Selma to Selma: Modern Day Voter Discrimination in Alabama

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> [A]ll types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal of the highest mandates of our democratic tradition. And so our most urgent request to the [P]resident of the United States and every member of Congress is to give us the right to vote.
>
> Give us the ballot, and we will no longer have to worry the federal government about our basic rights. — Martin Luther King, Jr., May 17, 1957[1]

Alabama's long and regretful history of racial discrimination begins, and does not end, in Selma, Alabama. The home of the modern day voting rights movement is also home to one of the country's most stringent voting laws.[2] Passed by the Alabama Legislature in 2011, House Bill 19 requires voters to present photographic identification before casting a ballot,[3] and is estimated to disenfranchise between 250,000 and 500,000 voters.[4]

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1. Martin Luther King, Jr., Address at the Prayer Pilgrimage for Freedom (May 17, 1957) (transcript available at http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_give_us_the_ballot_address_at_the_prayer_pilgrimage_for_freedom/).

2. *Compare* ALA. CODE § 17-9-30 (2011) (requiring that voters, with very few exceptions, present a government-issued photo ID at the polls), *with* Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 26, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (noting that 18 states do not require voters to present photo IDs at the polls, but instead use other methods to verify the identity of voters).

3. § 17-9-30.

4. BEN JEALOUS & RYAN P. HAYGOOD, CTR. FOR AM. PROGRESS ET AL., THE BATTLE TO PROTECT THE VOTE: VOTER SUPPRESSION EFFORTS IN FIVE STATES AND THEIR EFFECT ON THE 2014 MIDTERM ELECTIONS 8 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/VoterSupression-report-Dec2014.pdf.

Because of its history of racial discrimination, the State of Alabama was subject to federal preclearance[5] from the passage of the Voting Rights Act in 1965 until the Supreme Court handed down its decision in *Shelby County v. Holder* on June 25, 2013.[6] Under the federal preclearance requirements, prior to 2013, Alabama was required to seek federal approval before implementing any changes to its voting practices or procedures to ensure that the changes would not have a discriminatory effect on minority voters.[7]

After passing House Bill 19 in 2011, the State delayed implementation of the legislation pending the Supreme Court's decision in *Shelby County*.[8] Then, just days after the Supreme Court struck down Section 4 of the Voting Rights Act, eliminating the federal preclearance requirement, the law went into effect.[9] Moreover, not long after implementing the bill, the State announced that it would close thirty-one driver's license-issuing offices, many of which were located in predominantly Black counties.[10] In response, Greater Birmingham Ministries and the Alabama chapter of the NAACP filed a lawsuit on December 2, 2015, alleging that the Alabama voter ID law violates Section 2 of the Voting Rights Act, and the Fourteenth and Fifteenth

5. 52 U.S.C. § 10303(b) (2006), *invalidated by* Shelby Cty. v. Holder, 133 S. Ct. 2611, 2631 (2013). Preclearance is the requirement that jurisdictions covered by the Voting Rights Act seek federal approval from the United States Attorney General or U.S. District Court for the District of Columbia before implementing a change in voting practices or procedures. Brian L. Porto, Annotation, *What Changes in Voting Practices or Procedures Must Be Precleared Under § 5 of Voting Rights Act of 1965 (42 U.S.C.A. § 1973c)—Supreme Court Cases*, 146 A.L.R. FED. 619, 619 (1998).

6. 133 S. Ct. 2612 (2013).

7. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUSTICE (Aug. 6, 2015), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5; *see also* 52 U.S.C. § 10303(b) (2006), *invalidated by Shelby Cty.*, 133 S. Ct. at 2631.

8. NAACP LEGAL DEF. & EDUC. FUND, INC., BACKGROUND ON ALABAMA'S DISCRIMINATORY PHOTO VOTER ID LAW: *GREATER BIRMINGHAM MINISTRIES V. ALABAMA* 2, http://www.naacpldf.org/files/case_issue/Greater%20Birmingham%20Ministries%20v.%20Alabama%20Backgrounder.pdf.

9. *See* Bob Johnson, *Alabama Officials Say Voter ID Law Can Take Effect*, THE GADSDEN TIMES (Jun. 26, 2013, 12:01 AM), http://www.gadsdentimes.com/article/20130626/wire/130629842 ("[T]he Supreme Court's ruling on Monday throwing out part of the federal Voting Rights Act means the state does not have to submit for preclearance a new law requiring voters to show photo identification. [Alabama Attorney General] Strange said the voter identification law will be implemented immediately.").

10. Ari Berman, *Alabama, Birthplace of the Voting Rights Act, Is Once Again Gutting Voting Rights*, THE NATION (Oct. 1, 2015), http://www.thenation.com/article/alabama-birthplace-of-voting-rights-act-once-again-gutting-voting-rights/.

Amendments to the United States Constitution.[11] Plaintiffs alleged that the law not only has a disproportionate effect on the ability of minority voters to elect candidates of their choice, but was also motivated by that discriminatory purpose.[12]

The United States District Court for the Northern District of Alabama should act quickly in resolving this issue. Specifically, the court should grant the requested relief: a declaratory judgment that Alabama's voter ID law is a violation of Section 2 of the Voting Rights Act, and should issue a permanent injunction on its enforcement.[13] Although Alabama is no longer subject to federal preclearance, its history of racial discrimination has not been erased. Thus, the court should consider Alabama's past and recent history of racial discrimination in striking down the voter ID law as a violation of Section 2's prohibition on voting practices and procedures that deny or infringe the right to vote on account of race or color.

Part I of this Note discusses the history of racial discrimination in voting practices and procedures in Alabama that led to the passage of the 1965 Voting Rights Act. Part II provides an overview of the Voting Rights Act and relevant precedent, and discusses the history and current status of federal preclearance under Sections 4 and 5, as well as the prohibition on voter discrimination outlined in Section 2. Next, Part III describes Alabama's voter ID law. Part IV analyzes the current case challenging the voter ID law under Section 2 of the Voting Rights Act. Finally, Part V argues that the Alabama District Court currently considering the validity of Alabama's voter ID law should strike down the law as a violation of Section 2 of the Voting Rights Act.

I. Background

In the aftermath of the Civil War, the Thirteenth,[14] Fourteenth,[15] and Fifteenth Amendments[16] were ratified to

11. Complaint at 5, Greater Birmingham Ministries v. Alabama, No. 2:15-cv-02193-LSC (N.D. Ala. Dec. 2, 2015).

12. *Id.* at 5.

13. *Id.* at 66–67.

14. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . .").

15. U.S. CONST. amend XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

safeguard the rights of recently emancipated slaves.[17] The Fifteenth Amendment declares that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[18] Furthermore, Congress was given the power to protect the rights guaranteed by these so-called Civil War Amendments through the passage of appropriate legislation.[19] Nonetheless, in the years following the Civil War, efforts to disenfranchise Black voters continued throughout the states in the form of poll taxes, literacy tests, and acts of violence perpetrated by white supremacist groups.[20] The history of racial discrimination in the years following the Civil War was especially prominent in the South, and the 1901 Alabama Constitution is a stark example of nationwide attempts to legally disenfranchise Black voters.[21]

At the 1901 Constitutional Convention, there were 155 delegates; all of them were White.[22] In an opening address, the president of the convention made clear that the constitution's purpose was to establish white supremacy by force of law.[23] The

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within its jurisdiction equal protection of the laws.").

16. U.S. CONST. amend XV, § 1.

17. GARY MAY, BENDING TOWARDS JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY xi (2013).

18. U.S. CONST. amend XV, § 1.

19. U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

20. MAY, *supra* note 17, at ix ("[F]or an African American living in the Deep South in the 1960s . . . [voting] was a forbidden act, a dangerous act. There were nearly impossible obstacles to overcome: poll taxes, literacy tests, and hostile registrars. If a person succeeded and was allowed to vote, his name was published in the local newspaper, alerting his employers and others equally determined to stop him. The black men and women who dared to vote lost their jobs, their homes, and, often, their lives.").

21. *See* Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67, 70–71 (2001) (discussing the white supremacists' social and political movement aimed at solidifying the purported inferiority of African Americans in Alabama through violence, legal disenfranchisement, and promotion of new "scientific" theories such as survival of the fittest and eugenics that led up to the 1901 constitutional convention).

22. MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798–1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 263 (Fletcher M. Green et al. eds., 1955).

23. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, COMMENCING MAY 21, 1901, at 12 (1901) ("[I]t is[] within the limits imposed by the Federal Constitution[] to establish white supremacy in this State."); *see also* Flynt, *supra* note 21, at 71 (discussing Convention President John B. Knox's opening address at the 1901 Constitutional Convention and noting that it was well understood by delegates that the central purpose of the Convention was to establish white supremacy by force of law).

delegates looked to Louisiana, Mississippi, North Carolina, and South Carolina as pioneers in the disenfranchisement movement, as each of these states had passed constitutional amendments requiring poll taxes, literacy tests, or property ownership as a prerequisite to voting.[24] Out of the Alabama Constitutional Convention came recommendations to implement the following as prerequisites to the right to vote: a poll tax of $1.50 per year; passage of an English literacy test; and ownership of either forty acres of property or property valued at $300. All of these measures proved to have a disproportionate impact on the ability of African Americans to cast ballots.[25] Each of these proposed prerequisites were ratified in the 1901 Alabama Constitution.[26] The consequences of ratification were stark. Before ratification there were 181,000 registered Black male voters, and post-ratification that number dropped to fewer than 5,000.[27] Remarkably, the 1901 constitutional provisions limiting the voting rights of Black citizens remained on the books in Alabama until 1996, when they were finally repealed by constitutional amendment.[28]

In addition to the aforementioned constitutional amendments, state and local governments throughout the country implemented Jim Crow laws enforcing racial segregation.[29] Disenfranchisement across the United States gave rise to the Civil Rights movement of the 1960s, at the center of which was Selma, Alabama.[30] In the early 1960s, members of the Dallas County Voters League and Student Nonviolent Coordinating Committee

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24. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, COMMENCING May 21, 1901, at 13–14 (1901).

25. Flynt, *supra* note 21, at 73.

26. ALA. CONST. Art. VIII, § 194, *amended by* ALA. CONST. amend. No. 579 (1996) ("The poll tax mentioned in this article shall be one dollar and fifty cents."); ALA. CONST. Art. VIII, § 181, *amended by* ALA. CONST. amend. No. 579 (1996) ("[T]he following persons, and no others . . . shall be qualified to register as electors[:] [t]hose who can read and write any article of the Constitution of the United States in the English language . . . [and] [t]he owner . . . of forty acres of land . . . or . . . of real estate situate in this state, assessed for taxation at the value of three hundred dollars or more.").

27. Flynt, *supra* note 21, at 75.

28. ALA. CONST. amend No. 579 (1996).

29. MAY, *supra* note 17, at 6 (noting that "[i]n the twentieth century a different kind of slavery existed for Selma's black residents" in the form of Jim Crow laws); Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J. LEGAL COMMENTARY 649, 684 (2010) ("Jim Crow laws were a series of laws enacted mostly in the Southern United States in the latter half of the nineteenth century that restricted most of the new privileges granted to [B]lacks after the Civil War.").

30. *See* MAY, *supra* note 17, at 6–7.

began staging protests and organizing voter registration drives aimed at ensuring Black Alabama citizens the right to vote.[31] Activists faced strong resistance from authorities in Selma, and received no support from the federal government.[32] On January 2, 1965, Martin Luther King, Jr. addressed a crowd in Selma, Alabama saying,

> Today marks the beginning of a determined, organized, mobilized campaign to get the right to vote everywhere in Alabama. If we are refused, we will appeal to Governor George Wallace. If he refuses to listen, we will appeal to the legislature. If they don't listen, we will appeal to the conscience of the Congress in another dramatic march on Washington . . . . Our cry to the state of Alabama is a simple one, "Give us the ballot!"[33]

King's rallying cry gave rise to what would be known as Bloody Sunday. On March 7, 1965, Alabama State Troopers and local police beat nonviolent protesters—and injured more than fifty—as they attempted to cross the Edmund Pettus Bridge to march from Selma to Montgomery in support of their voting rights.[34] That evening, images of the horrific events were broadcast across the country and over the next several days, thousands of supporters flooded into Selma to stand side-by-side with the protesters.[35]

Meanwhile, President Lyndon B. Johnson was working with his staff to finalize the Voting Rights Act.[36] In the aftermath of Bloody Sunday, attorneys at the Department of Justice concluded that any new law aimed at protecting voting rights must have the force of the federal government behind it.[37] Just over a week after those events, President Johnson appealed to Congress to ensure that no American would continue to be denied the right to vote.[38]

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31. *Id.* at 31–35.

32. *Id.*

33. *Id.* at 54.

34. *Id.* at 85–90; *see also March 7, 1965—Civil Rights Marchers Attacked in Selma*, N.Y. TIMES: THE LEARNING NETWORK (Mar. 7, 2012, 4:07 AM), http://learning.blogs.nytimes.com/2012/03/07/march-7-1965-civil-rights-marchers-attacked-in-selma/?_r=0.

35. MAY, *supra* note 17, at 92–93.

36. *Id.* at 95.

37. U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 11 (1968) ("The Voting Rights Act of 1965 departed from the pattern set by the 1957, 1960, and 1964 Acts in that it provided for direct Federal action . . . ."); *see also* MAY, *supra* note 17, at 95.

38. President Lyndon B. Johnson, Special Message to Congress: The American Promise, Speech Before a Joint Session of Congress (Mar. 15, 1965), *in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, CONTAINING THE PUBLIC MESSAGES, SPEECHES AND STATEMENTS OF THE

President Johnson pleaded with state policymakers, "Open your polling places to all your people. Allow men and women to register and vote whatever the color of their skin."[39] Following his speech, President Johnson issued an executive order authorizing use of the Alabama National Guard, military police, and army troops to protect protesters in Selma.[40] On March 21, 1965, with the National Guard protecting them, about 8,000 protesters left Selma for a five-day march to Montgomery.[41] As the protesters reached Montgomery, Martin Luther King, Jr. addressed the crowd, calling once again for an end to racial injustice and access to the ballot box for *all* Americans.[42] On August 6, 1965, President Johnson signed the Voting Rights Act into law, with the promise of finally giving Black Americans full access to the ballot box.[43]

II. The Voting Rights Act of 1965

The Voting Rights Act was passed in 1965 to ensure that minorities, particularly Black Americans, would not be denied the right to vote on account of their race.[44] At its passage, the Voting Rights Act had two primary provisions: Section 5,[45] which

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PRESIDENT 1965, at 286 (1965) ("Because all Americans just must have the right to vote. And we are going to give them that right. All Americans must have the privileges of citizenship regardless of race. And they are going to have those privileges of citizenship regardless of race.").

39. *Id*.

40. Exec. Order No. 11207, 29 Fed. Reg. 3743 (Mar. 20, 1965); *see also* Rick Harmon, *Timeline: The Selma-to-Montgomery Marches*, USATODAY, (March 6, 2015, 8:42 AM), http://www.usatoday.com/story/news/nation/2015/03/05/black-history-bloody-sunday-timeline/24463923/.

41. Harmon, *supra* note 40.

42. Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965), (transcript available at http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_address_at_the_conclusion_of_selma_march.1.html) ("Let us march on segregated housing until every ghetto or social and economic depression dissolves, and Negroes and [W]hites live side by side in decent, safe, and sanitary housing. Let us march on segregated schools until every vestige of segregated and inferior education becomes a thing of the past, and Negroes and [W]hites study side-by-side in the socially-healing context of the classroom . . . . Let us march on ballot boxes, march on ballot boxes until race-baiters disappear from the political arena.").

43. Harmon, *supra* note 40.

44. President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, CONTAINING THE PUBLIC MESSAGES, SPEECHES AND STATEMENTS OF THE PRESIDENT 1965, at 840–41 (1965) ("Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote.").

45. 52 U.S.C. § 10304 (2006).

operated in tandem with Section 4,[46] and Section 2.[47] Section 5 of the Voting Rights Act was enacted to prevent jurisdictions with a history of racial discrimination from implementing new voting practices unless the Department of Justice determined that the proposed practice would not deny or infringe voting rights on account of race, color, or membership in a language minority group.[48] Section 2 of the Voting Rights Act, which closely mirrors the language of the Fifteenth Amendment, prohibits all jurisdictions from adopting any voting practice or procedure that restricts or denies the right to vote on account of those same characteristics.[49] Although Sections 4 and 5 of the Voting Rights Act were enacted as temporary remedies to the especially prominent discrimination Black voters faced in certain jurisdictions,[50] Section 2 was enacted as a permanent ban on voter discrimination.[51] Since the Voting Rights Act was originally passed in 1965, it has been amended four times[52] and has been the subject of much litigation.[53] The remainder of this section discusses the legislative and legal history of Sections 4 and 5, as well as Section 2.

A. Sections 4 and 5 of the Voting Rights Act: Jurisdictions

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46. 52 U.S.C. § 10303(b) (2006), *invalidated by* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

47. 52 U.S.C. § 10301 (2014).

48. *About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE (Aug. 8, 2015), http://www.justice.gov /crt/about-section-5-voting-rights-act.

49. *Compare* 52 U.S.C. § 10301(a) (2014) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."), *with* U.S. CONST. amend XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

50. *Section 4 of the Voting Rights Act,* U.S. DEP'T OF JUSTICE (Aug. 8, 2015), https://www.justice.gov/crt/section-4-voting-rights-act (noting that the formula for coverage was initially set to expire in 1970).

