote is not being counted, you've been denied the right to vote, haven't you?" Carvin conceded that there are circumstances in which "time, manner, and place" election regulations could produce impermissibly disparate impacts across racial lines.

Justice Kagan also sparred with Arizona AG Brnovich over what kind elections practices might disadvantage racial minorities, to which Brnovich conceded, "it depends on the circumstances and does that have a substantial impact on minorities." To which Justice Kagan shot back, "Yes, it does." She then followed with this barbed observation: "If [the polls are only open] 10-2 then people who work and don't have cars, then the impact has been shown to be that Black voters will be very disproportionately impacted."

Zero Sum Game

In response to a question from Justice Amy Coney Barrett about the Arizona Republican Party's standing to bring this case to the Supreme Court, Mike Carvin effectively argued that allowing more people to vote by invalidating the policies at issue would hurt Republican chances of winning elections, stating "[I]t puts us at a

competitive disadvantage relative to Democrats. Politics is a zero sum game." The *Brnovich* majority opinion slams that point home like a Boston Bruins hockey puck.

For better or worse, this artificial divide between race and partisan politics will come to a head as and when districts are created in late 2021 and 2022 based on the 2020 Census redistricting data in which partisan political affiliation is more and more closely intertwined.

This much is clear:

•The *Brnovich* majority did not engage in a searching practical evaluation of past and present reality demanded by Section 2's totality of circumstances test.

•It ignored the local conditions on the ground, including unique burdens placed on rural Native Americans who had disparate and strikingly limited access to mail service, with which the Arizona ballot collection law interacted.

•Its silence with respect to the Voting Rights Act's promise that the political process would be equally open to every citizen, regardless of race, was deafening. *Brnovich*, slip op. at 38-40 (Kagan, dissenting op.).

•And it sailed under a textualist flag like a pirate ship, stacking multiple extra-textual constraints onto Section 2 that could not find their mooring in the text of Section 2: (1) the requirement drawn out of thin air that a voting law impose more than the "usual burdens of voting" as compared to Section 2's explicit application to *any* denial or abridgement of the right to vote, and not to "substantial" abridgement; (2) the principle that even if a particular voting rule was racially discriminatory, it could be overlooked if a state offered "other available means" for voting, an idea that was not one advanced by Congress when it enacted Section 2; and (3) the pronouncement that one of the relevant considerations was "the degree to which a voting rule departs from what was standard practice" in 1982, the year Section 2 was revised in response to *City of Mobile v. Bolden*, when the provision *never said that*, and instead, its whole point was to unsettle the status quo and bring an end to voting restrictions that disproportionately harm minority citizens.

As Nicholas Stephanopoulos put it in his Washington Post op-ed, *The Supreme Court Showcased its "Textualist" Double Standard on Voting Rights,* July 1, 2021, https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act/

"It isn't textualism to follow statutory language only when doing so is congenial to one's ideological allies. It isn't textualism to flout statutory language by creating out of thin air extra-textual checks on a disfavored claim. And it isn't textualism to interpret the Voting Rights Act as one wishes it had been written, not as Congress actually wrote it. To return to Alito's metaphor, this is what a judicial pirate ship

looks like. It flies textualist colors while plundering one of the key statutory achievements of American democracy."

As for voter fraud, *Brnovich* has invited each state, especially the ones tilting red, to enact statutory measures, vote suppression rules, policies and practices, in the name of preventing election fraud "without waiting for it to occur within its borders." It does not matter that there has been no case of voter fraud linked to the practice.

Bail-In under Section 3 of the Voting Rights Act

As alluded to earlier, yet another consequence may be in store for Georgia in the event the court ultimately concludes that the General Assembly engaged in purposeful discrimination in enacting S.B. 202. An obscure provision of the Voting Rights Act, Section 3 (c), is known as the Pocket Trigger or bail-in provision. As the author of a prescient article on Section 3 put it in 2010, three years before *Shelby County v. Holder*, "The pocket trigger is a solution already in the civil rights arsenal -it's just been in the bunker for the past forty years." Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L. J. 1992, 2038 (June 2010).

Under it, if a jurisdiction is found by the court to have engaged in purposeful or intentional race discrimination in its enactment or enforcement of election laws, procedures or practices, the court in its discretion may impose what amounts to a ten year requirement for the jurisdiction to submit to the Department of Justice any changes in its election law for review and approval, similar to the procedure provided by now-immobilized Section 5. As Mr. Crum observed in his 2010 article on the pocket trigger, "Given its constitutional trigger, targeted preclearance, and flexible bailout, section 3 is more congruent and proportional than section 5. Quite simply, it is far more likely to survive the Supreme Court. … The pocket trigger utilizes a perfectly tailored coverage mechanism and institutes targeted preclearance for each jurisdiction. In sum, it updates section 5 for the twenty-first century." Id. at 2038.

