

Current Conditions of Voting Rights Discrimination

# Texas

A Report Prepared by

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REFORMS

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A VIEW FROM TEXAS: AN ASSESSMENT OF THE VOTING RIGHTS ACT'S IMPACT  
AND MINORITY VOTER ACCESS  
2006-2021

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## I. INTRODUCTION

This report examines voting conditions and obstacles to minority voters in Texas and focuses primarily on the time period following the 2006 reauthorization of the Voting Rights Act (“VRA”). Of course, one of the most consequential post-2006 reauthorization events was the U.S. Supreme Court’s decision in *Shelby County v. Holder*. Accordingly, we begin with discussions of the effects of the Supreme Court’s 2013 *Shelby County* decision and also provide necessary context regarding the nature of voting discrimination in Texas prior to the 2006 reauthorization of the VRA. We then summarize data relating to Texas demographics, voting, representation, and language. Next, we review the voting-related legal landscape in Texas since 2006, including the impact of Sections 2 and 5 of the VRA as well as the restrictive voting legislation pending as of the writing of this report. Finally, we consider other evidence of continuing voting discrimination in Texas.

As the U.S. Supreme Court noted in 2006:

Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State’s minority voting rights history. The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions.’ In addition, the ‘political, social, and economic legacy of past discrimination’ for Latinos in Texas may well ‘hinder their ability to participate effectively in the political process.’<sup>1</sup>

In light of this pattern of voting discrimination in Texas, this report examines the ongoing risks to the free and unabridged exercise of the vote faced by the state’s Latino, Black, and Asian-American voters. The report identifies several features of vote denial and abridgement in Texas: redistricting, the imposition of additional candidate qualifications, new at-large voting arrangements, photo ID laws, onerous voter registration procedures, voter roll purges, relocation, closures and overcrowded polling sites, and hurdles related to mail-in voting. Without federal oversight required by Section 5 of the VRA, these practices continue unfettered. The pattern is very familiar: gains in minority participation in voting—particularly in a state like Texas with racial minorities rapidly growing and mobilizing—are met with concerted efforts to impose new barriers in the path of those voters.

## II. IMPACT OF *SHELBY COUNTY*

Section 4 of the VRA abolished, in certain covered areas, a variety of mechanisms historically used to effect discriminatory disenfranchisement, such as literacy tests and tests of “good moral

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<sup>1</sup> *LULAC v. Perry*, 548 U.S. 399, 439-40 (2006) (citations omitted).

character.”<sup>2</sup> That section also contained the geographic coverage provision through which so-called covered areas were determined.<sup>3</sup> The covered jurisdictions generally included states and political subdivisions that had used such tests or devices and that experienced voter registration and/or turnout under 50% in specified federal elections.<sup>4</sup> Section 5, the preclearance provision, required covered areas seeking to change their voting qualifications or procedures to obtain a declaratory judgment of the District Court for the District of Columbia permitting the proposed changes, or, in the alternative, that any proposed changes be submitted to the Attorney General and the Attorney General not “interpose[] an objection within sixty days after such submission.”<sup>5</sup> This process of seeking pre-implementation review of any and all voting changes for covered jurisdictions is generally known as “preclearance.”

From 1982 to 2006, Section 5 objections “blocked over 700 voting changes based on a determination that the changes were discriminatory”; most of those objections “included findings of discriminatory intent”; and “over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements.”<sup>6</sup>

In *Northwest Austin Municipal Utility District Number One v. Holder*, the U.S. Supreme Court “expressed serious doubts about the ... continued constitutionality” of preclearance.<sup>7</sup> In *Northwest Austin*, a Texas municipality utility district sought a declaratory judgment exempting it from Section 5 preclearance, or alternatively, challenging the constitutionality of Section 5. The *Northwest Austin* court expressly avoided deciding the constitutional question before it, and ruled on a statutory basis that the jurisdiction was eligible to seek to bailout from coverage, but stated in dicta that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets,” and that “current burdens and must be justified by current needs.”<sup>8</sup> Though the Court cited no precedent for its test,<sup>9</sup> *Northwest Austin*’s “basic principles guide[d]” the Court’s review

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<sup>2</sup> 79 Stat. 438; 52 U.S.C. § 10303(c).

<sup>3</sup> See 79 Stat. 438; 52 U.S.C. § 10303(b).

<sup>4</sup> *Id.*

<sup>5</sup> 79 Stat. 439; 52 U.S.C. § 10304(a).

<sup>6</sup> *Shelby County, Ala. v. Holder*, 570 U.S. 529, 571 (2013) (Ginsburg, J., dissenting).

<sup>7</sup> *Id.* at 540.

<sup>8</sup> 557 U.S. 193, 203-204 (2009).

<sup>9</sup> To the contrary, the Supreme Court had previously rejected the proposition that Section 4’s preclearance formula “violates the principle of the equality of States” because “that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” *South Carolina v. Katzenbach*, 383 U.S. 301, 323, 328-29 (1966). And even such respect to such terms, the Supreme Court had not applied a test of the sort described in *Northwest Austin*; rather, it permitted conditions of admission so long as they pertained to subject matter “within the regulating power of Congress.” *Coyle v. Smith*, 221 U.S. 559, 574 (1911).

of preclearance in *Shelby County*.<sup>10</sup> *Shelby County*, unlike *Northwest Austin*, presented only a constitutional challenge to Sections 4 and 5. On the basis of the conclusion that “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions,” the Court “declare[d] § 4(b) unconstitutional,” holding that “[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”<sup>11</sup>

As many observers expected and predicted, the Supreme Court’s invalidation of preclearance released an immediate and sustained flood of new voting restrictions in formerly covered states. As Justice Kagan recently explained in *Brnovich v. Democratic National Committee*, “[o]nce Section 5’s strictures came off, States and localities put in place new restrictive voting laws, with foreseeably adverse effects on minority voters.”<sup>12</sup> Examples include Texas’s implementation—announced mere hours after *Shelby County* issued—of a voter identification requirement blocked by Section 5; a sweeping set of North Carolina voter restrictions (invalidated under Section 2 based on legislators’ expressly discriminatory purposes); replacement of neighborhood-based districts with at-large seats in many areas; and widespread closures of polling places in heavily minority areas.<sup>13</sup> Moreover, “that was just the first wave.”<sup>14</sup> This year, many states have imposed or are considering severe restrictions despite the success and popularity of easing access to voting during the COVID-19 pandemic. Many of those laws would go so far as to criminalize innocent errors on the part of would-be voters, those who assist them in good faith, and election officials.<sup>15</sup> As of the writing of this report, Texas’s Democratic state legislators are effectively operating in exile in an attempt to prevent the passage of a package of extreme restrictions transparently directed at limiting access of minority voters.

### III. PRE-2006 VOTING DISCRIMINATION

Voting in Texas is marred by a 150-year legacy of government-condoned discrimination affecting Latino, Black, and Asian-American voters.<sup>16</sup> This legacy demonstrates cycles of

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<sup>10</sup> 570 U.S. at 542.

<sup>11</sup> *Id.* at 535, 556-57.

<sup>12</sup> *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2355-56 (2021) (holding that Arizona’s out-of-precinct policy, early mail-in voting policy, and H.B. 2023, its ballot-collection law, do not violate Section 2 and that H.B. 2023 was not enacted with a racially discriminatory purpose).

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

<sup>14</sup> *Id.*

<sup>15</sup> See generally *State Voting Bills Tracker 2021*, Brennan Center for Justice (May 28, 2021) <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021>; *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

<sup>16</sup> Expert Test. by Dr. Andrés Tijerina at 3, *Patino et al v. City of Pasadena*, 229 F.Supp.3d 582 (S.D. Tex. July 30, 2016), ECF. No. 75 4:14-cv-03241 (noting that beginning in 1836, when Anglo-American government took over the state through defeat of Mexico, Mexican Americans have been subjugated in political processes).

suppression where minority voters' political mobilization after success in the courts is met by attempts to re-restrict minority voting. In a 1975 report, Congress acknowledged that "Texas has a long history of discriminating" against minorities using "myriad forms of discrimination," including poll taxes, intimidation towards and alienation of Mexican-American voters, and state-condoned racism.<sup>17</sup> For example, after courts struck down the establishment of a white primary by the state legislature and subsequently the Texas Democratic Party, the legislature instated a poll tax. After the implementation of the poll tax, only three percent of eligible Mexican-American voters in Austin voted, according to a study in 1933.<sup>18</sup> After the poll tax was repealed, the number of Austin's eligible voters increased from 42,300 to 71,300.<sup>19</sup> At that time, Mexican Americans were actively campaigning to gain political power. Scholar Juan Gomez-Quiñones noted that the lack of Mexican Americans at all levels of appointed positions in government marked the success of efforts excluding their participation in the democratic process.<sup>20</sup>

Even when more Mexican Americans registered to vote, their efforts were met with intimidation and alienation. The 1975 Congressional Report highlighted "the economic dependence of these minorities upon the Anglo power structure. People whose jobs, credit, or housing depend on someone who wishes to keep them politically powerless are not likely to risk retaliation."<sup>21</sup> Retaliation was prevalent. For example, "a loan officer at the bank went to each Mexican-American who had loans with the bank and told them he expected their votes."<sup>22</sup> Another report described that Mexican Americans "[we]re afraid their welfare checks will be reduced because of their political activity."<sup>23</sup>

Texas's "history of excluding Mexican Americans from the political process," led to its coverage under Section 4(b) of the VRA in 1975, rendering it subject to the preclearance requirement of Section 5.<sup>24</sup> Texas' then-governor called preclearance "a fraud," "an insult," and "an administrative nightmare."<sup>25</sup>

From 1982 to 2006, Texas's total of 107 Section 5 DOJ objections, including 10 to statewide voting changes, was the second-highest of any state (after Mississippi).<sup>26</sup> DOJ also pursued at

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<sup>17</sup> *Id.* at 33.

<sup>18</sup> *Id.* at 21.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 34.

<sup>21</sup> *Id.* at 35.

<sup>22</sup> *Id.*

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

<sup>24</sup> Nina Perales et al., *Voting Rights in Texas: 1982-2006*, 17 S. Cal. Rev. L. & Social Justice 713 (2008).

<sup>25</sup> Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight under the Voting Rights Act*, 11.3 American Economic Journal: Applied Economics 1, 10 (July 2019).

<sup>26</sup> Perales, *supra* note 24, at 714.

least 29 successful Section 5 enforcement actions regarding Texas voting restrictions.<sup>27</sup> In at least 54 instances, the state eliminated discriminatory voting changes that would have failed preclearance.<sup>28</sup> Texas was also subject to at least 206 successful Section 2 cases in the same time period; nearly one-third of all such cases in covered jurisdictions.<sup>29</sup> These reports of discrimination were brought not only by Latino voters, but Black and Asian-American voters as well.

In the 2004 federal election, the Mexican American Legal Defense and Educational Fund (“MALDEF”) identified a variety of voting rights violations in Texas. Those violations included “the closing of a polling place in a predominately African-American precinct, contrary to state law and despite the fact that voters remained in line; minority voters being turned away from their polling locations and asked to return at a later time; election judge intimidation through demands for identification, contrary to Texas law, and threats of jail time if it was determined that voters had outstanding warrants; disproportionately stringent voter screening and questioning; and a racial slur directed at a minority voter by an election judge.”<sup>30</sup>

The 2006 MALDEF report also explains that the VRA’s language assistance provisions have “played an important role in increasing Latino and Asian-American voter access to the political process in Texas.”<sup>31</sup> However, MALDEF’s investigation revealed pervasive failures to fully implement those provisions—“of the 101 counties investigated, 80% were unable to produce voter registration forms, official ballots, provisional ballots and their written voting instructions; only one county was able to produce evidence of full compliance.”<sup>32</sup>

Overall, MALDEF observed that the VRA had fostered dramatically increased political participation and representation on the part of non-White voters.<sup>33</sup> Nevertheless, MALDEF’s report made clear that Latinos and African-Americans remained “vastly underrepresented at every level,” and that “discriminatory and exclusionary practices continue[d] to plague the Texas electoral system.”<sup>34</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 716.

<sup>31</sup> *Id.* at 715.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 716-717.

<sup>34</sup> *Id.* at 717.