51. *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE (Aug. 8, 2015), https://www.justice.gov/crt/section-2-voting-rights-act ("Section 2 is permanent and has no expiration date . . . .").

52. Congress amended the Voting Rights Act in 1970, 1975, 1982, and 2006. *History of Federal Voting Rights Laws*, U.S. DEP'T OF JUSTICE (Aug. 8, 2015), http://www.justice.gov/crt/history-federal-voting-rights-laws.

53. *E.g.* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (invalidating Section 4 of the Voting Rights Act); United States v. Sandoval Cty., 797 F. Supp. 2d 1249 (D. N.M. 2011) (holding that continued federal supervision of voting practices and procedures in Sandoval County, New Mexico was warranted under the Voting Rights Act); United States v. Alamosa Cty., 306 F. Supp. 2d 1016 (D. Colo. 2004) (holding that the County's practice of electing commissioners at large was not a violation of the Voting Rights Act).

Subject to Preclearance

At the passage of the Voting Rights Act, Congress was especially concerned about cracking down on jurisdictions that had a history of discriminating on the basis of race in their voting practices and procedures.[54] Thus, Section 5 required jurisdictions subject to preclearance to seek approval—either through administrative review by the Attorney General or via a lawsuit filed in the United States District Court for the District of Columbia—before implementing a change to its voting practices or procedures.[55] In seeking permission to adopt the proposed change, the state or political subdivision needed to prove that the modification would not have the purpose or effect of inhibiting the right to vote on account of race or color.[56] Section 4 of the Voting Rights Act established the formula used to determine which jurisdictions are covered under Section 5 of the Act.[57]

Under Section 4, a jurisdiction was subject to federal preclearance if the following elements were established: (1) on November 1, 1964, the State or political subdivision maintained a "test or device" that restricted the right to vote; and (2) the Director of the Census determined that, on that same date, less than fifty percent of eligible voters were registered or less than fifty percent of voters cast a ballot in the 1964 presidential election.[58] In 1965, seven states, including Alabama, were covered in their entirety.[59] A state or political subdivision that wished to no longer be covered by Section 4 of the Act was required to "bailout"[60] through a declaratory judgment from a three-judge panel in the United States District Court for the District of Columbia.[61] In addition, the state or political subdivision had to demonstrate that, among other requirements,[62] it has not been

54. *Section 4 of the Voting Rights Act*, *supra* note 50.

55. 52 U.S.C. § 10304(a) (2006).

56. 52 U.S.C. § 10304(b) (2006).

57. 52 U.S.C. § 10303(b) (2006), *invalidated by* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

58. *Id.*

59. *Section 4 of the Voting Rights Act*, *supra* note 50.

60. *Id.* ("Section 4 . . . provides that a jurisdiction may terminate or 'bailout' from coverage under the Act's special provisions.").

61. 52 U.S.C. § 10303(a) (2006).

62. Other factors considered were: (1) whether federal examiners had been assigned; (2) whether all changes in voting practices and procedures were reviewed under Section 5; (3) whether any proposed changes were denied by the Attorney General or District Court of the District of Columbia; and (4) whether there had been any violations of the Constitution, federal, or state law with respect to voting practices and procedures. *See* 52 U.S.C. § 10303(a)(1)(C)–(F) (2006).

subject to allegations of voter discrimination, received an adverse judgment in a lawsuit alleging voter discrimination, or used any test or device with the purpose or effect of discriminating in voting practices or procedures.[63]

Section 4 of the Voting Rights Act was set to expire five years after its passage, but Congress reauthorized the provisions in 1970, 1975,[64] 1982,[65] and 2006,[66] determining that there was still a need for these provisions. When Congress reauthorized the Voting Rights Act for the final time in 2006, it discussed the progress that had been made thus far and emphasized that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise the right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[67]

In *Shelby County v. Holder*, however, the Supreme Court struck down Section 4 of the Voting Rights Act, reasoning that states should have broad authority to implement policy without interference from the federal government.[68] In so holding, the Supreme Court overruled a series of cases in which it had previously held that the Voting Rights Act did not exceed Congressional authority to enforce the Fifteenth Amendment.[69] In addition, after the 2006 reauthorization of the Voting Rights Act, a

63. 52 U.S.C. § 10303(a)(1)(A)–(B) (2006).

64. The 1975 amendments broadened coverage to include voting discrimination against members of a language minority group. *Section 4 of the Voting Rights Act*, *supra* note 50.

65. *Id.* (noting that the 1982 amendments to the Voting Rights Act extended the coverage formula for an additional 25 years without making any changes).

66. H.R. REP. NO. 109-478, at 2 (2006) ("The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.").

67. *Id.* at 2.

68. 133 S. Ct. 2612, 2623 (2013) ("Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives.").

69. *E.g.* Lopez v. Monterey Cty., 525 U.S. 266, 269, 294 (1999) (holding that Monterey County, California's effort to implement voting changes was covered under Section 5 and that preclearance requirements do not unconstitutionally violate state sovereignty); Rome v. United States, 446 U.S. 156, 177–78 (1980) (holding that Congress did not intend for voting practices to be precleared unless discriminatory purpose and effect were absent); Georgia v. United States, 411 U.S. 526, 531 (1973) (holding that "reorganization of voting districts and creation of multimember districts in place of single member districts" required administrative or judicial approval); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (holding that Sections 4 and 5, were "a valid means for carrying out the commands of the Fifteenth Amendment").

Texas jurisdiction subject to preclearance filed suit seeking to bailout from the Act or, in the alternative, to challenge the Act's constitutionality.[70] Although the Supreme Court expressed serious concerns about the validity of Sections 4 and 5,[71] it declined to rule on constitutional grounds,[72] holding instead that the district was eligible to seek bailout under the Act.[73]

In *Shelby County*, Shelby County, Alabama, a covered jurisdiction, sued in federal district court, arguing that Sections 4 and 5 of the Voting Rights Act were an unconstitutional infringement on states' rights.[74] Although the Court acknowledged that voter discrimination still existed, it reasoned that the prevalence of voter discrimination that justified Section 4's coverage formula was no longer characteristic of some or all of the covered jurisdictions.[75] On the other hand, the Court acknowledged that the improvements seen in many jurisdictions could be credited, in large part, to the Voting Rights Act itself.[76] Nonetheless, the Court struck down Section 4 of the Act—making Section 5 inapplicable until such time as Congress develops a new coverage formula—because of its basis in "decades-old data and eradicated practices."[77] In a dissenting opinion, Justice Ginsburg warned that, although the Voting Rights Act has gone a long way towards protecting minority voting rights, jurisdictions covered by federal preclearance have continued to attempt to implement legislation that infringes on the right to vote.[78] Justice Ginsburg argued that, with the elimination of the federal preclearance requirement, the country would see an increase in the number of laws that have a negative impact on minority voting rights.[79]

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70. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 196–97 (2009).

71. *Id.* at 203 ("The evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.").

72. *Id.* at 205 (citing Escambia County v. McMillan, 446 U.S. 48, 51 (1984) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.")).

73. *Id.* at 197.

74. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2621–22 (2013).

75. *Id.* at 2618–19.

76. The Court pointed specifically to Selma, Alabama, which, it noted, was once the site of Bloody Sunday, but is now governed by an African American mayor. *Id.* at 2626.

77. *Id.* at 2627.

78. *Id.* at 2634 (Ginsburg, J., dissenting).

79. *Id.*

B. Section 2 of the Voting Rights Act: Prohibition on Voter Discrimination

In the aftermath of *Shelby County v. Holder*, what substance remains of the Voting Rights Act lies in Section 2.[80] In striking down Section 4 of the Voting Rights Act, and thereby making Section 5 inapplicable to any state or political subdivision, the Supreme Court made clear that its decision in *Shelby* did not impact Section 2 of the Act.[81] Going forward, therefore, Section 2 provides the only grounds for challenging voting practices and procedures on the basis that they deny or infringe the right to vote on account of race.[82] The legislative history of the Voting Rights Act sheds some light on the current state of Section 2; its modern history begins with *City of Mobile v. Bolden*.[83]

In 1979, Black citizens of Mobile, Alabama challenged the City's practice of electing its commissioners at large.[84] Plaintiffs alleged that this practice was an unfair dilution of their voting strength, a violation of the Fourteenth and Fifteenth Amendments, and a violation of Section 2 of the Voting Right Act.[85] The Supreme Court rejected the claims, reasoning that for a voting practice to violate the Constitution, it must be motivated by a discriminatory purpose;[86] the same must be true for a voting practice to violate Section 2 of the Voting Rights Act.[87]

Congress responded to the Court's decision in *Bolden* by amending the Voting Rights Act in 1982 to clarify that a violation of Section 2 can be established if a federal, state, or local voting procedure has the purpose *or* effect of improperly diluting the

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80. *See* 52 U.S.C. § 10301(a) (2014).

