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S. HRG. 113–842

THE VOTING RIGHTS AMENDMENT ACT, S. 1945: UPDATING THE VOTING RIGHTS ACT IN RESPONSE TO SHELBY COUNTY V. HOLDER

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JUNE 25, 2014

Serial No. J–113–67

Printed for the use of the Committee on the Judiciary

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THE VOTING RIGHTS AMENDMENT ACT, S. 1945: UPDATING THE VOTING RIGHTS ACT IN RESPONSE TO SHELBY COUNTY V. HOLDER

WEDNESDAY, JUNE 25, 2014,

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in Room SD–106, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Durbin, Whitehouse, Klobuchar, Franken, Coons, Blumenthal, Hirono, Grassley, Sessions, Cornyn, Lee, and Cruz.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everybody. I appreciate all the people who are here today, Senator Grassley and all the other Senators who are here.

It was just a year ago today that five Justices on the Supreme Court disregarded extensive findings of Congress and gutted the Voting Rights Act. I remember the feelings I had when these five people turned back everything that hundreds of Members of Congress of both parties, both bodies, had worked so hard to get through.

But I know that during the oral argument, Justice Scalia foreshadowed the majority's view of the law when he asserted that Congress' support of the Voting Rights Act was based on the "perpetuation of racial entitlement." I could not disagree more with Justice Scalia, and I would suggest that he live in the real world and see what is happening in voting rights throughout this country. There is no right more fundamental to our existence as American citizens than the right to vote. Every eligible American is entitled to vote. No voter should have their vote denied, abridged, or infringed.

In the *Shelby County* decision, the Justices made clear that Congress could update the Voting Rights Act based on current conditions. And I do appreciate that because whether we agree or disagree with the Supreme Court decision, I and all the rest of us will follow the Supreme Court decision.

So I worked with Congressman Sensenbrenner—one of the most respected Republicans in the House of Representatives—as well as

Congressmen Conyers and Lewis—two other very respected Democrats in the House—to forge a bipartisan compromise to update and modernize the law. The bill was introduced 6 months ago on the eve of the weekend celebrating Dr. Martin Luther King's holiday. Now, at the time I was hopeful that Senate Republicans would join me in supporting this important bill, as they had joined in supporting the original Voting Rights Act. But despite repeated efforts, I am troubled to report that, as of this hearing, not a single Senate Republican has agreed to support the effort. But I thank my fellow Senate Democrats on this Committee who have all joined as cosponsors, and I hope that my fellow Republicans, especially those who supported the original Voting Rights Act, would join us.

Unfortunately, the House Republican leadership has shown a similar lack of willingness to act on this critical bill. Not only have they refused to vote on or mark up the bill; they refuse even to hold a hearing. This is unfortunate because the Voting Rights Act has never been a partisan issue. I remember standing there with President George W. Bush when he signed it, the last update, and he and I and Republicans and Democrats, all of us say how happy we were that bill had gotten through. From its inception through several reauthorizations, it has always been a bipartisan effort. And it would be a travesty if the Voting Rights Act were to become partisan for the very first time in this Nation's history.

The Voting Rights Amendment Act updates and strengthens the foundation of the original law to combat both current and future discrimination. It does so in a way that is based on current conditions.

A year after the *Shelby County* decision, it is clear that voters need more protection from racial discrimination in voting. As we approach the national election, it is not hard to see the attempts to deny and infringe upon the right to vote are only increasing. Just last week, the Brennan Center for Justice released a report called "The State of Voting in 2014." According to this report, since 2010—4 years ago—22 States have passed new voting restrictions that make it more difficult to vote. Of the 11 States with the highest African American turnout in 2008, 7 of those States have new restrictions in place. Of the 12 States with the largest Hispanic growth from 2000 to 2010, 9 of the 12 have passed laws to make it harder to vote.

In addition, the Leadership Conference on Civil and Human Rights released a report last week entitled "The Persistent Challenge of Voting Discrimination," which details nearly 150 voting rights violations just since 2000. And each of these cases impact thousands and sometimes tens of thousands of voters. And without objection, we will place these reports in the record.

[The reports appear as submissions for the record.]

Chairman LEAHY. The statistics and evidence in these reports reaffirm Chief Justice Roberts's acknowledgment that "voting discrimination still exists; no one doubts that." That is what the Chief Justice said: "voting discrimination still exists; no one doubts that." Recognizing that, it is time for Congress to act.

Next week marks the 50th anniversary of the signing of the Civil Rights Act. Just as Congress came together five decades ago to enact the Civil Rights Act—and I remember that as a young law

student at Georgetown—Democrats and Republicans must work together now to renew and to strengthen the Voting Rights Act. So I hope all Republicans and all Democrats will work with us to enact the meaningful protections in the Voting Rights Amendment Act.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Grassley.

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Mr. Chairman. Today our Committee, as you know, considers whether the Voting Rights Act needs to be amended. For almost 50 years, this Act has made effective the commands of the 14th and 15th Amendments to protect the right to vote. Its enactment, as the Chairman just said, and its support has always been bipartisan. Its reauthorization was bipartisan on multiple occasions. The current reauthorization of the law will continue in effect for another 17 years.

I am pleased to have played a role several times in reauthorizing the Act. In 1982, I worked extensively with Senators Kennedy and Dole to make sure the law was extended.

Last year, as has been stated, the Supreme Court ruled that the formula for preclearance under Section 5 was unconstitutional. It reminds us that, since 1965, circumstances have drastically changed, and, of course, for the better. No one should doubt that voting discrimination is far less widespread than in the 1960s. For that we have much to be grateful, and certainly the Voting Rights Act has contributed to that progress.

Now, in that Supreme Court decision, the *Shelby* case, all it did was strike down a formula almost 50 years old that determined which States and which political subdivisions were required to ask the Justice Department for prior permission to make even the most minor changes in voting procedures. Over the years, Justice has denied a progressively smaller percentage of these requests. The Justice Department since *Shelby County* has continued to bring voting rights cases under Section 2 and Section 3 of the current law. It has prevailed in a number of those cases. The current Voting Rights Act is strongly enforced and is protecting the rights of all Americans to vote.

As the New York Times reported last week, rulings on voter registration laws "have ensured that challenges will remain a significant part of the voting landscape, perhaps for years."

The bill before us contains problems that the witnesses will go into shortly. For instance, the bill seems to create only a fig leaf of protection for legitimate voter ID laws, which are supported by 70 percent or more of all Americans in every poll that I have seen. But, arguably, the bill creates a back-door mechanism that will be used to negate legitimate voter ID laws.

There is little doubt that this bill goes well beyond addressing *Shelby County* and beyond the coverage formulas of the Voting Rights Act it is meant to replace. Given that supporters need to show a clear need for this legislation, especially given that the remainder of the Voting Rights Act still exists and is being success-

fully enforced, at this point, Mr. Chairman, I would like to ask that letters from various Secretaries of State be included in the record.

Chairman LEAHY. Without objection, they will be included.

[The letters appear as submissions for the record.]

Senator GRASSLEY. And I would like to take a few moments to say that these letters note that the bill would impose significant and unnecessary costs on States and localities that have taken significant steps to eradicate voter discrimination. And I welcome today's witnesses.

Now, two organizations present today—the NAACP and the Inc. Fund, as suggested by its name—are nonprofit corporations. Separate from this bill, the Judiciary Committee is now considering a proposed constitutional amendment that would allow Congress to restrict the political activities of corporations such as Inc. Fund and NAACP. We held a hearing on the amendment earlier this month. I expect the Committee to vote on it soon.

An important case in the 1950s brought by the NAACP litigated by the Inc. Fund led the Supreme Court to recognize the First Amendment protection of freedom of association. When the Supreme Court in 1976 ruled that the First Amendment prohibits limits on campaign and independent expenditures, it expressly relied on that NAACP case. The constitutional amendment before the Committee would reverse the 1976 case and allow Congress to infringe on the ability of nonprofit corporations such as the NAACP to amplify the voices of their members in the political process.

These two proposals are said to be about giving voters the ability to elect candidates of their choice. But one would censor corporations and the others from presenting differing views to those voters to help them determine what their choice actually is. Both of these reflect degrees of elitism.

Proponents of these two measures do not trust voters to sift through the varying opinions and electoral claims giving weight to what makes sense and disregarding what does not. And they do not trust the elected officials the voters chose to make decisions without spending taxpayer money to ask Justice Department bureaucrats in Washington for advance approval.

This is the case even when the courts are available to remedy discrimination.

Now, I happen to trust voters. I do not trust the Attorney General to properly exercise the expanded powers this bill would give him.

This Attorney General has repeatedly enforced the law as he wishes it were written, not as we wrote it. That applies to drugs, immigration, health care, even the Recess Appointments Clause of the Constitution. He has treated the exercise of important congressional oversight powers with disdain. That is why the House is currently in litigation to hold him in contempt. Inevitably, that record of lawlessness will be a factor in consideration of this bill.

I am interested in exploring with our panel today how the bill would operate and the status of voting rights in America.

Thank you, Mr. Chairman.

Chairman LEAHY. Well, thank you very much.

Our first witness is Senator Sylvia Garcia, who serves in the Texas State Senate, where she represents the 6th District. Is that correct?

Ms. GARCIA. That is correct, Mr. Chairman.

Chairman LEAHY. Senator Garcia, please go ahead.

STATEMENT OF HON. SYLVIA GARCIA, STATE SENATOR, TEXAS STATE SENATE, DISTRICT 6, HOUSTON, TEXAS

Ms. GARCIA. Good morning. Thank you for the opportunity to speak today on the critical importance of modernizing Federal voting rights protections. My name is Sylvia Garcia, and I am a State senator in Texas, and also vice chair of our Senate Hispanic Caucus.

My district is 70 percent Hispanic and about 12 percent African American. In Texas, Latinos account for 65 percent of statewide population expansion, and minorities overall accounted for 89 percent of Texas growth in the past decade.

Texas, and our Nation as a whole, is growing increasingly diverse. Unfortunately, everyone is not embracing this change. As Congress considers legislation that would modernize VRA protections, both Houses must acknowledge and address the fact that discrimination in voting has deep roots and continues today.

I will discuss three examples; others can be found in my written testimony.

First, in my own district, in Pasadena, the voting-eligible Latino population has dramatically grown in recent years, making up one-third of its potential electorate and just over half of its adult population. Not surprisingly, Latinos have been elected to fill two of the eight single-member seats on its city council.

The mayor recognized that Latino candidates of choice were on the cusp of becoming an effective majority of the council, and to dilute Latino political power, he ramrodded a hybrid plan, reducing from eight to six the single-member districts and adding two at-large districts. The proposal had been discussed before, but never implemented. Despite strong opposition from residents in public hearings and a citizens committee, the mayor pursued the change. In debate, he said, and I quote: "The Justice Department can no longer tell us what to do."

He also argued, without factual validation, that Latino candidates were not elected to municipal positions because 75 percent of Latinos in Pasadena were "illegal aliens."

Given racially polarizing voting in Pasadena, it is unlikely that the Latino community's choice would win a race for an at-large seat. Considering the effect, timing, and racial element of the change, this is a classic case for the need for preclearance. Absent a full functioning VRA, this suspect change will proceed to next year's election.

Second, in August 2013, Galveston County seized upon the *Shelby County* decision to move a controversial change to reduce the number of justices of the peace in constable districts from eight to four. This effectively reduced the districts containing African American and Latino voter majorities. Moreover, no public hearings were held. Residents allege that the county went ahead with the change with full knowledge of discriminatory effects.

At the State level, within the hour of the *Shelby County* decision, our State moved quickly to implement changes which previously were found by a Federal court to be discriminatory. Our Texas Attorney General celebrated by tweeting, "Texas voter ID laws should go into effect immediately because SCOTUS struck down Section 4 of VRA today."

Last, following the 2000 census, the Texas Legislature failed to agree on congressional maps and ultimately court-created maps were implemented. In 2004, the legislature enacted mid-decade redistricting plans. In striking down the congressional map, Justice Kennedy observed, "The State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination."

The Court required changes to be made to the State's new maps in order to eliminate the discriminatory impact on Latino voters. The VRA provisions that remain in effect today are simply not enough. Local and State officials continue to adopt laws and impose challenges for minority voters and reduce the value of their votes. Texas continues to outpace every other State in enacting discriminatory policies and must be subject to the strongest protections we can devise. Between 1982 and 2005, Texas earned 107 Section 5 objections, second only to Mississippi. Without a modernized, full functioning VRA, we are left with only protracted and expensive litigation as the only method of attacking against discriminatory voting changes, which is more costly than the preclearance process.

I conclude with the words of President Johnson on his 1965 VRA address: "Our duty must be clear to us. The Constitution says that no person shall be kept from voting because of his race or his color. We have all sworn an oath before God to support and defend that Constitution. We must now act in obedience to that oath."

Thank you.

[The prepared statement of Hon. Sylvia R. Garcia appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much, Senator Garcia.

Our next witness is Michael Carvin, well known to this Committee. He is a partner at Jones Day.

STATEMENT OF MICHAEL A. CARVIN, PARTNER, JONES DAY, WASHINGTON, DC

Mr. CARVIN. Thank you, Mr. Chairman, for the opportunity to comment on proposed legislation to revive Section 5 in the wake of *Shelby County*.

I think the basic problem with any effort to revive Section 5 in 2014 is that there is just no need for it given the fact that Section 2 of the Voting Rights Act is a very effective remedy for any form of unconstitutional discrimination.

More specifically, the formula in S. 1945 is not designed to identify those rare jurisdictions where Section 2 would for some reason be inadequate because it is not even attempting to get at people who effectively resist constitutional norms. So I think it exceeds Congress' power to enforce under the 14th and 15th Amendments.

To take a step back and put this in perspective, ever since *Katzenbach*, the Supreme Court and common sense tells you that Section 5 is an extraordinary, unprecedented burden unknown pre-

viously to American law. And like all such burdens, particularly on sovereign states, it needs to be justified, particularly since it is selectively imposed on some States and not on others. And the justification needs to be that this extraordinary burden is needed to enforce the 14th and 15th Amendments' prohibition against intentional discrimination. And the old justification, which resonated in the 1960s and 1970s, was that Section 2's case-by-case approach, particularly when Section 2 only prohibited purposeful discrimination, was inadequate to get at the intransigent Southern jurisdictions. So we needed those extraordinary Section 5 burdens.

But I do not think that justification holds true anymore in 2014, and I think the important point for this Committee to recognize is that the question is not whether or not voting discrimination continues to exist. It clearly does. The question is whether or not Section 2 is an effective tool to remedy that discrimination or whether it needs to be supplemented with Section 5.

If somebody proposed to the Senate tomorrow we want every public employer to preclear with the Justice Department all employment or civil service requirements, you would ask yourself: Why do we need this extraordinary remedy? Isn't Title VII's effects test enough? You would not ask yourself: Does public employment discrimination exist? And that, again, is the question that is confronting this Committee.

Now, ever since Section 5 has been challenged, the civil rights groups have reversed their historical view, which was that Section 2 is an extraordinarily effective voting rights remedy that had done much to eliminate at-large election systems and all the other kinds of second-generation voting discrimination in the South and throughout the entire country. But now they have changed their tune and say Section 2 is somehow inadequate. But I would just like to make two basic points on that.

One is this Congress, the one that is proposing S. 1945, thinks that Section 2 is a perfectly adequate remedy in the vast majority of the United States. As I understand it, only four States would be covered by this coverage formula, which means that this Congress has made a quite correct determination that in 46 States Section 2 is more than adequate to remedy voting discrimination. So it needs to answer the question: Why are the four selected States so different, so much more intransigently racist than the other 46 that we need this extraordinary Section 5 remedy?

The other point I would make is that Section 2 has all of the attributes of every civil rights law we have got in employment, housing, and education; it is no different. So if Section 2 is inadequate to remedy discrimination in voting, that means Title VII, Title VI, and Title VIII are inadequate to remedy discrimination in the areas they cover.

In terms of the formula, the key point to understand is it does not look at people who have violated the Constitution. It looks at people who have violated Section 2. Well, I do not think it is logical to say that Section 2 is an inadequate remedy in circumstances where Section 2 lawsuits have already been successful. I do not think it is logical to say that these jurisdictions have engaged in unconstitutional discrimination based on the fact that they have violated the results test under Section 2 or the effects test under

Section 5, meaning this formula does not even try and look at jurisdictions that have violated the Constitution. A State and political subdivision could be swept under Section 5 even if it is stipulated that they have never violated the Constitution. I think the judicial preclearance provision is even more unconstitutional because it only requires one violation of any Federal voting rights law.

And my final point is Section 5 is not a guarantee against racial discrimination or against racial gerrymanders. Particularly in the arms of this Justice Department, it has become a very powerful vehicle for racial preferences and racial gerrymanders, and been used to even invalidate things that make it more difficult to elect white Democrats, such as in the Texas redistricting case.

With that, I thank you.

[The prepared statement of Michael A. Carvin appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our next witness is Dr. Francys Johnson. He is the State president of the Georgia NAACP. Reverend Johnson, go ahead, please.

STATEMENT OF REV. DR. FRANCYS JOHNSON, STATE PRESIDENT, GEORGIA NAACP, STATESBORO, GEORGIA

Reverend JOHNSON. Good morning. My name is Francys Johnson. I am president of the Georgia NAACP. Thank you, Senators Leahy and Grassley and Members of this Committee for holding this hearing and for your efforts to ensure the right to vote, the cornerstone of our democracy, is protected.

Fifty-one years ago, another Georgia preacher, much more articulate, came to this United States capital, in the shadow of Lincoln's Memorial, and shared that our Nation's suffering could be redemptive. He said, "We have come to this Nation's capital to cash a check, a demand for payment on a promissory note that had been signed in the blood and the fortune and sacred honor of our Founding Fathers."

It promised in principle that all men were created equal, would have an inalienable right to life, liberty, and the pursuit of happiness. Of course, it would take a Civil War and a Reconstruction under extraordinary Federal protection, a civil rights movement, and a Second Reconstruction to certainly make that principle practice.

In 1982, when President Ronald Reagan signed the reauthorization of the Voting Rights Act, he said, "actions speak louder than words. The Voting Rights Act proves our unbending commitment to voting rights." President Reagan also said that "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished."

While I am here on behalf of the NAACP, I am also here on behalf of my three sons—Thurgood, Langston, and Frederick Douglas—to ensure that their right to vote is protected regardless of their gender, the language they speak, or the color of their skin.

The history of voting rights in Georgia can best be characterized as promises made, promises broken, promises remade, promises broken, promises made, and now promises only partially realized. I have come to this August Committee with a view from rural communities like Sylvania, Statesboro, and Sylvester and cities like

Augusta, Albany, and Atlanta. And it is clear to me I am the great beneficiary of the progress that we have made, the great strides we have made as a country. But there is still much to be done.

In my written testimony, I have described a history of voting discrimination in Georgia and the positive impact the Voting Rights Act of 1965 has had. I have outlined promises made and promises broken. For the sake of time, I will not go into that here. I would rather refer you to my written submissions.

We all know 1 year ago today the United States issued the decision in *Shelby v. Holder*. In Georgia, the *Shelby* decision makes it much more harder for the NAACP to prevent eligible voters from being disenfranchised. And it makes it very difficult to win our battles against discrimination.

Prior to the *Shelby* decision, Section 5 prevented blatant discriminatory attempts to alter time, place, and manner of elections. One example would be that of the Board of Registrars in rural Randolph County, Georgia, which tried to reassign an Education Chair's who happened to be African American from his voter registration district which was 70 percent African American to a voting district that was 70 percent white. In a unanimous vote, the all-white members of that Board of Registrars voted for that district change. They voted to run that African American out of office, and there are literally hundreds of examples just like this.

Post-*Shelby*, in Athens, Georgia, home to the University of Georgia, the city considered eliminating half of its polling places, replacing them with only two early voting centers, both of which have been located in police stations. Let this Committee know that the police in Georgia for many, many Georgians, even of my generation, do not represent an effort to protect and serve. They represent an effort to intimidate. The argument was that it would save money.

Another money-saving proposal we saw was to shorten early voting days from 21 to 6 days. The argument was that we would save $3,400 on average per city. Given the fact we spent $45,000 a week keeping soldiers abroad to fight for democracy, I think $3,400 is a small investment to pay.

African Americans are 26 times more likely to vote in early voting, and I think those who proposed that bill knew it. The Supreme Court gutted the preclearance formula. It did so in areas that have a history of racial discrimination, and it gave them the freedom to go back to disenfranchising voters.

Senator Leahy, race still matters in America, and it certainly matters in Georgia. And to that point, Chief Justice Roberts and other witnesses will concede "voting discrimination continues to exist; no one doubts that." As a Nation, we have been here before. Our Nation is replete with a track record on race that is two steps forward and one step back.

Today we are here to test the metes and bounds of our Nation's commitment to expand the "we" in "we the people." Thus, I respectfully urge and request that you do all you can to strengthen and modernize the 1965 Voting Rights Act. We need a robust VRA to tackle head on the numerous attempts silence us in a democratic system. It requires all voices to participate in the search for the common good.

America must keep her promises regarding the right to vote. It is the cornerstone of our democracy. We should be reminded that the world is watching, and I welcome your questions.

[The prepared statement of Rev. Dr. Francys Johnson appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Dr. Johnson.

And our next witness is Dr. Abigail Thernstrom. She is an adjunct scholar at the American Enterprise Institute.

Please go ahead.

STATEMENT OF ABIGAIL THERNSTROM, PH.D., ADJUNCT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, DC

Ms. THERNSTROM. Thank you. Thank you, Mr. Chairman and Members of the Committee, for the opportunity to testify today.

The decision in *Shelby County* was absolutely right, in my view; The Act had become a period piece. Moreover, the statute today needs no updating. Its permanent provisions provide ample protection against electoral discrimination.

I develop these points at length in my written testimony, and Mike Carvin has already made this point powerfully.

But given my very limited time, I decided to concentrate on one point that I suspect other critics of the bill will not make. My focus is on the section that discusses "persistent, extremely low minority turnout" as an element in the new formula for Section 4 establishing Section 5 coverage.

It is hard to believe that anyone familiar with basic demography ever reviewed this section. It assumes simplistically that if minority participation is low, it must be the fault of the local jurisdiction, its political process must be discriminatory. This simplistic assumption flies in the face of an abundance of social science knowledge about voting behavior.

For instance, racial and ethnic groups differ in their average age. Older people are far more likely to vote than young ones. Since the Hispanic population today tends to be disproportionately young, the group will have lower turnout rates than non-Hispanics.

The bill assumes the lower turnout rates are evidence of public officials doing something to suppress the minority vote. The point, frankly, is absurd.

We see these same disparities when we control for education. The highly educated vote more, and both blacks and Latinos have less schooling on the average than non-Hispanic whites.

Two other closely related drivers of voting behavior are family income and homeownership. Residential turnover is also pertinent. Newcomers to a community are much less likely to turn out at the polls than long-settled residents.

In sum, forces far beyond the control of any local jurisdiction result in glaring disparities in rates of electoral participation. The framers of the bill's entire low minority turnout section seem to have been oblivious to what every social scientist knows.

The amended statute would extend Federal control over a great many jurisdictions that have made every possible effort to provide equal opportunity to elect candidates of their choice to all of the citizens.

This section in the proposed legislation also casually disregards the problem of how the evidence about turnout at the local level is to be gathered. The bill blithely states that "in each odd-numbered calendar year" the Attorney General will provide the required "figures ... using scientifically accepted statistical methodologies." But the only official figures on current turnout rates are those derived from the American Community Survey, and those rates are available only for whole States. We have no information about group differences in voter turnout in the vast majority of local jurisdictions.

For the Nation's smaller political subdivisions, accurate numbers would require a complete and very expensive canvass of the population. There are no "scientifically accepted statistical methodologies" to obviate the need for such a canvass.

Now, all jurisdictions could be required to include a question about race and ethnicity as part of the voter registration process. Voter lists would then be color-coded, just as they were in the days of Jim Crow. But that would provide no information about eligible voters who did not register.

It is stunning that the drafters of this bill had little interest in the abundant literature on demography and voter turnout and gave little thought to the problem of assembling the data that would be demanded by the amended statute.

A final note. Placing each registrant in a racial box will be offensive to many who consider election day to be a civic ritual celebrating the fact that we are one people. If it is so vital to have information color-coded, why don't we go all the way and list the race of each candidate on the ballot, which would make the gathering of information pertinent to much voting rights litigation easier.

Thank you very much.

[The prepared statement of Abigail Thernstrom appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

And our next witness is Sherrilyn Ifill. She is the president and director-counsel of the NAACP Legal Defense and Educational Fund. Welcome, and please give us your testimony.

STATEMENT OF SHERRILYN IFILL, PRESIDENT AND DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., WASHINGTON, DC

Ms. IFILL. Thank you, Chairman Leahy and Members of the Committee. Thank you for the opportunity to testify today and for holding this important hearing.

You are being asked by some, including two of today's witnesses, to turn a blind eye to the urgent need to amend the Voting Rights Act. Professor Thernstrom contends that voting discrimination is a thing of the past. Mr. Carvin concedes that racial discrimination in voting has not ended, but says that other provisions of the Act are sufficient.

So the questions you face are: Do we need an amendment to the Act? And if so, what should it contain?

Mr. Johnson and Senator Garcia have already responded to the first question, and my written testimony outlines scores of discrimi-

natory voting changes, both immediately before and after the *Shelby* decision.

I would note that because we no longer have the notice provisions of Section 5, the post-*Shelby* changes that we identify are only those we have been able to learn about.

You likely have not heard about many of these developments. Certainly you have heard about redistricting, about voter ID, about efforts to restrict early voting at the statewide level. But political power, authority over the lives of minority voters and communities all over this country, is exercised most powerfully at the local level, at the town council, the school board, the county commission, the water district. And this is where the greatest mischief has occurred and where preclearance makes all the difference.

You have heard about Galveston County where the seats held by African Americans and Latinos for justice of the peace and constable districts were eliminated. You have heard about polling place closures in the city of Athens, Georgia. You may not have heard about the fact that in Morgan County, Georgia, a third of the polling places were closed, or that Baker County considered closing four of its five polling places, requiring voters to travel up to 25 miles to vote.

The Jacksonville, Florida, Board of Elections closed and relocated a polling place that served large numbers of African Americans. In fact, in 2012, more than 90 percent of those who voted early at that precinct were African American, and the new polling place is not accessible by public transportation.

These are just a few examples from a long list of discriminatory voting changes demonstrating the urgent need to close the hole in the safety net caused by the *Shelby* decision.

Now to turn to what we need. It is worth remind us that the Voting Rights Act emanates from the authority given solely to this Congress by the Framers of the 14th and 15th Amendments to protect against discrimination in voting. As Congress recognized when it first enacted and on four occasions reauthorized the Act, neither Section 2 nor Section 3 are sufficient to fulfill that obligation.

First, voters need notice. This allows voters to learn in a timely fashion about electoral changes that may be discriminatory. Section 4 of this proposed bill provides notice, transparency, and information for all voters.

Second, voters need a way to stop discrimination before it happens. Litigation after a polling place has been eliminated and scores of voters are left without a place to vote can only ever partially remedy the harm. You can put a worker back in a job. You can put a tenant back in an apartment. But you cannot place a candidate into office even after voter discrimination has been proven. Section 3 and Section 6 address this reality.

And litigation is costly to both the parties and the courts. In fact, this Congress made the judgment in the Voting Rights Act to protect minority voting in a way that does not always require litigation, just as Congress did in passing other civil rights laws such as Title VII and the Fair Housing Act.

Third, the burden of proving that a proposed voting change does not discriminate should be returned to jurisdictions rather than

placed on the voter. Preclearance does that. The current provisions of Sections 2 and 3 do not.

We take no pleasure in what has unfolded since the *Shelby County* decision. The Legal Defense Fund, like many others, is prepared to fight on behalf of voters facing these challenges. But even we cannot keep up with the pace of voting changes taking place. This means that voters are left on their own to protect their most sacred right as citizens.

More importantly, we reject the notion that the right to vote should be premised on a voter's ability to find a lawyer and file a lawsuit. This is America, and we can and must do better. Our clients, the plaintiffs in the *Shelby County, Alabama* case, are here in this room today precisely because of their strong and unwavering belief in the democratic principles of this country. This bill is a measured effort to address voting discrimination based on current data and reflects current needs as the Court in Shelby advised. And I urge this Committee and Congress to promptly pass this voting rights amendment.

Thank you.

[The prepared statement of Sherrilyn Ifill appears as a submission for the record.]

Chairman LEAHY. Well, thank you very much. I find this testimony interesting, especially coming from a State that works very hard at making early voting available, making voting accessible and easy for everybody in all sections of our State. The idea of closing voting booths and moving them 25 miles is something that I just—well, we would not understand it in our State. Perhaps it is understandable in others.

Reverend Johnson, in *Shelby County*, the Supreme Court elevated the novel concept of equal sovereignty of the States over the rights of American to vote free from racial discrimination. Do you believe that that principle of equal sovereignty trumps the principle that every American is entitled to exercise their right to vote free from racial discrimination?

Reverend JOHNSON. I believe that the right to vote in this country is the cornerstone of our democracy. It is the well from which we search for the common good, that we sort in the public marketplace for that which we want for our communities. And I believe that we have litigated this through war and through Reconstruction and through a civil rights movement, and we are engaged in rethinking about this now. And there is serious, compelling interest for continued Federal protection through the Voting Rights Act and through the extraordinary remedies it provides as well as the prophylactic measures that prevent discriminatory impacts from taking place in the first place.

Chairman LEAHY. How do you respond to those who say it is unfair to the State of Georgia for its voting changes to be subject to greater Federal scrutiny?

Reverend JOHNSON. Well, I respond like this: Between 2000 and 2013, there were 148 Section 5 objections, violations that were recorded not just in Georgia and Texas but in 29 States. But Georgia and Texas lead the pack with the worst record.

I want to be clear that this is a problem not with just racism and sexism and xenophobism and all the other "isms." They are con-

structed legally. They are socially maintained. There are economic benefits, and it is politically expedient. But this is not a Southern problem. This is not a Southern problem.

Now, Vermont and Iowa certainly did not have any violations during that period. But this is a problem of power. Racism is not about hate. That is a byproduct of it. Racism is about power, who gets what, when, where and how. And in many of these places, like Randolph County, Georgia, Section 2 would have been ineffective. We would have never known about that change. It was in a closed-door meeting, and it was a unanimous vote of that Board of Elections, and Section 2 would have done nothing about that at all.

Chairman LEAHY. Let me go to Senator Garcia for a moment. In *LULAC v. Perry*, Justice Kennedy described the Texas Legislature's treatment of Latino voters in the post-2000 census redistricting by observing, and I am quoting Justice Kennedy now: "The State took away the Latinos' electoral opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."

Now, is that kind of voting discrimination which the Supreme Court condemned as recently as 2006 still prevalent in your State of Texas? And if so, do we need the Voting Rights Act Amendment to protect against it?

Ms. GARCIA. Mr. Chairman, as I said in my remarks, I mean, the classic case is the Galveston—I mean the city of Pasadena case. This is a case where the mayor appointed the committee. The committee said no to a charter change. The public hearings said no. But he proceeded, and he proceeded simply because he saw that four of the districts had majority Latino populations. He has seen that two veterans, Latinos, come home and decide that they wanted to fully engage in the political process, run for office, and get elected. This was historic for this city. When he saw the political power was changing, he then wanted to make the change and develop the hybrid system that he ramrodded and changed two districts—two elections by district to two at-large. This is exactly the classic case that Justice Kennedy is talking about. When the official sees that the power is coming, they want to do something to stop it.

Chairman LEAHY. Thank you.

Ms. GARCIA. And you cannot stop that later. You need to do it before, so that the harm cannot occur.

Chairman LEAHY. That was going to be my next question. Thank you.

Ms. Ifill, can you tell me whether Section 2 is an adequate remedy for contemporary voting discrimination?

Ms. IFILL. Section 2 is one piece of the safety net that was created by the Voting Rights Act. It is not in and of itself sufficient any more than Section 5 alone was sufficient, any more than the ability to appoint election observers is sufficient. All of the pieces work together to provide a safety net.

In many ways, the perfect example is the Galveston case that Senator Garcia just talked about. In fact, it was me 20 or so years ago that litigated the Section 2 case that created the district that for the first time allowed African Americans and Latinos to serve as justices of the peace and constables in Galveston County. And

as a result of that case, we had people in office for the first time from those communities.

But now, since the *Shelby* case, Galveston County has decided to eliminate those very seats that we litigated and won under Section 2 20 years ago. So this to me is the perfect example of why Section 2 is not sufficient.

Chairman LEAHY. Thank you. My time has expired. I would yield to Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman. This is an important hearing. The right to vote, as you say, Dr. Johnson, is the cornerstone of the Republic. Every citizen is entitled to vote and should be entitled to vote if they meet the basic qualifications of the franchise.

I grew up in an area in the State of Alabama where there was systematic discrimination. I remember as a teenager a march occurred in my small town, and the signs were held by young children that said, "Let our fathers and mothers vote." I still remember that very vividly. Richard Valeriani, CBS News, was there. I remember seeing him on that occasion. And it is the kind of thing that we all feel badly about, and that is why the Voting Rights Act was passed. It had universal provisions. It had extraordinary provisions. The extraordinary provision was that there would be a law that required that before any change whatsoever could occur in any voting procedure, it had to be preapproved, precleared by the U.S. Department of Justice. And that was based on the fact of the established proof of the systematic discrimination at that time.

It was always perceived to be an extraordinary remedy that would not be continued indefinitely, and the goal and the hope was it would reach a state where that would not continue and that provision would not have to be utilized.

I voted for the Voting Rights Act extension 8 years ago in this Congress, but I knew then that Section 5 was problematic, and it was difficult for me to—I wrestled with that because I felt that the South had made extraordinary progress. The Secretary of State in Georgia wrote a letter, just said, "The Voting Rights Act is still intact, and it is my duty to enforce it. I have full faith that the State of Georgia will continue to abide by it. The proposed legislation ignores the tremendous progress that Georgia and the rest of the Nation has made in the past 50 years and seeks to reinstate an outdated and obsolete formula." And this is basically what the Supreme Court held.

Now, will there arise disputes that impact in some way the right of an individual, particularly minority individual, to vote? Yes, there will. Some of these are deliberate, and others may be inadvertent. But, regardless, it has that impact.

Now, Mr. Carvin, you have studied this. You have heard Senator Garcia explain a case or two. We have heard, I believe, Mr. Johnson talk about a school board situation where a district was altered to eliminate the possibility of an African American being elected. Do we need the extraordinary remedy of Section 5? Or could those circumstances be handled effectively under Section 2 as the normal law of America would intend and has done normally throughout the history of the Republic?

Mr. CARVIN. Yes, thank you, Senator. I actually think——

Senator SESSIONS. Is your speakerphone on there?

Mr. CARVIN. I think the examples that have been offered up actually confirm the effectiveness of Section 2. We were told about a situation in Pasadena involving at-large elections. If anyone remembers the 1982 debates about amending Section 2, the principal purpose was to eliminate these at-large sections throughout the South, and it was incredibly effective in doing so.

Section 5, on the other hand, had basically nothing to do with eliminating these at-large systems for two reasons.

One is Section 5 only gets at changes. So if you had an at-large system, you were not going to change. You needed something to attack, and that was Section 2, and also a complicated issue involving retrogression.

The other example that has been offered up is Galveston, involving justices of the peace, but as Ms. Ifill pointed out, the reason we have a justice of the peace has nothing to do with Section 5. It is her Section 2 lawsuit. And nobody can tell me that a lawsuit that was perfectly viable when it was brought is no longer for some reason viable in 2014.

So, yes, that is the basic point. Section 2 works. It addresses all of these problems we have heard about. No one has seen any diminution in minority turnout or participation in the wake of various challenges to Section 5.

And the final point I will make, with no insult to your native State, when we were in Shelby County, Alabama was held up as the worst example, and obviously it has a very unfortunate history in terms of race relations, but Alabama would not be covered under the formula proposed by S. 1945. So what they need to explain to the four States that are covered is that they are so materially different from States like Alabama with their unfortunate history that, while Alabama can be trusted to be regulated under Section 2 alone, for some reason these four States cannot be.

Chairman LEAHY. Thank you——

Senator SESSIONS. Well, Mr. Chairman, just to say Alabama has more—at least a few years ago, more African American elected officials than any other State in America. And we have made tremendous progress. We will not accept racial discrimination and voting discrimination in our State, and the Federal Government is also there and prepared to step in.

Chairman LEAHY. You actually have more African American elected officials in your State than we do in the State of Vermont, but there may be different reasons.

[Laughter.]

Chairman LEAHY. We are going to try to stay on—sorry. We are going to try to stay on time, and I am going to yield now to Senator Klobuchar, and she will take the gavel at this point.

Senator KLOBUCHAR [presiding]. Thank you very much. Thank you, all of you, for being here for this important decision. I am troubled by the Supreme Court's *Shelby County* decision. As many of our witnesses testified today, there are, sadly, too many instances where voters face intentional discrimination at the ballot box.

Part of this is I come from a State where we pride ourselves in one of the highest voter turnouts in every single election with our

same-day registration. We also are very proud of the fact that we have some of the biggest refugee populations for Somali and Hmong immigrants who have come to our State and have been able to get involved in the political process very easily and are now serving in the city councils and at the State legislature. So I have seen how this can work, and I have seen what happens when people are encouraged to vote and how this is good for a political system.

My questions, of course, are focused on how we can get the data that we need to update this law, and I think one of the most important reasons that we need to update the Voting Rights Act for the 21st century is that Section 2 truly cannot do all of the work. You can still try to prove voting discrimination in court, but that often happens, as has been pointed out, after the fact. After an election is already over, that does not do any good for the people who have already been unfairly denied the right to vote.

Ms. Ifill, I guess I would start with you. Why do you think it is important that we update our standards for preclearance of changes that impact voting rights? And what are the benefits of updating both Section 3 and Section 4?

Ms. IFILL. Well, the Supreme Court in the *Shelby* case made very clear that it expected this Congress to rely on current data and to respond to current needs. And what this bill does is precisely that. In fact, I would take issue with the contention that there are certain States that are covered or not covered. This bill is not a geographic bill. It does not cover any one State. It sets out a provision that says that in a 15-year period a State or a jurisdiction will be covered if they have a certain number of violations.

Senator KLOBUCHAR. Right. And it is five, right?

Ms. IFILL. Five in a State and——

Senator KLOBUCHAR. And I think for anyone watching this at home on C-SPAN, it is an opportunity to explain this. It does not——

Ms. IFILL. Yes, so it is five violations over a 15-year period for a State.

Senator KLOBUCHAR. And for a city?

Ms. IFILL. And for a local jurisdiction, three violations. And so essentially it is a rolling formula which continues over time and continues to update itself. So a jurisdiction is not covered unless, in fact, they have those violations over the prior 15-year period. And what that means is that it is not geographically set in stone. A jurisdiction is only covered if they have violated the Voting Rights Act, violated the Constitution in some way.

And so this updated formula actually is nationwide. It is not targeted at the South or at any particular jurisdiction. But, of course, we cannot wipe clean the reality of what a jurisdiction has done over the past 15 years. And so there may be States that fall into the formula as currently stated, but that is different than saying that the bill is targeted at particular States or jurisdictions.

Senator KLOBUCHAR. All right.

Ms. IFILL. Now, Section 2 is insufficient simply because Section 2, as you said, requires you to litigate over the course of years, the election goes forward. That is very different from a formula that before the discrimination happens, stops the discrimination from

happening, requires that close look, and requires preclearance from the Federal authority.

Senator KLOBUCHAR. Exactly. And why don't we talk maybe with you, Ms. Garcia. Thank you for being here. I am really concerned that a number of States have moved to restrict access to voting since the *Shelby* case. In some of the cases like in Texas and Florida, officials have tried to move forward with changes that courts actually previously found to be discriminatory.

It seems to me that trying to enact changes that courts have found to be discriminatory clearly goes against the spirit of our democracy. We should be protecting people's rights and making it easier to vote. Why do you think these changes have been put in place in Texas?

Ms. GARCIA. Well, I think that the Attorney General acted very quickly, as I said in my opening remarks. I think, quite frankly, it is—you know, congratulations. I mean, you may be number one in voter participation, but Texas, regrettably, is 42nd in voter registration and 51st in voter turnout. So I would submit that part of the problem is because of some of the barriers and some of the impediments that we do have. And I think that is why we need this modernization of the Voting Rights Act to make sure that we can truly address today's challenges.

Senator KLOBUCHAR. All right. And why are people doing this? Do you think they just think it is to their election advantage if they do not let everyone vote? I am trying to understand it.

Ms. GARCIA. Well, I think, you know, the examples that I have given, it is really just a shifting of the demographics, a shifting of the power, and it goes back to what one of the other witnesses said. It is really about power. And when you have a mayor that can see that two Latinos have been elected and maybe the next time it will be four and there will be a majority, then they want to make the change. So I think it is about the balance of power, and it is about not embracing the demographic changes, not only in the State of Texas, but in the country as a whole.

Senator KLOBUCHAR. Thank you very much.

I believe Senator Grassley is going next.

Senator GRASSLEY. Thank you, Senator Klobuchar.

I am going to ask my first question of Mr. Carvin. We have heard testimony that "Section 2 litigation occurs only after the fact when the beneficiaries of an illegal voting scheme have been elected with the advantages of incumbency."

We have also heard that Section 5 preclearance is more efficient and less burdensome than Section 2 litigation and that Section 2 does not capture discrimination that is not identified and blocked by Section 5.

So to you, are these statements accurate?

Mr. CARVIN. No, Senator, they are not at all. The notion that Section 2 cannot deal with problems prior to an election is just a complete myth. The NAACP and a number of groups have been involved in multiple litigation where you have tried to either stop a redistricting plan or a voting change prior to the election. I think Texas, Senator Garcia's native State, might be the best example. There, the Section 2 court actually entered a remedy and resolved

the redistricting issue 8 months before the Section 5 court in D.C. even got around to it.

So that is just one example of where Section 5 is actually lagging well behind Section 2. But, no, you do exactly the same thing under Section 2 that you do under Section 5. You say, "Will moving the polling place make it more difficult to be accessed by minority voters? Will the redistricting plan dilute minority votes?" It is all based on prospective statistical projections, and no one can produce examples of where courts have just sat around and said, "Okay, let us let two or three elections go before we act on this." There is not a redistricting dispute in this country that was not resolved, if timely brought, prior to the upcoming elections.

Senator GRASSLEY. Another question for you. It has been reported that the bill would not affect State requirements that voters produce voter ID in order to vote. Is this a correct reading of the bill?

Mr. CARVIN. Oh, no. That is entirely incorrect. I mean, obviously one of the principal motivations for bringing people back underneath the Section 5 regime is to have the Justice Department, as we have heard today, preclear these things. Attorney General Holder has made it clear that he equates voter ID requirements with discriminatory poll taxes, and the Justice Department has taken the firm position that any kind of ballot integrity effort along those lines is somehow violative of the law.

So, no, bringing people back into the Section 5 regime will make voter ID very much on the table, and the Justice Department will vigorously oppose it.

Also, of course, Section 2 will be available to the Justice Department and private litigants who are currently litigating voter ID cases throughout the country from North Carolina to Washington. And Section 5 is particularly difficult for submitting jurisdictions just because of the time that is involved. They either have to go to the Attorney General, who is unalterably opposed to voter ID, or they have to go to court. I believe the State of South Carolina spent $3 million to have their voter ID law blessed by the three-judge court in D.C. So whichever way you look at it, there will be severe burdens on any State that thinks that voter ID is an important effort to ensure ballot integrity and exclude unqualified voters.

Senator GRASSLEY. Dr. Thernstrom, I would like to ask you about The Washington Post recently editorializing that political polarization and partisan conflict is now so deep that radical changes to redistricting might need to be considered. One of their suggested changes is a return to at-large or multi-member congressional districts, but they noted that the Voting Rights Act presents an obstacle to that plan.

Do you think that the Voting Rights Act deepens political polarization through its redistricting requirements? And if so, what should we do about that?

Ms. THERNSTROM. Thank you, and can I just say before answering your question that Ms. Ifill suggested that I thought all voting discrimination was a thing of the past. I did not say that. I simply said the permanent provisions provide ample protection against electoral discrimination. And that statement acknowledges the fact that there is still electoral discrimination.

Now, as to The Washington Post editorial, which I may or may not have read—I am not sure—look—I am sorry. Can you restate the question?

Senator GRASSLEY. Yes. Do you think the Voting Rights Act deepens political polarization through its redistricting requirements? And if so, what should we do about that? And they suggested that we ought to—that a possible solution would be multi-member districts.

Ms. THERNSTROM. Right. You know, once upon a time, in the progressive era in this country, at-large voting and multi-member districts were considered a progressive reform, good government reform. They are legitimate ways of conducting elections. Are they disadvantageous to minority voters who, if they have safe majority minority districts, can be sure of electing the candidate of their choice? Yes. And those districts, those designer districts that reserve legislative seats for minority candidates, yes, they have worked to elect black and Latino candidates. So they worked as designed. And the at-large district candidates do not have a safe constituency, and so, sure, the at-large districts, which have barely survived the enforcement of the Voting Rights Act, are disadvantageous to minority voters if you think that these race-based districts are a good thing simply because they do assure the election of minority candidates. And you ignore the downside of those districts which really make those black candidates—throw them to the sidelines of American politics because they do not have to put together biracial coalitions which would enable them—which would enable minority office holders in those districts to move up the political ladder and run, for instance, statewide.

So, you know, this is a complicated issue. That is my bottom line. But I do not happen to like those racially gerrymandered districts in part because I think they do a disservice to black voters and black candidates. And that race-based districting in itself does polarize American politics.

Senator KLOBUCHAR. Thank you. Thank you, Senator Grassley. I know you want to respond, Dr. Johnson, and I will ask you in the second round to respond. All right?

Reverend JOHNSON. Sure.

Senator KLOBUCHAR. And I wanted to acknowledge two Members of the House that are over here visiting, and we really appreciate their leadership on this issue, Congressman Bobby Scott and Congresswoman Sheila Jackson Lee, and we thank you for being here.

Senator Franken.

Senator FRANKEN. Thank you, Madam Chair.

I believe that the Voting Rights Act is one of the greatest achievements of the civil rights movement. It passed with incredible effort. And we must make sure that we fulfill Congress' longstanding bipartisan commitment to provide equal access to the ballot, and I share Chairman Leahy's conviction that it is time for Congress to act to strengthen and update the original Voting Rights Act. And I am a proud cosponsor of the Voting Rights Amendment Act, and I am optimistic that on this first anniversary of the *Shelby County* decision that we can come together to ensure that the promise of the 15th Amendment is made real for all Americans.

Ms. Ifill, in your testimony you discuss the preclearance framework. In 1965, Congress enacted this requirement because relying on litigation to enforce the right to vote just was not working. Litigation takes a long time, and it often begins only after a discriminatory voting practice has already been initiated. Congress can certainly continue to believe that the preclearance system was important because it reauthorized the Voting Rights Act four times with broad bipartisan support with Section 5.

Mr. Carvin states in his testimony, and I am going to quote: "This is not to say that racial discrimination in voting has ended, any more than it has ceased in employment, higher education, or housing. It is to say that Section 2, particularly given its extremely expansive 'results' prohibition, is more than adequate to address any unconstitutional discrimination. Just as Title VII's prohibition against discriminatory 'effects' in employment and Title VI's prohibition against higher education discrimination and Title VIII's prohibition against housing discrimination do not need to be supplemented by Section 5 . . ."

It seems to me that, yes, in some cases Section 2 has worked. There is no question about that. But my question, Ms. Ifill, is: Has there not been a redistricting case that was not resolved before the election? And isn't that kind of the point here?

Ms. IFILL. Well, Senator Franken, thank you. There have been many. I am not sure where Mr. Carvin has been litigating Section 2 cases, but where I have been litigating Section 2 cases—and these cases take an incredible amount of time and resources to litigate and to put together. And, in fact, very often the litigation takes years—years—to resolve. And without a preliminary injunction, holding the status quo, which very rarely is granted, in fact, elections do go forward during the course of Section 2 litigation.

It is interesting because, in fact, even jurisdictions in many ways would rather avoid the cost of litigation than the minimal de minimis course of amount of preclearance—that preclearance requires.

This past year, the city of Evergreen in Alabama was required by a Federal district judge to be bailed into preclearance, meaning that for changes related to mayoral and municipal elections, they will have to get approval for those changes as a result of the findings of the district court. And the city of Evergreen actually welcomed that order. They said they welcomed the opportunity to engage in preclearance rather than have the expense of litigation on the back end. And Congress made that decision, just as they have made in Title VII, which also has an administrative regime, just as they have under the Fair Housing Act, which also has an administrative regime, to create an administrative regime under the Voting Rights Act so that all claims do not have to be litigated, all claims do not have to be subjected to the expense and the time and the contentiousness of litigation, and can be resolved through the preclearance process.

Senator FRANKEN. Thank you, and that seems to be the point here. And the implication that we have heard is that you do not need Section 5 here, that Section 2 just takes care of this. And that is just not the reality. And there seems to be some acknowledgment that there still is some discrimination left in voting rights, but that

it is not as bad as it used to be. But what seems to be the implication is it would be okay if it was a little worse.

I think we need Section 5. Thank you, Madam Chair.

Senator KLOBUCHAR. Thank you very much, Senator Franken.

Senator Cornyn.

Senator CORNYN. I would say to my colleague from Minnesota, if he thinks this provision is a good one, it should apply to Minnesota, it should apply to Vermont, it should apply to the entire country, because it only applies to four States under the current formula, and——

Senator FRANKEN. May I ask——

Senator CORNYN. You may not. You may not.

Senator FRANKEN. Would you yield for a question?

Senator CORNYN. And——

Senator FRANKEN. Okay.

Senator CORNYN [continuing]. it imposes a presumption of guilt that is not borne out certainly by the evidence. And I would say that the statement that support for the Voting Rights Act has been bipartisan is absolutely true. It was signed into law by a Texan, Lyndon Johnson, and it has enjoyed bipartisan support through its history. But I would say that bipartisanship or lack of partisanship is at risk in the way that this legislation has been framed.

Mr. Carvin, it is still true that an act repugnant to the Constitution is void. The Supreme Court has been pretty clear about that.

Mr. CARVIN. Yes, that is a truism.

Senator CORNYN. And do you believe that this proposal, this bill that we are discussing today is unconstitutional?

Mr. CARVIN. Yes, I do, for essentially the same reasons that the Court in *Shelby County* struck down the 2006 effort to expand Section 5.

Senator CORNYN. And I believe you said that this legislation is not designed just to overturn legislatively the *Shelby County* decision; it goes much farther. Could you explain what you mean by that?

Mr. CARVIN. Yes. Well, there are two key provisions. One is it does not just adjust the coverage formula, as you note. The most, I think, clearly unconstitutional provision is revising the judicial preclearance Section 3(c), and under that provision, if a State or political subdivision has violated any Federal law that has a nondiscrimination component in it—the National Voter Registration Act, for example—even if the violation has absolutely nothing to do with discrimination, a Federal court can keep them in preclearance essentially as long as it wants.

So, for example, I was involved in this case in Florida where, amazingly, the Eleventh Circuit found that the NVRA prohibits States from excluding non-citizens from the voting rolls, even though they were using the Department of Homeland Security's data base, even though the accuracy of excluding these people was uncontested. Many of them had admitted that they were non-citizens. They, nonetheless, found that the NVRA prohibited keeping them off the voting rolls even though the NVRA makes it a felony for a non-citizen to register or to vote.

So one absurd decision like that involving a statute having nothing to do, really, with racial and ethnic discrimination enables the

Court to subject an entire State to preclearance for the foreseeable future.

Senator CORNYN. Do you know whether the Department of Justice requires a photo identification before you are admitted into that building?

Mr. CARVIN. Yes. You cannot get into a court or the Justice Department absent photo ID.

Senator CORNYN. And yet this Attorney General and this Justice Department takes the position that even a free identification issued by the State of Texas somehow is discriminatory. Isn't that their position?

Mr. CARVIN. Yes, and that has been their consistent position. It is their consistent position which they are now seeking to advocate under Section 2.

Just contrary to this myth that I think has been bandied about during this hearing, Section 5 courts take evidence, Section 5 courts require witnesses, and it is just as voluminous as Section 2. What you may get is what they had in Texas, for example, where the burdens shift, where everybody sort of threw up their hands and said, "Well, we do not really know if this affects minorities." The State would lose in those circumstances, where they would not lose in Section 2.

Senator CORNYN. Well, essentially this bill imposes a presumption of guilt, and the jurisdiction affected would have to come into court and disprove this presumption. But I would just say that in 1964 the voting rate for non-whites in the South was 20 to 35 percentage points lower than it was in the rest of the country, thus the need for the Civil Rights Act of 1964. Yet in 2012, blacks voted at a higher rate in the South than for the rest of the country.

Now, in Texas, contrary to what my friend Senator Garcia has suggested, the black voter turnout rate is substantially higher than for people that look like me. Indeed, blacks registered and voted at higher rates than whites in Texas in every Federal election from 1996 to 2004.

So, you know, rather than suggesting that the States that have come so far, thankfully, in remedying past discrimination when it comes to voting rights, the suggestion made in this legislation is we need to presume that four States that would be covered by the formula are guilty until they can prove their innocence, in spite of the fact that this law proposed is clearly unconstitutional under the Supreme Court's precedents.

So I hope we will stay with our previous commitment to nonpartisanship when it comes to vindicating voting rights, that we will actually take a moment to celebrate the great advances that have been made in this country, not to suggest, as Dr. Johnson said, that discrimination does not still exist. When it does, there are tools available, and we are all committed on a bipartisan basis to use those tools whenever and wherever we can to vindicate the right of each and every American citizen to cast a ballot for their chosen candidate.

Senator KLOBUCHAR. Thank you very much, Senator Cornyn.

Senator Franken, you wanted half a minute. And then we go to Senator Coons.

Senator FRANKEN. Yes, I will make this as short as I can. My good friend Senator Cornyn—and he is a friend—said would I be voting for this if Minnesota were covered by this. Every State is covered by this. In this formula——

Senator CORNYN. Madam Chairman, that is false.

Senator FRANKEN [continuing]. It would apply to any State that has had five violations in the last 15 years. If you violate the law—any State—if you violate the law five times, you will be subject under this for preclearance, no matter which State you are. So I am voting for a law that Minnesota would be subject to, that Utah would be subject to, that Illinois, Rhode Island, Delaware, Connecticut, and Hawaii would be subject to.

Senator CORNYN. Madam Chairman?

Senator KLOBUCHAR. Senator Cornyn.

Senator CORNYN. That is demonstrably false. The formula would not apply to any—to 46 States. And so Section 2 is clearly okay for those 46 States, while 4 States are presumed to be guilty and would have to go to court or go before the Attorney General and disprove any intent to discriminate. And so I certainly disagree with my colleague——

Senator KLOBUCHAR. You know what? I think, Senator Cornyn, you two are having a dispute, and I would like to resolve this with our experts, and I think Senator Coons is next, and maybe he can shed some light on this in his questions. Thank you.

Senator COONS. Thank you. Thank you very much.

Ms. Ifill, I would be grateful if you would help shed some light on this. My view is that as a cosponsor of the Voting Rights Amendment Act, it does have a nationwide impact, and it does take up the challenge of *Shelby County* in crafting an appropriately modernized formula. Preclearance is still necessary. I think this conclusion is demonstrated by the city of Evergreen, Alabama, which was recently bailed into preclearance under Section 3(c) of the VRA for just the sort of discrimination that the *Shelby County* majority concluded the Nation is largely free from today, I think incorrectly.

Why isn't Section 3(c) bail-in sufficient to identify jurisdictions for which preclearance is appropriate? And what is the scope and reach of the formula proposed in the Voting Rights Amendment Act?

Ms. IFILL. Well, let me return again to the nationwide application of this law. This is becoming something of a bait-and-switch. The Supreme Court's decision in the *Shelby* case was very much focused on the idea that you could not mark certain States based on data that the Court thought was too old, and the Court said that we needed current data based on current needs and invited Congress to draft a new formula.

There is now a new formula. That formula requires the focus on current data and current needs by creating a rolling formula that looks at the prior 15 years. It does not look at the prior 15 years for any particular one State or another. It covers from New York to Florida. Every State and every local jurisdiction is covered by the same formula.

As I said earlier, we simply cannot wipe out the past. If a State in the past 15 years has violated the law, then those violations

count toward that 15-year requirement. And if Texas happens to be one of those States, that is because Texas violated the law, not because the U.S. Congress is targeting Texas.

The second thing I would say about preclearance—and you raised the city of Evergreen, which I spoke about I think before you came in—the current bail-in law occurs after litigation, so it is the same issue of having to find the case, find the resources, litigate the case, and then bail-in is a remedy that a court can order. Bail-in is always limited to the particular kind of challenge and the findings that the district court made in that case and limited in time as well.

I find it disturbing, and I think that all of us should as Americans, if we are premising the idea that the protection of the right to vote should be based on the ability to find a lawyer and file a lawsuit. This Congress was given the sacred obligation under the 14th and 15th Amendments to the Constitution to protect against voting discrimination. And Congress in the Voting Rights Act has created a network of ways in which that protection can happen.

One way is Section 2, which, when it occurs, can be quite effective. But another way is Section 5, which is preclearance, designed to avoid the difficulties of litigation and to get at discrimination before it happens.

Senator COONS. Ms. Ifill, if I might on one other point, it has been suggested by some today that this bill does not reflect compromise, that it is frankly a liberal wish list that includes everybody possible remedy that the left might be seeking, and that it is not the result of compromise. I do not see that as accurate, but could you help fill in some of those details?

Ms. IFILL. Well, in fact, that is true. There was reference earlier to voter ID laws. This bill, frankly, assiduously walks around voter ID laws. It does not count denials of preclearance of voter ID laws. It does not count findings under Section 2, a Section 2 violation of voter ID laws as a violation that can count toward the five or the three for preclearance.

What that means is that only findings that a voter ID law was created with the intention of discriminating against minority voters can count toward a jurisdiction's violation, and I would hope that everyone in this room and in this country would be deeply concerned about a finding by a Federal court that a voter ID law had been created with the intention of discriminating against minority voters.

Senator COONS. A last question, if might, to Reverend Dr. Johnson. We are meeting today in a Senate building named for Everett Dirksen, a Senator of Illinois. I think anyone who knows their history knows that he played an absolutely central role in the enactment of the 1964 Civil Rights Act. In fact, I think one of the things of which the Republican Party has long justifiably been proud is the central role that Republican legislators played in the enactment of landmark civil rights legislation in the last century. Yet today we seem to see a partisan divide on this Voting Rights Amendment Act when previous VRAs had been broadly bipartisan in their support.

Why do you think that this has become a partisan issue?

Reverend JOHNSON. Very good question, especially considering the fact that every reauthorization of this important Act has been by a Republican President. This should not be a partisan issue, the right to vote, and it is sacred, as Ms. Ifill suggested. It was paid for with the blood, sweat, and tears of so many. But there is a larger historical point that needs to be made. If the Voting Rights Act is not modernized, then you are effectively ending the Second Reconstruction of this United States. And there is a reason in Georgia why we have to put an asterisk beside the names of elected Representatives. We say they are "since Reconstruction." We have been here before. After Reconstruction, across the South over 625 persons were elected to Congress, including Jefferson Long from Macon, who was the first African American to speak in this Congress as a Representative.

And so how do you get from 625 after the Civil War during that period of Reconstruction? You get there through Federal protection. When that Federal protection was withdrawn, then those elected Representatives disappeared because of the persistent nature of race as a problem in this country.

And so we are seeing extraordinary success under the Voting Rights Act. I am here today to say let us not take away what has worked so well. Let us keep it in place so that we do not repeat the mistakes of history and go down a pathway that I think is quite dangerous.

Senator COONS. Well, thank you. The day that we announced the introduction of this bill, I was proud to be joined by Republicans from the House. I continue to hope and pray that we will be joined by Republicans in the Senate in what I think is the result of compromise, responsible and reasonable, but absolutely essential response to this difficult case of the decision in *Shelby County*. And I think modernizing, strengthening, implementing, and updating the Voting Rights Act is absolutely essential for our Nation. Thank you for your testimony.

Thank you, Madam Chair.

Senator KLOBUCHAR. Thank you very much, Senator Coons.

Senator Lee.

Senator LEE. Thank you, Madam Chair.

Mr. Carvin, I would like to start with you, if that is okay. In your written testimony, you explained, citing the Supreme Court's opinion in *Shelby County*, that an updated formula like the one in Senate bill 1945 is only "an initial prerequisite to a determination that exceptional conditions still exist justifying" such a formula, an "extraordinary departure from the traditional course of relations between the States and the Federal Government."

Can you help us understand, help explain why it is the case that the proposed coverage formula alone is insufficient to determine that exceptional circumstances still exist?

Mr. CARVIN. The exceptional circumstances, Senator, obviously being the need for Section 5 preclearance on top of Section 2. We have had a lot of debate this morning about whether Section 2 is adequate, but the precise question the Supreme Court was asking was: Well, if Section 2 is adequate in all these other States, why does it somehow become inadequate here? Has Congress identified

the kind of intransigent resistance to Section 2 that justifies Section 5 in these jurisdictions?

Now, when you look at the coverage formula in S. 1945, it does not even attempt to do that. In other words, it bases its triggering formula on whether or not you have been found guilty of a Section 2 violation. Well, if you have been found guilty of a Section 2 violation five times in 15 years, then it is a little hard to say Section 2 is not working in your State.

They also throw in Section 5. Both Section 5 and Section 2 do not relate to constitutional discrimination, which is intentional discrimination. They have a much more demanding standard. You cannot do anything with the statistical discriminatory effect or result. So you are not even looking at places where there has been any constitutional violations.

As I said in my testimony, it is quite possible that a State or a political subdivision that has never been found guilty of violating the Constitution would nonetheless be designated as a flagrant constitutional violator, which does not make sense.

Moreover, of course, they count the Attorney General objections. Well, the Attorney General, particularly in recent years, has had an unblemished track record of objecting to every change, regardless of whether or not it in any way was seriously discriminatory. I would not view that as a reliable guide to people who are seeking to disenfranchise minority voters. I think that it much more reflects the fact that Section 5 has this demanding effect standard which has been exploited by this Justice Department to eliminate very sensible ballot integrity measures, or at least that is sufficiently debatable that you could not designate somebody who Attorney General Holder disagrees with as somehow a constitutional violator.

Senator LEE. So when you use the word "exploited" here, I assume you are referring to the fact that the more power we put in the hands of the few, perhaps, of the Attorney General of the United States or a small handful of officials at the U.S. Department of Justice, especially as you are giving them broader standards to apply, there is a greater risk of manipulation, a greater risk that one person might just decide I think this is—I do not like this, I am going to stop this, and that could impermissibly intrude on the State's authority to do something, even when the State is not actually doing something in violation of the Constitution.

Mr. CARVIN. The proponents here have been arguing that Section 5 is fast, faster than Section 2. Well, it is only fast if the Attorney General decides something without the basic due process safeguards that every State presumably is entitled to, an ability to present some evidence to a neutral magistrate. It is the classic Star Chamber proceeding. So while you do capture efficiency, you also, as you point out, Senator, invest this extraordinary power in a single unelected official to invalidate State laws without any opportunity for judicial review.

Senator LEE. By the way, why would it ever be appropriate for Federal officials to suggest to State or local government officials that they could not exclude from the voting rolls those who are not citizens?

Mr. CARVIN. There is no Federal law that requires that. There was a decision by two judges appointed by President Obama that rewrote the National Voting Registration Act to produce that genuinely absurd result.

Senator LEE. Okay. Finally, since you testified earlier—after you testified earlier as to the adequacy of Section 2 remedies, there are those who have suggested in their testimony and in response to questions by Members of this Committee that those are, in fact, inadequate, that they are not enough. Would you care to respond to that?

Mr. CARVIN. Yes. I have given the specific examples of why Section 2 is entirely adequate for those, and then I think there are two points that the proponents of this Act need to answer, which is why, if preclearance is required in the four States currently covered, or whatever States subsequently get sucked into it, why aren't they required in the other 46 States? And the next question is: If Section 2 even with this extraordinarily broad results standard is somehow inadequate to protect against voting discrimination, then why isn't every civil rights law passed by this body also inadequate to prevent discrimination in employment and housing and education, which are certainly very important aspects of American life, but we are nonetheless content to have the Title VII's of the world exist without being supplemented with a Section 5-type preclearance standard? Why does it work in all of these other areas and not work in voting?

Senator LEE. I see my time has expired. Thank you, Mr. Carvin. Thank you, Madam Chair.

Senator KLOBUCHAR. Thank you very much, Senator Lee.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Madam Chairman.

Mr. Carvin, I appreciate your very thoughtful testimony here, and we disagree. I happen to support the legislation. But you make the point that if the remedy under Section 2 is inadequate for voting rights, then all of these other remedies in vindicating other rights, whether employment, housing, et cetera, would be inadequate as well.

Can't Congress decide that, for whatever reason, if it is a constitutional reason, that voting rights is a right that has to be vindicated more promptly, that the litigation process that might be satisfactory to vindicate those other rights takes more time and expense for voting rights, and decide that Section 5 ought to be adopted for that reason?

Mr. CARVIN. I am not saying that the Senate or the House could not make distinctions among different kinds of problems and fine tune it. For the reasons I will not repeat, I do not think any such record has been compiled in the voting context.

I would also point out that while voting is obviously a very important right that helps all other participation in democracy, I would be loathe if the Congress was to rank order particular areas of American life and say voting is more important, for example, than employment or housing. While at a certain level that is true, I suppose somebody who is unemployed or homeless would not agree that discrimination in housing and employment is less important than discrimination in voting.

Senator BLUMENTHAL. And I am not suggesting that the Congress would be ranking in importance those rights, but simply the method to vindicate them might be unsatisfactory for voting rights as compared to those other rights.

Mr. CARVIN. And, again, Senator, yes, that is the kind of empirically based justification the Senate could come out with. I have not seen in any of the commentary either surround this or the 2006 amendments which suggests that voting discrimination is uniquely difficult to prove. And if you think about it from a commonsense perspective, particularly in private employment, private housing, private education, all of the discriminatory policies and decisions are made in private, confidential sessions. But in voting they are made public. They have to be made public because you need to tell people where to vote and how you will count their vote. So actually it is the most transparent of all of these various areas we have been discussing and, therefore, the easiest to get at.

Senator BLUMENTHAL. Well, I think there is some empirical data to contradict that argument. As you probably know, in 2013, the Brennan Center for Justice found that between 1999 and 2005 States initiated 262 potentially discriminatory policy changes that were withdrawn or suspended by altered submissions in response to the Department of Justice's request for more information, the first step in the preclearance procedures. It is hard to believe, hard for me to believe anyway, that if the Department of Justice had to go to court to challenge every one of those 262 policy changes, they would have been successful in preventing—and I stress and underscore the word "preventing"—discriminatory voting practices as they have been using Section 5 procedures. So I think there is something about those challenges, including the request for information, as an enforcement mechanism that has a very profoundly important effect.

Again, comparing rights here, I have no desire or intention to rank one as against the other. But as a matter of resources, in extraordinarily complex and massively challenging, resource-intensive cases as voting rights cases often are, couldn't you see a compelling argument for the preclearance procedure?

Mr. CARVIN. There is no question if you strip the States of their due process rights and presume them guilty that that empowers the Justice Department to be much more effective and efficient at getting at things that the Justice Department wants to accomplish. But as I indicated to Senator Lee, the question is not what does the Justice Department want to accomplish; it is whether or not these States have engaged in unconstitutional discrimination. Since the Nation's founding, we have presumed the legitimacy of State enactments. We would presume under this legislation the legitimacy of State enactments in 46 States. So the question then becomes: Why is it necessary to presumptively suspend all of these laws in these designated areas and not afford them the traditional justifications that are afforded to all other defendants in civil litigation?

Senator BLUMENTHAL. My time has expired, but I thank you for those thoughtful answers. I have no intention or desire to suspend the rights—as sovereigns, the rights of States to contest or in any way protect their rights. And I happen to believe that this law is

one of general applicability, just as criminal laws are. And to suggest otherwise is to say that criminal laws do not apply to all Americans simply because all Americans do not break the criminal laws. They apply where the law is broken, and I think they are laws of general applicability. But I very much appreciate your very helpful and forthright responses. Thank you.

Mr. CARVIN. Thank you.

Senator KLOBUCHAR. Thank you, Senator Blumenthal.

Senator Hirono.

Senator HIRONO. Thank you, Madam Chair.

All the members of the panel agree that voting discrimination still exists, and we do disagree on how to address the problem. And the Supreme Court invited Congress to address the problem by updating the coverage formula, and the Supreme Court, I note, maintained the principle of preclearance. They did not strike that down. They struck down the coverage formula and invited Congress to change the coverage formula, which is what this bill does. And to say that the formula in this bill is unconstitutional I would say is definitely premature.

We do have Members of the House of Representatives who are here, and I note that the companion bill in the House is supported in a bipartisan way, and I am hopeful that as we proceed with this discussion on this bill that we will be able to come up with a compromise, a version or a bill that will do what we need to do to maintain our Voting Rights Act and get bipartisan support in that regard.

And I also want to note—and thank you, Ms. Ifill, for being very clear that this bill does not punish States for historic discrimination in any kind of, you know, we are going to designate a particular State for this treatment, because no county or State is singled out. And, in fact, the requirement that is in this bill that requires five violations or three violations of Section 2, that seems to me a pretty high standard before the preclearance requirements kick in. Would you agree with that, Ms. Ifill?

Ms. IFILL. Indeed I would. I would think that a jurisdiction that is able to meet that number actually is on the high side in terms of egregious conduct. I think actually this Congress has been quite conservative in trying to create a formula that frankly leaves quite a bit of leeway there for States and for local jurisdictions. In fact, you know, one of those five for a State has to be a statewide violation. So there are lots of ways in which I think the drafters of this bill have tried to be as deferential to Congress as possible, but I would also point out again that, with regard to the sovereignty of the States, it is the Constitution of the United States and the 14th and 15th Amendments that gives this Congress the authority and the obligation to protect against voting discrimination. And those two amendments are specifically targeted at the States. They are telling this Congress what to do to protect and, frankly, historically, to protect against voting discrimination that happens in the States.

Senator HIRONO. Well, I note in your testimony, Ms. Ifill, that Section 5 blocked dozens of discriminatory voting changes over the decades that this law has been in place. Can you just describe to us what some of these discriminatory voting changes were that

were struck down under Section 5, and whether, in fact, post-*Shelby* the same kinds of voting changes are being put in place throughout our country in many States?

Ms. IFILL. Well, you have heard some of them this morning, Senator. You have heard about polling place changes. You have heard about shifting elections and reducing election—reducing the seats, the districts in particular elections. You have heard about redistricting, of course, taking populations and annexing populations from adjoining jurisdictions to try and create majority white district.

Senator HIRONO. Are these—excuse me. Are these the same kinds of restrictions that were struck down pre-*Shelby*?

Ms. IFILL. I think that is what we find most disappointing, Senator, that a lot of what we are seeing is precisely the kinds of electoral changes that Section 5 protected against and that the Voting Rights Act was meant to protect against. We are seeing jurisdictions return to the same kinds of tactics that were used in the past to hold on to, as Mr. Johnson says, power, political power.

Senator HIRONO. Reverend Johnson, we have heard testimony that this current Attorney General is particularly diligent in enforcing the Voting Rights Act. Now, in the decades that this law has been in place, hasn't Section 5 been used by both Democratic and Republican Attorneys General to enforce the Voting Rights Act?

Reverend JOHNSON. Absolutely. In 2006, the Congressional Record overwhelmingly demonstrated the need for continued Federal protections: 750 Section 5 objections by the Justice Department over that time period of this law being in effect; 800 potentially discriminatory voting changes; 105 successful actions to require covered jurisdictions to comply with Section 5; 25 denials of Section 5 preclearance by Federal courts; high degrees of racial polarization in these jurisdictions—all mandated that the Attorney General of whatever party, of whatever President was elected, to enforce this law.

Senator HIRONO. Thank you. My time is up.

Senator KLOBUCHAR. Thank you very much, Senator Hirono.

Senator Dick Durbin.

Senator DURBIN. Thank you very much, Madam Chair.

Madam Chair, Mr. Carvin challenged us: "Why just four States?" he says. Because in the past 15 years, those four States—Georgia, Texas, Mississippi, and Louisiana—have had five or more violations in the last 15 years. Could it be 14 States within the next 15 years? Possibly.

The way this is written is that, as we, I think made adequately clear, I hope adequately clear to most, it could apply to my State, yours, or any other. And that to me is a fair standard. It is not singling out States because of past conduct. It is looking prospectively at preserving the right to vote.

Which goes to your second question. If preclearance is such a good idea, why don't you use it in employment discrimination, housing discrimination, education discrimination? That was your question. And the answer is I think one you already know. This is about the right to vote. And the Supreme Court has said and the Chief Justice in the course of his hearing before this Committee

said that is the right that is preservative of all rights. It really goes way beyond—way beyond—important rights related to employment, housing, and education. The preclearance has had a profound impact on this country in terms of minority registration, and five different times with overwhelming bipartisan votes, Congress has reauthorized preclearance for voting. We think it is that important.

Now we are challenged by the Supreme Court to update it, and I would like to note that I think we need to be vigilant, every generation needs to be vigilant to protect this right to vote.

There was a Republican primary yesterday in Mississippi, and the word got out a week or so ago that incumbent Senator Thad Cochran was going to appeal to African American voters who did not historically vote in Republican primary to come vote with him. And his opponent announced he was sending poll watchers into those minority precincts. I think there is a message there, isn't there, that goes beyond voting, that goes beyond I think the obvious? And that is, there are still some questions that need to be asked and raised about whether people are being treated fairly in the polling place.

I have a Subcommittee, the Subcommittee on the Constitution, Human Rights, and Civil Rights, and we decided to hold some hearings after a group know as ALEC, the American Legislative—Exchange Council? Whatever. They are a big group, some 300 corporations fund them. And they are writing laws all over America, model laws all over America. And many of their laws are aimed at voter suppression, as I see it, reducing the number of voters. That is their goal. Voter IDs, limiting early voting, they just want fewer people to turn up and vote.

So I went to two States where they have been successful. I went to Florida and I went to Ohio, and I brought in voting officials from both parties, Republicans and Democrats. I put them under oath, and I asked them all the same question: What was it that happened in Ohio and Florida that led you to believe that you needed to change the voting laws when it came to voter IDs and such? How many cases of voter fraud were prosecuted in your State? None.

Oh, well, then how many instances of voter fraud were there that may not have been prosecuted but reported? Almost none.

If that is the case, if these laws are not being written to militate against voter fraud, they are clearly being written for another purpose. They are being written for voter suppression—and, sadly, voter suppression among minority voters in America. That is the reality of the 21st century in America. I wish to God we were beyond the reach of racism, but we still deal with discrimination and racism on a regular basis.

Ms. Ifill, I want to get down to one particular point because, as enraged as I am over the ALEC agenda and what it is doing, what you have said clearly is we have to prove intent, not effect. Expound on that for a second and put it in the context of the voter ID laws.

Ms. IFILL. Well, in order to for, Senator Durbin, a voter ID violation to count as a violation that would count toward preclearance of either a State or local jurisdiction, that voter ID law must have

been proven to be intentionally discriminatory. In other words, it could not have been the subject even of a finding under Section 2 that it violates Section 2. It could not have been the subject of a denial of preclearance by the Attorney General. It is held to the standard of having violated the Constitution based on intent. And it seems to me that is a pretty egregious violation.

Senator DURBIN. And it is a high standard.

Ms. IFILL. A very high standard.

Senator DURBIN. Beyond effect, we go to actually proof of intent.

Ms. IFILL. Yes.

Senator DURBIN. So this insidious ALEC agenda of voter suppression, which has no basis in fact other than to reduce certain turnouts in certain populations, really may not even qualify under the standard of this law if you cannot prove intent, a very, very difficult standard. Is that correct?

Ms. IFILL. Absolutely. As you know, Senator Durbin, to prove intentional discrimination in 2014 is very difficult, not because it does not exist but because one of the successes, frankly, of the civil rights movement is that racism is no longer socially acceptable. People do not say in most instances the things that they said before and know that they should not reveal their discriminatory animus. And so to prove intentional discrimination is incredibly difficult, and we prove it by circumstantial evidence. But it is an incredibly high standard.

Senator DURBIN. I just want to close with one point. I am in the midst of reading a book entitled, "An Idea Whose Time Has Come," by Todd Purdum. I recommend it. It is the story of the 1964 Civil Rights Act. And if there is one thing, one political fact that needs to be stated on the record over and over again, the critical role played by Republicans in Congress in the passage of the Civil Rights Act and the Voting Rights Act. This was truly a bipartisan effort, and much of the resistance to those laws came from my party, certain Members of my own party. And I want to be very open about that. I want to commend Congressman Sensenbrenner for making this a bipartisan issue with Senator Leahy. I hope it is bipartisan all the way until we enact this new law to deal with the *Shelby County* decision.

Thank you.

Ms. IFILL. Thank you.

Senator KLOBUCHAR. Thank you very much, Senator Durbin.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. I just wanted to close this hearing with a point. We are here because of the *Shelby County v. Holder* decision of the U.S. Supreme Court, which was a 5–4 decision on partisan lines, driven by the Republican judges that, in the view of many, opened the door to voter suppression efforts in States that had a legacy of discriminatory voter suppression efforts. And I think that was a very unfortunate decision, but I have to point out that it stands in the context of an array of similar decisions which have that—a couple of common elements. One is that they are decided 5–4 along partisan lines. The Republican judges do not wait to try to find consensus. They line up the five of them, and they shove what they want through. So *Shelby County* was one example.

Another example was *Citizens United*, again, 5–4, again, I think an unwise and unfair decision in that case, opening up our elections to unlimited spending on pretty flagrantly factually wrong, so-called findings of fact, which the Supreme Court is not supposed to do anyway, let alone get them so badly wrong.

And then there was a few years previously *Vieth v. Jubelirer*, which was a Supreme Court decision again 5–4—it was a 4–1–5 because it was a concurrence, but it was again driven by the Republican judges, that basically said that partisan gerrymander was okay, that there was nothing the Supreme Court was going to do about it, and they gave license to unlimited partisan gerrymander, believe it or not on the grounds that it was too difficult to come up with a standard for when partisan gerrymanders had gone too far.

The result is we have a House of Representatives that is dominated by the Republican Party after an election in which the Democratic Party got 1.4 million congressional votes more than the Republicans. And if you look at individual States, you see that Pennsylvania went for Bob Casey and President Obama in the 2012 elections and sent a 13–5 Republican delegation to Congress. Wisconsin went for President Obama and Senator Baldwin in 2012 and sent a 5–3 Republican delegation to Congress. Ohio went for Obama and Senator Brown, and yet sent a 12–4 delegation to Congress.

So what I see is a pattern of 5–4 decisions where the Court intrudes itself into political matters, and in each case, three for three, the practical political effect of what they have done is to advantage the Republican Party. They have advantaged the Republican Party and its use of partisan gerrymander in *Vieth v. Jubelirer*. They have advantaged the Republican Party by opening up the floodgates to these special interest dollars that have flowed in, and you can measure that in the early years particularly, Republicans outspent Democrats through these super PACs and through dark money by spectacular amounts. And now in *Shelby County* I think it is hard to deny that the Court's decision has had the practical effect, even if it was not the Court's intent, of advantaging the Republican Party.

So I think that the reason that we are here is a signal of a cause for concern at the Court, and it is not something that I am alone in describing. Jeffrey Toobin has described the politicization of the Court. Norm Ornstein has described the politicization of the Court. And just recently, Linda Greenhouse, who has spent a lot of time looking at the Court and who has held back and held back and held back at making the conclusion that they have become politicized, has written recently an article that, more in sorrow than in anger, says that the Court has basically lent itself to the Republican agenda. And I think that is very unfortunate, but I think it would be a shame if we closed this hearing without putting it in that larger context, because we are here because of one of those decisions, which is *Shelby County v. Holder*. And I see the one elected official on the panel, Senator Garcia, nodding energetically.

My time has expired, and I am sorry to spend it all on talking and not on questioning, but I did not want to have that topic be

missed when it is the elephant in the room behind what is going on here.

Senator KLOBUCHAR. Thank you very much, Senator Whitehouse.

Senator Cruz.

Senator CRUZ. Thank you, Madam Chairman.

Thank you to each of the distinguished members of the panel for being here today.

I want to start, Dr. Thernstrom, with asking you a question, which is am I correct that the Voting Rights Act and, in particular, Section 2, remains on the books as strong protection against discrimination in voting.

Ms. THERNSTROM. Of course you are right, absolutely. I mean, the counter-argument is close to incomprehensible to me.

Senator CRUZ. Well, I want to make sure that everyone observing this hearing understands what the focus is. The focus is one particular portion of the Voting Rights Act, Section 5, which subjected a handful of States to unique scrutiny.

I would like to ask, Mr. Carvin, a question of you. Under Section 5, elected state legislatures in the states that were singled out, before they could enact any laws concerning voting, had to receive the prior approval of unelected Federal bureaucrats in Washington. The Supreme Court has called that system extraordinary.

But my question is, is there any other area of law where elected officials in states have to come to the Federal Government to ask an unelected bureaucrats their permission before carrying out their duties in the legislature?

Mr. CARVIN. No, there is not, and the Court in 1965 in *Katzenbach* and all the other cases has recognized that this is not only a reversal of the traditional Anglo-American jurisprudence presumption of innocence, but you are literally suspending the states' rights to legislate in a particular area.

The Federal sovereign is telling them, no, you cannot do it until you come on bended knee and an unelected official says, okay, we will allow you to do it. There has been a lot of conversation today about the bipartisan support and the importance of the Voting Rights Act, and yet the basic premise of Section 5 pre-clearance is that elected representatives are incompetent minors who are literally incapable of arranging electoral systems even though, as you know, the Constitution left the question of voter qualifications and most important aspects of running elections to the states quite consciously.

So it is not only unprecedented, it certainly pushes the outermost boundaries of our Federalist system and was only justified in the 1960s as an acknowledged temporary exception to the normal rules because of the extraordinary situation that existed in the Jim Crow south.

Senator CRUZ. I would note, Mr. Carvin, you and I have a long history together, we practiced law together, and indeed we both were involved in litigating the last prior redistricting case in the State of Texas, where I was representing the State and you were litigating, as well, that went to the Supreme Court and ultimately prevailed in the Supreme Court.

I want to understand and I want people here to understand how those unelected bureaucrats in the Department of Justice have used this authority.

Is it not the case that the Department of Justice has taken the position that Section 5 and indeed Section 2, as well, protects the ability to elect Democrats? And, indeed, in Texas they took the position that Henry Bonilla, a Hispanic who was elected, was not protected; however, Lloyd Doggett, an Anglo Democrat, was protected, and the difference between the two was that one was a Republican and, therefore, that Hispanic elected official was not in the ambit, but the other, a Democrat, was. Is that correct?

Mr. CARVIN. Yes. That is exactly what happened in Texas. And I think it is important to focus on the fact that under the new ability to elect standard enacted for the first time in 2006 to overrule *Georgia v. Ashcroft*, the Justice Department and certain courts have taken the position that any effort to diminish minorities' ability to elect white Democrats is nonetheless violative of Section 5.

So you literally have a Federal law that says you cannot hurt the ability to elect white Democrats no matter how compelling the demographic or other justifications are.

Senator CRUZ. Thank you. Thank you, Mr. Carvin.

I would like to ask a final question of Senator Garcia. I find it interesting you and I are both at this hearing. We are both elected officials in the State of Texas. We are both Hispanic. And, indeed, Texas has a record of electing substantially more Hispanics and African-Americans statewide than almost any other state.

Yet, what this bill would do—and it is interesting to see a number of Democratic politicians, many from the northeast, suggesting that Texas needs some sort of special scrutiny, although the record in Texas of minorities being elected is better than most other states and, indeed, the turnout numbers in both the African-American community and the Hispanic community is better than many other states.

In your experience as an elected official in Texas serving in the legislature, do you believe that elected officials in Texas are somehow substantially more deficient than elected officials in other states across the country?

Ms. GARCIA. Well, I do not think—we in Texas think that we are the best no matter what it is.

Senator CRUZ. I agree with you in that regard.

Ms. GARCIA. Thank you. The Senate Hispanic Caucus has wrestled with some of these issues and I can tell you that for us it is just distressing, and I will repeat the numbers. In 2010, we were 42nd in registration as a state. We were 51st in voter turnout. Those numbers are just not anything to brag about, although we would like to brag about many things.

If you look historically at our record, we have had 107 Section 5 violations between 1982 and 2005. Again, that is nothing to brag about.

So you look at the immediate history and then if you just—my written testimony goes through all the history dating back to the 1800s. There has been historic discrimination in the State of Texas. Regrettably, it is still there.

Senator CRUZ. But, Senator Garcia, if I may briefly, and my time has expired, so if I just may briefly ask one final question.

If you look at the data, for example, for the 2012 election, in 2012, African-American voter turnout in Texas was 10 percentage points higher than white turnout in Texas.

In fact, if you look at the states in 2012, where turnout was worse, where there was a greater differential, the following states have substantially worse numbers than Texas. Texas has among the best numbers in the country. But you have Washington State, Colorado, Kansas, Arizona, Minnesota, Massachusetts, Delaware, Arkansas, Minnesota, Florida, Kentucky, Connecticut, Virginia, those are all the states where white turnout was higher than African-American turnout.

In Washington State, it was 18.5 percent higher. Now, Washington State is not covered. Texas, on the other hand, African-American turnout not only was not lower than white turnout, it was 10 points higher and with that record—and I would note, among Hispanics, the Hispanic record is also markedly better than many other states across the country.

What justifies singling out Texas and a couple of other states for some sort of special treatment when the record is markedly better in Texas than in many other states?

Ms. GARCIA. Again, I think it is because of the history and it is about some of the things that have been going on in our state. I think when you look—I will give you a perfect example. I filed the bill so that when anybody turns in the voter application, if it gets rejected by the voter registrar, that the person be simply told by letter your application was rejected because you forgot to put your date of birth or you forgot to put your full address.

That was rejected. So once it is rejected in terms of a bill which we cannot put in place to protect the voter so they will know why they were rejected so they get registered to vote and make sure they gain access to that ballot, that is just not good for us.

We need to be doing everything we can to improve access to the ballots and make it convenient and to make it easy so that we can have full participation. If we have increased, that is great, but I know our state is great. We can even do better.

Senator CRUZ. Thank you very much.

Ms. GARCIA. Thank you.

Senator KLOBUCHAR. Thank you very much, Senator Cruz.

Let us start here with you, Ms. Ifill, to get at some of the arguments that Senator Cruz was making. He talked about the fact that certain states in the past have had to come before the Nation, before Federal Government to get signed off on their voting systems.

Could you explain why that has happened? What is the constitutional and legal reason that that has happened?

Ms. IFILL. Yes, Senator Klobuchar. When I hear this argument, I think that the quarrel is more with the Constitution than with the attorney general. It is the Constitution that gives Congress this authority under the 14th and 15th Amendments to protect against voting discrimination, and Congress then creates a scheme, as it did under the Voting Rights Act and has reauthorized it over four

times, to deal with voting discrimination and they have provided various means.

One means is Section 2, which allows individuals to litigate. There is the possibility of Federal observers at elections. There is the Section 5 regime.

What I have heard today, this discussion about the attorney general and pre-clearance, I have heard it described as a star chamber, this is almost kind of an astonishing description of a process that has been utilized by Republicans and Democrats in the Administration and that is well recognized across party lines as a procedure that is efficient, that is not costly, that provides input, allows for input not only from community groups and voters, but allows input from the jurisdiction.

It is an ongoing conversation, not a star chamber, a conversation between the attorney general and between the jurisdiction about the likely effect of a voting change.

Senator KLOBUCHAR. Senator Cruz also focused on the fact that this is somehow to protect Democrats. And could you give us a little more sense of that history about how Republican attorney generals have enforced this law, about how traditionally with, of course, even currently with Representative Sensenbrenner, a Republican sponsoring this law in the House, but how in the past this has been a bipartisan effort?

Ms. IFILL. Always. The Voting Rights Act from its initial enactment and every reauthorization has been overwhelming bipartisan and signed into law by Republican Presidents.

The Voting Rights Act is focused on the protection of minority voters. It is not focused on the protection of one party's voters versus another party's voters.

I did want to say something about the turnout issue that Senator Cruz raised.

Senator KLOBUCHAR. This is about the Texas numbers.

Ms. IFILL. Yes. I want to point out that actually the figures that he cited should inspire this Congress to pass this bill, because what those turnout figures show is the determination of minority voters to come out and participate in the political process despite the obstacles, despite the discriminatory redistricting, despite the polling place changes.

We all saw in this country in 2012 minority voters standing on lines in places like Florida for 6 hours to vote. We should credit their determination to participate in the political process, not use the fact that they were so determined and cast their ballots as evidence that this Voting Rights Act is not needed.

Senator KLOBUCHAR. Very well said. Thank you.

Ms. Garcia, one of our jobs here, Senator Garcia, is to get evidence, because if and when we do pass this bill, I somehow believe it might be challenged as it has in the past and then the Supreme Court is going to look at what the evidence is.

You have all submitted thorough testimony on this, but perhaps, Senator Garcia, you could give to me what you think will be shown as some examples of discrimination coming out of the lawsuit in Texas.

Ms. GARCIA. Well, I think the examples that I have already given with regard to, first, Pasadena, where we see the shifting of the de-

mographics and the growing Latino population. In Galveston it was the minority population. It seems to me that we will just be seeing more and more because the Latino population has grown.

I think someone earlier said that it was a young population. Well, it is young, but it is already beginning to be at the age of registering to vote and getting very active.

The two council members in Pasadena that got elected are probably all of 30 and 32. They are young veterans. They went to Iraq, they went to Afghanistan, they came home, they believe in what they fought for and they wanted to participate.

So I think we are getting a younger population that is voting. We are getting a younger group of leaders in the Latino community.

I know in my role as the immediate past president of NALEO, which is the National Association of Latino Elected Officials, it was just really heartwarming to me to travel across the country and just see the new crop of young Latino leaders who are truly committed to public service, committed to making sure that people have the right to vote, and committed to making sure that we can make change in our communities, and, frankly, that is really what it is all about.

It is making sure that we protect the right to vote, that we make it as accessible as possible, as easy as possible so that people can be part of the fabric of our country.

Senator KLOBUCHAR. Dr. Johnson, I know way early on in this hearing you had wanted to respond to something that Dr. Thernstrom had said. You could do that, if you would like, but also to give me some examples from Georgia of what you have seen.

Then, also, Ms. Ifill answered in terms of the constitutional and legal reasons which are key here for why we have the Voting Rights Act, if you could also give us a sense of the moral reasons from your perspective.

So three questions really. One, if you want to reply to Dr. Thernstrom; two, the discriminatory examples that you see in Georgia; and then, three, if you want to give us the moral basis for doing this.

Reverend JOHNSON. Professor Thernstrom and I have been engaged in a side discussion.

Senator KLOBUCHAR. I have noticed this and I was very interested. I was thinking I would love to hear it.

Reverend JOHNSON. Right. But I think what Senator Cruz spoke to earlier underscores why there is a moral imperative to modernize the Voting Rights Act.

His attempt to go to an old southern strategy play of pitting the south versus the north, of pitting blacks against Hispanics, as we have seen in Texas, whites against—this is not about that issue and I think we need to look at higher ground here.

The reason why I am asking that Georgia be covered is because after the Federal protections ended after reconstruction before, Georgia quickly disenfranchised its citizens who look like me. They passed laws, like Jim Crow laws, they passed literacy tests, poll taxes, moral character tests, grandfather clauses, all in an attempt to do what they felt they had a right to do as state legislators.

The Federal Government said no, that the rights of citizens of these United States shall not be abridged or denied and that is

why we have the Voting Rights Act and that is why we continue to need it, because this legislature in Georgia sitting quickly moved to do the same thing, to roll back early voting days from 21 to 6 days, to introduce all kinds of laws to disenfranchise African-Americans, Hispanics, Asians, others, to discourage them, to confuse them.

At one point, there were going to be three different standards for voting if you were in a city, town or consolidated government, and that is simply wrong in America. And so I would say this finally. When you look at the issue of race in this country, we are not there yet. It is not lost to me that I am probably the only member of this panel born after the passage of this act. This is a different America, but we are not there yet.

My baby boy that I referenced earlier is twice as likely as a white to die during his first year of life, three times as likely as a white baby to be born of a mother who had no prenatal care. His father is still twice as likely to be unemployed. And even with a good education and a good foundation for opportunity this country has provided for me, I can only expect to make 72 percent of what white similarly situated folks in my shoes will make.

That is because we are not there yet. In Georgia the median income for a white similarly situated family is $51,000. The median income for a black family is $31,000. That has nothing to do with the pigment of my skin. That has to do with discrimination. It has to do with the fact that it still exists.

