

Testimony for the DNC Platform Committee

For persons who believe the right to vote is a sacred right in a democracy, I implore you to consider a passage from Nelson Mandela's autobiography:

But then I slowly saw that not only was I not free, but my brothers and sisters were not free. I saw that it was not just my freedom that was curtailed, but the freedom of everyone who looked like I did...that is when the hunger for my own freedom became the hunger for the freedom of my people..."

Nelson Mandela was describing his decision to join the African National Congress, and work to topple Apartheid in South Africa. I recite this passage because the right to vote is as sacred as freedom. It is the vehicle for true self-determination, agency and power.

My name is Judith Browne Dianis and I am the executive director of the national racial justice organization, Advancement Project. We exist to fulfill America's promise of a more just democracy. Based in Washington, D.C., my organization supports grassroots movements in states across the country that are working to confront and dismantle structural racism. As a result of our state-based work, we see first-hand the impact of various policies on communities of color. Because we are grounded in community, we spot trends and offer recommendations on ways to address them. That's what I'd like to do today; outline one of the most troubling trends and suggest steps you can take to resolve it.

The struggle to secure the right to vote remains a persistent challenge. Over the course of the last several years, we've witnessed the continued erosion and undermining of our right to vote.

It can be tempting to think the right to vote was forever established during the civil rights movement. However, the right to vote has always been grounded in race. Depending on your race, you may experience roadblocks as you attempt to exercise

this fundamental right. African Americans and their white allies were brutally beaten, maimed and sometimes killed as they sought to exercise the franchise. Even when gains were made, communities of color faced intense backlash because the right to vote confers power.

While the Voting Rights Act of 1965 increased political participation for African Americans and Latinos, politicians intent on maintaining power, have consistently worked to erect barriers to the ballot box for communities of color. The contracting of voting rights is really about limiting political power and participation for communities of color. We see this through a patchwork of policies such as those that require dual proof of citizenship; those that revoke voting rights for persons with prior felony convictions; policies advancing restrictive voter ID laws, cuts to early voting, cuts to same day registration, and polling place challenges. These policies are carefully maneuvered to make it harder for African Americans, Latinos, seniors, and students to vote.

Take voter ID for example. As many as 11 percent of Americans – more than 21 million individuals – do not have government issued photo ID.¹ Twenty-five percent of African-American voting-age citizens – or 5.5 million African Americans – do not have a current government-issued photo ID, compared to eight percent of white voting-age citizens.² Sixteen percent of Latino voting-age citizens – or approximately 3 million Latinos – do not have a current government-issued photo ID, compared to eight percent of white voting-age citizens.³ In 2016, 13 states will implement new restrictive photo ID requirements.⁴ These states include: Alabama,

¹ *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice at NYU School of Law (Nov. 2006), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

² *Id.*

³ *Id.*; Lizet Ocampo, *Top 6 Facts on the Latino Vote*, Center for American Progress (Sept. 2015), available at <https://www.americanprogress.org/issues/immigration/news/2015/09/17/121325/top-6-facts-on-the-latino-vote/>.

⁴ *Voter Identification Requirements*, National Conference of State Legislatures (Apr. 11, 2016), available at <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Laws in Effect>.

Indiana, Kansas, Mississippi, New Hampshire, North Carolina, North Dakota, Rhode Island, South Carolina, Tennessee, Texas, Virginia and Wisconsin.

Voter ID is not the only policy keeping African Americans from voting. Laws restricting or revoking voting rights for persons with prior felony convictions were designed to keep African Americans from voting.

Virginia Commonwealth Delegate Carter Glass told the Virginia Constitutional Convention of 1902: “This plan will eliminate the darkey as a political factor in this State in less than 5 years, so that in no single county . . . will there be the least concern felt for the complete supremacy of the white race in the affairs of government.” His comments were an explicit reference to Virginia lawmakers’ scheme to systematically eradicate Blacks from the state’s electorate. In a Pre-Civil Rights Era America, still glaringly torn by the lingering effects of slavery, the strategic disenfranchisement of Black voters wasn’t surprising; particularly in the Deep South (especially in states like Florida, Kentucky and Alabama). There was a strongly held belief that persons of African descent were inferior, dependent and unfit to vote. However, that there remains a racial tilt to the mistreatment of persons with felony convictions and their voting rights in a post-civil rights America is troubling.

