

**Statement of Paul M. Smith
Vice President of Litigation & Strategy
Campaign Legal Center**

**Senate Judiciary Committee
Subcommittee on Federal Courts, Oversight, Agency Action,
& Federal Rights**

**Hearing on “Supreme Court Fact-Finding and
the Distortion of American Democracy”
April 27, 2021**

Thank you for the opportunity to appear before you today to testify about the Supreme Court’s approach to deciding important constitutional issues that turn on factual assumptions about how the world works. I am the Vice President of Litigation and Strategy at the Campaign Legal Center, a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law. I am also a Professor from Practice at Georgetown University Law School, where I teach Election Law and Constitutional Law. For 35 years, I was a private practitioner specializing in appellate and Supreme Court advocacy. I have argued 21 Supreme Court cases and worked on hundreds of others.

I will briefly describe the importance of and process for fact-finding in our constitutional system, and then discuss two Supreme Court decisions in which the Court made factual misjudgments that have fundamentally altered the landscape and ideals of our democracy—*Citizens United v. Federal Election Commission* and *Shelby County v. Holder*. Each highlights different but equally serious problems: decisions based on an absence of fact in *Citizens United*, and decisions based on a disregard of fact in *Shelby County*.

I. INSTITUTIONAL COMPETENCIES FOR FINDING FACTS AND MAKING LAW

Our nation’s legal system is defined by its commitment to adversarial justice.¹ By

¹ See, e.g., Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 2 (2011) (“The United States’ commitment to an adversarial system of justice is a

this, I mean the premise “that the parties [to a lawsuit] know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”² This commitment “derives from the belief that adversarial testing is the surest route to truth.”³

The role of courts in this system is to resolve disputes between specific litigants by interpreting and applying the law.⁴ “[R]esponsibility for making the law”—including a factual record to support it—“rests with elected legislators who are better positioned, both institutionally and as a matter of democratic theory, to choose among competing policy positions and values.”⁵ According due respect to Congress’s fact-finding role promotes the all-important principle of separation of powers in our constitutional system.⁶

There is a further division of fact-finding responsibility within our judicial system, as different courts serve different functions. “[T]rial courts are supposed to resolve cases based on the factual records presented by the parties, and appellate courts are generally required to defer to district courts’ factual findings.”⁷

defining and distinctive feature of its legal system.”); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 495 (2009) (“[T]he adversarial system is widely acknowledged to be a fundamental feature of the American adjudicatory process.”).

² *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment).

³ Gorod, *supra* note 1, at 3; *see also United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) (“Truth is the essential objective of our adversary system of justice.”).

⁴ *See* U.S. Const. art. III, § 2; *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁵ Gorod, *supra* note 1, at 15; *see also* Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 1-2 (1986) (“I believe that both legislative lawmaking and administrative lawmaking are superior to judicial lawmaking in three main ways: (1) The product is better in clarity, reliability, and freedom from conflict; (2) the legislative process and the administrative process are more democratic than the judicial process; and (3) the factual base for legislation and for administrative rules is normally much stronger than the factual base for judge-made law.”).

⁶ *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997) (“The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process.”).

⁷ Gorod, *supra* note 1, at 4. The federal rules of procedure and evidence govern how trial courts find facts and how appellate courts review those findings.

This deference is warranted because trial courts hear testimony and witnesses directly, making them better positioned to weigh and assess the evidence presented and the credibility of witnesses.⁸ Playing this role on a daily basis allows trial courts to develop distinctive expertise in making factual determinations⁹ and serves “the public interest in the stability and judicial economy” of courts.¹⁰ For these reasons, deference by appellate courts to trial court fact-finding is not only a good idea but also required by the procedural rules governing federal courts.¹¹

A problem arises when appellate courts—especially the Supreme Court—fail to give due deference to legislative and trial court factual determinations—especially with regard to the “legislative facts” that often form the basis of constitutional adjudications. “Legislative facts” is a legal term of art meaning generalized observations about the world. They include any facts “which have relevance to legal reasoning and the lawmaking process,” and can be ascertained both “by a judge or court or in the enactment of a legislative body.”¹² They stand in contrast to “adjudicative facts,” which are “simply the facts of the particular case”¹³—those showing the what, when, where, and how of a particular event in a case.¹⁴

Legislative facts are those “facts *not* specific to a certain plaintiff or defendant but

⁸ See *Boyd v. Boyd*, 169 N.E. 632, 634 (N.Y. 1930) (“Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded.”).

⁹ See *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985) (“The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise.”).

¹⁰ Fed. R. Civ. P. 52 advisory committee’s note to 1985 amendment (“To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.”).

¹¹ Fed. R. Civ. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); see also *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (“This standard plainly does not entitle a reviewing court to reverse the trier of fact simply because it is convinced that it would have decided the case differently.”).

¹² Fed. R. Evid. 201(a) advisory committee note to 1972 amendment.

¹³ *Id.*

¹⁴ In the voting rights context, adjudicative facts may include when a specific voter plaintiff got in line to vote or delivered their absentee ballot, or how much money the voter makes and the particular burdens for them to comply with various requirements. In the campaign finance context, adjudicative facts could include who contributed, how much, and to whom.

concerning the world more generally.”¹⁵ The Supreme Court’s sweeping assumptions in *Citizens United* and *Shelby County* about how our democracy functions were quintessential examples of legislative facts—and in these two cases, particularly unjustified.¹⁶

To be sure, “[i]t is critical to acknowledge that courts must predict legislative facts quite often.”¹⁷ A system of constitutional adjudication depends on the application of judicial common sense, which in turn requires judges to bring to bear their knowledge of the world and how it operates. But that process becomes problematic when appellate courts refuse to defer to the facts in the legislative and trial records and instead rely on factual intuitions beyond their institutional competency.¹⁸ Those intuitions become legal rules and principles that apply not only to the case at hand, but broadly—in the case of the Supreme Court, nationally.

This can be dangerous because, “[u]nlike facts found by trial courts, which are subjected to adversarial testing, facts found by appellate courts are generally subjected to no testing at all.”¹⁹ Instead, such decisions are often “driven by evidence that the parties never explained and the meaning or importance of which

¹⁵ Brent Ferguson, *Predictive Facts*, 95 WASH. L. REV. 1621 (2020) (emphasis added); see also Allison Orr Larsen, *Judging “Under Fire” and the Retreat to Facts*, 61 WM. & MARY L. REV. 1083, 1093 n.33 (2020) (“Legislative facts are generalized observations about the way the world works as opposed to a specific ‘whodunit’ fact about any particular controversy.”).

¹⁶ See *Citizens United v. FEC*, 558 U.S. 310, 357, 360 (2010) (holding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” and that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy”); *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (concluding that “[o]ur country has changed” and that Congress’s reauthorization of the Voting Rights Act’s preclearance formula did not “speak[] to current conditions”).

¹⁷ Ferguson, *supra* note 15, at 1648; see also *id.* at 1648-49 (“Unremarkable predictions exist in almost any case involving legislative facts, because any time a court relies on data to find a regular legislative fact it is implicitly assuming that the data still accurately describe the world and will continue to do so into the immediate future. Similarly, courts often review legislation intended to ameliorate a societal harm, and in most cases, the court will assume that the harm would not disappear on its own without the legislation.”).

¹⁸ See, e.g., *Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J., dissenting) (“Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries[.]”).

¹⁹ Gorod, *supra* note 1, at 6 (“This failure to meaningfully test the facts underlying judicial decisions undermines both the legitimacy of the judicial process and the results of that process.”).

they never contested.”²⁰ “Compounding that problem, incorrect predictions might become factual precedents, such that lower courts feel bound to accept them even if later developments indicate that they are incorrect.”²¹ Such extra-record factfinding, when undertaken too aggressively to arrive at factual assumptions that are highly debatable, if not dubious, damages courts’ legitimacy and the sanctity of our adversarial system, leaving onlookers to question the true motivations behind court decisions.

Citizens United and *Shelby County* are two of the Supreme Court’s most imprudent and damaging ventures into legislative factfinding, illustrating related but distinct misjudgments of truth. In *Citizens United*, the Court concluded as a matter of law that independent expenditures “do not give rise to corruption or the appearance of corruption.”²² It did so without a single reference to the record, a problem of the Court’s own making that led it to purport to depend instead on the inapt records and reasoning of other cases. The result was an unfounded decision that paved the way for unlimited spending by super PACs, whose activities flout the Court’s conclusion that independent expenditures cannot corrupt. In *Shelby County*, the Court misinterpreted, second-guessed, or entirely disregarded Congress’s enormous record of legislative factfinding to conclude that voting discrimination is no longer a significant problem in modern America.²³ In reaching that conclusion, the Court expressed a wooden and overly simplistic understanding of voter suppression and substituted its own assumptions for Congress’s deliberative and nearly unanimous conclusions.²⁴

²⁰ Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 971-72 (2009).

²¹ Ferguson, *supra* note 15, at 1651 (“judges, like other human beings, are not always adept at predicting the future”); see also Allison Orr Larsen, *Factual Precedents* 162 U. PA. L. REV. 59, 102 (2013) (“A fact considered true in 1955 may seem laughable in 2015.”).

