

Current Conditions of Voting Rights Discrimination

# South Carolina

A Report Prepared by

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for submission by The Leadership Conference on Civil and Human Rights

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House Committee on the Judiciary  
OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE  
REFORMS

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South Carolina's Recent Voting Rights History: 1996 to July 2021

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## INTRODUCTION AND OVERVIEW

### *Purpose, Scope, and Organization of this Report*

This report examines South Carolina's recent history of racial discrimination in voting, as well as other violations of and limitations on the right to vote, in the past 25 years, from 1996 to July 2021. The report has been prepared in conjunction with the Leadership Conference Education Fund to assist in the ongoing discussions as to whether Congress should act now to amend and strengthen the Voting Rights Act of 1965.<sup>1</sup>

This report builds on a similar report issued in March 2006, *Voting Rights in South Carolina 1982-2006* (hereinafter, "2006 Report").<sup>2</sup> At that time, Congress similarly was considering whether to reauthorize and amend provisions of the Voting Rights Act, focusing in particular on whether to reauthorize the Act's preclearance requirements which were due to expire in 2007. Congress had previously reauthorized the preclearance provisions in 1982, for a 25-year period. Hence, the 2006 Report focused on the period of 1982 to 2006.

Later in 2006, Congress did reauthorize the preclearance provisions for an additional 25 years.<sup>3</sup> But, in June 2013, the Supreme Court, by a vote of 5-4, invalidated that extension in *Shelby County v. Holder*,<sup>4</sup> ruling unconstitutional the formula relied upon in the Act to determine which states and localities were subject to preclearance. The Court emphasized that Congress retained the option of enacting a new coverage formula "based on current conditions."<sup>5</sup> The Court did not, however, provide any guidance as to the length of time Congress should consider when evaluating "current conditions."

In this context, it appears that looking back 25 years would provide a reasonable assessment of South Carolina's current history of voting discrimination, and other matters relating to the right to vote, and that is the period this report examines. The report begins with a brief summary of the pre-1996 history (Chapter One). Next, it examines demographic information, voter participation rates, the extent to which Black South Carolinians have been

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<sup>1</sup> The author is a retired attorney who spent a significant portion of his career enforcing the Voting Rights Act and other federal voting rights laws, first at the U.S. Department of Justice and later at the Lawyers' Committee for Civil Rights Under Law. He also has written extensively on the preclearance provisions of the Voting Rights Act. Mark A. Posner, *Time is Still on its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to our Nation's History of Discrimination in Voting*, 10 N.Y. J. of Legis. & Public Policy 51 (2006); Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 Duke J. of Const. Law & Public Policy 79 (2006); Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in *Race and Redistricting in the 1990s* (Bernard Grofman ed. 1998).

<sup>2</sup> John C. Ruoff & Herbert E. Buhl III, *Voting Rights in South Carolina 1982-2006*, RenewtheVRA.org, (Mar. 2006), <http://www.protectcivilrights.org/pdf/voting/SouthCarolinaVRA.pdf>.

<sup>3</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

<sup>4</sup> 570 U.S. 529 (2013).

<sup>5</sup> *Id.* at 557.

ected to office, and racially polarized voting (Chapter Two). The report then turns to an examination of the state’s underlying voting processes and structures: voter registration; election day voting (in particular, the state’s photo ID requirement); absentee and early voting; claims of voter fraud, and other election administration issues (Chapter Three). Lastly, the report explores issues relating to structural election matters, including methods of election, redistricting plans, and changes to municipal voting constituencies through annexations (Chapter Four). In order to provide a comprehensive picture of voting issues that have arisen in the past 25 years, the report includes information on occurrences between 1996 and March 2006 which were addressed in the 2006 Report, though some details included in that report have been omitted here.

### *The Voting Rights Act, and the Constitutional Right to Vote*

Many readers of this report undoubtedly are well acquainted with the Voting Rights Act, and the constitutional right to vote. However, as a foundation for discussing South Carolina’s recent history, it is useful to briefly review their top-line features.

In 2013, when the Supreme Court issued its decision in *Shelby County*, Section 5 of the Voting Rights Act<sup>6</sup> applied to nine states, and localities in another six states – generally located in the South and Southwest.<sup>7</sup> These jurisdictions were required to obtain preclearance from the United States District Court for the District of Columbia (convened as a three-judge court), or, alternatively, the Attorney General, before implementing any change in a voting practice or procedure (broadly defined). To obtain preclearance, a covered jurisdiction was required to show that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language minority status (referring to Hispanics, Asians, Native Americans, and Alaskan Natives<sup>8</sup>)].”<sup>9</sup> A discriminatory effect existed where the change would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>10</sup>

Section 5 was first enacted in 1965, and was reauthorized by Congress in 1970, 1975, 1982, and most recently in 2006. South Carolina was covered from the outset.

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<sup>6</sup> 52 U.S.C. §10304.

<sup>7</sup> *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, U.S. Dep’t of Justice., Civil Rights Div., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

<sup>8</sup> 52 U.S.C. §10310(c)(3).

<sup>9</sup> *Id.* § 10304(a). A detailed exposition of how Section 5 operated is contained in regulations issued by the Attorney General, *Procedures for the Administration of Section 5*, 28 C.F.R. pt. 51.

<sup>10</sup> *Beer v. United States*, 425 U.S. 130, 141 (1976). Prior to the Supreme Court’s 2000 decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320, Section 5 prohibited voting changes enacted with a discriminatory purpose regardless of whether the change was retrogressive or not. In *Bossier Parish*, the Supreme Court held, instead, that Section 5 only prohibited the subset of discriminatory purposes that involve a purpose to retrogress. As part of the 2006 reauthorization of Section 5, Congress amended the statute to return Section 5 to the broader prohibition. 52 U.S.C. §10304(c).

Section 2 of the Act is a permanent, nationwide provision, enforced through traditional litigation, which prohibits the use of discriminatory voting practices and procedures, whenever enacted. It includes a special “results” test, which prohibits practices and procedures that result in minority citizens having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>11</sup>

Section 8<sup>12</sup> of the Act authorized the Attorney General to send federal observers (federal employees provided through the Office of Personnel Management) to jurisdictions covered by the preclearance provisions for the purpose of monitoring polling place practices on election day. Following the *Shelby County* decision, the Justice Department determined that the Supreme Court’s invalidation of the coverage formula insofar as it was used to identify the preclearance jurisdictions also meant that there were no longer any jurisdictions subject to Section 8.<sup>13</sup>

Section 208<sup>14</sup> grants voters who are blind, disabled, or unable to read or write the ability to obtain assistance in voting from any individual of their choice, provided that the individual is not their employer or an agent of their employer or union.

Section 203<sup>15</sup> requires election officials in certain jurisdictions to provide bilingual, or sometimes multilingual, election information. South Carolina is not covered by this provision.<sup>16</sup>

The right to vote is protected under the First and Fourteenth Amendments to the Constitution. In assessing whether a violation has occurred, courts “weigh the character and magnitude of the asserted injury . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>17</sup>

### *Overview of Report Findings*

Black residents of South Carolina make up about a quarter of both the state’s total population and citizen voting age population. However, Black residents currently register to vote and vote at lower rates than Whites, and thus are underrepresented in the electorate. Still, Blacks now constitute a roughly proportionate share of the senators and representatives in the state General Assembly (elected from single-member districts) and a slightly higher percentage of all county council members (also almost entirely elected from single-member

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<sup>11</sup> 52 U.S.C. §10301(b). Section 2 was most recently construed by the Supreme Court in a July 2021 decision. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>12</sup> 52 U.S.C. §10305.

<sup>13</sup> *About Federal Observers and Election Monitoring*, U.S. Dep’t of Justice., Civil Rights Div., <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>.

<sup>14</sup> 52 U.S.C. §10508.

<sup>15</sup> *Id.* §10503.

<sup>16</sup> A bilingual/multilingual requirement also existed in Section 4(f)(4) of the Act, 52 U.S.C. §10303(f)(4), for certain jurisdictions – not South Carolina – covered for preclearance; the *Shelby County* decision had the consequence of also ending the implementation of this section.

<sup>17</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted).

districts). There is one Black United States Senator, and one (of seven) United States Representatives for South Carolina is Black.

Despite some advances for Black voters in last quarter century, South Carolina's pre-1996 history of voting discrimination has continued to evidence itself in the manner in which the state runs elections, and the advances that have occurred often have been the result of litigation.

- The state has one of the most restrictive voter registration deadlines in the country.
- Although the methods available in South Carolina for registering to vote now are typical of other states, this came about only as a result of a federal court injunction in December 1995 that countermanded the state's refusal to implement the National Voter Registration Act.
- In 2011, South Carolina enacted what initially appeared to be a very strict photo identification requirement for voting in-person at the polls (and for in-person absentee voting). The data showed that the requirement would have a clear disparate and retrogressive effect on Black voters, and the Justice Department interposed a Section 5 objection blocking its implementation. The state then sought preclearance from the U.S. District Court for the District of Columbia. When it appeared that the evidence again would lead to a preclearance denial, the state – desirous of preclearance – reinterpreted the new law to create a significant exception to the photo ID requirement and, on that basis, obtained preclearance for future elections (but not the 2012 general election). The manner in which the photo ID law evolved, first in the General Assembly and then through the Section 5 review process, provides a clear illustration of the power Section 5 had to both block discriminatory voting changes and deter jurisdictions from seeking to implement such changes.
- South Carolina also has one of the most restrictive systems in the country regarding the opportunity for voters to cast their ballot ahead of Election Day, either by mail or in person. This became particularly significant in 2020, when the need for social distancing because of the COVID-19 pandemic raised significant concerns regarding voting in person on Election Day. These concerns were especially acute for Black voters since Black South Carolinians were at greater risk for severe COVID-related illness. Several federal lawsuits were brought, and relief was obtained based on the constitutional right to vote. The South Carolina General Assembly also passed legislation to liberalize absentee voting in the 2020 primary and general elections, however, it did so only after preliminary injunction motions were filed in the cases.
- South Carolina has one of the worst recent records in the country for wait times at the polls. Nationally, Black voters, on average, experience longer wait times than White voters. The available data do not indicate whether this pattern differs in South Carolina.