81. *Shelby Cty.*, 133 S. Ct. at 2631 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

82. *See* 52 U.S.C. § 10301(a) (2014); Myrna Pérez & Jerry H. Goldfeder, *After 'Shelby County' Ruling, Are Voting Rights Endangered?*, BRENNAN CTR. FOR JUSTICE (Sept. 23, 2013), http://www.brennancenter.org/analysis/after-shelby-county-ruling-are-voting-rights-endangered ("In a post-*Shelby County* world . . . voting rights advocates can no longer rely upon the preclearance process to block discriminatory election practices.").

83. 446 U.S. 55 (1980).

84. *Id.* at 58.

85. *Id.*

86. *Id.* at 66–67 ("This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment . . . . [T]his principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination.").

87. *Id.*

votes of members of a minority group.[88] Since the 1982 amendment, Section 2 of the Voting Rights Act reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) is established if, based on the *totality of the circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered . . . .[89]

In amending the Act, the Senate Judiciary Committee outlined the factors to be considered in determining whether a voting practice or procedure denies minority voters the right to participate in the political process and elect candidates of their choice.[90] These factors include: (1) the "history of official racial discrimination in the state or political subdivision" impacting electoral participation; (2) racial polarization of voting and political campaigns; (3) the use of any practices or procedures that increase opportunity for discrimination against a minority group; (4) whether minorities have been denied access to the "candidate slating process"; (5) whether minorities in the state or political subdivision face either purposeful discrimination or the effects of discrimination in other areas such as education, healthcare, or employment; (6) whether political campaigns have been subtly or overtly racist; and (7) whether "members of the minority group have been elected to public office in the jurisdiction."[91] The Committee also emphasized that this list is not comprehensive or exclusive, and a party need not prove any particular number of factors.[92]

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88. 52 U.S.C. § 10301(b) (2014); *see also* S. REP. NO. 97-417, at 27 (1982) ("The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation.").

89. 52 U.S.C. § 10301(a)–(b) (emphasis added).

90. S. REP. NO. 97-417, at 28–29 (1982).

91. *Id.*

92. *Id.*

Thornburg v. Gingles was the first Section 2 case decided by the Supreme Court after the adoption of the 1982 amendments.[93] The Court invalidated a North Carolina redistricting plan on the basis that it had a discriminatory *effect* on the ability of Black citizens to elect candidates of their choice, in violation of Section 2.[94] In so holding, the Court validated the 1982 amendments.[95] Specifically, the Court emphasized that the 1982 amendments expressly rejected the holding in *Bolden*, which required that a court find proof of intent to discriminate against minority voters in order to find that a policy or practice violated Section 2.[96] Thus, the "results in" language added to subsection (a) of Section 2 mandates that a practice or procedure be invalidated if it has the *effect* of denying or infringing the right to vote.[97]

In determining whether a practice or procedure results in the denial or abridgment of the right to vote on account of race, subsection (b) requires a court to look to the "totality of the circumstances."[98] In *Gingles*, the Court used the factors outlined in the 1982 Senate Judiciary Committee report to determine that, under the totality of the circumstances, the North Carolina redistricting plan had a discriminatory effect on the ability of minority voters to elect candidates of their choice.[99] Consequently, after *Gingles*, a plaintiff may use the factors laid out in the Senate Judiciary Committee report to establish that a state or local government's law or practice violates Section 2.[100]

While it is not necessary to prove purposeful discrimination on the basis of race, color, or membership in a language minority group, Section 2 still prohibits such purposeful discrimination.[101] According to the Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, a plaintiff alleging discriminatory intent under Section 2 must prove that adoption of the voting practice or procedure was motivated by "invidious

93. 478 U.S. 30 (1986).

94. *Id.* at 80.

95. *Id.* at 48–49 (discussing the application of the 1982 Voting Rights Act Amendments and accompanying Senate Committee Report factors to claims under Section 2 of the Voting Rights Act).

96. *Id.* at 43–44 (citing City of Mobile v. Bolden, 446 U.S. 55, 66–67 (1980)).

97. *Id.* at 44.

98. 52 U.S.C. § 10301(b) (2014).

99. *Gingles*, 478 U.S. at 44–45; S. REP. NO. 97-417, at 28–29 (1982).

100. *Gingles*, 478 U.S. at 46.

101. 52 U.S.C. § 10301 (2014); *see also Section 2 of the Voting Rights Act*, *supra* note 51.

discriminatory purpose."[102] To determine whether a voting practice or procedure was adopted with invidious discriminatory purpose, courts must consider factors including the "historical background of the decision,"[103] the specific sequence of events leading up to the decision, and the legislative intent or administrative history.[104]

Since *Gingles*, the Department of Justice has brought numerous challenges to voting practices and procedures, many of which have been successful claims that at-large election schemes have a disproportionate impact on minority voting rights in violation of Section 2.[105] In recent years, both the Department of Justice and civil rights groups have also begun to challenge voter ID laws under Section 2.[106] In most instances, however, these challenges have been significantly less successful.[107] In 2014, for example, the Seventh Circuit upheld a Wisconsin voter ID law against allegations that it violated Section 2 because minority voters are less likely to possess the photo identification required to

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102. 429 U.S. 252, 266 (1977).

103. This factor is particularly relevant "if it reveals a series of official actions taken for invidious purposes." *Id.* at 267.

104. *Id.* at 266–68.

105. *E.g.*, Consent Judgment and Decree at 2–4, United States v. Town of Lake Park No. 09-80507-MARRA (S.D. Fla. 2009) (stipulating that Lake Park, Florida would modify its at-large election scheme such that it no longer resulted in the denial or abridgement of the right to vote on account of race or color in violation of Section 2 of the Voting Rights Act); Second Order Extending and Modifying Stipulation and Order Originally Entered April 21, 1994 at 3, United States v. Cibola Cty., No. CIV-93-1134-LH/LFG (D. N.M. 2007) (requiring that Cibola County come into compliance with the Voting Rights Act, the National Voter Registration Act of 1993, and the Help America Vote Act of 1992); Consent Judgment and Decree at 4–5, United States v. Benson Cty., No. A2-00-30 (D.N.D. 2000) (stipulating that Benson County be permanently enjoined from administering elections under its at-large model, which resulted in Native Americans having less opportunity to participate in the political process and elect candidates of their choice). For a comprehensive list of challenges brought under Section 2 of the Voting Rights Act see *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE (July 8, 2016), https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0.

106. *E.g.*, Frank v. Walker, 768 F.3d 744, 755 (7th Cir. 2014), *cert. denied* 135 S. Ct. 1551 (2015) (holding that Wisconsin's Act 23, which required voters to present a photo identification at the polls in order to vote, violated neither Section 2 nor the Constitution).

107. *Id.* Challenges to voter ID laws under the Fourteenth Amendment have also been unsuccessful. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204 (2008) (upholding Indiana's voter ID law and reasoning that the burden on the right to vote must be balanced against the State's justification for the burden imposed); Common Cause/Georgia v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) (applying the balancing test outlined by the Court in *Crawford* and holding that the burden imposed by the photo ID law in Georgia was outweighed by the State's interest in protecting the right to vote).

vote.[108] While the court noted that there were documented disparities in comparing the number of minority and White voters who possessed the necessary photo ID, it reasoned that this was not proof of a "denial" of the right to vote by the State of Wisconsin.[109] The Supreme Court declined to take up the case on appeal.[110]

In contrast, two successful challenges to voter ID laws under Section 2 of the Voting Rights Act were brought in North Carolina[111] and Texas.[112] In North Carolina, the Department of Justice challenged a photo ID law passed in the aftermath of *Shelby County v. Holder*, alleging that it had a disproportionate effect on Black voters.[113] On July 29, 2016, the Fourth Circuit struck down the law, reasoning that it was passed with discriminatory intent in violation of both the Voting Rights Act and the Constitution.[114]

In Texas, a district court judge held in 2014 that the Texas photo ID law violated Section 2 of the Voting Rights Act, as well as the First and Fourteenth Amendments because of its burden on the right to vote and disproportionate effect on minority voters.[115] Subsequently, however, the Fifth Circuit stayed the decision because of its proximity to the 2014 election, and the Supreme Court declined to hear the case.[116] On March 9, 2016, the Fifth

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108. *Frank*, 768 F.3d at 751.

109. *Id.* at 752–54 (noting that the district judge estimated that 92.7% of Whites, 86.8% of Blacks, and 85.1% of Latinxs possessed the required photo IDs).