²² 558 U.S. at 357.

²³ See 570 U.S. at 554-56.

²⁴ See Bertrall L. Ross II, *The State As Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2030 (2014); Eric Berger, *When Facts Don’t Matter*, 2017 B.Y.U. L. REV. 525, 552 (2017).

Together, *Citizens United* and *Shelby County*, and their divergence from fact, have damaged the principles of adversarial justice, the legitimacy of the Supreme Court and its decisions, and the health of our democracy.

II. *CITIZENS UNITED*: A RULING WITHOUT EVIDENCE

Citizens United v. FEC, one of the most consequential recent cases affecting the health of our democracy, is premised on very few actual facts.²⁵

The case involved a challenge to the constitutionality of section 203 of the Bipartisan Campaign Reform Act (“BCRA”), which prohibited corporations from using their general treasury funds to pay for “electioneering communications,”²⁶—broadcast advertisements supporting or opposing a candidate for federal office within sixty days before a general election or thirty days before a primary.²⁷ *Citizens United*, a nonprofit corporation, argued that section 203 violated its First Amendment right to free speech by preventing use of its general treasury funds—rather than PAC money—to pay to disseminate a “movie” urging the defeat of a candidate for President.

The Supreme Court initially heard the case during the 2008-2009 Term, but then took the unusual step of ordering reargument in the 2009-2010 Term and expanding the list of questions presented to include a facial challenge to BCRA, even though one had not been pursued in the lower court.²⁸ In January 2010, the Court, 5–4, held section 203 facially unconstitutional, striking down the prohibition on corporations using general treasury funds to finance independent expenditures in elections.²⁹ The majority declared, as a matter of law, that “independent

²⁵ See, e.g., Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 35 (2012) (“*Citizens United* reflected a philosophical, rather than an empirical, position on money’s effect on politics.”).

²⁶ 2 U.S.C. § 441b(b)(2) (2002); see also 52 U.S.C. § 30118.

²⁷ See 11 CFR § 100.29.

²⁸ See Part II.A, “A Facial Ruling Built on the Record of an As-Applied Challenge”, *infra* at pp. 9-10.

²⁹ *Citizens United*, 558 U.S. at 360.

expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,”³⁰ and that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy” because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”³¹ Finally, the Court held that preventing corruption is the only basis for campaign finance regulation, and construed corruption narrowly as encompassing only a quid pro quo exchange.³²

The Court’s pronouncements were as sweeping as they were wrong. As the dissent observed, the majority took “a sledge hammer rather than a scalpel” to “one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics.”³³ Worse still, it acted without any basis in fact.

The Court’s ruling was factually unjustified for two reasons. First, there was no record to support the Court’s facial constitutional holding, because the case was litigated in the courts below as an as-applied challenge and was only then converted to a facial claim by the Supreme Court itself when it ordered re-argument.³⁴ Second, in the absence of a factual record, the Court based its conclusion on two older Supreme Court cases—*Buckley v. Valeo* and *McConnell v. FEC*—even though the first offered only a conditional conclusion from more than forty years prior and the second, ironically, depended on an extensive factual record to uphold the very provision struck down in *Citizens United*. Stunningly, the Court did not even acknowledge the lengthy record that Congress developed when it enacted BCRA.³⁵

³⁰ *Id.* at 357.

³¹ *Id.* at 360.

³² *Id.* at 351-60.

³³ *Id.* at 399 (Stevens, J., concurring in part and dissenting in part).

³⁴ As described *infra* at pp. 9-10, *Citizens United* initially brought a facial constitutional challenge but stipulated to its dismissal in the lower courts, before the adversarial system could test its factual premises.

³⁵ *Cf. FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (emphasizing that “careful legislative adjustment of the federal electoral laws, in a ‘cautious advance, step by step’ . . . warrants considerable deference”) (citation omitted).

The disconnect between *Citizen United*'s sweeping conclusions and the lack of facts supporting them reflects the Supreme Court's profound disregard for and misunderstanding of how elections would operate in practice under this new regime. In the name of free speech, the Court cleared the way for independent expenditure-only committees—known commonly as “super PACs”—to raise and spend unlimited amounts of money in federal elections.³⁶ And so they have, including more than \$2.1 billion spent during the 2020 election cycle alone.³⁷

The constitutional legitimacy of super PACs depends on the assumption that contributors to those entities do not exert undue influence over their government. But experience has proven otherwise. Today, super PACs, including the highly problematic single-candidate super PACs, are often closely tied to candidates for office with a mere mirage of separation. For example, super PACs are routinely established by close former aides of candidates, often contract with the same consultants as the campaigns they support, and candidates regularly appear at fundraising events for their supportive super PACs. The problem of rampant de facto coordination among super PACs and campaigns is only made worse by the high burden set for proving a coordination violation, and the ineffectiveness of FEC enforcement of this prohibition in recent years.³⁸

The proliferation of super PACs and their ability to obscure even overt coordination with campaigns has brought the core defect of *Citizens United* into sharp focus:

³⁶ See *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (striking down the Federal Election Campaign Act's limits on contributions to PACs that make only independent expenditures because *Citizens United* required it to “conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group”).

³⁷ See Ctr. for Responsive Politics, *2020 Outside Spending, by Super PAC*, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S> (last visited Apr. 17, 2021).

³⁸ See Letter from Ann M. Ravel & Ellen L. Weintraub to Fed. Election Comm'n, at 1-2 (June 8, 2015), https://www.fec.gov/resources/about-fec/commissioners/statements/Petition_for_Rulemaking.pdf; see also Sarah E. Adams, *How Single-Candidate Super PACs Changed the Game and How to Change it Back: Adopting a Presumption of Coordination and Fixing the FEC's Gridlock*, 85 BROOK. L. REV. 851, 861 (2020) (“existing coordination regulations—which are intended to ensure that single-candidate Super PACs remain independent—often fail to achieve their desired goal by leaving campaign activity with a strong likelihood of coordination risk unaddressed”).

independent expenditures can and often do give rise to corruption or the appearance of corruption. The Supreme Court’s failure to anticipate this is a product of its own making that has led to today’s ineffectual campaign finance regulatory system, which “mocks the idea of independence and non-corruption with the same effect.”³⁹

A. A Facial Ruling Built on the Record of an As-Applied Challenge

Understanding the inappropriateness of the Supreme Court’s facial ruling in *Citizens United* first requires briefly explaining the procedural history of the case. *Citizens United* initially argued, among other things, that section 203 of BCRA violated the First Amendment on its face—*i.e.*, that the law was unconstitutional under any circumstances, as opposed to as-applied to *Citizens United*.⁴⁰ But *Citizens United* expressly abandoned this facial claim, and the parties stipulated to its dismissal.⁴¹ The district court granted summary judgment for the Federal Election Commission on alternative grounds, noting briefly that precedent would have foreclosed a facial constitutional challenge had the plaintiffs pursued one.⁴² *Citizens United* then appealed to the Supreme Court, where it again raised only as-applied claims in the questions presented to the Court.

Here is where things went wrong. After the parties argued the case in March 2009, the Supreme Court ordered that it should be reargued during the next term. Instead of hearing the same as-applied issues already presented by the parties and considered by the district court, the Court required reargument on the *facial*

³⁹ Trevor Potter, *The Failed Promise of Unlimited “Independent” Spending in Elections*, 45 HUMAN RIGHTS MAG. (June 26, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/the-failed-promise-of-unlimited-independent-spending/.

⁴⁰ *Citizens United*, 558 U.S. at 396 (Stevens, J., concurring in part and dissenting in part).

⁴¹ *Id.* at 397.

⁴² See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278 (D.D.C. 2008) (three-judge court) (citing *McConnell v. FEC*, 540 U.S. 93 (2003)—the same case the Supreme Court depends on and overrules).

challenge to the law—without allowing for development of a new factual record below to inform the Court of how the law applied aside from *Citizens United*.⁴³

This procedural choice “is troubling on its own terms,”⁴⁴ because it means the Court went out of its way to make a sweeping conclusion—independent expenditures cannot be corrupting—that was not based on any record of fact.⁴⁵ In short, the Court in *Citizens United* upended campaign finance law based on a factual foundation that “is not simply incomplete or unsatisfactory; it is nonexistent.”⁴⁶

Just as troublingly, the Court failed to acknowledge, let alone consider, the “virtual mountain of research” Congress compiled when crafting BCRA, including evidence “on the corruption that previous legislation had failed to avert.”⁴⁷ Instead, the Court “negate[d] Congress’ efforts without a shred of evidence on how [the law] ha[s] been affecting any entity other than *Citizens United*,”⁴⁸ substituting its own prescribed view of how best to address money in politics for Congress’s carefully designed scheme.

