

CONGRESSIONAL AUTHORITY TO PROTECT
VOTING RIGHTS AFTER SHELBY COUNTY V.
HOLDER

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
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TUESDAY, SEPTEMBER 24, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC

The subcommittee met, pursuant to call, at 2:06 p.m., in Room 2237, Rayburn House Office Building, Hon. Jamie Raskin presiding.

Present: Representatives Raskin, Garcia, Escobar, Jackson Lee, Johnson, Jordan, Reschenthaler, Cline, and Armstrong.

Staff Present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Moh Sharma, Member Services and Outreach Advisor; James Park, Chief Counsel, Constitution, Civil Rights, and Civil Liberties; Keenan Keller, Senior Counsel, Constitution, Civil Rights, and Civil Liberties; Sophie Brill, Counsel, Constitution, Civil Rights, and Civil Liberties; Will Emmons, Professional Staff Member Constitution, Civil Rights, and Civil Liberties; Paul Taylor, Minority Counsel; and Andrea Woodard, Minority Professional Staff Member.

Mr. RASKIN. Mr. Johnson has arrived, so we can do it.

Welcome, everybody. Sorry for the heat in the room. I understand we have called about getting the air conditioning going. We say on Capitol Hill it is not heat, it is the stupidity. So we will try to keep both of them down to liveable levels during our hearing today.

The Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties will come to order. Without objection, the chair is authorized to declare a recess of the subcommittee at any time.

I want to welcome everybody, all of our distinguished witnesses and everybody in the crowd, to today's hearing on congressional authority to protect voting rights after *Shelby County v. Holder*. I am, let's see, going to recognize myself first for an opening statement and then turn it over to Mr. Johnson, we will swear in the witnesses, and then we will get going.

So today's hearing is part of a series that the House Judiciary Subcommittee on the Constitution and Civil Rights is holding to as-

sess ways that we can reinvigorate the preclearance requirement of Section 5 of the Voting Rights Act which was so badly damaged by the Supreme Court in *Shelby County v. Holder*.

While voting rights are a central part of our national narrative and self-understanding, continuing efforts to deny the vote and block suffrage rights for excluded groups has been as much a part of our history as the proud exercise of the franchise by those who enjoy it.

Congress passed the landmark Voting Rights Act in 1965, but it was won by the blood, sweat, tears, and martyrdom of countless brave Americans in the civil rights movement, like Mickey Schwerner, James Chaney, Andrew Goodman, Viola Liuzzo, and Medgar Evers, people who gave their lives struggling for the universal right to vote and strong democracy everywhere in our country.

The act mobilized Federal power to protect the fundamental right to vote against political White supremacy, focusing on jurisdictions that used a literacy test or a character examine and where a majority of African Americans or other minorities were disenfranchised.

The key innovation was the Section 5 preclearance requirement. The basic problem with laws against disenfranchisement is that even if you are able to prove the disenfranchisement and punish the offenders, the election is long since over, and so the damage to democracy and to disenfranchised communities has already been done.

So the architects of the Voting Rights Act required covered jurisdictions, those with the most sordid records of racial disenfranchised and oppression, to obtain approval of any changes of their voting laws or procedures from the Department of Justice or the United States District Court for the District of Columbia in advance.

The preclearance requirement ensured that proven racist jurisdictions would bear the burden of proving that any changes to their voting laws were not discriminatory before they were allowed to take effect. It thus provided a mechanism to ensure that any new voting rules and practices in jurisdictions with a history of discrimination would actually be fair changes.

In this way, preclearance proved to be a significant means of protecting the rights of minority voters, and it empowered millions of African Americans, Latinos, Native Americans, and other Americans to register and actually vote.

This is why Congress had repeatedly reauthorized the preclearance provision on an overwhelmingly bipartisan basis, most recently in 2006 when the House passed reauthorization by a vote of 390 to 33 and the Senate by a vote of 98 to 0.

But in 2013, the Roberts Supreme Court effectively gutted Section 5 and destroyed the preclearance mechanism when it struck down the coverage formula that determined which jurisdictions would be subject to the preclearance requirement. It held that the decades-old preclearance requirement was now an unjustified intrusion into State sovereignty because the coverage formula failed to reflect current conditions. It essentially held that the coverage formula now violated equal protection, not equal protection of the people but of the States, a fairly remarkable turn of events.

In any case, the preclearance provision is dormant and useless unless and until we adopt a new coverage formula to replace the one that was invalidated by the Court. Although the Court struck down the coverage formula in Shelby County, it noted that it issued no holding on the preclearance provision itself. The Court indicated that Congress could draft another formula based on current conditions.

As we have seen in the five hearings we have held so far on the problem, the Shelby decision opened a new era for formerly covered jurisdictions implementing a broad array of discriminatory new voting tactics and devices.

North Carolina, for example, passed a strict voter ID law that a Federal appeals court ultimately struck down as unconstitutional, finding that it intentionally targeted African Americans for disenfranchisement with almost surgical precision. Yet, as the litigation wound its way upwards, elections took place for officeholders at the Federal, State, and local level. In other words, judicial nullification of the preclearance provision paved the way for precisely the kind of voter disenfranchisement that Congress had intended to prevent when it adopted the Voting Rights Act.

We have learned of other profoundly troubling recent State efforts to turn the clock backwards, including by widespread polling place closures and relocations, the practice of purging voters from the rolls in a way that targets racial and ethnic minorities, and the imposition of aggressive restrictions on ex-felon voting.

With the current new generation of voter suppression tactics in the wake of *Shelby County v. Holder*, America is being served some of the same nasty old wine in some new bottles. And in some cases, even the bottles themselves are recycled.

Congress must act, and we have the power to do so. The considered opinion of many constitutional scholars, including many here today, several here today, is that our authority to stop race discrimination in voting remains expansive even within the terms of the Shelby County ruling. The 14th and 15th Amendments, of course, gave Congress explicit legislative power to enforce voting rights and equal protection against deliberate race discrimination. These amendments formed the basis of our authority to pass the Voting Rights Act in the first place, including the preclearance requirement.

When the Voting Rights Act was first challenged the year after passage, the Supreme Court in *South Carolina v. Katzenbach* upheld the preclearance provision and its coverage formula, holding that congressional authority to enforce the 15th Amendment is broad and comprehensive and that implementing legislation must pass only a test of minimum rationality, does it reasonably advance a legitimate State interest.

I also note that the Elections Clause, which confers authority on Congress to regulate Federal elections, could further bolster and does further bolster the act's constitutionality.

The Court in Shelby County hardly addressed these foundational sources of congressional authority. But even on its own terms, the Shelby County decision left precedent standing that recognizes our authority to act to protect the voting rights of the people. So this

is why we have invited the panel to gather today to come and advise us on this process.

I thank our witnesses and our members for being here today, and I look forward to a lively and substantive discussion.

It is now my great pleasure to recognize the distinguished ranking member of the subcommittee, the gentleman from Louisiana, Mr. Johnson, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman.

Thank you all for being here.

It is an important issue. This is our fifth hearing, as was mentioned. And as I said at our last one, we all agree, I mean, I think every Member of Congress would agree openly that discriminatory treatment in voting based on race or sex is abhorrent. It is, of course, prohibited by the Constitution, as it should be, and it is prohibited by Federal statute, as it should be.

But too often complaints of discrimination in voting have nothing to do with discriminatory treatment. Instead, rules entirely neutral on their face are sometimes claimed to be discriminatory simply because they have a disparate impact on one group or another. But we make the point so often that disparate impacts are not proof of discrimination. Indeed, they are statistically inevitable.

Yet the bill we will be discussing today, H.R. 4, would prevent States from enforcing their neutral voting rights laws if they aren't approved by the Justice Department, and that is an entity with a history of politicizing that power in the past. And it would do so based on claims of disparate impact, which are statistically inevitable and not evidence of any racially discriminatory treatment *per se*.

Take the example of the Department of Justice's letter declining to preclear South Carolina's voter ID law under the Voting Rights Act as it existed in 2011. The Department claimed in the letter that, quote, "minority registered voters were nearly 20 percent more likely to be effectively disenfranchised," unquote, by the law because they lacked a driver's license.

But the difference between White and African American holders of a driver's license was only 1.6 percent. The Justice Department used the 20 percent figure because, while the State's data showed that 8.4 percent of White registered voters lacked any form of DMV-issued ID as compared to 10 percent of non-White registered voters, the number 10 is 20 percent larger than the number 8.4.

So it is true mathematically that 10 is 20 percent larger than 8.4—actually, it is 19 percent larger, but the Justice Department rounded up—but it clearly distorts the reported difference in driver's license rates and it was used to falsely declare the South Carolina law discriminatory.

What other factors might then explain differences in outcome among demographic groups. Well, to give just one example, data shows that younger people among both African Americans and Whites tend to be the least likely to have driver's licenses. Consequently, if African Americans have proportionately more young people in their demographic group there will be a disproportion number of African Americans without driver's licenses, however slight, as is indeed the case. That is not discrimination. That is just math. It is demographics.

The disparate impact approach to civil rights and the assumption that different outcomes are the result of discrimination is fundamentally unsound for the same reason social scientists are trained that correlation does not imply causation. In other words, there can be all sorts of correlations between one event and another, and that doesn't answer the question as to why the correlation exists.

Regarding discriminatory treatment in voting that is based on race, Section 3 of the Voting Rights Act, which is permanent Federal statutory law, remains in place and in full effect. It allows any Federal judge, upon proof of discriminatory treatment in voting based on race, to subject the offending jurisdiction to whatever preclearance regime the Court deems appropriate.

But H.R. 4 would go far beyond what is constitutionally permissible and it would allow a politicized Justice Department to veto or amend State voting laws to the political advantage of the party in power.

As one of the witnesses before us today will explain, Congress cannot constitutionally enact legislation denying States and localities control over their voting rules when there is no evidence they have been engaging in discriminatory treatment in voting based on race.

The Supreme Court's holding in *City of Boerne v. Flores* held that a law enacted pursuant to the 14th Amendment must be congruent and proportional to actual constitutional violations that can be established in an evidentiary record.

In considering whether a law satisfies Boerne's congruence and proportionality standard, the Court assesses whether a record of actual constitution violations exist; that is, intentional discrimination in voting based on race. The Supreme Court has taken a dim view of statutes aimed primarily at eliminating disparate impacts that don't themselves violate the 14th Amendment. But that is just what H.R. 4 does.

This committee and other organizations have claimed to have compiled evidence to demonstrate the need to amend the Voting Rights Act. But the list of examples overwhelmingly includes DOJ objections to State and local voting rules changes under Section 5 of the old Voting Rights Act, Section 2 cases, and cases in which a jurisdiction may have stopped defending the case after the district court level.

The Department of Justice Section 5 objections are just that, and not official determinations by a court of ultimate jurisdiction that a State or locality actually engaged in disparate treatment in voting based on race.

Section 2 cases can continue to be brought today, just as other civil rights case are brought, so such cases don't demonstrate the need to amend the Voting Rights Act. And cases in which a jurisdiction may have stopped defending the case or settled the case after the district court level may simply indicate the jurisdiction couldn't afford to continue appealing the case up to a higher court where the jurisdiction may ultimately have won if it could have afforded to.

Lots said there, lots more to discuss. And with that, I look forward to hearing from all of our witnesses today. We do appreciate your time.

And I yield back.

Mr. RASKIN. All right. Thank you very much, Mr. Johnson, for your opening.

We welcome all our witnesses. And I want to thank you for participating in today's hearing. Please note that your written statement will be submitted to the record in its entirety, and we ask that you summarize your thoughts in 5 cogent minutes, if you would.

There is a timing light on the table. When the light goes from green to yellow, that indicates you have got a minute to go. When the light turns red, it signals that your 5 minutes have expired. So all you law professors take note, and I am speaking as a law professor here.

Before proceeding, I hereby remind each witness that all of your written and oral statements made to the subcommittee in connection with this hearing are subject to penalties of perjury pursuant to 18 U.S.C. 1001, which may result in the imposition of a fine or imprisonment of up to 5 years or both.

Our first witness is Justin Levitt, an associate dean for research, a professor of law at the Loyola School of Law in L.A. he was previously the deputy assistant AG in the Civil Rights Division of Justice. He has published many excellent pieces in the Yale Law and Policy Review, the Harvard Law Review, and so on, and I have learned a lot from his work over the years.

And Professor Levitt, you are recognized now for 5 minutes.

STATEMENTS OF JUSTIN LEVITT, ASSOCIATE DEAN FOR RESEARCH, PROFESSOR OF LAW AND GERALD T. MCLAUGHLIN FELLOW, LOYOLA LAW SCHOOL, LOS ANGELES; FRANITA TOLSON, VICE DEAN FOR FACULTY AND ACADEMIC AFFAIRS AND PROFESSOR OF LAW, UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SCHOOL OF LAW; DEBO P. ADEGBILE, ESQ.; MICHAEL T. MORLEY, ASSISTANT PROFESSOR, FLORIDA STATE UNIVERSITY COLLEGE OF LAW; JOE RICH, FORMER CHIEF, VOTING SECTION, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE; AND KIRA ROMERO-CRAFT, MANAGING ATTORNEY, LATINO JUSTICE, PRLDEF

STATEMENT OF JUSTIN LEVITT

Mr. LEVITT. Thank you very much, Mr. Chair, Mr. Ranking Member, distinguished members of the subcommittee, thank you very much for the opportunity to testify.

Federal legislation is essential to protecting voting rights. The courts have done serious damage to the current enforcement regime. Bipartisan action should restore it.

The members of this committee who were able to vote in 2006 on the last reauthorization, Republican and Democrat, voted for the last reauthorization. And I very much hope to help the committee reach a similar consensus here today.

Congress has the broad power to guard against racial discrimination in the franchise. I am, in fact, one of those scholars you mentioned, Mr. Chair.

The 15th Amendment, as just one example, is devoted entirely to the topic. The Constitution has only been amended 27 times in our history, and one explicitly prohibits discrimination in voting. That speaks both to the importance of the issue and the urgency of addressing it.

The 15th Amendment also expressly gives Congress the power and responsibility to enforce that prohibition through appropriate legislation. This is an enumerated power. It is not less than the enumerated power to regulate interstate commerce. It is not less than the power to regulate the Armed Forces. It is not less than the power to appropriate spending for the common defense and the general welfare.

This is a responsibility that Congress was given and one that I am increasingly encouraged that you are taking up, including with this hearing here today.

The Supreme Court has also been quite clear that this enumerated power is not confined to the four corners of the amendment itself. It includes the power to block State practices that, and I quote, “perpetuate the effects of past discrimination,” and it includes the power to, and I quote again, “prevent and deter discrimination on the horizon.” And the structure of H.R. 4 is squarely within that power.

Even while confining Federal authority in other areas, the court has repeatedly held up the Voting Rights Act as the exemplar of congressional authority. This is the thing that is most well-founded on Congress’ constitutional bulwark. And there is only one meaningful exception to that. It is the *Shelby County v. Holder* case in 2013.