## IV. VOTING DISCRIMINATION SINCE 2006

### A. Summary Statistics

#### 1. State Demographics

The population of Texas now tops 29 million.<sup>35</sup> Texas's population grew by 16% since 2010, making it one of the fastest growing states in the country and earning the state two additional congressional seats in the decennial reapportionment following the 2020 Census.<sup>36</sup>

Texans of color accounted for 95% of the state's population growth, with more than half of new residents—amounting to close to two million—being Latino.<sup>37</sup> According to the latest available U.S. Census Bureau estimates, the state's population is 39.8% non-Hispanic White; 39.3% Hispanic or Latino; 11.8% Black or African-American; and 5.4% Asian.<sup>38</sup>

Continued growth in the Latino and Asian populations is predicted to shift this landscape. Since 2011, Texas has been a majority-minority state.<sup>39</sup> The Texas Demographer predicts that during 2021, Hispanic or Latino residents will become the plurality population, and that by 2030, the population will be 41.5% Hispanic or Latino; 36.6% non-Hispanic White; 12.4% Black or African-American; and 6.9% Asian.<sup>40</sup>

Texas's voting age population reflects this diversification. According to the Census's 2019 Citizen Voting Age Population by Race and Ethnicity Survey ("CVAP"), of the 18.2 million voting age citizens in Texas,<sup>41</sup> 48.4% are racial or ethnic minorities: 29.9% (5.4 million) are Hispanic or Latino; 13.1% (2.4 million) are Black or African-American; 3.7% (~675,000) are

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<sup>35</sup> *2020 Census Demographic Data Map Viewer*, U.S. Census Bureau, <https://mtgis-portal.geo.census.gov/arcgis/apps/MapSeries/index.html?appid=2566121a73de463995ed2b2fd7ff6eb7> (last visited August 16, 2021).

<sup>36</sup> Alexa Ura et al., *People of color make up 95% of Texas' population growth, and cities and suburbs are booming, 2020 census shows*, *The Texas Tribune* (Aug. 12, 2021), <https://www.texastribune.org/2021/08/12/texas-2020-census/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Most Children Younger Than Age 1 are Minorities, Census Bureau Reports*, U.S. Census Bureau (May 17, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-90.html>.

<sup>40</sup> *2018 Texas Population Projections Data Tool*, Texas Demographic Center, <https://demographics.texas.gov/data/TPEPP/Projections/Tool?fid=D097BB5487804A5890C72F816F875148> (last visited June 23, 2021).

<sup>41</sup> Note: this number reflects the 2019 CVAP results in line with the last available census demographic data. The Census Bureau's most recent estimate of total voting age population is 21.9 million. See *Estimates of the Voting Age Population for 2020*, 86 Fed. Reg. 24379 (May 6, 2021).

Asian; and 0.8% (~153,000) are American Indian.<sup>42</sup> This trend has grown more evident over time. In 2018, three-in-ten eligible voters in Texas were Hispanic or Latino.<sup>43</sup> During that same time, the share of non-Hispanic White eligible voters in Texas fell 12 points, from 62% in 2000 to a bare majority (51%) in 2018.<sup>44</sup> Given the large proportion of the Latino population that is not yet voting age and continued growth of the Asian-American population, this distribution is set to change significantly in the coming years.

## 2. Voter Registration and Turnout

Voter turnout and Latino vote share have gradually grown over the past decade and a half. In the 2020 election, 11.9 million of the state's 13.4 million registered voters turned out, as did nearly 3 million of the 3.5 million registered Latino voters.<sup>45</sup> In the November 2018 federal midterm and state gubernatorial elections, 8.4 million of Texas's 15.8 million registered voters turned out.<sup>46</sup> Latino turnout in the 2018 midterms in Texas reached about 1.87 million, nearly doubling that of 2014.<sup>47</sup> In the November 2016 election, 9.6 million of the state's 11.7 million registered voters turned out, with 1.9 million of 2.7 Latino voters turning out.<sup>48</sup>

The November 2020 presidential election saw the highest voter turnout in Texas in more than thirty years. However, voter turnout in Texas is generally low compared to the rest of the nation; best estimates are that 61.7% of the voting age population voted nationally in November 2020—nearly ten percentage points higher than in Texas.<sup>49</sup>

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<sup>42</sup> *Citizen Voting-Age Population, Selected Characteristics: Texas*, U.S. Census Bureau, [https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/citizen\\_voting\\_age\\_pop/cb160-tps148\\_texas.pdf](https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/citizen_voting_age_pop/cb160-tps148_texas.pdf) (last visited June 23, 2021).

<sup>43</sup> *The Changing Racial and Ethnic Composition of the U.S. Electorate*, Pew Research (Sept. 23, 2020), <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/>.

<sup>44</sup> *Id.*

<sup>45</sup> *Citizen Voting-Age Population, Selected Characteristics: Texas*, U.S. Census Bureau, [https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/citizen\\_voting\\_age\\_pop/cb160-tps148\\_texas.pdf](https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/citizen_voting_age_pop/cb160-tps148_texas.pdf) (last visited June 23, 2021).

<sup>46</sup> *Id.*

<sup>47</sup> John C. Moritz, *Hispanic vote share rises in Texas during 2018 midterm election*, Caller Times (May 14 2020), <https://www.caller.com/story/news/local/texas/state-bureau/2019/05/14/hispanic-vote-share-rises-texas-during-2018-midterm-elections/1120993001/>.

<sup>48</sup> Voting and Registration in the Election of November 2016, U.S. Census Bureau, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> (last visited Aug. 16, 2021).

<sup>49</sup> *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, Pew Research Center (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/>.

### 3. Office-holders

In 2021, the state government of Texas is less diverse than the state's population. All but one of the nine principal statewide executive officers are non-Hispanic White,<sup>50</sup> and with the recent retirement of Justice Eva Guzman, all but one member of the Texas Supreme Court is non-Hispanic White.<sup>51</sup> Of the seats in the state legislature, 60.8% are held by non-Hispanic Whites, 25.4% by Hispanic or Latinos, 10.5% by Black or African-Americans, and 2.2% by Asians.<sup>52</sup> Among the state's 37 federal Congressional officeholders,<sup>53</sup> 35.1% are racially or ethnically diverse, including eight Latino and five Black congresspersons.

### 4. Data Relating to Section 203

Jurisdictions are covered by Section 203 of the VRA if they (1) have an illiteracy rate amongst voting age citizens in a single language minority group that exceeds the national illiteracy rate; and (2) meet one of three population triggers.<sup>54</sup> These triggers are: (1) if the number of LEP voting age citizens is greater than 10,000, or (2) if the population of LEP voting age citizens in a single language group is more than five percent of all voting age citizens, or (3) (a) an Alaskan Native or American Indian reservation is either wholly or partially located within the jurisdiction, and (b) the proportion of LEP voting age citizens in a single language group is more than five percent of all voting age citizens on said reservation. Census data pertaining to 2016 Section 203(c) coverage determinations is provided in **Appendix 1**.

In 2016, MALDEF sent letters to 36 counties in the state that failed to provide bilingual voting information on their websites, including information on polling places, voter registration instructions, and new procedures for voter ID.<sup>55</sup> Reports of non-compliance with Section 203 did not persist after the letter, however, MALDEF continues to follow the Texas Secretary of State's actions in this space.

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<sup>50</sup> Land Commissioner George P. Bush is Latino.

<sup>51</sup> Justice Rebeca Aizpuru Huddle is Latina.

<sup>52</sup> *Texas Legislature Representation*, The Texas Tribune, <https://apps.texastribune.org/features/2020/2021-texas-legislature-representation/> (last visited June 23, 2021).

<sup>53</sup> In the current 117<sup>th</sup> Congress, Texas is apportioned two U.S. Senators and 36 U.S. Representatives.

<sup>54</sup> *See* 52 U.S.C. § 10503(2).

<sup>55</sup> *MALDEF Finds Dozens Of Texas Counties Are Violating Federal Law By Failing To Provide Bilingual Voting Information*, MALDEF (Oct. 6, 2016), <https://www.maldef.org/2016/10/maldef-finds-dozens-of-texas-counties-are-violating-federal-law-by-failing-to-provide-bilingual-voting-information/>.

## B. Legal Landscape

### 1. The Impact of Section 5 Before *Shelby County*

On June 25, 2013, the U.S. Supreme Court held in *Shelby County v. Holder* that it is unconstitutional to use the geographic coverage provision in Section 4(b) of the VRA to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Act. Although Texas was previously designated for Section 5 coverage because it satisfied the requirements of Section 4(f)(4), the Supreme Court's decision in *Shelby County* removed Texas from the jurisdictions required to seek preclearance for new voting changes. Nevertheless, between 2006 and *Shelby County* in 2013, there were still eleven total Section 5 objections interposed on Texas by DOJ and a number of consent decrees and declaratory judgments to halt changes to voting and election procedures.

Blocked voting changes ranged from statewide voter identification requirements that would make it more difficult for minorities to cast a ballot, to localized changes to methods of election that would dilute minority voting strength. In some cases, Section 5 blocked repeated attempts to dilute minority voting rights by the same jurisdiction—the exact type of gamesmanship Section 5 was intended to prevent. The Section 5 objections applied to a range of discriminatory election rules, procedures, and methods of election, including:

- Changes to candidate qualifications for local elections that limited qualified candidates to landowning individuals;<sup>56</sup>
- Deviations from previously approved bilingual election procedures that made election-related information less accessible to minority voters;<sup>57</sup>
- Redistricting plans that removed the ability of minority voters to successfully elect their candidates of choice;<sup>58</sup> and

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<sup>56</sup> See Letter from Grace Chung Becker, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Phil Wilson, Sec'y of State, State of Tex. (Aug. 21, 2008), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_080821.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_080821.pdf).

<sup>57</sup> See Letter from Loretta King, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Robert T. Bass et al., Counsel, Gonzales Cty. (March 24, 2009), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_090324.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_090324.pdf).

<sup>58</sup> See Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to C. Robert Heath, Counsel, Galveston, Tex. (Oct. 3, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_111003.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_111003.pdf).

- A court order cutting short the terms of minority school board trustees and refusing to reopen the candidate filing period to allow the minority trustees to run for reelection after they relied on the school district's announcement that elections would *not* be held within their districts.<sup>59</sup>

While some of these voting changes were enacted by law and subsequently blocked by DOJ, many did not require legislation, such as changes to the number of polling places or procedures to assist limited-English-proficiency voters. Section 5 worked to stop even those discriminatory changes that could be approved and implemented by election officials with little delay and without public notice or participation by minority constituents who might otherwise seek relief from the courts.

a. Redistricting

Between 1982 and 2006, 61 of the 107 total Section 5 objections filed by DOJ were related to redistricting plans proposed at various levels of government. Eight-seven percent of these objections were filed at the local level, while eight of these objections related to redistricting at the state level. Between 2006 and 2013, DOJ filed two additional Section 5 objections specific to local redistricting plans.

In 2012, DOJ objected to one of two redistricting plans that Nueces County submitted for preclearance.<sup>60</sup> The redistricting plan for the commissioners court would have rearranged certain voting districts such that two predominantly white and high-turnout districts would have moved into a precinct, and a Latino-majority district out of that same precinct, effectively diminishing Latino electoral ability.<sup>61</sup> Under the existing arrangement, Latino voters of that precinct were able to successfully elect their preferred candidates for the commissioners court in each election from 1992 to 2008, such that, in total, three of the five seats of the commissioners court were generally held by Latino-preferred candidates in a county in which over 56% of the voting age population were Latino voters.<sup>62</sup> DOJ found that, by moving the white-majority districts in and a Latino -majority district out, the redistricting plan would reduce the ability of Latino voters to successfully elect their preferred candidates.<sup>63</sup> These changes were also opposed by Latino commissioners and minority residents on the ground that they would diminish Latino electoral

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<sup>59</sup> See Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Melody Thomas Chappell, Counsel, Beaumont Indep. Sch. Dist., Jefferson Cnty., Tex. (Apr. 8, 2013), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_130408.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_130408.pdf).

<sup>60</sup> See Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Joseph M. Nixon et al. (Feb. 7, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_120207.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120207.pdf).