Likewise, South Carolina's pre-1996 history of voting discrimination has continued to evidence itself in the state's recent history of structural election practices, including the use of at-large election methods and redistricting plans that dilute Black voting strength.

- It appears that the state's longstanding pattern of racially polarized voting continues to be a significant feature of elections in the state. Racially polarized voting is the fulcrum on which structural election practices may act to exert a discriminatory effect.
- Between 1996 and *Shelby County's* termination of Section 5 coverage, the Justice Department issued 13 Section 5 objections – in addition to the photo ID objection – to voting changes which jurisdictions in South Carolina were seeking to implement. Twelve of the 13 dealt with dilutive changes (election method changes, redistrictings, and a reduction in the number of elected officials); the other objection concerned racially selective annexations which were connected to the exclusion of adjacent Black populations from the town. The objections dealt with all levels of government within the state, including the General Assembly, county councils, school boards, and municipalities.
- The last 25 years also has included four Section 2 suits which led to the abandonment of at-large systems in favor of district methods of election. This followed on dozens of such suits in South Carolina following Congress' adoption of the Section 2 "results" test in 1982 and through 1995. Most notably, the last 25-year period includes a federal court ruling that Charleston County's at-large system for electing its county council violated Section 2, a decision which was affirmed by the Fourth Circuit.

## CHAPTER 1: A BRIEF LOOK-BACK AT SOUTH CAROLINA’S PRE-1996 VOTING HISTORY

During the 30 years following the enactment of the Voting Rights Act on August 6, 1965, Section 5 of the Act, in combination with Section 2, had a profound impact on the opportunity of Black South Carolinians to participate in the state’s political processes.

In 1964, one year before the passage of the Act, only 17 percent of South Carolina’s registered voters were nonwhite. Nearly two-thirds of the state’s nonwhite voting age population (VAP) was not registered to vote, while three-quarters of the White VAP was registered.<sup>18</sup> By 1996, nonwhites had risen to 27 percent of all registered voters.<sup>19</sup> The election results reflected this history of voter suppression and progress. Before 1965, not a single Black person was elected to public office in the state during the 20<sup>th</sup> century.<sup>20</sup> As of 2001, there were over 500 Black elected officials in the state.<sup>21</sup>

The progress was the product of many struggles. Immediately following passage of the Voting Rights Act, South Carolina filed suit in the Supreme Court seeking to enjoin key provisions of the Act, including Section 5. The Supreme Court rejected the state’s claims,<sup>22</sup> emphasizing that “[t]he 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.”<sup>23</sup>

Thereafter, through 1995, the Justice Department denied Section 5 preclearance (i.e., “interposed objections”) to South Carolina voting changes on approximately 100 occasions.<sup>24</sup> These changes concerned all levels of government, and particularly dealt with structural changes that significantly affect electoral opportunity, including election methods, redistricting plans, and municipal annexations.

In addition, plaintiffs repeatedly challenged in court the use of at-large election systems, whose use generally predated the Voting Rights Act and thus were not subject to Section 5 review. It is well-established that this election method, in the context of racially polarized voting, may significantly minimize minority voters’ electoral opportunities. The “results” test was incorporated into Section 2 by Congress in 1982, which meant that at-large systems that had the effect of minimizing Black voting strength were unlawful regardless of whether they had been adopted or were being maintained with a discriminatory purpose. Thereafter,

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<sup>18</sup> *Political Participation: A study of the participation by Negroes in the electoral and political processes in 10 Southern States since passage of the Voting Rights Act of 1965*, U.S. Comm’n on Civil Rights, at 13 (May 1968), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf>.

<sup>19</sup> *South Carolina 1996 General Election: Statewide Registered Voters Demographics*, <https://www.scvotes.gov/cgi-bin/scsec/vothist?election=vhgen96&regvote=REG>.

<sup>20</sup> *2006 Report*, *supra* at 3.

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>23</sup> *Id.* at 308.

<sup>24</sup> *Voting Determination Letters for South Carolina*, U.S. Dep’t of Justice., Civil Rights Div. <https://www.justice.gov/crt/voting-determination-letters-south-carolina>.



through 1995, Section 2 suits in South Carolina led to nine county councils, eight school districts, 18 municipalities, and an elected board of public works changing to district methods for electing their governing bodies.<sup>25</sup>

These Section 5 objections, together with the massive changeover to district systems due to Section 2 litigation, produced a sea change in the opportunity of Black voters to elect their preferred candidates at all levels of government in South Carolina.

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<sup>25</sup> *2006 Report, supra*, Attachment 1.

## CHAPTER TWO: PARTICIPATION IN SOUTH CAROLINA ELECTIONS

### Demographic Overview

Black residents of South Carolina are about a quarter – 26.5 percent – of the state’s total population according to 2019 Census estimates, which (as of the date of this report) are the most recently released Census data, by race/ethnicity, for South Carolina. Hispanics constitute an estimated 5.8 percent, Asians 1.7 percent, Native Americans 0.4 percent, and individuals of “two or more races” 2.4 percent.<sup>26</sup> As of the time this report was finalized, the Census Bureau had not yet released the population counts, by race/ethnicity, from the 2020 Census.<sup>27</sup>

The racial/ethnic composition of the state has remained relatively stable since 2000. The Black percentage has trended slightly downward, from about 30 percent to about 27 percent<sup>28</sup>; the Hispanic and Asian population percentages have grown but still are small.

*Table 1: South Carolina’s total population by race/ethnicity, 1990-2019.*

Year	% Black	% Black Alone + Black Multi-Race	% Hispanic	% Asian	% Native American & AK Native	% Two or More Races
2019	26.5	Not available	5.8	1.7	0.4	2.4
2010 <sup>29</sup>	27.9	28.8	5.1	1.3	0.4	1.7
2000 <sup>30</sup>	29.5	29.9	2.4	0.9	0.3	1.0
1990 <sup>31</sup>	29.8	Not available	0.9	0.6	0.2	Not available

<sup>26</sup> *Selected Characteristics of the Total and Native Populations in the United States*, U.S. Dep’t of Commerce, U.S. Census Bureau, American Community Survey, 2019 ACS 1-Year Estimate, <https://data.census.gov/cedsci/table?q=South%20Carolina%20population%20by%20race&tid=ACSST1Y2019.S0601>.

<sup>27</sup> The 2019 ACS 1-Year Estimate indicated a total state population of 5,148,714. *Id.* The 2020 Census apportionment data, which have been released, report a total population of 5,124,712. *Table 1: Apportionment Population and Number of Representatives by State: 2020 Census*, U.S. Dep’t of Commerce, U.S. Census Bureau, <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.pdf>. Thus, the 2019 estimate differs from the 2020 count by only 24,002, or 0.5%.

<sup>28</sup> The 2006 Report noted that Blacks were an estimated 33% of South Carolina’s population when the Voting Rights Act was passed in 1965. *2006 Report*, *supra* at 9.

<sup>29</sup> *Race*, U.S. Dep’t of Commerce, U.S. Census Bureau, Decennial Census, 2010: DEC 113th Congressional District Summary File, <https://data.census.gov/cedsci/table?q=2010%20South%20Carolina%20population%20by%20race&tid=DECENNIALLCD1132010.P8>; [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_South\\_Carolina.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_South_Carolina.pdf).

<sup>30</sup> *Census 2000: South Carolina Profile*, U.S. Dep’t of Commerce, U.S. Census Bureau (Aug. 2002), <https://www.census.gov/prod/2002pubs/c2kprof00-sc.pdf>.

<sup>31</sup> *1990 Census of Population: General Population Characteristics: South Carolina* tbl.3, U.S. Dep’t of Commerce, Bureau of the Census (Apr. 17, 1992), <https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-42.pdf>.

Currently, the Black share of the state’s citizen voting age population (“CVAP”) is about the same as the Black total population share. However, the current Black registration and turnout percentages are less than the Black CVAP percentage.

*Table 2: Current CVAP, voter registration, and voter turnout percentages, by race/ethnicity.*

Metric	% Black	% Hispanic	% Asian	% Native American	% Two or More Races
CVAP (2015-2019 estimate) <sup>32</sup>	26.6	2.8	1.1	0.3	1.2
Voter registration (Oct. 2020) <sup>33</sup>	25.9	1.9	1.1	0.2	0.4
Voter turnout, Nov. 2020	24.4	1.5	1.0	0.2	0.3

Stated more directly, Blacks in South Carolina currently register and vote at lower rates than Whites. In the 2020 general election, the Black registration rate (i.e., the percentage of the Black CVAP registered to vote) was five percentage points lower than the White rate (the percentage of the White CVAP registered to vote). Likewise, in the 2020 general election, the Black turnout rate (the percentage of the Black CVAP that voted) was nearly ten percentage points below the White rate (the percentage of the White CVAP that voted). See Table 3, below.

