



LEVERAGING CIVIL RIGHTS STATUTES TO EMPOWER THE YOUTH VOTE

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INTRODUCTION

Since the Vietnam War, youth voters—especially college students—have struggled to stake their claim in the larger voting rights movement. As the Civil Rights Movement and protests against the Vietnam War

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raised the consciousness of young people across the country, so too did it press the issue of enfranchising voters over eighteen years old.<sup>1</sup>

Meanwhile, the twentieth century brought voting rights reforms that transformed state and local election administration and enabled voters and advocates to enforce the right to vote in federal court. Most notably, the Voting Rights Act of 1965 (“VRA”) transformed how voters and advocates tackle voting practices that have a discriminatory impact on voters of color.<sup>2</sup> Other statutes, including the National Voter Registration Act (“NVRA”), require transparent, streamlined voter roll maintenance, and provide a cause of action for jurisdictions that do not comply.<sup>3</sup> Despite pushback—and far from perfect application—these statutes do provide a standard for enforcement and advocacy to secure access to the ballot box (even if today courts are increasingly hostile to these statutes).<sup>4</sup>

But the fruits of these legislative achievements have not necessarily been borne to youth voters, especially youth voters of color. To be sure, the Twenty-Sixth Amendment was ratified in 1971 and granted the right to vote for all eligible voters 18 years and over.<sup>5</sup> There have been cases interpreting the rights of youth voters under the Twenty-Sixth Amendment among the lower courts, though the Supreme Court has only taken up a Twenty-Sixth Amendment case once since the amendment’s ratification.<sup>6</sup> Likewise, there is some litigation that predates the ratification of the Twenty-Sixth Amendment, which sought to challenge onerous residency requirements that burdened youth voters under the Fourteenth Amendment.<sup>7</sup> But there is very little case law interpreting the right to vote for young people under the voting rights statutes.<sup>8</sup> Meanwhile, youth voters face denials of the right to vote by state and local actors alike.<sup>9</sup> In particular, youth voters face barriers to registering to vote that reflect the mobility of the youth voter to which state and local officials do not respond and have been historically hostile.<sup>10</sup> The status quo of voter registration assumes a single, permanent place of residency and government-issued identification, which reflects permanent

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1. See Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1120–23 (2019).

2. See discussion *infra* Sections II.A, III.A.

3. See discussion *infra* Sections II.B, III.B.

4. See *infra* notes 71, 77, 101 and accompanying text (discussing the declining and narrowing enforcement of the Voting Rights Act).

5. U.S. CONST. amend. XXVI.

6. See discussion *infra* Section II.A.2.

7. See discussion *infra* Section II.A.1.

8. See discussion *infra* Part II.

9. See discussion *infra* Part I.

10. See discussion *infra* Part I.

residency—two elements most likely to hinder youth voters.<sup>11</sup> Ostensibly, civil rights statutes should address these barriers by providing an enforcement mechanism when youth voters are disproportionately burdened by voter registration requirements. Yet, perhaps because the youth voter is a fluid and constantly changing constituency, very little legal advocacy has been dedicated to the enforcement of the youth vote under these statutes.

The voting rights statutes have transformed how voters vindicate their right to vote but have seldom been used to aid youth voters, especially youth voters of color, in providing that same access.<sup>12</sup> As a result, there is less guidance for local election administrators in enforcing these statutes as applied to youth voters, less guidance for advocates in prosecuting these statutes in federal court as applied to youth voters, and untapped reform potential for youth voters largely excluded from legal advocacy.

This article will propose theories of enforcement for youth voting rights violations, with an eye toward advocating for better voter registration practices that encourage youth voter participation. Section I will summarize the problems facing student voters in registering to vote. Section II will briefly survey the history of advocates using federal statutes to remedy violations of the right to vote for student voters, especially for voters of color. Section III will advance theories of enforcement under the Voting Rights Act and the National Voter Registration Act for student voters seeking to vindicate a violation of their right to vote. Strategies for ensuring the youth vote have mostly centered around organizing young voters, save some efforts litigating the Twenty-Sixth Amendment. To combat modern efforts to suppress the voters of marginalized citizens, advocates should explore enforcement of untapped statutory rights.

#### I. STUDENT VOTER REGISTRATION: PROBLEMS AND PITFALLS

Perhaps no other voting practice reflects the problems facing student voters more than voter registration. In fact, many of the first cases under the Fourteenth and Twenty-Sixth Amendments have involved challenges to state and local regulations that imposed onerous registration requirements on student voters.<sup>13</sup> In the years leading up to ratification

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11. See discussion *infra* Part I.

12. See discussion *infra* Part II.

13. See, e.g., *United States v. Texas*, 445 F. Supp. 1245, 1247–48 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105, 1105 (1979) (challenging a county regulation prohibiting Prairie View A&M students from registering to vote in the county

of the Twenty-Sixth Amendment and the period shortly after its ratification, it was common for local governments to require students to clear additional hurdles to register to vote or for state laws to prohibit students from registering to vote at their college residences.<sup>14</sup> And, not by coincidence, challenges to these requirements occurred during a particularly crucial time for the youth voting rights movement. As other scholars note, the 1970s was marked by rising student participation in the Civil Rights Movement and the protests against the Vietnam War.<sup>15</sup> As more young people grew a political consciousness around the war protests and the movement to end the apartheid in the American South, advocates uncovered pernicious restrictions to the ballot and sought to tackle them through enforcement of constitutional guarantees.<sup>16</sup>

Today, voter registration remains a primary barrier for youth voters in accessing the ballot box. Despite voting at the highest rate ever recorded during the 2020 elections, voters aged eighteen to twenty-four are still registered to vote at lower rates than any other age group.<sup>17</sup> Among all eligible voters aged eighteen to twenty-four, voters with college degrees report higher registration rates than youth voters with a high school education or less.<sup>18</sup> Voter registration barriers can be broken down into two main hurdles: proving residency and proving identity, both of which are analyzed below.

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where the college is located unless they establish that they intend to remain in the community after graduation); *Latham v. Chandler*, 406 F. Supp. 754, 755 (N.D. Miss. 1976) (preliminarily enjoining county from treating the voter registration forms of Mississippi Valley State University differently than other applications in the county); *Sloane v. Smith*, 351 F. Supp. 1299, 1300–03 (M.D. Pa. 1972) (challenging strict registration requirements that prevented Pennsylvania State University students from registering to vote at their college residence).

14. *Bright v. Baesler*, 336 F. Supp. 527, 534 (E.D. Ky. 1971) (enjoining a Kentucky law that presumed that a college student's university residence was not their domicile for purposes of voting as a violation of the Fourteenth and Twenty-Sixth Amendments); *Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (enjoining a Texas law that determined voting residency based on whether a person is over or under twenty-one years old as violative of the Fourteenth and Twenty-Sixth Amendments).

15. Bromberg, *supra* note 1, at 1121–23. See JENNIFER FROST, "LET US VOTE!": YOUTH VOTING RIGHTS AND THE 26TH AMENDMENT 222, 225–27 (2021).

16. See Bromberg, *supra* note 1, at 1121–23.

17. *Voting and Registration in the Election of November 2020, Table 4c*, U.S. CENSUS BUREAU (Apr. 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>; see also NANCY THOMAS ET AL., DEMOCRACY COUNTS 2020: RECORD-BREAKING TURNOUT AND STUDENT RESILIENCY 10 (2021), <https://static1.squarespace.com/static/5b27ba46f79392073c11513e/t/6197ea67695b507a201850c2/1637345896691/idhe-democracy-counts-2020.pdf> (detailing increased voter registration and voter turnout among college students).

18. *Voting and Registration in the Election of November 2020, Table 5*, *supra* note 17.

