

NATIONALLY, 95 PERCENT OF BLACKS VOTED FOR PRESIDENT OBAMA, BUT ONLY 43 PERCENT OF WHITES VOTED FOR HIM. WHITES WERE THE ONLY RACIAL GROUP THAT DID NOT CAST A MAJORITY OF THEIR VOTES FOR PRESIDENT OBAMA. ONLY 10, 11, AND 14 PERCENT OF WHITE VOTERS IN ALABAMA, MISSISSIPPI, AND LOUISIANA, RESPECTIVELY, PULLED THE LEVER FOR PRESIDENT OBAMA.



“POST-RACIAL” AMERICA?

**NOT YET:
WHY THE FIGHT FOR
VOTING RIGHTS CONTINUES
AFTER THE ELECTION OF
PRESIDENT BARACK OBAMA**



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"I understand there may be a temptation
among some to think that discrimination
is no longer a problem in 2009. . . .

But make no mistake:
the pain of discrimination is still felt in America."

*President Barack Obama
NAACP Centennial Anniversary*

In the dawn of a new era, the challenge lies in reconciling two truths embodied by President Obama's election: in the context of race relations in America, a great deal has changed; but to achieve full equality, a great deal of work still lies ahead.

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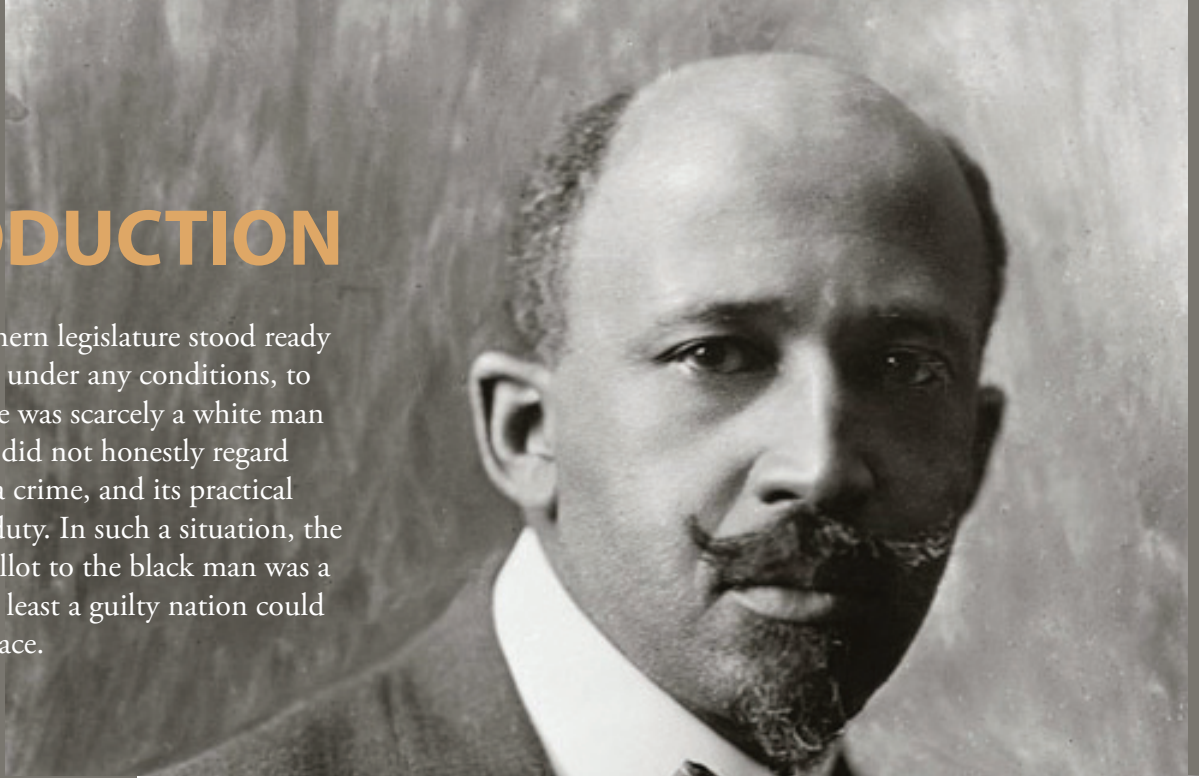
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INTRODUCTION

Not a single Southern legislature stood ready to admit a Negro, under any conditions, to the polls; . . . there was scarcely a white man in the South who did not honestly regard Emancipation as a crime, and its practical nullification as a duty. In such a situation, the granting of the ballot to the black man was a necessity, the very least a guilty nation could grant a wronged race.

—W. E. B. Du Bois



In 1903, when he uttered these words in his classic text, *The Souls of Black Folk*,¹ W. E. B. Du Bois could scarcely have imagined that a century later, in a watershed moment, President Barack Hussein Obama would become the first African American elected to be President of the United States. The extraordinary fact of President Obama's victory indisputably fulfilled the hopes and dreams of Du Bois and the many Americans who marched, bled, and lost their lives in the fight for equal protection under the law for African Americans and other minority groups. President Obama's election marks continued progress toward our highest ideals of freedom and equality, affording all Americans great hope about the promises of our Constitution. Yet, some mistake this critical milestone as the end of our nation's ongoing journey toward racial equality.

Amid the excitement of President Obama's election, "post-racial" has become a powerful new buzzword in our social and political lexicon, and its reach has had an enormous impact. By electing an African American to be President, some politicians, judges, and media pundits have asserted that America has now officially overcome racism and that the work of the Civil Rights Movement is completed.

It is important to resist the urge to embrace this oversimplified interpretation of the 2008 Presidential Election. To be sure, significant work still lies ahead. Notwithstanding the election of President Obama, the severe challenges facing African Americans remains daunting. Racial minorities in the United States continue to suffer from deplorable public schools, chronic unemployment, substandard housing and healthcare, intense residential segregation, and striking rates of over-incarceration. Clearly, discrimination has not been eliminated, as some contend; rather, it remains an integral component of complex and enduring social and political systems that promote racial inequality. One such system lies at the heart of our democracy: voting and elections.

With voting as its focus, this report confronts the growing myth that President Obama's election ushered America into a "post-racial" era by examining two recent developments in the area of race and politics.



Does meaningful progress toward equality negate the continuing need for further progress?

First, this report examines the “post-racial” argument made in *Northwest Austin Municipal Utility District Number One v. Holder*, a recent constitutional challenge to a core provision of the Voting Rights Act. In *MUD*, the plaintiff argued that the election of President Obama rendered that provision, known as Section 5, no longer necessary. This report closely contrasts plaintiff’s argument with the more than 16,000-page record of ongoing voting discrimination considered by Congress when it voted to renew Section 5 in 2006.