Troubling indeed is the sobering reality that nearly 5.8 million American citizens, or one in forty adults, are blocked from participating in national, state, and local elections by anachronistic laws that have no place in a modern democracy. That includes over 2.5 million people with felony convictions who are no longer incarcerated or 45 percent of the total population of disenfranchised citizens. According to the Sentencing Project, an estimated 2.2 million African Americans, or 7.7 percent of Black adults, are disenfranchised, compared to 1.8 percent of the non-African American population. In three states – Florida, Kentucky, and Virginia – more than one in five African Americans is or was recently disenfranchised. In states

that disenfranchise people due to prior felony convictions, as many as 40 percent of Black men may permanently be stripped of their right to vote.⁵

Put simply, one of the most pernicious barriers to voting is the stripping of voting rights of persons with felony convictions. These post-Reconstruction era laws continue to have a devastating effect on Black communities ravaged by irrationally-applied federal and state “tough on crime” policies and practices. We know, for example, that this lingering barrier to voting was perpetuated and solidified by former President Richard Nixon’s failed War on Drugs and its mass incarceration consequences that were launched in 1971. Whole neighborhoods are stripped of political voice as a result.

Placing this particular scheme aside, today it is becoming increasingly more difficult for voters of color to participate in voting. In 2000, in *Bush v. Gore*,⁶ the Supreme Court decided the outcome of the election while simultaneously holding that our constitution does not include a fundamental right to vote. Since 2006, more than 30 states have passed some form of voter identification law.⁷ And in 2013, the Supreme Court’s ruling in *Shelby County v. Holder*⁸ eviscerated the preclearance protections of the Voting Rights Act that we fought so hard for.

2016 will mark the first presidential elections in 50 years without the full protections of the Voting Rights Act. In the wake of the Supreme Court’s 2013 ruling in *Shelby v. Holder* that gutted this key provision of the Voting Rights Act, we have seen the fallout in states previously covered by the VRA’s preclearance provisions – 73 percent of which introduced restrictive voting laws that year alone. We have seen

⁵ See *Felony Disenfranchisement Laws in The United States*, Sentencing Project (Apr. 28, 2014), available at <http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/>.

⁶ *Bush v. Gore*, 531 U.S. 90 (2000).

⁷ Zoltan Hajnal, *et al.*, *Voter Identification and the Suppression of Minority Votes* (2016) at 1. Prior to 2006, no state required identification to vote. Today, a total of 34 states have enacted some form of a voter identification law and ten states have a strict requirement.

⁸ *Shelby v. Holder*, 133 S. Ct. 2612 (2013).

the fallout in states such as Texas, which set about implementing a restrictive voter ID law that was found to be illegally racially retrogressive under the VRA's preclearance provisions. And in states like Mississippi and Alabama that implemented photo ID laws that had been on hold. And there is perhaps no greater example of the impact of new voting rules on voters of color than in North Carolina, which passed the nation's most wide-sweeping voter suppression law once the VRA's preclearance protections were no longer in place. In fact, immediately after *Shelby* was handed down, North Carolina State Senator Tom Apodaca, Chairman of the Senate Rules Committee, explained that the Senate hadn't wanted the "legal headaches" of the VRA's preclearance requirements, and "[n]ow we can go ahead with the full bill."⁹ North Carolina thus became one of the first states to pass more restrictive voting provisions following the *Shelby* ruling. Its breadth is striking, targeting nearly every aspect of the voting process – decreasing the early voting period by a full week, eliminating same-day voter registration, eliminating out-of-precinct provisional ballots, expanding voter challenges at the polls, eliminating pre-registration for 16- and 17-year olds, eliminating straight party ticket voting, eliminating a state mandate for voter registration in high schools, among other provisions.¹⁰ In short, it eliminates virtually all of the measures that were responsible for expanding voter access over the last two decades. It also implements a discriminatory photo ID requirement.