The historical registration and turnout data tell the following story. Before 2008, the Black registration and turnout rates were well below the White rates. President Obama’s candidacy in 2008 resulted in a surge in Black political activity, with the Black rates jumping ahead of the White rates in 2008, and then moving somewhat further ahead in 2012 when

<sup>32</sup> The Census Bureau now regularly prepares estimates of CVAP by state and race/ethnicity, published in the Census Bureau’s American Community Survey’s five-year estimates. This practice began in 2011, with publication of a 2005-09 CVAP estimate; the most recent is the 2015-19 estimate, published this year. The Census Bureau also prepared a special CVAP estimate in 2000. *Citizen Voting Age Population by Race and Ethnicity*, U.S. Dep’t of Commerce., U.S. Census Bureau (Feb. 19, 2021), <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html>.

<sup>33</sup> South Carolina maintains voter registration and turnout data by race (residents self-identify their race when registering to vote). The state’s current computer systems include reports for registration and turnout, broken out by individual races, generally going back to 2008; these reports are available upon request from the South Carolina Election Commission and were provided to the author. The Election Commission website includes a data reporting tool which yields registration and turnout data broken out by white and “nonwhite,” for all presidential and off-year elections since 1984. *Voter History Statistics for Recent SC Elections*, S.C. Election Comm’n, <https://www.scvotes.gov/data/voter-history.html>.

President Obama won reelection. In 2016, however, the pre-Obama relationship re-emerged in the turnout rates with Whites again turning out at a higher rate than Blacks. In 2020, as indicated, Whites both registered and voted at higher rates than Blacks.

*Table 3: Comparison of White and Black/Nonwhite registration and turnout rates (as a function of White CVAP and Black/Nonwhite CVAP), in the 2020, 2016, 2012, 2008, and 2000 general elections.<sup>34</sup>*

General Election	Registration Rates – Comparison	Turnout Rates – Comparison
2020	96.3% White vs. 91.3% Black	70.5% White vs. 61.1% Black
2016	88.5% White vs. 89.1% Black	62.0% White vs. 56.1% Black
2012	84.2% White vs. 88.4% Black	56.6% White vs. 61.5% Black
2008	79.2% White vs. 80.7% Black	59.7% White vs. 62.5% Black
2000 <sup>35</sup>	79.5% White vs. 71.4% Nonwhite	52.4% White vs. 40.2% Nonwhite

### *Black Elected Officials*

As of June 2021, Black South Carolinians occupy the following federal and state offices:

- One United States Senator (Tim Scott), and one of seven Congresspersons (James Clyburn);
- None of the eight statewide offices – Governor and Lieutenant Governor (since 2018, elected as a ticket, rather than in separate contests), Attorney General, Agriculture Commissioner, Comptroller General, Secretary of State, Superintendent of Education, and Treasurer;
- Eleven of 46 members of the General Assembly’s Senate (24%); and
- Thirty-four of 124 members of the General Assembly’s House of Representatives (27%).<sup>36</sup>

<sup>34</sup> CVAP data are not available for 2004, and accordingly the comparison of participation rates skips the 2004 election. CVAP data also are not available for years prior to 2000. The CVAP data used in the table are the Census estimates prepared for 2015-19, 2012-16, 2008-12, 2005-09, and 2000. See fn.32 *supra*. The registration and turnout data are from the South Carolina Election Commission. See fn. 33 *supra*.

<sup>35</sup> The data for the nonwhite percentage of registered voters, and the nonwhite percentage of turnout, confirm that it was the 2008 election when the historical participation pattern was temporarily reversed. Whereas nonwhites were 31.3% and 30.3% of the registered voters in 2012 and 2008, respectively, they were the following in the four previous presidential elections – 28.5% (2004), 27.5% (2000), 27.0% (1996), and 25.2% (1992). Similarly, nonwhites were 31.4% and 30.6% of the turnout in 2012 and 2008, respectively, but were 26.6% (2004), 24.5% (2000), 24.5% (1996), and 23.2% (1992) in the four previous elections.

<sup>36</sup> The race of the state Senate and House members was identified by the author from their pictures posted on the South Carolina General Assembly website, and by speaking with one of the authors of the 2006 Report.

Senator Scott is the first Black person elected statewide since Reconstruction. He initially gained office by appointment in 2012 when his predecessor retired mid-term. Scott was elected to complete the term in a 2014 special election, and was re-elected for a full term in 2016.

Congressman Clyburn was first elected in 1992, and is the House Majority Whip. He is the first Black person elected to Congress from South Carolina since Reconstruction, and represents a Black majority district (the state's only Black majority congressional district). The only other Black person elected to since Reconstruction to the U.S. House of Representatives is Senator Scott, who was elected to the House from a White majority district in 2010 and re-elected in 2012 (shortly thereafter he was appointed to the Senate).

Seven of the 11 current Black state Senators were elected from districts with Black registration majorities. Two of the other four were elected from districts which are almost Black majority in registration (48 percent); and the remaining two were elected from districts in which Blacks constitute a substantial minority of those registered to vote (between 42 and 44 percent Black). One Black majority registration district has a White state Senator. As of the 2006 Report, there were eight Black Senators (three fewer than now); six were elected from Black majority VAP districts and two from districts between 45 and 47 percent black in VAP.<sup>37</sup>

Twenty-five of the 34 current Black state House members were elected from districts with Black registration majorities. With respect to the other nine, three were elected from districts between 45 and 49 percent Black in registration; four from districts between 40 and 44 percent Black in registration; and two from districts in the 30 percent range in Black registration. As of the 2006 Report, there were 23 Black state Representatives (11 fewer than now); all but one were elected from Black majority VAP districts, the one exception having been elected from a 49 percent Black VAP district.

At the local level, currently, about one-third of the over 300 county councilmembers are Black.<sup>38</sup> Almost all were elected from single-member districts. Similarly, as of 2006, 30 percent of the county councilmembers were Black, with over 90 percent elected from district with Black registration majorities.<sup>39</sup> Due to time limitations, this report does not contain information on the racial composition of the districts from which the current Black county council members were elected.

This report also does not address the race of other county elected officials. The 2006 Report found that 29 percent of school trustees were Black, 26 percent of sheriffs, and that,

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<sup>37</sup> 2006 Report, *supra* at 10.

<sup>38</sup> The race of county council members was identified by the author from their pictures posted on county websites.

<sup>39</sup> 2006 Report, *supra* at 12-13.

aside from sheriffs, Blacks rarely were elected at large to single-position offices in White majority counties.<sup>40</sup>

### *Racially Polarized Voting*

There is a longstanding pattern of racially polarized voting in South Carolina. This prominent feature of elections largely explains why Black citizens generally are elected only from voting constituencies where Blacks constitute a majority, or near majority, of the registered voters.

Federal courts have found statewide racially polarized voting, most recently in 2002 and 1996 in cases challenging statewide redistricting plans. In its 2002 ruling, the South Carolina district court determined that “[v]oting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state.”<sup>41</sup> Six years earlier, in 1996, the district court found that “[i]n South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state and is present in all of the challenged [state] House and Senate districts in this litigation.”<sup>42</sup> Prior to that, in 1992, the state defendants in another case concerning statewide redistricting plans, stipulated to its existence.<sup>43</sup> In addition, in 2003 the district court concluded that there was “significant and pervasive [racial] polarization” in Charleston County, in a case that successfully challenged at-large elections for the county council.<sup>44</sup>

The ongoing existence of racially polarized voting is strongly suggested by the fact that, currently, over four-fifths of Black elected officials at the federal and state levels are elected from districts that are Black majority or near Black majority in voter registration. At the same time, the modest increases in Black elected officials from White majority districts, noted above, raises a question as to whether polarized voting may have lessened at least somewhat in certain election contexts.

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<sup>40</sup> *Id.* at 13.

<sup>41</sup> *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002) (challenge to congressional and General Assembly plans).

<sup>42</sup> *Smith v. Beasley*, 946 F. Supp. 1174, 1202 (D.S.C. 1996) (challenge to General Assembly plans).

<sup>43</sup> *Burton v. Sheheen*, 793 F. Supp 1329, 1357-58 & n.49 (D.S.C., 1992), *vacated sub nom. Statewide Reapportionment Comm. v. Theodore*, 508 U.S. 968 (1993) (challenge to General Assembly plans).

<sup>44</sup> *United States v. Charleston County*, 316 F. Supp 2d 268, 278 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4<sup>th</sup> Cir.), *cert. den.*, 543 U.S. 999 (2004).

## CHAPTER THREE: SOUTH CAROLINA ELECTION ADMINISTRATION PRACTICES

### *Voter Registration*

South Carolina has one of the strictest voter registration deadlines in the country, requiring electors to register at least 30 days before an election.<sup>45</sup> In addition to South Carolina, only 12 of the country's 51 jurisdictions (50 states and the District of Columbia) similarly have a pre-election deadline of 29 or 30 days.

Two-thirds of the country, on the other hand, employs later deadlines, or essentially no deadline at all, to allow citizens the opportunity to decide to participate by registering to vote as debates between candidates intensify and early voting begins in many areas. Twenty states and the District of Columbia have a form of same-day registration on Election Day, and one state (North Dakota) does not require voter registration. In another 11 states, there is a deadline of three weeks or less, and one state has a 22-day deadline.<sup>46</sup>

With regard to the methods available for registering to vote, South Carolina only begrudgingly joined the mainstream as a result of judicial action to enforce the National Voter Registration Act of 1993 ("NVRA"). As declared by Congress, the NVRA was enacted, in part, to remedy "discriminatory and unfair registration laws and procedures [which] can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities."<sup>47</sup> South Carolina initially refused to comply with the NVRA, wrongly claiming that the law is unconstitutional, and a district court enjoined the state in December 1995 from refusing to implement the law.<sup>48</sup> Following that decision, and as required for federal elections by the NVRA,<sup>49</sup> South Carolina has provided a unitary system for voter registration for all elections by mail, at the Department of Motor Vehicles, and at social service agencies, in addition to registration in person at county

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<sup>45</sup> S.C. Code §7-5-150.