Second, this report demonstrates how President Obama’s victory provides evidence of great progress, while also illustrating the ongoing salience of race in American democracy. Exit polls from the 2008 Presidential Election show that a record 95 percent

of African Americans, 67 percent of Latinos, and 62 percent of Asian Americans voted for President Obama nationally, but that the President received the vote of only 43 percent of white voters. Whites were the only racial group that did not cast a majority of votes for President Obama. In addition, the results in Alabama, Mississippi, and Louisiana bring these national racially polarized trends into even sharper focus. The historic level of support for President Obama by voters of color in those states was decidedly not shared by their white neighbors: of the white voters in these three states, only 10 percent in Alabama, 11 percent in Mississippi, and 14 percent in Louisiana pulled the lever for President Obama. This report will show how, in the end, President Obama’s victory stemmed from two key sources: an increase in his share of the white vote in the jurisdictions not covered by Section 5 and a dramatic nationwide increase in his share of votes cast by voters of color.

Indeed, no single event could both remedy the vestiges of four centuries of unrelenting racial discrimination in the United States and render unnecessary the critical civil rights laws that have been in place for only four decades of that scarred history. While President Obama’s election was made possible by the Voting Rights Act, evidence of ongoing voting discrimination clearly demonstrates the continuing

need for meaningful voting rights protections. The proposition that President Obama’s victory is evidence of a “post-racial” society with no vestiges of racial inequality is a dangerous one that both demands repudiation and highlights the continuing need for vigilant civil rights advocacy.

In the dawn of a new era, the challenge lies in reconciling two truths embodied by President Obama’s election: in the context of race relations in America, a great deal has changed; but to achieve full equality, a great deal of work still lies ahead.





IS THE VOTING RIGHTS BATTLE OVER?

President Obama's election to the highest office in the land is remarkable not only because his inauguration ended a 220-year tradition of a racially exclusive Presidency, but also because African Americans and other Americans of color were systematically excluded from the political process in many parts of this country during the President's own lifetime. It was not until the enactment of the Voting Rights Act in 1965—four years after President Obama was born—that the right to vote for African Americans, guaranteed by the Fourteenth and Fifteenth Amendments of the United States Constitution nearly a century earlier, was finally protected.

Widely considered to be the crowning achievement of the Civil Rights Movement, the Voting Rights Act removed discriminatory barriers to voting, such as literacy tests and poll taxes, that had prevented African Americans and other people of color from exercising their constitutional right to vote for many generations. As the Supreme Court noted in its 1966 decision in *South Carolina v. Katzenbach*,² the voter registration rates of voting-age African Americans the year before the passage of the Voting Rights Act were only 19.4 percent in Alabama, 31.8 percent in Louisiana, and a stunning 6.4 percent in Mississippi—each state falling “roughly 50 percentage points or more” behind the registration rates of voting-age whites.³ The state-sanctioned exclusion of African Americans from the franchise during President Obama's childhood years underscores the significance of his election.

Americans of all backgrounds and citizens of nations around the world recognized the historic significance of President Obama's victory on Election Night 2008. On Inauguration Day, millions traveled to the nation's capital to witness and celebrate this historic moment. It is therefore not surprising that some now call into question the continuing need for civil rights laws such as the Voting Rights Act.

Debate Questions the Need for Voting Rights Laws

The “post-racial” debate has very real implications for efforts to preserve and defend civil rights in the United States.

Just days after the election, former University of California Regent and political activist Ward Connerly declared that President Obama's victory signified the end of racism in the United States. Connerly, who has backed numerous initiatives to dismantle affirmative action programs, observed, “[t]he argument that American society is institutionally racist, that the good ol' boys are the only ones that can succeed . . . is decimated by the election of Senator Obama.”⁴ In a similar vein, conservative commentator and Vice Chair of the U.S. Commission on Civil Rights Abigail Thernstrom wrote that President Obama's success marked “the end of a remarkable journey” and announced that “[t]he voting rights battle is over.”⁵ Even some commentators viewed as sympathetic to civil rights advocacy efforts have questioned whether President Obama's election “presents the moment” when Congress should dismantle certain voting rights protections.⁶

Other observers, however, have cautioned against overstating the significance of this single election. One commentator noted, “[w]e didn't erase 400 years of history with [President Obama's] election. His election said instead that 400 years of history don't have to define us.”⁷ Journalist Marjorie Valbrun echoed this sentiment in *The Washington Post*, writing, “[n]ow some people want to look to one solitary black man to just erase the so-called race problem. . . . Call it the I-Love-Obama-thus-racism-no-longer-exists phenomenon. If only things were that simple.”⁸ Former Secretary of State Colin Powell also rejected the idea that President Obama's election signaled the beginning of “post-racial” America. “With each passing year, with each passing generation, with each passing figure, we move closer and closer to what America can be,” Powell remarked.⁹ “But,” he added, “no matter what happens in the case of Senator Obama, there are still a lot of black

kids who don't see that dream there for them."¹⁰ Indeed, President Obama himself acknowledged as much in a speech commemorating the 100-year anniversary of the NAACP, where he explained, "I understand there may be a temptation among some to think that discrimination is no longer a problem in 2009. . . . But make no mistake: the pain of discrimination is still felt in America."¹¹

The Debate Reaches the Supreme Court

The question of whether the election of an African-American President made voting rights protections unnecessary has already made its way to the steps of the United States Supreme Court. Just months after President Obama took office, the Court heard arguments in *MUD*.¹² As described below, the *MUD* plaintiff urged the Court to strike down Section 5 of the Voting Rights Act, citing, in part, President Obama's election in arguing that the Act was no longer constitutional.

Section 5 applies only to certain states and jurisdictions that have a history of discriminating against minority voters. Nine states, as well as individual counties and townships in seven other states, are covered by Section 5.¹³ These jurisdictions, known as "covered jurisdictions," must submit all proposed voting changes for federal review or "preclearance" by either the Department of Justice or a three-judge panel of the federal district court in the District of Columbia. A proposed voting change will be approved if the covered jurisdiction demonstrates: (1) that the change was not adopted with a discriminatory purpose, and (2) that it will not worsen the position of minority voters in that jurisdiction.¹⁴

This "preclearance" requirement has proven extremely effective in blocking and deterring racially discriminatory voting practices. The effectiveness of the provision lies in the way that it provides powerful incentives to state and local governments to make voting laws fair, since they can expect that contrary approaches will be rejected.

Debo P. Adegbile, LDF Director of Litigation, argues before the U.S. Supreme Court in *MUD* (2009).





As a result of its well-documented history of voting discrimination, Section 5 applies to the entire state of Texas. In *MUD*, a small municipal utility district in Austin, Texas filed a lawsuit in 2006—just days after Congress overwhelmingly voted to reauthorize Section 5 of the Voting Rights Act, and after it was signed into law by President George W. Bush—seeking to bail out from the Section 5 preclearance process and challenging the constitutionality of the Section 5 preclearance provisions.