Since the *Shelby* ruling, inclusive democracy is under attack in ways that imperil voters of color. In an election year when more than \$10 billion will be spent to win votes, the U.S. Attorney General has less power to protect voting rights than she would have had in 1965. The impact across the states demonstrate why Congress must amend the Voting Rights Act to ensure that voting practices like North

⁹ *NC voter ID bill moving ahead with Supreme Court ruling*, WRAL (June 25, 2013), available at <http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/>.

¹⁰ H.B. 589 (2013), available at <http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v5.pdf>.

Carolina's are subject to the federal review to ensure that the promise of the Fifteenth Amendment is kept.

Accordingly, it is imperative that the DNC take a platform position to reinstate the preclearance provisions of the Voting Rights Act.

It is important that the DNC also take a stand against the wave of voter suppression techniques on display in states across the country. New restrictive voter ID requirements have been most prolific. Moreover, the rising Latino voting population¹¹ has brought with it efforts to require documentary proof of citizenship to register to vote, as we have seen in Alabama, Arizona, Georgia, Louisiana, Kansas and Tennessee, along with ill-conceived efforts to match voter registrations against an error-ridden immigration database.

In addition to these new restrictions we have seen efforts to curtail laws that have expanded access to voting. We must be vigilant in opposing efforts to cut early voting, as we have seen in states like North Carolina, Ohio, Florida, Georgia, Nebraska, Wisconsin and Tennessee. Studies show that African Americans are more likely to cast early ballots than their white counterparts.¹² As we saw in Florida during the last presidential election, after the state cut a week of its early voting period, long lines at the polls increased, especially in communities of color.¹³ We need to fight back against efforts to restrict the counting of provisional ballots by voters who are eligible to vote.

¹¹ Ruy Teixeira, William H. Frey, and Robert Griffin, *States of Change, The Demographic Evolution of the American Electorate, 1974–2060*, Center for American Progress, Heritage Foundation, and Brookings Institution (Feb. 2015) (“CAP Report”) at 82-86, available at <https://cdn.americanprogress.org/wp-content/uploads/2015/02/SOC-report1.pdf>;

¹² Paul Gronke & Charles Stewart, III, *Early Voting in Florida*, Massachusetts Institute of Technology Political Science Dept. Working Paper No. 2013-12 (Apr. 2013), available at <http://ssrn.com/abstract=2247144>; Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice at NYU School of Law (2013), available at https://www.brennancenter.org/sites/default/files/publications/VotingReport_Web.pdf.

¹³ Michael C. Herron and Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, *Political Research Quarterly* (2014) 67:646-65.

We also need to be cognizant of the ways that administrative actions can imperil access to voting. For example, last year, Alabama, after implementing its photo ID law in the wake of the *Shelby County* ruling, closed 31 driver's license issuing offices – the only location to procure a state-issued ID now need to vote in the state. Worse, the closures were concentrated in the counties with the state's largest African American and low-income populations, where there is little access to public transportation. In fact, every Alabama county in which African Americans make up more than 75 percent of voting population will see its driver's license office close.¹⁴

We have also seen a wave of closures or moving of polling places, also in ways that disparately impact voters of color. For example, during Arizona's presidential primary election in March 2016, Maricopa County cut the number of polling places by 70 percent since 2012 – from more than 200 to only 60. As a result, voters waited up to five hours to cast ballots.

Voters of color are increasing in their potential political power.¹⁵ Today, nearly 30 percent of America's eligible voters are people of color.¹⁶ The potential political power of voters of color is growing exponentially—every day, nearly 90 percent of U.S. population growth consists of people of color.¹⁷ Yet these elections are marked by a wave of restrictions in access to the ballot that have a disparate impact on voters of color.

We can share this information with you because for years, Advancement Project has been a leader in the movement to expand access to the ballot box and remove barriers to voting for voters of color. We brought litigation in places such as

¹⁴ *Alabama sends message: We are too broke to care about right and wrong*, Alabama Media Group (Sept. 30, 2015), available at <http://bit.ly/1j11Yku>.