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

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

<sup>63</sup> *Id.*

ability, and the county did not provide any response to these concerns and instead referenced what DOJ described as “shifting explanations” that “cannot withstand scrutiny.”<sup>64</sup>

That same year, DOJ objected to redistricting plans and reductions to the number of Justices of the Peace and Constables by Galveston County.<sup>65</sup> DOJ had previously objected to a Justice of the Peace and Constable redistricting plan in Galveston County that fractured African-American and Latino voter populations and provided no districts for minority voters to elect their candidates of choice.<sup>66</sup> Similarly, and like the proposed redistricting plan in Nueces County, Galveston’s redistricting plan for the county’s commissioners court relocated white-majority districts and minority-controlled districts to different precincts in a manner that would diminish the ability of minority voters to elect their preferred candidates.<sup>67</sup> In addition to rejecting the proposed plan for its adverse impact on minority voting power, DOJ indicated that the county failed to adopt a set of criteria to guide its redistricting process, as it had in previous redistricting cycles, and noted evidence of deliberate exclusion of the only member of the commissioners court elected from a minority-controlled precinct from key deliberations regarding the redistricting plan.<sup>68</sup> The proposed reduction in the number of election precincts for the Justice of the Peace and Constable, and the accompanying redistricting plan for the justices of the peace and constable precincts, also would have reduced minority electoral ability and consolidated the three precincts electing minority officials while leaving the precincts with white representatives untouched.<sup>69</sup> DOJ found that the county’s justification for the proposed consolidation—to save money—was made without any analysis of the financial impact of this decision and blocked these changes as well.<sup>70</sup>

Both Nueces and Galveston Counties sought preclearance for local redistricting plans that shifted districts in a manner that removed the ability of minority voters to successfully elect their preferred candidates. These plans were not supported by credible justifications and used procedures that DOJ found lacked integrity and strongly suggested discriminatory intent, and Section 5 provided authority for DOJ to effectively stop them from being implemented. Just as Section 5 blocked discriminatory redistricting plans prior to 2006, it continued to protect minority voting strength from strategic redistricting schemes until the *Shelby County* decision.

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<sup>64</sup> *Id.*

<sup>65</sup> See Letter from Thomas E. Perez, Ass’t Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to James E. Trainor III (March 5, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_120305.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120305.pdf).

<sup>66</sup> See Letter from John R. Dunne, Ass’t Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Ray Holbrook, County Judge, Galveston (March 17, 1992), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2450.pdf>.

<sup>67</sup> See Perez, *supra* note 60.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

Section 5 was also instrumental in providing court review of statewide redistricting plans. In the summer of 2011, the Texas legislature redrew the boundaries for voting districts in the state to account for the 2010 Census.<sup>71</sup> According to Census results, the state's population had grown in the preceding decade by more than 4 million people,<sup>72</sup> 90% of whom were Latinos or African Americans.<sup>73</sup> This population growth resulted in the state receiving four additional congressional seats and required significant changes to both the state legislative and congressional maps.<sup>74</sup> However, as required by Section 5, when Texas requested the District Court for the District of Columbia to issue a declaratory judgment that its redistricting plans had “neither the purpose nor the effect of denying or abridging the right to vote” based on race or minority group, the United States and minority groups that intervened argued that the proposed districts adversely impacted the voting rights of Latino and Black voters.<sup>75</sup> Despite the surge in the state's population of Latino voters and the resulting addition of four new congressional districts, the proposed plan for congressional districts did not increase the number of districts that would provide Latino voters with the ability to elect their preferred candidate and thus Latino voting strength was retrogressed.<sup>76</sup> Texas tried to argue that it maintained District 23 as a Latino-ability district, but the defendants pointed out that the 2011 plan swapped in Latinos with lower voter turnout—in effect decreasing Latino voter participation and their ability to elect.<sup>77</sup> There was also sufficient evidence to conclude that the 2011 congressional redistricting plan was motivated by discriminatory intent.<sup>78</sup> Similarly, Texas's state house plan retrogressed Latino voting strength by eliminating districts that previously provided Latino voters the opportunity to elect Latino-preferred candidates to the state legislature.<sup>79</sup> The State Senate plan was motivated by discriminatory intent.<sup>80</sup>

At the same time this litigation for preclearance was pending in the District of Columbia, a number of cases were filed in federal district courts in Texas, challenging the same redistricting plans. After the district court in D.C. declined to issue Texas's requested summary judgment in November 2011,<sup>81</sup> and eventually held in August 2012 that Texas could not show its proposed

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<sup>71</sup> *Texas v. United States*, 831 F. Supp. 2d 244, 246 (D.D.C. 2011).

<sup>72</sup> *Id.*

<sup>73</sup> *Abbott v. Perez*, Brennan Center for Justice (Aug. 2, 2019), <https://www.brennancenter.org/our-work/court-cases/abbott-v-perez>.

<sup>74</sup> *Id.*

<sup>75</sup> *Texas v. United States*, 831 F. Supp. 2d at 246-47.

<sup>76</sup> *Texas v. United States*, 887 F. Supp. 2d 133, 156 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928, 133 S. Ct. 2885, 186 L. Ed. 2d 930 (2013).

<sup>77</sup> *Id.* at 155-156.

<sup>78</sup> *Id.* at 161.

<sup>79</sup> *Id.* at 166.

<sup>80</sup> *Id.* at 162.

<sup>81</sup> *Texas v. United States*, 831 F. Supp. 2d at 247.

plans were not retrogressive or enacted without a discriminatory purpose,<sup>82</sup> a federal court in Texas held several hearings and adopted interim maps for congress and state house for the 2012 elections.<sup>83</sup> These maps made significant changes to remedy retrogression and create new Latino opportunity districts and in 2013 Texas subsequently adopted the interim maps for permanent use.<sup>84</sup>

Meanwhile, the Supreme Court decided *Shelby County* in 2013, effectively eliminating the Section 5 preclearance requirement (subject to potential further congressional action). Following the Supreme Court's decision, in December 2013, the District Court for the District of Columbia ruled that the dispute had been mooted and dismissed all claims.<sup>85</sup>

Although the Supreme Court had mooted the Section 5 claims brought by DOJ and voters, litigation in Texas continued. Minority litigants ultimately secured the creation of a new majority-minority congressional district in Dallas-Ft. Worth, restoration of Latino voting strength in CD23 in West Texas, the creation of two Latino opportunity State House seats and the restoration of Latino voting strength in two additional State House seats that had been retrogressed by Texas.<sup>86</sup> In 2017, Latino challengers secured an additional ruling that a Latino opportunity State House district in Ft. Worth was racially gerrymandered.<sup>87</sup>

#### b. Candidate Qualifications

The imposition of candidate qualifications that exploit barriers having a greater impact on minority populations is another way to prevent minority voters from electing their candidates of choice. For example, a 2007 state legislative bill amended the Texas Water Code to limit eligibility for the position of supervisor of each water district to landowners who are registered to vote, instead of any registered voters of the district.<sup>88</sup> In 2008, DOJ objected to this statewide provision and relied on statistics revealing a significant disparity in home and agricultural land ownership rates between white and minority residents in Texas, such that the legislative bill

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<sup>82</sup> *Texas v. United States*, 887 F. Supp. 2d at 178.

<sup>83</sup> *Perez v. Texas*, 11-CA-360-OLG-JES-XR, 2012 WL 13124275 (W.D. Tex. Mar. 19, 2012); *Perez v. Perry*, SA-11-CV-360, 2012 WL 13124278 (W.D. Tex. Mar. 19, 2012).

<sup>84</sup> *Id.*; Alexa Ura, *U.S. Supreme Court Rules Texas Lawmakers Did Not Intentionally Discriminate in Drawing Political Maps*, Texas Tribune (June 25, 2018), <https://www.texastribune.org/2018/06/25/us-supreme-ruling-court-texas-redistricting-case/>.

<sup>85</sup> *Case Profile: Texas v. United States*, Civil Rights Litigation Clearinghouse, <https://www.clearinghouse.net/detail.php?id=12380>.

<sup>86</sup> *Perez v. Perry*, SA-11-CV-360, 2012 WL 13124278 (W.D. Tex. Mar. 19, 2012) and *Perez v. Texas.*, 11-CA-360-OLG-JES-XR, 2012 WL 13124275 (W.D. Tex. Mar. 19, 2012).

<sup>87</sup> *Perez v. Abbott*, 267 F. Supp. 3d 750, 794 (W.D. Tex. 2017), *aff'd in relevant part*, 138 S. Ct. 2305 (2018).

<sup>88</sup> Myrna Pérez and Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, Brennan Center for Justice (June 12, 2013), <https://www.brennancenter.org/our-work/research-reports/if-section-5-falls-new-voting-implications>.



would have a discriminatory impact on minority candidates.<sup>89</sup> Moreover, there were already Latino supervisors at the time who did not own land and, according to the amended provision, would have been unable to run for reelection.<sup>90</sup> Despite DOJ's objection, the blocked change remained codified in the Texas Water Code after the objection and continues to be in force today.

c. At-Large Voting Arrangements

The use of at-large voting arrangements is not a new tool for dilution of minority votes. Just within Texas, DOJ has blocked 25 attempts to transform contests for posts elected by single-member districts to at-large elections since the enactment of the VRA. Two of those attempts occurred after 2006.

In 2011, DOJ blocked the city of Galveston from changing its method of election for city council from six single-member districts to four single-member districts with two members elected at-large.<sup>91</sup> DOJ had already rejected this method of election in 1992, 1998, and again in 2002, but the city renewed its proposal, citing its decreasing African American population and the election of a Latino councilmember from a district with a Latino population percentage of less than 50%.<sup>92</sup> Nevertheless, DOJ found that under the existing method, minority voters held the ability to elect a candidate of choice in three of six single-member districts.<sup>93</sup> The proposed change would make this available in only two of the four districts and in neither of the two at-large positions, and thus take away voting power from minority voters.<sup>94</sup>

In 2012, DOJ blocked a similar proposal to replace two single-member districts with at-large districts for trustee elections within the Beaumont Independent School District (BISD).<sup>95</sup> Under the existing method, African-American voters had the ability to elect four of the seven board members; under the proposed plan, they would have the same ability for only three of those positions, and DOJ concluded that it was highly unlikely that a Black-preferred candidate would be successfully elected in an at-large contest.<sup>96</sup> DOJ noted that the proposal itself "carried racial overtones with the genesis of the change and virtually all of its support coming from white

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<sup>89</sup> See Letter from Grace Chung Becker, *supra* note 56.

<sup>90</sup> *Id.*

<sup>91</sup> See Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to C. Robert Heath, Counsel, Galveston, Tex. (Oct. 3, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_111003.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_111003.pdf).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Melody Thomas Chappell, Counsel, Beaumont Indep. Sch. Dist., Jefferson Cnty., Tex. (Dec. 21, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_121221.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_121221.pdf).

<sup>96</sup> *Id.*

residents.”<sup>97</sup> The proposal created “extreme racial polarization,” with an estimate of “over 90 percent of white voters, but less than 10 percent of black voters” supporting the change.<sup>98</sup>

Racial polarization is not new to Beaumont. The city has a history of segregated and unequal schools well after *Brown v. Board of Education*.<sup>99</sup> In 1985, a federal judge created seven single-member districts for electing BISD trustees after DOJ found that Beaumont’s previous plan of five single-member districts and two at-large districts diluted African American votes.<sup>100</sup> But in 2011, the city narrowly voted along racial lines to approve the proposal returning to the previous 5-2 plan and replacing two of the seven districts with at-large representatives,<sup>101</sup> which DOJ subsequently blocked.

A few months later, BISD adopted a redistricting plan based on the 2010 Census and announced that elections would be held only in three districts in May 2013, in accordance with the previously established schedule of staggered terms.<sup>102</sup> Because the three districts did not include minority-controlled districts, the incumbents of those districts did not seek to qualify for the election while several supporters of the 5-2 proposal submitted candidate filings for those districts on the last day of the candidate filing period.<sup>103</sup> BISD did not accept their filings, the candidates sued, and in March 2013, a Texas judge permitted these candidates to run unopposed and replace the three incumbent trustees.<sup>104</sup> This decision truncated the incumbent trustees’ terms in office and treated the candidate filing period as closed such that the incumbents could not run for re-election in their own districts, even though their failure to file for reelection was in reliance on BISD’s notice of election.<sup>105</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See *Brown v. Hendrix*, 228 F. Supp. 698, 700 (E.D. Tex. 1964); Sydnee Fielkow, *Shelby County and Local Governments: A Case Study of Local Texas Governments Diluting Minority Votes*, 14 Ne. J. L. & Soc. Pol’y 348, 366 (2019).

<sup>100</sup> See Perez, *supra* note 95.

<sup>101</sup> Zachary Roth, *Breaking Black: The Right-Wing Plot to Split a School Board*, MSNBC (Oct. 11, 2013), <https://www.msnbc.com/msnbc/blacks-texas-town-fear-return-old-days-msna184126>. DOJ found that over 90 percent of white voters and less than 10 percent of Black voters supported the proposal.

<sup>102</sup> See Letter from Thomas E. Perez, Ass’t Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Melody Thomas Chappell, Counsel, Beaumont Indep. Sch. Dist., Jefferson Cnty., Tex. (Apr. 8, 2013), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_130408.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_130408.pdf).