I am not a fan of the Shelby County decision, but its legal rule is simple enough: Congressional action has to be reasonably related to current conditions. The Court thought that the formula for preclearing new laws reauthorized in 2006 took its core from 1964 turnout statistics, and the Court found that 40-year disconnect irrational.

Shelby County gave us more than that legal rule. It gave us a problem. Preclearance was an extraordinary remedy for an extraordinary concern: racial discrimination in voting. It is still sadly necessary. Indeed, after several Texas cases highlighted in my written testimony, preclearance is more necessary than ever. Shelby County neutered it.

Most civil rights legislation—most civil rights litigation is responsive. If there is a legal problem, you sue, you prove harm. Remedies make the plaintiff whole. But enforcing voting rights is different.

Discriminatory election laws skew the terrain by which officials hold office. When they fight tooth and nail to keep the skew to keep their jobs, they don’t bear the costs, the taxpayers do. If taxpayers disapprove, they can’t toss the offenders out because the election rules themselves are the problem.

In no other arena is the incentive for officials to discriminate so personal and the costs so dispersed. Enforcing voting rights is different.

Voting lawsuits are also complicated, the sixth most complicated in Federal Court. They are expensive and they are slow, with years to develop evidence and years, as you mentioned, Mr. Chair, to resolve. Voting rights are different.

Meanwhile, also as you mentioned, Mr. Chair, elections infected with discrimination don't wait. We know that elections have consequences. Discriminatory elections have consequences, too.

Discriminatory elections produce incumbents who end up making policy. And even if you eventually get the election structure right, that doesn't fix the policy of the meantime. There is no way to make voters whole after a discriminatory election. Enforcing votes rights is different.

After Shelby County, the existing tools to defend against this discrimination are insufficient. But Congress can and should fix the damage Shelby County created well within the rules Shelby County handed down. The Court explicitly invited Congress to pass a new basis for preclearance reasonably related to current conditions. H.R. 4 does that. It looks for current patterns of recidivism and stops them in their tracks.

The other remaining provisions of H.R. 4 are similarly all based on constitutional authority, which I have pointed to my written testimony. I look forward to discussing in Q&A. I thank the members for their time.

[The statement of Mr. Levitt follows:]



T 213.736.1000 919 Albany Street
F 213.380.3769 Los Angeles, CA 90015-1211
www.lls.edu

Justin Levitt
Associate Dean for Research and Professor of Law
Gerald T. McLaughlin Fellow
213.736.7417
justin.levitt@lls.edu

Testimony of
Professor Justin Levitt,
Loyola Law School, Los Angeles

Before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties,
of the U.S. House Committee on the Judiciary

Congressional Authority to Protect Voting Rights After *Shelby County v. Holder*

September 24, 2019

Chair Cohen, Vice Chair Raskin, Ranking Member Johnson, and distinguished Members,
thank you for inviting me to testify before you.

My name is Justin Levitt. I am a tenured Professor of Law and the Associate Dean for Research at Loyola Law School, in Los Angeles.¹ I teach constitutional law and criminal procedure, and I focus particularly on the law of democracy, including election law and voting rights — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish, and the election statutes that implement the democratic structures it establishes. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the law of democracy is not merely theoretical. I have recently returned to Loyola from serving as a Deputy Assistant Attorney General helping to lead the Civil Rights Division of the U.S. Department of Justice. There, I had the privilege to supervise and support much of the federal government's work on voting rights, among other issues. Before joining the Civil Rights Division, I had the chance to practice election law in other contexts as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and have their votes counted in a manner furthering meaningful representation. My work has included the publication of studies and reports; assistance to federal and state officials with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution.

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated. I appear today at the request of the Subcommittee, and on behalf of no other person beyond myself. I thank Hannah Bensen, Nairi Dulgarian, and Sara Rohani for their research assistance with this testimony.

I have had the privilege to seek voting rights for clients and constituents, and the privilege to teach others how to do the same. I have had the privilege to pursue research cited by the courts, and to testify as an expert to them, to bodies like the U.S. Commission for Civil Rights, to state legislative bodies, and to other committees of the U.S. House and Senate. And I have had the privilege to advise, and occasionally represent, elected officials and election officials, of both major parties and neither major party, and those whose partisan affiliation I simply do not know.

I am delighted to join you today for this exceedingly important hearing, continuing what I hope will become bipartisan action in both chambers to ensure that the franchise remains secure. Voting, the right preservative of all other rights,² “is of the most fundamental significance under our constitutional structure.”³ Constant vigilance is necessary to ensure that the franchise remains equally meaningful for all eligible citizens, regardless of race or ethnicity. Congress has both the specifically enumerated power and the moral responsibility to protect against electoral discrimination. And lamentably, bipartisan Congressional action is now just as important as ever. I am happy to assist in that effort however I can.⁴

The Voting Rights Act has been widely hailed as one of the most successful pieces of civil rights legislation in the country’s history. It is our most significant shared national commitment to equal electoral participation and equitable political diversity, based in part on history that allows us to recognize that we all suffer when such a commitment is absent. That is just part of why the Act has enjoyed broad popular support from Americans of all colors and creeds.⁵

² *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

³ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 210 (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

⁴ Some of this testimony borrows from testimony given to the Senate Judiciary Committee in the immediate aftermath of the *Shelby County* decision, and to the U.S. Commission on Civil Rights last year. See *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on Judiciary*, 113th Cong. (July 17, 2013) (statement of Justin Levitt), <https://www.judiciary.senate.gov/imo/media/doc/7-17-13LevittTestimony.pdf>; *An Assessment of Minority Voting Rights Access in the United States: Hearing Before the U.S. Comm’n on Civil Rights* (Feb. 2, 2018) (statement of Justin Levitt), <http://redistricting.ils.edu/other/2018%20Levitt%20testimony.pdf>. Sadly, some of the concerns expressed in that testimony have already proven justified.

⁵ Polls both at the time of the Voting Rights Act and as recently as 2015 showed strong support for the Voting Rights Act, regardless of race. Roper Center for Public Opinion Research, *Public Opinion on the Voting Rights Act*, Aug. 6, 2015, <https://ropercenter.cornell.edu/blog/public-opinion-voting-rights-act>. As discussed in further detail below, the Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), and related judicial decisions and enforcement patterns, have left significant holes in the enforcement structure of the Voting Rights Act — holes within Congress’s power to repair. And consistent with the attitudes above, polls in the wake of *Shelby County* showed that voters disapproved of that decision, regardless of race. See Press Release, ABC News/Washington Post Poll: SCOTUS Decisions, July 3, 2013, <http://www.langerresearch.com/uploads/1144a24SCOTUSDecisions.pdf>.

The Voting Rights Act has also always been an American commitment crossing partisan lines.⁶ The Act was passed in 1965 by substantial majorities of both parties.⁷ Portions of the Act were renewed and updated in 1970,⁸ 1975,⁹ 1982,¹⁰ and 2006;¹¹ on each and every occasion, the renewals were passed by substantial majorities of both parties. To my knowledge, Members of the Committee, only two of you were able to cast a Congressional vote in 2006, but both — Republican and Democrat — voted for the measure to reauthorize the Voting Rights Act. Despite occasional disagreements about the meanings of particular statutory terms, members of Congress from both sides of the aisle recognized the power of bipartisan action on the fundamental structure necessary to safeguard the voting rights of each and every eligible citizen.

Presumably, you and your colleagues voted overwhelmingly, and in bipartisan fashion, to reauthorize and update the Voting Rights Act because you and your constituents recognized in 2006 how very far we had come since 1965. That undeniable and positive progress existed in part due to the very protections that the Voting Rights Act offered. And you and your constituents presumably recognized that despite this remarkable progress, the protections of the Voting Rights Act remained unfortunately necessary. Those protections have been degraded by the courts since your vote, but those same courts also issued you an express invitation to rectify the matter. And the continued update of effective measures to prevent discrimination in the franchise are regrettably, and no less undeniably, necessary today.

The continuing need to update the Voting Rights Act

The most serious challenge to the efficacy of the Voting Rights Act stems from the result of the Supreme Court's 2013 opinion in *Shelby County v. Holder*, though the Court in the same

⁶ Indeed, in polls following the *Shelby County* decision, self-identified liberals, moderates, and conservatives all disapproved of the *Shelby County* decision. See Press Release, ABC News/Washington Post Poll: SCOTUS Decisions, July 3, 2013, <http://www.langerresearch.com/uploads/1144a24SCOTUSDecisions.pdf>.

⁷ 79% of Democrats voting on the measure voted in favor of the Act, and 88% of Republicans voting voted in favor of the Act. See 111 CONG. REC. 19,201, 19,378 (1965); House Vote #107 in 1965, <http://www.govtrack.us/congress/votes/89-1965/h107>; Senate Vote #178 in 1965, <http://www.govtrack.us/congress/votes/89-1965/s178>.

⁸ 75% of Democrats voting on the measure voted in favor, and 63% of Republicans voting voted in favor. See 116 CONG. REC. 7,335-36, 20,199-200 (1970); House Vote #274 in 1970, <http://www.govtrack.us/congress/votes/91-1970/h274>; Senate Vote #342 in 1970, <http://www.govtrack.us/congress/votes/91-1970/s342>.

⁹ 92% of Democrats voting on the measure voted in favor, and 75% of Republicans voting voted in favor. See 121 CONG. REC. 24,780, 25,219-20 (1975); House Vote #328 in 1975, <http://www.govtrack.us/congress/votes/94-1975/h328>; Senate Vote #329 in 1975, <http://www.govtrack.us/congress/votes/94-1975/s329>.

¹⁰ 97% of Democrats voting on the measure voted in favor, and 89% of Republicans voting voted in favor. See 127 CONG. REC. 23,205-06 (1981); 128 CONG. REC. 14,337 (1982); House Vote #228 in 1981, <http://www.govtrack.us/congress/votes/97-1981/h228>; Senate Vote #687 in 1982, <http://www.govtrack.us/congress/votes/97-1982/s687>.

¹¹ 100% of Democrats voting on the measure voted in favor, and 88% of Republicans voting voted in favor. See 152 CONG. REC. 14,303-04, 15,325 (2006); House Vote #374 in 2006, <http://www.govtrack.us/congress/votes/109-2006/h374>; Senate Vote #212 in 2006, <http://www.govtrack.us/congress/votes/109-2006/s212>.

breath expressly acknowledged that Congress could fix the damage.¹² As you know, an essential part at the heart of the Voting Rights Act's structure is section 5 of the Act, which establishes a system of "preclearance." Certain jurisdictions must submit election changes to a federal court or the Department of Justice before those changes may be implemented, in order to ensure that a change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a defined language minority group.¹³ Most crucially, the fact that changes have to be submitted before implementation means that section 5 is able to stop discriminatory laws and policies before they ever take effect.

The preclearance review of Section 5 is strong medicine, and was put in place only for some areas, based on what became known as the "coverage formula" primarily expressed in section 4 of the Act. Section 4(b) was the primary provision determining where preclearance applied, taking its principal direction from turnout statistics in the 1964 — and then 1968 and 1972 — general elections.¹⁴ In its original incarnation and in each amendment thereafter, section 4 was effectively time-limited; its penultimate iteration was set to expire in 2007. In 2006, Congress reauthorized section 4.¹⁵ It is this reauthorization that was the focus in *Shelby County*. The Court determined that section 4, as reauthorized in 2006, did not sufficiently reflect current conditions, and that the "disparate geographic coverage" reflected in section 4 was no longer "sufficiently related to the [current] problem[s] that it targets."¹⁶ The Court struck the geographic coverage for the preclearance mandate of section 5. Which means that today, section 5 is applied nowhere.¹⁷

Which does not mean that it is unnecessary. Despite offering justified praise for the progress that we as a people have made, the *Shelby County* Court did not cast doubt on the stubborn persistence of electoral discrimination on the basis of race, ethnicity, or language minority status. This was not an oversight. Four years earlier, Chief Justice Roberts, Justice Kennedy, and Justice Alito — three members of the *Shelby County* majority — acknowledged that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions . . ."¹⁸ In 2006, the same year that Congress reauthorized section 5, Justice Kennedy wrote for a majority in striking down a redistricting map, noting that "[i]n essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection

¹² 570 U.S. 529 (2013); *id.* at 557.

¹³ 52 U.S.C. §§ 10304(a), 10303(f)(2).

¹⁴ See 52 U.S.C. § 10303(b).

¹⁵ Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA"), Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (2006), *amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008).

¹⁶ *Shelby Cty. v. Holder*, 570 U.S. 529, 550-56 (2013).

¹⁷ There is still a provision of the Voting Rights Act providing for preclearance of election-related changes unaffected by *Shelby County*, found in Section 3 of the Act. 52 U.S.C. § 10302(c); see also Travis Crum, *Note, The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010). I discuss this provision in further detail below.

¹⁸ *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality).

violation.”¹⁹ More recently, several lower courts have struck regulations of electoral rules that were intended to discriminate on the basis of race, ethnicity, or language minority status, finding even after imposing extraordinary burdens of proof that plaintiffs had demonstrated abuse of government authority on the most pernicious grounds.²⁰

These are merely a few salient examples from the recent annals of the U.S. Reports, demonstrating what any observer of recent news knows well: despite progress toward equality, we are decidedly not yet at our goal. In 2019, it should no longer require much convincing to demonstrate that America is not free of invidious discrimination, much less “post-racial.”

The *Shelby County* decision, rendering Section 5 inert in the absence of Congressional action, has unquestionably impeded the ability to combat electoral discrimination against racial and ethnic minorities. It has done so in at least three ways.

Difficulty in securing timely, meaningful relief against discriminatory practices

First, and most important, the absence of preclearance means that discriminatory election rules require enormous time and expense to combat, with harm accruing as litigation plods along. The Voting Rights Act contains several provisions unaffected by *Shelby County* and designed to combat discrimination on the basis of race, ethnicity, and language minority status; other federal statutes may be deployed to similar purpose,²¹ and private plaintiffs may also bring claims

¹⁹ *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006).

²⁰ *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 728 (S.D. Tex. 2017); *Perez v. Abbott*, 390 F. Supp. 3d 803, 811-12 (W.D. Tex. 2019) (three-judge court) (bail-in); *Perez v. Abbott*, 253 F. Supp. 3d 864, 886, 949, 955 (W.D. Tex. 2017) (three-judge court) (congressional plan); *Perez v. Abbott*, 250 F. Supp. 3d 123, 145-46, 148-49, 152-54, 157, 163-64, 169-70, 172, 175-76, 179-80 (W.D. Tex. 2017) (three-judge court) (state House plan); *Veasey v. Abbott*, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017), *rev'd in part on other grounds*, 888 F.3d 792, 800 (5th Cir. 2018); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214-15 (4th Cir. 2016).