¹⁵ Steve Phillips, *Brown Is the New White: How the Demographic Revolution Has Created a New American Majority*, The New Press (2016) at 5 (citing U.S. Census data).

¹⁶ *Id.* (According to the latest Census data, the nation's citizen voting age population has reached over 220 million eligible voters. Of these, over 27 million (12.3%) are African-American, over 23.6 million (10.7%) are Latino, 8.7 million (4.0%) are Asian and Pacific Islander, and among others, 155.8 million (70.8%) are white). In 2012, people of color were 28% of all voters, and this percentage is likely to be higher in 2016).

¹⁷ *Id.*

Ohio, Florida, Missouri, Pennsylvania, North Carolina, Wisconsin; all to protect one of the most fundamental of rights; the right to vote. Having spent over a decade working on rights restoration for persons with prior felony convictions in Florida and Virginia; we know that a disproportionate number of African Americans are barred from the ballot box from this one tactic alone.

The politicians who are passing laws that make it harder for some eligible Americans to vote are not trying to stop voter fraud; they're trying to stop voting. For example, the ugly, racially discriminatory exclusion of the only adult population of mentally competent citizens who cannot register to vote prevents our nation from establishing a truly representative government of the people, for the people, and by the people. Bold commitments and resolutions are required to reverse this legacy of exclusion. We commend Virginia Governor Terry McAuliffe for his recent executive action to move towards an inclusive democracy by restoring political rights to over 200,000 formerly incarcerated citizens. Not surprisingly, opponents of a just democracy are challenging his action in state courts.

The Democratic National Committee must be resolved to support Governor McAuliffe's action and all local, state, and federal efforts to establish a blanket, automatic restoration of voting rights for all persons who have been rendered politically impotent by laws, policies, and practices that keep people with felony convictions from participating in our democracy. The Democratic National Committee must also be resolved to raise public awareness about the original intent of felony disenfranchisement schemes and finally be resolved to support local and national groups in their efforts to eliminate all forms of structural exclusion of voter participation in poor, communities of color.

Over the course of my career and work in the movement for racial justice, I have never been more convinced of the need for an explicit, affirmative, individual right to vote than I am now. Most people find it hard to believe that the U.S. Constitution and our Bill of Rights do not explicitly affirm nor guarantee the right to vote. Indeed, as the DNC Executive Committee has noted, “President Obama, as a constitutional law professor at the University of Chicago, began each of his constitutional law classes by sharing with his students the surprising fact that an explicit ‘federal individual right to vote’ is not in the U.S. Constitution.”¹⁸

Why the right to vote is not enshrined in the Constitution is inextricably tied to the history of race in America. The right to vote preserves all other rights in a democracy, and yet the Founders compromised on this fundamental right in order to accommodate slave states and slavery.

Tomorrow, we will mark Juneteenth, a day to commemorate Emancipation and the end of slavery. I am reminded of Abraham Lincoln, who delivered his last speech in 1865 in which he stated: “It is unsatisfactory... that the elective franchise is not given to the colored man” He then dared to explore the idea of granting the right to vote to African Americans. John Wilkes Booth was in the audience that night, and he confided to a friend: “That means n_____ citizenship! I’ll put him through! That is the last speech he will ever make.” Three days later, Booth assassinated Lincoln.

What followed was a disassembly and infanticide of Reconstruction. And with that, slavery was not truly abolished, but allowed to evolve, to live on by other names. You know these names: Black Codes, Jim Crow, Prison-Lease, Redlining, Zero-

¹⁸ Rob Ritchie, *Right to Vote Constitutional Amendment Secures Unanimous Backing of DNC Executive Committee*, The Huffington Post (Feb. 22, 2015), available at http://www.huffingtonpost.com/rob-ritchie/right-to-vote-constitutio_b_6730258.html (“DNC Article”).

Tolerance, Mass Incarceration, Mass Disenfranchisement, School-to-Prison Pipeline, Ferguson Police Dept., and Voter ID.