110. Frank v. Walker, 135 S. Ct. 1551 (2015).

111. Complaint, United States v. North Carolina, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013).

112. Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

113. Complaint, *supra* note 111, at 16 (noting that 7.4% of Black voters lack the required photo IDs, compared to 3.8% of White voters); Sari Horwitz, *Trial to Start in Lawsuit over North Carolina's Voter-ID Law*, WASH. POST (Jan. 24, 2016), https://www.washingtonpost.com/world/national-security/trial-to-start-over-north-carolinas-voter-id-law/2016/01/24/fac97d20-c1d1-11e5-9443-7074c3645405_story.html (quoting Rev. William J. Barber II, President of the North Carolina NAACP, who argued that state legislators passed the voter ID law with the intent of restricting the voting rights of people of color after record-high minority turnout in the 2012 election).

114. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) ("In holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems to have missed the forest in carefully surveying the many trees. This failure of perspective led the court to ignore critical facts bearing on legislative intent, including the inextricable link between race and politics in North Carolina.").

115. *Veasey*, 71 F. Supp. 3d at 693, 695.

116. Veasey v. Abbott, 796 F.3d 487, 496 (5th Cir. 2015), *cert. denied* Veasey v. Perry, 135 S. Ct. 9 (2014).

Circuit announced that it would reconsider the issue of whether the Texas voter ID law violated the Voting Rights Act or the Constitution.[117] Then, on July 20, 2016, the Fifth Circuit held that the stringent Texas Voter ID law violated the Voting Rights Act.[118]

In sum, in the aftermath of *Shelby County v. Holder,* challenges to voting practices and procedures must be brought under Section 2.[119] Under Section 2, plaintiffs can allege that the practice or procedure has the purpose *or* effect of discriminating on the basis of race, color, or membership in a language minority group.[120] Claims alleging purposeful discrimination are established with reference to the historical background of the decision to implement the voting practice or procedure, the specific sequence of events leading up to the decision, and the legislative intent or administrative history of the decision.[121] Claims alleging discriminatory effect, however, can be established through proof that, under the totality of the circumstances, the voting practice or procedure had the *effect* of discriminating on the basis of race, color, or membership in a language minority group.[122] Discriminatory effect claims are established with reference to the 1982 Senate Judiciary Committee report/*Gingles* factors, including the history of official racial discrimination in the state or political subdivision impacting electoral participation, the prevalence of racial polarization of voting and political campaigns, and the use of any practices or procedures that increase opportunity for discrimination against a minority group.[123]

III. Alabama's Voter Photo Identification Law

A total of thirty-four states have passed laws requiring voters to present a photo ID before casting a ballot.[124] In June 2011, the Alabama Legislature enacted a photo ID law,[125] which legislators

117. Josh Gerstein, *5th Circuit to Revisit Texas Voter ID Law*, POLITICO (Mar. 9, 2016), http://www.politico.com/blogs/under-the-radar/2016/03/5th-circuit-to-revisit-texas-voter-id-law-220525.

118. Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016); *see also* Jim Malewitz, *Texas Voter ID Law Violates Voting Rights Act, Court Rules*, TEX. TRIB. (July 20, 2016), https://www.texastribune.org/2016/07/20/appeals-court-rules-texas-voter-id/.

119. *See* 52 U.S.C. § 10301(a) (2014); Pérez & Goldfeder, *supra* note 82.

120. § 10301(a).

121. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

122. 52 U.S.C. § 10301(b) (2014).

123. Thornburg v. Gingles, 478 U.S. 30, 44–45 (1986); S. REP. NO. 97-417, at 28–29 (1982).

124. Underhill, *supra* note 2.

125. ALA. CODE § 17-9-30 (2011) ("Each elector shall provide valid photo

claimed was aimed at preventing voter fraud.[126] Prior to 2011, voters were required to present an ID in order to vote, but were permitted to use a non-photographic ID such as a utility bill, social security card, or voter registration card.[127] After the enactment of the 2011 photo ID law, however, voters are required to present one of seven forms of ID: (1) "[a] valid Alabama driver's license or nondriver [ID]"; (2) a valid photo ID issued by any state or the federal government; (3) a valid United States passport; (4) a valid employee photo ID card issued by Alabama or the federal government; (5) a valid photo ID from a college or university in Alabama; (6) a valid United States military photo ID; or (7) a valid tribal photo ID card.[128]

When the Alabama Legislature passed the voter ID law in 2011, the State was still subject to federal preclearance under Sections 4 and 5 of the Voting Rights Act.[129] Between 1982 and 2013, Alabama sought preclearance on forty-eight proposed voting changes, but the Department of Justice denied authorization each time.[130] These requests for approval included five attempts by the State to implement voter ID laws.[131] Thus, when the 2011 photo ID law was adopted, state officials were very much aware of the federal government's prior concerns about implementing a more stringent voter ID law in the State of Alabama. Nonetheless, the State did not immediately seek the necessary approval from the federal government to implement the law.[132] The office of the

identification to an appropriate election official prior to voting.").

126. Kim Chandler, *Alabama Photo Voter ID Law to Be Used in 2014, State Officials Say*, AL.COM (June 25, 2013, 5:07 PM), http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html ("The debate over photo ID has been highly partisan. Republicans and proponents have said the strict ID is needed to guard against voter fraud."). *But see* Michael A. Cohen, *Alabama 'Clarifies' Voter ID Confusion*, BOS. GLOBE (Oct. 6, 2015), https://www.bostonglobe.com/opinion/2015/10/06/alabama-clarifies-voterconfusion/qYHKjeGSURhMaxeYtJG6dI/story.html ("Republican leaders argued at the time this was a necessary tool for stopping voter fraud, even though voter fraud is practically nonexistent not only in Alabama, but also pretty much everywhere in the country.").

127. ALA. CODE § 17-9-30 (1975) (amended 2011).

128. ALA. CODE § 17-9-30(a)(1)–(7) (2011).

129. 52 U.S.C. §10303(b) (2006), *invalidated by* Shelby County v. Holder, 133 S. Ct. 2612 (2013).

130. *Voting Determination Letters for Alabama*, U.S. DEP'T OF JUSTICE, (Aug. 7, 2015), https://www.justice.gov/crt/voting-determination-letters-alabama.

131. *Id.*

132. Kim Chandler, *State Has Yet to Seek Preclearance of Photo Voter ID Law Approved in 2011*, AL.COM (June 12, 2013, 7:30 AM), http://blog.al.com/wire/2013/06/photo_voter_id.html; NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 8 (noting that the voter ID law was passed by the Alabama Legislature in 2011, but was not implemented until after the Supreme Court's 2013 decision in *Shelby*

Alabama Attorney General claimed that the State was waiting on the Secretary of State's Office to develop rules for a free voter ID program, which was required under the law.[133] At the same time, a spokesperson for the Alabama Secretary of State's Office declined to elaborate on how the free ID program would work saying, "The photo voter ID law has not yet been precleared. We cannot announce or implement the process until it has been precleared."[134] However, just two days after the Supreme Court handed down *Shelby County*, Alabama officials announced that the 2011 photo ID law would go into effect immediately.[135]

In announcing that the 2011 photo ID law would go into effect, Alabama's governor said that he believed preclearance was no longer necessary.[136] Democratic elected officials, on the other hand, said they feared the law would be used to disenfranchise Black and elderly voters.[137] Estimates suggest that the photo ID law has the potential to negatively impact between 250,000 and 500,000 voters in a given election.[138] This disenfranchisement is significant and has the ability to impact the outcome of an election.[139] Furthermore, Black and Latinx voters are substantially less likely to own a photo ID than White voters.[140]

County v. Holder, which removed Alabama's federal preclearance requirements).

133. Chandler, *supra* note 132.

134. *Id.*

135. Johnson, *supra* note 9.

136. *Id.*; *see also* Brandon Moseley, *Alabama Republican Leaders Respond to Supreme Court Decision*, ALA. POLITICAL REP. (June 26, 2013), http://www.alreporter.com/alabama-republican-leaders-respond-to-supreme-court-decision/ ("Alabama Republican Party Chairman Bill Armistead said in a written statement, 'The Supreme Court's decision today to rule Section 4 of the Voting Rights Act Unconstitutional [sic] is a testament to how far we have come as a state and as a nation in the area of fair and free elections. Attorney General Eric Holder should not have the power to play political games with the voting laws in Alabama and thanks to the courage of Shelby County; [sic] he no longer has that power.'").

137. Johnson, *supra* note 9 (quoting Democratic State Representative Alvin Holmes as arguing that Alabama's photo ID law is exactly the type of law that should be reviewed by the Department of Justice).

138. *See* JEALOUS & HAYGOOD, *supra* note 4, at 8.