<sup>46</sup> Information on registration deadlines across the country has been gathered by the National Conference of State Legislatures. *Voter Registration Deadlines*, Nat'l Conf. of State Legislatures (Oct. 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx#table%201>. On a related matter, up until recently South Carolina was one of a handful of states which required voters to put their entire nine-digit Social Security number on their voter registration application. The state was sued in November 2019, and it was alleged that this requirement discouraged persons from registering to vote and was unconstitutional. *South Carolina Democratic Party v. Andino*, No. 3:19-cv-03308 (D.S.C. Nov. 25, 2019). The state agreed to drop this requirement in January 2020. "SC agrees to change voter registration requirements after Democratic officials sue," *The State*, Jan. 17, 2020, <https://www.thestate.com/news/local/crime/article239387333.html>.

<sup>47</sup> 52 U.S.C. §20501(a)(3).

<sup>48</sup> *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995).

<sup>49</sup> 52 U.S.C. §20503.

boards of registration.<sup>50</sup> South Carolina also is now one of 41 states and D.C. to implement online voter registration (a method not addressed by the NVRA).<sup>51</sup>

As to those with criminal convictions, the state disqualifies individuals convicted and currently imprisoned; in addition, those convicted of a felony or an offense against election laws must fully serve their sentence in order to be re-enfranchised.<sup>52</sup> At least in the recent past, there has been some significant confusion among county election boards regarding the circumstances in which persons convicted of a felony, who no longer are imprisoned, regain their right to vote.<sup>53</sup>

Voting rights activists indicate that there have not been any significant concerns with wrongful removals of voters from the registration lists in at least the past 15 years.

In 2016, college students in Greenville County, South Carolina filed suit in state court challenging a decades-long practice of the local registrar requiring students with an on-campus address to complete a special questionnaire regarding residency that no other applicants were required to complete. The complaint alleged violations of state election law and the state constitution (equal protection and suffrage). The court issued a preliminary injunction, and the registrar agreed to end this practice.<sup>54</sup>

#### *Voting in Person – South Carolina’s Photo ID Requirement*

Owing to Section 5 of the Voting Rights Act, South Carolina employs a photo ID requirement for voting on Election Day (and for voting absentee in person) which, at first blush, seems quite strict, but which includes an exception that, after litigation under Section 5, has been construed to significantly diminish the strictness.

The law recognizes only five limited forms of photo ID: a driver’s license, which must be from South Carolina; another form of photo ID issued by the South Carolina Department of Motor Vehicles; a voter registration card with a photograph (issued by a voter going to the local board of registration office); a federal military photo ID; and a passport. Registered voters without one of these IDs may cast a provisional ballot by presenting their non-photo voter registration card (issued to all registered voters) and signing an affidavit stating that “the elector suffers from a reasonable impediment that prevents him from obtaining photograph

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<sup>50</sup> *South Carolina Voter Registration Information*, S.C. Election Comm’n, <https://www.scvotes.gov/south-carolina-voter-registration-information>.

<sup>51</sup> S.C. Code §7-5-185; *Online Voter Registration*, Nat’l Conf. of State Legislatures (Apr. 6, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>.

<sup>52</sup> S.C. Code §7-5-120.

<sup>53</sup> *Improving Elections in the United States: Voices from the Field* 60, Nat’l Comm’n on Voting Rights (Sept. 2015) (citing testimony of Bret Bursey, Exec. Dir. S.C. Progressive Network), <http://votingrightstoday.org/ncvr/resources/electionadmin>.

<sup>54</sup> *Ahmad v. Belangia*, No. 2016-CP-23-05477 (Ct. Common Pleas, 13<sup>th</sup> Jud. Cir.): Order for Temporary Injunctive Relief (Oct. 7, 2016); Consent Order of Dismissal (Dec. 30, 2016).



identification.” County election officials cannot reject the provisional ballot for lack of a photo ID unless they have “grounds to believe the affidavit is false.”<sup>55</sup>

The photo ID law was adopted in 2011, two years before the Supreme Court in *Shelby County* ended the preclearance requirement, and due to Section 5 South Carolina has implemented the “reasonable impediment” provision very broadly, undercutting the limits on which photo IDs are accepted. The process that led to this result vividly illustrates the power that Section 5 had to safeguard minority voting rights, by preventing discriminatory changes from being implemented and by deterring covered jurisdictions from seeking to implement such changes in the first place.

Before South Carolina adopted the liberal construction of the “reasonable impediment” provision, the Justice Department blocked the new photo ID requirement from being implemented, interposing a Section 5 objection in December 2011 pursuant to an administrative submission by the state. In its determination letter,<sup>56</sup> the Department concluded that the change had a prohibited retrogressive (discriminatory) effect. The Department cited data provided by the state which showed that the proportion of South Carolina’s nonwhite registered voters lacking the requisite ID was significantly higher than White proportion, and thus “[n]on-white voters were . . . disproportionately represented . . . in the group of registered voters who . . . would be rendered ineligible to go to the polls and participate in the election.”<sup>57</sup> This effect was not diminished by the “reasonable impediment” provision since neither the statute, nor the state in its submission, explained how it would be interpreted or applied by local election officials. Before the 2011 enactment, voters needed only to show their non-photo registration card, which local election officials automatically send to all registered voters.

South Carolina then filed a Section 5 declaratory judgment action seeking preclearance from a three-judge District of Columbia District Court. At trial, the state again failed to demonstrate that the limited roster of acceptable IDs would not have a discriminatory effect. The district court explained:

[T]he evidence reveals an undisputed racial disparity of at least several percentage points: About 96% of whites and about 92-94% of African-Americans currently have one of the [required] photo IDs. That racial disparity, combined with the burdens of time and cost of transportation inherent in obtaining a new photo ID card, might have posed a problem for South Carolina's law under the

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<sup>55</sup> S.C. Code §7-13-710; ; *Photo ID Requirements*, S.C. Election Comm’n, <https://www.scvotes.gov/node/235> (South Carolina Election Commission explanation of the photo ID requirement).

<sup>56</sup> Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to C. Havird Jones, Jr., Esq., Assistant Deputy Att’y Gen., Office of S.C. Att’y Gen. (Dec. 23, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_111223.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_111223.pdf).

<sup>57</sup> *Id.* at 3.

strict effects test of Section 5 of the Voting Rights Act absent the reasonable impediment provision.<sup>58</sup>

As the preclearance case proceeded forward, state officials realized that the only way they would obtain preclearance was to find – and agree amongst themselves on – an interpretation of the “reasonable impediment” provision which would neutralize this discriminatory effect, an effort which continued “in real time” throughout the trial and into the post-trial briefing.<sup>59</sup> Ultimately, the state decided to flip what, on its face, appeared to be an objective requirement (whether the impediment is “reasonable”) to a subjective prerequisite that merely necessitates that voters truthfully believe they have an impediment, regardless of whether election officials agree or not and regardless of whether the voters’ belief is reasonable or not. Under this interpretation, “any [truthful] reason asserted by the voter . . . must be accepted . . . . [T]he reasonableness of the listed impediment is to be determined by the individual voter, not by a poll manager or county board.”<sup>60</sup> As U.S. District Judge Bates observed in his concurrence, “to state the obvious” the voting change ultimately presented to the court for preclearance was substantially different from the change which had been enacted in 2011 and which the Justice Department had interposed an objection to.<sup>61</sup>

In these changed circumstances, the district court precleared the revised photo ID provision for elections after 2012.<sup>62</sup> However, the court denied preclearance for the 2012 general election, which then was less than a month off. The court explained that there was too little time to properly implement the “reasonable impediment” provision as newly construed by the state, and reiterated, in so many words, that without this provision the photo ID requirement was discriminatory.<sup>63</sup>

Judge Bates, in his concurring opinion (joined by District Judge Kollar-Kotelly), emphasized the key role Section 5 had played in South Carolina ultimately putting forth a nondiscriminatory photo ID provision:

[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive. Several legislators have commented that they were seeking to structure a law that could be pre-cleared. . . . The key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions of [the law], particularly the reasonable impediment provision, subsequently presented to this Court were

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<sup>58</sup> *South Carolina v. United States*, 898 F. Supp. 2d. 30, 40 (D.D.C. 2012).

<sup>59</sup> *Id.* at 35.

<sup>60</sup> *Id.* at 36.

<sup>61</sup> *Id.* at 53.

<sup>62</sup> *Id.* at 48.

<sup>63</sup> *Id.* at 48-50.

driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act.

Congress has recognized the importance of such a deterrent effect. . . . The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the new law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.<sup>64</sup>

Thus, Section 5 first deterred the General Assembly from adopting a more onerous law, then blocked the implementation of the voter ID requirement when it still was being construed by the state in a manner that was retrogressive, again had a deterrent effect when the state adopted its expansive interpretation of the “reasonable impediment” provision in order to obtain preclearance, and blocked the implementation of the revised requirement in the 2012 general election because the expansive version of the “reasonable impediment” provision could not be appropriately implemented in that election.

### *Absentee and Early Voting*

#### 1. South Carolina law.

South Carolina significantly restricts the opportunity of voters to cast a ballot before Election Day. These restrictions concern both those who wish to vote absentee by mail, and those who wish to vote early in person.