<sup>103</sup> *Id.*

<sup>104</sup> *In re Rodriguez*, 397 S.W.3d 817, 819 (Tex. App. 2013); see also Perez, *supra* note 102. The state court noted that the redistricting plan met constitutional one-person, one-vote requirements, and ordered that the election comply with state law, which provided that, “after each redistricting, all positions ... be filled.” See *Rodriguez*, 397 S.W.3d at 821.

<sup>105</sup> See Perez, *supra* note 102.

In April 2013, DOJ intervened under its Section 5 authority to block the implementation of the court's order, which it found to constitute changes to BISD's election procedures within the meaning of Section 5 and therefore subject to its review.<sup>106</sup> Not only did the court's order cause the terms of the three incumbent trustees to be cut short, it also prevented minority voters from electing their preferred candidates in the trustee elections and instead allowed the three candidates who submitted their filings—all of whom had run previously and failed to gain more than 10.9% of minority voters' support—to run unopposed.<sup>107</sup> DOJ found that these changes were discriminatory and effectively denied minority voters the right to vote.<sup>108</sup> As a result, Beaumont rescheduled its election from May 2013 to November 2013.<sup>109</sup>

*Shelby County*, however, was decided prior to the rescheduled trustee election, and Beaumont immediately reinstated the 5-2 plan.<sup>110</sup> The District Court for the District of Columbia dismissed a suit over preclearance of the 5-2 plan because it no longer had jurisdiction over the case and found that it was a “matter of Texas election law.”<sup>111</sup> The Texas Court of Appeals ruled that the 5-2 voting scheme was permissible, and that Section 5 was no longer the appropriate governing law because *Shelby County* prevented federal oversight.<sup>112</sup> However, it did permit the minority incumbents to file for reelection.<sup>113</sup>

These examples demonstrate the impact of Section 5 in shielding minority voters from at-large voting arrangements aimed at diluting minority votes, but they also show the effects of *Shelby County*'s removal of the preclearance requirement for jurisdictions like Texas. Without Section 5, it becomes much harder to identify and stop schemes that reallocate and redistribute minority votes in ways that infringe on the right to vote. As will be further discussed below, BISD is far from the only jurisdiction that reinstated procedures blocked by DOJ's Section 5 authority in the aftermath of *Shelby County*.

#### d. Voting Procedures

There have been five objections regarding voting procedures since 2006. Examples of voting procedure changes include a proposal to hold separate rather than consolidated elections, voter identification requirements, changes to the availability and methods of translation for election-related materials, and reductions in available bilingual poll workers at precincts serving limited-English-proficiency voters. DOJ also filed two suits resulting in consent decrees for violations

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Rodriguez v. Beaumont Indep. Sch. Dist.*, 413 S.W.3d 524, 528 (Tex. App. 2013).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 529.

<sup>112</sup> *Id.* at 530.

<sup>113</sup> *Id.* Ultimately, the November 2013 election was canceled after the Texas Education Agency intervened and appointed a board of managers to oversee BISD.

of Section 5 that would have implemented new voting and election procedures to the detriment of minority voters.

In 2006, DOJ objected to a decision by the North Harris Montgomery Community College District to no longer conduct joint school board elections with several coextensive school districts.<sup>114</sup> The change would have required voters to travel to two separate polling places in order to cast their ballots for the various districts.<sup>115</sup> The change also included a reduction in the number of polling places from 84 to 12, which would serve more than 540,000 voters.<sup>116</sup> DOJ noted that the assignment of voters to these 12 sites was “remarkably uneven”: the polling site with the smallest proportion of minority voters would have served 6,500 voters, while the site with the greatest proportion would have served more than 67,000 voters, almost 80% of whom were African American or Latino.<sup>117</sup> DOJ concluded that the District could not show that the proposed change would not have a “retrogressive effect” on minority voters.<sup>118</sup> Because the District was unable to meet all requirements in time to conduct the May 13, 2006 election and postponed the election, DOJ ultimately sued and entered into a consent decree requiring the District to maintain the voting locations previously in effect unless and until preclearance could be obtained under Section 5.<sup>119</sup>

In 2008, DOJ simultaneously filed a complaint and entered a consent decree against Waller County for adopting new voter registration practices leading up to the 2008 presidential election without seeking Section 5 preclearance.<sup>120</sup> These new practices included imposing new limits on the number of voter registration applications local election officials could collect and rejecting any applications that failed to provide a zip code or did not use the most recent versions of the application.<sup>121</sup> According to the complaint, the “vast majority” of voter registration applications rejected were applications of the approximately 8,000 enrolled students at Prairie View A&M University, a historically Black college.<sup>122</sup> The consent decree required Waller County to stop

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<sup>114</sup> Letter from Wan Kim, Ass’t Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Renee Smith Byas, Vice Chancellor & Gen. Counsel, N. Harris Montgomery Cmty. Coll. Dist. (May 5, 2006), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2960.pdf>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Consent Decree at 5, *United States v. N. Harris Montgomery Cmty. Coll. Dist.*, No. 4:06-cv-02488 (S.D. Tex. Aug 4, 2006).

<sup>120</sup> Consent Decree at 1-7, *United States v. Waller Cnty., Tex.*, No. 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008).

<sup>121</sup> Complaint, *United States v. Waller Cnty., Tex.*, No. 08-cv-03022 (S.D. Tex. Oct. 17, 2008).

<sup>122</sup> *Id.*

implementing these new practices until administrative or judicial preclearance could be obtained pursuant to Section 5.<sup>123</sup>

In 2012, DOJ blocked a Texas law, S.B. 14, that would have required voters to show photo identification before casting a ballot.<sup>124</sup> The state justified changing the current practice to “ensure electoral integrity,” but DOJ noted that the state did not include evidence of significant in-person voter impersonation not already addressed by the state’s existing laws.<sup>125</sup> DOJ found hundreds of thousands of disproportionately Latino registered voters did not have the necessary identification.<sup>126</sup> Later that year, the reviewing federal district court agreed, finding the law would disproportionately burden African Americans and Latinos.<sup>127</sup>

While these two changes were submitted for preclearance prior to being implemented, the remaining objections involved changes to bilingual election procedures that had already been implemented and for which DOJ provided post-hoc review and subsequently blocked. In effect, these discriminatory changes worked to hinder minority access to the polls years before DOJ discovered and blocked them with objection letters.

In 2009, DOJ blocked changes to bilingual election procedures in Gonzales County that had already been implemented since 2004.<sup>128</sup> Since 1978, the county had established procedures that would publish election notices in English and Spanish and provide bilingual poll workers in precincts with Spanish-speaking voters that were approved by DOJ.<sup>129</sup> But since at least 2004, DOJ found that a significant number of the county’s election notices and other documents containing election-related information were made available only in English.<sup>130</sup> Spanish versions were found to be incomplete and/or inaccurate.<sup>131</sup> In addition, the county had reduced the number of bilingual poll workers, despite an increase in the county’s Latino population and the

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<sup>123</sup> Consent Decree, *United States v. Waller Cnty., Tex.*, No. 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008).

<sup>124</sup> Letter from Thomas E. Perez, Ass’t Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Keith Ingram, Director of Elections, Office of the Tex. Sec’y of State (March 12, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_120312.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120312.pdf); *see also* Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Texas v. Holder*, 888 F. Supp. 2d 113, 143-45 (D.D.C. 2012).

<sup>128</sup> Letter from Loretta King, Acting Ass’t Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Robert T. Bass et al., Counsel, Gonzales Cty. (March 24, 2009), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_090324.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_090324.pdf).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

statewide recommended guideline that bilingual poll workers be assigned to 14 of the county's 15 precincts.<sup>132</sup> DOJ wrote that these deviations from the 1978 procedures violated Section 5.<sup>133</sup>

In response to DOJ's objection letter in 2009, Gonzales County submitted proposed changes regarding translated election materials and the assignment of bilingual poll workers that were more "retrogressive" even when measured against the county's 2008 procedures to which DOJ interposed an objection.<sup>134</sup> Specifically, the county proposed using online translation tools such as Google Translate for election materials and seeking approval from the Texas Secretary of State and the local chapter of the League of United Latin American Citizens for review.<sup>135</sup> DOJ objected because it was unlikely that the proposed measures would provide better translations than the use of a third-party translator under the 1978 procedures.<sup>136</sup> In addition, the county proposed making "best efforts" to provide bilingual poll workers to seven of the county's fifteen precincts.<sup>137</sup> DOJ noted that this would be a reduction in the number of available bilingual workers and again found that this would harm the ability of Spanish-speaking voters to participate in the electoral process.<sup>138</sup> Moreover, DOJ included evidence of the county's discriminatory intent in implementing its changed procedures, including instances of county officials openly expressing hostility toward complying with the language minority provisions of the VRA, such as the county official with direct control over the election process suggesting that people who do not speak English are not citizens.<sup>139</sup>

In 2010, DOJ filed another objection letter to bilingual election procedures, but this time in Runnels County.<sup>140</sup> Similar to Gonzales County, Runnels County had adhered to approved benchmark procedures, but during the 2008 and 2009 elections, the county failed to provide bilingual workers despite an accompanying increase in the county's Latino population.<sup>141</sup> Instead, the county relied on an on-call bilingual assistance provider available by phone on

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Robert T. Bass, Counsel, Gonzales Cty. (March 12, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_100312.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_100312.pdf).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Letter from Thomas E. Perez, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Elesä Ocker, Cty. Clerk, Runnels Cty. (June 28, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1\\_100628.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_100628.pdf).

<sup>141</sup> *Id.*

Election Day, a change that DOJ had not reviewed prior to its implementation and found did not provide effective language assistance.<sup>142</sup>

These examples demonstrate that Section 5 was used to address procedural obstacles that hindered minority voters from exercising their right to vote as well as to combat redistricting plans and election methods that removed minority voting power. Even when the preclearance requirement deterred state and local governments from imposing discriminatory changes to election rules and procedures, some jurisdictions continued to implement such changes without submitting them for review. Since *Shelby County*, the absence of Section 5’s deterrence effect has led to more concerted efforts to dilute minority votes.

## 2. Section 2 Violations

The protections of the permanent enforcement provision of the VRA, Section 2, have worked to enhance the political opportunities for African American and Latino voters in Texas. Section 2 is the general non-discrimination provision of the VRA, which provides litigants the ability to challenge any voting law or policy “which results in a denial or abridgement of any citizen of the United States to vote on account of race or color.”<sup>143</sup> The cases reviewed in this section demonstrate that courts have determined, as recently as 2020, that minority voters in Texas have been denied the equal opportunity to participate in the political process. These Section 2 violations have stemmed from Texas’s efforts to impose various voting requirements which resulted in the denial or abridgement of African American and Latino voters from the right to vote. The Supreme Court’s decision in *Brnovich v. Democratic National Committee* threatens the ability to protect future voters from an increasing and imminent risk of new methods of voter suppression being considered by the Texas Legislature.<sup>144</sup> Congress should assess whether the Court’s interpretation of Section 2 in *Brnovich* comports with congressional intent to ensure that the Voting Rights Act remains a powerful tool to combat racial discrimination in voting.

### a. Voting Procedures

In 2011, the Texas Legislature adopted S.B. 14, a law that imposed a variety of new photo identification requirements for voters.<sup>145</sup> DOJ successfully blocked the implementation of the law in 2012 under its Section 5 preclearance authority, as discussed above. However, Texas began enforcing S.B. 14 shortly after the Court’s 2013 decision in *Shelby County*. Numerous plaintiffs and the United States filed complaints again challenging S.B. 14. Without its Section 5 authority, DOJ relied on Section 2 to argue that S.B. 14 was adopted with the purpose, and would have the result, of denying Latino voters the equal opportunity to participate in the

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<sup>142</sup> *Id.*

<sup>143</sup> 52 U.S.C. § 10301.

<sup>144</sup> See S.B. 1, 87th Legis., 1st Sess. (Tex. 2021) and H.B. 3, 87th Legis., 1st Sess. (Tex. 2021). The Supreme Court’s “cramped reading” in *Brnovich v. Democratic National Committee* “undermines Section 2 and the right it provides.” 141 S. Ct. 2321, 2351 (2021) (Kagan, J. dissenting).