*A. Voter Registration Hurdles: Proving Residency*

Despite critical achievements in establishing the constitutional guarantee against disenfranchisement based on a student voter's residency, residency requirements continue to obstruct voter registration. The Supreme Court has long held that durational requirements that require the voter to live in a state for longer than thirty days before Election Day violate the Fourteenth Amendment.<sup>19</sup> And, most states have codified the right for a student who attends an out-of-state university to vote absentee if that voter is registered at their home address away from college (for example, the residence of their parents).<sup>20</sup> As a result, many college students who are first-time voters simply register to vote by mail at their home address away from college.<sup>21</sup> And no state imposes a voter registration deadline more than thirty days before Election Day, which typically falls well after a student gains residency at their college address.<sup>22</sup>

Youth voters, however, continue to face barriers with respect to residency requirements. In some states, for example, thirty-day voter registration deadlines still prevent college students from registering to vote in special elections or other elections that otherwise do not occur in November. These deadlines hinder student voters from registering who have not yet arrived at their college campuses but who will lawfully establish residency there by the time the election occurs. For example, Florida's deadline for voter registration is twenty-nine days before an election, but the 2022 Florida primary was August 23, 2022.<sup>23</sup> For students who arrive from out-of-state to Florida colleges in the fall, it will be far too late for them to register to vote in the Florida primaries, even

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19. *Dunn v. Blumstein*, 405 U.S. 330, 347 (1972).

20. *Absentee and Early Voting*, USA.GOV, <https://www.usa.gov/absentee-voting> (last visited May 31, 2022); *Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited July 27, 2022).

21. See Richard G. Niemi & Michael J. Hanmer, *Voter Turnout Among College Students: New Data and a Rethinking of Traditional Theories*, 91 SOC. SCI. Q. 301, 312 (2010) ("A large majority of the students (71 percent) who were registered did so in their hometowns. . . . [T]hey had to vote by absentee ballot or make some, possibly substantial [sic] effort to get to their polling places on Election Day (or before, in those places where there was early voting).").

22. See *Voter Registration Deadlines*, NAT'L CONF. OF STATE LEGISLATURES (July 12, 2022), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx> (canvassing the voter registration deadlines in every state).

23. *Election Dates*, FL. DIV. OF ELECTIONS (June 7, 2022), <https://dos.myflorida.com/elections/for-voters/election-dates/>.

though they may establish residency weeks earlier.<sup>24</sup> While the twenty-nine-day voter registration deadline may be constitutionally permissible, it leaves little room for students to establish residency for the first time within that twenty-nine-day period. Fifteen states have voter registration deadlines that fall between twenty-eight and thirty days before an election.<sup>25</sup> These states' voter registration deadlines effectively foreclose new college students arriving to campus from voting in elections that occur close in time to their relocation.

Additionally, states have recently taken steps to curtail college student voter registration. In 2017, the New Hampshire General Court passed S.B. 3, a law that attempted to restrict the definition of domicile for the purposes of voter registration to require all voters who registered within thirty days of the election to provide documentation to prove their residency to register to vote or be subject to civil and criminal penalties.<sup>26</sup> The law was invalidated by the New Hampshire Supreme Court in 2021.<sup>27</sup> At trial, an expert testified that the law "will disproportionately impact certain voters such as college students, highly mobile voters, and the homeless, and that, over time, fewer people would participate in New Hampshire elections as a result of SB 3," and college students testified that they did not believe that they possessed the required documentation to comply with S.B. 3.<sup>28</sup> In 2021, Texas enacted S.B. 1111, which requires voters to provide proof of residency to register to vote by showing a Texas driver's license, Texas identification card, a license to carry a gun in Texas, a utility bill addressed to the voter, or an official tax document.<sup>29</sup> While the bill exempts students who live on campus, advocates seeking to enjoin the law have pointed out that the bill still harms off-campus college students who cannot provide the required proof of residency to

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24. For example, fall semester classes began at the University of Florida on August 24, 2022. See *2022-2023 Dates and Deadlines*, UNIV. OF FL., <https://catalog.ufl.edu/UGRD/dates-deadlines/2022-2023/> (last visited Aug. 7, 2022). Most students moved in the week of August 18-21. *First Year Application*, UNIV. OF FL., <https://housing.ufl.edu/apply/first-year-student-application/#:~:text=Timeline&text=Summer%20B%20Move%2DIn%3A%20By,June%203%2D26%2C%202022> (last visited Aug. 7, 2022). Those students will miss the July 23 voter registration deadline for the August primary even though they will be residents by the time of the election.

25. See *Voter Registration Deadlines*, *supra* note 22.

26. *N.H. Democratic Party v. Sec'y of State*, 262 A.3d 366, 371, 382 (N.H. 2021) (invalidating S.B. 3).

27. *Id.* at 369.

28. *Id.* at 373.

29. Act effective Sept. 1, 2021, 2021 Tex. Sess. Law Serv. Ch. 869 (West) (referred to as "S.B. 1111").

register to vote.<sup>30</sup> Compounded with the logistic restrictions of meeting an onerous voter registration deadline, states' efforts to heighten residency requirements pose a unique threat to student voters.

*B. Voter Registration Hurdles: Proving Identity*

Additionally, strict photo identification requirements might serve to further disenfranchise youth voters. In general, adults under twenty-four are less likely to possess photo identification than older adults.<sup>31</sup> Furthermore, many states restrict the type of identification required to register to vote or disallow the type of identification that youth voters and student voters may possess, further decreasing the likelihood that those voters possess the requisite identification to register to vote and vote.<sup>32</sup>

While most states allow voters to identify themselves in their voter registration application with their state-issued identification number or social security number, some states impose a barrier to voter registration for those voters without a state-issued identification. Even where a college student voter may have a state-issued student ID with a photo, some states restrict how students may use their voter identification to register to vote.<sup>33</sup> For example, states may require voters to verify their voter registration after submitting an application but restrict the type of identification that the voter can use for verification. In Arkansas, voters are required to provide identification to verify their voter registration, but they are only allowed to use in-state student identification to verify their registration.<sup>34</sup> This rule excludes voters who are Arkansas residents, attend out-of-state colleges, and lack other qualifying identification. Other states restrict online voter registration to voters who have a state ID or driver's license, rather than allowing voters to

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30. *See id.* The bill specifically states that those requirements are not applicable to "a voter enrolled as a full-time student who lives on campus at an institution of higher education." *Id.* at 3. The bill further states that, "[n]otwithstanding the other provisions of this section, a voter enrolled as a full-time student who lives on campus at an institution of higher education may use the address of a post office box located on the campus of the institution or in a dormitory owned or operated by the institution to confirm the voter's residence." *Id.*; *see* Complaint at ¶¶ 46, 69, *Tex. State LULAC v. Elfant*, No. 21-cv-00546 (W.D. Tex. June 22, 2021).

31. VANESSA M. PEREZ, AMERICANS WITH PHOTO ID: A BREAKDOWN OF DEMOGRAPHIC CHARACTERISTICS 5 (2015), <http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf>.

32. *See infra* notes 34–38.

33. IND. CODE ANN. § 3-5-2-40.5 (2021); IND. CODE ANN. § 3-7-26.7-1 (2009); LA. STAT. ANN. § 18:115.1 (2013); LA. STAT. ANN. § 18:562 (2020).

34. ARK. CONST. amend. LI, § 13(b).

provide their social security number to register to vote online.<sup>35</sup> As a result, those youth voters without state-issued photo ID must register to vote by mail or in-person, including those youth voters who possess the requisite identification to ultimately cast their ballot.<sup>36</sup> Seven states do not allow students to use student ID as voter ID, whether to register to vote or cast a ballot.<sup>37</sup> Finally, Kansas and Arizona have attempted to curtail student voter registration by imposing a documentary proof of citizenship requirement for voter registration, which impacted youth voters who could not obtain the required proof.<sup>38</sup>

The issues regarding voter registration continue to threaten the ability of youth voters to cast their ballot, despite ostensible constitutional guarantees for youth voters to vote. Next is a brief canvas of advocates using federal statutes in an attempt to halt voter registration barriers for young people.