In May 2008, the U.S. District Court for the District of Columbia unequivocally rejected the suit.¹⁵ The district court found that the utility district was properly covered by Section 5 and held that Congress was well within its authority to renew Section 5 in light of significant evidence of ongoing voting discrimination in the jurisdictions where the law applies.¹⁶ In January 2009, shortly before President Obama's inauguration as the nation's first African-American President, the U.S. Supreme Court agreed to review the case.¹⁷

In the Supreme Court, the plaintiff utility district argued that Section 5 had become a remedy for an obsolete problem, claiming that voting discrimination was a thing of the past. Citing President Obama's election as evidence that voting rights laws were no longer necessary to protect African Americans and other people of color, plaintiff's brief stated that "[t]he country has its first African-American president, who received a larger percentage of the white vote than each of the previous two Democratic presidential nominees."¹⁸ In support of the plaintiff's case, Governor Sonny Perdue of Georgia—a Section 5-covered jurisdiction with a history of and current appetite for minority vote suppression—submitted a brief describing President Obama's success as "proof" that Georgia should no longer be subject to the Section 5 preclearance requirements.¹⁹ Notwithstanding the fact that President Obama lost Georgia to Senator John McCain by a 52 percent to 47 percent margin—with a mere 23 percent of white voters in that state casting ballots for President Obama—Governor Perdue argued that "[t]he election of President Obama, and *especially the President's voter performance in Section 5-covered jurisdictions*, illustrates how far those jurisdictions have come from their history of discrimination."²⁰

Both the plaintiff's and Governor Perdue's briefs ignored compelling data showing that President Obama, despite his success nationwide in the 2008 Presidential Election, faced a demonstrable challenge to winning votes in Section 5-covered jurisdictions on the basis of his race—as well as ample other evidence that other candidates of color, particularly at the state and local levels, face even higher obstacles to winning elections.

The Supreme Court ultimately declined to rule on the constitutionality of Section 5, leaving the law in full force and effect.²¹

CONGRESS'S 2006 REAUTHORIZATION OF SECTION 5 OF THE VOTING RIGHTS ACT

The debate on the “post-racial” significance of the 2008 Presidential Election reflects the central question that Congress confronted when it weighed the most recent renewal of Section 5 of the Voting Rights Act in 2006: Does meaningful progress toward equality negate the continuing need for further progress?

The Voting Rights Act, enacted by Congress in 1965 to protect the right to vote from unremitting discrimination, contains important provisions that must be periodically renewed by Congress. Among these provisions is Section 5, the preclearance provision, which requires covered jurisdictions to prove that voting changes are not discriminatory before they may legally take effect. Since the Act's initial passage in 1965, Congress has periodically reauthorized Section 5. It did so most recently when it passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (the “2006 Reauthorization”), which renewed Section 5 for an additional 25 years until 2031.²²

The 2006 Reauthorization followed an extensive and careful review by Congress to determine whether Section 5 was still needed to protect minority voters from discrimination. Over a ten-month period beginning in 2005, Congress held 21 hearings, during which it received testimony from over 90 witnesses, including federal and state policy makers, election experts, scholars, voting rights litigators, and individual citizens, some of whom personally experienced voting discrimination. These witnesses provided testimony both favoring and opposing Section 5's renewal. By the end of this process, Congress had compiled an extensive record containing more than 16,000 pages of evidence and testimony.

Based on this record, Congress concluded that, despite significant progress, the forty years since the Act's passage had proven insufficient to eliminate the vestiges of entrenched discrimination against minority voters in the covered jurisdictions. For example, Congress found that between 1982 and 2006, the previous reauthorization period,

Section 5 prevented more than 600 proposed discriminatory changes, 60 percent of which were based on purposeful discrimination.²³ Congress considered evidence of proposed practices that had been blocked by Section 5, including efforts to (1) make polling places inaccessible to African-American voters; (2) cancel elections in which African-American voters, for the first time, were positioned to elect candidates of their choice; (3) intimidate African-American voters and campaign workers; (4) annex predominantly white neighborhoods into local voting jurisdictions in order to dilute the proportion of minority voters in those areas; (5) implement “at-large” systems for school board elections in order to limit the potential for minority candidates to be elected to those boards; and (6) adopt redistricting plans in state and local legislative districts that would favor white candidates.²⁴

All of these discriminatory strategies, which have been attempted repeatedly over the years in the covered jurisdictions, aim to eliminate meaningful political competition at the local level in order to wall off minority voters' preferences and to ensure that the candidates preferred by white voters will always prevail. As Congress summarized, “[t]he changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process.”²⁵ Examples of such discrimination from 1982 through 2006 are provided in Table 1.

The record before Congress revealed a consistent pattern of repetitious violations in the covered jurisdictions. Consequently, Congress opted to renew the application of Section 5 to the existing covered jurisdictions. Moreover, while Congress noted that discrimination against minority voters also occurs in non-covered jurisdictions, it concluded that the record before it did not warrant expansion of the scope of Section 5 to the entire country.

Congress ultimately decided—by a 390-33 vote in the House of Representatives and a unanimous 98-0 vote in the Senate²⁶—that Section 5 was still necessary and, indeed, vital to protecting minority voters from discrimination.

Table 1	
EXAMPLES OF VOTING DISCRIMINATION IN SECTION 5-COVERED JURISDICTIONS CONSIDERED BY CONGRESS IN 2006	
Alabama	
1980s-1990's	Redistricting. The Department of Justice ("DOJ") blocked Alabama's statewide redistricting plan following the 1980 and 1990 Census after the State failed to provide a nondiscriminatory reason for fragmenting concentrated populations. The DOJ believed that the "underlying principle of the Congressional redistricting" plan was "to limit Black voting potential to a single district."
1993	Annexation. For the second time in four years, the DOJ rejects the City of Foley's policy of encouraging petitions for annexation from majority-white residential areas while rejecting petitions from predominately African-American areas.
Georgia	
1997	Annexation. The DOJ rejects the City of Augusta's proposed policy "that each time a Black residential area is annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's Black population percentage."
1995	Polling place change. The DOJ bars Jenkins County from moving its polling place from an accessible location to an inaccessible location in a white neighborhood, after concluding that the move was "designed...to thwart recent black political participation."
Louisiana	
2002	Redistricting. The DOJ objects to redistricting plans submitted by DeSoto Parish and the City of Minden that local officials admitted were intentionally designed to reduce opportunities for African Americans to elect candidates of their choice.
1984	Cancelled Primary. The DOJ blocks the state's attempt to cancel its Presidential primary, finding it would "reduce the opportunities for Blacks to participate . . . in the delegate selection process" and that it was motivated by Jesse Jackson's candidacy.
1960s-2000s	Redistricting. The DOJ objects to every decennial redistricting plan for the Louisiana House of Representatives as initially submitted by the State since the 1960 Census.
Mississippi	
2001	Cancelled Election. The DOJ blocks the City of Kilmichael's attempt to cancel its elections, finding that the city was motivated by evidence from the 2000 Census that African-American candidates could now plausibly be elected to local office.
Texas	
2006	Polling place reduction. A community college district covering two counties and 1000 square miles is barred from reducing the number of polling places from 84 to 12, which the DOJ concludes would disproportionately harm minority voters.
2004	Student vote suppression. Waller County, which for years had sought to suppress voting by students at historically Black Prairie View A&M University, drops a plan to reduce early voting, for which it did not seek preclearance, after a lawsuit was filed.
2000	Campaign worker intimidation. The home of a campaign worker for Wharton County's first African-American general election candidate in 100 years is set on fire after she received threatening calls demanding removal of her yard sign for the candidate.
1970s-2000s	Redistricting. The DOJ rejects as discriminatory every decennial redistricting plan for the Texas House of Representatives as initially submitted by the State since the 1970 Census.
Virginia	
2005	Voter intimidation. Literature is distributed in African American neighborhoods in Danville, which threatened to lynch Black voters and warned that if residents "didn't vote a certain way certain things could happen to you."

