



## HOW THE FREEDOM TO VOTE ACT STRENGTHENS JUDICIAL PROTECTION OF THE RIGHT TO VOTE

**The right to vote is preservative of all other rights.** As the Supreme Court explained more than 50 years ago, “the right of suffrage is a fundamental matter in a free and democratic society . . . since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.” *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). **All eligible voters must have the basic right to cast a ballot and have that ballot counted.**

**Courts play an essential role in safeguarding voting—and voters must have access to real judicial protections.** Lately, courts haven’t provided much protection. Constitutional claims are currently the only choice voters have to address general burdens on their ability to vote (as compared to more targeted statutory claims, such as racial or disability-based discrimination). Yet, since 2010, states have imposed more voting restrictions than at any time since Jim Crow, and the Supreme Court has *not once* struck down a voting restriction as unconstitutional in that time. Voters also face a steep uphill battle in the lower courts, because constitutional claims that state or local governments have burdened the right to vote almost always fail under the existing legal framework. **Voters must be able to seek meaningful legal protection when their ability to vote is unjustifiably burdened.**

**This legislation restores judicial protection of the right to vote.** This legislation (Subtitle E, secs. 3401–06) creates a *statutory* right to vote in federal elections (and to have that vote counted) and requires courts to engage in a robust analysis when the ability to vote is burdened. The legislation directs courts to apply heightened scrutiny to substantial impairments—and particularly exacting scrutiny when governments actually make it harder to vote than it was before (known as retrogression).

- In cases of substantial impairment of the right to vote, governments must prove that they are significantly furthering an important, particularized interest.
- And in cases of retrogression, governments must employ the least restrictive means of furthering that interest.

What’s more, no government can burden the right to vote unless it proves its justifications with clear and convincing evidence. **No government should be allowed to burden the right to vote, unless it shows the burden is necessary to administer safe and secure elections.**

**This legislation creates a non-prescriptive tool for protecting elections.** Congress cannot anticipate and prevent every suppressive or subversive tactic state and local governments might devise to undermine free and fair elections. Without dictating to state and local governments how they should conduct elections, this legislation nonetheless creates an invaluable tool to prevent them from unjustifiably burdening the ability of eligible voters to cast a ballot and have that ballot counted. **A general statutory right to vote with robust enforcement in the courts is a vital complement to other federal legislation.**

**Congress has the authority to protect against unjustified burdens on voting.** As the Supreme Court recently reaffirmed, the Elections Clause in Article I of the U.S. Constitution grants Congress the “authority to provide a complete code for [federal] elections.” *Arizona v. Inter Tribal Council*, 570 U.S. 1, 8 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). That authority includes protecting voters by creating a statutory right to vote and judicial standards for enforcing that right, without running afoul of state prerogatives or the separation of powers.

## **ADDITIONAL SUPPORT**

A similar version of this legislation is also included in the Right to Vote Act (S. 2615 and H.R. 4959) and is supported by the American Civil Liberties Union, Campaign Legal Center, Demos, Fair Fight Action, LatinoJustice PRLDEF, Lawyers’ Committee for Civil Rights Under Law, NAACP Legal Defense and Educational Fund, Inc. (LDF), People for the American Way, Protect Democracy, and Southern Coalition for Social Justice.

*The legislation can be found in Subtitle E, secs. 3401-06, of the Freedom to Vote Act. The full text of the Right to Vote Act (S. 2615 and H.R. 4959) can be found [here](#) and [here](#).*

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**Protect Democracy** is a nonpartisan nonprofit dedicated to preventing American democracy from declining into a more authoritarian form of government.

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