## II. HISTORY OF ENFORCING VOTING RIGHTS STATUTES TO THE YOUTH VOTE

There is a scarce history of enforcing the voting rights statutes to ensure the youth vote. Among the cases that exist, courts have often failed to identify an abridgement of the right to vote for youth voters or college students.<sup>39</sup> In part, courts struggle with identifying youth voters as a distinct class, despite the Twenty-Sixth Amendment's recognition of them as such.<sup>40</sup> Courts also decline to recognize distinct harms faced by youth voters due to barriers imposed upon them by election officials.<sup>41</sup> This pattern is especially problematic when the harm is borne primarily by youth voters of color who ostensibly have constitutional equal protection guarantees against discrimination on the basis of race in

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35. See ARK. CONST. amend. LI, § 13(b); *e.g.*, § 3-5-2-40.5; § 3-7-26.7-1; § 18:115.1; § 18:562 (allowing certain college students to use their student ID to cast their ballot but only allowing voters with a state-issued driver's license or ID to register to vote online).

36. See ARK. CONST. amend. LI, § 13(b); § 3-5-2-40.5; § 3-7-26.7-1; § 18:115.1; § 18:562.

37. See *Student ID as Voter ID*, CAMPUS VOTE PROJECT, <https://www.campusvoteproject.org/student-id-as-voter-id> (last visited July 14, 2022) (describing how Arizona, Iowa, North Dakota, Ohio, South Carolina, Tennessee, and Texas do not accept student identification as voter identification).

38. See *infra* Part III; see also *Lucha v. Hobbs*, CAMPAIGN LEGAL CTR. (Mar. 31, 2022), <https://campaignlegal.org/cases-actions/lucha-v-hobbs> (challenging a 2022 Arizona law creating a documentary proof of citizenship requirement).

39. See Bromberg, *supra* note 1, at 1151 (“Reviewing courts generally apply the Fourteenth Amendment to voter infringements at-large, or to claims of disparate impact on people of color, but they have given short shrift to claims concerning the impact of voter suppression measures on youth as a class.”).

40. See Bromberg, *supra* note 1, at 1107, 1151.

41. See discussion *infra* Parts II, III.



addition to their statutory rights.<sup>42</sup> Essentially, there are few cases that have attempted to enforce the statutory rights of youth voters, despite the constitutional guarantees from which those rights originate, and many of those cases fail to recognize the harms imposed by election officials on youth voters as a distinct class.

Below is a brief canvas of the history of enforcing the youth vote through the Voting Rights Act and National Voter Registration Act, as well as other statutes that impose legal obligations to ensure that youth voters and college students can cast their ballots.

#### A. *Voting Rights Act*

The Voting Rights Act of 1965 is widely regarded as one of the most successful pieces of legislation ever passed by Congress. It is unsurprising, then, that it has the longest history with respect to providing remedies to the youth vote, second only to the Ku Klux Klan Act, known more widely today as Section 1983.<sup>43</sup> Specifically, there are three primary provisions responsible for the (albeit limited) statutory enforcement of the youth vote: Title I, Title III, and Section 2.

##### 1. Title I

Title I provides a series of protections related to casting a ballot, voter eligibility, and voter intimidation.<sup>44</sup> Title I was originally passed as a part of the Civil Rights Act of 1964 and reflected Congress's last attempt to enforce the protections of the Fourteenth and Fifteenth Amendments before passing more comprehensive reforms in the Voting Rights Act of 1965.<sup>45</sup> Now codified in the Voting Rights Act, Title I (1) prohibits racial discrimination in voting, (2) proscribes certain voter registration denials and literacy tests, and (3) prohibits voter intimidation by elected officials, among other protections.<sup>46</sup>

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42. See Bromberg, *supra* note 1, at 1111–12; see also discussion *infra* Section II.A.3.

43. The Ku Klux Klan Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (codified at 42 U.S.C. § 1983). Section 1983 allows private plaintiffs to sue state officials for violations of federal law and the Constitution. 42 U.S.C. § 1983. It is the primary vehicle for litigating violations of the Fourteenth and Twenty-Sixth Amendment. Since the enforcement of the Twenty-Sixth Amendment is not a strict focus of this Article, Section 1983 will not be described here. For more information about enforcement of the constitutional right for young people to vote, see generally Bromberg, *supra* note 1. See also *supra* note 13 (listing cases brought under Section 1983).

44. See 52 U.S.C. § 10101.

45. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 101, 201, 78 Stat. 241, 241–43 (1964); see Henry L. Chambers, Jr., *Civil Rights Act of 1964*, in *ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES* 328 (D. Tanenhaus ed., 2008).

46. See § 10101(a)–(c).

To enforce the youth vote, advocates have attempted to use Title I's prohibition against the application of voter eligibility "standard[s], practice[s], or procedure[s] different from the standards, practices, or procedures applied . . . to other individuals."<sup>47</sup> The provision has been applied to challenge immaterial voter registration requirements that result in voter registration denials of youth voters or college students or substantially heavier burdens on student voters than other voters.<sup>48</sup> District courts have, for example, held that requiring additional documentation of residency<sup>49</sup> or a supplemental questionnaire to prove residency runs afoul of Title I.<sup>50</sup> In *Latham v. Chandler*, a district court enjoined a county election official from applying different standards and procedures for voter registration for Black students at Mississippi Valley State University than as applied to other voter registrants in the county, in violation of Title I.<sup>51</sup> A district court in *Frazier v. Callicutt* earlier enjoined a Mississippi law that applied different voter registration standards to college students than non-college students.<sup>52</sup> Likewise, in *Davis v. Commonwealth Election Commission*, the district court held that "an election official who requires students to fill out a residency questionnaire but does not require non-students to do so may be violating [Title I]."<sup>53</sup>

On the other hand, the Fifth Circuit has held that proof of residency for a student voter does not count as an additional requirement for voter registration to establish a violation of Title I.<sup>54</sup> In *Ballas v. Symm*, a county registrar in Texas required college students to submit a "Questionnaire Pertaining to Residence" to determine whether the college student was a Texas resident eligible to register to vote.<sup>55</sup> The registrar would deny students the right to register to vote on the basis of the questions or failure to fill out the questionnaire.<sup>56</sup> The students attended Prairie View A&M College, a Historically Black College or

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47. *Id.* § 10101(a)(2)(A).

48. See *Sloane v. Smith*, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972); *Shivelhood v. Davis*, 336 F. Supp. 1111, 1115–16 (D. Vt. 1971).

49. *Sloane*, 351 F. Supp. at 1305.

50. *Shivelhood*, 336 F. Supp. at 1115–16.

51. *Latham v. Chandler*, 406 F. Supp. 754, 755 (N.D. Miss. 1976).

52. *Frazier v. Callicutt*, 383 F. Supp. 15, 18, 20 (N.D. Miss. 1974).

53. *Davis v. Commonwealth Election Comm'n*, No. 1-14-CV-00002, 2014 WL 2111065, at \*25 (D. N. Mar. I. May 20, 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016).

54. *Ballas v. Symm*, 494 F.2d 1167, 1170–71 (5th Cir. 1974) (holding that proof of residency for a student voter was not an additional test or requirement of voter registration).

55. *Id.* at 1168.

56. *Id.* at 1168–69.

University (“HBCU”).<sup>57</sup> Unlike the district courts in the other cases, the Fifth Circuit held that the questionnaire was not an additional requirement for voter registration because the county official would sometimes require the questionnaire of non-students.<sup>58</sup> In so holding, the court failed to recognize the additional burden imposed on college students in applying the questionnaire. The burden particularly fell hard on students who came from out of the county, as the court failed to recognize the discrimination imposed on them by asking questions that students may not understand or were not applicable to them.<sup>59</sup> Indeed, the court in *Frazier* took pains to distinguish the holding in *Ballas* by finding an additional burden beyond the questionnaire, which the court held that county officials imposed on college students but did not impose on the “favored” class of non-students.<sup>60</sup> In sum, advocates have had mixed success in tackling voter registration barriers under Title I. Cases like *Ballas* loom over potential future attempts at preempting onerous voter registration requirements.