139. *Id.* (noting that, in the State of Alabama, the margin of victory in the 2014 gubernatorial election was 320,139 votes); *2000 Official Presidential General Election Results*, FED. ELECTION COMM'N (Dec. 2001), http://www.fec.gov/pubrec/2000presgeresults.htm (indicating that in 2000, President George W. Bush beat Vice President Al Gore by a margin of 537 votes in Florida); John T. Woolley & Gerhard Peters, *Election of 1960*, THE AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/showelection.php?year=1960 (last visited Jan. 14, 2017) (showing that, in the 1960 presidential election margins of victory in Alaska, Delaware, Hawaii, and Nevada were as few as 115 votes).

140. BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), https://www.brennancenter.org/sites/default/files/legacy/

Studies show that twenty-five percent of otherwise-eligible Black voters do not have a valid government-issued photo ID, compared to eight percent of eligible White voters, increasing the probability that the law will disenfranchise minority groups.[141]

As the Alabama photo ID law was going into effect, the State announced that it would close thirty-one driver's license-issuing office locations across the state, making it harder for voters to obtain the government-issued IDs required by the Act.[142] Moreover, many of the driver's license-issuing locations closing their doors are located in predominately Black counties.[143] Selma, Alabama retained its driver's license office, but nearly all of the surrounding Black Belt counties did not.[144] Although the State maintained that it was shutting down the driver's license offices as a cost-saving measure,[145] closing driver's license offices in predominantly Black counties will certainly have a detrimental effect on the ability of Black voters to obtain the photo IDs now required to vote.[146] In a letter written to Alabama's Governor, Secretary of the Law Enforcement Agency, and Secretary of State on October 2, 2015, the NAACP Legal Defense & Education Fund offered strong objections to the photo ID law and the subsequent driver's license office closures.[147] Fund President Sherrilyn Ifill wrote that "[t]hese planned closures are consistent with Alabama's long, egregious and ongoing pattern of racial discrimination against Black voters."[148] Former U.S. Secretary of State Hillary Clinton also weighed in on the matter, echoing the concerns of the NAACP and calling on Alabama's governor to keep the driver's license offices open.[149]

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d/download_file_39242.pdf.

141. *Id.*

142. Berman, *supra* note 10.

143. *Id.* ("'Every single county in which [B]lacks make up more than 75 percent of registered voters will see their driver license office closed,' writes John Archibald of the *Birmingham News*. 'The harm is inflicted disproportionately on voters who happen to be [B]lack, and poor, in sparsely populated areas.'").

144. *Id.*

145. *Id.*

146. *See id.* (noting many argue that this is exactly the type of voter discrimination Section 5 was meant to protect against).

147. Letter from Sherrilyn A. Ifill, President & Dir. Counsel, NAACP Legal Def. & Educ. Fund, Inc., to Robert Bentley, Governor of Ala., et al. (Oct. 2, 2015), http://www.naacpldf.org/files/case_issue/2015.10.02%20LDF%20Alabama%20closures%20letter.pdf.

148. *Id.* at 2.

149. Stassa Edwards, *Hillary Clinton Calls Alabama's Voting Laws a 'Blast from the Jim Crow Past'*, JEZEBEL: THE SLOT (Oct. 18, 2015, 12:30 PM), http://theslot.jezebel.com/hillary-clinton-calls-alabamas-voting-laws-a-blast-from-

Leading up to the 2016 presidential election, citizens, as well as national, state, and local officials were concerned about how and to what extent the 2011 photo ID law would disenfranchise eligible voters trying to cast their ballots.[150] When the law was adopted, the Alabama Secretary of State's office estimated that twenty percent of registered voters—or 500,000 people—did not have the photo IDs required to cast a ballot.[151] In addition, since the implementation of the photo ID law, the State closed driver's-license issuing office in eight of the ten counties with the highest concentration of Black voters.[152] These facts, taken together, demonstrate that the law will have a disproportionate impact on the right and ability of Black voters to cast ballots for candidates of their choices.[153]

IV. Challenging Alabama's Photo ID Law Under Section 2 of the Voting Rights Act: *Greater Birmingham Ministries v. Alabama*

On December 2, 2015, Greater Birmingham Ministries and the Alabama chapter of the NAACP filed suit in United States District Court, alleging that the 2011 Alabama photo ID law violates Section 2.[154] Specifically, Plaintiffs claimed that the law was enacted with a racially discriminatory purpose, namely, to limit the opportunity of Black and Latinx voters to participate equally in the political process.[155] In addition, Plaintiffs maintained that the photo ID law, coupled with the closure of driver's license offices across the state, has a significant and disproportionate effect on the right of Black and Latinx voters to participate in the electoral process.[156] Accordingly, Plaintiffs

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1737189661 (noting that Secretary Clinton "accused Alabama Republicans . . . of purposefully undoing the progress made in the state during the civil rights movement").

150. *See id.*; Ifill, *supra* note 147, at 3.

151. The Associated Press, *New Photo Voter IDs to Be Available at County Registrars' Offices and from Traveling Van*, AL.COM (Mar. 10, 2014, 7:58 PM), http://blog.al.com/wire/2014/03/new_photo_voter_ids_to_be_avai.html.

152. Ifill, *supra* note 147, at 3.

153. *See* Berman, *supra* note 10.

154. *See* Complaint, *supra* note 11, at 64–65. The Complaint also alleged violations of the Fourteenth and Fifteenth Amendments to the United States Constitution; however, this Note focuses only on the Section 2 claims. *See id.* at 66.

155. *Id.* at 4–5.

156. *Id.* ("The Photo ID law was conceived and operates as a purposeful device to further racial discrimination, and results in Alabama's African-American and Latin[x] (or Hispanic) voters having less opportunity than other members of the electorate to participate effectively in the political process and to elect candidates of their choice.").

asked that the State of Alabama be permanently enjoined from enforcing the law.[157] Subsequently, Plaintiffs also filed a motion asking the court to grant a preliminary injunction as to the photo ID law for all upcoming elections, including the November 8, 2016 general election.[158]

The State, however, urged the court to uphold the 2011 photo ID law.[159] Alabama argued that the national trend towards photo ID laws and the fact that Alabama has one of the most lenient photo ID laws in the country are sufficient reasons to uphold the law.[160] The State cited *Crawford v. Marion County Election Board*[161] and *Common Cause/Georgia v. Billups*[162] in arguing that it is within the government's power to safeguard the right to vote through the adoption of photo ID laws.[163] Moreover, the State contended that Plaintiffs falsely insinuated that the State delayed the implementation of the photo ID law until after the Supreme Court's decision in *Shelby County v. Holder*.[164] The State further asserted that the Secretary of State's Office was using the time to educate and inform the public about the requirements of the photo ID law, as required by statute.[165] Finally, Defendants also argued

157. *Id.* at 68.

158. Plaintiffs' Motion for a Preliminary Injunction at 1–2, Greater Birmingham Ministries v. Alabama, No. 2:15-cv-02193-LSC (N.D. Ala. Jan. 8, 2016); Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Greater Birmingham Ministries v. Alabama, No. 2:15-cv-02193-LSC (N.D. Ala. Jan. 8, 2016).

159. Secretary of State Merrill's Opposition to the Plaintiffs' Motion for Preliminary Injunction (Docs. 5, 6, & 14) & Partial Motion to Dismiss at 60, Greater Birmingham Ministries v. Alabama, No. 2:15-cv-02193-LSC (N.D. Ala. Jan. 29, 2016) [hereinafter Opposition to the Plaintiff's Motion].

160. *Id.* at 9–10.

161. 553 U.S. 181, 191–97 (2008) (reasoning that photo ID laws further state interests, including detecting and deterring voter fraud, modernizing elections, and increasing voter confidence).

162. 554 U.S. F.3d 1340, 1354 (11th Cir. 2009) (holding that Georgia's photo ID law did not infringe on the right to vote in violation of the Fourteenth Amendment).

163. Opposition to the Plaintiffs' Motion, *supra* note 159, at 14–15.

164. *Id.* at 16. Defendants, however, cite no proof other than pointing to the fact that the language of the Act provided that the legislation should be in effect by the first 2014 statewide primary. *See* Act No. 2011-673 at § 2. Defendants, for example, provide no explanation as to why they could not have sought implementation or preclearance prior to the Supreme Court's decision in *Shelby County*. Moreover, they do not even attempt to explain why they subsequently sought to implement the law just days after *Shelby County* was handed down, a seemingly bizarre coincidence if they were simply following the law. Opposition to the Plaintiffs' Motion, *supra* note 159, at 16.