B. Misreading and Misapplying Precedent

To fill in the factual gaps left by the absence of a developed record, the Supreme Court turned to two older campaign finance cases to support its blanket conclusion. Looking to the reasoning of *Buckley v. Valeo*⁴⁹ and the record of *McConnell v. FEC*,⁵⁰

⁴³ See Gorod, *supra* note 1, at 31-32 (“by setting the case for reargument rather than remanding to the district court for further factfinding, the Court ensured that factual development would occur largely by amicus brief and other extra-record sources, rather than by the parties before the district court”).

⁴⁴ Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 311 (2011); see also *Sabri v. United States*, 541 U.S. 600, 608-09 (“Facial adjudication carries too much promise of ‘premature interpretatio[n] of statutes’ on the basis of factually barebones records.”) (citation omitted).

⁴⁵ In addition, “[b]y reinstating a claim that *Citizens United* [had] abandoned, the Court [gave] it a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal.” *Citizens United*, 558 U.S. at 399 n.4 (Stevens, J., concurring in part and dissenting in part).

⁴⁶ *Id.* at 400.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 424 U.S. 1 (1976).

⁵⁰ 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310.

the Court noted that “[t]he *McConnell* record was over 100,000 pages long, yet it does not have any direct examples of votes being exchanged for . . . expenditures,” and concluded that this fact—plus a lack of evidence in the record below—“confirm[] *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of *quid pro quo* corruption.”⁵¹ This statement of law and the inferences drawn from it are both incorrect.

First, the Court misinterpreted *Buckley*,⁵² the seminal case establishing our modern jurisprudence for campaign finance law. In *Buckley*, the Court “drew a constitutional distinction between limits on candidate contributions, which implicated associational rights and were upheld as a means of preventing corruption, and limits on independent expenditures, which were struck down as a burden on core First Amendment speech that could not be justified on anti-corruption grounds.”⁵³ The Court reasoned that when expenditures are made independently, they “do[] not *presently* appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”⁵⁴ The Court in *Citizens United* rewrote this language to declare, as a matter of law, that independent expenditures can *never* be corrupting.⁵⁵

There are three interrelated problems with the Court’s reliance on *Buckley*. First, *Buckley*’s holding was indeterminate, not categorical: it stated only that independent expenditures “do[] not *presently* appear to pose dangers of real or apparent corruption.”⁵⁶ This language makes clear the temporally and factually limited nature of the Court’s ruling, which stands in stark contrast to the absolute

⁵¹ *Citizens United*, 558 U.S. at 360 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (per curiam)); see also *id.* (finding that “there is only scant evidence that independent expenditures even ingratiate.”).

⁵² See *id.* at 356-57 (discussing *Buckley*, 424 U.S. at 47).

⁵³ Potter, *supra* note 39.

⁵⁴ *Buckley*, 424 U.S. at 46 (emphasis added).

⁵⁵ *Citizens United*, 558 U.S. at 357 (“independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”).

⁵⁶ *Buckley*, 424 U.S. at 46 (emphasis added); see also *id.* at 47. (“independent expenditures *may* [] provide little assistance to the candidate’s campaign and indeed *may* prove counterproductive”) (emphasis added).

and prospectively binding disposition of *Citizens United*. This also highlights the second problem: *Buckley* was decided more than thirty years before *Citizens United*, so its record and conclusion were rooted in the circumstances of the time—as the decision itself qualified. The Court in *Citizens United* should not have rewritten *Buckley*'s cabined proposition—let alone expanded it categorically—without reevaluating the facts underlying it in light of thirty plus years of changes in the political process. Finally, the issue of *corporate* independent expenditures was not before the Court in *Buckley*, so even *Buckley*'s tentative conclusion did not extend to the Federal Election Campaign Act (“FECA”)’s regulation of corporations and unions. Such entities were not entirely barred from making independent expenditures; they simply had to fund such spending with money raised by their separate segregated funds—commonly known as PACs.

Moreover, to support its absolute reading of *Buckley*, the Court turned to a small part of the factual record developed in *McConnell*, where the Court had actually rejected a facial challenge to the same statute at issue in *Citizens United*, *i.e.*, section 203 of BCRA.⁵⁷ In stark contrast to *Citizens United*, the majority in *McConnell* came to its constitutional conclusions based on an extensive record of over 100,000 pages.⁵⁸ Yet the Court in *Citizens United* insisted that the lack of evidence in *McConnell* of “direct examples of votes being exchanged for . . . expenditures”—*i.e.*, direct quid pro quos—was proof enough, when combined with the (unsurprising) lack of evidence in the record below, that independent expenditures “do not give rise to corruption or the appearance of corruption.”⁵⁹

Besides the fact that the *McConnell* “record [was] not before [the Court]” in *Citizens United*,⁶⁰ the lack of evidence of quid pro quo corruption in *McConnell* is easily

⁵⁷ See *McConnell*, 540 U.S. at 203-09. This means, perversely, that the Supreme Court used *McConnell*'s own record to overturn it. See Teachout, *supra* note 44, at 311 (“The fact that the *McConnell* court came to a different conclusion [from *Citizens United*] after review of a 100,000 page record might indicate that facts actually matter.”).

⁵⁸ See *Citizens United*, 558 U.S. at 360 (quoting *McConnell*, 251 F. Supp. 2d at 209).

⁵⁹ *Id.* at 357.

⁶⁰ *Id.* at 400 n.5 (Stevens, J., concurring in part and dissenting in part).

explained: the “district court did not find quid pro quo corruption, at least in part, because it was not seeking it.”⁶¹ The district court was focused on the constitutionality of other aspects of BCRA, namely the extent to which Congress could regulate beyond “express advocacy.”⁶² The underlying reason for that focus was that the Supreme Court had already upheld the constitutionality of a limit on corporate independent expenditures in *Austin v. Michigan Chamber of Commerce*.⁶³ Thus, *McConnell* was concerned only with the scope of communications that Congress could regulate as election-related, even if lacking the “magic words” of express advocacy. In particular, *McConnell* analyzed whether the new definition of “electioneering communication” was overbroad and held that it was not; the Court had no reason to revisit the foundational *Austin* precedent that corporate election expenditures could potentially cause corruption or its appearance.

In light of this history, *Citizens United*’s reference to *McConnell* was nothing more than a red herring. The misleading reference to the *McConnell* record—as proof of “scant evidence that independent expenditures even ingratiate”⁶⁴—ignores the fact that the record in *McConnell* was developed to prove a different point. In sum, the Court “relied on the *absence of* evidence of direct corruption *as* evidence of no corruption.”⁶⁵ And to make matters worse, the Court ignored the fact that it would have been quite difficult to find recent quid pro quo corruption involving corporate independent expenditures since the nation’s prohibition on corporate independent expenditures had been in effect for several decades. In other contexts, the Court has recognized that it cannot expect litigants to marshal a robust record of past wrongdoings (and their consequences) when such misbehavior has long been illegal.⁶⁶

⁶¹ Teachout, *supra* note 44, at 310.

⁶² *McConnell*, 540 U.S. at 104.

⁶³ 494 U.S. 652 (1990).

⁶⁴ *Citizens United*, 558 U.S. at 360.

⁶⁵ Teachout, *supra* note 44, at 313 (emphasis added).

⁶⁶ See, e.g., *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (recognizing the “difficulty of mustering evidence to support long-enforced statutes” because “there is

In sum, the circularity of the Court’s reasoning in *Citizens United* is dizzying and obscures the baselessness of its conclusions.⁶⁷ But the groundlessness of the Court’s decision cannot be ignored when looking at its effects.

C. *SpeechNow*: The Case That Could Have Been

The Court’s unwarranted decision in *Citizens United* to reach beyond the questions presented and greenlight unchecked independent expenditures is even more egregious because it didn’t have to happen: the same issues were already being considered in a deliberative manner in another case ongoing at exactly the same time.

SpeechNow.org v. Federal Election Commission involved a challenge to FECA’s contribution limits as applied to political committees that make only independent expenditures,⁶⁸ and the FEC assembled a lengthy factual record of the potential corruption caused by independent expenditures.⁶⁹ The FEC’s proposed findings of fact demonstrated the danger of independent expenditures and the ways in which “[1] individuals attempt to influence or gain access to candidates through contributions to groups that make independent expenditures; [2] independent expenditure groups are used to circumvent direct contribution limits; and [3] independent expenditures then lead to indebtedness or access, pose a danger of quid pro quo arrangements, and create the appearance of corruption.”⁷⁰

no recent experience” without them); *Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (“Of course, we would not expect to find—and we cannot demand—continuing evidence of large-scale quid pro quo corruption or coercion involving federal contractor contributions [where] such contributions have been banned since 1940.”); cf. *Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting) (“[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet”).

⁶⁷ See *Larsen, Judging “Under Fire”*, *supra* note 15, at 1090 (noting that *Citizens United* is written “using facty language to discuss the evidence (or lack of evidence) of corruption caused by campaign spending”).

⁶⁸ See 599 F.3d at 689.

⁶⁹ See Defendant Federal Election Commission’s Proposed Findings of Fact, *Speechnow.org v. FEC*, 1:08-cv-00248-JR, at 18-118 (Oct. 28, 2008), https://www.fec.gov/resources/legal-resources/litigation/speechnow_fec_finding_facts.pdf.