## 2. Title III

Title III of the Voting Rights Act, 52 U.S.C. § 10701, was Congress’s attempt to enforce the youth vote and the first federal statute to prohibit restrictions on voters who are eighteen years or older.<sup>61</sup> First passed in the 1970 amendments to the VRA, Title III initially prohibited state and local jurisdictions from denying the right to vote to any citizen over eighteen years old in all elections.<sup>62</sup> In *Oregon v. Mitchell*, a divided Supreme Court struck down the part of Title III that applied to state and local jurisdictions as beyond Congress’s reach.<sup>63</sup> This decision led to the ratification of the Twenty-Sixth Amendment, which reaches all jurisdictions and elections, and grants Congress the authority to pass legislation to enforce the amendment.<sup>64</sup> Today, Title III authorizes the Department of Justice to enforce the right to vote of youth voters at the federal, state, and local levels against jurisdictions who violate the Twenty-Sixth Amendment.<sup>65</sup>

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57. *Id.* at 1168.

58. *Id.* at 1172.

59. *See id.* at 1168–69 (describing questions about property and questions that the plaintiff failed to answer because he did not understand).

60. *Frazier v. Callicutt*, 383 F. Supp. 15, 20 (N.D. Miss. 1974).

61. *See Bromberg, supra* note 1, at 1126.

62. *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970).

63. *Id.* at 118.

64. U.S. CONST. amend. XXVI; *see also Bromberg, supra* note 1, at 1132–34.

65. 52 U.S.C. § 10701.

Since its passage, the federal government has taken little occasion to enforce the Twenty-Sixth Amendment under the Act. Only one case under Title III has reached the Supreme Court.<sup>66</sup> In *Symm v. United States*, the Supreme Court affirmed a lower court's ruling holding that a Texas county's policy of refusing college students who sought to register to vote on their college campus violated the Twenty-Sixth Amendment as enforced by Title III.<sup>67</sup> This case, the only Twenty-Sixth Amendment case heard by the Supreme Court since its ratification, affirmed the right of student voters to register either at their home address or their college residence.<sup>68</sup> While *Symm* is a landmark case, the scant history of Title III reflects how few enforcement resources have been expended on the youth vote since the ratification of the Twenty-Sixth Amendment.

### 3. Section 2

Section 2 is a nationwide ban on “voting qualification[s] or prerequisite[s] to voting or [any] standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>69</sup> Section 2 is typically understood to tackle all forms of racial discrimination in voting.<sup>70</sup>

Few cases have attempted to assert a Section 2 violation to an abridgement of the youth vote. This dearth is likely a reflection of the lack of case law applying Section 2 to abridgments of the right to vote generally, especially during the period that federal preclearance existed, obviating the need for Section 2 claims in many jurisdictions.<sup>71</sup> In recent years, advocates have employed Section 2 to focus on standards,

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66. *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd sub nom. Symm v. United States*, 439 U.S. 1105, 1105 (1979).

67. *United States v. Texas*, 445 F. Supp. at 1262; *Symm*, 439 U.S. at 1105.

68. *See United States v. Texas*, 445 F. Supp. at 1255; *see also Symm*, 439 U.S. at 1105.

69. § 10301(a).

70. *Id.* § 10301.

71. *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (noting that “there is little authority on the proper test to determine whether the right to vote has been *denied or abridged* on account of race”); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated sub nom. Ohio State Conf. of NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (noting that “the vast majority of cases have concerned . . . vote dilution”). Federal preclearance required certain jurisdictions to submit changes to voting practices to the Department of Justice. *See* §§ 10304–10305. When the Supreme Court struck down the existing preclearance provisions in *Shelby County, Alabama v. Holder*, courts noted the increase of Section 2 cases for abridgments of the right to vote in the absence of federal preclearance. *See, e.g., Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020), *rev'd sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014).

practices, or election systems that have the effect of denying students of color the right to vote.<sup>72</sup> In *Allen v. Waller County, Texas*, for example, students at Prairie View A&M challenged a Texas county's decision to hold fewer early voting hours at the early voting location that served the students living on campus.<sup>73</sup> Prairie View A&M is an HBCU and the surrounding county is predominantly white.<sup>74</sup> In denying the county's motion for summary judgment, the court recognized that the "ability of students to access the community center and exercise their right to vote" was a genuine dispute that could give rise to a Section 2 claim.<sup>75</sup> Later, however, the trial court held that the students could not identify a discriminatory burden as compared to other residents in the county.<sup>76</sup> Specifically, the trial court held that the burdens identified by the students—including transportation from campus to the early voting location and the inconvenience of the hours for the students—amounted to nothing more than a "mere inconvenience" that other residents in the county also had to face.<sup>77</sup>

In *Bethea v. Deal*, a district court held that Georgia did not violate Section 2 of the Voting Rights Act when it failed to extend the voter registration deadline after a hurricane prevented high school students from registering to vote before the deadline.<sup>78</sup> In so holding, the district court declined to recognize that the state's failure to extend the deadline created an impediment on the right to vote, despite the undisputed fact that the students were unable to register as a result.<sup>79</sup>

### B. National Voter Registration Act

Congress passed the National Voter Registration Act in 1993 to combat discriminatory voter registration practices and to standardize

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72. See generally, e.g., *Allen v. Waller Cnty., Tex.*, 472 F. Supp. 3d 351 (S.D. Tex. 2020); *Bethea v. Deal*, No. CV216-140, 2016 WL 6123241 (S.D. Ga. Oct. 19, 2016).

73. *Waller Cnty.*, 472 F. Supp. 3d at 357.

74. *Id.* at 355.

75. *Id.* at 360.

76. *Johnson v. Waller Cnty.*, No. 18-CV-03985, 2022 WL 873325, at \*35–36 (S.D. Tex. Mar. 24, 2022).

77. *Id.* at \*35–39. During the course of this case, the Supreme Court issued a landmark ruling in *Brnovich v. Democratic National Committee*, which greatly narrowed the scope of Section 2 claims. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2020). Specifically, *Brnovich* elaborated a new standard for stating claims of discriminatory burden that result in the denial or abridgement of the right to vote. *Id.* at 2238–42. Critics note that this standard makes stating a Section 2 claim highly improbable. See, e.g., *Brnovich v. Democratic National Committee*, 135 HARV. L. REV. 481, 489 (2021). These developments likely doomed the Prairie View students' case against Waller County.

78. *Bethea v. Deal*, No. CV216-140, 2016 WL 6123241, at \*2 (S.D. Ga. Oct. 19, 2016).

79. *Id.* at \*1–2.

voter list maintenance practices across the country.<sup>80</sup> In general, the NVRA requires states to undergo several practices with respect to voter registration and voter list maintenance.<sup>81</sup> First, states are required to accept the federal voter registration form for federal elections and cannot require voters to provide additional information to register beyond what the federal law requires.<sup>82</sup> Second, the NVRA requires that states establish voter registration at motor vehicle agencies, as well as establish voter registration agencies in certain public offices.<sup>83</sup> Finally, the NVRA requires states to maintain a list of eligible voters and prohibits states from removing voters from the voter rolls without adequate notification.<sup>84</sup> Discussed below, there is some case law recognizing the difficulty facing college students to register to vote and to seek remedy under the NVRA. In general, the cases can be divided into the following categories: (1) college campuses as voter registration agencies, and (2) denial of voter registration for college students.<sup>85</sup>

In the first category, courts have generally held the NVRA's voter registration agency provision to require public colleges to designate their disability offices as voter registration agencies to assist college voters with disabilities in voter registration.<sup>86</sup>

Section 7 of the NVRA requires that states designate as voter registration agencies all state offices that provide public assistance and provide disability services.<sup>87</sup> In *National Coalition for Students with Disabilities Education & Legal Defense Fund v. Allen*, the Fourth Circuit held that the NVRA requires states to "designate as voter registration agencies those state-funded offices that provide services to disabled students at public colleges."<sup>88</sup> Lower courts across the country have since followed this lead, upholding the requirement that states must designate public colleges' disability offices as voter registration agencies and

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80. 52 U.S.C. § 20501.