WHY SECTION 5 IS STILL NECESSARY

Nearly 40 percent of all African Americans in the United States live in a Section 5-covered jurisdiction.²⁷ Five fully covered states (Alabama, Georgia, Louisiana, Mississippi, and South Carolina) and one partially covered state (North Carolina) are among those states with the highest proportion of African American voters.²⁸ Thus, while African Americans remain a minority in these states, they are a significantly larger minority in these states than elsewhere.

With current levels of racially polarized voting—a phenomenon in which voting preferences are sharply divided along racial lines, with white voters and voters of color voting for opposing candidates—the candidate of choice for a white majority in a given election rarely reflects the preferences of African-American voters in that election. In election contests between opposing candidates of different races, there is often a very high correlation between the voter's race and the voter's support for the nonwhite candidate. Thus, despite the increase in registration rates by African Americans since 1965, racially polarized voting continues to prevent voters of color from electing their candidates of choice.

Without the ongoing protections of Section 5, it becomes easier for state and local officials to structure electoral systems in ways that exacerbate racially polarized voting patterns and effectively close off opportunities for minority communities to elect candidates of their choice, including minority candidates, where that is their preference. Without Section 5, a retrenchment in the fragile gains that have been made in these jurisdictions would likely occur.

The results of the 2008 Presidential Election underscore the racially polarized voting that persists in covered jurisdictions.

The 2008 Election: A Great Deal Has Changed Nationally, But Much Work Remains to be Done in the Covered Jurisdictions

President Obama's decisive victory in both the national popular vote and the Electoral College obscures the reality that his race remained a significant and decisive factor for many voters. Contrary to claims that President Obama won the Presidency because the influence of race in Americans' voting choices had diminished, the race of both Senator McCain and President Obama was a critical factor in many voters' candidate selection in 2008.

Of course, the irrefutable effectiveness of the Voting Rights Act in removing historical barriers to voting provided President Obama with a significant base of support from voters of color, who both registered and participated in the 2008 Presidential Election in record numbers. Nevertheless, the majority of white voters across the country—and even more so in the Section 5-covered jurisdictions—did not cast their votes for President Obama. The data described below suggest that at least some voters' choices were influenced by the candidates' race.

The Voting Rights Act Has Successfully Expanded the Minority Vote, a Critical Element of President Obama's Success in 2008

President Obama built a national base of support that enabled him to win both the popular vote and the Electoral College. Significantly, President Obama's margin of victory can largely be credited to deep and widespread support by voters of color and young voters across the country, providing him with the edge needed to win electoral votes in critical states. The value of the racial minority vote to President Obama speaks to the power of the Voting Rights Act in expanding access to the polls by voters of color throughout the United States.

Evidencing the growing political strength of communities of color nationally are the following statistics:

- The number of African American voters that cast ballots in 2008 was 23.5 percent higher than in 2004, representing an increase of 3.16 million African-American voters.²⁹
- African-American voters constituted 13 percent of voters nationally, an increase from 11 percent in 2004. Hispanic/Latino voters made up 9 percent of voters nationally, up from 8 percent in 2004.³⁰
- 95 percent of African-American voters, 67 percent of Hispanic/Latino voters, 62 percent of Asian-American voters, and 66 percent of other nonwhite voters cast ballots for Obama.³¹
- At the same time, President Obama received only 43 percent of the total white vote, and the total share of the white vote decreased by 4 percentage points from 2004 to 2008.³²

The increase in participation by voters of color both in absolute numbers and as a proportion of the electorate is strong evidence that the Voting Rights Act continues to expand access to the franchise. Continued racially polarized voting, however, renders the increased participation by voters of color insufficient to enable those voters to elect candidates of their choice at the state, county, and local levels in Section 5-covered jurisdictions.

Discrimination and Racially Polarized Voting Remain Significant Barriers to Voters and Candidates of Color, Particularly in Section 5-Covered Jurisdictions

President Obama underperformed among white voters nationally, but his underperformance among white voters was especially pronounced in Section 5-covered jurisdictions. Although President Obama received approximately 43 percent of the white vote nationwide, he received, on average, *less than one out of four white voters' votes in the states covered by Section 5*.³³ In these same Section 5-covered states, President Obama received between 92 and 98 percent of the African-American vote.

Table 2

ELECTORAL VOTES FOR PRESIDENT OBAMA IN SECTION 5-COVERED STATES

COVERED JURISDICTION	SUPPORT FOR OBAMA		ELECTORAL VOTES	WINNER
	<i>White Voters</i>	<i>African-American Voters</i>		
Alabama	10%	98%	9	McCain
Alaska	33%	No data available	3	McCain
Arizona	40%	No data available	10	McCain
Georgia	23%	98%	15	McCain
Louisiana	14%	94%	9	McCain
Mississippi	11%	98%	6	McCain
South Carolina	26%	96%	8	McCain
Texas	26%	98%	34	McCain
Virginia	39%	92%	13	Obama

Data Source: MSNBC 2008 Exit Poll Data (<http://www.msnbc.msn.com/id/26843704>)



As illustrated in Table 2, President Obama carried only one of the nine fully covered states: Virginia. As a result, President Obama received just 13 of the 107 electoral votes available in these states, despite being the candidate of choice for nearly all African-American voters in those states. And despite the increased and historic participation by minority voters in the Section 5-covered jurisdictions, where the largest percentages of African Americans and other minority groups live, those states' electoral votes went almost exclusively to Senator John McCain. This result is largely due to white voters' comparably deep levels of support for Senator McCain in the Section 5-covered states.

President Obama's electoral performance among white voters nationwide, and in the covered jurisdictions in particular, vividly illustrates the persistence of racially polarized voting patterns and the significant work that remains to be done to overcome discrimination in the political process. Even recognizing patterns of racial polarization at the national level, these patterns were significantly magnified in the covered states.

Notably, President Obama performed worse in several covered jurisdictions than Senator John Kerry, the unsuccessful white Democratic candidate for the Presidency in 2004.³⁴ A study by the Joint Center for Political and Economic Activities found that President Obama's comparatively poor performance in these Southern states was attributable to his race.³⁵ Even in states like North Carolina, where President Obama outperformed Senator Kerry and narrowly carried the state, President Obama did relatively worse than the two white Democratic candidates who won statewide elections in that state in 2008.³⁶

Similarly, an analysis of 2008 exit poll data by Professor Nathaniel Persily of Columbia Law School demonstrated that President Obama's race played a considerable role in the election.³⁷ In an amicus brief submitted to the Supreme Court in the *MUD* case (the "Persily Amicus Brief"), Professor Persily explained that not only did President Obama's race cost him many white votes, but that the lion's share of these lost votes was in the states covered by Section 5. "Far from suggesting a break with the voting patterns of the past," Persily noted, "the 2008 election revealed the intransigence of racial differences in voting patterns."³⁸ The Persily Amicus Brief concluded that President Obama's

election was not a function of a "post-racial" moment, but rather a result of a marginal increase in white votes in non-covered states and an across-the-board and historic increase in the share of votes cast by minority voters in every state. President Obama's victory was not, as some have suggested, due to a uniform popularity among voters from *all* racial groups in *every* state.