So the moral imperative is there for my generation and for Langston's generation. If we are going to make this a more perfect Union, keep what is working in place. You referenced, Professor Thernstrom, in conclusion, in your written remarks, that America sort of needed a jumpstart, but no one, after getting a dead battery back to working, allows the jumper cables to be attached. Well, you do not throw them away either. You generally take prophylactic measures to keep your battery in good health and then you put a set of jumper cables in your trunk. And I say let us move America forward.

Ms. THERNSTROM. The jumpstart, of course, in my written testimony referred to my agreement that these racially driven districts, racially carefully designed districts to be safe for black candidates and Latino candidates were necessary to give a jumpstart to greater black political involvement.

So I am distancing myself from conservatives who say that those districts never did any good, in fact, they did nothing but harm. I think they worked as they were intended to in helping elected—in helping to elect the many black Members of Congress.

Reverend JOHNSON. And white Members of Congress, too. John Barrow——

Ms. THERNSTROM. And white Members.

Senator KLOBUCHAR. I am glad we are seeing the side discussion.

Reverend JOHNSON. Absolutely. We will continue that.

Senator KLOBUCHAR. So you guys should have lunch and continue that discussion.

Ms. THERNSTROM. Well, I had a lot more to say, but that is all right.

Senator KLOBUCHAR. I know you did and I think this has been a very good hearing, and, of course, you will have that opportunity with the record and I am sure many of the Senators will have questions for the record.

I was thinking of what you said, Dr. Johnson, and it reminded me a little bit of Justice Ginsberg's dissent about when she talked about getting rid of Section 4 of the Voting Rights Act was, quote, "like throwing away your umbrella in a rain storm because you are not getting wet."

So I think that is a sentiment of many people up here and I know there are going to be discussions about how to do this the best way. I think the simplistic description, which I really appreciated, that Ms. Ifill gave in terms of this new formula and how it works I think was a good one and I hope everyone thinks about it in terms of what this means going forward and how it would apply to all states.

I would just end with this. I had the privilege last year to go to Alabama with Congressman John Lewis, which many people up here have done. He, as you know, is one of the 13 original Freedom Riders and on March 17, he and 600 peaceful marchers were brutally attacked on the Edmund Pettus Bridge in Selma. We got to walk over that bridge again and learn a lot, but it was that weekend 48 years later when the Montgomery police chief, a white police chief, took off his badge and handed it to Congressman Lewis and 48 years later apologized for not protecting them on that bridge.

Well, we have our job now and that is to protect the rights of the people who want to go to that voting booth. And I have appreciated the civil nature of this discussion, including of my colleagues. I hope that guides us going forward on this important issue.

I want to thank all of you for what you have done and that you have come forward and testified. I think this was a good example of how democracy can work, from my perspective. I now want to get this bill through.

Thank you. The hearing will remain open for a week. I have a statement from Senator Feinstein that I am going to include in the record.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Senator KLOBUCHAR. Thank you and have a good day. The hearing is adjourned.

[Whereupon, at 12:26 p.m., the hearing was concluded.]

[Additional material submitted for the record follows.]

APPENDIX

Additional Material Submitted for the Record

Witness List

Hearing before the
Senate Committee on the Judiciary

On

"The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*"

Wednesday, June 25, 2014
Dirksen Senate Office Building, Room 226
10:00 a.m.

The Honorable Sylvia Garcia
State Senator
Texas State Senate, District 6
Houston, TX

Michael Carvin
Partner
Jones Day
Washington, DC

Francys Johnson
State President
Georgia NAACP
Statesboro, GA

Abigail Thernstrom
Adjunct Scholar
American Enterprise Institute
Washington, DC

Sherrilyn Ifill
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.
Washington, DC

PREPARED STATEMENT OF HON. SYLVIA R. GARCIA

SYLVIA R. GARCIA
STATE SENATOR
DISTRICT 6

The Honorable Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

Thank you for the opportunity to submit this testimony concerning the continuation of discrimination in voting in Texas, and the critical importance, for my constituents, Texans, and voters around the country, of modernizing federal voting rights protections.

My name is Sylvia Garcia. Currently, I represent District 6 in the Texas State Senate, which includes parts of Houston, Pasadena, Baytown, Jacinto City, Galena Park, and northern and eastern Harris County. I have also served as Presiding Judge of the Houston Municipal Courts, Houston City Controller, and Commissioner of the Harris County Commissioner's Court. I am the current Vice Chair of the Texas Senate Hispanic Caucus, as well as the past President and a current member of the Board of Directors of the National Association of Latino Elected and Appointed Officials (NALEO).

I am a Texas native, from the South Texas farming community of Palito Blanco. As a social worker, attorney, and now a public official, my career has revolved around ensuring that every Texan has an opportunity to be heard. The needs and desires my clients and constituents have shared with me in the course of many years of public service have reinforced values I have always held close and tried to live out in my work: to make sure that no one is forgotten; that precious resources are used wisely; and that community decision-makers do so openly and transparently, and maintain accountability to those affected by their decisions.

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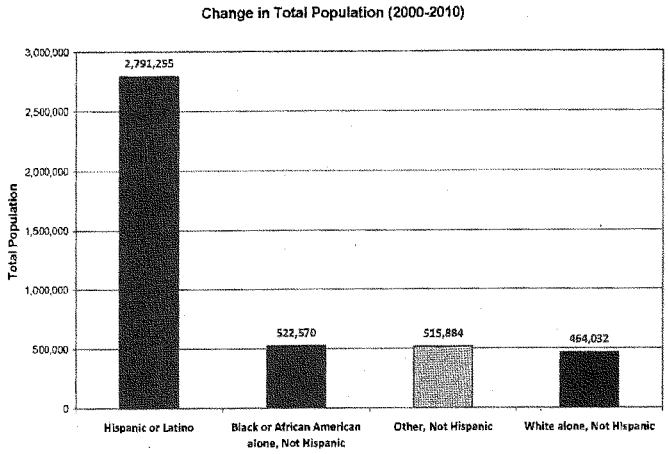
These same values that have guided my work for so many years motivate me to speak out on behalf of the millions of Texans whose opportunities to cast a ballot and to have a meaningful influence on elections remain under threat. A democracy offers empty promises if the citizens the government is intended to serve are not treated equally, regardless of race, ethnicity, or linguistic ability, and if citizens are prevented or dissuaded from participating in civic affairs. Unfortunately, we have too many such instances occurring in my home state today. For the sake of the integrity of our elections and our democracy, Texas urgently needs a modernized fully functioning Voting Rights Act (VRA).

The Rapid Growth of Historically Underrepresented Communities Makes Ensuring Equal Access to the Ballot Particularly Critical for the Health of Democracy

My District, as well as Texas more broadly, illustrates why defending and promoting equal access to the ballot box for voters of all races, ethnicities, and linguistic abilities is particularly critical. In my District and throughout the state, a disproportionate number of residents are members of communities that have historically suffered the brunt of discrimination in voting, education, employment, and other domains. I represent a population that is about 70% Hispanic and about 12% African American. These two groups along with other ethnic or language minority populations constitute significant shares of Texas' population overall. Today 37.6% of Texans now report Hispanic ethnicity. About 12% of Texans are African American, and about 4% are of Asian American, Native Hawaiian or Pacific Islander descent. My constituents and Texans are linguistically diverse as well. Though a majority also speaks English, nearly two-thirds of District 6 residents, and more than one-third of Texans statewide, who are 5 years old or older speak a language other than English at home. The Census Bureau calculates that 7% of all Texans eligible to vote are not fully fluent in English and need language assistance to cast an informed ballot, compared to 4.5% of all eligible voters nationwide.

These minority populations, vulnerable to discrimination in voting, are becoming an increasingly large segment of the electorate. Between the 2000 and 2010 decennial Censuses, Texas' Latino population increased by nearly 2.8 million people, accounting for 65% of statewide population expansion, as illustrated in the chart below. Minorities overall accounted for 89% of Texas growth in the past decade. During the same period, Latinos accounted for a similar, outsized 55.5% of all population growth nationwide. In the year 2000, 31.2% of Texas residents

reported speaking a language other than English at home; according to the most recent Census Bureau figures, this share has increased to 34.6%. Likewise, the percentage of United States residents speaking a language other than English at home grew from 18% in 2000 to 20.5% at most recent count.



Data Sources: Census 2000 Redistricting Data (Public Law 94-171) Summary File PL002 Table; 2010 Census Redistricting Data (Public Law 94-171) Summary File P2 Table

Texas, and our nation as a whole, is growing increasingly diverse and we must do a good job of engaging these communities as voters and candidates. Instead, voting discrimination based on race, ethnicity, and language ability continues in our state, and is alienating communities of color from participating in elections.

Discrimination in Voting in Texas Continues

As Congress considers legislation that would modernize VRA protections, both houses must acknowledge and address the fact that discrimination in voting has deep roots and continues, even today.

Texas has a long record of troubling and pointed attempts to exclude Latino, African American, and other historically underrepresented groups from full

participation in politics and governance. As early as the first half of the 19th century, delegates to Texas's constitutional convention who were preparing for U.S. statehood attempted to preclude the territory's Mexican Americans from the franchise. A second attempt originated in Texas in the 1890s to prohibit people of Mexican heritage from becoming naturalized American citizens and gaining the right to vote. In the first half of the 20th century, Texas jurisdictions developed evolving tactics to limit minority electoral participation and influence. A poll tax was added to the Texas Constitution in 1902, and remained in effect until the state was forced to repeal it in 1966. A 1923 state law barred African Americans from voting in Democratic primary elections, and in the following years numerous jurisdictions prohibited Latino and other voters from participating in white-only primary elections.

The enactment of the VRA in 1965, and its extension in 1975 to provide comprehensive protection to Latino and other language minority voters, ended the use of some of these well-known discriminatory techniques. However, Texas and its sub-jurisdictions have continued to adopt voting policies that impair and prevent minority citizens from casting ballots. Between 1982 and 2005, for example, Texas earned 107 Section 5 objections to voting policies, second only in number to Mississippi. Among them, 97 concerned local laws and affected about 30% of Texas counties home to a disproportionate share – nearly 72% – of the state's non-white voting age population. During this same period, aggrieved voters and candidates brought at least 206 successful lawsuits under Section 2 of the VRA against the state of Texas and Texas municipalities and counties.

In the years immediately preceding the Supreme Court's decision in *Shelby County v. Holder*, Texas and political subdivisions within the state adopted more policies that ran afoul of the VRA's preclearance protections than any other state. In the most recent 15 years, Texas has also amassed more violations of other VRA provisions – Sections 2, 203, and 208 – than any other state. Sadly, the number of discriminatory incidents, prompting litigation, has accelerated in the last five years. These troubling laws aimed at restricting access to the ballot box and voter influence of historically underrepresented voters will only exacerbate Texas' lagging and racially-disparate levels of voter turnout and registration. According to Census Bureau data on the 2012 Presidential election, for example, just 39% of Latino Texans eligible to vote cast a ballot, compared to 48% of Latinos nationwide, 61% of white Texans, and 64% of white Americans. In my own district, the fabric of the community has changed, and unfortunately not everyone

is embracing that change. For instance, two local colleges resisted alterations to their board compositions from at-large districts to single-member districts, and there are plenty of other examples of resistance to progress for voters across Texas.

There is New and Heightened Danger to Latino and Underrepresented Texans' Voting Rights in the Wake of *Shelby County*

In the year since *Shelby County* was decided and preclearance obligations in Texas lifted, policymakers in our state demonstrated an alarming eagerness to move forward both with new voting changes highly likely to impair underrepresented communities' civic participation, and to revisit old proposals already found to be discriminatory, but that were placed on hold. Preclearance coverage was effective in halting the use of many of these provisions *before* they could negatively affect minority voters in Texas. Currently-pending cases under the remaining sections of the VRA are proceeding slowly, and so far have not stopped troubling practices from taking effect, to the detriment of many of my constituents, as well as millions of Texans.

2013 – City of Pasadena

Recent developments in the city of Pasadena are particularly familiar to me, and of particular concern, because many of its residents are also my constituents. In Pasadena, the voting-eligible Latino population has grown exponentially in recent years. Today, just over one-third of Pasadena's potential electorate, and just over half of its adult population, is Latino. Given this increasing Latino presence, it is not surprising that Latinos have been elected to fill two of the eight single-member seats on the Pasadena City Council. The increasingly Latino face of Pasadena residents and governance has, however, sparked some apparent tensions. Facing a Latino majority, Pasadena's mayor Johnny Isbell unilaterally pushed a vote on a controversial plan to convert the city's method of election from eight single-member districts to six single-member districts and two at-large seats. The proposed change from eight to six single-member districts will reduce Latino voting strength in City Council elections. In describing the city, Mr. Isbell was quoted by the *Wall Street Journal* as stating, "The town's identity is plant workers . . . western . . . . It's a heritage that we are proud of." (See Attachment A).

The proposal had been discussed in Pasadena, but never implemented until, as the city's mayor said of conditions post-*Shelby County*, "The Justice Department can

no longer tell us what to do." (See Attachment B). The mayor pursued the change, despite receiving significant expressions of concern from residents in public hearings and in spite of a contrary recommendation by a Review Committee commissioned to study the proposal. The measure was approved by a very slim margin. In the course of public debate, the mayor reportedly expressed racially-themed concerns about the future makeup of a single-member city council. He also argued –without any support or factual validation—that the purported reason more Latino candidates were not elected to municipal positions was because 75% of Latinos in Pasadena were "illegal aliens."

Elections have not yet been held under the new hybrid election system, but there are ongoing community concerns about the new scheme. Four of the current city council districts contain Hispanic citizen-voting age population majorities. At least one incumbent Latino city councilmember may face a difficult re-election campaign in a reconstituted district, which is also home to a neighboring incumbent councilmember. The mayor recognized that Latino candidates of choice were on the cusp of becoming an effective majority of the council in Pasadena and as a way to dilute Latino political power he ramrodded this hybrid redistricting plan. Given racially polarized voting in Pasadena, it is unlikely that a candidate of the Latino community's choice would win a race for an at-large seat. The most likely consequence of the change – a reduction in Latino citizens' influence on elections and presence on governing bodies – combined with its timing and the racial element in related public debate make this a quintessential case for preclearance. (See Attachment C). In the absence of a fully functioning Voting Rights Act, this suspect change will proceed in the next year, with city council elections slated for May 2015.

2013 – Galveston County

In August 2013, Galveston County followed the state's lead in ceasing upon the *Shelby County* decision to move a controversial election change. The *Houston Chronicle* observed that Galveston County was, "the first Houston area government to take advantage of the June 25 U.S. Supreme Court decision to change an election law that otherwise might have been blocked by the Justice Department." (See Attachment D). County Commissioners moved quickly after *Shelby County* to adopt an initiative to reduce the number of justice of the peace and constable districts in the county from eight to four, similar to another change recently rejected for being discriminatory. No public hearings were held on the

topic. Both the rejected and enacted plans reduced the number of districts containing African American and Latino voter majorities. Incumbent officials and a resident challenging the move allege that the measure was adopted to intentionally limit African American and Hispanic voters', noting that the county went ahead with the change with full knowledge of its discriminatory effects.

2013 – Statewide Re-Implementation of Voter ID and Intentionally Discriminatory Redistricting Plan

On June 25, 2013, the Supreme Court announced the *Shelby County* decision, our state proclaimed its newfound ability to put into use the voter ID requirement and redistricting plan that had each been determined by a federal court to be discriminatory. On that very same day, our Attorney General celebrated, in tweets, that, "Eric Holder can no longer deny #VoterID in #Texas after today's #SCOTUS decision. #txlege #tcot #txgop" and "Texas #VoterID law should go into effect immediately b/c #SCOTUS struck down section 4 of VRA today. #txlege #tcot #txgop." The Attorney General also stated that day that, "Redistricting maps passed by the Legislature," meaning those rejected by the federal court in 2012 as intentionally discriminatory in part, "may also take effect without approval from the federal government."

While the Texas legislature ultimately adopted a new set of district plans, based on interim court-created maps that had replaced the intentionally discriminatory redistricting scheme, the state moved forward with its voter ID requirement that was found to be retrogressive in federal court. Mismatches between information in voter registration records and that appearing on IDs have been widely reported, and *The Dallas Morning News* concluded that use of provisional ballots skyrocketed in most of Texas's largest counties in November of 2013 when voter ID was first mandated at polling places. (See Attachment E). The full impact of the law on minority voter communities will become more apparent as Congressional and Presidential elections occur: the best available data on voter registration and turnout by race and ethnicity, from the Census Bureau's Current Population Survey, are collected only on these occasions, once every two years.

The following case examples are a non-exhaustive illustration of the forms in which Texans, including my constituents, have confronted voting discrimination in the immediate past.

Testimony of The Honorable Sylvia R. Garcia
June 25, 2014

Texas Statewide Violations

2001 – Statewide Redistricting

Following a significant increase in Texas's Latino population between 1990 and 2000, a redistricting plan was proposed for the state House of Representatives that would have caused a net loss of districts in which Latinos constituted a majority of registered voters, and in which registered Latino voters enjoyed a realistic opportunity to elect the candidates of their choice. This redistricting plan failed to win approval under the VRA because of its pointed, prospective negative impact on Texas minority voters.

2004 – Statewide Redistricting

Following rejection of discriminatory redistricting plans, the Texas Legislature was ultimately unable to agree on Congressional and statewide district maps post-2000 Census. The state moved forward with court-created maps; nonetheless, in 2004 the Legislature adopted yet another set of new maps to replace the court plan. As Supreme Court Justice Anthony Kennedy observed, "the State took away the Latinos' opportunity because Latinos were about [to] exercise it. This bears the mark of intentional discrimination . . . ." The Court required changes to be made to the state's new maps in order to eliminate the discriminatory impact on Latino voters.

2007 – Statewide Candidate Qualifications for Fresh Water Supply District Supervisors

The Texas Legislature adopted a change to qualifications required of candidates for fresh water supply district supervisor positions, mandating land ownership. The state failed to provide complete demographic information about affected districts and supervisors in the course of the preclearance process, but investigators determined that every incumbent supervisor who would have been prevented by the law from running for re-election because of lack of land ownership was Latino. Moreover, there were significant disparities throughout the state between Anglo and minority rates of land ownership that supported the conclusion that the rule was discriminatory and could not go into effect.

2011 – Statewide Congressional and Legislative Redistricting

In 2011, as our state undertook redistricting for Congressional and state legislative seats, the rapid Latino population growth described above had resulted in Texas gaining four additional seats in Congress. Yet the new district map ultimately approved by the Texas Legislature failed to create even one new district in which Hispanic or other minority voters were likely to have the opportunity to elect the candidate of their choice. A federal district court reviewing the plan found clear evidence that the maps had been enacted with intent to racially discriminate against Latinos and African Americans, pointing to email messages between legislative staff that revealed plotting to move important landmarks and actively voting minority communities from districts in which minority voters were previously able to exert notable influence. For as long as they remained in effect, preclearance procedures prevented use of district maps intended to diminish Latino and other voters' voices.

2011 – Statewide Voter ID

Texas recently adopted a particularly restrictive version of a requirement that voters provide one of a limited number of documents to prove their identity before voting. The law excludes some government-issued documents, such as student IDs, from the list of acceptable forms of proof. It also mandates "substantial" similarity between a voter's name as it appears on voter registration records and ID, a rule that has already caused complications and difficulties in voting for married and divorced women who have used various last names, and for Latino voters who alternately use one or both of their parents' last names. Moreover, reviewers found in 2012 that Latino and African American voters in Texas were not only less likely than others to possess the documentation they would need to vote under the law, but were more likely to face significant hurdles to obtaining ID. Latino Texan households, for example, are nearly twice as likely as white Texan households to lack access to a car, which is often needed to reach an ID-issuing location. As in the case of Texas's most recent statewide redistricting, preclearance procedures prevented this voter ID law from taking effect when they were in place.

Texas Political Subdivision Violations

2002 – City of Freeport

In the 1990s, a near-unbroken history of losses by Hispanic-preferred candidates and successful litigation resulted in Freeport's adoption of single-member city council districts. Under this new system, Hispanic-preferred candidates experienced increased electoral success, but a mere ten years later, the city tried to revert back to use of the at-large system that had put the city's minority voters at distinct disadvantage. Upon review, it was determined that racially-polarized voting persisted in Freeport, and would likely cause minority-preferred candidates to uniformly lose at-large elections. This change was rejected, and today Freeport has a Latina mayor and additional Latino representation on its city council.

2002 – City of Seguin

In 1978, Latino plaintiffs sued the city of Seguin for failing to redistrict after the 1970 Census. At the time, the city elected eight council members from four multi-member wards, and the city was 40% Mexican American and 15% African American, yet there had never been more than two minority candidates elected at once to the Seguin City Council. After protracted litigation the U.S. Court of Appeals for the Fifth Circuit required the redistricting plan to be precleared. Nevertheless, Seguin failed to redistrict after the 1980 and 1990 Censuses. By 1993, 60% of the city was minority, but only three of nine City Council members were Latino. Again, Latino plaintiffs won a settlement in 1994 resulting in the creation of eight single-member districts. Yet, following the 2000 Census, Seguin enacted a redistricting plan that fractured the city's Latino population across the districts to maintain a majority of Anglos on the City Council. Seguin amended the plan, following Department of Justice (DOJ) objection, but proceeded to close its candidate filing period so that the Anglo incumbent would run for office unopposed. Latino plaintiffs sued and secured an injunction under Section 5 of the VRA. A new election date was set as part of a settlement agreement, and today, a Latino majority serves on the Seguin City Council. The persistence of the opposition to minority voting power in Seguin presents powerful evidence that the equality principles protected by the VRA would not be vindicated in Texas absent vigilant enforcement of a fully functioning Voting Rights Act.

2006 – North Harris Montgomery Community College District

Officials proposed significant changes to the conduct of elections for seats on the North Harris Montgomery Community College District, located in The

Woodlands, Texas. The changes would have drastically reduced the number of polling places, and created a bifurcation of the community college district and school board elections that would have required voters to make two different trips to vote for candidates for the leadership of both bodies. Emblematic of the disproportionate negative effect these changes would have had on minority voters was the finding by reviewers that, "the [polling] site with the smallest proportion of minority voters will serve 6,500 voters, while the most heavily minority site (79.2 % black and Hispanic) will serve over 67,000 voters." The preclearance process stopped these changes from being implemented.

2007 – Waller County

Waller County is home to Prairie View A&M, a historically black university whose student population accounts for a considerable portion of the county's voting age population. Many of these students typically registered to vote with the assistance of designated volunteer deputy registrars. In 2007, the county changed its criteria for acceptance of registration applications submitted by volunteer deputy registrars, adding several conditions to the list of factors that would result in rejection. The county refused to seek preclearance, despite its obligation to do so. These changes threatened to impair registration of predominantly African American Prairie View A&M students. In settlement of a Section 5 action, the County agreed to stop applying its new criteria for rejection, and to register those applicants who were wrongfully rejected.

2008-09 – Gonzales County

Today, approximately 15% of the adult population in Gonzales County is estimated to be not fully fluent in English, according to the Census Bureau. The County adopted bilingual election procedures in 1976, but attempted to gut them in 2008 and again in 2009. In attempting to gain approval of a plan to reduce assignment of bilingual pollworkers and to use a computer program such as Google Translator to produce bilingual materials, the county election official was quoted in local press as wildly speculating that, "language minority voters are not citizens if they do not speak English." The proposed reductions in language assistance were stopped because of preclearance procedures.

2010 – Runnels County

Like Gonzales County, Runnels County, Texas abruptly changed its long-standing Spanish-language election procedures for the November 2008 general and November 2009 statewide constitutional amendment elections, despite 38% of Hispanic voting-age citizens speaking English less than very well. DOJ interposed an objection to the county's 2008 and 2009 oral assistance procedures. Specifically, half the county voting precincts did not have a bilingual poll worker in 2008 and no precincts had one in 2009, and the county only had one on-call bilingual assistor available by phone that received no calls for assistance in years. The county did not test the Spanish-language proficiency of its bilingual poll workers or provide training for the assistors. Runnels County failed to provide data to demonstrate that the reduction in quality and quantity of oral assistance procedures did not have a retrogressive effect, or even dispute the changes were not motivated, in part, by discriminatory purpose. But for a fully functioning Voting Rights Act, Runnels County would have abandoned its obligation to Latino voters needing language assistance at the polls.

2011 – Nueces County

Nueces County has experienced notable growth in its Latino population and decline in its white population over the past 20 years. Shifting demographics resulted in a Commissioner's Court that for some time had a majority of Hispanic candidates of choice. However, just before post-2010 Census redistricting was to occur, close contests resulted in the election of a majority of Commissioners favored by white voters. These Commissioners were responsible for a 2011 redistricting plan that was determined to "have been undertaken to have an adverse impact on Hispanic voters," according to the DOJ, and to preserve the new majority on the Commissioner's Court, preferred by a majority of white voters. County officials failed to offer reasonable non-discriminatory justification for their district boundary-drawing decisions, and the Commissioner's Court redistricting plan was rejected.

2011 – City of Galveston

Galveston moved to alter the method by which it elects candidates for municipal offices multiple times. In 1993 the city agreed to adopt single-member districts, but just five years later, in 1998, it attempted to revert back to a hybrid single-

member/at-large system that had previously been rejected as discriminatory. Once again in 2011 the city sought to eliminate some single-member districts of the city council, but was stopped because reviewers concluded that the proposed new district plan would have eliminated minority voters' opportunity to exert meaningful influence on elections for at least one seat. The city did not provide any justification for its repeated attempts to eliminate single-member districts, and was adjudged to have failed to prove that its actions were not motivated by discriminatory intent.

2011 – Galveston County

In the same year the city of Galveston pursued at-large elections, Galveston County adopted a redistricting plan for County Commissioner's Court precincts, and a proposed reduction in the number of constable and justice of the peace seats in the county. Unlike in previous years, the County avoided adopting criteria to guide the redistricting process; the Commissioner's Court also specifically avoided notifying its one minority member in advance that a map that would significantly reduce the minority population in that member's precinct would be considered and voted upon. In addition, the proposed elimination of constable and justice of the peace positions would have reduced the number of seats to which minority voters could elect candidates of choice from three to one. The timing of the change – virtually as soon as a previous court order requiring expansion of opportunities for minority voters expired – was not lost on reviewers who noted, "A stated justification for the proposed consolidation was to save money, yet, according to the county judge's statements, the county conducted no analysis of the financial impact of this decision." Both proposed changes failed to pass muster as having been adopted without discriminatory purpose.

2011-13 – Beaumont Independent School District

The African American population of the city of Beaumont is slightly larger, but votes in slightly smaller numbers, than its white population. In 2011, citizens of Beaumont approved along racially polarized lines an initiative to convert from electing seven members of its school board from single-member districts to a "5-2" plan in which two of the seven seats would be elected at-large, by the entire electorate of the city. It was determined that this change would be discriminatory, and the "5-2" plan was blocked through the preclearance process. Soon after this occurred, the three sitting African American members of the school board, who

were not up for re-election until 2015, were challenged pursuant to proposed changes to terms of office, election date, and candidate qualification procedures. These changes would have resulted in the effective and seemingly targeted removal of all three African American school board members, who received no advance notice that an election would be held in their districts, or of requirements for qualifying for re-election. Accordingly, they were prevented from taking effect.

Texans Need a Modernized Fully Functioning Voting Rights Act

The Voting Rights Act provisions that remain in effect today are not enough to meet the significant task of enforcing equal voting rights in Texas. As the numerous examples presented in this testimony demonstrate, municipalities and state officials in Texas continue to adopt laws and policies that selectively impose challenges for minority voters, and disproportionately reduce the value of their votes. Texas has surpassed and continues to outpace every other state in enacting discriminatory voting policies, and must be subject to the strongest protections we can devise.

For nearly fifty years, preclearance procedures did the best job possible of subverting gamesmanship and evolving tactics that denied and limited the minority vote. Preclearance was uniquely effective in preventing discrimination from becoming standard practice and from further diminishing minority voters' opportunities and participation rates in the places – like Texas – with the most egregious patterns of treating voters differently based on their race, ethnicity, and linguistic ability. For instance, Texas withdrew far more requests for approval of proposed voting changes after being asked for further clarifying information than any other jurisdiction between 1982 and 2005. These withdrawals included at least fifty-four instances in which the State canceled discriminatory voting changes after it became evident they would not be precleared. I fear the state legislature will follow with similar actions that could have a discriminatory impact on minority voters, in the absence of the deterrent effect of Section 5 of the VRA. Previous legislation has included residency requirements for voter registration, proof of citizenship for voter registration, reduced early-voting periods, and restrictions on third party voter registration efforts.[1]

[1] *See generally* Tex. H.B. 148, 83d Leg., R.S. (2013); Tex. H.B. 927, 83d Leg., R.S. (2013); Tex. H.B. 966, 83d Leg., R.S. (2013); Tex. H.B. 3074, 83d Leg., R.S. (2013); Tex. H.B. 174, 82d Leg., R.S. (2011); Tex. H.B. 47, 81st Leg., R.S. (2009); Tex. H.B. 157, 81st Leg., R.S. (2009); Tex. H.B. 208, 81st Leg., R.S. (2009); Tex. S.B. 268, 81st

The Voting Rights Act without preclearance cannot meet the needs to combat the vestiges of discrimination in a state like Texas. Section 5 is the most efficient means of alternative dispute resolution of contested voting changes. The revival of several discriminatory initiatives in Texas post-*Shelby County* conclusively establishes the fact that in the absence of a fully functioning Voting Rights Act problematic laws will slip through cracks. We are left with protracted and expensive litigation as the only remaining method of attack against a discriminatory voting change. Litigation imposes a greater burden on everyone concerned, including plaintiffs, defendants, and affected voters and candidates whose fate hangs in the balance, than does administrative review under the preclearance process.

The Voting Rights Amendment Act, S. 1945, proposes solutions to the present gaps in voter protection that are well-tailored to Texas voters' needs. In addition to preclearance coverage, this legislation would increase transparency around election policymaking, redressing the pointed secrecy that has often been used in Texas to limit minority communities' input and obscure suspect changes. By expanding opportunities to send neutral federal observers to monitor compliance with obligations to provide bilingual assistance at the polls, the Voting Rights Amendment Act would reveal those shortcomings that have impaired and frustrated thousands of Latino and other language minority voters. This has been the case in at least ten Texas jurisdictions that have settled charges of violating language assistance requirements in the past 15 years. Additional provisions would give federal courts more discretion to apply pre-emptive protections where warranted. In sum, the Voting Rights Amendment Act would provide effective checks against the kinds of rampant discriminatory actions described herein, and I implore you to take action to restore teeth to and modernize the Voting Rights Act and advance this legislation.

I will conclude by quoting the words of President Lyndon B. Johnson in his Voting Rights Act address before a joint session of Congress on March 15, 1965:

Leg., R.S. (2009); Tex. S.B. 363, 81st Leg., R.S. (2009); Tex. S.B. 391, 81st Leg., R.S. (2009); Tex. H.B. 1143, 81st Leg., R.S. (2009); Tex. H.B. 101, 80th Leg., R.S. (2007); Tex. H.B. 600, 80th Leg., R.S. (2007); Tex. H.B. 626, 80th Leg., R.S. (2007); Tex. H.B. 979, 80th Leg., R.S. (2007); Tex. H.B. 1146, 80th Leg., R.S. (2007); Tex. H.B. 1462, 80th Leg., R.S. (2007); Tex. H.B. 1463, 80th Leg., R.S. (2007).

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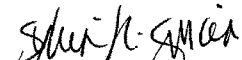
> "Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books—and I have helped to put three of them there—can ensure the right to vote when local officials are determined to deny it.
>
> In such a case our duty must be clear to all of us. The Constitution says that no person shall be kept from voting because of his race or his color. We have all sworn an oath before God to support and to defend that Constitution.
>
> We must now act in obedience to that oath."

Thank you for the opportunity to testify today.

Respectfully Submitted,



The Honorable Sylvia R. Garcia
Texas State Senate, District 6

Enclosed Attachments (5):

A. Voting-Rights Fights Crop Up, *Wall Street Journal*, Nov. 1, 2013.
B. All in With Chris Hayes, *MSNBC*, Nov. 8, 2013, pages 6-9.
C. Plans to Redistrict Pasadena City Council, *Houston Chronicle*, Aug. 15, 2013.
D. Suit Blasts Galveston Judge Plan as Biased County Commissioners Are Trying to Cut Number of Justice of Peace Courts, *Houston Chronicle*, Aug. 27, 2013.
E. Voter ID Woes Could Soar in Higher-Turnout Elections, Officials Fear, *Dallas Morning News*, Nov. 24, 2013.

Attachment A

LexisNexis

Voting-Rights Fights Crop Up; Court Ruling Opens Door for Redistricting by Cities-and Suits by Minorities

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Body

PASADENA, Texas-When ***JohnnyIsbell*** first became mayor here in the early 1980s, Hispanics were a minority in this refinery town, famous as the setting for the movie "Urban Cowboy."

Now the Houston suburb is more than 60% Hispanic and Mexican ballads are sung here as often as "Lookin' for Love" from the 1980 film. Gilley's honkytonk bar here burned down more than 20 years ago.

Mr. Isbell, again the mayor, believes it is high time for voters to eliminate two of the city's eight City Council districts, all of which were created to help ensure that Hispanics had a voice in politics, and replace them with two council seats elected citywide. He said the move, on the ballot here Tuesday, would result in more local leaders focused on the good of all of Pasadena.

"They don't care about citywide issues," said the 75-year-old Mr. Isbell of council members chosen to represent sectors of the city.

Until recently, Mr. Isbell's proposal would have required approval from the U.S. Department of Justice under the Voting Rights Act. The department screened revisions to local political districts in mostly Southern regions where discrimination historically had taken place, to ensure that minorities weren't disenfranchised.

But the U.S. Supreme Court ruled this summer that such oversight is no longer necessary, because minorities have made strides since passage of the 1965 law. That opened the door to change in cities such as Pasadena-and spurred new debates about what constitutes fair political representation.

In southeast Texas alone, legal challenges to redrawn voting maps in Galveston County and Beaumont have been complicated by the Supreme Court's ruling, which stemmed from a case involving Shelby County, Ala. The moves are being challenged by minority residents, who claim they would decrease the number of minority officeholders.

Other election changes have taken place in the South following the court decision, ranging from measures by counties to move polling locations in places with large minority populations to statewide laws, like one recently passed in North Carolina, that impose stricter identification requirements for voters.

"Before Shelby County, Galveston had the burden of showing what they were doing was not discriminatory," said Chad Dunn, a lawyer representing minority residents who filed a suit in federal court to block the county's redistricting proposal. "Now, we have the burden."

Joseph Nixon, a lawyer who represents Galveston County in the suit, said the maps were redrawn to eliminate certain unnecessary judicial positions and wouldn't dilute minority voting power.

Voting-rights experts expect the disputes to continue, especially in municipalities that previously were subject to federal oversight under the Voting Rights Act.

In Arizona after the ruling, state Attorney General Tom Horne, a Republican, gave the go-ahead to a redistricting plan for the Maricopa County Community College District that previously had been subject to federal review. Critics of the plan to add two at-large seats to the district's board say it could lead some parts of the region to end up with more representatives than others.

"The likelihood is very much there that it will work against minority representation," said Ben Miranda, one of five existing board members. Mr. Horne's office declined to comment.

In Pasadena, which has a population of roughly 150,000, some residents say special election protections for minorities are no longer necessary due to the city's Hispanic majority. But others say the changes in the city's racial composition haven't yet changed politics due to a lack of voter participation by Hispanics.

More than 55% of Pasadena's ***voting***-age population is ***Hispanic***, but people with a Spanish surname, a proxy for those of ***Hispanic*** origin, represent only around 35% of the registered ***voters***, according to city data.

"It doesn't punch its weight," said Walter Wilson, a political-science professor at University of Texas, San Antonio, of the minority electorate in general.

Pasadena elected all City Council members citywide in 1981, when Mr. Isbell, who has been elected to a total of five four-year terms, first became mayor. A decade later, local activists sued the city, seeking council districts to ensure representation for the growing Hispanic community. The tension was defused a year later, when city leaders moved to create council seats by geographic region.

The proposal before voters on Tuesday would turn two of the eight council seats back into citywide positions, and redraw the remaining six geographic districts to represent regions of the city.

Supporters say the change would unify the council and focus its attention on economic opportunities around Pasadena, including a new cruise-ship terminal and an entertainment district that could include a new version of Gilley's, the rollicking bar that put Pasadena on the map in "Urban Cowboy," starring John Travolta as a refinery worker.

"The town's identity is plant workers...western," said Mr. Isbell, as he swayed on a rocking chair in his office. "It's a heritage that we are proud of."

Opponents say the change would dilute Hispanics' voting power and make it harder for them to voice their needs, such as sprucing up the city's faded, heavily Hispanic north side.

"This city is no longer a Gilley's town," said Councilman Ornaldo Ybarra, 34, who keeps a bobble-head doll of President Barack Obama on his desk.

Mexican flags fly alongside American flags nowadays at Pasadena's car lots, and Hispanic businesses have taken over entire strip malls, including one that houses Cinema Latino, which mostly shows movies subtitled in Spanish and serves tamarind and hibiscus drinks along with Coke.

In a tiny storefront next door to the theater, Jorge Armando, a 32-year-old from the Mexican state of Puebla, sells CDs with music spanning his native country. He said that when people like him can vote-Mr. Armando is a permanent resident seeking citizenship-"things will be very different" for Hispanics in the U.S.

In the meantime, Cody Wheeler, a recently elected council member whose family hails from Mexico, is knocking door to door to urge those who are eligible to vote against the mayor's proposal on Tuesday. Overall turnout in Pasadena is regularly less than 10%.

"We're doing everything in our power to engage the electorate," said Mr. Wheeler, who won his seat last May by 33 votes.

He hadn't convinced Iris Gutierrez, 18, a college student, who could legally vote, but chose not to register because she feared she would be called for jury duty.

"I don't have much interest in it," she said of Tuesday's election.

Write to Ana Campoy at ana.campoy@wsj.com and Nathan Koppel at nathan.koppel@wsj.com

Notes

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ALL IN WITH CHRIS HAYES for November 8, 2013

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Highlight: CBS News is retracting, apologizing for and plans to correct a story it broadcasts on "60 Minutes" about the attack on the U.S. consulate in Benghazi, Libya, that killed four Americans last year. The city of Pasadena, Texas, is attracting attention for one thing related to their government, their effort to suppress the Latino vote.

Body

CHRIS HAYES, MSNBC HOST: Good evening from New York. I'm Chris Hayes.

We begin with a story that has refused to go away and not because of the facts involved, but because of the concerted effort on the right to stoke scandal at any cost.

Tonight, CBS News is retracting, apologizing for and plans to correct a story it broadcasts on its crown jewel program "60 Minutes" about the attack on the U.S. consulate in Benghazi, Libya, that killed four Americans last year -- a story it broadcasts using a government contractor who claimed to be an eyewitness to the attack, but who it appears was not in fact where he said he was on the night in question. The so-called eyewitness did not apparently see the events he claimed to describe.

On "CBS This Morning", "60 Minutes" correspondent Lara Logan acknowledged the mistake.

(BEGIN VIDEO CLIP)

LARA LOGAN, "60 MINUTES" CORRESPONDENT: You know, the most important thing to every person at "60 Minutes" is the truth. And today, the truth is that we made a mistake. And that's very disappointing for any journalist. It's very disappointing for me.

Nobody likes to admit they made a mistake, but if you do, you have to stand up and take responsibility, and you have to say that you were wrong. And in this case, we were wrong.

(END VIDEO CLIP)

HAYES: The explosive charge in Logan's original report was that there was an eyewitness account from a British security contractor named Dylan Davies who used the pseudonym Morgan Jones, who claimed the U.S. could have sent back-up to the besieged facility because he himself was able to go enter it and do battle with the bad guys.

(BEGIN VIDEO CLIP)

LOGAN (voice-over): Morgan Jones scaled the 12-foot high wall of the compound still overrun with al-Qaeda fighters.

MORGAN JONES, CONTRACTOR: One guy saw me. He just shouted, I couldn't believe that it's him because it's so dark. He started walking towards me.

LOGAN: And as he was coming closer --

JONES: I just hit him with the butt of the rifle in the face.

LOGAN: And no one saw you do it?

JONES: No.

LOGAN: Or heard it?

JONES: No, there was too much noise.

(END VIDEO CLIP)

HAYES: To a Benghazi scandal fire that was finally in its dying embers, the "60 Minutes" report was a gallon of gasoline.

The next morning, the FOX News tour began featuring Steve Doocy and Senator Lindsey Graham.

(BEGIN VIDEO CLIP)

STEVE DOOCY, FOX NEWS: CBS did this story on Benghazi and I see criticism from the left where they go, you guys are covering a phony scandal. "60 Minutes" doesn't cover phony scandals.

SEN. LINDSEY GRAHAM (R), SOUTH CAROLINA: If we don't have a joint select committee to get out of this stove-piping problem, we're never going to get the truth. And where are the survivors? Fourteen months later, Steve, the survivors, the people who survived the attack in Benghazi, have not been made able to the U.S. Congress for oversight purposes.

So I'm going to block every appointment in the United States Senate until the survivors are being made available to Congress. I'm tired of hearing from people on TV and reading about stuff and books.

(END VIDEO CLIP)

HAYES: Because of the "60 Minutes" segment, Senator Lindsey Graham was going to block every appointment made by the president.

But even then, that day, even on that Monday, it was apparent that the so-called eyewitness may have had some pretty questionable motives. Media Matters founder David Brock on our show that night disclosed that even FOX News itself was evidently weary of using Dylan Davies as a source.

(BEGIN VIDEO CLIP)

DAVID BROCK, MEDIA MATTERS: And the other witness appears to be some type of British mercenary who apparently in conversations with FOX News, asked for money to talk and so, you know, FOX News even drew a line there, but it was good enough for CBS.

(END VIDEO CLIP)

HAYES: It turns out, CBS was also publishing Davies book, through its company Simon & Shuster, the connection "60 Minutes" did not disclose during that original report.

As for Davies, while FOX News may have shied away from him because he asked for money, it didn't stop the very same FOX News from running more than 13 segments over 11 different shows inspired by the CBS report. The right's delight at mainstream validation of their own pet obsession was even comically evident at a campaign rally for the now defeated Virginia gubernatorial candidate, Ken Cuccinelli, a week before Tuesday's election.

Cuccinelli's warm-up act for stoking the crowd in Benghazi, including Congressman Frank Wolf.

(BEGIN VIDEO CLIP)

UNIDENTIFIED MALE: The man who was going to get to the bottom of what's going to happen in Benghazi.

Thank you, Jeremiah. I appreciate that introduction, and we are going to get to the bottom.

(CHEERS)

And if anyone watched "60 Minutes" last night, you can see why we need a --

(END VIDEO CLIP)

HAYES: Then, last Thursday, "The Washington Post" reported that Davies account to "60 Minutes" and the story in his book were different from an incident report he himself filed with his employer, but Blue Mountain Security.

But CBS News stood by their story, continued to defend it, despite multiple queries. CBS News chairman and "60 Minutes" executive producer Jeff Fager said he was proud of the program's reporting on Benghazi and, quote, "confident the source told accurate versions of what happened that night.

But the bottom fell out yesterday when "The New York Times" reporter that Mr. Davies told the FBI he was not in fact on scene until the morning after the attack.

(BEGIN VIDEO CLIP)

LOGAN: What we now know is that he told the FBI a different story and that was the moment for us, when we realized that we no longer had confidence in our source and that we were wrong to put him on air and we apologized to our viewers. We will apologize to our viewers and we will correct the record on our broadcast on Sunday night.

(END VIDEO CLIP)

HAYES: Joining me now is Bill Carter, a reporter for "The New York Times", who covers the television industry. He wrote "The Times" story on this today.

Bill, my head's spinning. How did this happen?

BILL CARTER, THE NEW YORK TIMES: Well, I think it happened because CBS was looking to get a new angle on the story. They got a book and in the book, this security man claimed that he was there and went through what they considered a betting process and decided he was credible and put him on the air. I think they needed a new angle because I don't think they had a lot of other new material in that report.

So, they really needed this guy to be truthful and they were in the middle of this situation where you know, he was saying one thing to his boss and a different thing to them, but it was a credible reason for that, because he had left his villa when he was supposed to not go to the scene, and what he told was a dramatic story and that added a lot of drama to what CBS wanted to report.

HAYES: What's interesting to me is that even when the issues start to be raised about his credibility, Media Matters is raising issues, then on Thursday, there's a "Washington Post" report, you know, it follows this kind of classic cycle, which is ignore, deny, double down, and then eat crow.

CARTER: Yes. And I spoke to Lara Logan before it blew up and she was very adamant about how credible this guy was.

HAYES: She was adamant about how credible he is to you when you talked to her?

CARTER: Yes, she said she believed in what he said and she didn't think he had given two versions and the FBI report would prove that. That he gave the same report to the FBI that he gave to CBS. And so, that became really the critical aspect of, with the FBI report corroborates it.

HAYES: So, you got two versions of the event, you got the diversion of event, the incident report, I stayed in my villa, I wasn't there the night I said I saw these dramatic things. You have what he told the CBS cameras and the audience of "60 Minutes", and the tiebreaker was what did he tell FBI, and the tiebreaker goes to he was not there.

CARTER: And it turns out he gave three interviews to the FBI. They interviewed him three separate times. And, you know, each occasion, he told the story the way it came out in the incident report. He stayed at the villa, he didn't go to the scene.

I spoke to CBS about that last night and they were obviously taken aback by that. They then spent the next couple of hours themselves checking with their FBI sources and by this morning, they had gotten the same report we had, which is that the FBI version was not their version.

HAYES: I want to bring in Eric Boehlert, senior fellow at Media Matters for America, Steven Reiner, former producer for "60 Minutes" and CBS, now director of broadcast and digital journalism at Stony Brook University

Eric, well, you guys -- I mean, in some ways, this is not to be uncharitable here, but I'll tell the truth. This is a little over- determined in the case of Media Matters, like you guys are a liberal group. You fact check conservatives, conservatives obsessed with Benghazi, people might say maybe people like to say, well, Media Matters stopped clock being right, you know, twice a day.

But, you guys were right about this.

ERIC BOEHLERT, MEDIA MATTERS: No, we have been right about Benghazi for 13 months. I mean, we have been fact checking the story to death, and when CBS decided we want to piece of that pie, we want a piece of that right wing media narrative, there are lingering questions when there are none, when this story has been exhaustively researched by Congress. Military have talked about what the reinforcement responsible was.

When they decided to sort of key into that buzz machine, you talked about you know, FOX News the next day for an hour, the senator talking about it. What's the number one way to know you hit a home run? The next day, a senator's talking about your story.

They knew it was all predetermined. They couldn't resist it. The story didn't add up. There were no lingering questions.

The conflicts of interest should have stopped them. The discrepancies in the narrative should have stopped them. They should have apologized a week ago.

This whole thing is a train wreck, conception, execution, denial.

HAYES: I want to make clear here, Steven, I don't want to like put a dagger in "60 Minutes." I have tremendous admiration for "60 Minutes". I really do. It's incredible franchise. It's incredible they do the journalism they do. That they get the ratings they do. That they produce the profit they do.

In some ways it's like a miracle it exists in television journalism, which I think is why all of us take it so seriously. What is it like in that building today?

STEVEN REINER, FORMER CBS "60 MINUTES" PRODUCER: It's obviously a very, very difficult day for everyone there, but my question is how much real self-examination is being done there. I watched Lara this morning on CBS this morning and even though there was an apology, and even though it was borderline mistakes were made, I don't believe there was still an adequate explanation of just what kind of vetting really was done, at the end of the day.

Journalism 101, you have a single source.

HAYES: Yes, exactly.

REINER: And you have --

HAYES: The most dangerous thing in the universe.

REINER: And you have a single source who is a self-interested source because the source is trying to sell books. Then, you have a story, which is a political hot potato, which can be red meat to certainly one side of the argument and it seems to me that raises the bar and makes it more crucial that you do your due diligence.

And I didn't hear anything in the explanation of what we did to vet that leads credibility to can be red meat to certainly one side of the argument we were fooled. You shouldn't have been fooled.

HAYES: So, the Boehlert piece is here, right, is that this was basically, you see this story, you think this is going to light up the right.

BOEHLERT: It did.

HAYES: And it did and it's also like a box for us to check the next time we're accused of liberal media. Remember, we did that Benghazi story.

Just so folks understand the universe this is coming out, Threshold is the imprint of Simon and Shuster, that was publishing the book, although it has now been recalled. Being pulled out of -- we're trying to get video of them packing up the books. That would be a good --

CARTER: By the way, that's a CBS decision.

HAYES: Right, that's a CBS decision, its' getting pulled from the top.

Now, Threshold is a conservative imprint that publishes books by Glenn Beck, Sarah Palin, the book, "Censorship: The Threat to Silence Talk Radio", Mark Levin. I mean, that's the world this story is coming out of. Those are some red flags.

BOEHLERT: Yes. You know, they wants to key into it, like I said, there's an automatic audience there. But when you're going to wade into that, you have to be careful. You cannot stain your reputation just because you want to sort of fuel this.

One other quick point, after the National Guard story, you know, 2004, "60 Minutes," their last real huge embarrassment, they appointed a panel. Came outside, did lots of interviews, hired lots of lawyers and looked at this. I don't see, if they did that for that, how do they don't --

HAYES: I want to talk about that. Mary Mapes, who is famously Dan Rather's producer on the story of the National Guard documents, which were forged documents about President George W. Bush's record in the National Guard, famous Rather-gate scandal.

Mary Mapes had this to say, "My concern is the story is done very pointedly to appeal to more conservative audience's beliefs about what happened at Benghazi. They appear to have done the story to appeal specifically to political conservative audience obsessed with Benghazi, believes that Benghazi is much more than a tragedy".

You can't avoid the parallels here, Bill.

CARTER: Well, you can't avoid them because everybody's going to think of it.

I mean, I do think -- to me, this is a far lesser scandal because I don't see this as people aren't doing this sort of in a presidential election, trying to influence voting, et cetera. I think, I may be wrong, but I think people have to step back and say, look, there's a lot of agendas that were being played out here.

You're saying CBS wanted to court the right or whatever.

HAYES: Well, I was saying, I call it the Boehlert piece.

CARTER: OK, that's (INAUDIBLE).

But my sense is they were wanting to do something on Benghazi, spent a lot of time doing it and didn't have a lot. And then this guy's book showed up. That's what I think. That's my guess.

REINER: It was a mini perfect storm. They needed to inject a big B12 shot into that Benghazi story.

(CROSSTALK)

REINER: One of the things we try to tell some of our students is how to watch television and be aware this that fellow's story, had nothing. I mean, in essence, had nothing to do with the same old story they were telling in the rest of the piece. This was a little bit of smoke and mirror -- let's inject a dramatic, heroic story, and somehow we'll give the rest of it deeper meaning.

CARTER: I want to say one thing. Getting involved in this, you then see the impact, because the State Department didn't like this at all. They didn't like this at all. And they kind of went after this guy. They wanted to go after.

And so, reporting on this is a minefield. It's a minefield.

HAYES: Right. And what I don't want to happen is to, well, if something is an ideological minefield, let's not step into it.

What does have to happen --

(CROSSTALK)

BOEHLERT: How about debunking it?

HAYES: Or just do diligence and put up what appears to be a fabricator and put the credibility of the crown jewel of CBS News on the line.

Bill Carter from "The New York Times", Eric Boehlert from Media Matters, Steven Reiner from Stony Brook University -- thank you all really.

Coming up, this is the city of Pasadena's Web site. See here where it says we have the kind of community, culture and responsiveness that are attracting attention. They are attracting attention for one thing related to their government. Their effort to suppress the Latino vote.

Why a Texas ballot initiative was the most important election of the week you haven't heard about, coming up.

HAYES: Later on the show, we're going to talk about Jonathan Martin, a Miami Dolphins offensive lineman who was allegedly bullied so mercilessly, he left the team. Sadly, Martin's experience is not unique. Extreme locker room hazing is pretty uncommon.

So, on a more sober note, tonight, I want to know, what questions would you ask someone who spent a lot of time in an NFL locker room? Tweet your answers @allinwithchris, or post to Facebook.com/allwithchris. I'll share a couple later in the show when we talk to someone who was in an NFL locker room for 12 years.

Stay tuned. We'll be right back.

HAYES: Earlier this year, the Supreme Court dealt the Voting Rights Act its most devastating blow in the 48 years since its enactment, when by a 5-4 vote, it suspended the important enforcement of the crucial section five of the act. It got a very core of the law and it meant that nine states would be free the change their election laws without getting preclearance approval from the federal government.

We've been talking for months about the potential and likely ramification of this decision and this week, we saw it play out in dramatic fashion on Election Day in one city in Texas.

(BEGIN VIDEOTAPE)

HAYES (voice-over): Pasadena, Texas, a suburb of Houston, sometimes calling stinkadina from the smell of its chemical plants and oil refineries, home of 150,000 people, and the setting, the iconic film, "Urban Cowboy".

UNIDENTIFIED MALE: Cowboy?

UNIDENTIFIED MALE: Depends on what you think a real cowboy is.

HAYES: But like a lot of Texas towns, Pasadena has changed radically since the days when John Travolta walked the streets in a 10 gallon hat.

UNIDENTIFIED FEMALE: Pasadena not longer a small town, but a not so small city.

HAYES: The changes come in the last ten years thanks to growth in the Hispanic population, which has risen from 48 percent to 62 percent, making white people a minority in the new Pasadena.

Luckily for them, they are still a majority of the ***voting*** population. While the ***Hispanic*** population accounts for a majority of Pasadena residents, Hispanics make up only 32 percent of the city's voters, but the people who are running Pasadena see the writing on the wall. They know there are only a few voter registration drives and maybe a comprehensive immigration reform bill away from being relegated to minority status.

So, this summer, Pasadena Mayor ***JohnnyIsbell*** came up with a plan. Right now, the city is run by maybe and eight council members. Each member is elected from one of eight districts each representing a section of the city.

And for the first time in the city's history, there are now two Hispanics on the council. One is Cody Ray Wheeler.

CODY RAY WHEELER, PASADENA CITY COUNCIL MEMBER: We kind of came in there, looking to bring change, reform, to really engage in the community and we've called the mayor out on a lot of things we thought weren't very honest.

HAYES: In August, Isbell started pushing a plan to shrink the number of districts from eight to six, and replace those two with at large seats to be voted on by everyone in Pasadena, and by everyone, we mean the town's white voting majority.

WHEELER: He decided to make a full power grab and he didn't care who you'd have to step over to get it.

HAYES: To the community, the goal of the plan was pretty clear.

PATRICIA GONZALES, PASADENA RESIDENT: I think what he's trying to do is trying to stop us from being able to get the things we need and be able to be the majority. He doesn't like it.

HAYES: Dilute the power of the ***Hispanicvote*** and hand two council seats to the majority white voting population. Ensuring the citywide, majority white population could band together and retain their power.

WHEELER: What this effectively does is give the south part of town the majority of council.

HAYES: It turns out this is precisely the sort of thing section five of the Voting Rights Act was designed to block. In fact, Supreme Court Justice Ruth Bader Ginsburg cited this precise type of discrimination from a pre-section five world when a Voting Rights Act came before the court earlier this year.

RUTH BADER GINSBURG, SUPREME COURT JUSTICE: These second generation barriers included racial gerrymandering, switching from district voting to at large voting.

HAYES: Did you hear that? At large voting -- it's the oldest trick in the book and it's so immediately recognizable that when a neighboring Texas town of Beaumont cooked up a similar at large plan, it was blocked by the Justice Department in December of 2012.

But then, the Supreme Court killed section five of the Voting Rights Act in their 5-4 decision in Shelby v. Holder. And the mayor of Pasadena, ***JohnnyIsbell*** made his move.

WHEELER: He blatantly said at the first meeting we had, now that the preclearance from the Voting Rights Act is gone, we're going to redistrict the city.

HAYES: In the mayor's own words --

MAYOR ***JOHNNYISBELL***, PASADENA: The Justice Department can no longer tell us what to do.

HAYES: So, this summer, Isbell arguing that certain council members don't care about citywide issues, moved to put his own at large plan on the ballot.

WHEELER: The mayor's quite aware of what this does, but he just seems to not care.

HAYES: On Tuesday, the folks of Pasadena went to vote on proposition one and the majority won by a margin of 87 votes. Now, that section five is dead, there are thousands of potential Pasadenas all across the South.

(END VIDEOTAPE)

HAYES: We should note that Patricia Gonzalez who we spoke to in that report is a resident of Pasadena, also community activist with the Texas Organizing Project.

Joining me now is Julie Fernandes, former deputy assistant attorney general in the civil rights division of the Department of Justice, now, a senior policy analyst at the Open Society Foundations.

All right. You used to work at a desk, getting applications from places that wanted to do changes like this. How common or anomalous is the story of Pasadena?

JULIE FERNANDES, OPEN SOCIETY FOUNDATIONS: Well, I think changes to the method of election are actually the second most common type of voting change, that drew objections during the days of section five, so they were ones that often got a lot of scrutiny because you always have to ask the question why and assess the impact in the way your piece described.

HAYES: I think what's interesting about this story, (a), if I'm not mistaken, the Shelby County case that came before the court that initiated the court striking down was not dissimilar case. It was actually a change to the gerrymandering of a district of a relatively small town.

And what I think is interesting is we talk about voter ID and stuff happening at the state level. There is a lot of stuff that happens at the municipal level where these fights can get really nasty, and when the stakes are high -- property taxes, school equity, things like that that we don't necessarily see from the national level.

FERNANDES: That's part of what we lost here when we lost section five, is we lost the ability to know about this stuff. Everybody's going to know about statewide redistricting, everybody is going to know about statewide law changes. But places like Pasadena, Texas, or little towns, Clara, Alabama, Shelby County, all over the country, they're going to be doing things to manipulate the system, things that sort of define who the electorate is for their advantage, that has a significant minority impact and we're just not going to know about it because we don't have section five.

HAYES: Just so people can see in that map, these are the entire states that were formerly subject to preclearance which (INAUDIBLE). They range from Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia.

Talk to me about the case of Beaumont because that was a case in which you had basically a very similar set of facts and precisely the sort of thing the Justice Department said no way.

FERNANDES: Right. Just in December of 2012 is the perfect analogy, just in December of 2012, the Beaumont ISD made a change, I think it was from seven single member districts to five single member and two at large.

HAYES: Sounds familiar.

FERNANDES: Yes, very similar story and the same region of the state. And DOJ determined that was going to have an impact. In this case, I think from your piece, it's also clear that there's a concern about there being a discriminatory purpose as well, which is a constitutional violation.

And I think, you know, in fact, we see in Texas, a similar thing in Galveston, Texas, twice. I think once fairly reasonably, one in the late '90s. This is not an unusual technique and the situation where the minority population is growing, you have districts and there's an attempt to say how do you stop that growth from impacting the outcome of the election. It's classic.

HAYES: So, what is the recourse now that section five isn't there, preclearance is gone, the vote happened on Tuesday. The people who want to change, the mayor got his way. That's the change -- I think the city's constitution essentially, the charter.

So, what can people do?

FERNANDES: I think the resource is and I think there are people looking at whether or not there's a way to challenge in under section two of the Voting Rights Act, the part of the act still there, that you can use to bring a lawsuit to say this action was purposely discriminatory or had discriminatory effect. But those lawsuits take forever, Chris, they take a long time, they're expensive.

If the plaintiffs have such a case and if they prevail, we're looking at two years or more before we're going to have a resolution. That's two years with this -- a council elected this system, which is an arguably discriminatory system, setting the policy for that town.

HAYES: Right. Two careers in which we have these two at large districts, which we may lose all Hispanic representation in this town that is majority Hispanic, what could be past in the interim, which is the whole entire reason section five and four of Voting Rights Act, the preclearance was there.

Julie Fernandes from the Open Society Foundation, thank you so much.

FERNANDES: Thanks.

HAYES: Coming up --

(BEGIN VIDEO CLIP)

BARBARA BUONO (D-NJ), GUBERNATORIAL CANDIDATE: New Jersey represents the last vestiges of the old boy machine politics that used to dominate states across the nation. And unless more people are willing to challenge it, New Jersey's national reputation will suffer.

(END VIDEO CLIP)

HAYES: That was Democratic candidate for governor of New Jersey, Barbara Buono, in her speech following loss to Governor Chris Christie. She has a lot to say about the race and the governor and her fellow Democrats, and she will be my guest right here, next.

(BEGIN VIDEO CLIP)

BARBARA BUONO, (D) NEW JERSEY GUBERNATORIAL CANDIDATE: The democratic political bosses, some elected and some not, made a deal with this governor despite him representing everything they are supposed to be against. They did not do it to help the state. They did it out of a desire to help themselves politically and financially.

(END VIDEO CLIP)

HAYES: That was former democratic New Jersey State Senator, Barbara Buono, on Tuesday, following her --

SEN. BUONO: Hey, I am still a senator.

(LAUGHING)

HAYES: Still senator -- good point, following her blowout loss to Chris Christie in the governor's race in a speech in which she also thanked her supporters for withstanding, quote, the onslaught of betrayal from our own political party. It is a victory speech/announcement for his 2016 presidential run that night. Christie suggested, he is the one guy who is figured out how to bring people together in a time of political polarization.

(BEGIN VIDEO CLIP

CHRIS CHRISTIE, (R) NEW JERSEY NEWLY ELECTED GOVERNOR: I know that tonight a dispirited America angry with their dysfunctional government in Washington -- looks to New Jersey to say, "Is what I think happening really happening?" Are people really coming together? Are we really working African-Americans and Hispanics, suburbanites and city dwellers, farmers and teachers? Are we really all working together?

Let me give the answer to everyone who is watching tonight, under this government, our first job is to get the job done and as long as I am governor, that job will always, always be finished.

(END VIDEO CLIP)

HAYES: There is a lot more to the story of how Chris Christie brought people together in New Jersey and the governor wants to tell you and there is no one better to tell that tale than current state Senator, Barbara Buono of New Jersey. Senator, thank you so much for being here.

BUONO: Great to be here.

HAYES: You use this word, betrayal, in your concession speech.

BUONO: Yes.

HAYES: It is a strong word. Why did you use that word?

BUONO: Well, I just thought it would be important to be honest. You know, I struck a positive note as well because I think that this is an election first woman to run for governor of the state of New Jersey in a Democratic Party, definitely a ground breaking event.

And I want to make sure that all the young women and young men for that matter and minorities knew that it can be done, even in the face of insurmountable odds. That said, the Democratic Party unfortunately cut deals with Chris Christie and we really never had a chance in terms of gaining the financial support and institutional support that we really needed.

HAYES: You were outfund raised, I think of 6-1, if I am not mistaken --

SEN. BUON: That is academic at this point.

HAYES: Well, the question -- I mean what do you mean by cut deals? I think the story - here is the story that the national media is saying about Chris Christie. In these polarized times, here is the guy who hugs President Obama after Sandy, who is in a Obama state that went Obama by 17 points, democratic state, won by a whopping, you know, whatever was 30 points on Tuesday night, you know? And, is bringing people together. What about the bringing people together, do people outside of New Jersey politics not understand?

BUONO: Well, I can tell you in New Jersey, he ha not brought people together. People are -- you know, we have the highest unemployment in the region for the last four years. People are struggling. But, what this governor has done, people's eyes glaze over when he tells jokes on late night T.V. and he talks about Sandy, Sandy, Sandy, and the fact of the matter is, you know, the Democratic Party bosses and Chris Christie struck a deal.

HAYES: What does it mean? What strike a deal mean?

BUONO: Well, you know? It can mean different things for different people. You know, for those in South Jersey that meant that Chris Christie would not mount an offensive against their senators and assembly people in that district.

It could mean different things in the Northern end of the state depending on what your political interests are and what your business interests are. And, the fact to the matter is, I think that people of New Jersey deserves someone to represent them and not someone's narrow political and business interests.

HAYES: So, there is a kind of nonaggression pact, essentially, that is struck between members of your party in the state senate, George Norcrossis one of them in South Jersey, right? Yes?

BUONO: Yes.

HAYES: That basically, they are not going to go after Christie because it is in their own interest to be able to work with him to deliver whatever goods they need for their district.

BUONO: Look, Chris Christie -- nobody is more enamored with Chris Christie than himself. And, he said, he is a straight talker; but, let me just tell you this. You put a political boss in front of him and say this is what you need to do to get elected in the next election and you will see him fold like a cheap suit.

HAYES: You say Christie?

BUONO: Yes.

HAYES: What do you mean by that?

BUONO: Well, you know he really does not -- he said it himself when he was in Boston a few months ago. He said if you want someone who stands for anything, or ideology or conviction, then I am not your guy because I am in it to win it. And, honestly, I do not care that he is running for president. It is how he is running for president.

HAYES: But, then what is wrong with this mono. I mean when you look at Washington, right, the thing that everyone is talking about warning for are the days of transactional deal making politics.

BUONO: They are?

HAYES: Well, people, when people look at the shutdown, they say, "Well, if we had things like earmarks, if there are ways to have kind of these transactional deals, that things would work."

BUONO: There is a big difference between having a deal that benefits the people of New Jersey or the people of the nation or any state and a deal that is solely to benefit the political or business interests of someone. That is the big difference. Compromise and transactional politics, I think, are two very different things and I have a very different impact on the people and the democracy.

HAYES: What is work going to be for you like as a member of the senate caucus in the state of New Jersey after saying the things you said, after being abandoned and betrayed by your fellow democrats?

BUONO: Look. I have always run against the bosses. Back in 1994, when I first transfer the assembly, I ran against the political bosses' candidate and I won. And, then again when I ran in the senate, they said I could not win, and I did.

And, I became the first woman majority leader, first woman budget chair because there were all these deals that were being made. You know I am always going to be the person I am. I have been there and I will continue to be there for the people of New Jersey and that is it. Very simple.

HAYES: All right. State Senator, Barbara Buono, thank you so much for your time.

BUONO: Thanks for having me.

HAYES: Coming up, the story everyone is talking about this week. NFL bullying. My guest will include a former NFL player, who says fans have demanded total access and immersion in the game and then complain about the culture in the same breath. Stay with us.

HAYES: Earlier in the show, we asked you what questions you would ask someone who spent years in an NFL locker room. We got a ton of answers on Twitter and Facebook. Here is just a few, Sean from Twitter asked, "Was there any discussion about harassment laws and your rights when you were hired by the NFL?

Stevie wonders, "If you saw this happening, would you intervene. I was choke it in the first place." And, Cindy wants to know, "Who sets the code of conduct in a locker room? How is that person chosen and is the code of conduct condoned by the coaches?" Those are great questions. Thanks to HBO's series "Hard Knocks," we can actually take a look inside a real NFL locker room. Here is what was happening last year with the Miami Dolphins.

(BEGIN VIDEO CLIP)

RICHIE INCOGNITO, MIAMI DOLPHINE GUARD: You check your Facebook lately? Maybe you should not use your (EXPLICIT WORD) number for your iPad password, bud. 8484.

UNIDENTIFIED MALE SPEAKER (1): I used it.

INCOGNITO: Weird.

UNIDENTIFIED MALE SPEAKER (2): Got him.

INCOGNITO: It is a good guess. You might want to check your Facebook, bud.

UNIDENTIFIED MALE SPEAKER (1): What does it say? (EXPLICIT WORD)

INCOGNITO: I was going to put something up there rude, but then I saw the picture of your girlfriend, I felt bad.

(END VIDEO CLIP)

HAYES: He seems, nice, right? Charming Facebook (inaudible) that clip Dolphins Lineman, Richie Incognito is at the center of a bullying harassment hazing scandal that is rocking the NFL this week. In just a few short minutes I will be joined right here in the studio by a former player who said this week that you only get bullied in an NFL locker room if you allow it to happen.

HAYES: It is the bullying scandal that has shaken a multibillion dollar business to its foundation. The story is absolutely thrown into disarray. The organization Forbes calls the most lucrative sports leak in the world. The $9 billion industry that is, The National Football League.

Well, it began last week when reports emerged that Miami Dolphins Jonathan Martin had left the team after a prank his teammates pulled on him in the cafeteria. A prank Martin apparently did not find funny. He sings that in a reporting he got frustrated and smashed his tray on the floor and left the facility.

Initially, the story out of Miami was that Martin left the team because he needed quote, "Assistance for emotional issues." In the days since, new allegations have emerged indicating that Martin was the victim of intense sadistic and persistent bullying and hazing in the locker room.

And, according to reports, the chief instigator of that bullying was his team Richie Incognito. Incognito for his part has quite a story. In 2003, he was suspended by his college coach of Nebraska. A year later convicted a misdemeanor assault, same year suspended indefinitely by Nebraska and he was dismissed from Oregon's program after only a week with the team then after a few years in the NFL in 2009, he was voted the league's dirtiest player in a poll of fellow players.

Fellow teammate Cam Cleeland remembers Incognito as and I am quoting directly, "An immature unrealistic scumbag with no personality and locker room cancer who just wanted to fight everybody all the time." Earlier this week, Incognito jumped on Twitter to defend himself and challenge a reporter from ESPN tweeting, "If you or any of the agents you sound off for have problem with me, you know where to find me. #bringit."

Which the reporter did by tweeting some of the messages Incognito allegedly left on Martin's phone like, "Hey, what's up, you half N-word piece of expletive." On Sunday, the dolphins announced Incognito had been suspended for conduct detrimental of the team. Now, the NFL is investigating just yesterday. Martin's camp released this statement. Jonathan Martin's toughness is not an issue. He endured harassment that went far beyond the traditional locker room hazing.

Jonathan looks forward to getting back to playing football. In the meantime, he will cooperate fully with the NFL investigation. The scandal has just ripped back the curtain in the part of the football world we do not get to see every week, when we tune in to watch what is essentially managed to televise violence, which also happens to be the most successful form of entertainment in America today.

Joining me now is Mike Pesca, Sports Correspondent for NPR. Emily Bazelon, Senior Editor of legal affairs, writer for "Slate." Also author of a great book, "Sticks And Stones: Defeating The Culture of Bullying and Rediscovering the Power of Character and Empathy.

Mike I want to begin with you. This has blown up. I mean, it is kind of remarkable to me what a fire storm this has created. And, I think the entry point into why it is, is you see Jonathan Martin, who is just a massive human being, who does one of the most physically demanding, intimidating, strenuous jobs in America probably and you think, how could this guy be bullied. Right? That is the core of it.

MIKE PESCA, NPR SPORTS CORRESPONDENT: Right. And, it is the job of so many Americans, so many armchair quarterbacks that they say -- you to them, it speaks to toughness and it speaks like this lost ideal of whatever their version of masculinity is.

And, this is why when it came out, you did not need a lot of information. In fact people did not have a lot of information. The first day when people were debating it, they did not even know about the death threats that he got from Incognito and some of the slurs that you read.

But, you know, the debate was, how do you not stand up for yourself? How do you not punch the other guy in the nose? And, that came from players, former players, the GM of his team, just everyone.

HAYES: From the GM of his team. Former players, coming out like Ricky Williams, who I like and respect.

PESCA: Yes. I am a football fan of Jeff.

HAYES: He is a really thoughtful guy. Emily, as someone who wrote about and studied bullying, I am really curious to hear your reaction to the kind of disbelief that is being expressed both in the league and I think people watching that someone of that size could be bullied. And, I want you to talk about that right after we take this break.

HAYES: We are back. I am here with Mike Pesco and Emily Bazelon. And, joining us now is Roman Oben a former NFL player, who is a left tackle, now a football analyst for MSG and MY9 News. He is wearing a super bowl ring. I never held a super bowl ring in person. It is massive.

All right, Emily, I want to go to you on this -- This bullying question. What was your reaction to someone who wrote a whole book on bullying to the reaction of so many people, how could this massive individual be bullied?

EMILY BAZELON, WRITER FOR SLATE: Look, Jonathan Martin is a big guy in a locker room with a lot of other big guys. And, I think what matters here is the context. He is the new player. Richie Incognito is the veteran, who is in a leadership position and you can be socially excluded and made to feel harassed and terrible about yourself by other people. You can go through that kind of psychological torment and bullying, no matter how big you are.

HAYES: Yes. I think the psychological component of this is key. But Roman, you are someone -- you have been tweeting basically being like -- what a lot of other players have said, which is, "Look, if you can't take the heat, get out of the kitchen," I guess? I mean how are you reacting to this?

ROMAN OBEN, FORMER NFL PLAYER: Well, I think given this incident, there is different levels between what is a rookie responsibility, or getting the donuts and doing all those things and what Richie Incognito did to Jonathan Martin. And, as these ten levels have saw in between there and I think -- At those cases, someone should have said hey, lay off this kid. I'm a man first. Deal with it in the parking lot.

And, obviously in regular society, in bullying in the bigger picture, you can't deal with it that way, but talking about a football environment because I played football in the locker, I mean that is how you deal with it. So, you deal with the locker room with locker room issues and unfortunately, this story has become so huge that you have Ph.Ds and people in education and if this is the workplace, you would not have to buy lunch for everyone everyday. You would not be in the hazing. But, unfortunately, this has come out, a lot of things I have seen throughout my whole career and college.

HAYES: OK. So, what I think we need to do here is distinguish between a few different categories and things.

OBEN: Right.

HAYES: So, there is hazing, which is like "Hey, rookie, pick up my pads," which I think is a kind of -- I guess kind of a jerk move; but, like that is okay. That is not the worst thing in the universe.

OBEN: No. Not at all.

HAYES: And, there is a rookie dinner, where we run up a $15,000 tab and you have to pay for it. Well, that sucks, I mean -- but -- OK that is not violent. Then, there is physical violence. I want to hear the story because this Incognito guy seems to me, just diagnosing like something of a psychopath.

This is a former player Cam Cleeland, who was clubbed in the face by a sock filled with coins that free-agent linebacker Andre Royal had spent all day collecting from teammates -- Incognito. It shattered Cleeland's eye socket and nearly cost him his eye, which now provides him only with partial vision. That is not hazing. That is assault. Right? Am I wrong about that? Or does that happen in locker rooms all the time.

OBEN: It is assault and when we read it, it is awful, but in the football environment, we always tow that line between what is a passionate head coach and what is the appropriate. What is motivation? What is getting in a guy's face and what is inappropriate? What's getting a rookie tougher, seeing what a guy is made of and what's a racist comment and I think Richie Incognito absolutely went too far. We have all acknowledged that. But, there is an unwritten rule, and this has not been discussed this week. If you cannot deal with the Richie Incognito, and I do not feel this way, but if you can't deal with Richie Incognitos of the world, what are yon going to do on third and ten against Jared Allen?

HAYES: That is -- I am sorry. That is crap.

OBEN: Hey! Look. Why do these teams scrutinize these rookies when they come out of college? Why does the general manager for the Miami, Dolphins asked Ded Bryant, was your mother a prostitute? This is the same organization.

HAYES: OK. So, there is two ways to go by responding to that. And, I want to get Emily's response to that question. But, here is my response to that is that first of all, you are making me feel like, "A. I got to think the psychological make-up that allows you the stand tough and strong under conditions of third and ten and in these sort of relentless, sadistic mental games are different, but may be they are not.

But, if they are not, then what you make me feel is that like football is just a game of sadism and violence and kind of a mall of horror that we all gaze upon and clap for. Like if you are telling me there is not that much difference than playing this game and being hounded this way in a locker room, I am like, "Oh, football is even more messed up than I thought."

OBEN: But, the fans want it, though. They want Hard Knocks. They want to go in the locker room. They want to see this stuff. And, when this happens, "It is oh! I can't believe these guys behave this." Well, it is football. It is not a fourth grade at recess.

HAYES: Right. But, it is also -- Mike. --

PESCA: But, It is not football. I mean so many teams have come out and said that sort of behavior would never happen in our locker room and I think what is troubling is that you are here saying rightly so, there is a fine line. There is a gray area. This is way over the line, but you ask the Dolphins. The Dolphins, all are sticking up for Incognito.

HAYES: Right.

PESCA: They are all saying, "Well, this is not the situation that you understand it." And, the rest of the league is kind of 50/50 on its Incognito was right. But the Dolphins all stick together. That shows me a sort of group mentality.

HAYES: Yes.

PESCA: Very troubling.

HAYES: That is my question for you, Emily, which is I think everyone now says, "Yeah, this was over the line."

OBEN: 100%.

HAYES: And, we have heard the voice mails that are just like, "I am threatening to kill you." Like you can't threaten to kill people or rape their loved ones, which is also happening.

BAZELON: Right. Right.

HAYES: So, why do not people intervene even when -- even when they know it is wrong and over the line?

BAZELON: You know, sometimes, it is easier to side with the dominating bully and it is harder to side with the person who in this case is being accused of breaking the code by going public. And, so I think this is a real test for the NFL.

I mean think about the message that this is sending to high school kids and their coaches about the kinds of team behavior we should be evaluating. If it is Richie Incognito who emerges from this as the one who has all the defenders in the sports world, then what does that say about kids who are being hazed and harassed on their team and who come forward and ask for help.

HAYES: If you are in that locker room, when you play that in your head, do you think you would have said something? You would have done something?

OBEN: 100% because I said from the rookie responsibility to where it led, you say, "Hey, Richie, lay off this kid. He is going to have to help us when he is a second round pick. Let's try something else."

HAYES: Have you ever done that, actually? Have you been in those situations?

OBEN: 100%. And, I have been in both sides of it. I have been in there when they are taping rookies, and a guy stripped down to his jock strap, and they are Icey -- I mean all these stuff -- all right, guys, that is enough, guys. That is enough. And, that is why people said, "Oh, this would not happen in the Steelers' locker room. The Giants or Patriots or teams have sustained, leadership sustained. A long head coach. This would happen in a Miami, Dolphins where they are trying to reestablish their identity.

HAYES: Emily Bazelon from Slate Mike Pesco for NPR and former NFL player, Roman Oben. I really wish we had an hour to talk about this. May be we will have you all back, really. Thank you so much. That is "All In" for this evening. The "Rachel Maddow" Show starts right now. Good evening, Rachel.

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Attachment C

Plans to redistrict Pasadena City Council

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After former House Majority Leader **Tom DeLay**'s fall from grace, we thought that Texas politicians would know better than pursue mid-decade redistricting. Not so in Pasadena, where Mayor **Johnny Isbell** is trying to change Pasadena's city council districts.

Isbell proposed last month to replace two of Pasadena's single-member districts with two at-large seats. The Bond/**Charter Review Committee** recommended against moving forward with the changes, at least for the upcoming election. But the proposal alone is distressing enough. Historically, replacing districts with at-large seats has been used to discriminatory ends, and such moves are often blocked by the **Department of Justice**. Only a few months ago, that would have been the case here. Not anymore. For decades, the Voting Rights Act has been a useful speed bump in Texas. Due to our history of discrimination, any alteration to voting laws or processes had to be approved by the Department of Justice. When the **Supreme Court** struck down the part of the VRA that based preclearance requirements on past discrimination, it busted open a hole in that wall, and Texas politicians have wasted no time to climb through.

This newfound lack of federal oversight allows local politicians to implement maps that threaten to discriminate against minority voters. The current individual districts in Pasadena allow large, compact and politically cohesive minority populations to elect the representatives of their choice. Replacing these districts with at-large seats could dilute minority voting power, submerging the voting-bloc in a sea of majority voters.

As our Founding Fathers wrote in the Federalist Papers, our republic cannot function if the full spectrum of our nation's diverse interests do not have representation in government. Decades of discrimination kept vast segments of society away from the table, and only now do we start to see representation rising to the ideals our nation was founded upon. That progress is brought to a halt when cities such as Pasadena make it more difficult for a growing Hispanic population to take part in the democratic process.

Even with the removal of direct barriers to voter registration, historic discrimination in education, housing, employment and health services hinders minority ability to participate effectively in the political process and elect representatives of their choice. Pasadena's city government makes this point painfully clear - Hispanics comprise a majority of the voting-age population, and a majority of a voting-age population in six of the eight city council districts, but have yet to turn that into electoral success.

Anyone who cares about functioning government should be troubled by such a disconnect between population and representation.

Attachment D

NewsRoom

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August 27, 2013

Section: B

Suit blasts Galveston judge plan as biased County commissioners are trying to cut number of justice of peace courts

Harvey Rice

GALVESTON - A Galveston County plan slashing the number of justice-of-the-peace districts from eight to four intentionally discriminates against minority voters and should be blocked, according to a federal lawsuit filed Monday.

The lawsuit comes exactly one week after Galveston County commissioners approved a redistricting plan for justices of the peace similar to one rejected last year by the U.S. Justice Department. The department opposed the plan because it reduced the number of districts with black and Hispanic majorities from two to one, as does the one adopted last week.

Galveston County was the first Houston-area government to take advantage of the June 25 U.S. Supreme Court decision to change an election law that otherwise might have been blocked by the Justice Department. The decision in Shelby County v. Holder effectively ended a requirement that Texas governments receive Justice Department approval before making any changes affecting voting. Since then Pasadena has asked voters to approve a redistricting plan that previously was blocked by the Justice Department, and the city of Galveston is considering doing so.

By cutting the number of justice of the peace districts in half, Galveston commissioners reduced the number of judges from nine to four. Although the county has eight districts, there are nine justices of the peace because two are elected from a single precinct, an unusual arrangement arrived at under a 1992 consent judgment in a discrimination lawsuit.

'They did it anyway'

Attorney Joe Nixon, whose firm was hired by the county to redraw the justice-of-the-peace districts, said the plan is in compliance with the 1965 Voting Rights Act. "It's hard to say there was race involved when of the five seats lost one was a minority and four were non-minorities," Nixon said. He said the proportion of minority districts is the same as in the plan the Justice Department approved for commissioner's districts.

Attorney Chad Dunn, who filed the lawsuit, said the new plan is both intentionally discriminatory and has a discriminatory effect. "The county was already told by the Department of Justice that this plan was discriminatory," Dunn said. "The county knew the plan was discriminatory, and they did it anyway."

Seeking injunction

Commissioners said the number of districts needed to be reduced to improve efficiency and save money. They argued that the change would save $1 million annually, noting that two of the existing justices of the peace accounted for only 2 percent of the county caseload.

The lawsuit by two black justices of the peace, two black constables, a Hispanic constable and a black Galveston County resident asks the court for an injunction halting the use of the new districts in November elections.

The lawsuit also asks the court to declare that the new plan dilutes the voting strength of minority voters in violation of the Voting Rights Act and it amounts to unconstitutional gerrymandering. It also asks the court to reinstate the requirement for Justice Department approval of changes to election policies.

'Like Pearl Harbor'

The president of the city of Galveston chapter of the National Association for the Advancement of Colored People, David Miller, said he was upset that the lone minority commissioner on the court, Stephen Holmes, who is black, was not consulted about the change and that it was made without public hearings. "That was like Pearl Harbor. That was a sneak attack," Miller said.

The failure to consult Holmes was a reason cited last year by the Justice Department for blocking a plan to redistrict commissioner's districts and is another reason for asking the court to halt the latest redistricting plan, Dunn said.

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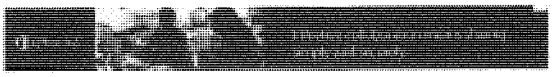

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Voter ID woes could soar in higher-turnout elections, officials fear

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By BRITTNEY MARTIN
Austin Bureau
bmartin@dallasnews.com
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AUSTIN — Delays at the polls this month due to glitches with voters' identifications could signal a bigger problem to come next year, when many more turn out for state and county elections.

Thousands of voters had to sign affidavits or cast provisional ballots on Nov. 5 — the first statewide election held under the state's new voter identification law — because their name on the voter rolls did not exactly match the name on their photo ID.

It took most only a short time, but election officials are concerned that a few minutes per voter to carefully check names and photos against voter registration cards, and then to have voters sign affidavits or fill out provisional paperwork, could snowball into longer waits and more frustration.

A review by *The Dallas Morning News* found that 1,365 provisional ballots were filed in the state's 10 largest counties. In most of them, the number of provisional ballots cast more than doubled from 2011, the last similar election, to 2013.

Officials had no exact count for how many voters had to sign affidavits, but estimates are high. Among those who had to sign affidavits were the leading candidates for governor next year, Republican Greg Abbott and Democrat Wendy Davis.

"If it made any kind of a line in an election with 6 percent [voter] turnout, you can definitely imagine with a 58 percent," said Dallas County elections administrator Toni Pippins-Poole.

In Dallas County, 13,903 people signed affidavits affirming their identity.

The statewide election included nine proposed constitutional amendments, along with various local city and school board offices and propositions. It was the first to take place under Texas' 2011 law requiring that voters present a government-issued photo ID when they vote.

Name-match issues might surface for women who recently married or divorced and changed their identification but not their voter registration. For others, a shortened version of a name might appear on one document, while the full name is on the other.

Signing the affidavit didn't interfere with their ballot counting in the election, and election workers were instructed to give the voter the benefit of the doubt on a name-match issue.

Alicia Pierce, a spokeswoman for the secretary of state's office, which oversees elections, said officials worked to make the affidavit process as simple as possible. To sign the affidavit, voters need to initial after their signature on the poll's sign-in sheet.

Voters are also given the option to update their voter registration information at the polls. Pierce said officials hope that shortcut, along with continued voter education campaigns, will cut down on the number of affidavits and provisional ballots needed next time.

Those without the proper ID or who refused to sign an affidavit could fill out a provisional ballot. Such ballots are not counted unless

the voter presented the proper identification to elections officials within six days.

Harris County, the state's largest, had 704 voters fill out provisional ballots. Of those, 105 were cast because the voter failed to show an acceptable photo ID.

Constitutional-amendment elections tend to draw a much lower turnout than elections for the governor, other statewide officials, countywide officials and members of Congress. Voter ID critics fear that means many voters who didn't cast ballots this year will have trouble in March, when the Republican and Democratic parties hold primaries, or next November's general election.

State Rep. Trey Martinez Fischer, D-San Antonio, said longer lines could deter working voters, voters with children and others from voting.

"Voter ID is a solution looking for a problem," said Martinez Fischer, who has worked to defeat the law. "There's not a voter identification problem in the state of Texas."

The law, which the Legislature enacted in 2011, was delayed by the U.S. Justice Department's objection but took effect earlier this year, when the Supreme Court struck down federal oversight of elections in Texas and other states.

Now, Democrats and civil rights groups, along with the Justice Department, are suing to try to overturn the law, arguing that it has a disproportionate effect on minorities. U.S. District Judge Nelva Gonzales Ramos will hold a trial in September in Corpus Christi.

Republicans say requiring ID is a necessary step to eliminating the possibility of fraud in elections.

A *Dallas Morning News* analysis in September found that just four cases of voter irregularity pursued by Abbott, the state attorney general, since 2004 could have been prevented by the photo ID requirement.

Follow Brittney Martin on Twitter at @beedotmartin.

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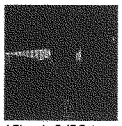
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PREPARED STATEMENT OF MICHAEL A. CARVIN

Senate Judiciary Committee
Testimony of Michael A. Carvin
Jones Day
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Mr. Chairman and distinguished members, I appreciate this opportunity to testify concerning "The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*."

I. INTRODUCTION AND SUMMARY

In my view, the fundamental constitutional and public policy problem with any legislative proposal to "restore" Section 5 is that there is simply no cognizable need in 2014 to restore a provision that was always intended to be a temporary and limited supplement to Section 2 of the Voting Rights Act. Although some have suggested in the wake of *Shelby County* that invalidating Section 5 somehow leaves minority voters unprotected, the reality is that Section 2 is extraordinarily effective civil rights legislation that fully protects minority voters against any electoral practices with disparate statistical "results."

This is not to say that racial discrimination in voting has ended, any more than it has ceased in employment, higher education or housing. It is to say that Section 2, particularly given its extremely expansive "results" prohibition, is more than adequate to address any unconstitutional discrimination. Just as Title VII's prohibition against discriminatory "effects" in employment and Title VI's prohibition against higher education discrimination and Title VIII's prohibition against housing discrimination do not need to be supplemented by a Section 5-type requirement to "preclear" all employment, educational and housing policies with the Justice Department, Section 2 no longer needs to be complemented by Section 5's unprecedented and onerous preclearance regime. This is particularly true because voting discrimination is easier to detect and challenge than discrimination in these other areas, because all voting practices are

openly conveyed to the public through laws and regulations in order to conduct elections, while potentially discriminatory employment, education and housing decisions are usually made in private, confidential sessions.

The absence of a remedial justification to supplement Section 2 with a "new" Section 5 is not just a public policy issue, it also renders S. 1945 unconstitutional because, like the version of Section 5 established in 2006, it would not be an appropriate exercise of Congress' authority to "enforce" the Fourteenth and Fifteenth Amendments. To be sure, the coverage formula in S. 1945 somewhat ameliorates the *temporal* flaw in the 2006 version, by looking at events in the preceding 15 years, rather than electoral data that was 34-42 years old. Yet the new formula has the same *substantive* flaw that doomed the 2006 version in *Shelby County*—the coverage formula does not identify jurisdictions where Section 5 is somehow needed because case-by-case adjudication under Section 2 is inadequate to effectively extinguish unconstitutionally discriminatory voting practices. Thus, while the proposed legislation's formula is more "current" than that used in 2006, it still wholly fails to identify the "current *conditions*" extant in the covered jurisdictions that somehow would evade effective Section 2 scrutiny, thus necessitating the extraordinarily strong additional medicine of Section 5 preclearance. *Shelby County v. Holder*, 133 S. Ct. 2612, 2627 (2013). Indeed, the "voting rights violations" used to trigger coverage, if anything, refute the notion that the covered jurisdictions can somehow evade effective Section 2 remedies and, like the 2006 formula, certainly do not accurately identify jurisdictions that are so recalcitrant and racist that they need a special preclearance regime not applied to the vast majority of states or political subdivisions.

In all events, the substantially more demanding *substantive* preclearance standards added to Section 5 in 2006 invalidate *any* effort to revive Section 5 under any coverage formula,

because those substantive standards cannot reasonably be justified as an effort to enforce the Constitution's prohibition against intentional discrimination. Finally, the proposed amendment to the "judicial preclearance" provision of the Voting Rights Act, Section 3(c), is even more obviously unconstitutional because it seeks to impose an extraordinary preclearance regime on jurisdictions that have never engaged in unconstitutional discrimination in modern times, much less unconstitutional discrimination that cannot be adequately addressed by Section 2.

II. S. 1945'S COVERAGE FORMULA IS UNCONSTITUTIONAL BECAUSE IT IS NOT APPROPRIATE ENFORCEMENT LEGISLATION UNDER THE FOURTEENTH OR FIFTEENTH AMENDMENTS.

It is important at the outset to identify the constitutional basis that Congress has to eliminate racial discrimination in voting. As the Supreme Court has repeatedly noted, "the Framers of the Constitution intended the states to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *See e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991); *Shelby County*, 133 S. Ct. at 2623. In light of this, it has always been recognized that any potential congressional power to impose preclearance must be found in the enforcement clauses of the Fourteenth and Fifteenth Amendments, which authorize Congress to "enforce" the Fourteenth and Fifteenth Amendment's prohibitions against abridging voting rights on account of race. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308-310 (1966); *Shelby County*, 133 S. Ct. 2629. These Amendments, however, prohibit only *intentional* discrimination in voting; *i.e.*, disparate treatment of voters based on their race. *Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, while Congress has very broad power to "enforce" these nondiscrimination commands, it can only enact laws with some nexus to eradicating or remedying such purposeful discrimination—it cannot enact laws not fairly described as enforcing purposeful discrimination prohibitions, simply because the laws "help" minorities. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

The dispositive constitutional question, then, is whether Section 5 is needed to enforce the Civil War Amendments' prohibitions against purposeful discrimination, even though Section 2 of the VRA already prophylactically prevents any such potential discrimination, by prohibiting even *neutral* actions that have disproportionate "*results*" for minority voters. 42 U.S.C. § 1973(a). In prior cases, the Court found that Section 5 served a permissible enforcement role precisely and only because its extraordinary preclearance regime was necessary to supplement Section 2, by effectively curing problems that were difficult to resolve through Section 2's "case-by-case litigation." *See Katzenbach*, 383 U.S. at 328; *City of Rome v. United States*, 446 U.S. 156 (1980). The inference that Section 5 played a valuable supplementary role was quite reasonable in the 1960s and 1970s, given the level of entrenched Southern intransigence and the limited scope of Section 2, which in those decades only prohibited *purposeful* discrimination. *See Mobile* at 66. But, given the dramatic improvements in the covered jurisdictions since the 1960's and the fact that Section 2 has been greatly expanded to now prohibit discriminatory "results," it is quite difficult to infer that Section 5's extraordinary and extra-constitutional regime is needed *on top of* Section 2's very effective remedies. And if Section 2 is effective at preventing and remedying unconstitutional discrimination in the covered jurisdictions, then Section 5's burdens are, by definition, gratuitous and unnecessary to vindicate the Constitution's guarantees.