81. *Id.*

82. *Id.* § 20505(a); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013) (holding that the NVRA "precludes [states] from requiring a Federal Form applicant to submit information beyond that required by the form itself").

83. *See* §§ 20504, 20506.

84. *See* § 20507.

85. *See generally, e.g.*, *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283 (4th Cir. 1998); *United States v. New York*, 700 F. Supp. 2d 186 (N.D.N.Y. 2010).

86. *See, e.g., Nat'l Coal. for Students with Disabilities*, 152 F.3d at 288.

87. § 20506(a)(2).

88. *Nat'l Coal. for Students with Disabilities*, 152 F.3d at 288.

affirming the obligation of those disability offices to aid college students with disabilities in registering to vote.<sup>89</sup>

In the second category, courts have beaten back attempts by states to implement registration policies for students that are preempted by the NVRA's requirements for registration in federal elections. Challengers have achieved some success in challenging onerous voter registration requirements that deny college students the ability to register to vote in violation of the NVRA. Various provisions of the NVRA prevent states from removing voters from the voter rolls,<sup>90</sup> including the NVRA's provision outlining the notice requirements before a voter can be deemed an inactive voter<sup>91</sup> and the requirements for voter registration in federal elections.<sup>92</sup> Student advocates have attempted to use these provisions to challenge burdensome voter registration requirements.<sup>93</sup> In *Cromwell v. Kobach*, for example, the district court held that a college student had standing to allege that his removal from the voter rolls violated the NVRA because Kansas' documentary proof of citizenship requirement, which out-of-state college students could not provide, caused him to be removed from the voter rolls for reasons not provided under the Act.<sup>94</sup> Later, a district court invalidated Kansas' documentary proof of citizenship requirement as preempted by the NVRA and recognized that the requirement prevented college students from registering to vote.<sup>95</sup> On the other hand, in *Bethea v. Deal*, a district court rejected two high school students' claims that a county's refusal to accept their late voter registration violated the NVRA when the county's offices were closed due to a hurricane that prevented them from registering on time.<sup>96</sup>

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89. *E.g.*, *New York*, 700 F. Supp. at 206 (holding that the state must designate disability offices in state universities and community colleges as voter registration agencies); *Nat'l Coal. for Students with Disabilities*, 152 F.3d at 288–89 (holding that the voter registration agency designated at a university was required to help students with disabilities register to vote even if the student was not enrolled in the university).

90. §§ 20507–20508.

91. *Id.* § 20507(c) (outlining requirements for a state's voter removal and inactive voter list programs).

92. *Id.* § 20508(b) (outlining the contents required on the federal voter registration form).

93. *Id.* § 20507(c).

94. *Cromwell v. Kobach*, 199 F. Supp. 3d 1292, 1300, 1304 (D. Kan. 2016) (dismissing the case on other grounds).

95. *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1119 (D. Kan. 2018), *aff'd sub nom.* *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

96. *Bethea v. Deal*, No. CV216-140, 2016 WL 6123241, at \*1, 3–4 (S.D. Ga. Oct. 19, 2016) (denying plaintiffs' motion for temporary restraining order for claims under the Fourteenth Amendment, VRA, and NVRA).

*C. Higher Education Act*

The Higher Education Act (“HEA”) was passed by Congress contemporaneously with the Civil Rights Act and Voting Rights Act to expand access to higher education. It provides some requirements for federally-funded colleges and universities with respect to voting and voter registration. Specifically, the HEA requires that all federally-funded colleges and universities “make a good faith effort to distribute a mail voter registration form” to every enrolled student and to “make such forms widely available to students at the institution.”<sup>97</sup> The Department of Education is tasked with enforcing the HEA, including the voter registration provision.<sup>98</sup> The Department of Education has affirmed this obligation to colleges and universities on occasion.<sup>99</sup> To date, however, the Department of Education has not taken any enforcement action with respect to this good faith requirement.

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In sum, a brief canvas of federal law demonstrates the sparing use of voting rights statutes to enforce the youth vote, with mixed success. The next section will outline several theories for enforcement of statutory rights provided by the voting rights statutes to increase protections for youth voting.

### III. THEORIES FOR ENFORCEMENT

As Section II demonstrates, there have been few attempts at statutory enforcement of the youth vote, with mixed results. The lack of development in this area provides opportunities for advocacy, and there are several unexplored and underdeveloped avenues under existing voting rights statutes that advocates should consider. The following examines several claims that advocates should consider: first, under the

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97. 20 U.S.C. § 1094(a)(23)(A).

98. See generally *Higher Education Opportunity Act* – 2008, U.S. DEPT OF EDUC., <https://www2.ed.gov/policy/highered/leg/hea08/index.html> (last visited July 14, 2022) (showing that the U.S. Department of Education enforces the HEA).

99. E.g., 34 C.F.R. § 668.14(d) (2022) (regulation reiterating voter registration requirement under the Act); Brenda Dann-Messier, *Requirement for Distribution of Voter Registration Forms*, FED. STUDENT AID (July 1, 2013), <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2013-07-01/gen-13-17-subject-requirement-distribution-voter-registration-forms> (including Dear Colleague Letter addressing voter registration requirement under the Act).



little-known Section 11 of the Voting Rights Act, then under the National Voter Registration Act.

A. *Voting Rights Act*

As stated above, several provisions of the VRA have been employed to attempt to enforce the rights of youth voters and youth voters of color in particular. The case law applying the VRA to the abridgment of the youth vote, however, reflects an instinct by some courts to decline to recognize the distinct harms facing youth voters.<sup>100</sup> Furthermore, the Supreme Court's recent decisions weakening the Voting Rights Act have rendered tools like federal preclearance unavailable to voters in states with a history of discrimination in voting<sup>101</sup> and have sharply narrowed the viability of Section 2 claims.<sup>102</sup>

At least one provision of the VRA, Section 11, has yet to be applied to denials of youth voters to register to vote and cast their ballots. As analyzed below, advocates may choose to explore this intentionally broad provision of the VRA to vindicate denials of the rights of youth voters of color to register to vote.

1. Section 11

Like Title I, Section 11 of the VRA outlines a set of prohibited acts by state and local election officials, including refusing to permit a voter to vote and voter intimidation.<sup>103</sup> Among other provisions, Section 11 provides:

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100. See *supra* note 77.

101. Federal preclearance was the process of federal approval by the Department of Justice and the federal district courts that certain states were required to receive before implementing certain election changes. See 52 U.S.C. §§ 10304–10305; *About Section 5 of the Voting Rights Act*, U.S. DEPT OF JUST. (July 14, 2022), <https://www.justice.gov/crt/about-section-5-voting-rights-act>. Preclearance prevented thousands of racially discriminatory voting changes from coming into effect in thousands of jurisdictions in states across the South, as well as in Arizona and California. See *Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 7 (2021) (statement of Kristen Clarke, Assistant Attorney General, U.S. Department of Justice), <https://www.judiciary.senate.gov/imo/media/doc/Clarke%20Testimony1.pdf>. *Shelby County, Alabama v. Holder*, the Supreme Court invalidated the provision of the Voting Rights Act, known as the preclearance formula, which determined those states that would be subject to preclearance. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 557 (2013). Since then, those states have been free to pass discriminatory laws with little recourse for voters.

102. See generally *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2020) (narrowing the standard for vote denial claims under Section 2 of the Voting Rights Act).

103. § 10307 (originally enacted as Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 443 (1965)).

**(a) Failure or refusal to permit casting or tabulation of vote**

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

**(b) Intimidation, threats, or coercion**

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of title 42.<sup>104</sup>

A part of the original provisions of the Voting Rights Act of 1965, this provision has seldom been used throughout its history.<sup>105</sup> Indeed, the vast majority of case law development of Section 11's provisions has focused on the voter intimidation provision;<sup>106</sup> very little research or case law is devoted to the other provisions. Section 11 has been compared to Title I in many ways, especially in the voter intimidation context.<sup>107</sup> However, they are analytically distinct. And unlike Title I, courts are not split regarding whether private litigants can enforce Section 11.<sup>108</sup>

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104. *Id.*

105. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 443 (1965) (original provision of Section 11(a)).