Exit poll data from the 2004 and 2008 Presidential Elections support the conclusions in the above studies. These data, tabulated in Figure 1 and Table 3, reveal the following findings:

- **President Obama's victory derived from an increase in his share of the white vote in the non-covered jurisdictions, and a nationwide increase in his share of votes cast by minorities.** President Obama's support among white voters increased relative to Senator Kerry's 2004 performance by 2 to 43 points in 26 states and the District of Columbia. His support among white voters declined in 25 states by 1 to 33 points, including all nine states fully covered by Section 5.³⁹
- **Each of the six states with the lowest percentage of white voters voting for President Obama in 2008 is a fully covered state.** These states are South Carolina, Texas, Georgia, Louisiana, Mississippi, and Alabama. The three other fully covered states—Arizona, Virginia, and Alaska—were in the bottom eighteen states ranked by percentage of white voters voting for President Obama.⁴⁰
- **President Obama only outperformed Senator John Kerry's 2004 support from white voters in three of the nine fully covered Section 5 states.** President Obama received an equal or lower share of white votes than Senator Kerry in six fully covered states: Alabama, Alaska, Arizona, Georgia, Louisiana, and Mississippi.⁴¹
- **Even where President Obama gained among white voters relative to Senator Kerry, his support among white voters was weak.** President Obama slightly outperformed Senator Kerry among whites in South Carolina, Texas, and Virginia, but still

did poorly overall in these states. President Obama received just 26 percent of the white vote in South Carolina and Texas, and 39 percent in Virginia. In comparison, Senator Kerry's support from white voters in 2004 was 22 percent in South Carolina, 25 percent in Texas, and 32 percent in Virginia.⁴²

- **President Obama's support from African-American voters exceeded Senator Kerry's in each covered state and most other states.** President Obama's gain in African-American support relative to Senator Kerry was marked in each fully covered state, ranging from a four-point increase from 90 to 94 percent in Louisiana to a 15-point increase from 83 to 98 percent in Texas.⁴³
- **President Obama's drop in white support relative to Senator Kerry was most pronounced in three Section 5-covered states: Alabama, Louisiana, and Mississippi.** In Alabama, the percentage of white voters voting for the Democratic candidate in 2008 was barely half that in 2004, dropping nine points from 19 percent in 2004 to 10 percent in 2008. In Louisiana, white support for the Democratic candidate dropped ten points from 24 percent to 14 percent. President Obama even suffered a precipitous drop in white support in Mississippi, despite the fact that only 14 percent of white voters voted for Senator Kerry in 2004: only 11 percent of white voters cast their ballots for President Obama in 2008.⁴⁴
- **President Obama did poorly even among white Democrats in the covered jurisdictions.** A comparison of voting patterns in the covered states and elsewhere reveals that polarized voting is distinctly racial in nature, not merely a function of partisan politics. Most strikingly, President Obama failed to receive a majority of votes from white Democrats in two covered states: Louisiana, in which he received just 38 percent of the white Democratic vote, and Alabama, in which he received 47 percent of that group's vote.⁴⁵
- **Both racial polarization in Section 5-covered jurisdictions and the racial disparity in voting patterns between covered and non-covered jurisdictions increased in 2008.** President Obama's disparate performance in the covered and non-covered jurisdictions demonstrated both "a

widening of the gap in political preferences between racial groups and a greater differentiation between the covered and non-covered jurisdictions."⁴⁶

- **President Obama received little support from white voters at large in the Section 5-covered states.** President Obama won just 26 percent of the white vote in the covered states, compared to 48 percent in the non-covered states. In contrast, he won 97 percent of the African-American vote and 62 percent of the Hispanic/Latino vote in the covered states, which is comparable to the rates for those groups in the non-covered states.⁴⁷

These figures are all the more notable when one considers that 2008 presented extremely favorable conditions for Democratic candidates across the country. Given the state of the economy, America's involvement in unpopular wars, and the historically low approval ratings of the outgoing incumbent Republican president, the decrease in support for the Democratic Presidential candidate among whites in the covered jurisdictions is striking.

Voters of Color in the Covered Jurisdictions Continue to Need the Protections of Section 5

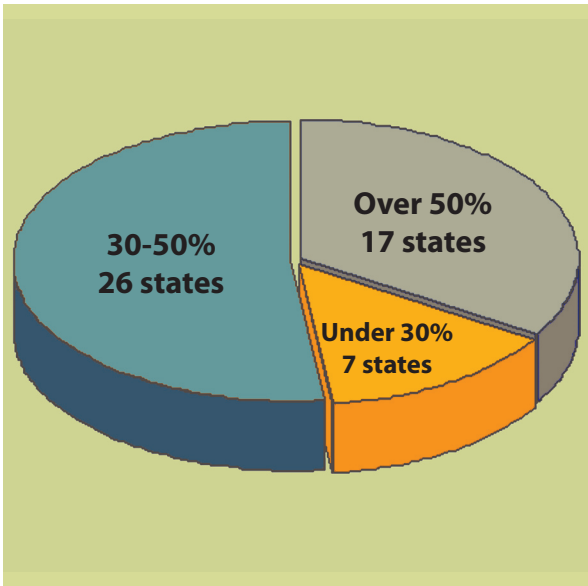
In addition to the statistics from the 2008 Presidential Election discussed above, which show that President Obama's success nationally was not paralleled in the Section 5-covered jurisdictions, in part because of his race, an understanding of the ability of candidates of color to win office at the state and local level is critical to assessing the ongoing need for Section 5.