If Section 2 broadly and effectively precludes all actions with a discriminatory "result"—as it does—there is simply no need to supplement this effective antidiscrimination law with the burdensome preclearance requirement, just as it would be unconstitutional to supplement Title VII's "effects test" with a law requiring public employers to preclear all hiring decisions with the Justice Department by proving the absence of such effect. Even

Judge Tatel, who wrote the *Shelby County* D.C. Circuit opinion *upholding* Section 5, acknowledged this obvious point; stating that Congress would have "*no* justification for requiring states to preclear their voting changes" "if Section 2 litigation is adequate to deal with the magnitude and extent of *constitutional* violations in covered jurisdictions" because the "critical factor" in the Supreme Court cases upholding Section 5 was that " case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *Shelby County v. Holder,* 679 F.3d 848, 863-64 (D.C. Cir. 2012) (emphasis added).

1. The question therefore is whether S. 1945 is reasonably designed to get at "unconstitutional discrimination" that Section 2 fails to adequately address. It plainly is not, for reasons already set forth in *Shelby County* itself. As noted, the proposed legislation's coverage formula is somewhat more "current" than the 2006 Congress' formula, since it goes back 15, rather than 34 to 42, years. But, as *Shelby County* emphasized, coming up with a more "current" formula is hardly a cure-all. Rather, it is merely an "*initial prerequisite* to a determination that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.'" *Id.* at 2631, quoting *Presley v. Etowah County Comm'n.*, 502 U.S. 491 at 500-501 (1992). And, again, the only condition "justifying" the "extraordinary departure" from the "traditional" rule that state enactments are presumptively valid until a plaintiff proves otherwise, is a showing that this traditional presumption of innocence precludes effective eradication of constitutional violations; *i.e.*, that "case-by-case litigation ha[s] proved inadequate to prevent such racial discrimination in voting." *Id.* at 2624.

Satisfying this standard is an extraordinarily daunting task because Congress has, quite correctly, determined that Section 2 is adequate to eliminate all potentially unconstitutional

voting discrimination in the vast majority of the United States. And it is quite difficult in modern times to reasonably argue that there are states that are so much worse than the others that they can somehow evade the Section 2 remedies that are effective throughout the rest of the Nation.

It seems clear that the proposed legislation's coverage formula clearly does not remotely satisfy this demanding test, because it is not even designed to identify those areas where the Section 2 case-by-case approach that suffices for the rest of the United States is somehow inadequate in the jurisdictions being targeted. Specifically, the coverage formula subjects states to Section 5 preclearance if there have been five "voting rights violations" in the past 15 years, including one by the state itself. S. 1945, 113th Cong. § 3(a)(1) (proposed subsection (b)(1)(A) to 42 U.S.C. § 1973b(b)); *see also id.* (Under proposed subsection (b)(1)(B), political subdivisions are covered if they have had three violations during that period or one violation plus "extremely low minority turnout during the previous 15 calendar years."). "Voting rights violations" consist of final Section 2 or Section 5 judgments by a court, or an unreversed Section 5 objection by the Attorney General, in addition to constitutional violations. *Id.* (proposed subsection (b)(3)).

Thus, S. 1945's formula for imposing preclearance does not even attempt to focus on jurisdictions engaged in unconstitutional discrimination that is not adequately remedied by Section 2. To the contrary, coverage is largely triggered by a finding of discriminatory "results" or "effects" that do *not* violate the Constitution and on *successful* Section 2 litigation.[1] It is not logical to identify jurisdictions where traditional Section 2 litigation is inadequate by targeting

[1] I have not examined the question in detail, but seriously doubt that the formula would ensnare any states or political subdivisions if "voting rights violations" were defined as "constitutional violations."

jurisdictions where Section 2 litigation has been most successful. It is equally illogical to identify jurisdictions where *unconstitutional* discrimination cannot be remedied by focusing on jurisdictions which have been found to violate *statutory* voting rights protections.

Relying on Section 5 objections by the Attorney General is equally misguided because Section 5 also prohibits constitutionally compliant practices with a discriminatory "effect" and because the Justice Department in modern times has a well-recognized propensity to object to completely nondiscriminatory voting practices merely because they fail to maximize the interest of minorities or the Democratic Party supported by minorities. *See Miller v. Johnson*, 515 U.S. 900, 921 (1995). For example, in the case where I represented voters challenging the constitutionality of Section 5, the Justice Department had objected to a majority-black city's adoption of a rule requiring nonpartisan elections for local offices, simply because it would purportedly lead to less support for black Democratic candidates. *See LaRoque v. Holder*, 831 F.Supp.2d 183, 192-93 (D.D.C. 2011).

In short, under S. 1945's formula, a state or political subdivision that has never been adjudicated to have violated the Constitution's protection of voting rights will be deemed a jurisdiction where "flagrant" unconstitutional discrimination is so entrenched that the preclearance procedure needs to be added on top of Section 2's prophylactic ban on discriminatory "results." But, of course, jurisdictions that have never violated the Constitution cannot reasonably be identified as flagrant violators of the Constitution, such that preclearance is required to "enforce" constitutional norms.

Indeed, S. 1945's formula seems to be based on flimsier evidence than that by which the 2006 Congress sought to justify the coverage formula struck down in *Shelby County*. That is, Section 5 proponents argued that the 2006 formula was justified because the "Katz study"

showed that "successful § 2 lawsuits" remain "concentrated in the jurisdictions singled out for preclearance." *Shelby County*, 133 S. Ct. at 2642-2643 (Ginsburg, J., dissenting) (quoting *Northwest Austin*, 557 U.S. at 203). The *Shelby County* majority, however, refused to even *evaluate* this § 2 evidence because, "[r]egardless" of what it showed, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." *Id.* at 2629 (quoting *Katzenbach* at 308, 315, 331). Needless to say, the fact that there have been *5* statutory violations in a state in *15* years also does not establish "anything approaching" the flagrant and racist discrimination of the Jim Crow South in the 1960's, or otherwise clearly distinguish the covered jurisdictions from the rest of the Nation.

The states that are subject to preclearance under S. 1945's formula further reveals the inadequacies and inconsistencies of that formula. I have been told (but have not independently confirmed) that the 4 states which currently violate S. 1945's formula are Texas, Mississippi, Louisiana and Georgia. Three of these states were part of the Jim Crow South subjected to preclearance under the 1965 Act, but all of them in modern times have voting participation rates by black voters that exceed or closely resemble those of whites. *See Shelby County*, 133 S. Ct. at 2626 (identifying participation rates in Georgia, Lousiana, and Mississippi). (Texas was not part of the Southern effort to disenfranchise black voters and was not even covered by the initial 1965 Act.)

Simply put, it cannot be persuasively shown that, for example, Texas and Georgia are so much more racist and law-defying than states like Alabama and South Carolina that they must be subjected to a preclearance regime that Alabama and South Carolina are exempted

from. Indeed, it was vigorously argued in *Shelby County* that Alabama was the paradigmatic example of a state that needed to be subjected to preclearance under *any* reasonable coverage formula. *See id.* at 2645-48 (Ginsburg, J., dissenting). The fact that the proposed formula excludes Alabama, standing alone, is powerful evidence that it does not "accurately" target "those jurisdictions uniquely characterized by voting discrimination 'on a pervasive scale.'" *Id.* at 2625.

2. Finally, and most generally, it should be noted that Section 5 proponents' arguments concerning Section 2's ineffectiveness and Section 5's necessity grossly distort both Section 2 and Section 5. The most obvious falsehood is that Section 2 litigation focuses on voting problems "only after the fact," requiring tolerance of illegal voting schemes "for several electoral cycles" so that a "§ 2 plaintiff can gather sufficient evidence to challenge" the system. *Shelby County*, 133 S. Ct. at 264 (Ginsburg, J., dissenting.) This is demonstrably untrue.

It is quite clear that Section 2 vote dilution challenges to redistricting schemes occur in the same time-frame and are based on the same evidence as any Section 5 redistricting dispute. Virtually all Section 2 challenges are brought before the first election under a new redistricting scheme and all of them rely on precisely the same analysis of racially polarized voting and potential minority success as is analyzed in Section 5 cases. That is, both Section 2 and Section 5 courts project future minority electoral success and racially polarized voting based on past electoral returns. There is no reason to believe, and no evidence to suggest, that courts adjudicating Section 2 challenges are somewhat slower than the D.C. courts resolving Section 5 challenges. If anything, experience proves otherwise. In the highly publicized challenge to Texas' statewide redistricting, for example, the Texas three-judge-court adjudicating the Section 2 challenges resolved the case and entered a remedial plan in November of 2011, while

the D.C. three-judge-court waited until late August of 2012 to resolve the Section 5 challenge, well past the time needed for relief that could effectively cure any problems prior to the upcoming elections. *See Perez v. Perry*, 835 F. Supp.2d. 209 (W.D. Tex. 2011); *Texas v. United States*, 2012 WL 3671924 (D.D.C. Aug. 28, 2012). (For this reason, S. 1945's new standard for preliminary injunctions—which virtually guarantees that state laws will be enjoined before upcoming elections—is both unnecessary and, as a practical matter, improperly revives the presumption *against* the validity of state voting laws. *See* S. 1945 § 6.)

In short, Section 2 clearly addresses the "second generation" vote dilution issues referenced by the 2006 Congress at least as well as Section 5. And with respect to "first generation" discriminatory denials of ballot access, the 2006 Congress unequivocally found that ballot access discrimination—such as moving polling places or unreasonable voter qualification requirements—was not a special problem in covered jurisdictions, especially given that minority registration and turnout in those areas equaled or exceeded the rate in noncovered jurisdictions. *See Shelby County*, 133 S. Ct. at 2625-26. Since all agree that Section 2 is adequate to ensure nondiscriminatory minority voting participation in noncovered jurisdictions, and since such participation is *higher* in the covered jurisdictions, it necessarily follows that Section 2 is adequate in the covered jurisdictions—eliminating the need for additional Section 5 burdens.

III. THE JUDICIAL "BAIL-IN" PROCEDURE AMENDMENT OF S. 1945 IS NOT PERMISSIBLE ENFORCEMENT LEGISLATION UNDER THE FOURTEENTH OR FIFTEENTH AMENDMENTS.

The new judicial preclearance section of S. 1945 is even more obviously unconstitutional than the general coverage formula. While previously a court could require a jurisdiction found to have violated the *Constitution* to be subjected to Section 5 preclearance, S. 1945 now authorizes courts to impose this burden based on any violation "of any Federal

voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group" (except for some violations based on voter ID requirements). *See* S. 1945, § 2(a). Thus, the entire purpose and effect of this amendment is to empower courts, with no constraints on their discretion, to subject states or political subdivisions to preclearance for any violation of a federal voting rights law, no matter how far removed that statutory violation is from a constitutional violation. For the reasons stated, subjecting states to preclearance for five statutory violations is not reasonably characterized as an effort to enforce the Constitution's nondiscrimination mandates. *One* such violation is therefore plainly inadequate.

This is particularly true because the statutes being violated need not be the Voting Rights Act, but any federal "voting rights" law that prohibits racial or ethnic discrimination, and the violation found need not relate to the part of the federal statute prohibiting discrimination, but extends to violating any part of the statute, no matter how unrelated to voting discrimination. Since most federal laws dealing with elections have a nondiscrimination command, this would include violations of laws such as the National Voter Registration Act. *See* 42 U.S.C. § 1973gg-6(b) (requiring that any state effort to confirm voter registration be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965"). Thus, violations of the NVRA having nothing to do with racial or ethnic discrimination would somehow provide a predicate for finding that the jurisdiction is a frequent violator of the Constitution's guarantees against racial discrimination.

For example, the Eleventh Circuit recently opined that the NVRA prohibits states from having programs removing *non-citizens* from the voting rolls, even though that statute makes it a federal crime for non-citizens to both register and to vote, and even though there was no dispute that the database for identifying non-citizens was a fully accurate one used by the

Department of Homeland Security (which is why even the Justice Department dropped its objections to the program when the Department of Homeland Security database was employed by Florida). *See Arcia v. Florida Secretary of State*, 746 F.3d 1273 (11th Cir. 2014).

Needless to say, *protecting* citizens' votes by excluding non-citizens from the electorate hardly suggests that the political subdivision has a predisposition to *exclude* minority citizens from the ballot. Yet, under S. 1945, a single absurd decision like *Arcia* would be sufficient to subject an entire state to preclearance.

Even strong supporters of Section 5, such as Professor Rick Hasen of the University of California-Irvine, have recognized that this provision of S. 1945 is "likely unconstitutional." As Professor Hasen put it, "I am quite skeptical the current court would allow states or political subdivisions to be bailed back into coverage based upon conduct which has not been found to be unconstitutional. Doing so would exceed Congress's power to enforce the 14th and 15th Amendment and violate principles of state sovereignty by being not congruent and proportional to the extent of state violations." (Professor Hasen clarified that this was not his personal view, but a "predictive judgment about how the current Roberts Court would decide these congressional power questions." Richard Hasen, *Initial Thoughts on the Proposed Amendments to the Voting Rights Act, Election Law Blog* (Jan. 16, 2014, 1:32 PM), http://electionlawblog.org/?p=58021.)

Finally, this "bail-in" provision will create mischief by leading to a number of lawsuits challenging technical violations of NVRA-like laws, in order to provide a basis for the judiciary to subject an entire state or subdivision to extended Section 5 preclearance.

IV. S. 1945 IS NOT PERMISSIBLE ENFORCEMENT LEGISLATION BECAUSE IT PERPETUATES THE 2006 CONGRESS' SUBSTANTIVE CHANGES TO SECTION 5.

Even assuming "current conditions" could justify imposing *some* preclearance requirement, S. 1945 would still be unconstitutional because it perpetuates the new, "expanded" substantive requirements to secure preclearance, added to Section 5 for the first time in 2006. These new substantive standards cannot be justified as "enforcing" the Constitution's prohibitions of purposeful discrimination because they invalidate practices that are not even arguably unconstitutional and, indeed, seem to clearly *violate* the Constitution's nondiscrimination commands by requiring and authorizing racially preferential treatment.

First, the 2006 Congress absolutely prohibited "diminishing" a minority groups' "ability . . . to elect their preferred candidates of choice," regardless of whether changed demographics or traditional districting principles compelled such diminution. *See* 42 U.S.C. § 1973c(b), (d). Thus, the 2006 Congress imposed a draconian quota floor under minority electoral opportunities until 2032, for the avowed purpose of overturning *Georgia v. Ashcroft*, 539 U.S. 461 (2003) which granted jurisdictions far more flexibility in arranging their electoral districts, precisely to avoid the serious constitutional questions created by the inflexible regime imposed by the 2006 Amendments. *Id.* at 480-82. This mandate to prefer certain groups based on race does not enforce—indeed, violates—the Constitution's requirement of equal treatment for all "persons." Notably, *Shelby County* emphasized precisely this danger of racially preferential requirements under the "current application of Section 5" caused by the 2006 Amendments. *Shelby County*, 133 S. Ct. at 2627. As the Court noted, "considerations of race that would doom a redistricting plan under the 14th Amendment or § 2 seem to be what saves it under § 5." *Id.*, quoting *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Since S. 1945

does not alter this quota floor, it is unconstitutional regardless of whether the coverage formula is valid.

Second, the 2006 Congress required covered jurisdictions to affirmatively prove the *absence* of "any discriminatory purpose," 42 U.S.C. § 1973c(c), notwithstanding the difficult burden of proving that negative. *See Shelby County*, 679 F.3d at 887-88. Such an expansion is clearly unwarranted—it could not possibly be the case that intentional discrimination that evades ordinary antidiscrimination litigation is more pervasive in the South now than it was in 1965. As *Shelby County* put it, "in light of those two [2006] amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved." *Id.* at 2627.

More generally, the Supreme Court cases overturned by the 2006 Amendments were expressly designed to alleviate the pressure on covered jurisdictions to engage in racially preferential redistricting and other voting practices. By reviving these invalid interpretations of Section 5, the 2006 amendments ensured that the preclearance requirement, far from being a deterrent to racial gerrymandering, would be the moving force behind racial, as well as political, gerrymandering. . As has been extensively documented, the Justice Department in the 1990s used its Section 5 powers to impose a "black-max" districting policy on covered jurisdictions, requiring them to discard traditional districting principles to maximize the number of grotesque majority-minority districts. *See Miller v. Johnson*, 515 U.S. at 921. Indeed, every racially gerrymandered district invalidated under *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny is directly traceable to the Justice Department's requirement to mandate such districts, even though they were irreconcilable with traditional districting principles.

In addition to being a powerful engine for racial gerrymanders, Section 5 has also been extensively used to require political line-drawing to advance parochial partisan interests. In the 1990 and 2000 redistricting cycles, Republicans used Section 5 to create or maintain majority-minority districts, because those districts served their political interests. (Majority-minority districts typically benefit Republicans because it makes the adjacent, predominantly white districts more amenable to Republican success.) *See, e.g.*, Steven Hill, *How the Voting Rights Act Hurts Democrats and Minorities*, THE ATLANTIC, June 17, 2013 ("The GOP has found the VRA to be a great ally . . . [because] as traditionally applied, it has helped the party win a great number of legislative races.").

In the latest round of redistricting, Democrats used Section 5 as a partisan tool to preclude any diminution of their potential electoral success. For example, the 2012 decision in *Texas v. United States*, No. 11–1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) squarely held that Section 5 prohibits diminishing the electoral fortunes of white Democrats solely because they receive the support of most minority voters in general elections, even though there is no indication that the district could elect a minority Democratic candidate or of racially polarized voting. *Id.* at *38-44. Specifically, the Texas court concluded that Section 5 protected the district of white Democratic Congressman Lloyd Doggett, even though whites constituted the vast majority of voters in his district. *Id.* at *39. Consequently, far from protecting minority voters against denials of equal opportunity "on account of race," Section 5 granted preferential partisan treatment of the nonminority candidate preferred by minorities in general elections (virtually always the Democratic candidate), in every district where there was a cognizable minority population. Needless to say, such a preference for one political party has nothing to do with protecting minorities against race-based discrimination and therefore has nothing to do

with enforcing the Fourteenth and Fifteenth Amendments' guarantees of racial equality in voting.

PREPARED STATEMENT OF REV. DR. FRANCYS JOHNSON

Statement of

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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

UNITED STATES SENATE

Committee on the Judiciary

Hearing before the Full Committee on the Voting Rights Amendment Act, S.1945:

Updating the Voting Rights Act in Response to Shelby County v. Holder

Dirksen Senate Office Building, Room 106

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Introduction

Good Morning. As President of the Georgia State Conference of NAACP Branches (the Georgia NAACP), I welcome the opportunity to testify before the Senate Judiciary Committee.

I would like to begin by thanking you, Chairman Leahy, Ranking Member Grassley, and members of this committee, for holding this hearing and for your efforts to ensure that the right to vote, the cornerstone of our democracy, is protected. Your efforts thus far and your actions after today's hearing will not go unnoticed by history. In 1982, when President Ronald Reagan signed the Reauthorization of the Voting Rights Act he said "actions speak louder than words. The Voting Rights Act proves our unbending commitment to voting rights." President Reagan went on to say that "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished." Sum and substance, what this Congress does with the Voting Rights Act is the real measure of this Nation's commitment to free, fair, and accessible elections. The United States must never again permit racial discrimination to silence our witness of freedom and darken our light of liberty in this world.

The NAACP founded in 1909 has had an unbroken presence in Georgia since 1917. The Georgia NAACP maintains a network of 118 units throughout Georgia, from cities and small rural counties to college and university campuses. The Georgia NAACP has, and continues to have, the distinction of being the most effective and consistent advocates for civil and voting rights in Georgia.

I am here today on behalf of the Georgia NAACP, and also on behalf of the nearly 10 million Georgia residents whose Constitutional right to vote no longer enjoys full federal protection. Most importantly, I am here on behalf of my children, Frederick Douglas Caleb Johnson, Thurgood Marshall Joshua Johnson, and Langston Hughes Elijah Johnson, to make sure that as they reach our state's legal voting age, they are protected as they cast an unfettered vote, have it counted and participate in our democracy regardless of their gender, the language they speak, or the color of their skin.

This statement will address three points from the perspective of what is going on the ground in Georgia that are central to Congress's response to the Supreme Court's devastating decision in Shelby County, Alabama v. Holder: (1) the history of the abridgement of voting rights in Georgia; (2) the importance of the Voting Rights Act to progress in Georgia; and (3) the Post-*Shelby* Georgia.

The History of the Abridgement of Voting Rights in Georgia

The history of voting rights in Georgia can best be categorized as promises made, promises broken; promises remade, promises broken; promises made and now only partially realized. I come to this United States Senate with a view from the rural communities like as Sylvania, Statesboro, and Sylvester and cities such Augusta, Albany, and Atlanta. It is clear to me that while we have made great strides; there is still much work to be done.

In 1870, the 15th Amendment to the U.S. Constitution promised all Americans the right to participate in the search for the common good. As a result of federal protection during the First Reconstruction, more than 600 African Americans served in the Congress, state legislatures, and many more held local offices. However, with the end of federal protection of those rights, Georgia effectively nullified the 14th and 15th Amendments, stripping African Americans of the right to vote. It would be nearly a century before the nation would again attempt to establish equal rights for African Americans. I come in the spirit of Henry McNeal Turner, Tunis Campbell, and Jefferson Franklin Long of Macon, who gave the first speech by a black representative ever presented before Congress during his brief term from 1870-71. I come bearing witness to those brave Americans who fought and died for equal rights. I come bearing witness to those that endured fire hoses, vicious dogs, separate but equal, poll taxes, literacy tests, the strange fruit hanging from the trees, and bodies floating down the rivers.

After the end of federal protection, the forces of retrogression in Georgia quickly disenfranchised citizens who looked like me by enacting Jim Crow laws; amending the constitutions and passing legislation to impose literacy tests, poll taxes, property-ownership requirements, moral character tests, and grandfather clauses that allowed otherwise-ineligible persons to vote if their grandfathers voted (and which excluded many African Americans whose grandfathers had been ineligible). In fact, Georgia often took the lead in many of these disenfranchising tactics. In 1871, Georgia became the first state to enact a poll tax, and in 1877, it made the tax cumulative, meaning that past unpaid poll taxes accumulate and that an individual must pay the back taxes in order to vote. The poll tax in Georgia was not abolished until 1945.

To the shame of the United States of America, efforts to disenfranchise African Americans and other racial and ethnic minorities were largely successful. In the period immediately preceding the enactment of the Voting Rights Act of 1965, only 27.4% of Georgia's non-white voting age population was registered to vote, compared with 62.6% of the white voting age population. In thirty Georgia counties with significant African-American populations, less than 10% of the age-eligible African Americans were registered in 1962. In four of these counties, the voting lists contained the names of fewer than ten non-whites. The last African American member of the Georgia General Assembly, W. H. Rogers, resigned in 1907. Not until 1963, during the civil rights movement or the Second Reconstruction, would another black politician, Leroy Johnson, enter the Georgia General Assembly. As a result of the end of federal protection in the face of the blatant abridgement of our rights, citizens in Georgia were not able to elect any person of color to represent our interests in Congress or local government for more than 60 years.

The Importance of the Voting Rights Act of 1965 to Progress in Georgia

Congress passed the Voting Rights Act of 1965 to enforce rights promised but not guaranteed for nearly a century. Under the 1965 Act, Georgians were offered federal protection from people who wanted to deny them their Constitutional right to vote. The reaction in Georgia was

immediate. By 1967, 52.6% of Georgia's non-white voting age population had registered to vote.

In eight counties, a majority of non-white adults had signed up to vote upon enactment of the Voting Rights Act. Baker County, with 71.7% of its non-white adults on the voting lists, led the way towards enfranchisement. The state-wide median level of non-white registration in 1967 was 28.25%, as compared to 5.6% in 1962.

With federal protection, Georgia's success continues to grow. In each of the thirty counties with low rates of African-American registration in 1962, African-American registration had become widespread by 2004. The mean for the thirty counties was 67.6%, and in eight counties, the registration rate exceeded 75%.

In addition to registration, the number of African Americans who have actually voted has substantially and consistently grown since 1965 as well. In every one of the thirty counties, at least a majority of registered African-American women voted in 2004. In the Atlanta suburbs of Fayette County, 88% of registered African-American women and 82% of registered African-American men participated.

The impact of the federal protections afforded to us by the Voting Rights Act of 1965 cannot be overstated. By 2004, African Americans constituted 27.4% of all registered voters in Georgia and 27.2% of the state's citizen voting age population, according to the U.S. Census.

With the enactment and enforcement of the Voting Rights Act of 1965, not only did African Americans register and vote, but their support helped to elect men and women who looked like me and represent my community values. As I have already testified, the end of federal protection signaled the demise of those great advances during the First Reconstruction. Indeed, at time of the enactment of the Voting Rights Act in 1965 there were no African American elected officials in Georgia. Yet by 1969, thirty African Americans held office in Georgia, fourteen of whom served in the state legislature. Eight sat on city councils, and three served on school boards. By 1973, the number of African-American elected officials in Georgia had risen to over one hundred, and three years later, in 1976, it topped two hundred. By the year 2001, 611 African Americans held public office in Georgia.

Recognizing the lessons of the First Reconstruction and the importance of the federal protection, Congress has passed every Voting Rights Act reauthorization and extension by overwhelmingly bipartisan votes. The 1965 Act passed the Senate 77-19, and the House 333-85. The 1970 extension passed the Senate 64-12, and the House 234-179. The reauthorization in 1982 garnered similar support passing 85-8 in the Senate and 389-24 in the House. Congress last extended the Act in 2006, by a vote of 98-0 in the Senate and 390-33 in the House, concluding that the coverage formula enforced by Section 5 was needed for at least another 25 years.

In 2006, the congressional record overwhelmingly demonstrated the need to maintain the Voting Rights Act's federal protections. The record included more than 750 Section 5 objections by the Department of Justice (DOJ), which blocked the implementation of some 2,400 discriminatory voting changes; the withdrawal or modification of over 800 potentially discriminatory voting changes after DOJ requested more information; 105 successful actions to require covered jurisdictions to comply with Section 5; 25 denials of Section 5 preclearance by federal courts, citing high degrees of racially polarized voting in the jurisdictions covered by Section 5; and reports from tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions. In total, the record included over 15,000 pages of testimony and reports and statements from over 90 witnesses in over a dozen hearings.

I would caution you, though, that we must do all that we can to protect the gains that we have made. As I have demonstrated in my preceding testimony, the percentage of African Americans who have registered to vote, and who have voted, has increased substantially over the past 40 years due almost entirely to the protections offered by the Voting Rights Act of 1965. In addition to protecting those gains in registration, we must also ensure that the votes of racial and ethnic minorities across our country and in Georgia specifically are not diluted by gerrymandering or other changes to election laws which the VRA has historically protected us from. We are not at a point now where we can say that our journey has ended. We must continue our work together to ensure that yesterday's gains remain intact and that tomorrow's challenges can be successfully confronted.

Although tremendous progress has been made in keeping America's promises, equal opportunity in voting still does not exist – particularly at the local level. In fact, the vast majority of instances of racially discriminatory laws since 2000 have occurred at the local level.

Georgia in a post-*Shelby* world

As we all know, one year ago today, the U.S. Supreme Court issued its decision in *Shelby v. Holder*. In that decision, the Court did not invalidate the principle of preclearance whereby a state or local jurisdiction needs to receive advanced approval by the U.S. Justice Department or a panel of Federal Judges before they can make any changes to the time, place or manner of an election, as established in Section 5. Instead, the Court, despite the exhaustive work during the 2006 reauthorization by this Congress, held that Section 4(b) of the Voting Rights Act, which sets out the formula that is used to determine which state and local jurisdictions must comply under Section 5's preapproval requirement, is outdated and as such unconstitutional and can no longer be used. Thus, although Section 5 passed Constitutional muster, it cannot fulfill its intended purpose unless and until Congress can enact a new formula to determine who should be covered by it.

Senator Leahy and Senator of Grassley, in Post-*Shelby* Georgia we are witnessing the wholesale elimination and changing of polling locations; significant changes in the methods of electing school board, town and city council members; a rush to move to at-large districts; annexations,

and changes to early voting that have the purpose or effect of denying or abridging the right to vote.

In Georgia, the *Shelby* decision makes it much harder for us to prevent eligible voters from being disenfranchised and to win our battles against discrimination. While Section 2 of the Voting Rights Act remains a crucial tool in protecting Americans' voting rights, it is not enough for three reasons: (1) Section 2 lacks the hallmarks of Section 5 that prevents discrimination from occurring in the first place through a relatively low-cost administrative process; (2) Section 2 requires much more money and resources than are often unavailable to engage long and drawn out legal battles; (3) and Section 2 litigation can only target discrimination that is already known and is adversely impacting voters and it does not consistently capture voting discrimination that was not identified and blocked by section 5. Thus, without section 5, the reporting onus is removed from the jurisdiction and placed on groups like the Georgia NAACP or individual voters.

By invalidating Section 4(b), the Court also took away the requirement that covered states provide notice to their local communities regarding any potential new voting law; it effectively invalidated the federal observer program – long relied upon by communities across the country to stop racial intimidation in polling places; and eliminated the mechanism that provided an efficient and effective way to stop the implementation of new voting laws that may be racially discriminatory, until there is a review of all the facts.

For the Committee's information, I am attaching a listing of some of the proposed and enacted laws and administrative changes which have occurred in Georgia which have racial implications. I would also like to highlight just a few of those proposals.

Prior to the *Shelby* decision, Section 5 prevented a blatantly discriminatory attempt to reassign the African American Board of Education Chair's voter registration district from a seventy percent African American voting population to a seventy percent white voting population in Randolph County, Georgia. Section 2 could not be used to stop the change in advance because the changes were done in a special closed door meeting the sole purpose of running that African American out of office. In a unanimous vote, the all-white members of the Board of Registrars voted for the district change. There are literally hundreds of examples just like this.

Post *Shelby*, in Athens, Georgia, with a population of over 118,000, almost 30% of whom are African American, the City of Athens considered eliminating nearly half of its 24 polling places, and replacing them with only two early voting centers—both of which would be located inside police stations. Community members raised concerns that the location of the new centers would intimidate some voters including those of color, who may have been exposed to a time or place in which law enforcement officials were used to enforce the preferences of one party or candidate or to enforce anti-democratic, intimidating, disenfranchising, tactics and that the proposed closures would be harmful to voters of color, low and moderate income citizens, and/or

students, many of whom would need to travel on three hour bus rides just to reach the new polling places. The race neutral argument was that this would save money.

Another "money saving" proposal which we saw in Georgia was the State's proposition to shorten the early voting period from 21 days to 6 days. This, it was agued at the State legislature, would save cities and counties on average $3,400. Given that we presently spend over $45,000.00 a week to station a soldier in Afghanistan to fight for freedom abroad, spending $3,400 to ensure that working Americans can participate in the search for the common good seems like a worthy investment.

Another challenge is the consolidation of governments. Georgia, with a population of less than 10 million people, has 159 counties; this was done in order to make the state government so weak that it couldn't enforce the laws which were enacted to protect racial and ethnic minorities, including African Americans. In a strange twist of history, the state is now consolidating a number of jurisdictions so that the local officials are even more removed from the average citizen than they were before. This also contributes to the dilution of the voice of the "new majority," specifically racial and ethnic minorities. This has happened in Columbus, in Macon, and in Augusta, GA, to name but a few jurisdictions.

Finally, another tactic has been to *divide and conquer* areas where consolidation can't or hasn't worked, such as the City of Atlanta. This is especially true as the state legislature gerrymanders its electoral maps, and without the federal protection conferred by preclearance provision in the Voting rights Act of 1965, it is likely to happen more often. The Supreme Court's gutting of the preclearance formula essentially gave jurisdictions with a history of racial discrimination freedom to go back to disenfranchising voters. Indeed, actions by the State of Georgia and of local governments after the Shelby decision, demonstrates the critical importance of federal protection that Section 5's preclearance provision conferred.

Conclusion

Let me be clear at this point, Race still matters in America and it certainly matters in Georgia. I shared earlier in my testimony that I am here to ensure that I, like the generations of Americans before me, leave a more perfect union to my children. Langston, my baby boy is 7 months old. I wonder if he will work more while earning less; face discrimination in school, on the job, in his neighborhood, and when he tries to vote.

According to the National Center for Health Statistics, Langston is more than twice as likely as a white to die during the first year of his life. Langston is almost three times as likely as a white baby to be born to a mother who has had no prenatal care at all and that baby's mother is four times more likely than a white mother to die in childbirth. Langston's father is still twice as likely to be unemployed as the white child's father and his family still earns 72% of what the white family earns with the same education. Last year, the median family income for African Americans from Georgia was still only $31,778, compared to $51,244 for Whites. That is not

the result of the pigment of his skin. That is the result of racism – a theory of power and privilege as practiced in discrimination. If Langston survives at all, he is more likely to attend overcrowded or crumbling schools where performance is below the state or national average. Langston will have a higher chance than his white counterpart of going to jail or prison. In fact, the color of my children's skin is still the best indicator of whether or not they will be pulled over by police; whether or not they will be tried as an adult instead of as a juvenile and what kind of plea bargain they will be offered; how long their prison sentence will be, and whether or not they will be given the death penalty. From the cradle to the grave, race still matters and discrimination still exists.

To that point Chief Justice Roberts acknowledged the same when he conceded that "voting discrimination continues to exist; no one doubts that." Yet, there is no longer a mechanism in place to prevent states and jurisdictions with a history of voter discrimination from enacting such disenfranchising laws. As a nation, we have been here before. Our history as nation on race is replete with progress that is two steps forward and one step back.

Let me be clear at this point about race, racism and all the other 'isms' for that matter. Race is a social construct that at the core is about power and privilege. Racism at its core is not about hate. That is merely a possible by-product. Racism is a theory of politics – that is the power and privilege to decide in a system of limited resources who gets what, when, where, and how.

Today, we are in a Third Reconstruction that will test the metes and bounds of our nation's commitment to expand the "we" in "we the people" to all Americans including American Indians, Asian Americans, and Latino Americans. Racism (a theory of politics as practiced in the form of discrimination) will worsen without Section 5 to combat such behavior.

The elimination of Section 4(b) of the Voting Rights Act of 1965 by the U.S. Supreme Court has opened the door to invite all sorts of mischief inside our Nations sacred voting box, and as such we risk the disenfranchisement of whole segments of our society. Thus, I come here today, on behalf of the State of Georgia, and specifically the people of Georgia who have traditionally suffered the most from discrimination, and on behalf of our children, to respectfully and urgently request that you do all that you can to strengthen and modernize the 1965 Voting Rights Act. We need the tools inherent in a pre-clearance requirement fully intact and operational in order to tackle head-on the numerous attempts to silence us in a democratic system that requires the voices of all its eligible citizen partners to be a successful Democracy.

Given the continued need for voting protections, I join with the national NAACP and others in urging swift action on the Voting Rights Amendment Act of 2014, S. 1945 / H.R. 4899. While I too support strengthening the bill so that it covers more jurisdictions and offers protections for more people, I recognize that to amend it we must move it through the legislative process. Thus, I offer my sincere appreciation for these hearings and I strongly urge your colleagues in the other body to follow suit and quickly hold hearings, and a markup, and to get the bill moving. The sad

truth is that right now, nobody is enjoying the crucial protections offered by Section 5 of the Voting Rights Act of 1965, and we should act as expeditiously as possible to amend that situation.

I thank you again, Chairman Leahy, Ranking Member Grassley, and members of this committee, for holding this hearing and for your efforts. There are some who don't believe this Congress can get anything done. I am reminded that though the woods are lovely, dark and deep,
America has promises to keep,
And miles to go before I sleep,
And miles to go before I sleep.

America must keep her promises regarding the right to vote, the cornerstone of our democracy! The world is watching. I welcome your questions.

ADDENDUM TO PREPARED STATEMENT OF REV. DR. FRANCYS JOHNSON

Section 5 Objections and Other Voting Rights Act Violations in Georgia: 2000-June 2013

Section 5 Objections:

- State of Georgia (2012) – In 2012, the state of Georgia passed statewide legislation that had the sole effect of changing the date for the non-partisan mayoral and commissioner elections for the consolidated government of Augusta-Richmond from November to July, a veiled effort to dilute minority voting strength. After analyzing the proposed plan under Section 5, DOJ concluded that moving Augusta-Richmond's mayoral and commissioner elections from November to July would disproportionately impact the turnout of African-American voters. DOJ also concluded that there was evidence that Georgia's actions in adopting this legislation were driven, in part, by a racially discriminatory purpose. In the wake of the *Shelby* decision, the Georgia secretary of state has announced that the 2014 election for Augusta-Richmond County will be held at the time of the primary rather than the November general election. **NOTE: This case is also listed later in the report among 10 cases of concern *since* the *Shelby* decision was handed down, because the secretary of state's actions.**

- Long County and Long County School District (2012) – The county proposed redistricting plans for the board of commissioners and the board of education under which the Black voting age population of District 3 decreased by 6.7 percentage points, from 47.2 percent to 40.5 percent. DOJ determined that the plan would have caused African-American voters to experience an avoidable retrogression of their ability to elect candidates of their choice.

- Greene County and Greene County School District (2012) – The county proposed redistricting plans for the board of commissioners and the board of education that would have eliminated the ability of AfricanAmerican voters to elect candidates of choice in two single-member districts.

- State of Georgia (2009) – The state proposed to establish a voter verification program for voter registration application data, including citizenship status, and changes to the voter registration application. However, the state's procedures for verifying voter registration information did not produce accurate and reliable information and thousands of citizens who would be eligible to vote under Georgia law were flagged. The flawed system frequently subjected a disproportionate number of African-American, Asian, and/or Latino voters to additional and erroneous burdens on the right to register to vote. DOJ subsequently precleared a modified version of the program that resolved a Section 5 declaratory judgment action brought by Georgia in the U.S. District Court for the District of Columbia.

- Lowndes County (2009) – The proposed redistricting plan for the county commission would have added two single-member commissioner districts. Under the existing plan, African-American voters had the ability to elect a candidate of their choice in one of the three single-member districts in the county. Under the proposed plan, African Americans would have had the ability to elect a candidate of choice in only one out of five single-member districts. The plan, therefore, would have placed Black voters in a worse electoral position than under the benchmark plan.

- Randolph County (2006) – In January 2006, the three-member Randolph County Board of Registrars held a special meeting for the sole purpose of determining anew the proper voter registration location of Henry Cook, an African-American candidate for office from District 5. The

all-White board of registrars voted unanimously to change the voter registration status of Cook and his family members from District 5, where more than 70 percent of the voters are African-American, to District 4, where more than 70 percent of the voters are White. In addition to the sequence of events being procedurally and substantively unusual, the board resurrected an issue that had been settled three years earlier by a judge in the Superior Court of Tift County, who ruled that Cook was eligible to vote and run for office in District 5. DOJ objected to this change.

- Marion County School District (2002) – The county proposed a redistricting plan that would have decreased the number of viable minority districts by one and, moreover, reduced the ability of Black voters to elect candidates of choice in an additional district. Due to the drop in the Black population, the proposed 2002 redistricting plan contained only two districts (as opposed to three in the benchmark plan) in which Black people were a majority of the voting age population. In one of the two remaining Black majority districts, the Black voting age population dropped to 50.7 percent. Given the pattern of racially polarized voting, the significant reduction in Black voting strength would have necessarily entailed a material reduction in the ability of Black voters to elect candidates of choice under the proposed plan.

- City of Albany (2002) – The city proposed a redistricting plan in which the Black population in Ward 4 would be reduced to 31 percent in spite of having steadily increased over the past two decades. In the 2000 Census, the ward's Black population increased to nearly 51 percent only to be reduced by the proposed plan in order to forestall creation of a Black district. The reduction in the Black population was neither inevitable nor required by any constitutional legal imperative.

- Putnam County and Putnam County School District (2002) – The proposed redistricting plans for the Putnam County School District and the board of commissioners contained only one district in which Black persons would have been a majority of the voting age population. However, given the data from the 2000 Census, there were two districts under the 1982 benchmark plan in which Black people were at the time a majority of the voting age population. The Black percentage of the voting age population in proposed District 1 was cut almost in half by the proposed plan, while the Black percentage of the voting age population in proposed District 2 dropped slightly.

- City of Ashburn (2001) – The city proposed changes regarding the adoption of numbered posts for city councilmembers and majority-vote requirement for the election of city officers. The numbered posts method has the effect of frustrating single-shot voting; single-shot voting has often been used by Black voters to overcome the refusal of White voters to support candidates that the minority community supports. A majority-vote requirement also creates head-to-head contests between minority and White candidates; the imposition of such a requirement would have resulted in a runoff in which the White vote controlled the outcome of the election.

- City of Tignall (2000) – The city proposed to amend the city charter to change the method of election for the city council to numbered posts with staggered terms and a majority vote requirement. The proposed system would have eliminated the opportunity that minority voters had under the existing system to boost the effectiveness of their vote for their preferred candidate through single-shot voting. The imposition of numbered posts and a majority-vote requirement made more likely head-to-head contests between minority and White candidates where minority candidates would be more likely to lose than under the existing system with concurrent terms and a plurality voting requirement.

- Webster County School District (2000) – The process of developing a new redistricting plan was initiated after the school district elected a majority Black school board for the first time in 1996.

The county proposed a redistricting plan for the Board of Education of Webster County that would have reduced the minority population in the three majority Black districts. Given that the voting patterns in Webster County appeared to be racially polarized, the reductions in minority voting strength raised serious doubt about whether minorities would continue to have an equal opportunity to elect candidates of choice in the districts with the reduced Black populations.

Other Voting Rights Act Violations:

- Georgia State Conference of the NAACP, et al. v. Fayette County Board of Commissioners, et al. **(2013)** – In 2013, a federal court struck down, as violative of Section 2, Fayette County's at-large method of electing members to the county board of commissioners and board of education. The court found that although Black residents comprise 20 percent of Fayette County, are geographically concentrated in the county, and consistently vote together for board of commissioners and board of education candidates, no Black candidate has ever been elected to either of these boards in the county's 191-year history. As a remedy for the violation, the court ordered that future elections be conducted under a district voting plan.

- **United States v. Long County, GA (2006)** – On February 8, 2006, the United States filed a complaint against Long County, Georgia under Section 2. The complaint alleged that Long County officials required 45 Latino residents whose right to vote had been challenged on the grounds that they were not U.S. citizens to attend a hearing and prove their citizenship, even though there was no evidence calling into question their citizenship and even though similarly situated non-Latinos were not required to do so. According to the complaint, the defendants' conduct had the effect of denying Latino voters an equal opportunity to participate in the political process and to elect candidates of their choice. On February 10, 2006, the district court entered a consent decree that requires defendants to train their election officials and poll workers on federal law, to maintain uniform procedures for responding to voter challenges, and to notify Latino voters who were challenged that no evidence was presented to support the challenges against them and that they are free to vote.

Examples of post-*Shelby* Voting Changes of Concern

Because voting discrimination typically comes to light near major elections or right after the decennial census, we are only beginning to see examples of potentially discrimination voting changes post-*Shelby*. The following is a list of potentially discriminatory voting changes enacted since June 2013:

- **State of Georgia** –In the wake of the *Shelby* decision, the Georgia Secretary of State has announced that the 2014 election for Augusta-Richmond County will be held at the time of the primary rather than during the November general election, reinstating a plan that DOJ had objected to prior to *Shelby* on the grounds that it would disproportionately negatively impact the turnout of African-American voters. **NOTE: This case is listed above in the pre-*Shelby* section as well.**

From the report of the 2013-2014 Voting Rights Commission on Voting Rights Violations

Dr. Nancy Dennard appeared at the NCVR hearing representing the "Quitman 10+2", a group of ten black individuals who were charged with voter fraud and removed from elected office because of their work electing minority candidates. Quitman is a small city located in Brooks County, Ga. The county is around 16,000 people, and the voting population is estimated to be 36% black, 59% white, and 5% other. The school board is elected at-large.

Dr. Dennard previously ran for school board in 2006, losing close races. In 2009, she won a special election based on a strong get-out-the-vote and voter education campaign. Between the two elections, Georgia made it easier to vote early and by absentee ballot, which Dr. Dennard stressed to the voters who ultimately elected her. The following year, a group of individuals decided to run for school board and the county commission. All of them were successful in the primary, and despite some questionable tactics permitted by the superintendent of elections, all three were elected in November. However, on election night, the initial results showed one candidate losing by sixty votes which was then flipped to a nine-vote lead before certification. There was a recount, and that candidate won—picking up two votes in the process. Dr. Dennard believes it was because the majority of votes were on paper ballots which allowed for an accurate recount.

Those victories sent a wave of enthusiasm through the community; they truly realized the power of their votes. However, the elation was short lived. In December of 2010, ten individuals were arrested and charged with voter fraud, illegally assisting voters, and improper handling of absentee ballots. A year later those ten, and two others, were indicted by a special session of a grand jury. In January 2012, Dr. Dennard and the other elected officials in the Quitman 10+2 were removed from their offices.
During the course of the trial, Dr. Dennard and the others discovered that the Georgia Bureau of Investigation used intimidation and threats of arrest to elicit untruthful statements from some of voters. Furthermore, of the roughly 350 individuals interviews by the GBI, 95% of them were black.
Additionally, the trial exposed several irregularities. For example, a postal supervisor, with no legal authorization, locked returned absentee ballots in his cash drawer for later retrieval, as well as kept the logs at his house where no one else had access to them. Dr. Dennard had suspected something irregular. The local Board of Elections claimed they were mailing the ballots out but not receiving them back, and the day after her first election, 50 ballots were delivered by the Post Office. Dr. Dennard complained to the local postmaster, but got nowhere. Further, a deputy registrar at the board of elections testified that she brought absentee ballots home on several occasions because she was behind on her work of logging them, a violation of Georgia law.

This information came out in open testimony in court, but the GBI and prosecutors—who are purportedly worried about the integrity of elections—didn't pass that information along to the defense or investigate those wrong doings.

In October 2012, the elected officials were reinstated, and this past November Dr. Dennard was reelected as school board president. The trial against the Quitman 10+2 has ended in a mistrial, but she fears the authorities will attempt similar tactics in the future.

From the NAACP Legal Defense and Education Fund's report, "HOW FORMERLY COVERED STATES &LOCALITIES ARE RESPONDING TO THE SUPREME COURT'S VOTING RIGHTS ACT DECISION"

Following the *Shelby* decision, pending voting changes include a county commission plan in Georgia's most populous (Fulton) county that, among other things, creates a new overwhelmingly white district and reduces the district sizes of majority-Black districts.26

o State lawmakers also proposed legislation that would cut (to 6 days, including a Saturday) early-voting periods for small, but not larger, consolidated cities, as a purported cost-saving measure.27

o *At the local level*, following the *Shelby* decision, the City of Athens considered eliminating nearly half of its 24 polling places, and replacing them with only two early voting centers—both of which would be located inside police stations.28 Community members raised concerns that the location of the new centers would intimidate some voters of color and that the proposed closures would be harmful to voters of color and/or students, many of whom would need to travel on three hour bus rides just to reach the new polling places.

o *At the local level*, following the *Shelby* decision, Greene County, implemented a redistricting plan for the five-member County Board of Commissioners. The plan, which one Black member of the Commission denounced, would result in Black voters' making up less than 51 percent, a bare majority, in all five districts under the plan.29

 Under Section 5, the Department of Justice blocked another redistricting plan in Greene County in 201230 and had been reviewing the abovementioned plan before the *Shelby* decision.

o *At the local level*, following the *Shelby* decision, Morgan County, after initially considering eliminating over half of the County's polling places, ultimately eliminated more than a third of them.31 One city council member expressed his belief that the closures would disfranchise low-income, voters of color, many of whom lack cars.

o *At the local level*, following the *Shelby* decision, election officials in Baker County, a majority Black county with high poverty rates, considered eliminating four of its five polling places, requiring some voters to travel upwards of 20 miles to vote.32

26 http://www.ajc.com/ap/ap/georgia/states-promise-quick-action-on-election-laws/nYWbD/; http://blogs.ajc.com/atlanta-forward/2013/06/27/voting-rights-act-2/

27 http://m.onlineathens.com/general-assembly/2014-02-04/georgia-lawmaker-seeks-shorter-earlyvoting-
periods-small-cities;
http://www.salon.com/2014/02/20/gops_chilling_new_assault_on_voting_why_this_man_wants_to_cl
ose
_georgia_voting_sites/

28 http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104

29 http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104;
http://www.msgr.com/lake_oconee_news/news/article_84967866-05da-11e3-801e-019bb2963f4.html

30 http://www.justice.gov/crt/about/vot/sec_5/ltr/l_041312.php

31 http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104

32 http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104

At the local level, following the *Shelby* decision, election officials in Augusta-Richmond are considering reintroducing a plan that would move County elections from their traditional timing in November to over the summer, when Black voter turnout is typically lower.33

 Under Section 5, the Department of Justice in 2012 blocked this same attempt to switch the election date from November to a summer time month.34

o *At the local level*, officials in Macon, a majority-Black city in Bibb County, decided to have just one non-partisan municipal election in July, when Black voter turnout typically is lower, moving from their traditional schedule of having partisan elections with a primary election in July and a general election in November.35

33 http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104; http://chronicle.augusta.com/news/government/elections/2013-06-29/court-ruling-revives-effort-moveaugusta-
elections-july; http://www.msnbc.com/msnbc/gop-revives-jim-crow-tactic
34 http://www.justice.gov/crt/about/vot/sec_5/ltr/l_122112_ga.php
35 http://www.npr.org/2014/02/06/272359791/voting-rights-act-update

For information on the history of voter discrimination in Georgia, go to
http://lawweb.usc.edu/why/students/orgs/rlsj/assets/docs/issue_17/03_Georgia_Macro.pdf

PREPARED STATEMENT OF ABIGAIL THERNSTROM

TESTIMONY OF DR. ABIGAIL THERNSTROM, ADJUNCT SCHOLAR AT THE AMERICAN ENTERPRISE INSTITUTE, ON THE VOTING RIGHTS AMENDMENT ACT, S 1945: UPDATING THE VOTING RIGHTS ACT IN RESPONSE TO *SHELBY COUNTY V. HOLDER*, JUNE 25, 2014, DIRKSEN SENATE OFFICE BUILDING, RM 106.

Thank you Mr. Chairman and members of the committee for the opportunity to testify today. My name is Abigail Thernstrom, and I am an adjunct scholar at the American Enterprise Institute. I have a Harvard Ph.D. in Government and from 2001 to 2013 I was first a commissioner and then vice-chair of the U.S. Commission on Civil Rights. I am also the author of two books on the Voting Rights Act.

I do not agree with the premises upon which this hearing rests. I believe the decision in *Shelby County* was absolutely right; section 4's coverage formula still rested on 1972 voter participation data, making the act a period piece. Moreover, the statute today needs no updating. Its permanent provisions provide ample protection against electoral discrimination.

In 1965 the passage of the Voting Rights Act marked the death knell of the Jim Crow South. The exclusive hold of whites on political power made all other forms of racial subjugation possible. The act was an indispensable and beautifully designed response to a profound moral wrong. It stood on very firm constitutional ground, and was animated by a clear principle: Citizens should not be judged by the color of their skin when states determine eligibility to vote. The enactment of the law was one of the great moments in the history of American democracy.

Over time, the Voting Rights Act morphed in an unanticipated direction—a change that has had both benefits and costs. The act's original vision was one that all decent Americans shared: racial equality in the American polity, such that blacks would be free to form political coalitions and choose candidates in the same manner as other citizens. But in the racist South, it soon became clear, that equality could not be achieved—as originally hoped—simply by giving blacks the vote. Merely providing access to the ballot was insufficient after centuries of slavery, another century of segregation, ongoing white racism, and persistent resistance to black political power. More aggressive measures were needed.

In response, Congress, the courts, and the Justice Department, in effect amended the law to ensure the political equality that the statute promised. The law came to mandate districting plans that ensured what were called racially "fair" results—districts carefully drawn to reserve legislative seats for blacks and Hispanics, districts that would protect minority candidates from white competition.

Ordinarily, there are no group rights to representation in the American constitutional order. True political equality demands not group rights to representation, but a political system that recognizes citizens as individuals with fluid identities, free to emphasize their racial and ethnic heritage as they wish and to coalesce in any manner they might choose. Nevertheless, a less radical approach could not have solved the deep-seeded problem of massive black disfranchisement in one region of the country. Draconian federal legislation was needed.

The race-conscious maps did work to promote minority office holding. Covered and non-covered states in the South became almost indistinguishable by the measure of blacks elected to state legislatures. But while federally mandated race-driven districts served a purpose, today they are no longer needed. Whites vote for black candidates at every level of government.

Voting rights scholar Daniel Lowenstein has drawn a nice analogy. The race-conscious districting was a temporary measure to give blacks "a jumpstart in electoral politics," he has written. But "the guy who comes and charges up your car when the battery's dead, he doesn't stay there trailing behind you with the cable stuck as you drive down the freeway. He lets it go."

It's time to let race-driven districting go the way of those jumper cables. America is better off with the increase in the number of black elected officials who gained office, in large part due to the deliberate drawing of majority-minority districts. But black politics has come of age, and black politicians can protect their turf, fight for their interests, and successfully compete even for the presidency, it turns out. It's a new world.

In today's America, the costs of continuing to insist on race-based electoral arrangements are very high. And thus reinstituting preclearance in some jurisdictions is a grave mistake. The enforcement of the statute herded black voters into what even Rep. Mel Watt once called "racial ghettos" – political ghettos that have generally rewarded minority politicians who win by making the sort of overt racial appeals that are the staple of invidious identity politics.

In such districts, officeholders tend to be pulled to the left—or, in any case, are certainly under no pressure to run as centrists. Their left-leaning tendencies, along with a reluctance to risk elections in majority-white settings, perhaps explain why so few members of the Congressional Black Caucus have run for statewide office and none made a serious bid for the presidency before Barack Obama. It is doubtful that anyone can imagine, for instance, South Carolina representative James Clyburn building a national campaign, despite the fact that he is a well-respected, long-serving political figure. Nevertheless, he's a *black* politician with a majority-*black* constituency. His race was his ticket to Congress.

The contrast with Barack Obama's history is striking. In 2000, Obama ran in the Democratic primary in Chicago for a U.S. House seat. "I've always thought," Michael Carvin once said,

> the best thing that ever happened to Obama was [that] he ran for a heavily minority black congressional district in Chicago and lost. If he had won, he would have just become another mouthpiece for a group that is ghettoized in Congress and perceived as representing certain interest groups in the legislature.

Obama did, however, win a seat in the U.S. Senate in 2004, and his status as a senator from a heavily white state enabled him to transcend that perception.

Blacks running in majority-minority districts, not acquiring the skills to venture into the world of competitive politics in majority-white settings—that is not the picture of

political integration, equality, and the vibrant political culture that the Voting Rights Act should promote. By another measure, as well, equality may be compromised by race-conscious districting. The creation of these districts has not overcome the heritage of political apathy created by the long history of systematic disfranchisement; their residents are generally less politically engaged and mobilized, with the result that turnout is generally low, a number of scholars have concluded.

A particularly troublesome section of the bill is "(4) DETERMINATION OF PERSISTENT, EXTREMELY LOW MINORITY TURNOUT." It provides that jurisdictions may be brought under coverage and deprived of their ordinary rights to govern themselves if any of several statistical measures indicate that minority voters have lower turnout rates than others. It is hard to believe that anyone familiar with basic demography ever reviewed this section. It assumes simplistically that if minority participation is low by some measure, it must be the fault of the jurisdiction—that its political process must be somehow flawed, and that the jurisdiction has to be kept under closely supervised probation until it remedies this alleged wrong. This simplistic assumption flies in the face of an abundance of social science knowledge about voting behavior.

This is clear from even a quick glance at the Census Bureau's estimates of participation in the 2012 presidential elections that are available in the Voting and Registration section of the Census Bureau web site. The tables there reveal, first, that racial/ethnic groups that differ in their average age can be expected to have different rates of voter turnout. Old folks are far more likely to vote than young ones are. In the 2012 presidential election, just 38 percent of eligible voters aged 18-24 actually cast a ballot, compared to 73 percent of those in the 65-74 age bracket. (It should be noted that there was nothing peculiar about the 2012 elections. This pattern, and the others discussed below, show up in every election in recent decades.) Since the Hispanic population today includes many more young people than elderly ones, the group can be expected to have lower turnout rates than non-Hispanics. The bill takes this to be proof that public officials are doing something to suppress the minority vote. This is ridiculous. It is impossible to know what any local government could do to force the young to vote at the same rate as the old. Should the police be ordered to round up youths and march them into the voting booths?

Education is a second powerful force driving electoral turnout. Everywhere in the United States, electoral participation is notably higher among the well educated than among those with little education. In 2012, only 37 percent of eligible voters with less than nine years of schooling turned up at the polls, but 75 percent of college graduates. Since both blacks and Latinos have less schooling on the average than non-Hispanic whites, lower minority turnout rates in a community are not evidence that that the local political process is flawed and that its elections need to be regulated and monitored by the federal government.

Turnout disparities along racial or ethnic lines can also be the result of residential mobility. Newcomers to a community are much less likely to turn out at the polls than long-settled residents. In 2012, just 41 percent of Americans who had resided at their

current address for less than a month cast a ballot; 76 percent of their counterparts who had lived in the same home for five years or more voted in November.

Two other closely related drivers of voting behavior are family income and home ownership. In 2012, just 39 percent of people in families with annual incomes below $10,000 cast a vote. For those from families earning more than $150,000 it was 77 percent. Similarly, 65 percent of homeowners turned out to vote, but only 41 percent of renters.

That whites, blacks, Latinos, and Asians are not equally likely to turn out at the polls is not at all surprising, since they differ from each other in their age structure, education, income, and rates of home ownership. We can expect to find substantial racial/ethnic disparities in turnout rates because the various groups differ in major demographic characteristics that determine turnout levels. No one has found a formula that would tell us how to engineer equal levels of voter registration and turnout among groups that vary dramatically in their average age, educational attainment, length of residence in the community, family income, and rate of home ownership.

Furthermore, changes over time in turnout levels of particular groups in particular communities are not prima facie evidence that a jurisdiction is doing anything wrong. They are likely the result of geographic mobility that brings into the jurisdiction more people whose social characteristics make it likely that their turnout levels will be very low.

In sum, forces far beyond the control of any state, and of any of its political subdivisions, result in glaring disparities in rates of electoral participation. The framers of the entire section of the proposed legislation focused on the issue of "low minority turnout" seem oblivious to what every social scientist knows. It would extend federal control over a great many jurisdictions that have made every possible effort to provide equal opportunity to elect candidates of their choice to all of the citizens. If the Congress were to enact the measure as written, I very much doubt that it would survive the scrutiny of the Supreme Court of the United States.

Another problem with this section of the proposed legislation is its casual disregard of how the evidence about turnout at the the local level is to be found. The bill blithely states that "in each odd-numbered calendar year" the Attorney General of the United States "in consultation with the heads of the relevant offices of the government" will provide "figures determined using scientifically accepted statistical methodologies." This seems to imply that the necessary data are already in the hands of the federal government; all the Attorney General needs to do push the right button and it will pop up on his computer screen.

But the only official figures on current turnout rates are those derived from the American Community Survey, and those rates are available only for *whole states*. (A handful of southern states do have a race question on the registration forms, but the vast majority of states do not.) The current CPS election studies offer *no information* about group differences in voter turnout in *local* jurisdictions. For the nation's smaller political

subdivisions, accurate numbers would require a complete canvas of the population. There are no "scientifically accepted statistical methodologies" to obviate the need for it.

Gathering the data for local jurisdictions would be a massive and very costly undertaking. One option would be a biennial national Registration and Voting Census conducted like the Decennial Census but confined to gathering information about the race/ethnicity of registrants and voters. What would that cost? Collecting data from a nation with a population over 300 million is a massively expensive endeavor.

A partial solution would be to pass on the huge costs of this effort to lower levels of government by requiring that all jurisdictions in the U.S. include a question about race and ethnicity as part of the voter registration process. Voter lists would have to be color-coded, just as they were in the days of Jim Crow. This would be useful, but it would only tell us something about the electoral participation of those who are registered, and would leave unknown the number of eligible voters who were not.

It is stunning that the drafters of this bill gave little thought to the problem of assembling the data that will be demanded by the amended statute, as envisioned.

Finally, placing each registrant in a racial box will be offensive to many who consider election day to be a civic ritual celebrating the fact that we are one people. If it is so vital to have information color-coded why don't we go all the way and list the race of each *candidate* on the ballot, which would make the gathering of information pertinent to much voting rights litigation easier.

ADDENDUM TO MY JUNE 24, 2014 TESTIMONY ON S 1945 BEFORE THE U.S. SENATE JUDICIARY COMMITTEE

Abigail Thernstrom

I had intended to address this issue in my written testimony, but other time commitments prevented me from developing my observations on this matter before my written statement had to be submitted. I am grateful for the opportunity to make these additional comments now.

In my written testimony, I discussed at some length what I see as serious flaws in the proposed bill's formula for bringing jurisdictions below the state level under coverage of the law. An even more important point, explored here, is that the formula used to determine which states are to be brought under special coverage is grotesquely biased. It defies elementary logic, frankly, and I suggest that it would be highly unlikely to withstand judicial scrutiny.

The primary indicator used to single out the states to be placed under Justice Department supervision is their record of voting rights violations over the past 15 years. It is reasonable to take such violations into account. But the way the formula is constructed and applied is simply indefensible, because it relies upon absolute numbers of violations and ignores radical differences in the size of the populations of the various states.

The problem can best be grasped by considering a hypothetical. Let us suppose that Congress decided that some states today are incarcerating too many of their citizens, and that it therefore passed legislation mandating that states with the worst records on this count would have their criminal justice systems placed under the supervision of the U.S. Department of Justice until they sharply reduced their prison populations. This hypothetical measure, which follows the logic of the Voting Rights Amendment Act of 2014, would find that by far the worst two states in the nation are California and Texas. Together they have 21.5 percent of all the nation's prisoners, even though they amount to just 4 percent of the number of states. [The numbers are to be found in the *Statistical Abstract of the United States: 2011*, Table 344.]

Does the fact that California and Texas have so many more prisoners than Vermont and Wyoming serve to establish that their systems of criminal justice are much too punitive? Or is the cause of this disparity in the number of incarcerations the simple fact that California and Texas have a combined population that is more than 50 times the size of that Vermont and Wyoming together? California and Texas are the home to a fifth of the total U.S. population. Their share of the incarcerated population closely resembles their share of the total U.S. population. There might be particular problems with their criminal justice system, of course, but the absolute size of the prison population would tell us nothing at all about whether this is indeed the case.

The coverage formula in the proposed voting rights bill is based upon precisely this fallacy. The supporters of this legislation insist that it is national in scope, and that it

treats all states equally, singling out for special coverage only the most egregious offenders. But the formula it sets out uses the absolute number of voting rights violations as the triggering mechanism, and thus ignores the huge variance in population size among the 50 states.

The formula could easily have avoided this huge built-in bias by relying not upon the absolute number of violations but upon the rates of violation per 100,000 residents of each state. Even better would have been to calculate VRA violation rates relative to the size of the minority population of the various states, because it is minority numbers that count in determining the number of voting rights violations. A state with a large population but comparatively few minority citizens could be expected to have many fewer voting rights complaints than one of the same size but much larger numbers of minorities within its boundaries.

Surely someone involved in the prolonged process of framing this bill must have had enough familiarity with elementary statistics to recognize that counting up violations per state without regard for huge variations in the size of their populations, and especially their minority populations, defies logic. I am not aware of any federal programs that disperse money to the states that award 2 percent of the total appropriation to each one. They always take population size into account, as well they should. The coverage formula in this bill is so illogical that it raises disturbing questions about the political motives of those who devised it.

PREPARED STATEMENT OF SHERRILYN IFILL

Testimony of Sherrilyn Ifill
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.

Before the United States Senate Committee on the Judiciary

Hearing on
"The Voting Rights Amendment Act, S. 1945:
Updating the Voting Rights Act in Response to *Shelby County v. Holder*"

Dirksen Senate Office Building
Room 106

June 25, 2014

I. INTRODUCTION

Good morning Chairman Leahy, Ranking Member Grassley, and members of the Committee. My name is Sherrilyn Ifill. I am the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF). Thank you for the opportunity to testify this morning on the most urgent civil rights problem facing us today: restoring the voting rights protections eliminated by the Supreme Court's decision in *Shelby County v. Holder*.

Since its founding in 1940 by Thurgood Marshall, LDF has been a leader in the struggle to secure, protect, and advance voting rights for African Americans and other communities of color. Beginning with *Smith v. Allwright*, our successful Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been engaged in combating all of the barriers to the full, equal, and active participation of African-American voters.

The Voting Rights Act of 1965 is universally recognized as the most successful piece of legislation to emerge from the Civil Rights Movement. The Act enshrined our most fundamental values by guaranteeing to all of our citizens the right to vote, which the Supreme Court has called "preservative of all rights."[1] The Act assures voters of color the utmost protection to participate fully in our political process. Congress has reauthorized the Voting Rights Act on four separate occasions. Each reauthorization received overwhelming bipartisan support and was signed into law by a Republican President. In 2006, Congress reauthorized the Act by a Senate vote of 98 to 0, and a House vote of 390 to 33. The provisions of the Act, including the process by which states and localities with records of discrimination are required to "preclear" voting changes before implementation, were considered by Congress to be an efficient and effective mechanism for detecting and redressing the many forms of discrimination that continue to taint our democratic process.

The Voting Rights Act has withstood constitutional attack in every instance except the last.[2] In *Shelby County v. Holder*,[3] a decision handed down one year ago today, the Supreme Court ruled unconstitutional the provision of the Act by which Congress determined which states and jurisdictions are subject to preclearance. The Court reached that decision despite an overwhelming record amassed by this Committee and its counterpart in the House demonstrating the existence of contemporary voting discrimination.

The result of that decision is that minority voters have been left without critically-needed voting protections for an entire year. Some commentators have said that we no longer need the kind of protection afforded by Section 5 of the Act. Nothing could be further from the truth. My testimony today will focus on bringing into clear view the protections we lost last year and the wide array of potentially discriminatory voting changes that numerous states, counties, and cities across our nation have enacted or proposed in the wake of the Court's devastating decision. These are only the examples we know about. It is very likely that many more discriminatory changes have been enacted, but have gone undetected or unchallenged; still more prospective changes may

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1 *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

2 *See Lopez v. Monterey*, 525 U.S. 266 (1999) (rejecting a constitutional challenge to the reauthorization of Section 5); *City of Rome v. U.S.*, 446 U.S. 156 (1980) (same); *South Carolina v. Katzenbach*, 383 US. 301 (1966) (upholding the entirety of the Voting Rights Act against constitutional attack).

3 133 S.Ct. 2612 (2013).

be under consideration. The general election in November presents a looming opportunity for those actors who are inclined to discriminate, leaving many more voters of color vulnerable.

Some have said that other provisions of the Voting Rights Act are sufficient to deal with discrimination in voting. This is also not true. Litigation is costly, time-consuming, and can only address voting discrimination after it has gone into effect and after the democratic process has been besmirched with the taint of discrimination. Moreover, even the assortment of civil rights law organizations that, like my own, are committed to representing voters in such cases, could not keep up with litigating the litany of changes that have been unleashed in just the first year after the *Shelby County* decision. The result is that, for countless voters, discrimination will go unredressed. The Voting Rights Amendment Act ("VRAA"), S. 1945, represents a bipartisan response to the Court's invitation in *Shelby County* to update the Voting Rights Act. With the discriminatory voting changes we have witnessed in the past year, combined with the many incidents compiled in advance of *Shelby County*, there is no question that this legislation is vital.

To LDF, the VRAA represents a modest and flexible approach to civil rights enforcement that will redress the present-day forms of voting discrimination and will ensure that voters are protected from discrimination anywhere in the country.

II. THE VOTING RIGHTS ACT BEFORE *SHELBY COUNTY V. HOLDER*

A year ago, on June 25, 2013, the United States Supreme Court issued its decision in *Shelby County, Alabama v. Holder*. The Supreme Court's opinion declared Section 4(b), which was the "coverage" provision that Congress used to define which states and local jurisdictions are subject to the Section 5 "preclearance" process, unconstitutional. Although the Court did not invalidate Section 5, the unfortunate reality is that, without the coverage provision, no jurisdiction is currently required to review the impact of proposed voting changes on people of color.

A. The Preclearance Framework before *Shelby County v. Holder*

Prior to *Shelby County* the preclearance process of the Voting Rights Act of 1965 had served as our democracy's discrimination checkpoint. For nearly fifty years, the preclearance regime had stopped thousands of potentially discriminatory voting changes before they happened.[4] "Covered" states, municipalities, and other jurisdictions with a long, documented history of racial discrimination in voting were required to notify the United States Department of Justice (Justice Department) before implementing a discriminatory voting change.[5] The burden was on the covered jurisdiction that was submitting the proposed change to demonstrate to the Justice Department that the proposed change was not more burdensome on voters of color than white voters when compared to the existing status quo.[6] Jurisdictions were also required to prove that the proposed change did not have a discriminatory purpose.[7] If the covered jurisdiction did not meet its burden,

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[4] *See Voting Determination Letters*, U.S. Dep't of Justice, (last visited June 22, 2014) (listing all of the objections ever imposed in sixteen covered or partially covered states between 1965 and 2013).

[5] 42 U.S.C. § 1973c.

[6] *See Beer v. United States*, 425 U.S. 130, 141 (1976) ("[T]he purpose of [Section] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

[7] 42 U.S.C. § 1973c(a).

the Justice Department could block the proposed change. The jurisdiction then had the option of submitting that change to a three-judge panel from the federal courts of Washington, D.C.

The preclearance process provided a quick, efficient, and non-litigious way of addressing the pervasive and persistent problem of voting discrimination in America. Congress, when enacting the Voting Rights Act, properly recognized that Section 5's preclearance requirement would not only lead to a decrease in litigation but would also provide an effective mechanism for expediently processing, investigating and possibly resolving voting rights challenges, without resorting to litigation.[8] As such, Section 5's preclearance requirement is akin to the administrative processes found in other landmark civil rights legislation passed by Congress, before and after the Voting Rights Act. For example, when Congress created the Equal Employment Opportunity Commission as part of the Civil Rights Act of 1964, it provided the agency with an administrative enforcement mechanism so that the goal of remedying unlawful employment discrimination could be achieved, to the extent possible, through investigation, voluntary compliance, and informal conciliation.[9] Likewise, Title VIII of the Civil Rights Act of 1968—more commonly known as the Fair Housing Act—provides a mechanism through which an aggrieved individual may file an administrative complaint with the Secretary of the U.S. Department of Housing and Urban Development.[10] The Secretary, in turn, is empowered to investigate the complaint and to seek resolution of the complaint through "conciliation and persuasion."[11]

Under Section 5's preclearance framework, communities were given broad public notice about proposed voting changes, and the status quo was preserved until the effect of the proposed changes on voters of color could be fully explored and presented to a third party. This framework was important. Between 1982 and 2006, the Voting Rights Act blocked over 700 discriminatory voting changes, more than half of which include findings of intentional discrimination.[12] Preclearance also had a significant deterrent effect. Since 1982, over 800 proposed voting changes were withdrawn or altered after the Justice Department merely sent a more information request letter.[13] This suggests that many jurisdictions withdrew or altered the preclearance request in acknowledgement of the change's discriminatory effect or purpose. Similarly, an unknowable number of jurisdictions likely never considered pursuing discriminatory changes simply because they knew the changes would be blocked by the Voting Rights Act. As a time- and cost-saving measure, the preclearance process meant that, even where a jurisdiction did seek preclearance through a trial in the district court, Section 5 lawsuits were often completed after a year.[14] This is

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8 *See, e.g.*, H.R. REP. No. 89-162, pt. 3, at 6-9, 23-24 (1965).

9 *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) ("Congress, in enacting Title VII, chose cooperation and voluntary compliance . . . as the preferred means of achieving its goals.") (internal quotation marks and citation omitted).

10 Herbert A. Danner, CONGRESSIONAL RESEARCH SERVICE, *The Civil Rights Act of 1968: Brief Summary of Basic Provisions* 6 (1968).

11 *Id.*

12 *Shelby County*, 133 S. Ct. at 2639 (Ginsberg, J., dissenting).

13 *Id.* at 2640-41.

14 *See id.* at 2640 ("And litigation places a heavy financial burden on minority voters. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a [Section] 2 claim, and clearance by [the Justice Department] substantially reduces the likelihood that a [Section] 2 claim will be mounted." (citations omitted)); *see also, e.g.*, *South Carolina v. United States*, 898 F. Supp. 2d 30, 50 (2012) (setting "an extremely aggressive trial schedule" in a Section 5 lawsuit regarding the state's voter ID law, and resolving the case in eight months).

significant as federal litigation brought under Section 2 of the Voting Rights Act is some of the most expensive and time-consuming type of litigation.[15] Moreover, Section 2 litigation occurs only after the fact, when the beneficiaries of an illegal voting scheme have been elected with the advantages of incumbency. This means that a discriminatory voter qualification, and electoral system or mechanism can remain in place for years until a federal court strikes it down.

B. Recent Examples of Blocked Discriminatory Voting Changes

A survey of the types of changes blocked by the preclearance requirement in the last decade or more uniquely demonstrates the effectiveness and necessity of the Voting Rights Act as a preemptive remedy. In just the seven years between the 2006 reauthorization and *Shelby County* in 2013, Section 5 blocked dozens of discriminatory voting changes. Indeed, after reviewing the record before Congress in 2006 reauthorization, the Court was careful to acknowledge that "voting discrimination still exists; no one doubts that."[16] These examples are characteristic of the intentionally discriminatory changes blocked in the years before and after 2006.

In 2012, the City of Clinton, Mississippi proposed a districting plan for its six-member council that, like the existing plan, did not include a single ward where African-American voters had the power to elect their candidate of choice. This was the proposal despite the fact that 34% of the city's population is African-American. After careful review under Section 5 of the Voting Rights Act, the Justice Department found reliable evidence that the City of Clinton acted with a racially discriminatory purpose in its decision not to create a city council ward where African-American voters had the ability to elect a candidate of their choice. In the wake of the Justice Department's objection, the city redrew the council district lines, creating, for the first time, a ward where African-American voters have the ability to elect their preferred candidate.[17]

In 2011, two other cities in Mississippi and Texas experienced similar problems. The City of Natchez, Mississippi, proposed a redistricting plan that reduced the percentage of African-American voters in one ward (Ward 5) by 6% and placed these voters into the three wards that were already majority African-American. This change decreased the African-American voting-age population in the impacted ward from almost 53% to under 47%, thus eliminating the ability of African-Americans in that ward to elect their preferred candidate. After careful review, the Justice Department concluded that the city's efforts to reduce the African-American population in Ward 5 were done with a discriminatory purpose.[18] In late 2011, the county commission in Nueces County, Texas, enacted a redistricting plan that diminished the voice of Latino voters at the polls

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[15] See Federal Judicial Center, 2003-2004 District Court Case-Weighting Study, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed); Voting Rights Act: Section 5 of the Act–History, Scope, and Purpose: Hearing Before the Sub-comm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits).

[16] *Shelby County*, 133 S. Ct. at 2619.

[17] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice, to Kenneth Dreher, Esq., and David Wade, Senior Planner, City of Clinton (Dec. 3, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/l_121203.pdf

[18] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice, to Everett T. Sanders, Esq., City Attorney, City of Natchez (Apr. 30, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/l_120430.pdf

by swapping Latino and white voters between election precincts. After careful review of the 2011 plan, the Justice Department concluded that the county's actions "appear to have been undertaken to have an adverse impact on [Latino] voters." The Justice Department also noted that the county offered "no plausible non-discriminatory justification" for these voter swaps, and instead offered "shifting explanations" for the changes.[19]

Even before the 2006 reauthorization of the Voting Rights Act, these forms of intentional discrimination were evident in covered jurisdictions. In September 2003, the town of North in Orangeburg County, South Carolina, proposed to annex a small white population into the town. Ultimately, the Justice Department concluded that the annexation could not go forward because "race appears to be an overriding factor in how the town responds to annexation requests." The letter denying the town approval to proceed with the annexation indicated that in the early 1990s, a large number of African Americans who resided to the southeast of the town had petitioned for annexation that was denied, and that the town gave no explanation for the denial. The Justice Department letter notes that the granting of the petition by this group of African Americans "would have resulted in African Americans becoming a majority of the town's population." Based on its investigation, the Department concluded that the county did not provide equal access to the annexation process for African-American and white residents, and blocked the proposed annexation.[20]

Also in 2003, in the City of Ville Platte in Evangeline Parish, Louisiana, proposed a redistricting plan that reduced the African-American population in one of the four majority African-American council districts, District F, from 55.1% to 38.1%. Notably, the city experienced a dramatic growth in its African-American population between 1980 and 2000, increasing from less than a third African-American to African-American registrants constituting 51.3% of the city's eligible voters. In the 2003 plan, significant African-American populations in this district would have been shifted to a district that was already 78.8% African-American. After careful analysis, the Department blocked the plan, and concluded that the plan to reduce the number of African-American districts from four to three was designed, at least in part, to make African-American voters worse off by eliminating their electoral power in District F.[21]

Finally, three weeks before Election Day in 2001, the town council of Kilmichael, Mississippi, decided to cancel its municipal election. At the time the election was cancelled, the most recent Census numbers showed an increase in the African-American population such that the town was now 52.4% African-American, though the mayor and all five members of the Board of Alderman were white. All council members were elected at-large to four year terms, with a plurality vote requirement. The stated purpose for the town's action was to develop a single-member ward system for electing town officials. In its letter of decision to the town, however, the Justice Department noted that the decision to cancel the election came only after African

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[19] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice, to Joseph M. Nixon, et al., (Feb., 7, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/l_120207.pdf.

[20] Letter from R. Alexander Acosta, Assistant Attorney General, U.S. Department of Justice, to the Honorable H. Bruce Buckheister, Mayor, North, South Carolina, (Sept. 16, 2003), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/SC/SC-2170.pdf

[21] R. Alexander Acosta, Assistant Attorney General, U.S. Department of Justice, to the Honorable Phillip A. Lemoine, Mayor, Ville Platte, Louisana and Glenn A. Koepp, Esq, Chief Executive Office, Redistricting LLC, (Jun. 4, 2004), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/LA/LA-2440.pdf

Americans became a majority of the population in the town and only after several African-American candidates announced plans to run for office. Under the existing at-large electoral method, African Americans had the very strong potential to win a majority of the municipal offices, including the office of mayor. Thus, the Department objected to the attempt to cancel the election, concluding that the town's decision was motivated by an intent to negatively impact the voting strength of African-American voters, just as they were prepared to use it.[22]

III. VOTING CHANGES SINCE *SHELBY COUNTY V. HOLDER*

Unfortunately, the Supreme Court's decision has now left communities of color largely on their own to monitor proposed statewide and local voting changes for potentially unfair changes. As LDF and others feared, over the last year, various states and jurisdictions have used the *Shelby County* decision to freely pursue and justify a range of voting changes, many of which are transparently aimed at suppressing the votes of people of color, while others have been proposed with a heedless disregard for the negative effects on voters of color. Not surprisingly, many of the states or jurisdictions that were once covered under the preclearance process are now the most likely to be engaged in pursuing changes that hurt voters of color. Although statewide changes to redistricting or voter qualifications are more widely known, the lack of preclearance is particularly troublesome at the local level where a number of counties and cities have eliminated elected positions once held by people of color, altered voting districts or methods of election, either moved or closed polling places, and shifted the dates of elections or even cancelled elections—all of which can effectively disfranchise voters of color, and which often occur without any prior public notice or legal challenges.

LDF has kept a running, and still growing, list of state and local level responses to the *Shelby County* decision. LDF's report identifying these responses is attached, hereto.

A. Statewide Voting Changes Since *Shelby County v. Holder*

State legislatures and executive officials have moved quickly and decisively to take advantage of the end of the preclearance process. For instance, within several months of *Shelby County*, several states announced changes to early voting. In February 2014, Georgia lawmakers proposed legislation that would cut early voting periods for smaller, but not larger, cities to six days, including a Saturday, as a purported cost-saving measure.[23] LDF submitted a letter on behalf of thirty organizations that helped to convince the state legislature not to go through with the proposed early voting cuts.[24] Similarly, in Florida, Secretary of State Ken Detzner has said

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[22] Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, (Dec. 22, 2001), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/MS-2680.pdf

[23] Walter C. Jones, *Georgia lawmaker seeks shorter early-voting periods for small cities*, ATHENS BANNER-HERALD, Feb. 4, 2014, http://m.onlineathens.com/general-assembly/2014-02-04/georgia-lawmaker-seeks-shorter-early-voting-periods-small-cities; Spencer Woodman, *GOP's chilling new assault on voting: Why this man wants to scale back early voting in Georgia*, SALON.COM, Feb. 20, 2014, http://www.salon.com/2014/02/20/gops_chilling_new_assault_on_voting_why_this_man_wants_to_close_georgia_voting_sites/.

[24] *Voting Rights Advocates urge the Georgia Legislature to Reject Attack on Voters*, NAACP LDF (Feb. 25, 2014), http://www.naacpldf.org/press-release/voting-rights-advocates-urge-georgia-legislature-reject-attack-voters.

"[w]e're free and clear to follow through with our [early voting] law now without any restriction by the Justice Department."[25] In August 2012, LDF represented African-American voters in a Section 5 lawsuit where a federal court rejected these changes as harmful to Florida voters of color.[26] In particular, the court determined that severe cuts to the state's early voting period would have serious consequences for African-American Floridians. In 2008, over *half* of African-American voters in Florida cast their ballots during the early voting period.

Equally troublesome are reports of statewide voter purges. Following *Shelby County*, Florida Governor Rick Scott sought to reinstitute a purge of purported non-citizens from the state voter database, as he attempted to do in 2012.[27] In 2012, because of Section 5, Florida election officials were blocked from using an error-prone list to purge purported non-citizens from the election rolls.[28] Following *Shelby County*, election supervisors resisted Governor Scott's attempts to reinstitute the purge. In 2014, a federal appellate court ruled, following a challenge from several civil rights organizations, that Florida's 2012 program of systematically purging names from the voter rolls within 90 days of a federal election (in the State's purported effort to remove suspected non-citizens) violated a provision of the National Voter Registration Act.[29] In Virginia, the State Board of Elections moved to remove up to 57,000 registered and potentially qualified voters from voter registration lists.[30] In a federal lawsuit, the plaintiffs alleged that the Board's purge process was error-ridden and that it had required registrars to "use their best judgment," in arbitrarily determining whether to purge voters. Virginia's purge likely disproportionately burdened voters of color, the elderly, and the poor. Although the lawsuit was recently dismissed, the court also acknowledged that otherwise eligible voters had been improperly removed from the rolls, and that these voters had been forced to bring a lawsuit to vindicate their rights.[31] Arizona lawmakers also recently proposed enacting voting provisions that would allow counties to purge people from the permanent early voter list, which is used to mail absentee ballots to voters prior to every election.[32]

Within hours and days of the Court's decision, Alabama, Mississippi, and Texas had each announced that their states' voter photo identification (ID) laws, as well as Texas's discriminatory redistricting plans, would go into effect. In Texas, within two hours of the announcement of the

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[25] *Reaction to Court Decision on Voting Rights Act*, THE ASSOCIATED PRESS, (Jun. 26, 2013), *available at* http://bigstory.ap.org/article/reaction-court-decision-voting-rights-act-0.

[26] *Case: Florida v. United States*, NAACP LDF, Sep. 6, 2011, http://www.naacpldf.org/case-issue/florida-v-united-states.

[27] Lizette Alvarez, *Florida Defends New Effort to Clean Up Voter Rolls*, N.Y. TIMES, Oct. 9, 2013, http://www.nytimes.com/2013/10/10/us/florida-defends-new-effort-to-clean-up-voter-rolls.html?_r=0; Steve Bousquet and Michael Van Sickler, *Renewed 'scrub' of Florida voter list has elections officials on edge*, TAMPA BAY TIMES, Aug. 3, 2013, http://www.tampabay.com/news/publicsafety/crime/renewed-scrub-of-florida-voter-list-has-elections-officials-on-edge/2134695.

[28] Mary Ellen Klas, *County elections officials to halt controversial voter purge*, TAMPA BAY TIMES, Jun. 1, 2012, http://www.tampabay.com/blogs/the-buzz-florida-politics/content/county-elections-officials-halt-controversial-voter-purge/2041621.

[29] *Arcia v. Florida Sec'y of State*, 746 F.3d 1273 (11th Cir. 2014).

[30] Matt Zapotosky, *Virginia's Democratic Party loses challenge against purge of 38,000 voters from rolls*, WASH. POST, Oct. 18, 2013, http://www.washingtonpost.com/local/virginia-politics/federal-judge-rejects-democratic-challenge-to-virginia-voter-roll-purge/2013/10/18/26235068-3809-11e3-8a0e-4e2cf80831fc_story.html.

[31] *Id.*

[32] Howard Fischer, *Lawmakers want to repeal, then reenact, recent voting law changes*, E. VALLEY TRIBUNE, Jan. 16, 2014, http://www.eastvalleytribune.com/arizona/capitol_media_services/article_8a05991e-7f04-11e3-8a04-001a4bcf887a.html.

Shelby County decision, Texas Attorney General Greg Abbott[33] and Secretary of State John Steen[34] both announced that the state's voter identification (ID) law, which was previously rejected by a federal court as the most discriminatory measure of its kind in the nation, would "immediately" into effect. "With today's decision, the state's voter ID law will take effect immediately," Abbott said in a statement.[35] Mr. Abbott also stated that "[r]edistricting maps passed by the legislature may also take effect without approval from the federal government,"[36] even though a federal court had deemed those same maps *intentionally* discriminatory under Section 5 after a full trial.[37] Mississippi's Secretary of State Delbert Hosemann announced that, after *Shelby County*, his plan to move forward with implementing the state's voter ID law for the next primaries,[38] a plan that he ultimately followed through with in June 2014. Alabama Attorney General Luther Strange stated that that State's voter ID law would be implemented immediately.[39] In January 2014, Arkansas also went forward with plans to impose a voter ID law that has since disfranchised hundreds of voters.[40]

Research shows that voter photo ID laws bear more heavily on voters of color, who are both less likely to own government-issued photo ID (disparate impact)[41] *and* much more likely to be asked by poll officials to show ID before voting (disparate treatment).[42] In Texas, LDF has intervened on behalf of Plaintiffs in a lawsuit under Section 2 to invalidate the Texas voter ID law. Trial is set for Fall 2014. In Alabama, LDF and over a dozen of other civil rights groups have expressed concerns with the Secretary of State's narrow interpretation of the "safety valve" provision of the photo ID law.[43] Rather than allowing people without photo ID to vote by showing non-photo IDs or by signing an affidavit, the Secretary of State has proposed rules that seek to

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33 Ryan J. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Ruling*, HUFFINGTON POST, (Jun. 25, 2013), http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html.

34 Tom Curry, *Let the lawsuits begin: Advocates pivot strategy following Voting Rights Act ruling*, NBC NEWS, (Jun. 29, 2013), nbcpolitics.nbcnews.com/_news/2013/06/29/19192537-let-the-lawsuits-begin-advocates-pivot-strategy-following-voting-rights-act-ruling?lite.

35 Sahil Kapur, *Texas Advances Voter ID Law After Supreme Court Strikes Down Voting Rights Act*, TALKING POINTS MEMO, (Jun. 25, 2013), http://tpmdc.talkingpointsmemo.com/2013/06/texas-advances-voter-id-law-after-supreme-court-ruling.php.

36 *Id.*

37 *See Texas v. United States*, 887 F. Supp. 2d 133 (2012).

38 Geoff Pender, *Next June, Miss. voters must have ID; Secretary of state reveals time line for implementation*, CLARION LEDGER, Jun. 25, 2013, *available at* http://www.clarionledger.com/article/20130626/NEWS01/306260018/Next-June-Miss-voters-must-ID.

39 Bob Johnson, *Alabama Officials Say Voter ID Law Can Take Effect*, THE ASSOCIATED PRESS, Jun. 26, 2013, *available at* http://www.gadsdentimes.com/article/20130626/WIRE/130629842;

40 Josh Israel, *Hundreds Disenfranchised By America's Worst Voter ID Law*, THINKPROGRESS.COM, (Jun.9, 2014), thinkprogress.org/justice/2014/06/09/3445559/arkansas-voter-id-absentee/.

41 BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (2006), http://www.brennancenter.org/analysis/citizens-without-proof.

42 Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 POL. SCI. & POL. 127, 128 (2009), *available at* http://alt.coxnewsweb.com/shared-blogs/austin/investigative/upload/2009/03/voter_id_will_the_law_suppress_voter_turnout/Ansolabehere2009.pdf

43 *Protecting Voting Rights in Alabama*, NAACP LDF, Mar. 6, 2014, www.naacpldf.org/press-release/protecting-voting-rights-alabama; *see also* Deuel Ross, Opinion, *Alabama's Voter ID Law Disenfranchises Some Minorities: Call for Secretary of State Jim Bennett to Relax Interpretation of 'Safety Valve' Provision*, AL.COM (Jun. 14, 2014), www.al.com/opinion/index.ssf/2014/06/alabamas_voter_id_law_disenfra.html.

enforce a congressionally-banned discriminatory test or device.[44] LDF also sent a letter to the Arkansas Secretary of State over his failure to do the minimum needed to make photo ID-issuing offices more accessible to African Americans living in the State's more rural and poorer counties.[45]

Similarly, Arizona and Kansas are seeking to require people to provide proof of citizenship in order to register to vote.[46] This move immediately follows a March 19, 2014 federal court decision that ordered the federal Election Administration Commission (EAC) to modify the state-specific instructions on the federal mail voter registration form to reflect state requirements of Arizona and Kansas that voter registrations provide documentary proof of citizenship.[47] In 2013, the Supreme Court held that Proposition 200, Arizona's proof of citizenship law for voter registration, violated the National Voter Registration Act.[48] Arizona contends that the Court's decision only applies to federal elections and, along with Kansas, sued the EAC seeking to require proof of citizenship to register to vote in state elections, setting up a two-tiered system of registering to vote in state versus federal elections.[49] After the EAC flatly rejected that position, Arizona and Kansas sued in federal court. The court then sided with Arizona and Kansas. This decision has prompted Alabama to also consider adopting a form of dual registration.[50] The Arizona and Kansas dual registration requirements and proof-of citizenship laws, however, are being challenged on appeal in federal court[51] and still face other challenges in state court.[52]

Notably, LDF has extensive experience with dual voter registration systems, and their long historical association with discriminatory two-tiered registration systems designed to hinder and prevent African-American voter registration. In 1987, for instance, successful LDF litigation under the Voting Rights Act eliminated dual registration for state and municipal elections in Mississippi.[53] After the National Voter Registration Act of 1993, Section 5 also blocked

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[44] 42 U.S.C. § 1973aa(b)(4).

[45] *NAACP Legal Defense Fund Presses Arkansas to Drop Discriminatory Voter ID Law; Urges Arkansas to Expand Opportunities for Voters to Obtain Photo IDs*, NAACP LDF, May 7, 2014, http://www.naacpldf.org/press-release/naacp-legal-defense-fund-presses-arkansas-drop-discriminatory-voter-id-law.

[46] Erik Eckholm, *After Ruling, Alabama Joins 2 States in Moving to Alter Voting Rules*, N.Y. TIMES, Mar. 21, 2014, *available at* http://mobile.nytimes.com/2014/03/22/us/after-ruling-alabama-joins-2-states-in-moving-to-alter-voting-rules.html.

[47] Fernanda Santos, *Two States Win Court Approval on Voter Rules*, N.Y. TIMES, Mar. 19, 2014, http://www.nytimes.com/2014/03/20/us/judge-says-us-must-help-states-enforce-voter-id-laws.html?hp; John Hanna, *Kansas, Arizona Prevail in Voter Citizenship Suit*, ASSOCIATED PRESS, Mar. 19, 2014, bigstory.ap.org/article/kansas-arizona-prevail-voter-citizenship-suit.

[48] *See Arizona v. The Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013).

[49] *Judge sends Arizona, Kansas voter citizenship suit back to US Election Assistance Commission*, ABC 15, Dec. 13, 2013, http://www.abc15.com/dpp/news/state/judge-sends-arizona-kansas-voter-citizenship-suit-back-to-us-election-assistance-commission.

[50] *Kansas ruling could result in Alabama enforcing proof of citizenship for voter registration*, THE ASSOCIATED PRESS, (Mar. 24, 2014), blog.al.com/wire/2014/03/kansas_court_ruling_could_resu.html.

[51] *Court Extends, in 2 States, Its Halt of Proof-of-Citizenship Voting Rules*, N.Y. TIMES, May 20, 2014, *available at* http://www.nytimes.com/2014/05/21/us/court-extends-in-2-states-its-halt-of-proof-of-citizenship-voting-rules.html.