106. See, e.g., *Rhodes v. Siver*, No. CV 19-12550, 2021 WL 1565137, at \*4 (E.D. Mich. Feb. 1, 2021), *report and recommendation adopted in part*, No. 19-12550, 2021 WL 912393 (E.D. Mich. Mar. 10, 2021); *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021); *Council on Am.-Islamic Rels.—Minn. v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 378 (D. Minn. 2020); *League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 18-CV-00423, 2018 WL 3848404, at \*3 (E.D. Va. Aug. 13, 2018).

107. See *League of United Latin Am. Citizens - Richmond Region Council 4614*, 2018 WL 3848404, at \*3 (discussing the analytical differences between the voter intimidation provisions in 52 U.S.C. § 10101(b) and 52 U.S.C. § 10307(b)).

108. E.g., *Moore v. Cecil*, No. 19-CV-1855, 2021 WL 1208870, at \*11 (N.D. Ala. Mar. 31, 2021). Compare *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016), with *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003), and *Migliori v. LeHigh*

The lack of development interpreting Section 11(a), combined with the broader language of the provision, provides an opportunity for student voting activists to enforce voter registration denials against local election officials and avoid the deficiencies in the case law interpreting Title I. Broadly speaking, Section 11(a) requires that election officials permit eligible voters to vote.<sup>109</sup> This provision has generally been viewed as an enforcement mechanism that imposes a duty on election officials to “refrain from applying any voting procedure which will have the effect of denying [voters of color] the right to cast effective votes.”<sup>110</sup> The VRA expressly includes voter registration in its definition of “vote,”<sup>111</sup> and every college student who is otherwise eligible to register to vote may vote in the jurisdiction of her home address (e.g., her parent’s address) or her college residence.<sup>112</sup> It follows, then, that any election official whose policies result in voter registration denials of college students could violate Section 11(a).

As stated in Section II, advocates have traditionally used Title I’s prohibition against additional voter registration requirements to attempt to enjoin onerous residency requirements for student voter registration.<sup>113</sup> But Section 11 arguably provides more expansive protections, despite the two provisions’ similarities. For one, Section 11’s prohibition against the failure to permit eligible voter registration is more proscriptive than Title I’s mandate that all eligible voters be allowed to vote in any election.<sup>114</sup> Section 11(a) specifically states:

*No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person’s vote.*<sup>115</sup>

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Cnty. Bd. of Elections, No. 22-cv-00397, 2022 WL 802159, at \*9 (E.D. Pa. Mar. 16, 2022) (representing the current circuit split regarding whether Congress conferred a private right of action to enforce the provisions of Title I of 52 U.S.C. § 10101).

109. § 10307(a).

110. *United States v. Post*, 297 F. Supp. 46, 50–51 (W.D. La. 1969); *see also Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) (“[Section 11(a)] is an enforcement provision of the Act’s comprehensive scheme to eliminate racial discrimination in the conduct of public elections.”).

111. § 10310(c)(1).

112. *See supra* Part II.

113. *See supra* Part II.

114. *Compare* § 10101(a)(1), *with* § 10307(a).

115. § 10307(a) (emphasis added).

The analogous Title I provision, on the other hand, states “[a]ll citizens of the United States who are otherwise qualified by law to vote at any election . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude.”<sup>116</sup> While Section 11 does not specify a prohibition against additional voter registration requirements as Title I does, Section 11’s broad language against “fail[ing] or refus[ing] to permit any person to vote who is entitled to vote” could be interpreted to include all voter registration denials by reason of onerous registration requirements imposed on student voters who are unable to comply.<sup>117</sup>

A broad reading of Section 11 is supported by the case law that exists. In *United States v. Post*, for example, the court held that a Louisiana parish election’s official change in voter registration procedures, which resulted in the inability of a large number of Black voters to register to vote, violated Section 11 even though the denial may have been unintentional.<sup>118</sup> The court held that Section 11 conferred “the duty to refrain from engaging in conduct which involves or results in any distinction based upon race, and to refrain from applying any voting procedure which will have the effect of denying to [Black] voters the right to cast effective votes for the candidate of their choice.”<sup>119</sup> This holding stands in stark contrast with the more narrow reading of Title I, especially the Fifth Circuit’s holding in *Ballas* that a questionnaire to determine student residency at an HBCU did not constitute an additional requirement for voter registration.<sup>120</sup> Applying the facts of *Ballas* to Section 11(a), a court might find that the very act of the denial of an eligible voter because of the questionnaire, and the impact that the questionnaire had on mostly Black students, violate Section 11(a)’s proscription against “fail[ing] . . . to permit any person to vote” on the basis of onerous proof of eligibility requirements when they are otherwise qualified to vote.<sup>121</sup> This application could include the restriction identified in *Bethea*, where a county election official refused to permit high school students from registering to vote despite their eligibility because a hurricane prevented them from registering by the voter registration deadline.<sup>122</sup> This application could also include the restriction on certain college students who become eligible between the

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116. *Id.* § 10101(a)(1).

117. *See id.* § 10307(a).

118. *United States v. Post*, 297 F. Supp. 46, 50–51 (W.D. La. 1969).

119. *Id.*

120. *Ballas v. Symm*, 494 F.2d 1167, 1168–70, 1172 (5th Cir. 1974).

121. § 10307(a); *see Ballas*, 494 F.2d at 1168–70.

122. *See Bethea v. Deal*, No. CV216-140, 2016 WL 6123241, at \*1 (S.D. Ga. Oct. 19, 2016).

time they become residents on their college campuses but are impeded by the voter registration deadline. In all cases, the election official's failure to permit the right to vote, despite eligibility, could be preempted by Section 11(a).

There is an open question about whether Section 11(a) applies only to denials without respect to race. Courts interpreting Title I are split about whether racial discrimination is a required element of stating a claim given the provision's more express references to race.<sup>123</sup> But unlike Title I, the text of Section 11(a) does not explicitly refer to race nor have other provisions of Section 11 been interpreted to require proof of racial discrimination.<sup>124</sup> And Section 11(b), the prohibition against voter intimidation, explicitly does *not* require evidence of racial animus to state a claim of voter intimidation.<sup>125</sup> The two leading cases interpreting Section 11(a) have read its purpose to be the elimination of racial discrimination, though both cases were reading Section 11(a) in conjunction with Section 2 of the VRA, which specifically requires a showing of racial discrimination.<sup>126</sup> Standing alone, it is unclear whether a court might require evidence that a denial had a racially discriminatory effect or intent to state a claim under the provision. But there is a stronger argument that Section 11 applies to all failures to permit voter registration, whether that be youth voters generally or youth voters of color specifically, providing a broader cause of action.

In any event, voters and advocates should consider enforcing the statutory guarantees of Section 11 to secure the youth vote against onerous voter registration barriers. The broad language of Section 11 cures some of the deficiencies created by the case law interpreting Title I in student voter registration cases, providing a clean slate for advocacy.

### *B. National Voter Registration Act*

Youth voting activists should challenge onerous voter registration requirements posed by states under the NVRA. The NVRA outlines the

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123. See *Common Cause v. Thomsen*, No. 19-CV-323, 2021 WL 5833971, at \*3 (W.D. Wis. Dec. 9, 2021) (holding that “the text of § 10101(a)(2)(B) isn’t limited to race discrimination or voter registration. The court concludes that § 10101(a)(2)(B) is not [directed] solely to cases of dirty tricks motivated by race discrimination”); *Auerbach v. Kinley*, 499 F. Supp. 1329, 1340 (N.D.N.Y. 1980) (noting the circuit split regarding whether Title I requires proof of racial discrimination and citing cases).

124. See § 10307(a).

125. H.R. REP. NO. 89-439, at 2437, 2462 (1965); *League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 18-CV-00423, 2018 WL 3848404, at \*3 (E.D. Va. Aug. 13, 2018).