Since Reconstruction, only three African Americans have ever been elected to the United States Senate, none from a Section 5-covered state.⁴⁸ Only two African Americans have ever been elected a state governor—former Governor L. Douglas Wilder of Virginia, a covered state, and current Governor Deval Patrick of Massachusetts, which is not a covered state.⁴⁹

Forty-two African Americans currently serve in the House of Representatives in the 111th Congress.⁵⁰ Of those members, eleven represent Congressional districts in fully covered states.⁵¹ Five others represent districts in partially covered states.⁵² Three fully covered states (Alaska, Arizona, and Louisiana) currently have no African-American representatives in Congress. Similar numbers of African-American representatives served in recent Congressional terms: since 1993, between 39 and 42 African-American members of Congress have been in office at any given time.⁵³

Figure 1

WHITE VOTERS SUPPORT FOR PRESIDENT OBAMA IN 2008



STATES WITH LESS THAN 30% OF WHITES VOTING FOR PRESIDENT OBAMA

STATE	% OF WHITE VOTE	DIFFERENCE FROM NATIONAL AVERAGE OF 43%	STATE RANK
Oklahoma	29%	-14	44th
South Carolina*	26%	-17	45th
Texas*	26%	-17	46th
Georgia*	23%	-20	47th
Louisiana*	14%	-29	48th
Mississippi*	11%	-32	49th
Alabama*	10%	-33	50th

* Section 5-Covered State

Data Source: 2008 MSNBC Exit Poll Data

Table 3

CANDIDATE PREFERENCES BY RACE, 2004-2008: SECTION 5-COVERED STATES

JURISDICTION	WHITES VOTING FOR KERRY (2004)	WHITES VOTING FOR OBAMA (2008)	CHANGE IN WHITE VOTE FOR DEMOCRATIC CANDIDATE, 2004-2008	AFRICAN AMERICANS VOTING FOR KERRY (2004)	AFRICAN AMERICANS VOTING FOR OBAMA (2008)	CHANGE IN AFRICAN-AMERICAN VOTE FOR DEMOCRATIC CANDIDATE 2004-2008
Alabama	19	10	-9	91	98	+7
Alaska	33	33	0	Data not available	Data not available	Unknown
Arizona	41	40	-1	Data not available	Data not available	Unknown
Georgia	23	23	0	88	98	+10
Louisiana	24	14	-10	90	94	+4
Mississippi	14	11	-3	90	98	+8
South Carolina	22	26	+4	85	96	+11
Texas	25	26	+1	83	98	+15
Virginia	32	39	+7	87	92	+5

Data Sources: Inter-University Consortium for Political and Social Research, ICPSR 4181, National Election Pool General Election Exit Polls, 2004 (for 2004 data); MSNBC 2008 Exit Poll Data (<http://www.msnbc.msn.com/id/26843704>) (for 2008 data).

As Table 4 indicates, every single African American currently serving in the House of Representatives from a Section 5-covered state serves a majority-minority Congressional district, i.e., a district in which the population is more than 50 percent nonwhite. This underscores the impact of polarized voting patterns in defining the opportunity for voters of color to vote for—and be represented by—candidates of color.

These numbers demonstrate that President Obama's national victory, despite its historical significance, does not demonstrate that a level playing field exists for other candidates of color in Section 5-covered jurisdictions. Indeed, without Section 5, which prevents Congressional redistricting plans that might dilute minority voters' ability to elect candidates of their choice, the majority-minority districts listed in Table 4 could have been redistricted out of existence. Because a large proportion of the African Americans currently serving in Congress have been elected from these districts, such redistricting efforts could drastically reduce African-American representation in Congress, if not prevented by Section 5.

In sum, Section 5 specifically targets those states and municipalities where racially polarized voting and countless other forms of discrimination against voters of color are greatest. In targeting those jurisdictions, Section 5 ensures two things: first, that the large numbers of voters of color that turned out to the polls in 2008 can continue to do so free of discriminatory obstacles; and second, that candidates of color who are the choice of nonwhite voters can win elections to local, state, and national office in areas in which white voters' and nonwhite voters' candidate preferences still tend to be at odds. Although the 2008 Presidential Election occurred after the 2006 Reauthorization, the results of that election show clearly that Congress's judgment in targeting Section 5 to the covered jurisdictions was correct.

STATE	CONGRESSIONAL DISTRICT	MEMBER OF CONGRESS	WHITE (NON-HISPANIC) POPULATION	NONWHITE & HISPANIC POPULATION
Alabama	7th	Artur Davis	32.8%	67.2%
Alaska	--	None	--	--
Arizona	--	None	--	--
Georgia	2nd	Sanford D. Bishop, Jr.	47.3%	52.7%
	4th	Henry C. Johnson, Jr.	24.7%	75.3%
	5th	John R. Lewis	37.3%	62.7%
	13th	David Scott	32.0%	68.0%
Louisiana	--	None	--	--
Mississippi	2nd	Bennie G. Thompson	32.0%	68.0%
South Carolina	6th	James E. Clyburn	40.9%	59.1%
Texas	9th	Al Green	13.5%	86.5%
	18th	Sheila Jackson Lee	16.2%	83.8%
	30th	Eddie Bernice Johnson	17.3%	82.7%
Virginia	3rd	Robert C. Scott	37.5%	62.5%

Data Source: U.S. Census Bureau, 2005-2007 American Community Survey (*available* at <http://factfinder.census.gov/>).

LOOKING AHEAD: SECTION 5 AFTER THE *MUD* DECISION

The Supreme Court issued its decision in the *MUD* case on June 22, 2009. The eight-member majority, with Justice Clarence Thomas dissenting, did not address the constitutionality of Section 5. Instead, the Court limited its ruling to a question of statutory interpretation and allowed the plaintiff utility district to seek bailout from Section 5's coverage.⁵⁴ In so doing, the Court recognized the critical importance of Section 5 in addressing voting discrimination faced by citizens throughout the country.

In his majority opinion, Chief Justice Roberts wrote that "[the] historic accomplishments of the Voting Rights Act are undeniable."⁵⁵ Nevertheless, the opinion implicitly suggested that the Court might reconsider the constitutional validity of Section 5 at a later date. "Past success alone," Chief Justice Roberts wrote, "is not adequate justification to retain the preclearance requirements" of Section 5.⁵⁶

The effectiveness of Section 5 is not, however, limited to the past; rather, the present-day successes of the Section 5 preclearance requirement in combating voting discrimination are numerous, and the necessity of Section 5 is ongoing. As this report has illustrated, race was a salient factor in the 2008 Presidential Election, particularly in the Section 5-covered jurisdictions.

The Section 5 preclearance provision will continue to block discriminatory changes to state and local voting practices, which will be particularly critical during the rapidly approaching legislative redistricting cycle that will follow the 2010 Census. History has shown that the decennial redistricting process often triggers the most strenuous efforts by state and local officials to minimize the voting power of minority citizens and, as a result, yields a high number of Section 5 objections. If actively enforced, the preclearance process will once again prevent many of these discriminatory efforts.

Ensuring that the Voting Rights Act's protections remain effective in the years to come will require diligence by the government, the courts, advocates, and active citizens. The Department of Justice and the federal courts must continue to aggressively enforce Section 5 and other provisions to guarantee that the protections promised by the Voting Rights Act are realized by African Americans and other voters of color. Furthermore, advocates and citizens must remain eternally vigilant in identifying and chronicling incidents of voting discrimination that occur both within the covered jurisdictions and elsewhere.

Democrat
Barack Obama
United States President
Joe Biden
United States Vice President

CONCLUSION

A strong and effective Voting Rights Act remains imperative to the health of our democracy. African-American voters and candidates have made great strides in overcoming the historical barriers to voting and political participation perpetuated during centuries of slavery, Jim Crow laws, and ongoing discrimination in many parts of the country. President Obama's election holds out much promise that the influence of race in politics has begun to wane nationally. The President's particularly strong support from young voters throughout the country suggests that progress toward equality in our American democracy will continue to grow with the next generation and those that follow.