The state is one of a minority of states (about one-third) that has not adopted “no excuse” absentee voting.<sup>65</sup> Instead, those seeking to vote by mail must satisfy one of the statutorily-defined excuses. These include five categories of persons who “are absent from their county of residence on election day during the hours the polls are open, to an extent that it prevents them from voting in person”; and ten other categories of persons “whether or not they are absent from their county of residence on election day.”<sup>66</sup> The latter includes persons who are 65 and older. The state’s photo ID requirement does not apply to those who vote by mail.

The state also is one of the minority of states (about one-fifth) that does not employ early in-person voting open to all voters, whether denominated as “early voting” or “in-person absentee voting.”<sup>67</sup> The state does allow for in-person absentee voting up until 5 p.m. on the

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<sup>64</sup> *Id.* at 53-54.

<sup>65</sup> *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, Nat’l Conf. of State Legislatures (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

<sup>66</sup> S.C. Code §7-15-320.

<sup>67</sup> *Voting Outside the Polling Place*, *supra*.

day before Election Day, but that is limited to those who possess one of the statutory excuses for voting absentee. Those who vote absentee in person must comply with the photo ID requirement.<sup>68</sup>

The procedures for voting absentee also include restrictions. In casting the ballot, the voter must include on the ballot envelope the signature of a witness, with the witness' address.<sup>69</sup> Generally, only the voter or a member of the voter's immediate family may submit an application for an absentee ballot (except certain ill voters or voters with a disability may designate an authorized representative).<sup>70</sup>

## 2. Absentee Voting in the 2020 Elections.

South Carolina's restrictive absentee voting rules threatened to significantly suppress voting in the 2020 elections in the context of the COVID-19 pandemic and the resulting urgent need to minimize interpersonal contacts in order to limit the risk of infection. Ultimately, as a result of three lawsuits and pressure from the South Carolina Election Commission, the ability of voters to cast their ballot before Election Day was significantly liberalized. However, these changes were made for the 2020 elections only, and the state has returned to its prior restrictive rules.

Two lawsuits filed prior to the June primaries, *Middleton v. Andino*<sup>71</sup> and *Thomas v. Andino*,<sup>72</sup> asserted that the excuse requirement and the witness requirement violated the constitutional right to vote and Section 2 of the Voting Rights Act.<sup>73</sup> Both lawsuits emphasized the particular health and safety difficulties facing Black voters in the state. The *Thomas* Complaint, for example, highlighted the fact that, according to COVID data maintained by the South Carolina Department of Health and Environmental Control, "[a]s of April 16[, 2020], African Americans in South Carolina represented 41% of reported COVID-19 cases and a staggering 57% of related deaths despite making up just 27% of the State's population."<sup>74</sup> The Complaint also pointed to the state's long history of racial discrimination affecting Black voters' socioeconomic conditions and access to medical care which put them at greater risk of suffering severe health complications upon contracting COVID-19.<sup>75</sup>

The Executive Director of the State Election Commission also recommended to the General Assembly that it pass legislation to significantly open the state's absentee voting

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<sup>68</sup> *Absentee Voting*, S.C. Election Comm'n, <https://www.scvotes.gov/absentee-voting>.

<sup>69</sup> S.C. Code §7-15-380. Excepted from the witness requirement are those who vote under the Uniformed and Overseas Citizens Absentee Voters Act.

<sup>70</sup> S.C. Code §§7-15-310, 7-15-330.

<sup>71</sup> No. 3:20-cv-01730 (D.S.C. May 1, 2020).

<sup>72</sup> No. 3:20-cv-01552 (D.S.C. April 22, 2020).

<sup>73</sup> *Middleton* also challenged several other aspects of the state absentee system, and the suits included claims under other statutory and constitutional provisions.

<sup>74</sup> Compl. ¶ 55, No. 3:20-cv-01552-JMC (D.S.C. Apr. 22, 2020) (footnotes omitted).

<sup>75</sup> *Id.*, par. 56.

system for the 2020 elections, including eliminating the excuse and witness requirements. The Executive Director wrote to the General Assembly about the June primaries on March 30, 2020 and about the November election on July 17, 2020.

Consolidated preliminary injunction motions were filed in *Middleton* and *Thomas* before the primaries. With these motions pending, the General Assembly enacted legislation to provide for no-excuse absentee voting in the primaries, but did not alter the witness requirement for the primaries or make any changes for the general election.<sup>76</sup> The district court then enjoined the witness requirement for the primaries as violative of the right to vote, finding that it “would only increase the risk for contracting COVID-19 for members of the public with underlying medical conditions, the disabled, and racial and ethnic minorities.”<sup>77</sup> No appeal was filed.

This pattern then repeated itself for the general election. Again, a preliminary injunction was filed, and following that, the General Assembly enacted legislation to provide for no-excuse absentee voting in the general election,<sup>78</sup> but refused to relax the witness requirement. The district court again enjoined the witness requirement – for the 2020 general election – as violative of the right to vote, noting that Blacks were among those who were particularly at-risk from COVID-19, and that they were among those who had a higher probability of living alone.<sup>79</sup> This time the defendants appealed, and the Supreme Court stayed the injunction, without expressing any opinion as to the validity of the district court’s findings.<sup>80</sup>

A third case, *League of Women Voters v. Andino*,<sup>81</sup> asserted violations of the right to vote and due process owing to the absence of a state law requirement that, when election officials determine that an absentee ballot has a signature-related deficiency, the voter is notified and provided an opportunity to cure. The Complaint alleged a lack of consistent practices among the counties, both as to whether there is pre-rejection notice and opportunity to cure, and whether signature matching is used. An investigation confirmed that some counties were using signature matching and others not. The state Election Commission issued a directive instructing that signature matching is not permitted under state law, and the district court granted a preliminary injunction enjoining the practice unless there is post-election notice and opportunity to cure.<sup>82</sup>

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<sup>76</sup> Act No. 133 (2020).

<sup>77</sup> *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at \*24 (D.S.C. May 25, 2020).

<sup>78</sup> Act No. 143 (2020).

<sup>79</sup> *Middleton v. Andino*, 488 F. Supp. 3d 261, 296-99 (D. S.C.), *stay denied*, 990 F.3d 768 (4<sup>th</sup> Cir) (en banc), *stay granted*, 141 S. Ct. 9 (2020). When the district court issued its preliminary injunction in September 2020, Blacks continued to represent a disproportionate share of South Carolinians who were dying from COVID-19.

<sup>80</sup> The stay apparently was based on the Court’s general opposition to changing election rules close to an election. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). See *Andino*, 141 S. Ct. at 10 (Kavanaugh, J., concurring in grant of application for stay).

<sup>81</sup> No. 2:20-cv-03537 (D.S.C. Oct. 2, 2020).

<sup>82</sup> *League of Women Voters of South Carolina v. Andino*, 497 F. Supp. 3d 59 (D.S.C. 2020), *appeal dismissed and remanded with instructions*, 849 F. App’x 39 (4<sup>th</sup> Cir. 2021) (unpublished opinion).

### 3. Black Voters' Use of Absentee Voting.

The election data maintained by the South Carolina Election Commission show that, at least in recent elections, there is a clear racial disparity in who votes absentee in-person in South Carolina: Black voters rely on in-person absentee voting at a much higher rate than White voters. On the other hand, Black and White voters cast their ballots by mail at about the same rate.<sup>83</sup> The figures for the last three general elections are as follows:

*Table 4: Percent of White turnout voting absentee in person and by mail, and percent of Black turnout voting absentee in person and by mail, 2016-2020.*

General Election	% White Voting Absentee In-Person	% White Voting Absentee By-Mail	% Black Voting Absentee In-Person	% Black Voting Absentee By-Mail
2020	31.5%	17.6%	47.2%	17.4%
2018	10.8%	4.4%	18.7%	4.3%
2016	15.1%	6.5%	24.4%	5.6%

These data indicate that any future changes in the state's absentee voting procedures, and if, the future, the state were to implement early voting, could have a significant and racially disparate impact.

#### *Spurious Claims of Voter Fraud*

In January 2012, while the photo ID requirement was undergoing Section 5 review, the state Attorney General (who was representing the state in seeking preclearance) made headlines with the assertion of large-scale voter fraud involving hundreds or thousands of ballots being cast on behalf of dead individuals in recent South Carolina elections. The matter was referred to the State Law Enforcement Division, which conducted an extensive investigation. Its 476-page report, completed in May 2012, concluded that there was no

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<sup>83</sup> Absentee voting statistics, by race, are maintained by the State Election Commission for recent elections. *Historical Absentee Reports*, S.C. Election Comm'n, [https://www.scvotes.gov/historical-absentee-reports?\\_ga=2.188346792.1495338608.1623968183-1185504350.1622143312](https://www.scvotes.gov/historical-absentee-reports?_ga=2.188346792.1495338608.1623968183-1185504350.1622143312). Based on consultations with Election Commission staff, this report uses as the number of in-person absentee voters those listed in the Election Commission data tables as absentee "Ballots Issued – In Person" (in the Election Commission spreadsheets entitled "Absentee Statistics by Request / Ballot Issued Method by Race"). The report calculated (for each election, and by race) the number of by-mail absentee voters by subtracting the "Ballots Issued – In Person" number from the number of absentee "Ballots – Returned Before Deadline" (in the Election Commission spreadsheets entitled "Absentee Statistics for Election by Race"). The data for total turnout, by race, are the same as the data discussed above. See fn. 33, *supra*.

substance at all to the claim, found no instances of such “zombie” ballots, and determined that clerical errors and mistaken identities were responsible for instances of alleged illegal voting.<sup>84</sup>

In 2020, when plaintiffs sought a preliminary injunction against the use of the absentee-voting witness requirement for the general election, the state sought to justify the requirement as an important means for investigating voter fraud. The district court found that the requirement plays only a “marginal” role in guarding against fraud, and noted the “utter dearth of absentee fraud” in South Carolina, including in the June primaries when the witness requirement was not used.<sup>85</sup>

### *Other Election Administration Matters*

There were two lawsuits during the past 25 years which successfully contended that election administration changes were being implemented without Section 5 preclearance. In 2010, the City of Columbia was enjoined from conducting an unprecleared special election for a vacant city council seat.<sup>86</sup> In 2000, the State Republican Party settled a suit regarding preclearance of polling places for a primary election.<sup>87</sup>

Following the *Shelby County* decision, the General Assembly, in 2014, enacted a requirement that “[t]he State Election Commission . . . publish on the commission's website each change to voting procedures enacted by state or local governments.”<sup>88</sup> Since then, the Election Commission published lists of state and local laws containing voting changes enacted by the General Assembly, however, the Commission has not published any changes enacted by counties or municipalities.<sup>89</sup> Redistricting plans for electing school board members and county precinct changes are enacted by the General Assembly through local legislation, and thus are included in the Election Commission lists. County council and municipal redistrictings, and polling place changes, are enacted at the local level, and are not listed.