[52] Roxana Hegeman, Kansas. *Arizona rekindling lawsuit over proof-of-citizenship voter registration*, TOPEKA CAPITAL-JOURNAL, Feb. 3, 2014, *available at* http://cjonline.com/news/2014-02-03/kansas-arizona-rekindling-lawsuit-over-proof-citizenship-voter-registration.

[53] *See Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. at 1245 (N.D. Miss. 1987), *aff'd sub nom.*, 932 F.2d 400 (5th Cir 1991).

Mississippi's attempt to reinstate a dual federal and state registration system.[54] This blocked dual registration system is indistinguishable from the systems that Arizona, Alabama, and Kansas hope to implement.

Finally, North Carolina has perhaps been the most bold, enacting an omnibus anti-voter law that includes most of the above voter suppression measures: a photo ID law, changes to registration, and cuts to early voting.[55] As a result of the *Shelby County* ruling, North Carolina State Senator Tom Apodaca stated that he would move quickly to pass a voter ID law, and other state legislators in North Carolina quickly began engineering an end to the state's early voting, Sunday voting, and same-day registration provisions.[56] Within two months of the *Shelby County* decision, the state legislature had in fact passed and the Governor had signed the omnibus anti-voter bill with all of these provisions.[57] At present, civil rights advocates and organizations in North Carolina are challenging this bill in a series of state and federal lawsuits.

B. Local Voting Changes since *Shelby County v. Holder*

While the preclearance process under the Voting Rights Act gave important protections to millions of voters at the statewide level, LDF also is aware of various discriminatory voting changes in many local jurisdictions in Arizona, Florida, Georgia, New York, Texas, and elsewhere. They have adopted a wide range of discriminatory voting changes, including changes to elected boards and districts, moved polling locations, and even cancelled elections. Unfortunately, for the dozens of changes we are aware of, there are many more that we may never learn of.

The City of Pasadena, Texas, for instance, changed the structure of its district council by eliminating two seats elected from predominantly Latino districts, and replacing those seats with two at-large seats elected from majority-white districts. Pasadena's 152,000 residents include a large and burgeoning Latino population. Historically, jurisdictions have used at-large voting to dilute the voting strength of communities of color. Officials in Galveston County, Texas cut in half (from eight to four) the number of constables and justices of the peace districts—a move that was previously blocked by Section 5.[58] This eight district electoral system was initially put into place by earlier litigation to remedy racial discrimination in voting and provide equal electoral opportunity for voters of color. The effect of the reduced number of officials will be to eliminate virtually all of the African-American and Latino held positions on the boards. This redistricting also comes in the midst of minority population gains in Galveston following the 2010 census.

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[54] Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Sandra M. Shelson, Special Assistant Attorney General, State of Mississippi, (Sep. 22, 1997), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/MS-2650.pdf.

[55] *NC voter ID bill moving ahead with Supreme Court ruling*, WRAL.COM, Jun. 25, 2013, http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/.

[56] David Zucchino, *Changes Loom for N.C. Electorate*, L.A. TIMES, Jun. 30, 2013, http://www.latimes.com/news/nationworld/nation/la-na-voting-rights-20130630,0,211700.story.

[57] Colleen Jenkins, *North Carolina Voting Changes to Go on Trial in 2015*, REUTERS, Dec. 12, 2013, http://www.reuters.com/article/2013/12/13/us-usa-northcarolina-voting-idUSBRE9BB19120131213.

[58] Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to C. Robert Heath, Bickerstaff Heath Delgado Acosta, (Oct. 3, 2011), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/l_111003.pdf.

Local level redistricting plans are aggressively pushing for changes with similar effects. Disturbingly, some of these changes were previously blocked as discriminatory before the suspension of Section 5 preclearance. For instance, the five-member Greene County, Georgia, Board of Commissioners recently implemented a new redistricting plan that reduces African-American voters to less than 51%, a bare majority, in all five districts.[59] Under Section 5, before *Shelby County*, the Department of Justice had been closely reviewing this new plan, and had blocked another redistricting plan in Greene County in 2012.[60] In Fulton County, Georgia's most populous county, the county commission's redistricting plan creates a new overwhelmingly white district and reduces the sizes of the African-American districts.[61] Benson County, North Carolina commissioners are considering lifting limits on at-large voting. Benson has three commission seats elected by district voting, and three commission seats elected at-large. At present, as the result of earlier litigation under Section 2, residents can only vote for one at-large seat every three years.[62]

In addition to redistricting, the actual and proposed changes to polling places and early voting sites also have created substantial hurdles for voters of color. Georgia cities and counties have been particularly active in this regard. After *Shelby County*, the City of Athens considered eliminating nearly half of its twenty-four polling places, and replacing them with only two early voting centers—both of which would be located inside police stations.[63] The community raised concerns that the new early voting locations would intimidate voters, and that the proposed closures would require some people to travel up to three hours by bus to vote. Morgan County, after initially considering closing over half of its polling places, ultimately closed more than a third of them.[64] A city council member believed that the broader closures would disfranchise poor voters of color, many of whom lack access to a car. Election officials in Baker County, a 46.1% African-American county with high rates of African-American poverty, also considered eliminating four of its five polling places, requiring some people to travel over twenty miles to vote.[65] LDF advocacy drew attention to this proposed closures, leading officials to reconsider.[66] But, in general, the absence of preclearance process means that many comparable changes likely have occurred or will occur in Georgia and elsewhere without any public notice or legal challenges.

Indeed, in Jacksonville, Florida the Board of Elections has closed and relocated a polling place that once served large numbers of African Americans.[67] In 2012, African Americans constituted more than 90% of those who voted early at the now relocated location, which according

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[59] Spencer Woodman, *Voting Rights At Risk in Georgia*, ROLLING STONE, Nov. 4, 2013, *available at* www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104.

[60] Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Michael S. Green, et al., Apr. 13, 2012, *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/l_120413.pdf.

[61] Bill Barrow, *States Promise Quick Action on Election Laws*, ASSOCIATED PRESS, Jun. 26, 2013, http://bigstory.ap.org/article/states-promise-quick-action-after-voting-ruling.

[62] Sarah Childress, *After Shelby, Voting-Law Changes Come One Town at a Time*, PBS FRONTLINE, Aug. 8, 2013, http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/after-shelby-voting-law-changes-come-one-town-at-a-time/.

[63] http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104

[64] Woodman, *supra* note 61.

[65] *Id.*

[66] *Id.*

[67] Deshayla Strachan, *Black Vote May Be Threatened in Jacksonville*, COURTHOUSE NEWS SERVICE, Oct. 3, 2013, http://www.courthousenews.com/2013/10/03/61749.htm.

to the plaintiffs challenging the closure, is inaccessible by public transportation. Hernando County, Florida also adopted a plan to close and consolidate voting locations, with a focus on the neighborhoods of the City of Brooksville.[68] The plan called for eliminating polling places for the general election, and consolidating all Brooksville precincts into one. While the African-American citizen voting-age population ("CVAP") of the County overall is about 4.5%, the African-American CVAP affected by this change in polling places is nearly 22%, and there are no minorities serving on the county commission. These polling place changes come in the wake of the 2012 elections, when the wait to vote in some Florida locations was over seven hours long,[69] and where more than 200,000 potential Florida voters did not vote in 2012 because of long lines.[70]

Even more brazen are the cancelations of elections and changes in election dates in local jurisdictions in Georgia and New York, some of which were previously blocked by Section 5. Just days after *Shelby County*, officials in Augusta-Richmond, Georgia moved to reintroduce a plan to move county elections from their traditional November date to over the summer, when African-American turnout is significantly lower.[71] In 2012, the Department of Justice had blocked Georgia's attempt to switch the county election date to a summertime month.[72] A federal lawsuit challenging this change is now pending.[73] Similarly, officials in Macon, a majority-African-American city in Bibb County, Georgia, held just one non-partisan municipal election for the consolidated Macon-Bibb County government in July.[74] Although turnout for all voters is lower in the summer months, African Americans are particularly harmed by such changes in election dates. In 2012, for example, 74.5% of African-American registrants in Augusta-Richmond voted in the November election; whereas, in the July election, African-American turnout rate was 33.2%. By comparison, the turnout rates for white registered voters were 72.6% in the November 2012 election, and 42.5% for the July election. Thus, African Americans were 55.4% less likely to vote in July than in November, while white persons were only 41.4% less likely to vote. In New York, Governor Andrew Cuomo has refused to call special elections for twelve vacant state legislative seats, many of which are located in New York City, including the three boroughs formerly covered by Section 5. LDF and other civil rights groups have protested the Governor's change from past precedent, in which special elections were called quickly. The Governor's decision has left over

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[68] Maryann Tobin, *Hernando Takes Mixed Approach to Voting Rights With Polling Location Changes*, EXAMINER.COM, (Aug. 25, 2013), http://www.examiner.com/article/hernando-takes-mixed-approach-to-voting-rights-with-polling-location-changes.

[69] Luke Johnson, *Florida Voting Lines Discouraged 201,000 Voters Statewide: Report*, HUFFINGTON POST (Jan. 24, 2013), http://www.huffingtonpost.com/2013/01/24/florida-voting-lines-report_n_2544373.html.

[70] Scott Powers & David Damron, *Analysis: 201,000 in Florida Didn't Vote Because of Long Lines*, ORLANDO SENTINEL (Jan. 29, 2013), http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner.

[71] Woodman, *supra* note 61.

[72] Letter From Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Dennis R. Dunn, Deputy Attorney General, State of Georgia, Dec. 21, 2012, *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/l_121221.pdf.

[73] Sandy Hodson, *Plaintiffs in Election Date Lawsuit File Response to City of Augusta*, THE AUGUSTA CHRONICLE, (May 7, 2014), *available at* http://m.chronicle.augusta.com/news/crime-courts/2014-05-07/plaintiffs-election-date-lawsuit-file-response-city-augusta.

[74] Adam Ragusea, *Ga. Voters Surprised Macon Election Change Isn't Challenged*, NPR.COM, (Feb. 6, 2014), http://www.npr.org/2014/02/06/272359791/voting-rights-act-update.

two million voters, at least 800,000 of whom are people of color in New York City, unrepresented and largely voiceless.[75]

Student voters of color face other new, yet eerily familiar, problems. In North Carolina, for example, elections officials in college towns and elsewhere began efforts to make voting more difficult for students and people of color.[76] Election officials considered closing an early voting site at Winston Salem State University, one of North Carolina's Historically Black Colleges and Universities (HBCUs).[77] The Watauga County Board of Elections voted to eliminate an early voting site and election-day polling precinct on the Appalachian State University campus.[78] The county also considered a plan to combine three precincts into one to serve 9,300 voters, making it the third-largest voting precinct in the state. That one precinct site has 35 parking spaces, is a mile away from the University, along a campus road with no sidewalks.[79] The Pasquotank County Board of Elections initially barred – before being reversed by the State Board of Elections – a senior at the HBCU Elizabeth City State University from running for city council based on a determination that his on-campus address did not establish local residency. A Pasquotank county leader continues to express his intention to challenge the voter registrations of *more* students at HBCUs in advance of upcoming elections.[80] In Arizona, the Maricopa County Community College District Board, which enrolled more than 260,000 students last year, and is located in a 30% Latino county, proposed adding two at-large electoral districts to its existing five-member Board, which is elected by districts.[81] In the past, Section 5 had blocked similar discriminatorily plans in Arizona.[82]

Finally, outright voter intimidation also remains a problem at the local level. In Florida, the Florida Department of Law Enforcement is investigating allegations that an appointed white city clerk in Sopchoppy intimidated African-American voters in a June 2013 election by needlessly questioning their residency; and, failed to remain neutral, instead actively campaigning for three white candidates.[83] Following the city clerk's efforts to prevent African Americans from voting, the incumbent African-American mayor lost by only one vote and an African-American city commissioner also lost the election. The Board of Elections in Forsyth County, North Carolina, also considered, but tabled, two proposals that would have placed security officers at the County's

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[75] *New York Voting Rights Organizations Urge Governor Cuomo to Promptly Order Special Election for 12 Vacant Legislative Seats*, NAACP LDF, Mar. 18, 2014,

[76] Penda D. Hair, *North Carolina's Student Voting Battle Is Not Over*, HUFFINGTON POST, (Sept. 5, 2013), http://www.huffingtonpost.com/penda-d-hair/north-carolinas-student-voting-battle_b_3868345.html.

[77] Bertrand M. Gutierrez, *Chairman: Eliminate WSSU Early-Voting Site*, WINSTON-SALEM JOURNAL, Aug. 18, 2013, *available at* http://www.journalnow.com/news/elections/local/article_3da9300a-07a2-11e3-b6b3-001a4bcf6878.html.

[78] Ann Blythe, *State Elections Board Reverses Pasquotank Decision, Backs Watauga Ruling*, NEWSOBSERVER.COM, (Sept. 3, 2013), http://www.newsobserver.com/2013/09/03/3161001/state-elections-board-says-elizabeth.html.

[79] *Id.*

[80] *Id.*

[81] Al Macia, Maricopa County Community College District Board To Add Two New Members, KJZZ.COM, (Sept. 4, 2013), http://kjzz.org/content/4855/maricopa-county-community-college-district-board-add-two-new-members.

[82] *Civil Rights Division: Arizona Determination Letters*, U.S. Dep't of Justice, http://www.justice.gov/crt/records/vot/obj_letters/state_letters.php?state=az (last visited Jun. 23, 2014).

[83] Brendan Farrington, *Vote Suppression in Close Florida Election*, PHILADELPHIA TRIBUNE, Aug. 9, 2013, *available at* http://www.phillytrib.com/newsarticles/item/10335-vote-suppression-alleged-in-close-fla-election.html.

one-stop early voting site, and collected information from individuals or organizations returning voter registration forms.[84] Most recently, in advance of Mississippi's 2014 U.S. Senatorial primary election, partisan poll watchers have just announced plans to use an ambiguous state election law to challenge African Americans who wish to lawfully vote in the Republican primary election.[85]

IV. THE VOTING RIGHTS AMENDMENT ACT IS A NARROW AND TARGETED RESPONSE TO *SHELBY COUNTY V. HOLDER*

In *Shelby County, Alabama v. Holder*, the Supreme Court found that Section 4(b) of the Voting Rights Act—the formula for determining which jurisdictions must seek preclearance of voting changes—was unconstitutional because it relied on historical data. However, the Court upheld the preclearance mechanism itself, Section 5, and suggested that Congress could enact another formula to redress voting discrimination based on "current data reflecting current needs."

The VRAA represents a measured, flexible and forward-looking attempt by Congress to update the Voting Rights Act in direct response to the Supreme Court's ruling in *Shelby County*. The VRAA contains several components which respond directly to the Court's directive that preclearance be linked to recent acts of discrimination while seeking to provide victims of voting discrimination, and the courts that hear their claims, the tools to detect and prevent voting discrimination before it takes effect. The proposals are uniform in that they protect against voting discrimination anywhere in the country.

One key provision is a revised formula which requires preclearance for jurisdictions with a recent history of voting discrimination. It is a direct response to the Court's instruction in *Shelby County* that "Congress may draft another formula based on current conditions."[86] The new formula provides that a state or political subdivision is required to preclear voting changes if a certain number of voting rights violations are committed by a state or political subdivision within any 15-year period. The new formula operates on a rolling basis, with an annual assessment of which states and political subdivisions meet the trigger. This ensures that coverage is always based on the most recent acts of discrimination, in keeping with the Supreme Court's admonition that the formula should focus on "current conditions."[87]

In addition to this new coverage formula, the VRAA includes other important provisions to combat voting discrimination nationwide. These new protections will be available anywhere they are needed, which responds to the Supreme Court's concern that some states were singled out for coverage.

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[84] Meghan Evans, *Elections Board Tables Vote on Security Officers at Polling Sites*, WINSTON-SALEM JOURNAL, Aug. 20, 2013, *available at* http://www.journalnow.com/news/local/article_a3528306-0a05-11e3-adf2-001a4bcf6878.html

[85] *Sheryl Gay Stolberg* and Theodore Schleifer, *Conservatives Plan to Use Poll Watchers in Mississippi*, N.Y. TIMES, Jun. 22, 2014, *available at* http://www.nytimes.com/2014/06/23/us/conservatives-plan-to-use-poll-watchers-in-mississippi.html

[86] *Shelby County*, 133 S. Ct. at 2631.

[87] *Id.*

First, the VRAA strengthens requirements that states and counties provide notice to the public of any changes to certain voting laws, including laws enacted within 180 days of an election. This nationwide notice provision will promote transparency and improve the ability of communities to effectively engage with their local and state governments on potential changes to election laws.

The VRAA would provide guidance to federal courts regarding when it is appropriate to grant a request from the local community to temporarily suspend the implementation of new voting laws, pending a federal court review of whether that new law is racially discriminatory. The bill would also allow a federal court to order preclearance as a remedy when it finds that such a remedy is necessary to cure *any* violation of federal voting rights law. Finally, the VRAA permits the Department of Justice to send Federal Observers to monitor elections in jurisdictions covered under either the new rolling coverage provision or Section 203 of the Act, an existing provision that makes elections more accessible to citizens in jurisdictions where there is a concentration of voters who need language assistance in order to cast an informed ballot.

V. CONCLUSION

This record of discriminatory voting changes—over just a one-year period—illustrates that adopting the Voting Rights Amendment Act is the wisest constitutional course. It is clear that political entities previously covered by Section 5 have begun to use the *Shelby County* decision as license to enact discriminatory measures across the full panoply of electoral processes. The record developed thus far indicates that there will be more discrimination to come, particularly as our nation approaches a general election. While LDF and other civil rights law organizations are using both litigation and public advocacy to aggressively combat many of the discriminatory changes that have occurred in the absence of Section 5's enforcement authority, we cannot do it alone. In reauthorizing the Voting Rights Act time and again, successive Congresses have sought to minimize the reliance on expensive, long-term, and contentious litigation in our courts to protect the fundamental right to vote and instead, have relied upon an administrative enforcement mechanism that is designed to detect discrimination and then prevent it from occurring before it can harm our democratic process. Only Congress has the ultimate authority to enforce the anti-discrimination principle articulated in the Fourteenth and Fifteenth Amendments to the Constitution. We urge this Congress to use that exclusive and clearly-stated authority to respond to the urgent need occasioned by the Court's decision in *Shelby County*.

It is our view that the VRAA directly responds to the Court's *Shelby County* decision by adopting a modern coverage provision, and restoring a preclearance process shaped to address contemporary voting discrimination wherever it may arise. The VRAA also would require public notice nationwide for many potentially discriminatory voting changes, make it easier to stop such changes at the earliest stages of litigation, and expand avenues for "bailing-in" certain jurisdictions to the preclearance regime if a court found this necessary to protect voters.

Without these vital protections, the very essence of our democracy is at stake. We call upon Congress to move quickly to enact the Voting Rights Act Amendment.

ATTACHMENT

STATEWIDE AND LOCAL RESPONSES TO THE SUPREME COURT'S VOTING RIGHTS ACT DECISION

JUNE 2013

INTRODUCTION

Since 1965, Section 5 of the Voting Rights Act (VRA) has required certain jurisdictions (including states, counties, cities, and towns) with a history of chronic racial discrimination in voting to submit all proposed voting changes to the Department of Justice or a federal court in Washington, D.C. for pre-approval. This requirement was commonly known as "preclearance."

For nearly 50 years, Section 5 preclearance has served as our democracy's discrimination checkpoint by halting discrimination in voting before it occurred. Section 4(b) of the VRA authorized Congress to determine which jurisdictions should be "covered" and therefore which jurisdictions were required to seek preclearance.

On June 25, 2013, the United States Supreme Court issued its decision in *Shelby County, Alabama v. Holder*. In this case, *Shelby County* challenged the constitutionality of Sections 4(b) and 5 of the VRA. The NAACP Legal Defense and Educational Fund vigorously defended the VRA's constitutionality in the Supreme Court and in the lower courts. In a devastating blow to the essence of the preclearance process, the Supreme Court ruled that Section 4(b) was unconstitutional. The Court held that the coverage provision was out of date and not responsive to current conditions in voting.

The Supreme Court's decision in *Shelby County* effectively suspended the preclearance requirement for all jurisdictions covered by Section 4(b)—those states and localities with the worst records of discrimination in voting. Before the decision, preclearance applied to nine entire states, mostly in the South (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia), and a number of counties, cities, and towns in six partially covered states (California, Florida, Michigan, New York, North Carolina, and South Dakota). After *Shelby County*, these states and jurisdictions have been free to implement changes in voting without having to go through the preclearance process to determine whether they are discriminatory.

NAACP LEGAL DEFENSE FUND'S RESPONSE TO SHELBY

Since the day of the *Shelby County* ruling, NAACP LDF has closely monitored how formerly covered states and localities are responding to the decision. In addition, NAACP LDF attorneys have fanned out across the country to empower communities of color made especially vulnerable by the Supreme Court's ruling, and to urge them to be their community's eyes and ears, and alert NAACP LDF to discriminatory voting changes.

NAACP LDF attorneys have collectively traveled hundreds of thousands of miles to more than a dozen states, holding community empowerment forums, meeting with community leaders and individuals, distributing literature, investigating complaints, meeting with elections official and elected representatives, and monitoring elections.

It is important to note that while changes in congressional districts attract media attention, local changes, such as moving a polling place or switching from district-based to at-large voting, also significantly impact communities of color. NAACP LDF is encouraging voters to let us know of any voting changes that are planned for their communities by emailing vote@naacpldf.org.

THE VOTING RIGHTS AMENDMENT ACT

In addition to pursuing litigation with all of the legal tools that remain available, NAACP LDF is urging Congress to aggressively respond to the Supreme Court's shameful decision and to protect voters of color from discrimination.

On January 16, 2014, a bipartisan group of Members of Congress introduced the Voting Rights Amendment Act of 2014 (VRAA). Congressmen John Lewis (D-GA-5), James Sensenbrenner (R-WI-5), Steve Chabot (R-OH-1) and John Conyers, Jr. (D-MI-13), among others, introduced H.R. 3899 in the House. Senator Patrick Leahy (D-VT) and other Senators introduced a companion bill, S. 1945, in the Senate on the same day.

The VRAA represents a measured, flexible and forward-looking attempt by Congress to update the Voting Rights Act in response to the Supreme Court's ruling in *Shelby County*. Although not perfect, the VRAA is an important first step toward restoring the protections now at risk because of the U.S. Supreme Court's decision in *Shelby County v. Holder*. The VRAA contains several components which respond directly to the Court's directive that preclearance be linked to recent acts of discrimination while seeking to provide victims of voting discrimination - and the courts that hear their claims - the tools to detect and prevent voting discrimination before it takes effect.

What follows is a running-and still growing-compendium of state, county, and local level responses to the decision, including jurisdictions' intentions to implement new discriminatory voting changes in the wake of the* Shelby County *decision.

The need for immediate Congressional action is starkly illustrated in the details of efforts by states and localities to enact measures with potentially devastating consequences on political participation by communities of color.

ALABAMA

State Level:

Following the *Shelby County* decision, Alabama Attorney General Luther Strange stated that the State's voter identification law will be implemented immediately.[1] Civil rights and pro-democracy groups, among others, have expressed concerns with the "voucher provision" of the photo ID law, which enables two election officials to "vouch" for voters lacking photo ID and, accordingly places substantial discretion in the hands of local officials, which potentially violates the Voting Rights Act. Those groups have urged the Secretary of State to issue regulations related to the voucher provision.[2]

Alabama also seeks to require voters to show proof of citizenship.[3] This move immediately follows a March 19, 2014 federal court decision that ordered the federal Election Administration Commission to modify the state-specific instructions on the federal mail voter registration form to reflect state requirements (of Arizona and Kansas only) that voter registrations provide documentary proof of citizenship.[4]

During the Supreme Court's 2012-2013 term, in Arizona v. The Inter Tribal Council of Arizona, the Court found that Proposition 200, Arizona's proof of citizenship law for voter registration, violated the National Voter Registration Act. Arizona contends that the Court's Inter Tribal decision only applies to federal elections. Section 5 blocked a similar two-tiered system of voting in Mississippi in the 1990s.[5]

Dual registration systems have a historical association with racial discrimination, hearkening back to the pre-VRA era, when segregated voter rolls were maintained to intentionally prevent Black voters from lawfully casting ballots.

Local Level:

A federal district court has ordered preclearance review of voting practices in **Evergreen** in Conecuh County under Section 3, the "bail-in" provision of the Voting Rights Act.[6] Specifically, Evergreen must submit voting changes related to the method of election for the city council, including any redistricting plan impacting the city council, as well as any change to the standards for determining voter eligibility to participate in Evergreen's municipal elections, to either the federal court or the Department of Justice through December 2020. In addition, the court appointed federal observers to monitor Evergreen's elections under the Voting Rights Act.

In 2012, Section 5 blocked Evergreen from continuing to implement an unprecleared discriminatory voter purge based on utility records that omitted eligible voters from a voter registration list, including nearly half of the Conecuh County registered voters who reside in districts heavily populated by Black people.[7] In 2012, Section 5 also blocked an unprecleared municipal redistricting plan that packed Black voters into only two of the five districts when it was possible to establish a third majority-Black voting district, thereby diluting the voting strength of Black voters in Evergreen.

ARIZONA

State Level:

The state of Arizona, along with the state of Kansas, has sued the Election Assistance Commission (EAC) seeking to require proof of citizenship to vote in state and local elections, setting up a two-tiered system of voting for state/local versus federal elections.[8] The EAC issued a decision denying those states' requests.[9] Multiple groups, including communities of color, intervened in that action[10] and have brought other cases to challenge Arizona's and Kansas's proof-of citizenship for voter registration laws.[11] On March 19, 2014, in one case, a federal court ordered the EAC to modify the state-specific instructions on the federal mail voter registration form to reflect Kansas and Arizona requirements that voter registrations provide documentary proof of citizenship.[12]

During the Supreme Court's 2012-2013 term, in *Arizona v. The Inter Tribal Council of Arizona*, the Court found that Proposition 200, Arizona's proof of citizenship law for voter registration, violated the National Voter Registration Act. Arizona contends that the Court's *Inter Tribal* decision only applies to federal elections. Section 5 blocked a similar two-tiered system of voting in Mississippi in the 1990s.

Dual registration systems have a historical association with racial discrimination, hearkening back to the pre-VRA era, when segregated voter rolls were maintained to intentionally prevent Black voters from lawfully casting ballots.

State lawmakers also propose reenacting voting provisions—previously blocked by voter referendum—that would allow counties to purge people from the permanent early voter list, a list that counties use to mail ballots prior to every election to individuals, who, after marking their ballot, mail them back or take them to a polling place.[13]

Local Level:

The **Maricopa County Community College District Board** is proposing to add two at-large electoral districts to its existing five-member Board, which is elected by districts.[14] This year, the community college district, which is the largest in the country, enrolled more than 260,000 students. Section 5 previously blocked this plan. Historically, jurisdictions have used at-large voting to dilute the voting strength of communities of color.

ARKANSAS*

The State's photo ID law was scheduled to be implemented on January 1, 2014, following an April 2013 bi-cameral majority vote to override Governor Mike Beebe's veto of the law.[15] After voters filed state constitutional challenges to stop the implementation of the photo ID law, one state court ruled that the law was "void and unenforceable."[16] Notwithstanding, appellate rulings may enable early voting with the photo ID law to go forward.[17]

*While Arkansas was not covered immediately before the *Shelby County* decision, it once was formerly covered due to LDF's litigation efforts. LDF continues to work in that state and track racial discrimination in voting as it arises there.

FLORIDA

State Level:

Following the *Shelby County* decision, Florida Secretary of State Ken Detzner said "[w]e're free and clear to follow through with our [early voting] law now without any restriction by the Justice Department. . . . Last year I think we spent over a half a million dollars defending our pre-clearance cases. That cost will be eliminated in the future as a result of this opinion."[18]

In August 2012, under Section 5, a federal court rejected these changes as harmful to Florida voters of color.[19] In particular, the court determined that severe cuts to the state's early voting period would have serious consequences for African-American Floridians. In 2008, over half of Black voters in Florida cast their ballots during the early voting period.

Following the *Shelby County* decision, Governor Rick Scott also sought to reinstitute a purge of purported non-citizens from the state voter database, as he attempted to do in 2012.[20] In 2012, because of Section 5, Florida election officials were blocked from using an error-prone list to purge purported non-citizens from the election rolls.[21] Following *Shelby County*, county election supervisors resisted Governor Scott's attempts to purge voters.

In 2014, a federal appellate court ruled, following a challenge from several pro-democracy and civil rights organizations, that Florida's 2012 program of systematically purging names from the voter rolls within 90 days of a federal election (in the State's purported effort to remove suspected non-citizens) violated a provision of the National Voter Registration Act.[22]

A voter sued Florida's Secretary of State and Attorney General under the 14th Amendment of the U.S. Constitution for racial and partisan gerrymandering, claiming that the state's Congressional District 5 packs Black voters into that district.[23]

During the 2012 elections, the wait to vote in some Florida locations was more than six hours.[24] More than 200,000 potential voters did not vote in 2012 because of long lines.[25]

Local Level:

The Florida Department of Law Enforcement is investigating allegations that an appointed white city clerk in **Sopchoppy,** Florida (1) suppressed Black voters in a June 11, 2013 election by questioning their residencies with no reasonable basis; and, (2) failed to remain neutral in her capacity as city clerk, by actively campaigning for three white candidates[26] Following the clerk's efforts to prevent Black voters from casting their ballots, the incumbent Black mayor lost by only one vote and a Black city commissioner lost.

In **Jacksonville**, the Board of Elections has closed and relocated a polling place that served large numbers of Black voters in the City.[27] In 2012, Black voters constituted more than 90 percent of those who voted early at the now closed polling place. The relocated polling place, according to plaintiffs challenging the closure, is inconvenient to public transportation, among other burdens.

Hernando County adopted a plan to close and consolidate voting locations, with a focus on the neighborhoods of the City of Brooksville.[28] The plan called for elimination of polling places for the general election, and consolidation of all Brooksville precincts into one. While the African American citizen voting-age population ("CVAP") of the County overall is about 4.5 percent, the CVAP affected by this change in polling places is nearly 22 percent African American. There are neither any African Americans nor Latinos serving on the County Commission.

GEORGIA

State Level:

Following the *Shelby County* decision, state lawmakers proposed legislation that would cut (to 6 days, including a Saturday) early-voting periods for small, but not larger, consolidated cities, as a purported cost-saving measure.[29]

Local Level:

Pending voting changes include a county commission plan in **Fulton County**, Georgia's most populous county that, among other things, creates a new overwhelmingly white district and reduces the district sizes of majority-Black districts.[30]

The **City of Athens** considered eliminating nearly half of its 24 polling places and replacing them with only two early voting centers—both of which would be located inside police stations.[31] Community members raised concerns that the location of the new centers would intimidate some voters of color and that the proposed closures would be harmful to voters of color and/or students, many of whom would need to travel on three-hour bus rides just to reach the new polling places.

Greene County implemented a redistricting plan for the five-member County Board of Commissioners. The plan, which one Black member of the Commission denounced, would result in Black voters' making up less than 51 percent, a bare majority, in

all five districts under the plan.[32] Under Section 5, the Department of Justice blocked another redistricting plan in Greene County in 2012[33] and had been reviewing the above mentioned plan before the *Shelby County* decision.

Morgan County, after initially considering eliminating over half of the County's polling places, ultimately eliminated more than a third of them.[34] One city council member expressed his belief that the closures would disfranchise low-income voters and voters of color, many of whom lack cars.

Election officials in **Baker County**, a majority Black county with high poverty rates, considered eliminating four of its five polling places, requiring some voters to travel upwards of 20 miles to vote.[35]

Election officials in **Augusta-Richmond** have reintroduced a plan that would move County elections from their traditional timing in November to over the summer, when Black voter turnout is typically lower.[36] A lawsuit, challenging a change in election date from the November general election to the May 20 primary election, is pending.[37] Under Section 5, the Department of Justice in 2012 blocked this same attempt to switch the election date from November to a summertime month.[38]

Officials in **Macon**, a majority-Black city in Bibb County, decided to have just one non-partisan municipal election in July, when Black voter turnout typically is lower, moving from their traditional schedule of having partisan elections with a primary election in July and a general election in November.[39]

MISSISSIPPI

Tate Reeves, Mississippi's Lieutenant Governor, said that pre-clearance "unfairly applied to certain states should be eliminated in recognition of the progress Mississippi has made over the past 48 years."[40] Secretary of State Delbert Hosemann said he is moving forward immediately to implement Mississippi's voter ID law for primaries in June 2014.[41]

NEW YORK

A group of leading local and national voting rights advocates have pressed the Governor to hold special elections to fill 12 legislative vacancies in the New York State Senate and Assembly, which represent—but are left unrepresented currently—approximately 1.8 million voters across New York, over 800,000 of whom are people of color.[42]

NORTH CAROLINA

State Level:

Immediately following the *Shelby County* decision, the lead sponsor of the state's voter ID law said that he would move ahead with the measure as a result of the ruling.[43] North Carolina State Senator Tom Apodaca also said he would move quickly to pass a voter ID law that some say would bolster the integrity of the balloting process. Other state legislators in North Carolina began engineering an end to the state's early voting, Sunday voting, and same-day registration provisions.[44] North Carolina Attorney General Roy Cooper, said that "[t]he North Carolina General Assembly is now considering legislation that among other changes would limit early voting and require voter I.D."[45]

Thus, within two months of the *Shelby County* decision, Governor Pat McCrory signed an omnibus anti-voter bill, which includes numerous provisions designed to make it harder for voters to access the polls (including a strict photo ID requirement, elimination of same-day voter registration, cutting the early voting period by seven days, and throwing out provisional ballots cast at the wrong polling station).[46]

Local Level:

Within hours of the passage of the omnibus anti-voter bill, election boards in two college towns began efforts to make voting less accessible for students.[47]

The **Watauga County Board of Elections** voted to eliminate an early voting site and election-day polling precinct on the Appalachian State University campus.[48] The County also considered a plan to combine three precincts into one to serve 9,300 voters, making it the third-largest voting precinct in the state. That one precinct site has 35 parking spaces and is located a mile away from the University, along a campus road with no sidewalks.[49]

The **Pasquotank County Board of Elections** initially a senior at historically Black Elizabeth City State University from running for city council based on a determination that his on-campus address did not establish local residency. This move was eventually reversed by the State Board of Elections. A Pasquotank county leader continues to express his intention to challenge the voter registrations of more students at historically Black colleges and universities in advance of upcoming elections.[50]

In **Benson**, North Carolina, county commissioners are considering lifting limits on at-large voting in the wake of the *Shelby County* decision. Benson has three commission seats elected by district voting, and three commission seats elected by at-large voting. As a result of earlier Section 2 of the Voting Rights Act litigation, residents can only vote for one at-large seat every three years.[51]

In **Forsyth**, North Carolina, the Board of Elections considered, but tabled, two proposals that would have (1) placed security officers at the County's one-stop early voting site, and (2) collected information from individuals or organizations returning voter registration forms.[52]The board chairman also considered closing an

early voting site at Winston Salem State University, a historically Black institution.[53]

SOUTH CAROLINA

Adam Piper, a spokesman for Attorney General Alan Wilson, has stated that the assurance that South Carolina gave to a federal court about its interpretation of the reasonable impediment exception to the requirement of voter photo ID, which South Carolina began implementing in 2013, "still applies."[54]

"This is a victory for all voters, as all states can now act equally, without some having to ask for permission or being required to jump through the extraordinary hoops demanded by federal bureaucracy," South Carolina Attorney General Alan Wilson said.[55]

TEXAS

State Level:

Within two hours of the Supreme Court's *Shelby County* decision, Texas Attorney General Greg Abbott announced that the state's voter identification law, previously rejected by a federal court as the most discriminatory measure of its kind in the country, would "immediately" go into effect.

In a statement, Abbott also said that "[r]edistricting maps passed by the legislature may also take effect without approval from the federal government," even though those same maps had been deemed intentionally discriminatory by a federal court.[56] Texas Secretary of State John Steen also immediately announced that the state's voter photo identification law would go into effect.[57]

On June 26, the Texas Department of Public Safety began to offer election identification certificates ("EICs") to Texas voters lacking other forms of identification. But even though the EIC is "free," applying for one requires several costly underlying documents. Moreover, as a federal court found, some citizens would need to drive up to 250 miles to the nearest DPS just to apply for an EIC.[58]

Local Level:

The **City of Pasadena** changed the structure of the district council by eliminating two seats elected from predominantly Hispanic districts, and replacing those seats with two at-large seats elected from majority white districts.[59] Voters recently approved this change. Pasadena's 152,000 residents include a large and burgeoning Latino population.[60] Historically, jurisdictions have used at-large voting to dilute the voting strength of communities of color.

In **Galveston County**, officials have cut in half (from 8 to 4) the number of constables and justices of the peace districts—a move that was previously rejected under Section 5—and initially put in place by earlier litigation to remedy discrimination and provide electoral opportunity for voters of color.61 The effect of the reduced number of officials will be to eliminate virtually all of the Black- and Latino-held positions on both boards. This redistricting comes in the midst of Black and Latino population gains in Galveston between 2000-2010.

In **Beaumont**, a group of white legislators has acted to eliminate the four-person Black majority school board.[62] Prior to the *Shelby County* decision, Section 5 blocked a plan that would have changed the method of electing from seven single- member districts, to five single-member districts and two at-large. This move would have likely reduced the number of Black representatives on the school board. Having failed in that regard, the group then stated that Black board members' districts were not up for re-election in that year, but nonetheless allowed white candidates to submit qualifying papers for elections for those same seats. Having been told that their seats were not up for re-election, the Black incumbents did not submit similar papers. A state court determined that the elections could go on, in spite of the Black candidates' having not filed qualifying papers for elections that they were led to believe were not taking place. Section 5 ultimately blocked that entire scheme. Without Section 5 in place, a state court has allowed Beaumont to implement the redistricting plan, changing the election method of certain seats on the board, while denying the challenges to the three Black board members' candidacy.

VIRGINIA

Paul Shanks, a spokesman for Governor Bob McDonnell, said; "We will be working with the Attorney General's Office to determine what, if any, impact the decision will have on the implementation of this [photo ID] legislation in July of 2014."[63] State Senate Majority Leader Tommy Norment explained that voters worried about discriminatory voting measures can still bring a lawsuit, noting that: "[v]oter discrimination has no place in the Commonwealth and will not be tolerated by members of the Senate of Virginia. As every Virginia voter who believes a voting law or redistricting line to be discriminatory retains the ability to bring a court challenge, protections against voter discrimination remain intact despite the Supreme Court's decision on the Voting Rights Act."[64]

A federal court recently dismissed a suit brought by the Democratic Party of Virginia (DPVA) against the State Board of Elections for removing up to 57,000 registered and qualified voters from voter registration lists.[65] The complaint alleges that the Board's purge process is error-ridden and that it has required county and city registrars to "use their best judgment," in determining whether to purge voters. Among others,[66] this purge has the potential to disfranchise voters of color, the elderly and the poor.

The NAACP Legal Defense Fund is the country's first and foremost civil and human rights law firm. Founded in 1940 under the leadership of Thurgood Marshall, LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society. LDF's victories established the foundations for the civil rights that all Americans enjoy today. In its first two decades, LDF undertook a coordinated legal assault against officially enforced public school segregation. This campaign culminated in* Brown v. Board of Education, *the landmark Supreme Court decision in 1954, a unanimous decision overturned the "separate but equal" doctrine of legally sanctioned discrimination, widely known as Jim Crow.

(ENDNOTES)

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PREPARED STATEMENT OF CHAIRMAN PATRICK J. LEAHY

Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing on "The Voting Rights Amendment Act, S.1945:
Updating the Voting Rights Act in Response to *Shelby County v. Holder*"
June 25, 2014

One year ago today five justices on the Supreme Court disregarded extensive findings of Congress and gutted the Voting Rights Act. During oral argument, Justice Scalia foreshadowed the majority's view of the law when he asserted that Congress's support of the Voting Rights Act was based on the "perpetuation of racial entitlement." I could not disagree more with Justice Scalia. There is no right more fundamental to our existence as American citizens than the right to vote. Every eligible American is entitled to vote and no voter should have their vote denied, abridged, or infringed.

In the *Shelby County* decision, the justices made clear that Congress could update the Voting Rights Act based on current conditions. In response, I worked with Congressmen Sensenbrenner, Conyers, and Lewis to forge a bipartisan compromise to update and modernize the law. This bill was introduced six months ago on the eve of the weekend celebrating Dr. Martin Luther King's holiday. At the time, I was hopeful that Senate Republicans would join me in supporting this important bill. Despite repeated efforts, I am troubled to report that as of this hearing, not a single Senate Republican has stepped up to the plate. I thank my fellow Senate Democrats on this Committee, who have all joined as co-sponsors. I hope that my fellow Senate Republicans on Committee will do the same.

The House Republican leadership has shown a similar lack of willingness to act on this critical bill. Not only have House Republicans refused to vote on or markup the bill, but they refuse even to hold a hearing. This is unfortunate because the Voting Rights Act has never been a partisan issue. From its inception and through several reauthorizations, the Voting Rights Act has always been a bipartisan effort. In fact, when President George W. Bush signed the most recent reauthorization in 2006, the vote in the Senate was unanimous and the vote in the House was 390-33. Congress too often is gridlocked, but there is almost unanimous agreement on the principle that no American should be denied his or her right to vote or to participate in our democracy. I can only hope that Republicans will come to the table so we can work together as Americans to update and strengthen the foundation of this important law. It would be a travesty if the Voting Rights Act were to become partisan for the first time in our Nation's history.

The Voting Rights Amendment Act updates and strengthens the foundation of the original law to combat both current and future discrimination. It does so in a way that is based on current conditions and recent history.

Under the Voting Rights Amendment Act, all states and jurisdictions are eligible for Section 5 protections under a new coverage formula, which is based on repeated voting rights violations in the last 15 years. This coverage provision is based solely on a state's or local jurisdiction's recent voting rights record. Significantly, the 15-year period "rolls" or continuously moves to keep up with "current conditions," as the Supreme Court stated should be a basis for any coverage provision. If a state that is covered establishes a clean record moving forward, it will fall out of coverage. In addition, the existing bailout provision would still be available for states

or jurisdictions that can establish that they had a clean record in a 10-year span. These provisions ensure that the coverage provision is not over-inclusive because jurisdictions that have not repeatedly violated the voting rights of its constituents can come out from under preclearance requirements.

The bill would also improve the Voting Rights Act to allow our Federal courts to bail-in the worst actors for preclearance. Current law permits states or jurisdictions to be bailed in only for intentional voting rights violations, but to ensure that the worst discrimination in voting is captured, the bill would amend the Act to allow states or jurisdictions to be bailed in for discriminatory results-based violations, where the effect of a particular voting measure is to deny an individual his or her right to vote.

In recognition that voters need to be aware of changes in laws affecting their right to vote, the bill provides for greater transparency in elections. Sunlight is a great disinfectant, as Justice Brandeis once observed. And in this instance, the additional sunlight will protect voters from discrimination. The transparency provisions provide for public notice and information in three areas. The first part requires public notice of late breaking changes in Federal elections. The second part requires information on polling place resource allocation for Federal elections. And the third part requires information on changes to electoral districts, including demographic information, to deter racial gerrymandering, impermissible redistricting, and infringement on minority voters. The last part requires this information for Federal, state and local elections because impermissible conduct oftentimes occurs in state and local elections.

And finally, the bill revises the preliminary injunction standard for voting rights actions. The principle behind this part of the proposal is the recognition that when voting rights are at stake, obtaining relief after the election has already concluded is too late to vindicate the individuals' voting rights. We recognize that there will be cases where there is a special need for immediate, preliminary relief where the plaintiff can establish that the voting measure is likely to be discriminatory.

This proposal responds to the Supreme Court's *Shelby County* decision in order to ensure that all Americans are protected against racial discrimination in voting. And a year after the *Shelby County* decision, it is clear that voters need more protection from racial discrimination in voting. As we approach a national election, it is not hard to see that attempts to deny and infringe upon the right to vote are only increasing. Just last week, the Brennan Center for Justice released a report called "The State of Voting in 2014." According to this report, since 2010, 22 states have passed new voting restrictions that make it more difficult to vote. Of the 11 states with the highest African-American turnout in 2008, 7 of those states have new restrictions in place. Of the 12 states with the largest Hispanic growth from 2000 to 2010, 9 have passed laws making it harder to vote.

A separate report issued yesterday entitled "Shelby County: One Year Later," demonstrates how harmful election law changes have occurred because of the Court's decision.

In addition, the Leadership Conference on Civil and Human Rights released a report last week entitled "The Persistent Challenge of Voting Discrimination," which details nearly 150 voting rights violations since 2000. And each of these cases impact thousands and sometimes tens of

thousands of voters. Racial discrimination in voting clearly remains a significant problem in our democracy. And the persistent refrain that the Federal government should not involve itself in local elections is clearly wrong, as the report demonstrates that the vast majority of voting violations takes place in local elections. I ask unanimous consent that these reports be included in the Record.

The statistics and evidence in these reports reaffirm Chief Justice Roberts's acknowledgment that "voting discrimination still exists; no one doubts that." Recognizing this, it is time for Congress to act.

There are some who argue that nothing more needs to be done because other provisions of the Voting Rights Act are still in effect. But these same individuals who praise the existence of the other sections of the Voting Rights Act are often the very same ones who are working to undermine and strike down this landmark law. The hypocrisy of some of these individuals gives me pause as to whether they are truly concerned with discrimination in voting, or whether their true goal is to see the Voting Rights Act removed from the books altogether.

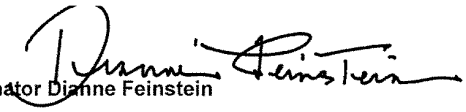
Section 2 of the Voting Rights Act continues to be a critical component of the Act. It is a general anti-discrimination provision that prohibits voting practices that have the purpose or result of discriminating on the basis of race, color, or membership in a minority language group. Plaintiffs may bring a lawsuit in Federal court challenging the voting practice, but the burden is on the plaintiffs to establish that there is a purpose or effect of discrimination. While Section 2 provides one avenue for plaintiffs to pursue an attempt to stop voter discrimination, history shows us that Section 2, on its own, is insufficient to resolve all our voter discrimination problems. This was confirmed by the 2006 Report from the House Judiciary Committee, which stated that "failure to reauthorize the temporary provisions [Section 5 and its coverage formula], given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action."

Not only is Section 2 on its face an insufficient protection, but there simply are not enough resources to prosecute all the instances of discrimination through litigation. Section 5 provides for an alternative administrative mechanism that helps resolve certain voting issues without having to go through long, protracted litigation. Litigation and the courts are not the only answer when trying to root out discrimination in voting. This is a principle that both Democrats and Republicans should be able to support.

Next week marks the 50th anniversary of the signing of the Civil Rights Act. Just as Congress came together five decades ago to enact the Civil Rights Act, Democrats and Republicans must work together now to renew and to strengthen the Voting Rights Act. I hope all Republicans will work with us to enact the meaningful protections in the Voting Rights Amendment Act.

# # # # #

PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN



Statement of Senator Dianne Feinstein

Hearing on the Voting Rights Amendment Act (S. 1945)

Senate Judiciary Committee

June 25, 2014

Thank you very much, Mr. Chairman. Let me first thank you for your diligent efforts, along with Congressman Sensenbrenner in the House, to update the Voting Rights Act.

You have put forward a very good bill, and it is one I am proud to cosponsor.

One year ago today, the Supreme Court decided *Shelby County v. Holder*. This is a decision that, in my view, was one of the worst in memory.

In a 5-4 decision written by Chief Justice Roberts, the Supreme Court struck down the formula for deciding what jurisdictions are covered by the Voting Rights Act's "preclearance" provision, called Section 5.

In 2006, under then-Chairman Specter's leadership, as well as your leadership, we reauthorized Section 5 of the Voting Rights Act – the "crown jewel" of the civil rights movement – by a unanimous vote in the Senate. President Bush signed it into law.

We often talk in this committee about whether a judicial nominee will follow precedent if confirmed.

Well, Section 5 had been repeatedly upheld against legal challenge, in 1966, 1970, 1973, 1980, and 1999, as an appropriate means of Congress exercising its constitutional authority to protect the right to vote.

As Justice O'Connor wrote in *Lopez v. Monterey County* in 1999, the Court "specifically upheld the constitutionality of [Section 5] of the Act against a challenge that [the] provision usurps powers reserved to the States."

Nevertheless, in *Shelby County*, the Court went back on decades of precedent to essentially nullify Section 5.

The Court did this even though, as the Court itself acknowledged, "voting discrimination still exists; no one doubts that."

Yet the Court essentially ignored the 15,000-page record of voting discrimination in covered jurisdictions that Congress compiled in 2006 – stating, quote:

> "We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record."

As Justice Ginsburg pointed out in dissent, the legislative record "overwhelmingly bears out . . . that there is a need for continuing the preclearance regime in covered States."

I believe the Court's decision was not only wrong, but an aggressive move to overturn precedent that simply cannot be justified.

I also fully agree with Justice Ginsburg, who said: "Throwing out preclearance when it has worked and is continuing to work is like throwing away your umbrella in a rainstorm because you are not getting wet."

In other words: it makes no sense to throw out a law because it works. But, unfortunately, that is where we are today, and we must respond.

The Court's decision said that, if we are to re-enact a preclearance requirement, we "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."

Mr. Chairman, I commend your effort to do that by authoring legislation with a number of critical provisions, including a preclearance formula that looks back 15 years at voting rights violations and that will update over time.

I simply wanted to state my views, and to say that I am pleased to cosponsor the Voting Rights Amendment Act.

QUESTIONS SUBMITTED TO MICHAEL A. CARVIN BY SENATOR GRASSLEY

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY

The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

Questions for Mr. Carvin:

1. Section 6(b) of S.1945 provides that court "shall" grant injunctive relief "if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted." In all other situations, courts exercise discretion in issuing an injunction, and never do so without finding that irreparable harm would occur in the absence of the injunction, as well as finding that the party seeking the injunction would be likely to succeed on the merits of his or her claim. Why is it desirable to require courts to issue injunctions in the absence of any showing of irreparable injury and for lawsuits that could be frivolous?

2. Ms. Ifill testified: "Litigation is costly, time-consuming, and can only address voting discrimination after it has gone into effect and after the democratic process has been besmirched with the taint of discrimination." What empirical evidence exists to support the proposition that litigation under Section 2 of the Voting Rights Act (1) is more costly than litigation arising from challenges filed under Section 5; (2) can only address voting discrimination only after it has gone into effect? Is there any statutory language or court decision that prevents a litigant from challenging a voting change under Section 2 prior to its effective date or that would require a court to rule against such a challenge as a matter of law prior to the effective date of the change? Is there any statutory language or court decision that says the opposite?

Questions Submitted to Abigail Thernstrom by Senator Grassley

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY

The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

Questions for Dr. Thernstrom:

1. As a matter of social science, is it valid for a coverage formula to trigger preclearance based on a uniform number of violations by a state and its subdivisions without regard to the population of the state or the number of jurisdictions within the state?

2. What is the difference between the coverage formula that Congress established in 1965 and the coverage formula contained in S.1945?

QUESTIONS SUBMITTED TO SHERRILYN IFILL BY SENATOR GRASSLEY

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY

The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

Questions for Ms. Ifill:

1. Section 6(b) of S.1945 provides that court "shall" grant injunctive relief "if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted." In all other situations, courts exercise discretion in issuing an injunction, and never do so without finding that irreparable harm would occur in the absence of the injunction, as well as finding that the party seeking the injunction would be likely to succeed on the merits of his or her claim. Why is it desirable to require courts to issue injunctions in the absence of any showing of irreparable injury and for lawsuits that could be frivolous?

2. You testified: "Litigation is costly, time-consuming, and can only address voting discrimination after it has gone into effect and after the democratic process has been besmirched with the taint of discrimination." What is the basis for your statements that litigation under Section 2 of the Voting Rights Act (1) is more costly than litigation arising from challenges filed under Section 5; (2) can only address voting discrimination only after it has gone into effect? For the latter, please cite to any statutory language or court decision that prevents a litigant from challenging a voting change under Section 2 prior to the effective date of the change or that would require a court to rule against such a challenge as a matter of law prior to its effective date.

RESPONSES OF MICHAEL A. CARVIN TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY

The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

Questions for Mr. Carvin:

1. Section 6(b) of S.1945 provides that court "shall" grant injunctive relief "if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted." In all other situations, courts exercise discretion in issuing an injunction, and never do so without finding that irreparable harm would occur in the absence of the injunction, as well as finding that the party seeking the injunction would be likely to succeed on the merits of his or her claim. Why is it desirable to require courts to issue injunctions in the absence of any showing of irreparable injury and for lawsuits that could be frivolous?

Answer:

It is plainly not desirable and would greatly disrupt how civil litigation should be and always has been conducted in all civil rights and other cases. Needless to say, the authority of federal courts to suspend presumptively valid state laws, particularly in areas like voter qualifications where the Constitution vests principal responsibility with the states, is extremely circumscribed. Therefore, it can only be done when the state will likely violate a citizen's constitutional or civil rights and impose an irreparable harm. As you note, however, Section 6(b) eliminates both of these basic requirements, replacing them with an unprecedented "balancing" test, measuring the relative "hardship" to the voter and the State, and *mandating* an injunction if the hardship is greater on the voter. Since the "hardship" of losing or burdening one's vote will inevitably outweigh the Government's administrative or ballot integrity interests *if* one assumes that the plaintiff's case is meritorious (as 6(b) requires), this "test" will actually mandate preliminary injunctions for all voting claims, even the manifestly frivolous ones. Thus, every voting practice in every state would be subjected to a *de facto* preclearance regime: state voting laws, particularly new ones, would be *presumptively* enjoined (once suit is filed by any voter) until the state can prevail on the merits. That being so, this section suffers from flaws quite similar to those that invalidated the 2006 renewal of Section 5 in *Shelby County*.

2. Ms. Ifill testified: "Litigation is costly, time-consuming, and can only address voting discrimination after it has gone into effect and after the democratic process has been besmirched with the taint of discrimination." What empirical evidence exists to support the proposition that litigation under Section 2 of the Voting Rights Act (1) is more costly than litigation arising from challenges filed under Section 5; (2) can only address voting discrimination only after it has gone into effect? Is there any statutory language or court decision that prevents a litigant from challenging a voting change under Section 2 prior to its effective date or that would require a court to rule against such a challenge as a matter of law prior to the effective date of the change? Is there any statutory language or court decision that says the opposite?

Answer:

As far as I am aware, there is no reliable empirical evidence that a Section 2 judicial challenge is more expensive than a Section 5 judicial challenge to the same voting laws. In redistricting cases, for example, the Section 2 and Section 5 cases both rely on expert testimony and complicated statistical regression analyses to assess likely outcomes for minority voters in future years. On the second question, there is nothing to support the notion that Section 2 cases cannot adjudicate or enjoin voting practices prior to their use in an election. Indeed, Section 2 redistricting challenges are quite frequently resolved, at least preliminarily, prior to the decade's first election. For example, as I mentioned in my testimony, the Texas three-judge court required new redistricting plans prior to the 2012 elections pursuant to Section 2, while the related *Section 5* challenge was not timely adjudicated. This is unsurprising because, again, Section 2 challenges involve fact-finding and evidence not cognizably different from Section 5 adjudication; *i.e.*, expert statistical and demographic analysis projecting the voting practice's consequences in *future* elections.

RESPONSES OF ABIGAIL THERNSTROM TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

DR. ABIGAIL THERNSTROM, ANSWERS TO:

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY
The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

Questions posed by Sen Grassley:

1. As a matter of social science, is it valid for a coverage formula to trigger preclearance based on a uniform number of violations by a state and its subdivisions without regard to the population of the state or the number of jurisdictions within the state?

2. What is the difference between the coverage formula that Congress established in 1965 and the coverage formula contained in S.1945?

ANSWERS:

1.
No. It is not valid to have a coverage formula that is based on a uniform number of violations by a state and its subdivisions without regard to the population of the state or the number of jurisdictions within the state.

The proposed formula uses the *absolute number* of voting rights violations as the triggering mechanism, and thus ignores the huge variance in population size among the 50 states. This obvious problem could have been solved by looking instead at the *rates* of violation per, say, 100,000 residents– particularly rates relative to the size of the *minority* population of the various states. A state with a large population but comparatively few minority citizens could be expected to have many fewer voting rights complaints than one of the same size but much larger numbers of minorities within its boundaries.

2.
The 1965 coverage formula was carefully designed to hit precisely those states that had been intentionally depriving blacks of their Fifteenth Amendment rights. No states were named. Instead a statistical trigger was used: states with total (both black and white) registration and turnout below 50 percent were rightly assumed to be engaging in deliberate disfranchisement.

If the same trigger (turnout below 50 percent) were used today, Only West Virginia (with its turnout of 47.8 percent in 2012) would be covered.

S. 1945 contains a section that refers to "PERSISTENT, EXTREMELY LOW MINORITY TURNOUT." It provides that jurisdictions may be brought under coverage and deprived of their ordinary rights to govern themselves if any of several statistical measures indicate that minority voters have lower turnout rates than others.

But it is hard to believe that anyone familiar with basic demography ever reviewed this section. It assumes simplistically that if minority participation is low by some measure, the jurisdiction must be at fault—that its political process must be somehow flawed. This assumption flies in the face of an abundance of social science knowledge about voting behavior.

As I argued at much greater length in my submitted testimony, racial/ethnic groups that differ in their average age can be expected to have different rates of voter turnout. Older people are far more likely to vote than young ones are. Since the Hispanic population today includes many more young people than elderly ones, the group can be expected to have lower turnout rates than that of non-Hispanics. The bill assumes public officials are doing something to suppress the minority vote. And yet it is impossible to know what any jurisdiction could do to force the young to vote at the same rate as the old.

Education is a second powerful force driving electoral turnout. Electoral participation everywhere is notably higher among the well educated than among those with little schooling. Since both blacks and Latinos have less schooling on the average than non-Hispanic whites, lower minority turnout rates in a community are not evidence that that the local political process is flawed and that its elections need to be regulated and monitored by the federal government.

Turnout disparities along racial or ethnic lines can also be the result of residential mobility. Newcomers to a community are much less likely to turn out at the polls than long-settled residents. Two other closely related drivers of voting behavior are family income and home ownership.

That whites, blacks, Latinos, and Asians are not equally likely to turn out at the polls is not at all surprising, since they differ from each other in their age structure, education, income, residential mobility, and rates of home ownership.

In sum, forces far beyond the control of any state, and of any of its political subdivisions, result in glaring disparities in rates of electoral participation. The framers of the entire section of the proposed legislation focused on the issue of "low minority turnout" seem oblivious to what every social scientist knows. It would extend federal control over a great many jurisdictions that have made every possible effort to provide equal opportunity to elect candidates of their choice to all of the citizens.

A final problem with this section of the proposed legislation is its casual disregard of how the evidence about turnout at the local level is to be found. The bill blithely states that "in each odd-numbered calendar year" the Attorney General of the United States "in consultation with the heads of the relevant offices of the government" will provide

"figures determined using scientifically accepted statistical methodologies." This seems to imply that the necessary data are already in the hands of the federal government; all the Attorney General needs to do push the right button and it will pop up on his computer screen. That this is far from the case is spelled out in my submitted testimony.

RESPONSES OF SHERRILYN IFILL TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY

The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

Questions for Ms. Sherrilyn Ifill:

1. Section 6(b) of S.1945 provides that court "shall" grant injunctive relief "if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted." In all other situations, courts exercise discretion in issuing an injunction, and never do so without finding that irreparable harm would occur in the absence of the injunction, as well as finding that the party seeking the injunction would be likely to succeed on the merits of his or her claim. Why is it desirable to require courts to issue injunctions in the absence of any showing of irreparable injury and for lawsuits that could be frivolous?

Ms. Ifill's Answer to Question No. 1:

This provision of the Voting Rights Amendment Act (VRAA) merely adopts established precedent, which holds that, in general, irreparable harm results from infringements on the right to vote. In the context of voting rights disputes, it is largely settled that "[a]n abridgement or dilution of the right to vote constitutes irreparable harm." *Montano v. Suffolk County Legislature*, 268 F.Supp.2d 243, 260 (E.D.N.Y. 2003); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Reynolds v. Sims*, 377 U.S. 533, 563-62 (1964) (stating that the right to vote is "fundamental," "preservative of other basic civil and political rights," and that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

This principle derives from the fact that, unlike in many legal disputes, "voters denied equal access to the electoral process cannot collect money damages after trial for the denial of the right to vote." *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 540-41 (E.D. Pa. 2003); *see also Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) ("An injury is irreparable if it cannot be undone through monetary remedies." (internal quotation and citation omitted)). In the absence of an injunction, during the years that are often required to successfully litigate a Section 2 action and overturn a discriminatory election law, the proponents of the law will continue to enjoy its benefits, including winning elections and gaining the advantage of incumbency. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 43-44 (Oct. 18, 2005).

Therefore, rather than "requir[ing] courts to issue injunctions in the absence of any showing of irreparable injury," the VRAA instead would merely recognize by statute what is now widely accepted by various federal courts. *See, e.g.*, *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." (citations omitted)); *Marks v. Stinson*, 19 F. 3d 873, 878-79 (3rd Cir. 1994) (affirming district court's conclusion that the plaintiffs, "and even the entire state, suffer irreparable injury when an improperly seated representative of the people exercises the powers of his office and when constitutional freedoms are lost." (internal quotation marks and alterations omitted)); *Wil-*

liams v. Salerno, 792 F.2d 323, 326 (2d Cir. 1986) (finding that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon.").

Moreover, this provision conditions the issuance of an injunction on the court's assessments of the relative hardships between the parties, and so the injunction shall issue only *if*, the court makes the appropriate determination. Courts therefore are necessarily asked to continue to exercise their sound discretion in order to determine whether the asserted hardships associated with the VRAA claim, even if meritorious, are sufficient to justify issuing a preliminary injunction. *Cf., e.g.*, *SW Voter Registration Educ. v. Shelley*, 344 F. 3d 914, 918-19 (9th Cir. 2003) (denying a preliminary injunction where, although the plaintiffs had established a "possibility of success on the merits," the balance of hardships tipped sharply in favor of the Defendants).

Thus, the VRAA would not require a court to issue a preliminary injunction if it found that, on balance, the legitimate interests of the Defendants in enforcing a likely valid election law outweigh the interests of the plaintiffs in pursuing a potentially frivolous claim.

2. You testified: "Litigation is costly, time-consuming, and can only address voting discrimination after it has gone into effect and after the democratic process has been besmirched with the taint of discrimination." What is the basis for your statements that litigation under Section 2 of the Voting Rights Act (1) is more costly than litigation arising from challenges filed under Section 5; (2) can only address voting discrimination only after it has gone into effect? For the latter, please cite to any statutory language or court decision that prevents a litigant from challenging a voting change under Section 2 prior to the effective date of the change or that would require a court to rule against such a challenge as a matter of law prior to its effective date.

Ms. Ifill's Answer to Question No. 2:

First, there can be no doubt that litigation under Section 2 is intensely complex, extremely costly and time-consuming, and puts significant strains on limited judicial resources. *See, e.g.*, Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed); *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (Oct. 25, 2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits); *Understanding the Benefits and Costs of Section 5 Pre-Clearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (May 17, 2006) (responses of Armand Derfner to questions submitted by Senators Cornyn, Coburn, Leahy, Kennedy, and Schumer) (describing Section 2 cases as "expensive and time-consuming to litigate and hard to win," and refuting the position that "Section 5 is not needed because other litigation will do the job"); *The Continuing Need for Section 5 Pre-Clearance, Hearing before the S. Comm. on the Judiciary, 109th Cong.* 15 (May 16, 2006) ("*Continuing Need*") (testimony of Pamela S. Karlan) (explaining that Section 2 suits demand "huge amounts of resources" and that Section 2 litigation is not "an adequate substitute in any way" for Section 5). Section 2 litigation requires attorneys "to assemble plaintiffs with standing, file a case and engage in discovery," and "even on an expedited schedule, trial will be months and possibly a year after the new law is put in place." *Continuing Need* 61 (Earls' Responses).

While your question asks about the comparison between Section 2 and Section 5 litigation, the appropriate comparison is between Section 2 litigation and the Section 5 administrative preclearance process, which rarely results in litigation. Indeed, of the thousands of changes submitted in accordance with Section 5 between 2006 and 2013, only a handful resulted in litigation. *See, e.g.*, *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012); *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012); U.S. Dep't of Justice, Civil Rights Division, *Cases Raising Claims Under Section 5 of the Voting Rights Act*, http://www.justice.gov/crt/about/vot/litigation/recent_sec5.php (last visited July 14, 2014) (summarizing the three cases brought by the U.S. Department of Justice to enforce Section 5 since 2006). The substantial burdens on the litigants and the federal judiciary inherent in Section 2 litigation stand in stark contrast to the ease of compliance with the administrative preclearance process under Section 5. *See, e.g.*, NAACP Legal Defense and Educational Fund, Inc., Br. of Respondent-Intervenors Cunningham et al., *Shelby Cnty., Ala. v. Holder*, 2013 WL 315241, at *33-34 (Jan. 31, 2013) (describing *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), in which Charleston County, South Carolina fought unsuccessfully for years to overturn a Section 2 liability finding concerning the County Council's discriminatory at-large electoral system at the cost of two million dollars in public funds, whereas Section 5 promptly blocked the similarly discriminatory efforts to change the Charleston County School Board's method of election). Still, even direct comparisons between Section 2 and Section 5 *litigation* have found that the latter is often faster and more efficient. *See, e.g.*, Br. for Amici Curiae Section 5 Litigation Intervenors, *Shelby County, Ala. v. Holder*, 2013 WL 432972, at *23-26 (Feb. 1, 2013).

Testimony before Congress from the 2006 reauthorization of the Voting Rights Act confirms that, under Section 5, most preclearance submissions "are routine matters that take only a few minutes to prepare using electronic submission formats" that are "readily available." *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 312-13 (2006) (testimony of Donald M. Wright, North Carolina State Board of Elections). That same testimony further characterized the practical cost of preclearance as "insignificant"—with the exception of redistricting submissions, which tend to be relatively infrequent—and explained that the "consensus" among North Carolina election officials is that Section 5 imposes "a manageable burden providing benefits in excess of costs and time needed for submissions." *Id.* A number of other witnesses also testified in 2006 that the preclearance submission process is "a task that is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the [election] change to begin with." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) ("*Benefits and Costs*") (testimony of Armand Derfner); *id.* at 25 (testimony of Fred D. Gray) (describing preclearance submissions as no more than "a small administrative act"); *Continuing Need* 64 (Earls' Responses) (explaining that "the majority" of election officials "did not find Section 5 requirements to be burdensome").

A number of formerly covered states also agree that the Section 5 preclearance regime is preferable to constantly being subject to Section 2 litigation. In *Shelby County v. Holder*, four states covered in whole or in part by former version of Section 4(b)—California, North Carolina, Mississippi, and New York—submitted an amicus brief in which they urged the U.S. Supreme

Court *not* to strike down Section 5, arguing that, if "every [U.S. Department of Justice] objection were to be replaced by Section 2 litigation, the burden on covered jurisdictions would arguably be more severe [than preclearance under Section 5]. . . . [O]ne of the most significant benefits of the preclearance process to covered jurisdictions is that a Section 5 objection will prevent a problematic voting change from taking effect, thereby reducing the likelihood that a jurisdiction will face costly and protracted Section 2 litigation." Amicus Br. for New York, California, Mississippi and North Carolina, *Shelby County*, 2013 WL 432966, at *8-9 (Jan. 31, 2009); *see also id.* at *12 ("the costs of gathering and submitting the information are relatively small"). Similarly, in *Northwest Austin Municipal Utility District Number One v. Holder*, Louisiana, California, North Carolina, Arizona, Mississippi, and New York had argued that the preclearance process under Section 5 is "expeditious and cost-effective" in part because it "helps States to prevent costly Section 2 litigation." Amicus Br. for North Carolina, Arizona, California, Louisiana, Mississippi and New York, *Nw. Austin*, 2009 WL 815239, at *1-2, 16-17 (Mar. 25, 2009).

Second, unlike under Section 5, even if the plaintiff is able to win a Section 2 lawsuit, the challenged discriminatory voting law is only *guaranteed* to be blocked *after* it has already been implemented to the detriment of voters of color. Even where an irreparable injury may otherwise result to the plaintiff, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), a preliminary injunction remains an "extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). It is awarded only if there is a "clear showing" that the standard was met, *id.*, and is "never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008),

Thus, very few successful Section 2 cases are preceded by the grant of a preliminary injunction. Estimates for the number of such cases ranges from "fewer than one-quarter" of ultimately successful Section 2 suits, Solicitor General Donald Verrilli, Transcript of Oral Argument, *Shelby Cnty.*, 2013 WL 6908203, at *38 (Feb. 27, 2013), to "less than 5% and possibly quite lower." J. Gerald Hebert and Armand Defner, *More Observations on Shelby County, Alabama and the Supreme Court*, Campaign Legal Center Blog (Mar 1, 2013), http://clcblog.org/index.php?option=com_content&view=article&id=506&Itemid=1. Again, the *Charleston County* litigation clearly illustrates this reality. 316 F. Supp. 2d 268. There, the United States alleged in January 2001 that the at-large method of electing the members of the County Council violated Section 2. *Id.* at 270. In March 2002, the United States moved for a preliminary injunction barring the use of at-large elections, and the court denied that request. *Id.* at 272-73. In 2003, however, the court found that the at-large system violated Section 2 and enjoined its use in future elections. *Id.* at 304. Unfortunately, by that time, the November 2002 elections had already occurred. *Id.* at 268; *see also Williams v. City of Dallas*, 734 F. Supp. 1317, 1317, 1367-68, 1415 (N.D. Tex. 1990) (finding after denial of preliminary injunction and trial that the electoral system for the Dallas City Council violated Section 2, and noting that an election had occurred since the time the injunction was denied).

June 4, 2014

The Honorable Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy:

AARP supports your bill, S.1945, the "Voting Rights Act Amendments of 2014," as common sense fixes to modernize the Voting Rights Act (VRA). This legislation is a major step forward to address the Supreme Court's decision in Shelby County v. Holder which invalidated important coverage protections under the original law. While the legislation does not fully address some important AARP concerns regarding voter identification, AARP believes the legislation responds to the Court's VRA concerns and would better protect all voters against discrimination at the ballot box and ensure Americans are guaranteed their right to vote.

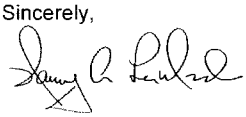
The proposed legislation will restore most of the original intent of the landmark law that prohibits discriminatory voting practices responsible for the denial and abridgement of the voting rights of racial, ethnic, and language minorities in the U.S. The bill would enact a modern, flexible and forward-looking set of protections that work together to ensure an effective response to racial and other discrimination in voting in every part of the country. These protections would:

- enhance the power of federal courts to stop discriminatory voting changes from being implemented and to order a preclearance remedy when needed;
- provide a flexible coverage formula that is updated annually to require preclearance for all changes in places with numerous recent voting rights violations;
- create new nationwide transparency requirements that help keep communities informed about voting changes in their community; and
- continue the federal observer program, which is critical to combatting various forms of discrimination at the polls.

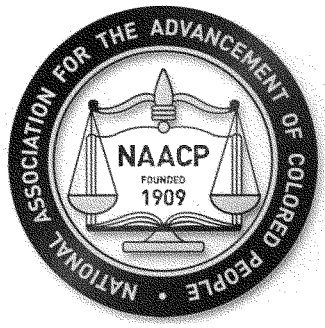
These tools will focus on protecting voters from discrimination where and when it's happening, and ensure that elections are fair, transparent, and available to all.

The right to vote is the most basic of all political rights. Over the last several years, the American public has become aware of the many inconsistencies that exist in voting systems throughout the country and which compromise both the fairness and integrity of the elections. AARP has a longstanding commitment to full citizen participation in the democratic process at the federal, state and local level. Because this is an effort that requires coordination between federal and state governments, AARP looks forward to working with Congress, the Administration and vested government and advocacy leaders at all levels to institute laws, regulations and administrative tools that promote, expand and ensure the exercise of every citizen's right to vote. If you have questions, please contact me or have your staff contact Joyce Rogers, Senior Vice President for AARP's Government Affairs office at jarogers@aarp.org or (202)434-3750.

Sincerely,



Nancy A. LeaMond
Executive Vice President
State & National Group



Testimony of Rev. Dr. William J. Barber II,

President of the North Carolina State Conference of NAACP Branches

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Submitted for the Record of

THE UNITED STATES SENATE

Committee on the Judiciary

Hearing before the Full Committee on the Voting Rights Amendment Act, S.1945:

Updating the Voting Rights Act in Response to *Shelby County v. Holder*

(June 25, 2014):

<u>The History of Voting Rights and Protecting the Franchise in North Carolina</u>

I. Introduction

I thank the Committee for holding this hearing and welcome the opportunity to testify regarding the need to reconstruct the preclearance provisions of the Voting Rights Act of 1965. I am the President of the North Carolina State Conference of the NAACP ("NC NAACP") and the leader of the Forward Together Moral Movement for civil rights that is being embraced by hundreds of thousands of people across the South. The NC NAACP is a nonpartisan, nonprofit organization composed of over 100 local branches and 20,000 individual members throughout the state of North Carolina. It has members who are citizens and registered voters in each of the state's 100 counties, including the 41 counties previously covered by the Voting Rights Act. The Forward Together Moral Movement is a multiracial movement of blacks, whites and Latinos seeking a just and inclusive democracy. I hope that you hear my call for justice and do all that is necessary to restore the protections of the Voting Rights Act.

Since the Supreme Court's ruling in *Shelby County, Alabama v. Holder*, inclusive democracy is under attack in ways that dangerously and disproportionately imperil voters of color. North Carolina is a stark example of the continued need for the Voting Rights Act and why Congress must amend it in a way that will ensure that voting practices like North Carolina's are subject to the federal review. The full protections of the Voting Rights Act remain necessary to ensure that the promises of the Reconstruction Amendments are kept. In North Carolina, we have been subjected to the most evil, egregious and comprehensive voter suppression bill since the *Shelby* decision. In fact it is an extraordinary stratagem encompassing perhaps the worst discrimination in voting we have experienced since the Voting Rights Act of 1965 ("VRA") was passed to end poll taxes, literacy tests, and many other forms of subtle and not-so-subtle discrimination in voting that persisted in this nation for a century after the Reconstruction Amendments were adopted. Tragically, without the protections of the Voting Rights Act's preclearance provisions, Jim Crow-era voting shenanigans are repeating themselves in North Carolina. Congress must act to stop adversaries of interracial democracy from doing further damage to our fundamental voting rights. On this 50th Anniversary of Freedom Summer, we all must remember that people died for the right to vote.

This is because even considering current conditions, history is important. History shows us that without the preclearance protections of the 1965 Voting Rights Act, which cover states with ongoing and repeated incidents of discrimination in voting, extremists in these states will continue to attempt to disenfranchise voters of color in ways that are difficult to stop. In fact, that is precisely why the North Carolina NAACP was forced to undertake expensive, time-consuming and difficult litigation to try to stop our state's most recent attempt to disenfranchise voters of color – measures that previously would have had federal review before they could be implemented.

II. The First Reconstruction

Looking at the historical pattern, one can easily see the need for the full protections of the VRA in states like North Carolina. The right to freedom from discrimination in voting was explicitly guaranteed by the 15th Amendment enacted on February 3, 1870, part of the three Reconstruction amendments enacted after slavery was abolished. The 15th Amendment clearly set forth that, "[t]he right of citizens of the United States to vote shall not be denied or abridged

by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." In states like North Carolina, this meant that African Americans could finally participate in our democracy. There was a surge in political participation and power among people of color. However, the backlash to political participation by African Americans was strong and harsh. Southern states reacted by putting in place numerous restrictions to our voting rights, including poll taxes, literacy tests, laws disenfranchising persons with former felony convictions, and out and out intimidation. Widespread violence at the polls often kept voters of color away.

The history of discrimination in voting in North Carolina is long and cyclical, with ebbs and flows in permitting people of color to vote. After the Civil War, in 1866, the state legislature passed the "Black Codes," controlling freedom of movement and prohibiting the freedmen from voting. In 1868, the state ratified the14th Amendment, which guaranteed citizenship to all persons born in the United States, as well as equal protection and due process under the law. Also in 1868, black and white delegates wrote a new state constitution enshrining the right to vote for all men and criminalizing intimidation of voters through violence, bribery or threats. There was a truly multiracial coalition behind a vibrant democracy emerging in my state, which was led by the Republican Party.

Founded in 1868, the Ku Klux Klan ("KKK") began exercising vigilante violence across the South, including North Carolina. They murdered the first black town commissioner in Graham, North Carolina, and hung his body in the town square. They murdered a white Republican state senator in the Caswell County Courthouse. KKK mobs killed, assaulted, flogged and otherwise terrorized black citizens and whites who sided with them. Despite violence around the state, white Conservatives did not have a clear majority as blacks and poor whites, many of whom were ensnared in the same crop lien system—sharecropping and tenant farming—came together to oppose their policies. Between 1877 and 1900, 52 African American men served in the state legislature, and four served in the U.S. House of Representatives. From 1894 – 1898, North Carolina had a biracial "Fusion" government," and the North Carolina State Conference of NAACP Branches is leading a movement to resurrect Fusion politics in North Carolina today.

During the first Fusion government, electoral reform included establishment of clear precinct lines, rules requiring the appointment of impartial election judges, accommodations for illiterate voters, and further prohibitions against voter intimidation. During this time, North Carolinians elected more than 1,000 African Americans to local office. From the 1894 to the 1896 elections, turnout among registered black voters went from 60 to almost 90 percent.

Today, Congress must remember that protection of the right to vote was what led to increased participation in North Carolina. Protection of the right to vote brought about the most democratic political system in the South in the 19th century, led by Republicans. Moreover, the backlash to this expanded democracy in the next phase of history and its Jim Crow laws is what decreased African-American voting. We are seeing a similar backlash today.

In 1898 and 1900, the "white supremacy campaigns," as their organizers called them, overthrew the state and many local governments by force, fraud, intimidation and racial demagoguery. The old Conservative Party, renamed as the Democratic Party, took power again

through racial appeals, along with violence and intimidation by the "Red Shirt" vigilantes that drove African-American and progressive white voters from the polls. Through these methods, Democrats swept the state elections in the name of white supremacy. In Wilmington, North Carolina, white supremacists staged a military coup in the state's largest city, which had a black majority, and removed all the Fusionists, white and black, from office at gunpoint. They also set fire to the printing press of the Wilmington Journal, perhaps the country's only black daily newspaper, and murdered dozens of black citizens in the streets.

In 1900, the North Carolina legislature vowed to strip African Americans of their voting rights. They passed their own constitutional amendment imposing a literacy test for voting, along with a "grandfather clause" exempting those whose grandfathers had been eligible to vote, which obviously excluded the grandchildren of the formerly enslaved. A new poll tax, revised voter registration rules, and new rules permitting any elector to challenge any voter upon suspicion of fraud and subject to the discretion of the local registrar, were also passed into law. These measures disfranchised nearly all African-American voters and a number of poor whites. Not surprisingly, voter participation fell sharply, and the white Conservatives entrenched their control of the state. Blacks were almost completely eliminated from political power for two generations. During this time, many African Americans were willing to bravely face down violence, but restrictive voting laws and procedures still disenfranchised them.

The failure to protect voting rights ushered in the era of Jim Crow, codifying white supremacy as law. To briefly summarize this complex era, without equal access to the right to vote, a series of racial segregation laws were passed in North Carolina from 1900 – 1921. Where we were once multiracial in the public sphere, we were no longer allowed to be in the same spaces, and those spaces to which African Americans were relegated were replete with suffering from economic decline. We had segregated schools, work places, public places, and even church and family life. In 1950, for example, Senator Willis Smith won on a blatantly white supremacist agenda (with campaign materials asking "Do you want Negroes working beside you, your wife and daughters?.. sitting with you and your family at all public meetings?.. going to white schools?..[.]"). Further discrimination in voting was legislated through strong local government models, as well as manipulating the district lines to ensure that whites would stay in power. The Jim Crow era also prompted a long civil rights movement based in large part on a moral calling. It included the difficult work by organizers and individual citizens to pass the literacy tests, pay the poll taxes, and attempt to participate as equals in American democracy. In North Carolina, black students held sit-ins at the Woolworth's lunch counter in Greensboro in 1960, which led to the forming of the Student Nonviolent Coordinating Committee in Raleigh and numerous sit-ins, boycotts and protest movements across the South. Our state's members of the NAACP also participated in the Voter Education Project, which between 1962 and 1964 registered nearly 800,000 voters across the region.

III. The Second Reconstruction: From Freedom Summer to the Passage of the Voting Rights Act

Fifty years ago, Michael Schwerner and Andrew Goodman, both of whom traveled from New York to help register blacks to vote, and James Chaney, a brave young African-American volunteer for the Congress for Racial Equality in Meridian, Mississippi, disappeared. As we all know, they had been stopped and turned over by the local police to the KKK, who murdered

them, and, as was evident by the mutilation of James Chaney's body, brutally tortured him. This was less than six months after the 23rd Amendment had abolished the poll tax, which had been instituted in 11 southern states, including North Carolina, to make it difficult for poor blacks to vote.

Murders, beatings, bombings, arson and intimidation marked the Freedom Summer of across the South, with the violence committed by those determined to suppress African-American voting rights. In North Carolina and across the region, fraud, foot-dragging and various forms of subterfuge also blocked black ballots. In the face of this onslaught, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964. But the right to vote was far from guaranteed. During this period in North Carolina, those who had refused to let African Americans eat at the same lunch counter as whites were not eager to let us vote to change that.

On what is known in our nation's history as "Bloody Sunday," on March 5, 1965, during a peaceful march across the Edmund Pettus bridge in Selma, Alabama, local police brutalized peaceful activists marching for the right to vote with tear gas, clubs, whips, and fire hoses, leading to the hospitalization of 50 of them. Reaction to the violence, in conjunction with a massive lobbying effort, helped to pass the Voting Rights Act of 1965. This legislation was necessary to enforce the 15th Amendment, which had been ratified almost a century earlier.

Even with the full protections of the VRA, voting rights have been a struggle in North Carolina. Without those protections, the many VRA violations from 1965-2013 would have resulted in disenfranchisement, rather than the higher levels of participation of African Americans who deeply appreciate the sacred nature of our voting rights.

The Struggle for Voting Rights in North Carolina from 1965-2013

After the passage of the VRA of 1965, voter registration among African Americans in North Carolina finally surpassed 50 percent. Even so, Section 5 immediately covered 40 counties due to low registration. Also in 1965, a federal court ruled that the district schemes of the North Carolina State House *and* Senate violated the one-person, one-vote rule derived from the 14th Amendment of the United States Constitution. In 1966, the state convened a special session to redraw legislative district lines as ordered by the federal court, but the state legislature found another way to dilute African-American voting power by making all the districts multi-member and "numbered" at the county level. This guaranteed that any black candidate had to face a white candidate at the county level. Out of the 170 members of the state General Assembly, the first African American was elected in 1968. This was Representative Henry Frye, who was also the first African American elected to state office in North Carolina since 1898. The second black legislator since the First Reconstruction, Mickey Michaux, won election in 1970. But up until 1980, only four African Americans served in the state General Assembly at the same time.

On July 30, 1971, the Department of Justice ("DOJ") objected to the state's redistricting plan under Section 5 of the VRA. On September 27 of the same year, the DOJ again objected to the state's subsequent, slightly-amended plan. (During the same year, DOJ also objected to two different iterations of the state's literacy tests for registration.) In 1981, the state legislature

enacted a new redistricting plan, which it did not submit to Section 5 review. It relied on the state constitutional rule that counties could not be split in legislative districts, to continue to discriminate in voting. In the case of *Thornburg v. Gingles*, in 1982, the Supreme Court found that North Carolina state redistricting plans violated Section 2 of the VRA. What is remarkable is that the state legislature changed the plan in various ways, each an attempt to put in the minimum number of black districts legally possible. While slight improvements were made in the face of the *Gingles* litigation, the state continued to discriminate. Such is the history of voting rights in North Carolina.

This history also demonstrates why we need both Section 2 and 5 coverage of the VRA in North Carolina. Section 5 is designed to prevent retrogression and so it must be shown that the discriminatory voting procedure "retrogresses" from the prior one; however, this is not at all useful when the new one is a little better but still discriminatory. Section 2 is designed to prevent other schemes of discrimination in voting that cannot meet the retrogression standard, where a voting practice has a disparate impact on voters of color as compared to white voters. We have experienced both in North Carolina, and unfortunately, recent history shows that we will still need both.

Over the past 30 years, the DOJ has objected more than 60 times to changes in voting laws in North Carolina, consisting of some 155 discrete voting changes, where it was found that either the State or one of the covered political subdivisions within the State had failed to show that the proposed changes would not have the purpose or effect of denying or abridging the right to vote on account of race or color. This era is also marked by continuing and effective racial appeals campaigns, such as the notorious campaign of Senator Jesse Helms in 1990, and various instances of attempted intimidation of African-American voters. In 1990, Mr. Helm's third Senate race included this infamous racial appeals campaign: "You needed that job and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. . . . You'll vote on this issue next Tuesday. For racial quotas, Harvey Gantt. Against racial quotas, Jesse Helms." Sadly, such examples are not limited to the past. President Obama was mocked even at the 2012 Democratic Convention held in Charlotte, when a trailer of a local "patriot" parked outside the delegate's hotels featured effigies of the President and state political figures hanging from nooses.

North Carolina's sordid history of racial appeals campaigns and racially discriminatory voting practices is well documented. This legacy has resulted in lower socio-economic status for people of color in North Carolina, lower educational attainment, fewer elected representatives of color, racially polarized voting and other practices that have lessened opportunities for voters of color in North Carolina to elect candidates of their choice and be full participants in our democracy.

For a while, this appeared to be on the mend, as the legislature undertook a concerted effort to expand access to voters of color. Over the past two decades, an era I know well through my work and ministry, increasing access to the vote led to greater democracy and participation. From 1999-2009, a series of laws in North Carolina expanded access to voting, through early voting, same-day registration, up-counting out-of-precinct ballots, and measures encouraging young people to vote – measures that had an especially profound impact on expanding access to African-American voters. North Carolina went from 48th out of 50 states in voter participation in

1988, to 11th highest participation among all the states in 2012. The preclearance protections of the Voting Rights Act were pivotal to increasing African-American participation, allowing North Carolina to move closer to the promise of including voters of color as full and equal citizens in our democracy. In truth, the majority of the people think that all citizens deserve equal access to the right to vote, so we passed laws ensuring that. After our appreciation of the ability to vote early and not on a workday, along with same-day registration and out-of-precinct voting, African-American participation increased. During 2012, there was a 67 percent increase in African-American turnout. In 2012, over 80 percent of African Americans in North Carolina cast a ballot, and our first African-American president was re-elected.

History shows that voting rights in North Carolina have as much to do with race as they do with party politics. The 2010 election changed the composition of the state house, which is now under Republican control. Now that the *Shelby* decision took away preclearance, without wasting any time, those who would currently suppress our voting rights starting cutting away at the means by which African Americans vote in my state through a dizzying array of new impediments to voting in a comprehensive voter suppression bill, H.B. 589. Indeed, just after *Shelby* was handed down, 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." North Carolina thus became one of the first states to pass more restrictive voting provisions following the *Shelby* ruling.

A leading election-law scholar calls H.B. 589 "probably the most suppressive voting measure passed in the United States in decades." The law targets 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 restrictions; in short, it eliminates virtually all of the measures that were responsible for expanding voter access over the last two decades. In our lawsuit challenging H.B. 589, (*NC NAACP v. McCrory*) now before the federal court in the Middle District of North Carolina, we even have to address intentional discrimination in voting.

The data already shows that this new law will disproportionately harm voters of color, who are statistically more likely to use early voting, to cast ballots during the first week of early voting that has now been eliminated, to use same-day registration and pre-registration, to cast out-of-precinct ballots, and less likely to have or be able to obtain compliant state-issued photo ID. During the 2012 presidential election, 70 percent of African Americans who voted did so through early voting. Latinos are registered at lower rates, but they have disproportionately used same-day registration. These have been highly popular programs used by large sections of the electorate, yet the North Carolina legislature did not offer any credible, non-discriminatory reason for cutting them. The other provisions we are forced to litigate against are also highly likely to disproportionately impact blacks and Latinos. The new voter challenge provisions are likely to be over-utilized against citizens of color, and unfortunately, in my home state, they evoke the days of Jim Crow as well as other discriminatory challenge practices of more recent years in North Carolina. Regarding voter ID, although African Americans only comprise 22 percent of the our state's electorate, two state Board of Elections analyses found that they

comprise 31 to 34 percent of those who could not be matched with Department of Motor Vehicle records, and thus are apt to lack ID. Among registered voters, African Americans are more than twice as likely as whites to lack a state-issued photo ID. Knowing this, the state legislature passed H.B. 589 through highly irregular and accelerated procedures, and despite the protest of thousands of North Carolina citizens in our Forward Together Moral Movement.

The current, multi-pronged voter suppression law is just another example of history repeating itself when protections of voting rights are removed in North Carolina. The state legislature knew that the measures would disparately impact voters of color and decrease our opportunity to elect candidates of our choice, and yet they passed the law anyway. After the *Shelby* decision, they even went so far as to make those measures even tougher, increasing the likelihood of suppressing voters of color. This is a clear sign of discriminatory intent, as well as the nature of these issues in North Carolina, where the legislature has taken advantage of any legal opening to change the rules and suppress the vote as much as it can. Let's be clear: the *Shelby* ruling opened the door these discriminatory voting measures. No longer bound by preclearance requirements of Section 5, states can implement voting restrictions without a preliminary federal review. The burden now rests on voters and their advocates to identify restrictive voting practices, uncover evidence of disparate impact and discriminatory intent, and pursue challenges. This is no small feat, is expensive, and a significant burden to place on voters. It is clear that without Section 5, the persistent adversaries of interracial democracy in North Carolina were set free to make it harder for people of color to vote.

IV. The Post-*Shelby* Era and the Need to Reconstruct the Voting Rights Act

The martyrs of the civil rights movement and the bipartisan leaders who passed the Voting Rights Act and reauthorized it four times—including by an overwhelming majority in 2006— all deserve better than what is happening in the South since the *Shelby* decision. The many thousands of people who are part of our multiracial Forward Together Moral Movement, who are peacefully protesting North Carolina's comprehensive voter suppression bill, also deserve better.

The *Shelby* decision put a dagger in the heart of the Voting Rights Act by taking away its preclearance protections until Congress brings back the preclearance formula. In the meantime, during only the last 365 days, five Southern states—Texas, Mississippi, Alabama, North Carolina and Virginia—have implemented restrictive voter ID laws that make it harder for African Americans and Latinos to vote as compared to white voters. This continuing discrimination is, of course, in addition to a long history of discrimination in voting. And as I discussed, in addition to its strict photo ID law, North Carolina passed and is attempting to implement a comprehensive voter suppression bill that cuts early voting, same-day registration, and out-of-precinct voting, all of which are overwhelmingly used by African-American and Latino voters.

Unless we win in costly and protracted litigation, without preclearance, voters like Ms. Rosanell Eaton, lead plaintiff in our lawsuit, will no longer have equal opportunity to exercise their fundamental voting rights. Ms. Eaton, 93, was one of the first African Americans in her county to register to vote in the 1940s, but unlike most white voters, she had to pass a literacy test. She had crosses burned on her lawn but even KKK terror did not stop her from registering

other African Americans to vote. Yet today, she will no longer be able to use early voting, no longer be able to help others use same-day registration, and because the name on her driver's license does not match her name on her birth certificate and voter registration, she will have to incur substantial expense and time to be able to continue voting under the state's restrictive new ID requirement. The same is true for many Latino voters in North Carolina, thus, our lawsuit includes both African Americans and Latinos.

During the June 3, 2014 primary in Alabama, the 93-year-old African-American voter Mr. Willie Mims was prohibited from voting because he did not have an ID. This is another voter ID law that was now not subject to review before implementation. And just hours after the *Shelby* decision, the Texas Attorney General tweeted that he would be reinstating his state's voter ID law. As you know, this is the same law that in 2012, under the preclearance rules, a federal court found to illegally discriminate against African-American and Latino voters due to its imposing "strict, unforgiving burdens" on poor and minority voters. There could not be a clearer example of the extraordinary stratagem of these states to attempt whatever forms of discrimination in voting they can, for whatever time they can. The DOJ is suing both Texas and North Carolina with regard to their discriminatory voter ID laws under Section 2 of the VRA. In the meantime, the Alabama, Mississippi, and Texas voter ID laws were already been put into place during the primaries, and portions of North Carolina's voter ID law were in effect for the May 2014 primaries here. Study after study has shown that a higher percent of African-American and Latino voters do not have the ID needed under new state requirements, yet since the *Shelby* decision, five southern states have implemented voter ID laws. If preclearance is not restored—and if discriminatory voter ID laws are not given the same legal weight as other discriminatory laws in the preclearance formula—instead of free, fair and accessible elections, we will have, at best, a hotbed of litigation.