Beyond intentional discrimination, there is also lamentably ample evidence of the continuing imposition of electoral policies and procedures with discriminatory effect on the basis of race and language minority status. *See generally, e.g.*, U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf; U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights Issues Compendium of Voting Rights Reports by our State Advisory Committees, Oct. 31, 2018, <https://www.usccr.gov/press/2018/20181031%20Notice%20SAC%20Compendium.pdf>; Alaska Advisory Comm. to the U.S. Comm’n on Civil Rights, *Alaska Native Voting Rights*, June 2019, <https://www.usccr.gov/pubs/2019/09-19-AK-SAC-Voting-Report.pdf>; R.I. Advisory Comm. to the U.S. Comm’n on Civil Rights, *Advisory Memorandum on Voting Rights Briefing*, Oct. 16, 2018, <https://www.usccr.gov/press/2019/05-15-RI-Voting-Rights.pdf>; Tenn. Advisory Comm. to the U.S. Comm’n on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee*, June 2014, https://www.usccr.gov/pubs/docs/TN_SAC_Ex-Felon-Report.pdf; Ky. Advisory Comm. to the U.S. Comm’n on Civil Rights, *Voting Rights in Kentucky*, Sept. 2009, <https://www.usccr.gov/pubs/docs/KYVotingRightsReport.pdf>; Nat’l Comm’n on Voting Rights, *Voting Landscape: State-by-State Profiles* (2015), <http://votingrightstoday.org/ncvr/resources/state-pages>; Nat’l Comm’n on Voting Rights, *Protecting Minority Voters: Our Work is Not Done* (2015), <http://votingrightstoday.org/ncvr/resources/discriminationreport>; Nat’l Comm’n on Voting Rights, *Improving Elections in the United States: Voices from the Field* (2015), <http://votingrightstoday.org/ncvr/resources/electionadmin>; Responses to Questions for the Record from Senator Charles E. Grassley to Professor Justin Levitt, *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on Judiciary*, 113th Cong. (July 17, 2013), http://redistricting.ils.edu/files/_%20Levitt%20responses%20to%20Grassley%20QFRs.pdf.

²¹ Because minority voters are often — but by no means always — voters with lower socioeconomic status, they are often harder hit by electoral regulations that impose burdens across the board; similarly, statutes that provide relief

against discrimination drawn directly from constitutional provisions or state causes of action. But each of these provisions is enforced by affirmative litigation, forcing aggrieved citizens to respond to a particular unlawful policy with a lawsuit. That is, of course, the more familiar means of addressing harm in our legal system, including civil rights violations. But electoral harms are not normal harms, and existing “normal” remedies — which might otherwise suffice in the “traditional course of relations between the States and the Federal Government”²² to rectify traditional harms — do not suffice in this arena.

Many claims of legal harm are, at least in theory, premised on the capacity of the justice system to provide a remedy that attempts to make the aggrieved plaintiff whole if the legal violation is proven. In the event of civil rights claims like employment discrimination or housing discrimination — or more run-of-the-mill common law torts — injunctive relief may correct bad behavior and monetary awards may compensate victims for any damage sustained in the meantime. In contrast, there is no way to compensate for past damage in the electoral arena, and no way to make aggrieved plaintiffs whole. Future contests may be held with the pernicious conditions mitigated or removed. But those elected to office via unlawful procedures not only gain the sheen of incumbency, but are empowered in the interim to promulgate policy binding everyone in the jurisdiction. And that policy includes not only matters of substantive import to the electorate — affecting small local issues and lofty national ones alike — but also the rules for conducting elections themselves, which may amount to means for those unlawfully elected to further retain power. The policies put in place by officials who gain office through discriminatory elections cannot be readily undone. “Elections have consequences,” we are often told. Elections held on unlawfully discriminatory terms have consequences as well, far beyond the ability of affirmative litigation to correct.

Moreover, election-based harms cause this irreparable damage on an extraordinarily compressed timeframe. The public may have the impression that the election cycle comes and goes, but those who work in the arena know that there is always an election pending, usually mere months in the future. The legitimate need for local officials to prepare the mechanics of an election on relatively stable terrain has led the Supreme Court to push back against last-minute changes wrought by litigation, which compresses the remedial calendar further.²³ And on the other side of Election Day, an election held under conditions later found to be unlawful works its communicative harm immediately, and the associated substantive policy harm as soon as the election winners are installed, well before normal litigation can undo the damage. Preclearance was designed to stop discrimination before it could have this irremediable impact on local communities.

from electoral burdens may end up disproportionately benefiting minority voters. The National Voter Registration Act, for example, is not tailored to address harm to racial or ethnic minorities specifically. But in guaranteeing ready opportunities for eligible voters to register to vote — including in connection with motor vehicle transactions, transactions involving public assistance, and transactions executed by agencies serving individuals with disabilities, 52 U.S.C. §§ 20504, 20506 — the NVRA may, in many areas of the country, provide substantial relief to minority populations.

²² *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (quoting *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500-01 (1992)).

²³ See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); see also, e.g., *Husted v. Ohio State Conference of the NAACP*, 573 U.S. 988 (2014) (staying, on September 29, 2014, preliminary injunction issued by the district court on September 4).

Election-based harms are also more difficult to deter through normal litigation. Through most of our legal system, civil litigation is — at least in theory — not only a means to achieve compensation and alterations in future behavior, but also an *ex ante* incentive to avoid wrongdoing. The prospect of a lawsuit forces would-be wrongdoers to think twice. That deterrent effect is less likely to materialize when racial discrimination in the election sphere is at stake. As jurists and commentators have frequently noted, the incumbency incentive is immensely powerful; if altering voting structures on the basis of race, ethnicity, or language minority status is seen as an effective means to preserve incumbency, it provides a powerful motivation to engage in a repeated pattern of unlawful behavior.²⁴ If one particular promulgated practice is struck down, officials have reason to try another, to achieve the same results by different means.²⁵

In other contexts, at least the repeated wear of responsive litigation might be expected to eventually overwhelm the incumbency incentive. But this wear is substantially dispersed in the context of electoral discrimination. The “benefits” of discriminatory election rules accrue to officials, but the transaction costs of litigation, which fall directly on private parties and/or their insurers in normal civil litigation, are borne not by the officials but by their constituents. That is, the costs are borne by the taxpayers. This often gives the officials who pass discriminatory election rules a natural incentive to fight tooth and nail to preserve those rules, even when it is clear that they persist in a losing cause; for the officials themselves, there is little downside in prolonging the fight. And the opportunity for the electorate to correct the misbehavior of their own officials is blunted because the policies at issue concern the very rules of the election itself.

All of this means that there is more need in the election arena than elsewhere to prevent discrimination on the basis of race, ethnicity, or language minority status by means that have expansive substantive breadth but also offer speedy, proactive protection. After *Shelby County*,

²⁴ See, e.g., *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 778-79 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (“When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern—a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. . . . But the record here illustrates a more general proposition: Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge. . . . Today’s case barely opens the door to our understanding of the potential relationship between the preservation of incumbency and invidious discrimination, but it surely gives weight to the Seventh Circuit’s observation that ‘many devices employed to preserve incumbencies are necessarily racially discriminatory.’”) (citations omitted).

²⁵ This is not ancient history. The congressional record of 2006 contained examples less than six years old in which jurisdictions implemented a discriminatory practice, saw that practice challenged by responsive litigation, and then changed course to implement a different policy aimed at similar ends. See Nina Perales et al., *Voting Rights in Texas 1982-2006*, at 29 (2006), <http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf>; see also Brief of Joaquin Avila et al. as *Amici Curiae* in Support of Respondents at 14-15, *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

and absent further Congressional action, the existing enforcement tools are inadequate to meet the need.²⁶

The existing tools essentially revolve around responsive litigation: litigation brought in response to perceived discrimination. As the Supreme Court has recognized — and as Congress understood in 2006 — responsive litigation in the voting rights realm is like an aircraft carrier: quite powerful, but also quite “slow and expensive.”²⁷ The time required for responsive litigation begins, in many ways, well before litigation itself. Responsive litigation depends on an ability to amass, process, analyze, and present substantial information even before filing a complaint — demographic and electoral data, formal legislative records and legislators’ informal comments, and historical context, among others. Some of this data will be generally available to the public, but much of the information — election records and demographic statistics by precinct, documents used and developed in the course of evaluating the merits of a new policy — will be in the government’s possession, and perhaps available only through a cumbersome public records request process. This takes cost and time.

Once a complaint is filed, litigation provides some additional tools for gathering information, but these, too, are often slow. Responsive litigation often features substantial discovery battles and extended motion practice, all of which often precedes the awarding of even preliminary relief. Such preliminary relief, according to experienced litigators, is itself quite rare in affirmative voting rights litigation, under the existing standard.²⁸ And as noted above, the rarity only increases in the period shortly before an election — when immediate rulings are most necessary to prevent harm — based in part on the Supreme Court’s admonishment that the judiciary should be particularly wary of enjoining enacted electoral rules under traditional equitable standards when there is “inadequate time to resolve . . . factual disputes” before the election proceeds.²⁹

This places many voting rights cases in a summary judgment or trial posture. There, the complexity of a voting rights case places even more reliance on extensive data collection and data analysis — which translates to additional time in court. Indeed, when asked to study the amount of judicial time and work required, the Federal Judicial Center determined that of 63 different forms of litigation, voting rights cases are the 6th most cumbersome for the courts: more cumbersome than an antitrust case, and nearly twice as cumbersome as a murder trial.³⁰

²⁶ See H.R. REP. NO. 109-478, at 57 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 658 (recognizing that “a failure to reauthorize the [preclearance regime], given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action.”).

²⁷ *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

²⁸ See Transcript of Oral Argument at 38, *Shelby Cty. v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013) (statement of Attorney General Verrilli) (noting that a preliminary injunction was issued in “fewer than one-quarter of ultimately successful Section 2 suits”); J. Gerald Hebert & Armand Derfner, *More Observations on Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CENTER BLOG (Mar. 1, 2013, 6:01 PM), <http://bit.ly/Z7xvht> (estimating that the true figure is likely “less than 5%”).

²⁹ *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006).

³⁰ Only death penalty habeas cases, environmental cases, civil RICO cases, patent cases, and continuing criminal enterprise drug crimes were deemed more cumbersome. See Federal Judicial Center, 2003–2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial

All of this can translate to extensive periods of justice delayed. There is no systematic study of which I am aware statistically analyzing the time required to secure relief in responsive voting rights litigation.³¹ But extended litigation and delayed relief under Section 2 of the Voting Rights Act — the most prominent of the affirmative litigation causes of action to combat discrimination in voting — is hardly unusual. One example that Congress had before it in 2006 involved a challenge to the at-large election structure of a county council. The complaint was filed on January 17, 2001.³² Preliminary relief was sought on April 1, 2002; despite a finding that plaintiffs were ultimately *likely* to succeed, the preliminary injunction was denied, and local primaries proceeded in June.³³ After a bench trial, another motion for preliminary relief was filed in September 2002 in advance of the general election, and again relief was denied, allowing the general election to take place.³⁴ The court issued a decision in favor of plaintiffs in March 2003, with a remedial plan settled by August of that year;³⁵ on appeal, the court's decision was affirmed in April 2004.³⁶ Though the complaint was filed in January 2001, the 2002 elections were held under discriminatory conditions, and the winning legislators remained in office until new elections were held in June of 2004.³⁷

Resources of the Judicial Conference of the United States 5-6 (2005), <https://bulk.resource.org/courts.gov/fjc/CaseWts0.pdf>.

³¹ Given the variation inherent in litigation, including the quality and experience of the attorneys, the nature of the data, and the quantity and incentives of the litigants, such studies would face significant methodological difficulties in attempting to parse the amount of time to be expected from an “average” successful case.

³² *United States v. Charleston Cty.*, 318 F. Supp. 2d 302, 313 (D.S.C. 2002).

³³ *Id.* at 327-28.

³⁴ *United States v. Charleston Cty.*, No. 2:01-0155 (D.S.C. Sept. 18, 2002) (doc. 155) (order denying preliminary injunction).

³⁵ *United States v. Charleston Cty.*, 316 F. Supp. 2d 268 (D.S.C. 2003); *United States v. Charleston Cty.*, No. 2:01-0155, 2003 WL 23525360 (D.S.C. Aug. 14, 2003).

³⁶ *United States v. Charleston Cty.*, 365 F.3d 341 (4th Cir. 2004).

³⁷ There were plenty of other ready examples available to the 2006 Congress as well. *Black Political Task Force v. Galvin*, for example, confronted a discriminatory redistricting plan designed to favor a particular incumbent at the expense of minority voters. 300 F. Supp. 2d 291 (D. Mass 2004). The complaint was filed on June 13, 2002. After a trial, the plan was enjoined in February 2004, and a remedial plan was implemented in April 2004. The 2002 elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2004.

Another example is the *Bone Shirt v. Hazelton* case, involving another discriminatory redistricting plan. 336 F. Supp. 2d 976 (D.S.D. 2004). The complaint was filed on December 26, 2001. After a trial, the court ruled in September 2004 that the plaintiffs had proven that the 2001 districts were unlawful. It was not until August 2005, however, that a remedial plan was imposed. That is, despite the fact that the complaint was filed in 2001, and the fact that plaintiffs had proven by the fall of 2004 that the 2001 districts were unlawful, both the 2002 and 2004 elections were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2006.

Still a third example, concerning local elections, is *New Rochelle Voter Defense Fund v. City of New Rochelle*, about a discriminatory city council districting plan. 308 F. Supp. 2d 152 (S.D.N.Y. 2003). The plan was adopted on April 29, 2003. A complaint was filed on May 27, 2003. Plaintiffs requested preliminary relief, but that relief was denied because the impending election was too close at hand. In December 2003, the court found for plaintiffs, and a remedial plan was imposed thereafter. The 2003 city council elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held; I believe that those new elections were first held in 2007.

Regrettably, there have also been ample more recent examples. Literally the day after *Shelby County* was decided, the chairman of the North Carolina Senate Rules Committee announced that the North Carolina legislature was changing course, from a narrowly focused voter ID statute to “the ‘full bill.’”³⁸ This “full bill” was later found to “target African Americans with almost surgical precision,” but the fact that it was only *later* struck down is the most relevant point for these purposes.³⁹ The bill was signed into law on August 12, 2013, and a suit was filed that same day.⁴⁰ Partial preliminary relief was granted on October 1, 2014, but stayed one week later; the partial preliminary injunction was allowed to go into effect only on April 6, 2015.⁴¹ On the eve of trial, the North Carolina legislature amended the law, further delaying trial with respect to those amendments.⁴² It was only on July 29, 2016, that the intentionally discriminatory “full bill” was ultimately struck down.⁴³ The 2014 midterm primaries and the 2014 general elections were held pursuant to rules intended to discriminate against voters on the basis of their race, and both legislative and presidential primary elections in 2016 were held under some of those rules.