This law was drafted by a longtime voting rights activist and was introduced by a Black House member. It was intended to provide the transparency for voting rights changes that Section 5 previously had provided through weekly lists published by the Justice Department of

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<sup>84</sup> Glen Kessler, *The case of “zombie” voters in South Carolina*, Wash. Post, July 25, 2013, [https://www.washingtonpost.com/blogs/fact-checker/post/the-case-of-zombie-voters-in-south-carolina/2013/07/24/86de3c64-f403-11e2-aa2e-4088616498b4\\_blog.html](https://www.washingtonpost.com/blogs/fact-checker/post/the-case-of-zombie-voters-in-south-carolina/2013/07/24/86de3c64-f403-11e2-aa2e-4088616498b4_blog.html). The investigation found one instance in which a South Carolinian voted absentee and then died before Election Day; that vote was properly counted. Though the report was completed in May 2012, it was bottled up by the state Attorney General and not released until July 2013 pursuant to a freedom of information request made by a South Carolina newspaper. *Id.*

<sup>85</sup> *Middleton*, 488 F. Supp. 3d at 300.

<sup>86</sup> *Butler v. City of Columbia*, No. 3:10-cv-794 (D.S.C. Apr. 5, 2010), <https://casetext.com/case/butler-v-city-of-columbia>.

<sup>87</sup> *Rutherford v. South Carolina Republican Party*, No. 3:10-cv-794 (D.S.C. Apr. 5, 2010), cited in *2006 Report*, *supra*, Attachment 2.

<sup>88</sup> Act No. 196, §10, amending S.C. Code §7-11-30.

<sup>89</sup> *Election Law Changes*, S.C. Election Comm’n, <https://www.scvotes.gov/index.php/election-law-changes> (last visited August 3, 2021).

all voting changes submitted for preclearance review.<sup>90</sup> As indicated, however, the manner in which the law is being implemented limits the extent to which the intended transparency is being provided.

There have been problems with voter intimidation and other discriminatory conduct at polling places in several South Carolina counties, at least at the beginning of the period under review in this report. The Justice Department sent election observers under Section 6 of the Voting Rights Act to four counties in 1996 and one county in 2001.<sup>91</sup> In 2003, a district court found “significant evidence of intimidation and harassment” of Black voters at the polls in Charleston County in the 1980s, 1990s, and continuing in the 2000 election, in ruling that the at-large method of election for the Charleston County council violated Section 2.<sup>92</sup>

For the most part, there apparently have been relatively few issues with polling place changes during the past 25 years. Between 1996 and the *Shelby County* decision, the Justice Department did not interpose any Section 5 objections to polling place (or precinct) changes in South Carolina (and no such objections were interposed for South Carolina prior to 1996), and a September 2019 report by the Leadership Conference Education Fund noted few polling place changes in the seven years after the *Shelby County* decision.<sup>93</sup>

One significant exception was for the June 2020 primaries, when the COVID-19 pandemic resulted in shortages of poll workers and a large number of polling place closures and consolidations, which in turn resulted in voter confusion and long lines to vote on election day. The problems were particularly acute in Richland County (where the state capital, Columbia, is located).<sup>94</sup>

Even before the 2020 elections, South Carolina has had a recent history of poor management of polling places, resulting in instances of long lines on Election Day. A study of polling place lines in the 2018 midterm elections by the Bipartisan Policy Center found that South Carolina had the second-highest average wait time among states and the District of Columbia (about 20 minutes).<sup>95</sup> The study also found that there had been a substantial increase in wait times in South Carolina from the immediately preceding midterm election in 2014 (when the state average wait time was only about six minutes); the study concluded that the increase was not caused by a voter turnout increase but, instead, was probably the result of

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<sup>90</sup> *The Great Poll Closure*, Leadership Conf. Education Fund, at 12-13, <https://civilrights.org/resource/the-great-poll-closure/>.

<sup>91</sup> *2006 Report*, *supra* at 45.

<sup>92</sup> *Charleston County*, 316 F. Supp. 2d at 289 n.23.

<sup>93</sup> *Democracy Diverted: Polling Place Closures and the Right to Vote*, Leadership Conf. Education Fund, at 51 (Sept. 2019), <https://civilrights.org/resource/democracy-diverted-polling-place-closures-and-the-right-to-vote/> (reporting 18 polling places closures out of the 1,922 open in 2012).

<sup>94</sup> *The Impact of COVID-19 on Voting Rights and Election Administration: Ensuring Safe and Fair Elections: Hearing Before the Subcomm. on Elections of Comm. on House Administration*, June 4, 2020, 116<sup>th</sup> Cong. 233 (June 4, 2020) (written testimony of Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense Fund).

<sup>95</sup> *The 2018 Voting Experience: Polling Place Lines*, Bipartisan Policy Center, at 8 fig. 1 (Nov. 2019), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/11/The-2018-Votin-Experience.pdf>.



officials in South Carolina pushing polling place resources to their limits or beyond.<sup>96</sup> In that regard, a separate analysis found that, in 2018, two-thirds of South Carolina counties (31 of 46) had more voters per voting machine than allowed by the state's minimum resource standards.<sup>97</sup>

Previously, in the 2012 general election, South Carolina was tied for having the second worst polling place wait times in the country, with an average wait time of 25 minutes. In 2008, the state had the worst record, with an average wait time of about 50 minutes.<sup>98</sup>

Waiting in line at the polls can exact a significant cost, discouraging citizens from voting,<sup>99</sup> and it is well established that, nationally, Black voters wait longer, on average, than White voters.<sup>100</sup> There does not appear to be South Carolina-specific data on wait times by race.

Voting by persons with disabilities also has been a recent issue in South Carolina. In 2017, the Justice Department entered into a non-litigation settlement agreement to enforce the Americans with Disabilities Act regarding polling place accessibility in Richland County,<sup>101</sup> and in 2018 the Department entered into a similar agreement with Anderson County.<sup>102</sup> State-by-state estimates of voting by persons with disabilities, prepared by Rutgers University professors, found that in the 2016 election, turnout by voters with a disability in South Carolina was about 14 percentage points lower than turnout by other voters.<sup>103</sup>

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<sup>96</sup> *Id.* at 8-10.

<sup>97</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections of the Comm. on House Administration*, June 11, 2021, 117<sup>th</sup> Cong. (June 11, 2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice).

<sup>98</sup> Charles Stewart III & Stephen Ansolabehere, *Waiting in Line to Vote*, at 7, 10 (July 28, 2013), <http://web.mit.edu/supportthevoter/www/materials-research/> (submitted to the Presidential Commission on Election Administration).

<sup>99</sup> *The 2018 Voting Experience: Polling Place Lines*, *supra* at 5-6.

<sup>100</sup> *Id.* at 7 (2018 election; also citing academic literature); *Waiting in Line to Vote*, *supra* at 11 (2012 election).

<sup>101</sup> *Settlement Agreement Between the United States of America and Richland County Board of Elections and Voter Registration, South Carolina Regarding the Accessibility of Polling Places*, DJ # 204-67-173 (May 22, 2017), available at [https://www.ada.gov/richland\\_county\\_sa.html](https://www.ada.gov/richland_county_sa.html).

<sup>102</sup> *Settlement Agreement Between the United States of America and the Board of Voter Registration and Elections, South Carolina Regarding the Accessibility of Polling Places*, DJ # 204-67-186 (Nov. 9, 2018), available at [https://www.ada.gov/anderson\\_cty\\_sa.html](https://www.ada.gov/anderson_cty_sa.html).

<sup>103</sup> Lisa Schur & Douglas Kruse, *Fact Sheet: Disability and Voter Turnout in the 2016 Elections*, Rutgers Univ. School of Mgmt. & Lab. Rels., at 6, [https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program\\_Disability\\_Research/Fact%20Sheet%20Disability%20Voter%202016%20Elections.pdf](https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/Fact%20Sheet%20Disability%20Voter%202016%20Elections.pdf).