⁷⁰ *Id.* at 18-19.

But this extensive factual record showing the actual corruptive risks of independent expenditures proved irrelevant to the case’s ultimate decision. Two months after the Supreme Court decided *Citizens United*, the en banc D.C. Circuit voted 9–0 to strike down FECA’s contribution limit as applied to what are now known as “super PACs,” reasoning that *Citizens United* required it to “conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group.”⁷¹ The holding of *Citizens United* therefore forced the D.C. Circuit to cast aside the FEC’s thoroughly developed factual record because it believed it was bound by the Supreme Court’s categorical holding that independent expenditures are incapable of causing corruption.

The combined consequences of these two cases have been disastrous. Together, *Citizens United* and *SpeechNow* “opened the floodgates”⁷² to unlimited contributions to and expenditures by super PACs, provided they operate independently of the candidates they support. As noted above, such “independence” is often nothing more than a legal fiction. Thus, *Citizens United* and *SpeechNow*, coupled with chronic inaction by the FEC and its failure to update its coordination regulations, have “led to a proliferation of super PACs . . . many of which appear to be closely associated with particular candidates.”⁷³

D. Single-Candidate Super PACs: The Corrupt, But Foreseeable, Consequence of *Citizens United* and *SpeechNow*

Since *Citizens United* and *SpeechNow*, super PACs have been allowed to raise unlimited contributions from individuals and corporations. This lightly regulated framework has resulted in an explosion of money in politics.

In 2010, total independent expenditures in federal elections were just over \$200 million.⁷⁴ By 2012, that number jumped to over \$1 billion.⁷⁵ And the flood of money

⁷¹ *SpeechNow*, 599 F.3d at 695.

⁷² Adams, *supra* note 38, at 861.

⁷³ Letter from Ravel & Weintraub, *supra* note 38, at 1-2.

⁷⁴ Adams, *supra* note 38, at 862.

⁷⁵ *Id.*

has not relented since: in 2020 alone, more than two thousand super PACs spent more than \$2 billion in federal elections.⁷⁶

Much of this spending has been driven by single-candidate super PACs, which accounted for more than \$640 million—almost one third—of 2020 spending.⁷⁷ In total, between 2012 and 2020, single-candidate super PACs spent over \$1.6 billion to influence federal elections.⁷⁸

The problem with super PACs—especially single-candidate super PACs—is that their constitutional grounding depends on the Supreme Court’s explicit presumption that they are truly separate from, and independent of, candidates’ campaigns, but in practice many are not. The ample examples of this not-so-separate relationship involve candidates from both major parties:

- In 2012, the first presidential election after *Citizens United*, both Barack Obama and Mitt Romney benefited from super PACs that their recent close aides established.⁷⁹ Together, the two super PACs spent over \$170 million during the 2012 election on supposedly independent expenditures.⁸⁰
- Throughout 2019, Pete Buttigieg’s presidential campaign paid fundraising consultant Zachary Allen’s firm; then, in early 2020, the pro-Buttigieg super PAC VoteVets hired Allen’s firm, and maxed-out direct Buttigieg

⁷⁶ See Ctr. for Responsive Politics, *2020 Outside Spending, by Super PAC*, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S> (last visited Apr. 17, 2021).

⁷⁷ See Ctr. for Responsive Politics, *2020 Outside Spending by Single-Candidate Super PACs*, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=C> (last visited Apr. 17, 2021).

⁷⁸ See Ctr. for Responsive Politics, *2012-2020 Outside Spending by Single-Candidate Super PACs*, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C> (last visited Apr. 17, 2021).

⁷⁹ See Matea Gold, *Former Obama aides launch independent fundraising groups*, L.A. TIMES (Apr. 29, 2011), <https://www.latimes.com/politics/la-xpm-2011-apr-29-la-pn-obama-fundraising-committee-20110429-story.html>; Dan Eggen & Chris Cillizza, *Romney backers start ‘super PAC’*, WASH. POST (June 23, 2011), https://www.washingtonpost.com/politics/romney-backers-launch-super-pac/2011/06/22/AGTkGchH_story.html.

⁸⁰ See Priorities USA Action, 2011-2012 Total Disbursements, FEC, <https://www.fec.gov/data/committee/C00495861/?tab=spending&cycle=2012>; Restore Our Future, Inc., 2011-2012 Total Disbursements, FEC, <https://www.fec.gov/data/committee/C00490045/?tab=spending&cycle=2012>.

donors began writing six-figure checks to the super PAC for his benefit, in lock step with the candidate they supported.⁸¹

- Iowa U.S. Senate candidate Joni Ernst's campaign paid the firm of the fundraising consultant Claire Holloway Avella; simultaneously, the pro-Ernst super PAC, Iowa Values Action, and the pro-Ernst 501(c)(4) organization, Iowa Values, were both paying the same fundraiser.⁸²
- Candidates sometimes even establish super PACs themselves before formally declaring their candidacies. Jeb Bush, for example, launched the super PAC Right to Rise and raised over \$100 million for it to support his presidential run before formally declaring his candidacy in 2015.⁸³ And Senator Rick Scott started and chaired New Republican PAC just a year before the super PAC began spending in support of Scott's 2018 U.S. Senate run in Florida.⁸⁴

Because current law does not sufficiently recognize the dangers of, let alone prohibit, these types of close relationships between campaigns and supportive super-PACs, single-candidate super-PACs are an enticing vehicle for deep-pocketed donors to evade the candidate contribution limits designed to guard against corruption.⁸⁵ Wealthy special interests can simply funnel millions to groups

⁸¹ See Maggie Severns, *Pro-Buttigieg super PAC hired Buttigieg finance staffer amid ad blitz*, POLITICO (Feb. 21, 2020), <https://www.politico.com/news/2020/02/21/pete-buttigieg-super-pac-staffer-116607>; CAMPAIGN LEGAL CTR., *Disclosures Shed Light on Relationship Between VoteVets and Buttigieg Campaign* (June 5, 2020), <https://campaignlegal.org/update/disclosures-shed-light-relationship-between-votevets-and-buttigieg-campaign>.

⁸² See Search for Disbursements to Holloway, Consulting, LLC from 2019-2020, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00546788&committee_id=C00751768&recipient_name=holloway&two_year_transaction_period=2020&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (last visited Apr. 17, 2021); see also Elizabeth Meyer, *'Dark Money' Group Funnels Money To Super PAC Boosting Ernst*, IOWA STARTING LINE (Oct. 30, 2020), <https://iowastartingline.com/2020/10/30/dark-money-group-funnels-money-to-super-pac-boosting-ernst/>.

⁸³ See Alex Isenstadt, *Jeb Bush's \$100M May*, POLITICO (May 8, 2015), <https://www.politico.com/story/2015/05/jeb-bush-right-to-rise-super-pac-campaign-117753>.

⁸⁴ See Ledyard King, *Florida Gov. Rick Scott's message to Republicans: Time for a makeover*, USA TODAY (May 11, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/11/florida-gov-rick-scotts-message-republicans-time-makeover/101551646/>.

⁸⁵ An individual may give only \$2,900 per election to a candidate, and corporations cannot give at all from their corporate treasuries, but individuals and corporations may contribute unlimited amounts to super PACs. So, when a super PAC supports only a single candidate—effectively operating as an extension of a candidate's campaign—a \$1 million corporate contribution to a super PAC can be as valuable to a candidate as a \$1 million corporate contribution to their campaign—and poses a similar risk of corruption or its appearance.

claiming to spend independently of candidates, but that operate functionally as an arm of the campaign.

- For example, in 2016, the private prison company GEO Group gave \$225,000 to a pro-Trump super PAC in the final stretch of the 2016 election, just after the Obama administration announced a plan to phase out federal private prison contracts.⁸⁶ A few months later, the new Trump administration reversed this plan, and GEO's stock soared.⁸⁷

Super PACs, especially single-candidate super PACs, are thus enabled to blur the distinction between contributions and independent expenditures, proving that activities “need not be formally prearranged or contracted with the campaign in order to be valuable to the candidate, *and to raise corruption issues.*”⁸⁸

“When writing a check to a super PAC earns a donor a closed-door dinner with the candidate that super PAC supports, when a campaign directs donors to the supportive super PAC, when a super PAC is established by close aides of the campaign, or when a super PAC coordinates its media strategy with the campaign, the line between the campaign and the super PAC blurs to the point that contributions to the super PAC almost become indistinguishable in function and effect from contributions made directly to that candidate. And, for those, the Court has repeatedly acknowledged that heightened corruption concerns justify capping those contributions.”⁸⁹ To hold otherwise for contributions to super PACs, especially

⁸⁶ See Fredreka Schouten, *Private prisons back Trump and could see big payoffs with new policies*, USA TODAY (Feb. 23, 2017), <https://www.usatoday.com/story/news/politics/2017/02/23/private-prisons-back-trump-and-could-see-big-payoffs-new-policies/98300394/>.