126. *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970); *United States v. Post*, 297 F. Supp. 46, 51 (W.D. La. 1969).

requirements for registering to vote in federal elections.<sup>127</sup> Specifically, the mail registration form to register to vote in federal elections may only include (1) information necessary to identify the applicant and assess the eligibility of the applicant and (2) a statement regarding eligibility requirements and may not include any notarization or other formal authentication.<sup>128</sup> Additionally, the NVRA requires states to designate certain offices as voter registration agencies to provide voter registration assistance to voters.<sup>129</sup> Explained below, both statutory rights can and should be enforced on behalf of youth voters.

### 1. Voter Registration Eligibility

Student advocates should push back against proposed requirements for voter registration in federal elections that go beyond the requirements of the NVRA. This recommendation applies in situations where counties or states require additional documentation for voter registration for college students. Onerous registration requirements threaten to abridge the rights of youth voters who may not have access to the documentation. This observation is especially true for out-of-state students who already have a decreased window of time for voter registration before an election because they may not arrive to the state in which their college is located in until right before classes begin. And in states where the voter registration deadline falls within thirty days of the election, out-of-state students may only have a week to register, granting them little time to retrieve the additional documentation required to prove their eligibility.

Two cases represent this problem for youth voters. In recent years, states including Kansas and Arizona have attempted to require additional documentary proof of citizenship (“DPOC”) for eligible voters to register to vote in federal elections.<sup>130</sup> In *Arizona v. Inter Tribal Council of Arizona*, the Supreme Court affirmed that state eligibility requirements that go beyond the NVRA’s requirements are preempted by the NVRA as applied to federal elections.<sup>131</sup> Arizona’s law required voters to present DPOC to register to vote and applied to both state and federal elections.<sup>132</sup> In an amicus brief, an organization representing Arizona college students noted that the Arizona law posed additional barriers to

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127. See §§ 20501–20508.

128. *Id.* § 20508(b)(1)–(3).

129. *Id.* § 20506(a)(2).

130. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013); *Cromwell v. Kobach*, 199 F. Supp. 3d 1292, 1299 (D. Kan. 2016).

131. *Inter Tribal Council of Ariz.*, 570 U.S. at 20.

132. *Id.* at 5.

voter registration that were preempted by the NVRA.<sup>133</sup> First, amici highlighted, the DPOC requirement poses a barrier to students who do not arrive on campus with the accepted documentation—in particular, the more than 25,000 out-of-state students who might have left their passports or birth certificates at home.<sup>134</sup> Additionally, retrieving the DPOC may pose a difficult task for students who do not have reliable access to those documents in time for the election.<sup>135</sup> Amici also noted that the requirement threatened the ability for advocates to host voter registration drives on Arizona college campuses.<sup>136</sup> Despite the Supreme Court’s ruling in *Inter Tribal Council of Arizona*, Arizona passed a similar law in 2022 that will require voters to provide proof of citizenship to register to vote in federal elections.<sup>137</sup>

In 2011, Kansas passed a law requiring documentary proof of citizenship to register to vote.<sup>138</sup> This passage meant that eligible Kansas voters had to submit any of the listed documentation to prove that the voter was a United States citizen, including a driver’s license (only if the license denoted citizenship), passport, certificate of citizenship, or birth certificate, among other accepted documentation.<sup>139</sup> If a voter did not provide this identification, the voter’s registration would be marked as “in suspense” or “incomplete.”<sup>140</sup> Voters sued under the NVRA, alleging that the Kansas law removed voters from the voter rolls for reasons not allowed under Section 8 of the Act.<sup>141</sup> Among the voters who sued included a college student at the University of Kansas who did not provide the requisite documentation to complete his registration, and his registration was suspended as a result.<sup>142</sup> The state challenged the college student’s standing in the case, in part because the student was an out-of-state student who was previously registered to vote in another state before he attempted to vote in Kansas.<sup>143</sup> The district court held that the college student had standing to plead his claims against the

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133. Brief for Amici Curiae Overseas Vote Foundation & Federation of American Women’s Clubs Overseas et al. in Support of Respondents at 26–27, *Inter Tribal Council of Ariz.*, 570 U.S. 1 (No. 12-71).

134. *Id.*

135. *Id.* at 28.

136. *Id.* at 27–29.

137. Complaint at 5–8, *Living United for Change in Ariz. v. Hobbs*, No. 22-cv-00519 (D. Ariz. Mar. 31, 2022).

138. *Cromwell v. Kobach*, 199 F. Supp. 3d 1292, 1297 (D. Kan. 2016).

139. *Id.*

140. *Id.* at 1298.

141. *Id.* at 1300.

142. *Id.* at 1298–99.

143. *Id.*

Kansas law.<sup>144</sup> Importantly, the court recognized the student's eligibility to vote in Kansas despite being an out-of-state student and recognized the injury caused by the student's failure to provide the requisite documentary proof of citizenship.<sup>145</sup> Eventually, in another case, the court struck down the Kansas law, holding that the DPOC requirement was preempted by Section 5 of the NVRA by requiring more for voter registration than the NVRA allowed.<sup>146</sup>

These cases illustrate how youth voting activists can push back against onerous voter registration practices imposed by states. In states that propose to heighten voter registration requirements for student voters to register to vote in federal elections, the NVRA should preempt those requirements.

## 2. Voter Registration Agencies

Additionally, youth voting advocates should consider challenging states with inadequate voter registration agencies. The NVRA's voter registration agency provision requires states to designate as voter registration agencies (1) state offices that provide public assistance and (2) state offices that provide disability services.<sup>147</sup> Section 7 further requires that states designate other offices as public registration agencies, permitting the state to choose to designate virtually any state, federal, or nongovernmental office as a voter registration agency.<sup>148</sup> Under the Act, voter registration agencies distribute the federal registration form, assist applicants in completing the form, and accept complete voter registration forms to transmit to the appropriate election official.<sup>149</sup>

Section 7's provisions are as important as they are underenforced. Congress mandated these agencies to be voter registration agencies specifically "to reach out to those sectors of the population which are not likely to have driver's licenses or other identification cards issued by a motor vehicle agency."<sup>150</sup> Problems abound with respect to state compliance under the Act, however. Many advocates complain that States fail to provide resources to voter registration agencies, rendering

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144. *Id.* at 1302–05.

145. *Id.*

146. *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1054 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105, 1113 (10th Cir. 2020).

147. 52 U.S.C. § 20506(a)(2).

148. *Id.* § 20506(a)(3)(A).

149. *Id.* § 20506(a)(4)(A).

150. S. REP. NO. 103-6, at 14 (1993).



them unhelpful.<sup>151</sup> Additionally, many states do not comply with all components of the Act; advocates have litigated to compel states to comply with the mandatory agencies provision.<sup>152</sup> Still, millions of voters have been registered at public assistance or disability agencies as a result of Section 7's provisions.<sup>153</sup> And studies have found litigation to be an effective method of ensuring that states comply with Section 7.<sup>154</sup> These successes reflect an open opportunity, and it is imperative for advocates to compel better voter registration assistance for youth voters.

Accordingly, student voting advocates could pursue two possible challenges under Section 7. First, mandated voter registration agencies should include colleges and universities that provide public assistance services. The NVRA requires that all public assistance agencies and disability services agencies be designated as voter registration agencies.<sup>155</sup> To determine whether an agency is a mandatory agency under the NVRA, a court must decide (1) whether the agency gives "public assistance" or "disability services" and (2) whether the agency is an "office."<sup>156</sup>

Under the first prong, the office may be either a public assistance agency or disability services agency; the office need not provide both services to be considered a mandatory voter registration agency.<sup>157</sup> To determine whether an agency provides "public assistance," at least one federal appeals court has held that the term should be read broadly and given effect whenever a state or local office provides assistance in receiving government services.<sup>158</sup> Here, advocates should argue that university offices provide public assistance when they assist students in receiving government services. For example, financial aid offices may provide public assistance when aiding students in obtaining state or federally funded scholarships. Likewise, university departments may

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151. TESTIMONY OF LISA J. DANETZ, SENIOR COUNSEL, DEMOS TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS: INCREASING COMPLIANCE WITH SECTION 7 OF THE NVRA 5 (2013),

<https://www.demos.org/sites/default/files/publications/Final%20USCCR%20Testimony.pdf>.