Yet, ongoing voting discrimination in many parts of the country, as well as the clear evidence of the salience of race in the 2008 Presidential Election, underscore the critical need for the protections afforded by Section 5. While we celebrate the remarkable progress that American society has made in race relations, we must also remain alert to the second truth revealed by this election: Our job in defending and advancing the civil rights of African Americans, other people of color, and other groups that face discrimination, is far from complete.





LDF Attorneys in Selma, Alabama for the 40th anniversary of the Voting Rights Act (2005).
L-R: Ryan Haygood, Janai Nelson, Ted Shaw, Jacqueline Berrien, Alaina Beverly, and Debo Adegbile.

ENDNOTES

¹ W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 76 (Oxford University Press 1903).

² 383 U.S. 301.

³ *Id.* at 313.

⁴ Robert King, *A new America? Not so fast*, INDIANAPOLIS STAR, Nov. 15, 2008, at A1.

⁵ Abigail Thernstrom, Op-Ed., *The voting rights battle is over. We all won.*, L.A. TIMES, Aug. 31, 2008, at A32.

⁶ Adam Liptak, *Review of Voting Rights Act Presents a Test of History v. Progress*, N.Y. TIMES, Apr. 28, 2009, at A16 (quoting University of Michigan Law School Professor Ellen Katz).

⁷ Mike Littwin, *Obama's victory redefines America*, ROCKY MOUNTAIN NEWS, Nov. 5, 2008, at 14.

⁸ Marjorie Valbrun, *Race Matters. So Does Hope.*, WASH. POST, Feb. 2, 2008, at A15.

⁹ David Remnick, *The Joshua Generation; Race and the campaign of Barack Obama*, NEW YORKER, Nov. 17, 2008, at 68.

¹⁰ *Id.*

¹¹ Press Release, The White House, Office of the Press Secretary, Remarks by the President to the NAACP Centennial Convention (July 17, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-NAACP-Centennial-Convention-07/16/2009/ (last visited Oct. 21, 2009).

¹² The Court heard oral arguments in the case on April 29, 2009. A transcript of the oral arguments is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-322.pdf (last visited Oct. 29, 2009).

¹³ See U.S. Dep't of Justice, Civil Rights Div., Section 5 Covered Jurisdictions, available at http://www.usdoj.gov/crt/voting/sec_5/covered.php (last visited Oct. 21, 2009). For the purposes of this report, Virginia will be considered a fully covered state, since it is listed by the Department of Justice's Civil Rights Division as a "state covered as a whole." It must be noted, however, that fifteen political subdivisions (11 counties and 4 cities) have "bailed out" from Section 5 coverage pursuant to Section 4 of the VRA and are no longer covered. Under Section 4, certain jurisdictions that can show a clean record for a sustained period of time may "bail out" and seek exemption from the preclearance requirement. *Id.*

¹⁴ 28 C.F.R. § 51.10 (2009)

¹⁵ *Nw. Austin Mun. Utility Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 223-24 (D.D.C. 2008).

¹⁶ *Id.* at 246-79.

¹⁷ *Nw. Austin Mun. Utility Dist. No. One v. Mukasey*, 129 S.Ct. 894 (2009).

¹⁸ Appellant's Brief at 1, *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504 (2009) (No. 08-322).

¹⁹ Jim Galloway, *Perdue joins Texas in voting rights case*, ATLANTA JOURNAL-CONSTITUTION, Mar. 19, 2009, at 3B.

²⁰ Brief of Amicus Curiae Georgia Governor Sonny Perdue in Support of Appellant at 27, *Nw. Austin Min. Dist. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322) (emphasis added).

²¹ *Nw. Austin Min. Dist. One v. Holder*, 129 S. Ct. 2504, 2508 (2009).

²² Pub. L. No. 109-246, 120 Stat. 577 (2006).

²³ See H.R. Rep. No. 109-478, at 21 (2006).

²⁴ *Id.* at 21-24.

²⁵ *Id.* at 21.

²⁶ See 152 Cong. Rec. H5143-02 (2006) (House Vote); 152 Cong. Rec. S7949-05 (2006) (Senate Vote).

²⁷ This estimate is based on demographic data for the covered jurisdictions obtained from the U.S. Census Bureau's 2000 Census and 2005-2007 American Community Survey 3-Year Estimates, available at <http://factfinder.census.gov/>. The African-American population for each covered state, county, and township was compared to the African-American population nationally to arrive at this figure.

²⁸ African Americans constitute over 20 percent of eligible voters in each of these states. See William H. Frey, *Race, Immigration and America's Changing Electorate*, Research Report 08-635, Univ. of Michigan Population Studies Center (Apr. 2008), at 26, available at <http://www.psc.isr.umich.edu/pubs/pdf/rr08-635.pdf> (last visited Oct. 26, 2009).

²⁹ David A. Bositis, *Blacks and the 2008 Elections: A Preliminary Analysis*, *Focus Magazine*, Dec. 2008, at 13, available at: <http://www.jointcenter.org/index.php/content/download/2338/15387/file/post%20election.pdf> (last visited Oct. 26, 2009).

³⁰ MSNBC, 2008 Election Results, Exit Polls, ("MSNBC 2008 Exit Poll

Data”), <http://www.msnbc.msn.com/id/26843704> (last visited Oct. 21, 2009); MSNBC, Decision 2004, Exit Poll, (“MSNBC 2004 Exit Poll Data”), <http://www.msnbc.msn.com/id/5297138/> (last visited Oct. 21, 2009).

³¹ MSNBC 2008 Exit Poll Data, *supra* note 30.

³² *Id.*; MSNBC, Politics, 2008 Election Results, National Overview, http://www.msnbc.msn.com/id/23907597/ns/politics-2008_election_results (last visited Oct. 21, 2009).

³³ Peter Wallstein & David G. Savage, *Voting Rights Act out of date? Obama is Exhibit A in challenge before the Supreme Court*, L.A. TIMES, Mar. 18, 2009, at A1; Editorial, *Uphold the Voting Rights Act*, N.Y. TIMES, Jan. 24, 2009, at WK9.

³⁴ In contrast, President Obama outperformed Senator Kerry among white voters in most states outside of the South—including receiving absolute majorities of the white vote in sixteen states and the District of Columbia. See MSNBC 2004 Exit Poll Data, *supra* note 30; MSNBC 2008 Exit Poll Data, *supra* note 30.

³⁵ Bosisis, *supra* note 29, at 15.

³⁶ Obama won North Carolina, a partially covered state, with 49.7 percent of the vote, compared to John McCain’s 49.4 percent. See N.C. State Board of Elections, 2008 General Election, *available at* <http://results.enr.clarityelections.com/NC/7937/14537/en/summary.html> (last visited Oct. 26, 2009). In comparison, North Carolina’s Democratic U.S. Senate candidate Kay Hagan beat incumbent Republican Elizabeth Dole by a 52.7 percent to 44.2 percent margin, and Democrat Beverly Perdue won the state’s governorship with 50.3 percent of the vote compared to her Republican challenger’s 46.9 percent. *Id.* Both Hagan and Perdue are white.