⁸⁷ See Brendan Fischer & Maggie Christ, *Americans Left in the Dark Over Reasons Behind Private Prison Policy Reversal*, CAMPAIGN LEGAL CTR. (Dec. 8, 2017), <https://campaignlegal.org/update/americans-left-dark-over-reasons-behind-private-prison-policy-reversal>; Amy Brittain & Drew Harwell, *Private-prison giant, resurgent in Trump era, gathers at president's resort*, WASH. POST (Oct. 25, 2017), https://www.washingtonpost.com/politics/with-business-booming-under-trump-private-prison-giant-gathers-at-presidents-resort/2017/10/25/b281d32c-adee-11e7-a908-a3470754bbb9_story.html.

⁸⁸ Potter, *supra* note 39 (emphasis added).

⁸⁹ *Id.*

single-candidate super PACs, in the face of evidence today “mocks the idea of independence and non-corruption with the same effect.”⁹⁰

In sum, *Citizens United*'s erroneous factual assumptions have introduced several levels of corruptive risk into federal elections, all rooted in the Court's failure to deal properly in its procedural choices and use of facts to support its sweeping conclusions.

III. *SHELBY COUNTY V. HOLDER: A RULING DISREGARDING EVIDENCE*

Shelby County v. Holder typifies the Supreme Court's rejection of Congress's factfinding in favor of the Court's misguided intuitions.⁹¹ There, the Court held unconstitutional a key provision of the 1965 Voting Rights Act (“VRA” or the “Act”) that required certain jurisdictions to preclear proposed voting laws with the federal government before going into effect.⁹² In reaching this conclusion, the Court made erroneous judgments about both the current state of voting rights and the forecast for the future, glossing over Congress's 15,000-page record that supported the opposite conclusions. The *Shelby County* decision represents a major setback in our nation's struggle to break down the entrenched barriers that minority groups must overcome to participate equally in the political process.

A. **Congress's Historic Role in Protecting Voting Rights**

Passed in the immediate aftermath of Bloody Sunday in Selma, Alabama in 1965 and other violence targeted at Americans seeking to vote, the VRA was a milestone and a turning point. Congress enacted the VRA in an effort to achieve the Constitution's unfulfilled promise of an equal franchise, and the Supreme Court immediately upheld the constitutionality of Congress's goal and chosen means “to rid the country of racial discrimination in voting.”⁹³ The Court recognized that Congress's decision to “shift[] the advantage of time and inertia [away] from the

⁹⁰ *Id.*

⁹¹ *See* 570 U.S. 529.

⁹² *Id.* at 537-38 (describing the interplay of Section 4(b) and Section 5).

⁹³ *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (discussing prior cases).

perpetrators of the evil” of voter suppression by “marshall[ing] an array of potent weapons against the evil” was “rational in both practice and theory” to achieve this worthy ambition.⁹⁴

Chief among those weapons was the combined framework established in Section 4(b) and Section 5 of the VRA. Section 4(b) provided a coverage formula Congress used to identify jurisdictions with a history of voting discrimination that must “preclear” election changes with the federal government,⁹⁵ and Section 5 establishes the substantive standard that prohibits any covered jurisdiction from enacting voting laws or practices that discriminate against minority voters by worsening their position compared to the status quo.⁹⁶

Since 1965, Congress reauthorized the Section 4(b) formula enforcing Section 5 on five occasions.⁹⁷ Every time, it did so with overwhelming bipartisan support because the many successes of the preclearance scheme showed that it was necessary both to block current discriminatory proposals and to prevent future backsliding.⁹⁸ Until *Shelby County*, the Supreme Court repeatedly agreed, rejecting numerous constitutional challenges to the VRA by deferring to Congress’s careful judgment that the reauthorizations advanced the Constitution’s guarantee of an equal and fair right to vote.⁹⁹ The Court did so because the Constitution gives Congress, not courts, the power “to assess and weigh the various conflicting considerations” in

⁹⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 328-30, 337 (1966).

⁹⁵ 52 U.S.C. § 10303(b) (2013). Section 4(b)’s formula covered jurisdictions that maintained a voting test or device in November 1964, 1968, or 1972, and in which less than 50% of persons of voting age were registered or voted in the 1964, 1968, or 1972 presidential elections. *Id.*

⁹⁶ *Beer v. United States*, 425 U.S. 130, 141 (1976) (ruling that Section 5 requires measuring voting changes against the status quo to determine whether they would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”).

⁹⁷ See Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CONG. RESEARCH SERV. 18-23 (2015), <https://fas.org/sgp/crs/misc/R43626.pdf>.

⁹⁸ U.S. COMM’N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 31 (2018), www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [hereinafter “USCCR Report”].

⁹⁹ See *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973).

legislating to protect voting rights,¹⁰⁰ and the Supreme Court “must accord substantial deference to [Congress’s] predictive judgments” and factual conclusions.¹⁰¹

B. Congress’s Investigative and Predictive Factfinding Role

Once again in 2006—just seven years before the Supreme Court decided *Shelby County*—Congress near-unanimously reauthorized the Section 4(b) coverage formula to continue Section 5’s effective preclearance requirements.¹⁰² Congress determined that covered jurisdictions with a legacy of entrenched and state-sponsored voting discrimination still threatened to impede minority voters’ freedom to equally participate in the political process. Importantly, it made this judgment after completing a careful and comprehensive process that included twenty-one hearings and collected over 15,000 pages of evidence describing the enduring discriminatory voting conditions in the covered jurisdictions.¹⁰³

Based on these findings, Congress emphasized that improvements to voting rights since 1965 provided strong reasons to continue the VRA preclearance formula—because it was working.¹⁰⁴ At the same time, it recognized that significant work remained to be done. As the House explained, although “[d]iscrimination today is more subtle than the visible methods used in 1965,” “the effect and results are the

¹⁰⁰ See *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (“It is not for [the Supreme Court] to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”).

¹⁰¹ See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994).

¹⁰² See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. Law 109-246, July 27, 2006, 120 Stat. 577 [hereinafter “2006 Reauthorization”]; see also *Bush Signs Voting Rights Act Extension*, NBC NEWS (July 26, 2006), www.nbcnews.com/id/wbna14059113 (noting that the Senate passed the 2006 VRA Reauthorization 98–0, and the House of Representatives passed the bill 390–33). In 2006, the Section 4(b) formula covered nine states and fifty-six local jurisdictions with a history of voting discrimination. See USCCR Report, *supra* note **Error! Bookmark not defined.**, at 48.

¹⁰³ See H.R. Rep. No. 109-478, at 5, 11-12 (2006); S. Rep. No. 109-295, at 2-4, 15 (2006); see also *Shelby County*, 570 U.S. at 565 (Ginsburg, J., dissenting) (“The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages.”).

¹⁰⁴ See 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, § 2(b)(1).

same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates.”¹⁰⁵

The evidence of these lasting dangers of voting discrimination fell into three principal categories: (1) data on minority voter turnout, registration, and rates of officeholding; (2) figures showing preclearance submission outcomes; and (3) comparisons of voting rights violations and litigation between covered and non-covered jurisdictions.¹⁰⁶

First, Congress recognized that due to the combined effect of minority voters’ painstaking efforts and the VRA’s protections, certain racial disparities in voting access had improved in many of the previously worst jurisdictions.¹⁰⁷ Nonetheless, many substantial barriers and discriminatory conditions persisted.¹⁰⁸ For example, numerous covered jurisdictions still had significant underrepresentation of racial minority groups in elected office. Looking to Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, Black people made up approximately 35% of the population but held only 20.7% of state legislative seats; they fared even worse for statewide office.¹⁰⁹ This underrepresentation revealed to Congress that minority voters in covered jurisdictions still faced discriminatory barriers to voting and effectively translating votes into seats.

Despite some progress addressing so-called “first generation” discrimination affecting voter turnout and registration, Congress found that several covered jurisdictions—specifically Virginia, South Carolina, Texas, and Florida—still had stark racial disparities in these areas.¹¹⁰ Moreover, disaggregating the data to isolate low Latino voter participation figures further exposed lasting inequities in

¹⁰⁵ H.R. Rep. No. 109-478, at 6 (2006).

¹⁰⁶ See, e.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 195 (2007).

¹⁰⁷ H.R. Rep. No. 109-478, at 2 (2006).

¹⁰⁸ See, e.g., USCCR Report, *supra* note **Error! Bookmark not defined.**, at 10 (summarizing turnout disparity data); see also *id.* at 205-17 (analyzing tabled data).

¹⁰⁹ H.R. Rep. No. 109-478, at 33 (2006).

¹¹⁰ *Id.* at 25-32.

covered states.¹¹¹ Congress also determined that all covered jurisdictions had substantial “second generation” barriers.¹¹² These include more subtle forms of discrimination such as dilutive redistricting practices or conditions of highly racially polarized voting that often gave governing lawmakers a political incentive to “prevent minority voters from fully participating in the electoral process.”¹¹³ Based on these extensive factual findings, Congress determined that the VRA’s preclearance coverage was still necessary because much work remained to be done to eliminate voting inequality.