Litigation in Texas reveals a similar pattern. In 2011, Texas revised its voter ID statute, limiting the permissible forms of ID in a manner later determined to be discriminatory (and in a manner which a trial court has found indicated specific discriminatory intent).⁴⁴ Before *Shelby County*, the law was blocked by the preclearance provision.⁴⁵ But the day of *Shelby County*, Texas began enforcing the law.⁴⁶ Plaintiffs filed the first of several lawsuits the next day. The law was enjoined in October 2014, but that injunction was itself stayed pending appeal.⁴⁷ The court of appeals ultimately agreed with the trial court on some grounds and remanded for further consideration of others;⁴⁸ in the meantime, the trial court adopted interim remedial relief on

³⁸ N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016).

³⁹ *Id.* at 214.

⁴⁰ *Id.* at 218.

⁴¹ *Id.* at 219.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Veasey v. Abbott*, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017); *Texas v. Holder*, 888 F. Supp. 2d 113, 144-45 (D.D.C. 2012), *vacated and remanded in light of Shelby Cty. v. Holder*, 570 U.S. 928 (2013). Not every means by which voters prove that they are who they say they are is discriminatory or unlawful, but as with virtually any generic type of regulation, the particular contours of a given voter identification statute may be designed so as to be discriminatory. See Justin Levitt, *Voter Identification in the Courts*, in COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2015, at 237, 238 (2015), <http://knowledgecenter.csg.org/kc/system/files/Levitt%202015.pdf>.

Relevant to the timing discussion, the D.C. court evaluating Texas's particular ID provision also found that “efforts to accelerate this litigation . . . were often undermined by Texas's failure to act with diligence or a proper sense of urgency.” *Texas*, 888 F. Supp. 2d at 120.

⁴⁵ Both the Department of Justice and a federal court found the law to be unlawfully discriminatory. *Veasey v. Abbott*, 830 F.3d 216, 227 n.7 (5th Cir. 2016) (en banc).

⁴⁶ *Id.* at 227.

⁴⁷ *Id.* at 228.

⁴⁸ *Id.* at 272.

August 10, 2016.⁴⁹ On May 31, 2017, the Texas legislature amended the voter identification law; the Fifth Circuit deemed this amendment sufficient to remove any discriminatory taint, and placing the burden of further challenge on the plaintiffs, found insufficient evidence offered to support a finding that the amendment was problematic on its own.⁵⁰ But for purposes of this testimony, the crucial takeaway in this procedural history is that the 2014 midterm primaries, 2014 general elections, and 2016 municipal, legislative, and presidential primary elections were all held pursuant to rules that were found by an en banc court of appeals to be discriminatory, and that were repeatedly been found by a trial court to have been intended to discriminate.⁵¹

Another aspect of the voting rights litigation in Texas reveals a further shortcoming of the emphasis on affirmative litigation: existing law provides shockingly little incentive for jurisdictions with a history of recalcitrance to change course and chart the right path. I have already discussed the various limitations on the efficacy of affirmative litigation in the election context, where officials fixed on wrongdoing rely on the personalized benefits of time and inertia but socialize the cost of legal defense. But in the past, the prospect of affirmative litigation for jurisdictions not already subject to preclearance at least brought with it the notions of two powerful remedies: muscular injunctive relief and the possibility of customized “bail-in.” Those remedies have also been sharply curtailed.

With respect to injunctive relief, it had once been blackletter law that a jurisdiction, once found to have engaged in racial discrimination, had the responsibility to eliminate the vestiges of that discrimination “root and branch.”⁵² At the very least, a finding of racial discrimination — particularly intentional racial determination — brought broad injunctive relief designed to ensure no traces of the original remained. In the litigation over Texas’s ID provision, however, the Fifth Circuit seemingly confined that “root and branch” responsibility to an as-yet-undetermined subset of intentional discrimination cases.⁵³ Instead, the court required deference to, and a presumption of good faith for, the preferred remedy of the legislative body that had recently engaged in intentional discrimination, as long as the new remedy was not itself proven to be unlawful.⁵⁴ That is: the court required deference in 2017 to the remedial wishes of the legislature that had intentionally set out to discriminate in 2011 and profited from that discrimination in 2014 and 2016.

⁴⁹ Order Regarding Agreed Interim Plan for Elections, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. Aug. 10, 2016).

⁵⁰ *Veasey v. Abbott*, 888 F.3d 792, 801-04 (5th Cir. 2018).

⁵¹ Another Texas case shows some of the consequences of *Shelby County* on local elections. Two days after *Shelby County*, the Mayor of Pasadena, Texas, instituted a process that included recommending changes to the composition of the Pasadena city council, including various proposals to change districted seats to at-large seats in a manner likely to decrease representation of Latino communities. See *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 681 (S.D. Tex. 2017). In part due to the Mayor’s tie-breaking vote, the city council election structure was actually changed in November 2013. *Id.* at 681-82. In January 2017, a trial court found the change to be not only discriminatory in effect, but designed intentionally to achieve that end, and ordered relief. *Id.* at 724-28. But the 2015 elections were held pursuant to districts intended to discriminate against the city’s Latino minority.

⁵² *Green v. County School Bd. of New Kent Cty., Va.*, 391 U.S. 430, 438 (1968).

⁵³ *Veasey*, 888 F.3d at 801.

⁵⁴ *Id.* at 802. Cf. *Abbott v. Perez*, 138 S. Ct. 2305, 2318, 2325-27 (2018) (faulting an allegedly similar refusal to presume good faith in a redistricting case, while still acknowledging that the discriminatory intent of an earlier legislature could, in context (or in theory), give rise to an inference regarding the intent of a later legislature).

This creates a dangerous incentive. The Fifth Circuit's standard creates the conditions for intentional racial discrimination to be met with milquetoast rather than muscular relief. A jurisdiction setting out to discriminate on the basis of race can rely on the cumbersome nature of litigation to sustain its efforts for a cycle or two, with the costs of legal defense pushed onto the taxpayers. Once caught, the jurisdiction need only apply a modest Band-Aid, changing its policy (and its communications strategy) not to remove all traces of discrimination, but just enough to make a follow-on challenge to the new rule difficult to prove in court. That constitutes remarkably little disincentive to engage in discrimination in the first instance.

Practical resistance to the other powerful remedy compounds the problem. Section 3 of the Voting Rights Act contains a provision that allows a federal court discretion to impose prospective preclearance upon the finding of a violation of the Fourteenth or Fifteenth Amendment justifying that equitable relief.⁵⁵ Essentially, it allows courts to impose preclearance requirements going forward, for a scope and duration chosen by the court, after a finding of intentional discrimination.⁵⁶ While various jurisdictions have been placed under Section 3 preclearance over the past few decades, the threshold for proving intentional discrimination is exceedingly high, and such findings are accordingly rare. Only three local jurisdictions are presently subject to the provision.⁵⁷

Indeed, even when intentional discrimination has been proven, and even when there is no sign that a jurisdiction with a repeated history of discrimination based on race has changed its ways or will change its ways, courts have declined to impose bail-in under Section 3. In many ways, Texas is again, unfortunately, the marquee example. As mentioned above, a majority of the Supreme Court in 2006 struck down Texas's 2003 redistricting map, noting that "[i]n essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation."⁵⁸ In 2011, the Texas legislature redeployed a more sophisticated set of tools to — again — intentionally discriminate against the Latino electorate, in (among other areas) the very same district.⁵⁹ (Indeed, a three-judge federal court found that the Texas legislature "intentionally discriminated in 2011 in numerous and significant ways.")⁶⁰ That is not the act of

⁵⁵ 52 U.S.C. § 10302(c).

⁵⁶ See, e.g., *Perez v. Abbott*, 390 F. Supp. 3d 803, 813-14 (W.D. Tex. 2019) (three-judge court). Analogous to the procedure under section 5, election changes subject to preclearance based on a Section 3 order must be reviewed by the Department of Justice or the court issuing that order. 52 U.S.C. § 10302(c).

⁵⁷ See *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729-30 (S.D. Tex. 2017); *Order, Allen v. City of Evergreen*, No. 1:13-cv-00107 (S.D. Ala. Jan. 13, 2014); *Consent Decree, Blackmoon v. Charles Mix County*, No. 05-cv-04017 (D.S.D. Dec. 4, 2007). The Evergreen order runs only for another year and change: though it was occasioned by allegedly discriminatory redistricting in 2012, the Section 3 order expires on December 21, 2020, before the next redistricting cycle. See *Order, Allen v. City of Evergreen*, No. 1:13-cv-00107 (S.D. Ala. Jan. 13, 2014).

⁵⁸ *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006).

⁵⁹ *Perez v. Abbott*, 253 F. Supp. 3d 864, 886, 949, 955 (W.D. Tex. 2017) (three-judge court) (congressional plan); *Perez v. Abbott*, 250 F. Supp. 3d 123, 145-46, 148-49, 152-54, 157, 163-64, 169-70, 172, 175-76, 179-80 (W.D. Tex. 2017) (three-judge court) (state House plan); Justin Levitt, LULAC v. Perry: *The Frumious Gerry-Mander, Rampant*, in *ELECTION LAW STORIES* 233, 282-83 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

⁶⁰ *Perez v. Abbott*, 390 F. Supp. 3d at 811, 814-16.

a reformed penitent. It is the act of a hardened recidivist, returning to the scene of the crime to finish the job, wearing only a slightly different mask.

The preclearance regime then in place stopped that 2011 Texas map from taking effect.⁶¹ But there is no preclearance provision currently in place for Texas. And as described above, there is precious little incentive for the Texas legislature of 2021 not to go back to the same well.

Those should have been the ideal conditions for imposing preclearance under Section 3(c) of the Voting Rights Act: a jurisdiction with a record of repeat offenses, caught in the act of intentional discrimination once again, and coming up on another redistricting cycle with a requirement to revisit the status quo and another tantalizing opportunity to offend. Indeed, a three-judge trial court noted that:

This case . . . involves findings of intentionally discriminatory behavior affecting minority voters statewide[.] . . . Numerous counties were drawn with the purpose to dilute minority voting strength in the Texas House plan, as well as CD23 and numerous congressional districts in the Dallas-Fort Worth metroplex in the Congressional plan. Though the Supreme Court may have found no discriminatory purpose in 2013, it did not undermine the findings of purposeful discrimination in 2011. These recent, statewide violations of the Fourteenth Amendment by the State are the type to appropriately trigger the bail-in remedy against the State, and the bail-in remedy sought by Plaintiffs would appropriately redress the violation.⁶²

I have said that the question of bail-in in Texas presented Frank Sinatra's memorable maxim in reverse: If you can make the case anywhere, you can make it there.⁶³

And yet. The three-judge Texas court accurately noted that “[i]n the wake of Shelby County” — which did not in any way concern Section 3 of the Voting Rights Act — “courts have been hesitant to grant § 3(c) relief.”⁶⁴ And though the court specifically professed “grave concerns about Texas’s past conduct,”⁶⁵ called attention to Texas’s strong incentives for future discrimination,⁶⁶ and specifically said that “[g]iven the fact of changing population demographics, the likelihood increases that the Texas Legislature will continue to find ways to attempt to engage in ‘ingenious defiance of the Constitution’ that necessitated the preclearance system in the first place,”⁶⁷ the court also declined to put Texas back under preclearance via Section 3. It offered little substantive rationale other than “[i]t is time for this round of litigation

⁶¹ *Texas v. United States*, 887 F. Supp. 2d 133, 138, 159 (D.D.C. 2012) (three-judge court), *vacated on other grounds by* 570 U.S. 928 (2013); *LULAC*, 548 U.S. at 440.

⁶² *Perez v. Abbott*, 390 F. Supp. 3d at 816.

⁶³ *Cf.* FRANK SINATRA, NEW YORK, NEW YORK (Reprise Records 1980).

⁶⁴ *Perez v. Abbott*, 390 F. Supp. 3d at 819.

⁶⁵ *Id.* at 820.

⁶⁶ *Id.* at 820-21.

⁶⁷ *Id.* at 820 (emphasis added).

to close.”⁶⁸ Texas, it seemed, had successfully run out the clock. And a new round of redistricting awaits. If the record in Texas was insufficient to put Texas back under preclearance, there are real questions about judicial will to enforce Section 3 with respect to any state — and, accordingly, real questions about the ability to deter discrimination. These conditions are crying out for Congressional reappraisal of the enforcement scheme.

The delay required by affirmative litigation in this arena, and its inability to provide substantive deterrence, would each be sufficient for Congress to revisit the enforcement tools of the Voting Rights Act. But beyond these flaws, the time and complexity of litigation also amount to substantial expense. A local challenge to districts drawn impermissibly on the basis of race or language minority status will require attorney time, filing fees, expert fees, deposition costs, transcript fees, document production costs, and on and on. Though reliable statistics are difficult to determine, such cases reportedly “require[] a minimum of hundreds of thousands of dollars.”⁶⁹ In the Charleston County, South Carolina, litigation described above, private plaintiffs’ fees and costs amounted to \$712,027.71, in addition to the time and expenses incurred by the Justice Department (and, of course, in addition to the defendant’s costs).⁷⁰ In statewide cases, the meter runs higher still. In the Texas voter ID litigation described above, private plaintiffs’ fees and costs amounted to more than \$8.7 million, in addition to the time and expenses incurred by the Justice Department (and, again, in addition to the defendant’s costs).⁷¹ Without a preclearance system, when the only tools involve affirmative litigation, litigating plaintiffs or plaintiffs’ groups must be readily prepared to float vast sums in order to procure justice. Few nonprofit organizations can afford a years-long float of this magnitude.

Given finite resources, more prominent disputes — for example, statewide redistricting battles — are likely to draw more substantial attention in responsive litigation. There is a far greater risk that smaller jurisdictions like counties, towns, villages, constable districts, and school boards will be comparatively neglected. Yet such jurisdictions create much of the concern. Between 2000 and the *Shelby County* decision in 2013, only 14% of the objections lodged by the Department of Justice under section 5 concerned statewide changes. 32% concerned county-level changes, and 55% concerned changes in municipalities, school boards, or special districts.⁷²

⁶⁸ *Id.* at 821.

⁶⁹ J. Gerald Hebert & Armand Derfner, *Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CENTER BLOG (Feb. 28, 2013, 7:07 AM), <http://bit.ly/Y3206a>.

⁷⁰ *Moultrie v. Charleston Cty.*, No. 2:01-0562 (D.S.C. Aug. 9, 2005) (doc. 207) (amended judgment).

In addition to their responsibility for plaintiffs’ costs, the people of Charleston County *also* paid approximately \$2 million to defend the incumbents’ preferred system. See Brief of Joaquin Avila et al. as *Amici Curiae* in Support of Respondents at 25, *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (U.S. 2013) (No. 12-96). In the absence of a preclearance regime, local governments’ taxpayers must pay doubly dearly for successful claims, covering incumbent officials’ expenses as well as those of the plaintiff citizen victims. See Levitt, *Shadowboxing*, *supra* note **Error! Bookmark not defined.**

⁷¹ The fees and costs calculations in the text are drawn from several motions submitted between April 11, 2019, and September 19, 2019, in *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex.).