165. Opposition to the Plaintiffs' Motion, *supra* note 159, at 25; *see* ALA. CODE § 17-9-30(n). The Secretary of State's Office noted that it also prepared a voter guide focused on photo IDs, maintained a website focused on photo IDs, met with

that Plaintiffs have not proved that there are voters who lack an acceptable form of photo ID[166] and maintained "anyone without a photo ID can easily get one."[167]

On February 17, 2016, the district court denied Plaintiffs' request for a preliminary injunction.[168] The right to vote, the Court noted, means the right to be free from undue burden.[169] The Court continued, however, and added that the right to vote also includes an assurance that one's vote will be counted and "any fraudulent vote cast effectively cancels the right of a citizen to have his or her vote counted."[170] The Court reasoned that Alabama's photo ID law is simply indicative of a nationwide trend towards requiring photo IDs at the polls.[171] Moreover, the Court noted that similar photo ID laws have been upheld in Indiana,[172] Georgia,[173] and Wisconsin[174] under constitutional and Voting Rights Act challenges.[175] Finally, the Court noted that election workers are already preparing for the upcoming elections, and any changes to voter ID requirements would disrupt this progress and require retraining.[176]

V. Analysis

Although the Court's decision in *Shelby County v. Holder* allowed Alabama to implement the 2011 photo ID law without first seeking federal preclearance,[177] voting practices and procedures that "result in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"

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citizens and citizens' groups to explain the requirements of the law, spoke publicly about the law, and conducted an educational program that included billboard, radio, and television advertisements. Opposition to the Plaintiffs' Motion, *supra* note 159, at 22–25.

166. *Id.* at 40–46.

167. *Id.* at 47.

168. Greater Birmingham Ministries v. Alabama, 161 F. Supp. 3d 1104, 1104, 1119 (N.D. Ala. 2016) ("Plaintiffs have failed to prove either likelihood of success on the merits or that they will suffer irreparable harm.").

169. *Id.* at 1107.

170. *Id.*

171. *Id.* at 1109–10.

172. *Id.* at 1109 (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008)).

173. *Id.* (citing Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009)).

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

175. *Id.*

176. *Id.* at 1118.

177. 133 S. Ct. 2612, 2631 (2013).

continue to be a violation of Section 2.[178] The Supreme Court made this clear when handing down its decision in *Shelby County*.[179] Claims brought under Section 2 must allege that the voting practice or procedure was enacted with the purpose of discriminating on the basis of race, color or membership in a language minority group, or they must allege that the voting practice or procedure results in such discrimination.[180]

In considering the Plaintiffs' challenge to the Alabama voter ID law, the District Court should look to the *Arlington Heights* factors to determine whether the practice or procedure is the result of purposeful discrimination,[181] and it should look to the Senate Judiciary Committee Report/*Gingles* factors to determine whether the law results in discrimination on the basis of race, color, or membership in a language minority group.[182] In examining the aforementioned factors as they relate to Alabama's 2011 photo ID law, it is clear that the law has both the purpose and effect of discriminating on the basis of race. As such, the court should grant the Plaintiffs' request for a permanent injunction. At the outset, it is important to note that the Supreme Court has never considered a challenge to a photo ID law under Section 2.[183] Thus, although *Crawford v. Marion County Election Board* is the Supreme Court's most recent decision on a photo ID law, its analysis is not relevant to the challenge to Alabama's photo ID law under Section 2 because it was decided solely on constitutional grounds.[184] Moreover, the Eleventh Circuit's decision in *Common Cause/Georgia v. Billups*, which upheld Georgia's photo ID law, also did not consider a challenge under Section 2 of the Voting Rights Act.[185] These cases should, therefore, not be cited as precedent for any decision about whether to uphold or strike down Alabama's voter ID law in the face of a Section 2 challenge.

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178. 52 U.S.C. § 10301(a) (2014).

179. *Shelby County*, 133 S. Ct. at 2619 ("Section 2 is permanent, applies nationwide, and is not at issue in this case.").

180. 52 U.S.C. § 10301 (2014).

181. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1976).

182. S. REP. NO. 97-417, at 28–29 (1982); Thornburg v. Gingles, 478 U.S. 30, 44–45 (1986).

183. *But see* Crawford v. Marion Cty Election Bd., 553 U.S. 181, 187 (2008) (ruling on a challenge to Indiana's photo ID law under the Fourteenth Amendment).

184. *Id.* at 201–02.

185. *See* Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009) (considering a constitutional challenge to Georgia's photo ID law).

A. Alabama's Photo ID Law Was Motivated by a Discriminatory Purpose

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court held that claims alleging purposeful discrimination are established with reference to the historical background of the decision to implement the practice or procedure, the specific sequence of events leading up to the decision, and the legislative intent or administrative history of the decision.[186] Alabama's past and recent history of racial discrimination, the State's decision to delay implementation of the law until after the Supreme Court handed down *Shelby County v. Holder*, and a legislative history fraught with overt racial overtones are clear evidence that Alabama's photo ID law has the purpose of discriminating on the basis of race.

Alabama's history of maintaining tests or devices such as poll taxes and literacy tests as prerequisites to voting, as well as its record of low voter turnout, were what first resulted in the requirement that—under Section 5 of the Voting Rights Act—the State seek federal preclearance before implementing any new voting practice or procedure.[187] Alabama remained a covered jurisdiction under Section 4 of the Voting Rights Act for nearly fifty years.[188] During those fifty years, Alabama continued its attempts to implement racially discriminatory voting practices and procedures that, when preclearance was sought, were not allowed to go into effect.[189] Alabama's fifty-year history of official attempts at racial discrimination should be used as evidence in determining that that the recent photo ID law has the purpose of discriminating on the basis of race.

In addition to Alabama's history of racial discrimination in voting practices and procedures, racial discrimination is prevalent in schools, housing, and hiring practices. Although more than sixty years have passed since the Supreme Court handed down its

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186. *Village of Arlington Heights*, 429 U.S. at 266–68.

187. *See* South Carolina v. Katzenbach, 383 U.S. 301, 312–13 (1966).

188. Complaint, *supra* note 11, at 16 (citing *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after* LULAC v. Perry*: Hearing Before the Subcomm. on the Constitution, Civil Rights & Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 365–402 (2006)).

189. *E.g.* Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) (blocking Alabama's attempts at redistricting); City of Pleasant Grove v. United States, 479 U.S. 462 (1987) (blocking Alabama's selective annexations); Hunter v. Underwood, 471 U.S. 222 (1985) (finding unconstitutional Alabama's constitutional provision that disenfranchised people convicted of certain categories of crimes).

decision in *Brown v. Board of Education*,[190] forty-three school districts in Alabama remain under some form of federal oversight as a result of continued segregation.[191] In addition, in 2009, the Department of Justice filed suit in Alabama alleging racial discrimination at an apartment complex in Clanton, Alabama.[192] Moreover, in 2015, 49.6% of Alabama cases before the Equal Employment Opportunity Commission alleged discrimination on the basis of race.[193] These claims made up 4.5% of the nationwide claims of race-based discrimination in employment.[194] The history of racial discrimination in Alabama across voting practices, education, housing, and employment is evidence that the recent photo ID law was adopted with the purpose of discriminating on the basis of race.

The decision to delay implementation of Alabama's photo ID law until after the Supreme Court handed down *Shelby County v. Holder* demonstrates that the State of Alabama believed that the Department of Justice would deny preclearance of the legislation because of its detrimental effect on the ability of minority voters to cast ballots for candidates of their choice.[195] As such, it also indicates that legislators and other state officials were aware of the photo ID law's likely discriminatory effect when the law was both adopted and implemented. It is therefore clear that Alabama's photo ID law has the purpose of discriminating on the basis of race in violation of Section 2 of the Voting Rights Act.

When the Alabama Legislature passed the 2011 photo ID law, it did so against a racially-charged backdrop.[196] Data from the U.S. Census Bureau showed that voter turnout across the

190. 347 U.S. 483, 495 (1954) (holding that separate public school facilities for Black and White students violates the Equal Protection Clause of the Fourteenth Amendment).

191. *Educational Opportunity Cases*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/educational-opportunities-cases#race (Oct. 18, 2016); Stan Diel, *Segregation Again? Racial Picture of Alabama Schools Changes 60 Years After* Brown v. Board of Education, AL.COM, (Apr. 16, 2014 10:27 PM), http://blog.al.com/wire/2014/04/segregation_still_racial_pictu.html.

192. Press Release, U.S. Dep't of Justice, Justice Department Files Lawsuit Alleging Racial Discrimination at Apartment Complex in Clanton, Alabama (July 21, 2009), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-alleging-racial-discrimination-apartment-complex-clanton.

193. *FY 2009–2015 EEOC Charge Receipts for Alabama*, U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, https://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm#centercol (select "Alabama" from the drop-down list, then click the "Submit" button).

194. *Id.*

195. *See* 52 U.S.C. § 10304(b) (2006).