Second, Congress evaluated the outcomes and processes for the voting changes covered jurisdictions submitted for preclearance. Between 1982 and 2006, the U.S. Department of Justice objected to more than 700 proposed voting changes in covered jurisdictions due to their discriminatory purpose or effect on minority voters.¹¹⁴ This included eighty-eight blocked proposals in Louisiana alone, among them every congressional redistricting plan the State submitted.¹¹⁵ Congress also considered the number and results of preclearance submissions in which DOJ did not formally object but asked the jurisdiction to provide more information to relieve concerns about discrimination.¹¹⁶ Jurisdictions withdrew over a quarter of preclearance submissions after receiving such requests, further suggesting that

¹¹¹ See Persily, *supra* note **Error! Bookmark not defined.**, at 197 & n.90.

¹¹² See 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, §§ 2(b)(1)-(2).

¹¹³ See *id.*, §§ 2(b)(2)-(3).

¹¹⁴ H.R. Rep. No. 109-478, at 21-22 (2006).

¹¹⁵ See *Shelby County v. Holder*, 811 F. Supp. 2d 424, 470 (D.D.C. 2011) (citing Voting Rights Act: Evidence of Continued Need at 264, *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 142 (Mar. 8, 2006)).

¹¹⁶ H.R. Rep. No. 109-478, at 40-41 (2006); USCCR Report, *supra* note **Error! Bookmark not defined.**, at 219; see also Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 47 (Ana Henderson ed., 2007) (studying the deterrent effect of section 5 generally and the DOJ’s “more information” requests specifically); Ellen Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248, 250 (2014) (explaining that the preclearance “regime’s deterrent effect . . . had been documented by substantial record evidence,” but that the Court in “*Shelby County* did not address this evidence”).

those jurisdictions were seeking to make discriminatory changes to their voting laws and that the VRA worked to prevent such changes from going into effect.¹¹⁷

Third, Congress assembled an extensive record of voting rights violations and numerous examples of modern intentional racial discrimination in covered jurisdictions, with nearly 300 pages dedicated to collecting these violations.¹¹⁸ They ranged from outright voter suppression to more subtle forms of voting rights deprivations, such as intimidation and violence against minority voters, discriminatory election administration, inequitable reductions in registration and voting opportunities, racial vote dilution and gerrymandering, and hostility toward non-English speaking voters.¹¹⁹ Congress also examined the litigation responses to these violations, including an authoritative study on VRA Section 2 cases¹²⁰ that revealed how voting discrimination continued to be an outsized problem in covered jurisdictions.¹²¹

In sum, Congress amassed and relied on an extensive factual record to conclude that voting discrimination was still a serious problem in covered jurisdictions in 2006, and that any improvements in voting and representation depended on the power of minority voters' mobilization and the effectiveness of the VRA's preclearance mechanism. It then voted near-unanimously to include this factual evidence in the enacted law instead of only in committee reports,¹²² further

¹¹⁷ H.R. Rep. No. 109-478, at 2 (2006).

¹¹⁸ See S. Rep. No. 109-295 apps. I-III, at 65-363 (2006).

¹¹⁹ See, e.g., H.R. Rep. No. 109-478, at 36-39 (2006) (recounting instances specifically in Mississippi, Georgia, Louisiana, and Texas); *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30–34, 43 (2006) (describing discrimination related to federal observer program); see also Persily, *supra* note **Error! Bookmark not defined.**, at 202 (collecting sources).

¹²⁰ Section 2 of the VRA, codified at 52 U.S. § 10301, provides a nationwide prohibition of discriminatory denials or abridgements of minority groups' voting rights. See *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

¹²¹ See Ellen 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, 655-56 (2006). The House included the Katz study in the record. See *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 964 (2005).

¹²² See 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, § 2.

solidifying the reliability of the record.¹²³ Given its findings, Congress also made an informed prediction about the future: “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”¹²⁴

Rather than confront this evidence and evaluate the sturdiness of Congress’s conclusions from it, the *Shelby County* Court chose to ignore the record almost entirely and substituted its own contrary forecast about voting rights going forward. With grave consequences for the country, the Court simply got it wrong.

C. The Court Substituted its Own Factual Conclusions

Despite Congress’s default factfinding role in our constitutional design,¹²⁵ the Supreme Court decided in *Shelby County* to make its own improvised judgments about the state of voting rights in the country. The Court spun a different factual narrative, touting advancements for voting equality in America only by “selectively emphasize[ing] certain record evidence, second-guess[ing] other evidence, and simply ignor[ing] other evidence” that Congress considered.¹²⁶

The Court’s disregard for the record was apparent almost immediately in the oral argument for the case. In a widely criticized exchange,¹²⁷ Chief Justice Roberts suggested that voting discrimination was worse in Massachusetts than Mississippi, and pressed the federal government’s attorney to explain why the reauthorized VRA

¹²³ The Court routinely gives increased deference to Congress’s specific factual findings included in enacted law. *See, e.g., King v. Burwell*, 576 U.S. 473, 481-83 (2015); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 29 (2010); *see also* Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 696–97 (2019) (collecting examples).

¹²⁴ 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, § 2(b)(9).

¹²⁵ *See supra* notes 6, **Error! Bookmark not defined.****Error! Bookmark not defined.**-101.

¹²⁶ Ross, *supra* note **Error! Bookmark not defined.**, at 2061.

¹²⁷ *See* Nina Totenberg, *In Voting Rights Arguments, Chief Justice Misconstrued Census Data*, NPR (Mar. 1, 2013), www.npr.org/sections/itsallpolitics/2013/03/01/173276943/in-voting-rights-arguments-chief-justice-may-have-misconstrued-census-data; Ryan Gabrielson, *It’s a Fact: Supreme Court Errors Aren’t Hard to Find*, PROPUBLICA (Oct. 17, 2017), www.propublica.org/article/supreme-court-errors-are-not-hard-to-find.

covered the latter but not the former.¹²⁸ But the Chief Justice reached that conclusion only by deriving flawed assumptions from the turnout and registration data he cited.¹²⁹ He also did so in direct conflict with the 2006 Congress’s careful conclusions, the Court’s prior VRA decisions recognizing the limitations of similar data, and the parties’ briefing to the Court that pointed out these limits.¹³⁰

Later in the oral argument, Justice Scalia also disregarded the legislative record to second-guess Congress’s stated reasons for reauthorizing the VRA. Scalia bluntly posited that Congress’s near-unanimous decision represented members’ “perpetuation of [a] racial entitlement” motivated by a desire to avoid political reproach rather than a commitment to minority voting rights.¹³¹ Of course, Congress’s exhaustive legislative record and statements of purpose undermined Justice Scalia ascription.¹³² Instead, Congress understood that guaranteeing an equal franchise is no “racial entitlement” but, in the words of the late John Lewis, is necessary to protect the “most powerful nonviolent tool we have in a democracy” to “actualize the true meaning of equality[.]”¹³³ Justice Sotomayor pointedly addressed

¹²⁸ Transcript of Oral Argument at 32, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

¹²⁹ The type of state-to-state comparison of census data that the Chief Justice conducted was methodologically and substantively flawed. *See, e.g.,* Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. F. 799, 813 (2018) (detailing problems and collecting sources). Moreover, scholars and courts have concluded that bare turnout comparisons are a notoriously imprecise metric for measuring the effects of voting discrimination. *See* Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 770-77 (2016); *see also* *Veasey v. Abbott*, 830 F.3d 216, 261 (5th Cir. 2016) (en banc) (rejecting reliance on turnout in a VRA Section 2 case).

¹³⁰ *See, e.g.,* H.R. Rep. No. 109-478, at 2, 26-29, 120 (2006) (recognizing limits of turnout and registration data); *City of Rome*, 446 U.S. at 180-82 (same); Brief For Respondent-Intervenor Harris at 56 n.33, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (addressing Massachusetts and Mississippi comparison).

¹³¹ Transcript of Oral Argument at 46-50, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

¹³² 2006 Reauthorization, 120 Stat. 577, Congressional Purpose and Findings, §§ 2(a)-(b).

¹³³ John Lewis, *Opinion: Why we still need the Voting Rights Act*, WASH. POST (Feb. 24, 2013), www.washingtonpost.com/opinions/why-we-still-need-the-voting-rights-act/2013/02/24/a70a930c-7d43-11e2-9a75-dab0201670da_story.html.

this difference, compelling Shelby County’s counsel to concede that Congress “intended to protect those who had been discriminated against.”¹³⁴

On opinion day, the *Shelby County* majority proceeded undeterred, invoking the factual mischaracterizations made during oral argument and other unsupported conclusions in its decision to immobilize the VRA’s preclearance framework. The Court ignored Congress’s considered choice in favor of its own assumptions and ill-informed predictions, using those assumptions to hold that the reauthorized preclearance coverage formula was unconstitutional because Congress had imposed “current burdens” that were not rationally justified by “current needs.”¹³⁵

Setting aside the doctrinal defects of the decision,¹³⁶ the Court’s willingness to discard the extensive 2006 congressional record is astonishing. Harkening back to Chief Justice Roberts’s remarks in oral argument, the Court surmised that “disparities in voter registration and turnout due to race [have been] erased,”¹³⁷ while glaringly overlooking Congress’s contrary record evidence¹³⁸ and failing to

¹³⁴ Transcript of Oral Argument at 62-63, *Shelby County. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

¹³⁵ *Shelby County*, 570 U.S. at 536 (citation omitted); see also Ross, *supra* note **Error!** **Bookmark not defined.**, at 2062.