<sup>145</sup> See Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

political process.<sup>146</sup> After a nine-day bench trial, the federal district court issued extensive findings of fact regarding the purpose and effect of Texas’s voter identification law, including that:

- The Texas Legislature followed an “[e]xtraordinary” approach to considering and passing S.B. 14.<sup>147</sup>
- S.B. 14’s voter identification requirement would impose a burden on approximately 608,470 registered voters in Texas (representing approximately 4.5% of all registered voters) who lacked qualified photo identification under S.B. 14.<sup>148</sup> This burden would “disproportionately impact both African Americans and Hispanics in Texas.”<sup>149</sup>
- S.B. 14’s voter identification requirement would “disproportionately impact lower income Texans” because they were less likely to own proper S.B. 14 IDs, and less likely to have the means to pay for the documents needed to secure an S.B. 14 ID.<sup>150</sup>
- The low-income Texans affected by S.B. 14 were disproportionately African-American or Latino.<sup>151</sup>

The district court held that S.B. 14 had an impermissibly discriminatory effect and was imposed with an unconstitutional discriminatory purpose against Latinos and African-Americans, violating Section 2 of the VRA.<sup>152</sup> Texas appealed the decision, and ultimately the full Fifth Circuit sitting en banc affirmed the district court’s holding that S.B. 14 created discriminatory results in violation of Section 2.

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<sup>146</sup> Complaint, *United States v. Texas*, No. 13-cv-00263 (S.D. Tex. Aug. 22, 2013)

<sup>147</sup> See *Veasey v. Perry*, 71 F. Supp. 3d 627, 645 (S.D. Tex. 2014), *aff’d in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh’g en banc*, 830 F.3d 216 (5th Cir. 2016), and *aff’d in part, vacated in part, rev’d in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

<sup>148</sup> *Id.* at 659.

<sup>149</sup> *Id.* at 663.

<sup>150</sup> *Id.* at 665.

<sup>151</sup> *Id.*

<sup>152</sup> In addition, the court held that SB 14 (1) created an unconstitutional burden on the right to vote violating the First and Fourteenth Amendments to the U.S. Constitution; and (2) constituted an unconstitutional poll tax in violation of the Fourteenth and Twenty-Fourth Amendments. *Id.* at 633. The Fifth Circuit panel, and then sitting en banc, reversed the District Court’s decision on these constitutional claims. See *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh’g en banc*, 830 F.3d 216 (5th Cir. 2016).



b. Vote-by-Mail / COVID-19

With the onset of the COVID-19 crisis in the leadup to the 2020 election, voters filed lawsuits seeking to expand access to voting through absentee and mail-in ballots. On October 1, 2020, Texas Governor Gregg Abbott issued a proclamation prohibiting county election officials from providing more than one absentee ballot drop off location in each county, regardless of the geographic size or population of the county. A coalition of organizations, including the League of United Latin American Citizens (LULAC) sued the Governor and state election officials seeking to bar implementation of the order, arguing that the order would violate the U.S. Constitution and Section 2 of the VRA. LULAC asserted that Latino voters were more at risk for contracting and dying from COVID-19 as a result of social and historical conditions stemming from discrimination.<sup>153</sup> Due to the increased risks associated with COVID-19 of voting in person for Latino voters, LULAC argued that limiting absentee ballot drop-off locations would result in the denial of the right to vote on account of race for Latino voters who lived both in densely populated counties like Harris County, but also geographically dispersed counties like Webb.<sup>154</sup> The District Court granted LULAC’s motion for a preliminary injunction holding that the Governor’s order likely violated voters’ fundamental right to vote under the First and Fourteenth Amendments, and that the order also likely violated the Equal Protection Clause of the Fourteenth Amendment. The District Court did not address LULAC’s Section 2 claim.<sup>155</sup> On appeal, the Fifth Circuit stayed the preliminary injunction, but Judge Ho, in concurrence, noted that the Governor’s order likely usurped the authority of the Texas State Legislature by “rewrit[ing] Texas election law by executive fiat.”<sup>156</sup>

c. Redistricting

The Texas 2011 statewide redistricting plans discriminated against Latinos, African American and Asian American voters.

In 2013, after *Shelby County*, Texas adopted for permanent use interim statewide redistricting plans and litigation continued in the Western District of Texas—this time exclusively under Section 2 of the VRA.<sup>157</sup> After trial on the Texas Legislature’s 2011 state house redistricting plan, the district court concluded that Texas had intentionally diluted minority voting strength throughout the plan, including in 9 specific state house districts around the state. The district court further concluded that Texas had unconstitutionally racial gerrymandered a district in San Antonio, Texas. The district court also concluded that Texas had violated the Constitutional

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<sup>153</sup> Complaint, *Texas League of United Latin American Citizens v. Abbott*, No. 1:20-cv-01006 (W.D. Tex. Oct. 1, 2020).

<sup>154</sup> *Id.*

<sup>155</sup> *Texas League of United Latin American Citizens v. Abbott*, 493 F. Supp. 3d 548, 581-582 (W.D. Tex. 2020), *vacated sub nom. Texas League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2021 WL 1446828 (5th Cir. Feb. 22, 2021).

<sup>156</sup> *Texas League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 150 (5th Cir. 2020)

<sup>157</sup> *Abbott v. Perez*, 138 S. Ct. 2305, 2317 (2018).

guarantee of one person one vote in three counties.<sup>158</sup> After trial on the Texas Legislature’s 2011 congressional redistricting plan, the district court concluded that Texas had intentionally diluted Latino voting strength in South and West Texas and racially gerrymandered districts in the Dallas-Ft. Worth Metroplex.<sup>159</sup> Texas did not appeal the decisions of the district court on the 2011 redistricting plans.

After two later trials, the district court concluded that a number of districts in the district court’s interim plans, later adopted by Texas, were discriminatory. These rulings were reversed on appeal by the U.S. Supreme Court.<sup>160</sup> However, the U.S. Supreme Court affirmed the district court’s conclusion that changes made by Texas in 2013 to House District 90 in Ft. Worth were an unconstitutional racial gerrymander.<sup>161</sup> In May 2019, the court ordered modifications to the district to take effect for the next set of elections.<sup>162</sup>

The Texas redistricting plaintiffs request that the district court place Texas under sec. 5 preclearance pursuant to 52 U.S.C. § 10302(c) (also known as judicial “bail-in”). The district court denied bail-in relief but observed that the intentional racial discrimination by Texas was sufficient to trigger bail-in:

The Court has found violations of the Fourteenth Amendment with regard to the 2011 plans, and concludes that these findings are sufficient to trigger bail-in as a potential remedy. . . . [T]he Court has grave concerns about Texas's past conduct. During the 2011 legislative session, Texas engaged in traditional means of vote dilution such as cracking and packing in drawing districts, and also utilized newer methods of dilution and suppression such as using the “nudge factor” and passing voter ID requirements.

*Perez v. Abbott*, 390 F. Supp. 3d 803, 818, 820 (W.D. Tex. 2019).

In another case, shortly after *Shelby County* was decided, the City of Pasadena, Texas changed its local government electoral structure in order to diminish the voting power of a growing Latino community.<sup>163</sup> Prior to *Shelby County*, Pasadena had eight single-member districts for

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<sup>158</sup> *Perez v. Abbott*, 250 F. Supp. 3d 123, 218–19 (W.D. Tex. 2017). With regard to the parties’ § 2 vote dilution claims against three state house districts in the 2011 plan, the district court found that it had already remedied those claims in its interim state house plan and thus the claims were moot.

<sup>159</sup> *Perez v. Abbott*, 253 F. Supp. 3d 864, 972–73 (W.D. Tex. 2017).

<sup>160</sup> *Perez v. Abbott*, 267 F. Supp. 3d 750, 794 (W.D. Tex. 2017), *aff’d in part, rev’d in part and remanded*, 138 S. Ct. 2305 (2018).

<sup>161</sup> *Id.* at 794.

<sup>162</sup> *Id.*

<sup>163</sup> *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 673 (S.D. Tex. 2017).

electing city council members.<sup>164</sup> After *Shelby County*, in 2014, Pasadena changed to six single-member districts and two at-large districts for electing city council members. Following the enactment of the plan, in 2015, the new 6-2 map and plan produced one less Latino-majority single-member district than under the prior 8-0 plan.<sup>165</sup> A group of Latino plaintiffs sued alleging these changes to the city council electoral districts violated Section 2 of the VRA and the Fourteenth and Fifteenth Amendments to the U.S. Constitution by diluting the votes of Latino citizens.<sup>166</sup> The plaintiffs requested that the district court enjoin the electoral changes and require Pasadena to submit the changes to preclearance by DOJ under Section 3(c) of the VRA before making future changes to its maps or plans for electing City Council members.<sup>167</sup>

The court held a seven-day bench trial, hearing the testimony of five expert witnesses and eleven other witnesses and admitting hundreds of pages of documents including maps showing the before- and after-redistricting lines.<sup>168</sup> Following the trial, the court made extensive findings of fact including that:<sup>169</sup>

- The City of Pasadena had a long history of discrimination against minorities, including against Latino citizens:<sup>170</sup>
  - When Pasadena was incorporated in 1942, its City Charter complied with state laws imposing segregation and banning Spanish-language instruction.<sup>171</sup>
  - Restrictive housing covenants were in place until the 1940s, and the pattern of housing segregation resulting from these covenants remains “de facto[.]”<sup>172</sup>
  - As late as 1980, the Pasadena Independent School District excluded undocumented immigrant students, and in 1987, the federal government successfully sued the school district for failing to hire African-American teachers and administrators.<sup>173</sup>

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 682.

<sup>166</sup> *Id.* at 673.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 677.

<sup>169</sup> *Id.* at 677-710.

<sup>170</sup> *Id.* at 682.

<sup>171</sup> *Id.* at 684.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

- Pasadena was the Texas Headquarters of the Ku Klux Klan, and the group targeted Mexican Americans.<sup>174</sup>
- From the 1980s through the present, Latino residents have complained about “policy antipathy” towards their community and that they are more likely to be targeted for traffic stops by police than white residents.<sup>175</sup>
- A Latino City Council Member “credibly” testified that he had experienced official racist attitudes and acts by city employees during his City Council service.<sup>176</sup>
- Recent Council election campaigns were marked by racial discrimination.<sup>177</sup>
- Pasadena officials used race and political party as proxies for one another in the November 2013 election.<sup>178</sup>
- Pasadena’s mayor initiated the change to the 6-2 voting map “immediately” after *Shelby County* removed the requirement for Pasadena to obtain DOJ preclearance, knowing that the “Department did not preclear at-large systems that dilute the voting strength of minorities . . . and likely would not preclear Pasadena’s map and plan because of its dilutive effect.”<sup>179</sup>
- “The Council sessions that led to the enactment of the 6-2 map and plan were marked by procedural irregularities.”<sup>180</sup>
- Under the original 8-0 single-member district plan, Latino citizens were the majority voting age population in four districts and nearing 46% in a fifth district, while under the 6-2 plan, Latino citizens were only the majority voting age population in three districts, and approximately 47% in a fourth district.<sup>181</sup>
- Pasadena’s plan to adopt a 6-2 map had the effect of diluting Latino voting strength and “[t]hat effect was foreseeable and foreseen.”<sup>182</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 685.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 708.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 709.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

Given these findings, the district court held that Pasadena’s City Council plan diluted Latino voting strength, and was intentional in doing so, violating Section 2 of the VRA and the Fourteenth and Fifteenth Amendments to the U.S. Constitution.<sup>183</sup> The court granted the plaintiffs’ request to enjoin Pasadena’s 6-2 plan, and required Pasadena to submit any future changes of the City Council election structure to preclearance by DOJ under Section 3(c) of the VRA until 2023.

### 3. Additional Violations

In 2016, a coalition of Asian-American voters successfully challenged a state election law that limited access to interpreters for limited-English-proficiency voters under Section 208 of the VRA. *OCA-Greater Houston v. Texas*, 2016 WL 9651777, at \*10 (W.D. Tex. Aug. 12, 2016). Section 208 of the VRA provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 52 U.S.C. § 10508.

In *OCA-Greater Houston*, The district court held that Texas Election Code § 61.033—which required interpreters to “be a registered voter of the county in which the voter needing the interpreter resides”—“flatly contradict[ed]” Section 208 of the VRA.<sup>184</sup> The plaintiff in this case was limited-English proficient, had found it difficult to vote in the past, and brought her son to a polling station in the county she was registered to assist her.<sup>185</sup> However, the poll officials did not permit her son to interpret for her because he was a registered voter in a neighboring county.<sup>186</sup> Texas appealed the district court’s decision enjoining enforcement of the interpreter requirement, but the Fifth Circuit upheld the district court’s decision and found the requirement to “impermissibly narrow[] the right guaranteed by Section 208.”<sup>187</sup> Although not a Section 2 violation, this law is proof that infringement of minority voting rights is not only present in legislative bills but sometimes already codified in state law.