Role of Section 2 in Redistricting Context

Section 2 of the Voting Rights Act has been weakened but not entirely eviscerated. It will play a major rule in redistricting litigation challenging redistricting plans at the state and local government level following the Census Bureau's now-delayed release of 2020 Redistricting Data. It may still have some degree of vitality and usefulness as a tool to fight voter suppression laws that create barriers to voter registration, undue restrictions on access to voting, and interference with every significant action taken by voters to exercise their right to vote in an open, fair and free electoral process.

As our Nation lurches forward two years before the 2024 Presidential Primaries begin, one can look for several developments on the election law horizon:

1. Federal challenges to restrictive voting laws enacted by state legislatures in violation of Section 2's ban on purposeful voting discrimination and the 15th Amendment's prohibition of denial or abridgement of the right to vote on account of race or color;
2. Congressional action on *The For The People Act* and *The John Lewis Voting Rights Restoration Act*. Depending on how the filibuster fares in the U.S. Senate, one or both of these may be renamed the *Joe Manchin Act*.
3. Action on the state level to expand voting access or curtail access, depending on one's partisan tilt;
4. The Bully Pulpit of President Joe Biden to generate focused attention and efforts on the part of civil rights organizations, corporate America, and activists dedicated to fighting in the courts, fighting in the streets, fighting for fair voting, educating the electorate on how to deal with the overwhelming flood of state laws enacted to curtail, limit or restrict access to the ballot box.

Conclusion

By now requiring minority voters to show that a state has imposed more than the "usual burdens of voting", the 6-3 *Brnovich* majority has erected a high burden for vote denial claims. Indeed, a state can now assert that it has an interest in preventing fraud to justify an election law without proving that fraud is actually a serious risk or that it has even taken place in any significant or widespread way.

Brnovich will make voting more difficult and burdensome for minority voters, and it has invited state legislatures to seize control of the regulation of voting procedures. This is taking place at a time when the independent state legislature doctrine has begun to take on greater significance, Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1,27 (2021) ("a state legislature may regulate the manner in which federal elections are held, except for issues relating to candidate qualifications and, for congressional elections, voter qualifications. When exercising this authority, the legislature is subject to the implied internal restrictions of the Elections Clause and Presidential Electors Clause themselves, as well as explicit federal constitutional restrictions such as due process, equal protection, and the voting rights amendments. State constitutions, however, may not impose additional substantive restrictions on the scope of legislatures' authority over federal elections."), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530136

In short, *Brnovich* has opened the door to state legislatures making a power grab to effectively rig decisions on who wins elections regardless of the actual vote.

Regulations imposed in the name of ballot integrity and voter protection from serious, widespread and rampant voter fraud will be capable of enactment, even in the absence of any credible evidence of fraud.

To some, *Brnovich* has arguably turned back the clock on voting rights for several decades. It has left a hollowed-out version of Section 2 as the one remaining federal statute that can be invoked to prevent minority vote dilution in redistricting. To others, it is clear that any future attempts to invoke Section 2 to fight vote denial or rein in vote dilution will be undertaken with full awareness that the Supreme Court has given future litigants a road map to circumvent what has been left of Section 2. And lest we forget, Justice Alito ended his 6-3 opinion with a "shot across the bow for Congress," when he rejected dissenting Justice Kagan's suggestion that Congress amend the Voting Rights Act to provide an easier standard for minority plaintiffs to meet, such as a disparate impact test. Such a test, according to Justice Alito, would "deprive the states of their authority to establish nondiscriminatory voting rules" that would potentially violate the Constitution. Brnovich, slip op. at 25. Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, July 1, 2021, The New York Times, at https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html

In light of *Brnovich*, the law in Section 2 denial cases is now clear that even if a voter suppression statute or some form of suppressive voting rule has a grossly disproportionate disparate impact on racial minorities, that alone will not serve as grounds to invalidate it.

These consequences of *Brnovich* may not be easily avoided by Congressional action, which most agree will be a steep uphill climb in which bipartisan support will be needed to enact an acceptable compromise on the *For the People Act* and the *John Lewis Voting Rights Restoration Act*. As a final backstop, state supreme courts may be called up to apply state constitutional provisions to nullify state legislation that is shown to suppress voting and make it harder and more burdensome.

In a nutshell, *United States v. State of Georgia* may not be resolved for several years, and it will not likely be concluded by the time of the 2022 elections in Georgia, which include both a Senate race and a Gubernatorial race. These elections will most likely proceed with S.B. 202 intact and, moreover, may not be completely resolved by the time of the 2024 Presidential Election. Saddle up.

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