Moreover, these post-*Shelby* voting rights violations are already repetitive. On January 13, 2014, the City of Evergreen, Alabama, submitted to a court-ordered consent decree in which it admitted to a very recent—but thrice-recurring—pattern of intentional discrimination through districts that dilute the voting strength of African Americans. Meanwhile, in Florida, the state's post-*Shelby* attempt to purge voters of color again was stopped only by intense advocacy and public outcry, as well as the proof that their recent purges have been discriminatory. Florida's pattern of purging, restricting third-party voter registration, and at the county level, likewise abridging the votes of African-American and Latino voters through vote dilution schemes, while similarly denying bilingual ballots and poll workers to voters of color who are entitled to them under the Voting Rights Act, is clear evidence of current conditions. Moreover, the Sunshine State's cuts to early voting led to the unconscionable long lines of 2012 that disparately impacted voters of color like 103-year-old Haitian American Ms. Desiline Victor, who was forced to stand in line for many hours before she could cast her ballot. The repeated pattern of VRA violations in Florida shows that this is another state in which voting rights are quite vulnerable. It is also an example of higher African-American turnout, but that is only because black voters were willing to overcome obstacles such as waiting on line for many hours longer than white voters.

V. Conclusions and Recommendations

Americans agree that elections must be free, fair and accessible to all. But many southern states, including North Carolina, currently evidence clear examples of ongoing attempted discrimination in voting, and through various methods such as cuts to early voting, discriminatory purges, discriminatory photo ID laws, moving district lines to dilute voting power of communities of color, and various discriminatory limits on the ability to register to vote. The *Shelby* decision rests on states' rights, but the people have rights as well. These are still found in the 14th and 15th amendments of the First Reconstruction. The full protections of the Voting Rights Act of 1965 enacted during the Second Reconstruction are quite plainly still needed today. The *Shelby* decision requires immediate Congressional action to put North Carolina and other southern states with egregious and ongoing histories of racial discrimination in voting back under the effective protections of Section 5. This conclusion is based on current conditions that we the people of the South can testify to.

First, while we disagree with the *Shelby* decision, the majority opinion acknowledges that there is still discrimination in voting, and my testimony shows that this is quite clearly the case in North Carolina. At this very moment in history, voters in states like North Carolina need the umbrella of protection of federal preclearance to prevent discrimination in voting by these repeat offenders *before* it can disenfranchise voters of color during an election. This is why Section 5's preclearance provisions are so critical – once a vote is lost, it can never be regained. The pattern of repeated discrimination in voting—and many examples of how it is continuing in states like North Carolina—calls for immediate Congressional action to comprehensively restore preclearance. There is not only evidence of "current conditions of discrimination in voting;" in the formerly-covered jurisdictions in the South, it is extraordinary.

Second, history shows that this is what happens when lawmakers stop being vigilant. The repeated, cyclical pattern of discrimination in voting rears its ugly head again when protections against it are removed. While there is no longer violence, intimidation persists, and voting procedures themselves continue to discriminate and keep us from fully participating as equals in American democracy. And while African-American voter participation has improved, the need for Section 5 continues as our community is still experiencing discrimination in voting.

Third, as Americans are honoring the 50th Anniversary of Freedom Summer, our Congress must remember that people died for the right to vote. They gave their lives because they had to. Not so long ago, that is what it took for our country to legislate that all men and women really are created equal. And ongoing conditions of numerous attempts at discrimination in voting in North Carolina show that this is clearly <u>not</u> the time to end preclearance, nor the time to unduly limit it. This is, instead, the time for Congress to act to stop the floodgates of damage before our country experiences another divisive and questionable election.

Fourth, without preclearance the people have to depend on the ability to litigate to protect our rights to freedom from discrimination in voting. The people of North Carolina should not have to depend on costly, protracted, difficult litigation to ensure our most fundamental rights—and our electoral system should not depend on whether or not we can find the means to do that, time and time again.

Finally, rather than discrimination in voting, everyone should be equal in the ballot box, whether rich or poor, young or old, black, white, Latino, Asian or Native American. This is precisely the principle that the VRA protects and precisely what Congress must reinstate before more damage is done to our democracy. Many people died for this right, and as Americans, it is your sacred duty to protect our most fundamental rights by answering the *Shelby* decision with a comprehensive formula. We submit this testimony today to show why we need preclearance and a comprehensive formula. We welcome the opportunity for future engagement. We welcome an open dialogue on amendments that would ensure that North Carolina and other states with egregious histories of discrimination in voting are covered. The attempted restrictions on our voting rights that have occurred in the 365 days since the *Shelby* decision show the need for vigilant protection of our most fundamental rights. We applaud you for holding this initial hearing.

Thank you for your consideration of these urgent and important issues.

Rev. Dr. William J. Barber, II,

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NAACP National Board Member

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June 23, 2014

The Leadership Conference

Protect the Right to Vote

The Honorable Patrick Leahy
Chairman
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United States Senate
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The Honorable Charles Grassley
Ranking Member
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Dear Chairman Leahy, Ranking Member Grassley, and Members of the Committee:

On behalf of The Leadership Conference on Civil and Human Rights (The Leadership Conference), a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, we thank you for the opportunity to submit our views regarding the need for the Voting Rights Amendment Act (S.1945) and ask that this statement and attachment be entered into the record of the Committee hearing entitled "The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*" scheduled for Wednesday, June 25, 2014. This bicameral, bipartisan legislation offers a measured and commonsense approach in response to the Supreme Court's June 25, 2013 decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act that for decades had ensured protection for voters against discrimination.

Racial discrimination in voting is real, not a thing of the past. It is still happening today and we need tools that respond to discrimination to ensure that all Americans can exercise their fundamental right to vote. Since the *Shelby* decision, states and localities have brazenly pushed forward potentially discriminatory changes to voting, such as changing district boundaries to disadvantage some voters and moving polling locations in areas with high concentrations of minority voters. Last week, The Leadership Conference released a report "The Persistent Challenge of Voting Discrimination: A Study of Recent Voting Rights Violations by State," which details more than 140 instances of voting discrimination across the country over the past fifteen years. We ask that the report, which is attached to this letter and can be found at http://www.civilrights.org/press/2014/Racial-Discrimination-in-Voting-Whitepaper.pdf, be made part of the hearing record.

Voting discrimination is a threat to our democracy and requires a strong, bipartisan response from Congress. The Voting Rights Amendment Act is a modern, flexible, nationwide approach to protecting voters that embodies the spirit and letter of the Court's decision. The legislation would provide new tools to get ahead of voting discrimination before it occurs and ensure that any proposed election changes are transparent.

Chief Justice Roberts said in the *Shelby* decision that "voting discrimination still exists; no one doubts that." The House and Senate must continue the long fight to ensure that no voter suffers discrimination at the ballot box. Every day that Congress fails to act, voters are in

danger. Failure to enact S. 1945 will continue to give a free pass to voting discrimination. Our nation cannot tolerate any American losing their right to vote solely because of their race or English language proficiency.

We look forward to working with you on this critical legislation. If you have any questions, please feel free to contact Lisa Bornstein, Legal Director and Senior Legal Advisor at bornstein@civilrights.org or 202-263-2856, or Nancy Zirkin, Executive Vice President at Zirkin@civilrights.org or (202) 263-2880.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

Testimony of
Jasjit Singh
Executive Director
Sikh American Legal Defense Education Fund (SALDEF)

Before the Judiciary Committee of the
United States Senate

Written Testimony for the Hearing Record on
"The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*"
June 25, 2014

Mr. Chairman, Ranking Member Grassley, and members of the Senate Judiciary Committee, thank you for holding this critical hearing on the necessity of the Voting Rights Amendment Act (VRAA), which will allow the Voting Rights Act (VRA) to continue to protect Americans and their right to vote. Through my advocacy work for the Sikh American community, I know how important it is to ensure that the ability to vote is protected, and that cases of bias and discrimination do not prevent citizens from voting, or from exercising any of their civil rights. Despite those who say that the Voting Rights Act is no longer necessary, claiming "Covered jurisdictions are not now engaged in a systematic campaign to deny black citizens access to the ballot through intimidation and violence,"[1] our nation still faces an unfortunate level of bias and discrimination towards those who appear to be different, are from different backgrounds, or hold different views.

Laws like the VRA allow for equal practice of civil rights, and the VRA protects one of the most fundamental: the ability to vote. Without protecting the voice of all our citizens, we cannot expect our nation to represent the diversity of our people. This is why, on behalf of the Sikh American Legal Defense Education Fund (SALDEF)[2] and the Sikh American community, I strongly support the immediate passage of the bicameral, bipartisan Voting Rights Amendment Act (S. 1945) which would provide the modern, flexible, and uniform voter protections necessitated by the ruling in *Shelby County v. Holder*.

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[1] Associate Justice Clarence Thomas, http://aclu.procon.org/sourcefiles/Northwest Austin Municipal Utility District Number One v. Holder, Attorney General, et al.pdf

[2] Founded in 1996, the Sikh American Legal Defense and Education Fund (SALDEF) is the oldest Sikh American civil rights and advocacy organization in the United States. Its mission is to empower Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedom for all Americans. More information is available at http://www.saldef.org.

Sikh Americans and Voting Rights:

Since its founding in 1996, SALDEF has worked on issues of discrimination, bias, and hate crimes against the Sikh community. After September 11th, 2001, the numbers of anti-Sikh hate crimes drastically increased,[3] as well as general ignorance and misunderstanding regarding the Sikh identity. In a survey done by Stanford University in association with the Sikh American Legal Defense and Education Fund (SALDEF), 20% of Americans surveyed said they would be angry or apprehensive when encountering a stranger with a turban. 35.3% of those surveyed said they would associate a man with a turban and beard with Osama bin Laden.[4] As a result, Sikh Americans are often the targets of hate-based violence, such as in Oak Creek, Wisconsin, where a man entered the Sikh gurdwara, or house of worship, and killed six people.[5] This was the deadliest attack on a house of worship since the 1963 bombing of the 16th Street Baptist Church in Birmingham, Alabama.[6] Because of this historical targeting and violence, the Sikh American voice has been incredibly vital in fighting for civil rights and social justice.

Sikh Americans have also paved the way for the rights of Asian Pacific Islander Americans to vote. Bhagat Singh Thind, a veteran of World War I, fought tirelessly for his right to vote. In 1923, he challenged laws, which denied him the rights to citizenship and to vote, in the United States Supreme Court. But, the Court unanimously decided that he would not be

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[3] History of Hate: Crimes Against Sikhs Since 9/11, *Huffington Post Religion*, Aug. 7, 2012, http://www.huffingtonpost.com/2012/08/07/history-of-hate-crimes-against-sikhs-since-911_n_1751841.html

[4] *Turban Myths: The Opportunities and Challenges for Reframing Sikh American Identity in Post-9/11 America*, Stanford University Peace and Innovation Lab and Sikh American Legal Defense and Education Fund, (Dec. 2013).

[5] *The Shooting and the Aftermath*, Milwaukee Journal Sentinel Online, http://www.jsonline.com/news/crime/oak-creek-wisconsin-sikh-temple-shooting.html

[6] *Joint Statement on First Anniversary of Oak Creek Shooting*, ACLU, (Aug. 5, 2013), https://www.aclu.org/religion-belief/joint-statement-first-anniversary-oak-creek-gurdwara-shooting

permitted become a citizen and vote, as those of Indian descent were not categorized as Caucasian, the only group allowed to vote at the time.[7] Thind continued to fight for his right to vote, receiving citizenship and then losing it multiple times over the years,[8] until President Truman passed the Luce-Celler Act on July 2, 1946, finally reversing the Supreme's Court decision in *United States vs. Bhagat Singh Thind.* Thind was only the first of many Sikhs who lobbied for equal rights in voting and citizenship, leading the way to citizenship for all Asian Pacific Islander Americans.

Following Thind was another Sikh American, Congressman Dalip Singh Saund. Immigrating to California from India, Saund spent several years studying at the University of California – Berkeley, where he received his Ph.D. in mathematics, and then became a successful farmer, but was troubled that he still could not become a citizen.[9] He launched the Indian Association of America, creating relationships between Indians in California and New York. This group of individuals, led by Saund, was eventually able to convince Representatives Luce and Celler to work on a bill that would allow Indians to become naturalized citizens of the United States. In 1946, with the successful passage of the Luce-Celler Act, Saund immediately applied for citizenship.[10] He would become the first Sikh-American and Asian Pacific Islander American in Congress, where he continued to fight for the rights of all Asian Pacific Islander Americans. Despite the fact that Bhagat Singh Thind, Congressman Dalip Singh Saund, and

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[7] *Roots in the Sand*, PBS, http://www.pbs.org/rootsinthesand/i_bhagat1.html. See also, *United States v. Thind*, 261 U.S. 204 (1923).
[8] Dr. Bhagat Singh Thind, *Naturalization Saga: In Summary*, http://www.bhagatsinghthind.com/naturalization_summary.php
[9] Saund, Dalip Singh. *Biographical Directory of the U.S. Congress.* http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000075
[10] Dalip Singh Saund, a Man to Remember, to Honor, and to Emulate -Part II, Anastasia Walsh, Dec. 2013. http://indiaamericatoday.com/article/dalip-singh-saund-man-remember-honor-and-emulate-part-ii - sthash.QVc5BEyJ.dpuf

other countless Sikh Americans fought for the voting rights of Asian Pacific Islander Americans and others almost 100 years ago, there are still many cases of discrimination ongoing today.

Cases of Voting Discrimination:

Despite the history of protections under the Voting Rights Act, racial and language discrimination in voting is still prevalent. Simply because discrimination in voting is not as obvious does not make it less pervasive; in fact, with it being one year since the Supreme Court's decision in *Shelby County v. Holder*,[11] it is more likely that many of these cases are being left unreported and without scrutiny. Without the tools to respond appropriately, through strong legislation, this discrimination will continue to impact voters, especially in the upcoming election, and even in our next Presidential race. *Shelby County* removed a key component of the Voting Rights Act of 1965, leaving Section 5 inoperable and limiting the ability of the Department of Justice to ensure fair and impartial administration of justice for all Americans.[12] Without the ability to determine which states need to provide an effective uniform and fair backstop and review, states and local jurisdiction are able to change voting procedures without warning, leaving voters unaware and helpless once they arrive at the polls.

Discrimination in voting practices is certainly not a topic of the past, as there have been many documented cases – within the past decade – in states across the nation, like Alabama, Arizona, California, New York, Texas, Virginia, and more.[13] In many states, there have been active movements to displace minority groups and dilute the power of the community's vote, effectively lessening the power that these communities have in selecting their United States

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[11] *Shelby County v. Holder*, 570 U.S. ___ (2013).
[12] Our Mission Statement, Department of Justice, http://www.justice.gov/about/about.html
[13] Voting Rights in the States, The Leadership Conference, http://www.civilrights.org/voting-rights/vra/states.html

Representatives, Senators, and even local politicians. One such example is in New Orleans, where the percentage of African American Representatives has notably decreased since Hurricane Katrina. In a recently report done by the Leadership Conference, Louisiana lists 13 violations of the VRA since 2000, most recently:

> East Feliciana Parish, Louisiana (2011) – The parish proposed a redistricting plan that included the creation, realignment, and renumbering of voting precincts. In this plan, District 5 is an ability-to-elect district for African Americans. DOJ concluded that the significant reduction in the percentage of Black people in the total population, the voting age population, and the number of registered voters in the district would mean that Black voters in the proposed district would no longer have the ability to elect a candidate of choice to office. Therefore, the department blocked the implementations of this change.[14]

These potential barriers to voting are present in other states as well, like Texas, where redistricting is often attempted to weaken the minority vote. Two examples are included below:

> Nueces County (2012) – In late 2011, the county commission in Nueces County, Texas, enacted a redistricting plan that diminished the voice of Hispanic voters at the polls by swapping Hispanic and White voters between election precincts. After careful review of the 2011 plan, DOJ concluded that the county's actions "appear to have been undertaken to have an adverse impact on Hispanic voters." DOJ also noted that the county offered "no plausible non-discriminatory justification" for these voter swaps, and instead offered "shifting explanations" for the changes."[15]

> Galveston County (2012) – The County's 2011 redistricting plan for justice of the peace/constable precincts relocated a largely White area from one precinct to another, reducing the overall minority share of the electorate in the latter district. DOJ also objected to the reduction in the number of election precincts for the justices of the peace and constable. In the benchmark plan, minority voters possessed the ability to elect candidates of choice in Precincts 2, 3, and 5 for the justice of the peace and constable districts, but the ability to elect was reduced to one precinct under the proposed plan.[16]

In these instances, without the Voting Rights Act of 1965, *especially Section 4*, this redistricting would have been able to go through without scrutiny, weakening the voices of

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[14] *The Persistent Challenge of Voting Discrimination: A Study of Recent Voting Rights Violations by State*, The Leadership Conference, June 2014, http://www.civilrights.org/press/2014/Racial-Discrimination-in-Voting-Whitepaper.pdf
[15] *Id.*
[16] *Id.*

minority communities and their ability to have representatives in Congress. Now, without Section 4 in action, there is no policy able to protect the minority vote easily and effectively.

Section 2, although it is in place to prevent discrimination on the basis of race, color, or language, does not act in the same manner that Section 4 would. Preclearance provides a much higher level of protection of individuals versus the protections of Section 2, which requires evidence of an at-large election system having discriminatory intent, or within its maintenance, to prove that a the entire election system was unconstitutional, as a result of 1980's *City of Mobile v. Bolden*[17]. After this decision, the Latino community in California had to bring their case to the court in 1988's *Gomez v. City of Watsonville*, where the voice of the community had been diluted due to the at-large election system creating racially polarized voting patterns.[18] The case was successful, but many like it were not, due to the cost and difficulty of proving that an overall system was inherently discriminatory. While Section 2 provides protection in the case of inherent discrimination, Section 5 preemptively supplies it by requiring preclearance of notably biased states, and also allows voters to be aware of their voting procedures ahead of time.

Another example of the efficacy of Sections 4 and 5 is during a 2004 city council primary in Bayou La Batre, Alabama, where a Vietnamese-American candidate, Phuong Tan Huynh, ran against incumbent Jackie Ladnier. Ladnier and his supporters challenged more than 40 Asian-American voters at the polls, saying that if they could not speak English well, they might not be citizens. The Department of Justice intervened, and Huynh went on to become the first Asian

[17] Voting Rights in California 1982-2006, RenewtheVRA.org, May 2006, http://www.protectcivilrights.org/pdf/voting/CaliforniaVRA.pdf
[18] *Id.*

American on the city council.[19] Without the protection of Section 5 of the VRA, many minority voters would be left stranded at the polls, without language support and unable to elect their desired representative. Section 5 has also allowed the progression of our Congress into a more accurate representation of our diverse nation and its citizens.

Barriers to access to the polls due to language is a major issue for the Asian Pacific Islander American community, as approximately 60% of the community is foreign-born and approximately one-third is limited English proficient.[20] Section 203 of the Voting Rights Act requires certain communities to provide language assistance, but areas that do not meet this threshold should still have poll workers who are aware of cultural and language differences, and are able to assist these individuals when they arrive at the polls, rather than turning them away. Furthermore, there is also the harm of various voter suppression laws, such as photo ID required to vote or proof of citizenship needed to register to vote. Since one in five Asian Pacific Islander Americans do not have valid government-issued photo ID, this will place most of the burden on individuals in this community who are naturalized citizens. Similarly, appearances of individuals have often led to discrimination at the polls, as Asian Pacific Islander Americans are often perceived as "foreigners" or "un-American."[21]

Language assistance has failed other communities as well, for example, the New York counties of Westchester, Nassau, and Suffolk are required by Section 203 to provide Spanish-language assistance, but an onsite study done by Cornell students in 2005 documented a failure

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[19] *Voting Rights Act: Sikhs, Asians Need Protection*, Jasjit Singh, *Mercury News*, http://www.mercurynews.com/opinion/ci_25913696/voting-rights-act-sikhs-asian-americans-need-protection

[20] 2012 Policy Platform, National Council of Asian Pacific Americans, http://ncapaonline.org/index_107_3400021688.pdf

[21] *Id.*

to do so.[22] Thus, it is clear that Asian Pacific Islander Americans are only one community of many that continues to face language discrimination at the polls, thus showing the vast necessity of an amendment, and its passage in a timely manner. As the fastest growing ethnic group in the country, Asian Pacific Islander Americans rely on the Department of Justice to protect their civil rights and provide the tools necessary for them to exercise these rights. Each day without a formula in place to evaluate voting procedures is another day that discriminatory policies can be put into place.

Voter ID:

Voter ID laws are ones that are often used to keep minority groups away from the polls. According to the nonpartisan National Conference of State Legislators, 9 out of 13 states in the South with a large Black population now have laws requiring voters to bring photo identification to the polling booth in order to cast a regular ballot, six of which are considered "strict," meaning that one has to take additional steps after Election Day to make their vote count if they do not have an ID at the polls.[23] Those in favor of voter ID laws claim that they prevent voter fraud, but in actuality, voter fraud has been proven to be nearly nonexistent.[24] These laws are more useful in making it even more difficult to vote for individuals from a low-income and those from communities of color.

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[22] Voting Rights in New York 1982-2006, RenewtheVRA.org, March 2006, http://www.protectcivilrights.org/pdf/voting/NewYorkVRA.pdf

[23] *True South: Unleashing Democracy in the Black Belt 50 Years After Freedom Summer*, Center for American Progress, June 2014, http://cdn.americanprogress.org/wp-content/uploads/2014/06/TrueSouthReport-6.16-version.pdf

[24] *Myth of Voter Fraud*, Brennan Center for Justice, Justin Levitt, Nov. 2007, http://www.brennancenter.org/sites/default/files/legacy/The Truth About Voter Fraud.pdf

However, beyond voter ID laws at the polls, Sikh and Muslim Americans can often not even obtain a state-issued ID, due to bans on religious headwear in ID pictures. There have been several recent cases of Sikh Americans not being able to obtain a driver's license, or other state-issued ID, due to their articles of faith, in which SALDEF has been engaged. One such case occurred in Minnesota, where a Sikh man, Mr. Jatinder Singh, was told that he would not be able to take his driver's license picture with his *dastaar*, or religiously mandated turban, on.[25] While Mr. Singh was eventually able to obtain his license, it is important to recognize the barriers he faced in obtaining his required identification, and the impact it would have had on the ability of other Americans of faith to participate in the American economy and political arena.

There have also been instances of state legislators, in states around the country and as diverse as Maryland, Minnesota, and Oklahoma, attempting to pass bans on wearing religious headwear in ID pictures,[26] which would prevent a large constituency from exercising their right to vote if they are unable to comply with voter ID requirements. The inability for a judge to order preclearance on discriminatory ID laws[27] is dangerous because it allows an indirect, albeit simple, manner for states to exclude voters from the polls. Although it is vital to pass an amendment now that will prevent voters from being turned away from the polls due to literacy levels, English proficiency, race, religion, and country of birth, it is also pertinent to continue to evaluate the efficacy of these policies and ensure that they are protecting Americans to the best of their ability. Voter ID is not an issue that was tackled in this amendment, but I hope it is one

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[25] *Sikh American Drives Away With Victory in Minnesota*, Sikh American Legal Defense Education Fund, Feb. 2014, http://www.saldef.org/news/sikh-american-drives-away-with-victory-in-minnesota/

[26] *Protecting Sikh ID*, Sikh American Legal Defense Education Fund, Jan. 2010, http://www.saldef.org/issues/protecting-sikh-id/

[27] Bill Summary: A VRA for Today – Protecting Voters in the 21st Century, The Leadership Conference, April 2014, http://vrafortoday.org/wp-content/uploads/2014/04/2014-04-07-VRAA-Bill-Summary_c4.pdf

that is covered in the future, ensuring that an individual's faith is not used as an obstacle to taking advantage of the right to vote.

Conclusion:

The passage of the Voting Rights Amendment Act is necessary to uphold the foundation of this country on the basis of civil rights, pluralism, and participation in government. There are clear examples of incidents in which the VRA has protected citizens' right to vote using sections that have been weakened under *Shelby County*, such as in 2012's *Perry vs. Perez*.[28] Each day that goes by without a strong, uniform, and fair law in place to prevent discriminatory practices in voting is another day where voters can be turned away from the polls, unable to elect the individual who will represent them. By not allowing the full participation of all Americans in our government, we are moving away from the founding principles of this nation. These discriminatory practices and denials of basic civil rights will only stop with a bipartisan effort to pass the Voting Rights Amendment Act, and a continued effort to improve the amendment to protect against voter ID policies and other discriminatory practices.

The Sikh American community stands together in supporting the passage of the Voting Rights Amendment Act, as demonstrated in a May letter we shared with each Member of Congress (Appendix A) and the hundreds of messages sent by Sikh American constituents to their Representatives and Senators. The Sikh American community and SALDEF ask that the Senate Judiciary Committee consider the positive impact that this amendment will have on our

[28] *Voting Rights Act: Sikhs, Asians Need Protection*, Jasjit Singh, *Mercury News*, http://www.mercurynews.com/opinion/ci_25913696/voting-rights-act-sikhs-asian-americans-need-protection

nation, and its ability to accept and represent all of its citizens without bias. Thank you for allowing me to present this testimony.

Appendix A: Letter to the U.S. House of Representatives and Senate: Sikh American Organizations Support the Voting Rights Amendment Act

May 20, 2014

Dear Member of Congress:

As national, state, and local Sikh organizations that collectively represent the hundreds of thousands Sikhs in America, we write to share our strong support for the Voting Rights Amendment Act of 2014 (H.R. 3899/S.1945) and urge its swift passage by both chambers of Congress.

For the Sikh community, the fight for the rights of citizenship, including the right to vote, is a critical part of our history in the United States. In 1923, Bhagat Singh Thind, a veteran of World War I, went to the U.S. Supreme Court to challenge racist laws that denied U.S. citizenship, including voting rights, to immigrants from Asia. In 1957, Dalip Singh Saund became the first Asian Pacific American Congressman and the only Sikh American to serve following years of advocacy for the right to become a citizen and have a vote and a voice in his country.

We are inspired not only by our history in America, but the values of our faith. Our scripture tells us to remember that all are equal, with an equal voice. "It is the Divine's command, that no one should dominate or subjugate another; every one is equal. Let all abide in peace, under this Benevolent Rule." (Sri Guru Granth Sahib Ji, Page 73).

The Supreme Court's recent decision in Shelby County v. Holder, which struck down a key provision of the VRA and stripped critical protections for voters, reminds us that our work is far from done. Chief Justice Roberts called upon Congress to develop a new formula.

Every day that passes without this new formula new voting procedures are proposed and implemented. At best, they are unreported and unscrutinized; at worst they are outright discriminatory.

This bill is not perfect. We remain concerned that voter ID laws are treated differently from other potentially discriminatory policies and that a "known practices" formula, which would provide recourse against some of the most common discriminatory practices, is not included. Yet, we firmly believe that now is the time to build on the critical tools in this legislation by working together to strengthen the overall bill and stop discriminatory voting practices wherever they occur.

Voting rights legislation has long been—and continues to be—a shining example of bipartisan unity. We urge you to support the Voting Rights Amendment Act of 2014 (H.R. 3899/S.1945) and see that its modern, commonsense provisions are swiftly enacted. If you have any questions, please free to contact Navdeep Singh, Policy Director at the Sikh American Legal Defense and Education Fund (SALDEF), at navdeep@saldef.org or 202- 393-2700 x 128.

Thank you for your consideration.

Jakara Movement
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Coalition
Sikh Council on Religion and Education (SCORE)
Sikh Research Institute
Surat Initiative
UNITED SIKHS

MEMBER ORGANIZATIONS

American G.I. Forum
ASPIRA Association
Avance Inc.
Casa de Esperanza
Cuban American National Council
Farmworker Justice
Hispanic Association of Colleges & Universities
Hispanic Federation
Hispanic National Bar Association
Labor Council for Latin American Advancement
Latino Justice PLDEF
League of United Latin American Citizens
MANA, A National Latina Organization
Mexican American Legal Defense and Educational Fund
National Alliance of Latin American and Caribbean Communities
National Association of Hispanic Federal Executives
National Association of Hispanic Publications
NALEO Educational Fund
National Association of Latino Independent Producers
National Conference of Puerto Rican Women, Inc.
National Council of La Raza
National Hispanic Caucus of State Legislators
National Hispana Leadership Institute
National Hispanic Council on Aging
National Hispanic Environmental Council
National Hispanic Foundation for the Arts
National Hispanic Medical Association
National Hispanic Media Coalition
National Institute for Latino Policy
National Latina Institute for Reproductive Health
National Puerto Rican Coalition
SER Jobs for Progress – National
Southwest Voter Registration Education Project
United States Hispanic Chamber of Commerce
United States Hispanic Leadership Institute
United States-Mexico Chamber of Commerce
U.S.-Mexico Foundation

June 24, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Hispanic Leadership Agenda (NHLA), a coalition of 37 national Latino organizations in the country, we write to express our support for the Voting Rights Amendment Act of 2014 (S. 1945). This critical piece of bipartisan legislation protects minority voter populations, and particularly the Latino community, from the egregious and far-reaching discrimination that has plagued past elections and continue to suppress the Latino electoral voice today.

NHLA firmly believes that voter suppression threatens the very core of our democratic society and has therefore vigorously advocated against efforts that disenfranchise Latino voters in elections. Both the 2008 and the 2012 NHLA Hispanic Policy Agenda highlighted the urgent need to combat discriminatory efforts, ranging from intimidation at the polls to new and unnecessary voter restrictions that disproportionately burden minority voters. The NHLA has long supported policies such as same-day registration and absentee voting options that expand the opportunity to participate in elections.

Racial discrimination in voting is ongoing, and our nation must have the appropriate tools to respond to and fight against its negative effects. The enclosed report, "Latino Voters at Risk, Support for Modernizing the VRA", issued by NHLA together with MALDEF and NALEO, outlines the blatant attempts to deter and limit the minority vote, attempts that have only been emboldened by the Supreme Court's recent decision in *Shelby County v. Holder*. These tactics vary from conversion of single-member election systems to at-large voting, which purposefully dilutes the minority vote; to redistricting measures that split up a minority population. Since *Shelby County*, jurisdictions in at least seven states attempted to or succeeded in passing discriminatory voting policies. The goal behind these policies seems obvious: disadvantage minority voters, and particularly the Latino community, in the political process.

Such attacks on our democracy cannot go unaddressed. Congress must respond expeditiously to communicate that, as a nation, we value every citizen's right to participate in the electoral process, no matter his or her race, socio-economic status, or language spoken at home. The Voting Rights Amendment Act is a modern, flexible, and nationwide approach that respects both the spirit and letter of the Court's decision, while simultaneously providing the necessary tools to prevent voter discrimination from occurring and ensure transparency in proposed election changes.

Americans who lose their right to vote cannot be remedied retroactively. Every day that passes without action from Congress is additional tacit approval of the discriminatory policies in place. This urgent issue must be addressed immediately to protect voters who are in danger of losing their ability to vote as early as this November. NHLA cannot, and Congress ought not, tolerate this grave violation of civil rights.

We look forward to collaborating with you on this critical legislation. We look forward to a vigorous debate in both houses, with a goal of arriving at the best legislation to protect voting rights, including Latino voting rights, in our dynamic twenty-first century. If you have any questions, please feel free to contact Melody Gonzales at melody@nationalhispanicleadership.org or 202-508-6917.

Sincerely,

Heetor E. Sanchez,
Chair, National Hispanic Leadership Agenda
Executive Director, Labor Council for Latin American Advancement
Encl. (1)

815 16th St. NW, 3rd Floor • Washington, DC 20005 • 202-508-6919 • nationalhispanicleadership.org • @NHLAgenda

June 25, 2014

The Honorable Patrick J. Leahy, Chairman
The Honorable Charles E. Grassley, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Hearing, "The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*"

Dear Chairman Leahy and Ranking Member Grassley:

President Johnson called the vote "a powerful instrument"; Dr. King called it the "foundation stone"; and for the hundreds of progressive faith leaders across the country who today are members of the ecumenical African American Ministers in Action (AAMIA) it's a sacred right for addressing injustice, removing obstacles to democracy, and empowering the disempowered. When discriminatory laws threaten Americans' fundamental right to vote, we are called as moral agents to utilize every tool available. We know the importance of the Voting Rights Act of 1965 (VRA) in successfully defending against voter suppression. It remains key to protecting families and communities, our own among them, from disenfranchisement. Hopefully, prayerfully, all members of Congress will realize this.

On behalf of AAMIA, as our nation marks the 50th anniversaries of Freedom Summer, the Chaney, Schwerner, and Goodman killings, and the Civil Rights Act, and as we look toward next year's 50th anniversary of the VRA, we thank you for holding today's hearing, and we urge Congress to restore strength to this landmark law.

In ruling last year on *Shelby County v. Holder*, the Supreme Court undermined some of the most important protections of the right to vote in our democracy. When the Court effectively gutted Section 5, which as you know requires certain covered states and subjurisdictions to submit any changes in voting and election laws to the Department of Justice (DOJ) or a federal court for approval before they can go into effect., we heard voices from north to south, east to west, express absolute frustration, disappointment, and dismay. The Court claimed that you – our elected representatives – have not kept pace with the times, though the VRA was updated with strong bipartisan support in 2006, and as a result today no place is protected by VRA preclearance.

Congress was thus tasked by the Court with determining (again) the appropriate coverage areas, and you answered the call this January when a bipartisan, bicameral group of lawmakers introduced the Voting Rights Amendment Act (VRAA) (S. 1945). AAMIA welcomed that opportunity to revive the VRA and replace what it lost in the *Shelby* ruling. The proposed legislation directly addresses the Court's concerns by developing not only a new coverage formula but also by addressing other challenges with preclearance and injunctive relief. While

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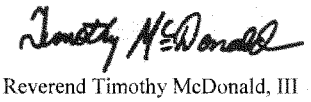
some of its provisions have prompted debate, including among AAMIA members, AAMIA believes that the VRAA is a worthy first step toward critically needed reform. Sadly, your hearing today is the first sign of any congressional action. With another national election looming, countless numbers of voters and members of our own congregations will be vulnerable if the process continues at its current pace. Time is running out, but we believe, as you have signaled with today's hearing, that the door isn't shut yet.

President Ronald Reagan once said, "…we cannot allow any American's vote to be denied, diluted or defiled." AAMIA agrees and strongly urges all members of Congress to support a full and fair legislative process for the VRAA. Starting debate and airing concerns now is the only hope we have of getting VRA reform to President Obama's desk and ensuring that whatever language he signs protects as many voters as possible from discrimination.

Since 1997, AAMIA has been advocating for social justice through civic engagement as faith leaders, spouses, parents, employees, taxpayers, and, of course, voters. The door is still open for the opportunity to right what *Shelby* wronged. We thank you for opening the Senate Judiciary Committee door, and we thank all who stand with us to protect Americans' right to vote.

Sincerely,



Reverend Timothy McDonald, III
Chairman

Reverend Dr. Robert P. Shine
Vice-Chair

Minister Leslie Watson Malachi
Director

cc: Senate Judiciary Committee members

June 25, 2014

The Honorable Patrick J. Leahy, Chairman
The Honorable Charles E. Grassley, Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Hearing, "The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*"

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the hundreds of thousands of members and activists of People For the American Way, we thank you for holding today's hearing on the Voting Rights Amendment Act (VRAA) (S. 1945). We're heartened that you have taken up the important work of restoring the Voting Rights Act of 1965 (VRA), but the time is long overdue for the rest of Congress to follow suit.

Fifty years ago, thousands of Americans risked their lives to challenge systems that prevented millions of Americans from exercising their right to vote. After continued protests by civil rights activists and everyday citizens over the gross disenfranchisement of African Americans – culminating in a violent confrontation in 1965 during an Alabama protest for voting rights – President Johnson signed the VRA into law. Since being enacted, its temporary provisions (Sections 5, 203, and 6-9) have been renewed and extended, always with broad bipartisan support. And until last year, this landmark law continued to ensure that all racial minorities in America had equal access to the ballot box.

On June 25, 2013, the United States Supreme Court ruled against a key component of the VRA in *Shelby County v. Holder*. In that 5-4 decision, the Supreme Court effectively gutted Section 5, which requires certain covered states and subjurisdictions to submit any changes in voting and election laws to the Department of Justice (DOJ) or a federal court for approval before they can go into effect. While the Court did not strike down Section 5 itself, it said that Congress's previous determination, through the Section 4 coverage formula, as to where Section 5 applied was unconstitutional. As a result, today no place is protected by the preclearance provisions of Section 5. Congress was tasked by the Court with determining (again) the appropriate coverage areas.

The VRAA proposes a new coverage formula, through which states will be subject to preclearance if they have five or more voting rights violations in the previous fifteen years, at least one of which is a statewide violation; and through which subjurisdictions will be subject to preclearance if they have three or more violations, or one violation and a demonstration of extremely low minority turnout in the previous fifteen years. It also enhances preclearance by ensuring that courts have the tools necessary to order it as a remedy for additional jurisdictions. Where neither route is available, it enhances plaintiffs' abilities to obtain preliminary injunctive

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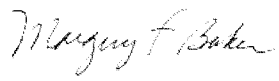
relief to stop certain types of voting changes – preventing discrimination in real time. In addition, it offers new notice and transparency standards and reinforces and expands the role of federal observers.

These provisions of the VRAA replace what the VRA lost through *Shelby*, and while they are not without concern, they are worthy of debate. You've taken a critical step with today's hearing, showing the rest of Congress that the legislative process must start if such concerns are to be aired at all. Before long, with another national election looming, the clock will run out.

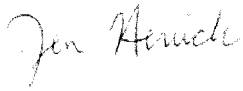
We believe as you do that the time is now.

PFAW thanks the Senate Judiciary Committee for moving forward on the VRAA, and we strongly urge all members of Congress to do everything they can to ensure not only that President Obama receives legislation without undue delay but also that the language he signs protects as many voters as possible from discrimination.

Sincerely,



Marge Baker
Executive Vice President for Policy and Program



Jen Herrick
Senior Policy Analyst

cc: Senate Judiciary Committee members

James R. Silkenat
President

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June 25, 2014

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the American Bar Association (ABA), I write to express our strong support for S. 1945, the Voting Rights Amendment Act of 2014. The Voting Rights Act has been critical to the expansion of our democratic franchise to all eligible citizens, and S. 1945 will restore a key component to the Act's arsenal of tools to combat voting discrimination.

While significant progress has been made since the original passage of the Voting Rights Act, there is ample evidence that voting discrimination still exists today in many areas of our nation. The Leadersbip Conference on Civil and Human Rights published a recent report outlining more than 148 separate instances of violations of the VRA's antidiscrimination provisions over nearly fifteen years. The report also outlines additional voting law changes adopted in the wake of the *Shelby County* decision that raised the specter of potential voting discrimination. In fact, shortly after the Court's decision, some jurisdictions that had been subject to preclearance under Section 5 moved to implement laws that had been blocked by the courts or by the Department of Justice.

Although *Shelby County* left intact Section 2 of the VRA, this remedy alone is not sufficient to prevent the fundamental harms to representative government that voting discrimination causes. Voting rights litigation under Section 2 is extremely complex, time consuming, and costly. The inordinate amount of resources and expertise it typically takes to litigate these cases successfully creates real obstacles, even to filing suit. Moreover, success in eliminating one discriminatory practice is often followed by the adoption of a new practice that must be fought all over again. Among other benefits, preclearance prevents relitigation of victories and effectively blocks new discriminatory measures from being implemented before they can result in further injuries.

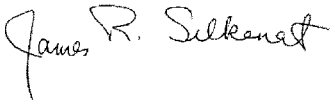
The ABA has traditionally been an active and guiding voice in matters involving the electoral process and has long supported the Voting Rights Act. In response to the decision in *Shelby County v Holder* in June 2013, the ABA adopted a resolution calling

on Congress to "act expeditiously to preserve and protect voting rights by legislating a coverage formula setting forth the criteria by which jurisdictions shall or shall not be subject to Section 5 preclearance and/or by enacting other remedial amendments to the Voting Rights Act of 1965, including but not limited to, strengthening the litigation remedy available under Section 2, or expanding the 'bail-in' provision under Section 3 (or some combination of these concepts)."

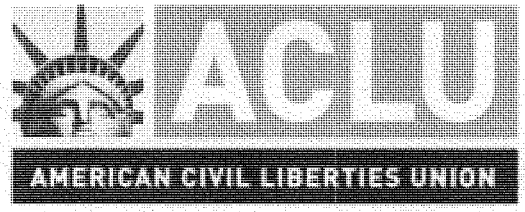
S. 1945 responds to this call by providing a new, flexible coverage formula that is updated annually to require preclearance for all changes in places with numerous recent voting rights violations. Among other things, the legislation also would create new nationwide transparency requirements that help keep citizens informed about voting changes in their community and continue the federal observer program.

The basic right of citizens to vote and the importance of having protections in place to ensure equal access to the voting process for all are at the core of our democratic process. The Voting Rights Act has been a key tool in protecting against voting discrimination for almost 50 years, and S. 1945 will restore and strengthen its provisions that are so critical to protecting the right of all Americans to vote. We commend the Committee for holding this hearing and urge the Senate to pass S. 1945 as soon as possible.

Sincerely,



James R. Silkenat



American Civil Liberties Union
Statement Submission For

"The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*"

Hearing Before the U.S. Senate Judiciary Committee

Submitted by

Laura W. Murphy
Director
ACLU Washington Legislative Office

and

Deborah J. Vagins
Senior Legislative Counsel
ACLU Washington Legislative Office

June 25, 2014

Introduction

The American Civil Liberties Union (ACLU) is pleased to submit this statement for the hearing, "The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder.*" We thank the Senate Judiciary Committee for this hearing and urge a bipartisan response to ensure key protections of the Voting Rights Act are updated and modernized following the Supreme Court's decision in *Shelby County v. Holder.*[1]

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, or national origin.

With one of the largest voting rights dockets in the nation, the ACLU's Voting Rights Project, established in 1965, has filed more than 300 lawsuits to enforce the provisions of the Voting Rights Act and the U.S. Constitution. The current docket has over a dozen active voting rights cases from all parts of the United States, including Alabama, Georgia, Iowa, Kansas, Kentucky, Montana, North Carolina, Ohio, Rhode Island, Washington, and Wisconsin. The ACLU is also engaged in state-level advocacy on voting and election reform all across the country.

The ACLU was co-counsel in both of the recent Supreme Court cases *Shelby County v. Holder* and *Arizona v. Inter Tribal Council of Arizona* (ITCA), and in *Shelby*, represented among other clients, the Alabama State Conference of the NAACP, to defend key provisions of the Voting Rights Act.

In addition, the ACLU's Washington Legislative Office is engaged in federal advocacy before Congress and the executive branch on a variety of federal voting matters and was one of the leading organizations advocating for the Voting Rights Act extensions of 1982 and 2006. We issued reports on the continued need for the Act[2] and provided expert testimony on racial discrimination in the then-covered jurisdictions.[3]

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[1] *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

[2] Laughlin McDonald and Daniel Levitas, *The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, (March 2006), *available at* http://www.aclu.org/voting-rights/case-extending-and-amending-voting-rights-act.; Caroline Fredrickson and Deborah J. Vagins, *Promises to Keep: The Impact of the Voting Rights Act in 2006*, ACLU (March 2006), *available at* http://www.aclu.org/voting-rights/promises-keep-impact-voting-rights-act-2006.

[3] *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before Senate Judiciary Committee*, 109th Cong. (2006) (testimony of Laughlin McDonald, Director, ACLU Voting Rights Project), *available at* http://www.aclu.org/voting-rights/testimony-laughlin-mcdonald-director-aclus-voting-rights-project-house-judiciary-subco; *The Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong (2006) (testimony of Nadine Strossen, President, ACLU), *available at* http://www.aclu.org/voting-rights/statement-aclu-president-nadine-strossen-submitted-subcommittee-constitution-regarding.

The Voting Rights Act of 1965 has proven to be one of the most effective civil rights statutes in eliminating racial discrimination in voting. For almost half a century, the Act has been utilized to ensure equal access to the ballot box by blocking and preventing numerous forms of voting discrimination.

Unfortunately, the recent decision in *Shelby* invalidated the coverage formula of Section 4(b), which determines which jurisdictions are subject to preclearance. For decades prior to the *Shelby* decision, certain states and localities had to submit all of their voting changes to the federal government (either the Department of Justice (DOJ) or the D.C. District Court) for approval before they could be implemented, a process known as "preclearance." The coverage formula – Section 4(b) of the Act – determined which jurisdictions fell under the government's purview. Prior to *Shelby*, Section 5 required nine states and portions of six others (previously seven, before New Hampshire bailed out) to get preclearance approval from DOJ or the federal court in the District of Columbia before they could implement any voting changes, because of those jurisdictions' past history and ongoing incidents of discrimination against racial and language minorities.

In *Shelby*, the Court declared this coverage formula unconstitutional. With the loss of Section 4(b), Section 5 has been rendered virtually useless, resulting in the loss of the most innovative and incisive tools against racial discrimination in voting, including preclearance and notice of voting changes. The Court, however, left in place the preclearance process itself, meaning that it was left to Congress to design a new coverage formula and other protections for citizens. The overwhelming evidence of the continued need for a robust Voting Rights Act means that Congress must now develop new mechanisms to prevent racially discriminatory voting practices.

This statement focuses on three major inquiries. First, it provides evidence of ongoing discrimination in voting and demonstrates the need for a robust Voting Rights Act. Second, it explains that what remains of the current Voting Rights Act, post-*Shelby*, does not go far enough to ensure the eradication of racial discrimination in voting. Third, this statement demonstrates that the Voting Rights Amendment Act (VRAA) is directly responsive to *Shelby* and the Supreme Court's directive to Congress to prevent such discrimination in voting.

We look forward to working with the Committee in restoring and updating the critical protections of the Voting Rights Act and in ensuring all voters have access to the ballot free from discrimination.

I. Bipartisan History of the Voting Rights Act

Congress passed the Voting Rights Act of 1965 to enforce rights guaranteed to minority voters nearly a century before by the Fourteenth and Fifteenth Amendments. Although these amendments prohibited states from denying equal protection on the basis of race or color and from discriminating in voting on account of race or color, African Americans and other minorities continued to face disfranchisement in many states. Poll taxes, literacy tests, and grandfather clauses were used to deny African American citizens the right to register to vote, while all-white primaries, gerrymandering, annexation, and at-large voting were used widely to dilute the effectiveness of minority voting strength.[4]

[4] Fredrickson & Vagins, *supra* note 2.

The passage of the Act represented the most aggressive steps ever taken to protect minority voting rights. The impact in increasing African American voter registration was immediate and dramatic.[5] DOJ has therefore called the Act the "most successful piece of civil rights legislation ever adopted."[6] Progress has been made, but despite the Supreme Court's recent decision, the full array of the Act's protections is still needed today.

In the 49 years since its passage, the Voting Rights Act has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. These increases in representation translate to vital and tangible benefits such as much-needed education, healthcare, and economic development for previously underserved communities. Prior to the Act's passage, African American communities had been denied resources and opportunities for many years; their issues were often ignored, and they were discounted as citizens. Officials elected when equal voting opportunities are afforded to minority citizens have been more responsive to the needs of minority communities.[7]

As President Ronald Reagan noted upon signing the 1982 reauthorization of the Voting Rights Act, the right to vote is the "crown jewel of American liberties."[8] Recognizing this importance, Congress has passed every Voting Rights Act reauthorization and extension by overwhelmingly bipartisan votes. The 1965 Act passed the Senate 77-19, and the House 333-85.[9] The 1970 extension passed the Senate 64-12, and the House 234-179.[10] The reauthorization in 1982 garnered similar support passing 85-8 in the Senate[11] and 389-24 in the House.[12] Congress last extended the Act in 2006, 98-0 in the Senate and 390-33 in the House,[13] concluding that the coverage formula enforced by Section 5 was needed for at least another 25 years. Including the 2006 reauthorization, the last three extensions have been signed by Republican presidents.

In 2006, the congressional fact-finding effort built a strong case for the continuing need to maintain the Voting Rights Act's protections. The resulting record included more than 750 Section 5

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[5] In Mississippi, African American registration went from less than 10% in 1964 to almost 60% in 1968; in Alabama, registration rose from 24% to 57%. In the South as a whole, African American registration rose to a record 62% within a few years of the Act's passage. *See* Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 782 (2003).

[6] U.S. Department of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws*, http://www.justice.gov/crt/about/vot/intro/intro.php..

[7] Fredrickson &Vagins, *supra* note 2, at 2.

[8] Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), *available at* http://www.presidency.ucsb.edu/ws/?pid=42688.

[9] *See Senate Roll Call Vote No. 78* (May 26, 1965); *House Roll Call Vote No. 32* (Feb. 10, 1964), *available at* http://docsteach.org/documents/5637787/detail; *House Roll Call Vote No. 87* (July 9, 1965), *available at* http://www.govtrack.us/congress/votes/89-1965/h87.

[10] *See Senate Roll Call Vote No. 342* (Mar. 13, 1970); *House Roll Call Vote No. 151* (Dec. 11, 1969), *available at* http://docsteach.org/documents/5637787/detail.

[11] *See Senate Roll Call Vote No. 190* (June 18, 1982).

[12] *See House Roll Call Vote No. 242* (Oct. 5, 1981).

[13] *See Senate Roll Call Vote No. 212* (July 20, 2006), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212; *House Roll Call Vote No. 374* (July 13, 2006), *available at* http://clerk.house.gov/evs/2006/roll374.xml.

objections by DOJ that blocked the implementation of some 2,400 discriminatory voting changes; the withdrawal or modification of over 800 potentially discriminatory voting changes after DOJ requested more information; 105 successful actions to require covered jurisdictions to comply with Section 5; 25 denials of Section 5 preclearance by federal courts; high degrees of racially polarized voting in the jurisdictions covered by Section 5; and reports from tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions.[14] In total, the record included over 15,000 pages of testimony, reports and statements from over 90 witnesses in over a dozen hearings.[15] According to the legislative findings, without Section 5 "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[16]

Although significant progress has been made as a result of the passage of the Voting Rights Act, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language still deny many Americans their basic democratic rights. Although such discrimination today is often more subtle than it used to be, it is still current and must still be remedied.

II. *Shelby County v. Holder*

On June 25, 2013, the Supreme Court, in *Shelby County v. Holder*, invalidated the coverage formula in Section 4(b), which defines who is subject to Section 5, one of the key provisions of the Voting Rights Act that has helped to protect the right to vote for people of color for nearly 50 years. With this decision, voters lost the ability to learn of voting changes that could disfranchise them and lost the main mechanism to stop discriminatory voting changes before implementation of the laws.

A. Procedural History

In 2008, the City of Calera, a subsidiary of Shelby County, Alabama, sought to make over 170 annexations, in conjunction with changes to its redistricting plan. Together, these changes would eliminate the city's sole majority African American district, which had elected an African American candidate – who was the City's lone African American councilperson – for the previous 20 years.[17]

In its submission to DOJ, Calera admitted that it had already adopted the annexations without receiving preclearance. DOJ objected to both the unprecleared annexations, as well as the redistricting plan. Notwithstanding this denial, Calera went on to conduct City Council elections with both the annexations and the rejected plan in place, causing the city's sole African American councilmember to lose his seat. DOJ was then compelled to bring an enforcement action under Section 5 to enjoin certification of the results of the illegal election. After a consent decree was reached with a new precleared plan, the city's lone majority African American district was restored,

[14] Laughlin McDonald, *Don't Strike Down Section 5*, http://www.aclu.org/blog/voting-rights/dont-strike-down-section-5 (Mar. 6, 2013); *see also* H. R. Rep. No. 109-478 (2006); S. Rep. No. 109-295 (2006).

[15] Deborah J. Vagins & Laughlin McDonald, *Supreme Court Put a Dagger in the Heart of the Voting Rights Act*, http://www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act (July 2, 2013).

[16] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, PL 109–246, July 27, 2006, 120 Stat 577.

[17] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Dan Head (Aug. 25, 2008), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/AL/l_080825.pdf.

and black voters in Calera succeeded in electing their candidate of choice. Shelby County subsequently challenged Sections 4(b) and 5 of the Voting Rights Act as facially unconstitutional.

B. The Supreme Court Decision

The Supreme Court found that while "voting discrimination still exists," Section 4(b) of the Voting Rights Act was unconstitutional, on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination. Therefore, the formula could no longer be used as a basis for subjecting jurisdictions to preclearance, and the protections of Section 5.[18] Section 5's continued operation thus depends on establishing new coverage, which complies with the Court's decision. As the Court noted: "[w]e issue no holding on section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[19] Without congressional action through the creation of a new coverage formula and other mechanisms that provide notice of and "freeze" voting changes before they take effect, the kind of discrimination occurring in Calera, Alabama, and elsewhere cannot be stopped before U.S. citizens lose their right to vote.

III. Recent Examples of Racial Discrimination in Voting

As Chief Justice Roberts acknowledged in *Shelby*, "voting discrimination still exists; no one doubts that."[20] The following violations brought under the various sections of the Voting Rights Act are just a few recent examples, which demonstrate the continuing problem of race discrimination in voting in America.

a. Section 5 of the Voting Rights Act

Section 5 has been particularly effective in stopping discriminatory state and local voting changes from going into effect. It is important that the safeguards of Section 5 apply in those jurisdictions with recent and egregious examples of discrimination. The elimination of precincts, changes in polling locations, methods of electing school board or city council members, moving to at-large districts, annexations, and other changes can have the purpose or effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group. Recent examples of such discriminatory voting measures blocked by Section 5 are numerous. In those areas where voting discrimination continues to exist, Section 5 must be enforced, and a coverage formula is needed to achieve this. Here are a few examples of the effectiveness of Section 5:

- **Mississippi:** In 2011, the City of Clinton, Mississippi proposed a redistricting plan for its six-member council that, like the existing plan, did not include a single ward where African American voters had the power to elect their candidate of choice, despite the fact that 34% of the city's population is African American. After careful review under Section 5, DOJ found reliable evidence that the City of Clinton acted with a racially discriminatory purpose in its decision not to create an ability-to-elect ward for African American voters. In the wake of the Justice Department's objection, the city redrew the council district lines,

[18] *Shelby County*, 133 S. Ct. at 2612.
[19] *Id.*
[20] *Id.*

creating, for the first time, a ward where African American voters have the ability to elect their preferred candidate.

- **Mississippi:** In 2011, the city of Natchez, Mississippi proposed a redistricting plan that reduced the percentage of African American voters in one ward by 6 percent and placed these voters into the three wards that were already majority African American. This change decreased the black voting-age population in the impacted ward from almost 53 percent to under 47 percent, thus eliminating the ability of African Americans in that ward to elect their preferred candidate. After careful review, the Justice Department concluded that the city's efforts to reduce the African American population were done with a discriminatory purpose.

- **Mississippi:** In 2001, three weeks before Election Day in Kilmichael, Mississippi, the town council decided to cancel the municipal election. At the time the election was cancelled, the most recent census numbers showed an increase in the black population such that the town was now 52.4 percent black, though the mayor and all five members of the Board of Alderman were white. All council members were elected at-large to four year terms, with a plurality vote requirement. The stated purpose for the town's action was to develop a single-member ward system for electing town officials.

  In response to the town, DOJ noted that the decision to cancel the election came only after blacks became a majority of the population in the town and only after the qualification period for the election was closed and it became evident that there were several black candidates for office, and that under the existing at-large electoral method, the minority community had the very strong potential to win a majority of the municipal offices, including the office of mayor. Thus, the Department objected to the attempt to cancel the election, concluding that the town's decision was motivated by an intent to negatively impact the voting strength of black voters.

- **Texas:** In late 2011, the county commission in Nueces County, Texas, enacted a redistricting plan that diminished the voice of Hispanics at the polls by swapping Hispanic and white voters between election precincts. After careful review of the 2011 plan, DOJ concluded that the county's actions "appear to have been undertaken to have an adverse impact on Hispanic voters." DOJ also noted that the county offered "no plausible non-discriminatory justification" for these voter swaps, and instead offered "shifting explanations" for the changes.[21]

- **Texas:** North Harris Montgomery Community College district in Texas sought to reduce the number of polling places for local and school board elections in 2006 from 84 polling places to 12.[22] Moreover, the assignment of voters to each polling place was very unbalanced. The polling place with the smallest proportion of minority voters would have served 6,500 voters while the site with the largest proportion of minority voters would have served over 67,000.

[21] Letter from Thomas E. Perez, Assistant Attorney General, to Joseph M. Nixon, et al. (Feb. 7, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/l_120207.pdf.
[22] Letter from Wan J. Kim, Assistant Attorney General, to Renee Smith Byas (May 5, 2006), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/TX-2960.pdf .

Following a DOJ complaint, a three judge court entered a consent decree prohibiting the locality from implementing the change without first obtaining preclearance.[23] Section 5 prohibited this change due to the retrogressive effect.

- **Georgia:** In 2006, Randolph County, Georgia, attempted to reassign the African American Board of Education Chair's electorate district from a 70 percent African American voting population to a 70 percent white voting population.[24] These changes were done in a special closed door meeting the sole purpose of which was to change the voter registration district of the Chair. In a unanimous vote, the all-white members of the Board of Registrars voted for the district change. Section 5 prevented this discriminatory change from taking place.

- **Georgia:** In 2009, Georgia implemented an error-filled voter registration verification system that matched voter registration lists with other government databases. Individuals who were identified as failing to match were flagged and required to appear on a specific date and time at the county courthouse with only three days' notice to prove their voter registration. The verification systems errors disproportionately impacted minority voters. Although representing equal shares of new voter registrants, more than 60 percent more African American voters were flagged for additional inquiry then white voters. In addition, Hispanic and Asian registrants were more than twice as likely to be flagged for further verification as white voter registration applicants. Section 5 stopped this retrogressive voter registration provision from continuing. The objection was later withdrawn on the mistaken premise that the state had significantly changed the database matching system.

- **Louisiana:** In 2011, East Feliciana Parish, Louisiana proposed a redistricting plan that included the creation, realignment, and renumbering of voting precincts. Under the proposed changes, DOJ concluded that the significant reduction in the percentage of black people in the total population, the voting age population, and the number of registered voters in the district would mean that black voters in the proposed district would no longer have the ability to elect a candidate of choice to office. Therefore, DOJ blocked the implementation of this change.

- **Louisiana:** In 2004, DOJ objected to the proposed redistricting plan for the City of Ville Platte, Louisiana, which would have eliminated a majority black city council district by shifting part of the population to another majority black district. While the city's black population percentage had increased both consistently and considerably since the previous census, becoming a majority of the population, the proposed 2003 redistricting plan eliminated the black population majority in one district by reducing it from 55.1 to 38.1 percent, and shifting the population to a district that already has a black population of 78.8 percent, thereby reducing the representation of blacks in the city.[25] After careful analysis DOJ concluded that the plan to reduce the number of districts where black voters had an

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[23] United States v. N. Harris Montgomery Cmty. Coll. Dist., Civil Action No. H 06-2488 (S.D. Tex. Aug. 4, 2006) (consent decree judgment).

[24] Letter from Wan J. Kim, Assistant Attorney General, to Tommy Coleman (Sept. 12, 2006), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/GA-2700.pdf.

[25] Leadership Conference on Civil and Human Rights, Real Stories of the Impact of the VRA, http://www.civilrights.org/voting-rights/vra/real-stories.html (last visited June 19, 2014).

opportunity to elect their candidate of choice from 4 to 3 was designed, at least in part, to make black voters worse off by eliminating the electoral ability of black voters in the District. Section 5 prevented this plan from being enacted.

- **South Dakota:** In December 2007, in Charles Mix County, South Dakota, after the first Native American candidate was poised to become a county commissioner, the county increased the number of county commissioners from three to five.[26] Native Americans would only have been able to elect the candidate of their choice in one of the five new districts as opposed to one of the three original districts. This racially discriminatory impact, in addition to comments admitting discriminatory purpose, led DOJ to object to the proposed plan.

- **Alaska:** In 2008, the state of Alaska submitted for Section 5 preclearance a plan to eliminate polling places in several Native villages, consolidating these communities with majority white communities far distances away. Some of these proposed changes included realigning Tatitlek, a community in which about 85 percent of the residents are Alaska Native, to the predominately white community Cordova, located over 33 miles away and not connected by road; consolidating a community, in which about 95 percent of residents are Alaska Native, with another community, approximately 77 miles apart and not connected by road. DOJ responded requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters. Rather than responding and submitting the additional voting changes for Section 5 review, Alaska abruptly withdrew the request for changes two weeks later.[27]

- **South Carolina:** In September 2003, the town of North in Orangeburg County, South Carolina proposed to annex a small population of whites voters into their town. However, because South Carolina is covered by Section 5 of the VRA, the Department of Justice performed an investigation to determine whether this change would discriminate against minority voters. Ultimately, the Department concluded that the annexation could not go forward because "race appears to be an overriding factor in how the town responds to annexation requests." In denying the town approval to proceed with the annexation, DOJ indicated that in the early 1990s, a large number of black voters who reside to the southeast of the town's current boundary made a petition for annexation that was denied, and that the town gave no explanation for the denial. DOJ noted that the granting of the petition by this group of citizens "would have resulted in black persons becoming a majority of the town's population."[28]

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[26] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008), *available at*http://www.justice.gov/crt/records/vot/obj_letters/letters/SD/l_080211.pdf ..

[27] *See* Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, (Sept. 10, 2008). *See also* Fact Sheet, LDF, Recent Examples of Discriminatory Voting Measures Blocked By Section 5 of the Voting Rights Act, *available at* http://www.naacpldf.org/files/case_issue/Shelby-Recent%20Section%205%20Successes.pdf.

[28] Letter from Alexander Acosta, Assistant Attorney General, to Honorable H. Bruce Buckheister (Sept. 16, 2003), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/SC/SC-2170.pdf.

Based on its investigation, the Department concluded that the county did not provide equal access to the annexation process for black and whites and blocked the proposed annexation from taking effect.

b. Section 2 of the Voting Rights Act

Section 2 prohibits not only election-related practices and procedures that are intended to be racially discriminatory, but also those that are shown to have a racially discriminatory result.[29] Section 2 has been effective in prohibiting nationwide voting practices and procedures, such as redistricting plans, at-large election systems, poll worker hiring, and voter registration procedures that discriminate on the basis of race, color or membership in a language minority group.[30] While Section 2 cases often require lengthy case-by-case litigation brought only after voting changes are implemented unlike Section 5 cases (as discussed more fully later in this statement), the cases listed below highlight the importance of Section 2 in challenging ongoing discrimination.

- **Wyoming:** The ACLU's Voting Rights Project filed suit in 2005 on behalf of tribal members on the Wind River Indian Reservation in Fremont County, Wyoming alleging that the at-large method of electing the five member county commission diluted Native American voting strength in violation of Section 2. At the time the suit was filed no Native American had ever been elected to the county commission despite the fact that Native Americans were 20 percent of the county's population and had frequently run for office with the overwhelming support of Native American voters. Following a lengthy trial the district court issued a detailed opinion on April 29, 2010, that the at-large system diluted Indian voting strength. The court concluded : "The evidence presented to this Court reveals that discrimination is ongoing, and that the effects of historical discrimination remain palpable." *Large v. Fremont County, Wyoming*, 709 F.Supp.2d 1176, 1184 (D. Wyo. 2010). As a remedy the court adopted a plan containing five single member districts, one of which was majority Native American allowing Native Americans the opportunity to elect candidates of their choice. The county did not appeal the decision on the merits but did appeal the remedy provided by the district court. The court of appeals, however, affirmed the decision of the district court.

- **Florida:** In 2008, the School Board of Osceola County changed their school board single-member district boundaries following a consent judgment and decree finding that the existing districts violated Section 2. The previous district boundaries diluted Latino voting strength by dividing the largest Latino population concentration between two districts such that none of the five districts was majority Latino in eligible voters. The new plan agreed to by the school board include one district with a Latino voter registration majority, allowing for the ability to elect a representative of their choice.[31]

- **Montana:** In 2012, Native American voters in Montana filed litigation in the case, *Wandering Medicine v. McCulloch*, alleging abridgment and dilution of voting strength, and

[29] United States Department of Justice: Statutes Enforced by the Voting Section, http://www.justice.gov/crt/about/vot/overview.php#vra (last visited June 19, 2014).
[30] *Id.*
[31] *U.S. v. The School Board of Osceola County*, no. 6:08-cv-582 (M.D. Fla. Apr. 23, 2008).

seeking satellite offices on the Crow, Northern Cheyenne, and Fort Belknap reservations for late registration and in-person absentee voting.[32] The ACLU Voting Rights Project and ACLU of Montana submitted an amicus brief in support of the plaintiffs. The Native Americans in Montana contend that because of the time, expense, and difficulty involved in traveling to the county offices, their voting strength is abridged and diluted in violation of Section 2, the Fourteenth Amendment, and state constitutional law. The parties agreed to submit to mediation and on June 16, 2014, and the court entered an order that the case had been settled and cancelled the trial.

c. Section 203 of the Voting Rights Act

Section 203 ensures that language minority citizens have an equal opportunity to vote in federal elections.[33] Section 203 particularly requires covered jurisdictions to provide bilingual written voting materials and voting assistance in the minority languages,[34] including registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.[35] While Section 203 has limited reach, it has also been effective in preventing recent discrimination against language minority citizens.[36]

- **Texas:** On February 27, 2006, the Department of Justice filed a complaint alleging that Hale County, Texas, violated Section 203 of the Voting Rights Act by failing to provide for an adequate number of bilingual poll workers trained to assist Spanish-speaking voters on Election Day and by failing to publicize effectively election information in Spanish.[37] On April 27, 2006, a consent decree was entered which would allow the Department to monitor future elections in Hale County and require the County to increase the number of bilingual poll workers, employ a bilingual coordinator, and establish a bilingual advisory group.

- **Alaska:** In *Nick et al. v. Bethel et al*, a federal court issued a preliminary injunction and specific relief finding that the Bethel Census Area of Alaska had not complied with its obligations under section 203 of the VRA since 1975, to provide bilingual election materials for the Eskimo language of Yup'ik, which is a covered minority language group.[38] The ACLU and the Native American Rights Fund working on behalf of the Bethel-area Alaska Natives reached a settlement requiring the state to provide bilingual election materials, including ballots, and to provide bilingual outreach workers to ensure voter registration information and notice of election to all communities.[39]

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[32] *Wandering Medicine v. McCulloch*, No. 1:12-cv-0135 (D. Mont.).

[33] *Id.* The language minority groups covered by Section 203 include Native Americans, Asian Americans, Alaskan Natives, and Spanish-heritage citizens if they meet certain population thresholds.

34United States Department of Justice: Statutes Enforced by the Voting Section, http://www.justice.gov/crt/about/vot/overview.php#vra (last visited June 19, 2014).

[35] *Id.*

[36] *Id.*

[37] *United States v. Hale County, TX*, (N.D. Tex. 2006).

[38] *Nick et al. v. Bethel et al.*, case no. 3:07-cv-00098. (2008).

[39] *Id.* (settlement agreement), *available at* https://www.aclu.org/voting-rights/nick-et-al-v-bethel-et-al-settlement-agreement-state-alaska. *See also* Press Release, American Civil Liberties Union, State Of Ala., NARF, Northern Justice Project And ACLU Reach Settlement In Yup'ik Language Voter Assistance Case (Feb. 19, 2010), *available at* https://www.aclu.org/voting-rights/state-alaska-narf-northern-justice-project-and-aclu-reach-settlement-yupik-language-vo.

IV. Section 5 Provides Necessary Protections Unavailable In Other Provisions

While there have been some successes under Section 2 and 203 of the Voting Rights Act, for example, those provisions and what remains of our legal avenues after *Shelby* are not enough to fully protect American citizens from discrimination in voting.

The protections that exist in Section 5, and enforced through Section 4(b), provide a powerful tool for deterring state and local governments from adopting discriminatory election procedures and preventing discriminatory practices that have been adopted from being enforced.[40] This preclearance requirement is a fundamental element of the Voting Rights Act that does not exist elsewhere in the Act or other federal voting laws, and has been rendered largely useless by the *Shelby* decision.

Section 5 was designed to check certain states' attempts to circumvent the protections of the 14th and 15th Amendments. Prior to the passage of the VRA, many states used an assortment of tactics – white-only primaries, literacy tests, poll taxes, violence and intimidation – to suppress minority voters, replacing one unconstitutional voting practice with another. As one method was deemed unconstitutional in the courts, another method would be enacted to take its place. However, new tactics have developed over time – *e.g.*, redistricting, last minute polling place changes and reassignment of voting districts, voting changes to elected bodies to dilute representation, limitations on third party voter registration activities, reducing the days for early voting, and others – all of which have worked to disfranchise voters.

There are several unique elements of Section 5 that are particularly valuable in defeating discrimination in voting that do not exist in any other part of the Voting Rights Act. First, Section 5 requires those jurisdictions included in a coverage formula to submit all proposed election changes to the federal government prior to implementation.[41] This functions as a notice mechanism giving DOJ and the public a level of knowledge regarding voting changes superior to placing the burden on individuals and watchdog groups to identify voting changes as they are proposed. As the examples previously discussed demonstrate, the majority of discriminatory changes take place at the local level where they are difficult to identify if the reporting onus is removed from the jurisdiction and placed on groups or individual voters.

Second, in evaluating the intent or effect of the proposed voting change, Section 5 places the burden of proof on the jurisdiction requesting the election change to show that the change does not have a "retrogressive" effect on minority voters.[42] Unlike Section 2, which places the burden on the voter to prove discrimination, Section 5's burden of proof makes it more effective in preventing discrimination by requiring the jurisdiction to show any change will not have a discriminatory impact prior to the law taking effect. The purpose of Section 5 is to "shift the advantage of time and inertia from the perpetrators" of discrimination in voting to the voters.[43]

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[40] *Shelby County, 133 S. Ct. at 2639. (Ginsburg, J., dissenting) (citing The Continuing Need for Section 5 Pre-clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006)).*
[41] 42 U.S.C. § 1973c.
[42] *Beer v. United States*, 425 U.S. 130 (1976).
[43] *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

Third, although Section 2 is a valuable tool in stopping discriminatory voting practices after they occur, in its current form, it lacks Section 5's ability to prevent discrimination from occurring in the first place. Unlike Section 2, Section 5's preclearance mechanism "freezes" voting changes before enactment.

Fourth, Section 5 targets ongoing discrimination in a relatively low-cost way through an administrative process. By largely avoiding long and drawn out legal battles, Section 5 avoids the high costs of case-by-case litigation associated with Section 2.[44] Through the simple administrative process, covered jurisdictions submit proposed changes in writing to DOJ. Within sixty days, the Attorney General can decide whether to object to the change. If there is no objection, the jurisdiction may implement the change. If an objection is filed, the jurisdiction can abandon or change its proposal or it may submit the changes for a judicial determination without deference to the findings from DOJ.[45] This method allows for instances of discrimination to be identified and prevented when the change is proposed.

Other provisions of the Voting Rights Act have been used more often following the *Shelby* decision as a somewhat less effective and more cumbersome measure to challenge discriminatory voting laws while the legislative fix to the *Shelby* decision is debated. These provisions, in their current form, however, were never intended to be replacements for Section 5, and are not currently designed to serve the purpose of providing the encompassing protections that Section 5 had provided prior to *Shelby*.

For example, Section 3(c) of the Voting Rights Act permits a court to "bail-in" a state or jurisdiction – that is, through a order or consent decree, a court can subject a jurisdiction's voting changes to preclearance under Section 5 of the Voting Rights Act. Section 3(c), although effective for its originally designed purpose of bringing in non-covered jurisdictions that discriminate under preclearance, is limited in scope and time. A court, in applying Section 3(c), can limit preclearance to a specific voting change (rather than all changes in that jurisdiction) and to a specific length of time. Thus, any preclearance coverage imposed by 3(c) would likely be more limited than the extensive coverage of Section 5, which, until *Shelby,* lasted for the entire reauthorization period as determined by Congress. In addition, under current law, the court may only order a preclearance remedy if it finds a violation of the 14th or 15th amendments, which generally requires a finding that the jurisdiction engaged in intentional discrimination. This provision in its current form is not an adequate replacement for Section 5, as Section 5 includes protections against voting changes that have a discriminatory impact, which does not currently exist in Section 3(c). Section 3(c) coverage, therefore, leaves open the possibility for discrimination to occur in different ways, in other areas, or after the bail-in period expires.

Moreover, no state[46] or federal constitutional claim is an adequate substitute for Section 5 because no other law provides advance notice of the change and uses preclearance to stop the discriminatory practice from going into effect.

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[44] *See, e.g.,* Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBlog (June 25, 2013), http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/.

[45] 42 U.S.C. § 1973c.

[46] *See, e.g.,* Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 VAND. L. REV. 89 (2014), *available at* http://www.vanderbiltlawreview.org/content/articles/2014/01/Douglas-67-Vand.-L.-Rev.-89.pdf.

Only when the powerful tools of Section 5 and updated provisions of the Voting Rights Act are established under a new statutory regime can discrimination in voting be adequately prevented.

V. The Voting Rights Amendment Act of 2014 (VRAA)

On January 16, 2014, Senator Patrick Leahy introduced the Voting Rights Amendment Act of 2014.[47] An identical bipartisan version of the bill was introduced in the House of Representatives by Representatives Jim Sensenbrenner and John Conyers.[48] While the bill is not perfect, it represents an important bipartisan compromise and includes commonsense updates to a law that has protected the fundamental right to vote for American citizens for nearly 50 years. It thoughtfully and successfully answers Chief Justice Roberts' invitation to Congress in *Shelby* to modernize the Voting Rights Act.

The bill seeks to go beyond a static, geographically based statute and instead is flexible and forward-looking, capturing jurisdictions that have recently engaged in acts of discrimination. The bill will still require those jurisdictions with the worst, most recent records of discrimination to be subjected to preclearance, while also providing new nationwide tools to ensure an effective response to race discrimination wherever it occurs. In light of the new modest coverage formula, these other nationwide protections are critical in fulfilling the Voting Rights Act mandate of eradicating race discrimination in voting for all citizens. The following are important provisions in the new legislation:

a. "Rolling" Preclearance Formula

The Voting Rights Amendment Act creates a new preclearance formula that follows the Supreme Court's mandate in the *Shelby* decision to reflect only current conditions of discrimination and to respect the equal sovereignty of the states by no longer singling out states for coverage. Under the new formula, any state with five or more voting rights violations,[49] and at least one of which involves a statewide practice, during the past 15 years will be covered for a period of 10 years. Political subdivisions that have had three or more violations within the jurisdiction, or one violation in combination with persistent and extremely low minority voter turnout, will also be subject to preclearance.

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[47] Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. (2014).

[48] Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014).

[49] The Voting Rights Amendment Act defines a "voting rights violation" as a final judgment by any court that determines that a denial or abridgement of the right to vote on account of race, color, or membership in a language minority group, in violation of the 14th or 15th Amendment, occurring anywhere within the State or subdivision; A final judgment by any court that determines that a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or would have been imposed or applied anywhere within the State or subdivision in a manner that resulted or would have resulted in a denial or abridgement of the right of any citizen to vote on account of race or color, or language minority in violation of section 2; A final judgment by any court that has denied a request for a preclearance declaratory judgment under section 3(c) or section 5, preventing a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting from being enforced; and An objection by the Attorney General under section 3(c) or section 5, that has not been overturned or withdrawn, not including a DOJ objection to voter ID. *See* Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. § 3(b)(3) (2014).

The rolling trigger would provide a flexible mechanism to require preclearance for those jurisdictions with a recent record of repeated violations of the Voting Rights Act. The "rolling" mechanism keeps the coverage designations continuously updated through an annual re-evaluation. Through the yearly evaluation process, states and jurisdictions that are conforming to the law will be removed from preclearance when they have not recently engaged in discrimination. Alternately, any jurisdiction that meets the threshold described above, will automatically become covered.

b. Notice and Disclosure Requirements

Every voter has a right to know of the voting changes that occur in his or her community, and as a matter of sound public policy this should not be limited to covered jurisdictions. The loss of notice provided under Section 5 following *Shelby* makes it nearly impossible to identify potentially discriminatory voting changes. This is particularly problematic if jurisdictions make last minute changes before an election. There has been criticism that Section 5's notice provision singles out individual states for separate treatment – the Voting Rights Amendment Act would end this by requiring all political subdivisions provide public notice of voting changes within a certain time period of enactment or an election.

Under the proposed bill, reasonable and accessible public notice, including online, is required within 48 hours for voting changes that differ from those that were in effect 180 days before an election, and notice on polling place resources, including allocation of registered voters and number of voting machines and poll workers, is required no later than 30 days prior to the election, and any further change within 30 days of an election must be disclosed within 48 hours of the change occurring.[50] Additionally, states and jurisdictions must report, within ten days, changes to demographic and electoral data for specified geographic areas that changes the constituency that will participate in the election.[51] The proposed notice requirements do not require non-covered jurisdictions submit their changes for DOJ approval.

This nationwide, uniform notice requirement will ensure community members across the country are adequately informed about pending voting changes. This will also allow these communities to make their voices heard regarding possible concerns with the change, in advance of its implementation.

c. Expanded Judicial Bail-in Provision

The VRAA amends the current bail-in provision of the Act in order to give courts additional authority to order remedies. This provision will allow courts to order a state or political subdivision's voting changes be precleared when there is a voting rights violation based on a discriminatory result.[52] As judicial bail-in is already available where discrimination under the Fourteenth or Fifteenth Amendments is found, this modest expansion would permit courts the option for bail-in where discrimination has been proven under other provisions of the VRA. This is a small universe of cases. However, providing courts with the full panoply of remedies after a

[50] S. 1945 §6.
[51] S. 1945 § 6(b)(3)(c)(1).
[52] This does not include a finding of a discriminatory result based on voter ID, which is currently exempt under this provision. *See* Voting Rights Amendment Act of 2014, S. 1945, 113th Cong. § 2(a) (2014).

finding of discrimination is an important addition to protect voters and is consistent with other provisions of the VRA.[53]

Additionally, preclearance through judicial bail-in allows courts to pinpoint specific jurisdictions with egregious and recent discrimination, without burdening other political subdivisions. When combined with the new rolling preclearance trigger, this enhanced judicial bail-in will recreate the important role of preclearance that was lost in *Shelby*. Amending Section 3 would also help to limit expensive case-by-case litigation, just as Section 5 previously has operated.

d. Expansion of the Availability of Preliminary Relief

One of the most important tools lost in *Shelby* was the ability to ensure that a voting change was not discriminatory prior to its implementation. There is very often no way to remedy the injury to voters, given that what they lost is the equal opportunity to participate in an election that has already taken place. Previously, preclearance was the only tool that could ensure this in the covered jurisdictions. The VRAA proposes to expand the ability of voters to obtain preliminary relief through the courts when challenging voting changes under Section 2 in non-covered jurisdictions.[54] This provision will allow the courts to review and "freeze" voting changes that are especially likely to result in discrimination, as a case is proceeding on the merits.[55] Once a court decides that a change is not discriminatory, it is free to take effect, but if a court finds that there is discrimination, it would have succeeded in preventing that change to occur before it can deny individuals the right to vote.

Giving courts enhanced authority to order preliminary relief will work in concert with the new coverage formula to ensure that voters in non-covered jurisdictions may also be protected before discriminatory changes are implemented. This expansion of preliminary relief is fully consistent with *Shelby's* call to identify discrimination wherever it occurs.

e. Additional Ability to Deploy Federal Observers

In places where there is evidence of possible race or language minority discrimination that would interfere with the right to vote, the bill gives DOJ the authority to deploy federal observers.[56] The Department's authority would apply in all covered jurisdictions, and where determined necessary to enforce the language minority provisions of Section 203. Federal observer coverage plays a critical role in the enforcement of the Voting Rights Act by allowing neutral observers to be present where there are concerns about racial intimidation or discrimination occurring in and around the polls.

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[53] Congress added a results standard to Section 2 during the 1982 reauthorization of the Voting Rights Act as a product of bipartisan negotiations. Section 5 also reaches more broadly than discriminatory purpose. These standards have been consistently applied and upheld by the courts in the Section 2 and Section 5 contexts, and would strengthen the effectiveness of Section 3(c).
[54] S.1945 §2.
[55] *Id.*
[56] S. 1945 §5.

When combined with the other provisions of this bill, the ability to have federal observers monitor elections in areas previously known to discriminate or where real threats exist, is a necessary added layer of protection to ensure that no one's right to vote is compromised.

Conclusion

The ACLU thanks the Senate Judiciary Committee for holding this important hearing to address the Voting Rights Act following the *Shelby* decision. The Voting Rights Act's long bipartisan history of protecting the right to vote and rooting out racially discriminatory changes must continue. Therefore, it is crucial that congressional action be taken to restore and redesign its protections and allow the Voting Rights Act to continue to be the crown jewel of civil rights laws. All the other rights we enjoy as citizens depend on our ability to vote; it is necessary that we safeguard access to the ballot for every citizen. We look forward to working with the Committee as the Voting Rights Amendment Act proceeds through the legislative process. While we will continue to work for the bill's improvement, we urge swift passage as soon as possible.

June 24, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the American-Arab Anti-Discrimination Committee (ADC), the largest grassroots Arab-American organization committed to protecting civil rights, promoting manual understanding, and preserving Arab American cultural heritage, we are writing you to voice our strong support for the Voting Rights Amendment Act of 2014 (VRAA) (S. 1945). As the largest Arab-American civil rights organization, ADC strongly supports legislation that protects the right to vote.

The Voting Rights Act (VRA) is a landmark law that prohibits discriminatory practices that have periodically denied the right to vote to racial, ethnic, and language minorities. Voting is a fundamental right in America. It is not merely a Democratic or a Republican issue, but a human rights issue. Racial discrimination in voting is a reality that merits an urgent response. It is time for Congress to modernize the VRA and restore the important voter protections that were crippled by the Supreme Court's June 25 decision in *Shelby County v. Holder* last year.

Much has changed since the passage of the Voting Rights Act almost 50 years ago, but much still remains the same in terms of discrimination. Since the Supreme Court's decision in the *Shelby* case, many states and localities have pushed forward discriminatory changes to voting procedures, such as changing district boundaries and moving polling locations in areas with high concentrations of minority voters. Many voters of limited means do not have the resources to travel long distances to polling locations to cast a vote. Discrimination in voting is not a thing of the past. We need a modern Voting Rights Act that provides tools that respond to discriminatory voting laws.

The VRAA is a bipartisan bill that offers common sense fixes to update the VRA in response to the *Shelby* decision. The VRAA would amend the VRA and ensure a modern, flexible, and forward-looking set of protections to ensure an effective response to voting discrimination. Now is the time to pass legislation that ensures the Voting Rights Act can be fully enforced. If this bill is not passed before the mid-term elections in November, many Americans will lose their right to vote simply because of their race or lack of English language proficiency. Every day that Congress fails to act, voters are in danger, and so is the most fundamental right in our democracy. If the right to vote is threatened, the integrity of our entire democracy is also threatened. The time to act is now.

Sincerely,

Samer E. Khalaf, Esq.
ADC President

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June 24, 2014

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the Anti-Defamation League (ADL), we write to urge the Senate Judiciary Committee to take prompt action to protect Americans' fundamental right to vote by approving S. 1945, the Voting Right Amendment Act (VRAA). We ask that this statement be included as part of the official hearing record for the Committee's June 25, 2014 hearing on "The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*."

ADL is a leading civil rights organization that has been working to secure justice and fair treatment for all since its founding in 1913. Recognizing the Voting Rights Act of 1965 (VRA) as one of the most important and most effective pieces of civil rights legislation ever enacted, the League has strongly supported the VRA and its extensions since its passage almost 50 years ago. ADL has consistently filed briefs before the U.S. Supreme Court supporting the constitutionality of the VRA, including in *Shelby County v. Holder.*[1]

In the almost half century since its passage, the VRA has secured and safeguarded the right to vote for millions of Americans. Its success in eliminating discriminatory barriers to full civic participation and in advancing equal political participation at all levels of government is undeniable. Between 1964 and 1968 – the presidential elections immediately before and after passage of the VRA respectively – African American voter turnout in the South jumped by seven percentage points.[2] The year after passage of the VRA, Edward Brooke became the first African American in history elected to the Senate by popular vote, and the first African American to serve in the Senate since Reconstruction.[3] By 1970 the number of African Americans elected to public office had increased fivefold.[4] Today there are more than 9,000 African American elected officials,[5] including the first African American president. According to some analyses, in 2012 African American voter turnout matched, or even passed, white voter turnout for the first time in history.[6]

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[1] 133 S. Ct. 2612 (2013).
[2] U.S. Bureau of the Census, *Current Population Reports,* Series P-20, No. 192, "Voting and Registration in the Election of 1968," 1 (1969), *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/ 1968/p20-192.pdf.
[3] United States Senate, *Ethnic Diversity in the Senate*, https://www.senate.gov/artandhistory/history/common/ briefing/minority_senators.htm.
[4] *See* H.R. Rep. No. 109-478, at 18, 130 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618.
[5] H.R. Rep. No. 109-478 at 18.
[6] Hope Yen, *Black Voter Turnout Rate Passes White in 2012 Election,* Associated Press Apr. 28, 2013, http://www.huffingtonpost.com/2013/04/28/black-voter-turnout-2012-election_n_3173673.html.

To be sure, §2 of the VRA, which prohibits discrimination based on race, color or membership in a language minority group in voting practices and procedures nationwide, has helped to secure many of these advances. Yet it is undeniable that §5 of the VRA, which requires certain states and political subdivisions with a history of discriminatory voting practices to provide notice and "pre-clear" any voting law changes with the federal government, has played an essential and invaluable role in the VRA's success. Between 1982 and 2006, pursuant to §5, the Department of Justice (DOJ) blocked 700 proposed discriminatory voting laws, the majority of which were based on "calculated decisions to keep minority voters from fully participating in the political process."[7] Proposed laws blocked by §5 included discriminatory redistricting plans, polling place relocations, biased annexations and de-annexations, and changing offices from elected to appointed positions, similar to many of the tactics used to disenfranchise minority voters before 1965.[8] In addition, states and political subdivisions either altered or withdrew from consideration approximately 800 proposed voting changes between 1982 and 2006, indicating that §5's impact was much broader than the 700 blocked laws.[9]

It is not coincidental that many of the greatest successes of the VRA are from jurisdictions covered by §5. Before passage of the VRA, African American voter registration rates in many areas of the South were 50 percentage points or more below white voter registration rates. By 2004, in many jurisdictions covered by §5 of the VRA, the registration rates were almost equal.[10] The number of African Americans elected to public office from the six states originally covered by the VRA has increased 1,000 percent since 1965.[11] As Chief Justice Roberts concluded, "there is no doubt that these improvements are in large part *because* of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process."[12]

Enacted in 1965, the VRA was reauthorized by Congress in 1970, 1975, 1982 and, with respect language assistance, in 1992.[13] Congress compiled a particularly extensive legislative record during consideration of the 2005-2006 reauthorization of the Act. Over the course of the 109th Congress, the House[14] and Senate Judiciary[15] Committees held 21 hearings on the legislation. As one scholar described:

> If sheer size were the determining factor, the amount of evidence amassed by Congress also stands as evidence of the particularly deliberative approach during the 2006 reauthorization process. Congress considered more evidence and committed more resources to studying the problem of ongoing voting discrimination in covered jurisdictions than it had to any other issue in several years. It compiled over 20,000 pages of records by the conclusion of hearings in both chambers.[16]

The testimony evinced both breadth and depth of expertise:

> The evidence compiled in the legislative record underlying the congressional reauthorization of Section 5 generally falls into three material categories: evidence of the success of Section 5 as a statutory tool that combats voting discrimination; evidence of ongoing voting discrimination in

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[7] *Shelby County*, 133 S. Ct. at 2639 (Ginsburg, J. dissenting) (citing H.R. Rep. 109-478 at 21).
[8] H.R. Rep. No. 109-478, at 36.
[9] *Shelby County*, 133 S. Ct. at 2639 (Ginsburg, J. dissenting).
[10] *See id.* at 2626.
[11] *Id.* at 2625.
[12] *Id.* at 2626.
[13] S. Rep. No. 109-295, at 7 (2006).
[14] H.R. Rep. 109-478.
[15] S. Rep. 109-295.
[16] Kristen Clarke, The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate? 43 Harvard C.R.-C.L.L. Rev., 386, 402 (2008).

> the covered jurisdictions; and legal analyses and studies considering the constitutionality of Section 5 or other doctrinal issues. The evidentiary forms included oral and written testimony, studies, analyses, reports, law review articles, judicial findings from voting rights cases, and objection letters issued by the DOJ. Witnesses included members of Congress, litigators and practitioners, private citizens, scholars and academics, historians, technical experts, local and state officials, and DOJ representatives.[17]

A final, dramatic demonstration of the convincing legislative record was the overwhelming, bipartisan support the legislation received on final passage in each chamber: 390 to 33 in the House of Representatives[18] and 98-0 in the Senate.[19]

Despite the exhaustive legislative history Congress compiled in 2005-2006 and the undeniable success of the VRA, on June 25, 2013 the U.S. Supreme Court, in a sharply-divided 5-4 ruling in *Shelby County v. Holder*, struck down §4(b) of the VRA, the formula to determine which states and political subdivisions would have to preclear all voting changes with the federal government pursuant to §5. The majority held that "the formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance,"[20] but specifically found that "Congress may draft another formula based on current conditions."[21] Absent congressional action that creates a new coverage formula, however, the critical protections of §5 have been "immobilized."[22]

In her dissenting opinion in *Shelby County*, Justice Ginsburg noted that the large numbers of voting law changes submitted for preclearance that DOJ declined to approve "augur[ed] that barriers to minority voting would quickly resurface were the preclearance remedy eliminated."[23] She further observed that "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[24] One year after the *Shelby County* decision, the evidence strongly suggests that Justice Ginsburg's predictions were correct.

Within hours of the Supreme Court's decision in *Shelby County*, Texas Attorney General Greg Abbott announced that the state's voter ID law and a redistricting plan, both of which had been previously blocked by §5, would go into effect immediately.[25] The three judge panel that had reviewed the Texas voter ID law and denied preclearance in 2012 had found that "based on the record of evidence before us, it is virtually certain that these burdens will disproportionately affect racial minorities. Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote."[26] With regard to the redistricting plan, a federal court that had declined to pre-clear the law the previous year concluded that there was "more evidence of discriminatory intent than we have space, or need, to address here."[27] Although litigation pursuant to §2 is ongoing, the discriminatory laws have already gone into effect in the absence of critical §5 protections.

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[17] *Id.* at 401-402.
[18] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, H.R. 9, 109th Cong. (2006) (enacted).
[19] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, H.R. 9, 109th Cong., (2006) (enacted).
[20] *Shelby County*, 133 S. Ct. at2631.
[21] *Id.*
[22] *Id.* at 2633 n.1 (Ginsburg, J. dissenting).
[23] *Id.* at 2634 (Ginsburg, J. dissenting).
[24] *Id.* at 2650 (Ginsburg, J. dissenting).
[25] Zachary Roth, *That Was Quick: Texas Moves Ahead with Discriminatory Voting Laws*, MSNBC (Jun. 25, 2013), http://www.msnbc.com/msnbc/was-quick-texas-moves-ahead-discri.
[26] *Tex. v. Holder*, 888 F. Supp. 2d 113, 141 (D.D.C. 2012).
[27] *Texas v. U.S.*, 887 F. Supp. 2d 133, 161 n.32 (D.D.C., 2012).

North Carolina, which before *Shelby County* had been required to pre-clear voting changes in 40 of its 100 counties, passed HB 589 shortly after the Court's decision. The bill, among other things, required government-issued photo identification (voter ID) to vote, made it easier for partisan poll watchers to challenge eligible voters, and greatly reduced the number of early voting days, all of which threaten to disenfranchise minority voters.[28] A report from the North Carolina Board of Elections, which found that 613,000 eligible voters in North Carolina lacked the government-issued photo identification required by HB 589, showed that a disproportionate number of those eligible voters were African American.[29] The law's expansion of partisan "observers" at the polls similarly threatens to disenfranchise minority voters. History shows that partisan poll watchers ostensibly guarding against voter fraud too often target precincts with high numbers of minority voters, becoming vigilantes who intimidate eligible minority voters. For example, lists from 2012 show that a Pittsburgh poll watching group targeted precincts where nearly 80 percent of registered voters were African American.[30] Similarly, poll watching groups in Ohio targeted primarily precincts with high percentages of minority voters, and there were allegations of minority voter intimidation by partisan poll watchers in Texas.[31] In addition, HB 589's reduction of early voting days threatens to impact even more minority voters. Estimates show that in North Carolina, more than 70 percent of people who vote early are African American, Latino, women or young voters.[32] Approximately seven in ten African American voters in North Carolina utilize early voting and cast a ballot before Election Day.[33] By slashing early voting from 17 to 10 days, the new law disproportionately impacts the State's minority voters. Again, litigation pursuant to §2 is ongoing, but the discriminatory law has already gone into effect.