⁷² Figures compiled from data available at U.S. Dep’t of Justice, Civil Rights Div., Section 5 Objection Letters, <https://www.justice.gov/crt/section-5-objection-letters>. The figures from 2000 to 2013 are similar to the breakdown of objections between the 1982 and 2006 reauthorizations of the preclearance system: only 14% of the objections lodged by the Department of Justice under section 5 concerned statewide changes; 39% concerned county-level changes, and 48% concerned changes in municipalities, school boards, or special districts. *Id.*

And the real wave of post-*Shelby County* concern in local jurisdictions has not yet arrived. Of the county- and municipal-level objections above, 75% of the objections concerned redistricting, switches in the numbers of districts or from districts to at-large elections, or annexations.⁷³ Beginning in 2021, after the next Census, jurisdictions across the country will redraw their district lines to abide by the Constitution's equal representation mandate.⁷⁴ In so doing, many local governments will never tread close to the line of discriminatory practice. But experience teaches, regrettably, that many others will. After *Shelby County*, current enforcement tools leave a substantial danger that discriminatory changes, particularly in local electoral policy, will take effect before under-resourced victims have an adequate opportunity to assemble a reasonably robust litigation response. If elections occur before sufficient proof of the wrong can be gathered, the officials elected under the improper regime are then empowered to make policy until plaintiffs overcome financial, logistical, and natural litigation hurdles to achieve a viable remedy.

Some might point to the Department of Justice as a counterexample. There is no question that the Department of Justice has the potential to be the elephant in the room. It has a staff of experienced litigators and experts, and a reservoir of institutional expertise, matched by at most a handful of attorneys within any given state, and a handful of national organizations with a few voting rights specialists stretched to capacity.⁷⁵ And the DOJ has funds for enforcement well beyond the reach of the private bar. But affirmative litigation cases as mammoth as those in North Carolina and Texas consume mammoth amounts of time and personnel; while DOJ capacity is sizable, it is not infinite. Data-intensive cases like voting rights cases also often rely heavily on the analysis of expert witnesses, whose time is also limited.⁷⁶ DOJ could not be

The calculations above, of course, do not account for litigable cases that did not arise from changes in election procedures, or from changes in *non*-covered jurisdictions. Still, it seems reasonable to predict that given past practice, and given the sheer volume of counties and local governments, such jurisdictions are likely to be responsible for a substantial majority of litigable violations going forward.

⁷³ *Id.*

⁷⁴ *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland Cty., Tex.*, 390 U.S. 474 (1968).

⁷⁵ See Brief of Joaquin Avila et al. as *Amici Curiae* in Support of Respondents at 28-29, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96); Voting Rights after *Shelby County v. Holder*: A Discussion & Webcast on the Supreme Court's Voting Rights Act Decision, Roundtable at the Brookings Institution, Transcript pt. 2, at 18 (July 1, 2013) (remarks of Thomas Saenz, Pres. & Gen. Counsel, MALDEF) ("I really appreciated those who believed that the LDF's of the world have the resources to challenge every state redistricting that might be a problem, but it's not true. I mean the simple fact is that my organization can probably pursue one statewide redistricting case at a time. So, we made a choice that Texas was more important for example, than California where we believe that there was at least one problem at the congressional level, and at least two at the legislative level. But the cost of pursuing two statewide cases at the same time was simply too high."), http://www.brookings.edu/~media/events/2013/7/1%20voting%20rights%20act/20130701_voting_rights_transcript_pt2.pdf.

⁷⁶ The availability of an appropriate expert should not be assumed. In 2012, an Alaska trial court described one of the factors contributing to some of its state redistricting body's delay:

It is also unclear whether the Board could have found a VRA expert to start sooner than [Lisa] Handley did. There was testimony that there are about 25 VRA experts [in the country]. These experts work on elections and voting issues around the country and around the world. Handley was chosen and officially hired while she was working on a project in Afghanistan. Had the Board chosen another candidate, it is possible that the

expected to deliver justice everywhere that it was warranted even in a regime with the deterrence of preclearance, much less in a new world without.

And while the DOJ has the capacity to be the elephant in the room, it also has the unfortunate capacity to be little more than a mouse. I have previously mentioned the Texas case concerning voter identification; in August 2013, the DOJ filed a complaint alleging, *inter alia*, that Texas had intentionally discriminated on the basis of race in passing the particular voter identification bill that it adopted.⁷⁷ Career attorneys at DOJ vigorously litigated the intentional discrimination claim for years, including securing a determination by the trial court that the legislature had, in fact, intentionally discriminated.⁷⁸

On February 27, 2017, the DOJ voluntarily dismissed its claim that the law had intentionally discriminated.⁷⁹ That filing was signed not, as custom in the Civil Rights Division would have suggested, by the career attorney leading the litigation team, but by the new political appointee, in a stark departure from prior practice. It cited, as its only rationale, a bill introduced in the Texas legislature six days before, which had not yet had a single hearing or been considered by a single committee; at the time, specific action by the Texas legislature was speculative at best (and, indeed, it was three months before any action in fact occurred).⁸⁰ I am not aware of any other circumstance in which the United States government has abandoned a fiercely litigated claim of intentional racial discrimination based on the potential prospect of eventual hypothetical legislation, much less a claim of intentional racial discrimination validated by the findings of a federal court.

A similar reversal of course attended the Texas redistricting litigation also described above. The Department of Justice had been a defendant in the case during preclearance proceedings, as Texas sought preclearance of discriminatory plans to which the Department objected.⁸¹ Shortly after *Shelby County* eliminated the preclearance requirement for Texas, the Department of Justice entered the case as a plaintiff, to seek Section 3 preclearance bail-in based

candidate also would have been in the middle of another project in a different country or state.

In re 2011 Redistricting Cases, No. 4FA-11-02209 CI, at 102 (Alaska Super. Ct. Feb. 3, 2012), *available at* <http://www.akredistricting.org/Litigation/Superior%20Court%20Memorandum%20Decision.pdf>.

⁷⁷ Complaint, *United States v. Texas*, No. 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/08/26/tx_comp_sec2.pdf.

⁷⁸ *Veasey v. Perry*, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2014). The decision was vacated and remanded in relevant part for the court to re-evaluate the evidence presented, 830 F.3d 216, 234-35 (5th Cir. 2016) (en banc), and the district court, upon re-weighing, again found that the law had been enacted with discriminatory intent, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017).

⁷⁹ *United States's Motion for Voluntary Dismissal of Discriminatory Purpose Claim Without Prejudice*, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. Feb. 27, 2017).

⁸⁰ Texas Legislature Online, Actions: SB 5, <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=85R&Bill=SB5>. Because the United States' motion for voluntary dismissal was unopposed, the district court granted the motion, but in the same order rejected the purported legal basis for the dismissal. *See Order on Government's Motion for Voluntary Dismissal of Discriminatory Purpose Claim and Assertion of Mootness*, *Veasey v. Abbott*, 248 F. Supp. 3d 833 (S.D. Tex. 2017).

⁸¹ *Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012) (three-judge court), *vacated on other grounds by* 570 U.S. 928 (2013);

on the intentional discrimination at the heart of the 2011 maps.⁸² In the years thereafter, Texas maps promulgated in 2013 in the aftermath of an interim judicial compromise were litigated up to the Supreme Court.⁸³ But the Department of Justice never contested the 2013 maps.⁸⁴ And no findings leading to the Department's engagement were ever questioned, much less overturned.⁸⁵ And yet, citing changed circumstances, the Department changed course in 2019, opposing the Section 3 relief it had once expressly sought.⁸⁶ Unlike other briefs in this and other cases, the DOJ briefs opposing Section 3 relief were once again signed not by career attorneys leading the litigation team, but by the political appointee.⁸⁷ The only relevant change in circumstances was the change in Administration.

I do not reflexively believe that every voting-related action of the Department since my departure has been a mistake. The Voting Section of the Civil Rights Division recently settled litigation in Eastpointe, Michigan, with a notable ranked-choice remedy relatively innovative for the DOJ; the case was filed during my tenure at the DOJ, but I applaud the way that it was litigated and I applaud the resolution.⁸⁸ The Voting Section resolved litigation under the National Voting Rights Act in both Kentucky and New York City, and settled NVRA matters out of court with Connecticut and New York; and settled litigation under the Uniformed and Overseas Citizens Absentee Voting Act in Arizona and Wisconsin, and I commend each.⁸⁹

But the two shifts in Texas are notable DOJ abdications of enforcement under the Voting Rights Act, in a zone where enforcement was and is sorely warranted. And there is a third shift more difficult to detect, but perhaps more notable still. Since the resolution of the Eastpointe litigation, I believe that there are no public enforcement matters actively being litigated by the

⁸² United States Complaint in Intervention, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex. Sept. 25, 2013).

⁸³ See *Abbott v. Perez*, 138 S. Ct. 2305, 2325, 2335 (2018).

⁸⁴ United States' Brief Opposing Section 3(c) Relief at 4, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex. Jan. 29, 2019).

⁸⁵ *Perez v. Abbott*, 390 F. Supp. 3d 803, 811-12 (W.D. Tex. 2019) (three-judge court).

⁸⁶ See United States' Brief Opposing Section 3(c) Relief at 4, *supra* note 84.

⁸⁷ See *id.* at 12; Justin Levitt, *The Civil Rights Division Bails Out of Bail-In in Texas*, TAKE CARE, Feb. 8, 2019, <https://takecareblog.com/blog/the-civil-rights-division-bails-out-of-bail-in-in-texas>.

⁸⁸ See, e.g., Consent Judgment and Decree, *United States v. City of Eastpointe*, No. 4:17-cv-10079 (E.D. Mich. June 5, 2019), <https://www.justice.gov/opa/press-release/file/1170156/download>.

⁸⁹ See, e.g., Consent Judgment, *Judicial Watch v. Grimes*, No. 3:17-cv-00094 (E.D. Ky. July 3, 2018), <https://www.justice.gov/crt/case-document/file/1083361/download>; Justin Levitt, *DOJ and the Voter Rolls*, TAKE CARE, July 5, 2018, <https://takecareblog.com/blog/doj-and-the-voter-rolls>; Consent Judgment and Decree, *Common Cause v. Bd. of Elections in the City of New York*, No. 1:16-cv-06122 (E.D.N.Y. Dec. 14, 2017), <https://www.justice.gov/crt/case-document/file/1079171/download>; Memorandum of Understanding Between United States and Connecticut, Feb. 15, 2019, <https://www.justice.gov/opa/press-release/file/1132801/download>; Memorandum of Understanding Between United States and New York, June 20, 2017, <https://www.justice.gov/crt/case-document/file/975901/download>; Consent Judgment and Decree, *United States v. Wisconsin*, No. 3:18-cv-00471 (W.D. Wis. June 20, 2018), <https://www.justice.gov/crt/case-document/file/1075226/download>; Consent Decree, *United States v. Arizona*, No. 2:18-cv-00505 (D. Ariz. Feb. 15, 2018), <https://www.justice.gov/crt/case-document/file/1068676/download>. I also understand the resolution of a difficult piece of NVRA litigation in Louisiana. See Memorandum of Understanding and Settlement Agreement, *United States v. Louisiana*, No. 3:11-cv-00470 (M.D. La. Aug. 21, 2017), <https://www.justice.gov/crt/case-document/file/1075351/download>.

Voting Section of the Department of Justice.⁹⁰ I am not referring merely to enforcement actions under Section 2 of the Voting Rights Act. I believe that, at present, there are no public enforcement matters actively being litigated under any single statute within the enforcement jurisdiction of the Voting Section of the DOJ.⁹¹

I should emphasize that enforcement is neither driven nor responsibly measured by raw numbers of filed cases, alone. Any given case may be big or small, warranted or unwarranted, rushed to filing or meticulously prepared — and each of those possibilities may have a very different value. The volume or success of litigation in any one time or place depends not only on the particular election practices in place there, but also the state of the law and changing interpretations over time; surrounding historical, political, and demographic context; the strategic choice of causes of action and strategic choices involving in developing the case; the facts available to prove the particular violations alleged; the availability of resources, skill, and expertise to diagnose the problem, muster the necessary facts, and embark on extended litigation; individual evidentiary and legal decisions made by individual judges; competing priorities and the opportunity costs represented by alternative litigation options elsewhere; and a host of other factors. And litigation is not the only activity of the Voting Section: there may be ongoing investigations, with or without settlement discussions, and there is usually some ongoing monitoring of consent decrees already in place.

But while raw numerical comparisons in other circumstances may mask underlying differences in difficulty or effort or merit, it is difficult to avoid the sense of abdication that is zero. The fact that the Voting Section currently has no active open litigation beyond the monitoring of a few consent decrees is not an indication that there are no active violations of any of the federal statutes within its jurisdiction in need of remedy, and not an indication that there are no active violations of the Voting Rights Act.⁹² It is, rather, an unfortunate reminder that effective enforcement of the Voting Rights Act requires more than a dependence on affirmative litigation by the Department of Justice.

In sum, the affirmative litigation process remaining as the lone practical enforcement mechanism of the Voting Rights Act is not currently up to the task. “Litigation occurs only after

⁹⁰ Within the Civil Rights Division, the Voting Section handles most of the civil rights enforcement work with respect to the voting process. Some other sections within the Civil Rights Division may also have a hand in enforcement work relevant to voting rights: the Disability Rights Section, for example, may work on cases involving access to the elections process for individuals with disabilities, and the Criminal Section may work on cases involving criminal violations of the civil rights statutes on racial grounds. Other violations of federal voting statutes, including prosecution of other election misconduct, is generally the primary responsibility of the Criminal Division of the DOJ. See 28 C.F.R. § 0.50.

⁹¹ My assessment is largely taken from the Department of Justice’s list of litigation, <https://www.justice.gov/crt/voting-section-litigation>, from a scan of the Civil Rights Division’s press releases, <https://www.justice.gov/crt/civil-rights-division-press-releases-speeches>, and from a brief review of recent litigation filed in federal court and categorized on the docket as related to voting. The Civil Rights Division states that it publicly announces all newly filed cases and resolutions. See U.S. Dep’t of Justice, Civil Rights Div., Does the Division Announce Cases and Resolutions?, <https://www.justice.gov/crt/does-division-announce-cases-and-resolutions>.

⁹² See, e.g., Order Granting in Part Plaintiffs’ Motion for Preliminary Injunction, *Rivera Madera v. Lee*, No. 1:18-cv-00152, 2019 WL 2077037 (N.D. Fla. May 10, 2019); Complaint, *McLemore v. Hosemann*, No. 3:19-cv-00383 (S.D. Miss. May 30, 2019); Complaint, *NAACP, Spring Valley Branch v. East Ramapo Central School Dist.*, No. 7:17-cv-08943 (S.D.N.Y. Nov. 16, 2017).

the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.”⁹³ Data sufficient to prove denial or dilution of the vote in the totality of circumstances must be gathered; these data often include information under the jurisdiction’s control that the jurisdiction will fight to keep, using house money. To the extent that the data include demographic and political information, they must be analyzed by experts, which means that one of the few available experts must be located and retained. And lawyers must be sought, which means that either the Department of Justice must be convinced to deploy its resources toward resolving the issue at hand or private attorneys must be found, either by raising sufficient funds or finding pro bono counsel willing and able to devote the time and resources to litigate one of the six most complex sorts of cases in the whole of the federal docket.