152. *See id.* at 6.

153. U.S. COMM'N ON CIV. RTS., INCREASING COMPLIANCE WITH SECTION 7 OF THE NATIONAL VOTER REGISTRATION ACT 12 (2016), <https://www.usccr.gov/files/pubs/docs/NVRA-09-07-16.pdf>.

154. *See, e.g., id.* at 5–6.

155. § 20506(a)(2).

156. *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) (determining the definition of public assistance agencies under the mandatory agency provisions of the NVRA); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 291–92 (4th Cir. 1998) (determining the meanings of "offices" and disability services under the mandatory agencies provisions of the NVRA).

157. *See* § 20506(a)(2).

158. *See Disabled in Action of Metro. N.Y.*, 202 F.3d at 124.

serve as implementing agencies for government services, such as the Supplemental Nutritional Assistance Program Education (“SNAP”) service.

Courts have already given broad application to the definition of disability services offices on college campuses, which can inform the definition of public assistance. In the leading case, *National Coalition for Students with Disabilities Education & Legal Defense Fund v. Allen*, the Fourth Circuit held that disability services agencies on college campuses are mandatory voter registration agencies under Section 7 of the NVRA.<sup>159</sup> The court deemed indisputable that university offices, which are funded by state appropriations and serve primarily to “ensure [students with disabilities] adequate access to educational programs and other activities” fall squarely within “disability services” under the Act.<sup>160</sup> Likewise, the district court in *United States v. New York* held that public universities that offer “[s]tate-funded assistance” and “‘programs’ to disabled students,” are offering disability assistance regardless of whether that assistance is being provided in the context of their college education.<sup>161</sup> Applying the same reasoning, an office within a public university that provides assistance with government services—such as assistance in applying for or receiving government-funded healthcare, food, or financial assistance—provides public assistance under the Act.

Under the second prong, an “office” is generally “a subdivision of a department [or institution] where citizens regularly go for service and assistance.”<sup>162</sup> In *National Coalition for Students with Disabilities*, the court held that offices within a public college or university are an “office” under Section 7.<sup>163</sup> A public university is a “department or institution” appropriated by the state, and so the subdivisions of public universities must be “offices.”<sup>164</sup> Therefore, just as disability services offices are required to provide voter registration assistance, so too are on-campus offices that provide public assistance.

Second, advocates should challenge states that do not provide voter registration agencies beyond state public assistance and disability offices. The NVRA expressly provides that states “shall” designate as voter registration agencies “other offices within the state.”<sup>165</sup> The Act then provides wide latitude for states to choose which “other offices” to designate, including public libraries, public schools, offices of city and

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159. *Nat’l Coal. for Students with Disabilities*, 152 F.3d at 293.

160. *Id.* at 288.

161. *United States v. New York*, 700 F. Supp. 2d 186, 203 (N.D.N.Y. 2010).

162. *Nat’l Coal. for Students with Disabilities*, 152 F.3d at 291.

163. *Id.* at 289.

164. *Id.* at 290.

165. 52 U.S.C. § 20506(a)(3)(A).

county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, as well as federal and nongovernmental offices.<sup>166</sup> Some states, however, only designate public assistance and disability services agencies as voter registration agencies, effectively treating the additional agencies requirement as permissive.<sup>167</sup>

There is a strong argument that the additional agencies requirement is mandatory; states only have discretion as to *which* additional agencies to designate, not *whether* states are required to designate such agencies. The mandatory nature of the requirement is indicated by the plain reading of the statute. The language in § 20506(a)(3)(A) states that the state “shall designate other offices[.]”<sup>168</sup> The term “shall” denotes “in laws, regulations, or directives . . . what is mandatory.”<sup>169</sup> Importantly, the language in § 20506(a)(2) regarding public assistance and disability offices—which is indisputably mandatory—also denotes the mandatory requirement by stating that the state “shall designate” these offices.<sup>170</sup> Accordingly, courts that have addressed the difference between mandatory voter registration agencies and additional agencies note that both designations are in fact required.<sup>171</sup>

Additionally, the legislative history of the NVRA suggests that the additional agencies provision was meant to be mandatory. In drafting Section 7, Congress envisioned the voter registration agencies provision to be a “two tiered program,” which included both public assistance and disability agencies and local offices that the state chooses at its discretion.<sup>172</sup> Congress expressly intended that the “State must have such a program” for additional agencies and that this tier of the program should be “complementary” to the tier of public assistance and disability services offices.<sup>173</sup> The implementation of a two-tiered voter registration

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166. *Id.* § 20506(a)(3)(B).

167. For example, Mississippi and South Carolina only designate certain disability services offices, Army recruitment centers, health and human services offices, and DMV offices as NVRA agencies. *See* MISS. SEC’Y OF STATE’S OFF., NATIONAL VOTER REGISTRATION ACT AGENCY GUIDE AND TRAINING MANUAL (2021), <https://www.sos.ms.gov/content/documents/Elections/SOS%20NVRA%20GUIDE%20AND%20TRAINING%20MANUAL.pdf>; *Register to Vote*, S.C. ELECTION COMM’N, <https://sevotes.gov/voters/register-to-vote/> (last visited Nov. 1, 2022).

168. *Id.* § 20506(a)(3)(A) (emphasis added).

169. *Shall*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/shall> (last visited July 29, 2022).

170. *See* § 20506(a)(2) (emphasis added).

171. *E.g.*, Nat’l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 285 (4th Cir. 1998); Disabled in Action of Metro. New York v. Hammons, 202 F.3d 110, 125 (2d Cir. 2000).

172. S. REP. NO. 103-6, at 14 (1993).

173. *Id.* at 14, 18.

agency program was designed to enable “more low income and minority citizens to become registered” and to effectively access every possible eligible voter by extending voter registration services as far as feasible for the state.<sup>174</sup>

In states where the additional agency requirement remains unenforced, advocates can challenge the violation of Section 7 and request that offices within a college or university be designated an additional office as a remedy. Section 7 gives virtually unfettered discretion for the state to designate any public office as an additional office, including “public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, [and] unemployment compensation offices.”<sup>175</sup> Additionally, states are allowed to work with federal and nongovernmental offices to establish additional offices.<sup>176</sup> As stated above, offices within public colleges and universities are state offices under the Act; under the additional offices provision, the state has discretion to designate as voter registration agencies those offices that do not provide public assistance or disability services.<sup>177</sup> Likewise, nonprofit private colleges and universities may cooperate with the state to designate offices within the institution as a voter registration agency.

Thus, advocates could explore Section 7’s requirements by arguing that public assistance offices on college campuses are public assistance agencies under the Act and are therefore required to provide voter registration assistance. In the alternative, advocates should challenge states’ lack of compliance with the additional agencies provision to compel states to designate offices within college campuses as voter registration agencies.

#### CONCLUSION

The movement to litigate the youth vote saw momentum during the height of voting rights enforcement. But more than fifty years later, advocates are still searching for ways to bridge the gap between the constitutional guarantees of the youth vote and the enforcement of those guarantees. A pathway exists in the enforcement of student voting rights through the voting rights statutes. Namely, the robust provisions of the Voting Rights Act and National Voter Registration Act indicate that there are still arguments left for advocates to make to tackle the most

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174. *Id.* at 14.

175. § 20506(a)(2)(B)(i).

176. *Id.* § 20506(a)(2)(B)(ii).

177. *See id.*

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common barriers facing youth voters in registering to vote. As states continue to pass laws that suppress the votes of the country's most marginalized communities—among them youth voters of color—advocates should consider using the untapped resources of the voting rights statutes.