As another example, in 2012 DOJ objected to a proposed statewide law in Georgia that effectively changed the date of the mayoral and commissioner elections in Augusta-Richmond from November to July, concluding that minority voter turnout in July would be lower and the law would have a "retrogressive effect."[34] In deciding to decline preclearance, DOJ found, based on previous voting patterns in the jurisdiction, that "in percentage terms, black persons were 55.4 percent less likely to vote in July than in November, while white persons were only 41.4 percent less likely to vote."[35] In the wake of the *Shelby County* decision, Georgia Attorney General Sam Olens announced that the election will be held in July of 2014, not November.[36] Absent injunctive relief, the law threatens to disproportionately impact African American voters in Georgia next month.

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[28] 2013 N.C. Sess. Laws 381.

[29] *2013 SBOE-DMV ID Analysis*, North Carolina Board of Elections (Jan. 7, 2013) (finding that although African American voters make up 22 percent of the State's population, they represent 30 percent of those who do not have proper photo ID).

[30] Dan Froomkin, *New Evidence Shows Poll Watching Efforts Target Minority Precincts*, Huff Post Politics (Nov. 5, 2012), *available at* http://www.huffingtonpost.com/2012/11/05/poll-watching_n_2078563.html.

[31] Dan Harris and Melia Patria, *Is True the Vote Intimidating Minority Voters from Going to the Polls?*, ABC News Nightline (Nov. 2, 2012), *available at* http://abcnews.go.com/Politics/true-vote-intimidating-minority-voters-polls/story?id=17618823.

[32] Peter Hamby, *Micro-Targeting Offers Clues to Early Vote Leads*, CNN Politics (Oct. 26, 2012), *available at* http://politicalticker.blogs.cnn.com/2012/10/26/micro-targeting-offers-clues-to-early-vote-leads/.

[33] *Id.*

[34] Complaint at 19, *Howard et al. v. Augusta-Richmond Cnty.*, No. 14-00097 (S.D.Ga. *filed* Apr. 18, 2014), *available at* http://redistricting.lls.edu/files/GA%20howard%2020140414%20complaint.pdf.

[35] *Id.*

[36] The Leadership Conference, *The Persistent Challenge of Voting Discrimination: A Study of Recent Voting Rights Violations By State,* 28 (June 2014), *available at* http://www.civilrights.org/press/2014/Racial-Discrimination-in-Voting-Whitepaper.pdf.

Two months after the *Shelby County* decision, Arizona Attorney General Tom Horne opined that "duly enacted statutes that were submitted for preclearance but later withdrawn are enforceable."[37] Six statutes or policies that had been submitted for preclearance by Arizona or political subdivisions of the state but later withdrawn when DOJ requested more information, therefore, went into effect on June 25, 2013.[38] Among those was HB 2261, which requires the addition of two at-large seats on the Governing Board of the Maricopa Community College District.[39] The Supreme Court "has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'"[40] Although there is ongoing litigation about the constitutionality of the voting law change there as well, absent injunctive relief this November there will be elections for the two at-large seats. Similarly, the city of Decatur, Alabama, which had withdrawn a preclearance request in 2011 when DOJ asked for more information about its proposed voting law, changed its election method from five single-member districts to three single-member districts and two at-large seats shortly after the *Shelby County* decision.[41]

These examples of discriminatory voting laws and practices documented in the year since *Shelby County* are far from an exhaustive list. Rather, they are illustrative of the kinds of laws that have either been conceived since *Shelby County* or given new life in the absence of §5's essential protections. Since the 2010 elections, new voting restrictions have been passed in 22 states, including nine of the 15 states previously covered by §5.[42] In 15 states, the elections this November will be the first federal elections with these new restrictive laws in place that threaten to disenfranchise American voters and disproportionately impact voters of color.[43] Although it is hard to point to quantifiable statistics about how many voters have been impacted by the lack of preclearance protections from §5, one thing is certain: the impact will only grow over time.

The efforts over the last few years to restrict voting rights around the country are unprecedented in modern America. The United States has not seen such a major legislative push to limit voting rights since right after Reconstruction.[44] That history presents a sobering lesson about what can happen when protections for minority voting rights are erased. After the Civil War Congress moved swiftly and decisively to enfranchise African American men. Under the supervision of federal troops, more than 700,000 African American men were registered to vote in the South by 1868, a 75 to 95 percent registration rate.[45] The 15th Amendment was ratified in 1870, and the Enforcement Act of 1870 prohibited discrimination in voter registration and created criminal penalties for interfering with voting rights. These combined efforts and federal protections led to unprecedented rates of African American participation in elected government. By the end of Reconstruction, 18 African Americans had served in statewide office in Southern states, there were eight African Americans in Congress from six different states, and more than 600 African Americans served in state legislatures.[46] When Reconstruction ended in 1877 and the Supreme Court struck down key portions of the Enforcement Act, however, progress quickly reversed.

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[37] Effect of Shelby County on Withdrawn Preclearance Submissions, Op. Att'y Gen. No. 113-008 (Aug. 29, 2013), *available at* https://www.azag.gov/sites/default/files/113-008.pdf.
[38] *Id.*
[39] *Id.*
[40] *Thornburg v. Gingles,* 478 U.S. 30, 47 (1986).
[41] The Leadership Conference, *supra* note 36, at 10.
[42] Wendy Weiser and Erik Opsal, *The State of Voting in 2014,* Brennan Center for Justice at New York University School of Law, 3 (June 2014), *available at* http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf .
[43] *Id.* at 1.
[44] *Id.* at 2.
[45] ELLIOTT ROBERT BARKAN, A NATION OF PEOPLES: A SOURCEBOOK OF AMERICA'S MULTICULTURAL HERITAGE 27 (1999).
[46] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 353, 355, 538 (1988).

Southern states began implementing racial gerrymandering, followed by more brazen efforts to disenfranchise African American voters, including poll taxes, literacy tests, whites only primaries, and grandfather clauses. By the early 1900s, 90 percent of African Americans in the Deep South had been disenfranchised by these schemes. The widespread, insidious disenfranchisement of African American voters only stopped in 1965, with passage of the VRA.

To be sure, the United States is very different today than it was after Reconstruction. Yet the possibility of repeating history by reversing decades of progress on improving minority voting rights looms large. In the short year since the Supreme Court's decision in *Shelby County* immobilized the essential §5 preclearance protections, the United States has already seen countless efforts to restrict voting, disenfranchise voters, and roll back the extraordinary progress made since Congress first passed the VRA in 1965.

The nationwide ban on voter discrimination based on race in §2 is not sufficient alone to protect voting rights. As the Supreme Court rightly recognized in the first challenge it heard to the VRA, "Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 manhours spent combing through registration records in preparation for trial. Litigation [is] exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings."[47] In the meantime, as is the case with many of the discriminatory laws put in place since *Shelby County*, voting rights are in peril while court cases slowly wind their way through the process. Just as in 1965 "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits,"[48] litigation pursuant to §2 is once more inadequate to address the flood of restrictive voting laws across the country. It is, therefore, imperative that Congress take swift and decisive action to restore the full protections of the VRA, including the preclearance requirements.

Although not perfect, S. 1945, the Voting Rights Amendment Act (VRAA) creates a modern, flexible, rolling formula to determine which states and political subdivisions will have to pre-clear their laws with the federal government. The formula will not require preclearance in all of the political subdivisions that have moved to restrict voting rights in the past year, including some of the examples above, but, over time, the rolling formula will sweep in many of the most problematic jurisdictions. It will restore critical safeguards, preventing enactment of discriminatory voting laws by once more "shift[ing] the advantage of inertia and time from the perpetrators of the evil to the victims."[49]

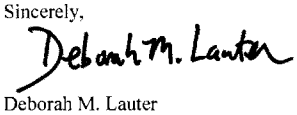
Congress has both the power and the imperative to pass the VRAA and restore critical voting rights protections. The Fifteenth Amendment to the U.S. Constitution proclaims that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[50] Section 2 of the Amendment expressly declares that "Congress shall have the power to enforce this article by appropriate legislation."[51] As the Supreme Court has recognized, "by adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in §1,"[52] and "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[53] Passage of the VRAA is not

[47] *S.C. v. Katzenbach*, 383 U.S. 301, 314 (1966).
[48] *Id.* at 328.
[49] *Id.* at 328.
[50] U.S. CONST. amend. XIV, §1.
[51] *Id.* at §2.
[52] *Katzenbach*, 383 U.S. at 325-26.
[53] *Id.* at 324.

only rational. It is critical to enforcing the constitutional prohibition on racial discrimination in voting and protecting the fundamental right to vote for all Americans.

We strongly welcome these hearings on the need for the VRAA and appreciate the opportunity to present ADL's views. We urge the Committee to promptly approve this vital legislation.

Sincerely,



Deborah M. Lauter
Director, Civil Rights

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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LEGISLATIVE**ALERT**

EXECUTIVE COUNCIL

RICHARD L. TRUMKA
PRESIDENT

ELIZABETH H. SHULER
SECRETARY-TREASURER

TEFERE GEBRE
EXECUTIVE VICE PRESIDENT

July 2, 2014

Honorable Patrick J. Leahy, Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510 and

Honorable Chuck Grassley, Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

I am writing on behalf of the AFL-CIO to express our strong support for the Voting Rights Amendment Act of 2014, (S.1945) and request that this statement be included in the record for the Senate Judiciary Committee hearing of June 25, 2014. The Voting Rights Amendment Act (VRAA) is a modern, flexible, nationwide approach to protecting voters and preventing voting discrimination by providing new tools to ensure that proposed election changes are transparent.

Discrimination in voting is not a thing of the past. Chief Justice Roberts said in the *Shelby* decision: "voting discrimination still exists; no one doubts that." Since the *Shelby* decision, states and localities have brazenly pushed forward potentially discriminatory changes to voting, such as changing district boundaries to disadvantage some voters and moving polling locations in areas with high concentrations of minority voters.

Voting discrimination is a threat to our democracy that requires strong, bipartisan legislative action. The Voting Rights Amendment Act is bicameral, bipartisan legislation that offers a measured approach in response to the Supreme Court's decision in *Shelby County v. Holder*, which struck down Section 5(c), a key provision of the Voting Rights Act of 2006.

We urge you act now to restore and strengthen the law which had for decades protected voters against discrimination by passing the Voting Rights Amendment Act of 2014.

Sincerely,

William Samuel, Director
Government Affairs Department

Lee Saunders
President
Laura Reyes
Secretary-Treasurer
Vice Presidents
Ken Allen
Henry L. Bayer
Ken Deitz, RN
Greg Devereux
Danny Donohue
David R. Fillman
Michael Fox
Kathleen Garrison
Raglan George Jr.
Mattie Hartell
Johanna Puno Hester
Danny J. Homan
Salvatore Luciano
John A. Lyall
Kathryn Lybarger
Roberta Lynch
Christopher Mabe
Glenard S. Middleton Sr.
Ralph Miller
Gary Mitchell
Douglas Moore Jr.
Frank Moroney
Henry Nicholas
Randy Perreira
Steven Quick Sr.
Lillian Roberts
Eddie Rodriguez
Lawrence A. Roehrig
Joseph P. Rugola
Eliot Seide
Mary E. Sullivan
Braulio Torres
Jeanette D. Wynn

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, DC 20510

June 23, 2014

Dear Chairman Leahy:

On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), I want to express AFSCME's strong support for S. 1945, the bipartisan Voting Rights Amendment Act of 2014, and request that this statement be included in the record for the June 25 Committee hearing on the legislation.

S. 1945 restores key provisions in the Voting Rights Act that for half of a century protected the right of American citizens to vote regardless of race, color or socioeconomic condition. This legislation offers a balanced, modern and flexible response to the issues raised by the Supreme Court in the Shelby County v. Holder decision. Moreover, the bill provides new tools to stop voter discrimination before it occurs and ensures that certain election law changes do not discriminate against any Americans.

AFSCME has supported the right to nondiscriminatory voting since our founding 82 years ago. It is imperative that Congress act now to restore and protect this fundamental right. It is the cornerstone of our democracy and is the most powerful tool exercised by our citizens to fully participate in the political process.

Conversely, voting discrimination is a threat to American democracy, eviscerating the ability of our citizens to influence how our government operates. Without S. 1945 millions of minority voters will likely face disenfranchisement in this fall's election. Voting discrimination because of race is a real and current issue. It is not a thing of the past. Since the Shelby decision, a number of voting restrictions have been imposed in various states which have a disproportionate effect on minority groups, including voter ID laws, the elimination of early voting and the reduction of polling place hours and locations.

Congress must act to preserve the right to vote for all Americans. AFSCME strongly supports the Voter Rights Amendment Act of 2014 and stands ready to work to pass this legislation into law.

Sincerely,

Charles M. Loveless
Director of Federal Government Affairs

CML:BL:mc

cc: Ranking Member Grassley
Members of the Judiciary Committee

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071-14
2014

B'NAI B'RITH INTERNATIONAL

ALLAN J. JACOBS, PRESIDENT

DANIEL S. MARIASCHIN, EXECUTIVE VICE PRESIDENT AND CEO

June 24, 2014

The Honorable Patrick J. Leahy, Chairman
The Honorable Chuck Grassley, Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Leahy and Grassley:

On behalf of B'nai B'rith International, America's oldest Jewish advocacy and social service organization, we write to urge your support for the Voting Rights Amendment Act of 2014. The Supreme Court's ruling last year on the Voting Rights Act of 1965 creates the dangerous potential for erosion of key protections in the legislation. This setback could give way to new state voter laws that make it more difficult for eligible low-income, minority, and elderly voters to participate in elections.

Since its founding, B'nai B'rith International has advocated for social justice and civil rights advancement in the United States, including support for the landmark Voting Rights Act in 1965. Since its passage, the Voting Rights Act has been diminished by court decisions that have limited voter access. Your support will help put an end to this threatening trend.

The current status of the Voting Rights Act is a considerably weakened version of its original form and is lacking in authority. If passed, this critical amendment will re-empower the Voting Rights Act by implementing a new, fair coverage formula with enhanced voter protection measures. The legislation will also make it compulsory for states and local governments to notify voters in advance of any electoral changes involving federal elections, polling places, and redistricting.

The Voting Rights Amendment Act of 2014 will ensure that elections are unbiased, accessible, and valid. We strongly urge you to support this critical legislation.

Respectfully,

Allan Jacobs
President

Daniel S. Mariaschin
Executive Vice President

CC: Senate Committee on the Judiciary

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BRENNAN
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FOR JUSTICE

Shelby County: One Year Later

By Tomas Lopez

One year ago, the U.S. Supreme Court gutted the most powerful provision in the Voting Rights Act of 1965 — a law widely regarded as the most effective piece of civil rights legislation in American history. Specifically, in *Shelby County v. Holder*, the Court invalidated the formula that determined which states and localities, because of a history of discrimination, had to seek federal "preclearance," or approval, from either the Department of Justice or a federal court before implementing any changes to their voting laws and procedures. For nearly 50 years, preclearance (set forth in Section 5 of the Voting Rights Act) assured that voting changes were transparent, vetted, and fair to all voters.

Before the *Shelby County* decision, the Brennan Center examined the potential consequences of a ruling against the preclearance process in *If Section 5 Falls: New Voting Implications*. In just the year since *Shelby County*, most of the feared consequences have come to pass — including attempts to: revive voting changes that were blocked as discriminatory, move forward with voting changes previously deterred, and implement new discriminatory voting restrictions.

The decision has had three major impacts:

- Section 5 no longer blocks or deters discriminatory voting changes, as it did for decades and right up until the Court's decision.
- Challenging discriminatory laws and practices is now more difficult, expensive, and time-consuming.
- The public now lacks critical information about new voting laws that Section 5 once mandated be disclosed prior to implementation.

This paper summarizes some of the stories behind these facts, and tracks the voting changes that have been implemented in the states and other jurisdictions formerly covered by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia in their entirety; and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota.

I. The Loss of Section 5 Has Removed an Effective Deterrent Against Harmful Election Law Changes

Section 5 was a uniquely effective law that blocked or otherwise prevented scores of discriminatory voting changes from being implemented. While the *Shelby County* decision argued that the law was effectively obsolete, Section 5 remained a powerful tool through June 2013. In the 15 years before its operation was halted, Section 5 blocked 86 laws through its administrative process[1] and several more through litigation.[2] At least 13 of these laws were blocked in just the final 18 months before the *Shelby* Court's ruling.[3]

Its effectiveness went beyond the laws it blocked. In one recent six-year period, 262 voting changes were withdrawn or altered after the Department of Justice (DOJ) asked the jurisdictions for more information to assess whether they were discriminatory under the Voting Rights Act (VRA).[4] That figure does not include the hundreds of voting changes that were deterred because jurisdictions knew they would not withstand VRA review.

A. Statewide Voting Changes That Were or Would Likely Have Been Blocked

Immediately after *Shelby County*, one state moved forward with implementing laws that were previously blocked, two states moved forward with passed laws that may have been blocked, and one state passed new restrictive legislation:

- **Texas:** On the very day of the *Shelby County* ruling, Texas officials announced[5] they would implement the state's strict photo ID law, which was previously blocked by Section 5 because of its racial impact. "[U]ndisputed… evidence demonstrates that racial minorities in Texas are disproportionately likely to live in poverty, and [that the ID law] will weigh more heavily on the poor," a federal court held.[6] Early assessments indicated that between 600,000 and 800,000 registered voters in Texas lacked photo ID, over 300,000 of them Latino.[7] Voter advocates, including the Brennan Center and the DOJ, have now sued the state of Texas over this law under Section 2 of the Voting Rights Act, among other claims.

- **North Carolina:** Also shortly after the *Shelby County* decision, the state legislature passed a law that imposed a strict photo ID requirement, significantly cut back on early voting, and reduced the window for voter registration. This law is widely regarded as the most restrictive piece of voting legislation passed in recent years. Lawmakers waited until after preclearance was gone to move forward with the legislation, with a State Senate committee chair telling the press after the Court's decision, "now we can go with the full bill," rather than a pared down, less restrictive version.[8] Prior to *Shelby County*, the legislation, which is currently being challenged under Section 2 of the VRA, among other claims, would have required preclearance review before going into effect. Data shows the law will disproportionately affect minorities. In North Carolina, the State Board of Elections identified more than 300,000 registered voters who lack a DMV-issued ID, the most common form of ID accepted under the state's strict law.[9] One-third of these voters are African American.[10] And 7 in 10 African Americans who cast ballots

in 2008 used the early voting period (23 percent of whom did so during the week that was cut by the law).[11]

- **Alabama:** After the *Shelby County* decision, the state moved ahead with its law requiring strict photo ID to vote. This law passed in 2011 and would have required preclearance. However, state officials never submitted the bill for preclearance[12] and did not announce plans for implementation until after the Supreme Court's ruling.[13] More than 30 percent of Alabama's voting-age citizens live more than 10 miles from the nearest state-ID issuing office.[14] According to a Brennan Center study, in 2012, 11 counties with substantial black populations had state driver's licenses offices that were open only once or twice per week.[15] Even those looking to register to vote in Alabama will experience challenges — legislators also passed a law requiring individuals to provide documentary proof of citizenship when registering to vote.[16] This measure is not currently in effect.

- **Mississippi:** Shortly following the Supreme Court's ruling, state officials moved to enforce its photo ID law, which the state submitted for preclearance but was never allowed to implement.[17] Nearly 35 percent of the state's voting-age population lives more than 10 miles from the nearest office that will issue ID and,[18] in 2012, 13 contiguous counties with sizable African-American populations lacked a single full-time driver's license office.[19]

These laws exist alongside other attempted or proposed statewide policy measures that can restrict the ability to vote through design and/or poor implementation:

- In 2013, Florida officials attempted to purge thousands of people from the state's voter's rolls because of suspicions they were non-citizens.[20] The state ultimately suspended these efforts.[21] When it tried the same thing in 2012, its purge list began with 180,000 suspected non-citizens on the voter rolls and was reduced to approximately 2,700.[22] That purge list contained a disproportionately high number of Latino surnames. While Latinos compose 13 percent of Florida's registered voters, an analysis found they made up 58 percent of that group of approximately 2,700.[23] From the 180,000 to fewer than 3,000, Florida eventually found fewer than 40 non-citizens suspected of voting illegally.[24]

- Also in 2013, Virginia officials sought to purge the names of tens of thousands of voters from the state's rolls. While a federal court allowed the purge to proceed,[25] the state's efforts were error-prone and taken unnecessarily close to that year's elections.[26] One month before the election, one county registrar found that of a list of 1,000 names he was told to purge, more than 170 were in error.[27]

- Arizona officials have proposed implementing separate voter registration systems for federal and state elections. The U.S. Supreme Court ruled last year that Arizona cannot ask for documentary proof of citizenship when voters sign up using the federal registration form.[28] State officials then devised a two-tiered system that would allow the state to require proof of citizenship documents for anyone registering to vote in a state election.[29] The Department of Justice has previously used Section 5 to block such dual registration systems.[30]

B. Local Voting Changes That Were or Would Likely Have Been Blocked

Section 5's loss will perhaps be felt most acutely at the local level. The great majority of voting law changes that were blocked as discriminatory under the Voting Rights Act were local: counties, municipalities, and other places that operate below the state level.[31] In the past year, the following changes and attempted changes have already taken place in jurisdictions previously covered in whole or in part by preclearance:

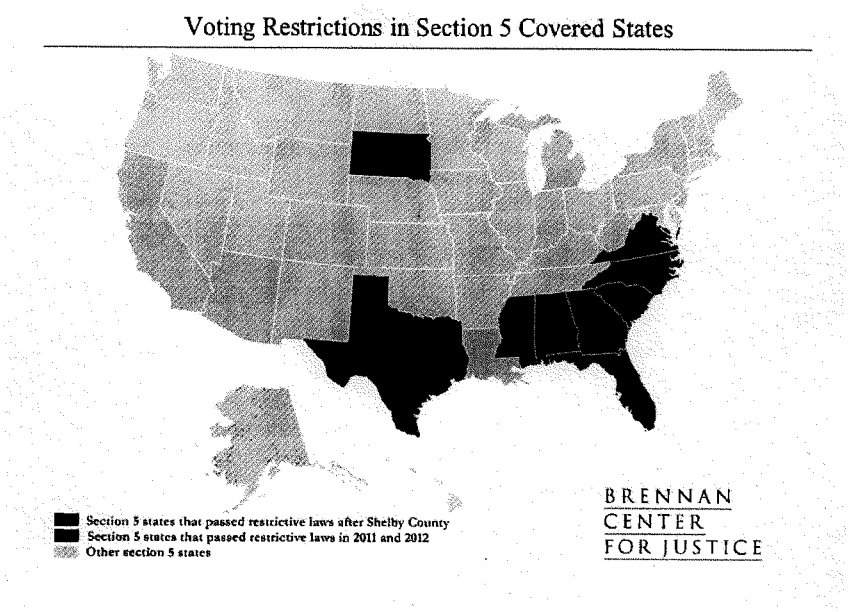
- In 2013, Galveston County, Texas, revived a redistricting plan for electing justices of the peace that was previously blocked by the DOJ because it discriminated against minority voters. The new map diminished minority voting strength by reducing the number districts where minority voters would have a fair and effective voice.[32]The Justice Department blocked a similar proposal under Section 5 only two years ago out of concern that "minority voters possess the ability to elect candidates of choice."[33] Now, without Section 5's protections, the districts are slated to be implemented in 2015,[34] but are being challenged in an ongoing case in federal court in the Southern District of Texas. The case went to trial this spring and is awaiting a decision.[35]

- The city of Pasadena, Texas, is redrawing its city council districts in a way that is expected to diminish the influence of its Latino voters in municipal government.[36] A functioning Section 5 would have blocked any new redistricting plan that would have made it harder for Latinos to elect their candidates of choice.

- After *Shelby County*, Georgia officials moved the dates of municipal elections in two counties with substantial African American populations from the traditional November date to another date. This may reduce black voter participation in local elections because the municipal elections are not occurring when citizens are voting in state and federal general elections. The DOJ blocked a similar proposal under Section 5 in 2012 because turnout is lower outside of November elections, and the drop in turnout is "significantly greater" for black voters than white voters.[37] After a federal court dismissed a challenge to the new date for one of the counties, municipal elections took place in May 2014.[38] Data as to minority participation is not yet available for that election, but overall turnout in that county was down nearly 20 percent (30.02 percent in 2014)[39] from the previous mayoral election (49.54 percent turnout in 2010).[40]

C. Restrictive Voting Legislation in States Previously Covered by Section 5

In 2013 and 2014, at least 10 of the 15 states that had been covered in whole or in part by Section 5 introduced new restrictive legislation that would make it harder for minority voters to cast a ballot. These have passed in two states: Virginia (stricter photo ID requirement and increased restrictions on third-party voter registration) and North Carolina (the above-discussed omnibus bill, which included the ID requirement, early voting cutbacks, and the elimination of same-day voter registration). Further, seven other formerly covered states also passed restrictive legislation in 2011 and 2012, prior to the *Shelby County* decision.



II. Challenging Discriminatory Voting Laws is Now More Difficult, Expensive, and Time Consuming

As described above, under Section 5, discriminatory voting laws could not go into effect unless they were vetted through the preclearance process, which consisted of either an effective administrative process or through litigation before a federal court. The jurisdiction had the choice of which preclearance route to take, and the vast majority of preclearance actions were done through the administrative process because it was cheaper, faster, and easier than preclearance litigation.

Consider Texas, where state lawmakers passed one of the country's most restrictive photo ID laws. That law did not and could not go into effect unless and until it was precleared by the DOJ or a three-judge federal court. In this instance, Texas first sought preclearance from the DOJ, but then eventually elected to litigate the matter before a federal court. Both the DOJ and the court denied preclearance, finding the restrictive photo ID requirement violated Section 5.

After the *Shelby County* decision, Texas put the previously blocked law into effect, and it remains so until voters can win a new lawsuit under another provision of the VRA, Section 2, making a similar showing, albeit under a different legal standard.[41] The photo ID law has been in place for local elections and the March 2014 primaries. The case is currently scheduled to go to trial before the 2014 election.

Challenging restrictive laws one by one under Section 2 or some other law is considerably more expensive than the administrative preclearance process these individual challenges now have to replace. The active Texas photo ID suit, which is a number of consolidated lawsuits, now lists more than 50 counsel of record on all sides.[42] In the months since that litigation began, the parties have produced more than 300 court filings, including motions, notices, and briefs, large and small. The consolidated North Carolina lawsuits include 40 counsel of record and have filed more than 120 documents.[43] The total cost of these lawsuits will be substantial. As a point of reference, three lawyers who participated in the Texas photo ID preclearance case in 2012 sought more than $350,000 in attorneys' fees to cover their expenses.[44] The expenses for the active Texas photo ID litigation can expect to run into the millions.

III. Without Section 5, Thousands of Voting Law Changes Lack Accountability

Section 5 used to cover more than 8,000 state and local jurisdictions. That is gone now, and it is a large loss. In 2012, the final full calendar year before the *Shelby County* decision, the Justice Department received 18,146 election law and procedure changes from Section 5 jurisdictions.[45] From 2009 to 2013, the DOJ received 58,692 such changes.[46]

One of the statute's most important functions was to impose transparency on these many thousands of election law changes. For example, the preclearance process included the possibility of input from the public, who could consult with the DOJ during its review or weigh in during any preclearance litigation before a court. Because covered jurisdictions had to provide notice to the DOJ whenever they made a change to their voting systems, there was also a centralized method to monitor those changes before they were implemented. The public benefited from that accountability. Without Section 5, thousands of changes to voting procedures may go unnoticed.

While advocates and community leaders remain vigilant and are working to build monitoring systems, Section 5's mandate to centralize information for thousands upon thousands of voting law changes will be very difficult to replicate. Public notice by election officials and constant awareness by community members may well keep the public informed to a certain extent, but no *ad hoc* method of learning about incidents will adequately replace a tool with considerable coverage.

IV. Conclusion

Section 5 protected voting rights by regulating, deterring, and blocking harmful voting law changes for nearly 50 years. The above information speaks to the fact that it remained active well after its enactment in 1965, and the continued existence of harmful, discriminatory voting laws rebuts the Supreme Court's claim that progress has made the statute obsolete.

For all the real progress Section 5 facilitated, the nation and its voters now lack a critical tool to protect those earned advances. Bad laws with lasting, harmful consequences now lack a review mechanism, the method of fighting these laws is now limited to costly and time-intensive litigation, and the public has lost the one centralized means to track the thousands of changes annually that affect Americans' right to vote.

The year since *Shelby County* tells only the beginning of a story, but even that beginning points to the tools and accountability that have been lost, and the necessity that our lawmakers recover them.

Endnotes

[1] This is the number of submissions of voting changes from the beginning of 1998 to which DOJ has interposed an objection. Some objections were later withdrawn or were superseded by a declaratory judgment action for court preclearance in the U.S. District Court for the District of Columbia. For state-by-state chronological listings of Section 5 objections, *see Section 5 Objection Letters*, U.S. Dept. of Justice, http://www.justice.gov/crt/records/vot/obj_letters/index.php (listing 86 objections since the beginning of 1998).
[2] *See, e.g.*, *Florida v. United States*, 885 F. Supp. 2d 299, 357 (D.D.C. 2012) (denying preclearance for reduction in early voting opportunities but granting preclearance for procedures for inter-county movers); *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) (denying preclearance for Texas voter photo ID law); *Texas v. United States*, 887 F. Supp. 2d 133, 178 (D.D.C. 2012) (denying preclearance for Texas's redistricting plans).
[3] *Supra* notes 1 and 2. This is the number of objections interposed from the beginning of 2012 through the date of the *Shelby County* decision, combined with the preclearance litigation described in note 2.
[4] Myrna Pérez & Vishal Agraharkar, *If Section 5 Falls: New Voting Implications* 5 (2013) (*citing* Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power, 47, 57-58 (Ana Henderson ed., 2007), *available at* http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf.
[5] Ed Pilkington, *Texas Rushes Ahead with Voter ID Law after Supreme Court Decision*, The Guardian (June 25, 2013), http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision.
[6] *Texas v. Holder*, 888 F. Supp. 113, 127 (D.D.C. 2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/340%20Opinion%20Denying%20States%20Request%20for%20a%20Declaratory%20Judgment.pdf.
[7] Letter from Thomas E. Perez, Assistant Att'y Gen., to Keith Ingraham, Director of Elections, Office of the Texas Secretary of State (Mar. 12, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/l_120312.pdf.
[8] Laura Leslie, *NC Voter ID Bill Moving Ahead With Supreme Court Ruling*, WRAL.com (June 25, 2013), http://www.wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669/.
[9] North Carolina State Board of Elections, *April 2013 SBOE-DMV ID Analysis* 9 (April 17, 2013), *available at* http://canons.sog.unc.edu/wp-content/uploads/2013/12/St-Bd-voter-ID-report.pdf.
[10] *Id.*
[11] Compl., *United States v. North Carolina*, No. 13-861 (M.D.N.C. Sept. 30, 2013), *available at* http://www.justice.gov/iso/opa/resources/646201393013723793555.pdf.
[12] Kim Chandler, *State Has Yet to Seek Preclearance of Photo Voter ID Law Approved in 2011*, AL.com (June 12, 2013), http://blog.al.com/wire/2013/06/photo_voter_id.html.
[13] Kim Chandler, *Alabama Photo Voter ID Law to be Used in 2014, State Officials Say*, AL.com (June 26, 2013), http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html.
[14] Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Photo Identification*, Brennan Center for Justice, at 7, *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf.
[15] *Id.*
[16] Ala. Code § 31-13-28.
[17] Letter from Delbert Hosemann, Mississippi Secretary of State, to T. Christian Herren, Jr., U.S. Dept. of Justice (Jan. 18, 2013), *available at* http://sos.ms.gov/links/voter_id/Cover%20letter.pdf. *See Voting Determination Letters for Mississippi*, U.S. Dept. of Justice, *available at* http://www.justice.gov/crt/records/vot/obj_letters/state_letters.php?state=ms (listing no objection letter as to Mississippi's ID law).
[18] Gaskins & Iyer, *supra* note 14, at 3 (Table 1).
[19] *Id.* at 8.
[20] *See* Steve Bousquet & Michael Van Sickler, *Governor to Launch New Purge of Florida Voter Rolls*, Miami Herald (Aug. 4, 2013), http://www.miamiherald.com/2013/08/04/3538862/governor-to-launch-new-purge-of.html; Amy Sherman, *Many Questions, Few Answers on State's Voter Purge Plan*, Miami Herald, (Oct. 9, 2013), http://www.miamiherald.com/2013/10/09/3680007/many-questions-few-answers-on.html.

[21] Steve Bousquet & Amy Sherman, *Florida Halts Purge of Noncitizens from Voter Rolls*, Tampa Bay Times, (Mar. 27, 2014), http://www.tampabay.com/news/politics/elections/florida-halts-purge-of-noncitizens-from-voter-rolls/2172206.

[22] Lizette Alvarez, *Ruling Revives Florida Review of Voting Rolls*, N.Y. Times, (Aug. 7, 2013), http://www.nytimes.com/2013/08/08/us/ruling-revives-florida-review-of-voting-rolls.html?_r=0.

[23] Marc Caputo, *Feds to Florida: Halt Non-Citizen Voter Purge*, Miami Herald, (May 31, 2012), http://www.miamiherald.com/2012/05/31/2826708/feds-demand-florida-cease-its.html.

[24] Lizette Alvarez, *Ruling Revives Florida Review of Voting Rolls*, N.Y. Times (Aug. 7, 2013), http://www.nytimes.com/2013/08/08/us/ruling-revives-florida-review-of-voting-rolls.html; Rachel Weiner, *Florida's Voter Purge Explained*, Wash. Post (June 18, 2012), http://www.washingtonpost.com/blogs/the-fix/post/floridas-voter-purge-explained/2012/06/18/gJQAhvcNlV_blog.html.

[25] Matt Zapotosky, *Virginia's Democratic Party loses challenge against purge of 38,000 voters from rolls*, Wash. Post (Oct. 18, 2013), http://www.washingtonpost.com/local/virginia-politics/federal-judge-rejects-democratic-challenge-to-virginia-voter-roll-purge/2013/10/18/26235068-3809-11e3-8a0e-4e2cf80831fc_story.html.

[26] *See* Jonathan Brater, *Virginia Offers Lessons for Voter List Maintenance*, Brennan Center for Justice (Nov. 25, 2013), http://www.brennancenter.org/analysis/virginia-offers-lessons-voter-list-maintenance *see also Virginia Removes 40K From Voter Rolls Over Democrats' Objections*, Associated Press (Oct. 17, 2013), http://www.timesdispatch.com/news/state-regional/va-removes-k-from-voter-rolls-over-democrats-objections/article_2d111de4-49de-523b-bd9c-5d93b7c0a00e.html.

[27] Jim Nolan, *Chesterfield registrar delays purge of voter rolls*, Richmond Times-Dispatch (Oct. 9, 2013), http://www.timesdispatch.com/news/local/chesterfield/chesterfield-registrar-delays-purge-of-voter-rolls/article_162e36b5-0be7-5dc8-af9f-48876a167b43.html.

[28] *Arizona v. Inter-Tribal Council of Arizona*, 133 S. Ct. 2247 (2013).

[29] Ariz. Op. Att'y Gen. No. I13-011 (Oct. 7, 2013); *see* Cindy Carcamo, *Arizona officials say rule may keep thousands from voting*, L.A. Times (Oct. 8, 2013), http://articles.latimes.com/2013/oct/08/nation/la-na-ff-arizona-voting-20131009.

[30] *See* Letter from Sandra M. Shelson, Special Assistant Att'y Gen., U.S. Dept. of Justice, to State of Mississippi (Sept. 22, 1997), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/MS-2650.pdf (denying preclearance for a two-tier system, noting that "a similar requirement had led to pronounced discriminatory effects on black voters"). *See Young v. Fordice*, 520 U.S. 273, 275 (1997) (holding that Mississippi needed to seek preclearance for its proposed change to a two-tier system).

[31] *See Section 5 Objection Letters*, Dept. of Justice, *available at* http://www.justice.gov/crt/records/vot/obj_letters/index.php. Unfortunately, because of the loss of Section 5's notice requirement, it is difficult to learn of voting changes at the local level, which typically are not as high profile as the state-level changes. While some local voting changes have come to light, many others (like polling place closures, local election cancellations, and the like) are undoubtedly undiscovered.

[32] Galveston County, Tex., Redistricting Order Establishing Justice of the Peace Precinct Boundaries (Aug. 19, 2013), *available at* http://www.guidrynews.com/13August/23113GalvestonCo.pdf. *See also* Harvey Rice, *Lawsuit says Galveston remap discriminatory*, Houston Chronicle (Aug. 26, 2013), http://www.houstonchronicle.com/news/houston-texas/texas/article/Lawsuit-says-Galveston-remap-discriminatory-4761878.php (paywall only).

[33] Letter from Thomas E. Perez, Assistant Att'y Gen., to James E. Trainor, III, Counsel for Galveston County, Texas (March 5, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/TX/l_120305.pdf

[34] Annette Baird, *Candidates compete for fewer Galveston County justices of peace positions*, Houston Chronicle (Feb. 18, 2014), http://www.chron.com/neighborhood/bayarea/news/article/Candidates-compete-for-fewer-Galveston-County-5245671.php.

[35] *Petteway, et al. v. Galveston County, Texas, et al.*, No. 3:13-cv-308 (S.D. Tex. Aug. 26, 2013).

[36] Sylvia Garcia & Larry Peacock, Garcia, *Peacock: Redistricting proposal targets Hispanic gains*, Houston Chronicle (Nov. 1, 2013), http://www.chron.com/opinion/outlook/article/Garcia-Peacock-Redistricting-proposal-targets-4947300.php.

[37] Letter from Thomas E. Perez, Assistant Att'y Gen., to Dennis R. Dunn, Deputy Att'y Gen., State of Georgia (Dec. 21, 2012), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/l_121221.pdf.

[38] Sandy Hodson, *City Wins Lawsuit over Change in Election Date for Local Offices*, The Augusta Chronicle (May 13, 2004), http://chronicle.augusta.com/news/government/elections/2014-05-13/city-wins-lawsuit-over-change-election-date-local-offices; Maggie Lee, *Macon-Bibb Legislators React After Tuesday Wins*, The Telegraph (Macon,

Ga.) (May 21, 2014), http://www.macon.com/2014/05/21/3109205/macon-bibb-legislators-react-after.html?sp=/99/148/198/415/.

[39] Table of Voter Turnout in General Primary/General Nonpartisan/Special Election (May 20, 2014), Georgia Secretary of State, *available at* http://results.enr.clarityelections.com/GA/51345/132192/en/vt_data.html.

[40] Augusta-Richmond County General Election Results 2010, Augusta-Richmond County Board of Elections, *available at* http://appweb.augustaga.gov/board_elections/voter/electab10ge/totals.asp?RaceID=310.

[41] Some private plaintiffs also raised constitutional and state law claims, which could also be a basis for striking down the law. *See Ortiz, et al. v. State of Texas*, No. 2:13-cv-00348 (S.D. Tex. Nov. 5, 2013), ECF No. 1. The *Ortiz* suit has been consolidated with other challenges to the Texas ID law. Order, *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex., Jan. 10, 2014), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Consolidating.pdf (granting motion to consolidate cases).

[42] *See* Notice of Pending Matters and Submission of Proposed Orders at 8-10, *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex., June 4, 2014), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey3441.pdf.

[43] *See* Joint Status Report Regarding Defs.' and the State Legislators' Doc. Produc. at 4-7, *N.C. State Conference of the NAACP, et al. v. McCrory*, No. 1:13-cv-658 (M.D.N.C. May 22, 2014), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/League168.pdf (listing counsel of record).

[44] *See* Kennie Def.-Intervenors' Mot. For Att'ys' Fees, Expenses, and Costs With Supporting P. & A. at 27, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. Sept. 10, 2013), ECF No. 130.

[45] U.S. Dept. of Justice, *Section Five Changes by Type and Year*, http://www.justice.gov/crt/about/vot/sec_5/changes_10s.php.

[46] *Id.*

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THE STATE OF VOTING IN 2014

By Wendy Weiser and Erik Opsal

Executive Summary

As we approach the 2014 election, America is still in the midst of a high-pitched and often highly partisan battle over voting rights. On one side are politicians passing laws and executive actions that would make it harder for many citizens to vote. This started after the 2010 midterm elections, when new state legislative majorities pushed a wave of laws cracking down on voting. On the other side are groups of voters and advocates pushing back — in the legislatures, at the ballot box, and especially in the courts.

Until recently, the Voting Rights Act was a critical tool in the fight, but the U.S. Supreme Court gutted the law's core protection last year. Since then, a number of states moved forward with controversial voting changes, including those previously blocked under the Voting Rights Act. As most state legislative sessions wind down, the focus shifts to activity in the courts, which are currently considering major challenges to new restrictions across the country.

In short, many Americans face an ever-shifting voting landscape before heading to the polls this November.

In advance of this crucial midterm election, this report details the new voting restrictions put in place over the past few years, the laws that are in place for the first time in 2014, and the major lawsuits that could affect this year's elections. Our key findings include:

- **Since the 2010 election, new voting restrictions are slated to be in place in 22 states.** Unless these restrictions are blocked — and there are court challenges to laws in six of those states — voters in nearly half the country could find it harder to cast a ballot in the 2014 midterm election than they did in 2010. The new laws range from photo ID requirements to early voting cutbacks to voter registration restrictions. Partisanship and race were key factors in this movement. Most restrictions passed through GOP-controlled legislatures and in states with increases in minority turnout.

- **In 15 states, 2014 will be the first major federal election with these new restrictions in place.** Ongoing court cases could affect laws in six of these states.

- **The courts will play a crucial role in 2014, with ongoing suits challenging laws in seven states.** Voting advocates have filed suits in both federal and state courts challenging new restrictions, and those suits are ongoing in seven states — Arizona, Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. There is also an ongoing case in Iowa over administrative action that could restrict voting. More cases are possible as we get closer to the election.

There has also been some positive momentum. Laws to improve the election system and increase voting access passed in 16 states since 2012, and these laws will be in effect in 11 states this November. The most common improvements were online registration and other measures to modernize voter registration, and increased early voting.

Still, this national struggle over voting rights is the greatest in decades. Voters in nearly half the country could head to the polls in November worse off than they were four years ago. This needs to change.

New Laws Restricting the Vote

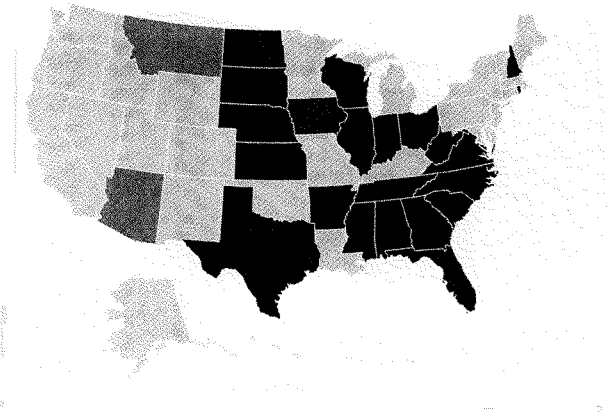
Election laws have long been prone to politicization, but for decades there were no major legislative movements to restrict voting. Indeed, the last major legislative push to cut back on voting rights was after Reconstruction. The first stirrings of a new movement to restrict voting came after the 2000 Florida election debacle. Indiana and Georgia passed restrictive photo ID laws in 2005 and 2006, respectively, and Arizona voters approved a ballot initiative in 2004 requiring registrants to provide documentary proof of citizenship when signing up.

But the 2010 election marked a major shift. From early 2011 until the 2012 election, state lawmakers across the country introduced at least 180 restrictive voting bills in 41 states. By the 2012 election, 19 states passed 27 restrictive voting measures, many of which were overturned or weakened by courts, citizen-led initiatives, and the Department of Justice before the election. States continued to pass voting restrictions in 2013 and 2014.

What is the cumulative effect of this legislative movement? As of now, a few months before the 2014 midterm elections, new voting restrictions are set to be in place in 22 states.[1] Ongoing court cases could affect laws in six of these states.[2] Unless these restrictions are blocked, citizens in nearly half the nation could find it harder to vote this year than in 2010.

Partisanship played a key role. Of the 22 states with new restrictions, 18 passed entirely through GOP-controlled bodies,[4] and Mississippi's photo ID law passed by a voter referendum. Two of the remaining three states — Illinois and Rhode Island — passed much less severe restrictions. According to a recent study from the University of Massachusetts Boston, restrictions were more likely to pass "as the proportion of Republicans in the legislature increased or when a Republican governor was elected."

STATES WITH NEW VOTING RESTRICTIONS SINCE 2010 ELECTION



Click on map for interactive version. Note: This map includes two states — Montana and Arizona — that do not technically fit the title and thus are reflected in light red.[3]

1. Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Mississippi, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. For a detailed description of each state's laws, see our interactive map or this list.
2. Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. There is also a challenge to an Arizona law not reflected here because that law passed before 2010.
3. Montana lawmakers put a referendum on the November ballot to repeal Election Day registration, but that repeal will not actually be in effect this year. An Arizona law requiring documentary proof of citizenship when registering was passed in 2004, but blocked in 2012 for a voter using the federal registration form. In response, Arizona joined Kansas, which has a similar law, in a suit to force the U.S. Election Assistance Commission (EAC) to change the federal form to allow the two states to require such documents. In March 2014, a federal judge ruled the EAC must change the form, but the 10th Circuit Court of Appeals stayed that decision while it considers the appeal. Arizona is included here because until now, the federal form has never been amended to allow for documentary proof of citizenship in any state.
4. By GOP-controlled body, we mean: (1) Both chambers of the legislature were controlled by Republicans and a Republican governor signed the bill, (2) Republicans controlled both chambers and overrode a veto from a Democratic governor, or (3) a Republican governor took executive action without legislative involvement. States in the first category were Alabama, Florida, Georgia, Indiana, Kansas, Nebraska (unicameral legislature with GOP governor), North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Virginia (the GOP lieutenant governor broke a tie between an equally divided Senate), and Wisconsin. States in the second category were Arkansas and New Hampshire. Iowa and Florida fall into the third category.

Race was also a significant factor. Of the 11 states with the highest African-American turnout in 2008, 7 have new restrictions in place.[5] Of the 12 states with the largest Hispanic population growth between 2000 and 2010, 9 passed laws making it harder to vote.[6] And nearly two-thirds of states — or 9 out of 15 — previously covered in whole or in part by Section 5 of the Voting Rights Act because of a history of race discrimination in voting have new restrictions since the 2010 election.[7] Social science studies bear this out. According to the University of Massachusetts Boston study, states with higher minority turnout were more likely to pass restrictive voting laws. A University of California study suggests that legislative support for voter ID laws was motivated by racial bias.

What do these laws look like?

- **Voter ID:** A total of 13 states passed more restrictive voter ID laws between 2011 and 2014, 11 of which are slated to be in effect in 2014.[8] Nine states passed strict photo ID requirements,[9] meaning a citizen cannot cast a ballot that will count without a specific kind of government-issued photo ID. An additional four states passed less strict ID requirements.[10] Eleven percent of Americans do not have government-issued photo ID, according to a Brennan Center study, which has been confirmed by numerous independent studies. Research shows these laws disproportionately harm minorities, low-income individuals, seniors, students, and people with disabilities. In Texas, for example, early data from the state showed that between 600,000 and 800,000 registered voters did not have the kind of photo ID required by the state's law, and that Hispanics were 46 to 120 percent more likely to lack an ID than whites. In North Carolina, estimates show that 318,000 registered voters — one-third of whom are African American — lack a DMV-issued ID.[11]

- **Voter Registration:** A total of 10 states passed laws making it harder for citizens to register to vote between 2011 and 2014.[12] These measures took a variety of forms. Four states[13] have new restrictions on voter registration drives. Nationally, African Americans and Hispanics register through drives at twice the rate as whites.[14] Three states[15] also passed laws requiring registrants to provide documentary proof of citizenship, which as many as 7 percent of Americans do not have readily available. Nebraska and North Carolina eliminated highly-popular same-day registration, and Wisconsin made it harder for people who have moved to stay registered.

- **Early Voting:** Eight states passed laws cutting back on early voting days and hours.[16] These restrictions could exacerbate lines on Election Day and are particularly likely to hurt minority voters. For example, in North Carolina, Department of Justice data show that 7 in 10 African Americans who cast ballots in 2008 voted during the early voting period, and 23 percent of them did so during the week that was cut. Many states eliminated weekend and evening hours, when minority voters are more likely to cast a ballot. According to a study in Ohio in 2008, 56 percent of weekend voters in Cuyahoga County, the state's most populous, were black.

- **Restoring Voting Rights to People with Past Convictions:** Three states also made it harder to restore voting rights for people with past criminal convictions.[17] These laws disproportionately impact African Americans. Nationwide, 7.7 percent of African Americans have lost the right to vote, compared to 1.8 percent of the rest of the population.

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5. Mississippi (73.1 percent), South Carolina (72.5), Wisconsin (70.5), Ohio (70.0), Georgia (68.1), North Carolina (68.1), and Virginia (68.1). *Source: U.S. Census Bureau, Voting and Registration in the Election of November 2008 - Detailed Tables, Table 4b (Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008) http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html.*
6. South Carolina (148 percent growth), Alabama (145), Tennessee (134), Arkansas (114), North Carolina (111), Mississippi (106), South Dakota (103), Georgia (96), and Virginia (92). *Source: Pew Hispanic Center tabulations of U.S. Census Bureau Redistricting_Files-PL_94-171 for states http://assets.pewhispanic.org/files/reports/141.pdf.*
7. Alabama, Florida (partially covered), Georgia, Mississippi, North Carolina (partially covered), South Carolina, South Dakota (partially covered), Texas, and Virginia.
8. Alabama, Arkansas, Kansas, Mississippi, New Hampshire, North Carolina, North Dakota, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. The North Carolina law will not be in effect for 2016, and the Wisconsin law was blocked by the courts in ongoing litigation. Some of these states passed more than one voting restriction and thus appear in other categories as well.
9. Alabama, Arkansas, Kansas, Mississippi, North Carolina, Tennessee, Texas, Virginia, and Wisconsin. The North Carolina law will not be in effect for 2016, and the Wisconsin law was blocked by the courts in ongoing litigation.
10. A photo ID is requested in New Hampshire, Rhode Island, and South Carolina, but there is an affidavit alternative. A non-photo ID is required in North Dakota.
11. A study from the North Carolina Board of Elections estimates 318,643 registered voters lack a DMV-issued photo ID. Approximately one-third of that total (107,681) are African American. Available here: http://moritzlaw.osu.edu/electionlaw/litigation/documents/Largent591.pdf.
12. Alabama, Florida, Illinois, Kansas, Nebraska, North Carolina, Tennessee, Texas, Virginia, and Wisconsin.
13. Florida, Illinois, Texas, and Virginia.
14. Voting Law Changes in 2012, at 20 & 48 (2011), *available at* http://www.brennancenter.org/sites/default/files/legacy/Justice/VRE/Brennan_Voting_Law_V10.pdf; State Restrictions on Voter Registration Drives, at 3 & 9 (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/State%20Restrictions%20on%20Voter%20Registration%20Drives.pdf.
15. Alabama, Kansas, and Tennessee. The Kansas law is only in effect for the state registration form. Alabama and Tennessee election officials have yet to implement their state's laws.
16. Florida, Georgia, Nebraska, North Carolina, Ohio, Tennessee, West Virginia, and Wisconsin.
17. Florida, Iowa, and South Dakota.

Lawsuits Over Voting Restrictions

Voter advocates are fighting many of these new restrictions, especially in court. Voting restrictions are currently being challenged in court in seven states — Arizona, Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. A lawsuit over a voter purge is also ongoing in Iowa. Most of the cases we are watching this year will likely be decided, at least preliminarily, in the coming months and could thus impact the 2014 election.

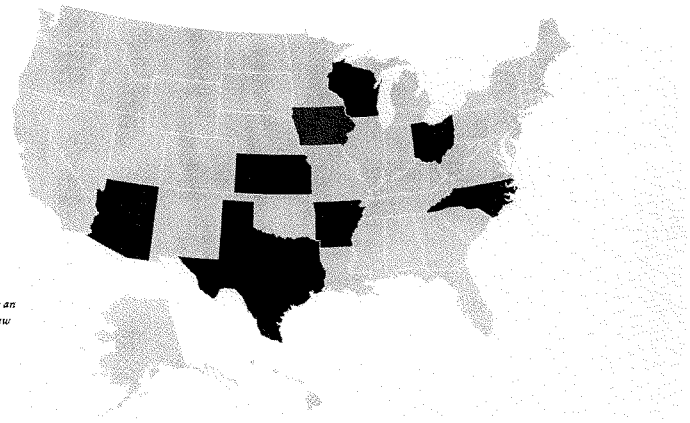
Challenges to restrictive voting laws have had a successful track record to date. Before the 2012 election, 10 courts blocked new restrictions in at least 7 states.[21] Some of those legal fights continued into this year — in Pennsylvania (where a case challenging a strict new photo ID requirement is now over after the governor chose not to appeal a ruling against the law), in Texas (where a court found the state's voter ID law discriminatory under Section 5 of the Voting Rights Act, but then the Supreme Court effectively invalidated Section 5, prompting a new lawsuit challenging the same voter ID law under a different legal provision), and in Arizona (where the Supreme Court ruled against the state's new documentary proof of citizenship requirement for voter registration but left room for the state to sue again to seek a different result).

Over the past few years voters have won decisively in Pennsylvania on voter ID; in Florida on voter registration restrictions, early voting cutbacks, and a voter purge; in Ohio on early voting cutbacks and provisional ballot counting; and in a few cases challenging ballot measure language.

Voters received favorable decisions in ongoing lawsuits in Wisconsin and Arkansas on voter ID and Iowa on voter purges. Voters also won a lawsuit challenging Texas's voter ID law that is now being re-litigated under a different provision of law after the Supreme Court gutted a key provision of the Voting Rights Act.

Voters have also experienced losses — in Tennessee on voter ID, in Texas on voter registration drive restrictions, and in South Carolina on voter ID (though during the course of the litigation, the state interpreted the law in a way that was much less restrictive). All of those laws are in place this year.

MAJOR VOTING LITIGATION THAT COULD IMPACT 2014



Click on map for interactive version. Note: An Iowa suit, reflected in light blue, involves an administrative action, not a law passed by the legislature.

21. Arizona, Florida, Missouri, Ohio, Pennsylvania, Texas, and Wisconsin.

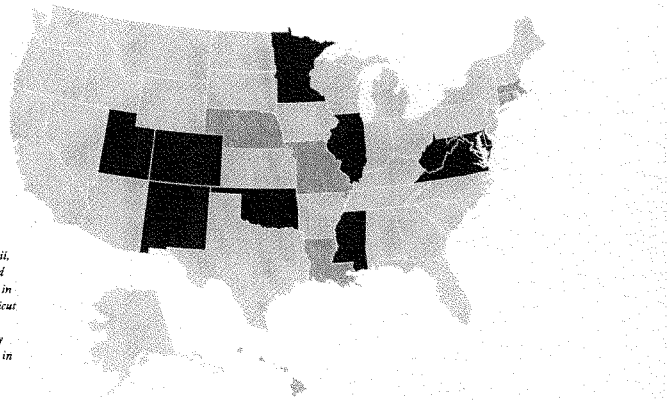
Improving Voting Access

There has also been some positive momentum to improve voting. After long lines marred the 2012 election, dozens of states introduced legislation in 2013 and 2014 to improve access to the polls. Overall, laws to improve the voting process passed in 16 states, and are set to be in effect in 11 states this November.[22] Five of these states also passed voting restrictions.[23]

What do these laws look like?

- **Voter Registration Modernization:** A total of 11 states passed laws to modernize the voter registration system and make it easier for eligible citizens to sign up.[24] (A number of states, like New York, implemented reforms administratively and are not reflected here.) Research shows these upgrades can increase registration rates, efficiency, and accuracy, save money, and curb the potential for fraud.
  - Seven states passed laws creating or upgrading online registration systems.[25]
  - Five states added same-day registration options.[26]
  - Two states passed laws requiring motor vehicle offices to transfer voter registrations electronically to local election offices.[27]
- **Early Voting:** Three states expanded or created early voting opportunities,[28] which can reduce stress on the voting system, lead to shorter lines on Election Day, and improve poll worker performance, among other benefits. Massachusetts's law will not be in effect until 2016. Missouri and Connecticut voters will also consider ballot measures to create early voting periods.
- **Pre-Registration:** Three states passed laws allowing 16- and 17-year-olds to pre-register to vote before turning 18.[29]
- **Restoring Voting Rights to People with Past Convictions:** Delaware passed a constitutional amendment expanding opportunities for people with criminal convictions to regain their right to vote.
- **Easing Voter ID Burdens:** Oklahoma passed a law making its existing photo ID law less restrictive.
- **Access to Ballots:** Colorado expanded access for voters who speak a language other than English. Mississippi and Oklahoma also expanded access to absentee ballots.

STATES THAT EXPANDED VOTING IN 2013 AND 2014



Click on map for interactive version. Note: Laws in Hawaii, Louisiana, Massachusetts, and Nebraska will not be in effect in 2014. Missouri and Connecticut voters will consider ballot measures this year to add early voting. These states are shown in light green.

22. Laws in Colorado, Delaware, Illinois, Maryland, Minnesota, Mississippi, New Mexico, Oklahoma, Utah, Virginia, and West Virginia are slated to be in effect in 2014. Measures in Hawaii, Louisiana, Massachusetts, and Nebraska will be in effect at a later date. Missouri voters will consider a ballot measure this November. Connecticut citizens will also vote on an early voting ballot measure this year, but that bill passed prior to 2013 and is not included in this count. For a detailed description of each state's laws, see our interactive map or this list.
23. Illinois, Nebraska, Mississippi, Virginia, and West Virginia.
24. Colorado, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, Utah, Virginia, and West Virginia.
25. Illinois, Massachusetts, Minnesota, Nebraska, Utah, Virginia, and West Virginia.
26. Colorado, Hawaii, Illinois, Maryland, and Utah. Both Illinois and Utah are pilot programs.
27. Nebraska and New Mexico.
28. Illinois, Maryland, and Massachusetts. Illinois's bill is a pilot program for 2014 only.
29. Colorado, Louisiana, and Massachusetts.

There was also movement on the national level. The bipartisan Presidential Commission on Election Administration released a widely-praised set of recommendations to fix many of the problems persistently plaguing the voting system. These ideas included modernizing voter registration and increasing early voting opportunities. A few states — Hawaii, Illinois, Nebraska, Massachusetts, and Minnesota — adopted some of these reforms in 2014. And in Congress, Republicans and Democrats introduced a bill to strengthen the Voting Rights Act. Unfortunately, that measure appears stalled. Democrats in Congress also introduced a host of bills to modernize the voting system, reduce long lines, and increase access to the polls.

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June 25, 2014

The Honorable Patrick J. Leahy
Chair
Senate Committee on the Judiciary
224 Dirksen
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary
224 Dirksen
Washington, D.C. 20510

Dear Chairman Leahy, Ranking Member Grassley and Members of the Senate Judiciary Committee:

On behalf of The Campaign Legal Center, we applaud the United States Senate Judiciary Committee's decision to hold today's hearing on the Voting Rights Amendment Act of 2014 (S. 1945), and we appreciate the opportunity to submit a statement into the hearing record. Given the consequences of the U.S. Supreme Court's decision in *Shelby County v. Holder* last year, we strongly urge the U.S. Senate to advance and pass this Act without delay.

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization that works in the areas of voting rights, campaign finance, and government ethics. CLC offers nonpartisan analyses of these issues and represents the public interest in various administrative, legislative, and legal proceedings. CLC is committed to promoting a healthy democracy, and an important part of that mission is protecting all Americans' fundamental right to vote.

One year ago today–June 25, 2013–a narrow 5-4 majority of the Supreme Court struck a significant blow to those rights. The Court held that the Section 4(b) coverage formula of the Voting Rights Act of 1965 was unconstitutional. That formula covered states and jurisdictions with histories of racial discrimination in election laws and procedures. Before *Shelby County*, these covered jurisdictions were required to obtain "preclearance" from the U.S. Department of Justice (DOJ) or a three-judge panel of the U.S. District Court for the District of Columbia before implementing any changes in voting laws or practices. For decades, this preclearance regime stopped hundreds of discriminatory voting practices from going into effect and it was critical in advancing the voting rights of all Americans.

Importantly, in *Shelby County*, the Court struck down Section 4(b) because the coverage formula did not reflect "current conditions." The Court then explained that "Congress may draft another formula based on current conditions."

Over the last twelve months, members of Congress have accepted the Court's invitation and have moved swiftly to propose common-sense, modern-day fixes to the Voting Rights Act of 1965. The Voting Rights Amendment Act of 2014 (VRAA), which has bipartisan support, will help ensure that our democracy's most cherished right—the right to vote—is guaranteed for every American citizen. It is time for Congress to take action and enact the VRAA now.

Without a doubt, the Voting Rights Act has been one of the most successful civil rights laws in American history. It has helped Congress enforce the protections of the 14th and 15th Amendments, eradicating the literacy tests, grandfather clauses, and violent intimidation tactics of the Jim Crow era. But while the VRA has resulted in significant progress, new tactics exist today to impede the opportunity of minorities to elect candidates of their choice. Writing for the majority in *Shelby County*, Chief Justice John Roberts stated: "[V]oting discrimination still exists; no one doubts that."

The continuing need for the Voting Rights Act and preclearance is clear from recent events in formerly covered jurisdictions. Take, for example, what is happening in Beaumont, Texas. For decades, Beaumont used single-member districts to select its seven-member school board. In four of the districts, black voters were able to elect the candidates of their choice. Then, in an apparent attempt to dilute black votes and regain control of the school board, certain segments of the white community proposed a change in the method of electing the school board that reduced the number of single-member districts to five and converted two district seats to citywide (or at-large) elections. At-large elections have traditionally been used as a tool to dilute black voting strength, by making it more difficult in a racially polarized electorate for minority voters to elect candidates of their choice.

In 2011, voters in Beaumont approved the new 5-2 voting scheme in a racially polarized election. Whites predominantly voted in favor of the change, and blacks predominantly voted against the change. At the time, because Beaumont was one of the political subdivisions included in the VRA's preclearance regime, the federal government had to pre-clear the change before it could go into effect. The DOJ denied preclearance, finding that the proposed 5-2 redistricting plan would impede the ability of minority voters to elect candidates of their choice. A federal court in Washington also enjoined the change when the white community obtained a state court order requiring the 5-2 plan to go into effect. As a result, Beaumont maintained its seven single-member districts, but this victory was only temporary. Almost immediately after the Supreme Court's decision in *Shelby County*, the white community returned to state court and obtained a decision requiring the school board to implement the 5-2 plan in the next election. Thus, as a direct result of the *Shelby County* decision, the Beaumont school board will use the 5-2 plan that was previously found to impede the ability of minority voters to elect their candidates of choice, unless a lawsuit can stop this discrimination.

Similarly, in other jurisdictions such as Galveston County, Texas, and Pasadena, Texas, officials are implementing or have announced plans to implement discriminatory voting changes that were prohibited before the *Shelby County* decision. In Galveston County, for example, officials acted after the *Shelby County* decision to reduce the number of justice of the peace and constable districts, a plan that had been blocked in the pre-*Shelby County* era. The Department of Justice had found in 2012 that there was "sufficient credible evidence that precludes the

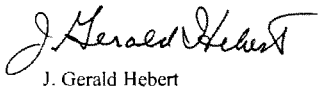
county from establishing that . . . the reduction in the number of justice of the peace/constable districts as well as the redistricting plan to elect those officials will not have a retrogressive effect, and were not motivated by a discriminatory intent." Nevertheless, in spite of this finding, the County instituted the discriminatory changes almost immediately in the wake of *Shelby County*. We have attached the DOJ's objection letters in Beaumont and Galveston County for the Judiciary Committee's reference.

These present instances of discrimination, and other instances that will be submitted for the record, underscore the value of what was lost when the Supreme Court struck down Section 4(b) of the Voting Rights Act – and emphasize the importance of advancing the VRAA today.

Failure to update and amend the Voting Rights Act will make it difficult to fully combat voting discrimination. Although Section 2 of the Act gives voters the opportunity to challenge discriminatory laws, those laws can take effect quickly – often before voters and potential litigants know these laws even exist. Section 2 cases can also take years to litigate, meaning that discriminatory laws may be in effect for several elections before courts can determine whether those laws are valid. Moreover, without federal review, private citizens must shoulder the heavy financial burden of lawsuits to try to block discriminatory laws. The VRAA offers a modern, flexible, and bipartisan approach in line with the letter and spirit of the Supreme Court's decision in *Shelby County* that will protect minority voters.

Our country has truly come a long way since the Freedom Summer murders fifty years ago this month, when three brave men – James Earl Chaney, Andrew Goodman, and Mickey Schwerner – were murdered by white supremacists after trying to register black Mississippians to vote. But the fight for voting rights is not over. Present instances of discrimination persist and they emphasize the need for Members of Congress to advance and pass the Voting Rights Amendment Act of 2014. Today's hearing in the Senate Judiciary Committee is a good start, and we again appreciate Chairman Leahy's efforts to renew the conversation to protect minority voting rights. Although we cannot undo the damage that the Court's decision in *Shelby County* has already caused in a short twelve months, we can again strengthen protections for voting rights to ensure that all Americans have the opportunity to exercise their fundamental right to vote.

Sincerely,



J. Gerald Hebert
Executive Director
Campaign Legal Center

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

December 21, 2012

Ms. Melody Thomas Chappell, Esq.
Wells, Peyton, Greenberg & Hunt
P.O. Box 3708
Beaumont, Texas 77704-3708

Dear Ms. Chappell:

This refers to the change in the method of election from seven single-member districts to five single-member districts with two at-large positions, and the 2012 board of trustee districting plan, for Beaumont Independent School District in Jefferson County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our October 1, 2012, request for additional information on October 22, 2012, and additional information was received through December 10, 2012.

We have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. Under Section 5 of the Voting Rights Act, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes "neither [have] the purpose nor will have the effect" of denying or abridging the right to vote on account of race, color, or membership in language minority group. *Georgia* v. *United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52. The voting changes at issue must be measured against the benchmark practice to determine whether they would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

According to the 2010 Census, the district had a total population of 132,225 persons, of whom 60,581 (45.8%) were African American and 19,459 (14.7%) were Hispanic. Its voting age population was 101,912, of whom 44,085 (43.3%) were black, and 13,734 (13.5%) were Hispanic. The vast majority of the district's population resides in the City of Beaumont, which has a similar demographic profile.

Prior to 1985, five of the seven board members were elected from single-member district and two were elected at large. In 1985, a federal court devised a single-member district plan for the election of all seven board members. *United States* v. *Texas Education Agency (Beaumont*

Independent School District), Cause No. 6819-CA (E.D. Tex. Apr. 22, 1985). That method of election has been used continuously since then and is the benchmark for our analysis here. It provides African American voters with the ability to elect four members to the district's board.

The district proposes to elect two of its members at large and five members from single-member districts. Our analysis shows that a fairly-drawn districting plan with five districts will provide African American voters with the ability to elect candidates of choice in three of the districts. Accordingly, to meet its burden that the change does not result in impermissible retrogression, the district must establish that the at-large method for the two remaining seats does not preclude African American voters from electing a candidate of choice to office. For the reasons discussed below, the district has failed to do so.

Aside from various tax elections, the May 2011 referendum is the only recent school district election in which the electorate would be identical to that of an at-large position on the school board. There is overwhelming evidence that both the campaign leading to the election as well as the issue itself carried racial overtones with the genesis of the change and virtually all of its support coming from white residents. A statistical analysis of the election confirms the extreme racial polarization that the issue created. Black voters cohesively voted to maintain the current method of election and white voters voted cohesively for the proposed change. We estimate over 90 percent of white voters, but less than 10 percent of black voters, supported the change.

An examination of at-large elections for the Beaumont City Council also proved informative because of the overlap in population and the similarity in demographics. There, we found racial cohesion among black voters at levels similar to those identified in the school district election. More significantly, we found significant racial polarization and the same unwillingness of white voters to support a black-preferred candidate, with little evidence of crossover voting by white voters in the city's at-large council races.

In the past ten years, numerous black-preferred candidates have sought municipal office in the city. With the sole exception of one candidate, African Americans have been unable to elect candidates of choice to the city's at-large council positions. Our analyses showed that this candidate only received about eight percent of the non-black vote in both the 2007 and 2011 elections, placing second to last among non-black voters in 2011. And anecdotal evidence suggests that even this minimal level of crossover voting was the result of an out-of-the-ordinary public endorsement and television appearance by white voters on behalf of this candidate; other black-preferred candidates have failed to achieve more than three percent of the non-black vote in at-large city council elections. In addition, our analyses demonstrate that this candidate's election was dependent on single-shot voting, in which black voters withheld their votes for the second at-large city council seat in both 2007 and 2011, voting only for this candidate. The statistical and anecdotal evidence therefore confirm that this one candidate's experience is not indicative of black-preferred candidates' prospects for success in at-large elections. *See Texas* v. *United States*, 2012 WL 3671924, at *22-23 (D.D.C. Aug. 28, 2012) (three-judge court) (isolated electoral success by one candidate is insufficient to demonstrate that minority voters have the consistent ability to elect their preferred candidates of choice).

The school district has failed to establish that implementing the proposed method of election will offer the same ability to African American voters to exercise the electoral franchise that they enjoy currently. Black voters now have the ability to elect four of the seven board members; the proposed plan provides that ability for only three positions. In order for black voters to maintain their current level of voting strength under the new configuration, they must be able to elect a candidate of choice from one at-large position. The evidence, however, offers little, if any, support for that conclusion.

We note as well that this is not the first occasion on which the school district has proposed the use of at-large elections in a manner that would cause a retrogression in black voting strength; on October 20, 1983, the Attorney General objected to the proposed consolidation of the Beaumont and South Park school districts on the ground that the change would "have a significant adverse impact on the ability of blacks to elect representatives of their choice to the surviving school board under an at-large election system."

As detailed above, it is not likely that a black-preferred candidate would successfully be elected in an at-large contest. Based upon that analysis I cannot conclude, as I must under Section 5, that the district has met its burden of establishing the absence of a retrogressive effect. Accordingly, I must interpose an objection to the proposed change in method of election for the Beaumont Independent School District from seven single-member districts to five single-member districts with two at-large positions. Because the district has failed to meet its burden of demonstrating that this proposed change will not have a retrogressive effect, we do not make any determination as to whether the district has established that the proposed change was adopted with no discriminatory purpose.

Because the adoption of the districting plan is dependent upon the objected-to proposed change in method of election, it would be inappropriate for the Attorney General to make a determination on this related change. 28 C.F.R. 51.22.

Under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, unless and until the objection is withdrawn or a judgment from the federal district court is obtained, the changes continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 0 5 2012

James E. Trainor III, Esq.
Beirne, Maynard & Parsons
401 West 15th Street, Suite 845
Austin, Texas 78701

Dear Mr. Trainor:

This refers to the 2011 redistricting plan for the commissioners court, the reduction in the number of justices of the peace from nine to five and the number of constables from eight to five, and the 2011 redistricting plan for the justices of the peace/constable precincts for Galveston County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our December 19, 2011, request for additional information on January 4, 2012; additional information was received on February 6, 2012.

We have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the county's previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group. *Georgia* v. *United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52(c). For the reasons discussed below, I cannot conclude that the county's burden under Section 5 has been sustained as to the submitted changes. Therefore, on behalf of the Attorney General, I must object to the changes currently pending before the Department.

According to the 2010 Census, Galveston County has a total population of 291,309 persons, of whom 40,332 (13.8%) are African American and 65,270 (22.4%) are Hispanic. Of the 217,142 persons who are of voting age, 28,716 (13.2%) are black persons and 42,649 (19.6%) are Hispanic. The five-year American Community Survey (2006-2010) estimates that African Americans are 14.3 percent of the citizen voting age population and Hispanic persons comprise 14.8 percent. The commissioners court is elected from four single-member districts with a county judge elected at large. With regard to the election for justices of the peace and constables, there are eight election precincts under the benchmark method. Each elects one

person to each position, except for Precinct 8, which elects two justices of the peace. The county has proposed to reduce the number of election precincts to five, with a justice of the peace and a constable elected from each.

We turn first to the commissioners court redistricting plan. With respect to the county's ability to demonstrate that the commissioners court plan was adopted without a prohibited purpose, the starting point of our analysis is the framework established in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There, the Court provided a non-exhaustive list of factors that bear on the determination of discriminatory purpose, including the impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors it has otherwise considered important or controlling in similar decisions. *Id.* at 266-68.

Based on our analysis of the evidence, we have concluded that the county has not met its burden of showing that the proposed plan was adopted with no discriminatory purpose. We start with the county's failure to adopt, as it had in previous redistricting cycles, a set of criteria by which the county would be guided in the redistricting process. The evidence establishes that this was a deliberate decision by the county to avoid being held to a procedural or substantive standard of conduct with regard to the manner in which it complied with the constitutional and statutory requirements of redistricting.

The evidence also indicates that the process may have been characterized by the deliberate exclusion from meaningful involvement in key deliberations of the only member of the commissioners court elected from a minority ability-to-elect precinct. For example, the county judge and several – but not all – of the commissioners had prior knowledge that a significant revision to the pending proposed map was made on August 29, 2011, and would be presented at the following day's meeting at which the final vote on the redistricting plans would be taken. This is particularly noteworthy because the commissioner for Precinct 3, one of two precincts affected by this particular revision, was one of the commissioners not informed about this significant change. Precinct 3 is the only precinct in the county in which minority voters have the ability to elect a candidate of choice, and is the only precinct currently represented by a minority commissioner.

Another factor that bears on a determination of discriminatory purpose is the impact of the decision on minority groups. In this regard, we note that during the current redistricting process, the county relocated the Bolivar Peninsula – a largely white area – from Precinct 1 into Precinct 3. This reduced the overall minority share of the electorate in Precinct 3 by reducing the African American population while increasing both the Hispanic and Anglo populations. In addition, we understand that the Bolivar Peninsula region was one of the areas in the county that was most severely damaged by Hurricane Ike in 2008, and lost several thousand homes. The county received a $93 million grant in 2009 to provide housing repair and replacement options for those residents affected by the hurricane, and has announced its intention to spend most of the grant funds restoring the housing stock on Bolivar Peninsula. Because the peninsula's population has historically been overwhelmingly Anglo, and in light of the Census Bureau's

estimated occupancy rate for housing units in the Bolivar Census County Division of 2.2 persons per household, there is a factual basis to conclude that as the housing stock on the peninsula is replenished and the population increases, the result will be a significant increase in the Anglo population percentage. In the context of racially polarized elections in the county, this will lead to the concomitant loss of the ability of minority voters to elect a candidate of choice to office in Precinct 3. *Reno* v. *Bossier Parish School Board*, 528 U.S. 320, 340 (2000) ("Section 5 looks not only to the present effects of changes but to their future effects as well.") (citing *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 471 (1987)).

That this retrogression in minority voting strength in Precinct 3 is neither required nor inevitable heightens our concern that the county has not met its burden of showing that the change was not motivated by any discriminatory purpose. Both Precincts 1 and 3 were underpopulated, and it would have been far more logical to shift population from a precinct that was overpopulated than to move population between two precincts that were underpopulated. In that regard, benchmark Precinct 4 was overpopulated by 23.5 percent over the ideal, and its excess population could have been used to address underpopulation in the other precincts. Moreover, according to the information that the county supplied, its redistricting consultant made the change based on something he read in the newspaper about the public wanting Bolivar Peninsula and Galveston Island to be joined into a commissioner precinct; but a review of all the audio and video recordings of the public meetings shows that only one person made such a comment.

Based on these factors, we have concluded that the county has not met its burden of demonstrating that the proposed commissioners court redistricting plan was adopted with no discriminatory purpose. We note as well, however, that based on the facts as identified above, the county has also failed to carry its burden of showing that the proposed commissioners court plan does not have a retrogressive effect.

The voting change at issue must be measured against the benchmark practice to determine whether it would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). Our statistical analysis indicates that minority voters possess the ability to elect a candidate of choice in benchmark Precinct 3, and that ability has existed for at least the past decade.

As noted, the county's decision to relocate the Bolivar Peninsula from Precinct 1 into Precinct 3 had the effect of reducing the African American share of the electorate in Precinct 3, while increasing both the Hispanic and Anglo populations. In specific terms, the county decreased the black voting age population percentage from 35.2 to 30.8 percent and increased the Hispanic voting age population 25.7 to 27.8 percent, resulting in an overall decrease of 2.3 percentage points in the precinct's minority voting age population. There is sufficient credible evidence to prevent the county from establishing the absence of a retrogressive effect as to this change, especially in light of the anticipated and significant population return of Anglo residents to the Bolivar Peninsula, as discussed further above.

We turn next to the proposed reduction in the number of election precincts for the justice of the peace and constable, and the 2011 redistricting plan for the justices of the peace/constable precincts. With regard to the election for justices of the peace and constables, there are eight election precincts under the benchmark method. Each elects one person to each position, except for Precinct 8, which elects two justices of the peace. The county has proposed to reduce the number of election precincts to five, with a justice of the peace and a constable elected from each.

Our analysis of the benchmark justice of the peace and constable districts indicates that minority voters possess the ability to elect candidates of choice in Precincts 2, 3 and 5. With respect to Precincts 2 and 3, this ability is the continuing result of the court's order in *Hoskins* v. *Hannah*, Civil Action No. G-92-12 (S.D. Tex. Aug. 19, 1992), which created these two districts. Following the proposed consolidation and reduction in the number of precincts, only Precinct 3 would provide that requisite ability to elect. In the simplest terms, under the benchmark plan, minority voters in three districts could elect candidates of choice; but under the proposed plan, that ability is reduced to one.

In addition, we understand that the county's position is that the court's order in *Hoskins* v. *Hannah*, which required the county to maintain two minority ability to elect districts for the election of justices of the peace and constables, has expired. If it has, then it is significant that in the first redistricting following the expiration of that order, the county chose to reduce the number of minority ability to elect districts to one. A stated justification for the proposed consolidation was to save money, yet, according to the county judge's statements, the county conducted no analysis of the financial impact of this decision. The record also indicates that county residents expressed a concern during the redistricting process that the three precincts electing minority officials were consolidated and the precincts with white representatives were left alone. The record is devoid of any response by the county.

In sum, there is sufficient credible evidence that precludes the county from establishing, as it must under Section 5, that the reduction of the number of justice of the peace/constable districts as well as the redistricting plan to elect those officials will not have a retrogressive effect, and were not motivated by a discriminatory intent.

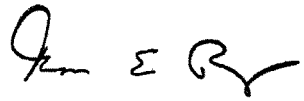
Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia* v. *United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the county's 2011 redistricting plan for the commissioners court and the reduction in the number of justice of the peace and constable districts as well as the redistricting plan for those offices.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the

objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted changes continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that Galveston County plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202/514-8690), a deputy chief in the Voting Section.

Because the Section 5 status of the redistricting plan for the commissioners court is presently before the United States District Court for the District of Columbia in *Galveston County* v. *United States*, No. 1:11-cv-1837 (D.D.C.), we are providing the Court and counsel of record with a copy of this letter. Similarly, the status of both the commissioners court and the justice of the peace and constable plans under Section 5 is a relevant fact in *Petteway* v. *Galveston County*, No. 3:11-cv-00511 (S.D. Tex). Accordingly, we are also providing that Court and counsel of record with a copy of this letter.

Sincerely,



Thomas E. Perez
Assistant Attorney General

United States Senate Committee on the Judiciary

Statement for the Record at the Hearing:

***"The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to* Shelby County v. Holder"**

Miles Rapoport
President
Common Cause

June 25, 2014

Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. Protecting the right to vote against discrimination is fundamental to a democracy where every vote is equal and sacred. Mr. Chairman, on behalf of our 400,000 members and supporters, we appreciate the opportunity to submit this statement for the record.

One year ago this morning, the Supreme Court issued its shameful decision in *Shelby County, Alabama v. Holder*. In striking down Section 4 of the Voting Rights Act, the Court gutted a core protection against discrimination, leaving a hollow shell of Section 5's preclearance provision that existed for decades as a bulwark against insidious efforts to block citizens of color from voting.

Racial discrimination against voters continues to subvert the integrity of our democracy.[1] That was true when Congress overwhelmingly reauthorized the Voting Rights Act in 2006 with strong bipartisan support, it was true one year ago when the Court handed down its 5-4 decision in *Shelby County* and it remains true twelve months later.[2] Even Chief Justice Roberts, ruling

[1] Kara Brandeisky and Mike Tigas, *Everything That's Happened Since the Supreme Court Ruled on Voting Rights Act*, PROPUBLICA, Nov. 1, 2013, http://www.propublica.org/article/voting-rights-by-state-map.
[2] For a comprehensive review of voting rights violations since 2000 and new laws after the decision last June, *see* THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE PERSISTENT CHALLENGE OF VOTING DISCRIMINATION: A STUDY OF RECENT VOTING RIGHTS VIOLATIONS BY STATE, June 2014, http://www.civilrights.org/press/2014/Racial-Discrimination-in-Voting-Whitepaper.pdf.

that the previous preclearance formula was unconstitutional, wrote that "voting discrimination still exists; no one doubts that."[3]

We urge this Committee and the Senate to approve the Voting Rights Amendment Act, S. 1945, swiftly. This bill is a measured legislative response to the *Shelby County* decision and conforms closely to the Court's reasoning. In addition to providing new protections for voters in all 50 states, the bill establishes a new modern formula to determine which jurisdictions will be subject to Section 5's pre-clearance mechanisms (which remain undisturbed, but rely on a formula that is no longer in place). This will stop the implementation of racially discriminatory voting changes before they occur in jurisdictions with a recent history of voting rights violations.

In her dissent to *Shelby County*, Justice Ginsburg wrote that "[t]hrowing out pre-clearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[4] Unfortunately, it is still raining, and voters no longer have an adequate umbrella. Discrimination continues to mar our democracy.

Soon after *Shelby County*, some jurisdictions previously subject to preclearance began implementing laws that will make it harder for certain minority populations to vote, even though the Department of Justice and federal courts previously denied preclearance to those very laws.[5] For example, the Attorney General of Texas announced hours after the Supreme Court's decision that the state would move forward immediately with two restrictive voting measures that federal courts previously rejected.[6] This included Texas's stringent voter identification law which had previously failed to obtain preclearance because it would disproportionally affect African American and Latino voters, as well as gerrymandered redistricting maps charged with being discriminatory in both purpose and effect.[7]

Similarly, Alabama passed a voter identification law in 2011 but did not submit it for preclearance because it was then unlikely to obtain approval due to its discriminatory effects.[8]

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[3] *Shelby County, Alabam v. Holder*, 133 S. Ct. 2612, 2619 (2013).
[4] *Id.* at 2650 (Ginsburg, J., dissenting).
[5] Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 5, 2013, http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html?pagewanted=all.
[6] *Id.*
[7] *Id.*; Sarah Kellogg, *Voting Rights Act Post*-Shelby County, WASHINGTON LAWYER, Dec. 2013, http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/december-2013-voting-rights.cfm.
[8] THE NEW YORKER, "Interactive Map: The War on Voting Rights," Feb. 12, 2014, http://www.newyorker.com/online/blogs/newsdesk/2014/02/interactive-map-the-war-on-voting-rights.html.

Post-*Shelby County,* Alabama implemented the law. It was in place for the June 2014 primary election where pollworkers turned 93-year old Willie Mims away from voting (even with a provisional ballot) despite having voted in every past election for as long as the records exist.[9] Ms. Mims, who is black, no longer drives and no longer has a license to use as identification. She is not unlike many other voters of color who are more likely than whites to lack the specific form of voter identification required to cast a ballot.[10] Mississippi and South Carolina also passed voter identification laws before the decision that they moved forward implementing after *Shelby County*. The laws will disproportionally affect minority voters. Preclearance would have served as a backstop for further review.[11]

Other jurisdictions passed new, more restrictive laws after the Supreme Court struck down the preclearance formula. North Carolina is the most egregious example, where just weeks after the Court's ruling, the state legislature eliminated same-day voter registration, eliminated a week of early voting, ended pre-registration for 16- and 17-year olds, introduced stringent voter identification requirements, and eliminated out-of-precinct voting, among other changes.[12] The pending Justice Department lawsuit details numerous ways that North Carolina's entire package of voting limitations disproportionately affects minority voters, including the 71 percent of African American voters who voted during the early voting period in 2012 and the disproportionate number that utilized same-day voter registration and lack the requisite photo identification.[13] According to one analysis, "African Americans were 22 percent of registered voters in 2012 [in North Carolina], but they cast 34 percent of the Same-Day Registration ballots for new voters, 33 percent of the ballots cast in the first week of the Early Voting, 30 percent of the out-of-precinct ballots cast on Election Day and 43 percent of the ballots cast on the now eliminated first Sunday of Early Voting. They are 34 percent of the registered voters who do not

[9] Steve Benen, *ID Law Blocks 93-year-old Voter in Alabama*, MSNBC, Jun. 3, 2014, http://www.msnbc.com/rachel-maddow-show/id-law-blocks-93-year-old-voter-alabama.
[10] Wendy R. Weiser, Erik Opsal, THE STATE OF VOTING IN 2014, BRENNAN CENTER FOR JUSTICE, Jun. 17, 2014, http://www.brennancenter.org/sites/default/files/analysis/Restrictive_Appendix_Post-2010.pdf.
[11] *Id.*
[12] Democracy North Carolina, *Summary of North Carolina's New Voting Law*, August 2013, http://democracy-nc.org/downloads/NewVotingLawSummaryAug2013.pdf.
[13] Complaint, *United States v. North Carolina*, No. 13-cv-861 (M.D.N.C. filed Sept. 30, 2013); Maya Rhodan, *Obama Administration Targets North Carolina Voting Law*, TIME, Sept. 30, 2013, http://swampland.time.com/2013/09/30/obama-administration-targets-north-carolina-voting-law.

appear to have a DMV license of NC photo ID."[14] Common Cause's North Carolina chapter is a party to ongoing litigation challenging the constitutionality of North Carolina's new law.[15]

In another example at the local level, Georgia lawmakers changed the date of the elections for the city council of Augusta from November to June, a time well known for having lower turnout among African American voters.[16] A jurisdiction in Pasadena, Texas is moving from single-district to at-large elections for council members, making it more difficult for minority candidates to win office.[17] Such tactics date back to the Jim Crow era.

Additionally, several states are initiating or reenacting programs to purge their voter rolls of allegedly non-citizen voters. Florida is using the federal SAVE database (Systematic Alien Verification for Entitlements) to remove thousands of names from their voter lists.[18] Using the SAVE system to verify voting rolls risks disenfranchising eligible voters who are in fact citizens because the system was never designed to be used for such a purpose. It is notoriously unreliable for voter list maintenance. Past uses of the system resulted in disproportionate targeting of Latino voters and many voters flagged as non-citizens were later able to demonstrate that they were in fact citizens.[19] In Virginia more than 40,000 voters were purged just weeks before the November gubernatorial elections in 2013, even though local election administrators voiced their concerns that many names of these individuals were in fact citizens eligible to vote.[20]

Respectfully, the time for Congress to act is now. The need is urgent. What remains of the Voting Rights Act is inadequate to fully address the problem of racial discrimination in voting. Section 2 provides critical remedies, but bringing such litigation is often costly, time-consuming and does not provide the best tools to stop discrimination before it occurs. Justice Ginsburg wrote in her dissent that *Shelby County* upended "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history."[21]

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[14] Bob Hall, *Why NC's Voter ID Law is Unfair*, op-d, Oct. 15, 2013, NEWS & OBSERVER, http://www.newsobserver.com/2013/10/15/3284031/why-ncs-voter-id-law-is-unfair.html.
[15] *League of Women Voters et al. v. North Carolina et al.*, No. 1:13-cv-00660 (M.D.N.C. filed Aug. 12, 2013).
[16] Zachary Roth, *Voting Rights in Danger One Year After Shelby County Supreme Court Ruling*, MSNBC, Jun. 23, 2014, http://www.msnbc.com/msnbc/one-year-after-shelby-county-ruling-voting-rights-are-danger.
[17] *Id.*
[18] Ashley Lopez, *Secretary of State Prepares New Voter Purge*, FLORIDA CENTER FOR INVESTIGATIVE REPORTING, Aug. 6, 2013, http://fcir.org/2013/08/06/rick-scott-voter-purge.
[19] *Id.*
[20] Reid Wilson, *Virginia Election Officials Purging Almost 40,000 Voters*, WASHINGTON POST, Oct. 17, 2013 http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/17/virginia-election-officials-purging-almost-40000-voters/.
[21] *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting).

As the record demonstrates, the Voting Rights Amendment Act is similarly amply justified. Moreover, it comports with the Court's jurisprudence in a manner that will advance our shared commitment to a vibrant, open, fair and participatory democracy for all Americans.

We thank you for the opportunity to submit this statement for the record.

June 25, 2014

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

Re: Jewish Organizations Support the Voting Rights Amendment Act

Dear Chairman Leahy and Ranking Member Grassley:

As organizations that collectively represent tens of millions of diverse people of faith across the United States, we write to share our strong support for the Voting Rights Amendment Act of 2014 (S.1945) and urge its swift passage by both chambers of Congress.

Many people of faith proudly fought for the Voting Rights Act (VRA) of 1965, which took historic steps to prohibit the discriminatory voting practices that denied and abridged the rights of so many in our communities. The Supreme Court's 2013 decision in *Shelby County v. Holder*, which stripped critical protections for voters in striking down a key provision of the VRA, reminds us that our work is far from complete.

The teachings of our respective faiths may diverge on issues of theology and practice, but all speak clearly of the imperative to pursue justice and treat each and every human being with dignity and respect. We are united in standing up for those most at risk of having their voices silenced at the ballot box. We are inspired to do what we can to protect the right of each individual to play a role in shaping the future of our cities, towns, states and nation. What is at stake in this fight is the very nature of our society, whether we can truly call ourselves a democracy in which each citizen can cast a vote to choose our leaders and shape the direction of our country.

Chief Justice Roberts called upon Congress to update the Voting Rights Act. Every day that passes without Congressional action brings new voting procedures unreported at best and outright discriminatory at worst. This bill is not perfect. We remain concerned that voter ID laws are treated differently from other potentially discriminatory policies and that a "known practices" formula, which would provide recourse against some of the most common discriminatory practices, is not included. Yet, we are united in the belief that now is the time to build on the critical tools in this legislation and stop discriminatory voting practices wherever they occur.

Voting rights legislation has long been—and continues to be—a shining example of bipartisan unity. We urge you to support the Voting Rights Amendment Act of 2014 (S.1945) and see that its modern, commonsense provisions are swiftly enacted. Thank you for your consideration.