## CHAPTER FOUR: ELECTION METHODS, REDISTRICTING PLANS, AND MUNICIPAL ANNEXATIONS

### Overview

In the past 25 years, South Carolina has continued to implement or seek to implement at-large election systems, redistricting plans, and municipal annexations that minimize and dilute Black voters' electoral opportunities in the context of racially polarized voting. From 1996 until the *Shelby County* decision in 2013, the Justice Department interposed a total of 13 Section 5 objections (in addition to the photo ID objection), and 12 of the 13 concerned voting changes which had the effect, and sometimes also the purpose, of minimizing the opportunity of Black citizens to elect their preferred candidates.<sup>104</sup> In addition, four Section 2 lawsuits were brought against at-large election methods, all of which led to the adoption of district election systems to now provide Black voters with equal electoral opportunities.<sup>105</sup>

Following the enactment of the Voting Rights Act and up until 1996, South Carolina's voting rights record was replete with racially discriminatory voting changes made at all levels of government – the General Assembly, county councils, school districts, and cities and towns. Approximately 100 Section 5 objections were interposed by the Justice Department from 1965 to 1995, of which about four-fifths concerned structural changes that would have diluted Black voting strength. About half blocked discriminatory election method changes (the adoption of at-large systems, multi-member district systems, and mixed systems (at-large and districts); and provisions which would have minimized Black electoral opportunity in the context of at-large elections, i.e., majority-vote requirements and anti-single-shot provisions). Another fifth blocked the implementation of discriminatory redistricting plans. And close to ten percent addressed dilutive municipal annexations.<sup>106</sup> There also was one preclearance denial by the District of Columbia Court, concerning an adoption of at-large elections.<sup>107</sup>

Likewise, numerous Section 2 suits led to the abandonment of at-large elections in favor of district systems from 1965 to 1995. This particularly occurred after Congress' adoption of the Section 2 "results" test in 1982, when Section 2 litigation led to new election methods for nine county councils, eight school boards, 18 municipal governing bodies, and an elected board of public works.<sup>108</sup>

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<sup>104</sup> *Voting Determination Letters for South Carolina, supra*, <https://www.justice.gov/crt/voting-determination-letters-south-carolina>.

<sup>105</sup> *2006 Report, supra*, Attachment 1.

<sup>106</sup> This summary is based on a review of all objections from 1965 through 1995, set forth at *Voting Determination Letters for South Carolina, supra*, <https://www.justice.gov/crt/voting-determination-letters-south-carolina>. See also *2006 Report, supra* at 16-17.

<sup>107</sup> *County Council of Sumter County v. United States*, 596 F. Supp. 35 (D.D.C. 1984).

<sup>108</sup> *2006 Report, supra*, Attachment 1.

*Section 5 Dilution Objections: 1996 to Shelby County*

The Justice Department’s post-1995 Section 5 objections to dilutive voting changes prevented the implementation of discriminatory election method changes, redistrictings, and a reduction in the number of elected officials. In many of these objections, the Justice Department made an explicit finding of racially polarized voting. One objection (in addition to the photo ID objection) did not specifically concern a dilutive change; it addressed a South Carolina town’s efforts to adopt racially selective annexations, and to exclude adjacent Black populations from the town.

These objections were as follows:

*Table 5: Section 5 objections from 1996 to 2013 (not including the photo ID objection)*

Date	Jurisdiction	Voting Changes
March 5, 1996	Gaffney Board of Public Works	At-large method of election
April 1, 1997	State	1997 state Senate redistricting plan
May 20, 1998	Horry County	1997 county council redistricting plan
October 12, 2001	Charleston	2001 city council redistricting plan
November 2, 2001	Greer	2001 city council redistricting plan
June 27, 2002	Sumter County	2001 county council redistricting plan
September 3, 2002	Union County School District	2002 redistricting plan
December 9, 2002	Clinton	Redrawing of city council wards to include annexed population
June 16, 2003	Cherokee County School District No. 1	Reduction in the size of the school board (in the context of available redistricting plans for the smaller board)
September 16, 2003	North	Annexations (racial selectivity)
February 26, 2004	Charleston County School District	Change from nonpartisan to partisan at-large elections
June 25, 2004	Richland-Lexington School District No. 5	Majority-vote requirement and numbered posts for at-large elections
August 16, 2010	Fairfield County School District	Method of election and number of school trustees

The actions and concerns which prompted these objections are summarized below, as described in the Justice Department’s objection letters. The 2006 Report includes further background information on all except the Gaffney objection and the Fairfield County School District objection (the latter occurred four years after the 2006 Report was issued).

Gaffney Board of Public Works – at-large method of election: The Justice Department interposed the objection based on both discriminatory purpose and retrogressive effect.<sup>109</sup> The Board of Public Works was elected from an area coterminous with the Gaffney city limits, and, as of 1990, Black persons constituted 39 percent of the city’s population. In 1994, the Board changed from at-large to district elections, with two Black majority districts, at the urging of the local NAACP and because the Board believed that the at-large system likely violated Section 2 of the Voting Rights Act. Before the first election could be held under the plan, however, the Board voted to return to at-large elections. The Justice Department explained in detail how this change would reduce the opportunity of Black voters to elect candidates of choice, and discussed the significant procedural and substantive irregularities in the process followed by the Board in making its decision.

State Senate – 1997 redistricting plan: The 1997 Senate plan was adopted after a district court in South Carolina rejected a portion of the state’s previous post-1990 Census plan (which had been precleared), ruling that two of the previous plan’s Black majority districts were based on an unconstitutional use of race.<sup>110</sup> The 1997 remedial plan redrew both of these districts with White VAP majorities. In its determination letter, the Justice Department agreed that reducing the Black percentages in both districts was necessary to remedy the violation, but found that the reduction for one of the districts was excessive in that a compact district could be drawn which involved a lesser reduction in Black voting strength.<sup>111</sup>

Horry County – 1997 county council redistricting plan: White county residents filed suit in 1997 claiming that the two Black majority districts (out of 11) in the county council’s initial post-1990 Census plan were unconstitutionally drawn based on race. The county council offered no defense and quickly conceded liability (the county was 18% Black in population according to the 1990 Census).<sup>112</sup> The county’s new 1997 plan included one bare-majority (50.04%) Black district. The Justice Department determined that the county’s response was discriminatory since it had readily available redistricting options for drawing compact districts which did not reduce Black voting strength to the extent it sought to do in the new plan.<sup>113</sup>

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<sup>109</sup> Letter from Deval L. Patrick, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to James R. Thompson, Esq., Saint-Amand, Thompson & Brown (Mar. 5, 1996), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2080.pdf>.

<sup>110</sup> *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996).

<sup>111</sup> Letter from Isabelle Katz Pinzler, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to the Honorable John W. Drummond, President Pro Tempore of S.C. Senate (Apr. 1, 1997), <https://www.justice.gov/crt/voting-determination-letter-68>. The district in question was 55.5% Black in VAP in the plan which the district court invalidated, and was reduced to a 42.6% Black VAP in the 1997 plan (according to the 1990 Census). Following the objection, the district court in *Smith v. Beasley* adopted a plan in which the district was increased to 45.8% Black in VAP. *2006 Report, supra* at 30.

<sup>112</sup> *Prince v. Horry County Council*, No. 4:97-0273-12 (D.S.C. Oct. 31, 1997).

<sup>113</sup> *2006 Report, supra* at 52-53; Letter from Bill Lann Lee, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to John C. Henry, Esq., Thompson Law Firm (May 20, 1998), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2100.pdf>.

Charleston – 2001 redistricting plan: The Justice Department found that the city unnecessarily drew into one of the Black majority districts an area that was experiencing rapid White population growth, such that this district would soon evolve into a White majority district, significantly diminishing Black electoral opportunities.<sup>114</sup>

Greer – 2002 redistricting plan: The Justice Department found that the plan purposefully reduced Black voting strength. The city rejected a plan presented by Black residents which included a more viable Black majority district and more compact districts than in the city’s plan; the city’s plan divided historic communities of interest; and the city had followed an enactment process which responded to White residents’ concerns about how their communities would be redistricted but failed to respond to the concerns of the city’s Black residents.<sup>115</sup>

Sumter County – 2001 county council redistricting plan: The 2006 Report described the racially-charged atmosphere in which the plan was developed, the Justice Department’s objection, and the racially-charged debate which characterized the county’s efforts to then adopt a remedial plan. The redistricting effort also was preceded by decades of resistance by the county to the Voting Rights Act, including the adoption of at-large elections in 1967, illegal implementation of that change into the 1980s without preclearance, and a compelled change to districts when the county finally sought and was denied preclearance first by the Justice Department and then by the U.S. District Court for the District of Columbia. The Justice Department found that the 2001 redistricting plan was unnecessarily retrogressive.<sup>116</sup>

Union County School District – 2002 redistricting plan: The plan unnecessarily and meaningfully reduced Black voting strength in both of the pre-existing Black majority districts, and was developed through a secretive process, which led the Justice Department to conclude that the retrogression in Black voting strength was purposeful.<sup>117</sup>

Clinton – inclusion of annexed population in voting districts: The Justice Department found that the city’s decision to assign all of the White majority newly annexed population to one of the Black majority city council districts would change that district from having a Black

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<sup>114</sup> 2006 Report, *supra* at 24-25; Letter from R. Alex Acosta, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to Francis I. Cantwell, Esq., Regan, Cantwell and Stent (Oct. 12, 2001), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2110.pdf>.

<sup>115</sup> 2006 Report, *supra* at 24; Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to John B. Duggan, Esq., Love, Thornton, Arnold & Thomason (Nov. 2, 2001), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2120.pdf>.

<sup>116</sup> 2006 Report, *supra* at 19-21; Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to Charles T. Edens, Chairperson, County Council (June 27, 2002), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2130.pdf>.