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<sup>183</sup> *Id.* at 718, 728.

<sup>184</sup> 2016 WL 9651777, at \*10

<sup>185</sup> *Id.* at \*1.

<sup>186</sup> *Id.*

<sup>187</sup> *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017) (“We must conclude that the limitation on voter choice expressed in Tex. Elec. Code § 61.033 impermissibly narrows the right guaranteed by Section 208 of the Voting Rights Act.”). While the Fifth Circuit upheld the district court’s grant of summary judgment, it found the court’s injunction to be overbroad and remanded for entry of a narrower remedy, which the district court issued. *See OCA Greater Houston v. Texas*, 2018 WL 2224082, at \*1, 4 (W.D. Tex. May 15, 2018).

#### 4. Pending Legislation

As of the writing of this report, the Texas legislature is considering two bills that would impose a variety of severe voting restrictions, summarized below.<sup>188</sup>

##### a. House Bill 3

Key provisions of H.B. 3 included the following.

- Public officials will be prohibited from sending absentee ballot applications to eligible voters, unless the voter specifically requests an application.
- Public election officials could be charged with a felony if they violate the prohibitions on sending mail ballots to anyone who hasn't specifically requested one.
- Election judges will no longer have the discretion to remove a poll watcher who is intimidating voters.
- Voter assistants—who are already required to be recorded on the poll list when helping someone vote—would also be required to fill out an invasive form about why they are assisting the voter. Failure to accurately complete the form would be subject to criminal penalties, as would even innocent violations of the voter assistant's oath.
- Receiving payment for assisting voters would be criminalized; this would prevent, among others, advocates for voters with disabilities from receiving payment for their voting-related work.

##### b. Senate Bill 1

Key provisions of S.B. 1 included the following.

- Removing local election officials' discretion to set voting times and elimination of overnight voting options that are popular with people who work nontraditional hours.
- Prohibition of mobile voting such as the safe, convenient, and popular drive-through voting provided by Harris County.
- Like H.B. 6, prohibiting public officials from sending absentee ballot applications to eligible voters, unless the voter specifically requests an application.
- Providing effectively free rein to poll watchers, including permitting them to take videos of voters.

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<sup>188</sup> Summary adapted from <https://www.aclutx.org/en/news/what-you-need-know-about-texas-dangerous-voting-bills>; [https://www.aclutx.org/sites/default/files/analysis\\_sb1.pdf](https://www.aclutx.org/sites/default/files/analysis_sb1.pdf).

- Potential criminal penalties for even innocent errors by election officials.
- Imposing a polling place location geographic coverage provision that would force the largest counties in Texas to move polling places out of communities of color and into whiter suburbs.
- Like H.B. 6, requiring voter assistants to fill out an invasive form about why they are assisting the other voter. In addition, SB 7 will require most people accompanying a curbside voter to stand outside the car while the voter fills out their ballot.

### C. Other Indicia of Voting Discrimination

Texas has a well-documented history of being a state afflicted with a pattern of voting discrimination.<sup>189</sup> Election access and administration is a long-standing challenge as well.<sup>190</sup> A 2020 study in the *Election Law Journal* found that Texas is the most difficult state in the nation in which to vote.<sup>191</sup> By that report's metrics, Texas's relative position worsened four spots between 2016 and 2020, coinciding with new stricter voting laws passed in the wake of *Shelby County*, such as 2017's voter ID law.<sup>192</sup> Similarly, a 2018 MIT tracker rated Texas as the eighth worst state in the nation in electoral performance.<sup>193</sup> This too reflects a recently accelerated deterioration of voting rights: as recently as 2010, Texas was ranked 25<sup>th</sup> best in the nation for election administration.<sup>194</sup>

Challenges to voting access have huge implications both for individual voters facing *de facto* disenfranchisement, and for the integrity and results of elections across the state. A 2019 report found that during the 2018 midterm elections, voting administration failures affected at least

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<sup>189</sup> Alexandra Villarreal, *Texas is a 'Voter Suppression' State and One of the Hardest Places to Vote. Will it Help Trump Win?*, *The Guardian* (Sept. 18, 2020), <https://www.theguardian.com/us-news/2020/sep/18/texas-voting-restrictions-rights-coronavirus>.

<sup>190</sup> *Id.*

<sup>191</sup> Scot Schraufnagel, et al., *Cost of Voting in the American States: 2020*, 19 *Elec. L. J.: Rules, Politics, and Policy* (2020)

<sup>192</sup> See Texas Legislature Online, History: Texas SB5 (2017), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB5> (last visited July 30, 2021).

<sup>193</sup> *Electoral Performance Index 2018*, Massachusetts Institute of Technology, <https://elections.mit.edu/#/data/map?view=state-profile&state=TX&year=2018> (last visited June 24, 2021).

<sup>194</sup> *Electoral Performance Index 2010*, Massachusetts Institute of Technology, <https://elections.mit.edu/#/data/map?view=state-profile&state=TX&year=2010> (last visited June 24, 2021).

277,000 voters across the state, a number greater than the margin of victory in Senator Ted Cruz’s reelection against challenger Beto O’Rourke.<sup>195</sup>

The principal barriers faced by voters in Texas can be broken into roughly three categories: (1) registration problems, most notably aggressive purges of the voting rolls often targeted at minority voters; (2) voting date and voting site problems, most notably those related to provisional ballots; and (3) more situationally specific challenges, such as those related to voting during the COVID-19 pandemic and absentee or mail ballots.

### 1. Voter Registration

Voter registration is difficult in Texas due to the murky patchwork of state requirements. At the outset, the National Voter Registration Act requires states to offer automatic and simultaneous voting registration when a driver’s license or state-issued identification is issued. Until recently, however, Texas did not offer simultaneous registration for the 1.5 million Texans who renew or update their driver’s licenses online.<sup>196</sup> Only in response to litigation finally settled in August 2, 2021—pursuant to which the state agreed to donate \$175,000 to the Texas Civil Rights Project—did Texas begin to provide simultaneous registration as required.<sup>197</sup>

The state also has very early registration deadlines; applications must be postmarked or received by 30 days before an election.<sup>198</sup> Texas does not offer same-day registration under any circumstances.<sup>199</sup> Until a 2020 judicial order, Texans were not able to register to vote online.<sup>200</sup> Additionally, state law requires all high schools in Texas, both public and private, offer voter registration materials to their students on a biannual basis.<sup>201</sup> A report by the Texas Civil Rights Project, however, found that many schools were not in compliance with this requirement, making it harder for young voters to register to vote.<sup>202</sup> They found that “[i]n 2016, a mere 14% of

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<sup>195</sup> Emily Eby, *Texas Election Protection 2018*, Texas Civil Rights Project (Mar. 2019), <https://txcivilrights.org/wp-content/uploads/2020/05/2019-Election-Protection-Report.pdf>

<sup>196</sup> *Id.* at p. 4.

<sup>197</sup> Settlement Agreement, Dkt. 113-1, *Stringer v. Hughs*, No. SA-20-cv-46-OG (W.D. Tex. Aug. 2, 2021).

<sup>198</sup> *Register to Vote*, VoteTexas.gov, <https://www.votetexas.gov/register-to-vote/you-must-register-by.html> (last visited July 30, 2021).

<sup>199</sup> *Same Day Voter Registration*, NCSL (May 7, 2021), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> (last visited July 30, 2021).

<sup>200</sup> Dan Rosenzweig-Ziff, *Texas Begins Letting People Register to Vote Online When They’re Updating Their Driver’s Licenses*, The Texas Tribune, (Sept. 23, 2020), <https://www.texastribune.org/2020/09/23/register-vote-online-texas/>.

<sup>201</sup> Beth Stevens, et al., *The High School Vote: How Texas Fails to Engage the Next Generation of Voters*, Texas Civil Rights Project, (Sept. 2017), <https://texascivilrightsproject.org/wp-content/uploads/2018/02/HSVR-Report.pdf>.

<sup>202</sup> *Id.*



public high schools in Texas requested voter registration applications from the Secretary of State.”<sup>203</sup>

Impediments to voter registration kept some Texans eligible to vote from voting in the November 2020 election. Even Texans who attempted to register in advance of the registration deadline never had their applications processed so were unable to vote in the election. Serena Ivie submitted her registration materials in September 2020 after encountering difficulty navigating the state’s voter registration process, it was only after the deadline to register had passed that she learned the state had never processed her application, leaving her unable to vote.<sup>204</sup> When reflecting on the experience, Ivie said “I was disappointed that I’d let myself down, and I really felt that I screwed up. It was a huge letdown, and I, in turn, feel like I’m letting my country down.”<sup>205</sup>

## 2. Purges and S.B. 1

Beyond generalized registration challenges, voter roll purges have long been a contentious issue and nexus for disenfranchisement in Texas—and the state has had a long history of aggressive purges. Texas does not report its voting roll purge data annually, as many states do, so precise data is lacking. But a 2018 study conducted by the Brennan Center for Justice offers a window into the scope of the problem.<sup>206</sup> That analysis found that beginning in 2012, the pace of purges accelerated, and 363,000 more voters were removed from the rolls between 2012 and 2014 than were removed between 2008 and 2010.<sup>207</sup> The trend continued after *Shelby County*, with counties reporting data showing a median increase in their purge rate of 3.5%. This dovetails with national evidence that the median purge rate in jurisdictions covered by preclearance at the time of *Shelby County* was 40% higher than in other jurisdictions.<sup>208</sup>

The volume of these purges is especially concerning given the unreliable methods employed by the state in trying to cull its voter rolls. For instance in 2012, Texas conducted a purge of voters presumed to be dead. But in cross-referencing against the Social Security Administration’s Death Master File, Texas included so-called “weak” data matches—in other words, “matches” for which the possibility that the person identified was actually deceased was too low to be

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<sup>203</sup> *Id.*

<sup>204</sup> Karen Brooks Harper, *Despite Record Turnout, Some Texas Voters Were Still Shut Out*, The Texas Tribune, (Nov. 6, 2020), <https://www.texastribune.org/2020/11/06/texas-voting-access-turnout/>.

<sup>205</sup> *Id.*

<sup>206</sup> Jonathan Brater, *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

<sup>207</sup> *Id.*

<sup>208</sup> Kevin Morris, *Voter Purge Rates Remain High, Analysis Find*, Brennan Center for Justice (Aug. 21, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

trusted—in the group marked for removal.<sup>209</sup> By some estimates, as many as 68,000 of the 80,000 voters flagged as possibly dead were “weak” matches.<sup>210</sup>

And unsurprisingly, Texas’s aggressive purges disproportionately affect would-be voters and voters of color. Texas is one of the first states with statutory requirements that voting officials attempt to identify and purge noncitizens from the rolls, and the state has engaged in a number of flawed practices in attempting to ferret out and purge noncitizens from the rolls. Such measures clearly target and disproportionately affect the state’s large Latino and immigrant community. For example, Texas is one of three states that remove voters from the rolls if they decline jury service on the basis of non-citizenship—even though significant evidence exists suggesting that many eligible voters wrongfully attempt to evade jury service by citing a lack of citizenship but nonetheless remain eligible to vote.<sup>211</sup>

In 2019, MALDEF, AALDEF, and AACJ challenged a purge of as many as 100,000 voters suspected of being noncitizens.<sup>212</sup> Specifically, Texas officials singled out naturalized citizens for investigation and potential removal from voter rolls based on their birth outside of the United States. Based on the testimony of their Latino clients who had received purge letters, the organizations won a temporary restraining order to stop the purge.<sup>213</sup> The judge noted that the state’s investigation was “inherently paved with flawed results, meaning perfectly legal naturalized Americans were burdened with what the Court finds to be ham-handed and threatening correspondence from the state which ... exemplifie[d] the power of government to strike fear and anxiety and to intimidate the least powerful among us.”<sup>214</sup> Texas subsequently settled the case and adopted a policy that would not flag voters for purges based on documents that were older than the voters’ registration.<sup>215</sup>

Ominously, given this history of suspicious purges, S.B. 1 would direct more aggressive purges of suspected noncitizens in the future, requiring both pre- and post-voting purges. Moreover, S.B. 1 requires that election officials be fined \$1000-a-day if they fail to promptly update

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<sup>209</sup> Brater, *supra* note 206.