³⁷ Brief for Nathaniel Persily, Stephen Ansolabehere & Charles Stewart III as *Amici Curiae* on Behalf of Neither Party, *MUD* (the “Persily Amicus Brief”). The Persily Amicus Brief analyzed 2004 exit poll data from the National Election Pool, Edison Media Research, and Mitofsky International, National Election Pool General Election Exit Polls, 2004, *available at* <http://dx.doi.org/10.3886/ICPSR04181> (dataset excludes South Dakota), and 2008 MSNBC Exit Poll Data, *supra* note 30. See Persily Amicus Brief at 8 n.4.

³⁸ Persily Amicus Brief, *supra* note 37, at 3.

³⁹ See Figure 1.

⁴⁰ *Id.*

⁴¹ See Table 3.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ See MSNBC 2008 Exit Poll Data, *supra* note 30.

⁴⁶ Persily Amicus Brief, *supra* note 37, at 5.

⁴⁷ *Id.* at 7-8.

⁴⁸ The fourth African-American Senator, Roland Burris of Illinois, was appointed in 2009 to serve for the remainder of President Obama’s Senate term; he does not plan to seek reelection.

⁴⁹ The third African-American governor, current New York Governor David Paterson, was elected Lieutenant Governor of that state and succeeded Governor Eliot Spitzer upon Governor Spitzer’s resignation from office.

⁵⁰ See Congressional Black Caucus, Member Info, *available at* http://thecongressionalblackcaucus.lee.house.gov/member_info.html (“CBC Member Info”) (last visited Oct. 21, 2009).

⁵¹ They are Rep. Artur Davis of Alabama; Reps. Sanford D. Bishop, Jr., John Lewis, Hank Johnson, and David Scott of Georgia; Rep. Bennie G. Thompson of Mississippi; Rep. James E. Clyburn of South Carolina; Reps. Al Green, Sheila Jackson Lee, and Eddie Bernice Johnson of Texas; and Rep. Robert C. Scott of Texas. See CBC Member Info, *supra* note 50.

⁵² They are Rep. Alcee Hastings of Florida; Reps. Yvette Clark, Charles Rangel, and Edolphus Towns of New York; and Rep. G.K. Butterfield of North Carolina. See CBC Member Info, *supra* note 50.

⁵³ See Mildred A. Amer, Congressional Research Service, CRS Report for Congress: *African American Members of the United States Congress: 1870-2008* (Updated July 28, 2008), Table 3, at 48-57 *available at* <http://www.senate.gov/references/resources/pdf/RL30378.pdf>. The largest number of African-American representatives elected in a Congressional term was 45 in the 109th Congress, but 42 was the maximum number that served at any given time during that term due to several deaths and resignations. *Id.* at 56 n.a.

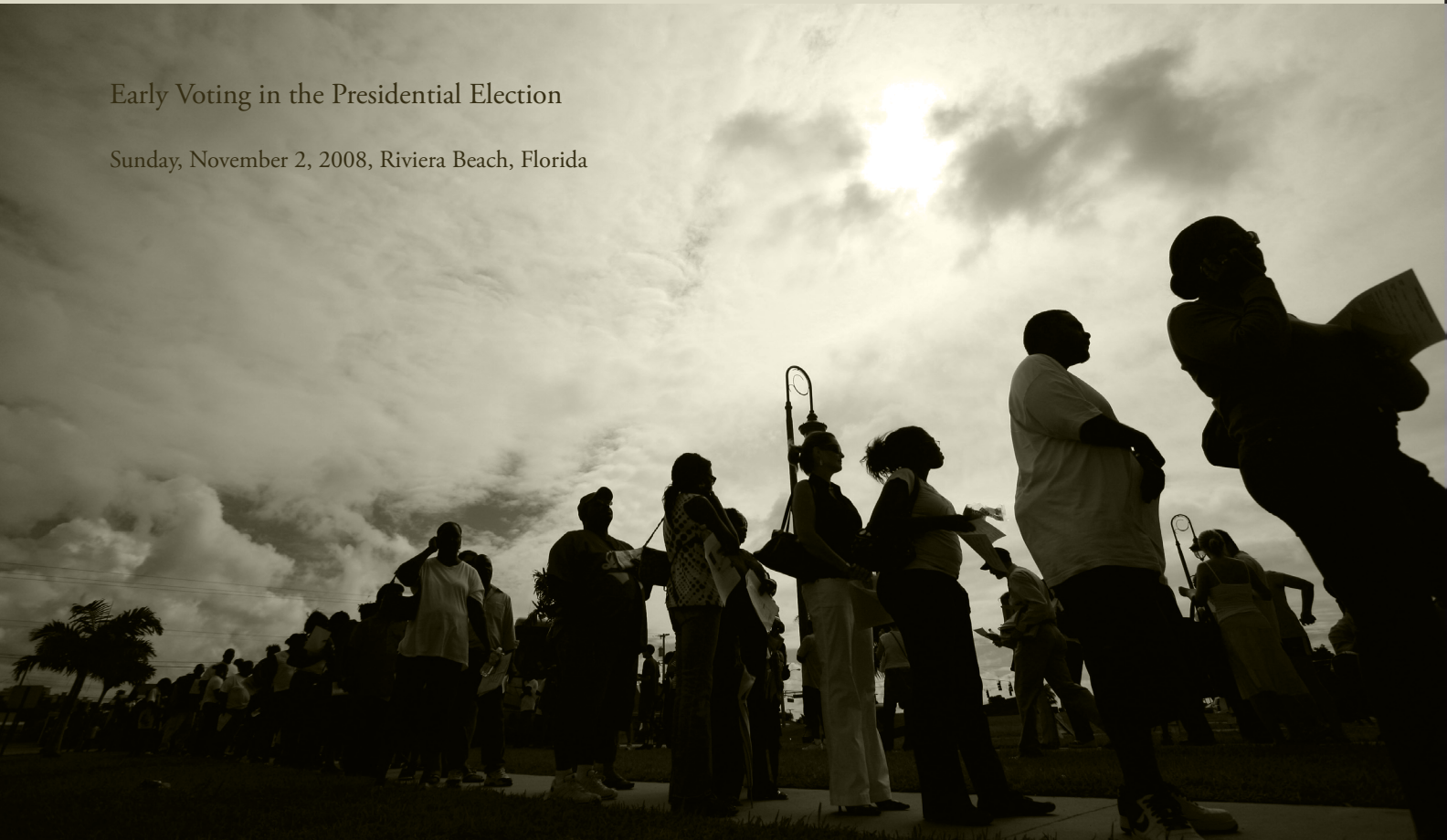
⁵⁴ *MUD*, 129 S. Ct. at 2508.

⁵⁵ *Id.* at 2511.

⁵⁶ *Id.*

Early Voting in the Presidential Election

Sunday, November 2, 2008, Riviera Beach, Florida



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“The election of Barack Obama was a watershed event. Not because it solved any of [our nation’s] endemic problems, but because it presented the possibility of acknowledging these problems and undertaking to solve them. It represented an opportunity.”

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Available at www.naacpldf.org/content.aspx?article=1477