¹³⁶ The Court read a strong “equal sovereignty” rule into the Constitution that even proponents admit was “pulled . . . out of thin air.” Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1091 (2016); cf. Judge Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives’ imagination*, SLATE (June 26, 2013) (“[T]here is no doctrine of equal sovereignty. The opinion rests on air.”). It relied on the theory that laws have a “constitutional shelf life” that had a substantial mismatch with the exhaustive record of modern conditions. See Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 61, 110 (2015). The Court gave short shift to the scope of Congress’s power to enforce the Fifteenth Amendment. See Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549 (2020). And it entertained a facial constitutional challenge from a discriminatory jurisdiction that would have qualified for preclearance coverage under any formula. See Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 734 (2014).

¹³⁷ *Shelby County*, 570 U.S. at 533.

¹³⁸ See Ian Vandewalker & Keith Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99, 107 (2015) (“At its heart, *Shelby County* is an opinion about levels of minority voter registration and turnout: they are mentioned repeatedly, almost to the exclusion of any other measure of discrimination.”).

“take into account turnout data among Asian, Latino, and Native Americans, who are also protected under the VRA[.]”¹³⁹

Along the lines of Justice Scalia’s “racial entitlement” hunch, the Court ruled that it could simply disregard Congress’s factfinding concerning severe and enduring discrimination because, as the Court boldly concluded, “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.”¹⁴⁰

In total, the Court “spent less than a page of its opinion reviewing the 15,000-page legislative record.”¹⁴¹ Still, it declared that “[o]ur country has changed” because the discriminatory “conditions that originally justified [the VRA’s preclearance] measures no longer characterize voting in the covered jurisdictions.”¹⁴² It then dismissed out of hand the VRA’s documented deterrence effect, and forecasted based on its implicit assumptions that nullifying the preclearance system would not lead to unleashed voting discrimination.¹⁴³

Justice Ginsburg’s moving dissent for four justices emphasized how the majority’s treatment of Congress’s factual findings and conclusions fundamentally misunderstood “who decides” whether the preclearance system “remains justifiable[.]”¹⁴⁴ The dissent thoroughly detailed Congress’s factfinding in the record, including the lasting turnout and registration disparities in certain jurisdictions, widespread “second-generation” barriers, high racial polarization, DOJ’s many preclearance objections and responses, and the study on Section 2 litigation.¹⁴⁵ Recounting this ranging and irrefutable evidence, the dissent complained that the majority had simply announced that it “decline[d] to enter the debate about what the record shows.”¹⁴⁶ The dissent also questioned the majority’s optimistic

¹³⁹ USCCR Report, *supra* note **Error! Bookmark not defined.**, at 54.

¹⁴⁰ *Shelby County*, 570 U.S. at 553; *see also id.* at 554 (“[W]e are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.”).

¹⁴¹ Ross, *supra* note **Error! Bookmark not defined.**, at 2028.

¹⁴² *Shelby County*, 570 U.S. at 535, 557.

¹⁴³ *Id.* at 553, 557.

¹⁴⁴ *Id.* at 559 (Ginsburg, J., dissenting).

¹⁴⁵ *See id.* at 565-66, 571-80.

¹⁴⁶ *Id.* at 580 (citing majority opinion) (internal quotation marks and alterations omitted).

predictions about the future of voting rights in the absence of Section 5 preclearance and its deterrent effects, observing that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”¹⁴⁷

D. *Shelby County’s Assumptions and Predictions Proved Wrong*

The majority in *Shelby County* gravely misjudged the landscape of voting rights in making its prediction for the future. As Justice Ginsburg warned, the rain of discriminatory voting changes came almost immediately. North Carolina and Texas offer two of the most blatant examples.

In North Carolina, the General Assembly passed a piece of voting legislation ignobly dubbed the “monster” law, which tried to erect deliberate and discriminatory barriers to voting in nearly every possible area.¹⁴⁸ Pre-*Shelby County*, the North Carolina Assembly had introduced an election bill that it expected to submit for federal preclearance and included some relatively benign provisions and a narrower voter ID requirement.¹⁴⁹ Within a day of the *Shelby County* decision, however, the General Assembly announced its intent to “move ahead with the full bill”—an enormous voter suppression bill that North Carolina lawmakers had held off introducing in anticipation of the Supreme Court’s decision.¹⁵⁰ Freed from preclearance, the Assembly engaged in a rushed and secretive process that included collecting racial data on minority voting practices to ensure the new law would “target African Americans with almost surgical precision.”¹⁵¹ Plaintiffs challenged the law in court and, after three years of protracted litigation that included multiple

¹⁴⁷ *Id.* at 590.

¹⁴⁸ See Voter Information Verification Act, S.L. 2013-381, 2013 N.C. Sess. Laws 1505 (HB 589); Act of June 22, 2015, S.L. 2015-103, 2015 N.C. Sess. Laws 225 (HB 836); see also William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law*, WASH. POST (Sept. 2, 2016), <http://wapo.st/2bXdfRs>.

¹⁴⁹ See *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 227-29 (4th Cir. 2016).

¹⁵⁰ See *id.* at 228-29.

¹⁵¹ See *id.* at 214; see also Wan, *supra* note **Error! Bookmark not defined.** (describing legislative process).

appeals and court decisions,¹⁵² the Fourth Circuit ruled the entire bill was unconstitutional because the legislators demonstrated clear discriminatory intent.¹⁵³ The court ordered the State to pay the plaintiffs nearly \$6 million in attorneys' fees and costs.¹⁵⁴ But that has not stopped North Carolina from taking another shot at enacting a new voter ID law, which is again the subject of litigation over its discriminatory burdens and intent.¹⁵⁵

Texas tells a similar story. Before *Shelby County*, the State had attempted to enact a voter ID law but failed to obtain preclearance because of the law's discriminatory burdens on minority voters.¹⁵⁶ After *Shelby County* and unrestrained by Section 5's requirements, Texas officials acted immediately¹⁵⁷ to pass the strictest voter ID law in the country.¹⁵⁸ Plaintiff groups sued to stop the law from going into effect and prevailed in the Fifth Circuit, but only after a lengthy court process with high costs to litigants and the State.¹⁵⁹ In the end, Texas paid the plaintiffs almost \$7 million in attorneys' fees and costs.¹⁶⁰ But the State was able to continue using a watered-

¹⁵² See also *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 233 (4th Cir. 2014).

¹⁵³ *McCrary*, 831 F.3d at 215.

¹⁵⁴ See Memorandum Order Granting Plaintiffs' Motion for Attorneys' Fees and Costs at 19, *N. Carolina State Conf. of NAACP v. McCrary*, No. 1:13-cv-658 (Dec. 7, 2018) (Doc. 508).

¹⁵⁵ See Rusty Jacobs, *North Carolina's Photo ID Law Is On Trial. Again*, N.C. PUBLIC RADIO (Apr. 12, 2021), www.wunc.org/politics/2021-04-12/north-carolina-photo-id-law-trial-voting-rights.

¹⁵⁶ See *Texas v. Holder*, 888 F. Supp. 2d 113, 127 (D.D.C. 2012), *vacated and remanded in Shelby County*, 570 U.S. 928 (2013).

¹⁵⁷ Greg Abbott, then Texas Attorney General, said that "with today's [*Shelby County*] decision, the state's voter ID law will take effect immediately. Redistricting maps passed by the legislature [but blocked in 2011] may also take effect without approval from the federal government." See Campbell Robertson, *Texas to Move Quickly on Voter Laws and Maps*, N.Y. TIMES (June 23, 2013), <http://nyti.ms/11F9AdA>. Then Texas Governor Rick Perry also commented shortly after the *Shelby County* decision that "Texas may now implement the will of the people without being subject to outdated and unnecessary oversight and the overreach of federal power." See Michael Cooper, *After Ruling, State Rushes to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <https://nyti.ms/2luifAc>.

¹⁵⁸ Texas Senate Bill 14, Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619 (SB 14) (original strict ID bill); Texas Senate Bill 5, Act of June 1, 2017, 85th Leg., R.S., 2017 Tex. Sess. Laws ch. 410 (SB 5) (mid-litigation amendment to lessen burdens of proposed ID requirements).