196. Complaint, *supra* note 11, at 17–19.

country had increased by nearly five million in the 2008 presidential election, with much of the increase seen among Latinx, Black, and young voters.[197] This change in voter turnout was also reflected in Alabama.[198] As a result, the 2010 election season was highly racially charged.[199] During the election, State Senators Scott Beason and Benjamin Lewis engaged in a scheme to "suppress [B]lack votes by manipulating what issues appeared on the 2010 ballot."[200] In recorded conversations, both Senators were caught using derogatory and racist slurs against Black voters when expressing their concerns that, were a gambling referendum to appear on the ballot, "'[e]very [B]lack, every illiterate' would be 'bused on HUD financed buses' to the polls."[201] Both Senators Beason and Brooks later voted in favor of the 2011 voter ID bill.[202]

In addition, the 2011 photo ID law was passed alongside two other racially discriminatory bills. The first—a state immigration law designed to crack down on undocumented immigrants in the State—was sponsored by Senator Beason.[203] Black legislators voted overwhelming to oppose the bill, and in December 2011, a federal district court enjoined portions of the bill after finding evidence of intentional discrimination during the legislative debates.[204] The second bill, a redistricting plan, was subsequently challenged in federal district court by members of Alabama's Legislative Black Caucus as unconstitutional racial gerrymandering.[205] In 2015, the Supreme Court determined that the Alabama Legislature had likely engaged in purposeful racial discrimination in violation of the Fourteenth Amendment and remanded the case to Alabama district court.[206] The racially charged election season and legislative session that served as a backdrop to the passage of Alabama's photo ID law should be taken as proof of the law's intent to purposefully discriminate on the basis of race.

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197. THOM FILE & SARAH CRISSEY, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN ELECTION OF NOVEMBER 2008: POPULATION CHARACTERISTICS 2 (2012), https://www.census.gov/prod/2010pubs/p20-562.pdf.

198. Complaint, *supra* note 11, at 17.

199. *Id.* at 18.

200. United States v. McGregor, 824 F. Supp. 2d 1339, 1345 (M.D. Ala. 2011).

201. Complaint, *supra* note 11, at 18 (citing *McGregor*, 824 F. Supp. 2d at 1346).

202. *Id.* at 20.

203. ALA. CODE §§ 31-13-1, 31-13-2 (2011); United States v. Alabama, 691 F.3d 1269, 1276 (11th Cir. 2012).

204. Ala. Fair Hous. v. Magee, 835 F. Supp. 2d 1165, 1192–94 (M.D. Ala. 2011).

205. Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1236 (M.D. Ala. 2013).

206. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1262–63 (2015).

B. Alabama's Photo ID Law Results in Black Voters Having Less of an Opportunity to Participate in the Political Process and Elect Candidates of Their Choice

Claims alleging that a voting practice or procedure results in the denial of the right of minority voters to participate in the political process and elect candidates of their choice can also be brought under Section 2 of the Voting Rights Act.[207] These claims are established with reference to a series of factors outlined by the Senate Judiciary Committee when adopting the 1982 amendments to the Voting Rights Act[208] and adopted by the Court in *Gingles*.[209] These factors include: (1) the "history of official racial discrimination in the state or political subdivision" impacting electoral participation; (2) racial polarization of voting and political campaigns; (3) the use of any practices or procedures that increase opportunity for discrimination against a minority group; (4) whether minorities have been denied access to the "candidate slating process"; (5) whether minorities in the State or political subdivision face either purposeful discrimination or the effects of discrimination in other areas such as education, healthcare, or employment; (6) whether political campaigns have been subtly or overtly racist; and (7) whether "members of the minority group have been elected to public office in the jurisdiction."[210] Not all factors must be met in order to satisfy a claim under Section 2 of the Voting Rights Act.[211] Instead, the court should look to the totality of the circumstances.[212]

Analyzed under both the language of Section 2 and the Senate Judiciary Committee Report factors, Alabama's voter ID law results in Black voters having less of an opportunity to participate in the political process and elect candidates of their choice. Therefore, the federal district court considering *Greater Birmingham Ministries* should grant the Plaintiffs' request for a permanent injunction. First, the decision to grant or deny Plaintiffs' request for a permanent injunction should be made with reference to Alabama's long history of racial discrimination. The court must recognize that Alabama remained a covered

207. Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1281 (M.D. Ala. 2013).

208. S. REP. NO. 97-417, at 28–29 (1982).

209. Thornburg v. Gingles, 478 U.S. 30, 37, 46 (1986).

210. S. REP. NO. 97-417, at 28–29.

211. *Id.*

212. 52 U.S.C. § 10301(b) (2014).

jurisdiction under Section 4 for nearly fifty years.[213] This, in and of itself, is evidence of official racial discrimination impacting electoral participation. As such, it satisfies the first Senate Judiciary Committee Report factor.

Many of the Senate Committee Report factors can be satisfied through the proof of purposeful discrimination discussed above. For example, Alabama's past and present history of discrimination in education, housing, and employment satisfies the fifth factor in the Senate Judiciary Committee Report.[214] In addition, the scheme to suppress Black voter turnout perpetrated by State Senators Beason and Brooks should be used as evidence to satisfy Senate Committee Report factor number two.[215]

In addition to the factors discussed above, the available data indicate two things related to voter turnout in Alabama and across the country in the aftermath of photo ID laws. First, after the implementation of the 2011 photo ID law, Alabama saw a decrease in voter turnout of 10.3 points from 2010 to 2014.[216] The overall turnout in 2014 was forty-one percent, which was the lowest participation in more than twenty years.[217] Although turnout is typically lower in non-Presidential years, voter turnout had not dropped below fifty percent since before 1986.[218] When the Alabama photo ID law was passed in 2011, the Alabama Secretary of State estimated that the law would impact between 250,000 and 500,000 voters.[219] Based on the voter turnout data, it appears that the law indeed had this effect.[220]

Because Black voters are less likely than White voters to own the required ID, the Alabama photo ID law has a disproportionate impact on the ability of Black voters to cast ballots for candidates of their choice. Twenty-five percent of Black voters lack the required photo IDs, compared to only eight percent of White voters

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213. *See* Complaint, *supra* note 11, at 16.

214. *See supra* notes 190–95 and accompanying text.

215. *See* United States. v. McGregor, 824 F. Supp. 2d 1339, 1345–47 (N.D. Ala. 2011).

216. Joanna S. Kao et al., *Actual Election Turnout Far Lower Than Reported*, ALJAZEERA AM.: THE SCRUTINEER (Nov. 5, 2014), http://america.aljazeera.com/blogs/scrutineer/2014/11/5/why-the-real-electionturnoutwasfarlowerthanreported.html#alabama.

217. Mike Cason, *Alabama Voter Turnout Only 41 Percent, Lowest in Decades*, AL.COM (Nov. 5, 2014), http://www.al.com/news/index.ssf/2014/11/alabama_voter_turnout_only_41.html.

218. *Id.*

219. JEALOUS & HAYGOOD, *supra* note 4, at 9.

220. *See* Cason, *supra* note 217.

who do not have the required ID.[221] In addition, Black voters in Alabama face greater barriers to obtaining the necessary IDs in the aftermath of the closure of driver's license offices across the state.[222] Selma, Alabama will retain its driver's license office, but nearly all of the surrounding Black Belt counties will not.[223] Although the State maintains it is shutting down the driver's license offices as a cost-saving measure,[224] closing driver's license offices in predominately Black counties will certainly have a detrimental effect on the ability of Black voters to obtain the photo IDs now required to vote.[225] In sum, Alabama's photo ID law has a discriminatory effect on the ability of Black voters to cast ballots. As such, the court should grant Plaintiffs' motion for a permanent injunction.

Conclusion

On May 17, 1957, eight years before the Voting Rights Act was signed into law, Martin Luther King, Jr. spoke to a crowd of civil rights activists saying, "Give us the ballot, and we will no longer have to worry the federal government about our basic rights."[226] Over fifty years after the passage of the Voting Rights Act, however, minority voters in Alabama still face attacks on their basic rights, specifically on the right to vote. In 2011, the Alabama Legislature passed a measure requiring voters to present photo ID at the polls.[227] This measure was passed amidst a racially charged legislative session and against a backdrop of fifty years' worth of attempts to implement racially discriminatory legislation that was subsequently blocked by the federal government under the preclearance requirements of Section 5 of the Voting Rights Act.[228] The United States District Court for the Northern District of Alabama should act quickly in resolving this issue and grant the requested relief: a declaratory judgment that Alabama's voter ID law is a violation of Section 2 of the Voting Rights Act and a permanent injunction on its enforcement.[229]

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221. BRENNAN CTR. FOR JUSTICE, *supra* note 140, at 3.

222. Berman, *supra* note 10.

223. *Id.*

224. *Id.*

225. *See id.* (noting many argue that this is exactly the type of voter discrimination that Section 5 was meant to protect against).

226. MAY, *supra* note 17, at 54; King, *supra* note 1.

227. ALA. CODE § 17-9-30 (2011).

228. *See supra* Part V.

229. *See* Complaint, *supra* note 11, at 5; Plaintiffs' Motion for a Preliminary Injunction, *supra* note 158, at 1–2.