The time has come to breathe new life into the Constitution and into our democracy. Our communities are on the verge of becoming the new American majority. For this new majority to achieve its potential and for the United States to achieve its potential, we must stand together to defeat structural racism that perpetuates white supremacy. It is no accident that those who seek to remain in power are finding every means to deny and restrict our voices. In this moment when our democracy is being tested by hatred, bigotry, violence, cynicism, and demagoguery, the time is now for us to claim what is rightfully ours, our key to having a voice in this democracy – our right to vote.

It is time to enshrine an explicit right to vote in our Constitution. Enshrining the right to vote puts the right on par with the right to free speech and other individual constitutional rights.

The right to vote can no longer remain a weak political right, tethered to the Equal Protection Clause in the Fourteenth Amendment and Article I, protected only by a lenient level of judicial scrutiny, a mere balancing test that defers to state governments at the expense of American voters.¹⁹ Instead, the right to vote must be an affirmative, explicit, bedrock, individual constitutional right protected by the highest level of judicial scrutiny: strict scrutiny. Under strict scrutiny, states would have to prove – **with evidence** – that a restrictive law like voter ID is justified by a compelling purpose and is the least restrictive means to achieve that purpose. Hollow claims of “voter fraud” would no longer be acceptable. States would have to **prove** that “voter fraud” is a real problem that can be addressed only through denying or

¹⁹ See *Harper v. Va. Board of Elections*, 383 U.S. 663, 665 (1966) (stating “the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (Art. I, § 2 “gives persons qualified to vote a constitutional right to vote and to have their votes counted”); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 893 (1983).

restricting the right to vote, which is something they cannot do. As we know, one is more likely to spot a UFO or be struck by lightning than to be a victim of in-person voter fraud.²⁰ Voter fraud simply is not a problem, much less a problem that can only be resolved by denying or restricting the fundamental right to vote. Enshrining the right to vote would help put an end to voter ID and other unjustifiable restrictions on the franchise.

Enshrining the right to vote would also ensure a uniform set of voting laws throughout the nation. Right now, we have an assortment of inconsistent voting guidelines across 50 states (plus the District of Columbia), 3,143 counties (or county equivalents) and 13,000 local voting jurisdictions that administer about 186,000 precincts.²¹ A right to vote amendment would “nationalize the right . . . [making] it an element of national citizenship, not a derivative of state citizenship,” thereby creating “a foundation for direct federal regulation of elections and for the preemption of restrictive state laws.”²²

I applaud the DNC Executive Committee’s decision last year to adopt a resolution supporting the Right-To-Vote Amendment to the U.S. Constitution and urge this body to support that decision and add an affirmative right to vote to the DNC platform. As you can see from my remarks, there is clearly much to do.

²⁰ As Judge Richard A. Posner set forth in his dissent in *Frank v. Walker*, the Wisconsin voter ID litigation: “[R]epeated investigations of [voter fraud] allegations show that there is virtually no in-person voter fraud nationally [S]ince 2000 there have been only ten cases of in-person voter fraud that could have been prevented by photo ID laws. Out of 146 million registered voters, this is a ratio of one case of voter fraud for every 14.6 million eligible voters—**more than a dozen times less likely than being struck by lightning**.” 773 F.3d 783, 791-92 (7th Cir. 2014) (citations omitted) (emphasis added).

²¹ DNC Article, *supra* note 18; see also *In Pursuit Of An Affirmative Right to Vote: Strategic Report*, Advancement Project (July 2008) at 9, available at http://b3cdn.net/advancement/ae94ee5ad8686f5760_27m6vr0j7.pdf (quoting Jesse L. Jackson, Jr., *Democrats Should Fight for a “Right to Vote” Amendment*, *The Nation* (Nov. 15, 2005), available at <http://www.jessejacksonjr.org/query/creadpr.cgi?id=6908>)).

²² Richard Briffault, *Three Questions for the “Right to Vote” Amendment*, 23 *Wm. & Mary Bill Rts. J.* 27, 30, 45 (2014), available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1705&context=wmborj>.