There are some occasions when the local victims of discrimination can amass data, experts, and attorneys, and when a thoroughly prepared case can work its way through the courts on an expedited docket, between the time that a discriminatory practice becomes law and the next election to follow. But often — particularly when a practice is changed shortly before an election or when the change occurs in a jurisdiction where the victims have fewer resources — it will not be possible to prepare, present, and prove to the certainty demanded by a court a thorough case before the litigation window closes and an election is held on discriminatory terms. And if discrimination becomes more readily provable only in the aftermath of a discriminatory election, the victims of the discrimination cannot ever be made whole.

Notice regarding changes of concern

All of the above discussion addresses just one aspect of the VRA enforcement regime after *Shelby County*: the difficulty in securing relief against discriminatory electoral policy, and the degree to which the remaining affirmative litigation tools sufficient in other civil rights contexts may be insufficient in the electoral realm. But the particular impact on local jurisdictions highlights still another aspect of the VRA enforcement regime after *Shelby County*. Without a preclearance system, it will be more difficult to learn about and draw appropriate attention to discriminatory policies, so that the few entities with sufficient resources and expertise know where to litigate in the first place.

In requiring the preclearance of electoral changes in covered jurisdictions, Section 5 did not only thwart the discriminatory practices before they could be deployed to pernicious effect. In order to determine which practices were discriminatory, it also created a system of review for every practice, discriminatory or not, in jurisdictions with a demonstrated history of trouble that left lingering concern for the present. Jurisdictions were responsible for preparing descriptions of each electoral change for review by federal authorities; given the less time-consuming and less costly mechanisms of administrative review as compared to judicial review, this usually meant preparing packages for the Department of Justice. These packages would have to demonstrate that the change was neither intended to, nor would actually, undermine effective minority exercise of political power. And this usually meant that jurisdictions would recount the extent to which representatives from the minority community had been consulted regarding the change, as well as amass the hard data showing the tangible impact of the proposed change on minority populations. Sometimes, the process (or prospect) of preclearance may have been sufficient to

⁹³ *Shelby Cty. v. Holder*, 570 U.S. 529, 572 (2013) (Ginsburg, J., dissenting).

head off discriminatory practices before they ever became law, or to encourage the mitigation of potentially harmful practices in a dialogue with DOJ officials.⁹⁴

In the absence of preclearance, the above responsibilities simply do not exist. Jurisdictions no longer need affirmatively report changed electoral practices to any watchdog organization, provoking the fear that discriminatory changes will be overlooked. There is no longer a forum in which jurisdictions will regularly be expected to recount consultation with minority communities, provoking the fear that such dialogue will no longer occur. And there is no longer a forum in which jurisdictions will regularly be expected to accumulate the data assessing the impact of a change on minority communities, provoking the twin fears that jurisdictions will either turn a blind eye to practices with serious discriminatory impact or that they will actively seek to harm minority communities but be less than forthcoming with the data that makes that harm clear.

It is true that when a state changes the rules for casting or counting a ballot, or when a state draws new legislative or Congressional district lines, there is usually ample attention brought to bear, and government and nonprofit entities generally muster the resources to diagnose any problems that exist, even if those same resources are, as described above, insufficient to secure timely redress. Fifty may not be too large a number to lose focus.

However, as of 2017, the United States hosts 3,031 county governments, 35,748 town and municipal governments, 38,542 special districts, and 12,754 independent school districts.⁹⁵ It can fervently be hoped that relatively few of them will turn to discrimination. But the impact of and intent behind last-minute changes in the rules or procedures of these smaller local governments, changes in the locations of or resource allocations within their polling places, or changes in their district lines or geographic scope, is difficult enough to assess with targeted focus on an individual perpetrator. Without a mechanism for notice to the public of the nature of the changes, it may not be possible for the advocates with available tools and expertise to effectively determine where they should look for those that go astray.

Observers at the polls

There is still a third relevant aspect of the Voting Rights Act enforcement regime changed by *Shelby County* and important to mention today: *Shelby County* made it significantly more difficult for the federal government to effectively monitor the polls, limiting both a powerful deterrent to electoral violations and a powerful means to collect evidence when they do occur. In 2016, the Department of Justice explained that before *Shelby County*, there were three means by which they monitored the elections process at the polls, in local, state, and federal elections year-round:

First, the department sent our own personnel to watch the voting process. Second, the department sent federal election observers who are specially recruited and trained by the Office of Personnel Management (OPM), to jurisdictions that are subject to a pertinent court order. Third, the department sent these federal election

⁹⁴ See Ellen D. Katz, *South Carolina's "Evolutionary Process,"* 113 COLUM. L. REV. SIDEBAR 55, 60-64 (2013).

⁹⁵ U.S. Census Bureau, 2017 Census of Gov'ts — Organization, tbl. 2: Local Governments by Type and State (2019), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

observers from OPM to jurisdictions with a need certified by the Attorney General, based in part on the Section 4(b) coverage formula. Much of the federal election monitoring before Shelby County was in this third category.⁹⁶

Because *Shelby County* invalidated the Section 4(b) formula as the basis for preclearance, the DOJ concluded that it would not rely on the 4(b) coverage formula as a way to identify jurisdictions for election monitoring.⁹⁷ As DOJ acknowledged, this cut off what had been the bulk of the federal election monitoring to date, not least because it engaged OPM observers drawn from a much broader pool than simply Civil Rights Division personnel,⁹⁸ and who were therefore free to engage in election observation without detracting from other ongoing civil rights enforcement activities. In November of 2016, DOJ announced that it had mustered more than 500 personnel to observe the election process in 67 jurisdictions in 28 states,⁹⁹ but this required a significant shift of resources given the loss of OPM observers sent to jurisdictions based in part on the preclearance coverage formula. And even with that effort, as expected, the observation force was less robust than it had been before *Shelby County*.¹⁰⁰

The handicap matters because observers at the polls serve several exceedingly important functions. Observers watch the process, and although they do not themselves enforce the law, the simple fact of a federal presence to observe proceedings may help to deter discrimination and other electoral misconduct, including by third parties. Similarly, the simple fact of a federal presence may help to defuse tension and promote public confidence that the elections were conducted without discrimination and other electoral misconduct. And should misconduct actually occur, observers provide an unmatched trained and professional means to bear witness to that misconduct for future enforcement activity. As DOJ recounted:

[Personnel at the polls] will gather information on, among other things, whether voters are subject to different voting qualifications or procedures on the basis of race, color or membership in a language minority group; whether jurisdictions are complying with the minority language provisions of the Voting Rights Act; whether jurisdictions permit voters to receive assistance by a person of his or her choice if the voter is blind, has a disability or is unable to read or write; whether jurisdictions provide polling locations and voting systems allowing voters with disabilities to cast a private and independent ballot; whether jurisdictions comply with the voter registration list requirements of the National Voter Registration

⁹⁶ U.S. Dep't of Justice, Civil Rights Div., Fact Sheet on Justice Department's Enforcement Efforts Following *Shelby County* Decision (2016), <https://www.justice.gov/crt/file/876246/download>.

⁹⁷ *Id.*

⁹⁸ See 52 U.S.C. § 10305(a).

⁹⁹ U.S. Dep't of Justice, Press Release, Justice Department to Monitor Polls in 28 States on Election Day, Nov. 7, 2016, <https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day>.

¹⁰⁰ See, e.g., U.S. Dep't of Justice, Press Release, Justice Department to Monitor Polls in 23 States on Election Day, Nov. 2, 2012, <https://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day>. In 2018, the Department did not announce the number of personnel deployed, but announced that it would monitor voting rights compliance in 35 jurisdictions across 19 states. See U.S. Dep't of Justice, Press Release, Justice Department to Monitor Compliance with Federal Voting Rights Laws on Election Day, Nov. 5, 2018, <https://www.justice.gov/opa/pr/justice-department-monitor-compliance-federal-voting-rights-laws-election-day>.

Act; and whether jurisdictions comply with the provisional ballot requirements of the Help America Vote Act.¹⁰¹

As the list indicates, observers at the polls constitute one of the DOJ's best sources of firsthand information about compliance with Section 2 of the Voting Rights Act, but also various other federal statutes with distinct application at the polls, like Section 203 and 208 of the Voting Rights Act, Section 202 of HAVA, and various components of the ADA and VAEHA.¹⁰² Limiting the practical capacity to deploy observers curtails the means to enforce these other statutory provisions as well.

Congressional authority to update the Voting Rights Act, and H.R. 4

The discussion above reflects the urgent need to update the Voting Rights Act, to provide an enforcement regime with tools adequate to the task. It is abundantly clear that the Constitution provides Congress the authority to do so.

First, with respect to elections for federal office, the Supreme Court has repeatedly emphasized that under the Elections Clause of Article I, Congress has “comprehensive” power over the manner in which federal legislative elections are conducted, exempting only the places of choosing Senators.¹⁰³ Congress may alter state electoral regulations with respect to how elections are conducted “or supplant them altogether,” with the “authority to provide a complete code for congressional elections” if it wishes.¹⁰⁴ And Congress is not limited to an all-or-nothing choice in this respect: it may exercise power over the means and mechanics of Congressional elections “at any time, and to any extent which it deems expedient.”¹⁰⁵ Congress may not use its Elections Clause authority to alter the baseline qualifications that states set for their voters — traits like age, citizenship, and residency.¹⁰⁶ But if the question concerns Congressional authority to set the rules for the procedure of a federal election — whether restrictions on the locations of polling places or the placement of electoral district lines — the answer is a resounding “yes.” And this is just as true whether Congress adopts a command-and-control approach to specifying the particulars of federal election procedure in minute detail, or whether it adopts the significantly less intrusive model of the Voting Rights Act: categorically excluding only a few specified practices and otherwise allowing states the flexibility to design their own election processes as long as those processes do not produce discriminatory inequity.¹⁰⁷

¹⁰¹ Press Release, *supra* note 99.

¹⁰² See, e.g., 42 U.S.C. § 12132; 52 U.S.C. §§ 10503, 10508, 20102, 20104, 21082; 28 C.F.R. §§ 35.130, 35.160.

¹⁰³ See, e.g., U.S. CONST., art. I, § 4; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013).

¹⁰⁴ *Id.* at 8-9.

¹⁰⁵ *Id.* at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

¹⁰⁶ *Id.* at 16; *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 625-26 (1969).

¹⁰⁷ See, e.g., Justin Levitt, *Performance Standards and Design Standards in New Election Legislation*, TAKE CARE, Nov. 27, 2018, <https://takecareblog.com/blog/performance-standards-and-design-standards-in-new-election-legislation>.

Congress also has the authority to regulate elections — both federal elections and state and local elections — under its power to enforce the Fourteenth Amendment.¹⁰⁸ This is an expressly enumerated power, no less than the power to regulate interstate commerce, or the power to make rules for the regulation of the armed forces, or the power to appropriate spending for the common defense and general welfare of the country. Of particular relevance to the Voting Rights Act, the Fourteenth Amendment requires that similarly situated voters be treated similarly,¹⁰⁹ prohibits invidious discrimination on the basis of race or ethnicity,¹¹⁰ precludes restrictions on the right to vote unrelated to voter qualifications,¹¹¹ and demands that any burden on the right to vote, no matter how slight, be imposed only when “relevant and legitimate state interests [are] sufficiently weighty to justify the limitation.”¹¹²

The Fourteenth Amendment gives Congress the expressly enumerated power to enforce each and every of these requirements and restrictions through appropriate legislation.¹¹³ This “appropriate” federal enforcement legislation certainly includes the creation of a cause of action authorizing courts to enjoin precisely that which the constitution prohibits. But crucially, the Court has repeatedly said that federal enforcement legislation is not limited to the precise contours of the Amendment itself.¹¹⁴ Instead, Congress may also, in the exercise of its enforcement power, remedy past discrimination, “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”¹¹⁵ And Congress may also, in the exercise of its enforcement power, act prophylactically “to prevent and deter” intentional discrimination by prohibiting conduct that is not itself unconstitutional.¹¹⁶ Such Congressional action need not be confined to voting practices for which immediate proof of intentional discrimination is available.

Perhaps because the provisions of the Fourteenth Amendment are so wide-ranging — encompassing not merely the whole of the Equal Protection Clause, but the substantive and procedural protections of the Due Process and Privileges and Immunities clauses as well — the Court has imposed a constraint on Congress’s power to legislate to enforce the Amendment. In *City of Boerne v. Flores*, the Court determined that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹¹⁷ That is, under the Fourteenth Amendment’s enumerated enforcement power, legislation must be reasonably suited to remedying or deterring violations of the Amendment, rather than

¹⁰⁸ U.S. CONST., amend. XIV, § 5.

¹⁰⁹ See, e.g., *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

¹¹⁰ See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

¹¹¹ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) (plurality).

¹¹² *Id.* at 191 (quotation marks and citation omitted).

¹¹³ U.S. CONST., amend. XIV, § 5.

¹¹⁴ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

¹¹⁵ *City of Boerne*, 521 U.S. at 518.

¹¹⁶ *Id.*; *Tennessee v. Lane*, 541 U.S. 509, 518-19 & n.4 (2004).

¹¹⁷ *City of Boerne*, 521 U.S. at 520.

redefining the protections of the Amendment itself. Without such a limit, the Court was concerned that Congress would simply accrue to itself unlimited Congressional power.¹¹⁸

If the Fourteenth Amendment's protections are wide-ranging, and hence subject to concern that Congressional enforcement be delimited by congruence and proportionality so as not to become literally all-encompassing, the Fifteenth Amendment's protections are narrow — and might well imply that Congressional enforcement runs significantly deeper, without precisely the same constraints imposed by *City of Boerne*.¹¹⁹ While the Fourteenth Amendment protects against many different forms of state imposition on individual rights, the Fifteenth Amendment has one purpose and one purpose alone: to eradicate discrimination on the basis of race and ethnicity in the exercise of the franchise.¹²⁰ The Fifteenth Amendment also gives Congress the expressly enumerated power to enforce this specific prohibition through appropriate legislation, and there is little concern that Congress would accrue unbounded power in so doing.¹²¹

As with the Fourteenth Amendment, the federal enforcement power of the Fifteenth Amendment is not limited to the precise contours of the Amendment itself.¹²² Instead, Congress

¹¹⁸ *Id.* at 529.

¹¹⁹ *Cf.* *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (acknowledging that the standards of review under the Fourteenth Amendment and Fifteenth Amendment might be distinct).

