Oral Testimony of Janai S. Nelson Associate Director-Counsel NAACP Legal Defense and Educational Fund, Inc. Before the United States Senate Committee on the Judiciary Subcommittee on The Constitution

Chair Blumenthal and Committee members, my name is Janai Nelson. I am the Associate Director-Counsel of the NAACP Legal Defense Fund—founded by Thurgood Marshall and leading the fight to defend the voting rights of Black citizens for over 80 years.

Despite the guarantees of the 14th and 15th Amendments and the Voting Rights Act, targeted voter suppression and racial discrimination against Black voters persist at disturbing rates. And, since the infamous 2013 *Shelby County* disabled Section 5, they have metastasized. Now the Court's recent decision in the consolidated *Burn-o-ovich* cases threatens Section 2—a singular force of national reach that immunizes the right to vote from laws based on discriminatory intent *or* that produce discriminatory results on account of race.

The *Brnovich* decision improperly and illogically departs from the plain text of Section 2, ignores precedent, and severely curtails the broad application Congress intended. And, as Justice Kagan stated in dissent, the new guideposts proposed by the Court's conservative majority are QUOTE "mostly made-up factors, at odds with Section 2 itself" and "mostly inhabit[] a law-free zone". END

QUOTE In other words, *Brnovich*'s guideposts are unmoored from both text and truth.

For example, the majority discounts the express text of Section 2, which requires "an equal opportunity" to vote, and instead asks whether a State's *entire* system of voting is sufficiently "open" to all-- contrary to any prior interpretation of Section 2 and to several of the factors that originated in this very body, aptly called "the Senate Factors", which have guided Section 2 litigation for decades.[1]

Another guidepost invites courts to compare a challenged voting restriction to voting burdens in 1982—nearly 40 years ago, when Congress amended Section 2 to correct the Court's previous misreading of the statute in *City of Mobile v. Bolden.* This arbitrary benchmark flouts the text and purpose of Section 2, which is to prohibit unequal voting opportunities between *present-day* racial groups—not to impose 1982 as a reference point for evaluating current laws.

Another *Brnovich* "guidepost" suggests govt actors can disproportionately burden the voting rights of historically disenfranchised racial groups so long as govts raise a theoretical—even if unsubstantiated—interest in combatting mythical voter fraud. This guidepost threatens to return our nation to the time when states adopted facially neutral voting laws under the pretense of the "purity of the ballot" but with the intent of excluding Black voters from the political process. Not only does this guidepost find no support in the VRA's text, it has no basis in the factual record. Arizona could not point

[1] *Id.* at 16 (opinion of the Court).

to any voter fraud to justify its challenged laws.[2] A study of the 834 million ballots cast in elections between 2000 and 2014 found only 35 credible allegations of in-person voter fraud.[3] By contrast, there are voluminous examples of proliferating racial discrimination in voting during the same period.[4]

In short, this unscrupulous decision disregards the purpose of Section 2 and erects indefensible barriers for plaintiffs simply because a majority of the Court fundamentally disagrees with Congress's use of its enforcement powers to legislate *broadly* to protect the right to vote from racial discrimination. It is nothing short of an attempt to rewrite and weaken Section 2, resulting in incalculable costs to our democracy.

Since the disabling of Section 5, Section 2 has been the primary defense against discriminatory vote denial and abridgement. In 2020 alone, LDF filed five cases under Section 2 and has filed two more this year. In the first five

---

[2] Richard Hansen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, Slate (July 8, 2021), https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html?via=rss.

[3] German Lopez, *The case against voter ID laws, in one chart*, Vox.com (August 6, 2015), https://www.vox.com/2015/8/6/9107927/voter-id-election-fraud; *See also,* Quinn Scanlan, *'We've never found systemic fraud, not enough to overturn the election': Georgia Secretary of State Raffensperger says*, ABC News (Dec. 6, 2020), https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956; *Debunking the Voter Fraud Myth*, Brennan Center for Justice (Jan. 31, 2017), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf.

[4] J. Morgan Kousser,_*Facts of Voting Rights* 3 (cataloguing currently 4,173 "voting rights events" after 1982, including many after 200); H. R. Rep. No. 109-478, at 40–43 (2006) (reciting numerous Department of Justice objections to proposed voting laws under Section 5 in the relevant time period, as well as several voting laws that were withdrawn or amended voting changes were withdrawn or amended after the DOJ requested more information); U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 226 (Sept. 12, 2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf (identifying successful Section 2clitigation between the 2006 reauthorization and the *Shelby* decision in 2013); *see generally* Ellen D. Katz et al, ,*Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643 (2006).

years following *Shelby*, an unprecedented sixty-one lawsuits were filed under Section 2.[5]

It's been 8 years since Chief Justice Roberts expressly invited Congress to update Section 5's preclearance formula to reflect modern conditions in the *Shelby* opinion. *Brnovich* has now issued its own tacit invitation for Congress to act. And it is within this Congress's power—no less today than it was in 1982—to reject the Supreme Court's latest misreading of Section 2 and issue bold legislation to protect the right to vote.

In a week where Texas legislators took the rare measure of leaving a special session to protest a discriminatory voter suppression bill and beseeched the federal government to intervene, the urgent need for Congressional action to update the Voting Rights Act with an clear and unequivocal mandate to protect the right to vote from partisan excess and the corrosive stain of race discrimination could not be more pronounced. And, as we approach the first anniversary of the passing the late Congressman, civil rights stalwart, and voting rights martyr John Lewis, I urge you to do everything in your power to protect the right to vote, which he described as "precious", "almost sacred" and "the most powerful non-violent tool we have in a democracy."

Thank you.

[5] U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 10 (Sept. 12, 2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.