Sincerely,

Am Kolel Jewish Renewal Community of Greater Washington
Ameinu
American Baptist Churches U.S.A.
American Baptist Home Mission Societies
American Friends Service Committee
American Jewish Committee
Amir
Anti-Defamation League
AVODAH: The Jewish Service Corps
B'nai B'rith International
Bend the Arc: A Jewish Partnership for Justice
Bernardine Franciscan Sisters, Reading, PA
Capuchin Franciscans of the Province of St. Mary (CT, ME, NH, NY, VT)
Community of Christ
Conference of National Black Churches (CNBC)
Congregation Beit Simchat Torah, New York, NY
Crossroad Bible Institute
Disciples Center for Public Witness (Disciples of Christ)
Disciples Home Missions of the Christian Church (Disciples of Christ)
Disciples Justice Action Network
Evangelical Lutheran Church in America
Faith in Public Life
Franciscan Action Network
Franciscan Friars, TOR, Province of the Immaculate Conception
Franciscans for Justice
Friends Committee on National Legislation
Global Faith and Justice Project, Santa Fe, NM
Global Justice Institute
Hindu American Foundation
Interfaith Communities United for Justice and Peace
International Council of Community Churches
Islamic Society of North America
Jewish Alliance for Law and Social Action (JALSA)
Jewish Community Action
Jewish Community Relations Council of Greater Boston
Jewish Council for Public Affairs
Jewish Council on Urban Affairs
Jewish Labor Committee
Jewish Reconstructionist Communities
Jewish Women International
Jews for Racial and Economic Justice
Jews United for Justice
Keshet
Leadership Conference of Women Religious
Leadership Team of the Felician Sisters of North America

Leadership Team, Sisters of St. Francis of Tiffin, OH
Mennonite Central Committee U.S. Washington Office
Metropolitan Community Churches
More Light Presbyterians
National Council of Churches, U.S.A.
National Council of Jewish Women
National Council of Jewish Women, Austin Section
National Council of Jewish Women, Maine Section
National Council of Jewish Women, Peninsula Section
National Council of Jewish Women, Seattle Section
National Council of Jewish Women, Texas State Policy Advocacy Network
National Gay and Lesbian Task Force's Institute for Welcoming Resources
NETWORK, A National Catholic Social Justice Lobby
Pax Christi USA
PICO National Network
Presbyterian Church (U.S.A.)
Progressive National Baptist Convention, Inc.
Province of St. Joseph of the Capuchin Order, Detroit, MI
Rabbinical Assembly
Reconciliation Ministries of the Christian Church (Disciples of Christ)
Reconciling Ministries Network
ReconcilingWorks: Lutherans for Full Participation
Reconstructionist Rabbinical College
Religious Institute
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Council on Religion and Education (SCORE)
Sisters of St. Francis of Philadelphia, PA
Sisters of St. Francis, Sylvania, OH
Sojourners
Surat Initiative
The Association of Welcoming & Affirming Baptists
The Fellowship of Affirming Ministries
The Solomon Project
The Workmen's Circle/Arbeter Ring
Union for Reform Judaism
Unitarian Universalist Association
United Church of Christ, Justice and Witness Ministries
United Methodist Church-General Board of Church and Society
UNITED SIKHS
Uri L'tzedek
Valley Interfaith Council
Wheaton Franciscans, Wheaton, IL
Women's Alliance for Theology, Ethics and Ritual (WATER)

The Office of Secretary of State

Brian P. Kemp
SECRETARY OF STATE

June 20, 2014

Via U.S. and Electronic Mail

The Honorable Patrick Leahy
437 Russell Senate Office Building
Washington, D.C. 20510

Re: Voting Rights Amendment Act of 2014

Dear Chairman Leahy:

It is my understanding that the Senate Judiciary Committee will hold a hearing on June 25th to discuss the Voting Rights Amendment Act. My office has reviewed Senator Leahy's bill as well as Representative Sensenbrenner's bill, and I am writing to register my serious concerns with them.

I have taken the consistent position that any federal laws regarding elections should be uniform throughout the United States. Our Constitution and Section Two of the Voting Rights Act prohibit any form of racial discrimination within the democratic process and apply equally to all states. The Voting Rights Act is still intact and it is my sacred duty to uphold it. I have full faith that the State of Georgia will continue to abide by it. The proposed legislation ignores the tremendous progress that Georgia and the rest of the nation have made in the past 50 years and seeks to reinstate an outdated and obsolete formula that would cost Georgia taxpayers a significant amount in time, resources, and money.

Georgia would be subject to pre-clearance under the proposed bill due to previous "voting rights violations" of Section 4 of the Voting Rights Act—the section that was struck down as unconstitutional in *Shelby County v. Holder*. However, these "voting rights violations" are not limited to findings of discriminatory intent. They include any instance where the Department of Justice—under the old, unconstitutional formula—interposed an objection that was not later overturned by a court. Basing pre-clearance off of past objections with no findings of discriminatory intent attempts to resurrect an unconstitutional system. The proposed bill also enshrines the controversial "disparate impact" standard, meaning that states or localities could find themselves under federal control even when there is no evidence of discriminatory intent.

Our research indicates that the "violations" that would place Georgia back under pre-clearance are not state laws that were found to be discriminatory. Rather, the "violations" refer almost exclusively to city

214 State Capitol •Atlanta, Georgia 30334 • (404) 656-2881 • (404) 656-0513 Fax
www.sos.ga.gov

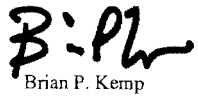
or county redistricting plans or other minor changes. To subject an entire state to the administrative and financial burdens of pre-clearance based on these objections is a remedy in search of a wrong.

I also understand that the proposed bill drastically lowers the standard for litigants seeking a preliminary injunction, allowing political interest groups to control whether our state can implement its own laws and costing our taxpayers significant time, money, and resources.

Pre-clearance was an extraordinary remedy for an extraordinary time. Putting Georgia back under pre-clearance will subject our state to significant financial and administrative burdens, and these burdens are not necessary to prohibit racial discrimination in our democratic process. As Georgia's chief elections official, it is my sacred duty to uphold secure, accessible and fair elections. Pre-clearance does not help us achieve that goal.

In closing, I reiterate my strong belief that every state in the United States of America should be subject to the same federal law. If it is your desire to implement changes to the system, I feel it would be discriminatory to treat four states differently than the other forty-six due to an outdated and arbitrary formula that the Supreme Court has already ruled unconstitutional.

Sincerely,



Brian P. Kemp

cc: The Honorable Saxby Chambliss
The Honorable Johnny Isakson

JAPANESE AMERICAN CITIZENS LEAGUE / JACL
Headquarters: 1765 Sutter Street, San Francisco, CA 94115
DC Office: 1629 K Street, NW, Suite 400, Washington, DC 20006
Phone: (202) 223-1240 • E-mail: pouchida@jacl.org

June 17, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

The Japanese American Citizens League (JACL) writes to express its strong support the passage of the Voting Rights Amendment Act of 2014 (S. 1945). JACL, the oldest and largest Asian American civil and human rights organization in the United States, was founded in 1929, at a time when immigrants from Asia were barred by law from becoming naturalized citizens and gaining rights like voting eligibility. The inability of Japanese American *Issei* to elect representatives who would fight for their rights contributed to the ability of the government to unconstitutionally imprison over 110,000 Japanese Americans – non-citizens and citizens alike – in incarceration camps across the country during World War II in 1942.

While Asian Americans immigrants are now able to become naturalized citizens and participate fully in the democratic process, local attitudes and discriminatory practices sometimes still prevent their voices from being fully heard at the ballot box. Even today, voting districts still often discriminate against minorities like Asian Americans by questioning their voting eligibility based on race, ethnicity, English language capabilities, and other factors that should not determine their participation in choosing our elected officials.

Since the Supreme Court's decision in *Shelby County v. Holder* gutted a key provision of the Voting Rights Act of 1965, we have needed legislation that reinforces the rights of minorities across the country to vote. The bipartisan VRAA bill currently proposed includes many key elements of a modern, flexible and forward-looking Voting Rights Act, and although imperfect, we are committed to moving it forward.

Please feel free to contact our office at (202) 223-1240 or at policy@jacl.org. We look forward to working with you to ensure that all Americans are given an equal voice in making the United States as great as it can be.

Sincerely,

Priscilla A. Ouchida

Priscilla Ouchida
Executive Director

June 25, 2014

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510

Re: Jewish Organizations Support the Voting Rights Amendment Act

Dear Chairman Leahy and Ranking Member Grassley:

As Jewish organizations that collectively represent millions of American Jews, we write to share our strong support for the Voting Rights Amendment Act of 2014 (S.1945) and urge its swift passage by both chambers of Congress.

For the Jewish community, the fight for voting rights is deeply personal. We proudly joined African Americans and many others who marched and fought for the Voting Rights Act (VRA) of 1965, which took monumental steps to prohibit discriminatory voting practices that denied and abridged the rights of so many in our communities.

We are inspired not only by the Jewish leaders of our time, but by our sages of old. Jewish tradition teaches that "a ruler is not to be appointed unless the community is first consulted" (Babylonian Talmud, *B'rachot* 55a). In our nation, that means the full diversity of our citizenry must have the unabridged right to choose their leaders at the ballot box.

The Supreme Court's recent decision in *Shelby County v. Holder*, which struck down a key provision of the VRA and stripped critical protections for voters, reminds us that our work is far from done. Chief Justice Roberts called upon Congress to develop a new formula. Every day that passes without this new formula new voting procedures are proposed and implemented. At best, they are unreported and unscrutinized; at worst they are outright discriminatory.

This bill is not perfect. We remain concerned that voter ID laws are treated differently from other potentially discriminatory policies and that a "known practices" formula, which would provide recourse against some of the most common discriminatory practices, is not included. Yet, we firmly believe that now is the time to build on the critical tools in this legislation by working together to strengthen the overall bill and stop discriminatory voting practices wherever they occur.

Voting rights legislation has long been—and continues to be—a shining example of bipartisan unity. We urge you to support the Voting Rights Amendment Act of 2014 (S.1945) and see that its modern, commonsense provisions are swiftly enacted. Thank you for your consideration.

Sincerely,

Ameinu
American Jewish Committee
Amir
Anti-Defamation League
AVODAH: The Jewish Service Corps
B'nai B'rith International
Bend the Arc: A Jewish Partnership for Justice
Jewish Alliance for Law and Social Action (JALSA)
Jewish Community Action
Jewish Community Relations Council of Greater Boston
Jewish Council for Public Affairs
Jewish Council on Urban Affairs
Jewish Labor Committee
Jewish Reconstructionist Communities
Jewish Women International
Jews for Racial and Economic Justice
Jews United for Justice
Keshet
National Council of Jewish Women
National Council of Jewish Women, Austin Section
National Council of Jewish Women, Maine Section
National Council of Jewish Women, Peninsula Section
National Council of Jewish Women, Seattle Section
National Council of Jewish Women, Texas State Policy Advocacy Network
Rabbinical Assembly
Reconstructionist Rabbinical College
The Solomon Project
The Workmen's Circle/Arbeter Ring
Union for Reform Judaism
Uri L'tzedek

BEND
for justice

MALDEF

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Regional Office
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Suite 100
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Tel: 202.293.2828
Fax: 202.293.2849

July 2, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Re: United States Senate Committee on the Judiciary Hearing Entitled "The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*"

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of MALDEF (Mexican American Legal Defense and Educational Fund), I write in strong support of the Voting Rights Amendments Act (S.1945) as a critical step toward ensuring full protection of the voting rights of all Americans following the Supreme Court's decision in *Shelby County v. Holder* one year ago. Our nation urgently needs a vigorous restoration of the effective and efficient voting rights protection mechanism provided through the Voting Rights Act of 1965 (VRA) Section 5 pre-clearance process. Moving forward the Voting Rights Amendments Act answers that critical need.

As part of MALDEF's mission to protect and promote the civil rights of all Latinos living in the United States, we have, throughout our 46-year history, engaged in litigation and advocacy to defeat attempts to artificially reduce the voting influence of the Latino community. These attempts are increasingly undertaken in response to a growth in the size of the Latino electorate in a jurisdiction to a point viewed as threatening to those, of whatever political affiliation, currently in power. Often, the perceived "threat" is the byproduct of the divergent voting patterns of the Latino electorate, which themselves stem frequently from non-responsiveness in the incumbent political powers to the interests and views of the Latino community. With the growth and dispersion of the Latino community, now the nation's largest minority group, throughout the country, we anticipate an increase in efforts to artificially stem the growth of Latino voter influence.

At MALDEF, our efforts to challenge electoral practices -- including discriminatory redistricting, at-large election systems, restrictions on bilingual elections materials, among others -- in the courts and before policymaking bodies have conclusively demonstrated two points. First, there is no question that voting discrimination still occurs. A recent report that MALDEF completed together with National Association of Latino Elected and Appointed Officials (NALEO) and the

National Hispanic Leadership Agenda provides a non-exhaustive list of ample, recent examples of such discrimination targeted at the Latino community. That report, "Latinos and the VRA: A Modern Fix for Modern-Day Discrimination," has already been submitted for the record by NALEO. Moreover, as explained above, and as the report's examples demonstrate, there is every reason to expect additional attempts in multiple jurisdictions in the future to stem the voting influence of the Latino community.

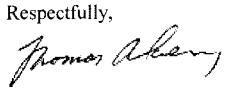
The second, and perhaps even more critical, conclusion from MALDEF's decades of voting rights work is that Section 2 of the VRA, as essential a protection as it is, is inadequate to address the recent and ongoing pattern of voting rights violations. The "totality of the circumstances" test under Section 2, which the Supreme Court endorsed 28 years ago this week in *Thornburg v. Gingles*, is an expensive and time-consuming legal test to meet. While the Section 2 legal test promises a broad and vigorous review of the context in which discriminatory voting schemes arise, the test requires extensive discovery in litigation, the selection and preparation of multiple percipient witnesses, and the retention of at least three to five expert witnesses to complete extensive study and present reports and testimony. These costs in time and resources present a serious obstacle to challenging all of the voting discrimination that occurs nationally under Section 2.

Moreover, these significant costs are borne by both sides, both plaintiffs and defendants. Indeed, if a challenge succeeds, the defending jurisdiction will face the bulk of the costs. While the deep inquiry entailed in the "totality of the circumstances" test is useful and necessary in regards to some challenges to voting practices, an interest in cost avoidance plainly supports a more efficient and streamlined resolution mechanism. Pre-clearance provides that mechanism. While its efficiency may not support its utility in all circumstances, the pre-clearance process can save much unneeded resource expense if employed with respect to those jurisdictions and practices that have proven, over time, recently and historically, to result in significant discriminatory impacts on minority voting rights.

In short, Section 2 does not and cannot suffice to address the void left in the wake of *Shelby County*. Protection of voting rights urgently demands the reinvigoration of the Section 5 pre-clearance mechanism.

In closing, I would like to take this opportunity to urge the committee to move forward the Voting Rights Amendment Act of 2014 and respectfully request that all members of the Senate recommit to the bipartisan tradition that has characterized the history of the Voting Rights Act for decades.

Respectfully,



Thomas A. Saenz
President and General Counsel
MALDEF

National Association of Latino Elected and Appointed Officials

Founder
Hon. Edward R. Roybal†

President
Hon. Alex Padilla
California State Senator

Vice President
Hon. Lori Weinberg
Commissioner, City of Aventura, FL

Treasurer
Hon. Fernando Shipley
Member, Gila Regional Partnership Council, AZ

Secretary
Hon. Robert Peña
School Board Member
Edinburg Consolidated Independent School District, TX

Board of Directors

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President, Hispanic Elected Local Officials

Hon. Eduardo Bhatia
President, National Hispanic Caucus of State Legislators

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Alderman, City of Chicago, IL

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Board President, Azusa Unified School District, CA

Hon. Mario Díaz-Balart
Chair, Congressional Hispanic Conference

Hon. Carmichael Dominguez
Councilor, City of Santa Fe, NM

Hon. John J. Duran
Councilmember, City of West Hollywood, CA

Hon. Juliana Ferreras
Councilmember, City of New York, NY

Hon. Ron Garcia
Councilmember, City of Brea, CA

Hon. Sylvia R. Garcia
Texas State Senator

Hon. Ruben Hinojosa
Chair, Congressional Hispanic Caucus

Hon. Guillermo Z. López
Chair, National Hispanic Caucus
Of School Board Members

Hon. Paul D. López
Councilmember, City of Denver, CO

Hon. Michele Martinez
Councilmember, City of Santa Ana, CA

Hon. Pauline Medrano
Chair, NALEO Educational Fund

Hon. Catherine Miranda
Arizona State Representative

Hon. Joel Navarro
First Vice President, Hispanic Elected Local Officials

Hon. Carmen Piñeyro
Trustee, Village of Freeport, NY

Hon. Raquel Regalado
School Board Member
Miami-Dade County Public Schools, FL

Hon. Robert Rivera
Councilmember, City of Arlington, TX

Hon. Justin Rodriguez
Texas State Representative

Hon. Rosa Romero
Former Utah State Senator

Hon. John Sapien
New Mexico State Senator

Hon. Ana Sol Gutierrez
Maryland State Delegate

Hon. Lilian Tafoya
Board President, Bakersfield City School District, CA

Executive Director
Mr. Arturo Vargas

† Deceased

June 25, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Association of Latino Elected and Appointed Officials (NALEO), I write to express strong support for the Voting Rights Amendment Act of 2014, S. 1945 (VRAA), and to provide the attached report for this Committee's consideration, as evidence of the need for legislation that modernizes the Voting Rights Act (VRA).

NALEO was founded in 1976 as a 501(c)(4) nonprofit membership organization of the nation's Latino elected and appointed officials and their supporters. NALEO is nonpartisan, and its Board and constituents include Republicans, Democrats, and Independents. Today, NALEO is the leading national organization focused on increasing and promoting Latino civic engagement. NALEO's membership forms a nationwide network dedicated to providing strong leadership and Latino participation in the decisions that affect us all. Since the organization's inception, the number of Latino elected leaders in the United States has increased significantly, from just over 3,000 in 1984 to more than 6,000 by 2014.

NALEO's constituents are members of what is now the nation's second largest population group, and represent large segments of this population on municipal, county, state, and federal governing bodies. The Latino electorate is increasing rapidly throughout the country, comprising a growing share of America's voters, and the community's full participation in our political process is necessary to ensure that our democracy remains robust and vital.

As the Latino electorate has grown and spread throughout the nation, some policymakers have shown an increasing willingness to consider and adopt measures that violate principles of fair and equal treatment for all of America's eligible voters. Unfortunately, at this critical time, the U.S. Supreme Court issued its ruling against Section 4 of the VRA in *Shelby County v. Holder*. Nearly one in three Latinos eligible to vote lives in one of the counties and states that, until this ruling, were subject to preclearance requirements in order to protect members of underrepresented communities from policies that would prevent them from voting

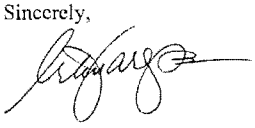
1122 W. Washington Blvd., Third Floor • Los Angeles, CA 90015 • Tel: (213) 747-7606 Fax: (213) 747-7664 • www.naleo.org

or impair their ability to do so. This review process regularly produced findings that jurisdictions intended to discriminate against underrepresented communities when implementing changes, or that the changes had discriminatory effects.

Discrimination in voting has not yet been eradicated, as Chief Justice Roberts acknowledged in his opinion in *Shelby County*, and as our report, "Latinos and the VRA: A Modern Fix for Modern Day Discrimination," demonstrates conclusively. In the context of a growing Latino electorate and enduring threats to the Latino vote, it is indispensable for the future of our nation that the VRA provide effective protection of Latino access to the ballot. The VRAA would accomplish this task, instituting commonsense safeguards to ensure that all U.S. citizens, regardless of race, ethnicity or linguistic ability, are able to fully exercise their fundamental right to participate in elections now and in the years to come. The bill would apply preclearance procedures in a limited number of jurisdictions with very recent and egregious records of violating voting rights laws, and would extend flexible protections inspired by successful aspects of preclearance, such as transparency and disclosure provisions, around the nation.

We urge you to work together, in the spirit of bipartisanship this issue deserves, to advance the VRAA in order to ensure that the promise of America's democracy remains a reality for all, and to support its passage by the full Senate. Thank you for your consideration and attention to the critical importance of fair and equal voting rights.

Sincerely,



Arturo Vargas
Executive Director

cc: Latino Members of Congress

National Asian Pacific American Bar Association | NAPABA

STATEMENT OF

William J. Simonitsch, President

National Asian Pacific American Bar Association

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

Committee Hearing on the Voting Rights Amendment Act

JUNE 24, 2014

Chairman Leahy, Ranking Member Grassley, and members of the Committee: I am honored to submit this testimony for the record on behalf of the National Asian Pacific American Bar Association (NAPABA), regarding today's hearing entitled "**The Voting Rights Act Amendment S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*.**" I commend the Senate Judiciary Committee for holding this critical and timely hearing on the Voting Rights Amendment Act today on the one-year anniversary of the *Shelby County* decision, and I thank Chairman Leahy for his leadership on this issue.

NAPABA is a national bar association representing the interests of over 40,000 Asian American attorneys and almost 70 local Asian Pacific American bar associations. Its members include solo practitioners, large law firm lawyers, corporate counsel, legal service and nonprofit attorneys, judges, and lawyers serving at all levels of government. Through its national network of affiliates and committees, NAPABA provides a strong voice for increased diversity of federal and state judiciaries, advocates for equal opportunity in the workplace, seeks to eliminate anti-Asian Pacific American crime and anti-immigrant sentiment, and promotes professional development of people of color in the legal profession.

In 2006, the Voting Rights Act was reauthorized with nearly unanimous bipartisan support in both the Senate and the House of Representatives. But the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder* struck down Section 4 of the Voting Rights Act, which contained the coverage formula that determines which jurisdictions are subject to Section 5 of the Voting Rights Act. Because of the *Shelby County* decision, we must recommit to addressing the obstacles that voters across our great nation are facing. NAPABA supports the Voting Rights Amendment Act because it is critical that Congress enact a new, modern coverage formula that will protect all Americans, including Asian Pacific Americans, at the polls—particularly those with limited English proficiency. The right to vote is the most fundamental right of our democracy. NAPABA urges both the Senate and House to act expeditiously, before the November elections, to protect all Americans from voting discrimination.

Asian Pacific Americans are the fastest growing minority group in the United States. We must ensure that all parts of the Asian Pacific American community are able to vote, regardless of whether they live in California, or Arizona, or in Florida, my home state. Many Asian Pacific Americans still face racial discrimination derived from historical antipathy or the perception of Asian Pacific Americans as outsiders, aliens, and perpetual foreigners. Numerous hate crimes have been directed against Asian Pacific Americans because of their minority status or because they are perceived as unwanted immigrants. Some states and localities have employed discriminatory tactics to prevent language minority citizens from registering and voting. For example, in Alabama's 2004 primary election, some Asian Pacific American voters were falsely accused of not being U.S. citizens. They were forced to complete a paper ballot, and another registered voter was required to vouch for the paper ballot. When questioned about these demands, the losing incumbent stated that he assumed that if the voters "could not speak good English," they could not be American citizens. Other recent discriminatory actions against Asian Pacific American voters have included redistricting efforts to dilute Asian Pacific American voting power, demanding photo identification from Asian Pacific American voters when it was not required for others, and refusing to provide appropriate language materials at polling places.

Voting discrimination is a continuing threat to our democracy. Any violation of voting rights is deeply troubling, and the issue requires strong, bipartisan legislation from Congress. The Voting Rights Amendment Act is a modern, flexible, nationwide approach to protecting voters that embodies the spirit and letter of the Court's decision. The legislation would provide new tools to prevent voting discrimination before it occurs and to ensure that proposed election changes are transparent.

In the *Shelby County* decision, Chief Justice Roberts noted that "voting discrimination still exists; no one doubts that." It is now up to us to work together to enact an updated Voting Rights Act. This is a key time in the long fight to insure that no voter suffers discrimination at the ballot box. Every day that Congress fails to act, voters and our democracy are in danger. Failure to advance this legislation gives a free pass to voting discrimination. As early as this November, there will be Americans who will lose their right to vote solely because of their race or lack of English language proficiency. This type of discrimination should not be tolerated.

Thank you again for this opportunity to express the views of NAPABA. We welcome the opportunity for further dialogue and discussion about these important issues.

NATIONAL BAR ASSOCIATION

Patricia M. Rosier
President
Largo, MD

Pamela J. Meanes
President-Elect
St. Louis, MO

Twanda Turner-Hawkins
Vice President
Philadelphia, PA

J. Goodwille Pierre
Vice President
Houston, TX

Rozenia Cummings
Vice President
San Pablo, CA

Juan R. Thomas
Secretary
Chicago, IL

Micheal A. Thompson
Treasurer
Vallejo, CA

Johnine Barnes
General Counsel
Washington, DC

Jim Jones
Parliamentarian
Washington, DC

Alfreda V. Davis
Executive Director
Washington, DC

July 2, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Bar Association, the nation's oldest and largest national network of predominantly African American lawyers, and the nearly 59,000 lawyers, judges, law professors and law students it represents throughout the United States and around the world, I strongly support passage of the Voting Rights Amendment Ace of 2014 (VRAA).

The Voting Rights Amendment Act offers nationwide protections for these current threats, with new tools to get ahead of voting discrimination before it occurs and to ensure that proposed election changes are transparent and areas that currently discriminate are held accountable.

Described by President Ronald Reagan as the "crown jewel of American liberties," there is no right more fundamental to our democracy than the right to vote. It is the constitutional obligation of the Congress to protect every American's right to vote and therefore must act swiftly to protect this precious right.

Voter discrimination is not over. That right to vote is in serious danger. Right now, in 2014, states and localities around the country are making changes to elections that would take away the right to vote for some people. African Americans are particularly at risk for voter discrimination. Excessively restrictive and discriminatory state laws disproportionately affect people of color, the poor and senior citizens. Every day that Congress fails to act, voters are in danger.

Protecting the right to vote for all has always been a bipartisan issue. That's because the right to vote is one of the most basic rights in our country. We applaud last week's hearing and hope that today, on the Anniversary of the passage of the Civil Rights Act of 1964, Senate Republicans, and the House will follow your lead and decide to move quickly to pass this bill.

Sincerely,

Patricia Rosier, Esq.
President, National Bar Association

NATIONAL BAR ASSOCIATION, 1225 11th Street, N.W., Washington, DC 20001 - 4217 • Tel: 202-842-3900 • Fax: 202-289-617(
www.nationalbar.org

June 25, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510 and

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Congress of American Indians (NCAI), the oldest and largest organization of American Indian and Alaska Native tribal governments, and the Native American Rights Fund, the largest non-profit law firm dedicated to serving Indian tribes, tribal organizations and individual Indians, we write to express our support for the Voting Rights Amendment Act (S.1945). We further encourage the Committee to consider including S. 2399 as an amendment to S. 1945, and carefully consider any proposals that may result from the formal consultation with Tribal governments recently initiated by the Department of Justice (DOJ).

The First Americans were the last to legally obtain the fundamental right to vote in the United States and Native voters continue to face persistent barriers in exercising that right. In 1884, the Supreme Court held that the Fourteenth and Fifteenth Amendments did not apply to Indians living on reservations. And although Indians were made U.S. citizens by the Indian Citizenship Act of 1924, some states continued to impose undue barriers to voting, such as literacy tests or the outright refusal to recognize Indians as state citizens.

Some jurisdictions continue to implement schemes that impair the ability of Native people to fully participate in the electoral process. Redistricting, unacceptable siting of registration and polling locations and insufficient language assistance plague voters in Indian Country. As detailed in the attached framing paper from DOJ, discrimination is all too real for many American Indian and Alaska Native voters. Native voters often live far from established polling places in remote, isolated areas, with high rates of poverty, and in some areas, limited English proficiency. As a result, turnout among American Indians and Alaska Natives nationwide is 5 to 14 percentage points below that of other racial and ethnic groups.

Section 5 of the Voting Rights Act was an important mechanism for protecting Native voters. Alaska as well as several counties in Arizona and South Dakota with very large Native populations were covered under Section 5's preclearance procedures. Since the Supreme Court's *Shelby* decision, states and localities have pushed forward potentially discriminatory changes to voting including the elimination of in-person voting for the residents of more than a dozen Native villages in Alaska, many of whom are Native language speakers. While S. 1945 would

provide new tools to get ahead of voting discrimination before it occurs and ensure that any proposed election changes are transparent, we believe that additional measures are needed to more fully protect Native voters, and Congress possesses the authority vis-à-vis Indian tribes and citizens to craft the required remedies.

Our organizations have held a series of conference calls with American Indian and Alaska Native stakeholders from across the country and have identified five issues frequently encountered by Native voters that could be addressed in amendments to S. 1945, thereby strengthening the bill's protections for Native voters:

- **Access to the Polls:** Indian reservations and Alaska Native Villages are generally located in rural areas far from other population centers. The most common and serious concern consistently raised by Native Voters is distance to polling locations. For example, some Alaska Native Villages are assigned to polling places that are a 150-mile roundtrip and accessible only by plane or boat. In these instances, polling locations may be completely inaccessible on election day.

- **Voter ID Laws:** For many Native People, their only identification document is issued by their tribe. However, state laws vary on whether these are acceptable forms of identification for voting. States should not be permitted to discriminate against tribal documents in their voter ID laws.

- **Voter intimidation:** Every election cycle there are reports of Native voters being harassed or intimidated at the polls. Tribal communities should have the ability to secure election monitors when they have reason to believe that harassment or discrimination may occur.

- **Language access:** Many Native voters, particularly elders, speak their indigenous language and require language assistance to vote. The Voting Rights Act provides that voting materials shall be provided in the language of the applicable language minority group as well as in the English language. However, even though there are frequently modern written forms of Native languages, "in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting." This provision is used to deny language assistance to Native voters even when a written form the applicable Native language currently exists.

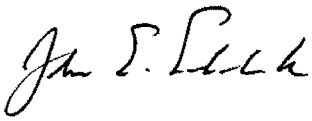
- **Voting Rights Consultation and Enforcement:** Because of the isolation of Indian Country and a historic lack of access to legal services, there simply has not been as much litigation to enforce the Voting Rights Act in Indian Country as there has been in other places. Litigation is very costly and time-consuming and Indian Country needs protections that do not rely on lawsuits brought by disenfranchised voters with few resources. The Department of Justice is well-positioned to use its resources to help ensure enforcement of the Voting Rights Act in Indian Country and should be required to consult with Indian tribes on a government-to-government basis to gather information about voting issues experienced by Native voters.

Two proposals, one currently pending in the Senate and one currently the subject of consultation between DOJ and Indian tribes, align with the five priorities identified by tribal leaders and could be incorporated into S. 1945. S. 2399 includes additional protections for Native voters including: restoring preclearance for certain discriminatory practices related to the locations and hours of polling places; increasing the use of federal monitors in tribal communities; requiring consultation by DOJ; ensuring that language assistance is provided for all written languages; and prohibiting discrimination against tribal identification documents under state law. In addition, DOJ has recently requested consultation with tribal leaders to discuss a proposal that would require any state or local election administrator whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by each tribal government.

The proposals set forth in S. 2399 and by DOJ would strengthen S. 1945 and help ensure that all Native voters have equal access to the ballot box. We welcome these proposals, all of which are consistent with recommendations we have heard from tribal leaders from across the country. We believe they deserve your careful consideration as you take up S. 1945. We look forward to working with you on this important legislation. If you have any questions, please feel free to contact Virginia Davis, NCAI Senior Policy Advisor at vdavis@ncai.org or 202-321-6515 or Joel Williams, NARF Staff Attorney at Williams@narf.org or (202) 785-4166.

Sincerely,

Jacqueline Pata, Executive Director
National Congress of American Indians



John Echohawk, Executive Director
Native American Rights Fund

U.S. Department of Justice

Office of Tribal Justice

Room 2318, RFK Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

(202) 514-8812
FAX (202) 514-9078

June 9, 2014

Dear Tribal Leader:

To address some of the unique and persistent challenges that American Indian and Alaska Native voters face, the Attorney General would like to initiate formal consultation between officials of federally recognized Indian tribes and Department of Justice officials to discuss whether the Department of Justice should recommend to Congress new legislation that would require any state or local election administrator whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by each tribal government.

The attached framing paper outlines the Department of Justice's intent to hold consultations on this matter and raises several questions and issues for your consideration. The consultation schedule will be circulated within the next 30 days.

If you have questions in the meantime, please contact the Office of Tribal Justice at (202) 514-8812 (not a toll-free number) or OTJ@usdoj.gov. We look forward to consulting with you on this important issue.

Sincerely,

Tracy Toulou
Director, Office of Tribal Justice
U.S. Department of Justice

TRIBAL CONSULTATION ON WHETHER TO PROPOSE FEDERAL LEGISLATION TO SAFEGUARD NATIVE AMERICAN VOTING RIGHTS

The Department of Justice places a high priority on protecting the voting rights of American Indians and Alaska Natives. The Department plans to consult with tribes to determine whether this effort might be significantly advanced by new federal legislation and is providing this framing paper to facilitate the consultation and frame the discussion with the tribes. The framing paper begins by presenting some background on the problem, and then focuses on whether federal legislation to guarantee that American Indian and Alaska Native voters have access to polling places on Indian reservations and in Alaska Native villages can contribute to solving that problem.

Tribal recommendations in these areas, and others, are of course most welcome. This framing paper is designed merely to raise questions about options for tribal leaders to consider. It is not intended to be, nor should it be construed as, a statement of Department policy.

BACKGROUND ON VOTING BY AMERICAN INDIANS AND ALASKA NATIVES AND GAPS IN CURRENT LAW

American Indians and Alaska Natives have faced a distinctive history of discrimination affecting their right to vote. Even after Reconstruction had dramatically expanded the franchise, the U.S. Supreme Court held that Indians living on reservations could not invoke the protections of the Fourteenth and Fifteenth Amendments. *See Elk v. Wilkins*, 112 U.S. 94, 101-03 (1884). And although the Indian Citizenship Act of 1924 conferred U.S. citizenship on all American Indians born within the United States, many states continued to disenfranchise Indians, either by refusing to treat them as state residents or by imposing literacy tests that American Indians and Alaska Natives with limited English proficiency — often the result of the state's failure to provide adequate education — were unable to pass. As recently as 1948, Indians, including veterans who recently had returned from the battlefields of World War II, were barred from voting in Arizona and New Mexico.

In 1975, recognizing the barriers to full participation that American Indians and Alaska Natives continued to confront, Congress not only permanently prohibited literacy tests throughout the United States but also expressly included American Indians and Alaska Natives within the special protections of the Voting Rights Act. As a result, certain jurisdictions with large American Indian or Alaska Native populations were placed

under the preclearance regime of Sections 4 and 5 of the Act and were prohibited from making any changes to their voting laws until they could prove to the Department of Justice or to a three-judge federal court that the change neither had a discriminatory purpose nor would have a retrogressive effect. A number of other jurisdictions with large Native American populations were also covered by Section 203 of the Voting Rights Act, which requires bilingual election materials and assistance in areas with large numbers of citizens with limited English proficiency.

Despite these reforms, participation rates among American Indians and Alaska Natives continue to lag far behind turnout rates among non-Native voters. Estimates suggest that nationwide, while nearly 64% of non-Native adult citizens cast a ballot in the 2008 presidential election, less than 48% of Native American adult citizens voted. Part of that gap is attributable to differences in registration rates; but even among registered voters, the turnout among American Indians and Alaska Natives nationwide falls 5 to 14 percentage points below that of other racial and ethnic groups. And the gap with respect to Alaska Natives is especially large: Turnout among Alaska Natives often falls 15 to 20 or more percentage points below the non-Native turnout rate.

The causes of these disparities are complex. Lingering effects of prior overt discrimination play a role, as do socioeconomic conditions: Among all Americans, political participation is positively correlated with income and education, and Native communities are disproportionately poor. But two factors stand out. The first is that many American Indians and Alaska Natives live far from established polling places. The second is that, in some tribal communities, Native American voters have significant rates of limited English language proficiency. These two factors, alone and in combination, create special barriers to effective political participation by citizens living on Indian reservations and in Native villages.

There are myriad examples of the problems American Indian and Alaska Native voters have faced getting to the polls. Residents of the Cheyenne River Sioux Reservation in South Dakota had to travel up to 150 miles roundtrip to vote until a federal court ordered the establishment of polling places on the reservation. There is ongoing litigation in Montana over several counties' refusal to set up satellite early-voting sites on reservations far from the county seat. And in Alaska, polling places to which Alaska Natives have been assigned are sometimes located across a river or other body of water or across a mountain range that is impassable on Election Day. The Alaska Division of Elections has assigned some Native villages to polling places that are 75 miles away and accessible only by air or boat.

Moreover, although jurisdictions with large numbers of limited English proficiency voters are often covered by Section 203, many jurisdictions with large numbers of American Indian or Alaska Native citizens have failed to provide those materials or adequate assistance at the polls. In Cibola County, New Mexico — the subject of a

decade's worth of enforcement litigation by the Department of Justice — the Department was again required to intervene earlier this year to prevent the county's planned elimination of voting-rights coordinators to train poll-workers and provide election information to Navajo- and Keres-speaking voters.

For some potential voters, the inaccessibility of polling places poses only a minor barrier, since they can instead vote absentee. But that option is far less manageable for American Indian or Alaska Native voters with limited English proficiency, because they receive little or no assistance in navigating the bureaucratic process for obtaining and casting an absentee ballot. In Alaska, for example, the state has designated dozens of Yup'ik-speaking Native villages as "permanent absentee voting" sites where voters must fill out an English-language application to vote absentee in each election.

Currently, federal law does not specifically address the location of polling places, leaving the decision essentially in the hands of each state. States often devolve that responsibility to local jurisdictions, giving counties or municipalities discretion to choose how many polling places to have and where to locate them. While Section 2 of the Voting Rights Act prohibits states from using election procedures, including poll-siting, that deny minority voters an equal opportunity to participate in the political process, *see*, *e.g.*, *Spirit Lake Tribe v. Benson County*, 2010 WL 4226614 (D.N.D. 2010), Section 2 cases can be complex and costly to litigate.

Until the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which held invalid the formula used to place jurisdictions under the obligation to preclear their voting changes, the Department of Justice used Section 5 to prevent covered jurisdictions (which included Alaska, Arizona, and two counties in South Dakota with large Indian populations) from making changes in polling places that could have a discriminatory impact on Native American voters. In Arizona, the Department of Justice used Section 5 to prevent a series of efforts by Apache County to close polling places located in the Navajo Nation. Similarly, in 2008, Alaska ultimately withdrew a request to change a number of polling places to which Native villages had been assigned after the Department of Justice issued a "more information" request, asking the state to explain why the changes would not disadvantage Alaska Native voters. Since the Supreme Court's decision last year in *Shelby County*, Alaska has apparently eliminated in-person voting for more than a dozen Native villages, forcing their residents into "permanent absentee voting."

Given the continued difficulties faced by American Indian and Alaska Native voters, the Department of Justice is consulting with the tribes about possible federal legislation to fill gaps in federal election laws to better safeguard Native Americans' voting rights.

TRIBAL DESIGNATION OF POLLING PLACES FOR FEDERAL ELECTIONS

The Central Question: Should the Department of Justice recommend to Congress legislation that would require any state or local election administrator whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by each tribal government?

Background: The Constitution grants Congress "plenary" power "to legislate in respect to Indian tribes." *United States v. Lara*, 541 U.S. 193, 200 (2004). Congress's "unique obligation" toward Indians — in particular, its responsibility to ensure that they are included fully within the "modern body politic" — gives Congress the power to require fair treatment for American Indian and Alaska Native voters. *See Morton v. Mancari*, 417 U.S. 535, 552 (1974).

Moreover, under the Elections Clause of Article I, Section 4 of the Constitution, Congress has additional power to regulate any election conducted at least in part to select Members of Congress. That clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ...."

The Elections Clause has traditionally been interpreted to give Congress virtually plenary power over a wide range of aspects relating to congressional elections. In *Cook v. Gralike*, 531 U.S. 510 (2001), the Court stated that the term "Manner of holding Elections" "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Id.* at 523 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The list of practices that the Supreme Court and the lower federal courts have found within the scope of Congress's Elections Clause power is broad indeed. *See, e.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (authority to regulate recount of elections); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); *In re Coy*, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with a federal contest).

Taken together, the Indian powers and the Elections Clause authorize Congress to enact legislation to safeguard the voting rights of Native American voters, particularly in elections conducted in whole or in part to elect Members of Congress. Here, long experience with inaccessible polling places and failures to provide sufficient assistance to American Indian and Alaska Native voters support the conclusion that Congress might rationally impose affirmative obligations on state and local election authorities to enable these citizens to cast their ballots.

The Department of Justice would welcome feedback on the following questions, which may be relevant to both policy considerations and constitutional analysis.

Selection of Polling Places: Should Congress require that states permit tribes to designate a polling place on tribal land if the tribe concludes that such a location would help provide tribal members a fair and equal opportunity to participate in the political process? Should tribes be permitted to designate such polling places for voting only on Election Day itself, or should they be permitted also to designate early-voting sites in jurisdictions that permit early voting (sometimes referred to as "in-person absentee voting")?

Should there be any requirements tied to the number of potential voters? For example, should tribes with large numbers of voters or dispersed populations be entitled to request more than one polling place? Conversely, should there be a minimum potential voter population to trigger the requirement?

Actual Operation of the Polling Place: For any polling place the location of which is determined by the tribe, how should the polling place be operated? Obviously, the state or local election administrator would be required to equip the polling place with as many ballots and voting machines (on a per-registered-voter basis) as are provided to similar polling places in non-Native communities. But should staff for the polling place be supplied by the tribe, with proper training to be supplied by the state or local election administrator? Such a proposal could help ensure that poll-workers are sensitive to the distinctive needs of tribal voters with respect to assistance in voting, and would accommodate state and local administrators' concerns about the costs of the proposal.

Scope of the Requirement: Should the requirement apply only to elections held in whole or in part to select candidates for federal office? Or should the requirement apply to all elections for public office or in which ballot propositions are involved?

Voter Registration: Should Congress also require state or local election administrators to designate, upon the request of a federally recognized Indian tribe, a tribal office or agency as a site for voter registration? If so, what procedures should apply to this requirement?

National
Urban League

Empowering Communities.
Changing Lives.

Statement for the Hearing Record

Before the

Senate Committee on the Judiciary

"The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to Shelby County v. Holder"

June 25, 2014

Chairman Leahy, Ranking Member Grassley, members of the Committee, on behalf of the National Urban League and our 95 Urban League affiliates in 36 states and the District of Columbia, we thank you for holding this most important hearing and offer our strong support for the *Voting Rights Amendment Act of 2014 (S.1945)*.

One year ago today, the U.S. Supreme Court dealt a crushing blow to voting rights by removing important protections for voters who had suffered —and still suffer—historic disenfranchisement in its devastating 5-4 decision in *Shelby County v. Holder*. As a result, we are left with a Voting Rights Act of 1965 (VRA) that is insufficient to protect our fundamental right to vote, particularly in those states and localities where racial discrimination in voting remains real, documented and ongoing.

A newly released report[1] by the Brennan Center for Justice demonstrates that there is no time to waste to move and enact the VRAA before this November's mid-term elections. The report finds that since the 2010 election, new voting restrictions are slated to be in place in 22 states[2]; unless these restrictions are blocked — and there are court challenges to laws in six of those states — voters in nearly half the country could find it harder to cast a ballot in the 2014 midterm election than they did in 2010. The new laws range from photo ID requirements to early voting cutbacks to voter registration restrictions. The report points out that race was a significant factor, where of the 11 states with the highest African-American turnout in 2008, 7 have new restrictions in place; and of the 12 states with the largest Hispanic population growth between 2000 and 2010, 9 passed laws making it harder to vote.[3]

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[1] "The State of Voting in 2014," by Wendy R. Weiser, By Erik Opsal, Brennan Center For Justice at New York University School of Law, June 17, 2014, http://www.brennancenter.org/print/11892
[2] Ibid. See note [1].
[3] Ibid. p. 3.

The National Urban League believes that the provisions in the bicameral, bipartisan *Voting Rights Amendment Act* include many key elements of a nationwide, modern, flexible and forward-looking VRA and offer a commonsense approach in response to the *Shelby* decision. The legislation would provide new tools to get ahead of voting discrimination *before it* occurs and ensure that any proposed election changes are transparent. Through this Senate hearing, we look forward to a robust discussion of the problems voters across the country still face in the wake of the *Shelby* decision. In light of the raw reality that discrimination in voting is not a thing of the past, there is the "urgency of now" that calls upon Congress to act before we risk keeping more and more voters from the polls and inflicting additional damage to our democracy.

As a historic civil rights, direct service and urban advocacy organization dedicated to economic empowerment in historically underserved urban communities, the National Urban League is acutely aware of the importance and power of the voting franchise. In 2012, we launched our Occupy the Vote effort which directly reached more than 300,000 citizens across the country. Through a robust grassroots campaign, including door-to-door canvassing, online outreach, and targeted telephone calls, the National Urban League registered, educated, and turned our communities out to the polls. The Occupy the Vote campaign emphasized the importance of year round engagement and that every election matters.

Additionally, through the Urban League's work across the country to help secure equity and excellence in education, jobs with livable wages, employment training for high school dropouts and the unskilled, affordable housing and homeownership, affordable health care and the elimination of health disparities, we can attest first-hand to the powerful relationship that exists between access to the ballot box and access to economic and social justice.

The National Urban League believes that there is no better and fitting tribute to the men and women who, 50 years ago, fought for and died to secure a Civil Rights Act and a Voting Rights Act than to pass the VRAA this year before the November mid-term elections. We cannot focus only on a celebration of progress. We must also ensure there is a continuation of the very equality and opportunity that are at the core of this country's democratic values.

About the National Urban League

The National Urban League (www.nul.org) is a historic civil rights and urban advocacy organization dedicated to economic empowerment in historically underserved urban communities. Founded in 1910 and headquartered in New York City, the National Urban League has improved the lives of tens of millions of people nationwide through direct service programs that are implemented locally by its 95 Urban League affiliates in 36 states and the District of Columbia. The organization also conducts public policy research and advocacy activities from its D.C.-based, Washington Bureau. The National Urban League, a BBB-accredited organization, has a 4-star rating from Charity Navigator, placing it in the top 10 percent of all U.S. charities for adhering to good governance, fiscal responsibility and other best practices.

HENRY C. "HANK" JOHNSON, JR.
4TH DISTRICT, GEORGIA

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House of Representatives
Washington, DC 20515–1004

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July 17, 2014

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
437 Russell Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

Re: Voting Rights Amendment Act of 2014

Dear Chairman Leahy and Ranking Member Grassley,

Federal protections for voting rights are as necessary today as they were when the Voting Rights Act was passed in 1965. Unfortunately, the United States Supreme Court ruled in *Shelby v. Holder* that Section 4 of the Voting Rights Act was unconstitutional, rendering Section 5- one of the Act's most important tools to root out race discrimination in voting, essentially useless. While I disagree with the court's ruling, I recognize that we must move forward under the direction of the Court.

As the U.S. Representative for Georgia's 4th District, I want to express my support for S. 1945 and H.R. 3899, the Voting Rights Act Amendment. Under this bill, any state that has had five voting rights violations in the previous 15 years, including one statewide violation, would be subject to preclearance. Georgia has been home to not five but 15 Section 5 preclearance objections by the Department of Justice, mostly by municipalities and counties in the last 15 years, including two committed by the state of Georgia.

That is why I was quite surprised to see a letter from Georgia's Secretary of State, Brian Kemp, to you in the *Atlanta Journal-Constitution* on Monday, June 23, 2014. Secretary Kemp believes it is discriminatory to treat four states differently under the proposed Amendment. It is important to clarify that this legislation does not single out specific states. Under the legislation, any state can be covered by Section 5 if it commits the requisite number of violations. And any state that is covered can come out from under coverage if it no longer discriminates against its voters. Unfortunately, the Secretary's contention that preclearance is discriminatory and does not help to ensure secure, accessible, and fair elections is inconsistent with the facts.

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Georgia has a persistent history of disenfranchising voters. Preclearance is necessary until the state can demonstrate over a sustained period of time that it can decrease the number of Voting Rights Act violations to zero.

Disenfranchising voters is a very egregious practice, and is much more pernicious than the justifiable discrimination against the State of Georgia which Secretary Kemp complains of. I agree with the Republican Senator from Kentucky, Rand Paul, who recently said: "I'm for more people voting, not less people voting".

In Secretary Kemp's letter, he states that federal election laws should be uniform throughout the United States because the Constitution and Section 2 of the Voting Rights Act provide adequate protections against racial discrimination within the democratic process.

First, the legislation does, in fact, apply uniformly across the United States. Second, while Section 2 allows for the challenge of discriminatory laws, it is insufficient to protect against widespread voter suppression because it only allows the law to be challenged after a violation has occurred. Section 5, however, was a preemptive measure that stopped bad laws before they were implemented. Section 2 litigation is also an extremely expensive burden on voters. Section 5 removed expensive case-by-case litigation.

Several states continue to manipulate and undermine voting rights, including Georgia. While Secretary Kemp professes full faith that Georgia will continue to abide by the Voting Rights Act, the state's history is subpar and causes one to question whether faith will be enough to ensure all Georgians can vote and expect their vote to count.

In 2012 for example, the U.S. Department of Justice (DOJ) concluded that legislation passed by the Georgia state legislature to change the date for non-partisan mayoral and commissioner elections from November to July would disproportionately impact African-Americans.

It was also found by the DOJ that Georgia's adoption of this legislation was driven, in part, by a racially discriminatory purpose. States with a history like Georgia's must be compelled to recognize the importance of protecting and expanding the right to vote rather than limiting it. Pre-clearance is a useful mechanism for combating discriminatory practices.

Secretary Kemp also mentions that previous voting rights violations are not limited to findings of "discriminatory intent." This is correct. Nor should they be. Discriminatory intent is not necessary if minority voters are disproportionately disenfranchised. While racism may not be as overt as it was when the Voting Rights Act was passed in 1964, racism is as President Barack Obama once said: "real and must be addressed, not just in words but in deeds by enforcing all our civil rights laws." The Voting Rights Act has protections for both discriminatory results and purpose. The "results standard" in Section 2 was the product of bipartisan efforts in 1982, led, in part by Senator Orrin Hatch. The proposed legislation is consistent with that approach.

In regard to preliminary injunctive relief, the new provision allows courts to maintain the status quo while reviewing potentially discriminatory voting changes. Preliminary injunctions would not be mandatory, but would grant courts the full range of remedies on a case-by-case basis. This does not open the door for political interest groups to control Georgia's lawmaking process; rather it is simply a way to make sure laws that may disenfranchise voters are not implemented.

Secretary Kemp mentions the cost associated with seeking pre-clearance. In fact, preclearance is a low cost administrative process that gives both jurisdictions and voters the ability to avoid expensive litigation. Preclearance is also a low cost way to ensure changes to voting laws are proper. In fact, some jurisdictions that could have opted out of coverage before *Shelby* chose not to because it was a more streamlined process to go through the process of preclearance than face litigation.

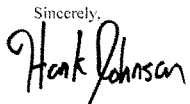
Sadly, what remains of the Voting Rights Act, post-*Shelby*, will require very expensive, case-by-case litigation. Those worried about the prospects of costly litigation should be in favor of the streamlined administrative approach of Section 5 preclearance. Over and above the expense involved, the right to vote should be sacrosanct and subject to protection, whatever the cost.

Finally, he claims that "pre-clearance was an extraordinary remedy for an extraordinary time." I would argue – as Chief Justice John Roberts said – that "voting discrimination still exists; no one doubts that." And as long as voting discrimination still exists; so too does the need to have a mechanism like preclearance to stop it before voters lose their fundamental rights.

With 15 Section 5 preclearance objections in the last 15 years, Georgia's record on voting rights is dubious at best. Despite Secretary Kemp's assertions, the need for a Voting Rights Act Amendment, with preclearance provisions, is still as necessary now as it ever was before.

The bipartisan Voting Rights Amendment Act of 2014 is a flexible, modern, nationwide solution to the problem of discrimination in voting and I thank you for holding a Senate Judiciary Committee hearing on this topic. Failure to advance this legislation gives a free pass for voting discrimination to continue in Georgia, and throughout the nation. The right to vote is the foundation of our democracy and should be fully protected under the law.

Sincerely,



Henry C. "Hank" Johnson
Member of Congress

cc: The Honorable Brian Kemp, Secretary of State

American Federation
of Teachers, AFL-CIO

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AFT Higher Education
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June 25, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the more than 1.5 million members of the American Federation of Teachers, I write in strong support of S. 1945, the Voting Rights Amendment Act and commend you for holding today's hearing on this important bill.

This bicameral, bipartisan legislation offers a measured and commonsense approach in response to the Supreme Court's June 25, 2013, decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act and rolled back the protections of a fundamental civil rights law that has preserved voting rights for millions of Americans. For nearly 50 years, the Voting Rights Act has enshrined the right to free and fair elections in our country. Tragically, the Supreme Court's decision ignores real-life efforts to suppress voting that are happening right now across our nation.

The majority in the *Shelby* decision ignored the recent history of voter suppression efforts. The tests and devices that blocked ballot access in the 1960s may be largely gone, but 21st-century tactics to disenfranchise Americans—restrictive voter ID laws, outcome-driven redistricting, limiting voting hours and opportunities, and spreading misinformation about polling places and times—still disproportionately affect African-American, Latino, immigrant and low-income voters, as well as students and seniors.

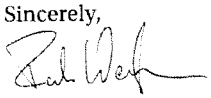
S. 1945 is necessary so that our aspirations for a stronger democracy can be a reality for all voters. It is a proven tool to ensure voters in covered jurisdictions are not deprived of their fundamental right to vote and to have their votes counted. We can only imagine the long-term damage that will occur if this legislation is not adopted.

In 2006, when Congress reauthorized the pre-clearance sections of the law that the *Shelby* decision invalidated, the House and Senate took note of the voluminous evidence of continuing voter discrimination. It now becomes essential that Congress take new action to ensure the efficacy of the Voting Rights Act. We do not want future generations of students to read in their history textbooks that the Supreme Court in 2013 had the final word on voting rights and turned the clock back on decades of progress.

Renewing and strengthening the Voting Rights Act has always been a bipartisan effort. This year should be no different. To this end, I hope that all senators will work with us and support immediate passage of S. 1945.

Thank you for considering our views on this important matter.

Sincerely,



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Rabbi David Saperstein
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June 25, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the Union for Reform Judaism, whose nearly 900 congregations encompass more than 1.3 million Reform Jews across North America and the Central Conference of American Rabbis, which represents more than 2,000 Reform rabbis, we strongly support the passage of the Voting Rights Amendment Act of 2014 (S. 1945).

Jewish tradition teaches us that the selection of leaders is not a privilege but a collective responsibility. The Sage Hillel taught, "Do not separate yourself from the community" (Pirkei Avot 2:4). Rabbi Yitzchak taught that "a ruler is not to be appointed unless the community is first consulted" (Babylonian Talmud, B'rachot 55a). In keeping with the insight of these teachings, we have long felt that it is the duty of all who cherish democracy to ensure that all eligible citizens are afforded the opportunity to vote and have their votes counted. The right to vote is fundamental to American democracy, and the Reform Jewish Movement has for the past century strongly supported legislation that protects the rights of all citizens to be free of discrimination in their efforts to exercise the right to vote.

The Supreme Court's decision one year ago in *Shelby v. Holder* invalidated key parts of the Voting Rights Act. Unfortunately, while it is true that voter discrimination is less rampant than it was when the Voting Rights Act was first passed in 1965, to suggest, as this decision does, that it no longer exists is simply inaccurate. The legal protections that remain are inadequate to uphold the voting rights of all Americans, and in the aftermath of the Court's *Shelby* decision, many states previously covered by the invalidated "preclearance" formula have tested the extent to which they can legally limit citizens' access to the ballot box, by introducing, and in some cases passing, restrictive voting laws. The Voting Rights Amendment Act (S. 1945) is a bicameral, bipartisan bill that would play a key role in upholding those rights. The bill reflects cotemporary realities, is flexible and forward-looking, and directly addresses the concerns of the Court in *Shelby*.

The Union for Reform Judaism and Central Conference of American Rabbis strongly urge Congress to pass swiftly the Voting Rights Amendment Act. It is vital to ensure that the protections that voters have enjoyed for decades remain protected in advance of the elections this November.

Sincerely,

Rabbi David Saperstein

The Religious Action Center pursues social justice and religious liberty by mobilizing the Jewish community and serving as its advocate in Washington, D.C. The Center is led by the Commission on Social Action of the Central Conference of American Rabbis and the Union for Reform Judaism (and its affiliates) and is supported by the congregations of the Union.

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June 24, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the 2.1 million members of the Service Employees International Union (SEIU), I write to express strong support for the Voting Rights Amendment Act of 2014 (S. 1945). This bipartisan, bicameral legislation is a good first step toward restoring key protections of the Voting Rights Act, specifically Section 5, which were undermined by the Supreme Court's decision on *Shelby County v. Holder*.

Regardless of race or where we live, we all deserve the right to vote, and yet racial discrimination in voting is real and ongoing. In 2012, before *Shelby*, Section 5 protected voters when there were efforts to disenfranchise them in Texas, South Carolina, Florida, Georgia, and elsewhere. Since *Shelby*, states and localities have moved swiftly to enact potentially discriminatory changes to voting, such as changing district boundaries to disadvantage some voters, moving polling locations in areas with high concentrations of minority voters, eliminating early voting periods, reducing polling location hours and machines in minority areas. The unfortunate reality is that discrimination in voting is not a thing of the past—it still happens today and we need tools that respond.

Because of the Supreme Court's decision in *Shelby County v. Holder*, the voting protections we currently have are not enough. By gutting Section 5 voters now must now wait until they have been deprived of their rights before judicial intervention can be sought, at which point the damage has already been done, and the election has most likely been decided.

The Voting Rights Amendment Act of 2014 currently proposed includes many key elements of a modern, flexible and forward-looking VRA. While key improvements are needed to undo the full damage done by *Shelby*, the bipartisan cooperation that has allowed us to get this far will ultimately carry the day and allow us to meet the challenges made by the Supreme Court, and to continue strong enforcement around our most fundamental right: the right to vote.

We believe the time is now to pass legislation to ensure that the Voting Rights Act can be fully enforced, and to that end, we must move this bipartisan bill forward. Every day we wait is another day voters are at risk of being kept from the polls.

Sincerely,

Mary Kay Henry
International President

MKH:DD:bq

opeiu#2
afl-cio, clc

NCJW

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Los Angeles Section

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The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510 and

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Council of Jewish Women Los Angeles Section, a 120-year old grassroots network of volunteers and advocates who turn progressive ideals into action, we write to express our strong support for the Voting Rights Amendment Act (S.1945). This bicameral, bipartisan legislation offers a measured and commonsense approach in response to the Supreme Court's June 25, 2013, decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act that fo decades had ensured protection for voters against discrimination.

Racial discrimination in voting is real and it is not a thing of the past—it is still happening today and we need tools that respond. Since the *Shelby* decision, states and localities have brazenly pushed forward potentially discriminatory changes to voting, such as changing district boundaries to disadvantage some voters and moving polling locations in areas with high concentrations of minority voters.

Voting discrimination is a threat to our democracy, making any violation deeply troubling and requires a strong, bipartisan response from Congress. The Voting Rights Amendment Act is a modern, flexible, nationwide approach to protecting voters that embodies the spirit and letter of the Court's decision. The legislation would provide new tools to get ahead of voting discriminating before it occurs and ensure that any proposed election changes are transparent.

Chief Justice Roberts said in the *Shelby* decision: "voting discrimination still exists; no one doubts that." This is a key time in the long fight to ensure that no voter suffers discrimination at the ballot box. Every day that Congress fails to act, voters are in danger. Failure to advance this legislation gives a free pass to voting discrimination. As early as this November, there are Americans who will lose their right to vote solely because of their race or English language proficiency. This cannot be tolerated.

We look forward to working with you on this critical legislation. If you have any questions, please feel free to contact Madeline Shepherd, Legislative Associate, at (202) 375-5063 or madeline@ncjwdc.org.

Sincerely,

Cipra Nemeth, Vice President of Legislative and Community Engagement

Maya Paley, Director of Legislative and Community Engagement

NCJW®

National Council of Jewish Women
Greater Miami Section

June 24, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510 and

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Council of Jewish Women Greater Miami Section, a 120-year old grassroots network of volunteers and advocates who turn progressive ideals into action, we write to express our strong support for the Voting Rights Amendment Act (S.1945). This bicameral, bipartisan legislation offers a measured and commonsense approach in response to the Supreme Court's June 25, 2013, decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act that for decades had ensured protection for voters against discrimination.

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Sincerely,

Karen Warner

Karen Warner, VP of Advocacy
NCJW, Greater Miami Section

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June 22, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510 and

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Council of Jewish Women Palm Beach Section, a 120-year old grassroots network of volunteers and advocates who turn progressive ideals into action, we write to express our strong support for the Voting Rights Amendment Act (S.1945). This bicameral, bipartisan legislation offers a measured and commonsense approach in response to the Supreme Court's June 25, 2013, decision in Shelby County v. Holder, which struck down a key provision of the Voting Rights Act that for decades had ensured protection for voters against discrimination.

Racial discrimination in voting is real and it is not a thing of the past—it is still happening today and we need tools that respond. Since the Shelby decision, states and localities have brazenly pushed forward potentially discriminatory changes to voting, such as changing district boundaries to disadvantage some voters and moving polling locations in areas with high concentrations of minority voters.

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early as this November, there are Americans who will lose their right to vote solely because of their race or English language proficiency. This cannot be tolerated.

We look forward to working with you on this critical legislation. If you have any questions, please feel free to contact Madeline Shepherd, Legislative Associate, at (202) 375-5063 or madeline@ncjwdc.org.

Sincerely,

Linda Geller-Schwartz

State Policy Co-Chair, Florida
VP (Advocacy) NCJW Palm Beach Section
National Council of Jewish Women

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National Council of Jewish Women

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The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510 and

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Council of Jewish Women, Southeast Atlantic Section, a 120-year old grassroots network of volunteers and advocates who turn progressive ideals into action, we write to express our strong support for the Voting Rights Amendment Act (S.1945). This bicameral, bipartisan legislation offers a measured and commonsense approach in response to the Supreme Court's June 25, 2013, decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act that for decades had ensured protection for voters against discrimination.

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A FAITH IN THE FUTURE.

A BELIEF IN ACTION.®

We look forward to working with you on this critical legislation. If you have any questions, please feel free to contact Madeline Shepherd, Legislative Associate, at (202) 375-5063 or madeline@ncjwdc.org.

Sincerely,

Arlene Davidson

State Policy Co-Chair, Florida
VP Public Advocacy, NCJW SE Atlantic Sections
National Council of Jewish Women

NCJW®

National Council of Jewish Women
Utah Section

June 24, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510 and

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Council of Jewish Women Utah Section, a 120-year old grassroots network of volunteers and advocates who turn progressive ideals into action, we write to express our strong support for the Voting Rights Amendment Act (S.1945). This bicameral, bipartisan legislation offers a measured and commonsense approach in response to the Supreme Court's June 25, 2013, decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act that for decades had ensured protection for voters against discrimination.

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Sincerely,

Kitty K. Kaplan

Utah State Policy Advocate
National Council of Jewish Women
A faith in the future. A belief in action.

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

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Congress of the United States
House of Representatives
Washington, DC 20515

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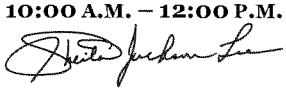
CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS

STATEMENT BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY

HEARING: VOTING RIGHTS AMENDMENT ACT, S.1945: UPDATING THE VOTING RIGHTS ACT IN RESPONSE TO SHELBY COUNTY V. HOLDER

WEDNESDAY, JUNE 25, 2014
10:00 A.M. – 12:00 P.M.



- Chairman Leahy, Ranking Member Grassley, and Members of the Committee:

- Thank you for allowing me to share my views with the Committee on this, the first anniversary of the Supreme Court's decision in Shelby County v. Holder, 570 U.S. 193 (2013), regarding the continuing need for a Voting Rights Act that protects the right of all Americans.

- I ask that my entire statement be included in the record of these proceedings.

- I also wish to thank all of the witnesses who have come today to assist the Committee with their testimony about the prevalence of voter

suppression and intimidation actions that threaten the ability of voters in underrepresented communities to cast their votes and to have those votes counted.

- Mr. Chairman, as a senior member of the Judiciary Committee and one who has served on the Committee throughout my tenure in Congress, I was proud of the work performed in bipartisan fashion by both the House and the Senate in 2006 when we crafted the legislation reauthorizing the Voting Rights Act of 1965 for an additional 25 years.

- That legislation proudly bears the name:

  "Fannie Lou Hamer, Rosa Parks, Coretta Scott King, Cesar E. Chavez, Barbara C. Jordan, William C. Velasquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006."

- The bipartisan majority vote to renew the Voting Rights Act in 2006 was the largest in history: the House vote was 390-33 and the Senate vote was 98-0. President George W. Bush signed the legislation into law on July 27, 2006.

- The Voting Rights Act safeguarded the right of Americans to vote and stood as an obstacle to many of the more egregious attempts by certain states and local jurisdictions, including Texas, to game the system by passing discriminatory changes to their election laws and administrative policies.

- But in June 2013, the Supreme Court's decided *Shelby County v. Holder, 570 U.S. 193 (2013),* which invalidated Section 4(b) of the VRA, and paralyzed the application of the VRA's Section 5 preclearance requirements.

- Officials in some states, notably Texas and North Carolina, seemed to regard the *Shelby* decision as a green light and rushed to implement election laws, policies, and practices that could never pass muster under the Section 5 preclearance regime.

- ***To take just one example***, on April 1, of this year, Councilwoman Pat Van Houte, who serves on the Pasadena, Texas City Council was forcibly ejected by armed officers at the direction of Pasadena Mayor Johnny Isbell at a council meeting to consider a controversial redistricting plan.

- That redistricting plan is one of the first to be implemented in the aftermath of the *Shelby v. Holder* decision.

- Pushed through by Pasadena Mayor Isbell and narrowly passed by the voters, the redistricting plan switches two of the city's eight council seats from single member district to at-large.

- Thus, the effect of the plan is to dilute the voting power of the poorer, predominantly Hispanic residents of the Pasadena's north side who opposed the change, and to increase the voting power of residents in the wealthier, whiter south side who supported it.

- This shameful episode is a reminder that the Voting Rights Act protected not only right to vote in federal elections but also applied to state and local jurisdictions as well.

- For example, Section 5 subjected to preclearance and could have blocked the Texas Education Administration (TEA) from closing the North Forest Independent School District (NFISD) and disbanding its locally elected school board comprised of 7 African American members.

- Once freed by the *Shelby County* decision from having to pass muster under Section 5, however, TEA directed the annexation of the NFISD by HISD and dissolved the school board, thus diluting the ability of the African American and Hispanic community residents served by NFISD to influence the decisions affecting the education opportunities of their children.

- In addition to depriving the residents of NFISD of the right to elect representatives of their choosing from their communities, the decision of the TEA to close NFISD was draconian, unreasonable, and unwarranted in the circumstances given the progress made by NFISD and its elected representatives in recent months.

- Section 5 is a vital asset in such circumstances because it would have required TEA to acquire pre-clearance by the Department of Justice prior to changing the bounds of the district.

- So this hearing on protecting the right to vote is very timely.

- Protecting voting rights and combating voter suppression schemes are two of the critical challenges facing our great democracy. Without safeguards to ensure that all citizens have equal access to the polls, there great injustices are likely to occur and the voices of millions silenced.

- Although much progress has been made with regard to Civil Rights there is still much work to be done in order to prevent systemic voter suppression and discrimination within our communities, particularly in Texas.

- Texas is the home of many great civil rights leaders and activists, yet a misguided belief held by opponents of the Voting Rights Act that the battle for equal rights is over threatens many of the gains made and reveals the need for continued vigilance and action.

- Texas is the home of President Johnson, who played the pivotal role in making the Voting Rights Act a reality.

- In signing the Voting Rights Act on August 6, 1965, President Lyndon Johnson said:

  > *"The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men."*

- That powerful instrument that can break down the walls of injustice is facing grave threats. There is still much work to be done with regard to freeing many Americans from discrimination and injustice that prevent them from exercising their right to vote.

- The Voting Rights Act of 1965 was critical to preventing brazen voter discrimination violations that historically left millions of African Americans disenfranchised.

- In 1940, there were less than 30,000 African Americans registered to vote in Texas and only about 3% of African Americans living in the South were registered to vote.

- Poll taxes, literacy tests, and threats of violence were the major causes of these racially discriminatory results.

- After passage of the Voting Rights Act in 1965, which prohibited these discriminatory practices, registration and electoral participation steadily increased to the point that by 2012, more than 1.2 million African Americans living in Texas were registered to vote.

- Section 5 of the Voting Rights Act of 1965 requires that states and localities with a chronic record of discrimination in voting practices secure federal approval before making any changes to voting processes.

- Since 1982, Section5 has stopped more than 1,000 discriminatory voting changes in their tracks, including 107 discriminatory changes right here in Texas.

- We all remember the Voter ID law passed in Texas in 2011, which would require every registered voter to present a valid government-issued photo ID on the day of polling in order to vote.

- The Justice Department blocked the law in March of 2012, and it was Section 5 that prohibited it from going into effect. The State of Texas sued the Justice Department that July for blocking the law.

- Section 5 protects minority voting rights where voter discrimination has historically been the worst.

- The right to vote, free from discrimination, is the capstone of full citizenship conferred by the Civil War Amendments.

- And it is a source of eternal pride to me that in in pursuit of extending the full measure of citizenship to all Americans that in 1975, Congresswoman Barbara Jordan, who also represented the historic 18th Congressional District of Texas, introduced, and the Congress adopted, what are now Sections 4(f)(3) and 4(f)(4) of the Voting Rights Act, which extended the protections of Section 4(a) and Section 5 to language minorities.

- I believe that the Lone Star State can be the leading state in the Union. But to realize that future, we cannot return to the dark days of its past.

- That is why we must remain ever vigilant and oppose schemes that will abridge or dilute the precious right to vote.

- That means standing up to and calling out groups and organizations like "True the Vote" and its local Houston-based affiliate, the "King Street Patriots," who in recent years have under the guise of poll watchers improperly interact with persons at polling stations in Hispanic and African American communities in an attempt to intimidate them from voting.

- The behavior of this group was so outrageous in 2010 that I reported its conduct to the Attorney General and requested the Department of Justice to investigate. *(See Attachment, Letter from Congresswoman Jackson Lee to U.S. Attorney General Holder (October 28, 2010)).*

- Those of us who cherish the right to vote justifiably are skeptical of Voter ID laws because we understand how these laws, like poll taxes and literacy tests, can be used to impede or negate the ability of seniors, racial and language minorities, and young people to cast their votes.

- Consider these percentages of demographic groups who lack a government issued ID:

  - African Americans: 25%
  - Asian Americans: 20%
  - Hispanic Americans: 19%
  - Young people, aged 18-24: 18%
  - Persons with incomes less than $35,000: 15%

- Voter ID laws are just one of the means that can be used to abridge or suppress the right to vote. Others include:

    1. Curtailing or Eliminating Early Voting
    2. Ending Same-Day Registration
    3. Not counting provisional ballots cast in the wrong precinct on Election Day will not count.
    4. Eliminating Teenage Pre-Registration
    5. Shortened Poll Hours
    6. Lessing the standards governing voter challenges to vigilantes like the King Street Patriots to cause trouble at the polls.

THE VOTING RIGHTS ACT, H.R. 3899, AND S. 1945

- Since its passage in 1965, and through four reauthorizations signed by Republican presidents (1970, 1975, 1982, 2006), more Americans, especially those in minority communities, have been empowered by the Voting Rights Act than any other single piece of legislation.

- Section 5 of the Act requires covered jurisdictions to submit proposed changes to any voting law or procedure to the Department of Justice or the U.S. District Court in Washington, D.C for pre-approval, hence the term "pre-clearance."

- Under Section 5, the submitting jurisdiction has the burden of proving that the proposed change(s) are not retrogressive, i.e. that they do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

- But a terrible blow was dealt to the Voting Rights Act on June 25, 2013, when the Supreme Court handed down the decision in *Shelby County v. Holder, 570 U.S. 193 (2013),* which invalidated Section 4(b), the provision of the law determining which jurisdictions would be subject to Section 5 "pre-clearance."

- In 2006, the City of Calera, which lies within Shelby County, Alabama enacted a discriminatory redistricting plan without complying with Section 5, leading to the loss of the city's sole African-American councilman, Ernest Montgomery. In compliance with Section 5,

however, Calera was required to draw a nondiscriminatory redistricting plan and conduct another election in which Mr. Montgomery regained his seat.

- According to the Supreme Court majority, the reason for striking down Section 4(b): "Times change."

- Now, the Court *was* right; *times have changed.* But what the Court did not fully appreciate is that the positive changes it cited are due almost entirely to the existence and vigorous enforcement of the Voting Rights Act.

- *And that is why the Voting Rights Act is still needed.*

- Let me put it this way: in the same way that the vaccine invented by Dr. Jonas Salk in 1953 eradicated the crippling effects but did not eliminate the cause of polio, the Voting Rights Act succeeded in stymieing the practices that resulted in the wholesale disenfranchisement of African Americans and language minorities but did eliminate them entirely.

- The Voting Rights Act is needed as much today to prevent another epidemic of voting disenfranchisement as Dr. Salk's vaccine is still needed to prevent another polio epidemic.

- In 1964, the year before the Voting Rights Act became law, there were approximately 300 African-Americans in public office, including just three in Congress. Few, if any, black elected officials were elected anywhere in the South.

- Because of the Voting Rights Act, as of 2013 there are more than 9,100 black elected officials, including 43 members of Congress, the largest number ever.

- The Voting Rights Act opened the political process for many of the approximately 6,000 Latino public officials that have been elected and appointed nationwide, including 263 at the state or federal level, 27 of whom serve in Congress.

- Native Americans, Asians and others who have historically encountered harsh barriers to full political participation also have benefited greatly.

- Now to be sure, the Supreme Court did not invalidate the preclearance provisions of Section 5; it only invalidated Section 4(b).

- But that is like leaving the car undamaged but destroying the key that unlocks the doors and starts the engine.

- According to the Court, the coverage formula in Section 4(b) had to be struck down because the data upon which it was based – registration rates and turn-out gaps – was too old and outdated.

- Like many others, I disagreed. I thought the Court got it wrong and said in an *op-ed published in the Forward Times* of Houston, in which I wrote:

  > The Court majority confuses the symptom with the cause. Congress' focus was not on voter registration or turnout rates. Congress instead was focused on eliminating the causes or at least eradicating the effects of racial discrimination in voting in *states that had a "unique history of problems with racial discrimination in voting." Shelby, 570 U.S. 193, (Ginsburg, J., dissenting), slip op. at 19 (June 25, 2013).*

- I believe Justice Ruth Bader Ginsburg was exactly right when she wrote in her dissent that the question in 2006 was not which states were to be covered by Section 4(b) and thus subject to pre-clearance as was the case in 1965. *Rather the question before Congress in 2006:*

  > *"Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places?"*

- There were many commentators, pundits, and opponents of the Voting Rights Act who viewed the Court's *Shelby* decision as the death knell of the Act.

- But they underestimated the determination of my colleagues in the House and Senate, on both sides of the aisle. They discounted the commitment of persons like:

  1. Republican James Sensenbrenner and Democrat John Conyers, each a former Chairman of the House Judiciary Committee;

  2. Congressman John Lewis, who shed his blood on the Edmund Pettus Bridge in Selma, Alabama on "Bloody Sunday";

  3. Northern members of Congress like Democratic Whip Steny Hoyer, Republicans Steve Chabot of Ohio and Sean Duffy of Wisconsin; and

  4. Southern members like Spencer Bacchus of Alabama, Robert "Bobby" Scott of Virginia and Sheila Jackson Lee of Texas.

- These members, joined by several of their colleagues, refused to let the Voting Rights Act die.

- We recognized and understood that for all the progress this nation has made in becoming a more inclusive, equitable, and pluralistic society, it is the Voting Rights Act "that has brought us thus far along the way."

- And so we went to work. Led by Congressman Jim Clyburn of South Carolina, I was a member of the working group tasked with sharing ideas, making recommendations, and crafting and drafting the legislation that would repair the damage done to the Voting Rights Act by the Supreme Court decision and capable of winning majorities in the House and Senate and the signature of the President.

- After months of hard work, consultation, negotiation, and collaboration, we were able to produce a bill, H.R. 3899, "VOTING RIGHTS AMENDMENTS ACT OF 2014," that can achieve these goals.

- The companion to this legislation is S. 1945.

- To be sure, this legislation is not perfect, no bill ever is.

- But – and this is important – the bill represents an important step forward because it is responsive to the concern expressed by the Supreme Court and establishes a new coverage formula that is carefully tailored but sufficiently potent to protect the voting rights of all Americans.

- First, H.R. 3899 and S. 1945 specify a new coverage formula that is based on current problems in voting and therefore directly responds to the Court's concern that the previous formula was outdated.

- The importance of this feature is hard to overestimate. Legislators and litigators understand that the likelihood of the Court upholding an amended statute that fails to correct the provision previously found to be defective is very low indeed.

- H.R. 3899 and S. 1945 replace the old "static" coverage formula with a new dynamic coverage formula, or *"rolling trigger,"* which works as follows:

  1. *for states*, it requires least one finding of discrimination at the state level and at least four adverse findings by its sub-jurisdictions within the previous 15 years;

  2. *for political subdivisions*, it requires at least three adverse findings within the previous 15 years; but

  3. *political subdivisions with "persistent and extremely low minority voter turnout"* can also be covered if they have a single adverse finding of discrimination.

- The "rolling trigger" mechanism effectively gives the legislation nationwide reach because any state and any jurisdiction in any state potentially is subject to being covered if the requisite number of violations are found to have been committed.

- The rolling trigger contained in H.R. 3899 and S. 1945, however, does not cover all of these states. To compensate for the fact that fewer jurisdictions are covered, the bill also includes several key provisions

that are consistent with the needs created by a narrower Section 5 trigger.

- For example, H.R. 3899 and S. 1945:

  1. Expand judicial "bail-in" authority under Section 3 so that it applies to voting changes that result in discrimination (not just intentional discrimination);

  2. Require nationwide transparency of "late breaking" voting changes; allocation of poll place resources; and changes within the boundaries of voting districts;

  3. Clarify and expand the ability of plaintiffs to seek a preliminary injunction against voting discrimination; and

  4. Clarify and expand the Attorney General's authority to send election observers to protect against voting discrimination.

- Before concluding there is one other point I would like to stress.

- I would urge the Committee to be particularly sensitive to the interests of language minorities in emerging communities because they have distinct and particular interests that ought to be considered.

- "Emerging communities" are those located in states such as Alabama, Arkansas, Tennessee, and South Carolina that historically were not home to large numbers of Hispanics or Asian-Pacific Americans but have in recent years experienced tremendous population growth which is expected to accelerate.

- The concern is that as these Hispanic and Asian-Pacific voters in these areas become more numerous in these states and capable of having a tangible influence on electoral outcomes, some communities may respond by adopting measures that violate principles of fair and equal treatment.

- Such measures may include:

1. Changes from single-member to at-large election districts;
2. Changes to jurisdictional boundaries through annexation; or
3. Changes to multilingual voting materials requirements.

- We can all agree that language minorities and those residing in emerging communities deserve protection from any such retaliatory election changes.

- In closing, let me say again that the right to vote, free from discrimination, is the capstone of full citizenship conferred by the Civil War Amendments and the Voting Rights Act of 1965 is no ordinary piece of legislation.

- For millions of Americans, the Voting Rights Act of 1965 is sacred treasure, earned by the sweat and toil and tears and blood of ordinary Americans who showed the world it was possible to accomplish extraordinary things.

- So we must be vigilant and fight against efforts to abridge or suppress the voting rights of Americans until voter discrimination is truly a vestige of the past.

- This concludes my testimony. Thank you very much for the opportunity to appear before the Committee to present my views regarding the continuing need for a Voting Rights Act that protects the right of all Americans.

June 25, 2014

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Gay and Lesbian Task Force, the oldest national organization advocating for the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and their families, we strongly support the passage of the Voting Rights Amendment Act of 2014 (S. 1945). This bipartisan legislation offers an effective approach in response to the Supreme Court's decision in *Shelby County v. Holder*, which struck down a key provision of the Voting Rights Act that for decades had protected voters from discrimination. LGBTQ people come from every race, economic class, and faith background – voting discrimination of any kind stymies the voices of LGBTQ people and prevents the LGBTQ community from being accurately represented in the political process.

Discriminatory voting practices continue to be a pervasive issue throughout the United States, and we need structures in place to help combat and prevent voting discrimination. Since the *Shelby* decision, state and local governments have implemented the types of voting changes that have previously been ruled discriminatory by the U.S. Department of Justice, such as changes to voting district boundary lines targeting minorities and moving polling places to locations that present substantial barriers to low-income voters.

The voting protections currently in place are no longer adequate in light of the Supreme Court's *Shelby* decision, gutting a key provision of the Voting Rights Act of 1965. Voting discrimination is a bipartisan issue that negatively impacts both parties and is a threat to our democracy. The Voting Rights Amendment Act is a modern, flexible, nationwide approach to protecting voters, which embodies the spirit and letter of the Court's decision. This legislation does not just provide a reactionary devise to discrimination; it puts in place protections that will help prevent future discriminatory practices.

The time is now to pass this crucial legislation. We must move the Voting Rights Amendment Act forward in order to protect the votes and voices of all Americans. Every day that passes without protections causes further harm to our voters.

We look forward to working with you on this critical legislation. If you have questions, please feel free to contact Stacey Long, Director of Public Policy and Government Affairs, at slong@thetaskforce.org or 202-639-6307.

Sincerely,

National Gay and Lesbian Task Force

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Tel 202.393.5177 > Fax 202.393.2241 > www.the TaskForce.org

BEND THE ARC
a jewish partnership
for justice

Testimony of Stosh Cotler
Chief Executive Office, Bend the Arc: A Jewish Partnership for Justice
Submitted to
The Senate Committee on the Judiciary
For the hearing record on:
"The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to Shelby County v. Holder"
June 25, 2014

Almost exactly fifty years ago, three young men were murdered by the Ku Klux Klan in Mississippi for working to register African-Americans to vote. Today, we work to carry on Andrew Goodman, James Chaney and Michael Schwerner's fight to defend the voting rights of all Americans. Inspired by their legacy, I submit this testimony for the record of this hearing, thank you for giving the Voting Rights Amendment Act of 2014 the consideration it deserves and urge you to pass this important bill. The landmark protections of the Voting Rights Act are critical and must be reinstated by Congress before the midterm elections this fall.

There is something quintessentially American, but also quintessentially Jewish, about voting. After all, voting is a ritual, part of belonging to the community. American Jews have always valued our right to vote. As our ancestors fled pogroms and persecution, those who came here found a country where they, even if they were not always welcome or even fully protected under the law, nonetheless had a legal right to exist, pursue their own affairs, and be part of our political system at the basic level.

We draw inspiration not only from our ancestors, but from the Jewish leaders of our time—those who marched on Washington, those who participate in election protection today—and from our sages of old. "A ruler is not to be appointed unless the community is first consulted," (Babylonian Talmud, B'rachot 55a) our rabbis taught, and in our nation, that means the full diversity of our citizenry has the unhindered right to vote for their leaders.

Yet, while voting rights have long been—and continue to be—a personal issue for the Jewish community, this is true for the broader interfaith community as well. To illustrate this, I submit for the record two letters in support of the Voting Rights Amendment Act on behalf of the myriad diverse signers. The first, a Jewish community letter, was signed by dozens of Jewish organizations and the second was signed by 88 faith-based organizations representing more than a dozen religious denominations.

In striking down a key provision of the Voting Rights Act, the Supreme Court's 2013 decision in *Shelby County v. Holder* dismantled critical protections for

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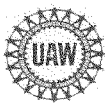
those most at risk of having their rights abridged. It took mere weeks after the ruling for many of the jurisdictions previously monitored under the VRA to rush out and make changes to election law that could deny the vote to thousands of citizens. The reasons for these changes may or may not be as blatantly racist as they were fifty years ago, but they are certainly just as cynical and malicious. Many proponents have been clear that their motives are based on suppressing votes to win partisan election contests. Yet, even ignoring the motives, the results of these changes are clear—they will make it harder for communities of color, women, first-time voters, the elderly, and the poor to cast their vote.

Yesterday, Bend the Arc and our supporters delivered a *yahrtzeit* candle (a memorial candle lit by Jews to commemorate the anniversary of a loved one's passing) to every member of Congress. Emblazoned with the faces Goodman, Chaney and Schwerner, it is our hope that these memorial candles help ensure that these brave young men are not forgotten and that our elected officials honor their memory—and that of so many others like them—by passing the Voting Rights Amendment Act of 2014. It is clear that our work is far from complete. It is clear we still need the Voting Rights Act.



INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW

DENNIS WILLIAMS, President GARY CASTEEL, Secretary-Treasurer

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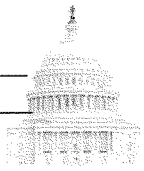

June 25, 2014

IN REPLY REFER TO

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"The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*"

Statement for the Record

UAW President Dennis Williams
226 Dirksen Senate Office Building

On behalf of the more than one million active and retired members of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), I applaud Chairman Leahy for holding a hearing on the bipartisan *S.1945, Voting Rights Amendment Act of 2014*. The UAW calls on House Judiciary Chairman Goodlatte to also schedule a hearing on this critical matter immediately. We strongly urge the Senate and House to pass the legislation this summer. This important bill would repair last year's harmful Supreme Court decision in *Shelby County v. Holder*. *Shelby County v. Holder* undermines the Voting Rights Act (VRA) by curtailing voting protections. S.1945 would fix some of the egregious aspects of the decision and helps ensure all Americans can exercise the fundamental right to vote without facing discrimination. As we mark the one year anniversary of this misguided decision, it is important for Congress to finally act to restore voting rights. Our country must protect the right to vote in order to maintain a well-functioning democracy.

The UAW has a long and storied history of fighting for civil rights and social change. The Voting Rights Act has been a mainstay against voter discrimination for decades. We are pleased to see that there is a bipartisan commitment to protecting the freedom to vote. S. 1945 represents what we can accomplish as a nation if we maintain our willingness to work together for the good of the American people.

While this bill is not perfect, it includes some major provisions that are imperative in protecting one's right to vote. Specifically, the bill includes preclearance requirements for jurisdictions with a recent history of voting rights violations and adds transparency and disclosure requirements for important voting changes. We stand ready to work with all supporters of voting rights to pass *Voting Rights Amendment Act of 2014* into law.

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National Action Network
Reverend Al Sharpton, President & Founder
Reverend W. Franklyn Richardson, Chairman of the Board
Janaye Ingram, Acting National Executive Director

Statement for the Record

Submitted By

National Action Network (NAN)

Statement for the Record on

"The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to Shelby County v. Holder"

Thank you, Chairman Leahy and members of the Judiciary Committee for holding this very important hearing on the S. 1945 Voting Rights Amendment Act of 2014 and allowing us to submit this statement for the record.

National Action Network ("NAN") is a leading civil rights organization that fights for one standard of justice, decency and equal opportunity for all people regardless of race, religion, national origin, or gender. NAN acts as a megaphone for the voiceless and appreciates this hearing regarding voting rights.

As we celebrate the 50th anniversary of the Civil Rights Act and the 50th anniversary of Freedom Summer, we find ourselves asking why S.1945 the Voting Rights Amendment Act (VRAA), is needed. We remember individuals who gave their lives for the right to vote. People like Goodman, Schwener and Chaney. So many others, who made the ultimate

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Reverend Al Sharpton, President & Founder
Reverend W. Franklyn Richardson, Chairman of the Board
Janaye Ingram, Acting National Executive Director

sacrifice for their strong belief in freedom and equality so others could exercise their franchise without fear and harassment.

Last year when the U.S. Supreme Court rendered their decision in *Shelby County vs. Holder,* they gutted one of the most important sections of the 1964 Voting Rights Act. It cleared the way for more discriminatory laws to take hold and set us back more than 50 years. We know that thousands of pages of updated evidence were introduced and reviewed by Congress during the last reauthorization of the Voting Rights Act. This updated evidence should have been enough for the Court to keep the law intact. But since their decision, we need a measure that will replace the formula and that is why we support S. 1945. As we debate the merits of the Voting Rights Act Amendment, and why it is important that no American be denied access to the ballot box, NAN commends you for taking the first steps of addressing the Court's concerns with this legislation. Prior to *Shelby*, Section 4 required a formula for how states were to be covered. Section 5 required those covered jurisdictions to submit any proposed changes in voting procedures to the U.S. Department of Justice; or to a federal district court in D.C. to determine whether that change would be discriminatory before the change could go into effect.

Since *Shelby*, seven former preclearance states have announced new restrictions on the right vote. Last year, a federal court called Texas's photo ID law the "most stringent in the country." Now, it is the law. Two months after the Supreme Court ruling, North Carolina

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cut early voting and eliminated same-day registration. 38,000 voters in Virginia who thought they were registered to vote were purged from the voting rolls. Kansas suspended registration for 17,500 voters. Currently 13 states have voted on some form of voter identification legislation; 15 states will have new voting restrictions in place; in six states there are ongoing court cases that could impact their elections; and in one state new voting law will be effective in 2106. Some states have passed laws requiring voters to show some form of government issued identification at the polls. There are even states that accept a gun permit as ID but not a student photo ID. Previously there were no such requirements.

Historically, protecting and securing the right to vote has been fraught with controversy. Denying African Americans the right to vote is a discriminatory practice. The 1866 Civil Rights Act granted citizenship, but not the right to vote, to all native-born Americans. Three years later in 1869, Congress granted African American men the right to vote in the Fifteenth Amendment to the Constitution. However, in 1896, Louisiana passed the "grandfather clause" to keep former slaves and their descendants from voting. As a result, registered black voters dropped from 44.8% in 1896 to just 4% four years later. Mississippi, South Carolina, Alabama and Virginia followed Louisiana's lead by enacting their own grandfather clause. The very same states that once enforced the grandfather clause and other restrictive laws are now introducing laws that will restrict rights. From 1890 to 1960 state after state, primarily in the south as well as other jurisdiction

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Janaye Ingram, Acting National Executive Director

throughout the country, adopted some form of voter suppression. This included grandfather clauses, literacy tests, poll taxes or lynching voters who dared to try to utilize their franchise. All of this was to deny African Americans and other minorities the right to vote.

Today, gone are the grandfather clauses, the literacy tests and poll taxes, only to be replaced by a requirement for a government issued ID and other suppressive requirements that place an undue burden on otherwise eligible voters.

According to the US Census Bureau, the 2012 and 2008 elections had the highest number of African American and Hispanic voter turnout. Overall, 133 million people reported voting in 2012, a turnout increase of about 2 million people since the election of 2008. But this fact is in spite of the new restrictions. Some of the laws are now in place were not in place for either of those elections because their enactment date was beyond 2012.

Research and studies have shown that voting discrimination practices are as widespread today just as they were 50 years ago. The Voting Rights Act is the country's most proven, effective tool to protect voters from discrimination. Specifically, section 5 is the fastest way to protect voters if states created laws that would serve to impede their right to vote. However, that key provision has been disabled due to the restriction of section 4. The Voting Rights Amendment Act includes a vital set of protections that *Shelby* stripped from

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Janaye Ingram, Acting National Executive Director

the VRA. The VRAA will address current discrimination in real time; provide the ability to review voting changes in places that have engaged in discrimination presently and in the past. It will also provide for better notification pf potential voting changes to enhance transparency and accountability. Additionally, the VRAA will address some commonsense fixes that will ensure that voters everywhere are protected by up to date safeguards. While further debates are needed now is the optimum time to pass this critical bill.

National Action Network's chapters have worked tirelessly to ensure that our communities have a voice and vote in every election. From Pennsylvania to Florida, Texas, Ohio, Arizona and many states in between, NAN members have addressed the numerous accounts of voter suppression and discrimination. Serving as steward of civic engagement and a fair political process, we continue to speak out when voters are denied the right to vote. We challenge those that challenge the laws of equity and due process and we advocate for those who are not able to do so for themselves.

As we move further into the 2014 election cycle, the Voting Rights Amendment Act is needed now more than ever because voting discrimination still exists in this country and every American has the right to vote and should be empowered to do so instead of restricted. As the 2016 election cycle quickly approaches, most if not all of the new restrictive laws pushed through since *Shelby* will be in effect unless we see a law passed that will restore section 5. It is imperative that Congress works to protect every citizen's

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right to vote and works together in a bi-partisan effort to restore the powers of the Voting Rights Act.

NAN looks forward to working with Congress to restore the vital protections of the Voting Rights Act of 1964 through an updated and modern formula. Thank you.

Communications Workers of America
Legislative Department
Shane Larson, Director

July 2, 2014

The Honorable Patrick Leahy
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the officers and members of the Communications Workers of America (CWA), we applaud Chairman Leahy for holding the following hearing today: "The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*." Equal voting access is a key tenet of our democracy and CWA is committed to the fight to ensure that access is equal, inclusive and fair.

The original Voting Rights Act (VRA)—enacted in response to persistent and purposeful discrimination through literacy tests, poll taxes, intimidation, threats, and violence—had remarkable success in ensuring access to the voting booth. For millions of racial, ethnic, and language minority citizens, it eliminated discriminatory practices and removed other barriers to political participation.

A year ago today, in *Shelby County v. Holder*, the U.S. Supreme Court invalidated Section 4 of the Voting Rights Act, a key provision. That ruling has severely undermined the law's effectiveness, halted progress, and is threatening to turn back the clock.

Voter suppression and intimidation are very much alive in America. In recent years, we have seen an unprecedented number of anti-voter initiatives in state legislatures—proposals and laws enacted that require photo identification, eliminate same-day registration, shrink early voting windows, change student voting requirements, and make it hard for people to vote in other ways. During the 2012 presidential election campaign, we saw a deeply troubling increase in misleading and fraudulent information about elections, voter intimidation, and robocalls designed to suppress voting.

In direct response to *Shelby*, the House and Senate worked together and crafted the Voting Rights Amendment Act (S. 1945/H.R. 3899)—modern, flexible, forward-looking legislation designed to protect 21st century voters. While it is not perfect, we are encouraged by the bipartisan, bicameral effort to update the VRA and protect the constitutional right to vote. Among other things, this legislation enhances the ability to apply preclearance review when needed, allows for greater transparency with nationwide notification, provides nationwide review and remedies for current discrimination, and halts discriminatory voting changes before they take effect.