<sup>117</sup> 2006 Report, *supra* at 21-22; Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to C. Havird Jones, Jr., Esq., Senior Assistant Att’y Gen., Off. of S.C. Att’y Gen. (Sept. 3, 2002), <https://www.justice.gov/crt/voting-determination-letter-67>.

VAP majority to a White VAP majority, and that several alternatives were available in which the annexed population would have less impact on Black electoral opportunity.<sup>118</sup>

Cherokee County School District No. 1 – school board reduction in size: The Justice Department’s analysis indicated that the reduction from a nine-member board to a seven-member board was retrogressive. The pre-existing redistricting plan with nine districts included two Black opportunity districts, and a fairly drawn nine-district redistricting plan based on the 2000 Census would maintain that number. However, with a seven-member board, it was possible to only draw one such district, and thus the change in the size of the board would have reduced Black voters’ proportional influence on the board.<sup>119</sup>

North – annexations: The Justice Department objected based on the town’s implementation of a racially selective annexation policy. Although the annexations at issue were not themselves dilutive, the policy avoided adding Black population to the town which had the potential to significantly increase Black voting strength in town elections.<sup>120</sup>

Charleston County School District – change from nonpartisan to partisan elections in the context of at-large elections: The Justice Department concluded that the change was retrogressive. It was adopted immediately following a district court ruling that the Charleston County Council’s at-large system violated Section 2 (see discussion below). The county council’s at-large system had used partisan elections, and the effort to now have the school board also use partisan elections essentially would have meant that the school district now would use the same election system formerly used by the county council and which violated Section 2. Moreover, in its analysis of elections in Charleston County, the district court had found that the nonpartisan feature of school board elections had the effect of partially mitigating the discriminatory impact of the board’s at-large system.<sup>121</sup> Eliminating this mitigating feature

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<sup>118</sup> 2006 Report, *supra* at 25-26; Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to C. Samuel Bennett II, City Manager (Dec. 9, 2002), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2150.pdf>.

<sup>119</sup> 2006 Report, *supra* at 22-23; Letter from Ralph F. Boyd, Jr., Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to C. Havird Jones, Jr., Esq., Senior Assistant Att’y Gen., Off. of S.C. Att’y Gen. and Keith R. Powell, Esq. & Kenneth L. Childs, Esq., Childs & Halligan (June 16, 2003), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2160.pdf>.

<sup>120</sup> 2006 Report, *supra* at 26; Letter from R. Alexander Acosta, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to the Honorable H. Bruce Buckheister, Mayor (Sept. 16, 2003), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2170.pdf>. The Justice Department subsequently withdrew the objection after the town ended its racially selective policy. Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to the Honorable W. Earl Jeffcoat, Mayor (Dec. 3, 2010), <https://www.justice.gov/crt/voting-determination-letter-175>.

<sup>121</sup> This was because nonpartisan elections were plurality-win, whereas partisan elections had a majority-vote requirement. In plurality-win elections in which numerous candidates ran, and Black voters could perhaps elect a preferred candidate by focusing their vote on one or a few candidates.

would thus reduce Black electoral opportunities, in violation of the Section 5 non-retrogressive standard.<sup>122</sup>

Richland-Lexington School District No. 5: majority vote and numbered posts in the context of at-large elections: The Justice Department determined that the electoral history of the school district showed that these changes would reduce Black electoral opportunities.<sup>123</sup>

Fairfield County School District – election method and the number of school trustees: The change involved the addition of two appointed members to the existing seven-member elected board of trustees. The new members would serve for up to 12 years, and were to be appointed by the county’s two-member General Assembly delegation, neither of whom were the choice of Black voters. The seven elected members were chosen from single-member districts, some of which provided Black voters the opportunity to elect their preferred candidates. The Justice Department concluded that the change had a prohibited retrogressive effect because it would reduce the proportion of the board that Black voters could select. The Department carefully examined the justification offered for the change, relating to the financial difficulties of the school district, and found that it did not justify the retrogressive effect since there were less drastic alternatives that would be of lesser duration and have less impact on Black voting strength.<sup>124</sup>

### *Section 2 Lawsuits: 1996 to the Present*

Four Section 2 cases have resulted in the abandonment of at-large elections in the past 25 years.<sup>125</sup> This included litigation leading to a finding of a Section 2 violation in the state’s third-most populous county, Charleston.

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<sup>122</sup> 2006 Report, *supra* at 18-19; Letter from R. Alexander Acosta, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to C. Havird Jones, Jr., Esq., Senior Assistant Att’y Gen., Office of S.C. Att’y Gen. (Feb. 26, 2004), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2180.pdf>.

<sup>123</sup> 2006 Report, *supra* at 23-24; Letter from R. Alexander Acosta, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to C. Havird Jones, Jr., Esq., Senior Assistant Att’y Gen., Office of S.C. Att’y Gen. (June 25, 2004), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2190.pdf>.

<sup>124</sup> Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., to C. Havird Jones, Jr., Esq., Senior Assistant Att’y Gen., Office of S.C. Att’y Gen. (Aug. 16, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l\\_100816.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_100816.pdf).

<sup>125</sup> In addition, during this time period, plaintiffs succeeded in a one-person, one-vote case regarding the election districts for the Jasper County School District. *Fraser v. Jasper County, S.C. School District*, No. 9:14-cv-2578 (D.S.C. Sep. 5, 2014) (granting summary judgment).



Table 6: Section 2 challenges to at-large election methods in the past 25 years.

Year	Jurisdiction	Case	How Resolved
1996 & 1997	Florence County School District No. 1	<i>NAACP v. Truitt</i> <sup>126</sup>	Court decision, 1996 (Section 2 violation); consent decree, 1997 (remedy)
2000	York County School District No. 1	<i>Love v. York County School District No. 1</i> <sup>127</sup>	Settlement
2003	Charleston County	<i>United States v. Charleston County</i> <sup>128</sup>	Court decision
2008	Georgetown County School District	<i>United States v. Georgetown County School District</i> <sup>129</sup>	Consent decree

Further information about the two most recent cases is as follows:

Charleston County: The district court ruled that the county council’s at-large system violated Section 2, and this ruling was affirmed by the Fourth Circuit. Among other things, the district court determined that “voting in Charleston County Council elections is severely and characteristically polarized along racial lines.”<sup>130</sup> The county was one of only three counties in the state (46 counties total) that still was electing its county council at large. As a remedy, the court ordered the county to adopt single-member districts.

Georgetown County School District: The school district agreed that there was a “strong likelihood that Plaintiff would prevail were this action to proceed to trial because there is a basis in both law and fact for contending that the current at-large method of electing members of the Board” violates Section 2.<sup>131</sup>

#### *Lawsuits Claiming Unconstitutional Race-Conscious Redistricting*

Beginning in the 1990s, the Supreme Court has held that, in certain circumstances, an excessive reliance on racial considerations in preparing a redistricting plan will render a plan unconstitutional, although, as a general matter, race may be considered when preparing redistricting plans.<sup>132</sup>

<sup>126</sup> No. 4:95-cv-1054 (D.S.C.).

<sup>127</sup> No. 0:00-cv-442 (D.S.C.).

<sup>128</sup> 316 F. Supp. 2d 268 (D.S.C. 2003), *aff’d*, 365 F.3d 341 (4<sup>th</sup> Cir.), *cert. den.*, 543 U.S. 999 (2004).

<sup>129</sup> No. 2:08-889 (D.S.C. 2008),

[https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/georgetown\\_cd.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/georgetown_cd.pdf).

<sup>130</sup> 316 F. Supp. 2d at 277.

<sup>131</sup> [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/georgetown\\_cd.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/georgetown_cd.pdf).

<sup>132</sup> See generally *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).



In South Carolina, the federal district court has overturned three plans on this basis, all in the 1990s. In one case, the court found unconstitutional three districts in a state Senate plan and six districts in the state House plan.<sup>133</sup> In a second case, Horry County did not offer any opposition to the suit, and conceded liability with regard to its county council plan.<sup>134</sup> As discussed above, the Justice Department interposed objections to subsequent remedial plans for the state Senate and for Horry County, finding that the plans minimized Black voting strength beyond what was necessary to remedy the constitutional violations. One case was filed thereafter, in which plaintiffs unsuccessfully challenged the 2011 plans for the state House and Congress.<sup>135</sup>

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<sup>133</sup> *Smith*, 946 F. Supp. at 1213.

<sup>134</sup> *Prince*, *supra*. See fns. 112-13, *supra* and accompanying text. A third case filed in the 1990s challenged the state's sole Black majority congressional district, but that suit was settled without an effect on the district. *Leonard v. Beasley*, No. 3:96-cv-03640 (D.S.C. Aug. 6, 1997), discussed in the *2006 Report, supra* at 51-52.

<sup>135</sup> *Backus v. South Carolina*, 857 F. Supp.2d 553 (D.S.C. 2012). Plaintiffs in that case also unsuccessfully asserted Section 2 violations.

## CONCLUSION

This report documents a pattern in South Carolina over the past 25 years of numerous instances of voting discrimination blocked and deterred, and voting practices which otherwise restrict and limit voting in South Carolina elections. The pattern has touched and impacted all stages of the election process, from voter registration, to casting one's ballot before election day, to casting a ballot on election day, to the electoral structures which organize and govern the results of elections. South Carolina also has made progress since 1965 toward the national goal of "banish[ing] the blight of racial discrimination in voting,"<sup>136</sup> and this progress has continued over the past 25 years. Yet, as documented in this report, South Carolina's recent history demonstrates that Black voters face significant obstacles, and that the state continues to fall significantly short of achieving the national ambition.

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<sup>136</sup> *South Carolina v. Katzenbach*, 383 U.S. at 308.