¹⁵⁹ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

¹⁶⁰ See Alex Ura, *Texas on the hook for \$6.8 million after long voter ID fight*, TEXAS TRIBUNE (May 27, 2020), www.texastribune.org/2020/05/27/texas-voter-id-legal-fees-court-costs/.

down version of its voter ID law that still imposes significant burdens on minority voters.¹⁶¹

In both North Carolina and Texas, plaintiffs were able to muster enough resources and blatant proof of discrimination to at least address the worst aspects of those State's responses to *Shelby County*. But in many other places, especially smaller localities, the gap in voting rights enforcement left after *Shelby County* gutted the VRA's preclearance protections is unmistakable. Take for example Augusta-Richmond County, Georgia, which decided after *Shelby County* to move certain local elections to off-cycle dates in July instead of November.¹⁶² Although DOJ blocked an identical proposal a year earlier under Section 5 preclearance because the change would have substantial discriminatory effects on minority voters,¹⁶³ plaintiffs in a post-*Shelby County* world struggled to challenge those same effects in court and, ultimately, the changed election dates went into effect.¹⁶⁴

Consider also Waller County, Texas, an area outside of Houston with a dark history of voting discrimination.¹⁶⁵ In the last two decades, the county has repeatedly tried to enact discriminatory laws or practices burdening Black college students, but failed to do so under Section 5's preclearance oversight.¹⁶⁶ Now that Waller County is unrestrained by these requirements, it has renewed its efforts to increase voting barriers by disproportionately eliminating voting opportunities for Black college

¹⁶¹ See *Veasey v. Abbott*, 870 F.3d 387, 393-94 (5th Cir. 2017) (Graves, J., dissenting).

¹⁶² See Zachary Roth, *Georgia GOP dusts off Jim Crow tactic: Changing election date*, MSNBC (Nov. 21, 2013), <https://www.msnbc.com/msnbc/gop-revives-jim-crow-tactic-msna217276>.

¹⁶³ U.S. Dep't of Justice, *Voting Determination Letter by the Department of Justice to Dennis R. Dunn, Deputy Attorney General of Georgia* (Dec. 21, 2012), www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_121221_0.pdf (last accessed Apr. 17, 2021).

¹⁶⁴ See *Howard v. Augusta-Richmond Cnty.*, No. 1:14-cv-097, 2014 WL 12810317, at *1 (S.D. Ga. May 13, 2014).

¹⁶⁵ See *Shelby County*, 570 U.S. at 574 (Ginsburg, J., dissenting) (listing Waller County's discriminatory practices that preclearance requirements blocked).

¹⁶⁶ See, e.g., *Veasey v. Perry*, 71 F. Supp. 3d 627, 635 (S.D. Tex. 2014) (addressing discrimination against Black students); Consent Decree, *United States v. Waller County*, No. 4:08-cv-3022 (S.D. Tex. Oct. 17, 2008) (Doc. 8) (blocking discriminatory registration practices and procedures); Consent Order, *Prairie View Chapter of NAACP v. Kitzman*, No. 4:04-cv-459 (S.D. Tex. Feb. 24, 2004) (Doc. 11) (relieving prosecution threats against Black student voters).

students.¹⁶⁷ Those reductions, which assuredly would not have passed preclearance scrutiny, are currently subject to costly, drawn-out, and uncertain litigation.¹⁶⁸

In a year of alarming efforts by state lawmakers to make voting harder across the country, 2021 will give new meaning to the damaging effects of *Shelby County*'s incorrect factual assumptions and predictions.¹⁶⁹ In previously covered states alone, lawmakers have already introduced or enacted at least 108 bills this year that would restrict voting rights—a striking total, particularly given how many of them threaten to disproportionately harm minority voters.¹⁷⁰ *Shelby County* paved the way for these discriminatory bills to become discriminatory laws. These efforts and outcomes are the proof that indeed “our country has changed” after *Shelby County*, undoubtedly for the worse for minority voters and the health of our democracy.

IV. CONCLUSION

In both *Citizens United* and *Shelby County*, the Supreme Court reached beyond its limits to opine on how elections work, basing those conclusions more on philosophical judgments than empirical reality. And in both cases, the Court got it wrong—unchecked money in politics and the rise of voting discrimination have had profound distortive effects on our electoral system that hinder voters' ability to prevent corruption and to hold elected officials accountable. In this way, the Court's arrogation of Congress's factfinding role was doubly misguided because it

¹⁶⁷ See Alex Ura, *Texas' oldest Black university was built on a former plantation. Its students still fight a legacy of voter suppression.*, TEXAS TRIBUNE (Feb. 25, 2021), www.texastribune.org/2021/02/25/waller-county-texas-voter-suppression/.

¹⁶⁸ See *Allen v. Waller County*, No. 4:18-cv-3985 (S.D. Tex.) (holding trial in fall 2020).

¹⁶⁹ See, e.g., Joan Biskupic, *How the Supreme Court laid the path for Georgia's new election law*, CNN (Mar. 27, 2021), www.cnn.com/2021/03/27/politics/supreme-court-georgia-voting-law-john-roberts-shelby-county/index.html; Jeremy Duda, *Supreme Court ruling on Voting Rights Act opened floodgates for new restrictions*, VIRGINIA MERCURY (Oct. 7, 2020), www.virginiamercury.com/2020/10/07/supreme-court-ruling-on-voting-rights-act-opened-floodgates-for-new-restrictions/.

¹⁷⁰ See *State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUSTICE (Apr. 1, 2021), www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021 (last visited Apr. 17, 2021); *Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUSTICE (Apr. 1, 2021), www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021 (last visited Apr. 17, 2021).

simultaneously discounted the popular will expressed through elected representatives and curtailed the people’s ability to make their representatives truly speak for them in the future.

The Court’s ability to conduct its own legislative factfinding is at times necessary and helpful. But the Court must do so with a humble recognition of its structural limitations, while offering great deference to Congress’s factual determinations. Nothing is natural or inevitable about the Court’s recent assertive factual encroachments in *Citizens United* and *Shelby County*. Indeed, our constitutional design counsels against it, and the Court used to get this right by respecting Congress’s superior factfinding role as a matter of institutional competency and separation of powers.¹⁷¹ It previously did so in the campaign finance context, repeatedly acknowledging that the “legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, [and] the Court in practice defers to empirical legislative judgments[.]”¹⁷² The same was true for the Voting Rights Act, where the Court historically deferred to Congress’s assessment of the factual landscape for minority voting rights and the tools necessary to prevent discrimination.¹⁷³ Returning to that deferential default to Congress’s legislative factfinding is a roadmap for the future and the Court must correct course.

In the meantime, Congress can act now to address some of the worst effects of the Supreme Court’s factual miscalculations in *Citizens United* and *Shelby County*. Passing the For the People Act and the John Lewis Voting Rights Advancement Act

¹⁷¹ *Turner*, 520 U.S. at 199 (“The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process.”); *Turner*, 512 U.S. at 665 (collecting cases and summarizing that the Court “must accord substantial deference to [Congress’s] predictive judgments”); *accord Blodgett v. Holden*, 275 U.S. 142, 147-148 (Holmes, J., concurring) (observing that judging Congress’s decisionmaking is “the gravest and most delicate duty that this Court is called upon to perform”).

¹⁷² *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000); *see also Nat’l Right to Work Comm.*, 459 U.S. at 209 (emphasizing that “careful legislative adjustment of the federal election laws, in a ‘cautious advance, step by step’ . . . warrants considerable deference” (citation omitted)).

¹⁷³ *See, e.g., South Carolina v. Katzenbach*, 383 U.S. at 324; *City of Rome*, 446 U.S. at 178.

would reaffirm to the American people that transparency, equality, and popular accountability are the hallmarks of our democracy.

On the campaign finance side, for example, Title VI, Subtitle B of the For the People Act would add new tools to specifically address the problem of barely disguised coordination between super PACs and candidates, putting more teeth behind the requirement of truly “independent” expenditures.¹⁷⁴ For voting rights, the For the People Act sets a new federal baseline to standardize basic registration and voting access across the country,¹⁷⁵ and would block the landslide of discriminatory election laws that state legislatures have introduced in 2021.¹⁷⁶ Importantly, the John Lewis Voting Rights Advancement Act also restores federal preclearance protocols to block racial discrimination in voting wherever it may arise.¹⁷⁷

The Supreme Court in *Citizens United* and *Shelby County* made dangerously wrong factual judgments and predictions about the way elections work in our country, but Congress can help reverse some of the most harmful consequences of those decisions.

¹⁷⁴ See *The For the People Act: How Key H.R. 1 Provisions Would Fix Democracy Problems* at 24-27, CAMPAIGN LEGAL CTR. (Dec. 2020), <https://campaignlegal.org/sites/default/files/2021-01/FINAL%20HR%201%20Document%2012.24%2010.40am.pdf> (last visited Apr. 17, 2021).

¹⁷⁵ See *id.* at 3-9.

¹⁷⁶ See *Congress Could Change Everything*, BRENNAN CTR. FOR JUSTICE (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/congress-could-change-everything> (last visited Apr. 17, 2021).

¹⁷⁷ See U.S. Senator Patrick Leahy, *John Lewis Voting Rights Advancement Act One-Pager*, <https://www.leahy.senate.gov/imo/media/doc/John%20Lewis%20Voting%20Rights%20Advancement%20Act%20one%20pager.pdf> (last visited Apr. 17, 2021).