We look forward to working with Congress to ensure no American is denied the right to vote or the equal protection under the law the Constitution provides.

Sincerely,

Shane Larson
Legislative Director
Communications Workers of America
501 Third Street NW
Washington, DC 20001
(c) 202-997-0928
(o) 202-434-0573

June 24, 2014

By E-Mail

Senator Patrick Leahy, Chairman
Senator Chuck E. Grassley, Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy, Ranking Member Grassley, and Members of the Committee:

On behalf of Project Vote, I am writing to you in support of the Voting Rights Amendment Act, S. 1945. Project Vote is a national nonpartisan, non-profit organization dedicated to building an electorate that accurately represents the diversity of America's citizenry. Project Vote takes a leadership role in nationwide voting rights and election administration issues, working through research, litigation, and advocacy to ensure that every eligible citizen can register, vote, and cast a ballot that counts.

First, we commend Senator Leahy for holding this hearing today, which marks the one-year anniversary of the United States Supreme Court decision in *Shelby County v. Holder*, a decision that dramatically limited the efficacy of the landmark Voting Rights Act of 1965. We must remember, however, that the Supreme Court also issued an invitation in that opinion, and the VRAA is simply a positive and direct response to that invitation. We needn't opine here on whether the Supreme Court decided *Shelby* rightly or wrongly. What is important is that the Court invited Congress to enact an "updated" coverage formula that would be used to determine what jurisdictions would be subject to federal preclearance in the future. And that is exactly what the Voting Rights Amendment Act does.

Racial discrimination in elections is not a quaint relic of the past. It is real, and it happens today. Without the safeguard of preclearance of voting changes in jurisdictions with particularly troubling histories of discrimination, their residents do not have adequate tools to combat racially motivated policies when it counts—*before* they go into effect. In just the year since the *Shelby County* decision, states and counties previously under preclearance have been able to enact problematic new policies with impunity. For example:

- Decatur, Alabama: In 2011, the city's plan to change its city council election method from five single-member districts to three single and two at-large districts was subject to preclearance and was withdrawn when the

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Department of Justice (DOJ) asked for more information. After *Shelby* was decided, the city implemented the plan.

- State of Georgia: After *Shelby*, the Georgia Secretary of State announced that the 2014 election for Augusta-Richmond County would be held at the time of the primary rather than the general election, reinstating a plan that DOJ had objected to because it would disproportionately impact minority turnout.
- State of Texas: Immediately after the *Shelby* decision, the state's Attorney General announced that its strict photo ID law, which had been denied preclearance by both DOJ and a federal court, would go into effect immediately.
- Galveston County, Texas: DOJ had objected to a proposed reduction in the number of justice of the peace and constable districts because it would have a disparate impact on minority voters, but the county implemented the plan a few days after the *Shelby* decision.

The Voting Rights Amendment Act was introduced on January 16, 2014, and it is time for Congress to move it forward. It is a commonsense compromise that ensures that only a jurisdiction's recent violations of federal voting laws will be considered in the determination of whether it should be subject to preclearance. This approach directly addresses the Supreme Court's concerns and reinstates the indispensable safeguard provided by preclearance: that discriminatory voting changes can be stopped or ameliorated prior to implementation, before anyone's voting rights are actually violated.

With an important federal election just a few months away, we hope that the Senate will move expeditiously, and in a bipartisan manner, to send a clear message to the citizens of our country that voting rights are sacrosanct and that deprivations of these fundamental rights will not be tolerated. It was heartening to us that both the House and Senate introduced this legislation in January, and that the House has seen a steadily growing list of cosponsors from both parties. It is time that Senators of both parties likewise join in support of the Voting Rights Amendment Act. The robust protection of voting rights under federal law cannot wait.

Please contact Estelle H. Rogers, Esq., Legislative Director of Project Vote, at erogers@projectvote.org or 202-546-4173, ext. 310, if you have any questions. We look forward to working with you on this crucial legislation.

Sincerely,

Estelle H. Rogers, Esq.
Legislative Director

Cc: Members of Senate Judiciary Committee

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The Office of Secretary of State

Brian P. Kemp
SECRETARY OF STATE

June 20, 2014

Via U.S. and Electronic Mail

The Honorable Chuck Grassley
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Voting Rights Amendment Act of 2014

Dear Senator Grassley:

It is my understanding that the Senate Judiciary Committee will hold a hearing on June 25th to discuss the Voting Rights Amendment Act. My office has reviewed Senator Leahy's bill as well as Representative Sensenbrenner's bill, and I am writing to register my serious concerns with them.

I have taken the consistent position that any federal laws regarding elections should be uniform throughout the United States. Our Constitution and Section Two of the Voting Rights Act prohibit any form of racial discrimination within the democratic process and apply equally to all states. The Voting Rights Act is still intact and it is my sacred duty to uphold it. I have full faith that the State of Georgia will continue to abide by it. The proposed legislation ignores the tremendous progress that Georgia and the rest of the nation have made in the past 50 years and seeks to reinstate an outdated and obsolete formula that would cost Georgia taxpayers a significant amount in time, resources, and money.

Georgia would be subject to pre-clearance under the proposed bill due to previous "voting rights violations" of Section 4 of the Voting Rights Act—the section that was struck down as unconstitutional in *Shelby County v. Holder*. However, these "voting rights violations" are not limited to findings of discriminatory intent. They include any instance where the Department of Justice—under the old, unconstitutional formula—interposed an objection that was not later overturned by a court. Basing pre-clearance off of past objections with no findings of discriminatory intent attempts to resurrect an unconstitutional system. The proposed bill also enshrines the controversial "disparate impact" standard, meaning that states or localities could find themselves under federal control even when there is no evidence of discriminatory intent.

Our research indicates that the "violations" that would place Georgia back under pre-clearance are not state laws that were found to be discriminatory. Rather, the "violations" refer almost exclusively to city

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or county redistricting plans or other minor changes. To subject an entire state to the administrative and financial burdens of pre-clearance based on these objections is a remedy in search of a wrong.

I also understand that the proposed bill drastically lowers the standard for litigants seeking a preliminary injunction, allowing political interest groups to control whether our state can implement its own laws and costing our taxpayers significant time, money, and resources.

Pre-clearance was an extraordinary remedy for an extraordinary time. Putting Georgia back under pre-clearance will subject our state to significant financial and administrative burdens, and these burdens are not necessary to prohibit racial discrimination in our democratic process. As Georgia's chief elections official, it is my sacred duty to uphold secure, accessible and fair elections. Pre-clearance does not help us achieve that goal.

In closing, I reiterate my strong belief that every state in the United States of America should be subject to the same federal law. If it is your desire to implement changes to the system, I feel it would be discriminatory to treat four states differently than the other forty-six due to an outdated and arbitrary formula that the Supreme Court has already ruled unconstitutional.

Sincerely,

Brian P. Kemp

cc: The Honorable Saxby Chambliss
The Honorable Johnny Isakson

06/24/2014 13:20 2259222003 LA SECRETARY OF STATE #1100 P.001 /012

TOM SCHEDLER
SECRETARY OF STATE

Secretary of State
State of Louisiana

P.O. BOX 94125
BATON ROUGE, LA 70804-9125
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June 23, 2014

Honorable Patrick Leahy
U.S. Senate
437 Russell Senate Bldg.
Washington, D.C. 20510

Honorable Chuck Grassley
U.S. Senate
135 Hart Senate Office Bldg.
Washington, D.C. 20510

Re: S 1945, Sen. Leahy (D-VT)
HR 3899, Rep. Sensenbrenner (R-WI)
113th Congress
Via Facsimile

Dear Senators Leahy and Grassley:

As Secretary of State and the Chief Elections Officer for the State of Louisiana, it is of extreme importance that I inform you of my strong objections and concerns to S 1945 (HR 3899 by Representative Sensenbrenner, R-WI), proposing to enact the "Voting Rights Amendment Act of 2014". The proposed Act purports to amend the Voting Rights Act of 1965 to revise the criteria for determining which states and political subdivisions are subject to Section 4 of the Act, and to provide for other purposes.

As you are aware, the United State Supreme Court ruled on June 25, 2013, that Section 4(b) of the Voting Rights Act of 1965 is unconstitutional because the coverage formula is based on data over 40 years old, making it no longer responsive to current needs, and therefore an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states. *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

Louisiana was a Section 5 preclearance state, meaning that any voting law, practice or procedure had to be submitted for approval by the U.S. Attorney General or the U.S. District Court in Washington, D.C. prior to implementation. Each political subdivision of our state has had to submit every single change to the Justice Department, including for example, something as simple as moving a polling place from one location to another, even if it was just down the street

because the old location was no longer available for use. Although the court did not strike down Section 5, without Section 4(b), our state is presently not subject to Section 5 preclearance unless Congress enacts a new coverage formula.

S 1945 (HR 3899) goes way beyond enacting a new coverage formula and tramples states' rights to conduct elections by providing sole power in the U.S. Attorney General to immediately subject states, such as Louisiana, to coverage based on past "objections" as determined by the Attorney General. The Elections Clause, Art. I, §4, cl. 1, provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators." In practice, the clause functions as "a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997).

Not only does S 1945 (HR 3899) resurrect preclearance coverage based on old data specifically rejected by the Court (allowing the Attorney General to go back 15 years to determine violations), but it is a dangerous attempt to pre-empt the state's sovereign right to exercise its discretion in the formulation of an election system for the election of representatives in Congress. It would displace Louisiana's pre-existing legal system of conducting elections for some undetermined election process decided upon by the United States Attorney General. It provides for unprecedented power entrusted to the Attorney General to cite violations and determine all state election procedures.

Another new issue introduced into the VRA debate is that somehow compliance with VRA should be tied to voter turnout. Low voter turnout in elections, which we all know is driven by what is on the ballot, would now be something the Attorney General could use to cite as a violation.

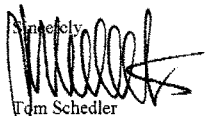
In comparing the turnout of the 2008 Presidential election to the 2012 Presidential election, Louisiana's turnout actually increased! Louisiana was one of only two states (Iowa being the other) to increase the voting turnout. However, looking at an analysis of how turnout would be a factor in determining the fate of Louisiana with Section 5, the results are grim. Just on turnout alone, the Attorney General could cite Louisiana for violations. The right to vote is just that – **a right.** All registered voters have a choice and can choose to either exercise that right, or choose not to do so. How can any state or political subdivision be held accountable for what amounts to a personal responsibility? Voting is an expression of free will/free speech. The lack of turnout could very well be the result of citizens expressing free speech and/or free will in choosing not to participate.

Additionally, S 1945 (HR 3899) would add new burdens and costly provisions disguised as promoting transparency for enforcement of the Voting Rights Act by making the state provide public notice according to a format to be determined by the Attorney General. It presently costs Louisiana tax payers $350,000 to publish 90 days before a federal election, a listing of inactive voters on one day in each parish journal every other year. Two years ago, we began publishing on our website a real-time listing of inactive voters, which is available 24/7. The projected cost to publish the information required by S 1945 (HR 3899) could increase Louisiana election costs for the 2014 federal cycle by four times the current projection. If published for just one day in each journal of each parish, much like we do for inactive voters, Louisiana's publication costs would increase to $1.4 million minimally for a one-time publication. However, the way this legislation reads the Attorney General will have full latitude in determining how the information is published and the number of times it is to be published, potentially further increasing our costs.

Expanding upon the example of polling location changes in paragraph 3, additional consequences for failing to publish a precinct change, as determined by the Attorney General, would bar Louisiana from preventing anyone from voting in the wrong precinct. An additional example is if Louisiana ever-so-slightly amends our law on the prohibition of felons voting and does not provide the public notice as determined by the Attorney General, we could be forced to allow all felons the right to vote. These are absurd proposals leading to absurd results!

I am enclosing a fact sheet addressing issues of each section of the proposed legislation, as well as a spreadsheet showing the difficulties associated with the minority turnout provisions within the legislation. Louisiana has an excellent reputation in the mechanics and execution of its elections. We have been nationally recognized for our innovative and consistent elections procedures and processes, such as having one of the first online voter registration systems in the country. We also have a state of the art mobile elections application for smartphones, which provides a wealth of voting information to our citizens. We are on the forefront of elections, and we are not going to sit idly by and watch the provisions of S 1945 (HR 3899) turn back the clock. We need your assistance and support in this endeavor and welcome the opportunity to speak to you at your earliest convenience.

Sincerely,



Tom Schedler
Secretary of State

Enclosures

Cc: Honorable Bobby Jindal, Governor
Honorable Mary L. Landrieu
Honorable David Vitter
Honorable Dianne Feinstein
Honorable Charles Schumer
Honorable Dick Durbin
Honorable Sheldon Whitehouse
Honorable Amy Klobuchar
Honorable Al Franken
Honorable Christopher A. Coons
Honorable Richard Blumenthal
Honorable Mazie Hirono
Honorable Orrin G. Hatch
Honorable Jeff Sessions
Honorable Lindsey Graham
Honorable John Cornyn
Honorable Michael S. Lee
Honorable Ted Cruz
Honorable Jeff Flake

Louisiana Secretary of State
Summary of Issues
HR 3899 by Rep. Sensenbrenner (R-WI) and
S 1945 by Sen. Leahy (D-VT)

Section 2: Violations Triggering Authority of Court to Retain Jurisdiction

- This section amends Section 3(c) of the VRA, the "bail-in" provision that allows a court to order a state or political subdivision (not subject to Section 5 preclearance) to preclear any voting-related changes. The current version of Section 3(c) requires a plaintiff to show that there was actual, intentional discrimination that violated the Constitution, but the amendment would lower the standard for which a court may bail-in a state or political subdivision to virtually any voting statute violation, even those based solely on statistics and in the complete absence of discriminatory conduct.

- If this amendment passes, Congress would be overreaching its power and would violate the principle of state sovereignty by allowing states or political subdivisions to be bailed back into preclearance based on conduct or even statistics that do not violate the constitution.

- In its current form, Section 3(c) is constitutional because its intentional discrimination requirement is identical to the Constitutional standard for establishing violations of the Fourteenth and Fifteenth Amendments. To justify legislation that imposes liability for actions that do not amount to intentional discrimination, Congress must show that there is a record of purposeful discrimination by a state. It is equally unlikely that there is a record of purposeful discrimination sufficient to justify bailing in a jurisdiction under Section 3(c) for any violation of a federal voting rights law, particularly if those actions lack discriminatory intent. Notably, a jurisdiction can violate Section 2 of the Voting Rights Act, which prohibits abridgment of the right to vote on the basis of race, without engaging in intentional discrimination. If the Court ultimately requires evidence of purposeful discrimination to justify the proposed changes to Section 3(c), the Court also could invalidate Section 2 if that provision is used as the basis for bailing in a jurisdiction under Section 3(c). In short, the proposed VRA "fix," although badly needed to replace the recently invalidated coverage formula, could have the effect of undermining the rest of the statute if the bill is adopted in its current form. The legislative focus should be limited to replacing the coverage formula and leaving Section 3(c) alone.

Section 3: Criteria for Coverage of States and Political Subdivisions

- This section creates the new formula for subjecting states and political subdivisions to preclearance. It would place entire states automatically under a preclearance requirement for ten years if the Attorney General (exclusively) determines that five

"voting rights violations" occurred in the previous 15 years -- even if only one was committed by the state, as opposed to local political jurisdictions over which the state government has no control, and no matter whether the "violations" were actually discriminatory.

- "Violations" include objections made by the Attorney General to anything from a redistricting bill to a change in a polling location -- and statistical data, no matter how insignificant of a disparate impact it may show, would allow an objection to be filed. If moving a polling location from one public school to another for purely nondiscriminatory reasons had some statistical impact on the distance that different voters have to go, it could be the basis for an objection (at the sole discretion of the AG) that would count as a "voting rights violation."

- Worse, this amendment unfairly singles out states previously under Section 5 preclearance requirements. Louisiana and the other states that had to preclear any voting changes are singled out and are automatically at a greater disadvantage than the rest of the country because pre-*Shelby County* preclearance objections (both judicial and by the AG) will count toward their tally of "voting rights violations". These objections could be (and for Louisiana, *are*) totally unrelated to changes that intentionally discriminate against voters.

- Also troubling is the bill's reliance on old, unconstitutional standards to determine the new preclearance formula, despite the Supreme Court's clear directive that reverse-engineering a formula to target Southern states will not pass constitutional muster: prior preclearance objections to determine whether these states should fall under the new preclearance standards effectively revives the old, unconstitutional formula.

- For instance, in 2004, Louisiana submitted for preclearance a statute that would have given the state authority to limit local jurisdictions from changing precinct boundary lines during a freeze period for redistricting of local offices; however, the USDOJ objected to the law change, ultimately forcing Louisiana's legislature to allow exceptions during the freeze period causing split precincts and voter confusion on election day.

- Additionally, local political subdivisions like parishes and towns would automatically be placed under Section 5 preclearance requirements if they had three "voting rights violations" in 15 years, or one violation combined with "persistent, extremely low minority turnout" (as determined by the AG).

- Another troubling feature of the bill considers "persistent, extremely low voter turnout" to be a voting rights violation even if low turnout has absolutely nothing to do with anything other than voters not being interested in politics, the candidates, or voting. This would punish localities (and states, by association) not for any wrongdoing, but for the uncontrollable, independent behavior of their voters (or nonvoters as the case may be).

- Defining a "violation" for the Section 4 formula to mean anything other than intentional discrimination essentially invalidates Section 2 of the VRA, which prohibits abridgment of the right to vote on the basis of race, regardless of whether the discrimination was intentional.

- The Attorney General has *sole* discretion to determine the number of so-called "violations" and whether preclearance applies – and his determination becomes effective the moment it is published in the Federal Register. A prior version of Sensenbrenner's bill specifically said that the AG's determination is final and unappealable. Even though that language was deleted from the introduced version, there's still no mechanism that would allow states to review the AG's determination of whether there is a "violation".

- Coverage does not automatically end. The state or political subdivision must get a declaratory judgment in order to end preclearance, even if there haven't been violations in the past 10 years.

- The definitions of "minority" and "nonminority" categorize the protected classes solely by race, regardless of actual minority status, and thus the amendments offer protections only for "minority voters" that they withhold from "nonminority" voters. There are jurisdictions in Louisiana, and throughout the country, where historically majority races are the minority – but this bill specifically excludes them from consideration of whether a political subdivision has persistently low minority turnout. The VRA has always been race-neutral, protecting everyone, but this resolution basically implements government-sanctioned discrimination. For instance, if whites are a minority within a jurisdiction, and for 15 calendar years or longer the white turnout rate within that jurisdiction is substantially lower than the voter turnout rate for white voters nationally, no notice is taken, and no protection is granted. Thus, white voters who are a minority of the voters in Noxubee County, Mississippi, and who a federal court found were blatantly discriminated against by local black officials, would *not* be protected from discrimination under the proposed amendments. Likewise, the amendments may fail to equally protect Louisiana's Vietnamese population if they do not "identify themselves" as having some non-white ancestry.

- Voter turnout becomes a major factor of determining Louisiana's fate for Section 5. In an analysis provided by GCR Consulting that utilizes the same information contained in HR3899 on pages 8 through line 2 on page 10, it shows that for the 2012 federal elections, Louisiana's political subdivisions, and in turn the State, would violate HR3899 because of consistent lower turnout of minorities (other non-majority races) – despite the fact that Louisiana was one of only *two* states to increase voter participation as compared to the 2008 Presidential election.

- It is important to point out that Louisiana has made great strides in not only registration efforts (95% of all eligible African American females are currently registered to vote and 77% of all eligible African American males are registered) but Louisiana has also made great strides with voter participation. African American participation in the 2012 Presidential race, for example, showed a variance of -0.5% statewide as compared to non-minority participation: meaning African American turnout as compared to non-minority turnout was 0.5% higher!

Section 4: Promoting Transparency to Enforce the Voting Rights Act

- This part of the bill creates an entirely new section of the VRA that requires *every* state or political subdivision (whether subject to preclearance or not) to "provide reasonable public notice in the state or political subdivision and on the Internet, in a reasonably convenient and accessible format," of information on polling place resources and any change to voting prerequisites, standards, practices, or procedures affecting an election for Federal office. Additionally, *every* state and political subdivision must also provide reasonable public notice (etc.) of any changes relating to demographics and electoral districts for any Federal, *state, or local* office.

- Such requirements would impose burdensome and impractical information disclosure requirements on election officials that will be ridiculously expensive and be almost impossible to meet. For example: the number of poll workers assigned to a precinct must be published 30 days prior to the election, but poll workers are not assigned by this State until 29 days prior to the election. Another issue is whether a state or political subdivision will violate this section if the number of poll workers assigned and advertised does not match up to the number of poll workers who actually report to work on election day (if someone is sick, injured, or does not report for duty for whatever reason).

- There is no definition of what constitutes "reasonable public notice" or where on the Internet the information must be posted. Is posting on the door of a parish courthouse "reasonable public notice"? Is the Louisiana Secretary of State's website sufficient?

Louisiana election information and inactive voter lists are currently made available 24/7 on the Secretary of State's website at very little cost to Louisiana taxpayers. We are also working to amend our law to delete a now-redundant one-day newspaper publication of inactive voters and save the State $350,000. Under the proposed amendments, however, the Attorney General could determine such a change to be a "voting rights violation", and with the number of elections Louisiana administers every year, we will spend millions publishing the data required by the new transparency section.

- The Attorney General has sole discretion to decide on the format to be used by the states to meet the requirement, regardless of how onerous or costly that format may be to disseminate.
- Additionally, consequences for failing to provide public notice in the format determined by the Attorney General would include barring Louisiana from preventing anyone from voting. Thus, for example, if this State puts in changes designed to prevent ineligible individuals from voting but does not post the change within 48 hours, it would not be able to legally stop that ineligible individual (such as a felon, noncitizen, or nonresident) from voting.

Section 5: Authority to Assign Observers

- This section amends the VRA to allow the Attorney General to now send federal observers into jurisdictions upon simply receiving any complaints that an effort to violate Section 203 (the ballot translation language requirements) is "likely to occur" or if he thinks observers are necessary to "enforce the guarantees" of Section 203. This gives the Attorney General virtually unlimited authority to send observers and gives third parties the ability to have observers sent anywhere without the requirement for any kind of substantive, independent finding by a judge that violations of the law are actually occurring.

Section 6: Injunctive Relief

- This section would provide a private right of action for federal voting rights laws, and would essentially promote plaintiffs' lawyers to the status of the Attorney General in making civil-rights enforcement decisions.
- The injunctive relief provisions lower the standard for enjoining an election. By requiring the court to grant relief if it determines that the hardship on the defendant will be less than the hardship on the plaintiff if relief is not granted, private plaintiffs will virtually *always* be entitled to injunctive relief with regard to any change in the administration of elections that they do not like. For example, a key consideration in favor of granting an

injunction under the bill will be whether "the change was adopted fewer than 180 days before the date of the election." So if Louisiana adopts a new program five months before an election to remove aliens who have illegally registered to vote, the ACLU could obtain an injunction preventing the State from removing individuals who are committing felonies by registering.

Section 7: Other Technical and Conforming Amendments

- The last part of this section amends Section 5 of the VRA to define "applicable date of coverage" (the date that preclearance submissions must start) to be either:
  - June 25, 2013, if the beginning date of the ten-year preclearance period begins on or before December 31, 2015; or
  - The date the ten year preclearance period started, if the last violation started after December 31, 2015.
- This means that if a state is determined to have 5 voting rights violations that occurred on or before December 31, 2015, and must thus submit any changes for preclearance for the next ten years, that state must retroactively submit any voting changes enacted since June 25, 2013 (the date that the Supreme Court declared Section 4 to be unconstitutional), despite the fact that there was no constitutional or statutory prohibition against those changes at the time they were made.

Turnout Analysis - Variance by Race

Turnout Based on Voter Registration

Congressional District and Elections	Registered	White Registered	AA Registered	Other Races Registered	Voted	White Voted	AA Voted	Other Races Voted	Turnout	White Turnout	AA Turnout	Other RaceTurnout	AA TO Variance from All	AA TO Variance from Majority	Other Races TO Variance from All	Other Races TO Variance from Majority
CD 01																
102211	413,758	358,015	56,199	27,576	146,513	127,486	14,117	4,930	35.4%	35.6%	25.1%	17.9%	8.6%	10.5%	16.8%	17.6%
111911	434,751	350,705	56,339	27,708	79,858	72,010	5,671	2,217	18.4%	20.5%	10.0%	8.0%	8.4%	12.1%	10.4%	12.2%
110612	495,919	403,941	56,441	35,658	334,529	278,170	35,872	19,487	67.5%	68.9%	63.5%	54.6%	2.8%	3.4%	11.8%	14.3%
CD 02																
102211	336,385	167,150	188,525	25,711	73,652	28,359	43,980	3,313	21.9%	27.8%	23.3%	12.9%	1.0%	5.5%	10.3%	14.8%
111911	317,135	182,380	129,052	25,703	37,011	19,734	21,809	1,468	11.7%	13.4%	11.5%	5.7%	-0.1%	1.8%	6.0%	7.7%
110612	506,409	158,050	316,068	32,291	330,963	102,052	212,622	16,289	65.4%	64.6%	67.3%	50.4%	-1.8%	-2.7%	1.9%	14.3%
CD 03																
102211	380,584	276,448	105,204	35,937	159,619	131,174	44,681	3,764	41.9%	47.4%	42.1%	21.6%	1.0%	5.6%	21.3%	11.8%
111911	398,166	276,671	105,485	36,010	112,143	82,969	26,997	2,176	28.1%	30.0%	25.6%	13.0%	1.7%	4.6%	14.6%	8.4%
110612	439,324	303,257	119,248	16,979	316,707	248,998	78,160	8,557	67.4%	68.3%	66.4%	50.4%	1.0%	2.3%	16.9%	14.1%
CD 04																
102211	402,653	257,294	129,610	15,751	110,354	104,096	42,841	3,417	27.3%	40.5%	33.1%	21.7%	4.3%	7.4%	12.3%	13.3%
111911	403,731	257,958	129,853	15,923	95,494	82,841	30,613	2,038	23.7%	24.4%	23.6%	12.8%	0.3%	0.8%	10.9%	12.6%
110612	482,504	304,501	159,467	18,536	377,281	211,335	106,316	9,630	67.8%	69.4%	66.7%	52.0%	1.2%	2.3%	15.0%	17.8%
CD 05																
102211	412,891	268,416	133,810	30,666	188,264	135,902	47,718	2,644	45.6%	50.6%	35.7%	24.8%	9.5%	14.0%	10.2%	21.6%
111911	413,419	268,720	133,993	30,706	117,204	94,583	20,931	1,728	28.3%	35.2%	23.1%	16.1%	7.7%	12.1%	14.8%	18.1%
110612	490,955	319,947	162,325	32,683	353,885	231,778	105,456	6,670	68.0%	70.2%	65.0%	53.8%	3.0%	5.7%	13.7%	16.5%
CD 06																
102211	445,584	285,162	142,270	37,112	171,277	119,493	48,203	3,581	38.4%	41.9%	33.9%	10.9%	4.8%	7.9%	17.1%	31.0%
111911	446,357	284,758	142,634	37,165	106,012	80,374	23,509	2,049	23.7%	28.2%	16.5%	11.9%	7.2%	11.4%	11.8%	16.5%
110612	480,429	304,547	165,421	10,461	351,183	262,588	76,912	11,683	73.1%	73.0%	75.0%	57.1%	-1.3%	-0.9%	1.9%	14.0%
Statewide																
20111022	2,847,168	1,857,504	869,919	128,120	1,065,748	770,391	271,516	24,041	37.4%	41.5%	31.2%	19.1%	6.0%	10.3%	14.1%	17.5%
20111119	2,853,382	1,860,704	866,006	126,669	660,614	468,420	159,547	32,647	23.1%	25.2%	18.4%	10.1%	4.1%	6.8%	12.3%	11.6%
20121106	2,565,751	1,910,143	518,700	136,908	2,014,548	1,324,914	617,318	72,316	67.9%	69.4%	67.2%	53.3%	0.7%	2.1%	13.7%	13.2%

Turnout Based on Population 18 and Over

Congressional District and Elections	Total Population 18+	White Population 18+	AA Population 18+	Other Races Population 18+	Voted	White Voted	AA Voted	Other Races Voted	Turnout	White Turnout	AA Turnout	Other RaceTurnout	AA TO Variance from All	AA TO Variance from Majority	Other Races TO Variance from All	Other Races TO Variance from Majority
CD 01																
102211	579,661	469,814	68,604	41,153	146,513	127,486	14,117	4,930	25.3%	27.1%	20.6%	11.9%	4.7%	6.6%	13.3%	13.3%
111911	579,661	469,814	68,604	41,153	79,858	72,010	5,671	2,217	13.8%	15.3%	8.2%	5.4%	5.8%	7.1%	8.4%	9.9%
110612	579,661	469,814	68,604	41,153	334,529	278,170	35,872	19,487	57.7%	59.2%	52.3%	47.4%	4.0%	5.5%	10.4%	11.0%
CD 02																
102211	568,681	196,391	336,055	37,155	73,652	28,359	43,980	3,313	12.9%	14.4%	12.5%	8.9%	0.4%	1.9%	4.0%	5.5%
111911	569,681	196,391	336,055	37,155	37,011	19,734	21,809	1,468	6.5%	7.0%	6.5%	4.0%	0.0%	0.5%	2.5%	3.0%
110612	569,681	196,391	336,055	37,155	330,963	102,052	212,622	16,289	58.1%	52.0%	63.3%	43.8%	-5.2%	13.3%	14.4%	8.1%
CD 03																
102211	561,620	410,137	128,906	22,647	179,619	131,174	44,681	3,764	32.0%	32.0%	34.7%	16.6%	-1.7%	-1.7%	15.3%	15.3%
111911	561,620	410,137	128,906	22,647	112,143	82,969	26,997	2,176	20.0%	20.2%	20.9%	9.6%	-1.0%	-0.7%	10.4%	10.6%
110612	561,620	410,137	128,906	22,647	316,707	248,990	73,160	8,557	56.4%	60.7%	56.7%	37.8%	-1.9%	-0.7%	17.9%	22.9%
CD 04																
102211	566,810	360,606	182,622	23,602	150,354	104,096	42,841	3,417	26.5%	28.9%	23.5%	14.5%	3.1%	5.4%	12.0%	14.4%
111911	566,810	360,606	182,622	23,602	95,494	82,841	30,613	2,030	16.8%	17.4%	16.8%	8.6%	0.1%	0.7%	8.2%	8.8%
110612	566,810	360,606	182,622	23,602	327,181	211,335	108,316	9,630	57.7%	58.6%	59.3%	40.8%	-0.5%	0.4%	16.8%	17.8%
CD 05																
102211	567,667	363,552	186,106	15,009	188,264	135,902	47,718	2,644	32.8%	37.4%	25.3%	17.6%	7.6%	12.1%	8.3%	19.8%
111911	567,667	363,552	186,106	15,009	117,204	94,583	20,931	1,728	22.4%	26.0%	16.3%	11.5%	6.1%	9.7%	10.4%	14.7%
110612	567,667	363,552	186,106	15,009	353,885	231,779	105,456	6,670	58.8%	61.0%	56.8%	44.4%	3.1%	5.2%	14.4%	15.6%
CD 06																
102211	569,908	421,357	120,838	27,701	171,277	119,493	48,203	3,581	30.1%	28.4%	39.9%	12.9%	-9.8%	-11.5%	12.9%	14.6%
111911	569,908	421,357	120,850	27,701	106,012	80,374	23,509	2,049	18.6%	19.1%	19.5%	7.4%	-0.9%	-0.4%	11.2%	11.7%
110612	569,908	421,357	120,850	27,701	351,183	262,588	76,912	11,683	61.6%	62.3%	63.6%	42.2%	-2.0%	-1.3%	21.4%	20.1%
Statewide																
20111022	3,415,357	2,221,857	1,026,233	167,267	1,065,748	770,391	271,516	24,041	31.2%	34.7%	26.5%	14.4%	4.3%	8.2%	11.7%	17.5%
20111119	3,415,357	2,221,857	1,026,233	167,267	660,614	468,420	159,547	32,647	19.3%	21.1%	15.5%	7.7%	2.2%	5.6%	9.8%	13.4%
20121106	3,415,357	2,221,857	1,026,233	167,267	2,014,548	1,324,914	617,318	72,316	59.0%	59.6%	60.2%	43.2%	-1.2%	-0.5%	12.7%	13.4%

Registered Voters - STATEWIDE

Population

	Pop 18+	Male	Female	Total White	White Male	White Female	Total AA	AA Male	AA Female	Total Other Race	Other Race Male	Other Race Female
Total	3,415,357	1,648,499	1,766,858	2,221,857	1,085,714	1,136,143	1,026,233	474,628	551,605	167,267	88,157	79,110
18 - 24	474,531	237,638	236,893	269,041	135,670	133,371	175,080	85,172	89,908	30,410	16,796	13,614
25 - 44	1,193,032	594,748	598,284	735,936	373,497	362,439	380,017	179,294	200,723	77,079	41,957	35,122
45 - 64	1,189,937	578,824	611,113	798,259	395,098	403,161	345,665	160,435	185,230	46,013	23,291	22,722
65 - 74	311,994	143,251	168,743	229,020	107,352	121,668	74,328	31,828	42,500	8,646	4,071	4,575
75 +	245,863	94,038	151,825	189,601	74,097	115,504	51,143	17,899	33,244	5,119	2,042	3,077

Registered Voters

	Voters 18+	Male	Female	Total White	White Male	White Female	Total AA	AA Male	AA Female	Total Other Race	Other Race Male	Other Race Female
Total	2,849,588	1,288,234	1,561,354	1,890,005	886,220	1,003,785	892,891	366,983	525,908	66,692	35,031	31,661
18 - 24	286,599	129,392	157,207	161,121	75,655	85,466	116,819	49,606	67,213	8,659	4,131	4,528
25 - 44	1,022,674	462,941	559,733	642,412	305,944	336,468	352,657	142,220	210,437	27,605	14,777	12,828
45 - 64	1,041,310	484,910	556,400	708,420	340,184	368,236	309,947	132,221	177,726	22,943	12,505	10,438
65 - 74	277,004	125,627	151,377	205,685	96,104	109,581	66,436	27,024	39,412	4,883	2,499	2,384
75 +	222,001	85,364	136,637	172,367	68,333	104,034	47,032	15,912	31,120	2,602	1,119	1,483

% of Population

	Total	Male	Female	Total White	White Male	White Female	Total AA	AA Male	AA Female	Total Other Race	Other Race Male	Other Race Female
Total	83.4%	78.1%	88.4%	85.1%	81.6%	88.4%	87.0%	77.3%	95.3%	39.9%	39.7%	40.0%
18 - 24	60.4%	54.4%	66.4%	59.9%	55.8%	64.1%	66.7%	58.2%	74.8%	28.5%	24.6%	33.3%
25 - 44	85.7%	77.8%	93.6%	87.3%	81.9%	92.8%	92.8%	79.3%	104.8%	35.8%	35.2%	36.5%
45 - 64	87.5%	83.8%	91.0%	88.7%	86.1%	91.3%	89.7%	82.4%	95.9%	49.9%	53.7%	45.9%
65 - 74	88.8%	87.7%	89.7%	89.8%	89.5%	90.1%	89.4%	84.9%	92.7%	56.5%	61.4%	52.1%
75 +	90.3%	90.8%	90.0%	90.9%	92.2%	90.1%	92.0%	88.9%	93.6%	50.8%	54.8%	48.2%

Data Sources: [Population] - 2010 U.S. Census Summary File 1 (SF1), [Voter Registration] - Louisiana Secretary of State July 1,2010 Voter Registration

Definitions: [Very Low Income] = Less Than 50% of Area Median Income, [Low Income] = 50% - 80% of Area Median Income, [Not Low Income] = Greater Than 80% of Area Median Income

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The Voting Rights Amendment Act of 2014: A Constitutional Response to *Shelby County*

By William Yeomans, Nicholas Stephanopoulos, Gabriel J. Chin, Samuel Bagenstos, and Gilda R. Daniels

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Introduction: An Overview of the Voting Rights Amendment Act of 2014

William Yeomans*

The Voting Rights Act of 1965 ("VRA") has been described as "the most effective civil rights law in the history of the United States."[1] No provision of the VRA has been more effective than the preclearance requirement of Section 5.[2] Prior to the Supreme Court's 2013 decision in *Shelby County v. Holder*,[3] a formula in Section 4 of the VRA[4] identified nine states and jurisdictions in six more (collectively "covered jurisdictions")[5] with a pervasive history of racial discrimination in voting. As covered jurisdictions, they were required to prove to the United States Attorney General or a three-judge court in the District of Columbia that any proposed voting change did not have the purpose and would not have the effect of discriminating on the basis of race or language minority status. If the Attorney General objected within 60 days, the change could not go into effect. If he remained silent or the jurisdiction obtained a declaratory judgment, the change could proceed. The preclearance provisions proved so successful that Congress reauthorized them four times since 1965, most recently in 2006.

In *Shelby County*, the Supreme Court, in a 5-4 decision, held the Section 4 coverage formula unconstitutional, asserting that it was not adequately grounded in "current conditions."[6] It did so even though Congress, when it reauthorized the VRA in 2006 by votes of 390 to 33 in the House and 98 to 0 in the Senate, compiled over 15,000 pages of evidence showing the persistence of racial discrimination in voting in the covered jurisdictions.[7] The Court left in place Section 5, which contains the preclearance requirement, and invited Congress to craft a new coverage formula, which would, in turn, bring Section 5 back to life. Representatives James Sensenbrenner (R-WI) and John Conyers (D-MI) have done just that, introducing the bipartisan Voting Rights Amendments Act of 2014 ("VRAA").[8] Senator Patrick Leahy has introduced identical legislation in the Senate.[9]

The VRAA attempts to fill the hole *Shelby County* opened in four ways. It would: 1) create a new coverage formula that would be based on recent violations of voting rights laws and would update coverage determinations annually; 2) expand judicial bail-in to allow courts to order preclearance as a remedy for proven violations of voting laws prohibiting racial and language discrimination; 3) create a new standard for preliminary relief to prevent use of potentially discriminatory voting changes until they can be reviewed by a court; and 4) increase the transparency of voting changes to allow for identification of problematic provisions.

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[1] Richard L. Engstrom, *Race and Southern Politics*, 10 ELECTION L.J. 53, 53 (2011).

[2] *See* 42 U.S.C. § 1973c (2012).

[3] 133 S. Ct. 2612 (2013).

[4] 42 U.S.C. 1973b (2012).

[5] *See Jurisdictions previously covered by Section 5*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 7, 2014).

[6] *Shelby Cnty.*, 133 S. Ct. at 2629.

[7] *Id.* at 2635-36 (Ginsburg, J., dissenting).

[8] H.R. 3899, 113th Cong. (2014) [hereinafter "VRAA"].

[9] S. 1945, 113th Cong. (2014).

This Issue Brief, a collaborative effort of five authors, analyzes the major aspects of the VRAA and their constitutionality. The section below provides an overview of the legislation. The four sections that follow contain analyses of the constitutionality of each of the bill's four key provisions. These analyses conclude that the relevant provisions of the VRAA are constitutional exercises of congressional power and should be upheld if challenged in court.

A. The Coverage Formula

Section 3 of the VRAA would create a new "rolling trigger" coverage formula.[10] Under the new formula, each year, the Attorney General would look back fifteen years to determine whether, within that time frame, five voting rights violations had occurred within any given state, including one violation committed by the state itself, and whether three voting rights violations had occurred within any local jurisdiction. If so, the state or jurisdiction would be required to preclear voting changes for ten years from the date of the most recent violation. In addition, if a single violation had occurred in a local jurisdiction combined with extremely low minority turnout, as defined in the bill, for the preceding fifteen years, that jurisdiction too would be subject to preclearance. Voting rights violations counted in the formula would include final judgments finding violations of the Fourteenth and Fifteenth Amendments or Section 2 of the VRA, objections by the Attorney General pursuant to Section 5, and denials of declaratory judgments granting preclearance pursuant to Section 5.

Although it is impossible to identify with certainty the jurisdictions that would be covered until the Attorney General makes the annual determination of extremely low minority turnout, if implemented today, the formula likely would capture Georgia, Louisiana, Mississippi, Texas, and a few jurisdictions outside those states. The rolling trigger ameliorates concern that the bill's initial coverage is too limited by ensuring that future violations can trigger the extension of coverage. This feature also obviates the need for periodic reauthorization.

The bill states that an Attorney General's preclearance objection to the imposition of a "photo identification" requirement for voting will not count in calculating coverage. As a three-judge court held in denying preclearance of a photo identification law enacted by Texas and as a district court recently held in striking down a Wisconsin photo identification law, such laws can indeed disproportionately burden minority voters.[11] Their special treatment in the coverage formula appears to be part of the price required to initiate bipartisan legislation, a bargain that should be revisited during consideration of the bill. The exemption likely would not affect the initial coverage determinations, but could affect coverage in future years.

B. Judicial Bail-In

Section 3 of the Voting Rights Act authorizes a court to impose preclearance as part of the remedy for a finding of a violation of the Fourteenth or Fifteenth Amendment.[12] This rarely used provision has taken on increased significance after *Shelby County*, both because it remains

[10] *See* VRAA § 3.
[11] *See* Frank v. Walker, Nos. 11-CV-01128, 12-CV-00185, 2014 WL 1775432, at *33 (E.D. Wis. Apr. 29, 2014); Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013).
[12] *See* 42 U.S.C. § 1973a(c) (2012).

the sole means of extending preclearance until a new formula is enacted and because it offers an indisputably constitutional means of doing so. Section 3 answers the Court's requirement that preclearance coverage reflect current conditions by basing coverage on a finding of a recent constitutional violation. It also allows a court to shape the preclearance requirement to fit the violation and authorizes the court to determine whether it or the Attorney General will conduct preclearance reviews.

Currently, however, Section 3 requires a showing of intentional discrimination, which can be a high hurdle in voting cases where intentions can be complex, multi-faceted, hidden, and difficult to prove. For that reason, Congress amended Section 2 of the VRA in 1982 to clarify that a showing of a discriminatory result was sufficient to establish a violation of that section. Because Section 2 has become the principal litigation tool for vindicating rights under the VRA, there is typically no need to find a constitutional violation, which means there is rarely a basis to invoke the bail-in remedy.

The VRAA, therefore, would amend Section 3 of the VRA to allow a violation of Section 2 of the VRA or "any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group" to serve as a predicate for judicial imposition of preclearance.[13] This amendment responds directly to *Shelby County* by recognizing that a more limited formula such as the VRAA's may leave problematic jurisdictions uncovered, and bases the imposition of preclearance in those instances on a judicial finding of a current condition that violates federal law.

Unfortunately, the strengthening of Section 3 is marred by a provision that states that a violation of Section 2 that is based on "the imposition of a requirement that an individual provide a photo identification" cannot serve as a predicate for imposing preclearance.[14] As with the similar carve-out in the coverage formula, removing this exception would improve the legislation.

C. Preliminary Relief

Preclearance was so effective because it ensured that potentially discriminatory voting changes would be reviewed *before* they could impose harm. The alternative—attempting to undo a tainted election after the fact—can be difficult or impossible. The contracted scope of preclearance, therefore, makes it essential to provide a fast and effective means for blocking, in advance of an election, the implementation of voting changes that may be discriminatory.

Section 6 of the VRAA addresses this need by reducing the traditional four-factor standard for preliminary relief[15] to a single inquiry. In a departure from the traditional test, the bill does not require the complaining party to make a showing on the merits of its claim, but instead authorizes a preliminary injunction if "the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which

[13] VRAA § 2(a).
[14] *Id.*
[15] *See* Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008).

would be imposed upon the plaintiff if the relief were not granted."[16] The bill also offers a series of factors that a court must consider in balancing the harms, including whether the challenged change would replace a practice that was implemented because of prior voting rights litigation, whether the change was adopted within 180 days of an election, and whether the jurisdiction has failed to provide timely or complete notice of the change.[17] Presumably, a finding that any of these factors is present should tilt the balance in favor of the party challenging the change.

D. Notice and Transparency

Prior to *Shelby County*, covered jurisdictions were required to submit every voting change to the Attorney General or a three-judge court. That reporting requirement guaranteed that problematic changes would reach the attention of federal officials and voting rights advocates. The VRAA recognizes that compensating for that lost reporting is essential to ensuring the protection of voting rights. It does so by imposing new transparency measures.

Section 4 of the VRAA would require jurisdictions to publicize and describe, within forty-eight hours, any voting change affecting a federal election that occurs within 180 days of the election.[18] It would also require that jurisdictions report, prior to thirty days before an election for federal office, on the polling place resources in use for the election, including the location of polling places, the voting age population identified by demographic group, the number of registered voters served broken down by demographic group, the number of voting machines and poll workers assigned, and the dates and hours of operation of polling places.[19]

Significantly, the bill would also mandate reporting of changes in "the constituency that will participate in an election for Federal, State, or local office or the boundaries of a voting unit or electoral district" for such an election.[20] The bill would require detailed reporting of demographic data, as well as voting data for the previous five years, for any county or parish, municipality with a population greater than 10,000, and school district with a population over 10,000. This provision recognizes the historic and continuing sensitivity of redistricting and changes between at-large and district-based methods of election.

* * *

The requirement that jurisdictions with a history of discrimination in voting preclear voting changes has been an indispensable tool in overcoming attempts to block access to the ballot and dilute the strength of minority votes. Yet the persistence—and disturbing proliferation —of such attempts in the aftermath of *Shelby County*[21] makes it clear that a modern, effective VRA is still needed today.

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[16] VRAA § 6(b).
[17] *See id.*
[18] *See id.* § 4(a).
[19] *See id.*
[20] *Id.*
[21] *See, e.g.*, *How Formerly Covered States and Localities are Responding to the Supreme Court's Voting Rights Act Decision*, NAACP LEGAL DEF. & EDUC. FUND, http://www.naacpldf.org/document/states-responses-shelby-decision (last updated Apr. 24, 2014).

The VRAA addresses the significant gaps in the protection of voting rights created by *Shelby County*. Because it represents a bipartisan effort to create legislation that can move, it does not do so perfectly. Some will argue that the new formula for preclearance is underinclusive, although the rolling trigger provides a mechanism for drawing in jurisdictions that misbehave. Additionally, the bill's two provisions providing special treatment for photo identification laws will inspire debate and test the limits of compromise.

The difficulties faced by the current Congress in dealing with major legislation signal that the path to enactment will not be easy. Congress should, however, rouse itself to respond to the Supreme Court's ruling. It should revive the concern for the voting rights of all people that animated the enactment and repeated reauthorization of the VRA, and pass the Voting Rights Amendment Act of 2014.

The Coverage Formula
Nicholas Stephanopoulos*

The *Shelby County* Court's main criticism of the coverage formula that Congress adopted when it reauthorized Section 5 in 2006 was that the formula was irrational because it relied on obsolete data. In a key passage, the Court observed, "Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s."[1] The Court also emphasized that the disparities in registration and turnout that had existed in that era subsequently had vanished.[2] These features rendered the formula unreasonable and hence unconstitutional in the Court's eyes: "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data[.]"[3]

The new coverage formula clearly does not fall victim to this critique. First, its reliance on *recent* voting rights violations means that it indeed is "based on current conditions."[4] As noted earlier, only violations that occurred in the last fifteen years count toward the preclearance determination. Violations that occurred earlier are not taken into account, and the preclearance assessment is made anew each year, dropping older violations from consideration and adding newer ones. Although the fifteen-year window reaches into the past to some degree, this is inevitable with any formula that makes use of events that already have transpired. And the new formula's fifteen-year reach is eminently defensible given that the prior formula was upheld by the Court in 1980 when it extended sixteen years into the past,[5] and in 1999 when it extended backward by thirty-five years.[6]

The new formula not only relies on current data; it also does so *reasonably* to distinguish between jurisdictions with greater and lesser levels of racial discrimination in voting. Racial

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[1] Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2627 (2013).
[2] *See id.* at 2618-19, 2625-26.
[3] *Id.* at 2630-31.
[4] *Id.* at 2631.
[5] *See* City of Rome v. United States, 446 U.S. 156 (1980).
[6] *See* Lopez v. Monterey Cnty., 525 U.S. 266 (1999).

discrimination in voting, of course, is not easy to observe or prove. Government officials almost never admit to engaging in discrimination, and at least as a constitutional matter, discriminatory intent (not merely effect) must be established. Given these constraints, past voting rights violations are a sensible—indeed, obvious—proxy for levels of racial discrimination in voting. If a constitutional violation has occurred, then a jurisdiction necessarily has engaged in precisely the conduct that the VRA aims to prevent. If a violation of Section 2 has taken place, then a jurisdiction has employed (or tried to employ) a policy that "results in a denial or abridgement of the right . . . to vote on account of race or color."[7] This formulation is tightly interwoven with the constitutional standard, especially since discriminatory results typically are the best available evidence of discriminatory intent. And if a violation of Section 5 has transpired, then a jurisdiction attempted to adopt a policy with either the "purpose" or "effect" of "denying or abridging the right to vote on account of race or color."[8] This language is even closer to the constitutional test since it explicitly refers to discriminatory purpose.

Of course, there is no obvious reason why the preclearance line has to be drawn at five violations (for a state) or three violations (for a political subdivision). But every statutory line has to be drawn somewhere, and the VRAA's choices are quite defensible. Notably, over the twenty-five year period between the 1982 amendments to Section 2 and the 2006 reauthorization of Section 5, federal courts found approximately five Section 2 violations per year.[9] Over this period, the Department of Justice also objected annually to approximately twenty-five policy changes under Section 5 (though these objections necessarily were limited to formerly covered areas).[10] That at least five or three violations have occurred in a state or subdivision during the preceding fifteen years therefore means that a jurisdiction has accounted for a vastly disproportionate share of all voting rights violations over this period. It does not mean that a jurisdiction is clearly worse than a peer with four or two violations in the relevant timespan, but such precision is never expected for statutory distinctions.

Accordingly, the new coverage formula is constitutional if it is assessed according to *Shelby County*'s requirements that it be based on current data and distinguish reasonably between jurisdictions with greater and lesser levels of racial discrimination in voting. The fifteen-year window for voting rights violations is *more* current than was the prior formula when it was upheld in 1980 and 1999. And jurisdictions with at least five or three violations during the previous fifteen years are egregious as a group, and certainly more objectionable than jurisdictions that lack such poor records.

While this concludes the analysis based on *Shelby County*'s actual holding, it is also important to consider certain dicta suggesting that preclearance itself may no longer be a permissible remedy in the Court's view. The Court commented that states subject to preclearance "must beseech the Federal Government for permission to implement laws that they

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[7] 42 U.S.C. § 1973(a) (2012).

[8] *Id.* § 1973c(a).

[9] Specifically, there were 123 published findings of Section 2 liability over this period. *See* Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 655 (2006), *available at* http://sitemaker.umich.edu/votingrights/files/finalreport.pdf.

[10] *See* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2639 (2013) (Ginsburg, J., dissenting) (noting that there were 626 preclearance denials over this period).

would otherwise have the right to enact and execute on their own."[11] The Court also stressed that "things have changed dramatically" with respect to voting rights due to increases in minority turnout, fewer evasions of court decrees, and greater numbers of minority candidates holding office.[12] According to the Court, these improvements mean that the claim that sufficiently "exceptional" conditions to justify preclearance no longer exist has "a good deal of force."[13]

For several reasons, the Court should not embrace these dicta. First, for the Court to hold that preclearance is now intrinsically invalid would be inconsistent with its explicit invitation to Congress to "draft another formula based on current conditions."[14] There would be no point to drafting another formula, of course, if any such formula would be deemed unconstitutional. Second, while improvements have occurred over the last few decades, serious racial discrimination in voting continues to plague parts of the country. As Congress found in 2006, shocking instances of first-generation discrimination—the prosecution of minority candidates, the intimidation of minority voters, the cancelation of elections that minorities are expected to win—still take place with some frequency.[15] Second-generation offenses, in particular the use of at-large electoral systems and discriminatory district plans, are even more common.[16] Such violations resulted in more than 600 denials of preclearance over the 1982-2006 period, more than 800 policies being withdrawn or modified after the Department of Justice requested more information, and more than 600 successful Section 2 suits in formerly covered areas.[17] These conditions seem no less "exceptional" than those faced by the Court when it last upheld the preclearance requirement in 1999.[18]

Finally, and perhaps most importantly, the question of whether preclearance is still necessary is not one for the Court to answer in the first instance. The Court repeatedly invoked the language of "rationality" in *Shelby County*,[19] and Justice Ginsburg emphasized (without being corrected) that "[t]oday's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed 'rational means.'"[20] Accordingly, the relevant test is not whether *the Court* believes that preclearance is still required, or even whether preclearance is a "congruent and proportional" response to ongoing constitutional violations.[21] Instead, the issue is whether *Congress* chose rational means to achieve a legitimate end. And on

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[11] *Id.* at 2624 (majority opinion).
[12] *Id.* at 2625.
[13] *Id.* at 2625, 2631.
[14] *Id.* at 2631.
[15] *See id.* at 2640-41 (Ginsburg, J., dissenting) (recounting some of the congressional findings).
[16] *See id.* at 2634-35 (discussing some of these barriers).
[17] *See* Shelby Cnty., Ala. v. Holder, 679 F.3d 848, 872 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013) [hereinafter *Shelby Cnty. I*].
[18] *See* Lopez v. Monterey Cnty., 525 U.S. 266, 282-85 (1999).
[19] *See Shelby Cnty.*, 133 S. Ct. at 2625, 2627, 2628, 2629, 2630, 2631.
[20] *Id.* at 2638 (Ginsburg, J., dissenting).
[21] *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (setting forth "congruence and proportionality" standard for exercises of congressional power under *Fourteenth* Amendment). The VRA, of course, was enacted under Congress's *Fifteenth* Amendment powers as well. Moreover, even if the *Boerne* standard applies, the preclearance requirement satisfies it. As described above, racial discrimination in voting continues to be a serious problem in parts of the country, which justifies a potent congressional response. For its part, preclearance is *not* a particularly onerous requirement (especially for jurisdictions that have complied with it for decades), and it is quite effective at identifying and blocking instances of discrimination.

this point, no one doubts that ending racial discrimination in voting is a valid aim, and it is equally clear that preclearance is at least *rationally* related to this goal. Because it is more difficult for jurisdictions to enact discriminatory policies if these policies must first be approved by a federal body, preclearance has at least some tendency to reduce discrimination. The Court's own language thus foreshadows what the result should be in a frontal challenge to preclearance: It should be upheld because it cannot possibly be deemed irrational.

A. Potential Areas for Improvement

While the VRAA's coverage formula is constitutional in its current form, it could be improved by incorporating metrics beyond judicial judgments and preclearance denials. To begin with, even if one believes that court actions are an excellent proxy for levels of racial discrimination in voting, judicial *judgments* are not synonymous with all judicial *activity*. In particular, courts often approve settlements between parties rather than themselves deciding cases on the merits. And at least with respect to Section 2, the gap between judicial judgments and all judicial activity is quite large. Between 1982 and 2006, there were 68 published Section 2 findings of liability in covered areas, and 123 published Section 2 findings of liability nationwide.[22] But, including unpublished dispositions (primarily court-approved settlements), there were *653* successful Section 2 suits over this period in covered areas alone.[23] The published findings of liability thus are only the tip of the Section 2 iceberg. To capture properly the full set of Section 2 violations, it would be advisable for the new formula to take into account all Section 2 activity, not just Section 2 judgments.

Which jurisdictions would be subject to preclearance if all Section 2 activity was considered? The answer depends on the exact details of the formula, but some clues can be found in the D.C. Circuit's *Shelby County* decision. As the court noted, if the threshold for preclearance were set at five successful Section 2 suits per million residents over the 1982-2006 period (including settlements), then Alabama, Arkansas, Georgia, Mississippi, Montana, North Carolina, South Carolina, South Dakota, and Texas would be covered.[24] All of the states covered by the VRAA's formula would be covered by this test as well, except for Louisiana, which would fall right below the threshold.[25] Covered as well would be Alabama, Arkansas, Montana, North Carolina, South Carolina, and South Dakota, all of which (except Montana) were covered in part or in full by the prior formula or were bailed in under Section 3.

The new formula also could be improved by recognizing that successes in court are an imperfect proxy for levels of racial discrimination in voting. Suits are not brought against many potentially discriminatory policies, and even suits that *are* brought may fail for reasons unrelated to the claims' merits—e.g., insufficient resources, difficulties developing evidence, unreceptive judges, etc. Fortunately, there do exist indicia of discrimination that are unaffected by the vagaries of litigation. Probably the most prominent of these is racial polarization in voting, that is, the extent to which minorities and non-minorities diverge in their electoral preferences. As Justice Ginsburg observed in *Shelby County*, racial polarization "increases the vulnerability of

[22] *See* Katz et al., *supra* note 9, at 655-56.
[23] *See Shelby Cnty. I*, 679 F.3d at 868.
[24] *See id.* at 875-76.
[25] *See id.*

racial minorities to discriminatory changes in voting law" by magnifying the electoral payoff of such changes.[26] In the 2008 presidential election, then, the nine states in which white and black voters differed by at least sixty percentage points in their vote shares for Barack Obama were Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas.[27] All of these states except Tennessee were covered by the prior formula or were bailed in.

Another promising metric is the prevalence of racially discriminatory attitudes among white voters. Such attitudes may make de jure discrimination more likely, and they are conducive as well to a finding of discriminatory purpose, which is required for there to be a constitutional violation. According to cutting-edge survey research, the six states that have the highest proportions of whites whose views of blacks' intelligence and work ethic are more negative than the national median are Alabama, Louisiana, Mississippi, South Carolina, Texas, and Wyoming.[28] All of these states except Wyoming previously were covered jurisdictions.

The point of this discussion is *not* that the new formula must take into account Section 2 settlements, racial polarization in voting, or the prevalence of racially discriminatory attitudes in order to pass constitutional muster. Section 2 judgments, judgments of constitutional violations, and denials of preclearance are, in combination, a reasonable proxy for levels of racial discrimination in voting, and that is all that is necessary for the new formula to be upheld. The point, rather, is that the formula could be *strengthened*, for both legal and policy purposes, by incorporating these additional metrics. The additional metrics provide valuable further evidence about where racial discrimination in voting is concentrated in contemporary America. Such evidence would be helpful legally, because it would confirm that the formula is distinguishing accurately between jurisdictions with greater and lesser levels of discrimination. And it would be helpful as a matter of policy too, because it would ensure that the formula is targeted at (and only at) the country's most problematic jurisdictions.

The Expansion of the Section 3 Bail-In Remedy
Gabriel J. Chin*

Since enactment, Section 3 of the Voting Rights Act has provided for "bail-in," sometimes called the "pocket trigger," allowing courts to require preclearance of future voting changes in jurisdictions found to have denied voting rights but not previously covered by Section 5. The VRAA revises and expands Section 3 in a manner attentive to and respectful of the Supreme Court's concerns in *Shelby County*.

The existing version of Section 3 provides that a court finding a violation of the Fourteenth or Fifteenth Amendments warranting equitable relief, in addition to all other forms of

[26] Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2643 (2013) (Ginsburg, J., dissenting).
[27] Exit poll data from 2008 is available at *Election Center 2008 – Results*, CNNPOLITICS.COM, http://www.cnn.com/ELECTION/2008/results/polls.main (last visited May 7, 2014). Unfortunately, 2012 exit poll data is not available for all states.
[28] *See* Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After* Shelby County, 102 CAL. L. REV. (forthcoming 2014) (manuscript at 38, available at http://www.law.uchicago.edu/files/files/The%20Geography%20of%20Racial%20Stereotyping.pdf).
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relief, "shall retain jurisdiction for such period as it may deem appropriate."[1] While jurisdiction is retained, "no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[2] Alternatively, the jurisdiction's proposed change can go into effect if submitted to the Attorney General and the Attorney General fails to object.

Section 3, then, provides for case-by-case imposition of a preclearance requirement. Although bail-in under Section 3 has effects quite similar to being deemed a "covered jurisdiction" under Section 4, one difference is that the U.S. district court with jurisdiction to approve any change and to end preclearance is the one hearing the underlying lawsuit, not the U.S. District Court for the District of Columbia. Also, bail-in provides considerably more flexibility than Section 4 coverage. Jurisdiction is not to be retained forever, but only for "such period as [the district court] may deem appropriate." As courts have interpreted Section 3, imposition of bail-in as a remedy is discretionary, and a court may, in its discretion, impose preclearance on only certain types of electoral changes.[3] Arkansas, New Mexico, counties in California, Florida, Nebraska, and South Dakota, and the City of Chattanooga, Tennessee have been bailed in under Section 3.[4] Many of these jurisdictions were bailed in based on consent decrees. This means that the jurisprudence of Section 3 is relatively undeveloped compared to other provisions of the Act. This is an advantage in the sense that the Court will have the opportunity to construe the Section in ways that it deems constitutional.

In its existing version, Section 3 might serve to mitigate some of the effects of *Shelby County*.[5] Indeed, the Department of Justice is currently seeking to bail-in North Carolina[6] and Texas[7] under the current version of Section 3. However, because bail-in is limited to cases in which a court finds a constitutional violation, the availability of the remedy is limited. Accordingly, the VRAA would extend Section 3 by providing that a jurisdiction may be bailed in not only based on violations of the Fourteenth and Fifteenth Amendments, but also for violations of the Voting Rights Act itself or "any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group."[8] It excepts, however,

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[1] 42 U.S.C. § 1973a(c) (2012).
[2] *Id.*
[3] *See* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2007-08 (2010).
[4] *Id.* at 2010.
[5] Michael Ellement, *Preclearance Without Statutory Change: Bail-in Suits Post-*Shelby County, 32 YALE L. & POL'Y REV. INTER ALIA 1, 6 (Sept. 7, 2013, 11:45 AM), http://ylpr.yale.edu/inter_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county.
[6] United States v. North Carolina, No. 1:13CV861 (M.D.N.C.); *see also* Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department to File Lawsuit Against the State of North Carolina to Stop Discriminatory Changes to Voting Law (Sept. 30, 2013), http://www.justice.gov/opa/pr/2013/September/13-crt-1096.html.
[7] United States v. Texas, No. 2:13CV263 (S.D. Tex.); *see also* Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law (Aug. 22, 2013), http://www.justice.gov/opa/pr/2013/August/13-ag-952.html.
[8] *See* VRAA § 2(a).

violations of Section 2 of the Voting Rights Act that are based on unlawful imposition of a photo identification requirement; such a violation cannot be the predicate for bail-in.

The basic constitutionality of Section 3 was not questioned in *Shelby County*, and indeed, bail-in does not implicate many of the concerns of the Court in *Shelby County*.[9] First, coverage is based on a finding of specific, current misconduct by the jurisdiction to be covered. As Justice Thomas explained, "discriminatory intent does tend to persist through time[;]"[10] accordingly, the Court is likely to find a recent violation to be a sufficient predicate for the imposition of preclearance. Historical conditions and events from generations ago, which the Court found insufficient in *Shelby County*, are not relevant. Second, coverage is imposed on a case-by-case basis by a local court, which is likely to be aware of conditions and circumstances in the area. For both of these reasons, the Court is likely to find Section 3 bail-in more justifiable than the formula at issue in *Shelby County*; it implies no punishment for decades-old misconduct or lack of equal state sovereignty. Also, while Section 5 was always nominally temporary, it was subject to repeated extensions, and a majority of the Court feared that it might be practically permanent. By contrast, Section 3, while a permanent provision, contemplates temporary and targeted relief.

One aspect of the revised Section 3 likely to be challenged in court is its availability as a remedy based on findings of non-constitutional violations, in particular, violations of Section 2 of the Voting Rights Act. Section 2 prohibits state voting policies and procedures, under some circumstances, when they have a discriminatory result, even if the policies do not violate the Constitution per se.[11] Some have argued that Section 2 is unconstitutional to the extent that it goes beyond constitutional violations.[12] To be sure, if Section 2 is itself invalid, then imposing any remedies based on its violation would also be unconstitutional. Similarly, the Court's interpretation of Section 2 would automatically affect the scope of a revised Section 3. But taking the *Shelby County* majority at its word suggests that Section 2, and therefore Section 3, is on firm constitutional ground. The Court emphasized that its "decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."[13] To the extent that Section 2 is valid, so too are various reasonable methods of enforcing it.

The Court might well have written favorably of Section 2 because, in operation, it has not been construed to apply to actions which merely have a discriminatory effect. Rather, courts applying Section 2 look at the "totality of the circumstances" to determine whether racial

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[9] Since *Shelby County*, courts have continued to treat Section 3 as valid. *See* Allen v. City of Evergreen, No. 13-CV-0107-CG-M, slip op. at 2-5 (S.D. Ala. Jan. 13, 2014) (granting plaintiffs' unopposed motion to "bail in" City of Evergreen, Alabama, with respect to two types of voting changes, noting that "Section 3's provisions have long applied equally to all states and localities, and have been imposed in numerous cases"). *See also* Ala. Legislative Black Caucus v. Alabama, No. 2:12-CV-691, 2013 WL 6925681, at *106 n.38 (M.D. Ala. Dec. 20, 2013) (three-judge court) (Thompson J., dissenting) ("A jurisdiction may still be required to obtain preclearance of redistricting plans, even after *Shelby County*, under the 'bail-in' provision of § 3 of the VRA.").

[10] United States v. Fordice, 505 U.S. 717, 747 (1992) (Thomas J., concurring) (citing Hazelwood School Dist. v. United States, 433 U.S. 299, 309-10, n.15 (1977)).

[11] *See* 42 U.S.C. § 1973(a) (2012).

[12] Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act* (Mar. 17, 2014), http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act.

[13] Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013).

discrimination in voting has occurred.[14] As Professor Justin Levitt has explained, while discriminatory impact is a necessary part of a Section 2 claim, there also must be "danger signs demonstrating enhanced risk of perpetuating past or present misconduct."[15] Professor Christopher Elmendorf has similarly explained that Section 2 can be understood as smoking out unconstitutionally discriminatory action which is otherwise not remediable.[16] As such, "calling section 2's test a 'results test' is something of a misnomer" given that it has long been understood to require more than "mere disproportionality in electoral results."[17]

The United States has a long tradition, ranging from strong reluctance to absolute prohibition, disfavoring putting legislators in the witness box under oath to find out the real reasons for enactment of a particular law. The Court's clear statement that Section 2 was not called into question should be understood as recognizing that some proxy methods of evaluating legislative intent are therefore necessary. The alternative is that significant unconstitutionally-motivated actions will too easily survive judicial challenge.

Understanding Section 2 as a method of finding otherwise irremediable constitutional violations makes violation of Section 2 a reasonable basis for bail-in. This is particularly so because Section 3 will be applied to a state, municipality, or other governmental entity on a case by case basis, after a court has evaluated the nature of the Section 2 violation and other relevant facts, such as the presence or absence of other recent misconduct. Moreover, any bail-in order will be individually tailored as to duration and as to the types of covered electoral changes. For these reasons, the VRAA's expansion of the availability of the bail-in remedy is a constitutional means of remedying racial discrimination in voting.

The Preliminary Injunction Provision
Samuel Bagenstos*

Section 6 of the VRAA would make preliminary injunctive relief available in voting rights cases based purely on an assessment of the balance of hardships, without any inquiry into the merits.[1] Section 6 provides that a court addressing a request for a preliminary injunction in a voting rights case "shall grant the relief if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted."[2] The provision goes on to

[14] 42 U.S.C. § 1973(b) (2006).
[15] *From Selma to* Shelby County*: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 5 (2013) (questions for the record submitted by Sen. Al Franken for Justin Levitt), *available at* http://redistricting.lls.edu/files/_%20Levitt%20responses%20to%20Franken%20QFRs.pdf. Such "danger signs" include, but are not limited to, seven potential indicia of discrimination identified in a 1982 Senate Judiciary Committee Report. *Id.* at 6 (citing S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06).
[16] *See* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012).
[17] United States v. Blaine Cnty., Mont., 363 F.3d 897, 909 (9th Cir. 2004).
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[1] As currently drafted, Section 6's text would appear to make both preliminary *and* permanent relief in voting rights cases depend solely on the balance of hardships. But the plain intent of the provision is to apply to requests for preliminary injunctions only, and the text will presumably be changed to make that intent clear.
[2] VRAA § 6(b).

state that when a plaintiff seeks a preliminary injunction against a *change* in a voting practice, the balance-of-hardships analysis should consider whether the former voting practice was adopted as a remedy in, or as part of a settlement of, previous voting rights litigation.[3]

Section 6 would represent a departure from the usual federal court preliminary injunction standards under which a court can grant preliminary relief only after an inquiry into not just the balance of hardships but also the chances of success on the merits, whether the plaintiff will suffer irreparable harm in the absence of relief, and the public interest.[4] There is nothing about these usual standards that is constitutionally required, however. To the contrary, the Supreme Court has recognized that Congress has the power to override such equitable principles.[5] As the Court has explained, "when district courts are properly acting as courts of equity, they have discretion *unless a statute clearly provides otherwise*."[6] "Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."[7]

Although it is unusual for Congress to depart from the standard criteria for granting preliminary relief, it is hardly unprecedented. For example, the stay-put provision of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(j), prohibits school districts from unilaterally changing a disabled student's educational placement while due-process proceedings are pending. Numerous courts have held that this provision directs courts to impose "an 'automatic' preliminary injunction, meaning that the moving party need not show the traditionally required factors (e.g., irreparable harm) in order to obtain preliminary relief."[8] Rather, "[t]he statute substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships."[9] Congress itself balanced the relevant equitable factors and determined that the harm entailed by disruption of a disabled child's educational environment categorically outweighs any countervailing benefits and justifies preliminary relief to leave the child where she is while a dispute is pending.[10]

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[3] *See id.*

[4] *See* Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008). The courts of appeals after *Winter* are divided regarding whether a plaintiff seeking a preliminary injunction under the ordinary test must always show that he or she is *likely* to succeed on the merits, or whether, instead, a plaintiff who makes a sufficiently strong showing of irreparable harm can obtain preliminary relief based merely on identifying serious questions going to the merits. *See* Bethany M. Bates, Note, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011).

[5] *See, e.g.*, Miller v. French, 530 U.S. 327 (2000) (Congress had power, in the Prison Litigation Reform Act, to require district courts to grant automatic stays in certain cases involving prison conditions); TVA v. Hill, 437 U.S. 153, 194 (1978) (in Endangered Species Act, Congress displaced courts' equitable discretion and determined that balance of equities favored preserving endangered species). *See also* Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("Of course, Congress may intervene and guide or control the exercise of the courts' discretion[.]").

[6] United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496 (2001) (emphasis added).

[7] *Id.* at 497.

[8] Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036, 1037 (9th Cir. 2009) (quoting Drinker ex rel. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996)).

[9] Zvi D. ex rel. Shirley D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982).

[10] *See* R.B. ex rel. Parent v. Mastery Charter Sch., 762 F. Supp. 2d 745, 756 (E.D. Pa. 2010) ("The stay-put provision represents Congress's policy choice that the danger of excluding a handicapped child entitled to an educational placement from that placement was much greater than the harm of allowing a child not entitled to an educational placement to remain in that placement during the pendency of judicial proceedings.") (internal quotation marks omitted), *aff'd*, 532 F. App'x 136 (3d Cir. 2013).

Section 6 of the VRAA would represent a more moderate exercise of the same power. By adopting Section 6, Congress would be determining that the disenfranchising effect of a new voting law would necessarily cause sufficient irreparable harm to justify freezing the status quo in place, so long as the party challenging the law can show that the balance of hardships tips in its favor. By requiring the court to engage in an inquiry into the balance of hardships—something the IDEA does not even *permit*—the VRAA's preliminary-injunction provision reflects less of a break from traditional equity practice, and thus rests on even firmer ground than does the stay-put provision.[11] Section 6 thus fits comfortably within the pattern of Congress's previous exercises of its power to balance the relevant considerations and alter the standards for preliminary relief in particular contexts.

Section 6 is also a valid exercise of Congress's power to enforce the Fourteenth and Fifteenth Amendments. Because Section 6 applies uniformly across all of the states, it does not implicate the "equal sovereignty" principle that led the Court to invalidate the Voting Rights Act's coverage formula in *Shelby County*. Nor does Section 6 impermissibly seek "to decree the substance of the Fourteenth Amendment's [and Fifteenth Amendment's] restrictions on the States."[12] Even Justice Scalia, who takes the narrowest view on the Court of the power to enforce the Reconstruction Amendments, has endorsed Congress's authority to adopt "measures that do not restrict the States' substantive scope of action but impose requirements directly related to the facilitation of 'enforcement'—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified."[13] In its unanimous opinion in *United States v. Georgia*,[14] the Court held that, *at the least*, Congress has enforcement power in the circumstances Justice Scalia identified.

Fully consistent with Justice Scalia's test, Section 6 does not impose any new substantive standard on the states. To the contrary, it merely adopts a remedial rule that serves to facilitate enforcement of the underlying rights secured by the Constitution and the voting rights laws. Federal courts have repeatedly recognized that the harms caused by holding an election under procedures that are later held unlawful cannot be fully undone after the election is held.[15] When a court concludes, after an election, that the state held the election under procedures that violated

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[11] Other statutes relax the preliminary injunction standard without eliminating the success-on-the-merits prong. The Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2805(b)(2), for example, authorizes a preliminary injunction if the plaintiff's franchise has been terminated, the plaintiff has shown "sufficiently serious questions going to the merits to make such questions a fair ground for litigation," and the balance of hardships tips in the plaintiff's favor. *See* Mac's Shell Serv., Inc. v. Shell Oil Products Co., LLC, 559 U.S. 175, 193 n.12 (2010). If Congress were to amend the VRAA to include a "serious questions going to the merits" requirement, such a step would place Section 6 on still firmer ground.

[12] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[13] Tennessee v. Lane, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting).

[14] 546 U.S. 151, 158-59 (2006).

[15] *See, e.g.*, Council of Alt. Political Parties v. Hooks, 121 F.3d 876, 883 (3d Cir. 1997) ("If the plaintiffs lack an adequate opportunity to gain placement on the ballot in this year's election, this infringement on their rights cannot be alleviated after the election."); Spencer v. Blackwell, 347 F. Supp. 2d 528, 537 (S.D. Ohio 2004) (granting preliminary injunction, shortly before an election, against allowing challengers into polling places on election day). *See also* United States v. Berks Cnty., Pa., 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) ("Federal courts have recognized that the holding of an upcoming election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters.").

federal law, the court is forced to choose between two deeply problematic options: (1) waiting until the next election to provide relief, thus forcing the successful plaintiffs to wait years for redress of the violations of law; or (2) requiring the state to run the election over again, thus imposing great burden and expense, "disrupt[ing] the state's interest in assuring the finality of the election results,"[16] and likely forcing the election to be held at an unusual and inconvenient time that affects the composition of the electorate. Although courts have the *power* to void elections held under unlawful procedures,[17] they are understandably hesitant to do so. Section 6 would reflect a congressional determination that, given the harms of re-running elections, the preferable course where the balance of hardships tips toward the plaintiff is to freeze prior voting practices in place until a court can determine whether new practices violate federal law. Under the remedial theory of congressional power adopted in *Georgia*, that determination is valid and need not be subjected to the "congruence and proportionality" analysis that applies when Congress seeks to impose more searching prophylactic *substantive* requirements on states.[18]

Even if a court were to hold that the "congruence and proportionality" test *does* apply to Section 6, the provision would still be constitutional. Unlike any of the provisions the Supreme Court has struck down under that test, Section 6 imposes no new substantive requirement on states.[19] Nor does it even alter the remedies that a court may award on a finding of liability. Section 6 simply changes the process for granting preliminary relief while the litigation proceeds. The minimal impact of that provision, when measured against the extensive history and pattern of state deprivations of constitutional rights in the voting area—a pattern that, as the Supreme Court itself recognized, extends across the Nation[20]—makes it fully congruent and proportional to the underlying Fourteenth and Fifteenth Amendment rights.

To be sure, a state might argue that Section 6 violates its sovereignty by preventing it from putting into effect a change to voting procedures in the absence of a finding that the change violates federal law. But the suspension will be only temporary. And the temporary suspension authorized by Section 6 promotes the core purpose of preliminary relief in federal courts—to ensure that the plaintiff does not experience irreparable harm before the court has the opportunity to decide whether the defendant's action violates federal law.[21] Finally, any harm to the state will be mitigated by two factors. First, Section 6 authorizes a preliminary injunction only when

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[16] Doe v. Walker, 746 F. Supp. 2d 667, 682 (D. Md. 2010).
[17] *See* Pope v. Cnty. of Albany, 687 F.3d 565, 570 (2d Cir. 2012).
[18] *See Georgia*, 546 U.S. at 158-59; *Lane*, 541 U.S. at 558-59 (Scalia, J., dissenting).
[19] *Cf.* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1334-1337 (2012) (opinion of Kennedy, J., announcing judgment of the Court) (Family and Medical Leave Act's self-care provision gave individuals substantive rights that went well beyond the rights recognized in the Court's Fourteenth Amendment cases); Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 372-373 (2001) (same for Americans with Disabilities Act's employment provisions); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 86 (2000) (Age Discrimination in Employment Act "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard"); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643 (1999) (Patent Remedy Act provided a remedy for states' acts of patent infringement, without more, but "a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution"); City of Boerne v. Flores, 521 U.S. 507, 533-34 (1997) (Religious Freedom Restoration Act gave individuals substantive rights that went well beyond the rights recognized in the Court's Free Exercise Clause cases).
[20] *See* Nw. Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193, 203 (2009).
[21] *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 565 (1978).

"the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted."[22] Where a court determines that the harm to the state of issuing a preliminary injunction will outweigh the benefit to the plaintiffs, Section 6 will not authorize a preliminary injunction. Second, after issuing a preliminary injunction that suspends the operation of a state voting law, a court can be expected to expedite its consideration of the merits. By following that procedure, the court can ensure that any suspension of a state voting practice lasts only so long as is necessary to avoid harm to voters while determining, once and for all, whether that practice violates federal law.

For all of these reasons, the VRAA's preliminary injunction provision would be a valid exercise of Congress's power to enforce the Fourteenth and Fifteenth Amendments. That provision would make a change to the preliminary injunction standards that, while unusual, is far from unprecedented. And it would fit comfortably within the congressional authority that the Supreme Court has recognized.

Notice and Transparency
Gilda R. Daniels*

Congress and the courts have consistently recognized the importance of notice and transparency to foster public confidence in elections and to protect voting rights. For example, the National Voter Registration Act ("NVRA") requires states to make records pertaining to voter registration activities available for public inspection and photocopying.[1] The Fourth Circuit noted that this requirement "promotes transparency in the voting process" and "the integrity of federal elections."[2] Further, the court held that the provision "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies."[3]

To that end, the VRAA contains provisions designed to increase notice and transparency of elections and to restore some, but not all, of the benefits of the prior preclearance regime. An often-overlooked aspect of preclearance was that it required robust disclosure of changes to voting laws by covered jurisdictions.[4] To obtain preclearance, covered jurisdictions had to provide the Department of Justice ("DOJ") with information explaining proposed voting changes, including the differences between the prior procedure and the new one, the reasons for the change, and the anticipated effect on members of racial or language minority groups.[5] In complex changes such as redistricting and annexation, DOJ often received additional information, such as demographic data, maps, and election returns data.[6] The information was kept on file with DOJ and was made available to civil rights groups and other interested parties

[22] VRAA § 6(b).
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[1] 42 U.S.C. § 1973gg–6(i)(1) (2012).
[2] Project Vote/Voting for America, Inc. v. Long, 682 F.3d 331, 339–40 (4th Cir. 2012).
[3] *Id.* at 334–35.
[4] *See* Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 955-56 (2011).
[5] *See* 28 C.F.R. § 51.27.
[6] *See id.* §§ 51.27(q); 51.28.

upon request.[7] DOJ also provided interested individuals and groups with regular notices of new submissions, and posted weekly information online.[8] This enabled the public to serve as a partner with the federal government to prevent discrimination in voting.

Shelby County thus leaves a significant gap in the public's ability to monitor the practices of those jurisdictions, especially at the local level, where voting changes are difficult to monitor and may receive scant media attention. Unsurprisingly, then, since *Shelby County*, many jurisdictions have moved forward with previously challenged or blocked voting changes.[9] For example, jurisdictions in Georgia have implemented or sought to implement a number of changes, such as the redistricting of the Fulton County Commission, which decreased the size of majority-minority districts,[10] and a proposal in Athens, Georgia to close almost half of its twenty-four polling places and replace them with two early voting facilities located in police stations—closures that would force some voters to travel three hours to reach the new polling places.[11] In Greene County, Georgia, the County Board of Commissioners revised its redistricting plan decreasing the percentage of African American voters in a majority-minority district to less than fifty-one percent.[12] Augusta-Richmond, Georgia has moved its county elections from November to the summertime, when African-American turnout is usually lower.[13]

A striking example of local "chicanery" has taken place in Beaumont, Texas. Whites in Beaumont had sought since 2011 to eliminate a four-person African-American majority school board by changing the board from seven single-member districts to five single-member districts and two at-large seats—a change that would in all likelihood reduce-African American representation.[14] When this change was blocked by Section 5, supporters of the change sought to circumvent Section 5—and the democratic process—by having three white candidates submit candidacy papers for the seats of three incumbent African-American board members immediately before the filing deadline for the 2013 election, even though their terms were not due to expire until 2015. When the school district rejected the filings, the challengers sued, claiming based on a novel interpretation of state law that the seats should have been up for re-election, and that since the filing deadline had passed, they were entitled to the seats

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[7] *See id.* § 51.50.

[8] *See id.* § 51.32; *Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/notices/noticepg.php (last visited May 7, 2014).

[9] *See, e.g.*, *How Formerly Covered States and Localities are Responding to the Supreme Court's Voting Rights Act Decision*, NAACP LEGAL DEF. & EDUC. FUND, *available at* http://www.naacpldf.org/document/states-responses-shelby-decision (last updated Apr. 24, 2014); Sarah Childress, *After Shelby, Voting-Law Changes Come One Town at a Time*, FRONTLINE, Aug. 8, 2013, http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/after-shelby-voting-law-changes-come-one-town-at-a-time.

[10] *See Election may change Fulton commission makeup, priorities*, ATLANTA JOURNAL-CONSTITUTION, Mar. 13, 2014; David Wickert, *Fulton Redistricting*, ATLANTA JOURNAL-CONSTITUTION, May 19, 2013, at B1.

[11] *See* Spencer Woodman, *Voting Rights at Risk in Georgia*, ROLLING STONE, Nov. 4, 2013, http://www.rollingstone.com/politics/news/voting-rights-at-risk-in-georgia-20131104.

[12] *See id.*; Billy W. Hobbs, *Rhodes addresses injustice concerning redistricting map in Greene County*, LAKE OCONEE NEWS, Aug. 15, 2013, http://www.msgr.com/lake_oconee_news/news/article_84967866-05da-11e3-801e-0019bb2963f4.html.

[13] Officials originally sought to move the Augusta elections to July. *See Court ruling revives effort to move Augusta elections to July*, AUGUSTA CHRON., June 29, 2013. Ultimately, they were moved to May, with any runoff elections to be held in July. *See Governor Deal Signs Bill Moving Elections to May*, AUGUSTA CHRON., Jan. 22, 2014.

[14] *See* Zachary Roth, *Breaking Black: The Right-Wing Plot to Split a School Board*, MSNBC.COM, Oct. 17. 2013, updated Jan. 30, 2014, http://www.msnbc.com/msnbc/blacks-texas-town-fear-return-old-days.

unopposed.[15] After *Shelby County*, a state court has allowed Beaumont's redistricting plan to proceed, although it denied the white candidates' attempts to be seated unopposed. The Beaumont case underscores both that adequate notice regarding the composition of districts, changes in redistricting schemes, and candidate qualification information is essential, and that racial discrimination in voting is still an unfortunate reality.

In an effort to restore some of the benefits of Section 5, the VRAA would require states and political subdivisions to publicize certain information pertaining to voting changes. First, states and localities would be required to publicize, within 48 hours, any changes to voting practices and procedures that occur 180 days before a federal election.[16] Second, no later than 31 days before a federal election, states and localities would have to publicize detailed information about polling place resources, including the number of voting machines and poll workers assigned to each precinct or polling place.[17] Finally, for federal, state, or local elections, states and jurisdictions would have to publicize any changes to the constituency that will participate in the election or to the boundaries of electoral districts within ten days of making such changes.[18] Notice would be provided within the affected jurisdictions and on the internet. If a jurisdiction did not comply, the VRAA would prohibit it from denying or abridging a citizen the right to vote based on the individual's failure to comply with the change.[19]

A. Congressional Authority to Require Notice in Elections

In addition to Congress's Fourteenth and Fifteenth Amendment authority to address racial discrimination in voting, the Constitution's Elections Clause serves as a viable and important tool in Congress' ability to regulate federal elections. The Elections Clause requires states to prescribe "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives," but mandates that "Congress may at any time by Law make or alter such Regulations[.]"[20]

Recently, the Supreme Court, in an opinion by Justice Scalia, strongly affirmed Congress's authority to regulate federal elections, noting that "[t]he [Elections] Clause's substantive scope is broad[,]" and that Congress may, if it desires, "alter [state] regulations [for federal elections] or supplant them altogether."[21] The Court emphasized that congressional

[15] All three of the challengers had lost to the three African-American incumbents in a previous election. The last-minute nature of their filing made it clear that they had no interest in putting the incumbents on notice of their interpretation until after the 2013 filing deadline had passed. The incumbents understandably had not filed re-election papers by the 2013 deadline since their terms were not due to expire until 2015.

[16] *See* VRAA § 4(a) (proposed VRA § 6(a)).

[17] *See* VRAA § 4(a) (proposed VRA § 6(b)). Any changes to polling place resources after the deadline of 31 days prior to the election must be publicized within 48 hours. *See id.*

[18] *See* VRAA § 4(a) (proposed VRA § 6(c)).

[19] *See* VRAA § 4(a) (proposed VRA § 6(e)).

[20] U.S. CONST. Art. I, § 4, cl. 1. The only exeeption to Congress's authority to "make or alter such Regulations" is that Congress may not change "the Places of chusing Senators." This has no real-world implications today given that under the Seventeenth Amendment, Senators are chosen by popular vote and on the same ballots as congressional elections, rather than by state legislatures.

[21] Arizona v. Inter Tribal Council of Ariz., 133 S. Ct. 2247, 2253 (2013); *see also* Foster v. Love, 522 U.S. 67, 69 (1997) (finding Congress' Elections Clause authority "well settled . . . to override state regulations" involving federal election administration matters) (internal citation omitted).

authority to "make or alter" the "Times, Places, and Manner" of federal elections is grounded in "comprehensive words" that "embrace authority to provide a complete code for congressional elections[.]"[22] Such authority applies "not only as to times and places, but in relation to *notices*, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[23] Thus, the phrase "manner of holding elections" grants Congress authority to regulate the entire federal election process, including voter registration and ballot counting. Congress has previously used this authority with the enactment of the NVRA and the Help America Vote Act ("HAVA").

The Elections Clause clearly provides Congress with authority to require the type of notice in the VRAA pertaining to federal elections. The Court has explicitly embraced congressional authority over "notices" pertaining to federal elections.[24] And if Congress may actively "alter" or "supplant" state laws governing federal elections, then surely it may require that states merely inform the public, in a timely fashion, of any changes to such laws and procedures. Finally, the VRAA's notice requirements apply nationwide and therefore do not implicate the "equal sovereignty" concerns in *Shelby County*. Thus, all of the VRAA's notice provisions regarding federal elections are squarely within Congress's Elections Clause power.

As to the VRAA's provision requiring notice of changes to electoral constituencies and election boundaries for state and local elections in addition to federal ones, the primary authority for this requirement is likely Congress' power to enact "appropriate legislation" to enforce the Fifteenth Amendment's prohibition on racial discrimination in voting.[25] For several reasons, this provision is an appropriate exercise of Fifteenth Amendment power, whether this power is subject to the "rationality" standard used by the Court in *Shelby County*[26] or even the stricter "congruence and proportionality" test the Court has invoked in Fourteenth Amendment cases.[27] First, it is well-documented that processes such as redistricting, reapportionment, and manipulation of "at-large" elections have been used for racially discriminatory purposes.[28] Indeed, less than two years ago, a federal court found Texas's congressional and state Senate redistricting plans to have been enacted with a discriminatory purpose,[29] and post-*Shelby* developments such as those described above confirm that these processes continue to serve as vehicles for racial discrimination. Moreover, public notice is a minimal intrusion on state sovereignty. Unlike preclearance, notice requirements do not delay or prevent the enactment of state or local laws. Nor do they establish new rights or abrogate states' sovereign immunity—

[22] *Id.* (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).
[23] *Smiley*, 285 U.S. at 366 (emphasis added).
[24] *Id.*
[25] U.S. CONST. amend. XV, § 2.
[26] *See Shelby Cnty.*, 133 S. Ct. at 2625, 2627-31.
[27] *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).
[28] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 47 (1986) ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.") (internal citations omitted); Rogers v. Lodge, 458 U.S. 613, 616 (1982) (describing how at-large elections can dilute minority votes); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (finding that a racially gerrymandered district violated the Fifteenth Amendment).
[29] Texas v. United States, 887 F. Supp. 2d 133, 161, 166 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013).

measures that the Supreme Court has sometimes found exceed congressional authority if they are not adequately tailored to remedying state discrimination.[30] Rather, the VRAA merely requires states and jurisdictions to provide the public with information about certain voting changes. Such a requirement is a reasonable and appropriately-tailored response to the history of discrimination associated with these types of voting changes.

B. Taking Notice a Step Further: The Voter Impact Statement

While the VRAA is a good first step, notice does not begin to replace the strength of Section 5. The legislation's enforcement provision should be clarified and strengthened.[31] Moreover, a stronger approach would be for jurisdictions to provide "Voter Impact Statements" ("VIS") to function as a notice mechanism and provide affected voters an opportunity to comment *prior* to implementation.[32] The concept of a VIS is modeled after Environmental Impact Statements ("EIS"), which have been required since 1969 under the National Environmental Policy Act ("NEPA"). NEPA requires federal agencies to conduct an assessment of the environmental effects of their activities when they plan to undertake major actions that could "significantly affect the quality of the human environment."[33] EIS's fill the information void and provide notice and transparency in environmentally affected areas before the government undertakes the project at issue.

A VIS would differ from the VRAA notice requirement because it would not only require a jurisdiction to publicize a proposed change, but also to demonstrate that it has vetted the proposal to ensure that it does not adversely impact the voting rights of any group. If an adverse impact would occur, the VIS proposal would require the jurisdiction to publicize the alternatives it considered, in contrast with the VRAA, under which a jurisdiction's notice requirements are met once it publicizes the change. While the VRAA would be a welcome start, Congress should use all means within its authority to ensure that the public can assess voting changes prior to execution to guarantee that the fundamental right to vote is not overly burdensome for the most vulnerable voters.

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[30] *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); *City of Boerne*, 521 U. S. at 532.

[31] The VRAA states that "the right to vote of any person shall not be denied or abridged because the person failed to comply with any change made by a State or political subdivision" if the state or jurisdiction failed to provide proper notice. VRAA § 4(a) (proposed VRA § 6(e)). While this language appears to bar jurisdictions from enforcing consequential voting changes if notice is not given, it should be clarified to make it explicit that states may not implement voting changes absent the required notice.

[32] *See generally* Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57 (2008).

[33] 42 U.S.C. § 4332(2)(C) (2012).

ADDITIONAL SUBMISSIONS FOR THE RECORD

A list of material and links can be found below for Submissions for the Record not printed due to voluminous nature, previously printed by an agency of the Federal Government, or other criteria determined by the Committee:

Asian Americans Advancing Justice/AAJC, July 1, 2014, letter:

http://mobile.advancingjustice-aajc.org/sites/aajc/files/Advancing%20 Justice- AAJC%20Testimony%20for%206.25.14%20Senate%20 Judiciary%20 Hearing%20on%20VRAA.pdf.

Lawyers' Committee for Civil Rights Under Law, statement:

http://vrafortoday.org/wp-content/uploads/2014/07/Lawyers-Committee-VRAA- Senate-Judiciary-hearing.pdf.

Leadership Conference on Civil and Human Rights, The, report:

http://www.civilrights.org/press/2014/Racial-Discrimination-in-Voting-Whitepaper.pdf.

Mexican American Legal Defense and Educational Fund (MALDEF), National Association of Latino Elected and Appointed Officials (NALEO), and National Hispanic Leadership Agenda (NHLA), "Latinos and the VRA: A Modern Fix for Modern-Day Discrimination," report:

http://www.maldef.org/assets/pdf/VRA__comp.pdf.

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