<sup>210</sup> *Id.*

<sup>211</sup> Christopher Famighetti, et al., *Noncitizen Voting: The Missing Millions*, Brennan Center for Justice (2017), [https://www.brennancenter.org/sites/default/files/publications/2017\\_NoncitizenVoting\\_Final.pdf](https://www.brennancenter.org/sites/default/files/publications/2017_NoncitizenVoting_Final.pdf)

<sup>212</sup> Order, Texas League of United Latin American Citizens, et al. v. Whitley, No. SA-19-CA-074-FB (Feb. 27, 2019), <https://www.maldef.org/wp-content/uploads/2019/04/61-ORDER-DENYING-20-Motion-to-Dismiss.pdf>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Alexa Ura, *Texas Will End its Botched Voter Citizenship Review and Rescind its List of Flagged Voters*, The Texas Tribune (Apr. 26, 2019), <https://www.texastribune.org/2019/04/26/texas-voting-rights-groups-win-settlement-secretary-of-state/>.

registration lists or obstruct poll-watchers during voting.<sup>216</sup> Understanding that poll watchers and the specter of illegal voting often looms in polling sites in minority neighborhoods, S.B. 1 would not only solidify purges of minority voters on voter rolls, but purges of minority voters' ballot results.<sup>217</sup>

### 3. Polling Place Issues

Texas is also plagued by familiar and chronic polling place failures across the state, including poll closures, late poll openings, lines as long as three hours at polling places across the state, voting machine malfunctions, and voter intimidation.<sup>218</sup> Latino voters were the most likely to report problems at the polls.<sup>219</sup>

#### a. Closures

Texas has closed numerous polling locations, disproportionately impacting Black and Latino voters' ability to access the polls. A 2019 Leadership Conference Education Fund report found that Texas had closed 750 polling sites since *Shelby County*.<sup>220</sup> *The Guardian* found that the 50 Texas counties with the most Black and Latino residents had 542 polling place closures between 2012 and 2018, whereas the counties with the least Black and Latino representation saw just 34 polling place closures during the same time period.<sup>221</sup> Polling place closures in majority-minority counties made up a significant proportion of the state's overall polling place closures, limiting the ability of Black and Brown voters to access the polls.<sup>222</sup> For example, Dallas County, where Latinos make up 41% of the population and African Americans represent 22% of the population, lost 74 polling locations.<sup>223</sup> Additionally, counties that saw growth in their Black and Latino populations closed a significant number of polling places. For example, McLennan

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<sup>216</sup> See S.B. 1, 87th Legis., 1st Sess. (Tex. 2021).

<sup>217</sup> Trump Challenge to Election Results Hits Hardest at Black Voters, *Bloomberg*, (Nov. 21, 2020), <https://www.bloomberg.com/news/articles/2020-11-21/trump-challenge-to-election-results-hits-hardest-at-blackvoters>.

<sup>218</sup> Eby, *supra* note 195.

<sup>219</sup> *Id.*

<sup>220</sup> *Democracy Diverted: Polling Closures and the Right to Vote*, THE LEADERSHIP CONFERENCE EDUCATION FUND (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

<sup>221</sup> Richard Salame, *Texas Closes Hundreds of Polling Sites, Making it Harder for Minorities to Vote*, *The Guardian* (Mar. 9, 2020), <https://www.theguardian.com/us-news/2020/mar/02/texas-polling-sites-closures-voting>.

<sup>222</sup> *Democracy Diverted: Polling Closures and the Right to Vote*, *supra* note 220.

<sup>223</sup> *Id.*

County lost 44% of its polling stations while its share of Black and Latino residents also increased.<sup>224</sup> In many counties, local polling places closed in favor of larger voting centers.<sup>225</sup>

The closure of polling places has curtailed minority access to the polls. Research has shown that in what has been described as the “tyranny of distance,”<sup>226</sup> the farther people need to travel to cast their ballot, the less likely they are to vote.<sup>227</sup> According to Beth Stevens, director of the Texas Civil Rights Project’s Voting Rights Program:

“Voters often don’t hear that a beloved polling location near their home has closed until Election Day, forcing them to make disruptive changes on the spur of the moment to work schedules, childcare plans, and transportation arrangements. Even when they do hear about it ahead of time, voters may have to choose between going to a new polling place significantly further away and working enough hours that day to put food on the table — it’s an impossible choice.”<sup>228</sup>

Polling place closures and the shift to voting centers in Texas have made it harder for voters of color to exercise their right to vote and keep marginalized communities out of the election process, impacting the representation they get in state and local offices.

The problem of polling place closures is exacerbated by the State’s failure to update voters about the status of their polling place. The Texas Civil Rights Project found that “[w]ebsites, including those of the Texas Secretary of State and Bell, Dallas, Harris, Hays, and Travis Counties, malfunctioned or crashed at some point throughout Election Day, leaving voters stranded without answers to basic questions about where to vote or what they were voting on.”<sup>229</sup> Difficulty accessing basic information about where and how to vote further disenfranchises voters, especially voters of color who already face challenges accessing the voting system and exercising their right to vote.

#### b. Long Lines

Voters in Texas have reported long lines to vote, including in extremely hot weather. The Texas Civil Rights Project documented voter experiences with long lines during Texas’s March 2020 primary election. Voters in Bexar, Collin, Denton, Dallas, Freestone, Fort Bend, Harris, Hays, Tarrant, Travis, and Williamson Counties reported long lines and hours-long wait times during

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<sup>224</sup> Salame, *supra* note 221.

<sup>225</sup> *Democracy Diverted: Polling Closures and the Right to Vote*, *supra* note 220.

<sup>226</sup> Native America Rights Fund, *Obstacles at Every Turn: Barriers to Political Participation by Native Americans* 32, 95 (2020).

<sup>227</sup> Salame, *supra* note 221.

<sup>228</sup> *Democracy Diverted: Polling Closures and the Right to Vote*, *supra* note 220.

<sup>229</sup> Louis Bedford and Faith Castillo, *A Texas-Sized Disaster: Lessons From the Primary Election to Carry into November*, TEXAS CIVIL RIGHTS PROJECT, (Sept. 2020), <https://txcivilrights.org/wp-content/uploads/2020/09/EP-Report-2020.pdf>.

the primary election.<sup>230</sup> “Voters in Harris County were left without water, chairs, or A/C, endangering elderly voters in particular, with one voter nearly fainting while waiting in line. At this same location, an elderly voter went to go get water after waiting in line for hours and was not permitted back in line because it was after 7 p.m.”<sup>231</sup>

The experiences of individual voters during the March 2020 Primary election illustrate problems with long lines and voter suppression. Hervis Rogers, a Black resident of Houston, waited in line for nearly seven hours before casting his vote at a Texas Southern University polling place on the day of the March 2020 primary election. Rogers said “I wanted to get my vote in to voice my opinion. I wasn’t going to let them stop me, so I waited it out.” He considered leaving, noting the voting system “was set up for me to walk away. But I said I’m not going to do that.”<sup>232</sup> Marleta Haynes also voted at the Texas Southern University polling place in March 2020; she was initially deterred by the long line at 4 p.m. but returned at 6:50 that evening, and waited until midnight to cast her vote. After hours waiting outside the polling place, Haynes realized the line continued inside the building, saying to herself “‘Okay, I don’t think I can do this. I don’t think I can do this.’ But I started texting my friends, and they were like, ‘You’ve been waiting in line for too long; you cannot give up now.’”<sup>233</sup> Kim Rivers, a Texas Southern University freshman, voted for the first time in March 2020. She waited two hours to vote—a delay attributed to the number of voting machines allotted for Democrats which resulted in long lines. She said “Being in an all-black community, you know there’s not many Republicans coming to vote. Especially on campus at an HBCU. So why do y’all have a whole five voting machines and only five for the Democrats?”<sup>234</sup> There were also reports of people with disabilities being unable to vote because of long wait times and parents waiting for hours with young children.<sup>235</sup>

#### 4. Absentee Voting

As it was across the country, absentee voting in Texas was a flashpoint for significant litigation and voting access issues in recent years. The number of mail-in ballots more than doubled in 2020 compared to 2016, and Texas voters cast more than 1 million absentee ballots in the 2020

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> William Cummings, ‘I Wasn’t Going to Let Anything Stop Me’: Texas Voter Waits Six Hours to Vote on Super Tuesday, USA Today, (Mar. 4, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/03/04/super-tuesday-texas-man-waits-six-hours-vote/4952084002/>.

<sup>233</sup> Elise Viebeck, *Long Voting Lines in Texas Spotlight Concerns About Access to the Polls*, The Washington Post, (Mar. 4, 2020), [https://www.washingtonpost.com/politics/long-voting-lines-in-texas-spotlight-concerns-about-access-to-the-polls/2020/03/04/e729486a-5e2e-11ea-b014-4fafa866bb81\\_story.html](https://www.washingtonpost.com/politics/long-voting-lines-in-texas-spotlight-concerns-about-access-to-the-polls/2020/03/04/e729486a-5e2e-11ea-b014-4fafa866bb81_story.html).

<sup>234</sup> *Id.*

<sup>235</sup> Bedford and Castillo, *supra* note 229.

election. Nonetheless, access to absentee ballots was more circumscribed in Texas than most states.

During the 2020 election cycle, voters in twenty-one counties experienced difficulties with the absentee voting system.<sup>236</sup> Harris County tried to implement universal mail-in ballot voting in light of the COVID-19 pandemic, but Texas Attorney General Ken Paxton and Governor Abbott intervened to prevent an expansion of mail-in ballot access.<sup>237</sup> Under generally applicable Texas election law, mail-in ballots are only available for voters over the age of 65 or with a disability under the ADA.<sup>238</sup> After decisions by the Fifth Circuit, the Texas Supreme Court, and the U.S. Supreme Court, the state’s order was enforced to prevent universal mail-in voting.<sup>239</sup> Separate litigation resolved that under state law, a lack of immunity to the COVID-19 virus did not provide a qualifying “disability” under state law.<sup>240</sup>

In order to accommodate this increased absentee ballot voting and delays in postal service, several of the state’s most populous counties increased the number of ballot drop boxes. In October 2020, Texas Governor Greg Abbott issued an order limiting each county to one ballot drop box.<sup>241</sup> The order was challenged as *ultra vires* in both state and federal courts, but both the Texas Supreme Court and the Fifth Circuit sided with the governor.<sup>242</sup> Harris County was forced to reduce its number of ballot boxes from twelve to one; Travis County also reduced its four drop boxes to one.<sup>243</sup>

Several other aspects of Texas’s mail-in ballot process also present obstacles or provide inadequate safeguards. For instance, Texas law allows counties to reject mail-in ballots for signature mismatches without offering voters an opportunity to “cure” such a defect. That

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Chuck Lindell, *Texas Supreme Court: Mail-In Voting Can’t Expand Over Lack of Coronavirus Immunity*, Statesman (May 28, 2020), <https://www.statesman.com/news/20200527/texas-supreme-court-mail-in-voting-can-quot-expand-over-lack-of-coronavirus-immunity>; <https://www.texastribune.org/2020/05/27/texas-vote-by-mail-coronavirus/>.

<sup>241</sup> Proclamation by the Governor of the State of Texas (Oct. 1, 2020), [https://gov.texas.gov/uploads/files/press/PROC\\_COVID-19\\_Nov\\_3\\_general\\_election\\_IMAGE\\_10-01-2020.pdf](https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_10-01-2020.pdf).

<sup>242</sup> Opinion, *Abbott v. Anti-Defamation League Austin, SW and Texoma Regions*, No. 20-0846 (Tex. Oct. 27, 2020), <https://www.brennancenter.org/sites/default/files/2020-10/Per%20Curiam.pdf>.

<sup>243</sup> Ashley Killough and Caroline Kelly, *Texas Supreme Court Sides with Governor on Rule Requiring One Ballot Drop Box Per County*, CNN (Oct. 27, 2020), <https://www.cnn.com/2020/10/27/politics/texas-supreme-court-drop-boxes/index.html>.

provision was also the subject of litigation, with the Fifth Circuit ruling that the Texas provision—an outlier amongst state procedures—was permissible for the 2020 election.<sup>244</sup>

Voters experienced these challenges as they tried to cast their ballot. “A college student who attends university outside of Texas, but considers San Antonio his place of residence, received his ballot in the mail at 8:30 p.m. Eastern Standard Time in New York City on the day of the March Primary—well after the 7:00 p.m. Central Standard Time postmark requirement.”<sup>245</sup> Additionally, “[a] truck driver was in El Paso being treated for cancer and did not receive her requested absentee ballot from Kaufman County. The voter was ultimately unable to vote as she could not make it physically back to her county with enough time to vote.”<sup>246</sup> Stories like this illustrate the problems with absentee voting in the state.