¹²⁰ U.S. CONST., amend. XV, § 1. We know that the Fourteenth Amendment's Equal Protection Clause prohibits invidious racial discrimination in redistricting, *see, e.g.,* *Rogers v. Lodge*, 458 U.S. 613, 617 (1982), and hence supports Congressional legislation on the subject, but there is apparently some dispute about whether the Fifteenth Amendment applies to redistricting as well. The dispute concerns the difference between vote denial (like restrictions on the ability to cast a ballot) and vote dilution (like redistricting decisions that do not impair the ability to cast a ballot, but render that act less meaningful by restricting the plausible ability to elect preferred candidates). It is clear that acts taken to restrict voters' ability to cast a ballot because of their race or ethnicity violate the Fifteenth Amendment, which specifically prohibits the discriminatory denial or abridgment of the right "to vote." But there is somewhat less agreement about whether the Fifteenth Amendment encompasses claims of vote dilution as well. As I have described in *Race, Redistricting, and the Manufactured Conundrum*, 50 LOY. L.A. L. REV. 555, 560 n.13 (2017), claims that the Fifteenth Amendment reaches only vote denial and not vote dilution seek to rewrite precedent in a rather unconvincing manner.

In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court faced a claim that the city boundaries of Tuskegee, Alabama, had been drawn to excise African-American voters from the city electorate. Eight Justices found a clear violation of the Fifteenth Amendment, 364 U.S. at 346; one agreed that the boundaries were unconstitutional but found the Fourteenth Amendment more apt, *id.* at 349 (Whittaker, J., concurring). Years later, Justice Scalia asserted that *Gomillion* concerned only the complete denial of the municipal franchise, and therefore claimed that the Court has never directly addressed the application of the Fifteenth Amendment to redistricting. *See, e.g.,* *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000).

Justice Scalia's gloss on *Gomillion*, however, is difficult to credit. The Tuskegee voters removed from the city limits by the boundary redrawing invalidated in *Gomillion* did not entirely lose the ability to vote on local officials. The redrawing removed their ability to vote in Tuskegee elections, but not the elections of Macon County, or the elections of a newly incorporated municipality should they have sought to create one. That is, the Tuskegee redrawing shifted the representation of African-American voters from one local representative to another, in a manner calculated to send a message of exclusion based on race—but it did not deny the right to cast a ballot for local representatives. Seen in this light, *Gomillion* is no more a case about vote denial than any other case predicated on moving voters from one legislative district to another. If the Fifteenth Amendment does not apply to redistricting, the eight Justices of *Gomillion* were mistaken.

¹²¹ U.S. CONST., amend. XV, § 2.

¹²² *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).

may also, in the exercise of its enforcement power, remedy past discrimination, including “prohibit[ing] state action that . . . perpetuates the effects of past discrimination.”¹²³ And Congress may similarly act prophylactically “to prevent and deter” intentional discrimination, including by prohibiting conduct that is not itself unconstitutional.¹²⁴ For example, in *City of Rome v. United States*, the Supreme Court reiterated that “under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.”¹²⁵

Indeed, Congress has, in the past, determined that facts on the ground rendered it necessary and proper to outlaw voting practices that are discriminatory in effect, in order to ensure adequate remediation or prevention of the denial or abridgment of the right to vote on account of race or ethnicity. The Supreme Court has, without exception, upheld such legislation.¹²⁶

In ensuring that the exercise of its power is sufficiently related to a present need to remedy or deter constitutional violations, Congress has not, to my knowledge, ever used its enforcement power under the Fifteenth Amendment to prohibit practices based purely on a statistical disparity. The preclearance regime of the Voting Rights Act, for example, prohibited discriminatory effects where context demonstrated past misconduct (in need of remediation) and present risk (in need of deterrence). The “results test” of § 2 of the Voting Rights Act — an unfortunate misnomer¹²⁷ — is similarly not based purely on electoral results alone; instead, it relies on danger signs demonstrating enhanced risk of perpetuating past or present misconduct. The totality of the circumstances analysis, driven by (but not limited to) the “Senate factors” of the 1982 Senate Judiciary Committee report,¹²⁸ performs this function.¹²⁹

That is, when Congress has acted in the past to prohibit electoral practices with a discriminatory effect, it has done so based on at least one of several different ties to the underlying substantive prohibition of the Fifteenth Amendment. Congress has outlawed voting practices that are discriminatory in effect based on the recognized difficulty of proving intentional discrimination, which leads to underenforcement of constitutional wrongs; based on the need to stop the perpetuation of the impact of past discrimination; based on the assessment of a contextual risk of present or future discrimination, often with reference to historical patterns; based on the unique and uniquely pernicious incentives that some incumbent policymakers may see in electoral discrimination as a means to preserve power (and a recognition that there are not

¹²³ *City of Rome v. United States*, 446 U.S. 156, 176 (1980).

¹²⁴ *Tennessee v. Lane*, 541 U.S. 509, 518-19 & n.4 (2004) (noting the existence of this power under both Fourteenth and Fifteenth Amendments); *see also* *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (addressing Fifteenth Amendment enforcement power, relying in part on Congressional ability to deter or remedy violations of the Fourteenth Amendment, even if in the process conduct is prohibited that is not itself unconstitutional).

¹²⁵ *City of Rome*, 446 U.S. at 175.

¹²⁶ *See, e.g.,* *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (literacy tests).

¹²⁷ *See, e.g.,* *United States v. Blaine Cty.*, 363 F.3d 897, 909 (9th Cir. 2004); Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FL. ST. U. L. REV. 573, 587 n.69.

¹²⁸ S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06.

¹²⁹ *See* Levitt, *supra* note 127, at 587 & n.69.

similarly powerful incentives to discriminate in other arenas); or based on some combination of the above.

Together, then, the Elections Clause and the enforcement clauses of the Fourteenth and Fifteenth Amendments present an abundance of authority for Congressional regulation of the election process relevant to the Voting Rights Act.¹³⁰ Each of these sources of federal power inherently involves federal entry into default state procedures, yes, but that federal presence and the yielding of contrary state or local regulation is thoroughly and expressly contemplated as part of the constitutional design. To the extent there may be federalism costs in the abstract, the constitutional Framers have already built them in to the calculus ... and into the text. The Fourteenth and Fifteenth Amendments contain express federal restrictions on state authority, bought at the cost of a Civil War, with express constitutional permission to Congress to effectuate them. The Elections Clause contains a similarly express grant of power for Congress to override any state default in the context of a federal election. When Congress acts in this arena, it has ample constitutional backing.

Until very recently, the Supreme Court repeatedly referred to the Voting Rights Act as a model use of Congressional power. At the original enactment of the Voting Rights Act, and upon the next three reauthorizations and updates, the Court confirmed that Congress had properly utilized its constitutional authority.¹³¹ Indeed, even in decisions otherwise trimming Congressional enforcement power under the Fourteenth Amendment in other non-electoral arenas, the Court repeatedly held up the Voting Rights Act as the lawful counterexample.¹³²

Then came *Shelby County*.¹³³ *Shelby County* faulted Congress for the 2006 reauthorization legislation that took turnout data from 1964, 1968, and 1972 as the ostensibly primary referents for preclearance “coverage.”¹³⁴ The Court believed that Congress’s calculations concerning which jurisdictions to submit to preclearance were simply based on outdated criteria. It held that if Congress were to require a preclearance procedure for some states and not others, those choices had to be “sufficiently related” to the problems Congress was

¹³⁰ There are, of course, other Constitutional provisions that provide additional sources of support for electoral regulation. I omit them here simply because they may not be as directly relevant as the sources of authority addressed in the text to the legislation presently pending before this Committee. See, e.g., U.S. CONST. amend. I, V, XVII, XIX, XXIII, XXIV, XXVI; see also U.S. CONST. art. I, § 8, cl. 18 (“Necessary and Proper Clause”); art. II, § 1; amend. XII, XX, XXII.

¹³¹ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the 1970 reauthorization); *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding the 1975 reauthorization); *Lopez v. Monterey County*, 525 U.S. 266 (1999) (upholding the 1982 reauthorization).

¹³² *City of Boerne v. Flores*, 521 U.S. 507, 518, 525-27, 532-33 (1997).

¹³³ 570 U.S. 529 (2013).

¹³⁴ In assessing the legislation’s responsiveness to current conditions, the *Shelby County* Court essentially ignored the presence or effect of the bail-in and bail-out provisions of the Act. See Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG (June 25, 2013, 10:39 PM), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>; Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (2013), <https://ssrn.com/abstract=2265729>.

actually targeting, based on current conditions.¹³⁵ And it found, instead, that the ostensible coverage formula reauthorized in 2006 was irrational because it was rooted in “40-year-old data.”¹³⁶

The Court offered little further elaboration of this “sufficiently related” standard, or whether it is meaningfully different from the “rational basis” standard the Court has previously applied to the Fifteenth Amendment enforcement power.¹³⁷ Indeed, in critiquing the 2006 reauthorization’s reliance on turnout data in part from 1964, the Court critiqued a formula “having *no logical relation* to the present day” and cited the alleged “*irrationality*” of turnout statistics to vote dilution concerns: critique that sounds in rational basis review.¹³⁸ But whether there is a difference or not, the legislation presently before the committee should readily meet either standard. The *Shelby County* Court was concerned that there must be a logical relationship between the exercise of a Congressional enforcement power and the underlying constitutional harm. And it made clear that though Congress may not change the substantive definition of that which constitutes a constitutional violation, it has substantial latitude in choosing multiple means to confront the constitutional harm.¹³⁹ As the D.C. Circuit put the matter: “When Congress seeks to combat racial discrimination in voting—protecting both the right to be free from discrimination based on race and the right to be free from discrimination in voting, two rights subject to heightened scrutiny—it acts at the apex of its power.”¹⁴⁰

What the *Shelby County* Court did *not* say is also quite significant. The Court did not overrule the constitutionality of a properly tailored preclearance requirement — nor did it take other potential remedies and prophylactic tools off of the table. The Court recognized that preclearance is a “stringent” and “potent” measure, an “extraordinary” tool to confront electoral discrimination based on race, ethnicity, and language minority status, which is necessarily an “extraordinary” harm.¹⁴¹ Indeed, discrimination with respect to the vote is so pernicious that a constitutional Amendment is devoted to nothing else, with power expressly delegated to Congress to enforce its protections.¹⁴² The *Shelby County* Court refused to overturn four previous cases approving preclearance as an appropriate use of that enumerated Congressional power where remedies like affirmative litigation proved insufficient.¹⁴³ To the contrary: the

¹³⁵ *Shelby Cty.*, 570 U.S. at 551, 556; *see also* *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 203-04 (2009).

¹³⁶ *Shelby Cty.*, 570 U.S. at 556.

¹³⁷ *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 330 (1966).

¹³⁸ *Shelby Cty.*, 570 U.S. at 554, 556 (emphasis added).

¹³⁹ *Levitt, Section 5 as Simulacrum*, *supra* note 134, at 172-73.

¹⁴⁰ *Shelby County v. Holder*, 679 F.3d 848, 860 (D.C. Cir. 2012), *rev’d* on other grounds, 570 U.S. 529 (2013).

¹⁴¹ *Shelby Cty.*, 570 U.S. at 545-46.

¹⁴² U.S. CONST. amend. XV; *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 205 (“The Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed to enforce it.”).

¹⁴³ *See supra* note 131.

Court emphatically stated that “Congress may draft another formula [determining coverage for a preclearance requirement] based on current conditions.”¹⁴⁴

It certainly appears that the approach in H.R. 4 would qualify. In line with the Court’s admonition, that approach “is not designed to punish for the past; its purpose is to ensure a better future.”¹⁴⁵ And as such, it is relentlessly focused on current conditions: either the current need to avoid perpetuating the current effects of past intentional discrimination, or the current presence of danger signs indicating either present intentional discrimination or the urgent need to prevent or deter intentional discrimination on the immediate horizon.

I have spoken, above, to the present need for preclearance. We may perhaps look with optimism to a future free of discrimination on the basis of race or ethnicity, but discrimination is not yet a sepia-stained relic of the past: in some pockets of the country, it displays stubborn persistence, and in others, it is fashioned anew. Unlike other discriminatory harms, electoral harms are distinct; unlike other remedial contexts, the electoral cycle is distinct; and unlike other governmental action, officials’ incentives in the electoral arena are distinct. All of these factors indicate the desperate need for a distinct remedial structure — not 50 years ago, but now. In the jurisdictions where danger signs point to a proclivity to discrimination, preclearance is the only structure with the power to stop the discrimination before it happens.

Section 3 of H.R. 4 speaks to the basic standard of preclearance coverage under an updated Voting Rights Act, and it is abundantly tied to current conditions. It recognizes that preclearance is a “potent” measure, and it does not apply that potency to one-time offenders or jurisdictions that may have stumbled across a stray violation. Instead, it creates a trigger based only upon demonstrated patterns and proclivities that show a likelihood of future misconduct: it seeks to identify recidivists for whom more potent medicine may be necessary, based on facts rather than assumptions. Political subdivisions would send new electoral practices or procedures for preclearance review if they were caught up in three strikes; a State as a whole would send changed new electoral practices or procedures for preclearance review if there had been 15 different violations, or 10 violations amid a violation by the State itself. Those triggers are patterns of conduct signaling a strong present need.

Moreover, the preclearance structure in the bill is time-limited, forward and backward. Because it is responsive to both vote denial and vote dilution concerns, it is based on violations occurring in a period spanning two redistricting cycles. And unlike the preclearance formula struck by *Shelby County*, the reference point for H.R. 4 continues to move as time does: because it looks to a set number of years from the present, rather than to a particular date, there is no danger that the formula becomes stale by the passage of time. It will always be as current as it is the day that it is passed. Furthermore, unlike the preclearance of old, review in the new structure comes with a predetermined expiration date as well: no more than one redistricting cycle into the future.

¹⁴⁴ *Shelby Cty.*, 570 U.S. at 557. This Court’s recognition of Congressional power to draft another preclearance formula demonstrates that the supposed “equal sovereignty” principle of *Shelby County* does not preclude the differing federal treatment of different state or local jurisdictions based on those jurisdictions’ own conduct.

¹⁴⁵ *Shelby Cty.*, 570 U.S. at 553.

The preclearance structure of H.R. 4 also retains flexibility for States and subdivisions to move into or out of preclearance based on individualized intervening conduct not tied to the broader pattern of violations. Courts have the discretion to place jurisdictions under even more tailored preclearance standards — either for an even more customized time period or for a customized category of electoral procedures¹⁴⁶ — based on individual acts of discrimination in voting on the basis of race or ethnicity. And courts retain the discretion to release jurisdictions from preclearance if jurisdictions that once demonstrated a pattern of worrisome conduct have refrained from discriminatory acts and have demonstrated improvement with respect to the facilitation of or support for minority voting. The overall structure of preclearance in H.R. 4 not only builds in reference to current conditions, it builds in breathing room. Preclearance — which simply entails speedy review of new electoral practices to ensure the absence of discrimination, in jurisdictions where there are strong warning signs of a contrary need — is designed to encompass the jurisdictions that display the most pressing signs of present trouble, and to release the jurisdictions that do not. The Constitutional provisions expressly authorizing Congressional action in this arena abundantly empower Congress to erect such a structure.