During the July 2020 runoff election, Dallas County voters reported having their absentee ballots returned to them without explanation. Dorit Suffness described her returned ballot, “it doesn’t say why. It just comes back.”<sup>247</sup> Norma Collins and Julia Diffily made multiple trips to the post office to submit their returned ballots; upon sending them a second time Collins said “[n]ow, we’re just holding our breath hoping we don’t see them back here on Monday.”<sup>248</sup> Experiences like this have decreased voter confidence in their votes being counted and the absentee voting system as a whole.

Problems with the absentee voting system persisted during the November 2020 election and prevented Texans from casting ballots. Wanda Kizzee, a traveling nurse who was in California at the time of the election did not receive her mail-in ballot and was therefore unable to vote in the election.<sup>249</sup> She said “[i]t’s very frustrating because I felt like my right to be heard was stripped from me by no fault of my own. It wasn’t that I didn’t want to vote, or anything like that. I really wanted to vote, and it was just taken away from me. This has never happened to me, and I almost think it’s criminal that it did.”<sup>250</sup> Kizzee was not alone; many other Texans experienced similar difficulties accessing the state’s absentee voter system. Lauren Nip’s absentee voter application did not reach her local elections office; she described the experience

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<sup>244</sup> Karen Brooks Harper, *Texas Can Reject Mail-In Ballots Over Mismatched Signatures Without Giving Voters a Chance to Appeal, Court Rules*, The Texas Tribune (Oct. 19, 2020) <https://www.texastribune.org/2020/10/19/texas-mail-in-ballots-signatures/>.

<sup>245</sup> Bedford and Castillo, *supra* note 229.

<sup>246</sup> *Id.*

<sup>247</sup> Marc Ramirez, *Dallas County Absentee Voters Say Mailed Ballots are Inexplicably Being Returned with Days Left Before Election*, The Dallas Morning News, (July 11, 2020), <https://www.dallasnews.com/news/elections/2020/07/11/dallas-county-absentee-voters-say-mailed-ballots-are-inexplicably-being-returned-with-days-left-before-election/>.

<sup>248</sup> *Id.*

<sup>249</sup> Karen Brooks Harper, *Despite Record Turnout, Some Texas voters Were Still Shut Out*, The Texas Tribune, (Nov. 6, 2020), <https://www.texastribune.org/2020/11/06/texas-voting-access-turnout/>.

<sup>250</sup> *Id.*

as “frustrating to have a voice in these elections but not be able to use it.”<sup>251</sup> In the November 2020 election, 5.7 million Texans who were registered to vote did not cast ballots.<sup>252</sup> Calls to voter hotlines, posts on social media, and other reports indicate many Texans tried to vote but faced impediments like barriers to access the absentee voter system.

## 5. Election Protection Data

The Texas Secretary of State has not provided election protection information, though a group of non-profits working on election administration and voting access, the Texas Election Protection Coalition, ran a voter protection hotline and organized poll workers in 2020 and collected data on election protection issues.<sup>253</sup> Data from the March 2020 primary revealed at least 2,421 reports of election administration issues from the hotline or poll workers. Harris, Dallas, Travis, Tarrant, and Bexar Counties were the jurisdictions with the most number of tickets.<sup>254</sup> The below table features many of the election protection issues that emerged and their frequency.

<b>Issue</b>	<b>Number of Reports/Tickets</b>
Political Apparel/Electioneering	82
Registration Lookup & Provisional Ballots	197
Assistance with Voting	199
Voter ID	262
Where to Vote & Precinct Questions	954
Poll Worker Misinformation	53
Intimidation / Challenges	85
Long Lines	122
Ballot Issues	162
General Information	263

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Bedford and Castillo, *supra* note 229.

<sup>254</sup> A ticket refers to a filing by a voter indicating an issue with voting.



## 6. Persistence of Racially Polarized Voting

In relation to vote dilution under Section 2 of the VRA, “the legal concept of racially polarized voting” refers to “the existence of a correlation between the race of voters and the selection of certain candidates.”<sup>255</sup> In *League of United Latin Am. Citizens v. Perry*, the Supreme Court acknowledged the prevalence of racially polarized voting “through the state.”<sup>256</sup>

Racially polarized voting persists in Texas. In 2016, the Fifth Circuit Court of Appeals note that “Texas has conceded that racially polarized voting exists in 252 of its 254 counties.”<sup>257</sup> In fact, in *Veasey*, “[t]he State did not contest” the district court’s conclusion “that racially polarized voting exists *throughout* Texas.”<sup>258</sup> Among the bases of that conclusion was “that the gap between Anglo and Latino Republican support is between 30 and 40 percentage points.”<sup>259</sup>

## V. CONCLUSION

This report demonstrates that discriminatory voting restrictions remain common in Texas, and that there are very active and sweeping attempts to expand their reach. At the same time, the Supreme Court’s decisions in *Shelby County* and *Brnovich* have dramatically undermined the ability of the courts and the Department of Justice to rein in such practices. There is a long-standing and very well-documented pattern of persistent and adaptive voting discrimination in Texas that has been recognized in Supreme Court opinions. Moreover, in *LULAC*, the U.S. Supreme Court recognized that a very familiar pattern in voting discrimination—cutting off minority voting opportunities just as cohesive groups of minority voters are on the verge of exercising their political power—is still present on a statewide level in Texas in ways that “bear the mark” of intentional discrimination. Texas thus demonstrates that vigorous voting rights enforcement is necessary in securing the vote and that a full array of VRA tools, among others, to protect free and unbridged elections, are required.

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<sup>255</sup> *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986).

<sup>256</sup> 548 U.S. 399, 427 (2006) (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 493 (E.D. Tex. 2004)).

<sup>257</sup> *Veasey v. Abbott*, 830 F.3d 216, 258 (5th Cir. 2016) (affirming finding that voter identification law had discriminatory effect) (emphasis added).

<sup>258</sup> *Id.* (emphasis added).

<sup>259</sup> *Id.* (citing *Veasey v. Perry*, 71 F. Supp. 3d 627, 685 (S.D. Tex. 2014)).

**APPENDIX 1: 2016 SECTION 203(c) COVERAGE DETERMINATION DATA**

The tables below show Texas localities covered by Section 203. For each locality, “LEP Number (N)” refers to the number of voting age citizens in the identified language group who are limited-English proficient, or “LEP;” a person is LEP if they speak English less than “very well.” “LEP Percent (P)” refers to the percentage of voting age citizens in the identified language group who are LEP. “Illiteracy Rate” refers to the percent of voting age citizens in the identified language group who are LEP and low literate.

<b>Texas Jurisdictions Covered by Section 203 for Spanish Language</b>				
<b>Covered Jurisdiction</b>	<b>Total Population</b>	<b>Number LEP (N)</b>	<b>Percent LEP (P) (%)</b>	<b>Illiteracy Rate (%)</b>
<b>Texas</b>	<b>9,962,645</b>	<b>909,535</b>	<b>5.50</b>	<b>15.43</b>
Andrews County	8,360	585	5.76	16.24
Atascosa County	28,945	3,725	11.75	17.45
Bailey County	4,210	415	10.64	24.10
Bee County	18,510	1,500	6.12	24.67
Bexar County	1,055,570	85,360	7.22	13.98
Brooks County	6,555	895	17.05	23.46
Caldwell County	18,845	1,730	6.31	10.98
Calhoun County	10,220	765	5.14	22.88
Cameron County	366,890	43,275	20.07	20.50
Castro County	4,935	560	12.64	30.36
Cochran County	1,670	225	11.90	33.33
Crane County	2,685	395	14.01	18.99
Crockett County	2,455	315	12.35	19.05
Crosby County	3,220	345	8.36	36.23
Culberson County	1,845	215	13.31	39.53

**Texas Jurisdictions Covered by Section 203 for Spanish Language**

<b>Covered Jurisdiction</b>	<b>Total Population</b>	<b>Number LEP (N)</b>	<b>Percent LEP (P) (%)</b>	<b>Illiteracy Rate (%)</b>
Dallam County	2,900	235	5.50	19.15
Dallas County	950,160	76,225	5.41	13.17
Dawson County	7,385	905	9.47	30.39
Deaf Smith County	13,350	1,175	10.77	24.68
Dimmit County	9,050	1,405	19.72	22.42
Duval County	10,300	1,315	15.34	18.25
Ector County	80,170	6,945	7.74	14.47
Edwards County	995	190	11.69	50.00
El Paso County	670,945	104,465	22.25	11.78
Floyd County	3,440	235	5.60	27.66
Fort Bend County	151,615	11,785	3.06	14.00
Frio County	13,920	1,450	12.31	23.45
Gaines County	7,080	700	7.31	21.43
Garza County	3,465	295	9.98	15.25
Glasscock County	345	40	5.26	25.00
Hale County	20,620	1,760	7.50	27.27
Hansford County	2,470	160	5.10	12.50
Harris County	1,766,485	153,920	6.32	13.32
Hidalgo County	733,180	75,545	20.04	22.07
Hockley County	10,535	985	6.20	25.38
Hudspeth County	2,635	275	17.41	23.64

**Texas Jurisdictions Covered by Section 203 for Spanish Language**

<b>Covered Jurisdiction</b>	<b>Total Population</b>	<b>Number LEP (N)</b>	<b>Percent LEP (P) (%)</b>	<b>Illiteracy Rate (%)</b>
Jeff Davis County	850	90	5.29	44.44
Jim Hogg County	4,890	615	16.21	15.45
Jim Wells County	32,775	3,780	13.23	21.69
Jones County	5,250	945	5.95	13.23
Karnes County	7,590	845	7.54	28.99
Kenedy County	385	55	17.19	7.27
Kinney County	2,215	175	7.22	20.00
Kleberg County	22,825	2,180	9.59	15.83
Knox County	1,210	155	5.86	41.94
La Salle County	5,970	930	20.48	22.58
Lamb County	7,365	750	8.26	31.33
Live Oak County	4,265	500	5.62	26.00
Lynn County	2,720	260	6.51	26.92
Martin County	2,340	200	6.46	25.00
Matagorda County	14,430	1,505	6.02	20.27
Maverick County	53,195	9,355	35.71	12.77
McMullen County	365	30	5.88	33.33
Medina County	23,675	2,250	6.63	20.89
Menard County	815	125	8.14	16.00
Midland County	58,705	5,395	5.55	15.48
Moore County	11,655	1,060	9.63	15.09

**Texas Jurisdictions Covered by Section 203 for Spanish Language**

<b>Covered Jurisdiction</b>	<b>Total Population</b>	<b>Number LEP (N)</b>	<b>Percent LEP (P) (%)</b>	<b>Illiteracy Rate (%)</b>
Nolan County	5,255	575	5.28	24.35
Nueces County	214,575	21,120	8.63	17.90
Ochiltree County	5,295	340	6.13	19.12
Parmer County	6,175	725	12.45	9.66
Pecos County	10,590	1,150	10.90	30.00
Presidio County	6,070	835	22.94	20.96
Reagan County	2,375	245	12.50	16.33
Reeves County	10,400	1,215	14.24	32.92
Refugio County	3,545	370	6.86	18.92
San Patricio County	36,190	3,850	8.44	26.10
Schleicher County	1,595	120	5.91	20.83
Scurry County	6,495	745	6.20	14.77
Sherman County	1,290	95	5.34	15.79
Starr County	59,360	11,170	39.93	16.38
Sterling County	490	60	6.82	16.67
Sutton County	2,315	305	11.78	36.07
Swisher County	3,220	295	5.45	20.34
Tarrant County	513,740	35,970	3.01	13.09
Terry County	6,520	765	8.93	20.92
Titus County	13,210	1,335	7.18	19.10
Travis County	368,010	19,250	2.71	14.31

**Texas Jurisdictions Covered by Section 203 for Spanish Language**

<b>Covered Jurisdiction</b>	<b>Total Population</b>	<b>Number LEP (N)</b>	<b>Percent LEP (P) (%)</b>	<b>Illiteracy Rate (%)</b>
Upton County	1,570	115	5.52	26.09
Uvalde County	18,700	1,755	10.17	30.77
Val Verde County	39,310	4,745	16.86	26.45
Ward County	5,475	735	9.74	25.17
Webb County	247,595	42,465	34.38	10.51
Willacy County	19,280	2,030	14.54	24.38
Winkler County	4,150	480	10.80	20.83
Yoakum County	4,900	480	11.31	22.92