Other salient provisions of H.R. 4 encompassed in today's hearing are similarly well within Congress's constitutional authority. For example, section 7 of H.R. 4 would provide an express private cause of action for enforcing the provisions of federal law prohibiting discrimination on the basis of race or ethnicity, in addition to the public enforcement power currently in 52 U.S.C. § 10308(d). This provision is merely more specific than the general private right of action in 42 U.S.C. § 1983, and no less within Congress's constitutional authority.

Section 7 would also provide a specific statutory standard for preliminary equitable relief in voting rights cases. This standard may be slightly distinct from the general common-law standard, but it too is no less within Congressional authority. The common-law standard generally applied by the courts considers the merits of the alleged violation and the balance of harms to the parties and the public.¹⁴⁷ But as long as an alternative comports with constitutional due process, Congress may tweak that standard if it chooses, raising or lowering the merits threshold or recalibrating consideration of the balance of harms.¹⁴⁸ And indeed, Congress has exercised this authority on numerous occasions, sometimes by contracting the availability of preliminary relief and sometimes by expanding it.¹⁴⁹

¹⁴⁶ See, e.g., *Crum*, *supra* note 17, at 2007-08.

¹⁴⁷ See, e.g., *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

¹⁴⁸ See, e.g., *Yakus v. United States*, 321 U.S. 414, 441-42 (1944) ("Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. . . . The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity.") (internal quotation marks and citations omitted); see also *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496-97 (2001) (emphasizing that "[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (emphasizing that a court's equitable powers permit the exercise of discretion along traditional lines "[u]nless otherwise provided by statute" or "in the absence of a clear and valid legislative command").

¹⁴⁹ See *id.* at 442 n.8 (collecting instances in which Congress had regulated the authority of the federal courts to grant temporary injunctions); see also *Miller v. French*, 530 U.S. 327, 350 (2000) (ratifying Congress's power to reshape the equitable discretion of the courts in the context of the Prison Litigation Reform Act, by passing § 18

Here, Section 7 would ask the courts to consider the merits of the alleged violation (in the present draft, courts are instructed to determine whether “the complainant has raised a serious question” concerning a violation), as well as the balance of hardships to plaintiff and defendant. These standards specifically echo those deployed by Congress to alter the common-law referent for preliminary injunctions in other statutory provisions.¹⁵⁰ They refer specifically to the context of the procedure being challenged, including the amount of time between the adoption of the new procedure and the impending election. And presumably, in keeping with common-law principles of equitable relief generally, federal courts applying this standard would continue to be far more likely to issue prohibitory than mandatory injunctions, effectively ensuring that a sudden change raising serious questions of discrimination and imposing serious hardship would not disrupt a forthcoming election, by returning the jurisdiction to the status quo ante at least for the moment.¹⁵¹

Each of these elements is appropriately responsive to the distinct nature of election litigation, reviewed more fully above. True, in jurisdictions where current conditions demonstrate a pattern indicating special concern about discrimination, preclearance coverage will mitigate the need for much affirmative litigation, and render the preliminary relief structure in H.R. 4 unnecessary. But jurisdictions without such warning signs of trouble, beyond the scope of preclearance coverage, may also err in the imposition of individual discriminatory policies. And in those instances, the cost and difficulty of amassing evidence and expertise sufficient to secure timely preliminary relief in a voting case often remains greater than in most other contexts, the clock often remains shorter, and the damage of a discriminatory election remains irreparable. It is rational that Congress might wish to establish a standard for the granting of preliminary injunctive relief designed to address these distinct characteristics in election cases — and in so doing, reduce the litigation expense for all concerned. And that renders the basic structure of preliminary relief in H.R. 4 similarly within Congress’s constitutional authority.

The basic structure of Section 5 of H.R. 4 is similarly within Congress’s constitutional authority. I noted, above, that one of the consequences of *Shelby County* is a lack of public information and explanation about changes in the voting process, and the enforcement difficulties attending that absence of information. Section 5 would respond to the general need by requiring basic notice and transparency for the electoral changes that jurisdictions make, particularly when those changes are likely to jeopardize the constitutional rights of the voting public through confusion or discrimination. The structure in the bill does not restrict any

U.S.C. 3626(b)(2)); 20 U.S.C. § 1415(j) (a provision of the Individuals with Disabilities Education Act departing from the common-law standard and effectively directing the issuance of a preliminary injunction under certain circumstances); cf. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187-88, 193-95 (recognizing, in the context of permanent injunctive relief, that the Endangered Species Act overrides the exercise of common-law equitable authority).

¹⁵⁰ See, e.g., 15 U.S.C. § 2805(b)(2) (a provision of the Petroleum Marketing Practices Act directing the issuance of a preliminary injunction upon a particular injury if “there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation,” and if the balance of hardships indicates that an injunction should issue).

¹⁵¹ In the event of a redistricting change, preliminary relief might have to account for the potential malapportionment in a return to the status quo ante, and may instead appropriately seek a least-change modification of the status quo. See, e.g., *Perry v. Perez*, 565 U.S. 388, 392-94 (2012).

jurisdiction's substantive choices, nor does it even demand information about each and every change that each and every jurisdiction may make to its electoral system. Instead, it aims to provide citizens with additional information about the electoral pinch points where gathering the data about jeopardy to voting rights has proved most problematic in the past: changes at the last minute before an election,¹⁵² changes in the polling place resources available for a given election, and changes in the district lines determining the electorate for a given election.¹⁵³ Even Justice Scalia, who took a fairly narrow view of Congressional power, recognized that the enforcement provisions of the Civil Rights Amendments would authorize Congress to create "reporting requirements that would enable violations of the Fourteenth [and, presumably, Fifteenth] Amendment to be identified."¹⁵⁴ The choices in Section 5 of the bill are decidedly related to the real-world lacunae in information that inhibit resolution of discriminatory changes, and are decidedly within Congressional authority.

Finally, Section 6 of H.R. 4 helps to remedy the final consequence of *Shelby County* noted above, in a way that is similarly well within Congress's constitutional authority. Federal observers trained and deployed by OPM and DOJ — simply to serve as eyes and ears at the polls — were vital to deterring discrimination and other unlawful electoral conduct, and to promoting public confidence that the elections were conducted without discrimination or other unlawful electoral conduct. Indeed, because of their potential to deter misconduct and defuse tension, most local jurisdictions welcomed federal observers with open arms. And federal observers trained and deployed by OPM and DOJ were vital to collecting evidence of misconduct for later enforcement activity when misconduct did occur.

By invalidating Section 4(b) of the Voting Rights Act, *Shelby County* seriously limited the federal government's practical capacity to enforce federal law and deter violations. H.R. 4 would restore Section 4(b), once again permitting the deployment of federal observers to any jurisdiction covered for preclearance, contingent on transparent and reasoned certification by the Attorney General that observers are necessary there.¹⁵⁵ And while the Voting Rights Act had previously focused the certification process on constitutional guarantees, leaving the gathering of evidence for other federal voting law enforcement as an incidental benefit,¹⁵⁶ Section 6 of H.R. 4 simply clarifies that observers may be certified based on the need to watch for violations of any federal voting rights laws. The ability to gather evidence for the enforcement of federal laws is clearly and directly related not only to the authority to pass those laws themselves but also to Congress's power to spend funds to create the Department of Justice and its enforcement apparatus. And as such, there is no doubt that it too is constitutionally appropriate.

¹⁵² The Supreme Court has itself identified the potential disruption and confusion occasioned by last-minute changes in the electoral process without sufficient notice to the public. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

¹⁵³ For the smallest municipalities and school districts, H.R. 4 would make voluntary the provision of public information with respect to new redistricting plans, while still capturing the sorts of jurisdictions responsible for the bulk of the objections lodged under the old preclearance process. See *supra* text accompanying note 72 and note 72.

¹⁵⁴ *Tennessee v. Lane*, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting); cf. *Citizens United v. FEC*, 558 U.S. 310, 368-71 (finding "no constitutional impediment" to basic disclosure and transparency requirements, even in the context of the protected speech of private persons).

¹⁵⁵ Only a subset of the jurisdictions covered by Section 4 ever received such a certification. See U.S. Dep't of Justice, Civil Rights Div., Federal Observers, <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring#observers>.

¹⁵⁶ See, e.g., 52 U.S.C. § 10305(a)(2)(B).

* * *

For all of the reasons above, it should be clear that *Shelby County* has seriously hampered the country's ability to deter and correct racial and ethnic discrimination in the voting process, in ways large and larger still. Even after *Shelby County*, there remain powerful federal statutes — including those enforced by the Department of Justice and those enforced by private parties — and powerful state statutes as well, that could be and have been deployed to this purpose. But these tools, powerful as they are, are insufficient: it is too hard to get information about new discriminatory practices, and too difficult to respond in time when and where those practices occur. I eagerly look forward to the day when tools beyond those that currently exist are unnecessary. As experience since *Shelby County* has amply proven, we are not there yet.

I hope that this testimony today assists the Committee in assessing the power and duty of the Congress to update and restore the Voting Rights Act. The structure evinced in H.R. 4 is not the only way in which Congress may address the pressing need, but the salient aspects of the bill teed up for discussion in today's hearing are well within Congress's constitutional authority. I thank you again for the opportunity to testify before you, and look forward to answering any questions that you may have.

Mr. RASKIN. And thank you very much, Mr. Levitt.

Franita Tolson is the vice dean for faculty and academic affairs and professor of law at the University of Southern California Gould School of Law where she teaches in constitutional law and election law. She has written a wide range of topics in the field of election law, including partisan gerrymandering, campaign finance reform, the Voting Rights Acts of 1965, and the Reconstruction amendments.

Her voluminous research has appeared in leading law reviews, including the *BU Law Review*, the *Vanderbilt Law Review*, the *Alabama Law Review*, and many others.

And we are delighted that you came all the way out, Professor Tolson. And you are recognized for 5 minutes.

STATEMENT OF FRANITA TOLSON

Ms. TOLSON. Thank you, Mr. Chair, ranking members, and distinguished members of this committee. Thank you for the opportunity to appear and speak about the scope of congressional power to protect voting rights. This issue has been at the core of my research since I entered the legal academy over a decade ago.

My brief comments will focus on how Congress has broad constitutional authority to enact H.R. 4, authority that includes the elections clause of Article I, Section 4 of the Constitution.

In addition to its power to enforce the guarantees of the 14th and 15th Amendments, which prohibit racial discrimination in voting and elections, the Elections Clause of Article I, Section 4 provides that the States shall choose, quote, "the times, places, and manner of holding elections" for Representatives and Senators, but subject to Congress' authority to, quote, "make or alter such regulations."

As I have argued in my scholarship, this provision forms the basis of our system of Federal elections by giving States plenary authority to set the ground rules while Congress retains a veto power over State regulations.

Congress' authority under the Elections Clause is, in the words of the Supreme Court, paramount. The Elections Clause has been overlooked as a source of authority for the Voting Rights Act of 1965 even though the clause provides additional authorization for its provisions.

In *Shelby County v. Holder*, the Supreme Court held that the coverage formula of Section 4(b) of the Voting Rights Act was unconstitutional. In striking down Section 4(b), Shelby County accorded no significance to the fact that authority for the VRA rested on both the 14th and the 15th Amendments. There was also no consideration of the Elections Clause.

In the post-Shelby world, this has created substantial confusion about the level of deference that the Court should accord to Congress when reviewing the legislative record of any Federal voting rights legislation.

Congress can reduce the risk that the Supreme Court will invalidate the coverage formula of the Voting Rights Act Amendment Act by explicitly relying on provisions like the Elections Clause that bolster Federal power when coupled with Congress' enforcement authority under the 14th and 15th Amendments.

The Elections Clause has its own set of unique values that place a premium on congressional sovereignty, and Congress has, on occasion, imposed substantive requirements that States must follow in structuring Federal elections.

The overarching purpose of the clause is to ensure the continued existence and legitimacy of Federal elections. So the text empowers Congress to displace State law and commandeer State officials towards achieving this end.

The Elections Clause avoids many of the traps that have constrained congressional power under the Reconstruction amendment. By depriving States of the final policymaking authority that is the hallmark of sovereignty, the clause is impervious to the federalism concerns that have constrained congressional action under the 14th and 15th Amendments.

The clause is also distinct from these provisions because the clause does not require any evidence of discriminatory intent in order for Congress to intervene, providing further justification for a legislative record that shows that States acted with discriminatory effect or in ways that otherwise abridge or deny the right to vote.

The Elections Clause can also indirectly affect regulations long considered to be in the domain of the States, voter qualification standards and procedural regulations that govern State elections.

It is difficult to insulate these regulations from the reach of Federal power. Not only do voters in State and Federal elections have the same qualifications, but State and local governments use many of the same practices in Federal elections as they do for State and local elections. Voters register to vote, go to the same polling place at the same time and vote on the same ballot for Federal, State, and local elections in most places.

As a result, a voting change affecting State and local elections will also affect Federal elections. If a voting change will have the effect of undermining the health of Federal elections, then the Elections Clause provides sufficient authority for Congress to regulate those changes.

H.R. 4, if enacted pursuant to the Elections Clause and the Reconstruction amendments, would address all of the objections lodged against the preclearance regime by the Court in *Shelby County v. Holder*.

The Court was concerned that preclearance for covered jurisdictions was determined based on outdated information rather than based on current voting rights violations. H.R. 4 links preclearance to voting rights violations committed in the State in recent decades, the existence of which illustrates that the State has failed in its obligation to protect the right to vote such that Federal intervention is required under the 14th and 15th Amendments.

H.R. 4 also addresses constitutional objections that seek to challenge congressional power to premise liability on violations of Federal voting rights laws that, unlike constitutional claims, do not require the plaintiff to establish discriminatory intent.

The Elections Clause, when coupled with the 14th and 15th Amendments, provides sufficient constitutional justification for a regime that premises liability on both discriminatory intent and effect. Because there is no requirement of discriminatory intent

under the Elections Clause, this decreases the amount of intentionally discriminatory behavior that Congress has to amass in compiling the legislative record for H.R. 4.

With the authority granted by these provisions, Congress' constitutional authority to enact H.R. 4 is substantial.

Thank you for the opportunity to discuss my research. I welcome any questions that you have.

[The statement of Ms. Tolson follows:]

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Judiciary Committee:

Thank you for the opportunity to appear and speak about the scope of congressional power to protect voting rights. This issue has been at the core of my research since I entered the legal academy over a decade ago. I have published numerous articles in leading law reviews, and I have a forthcoming book project on the scope of congressional power over elections.¹ My comments will focus on the issue of whether Congress has constitutional authority to enact the coverage formula in the Voting Rights Amendment Act (“VRAA”), which would premise preclearance on, among other things, the violation of federal voting rights laws. First, I will explain how Congress’s authority to regulate elections is much broader than the U.S. Supreme Court has acknowledged, extending beyond the scope of the Fourteenth and Fifteenth Amendments to also include congressional power under the Elections Clause of Article I, Section 4 of the Constitution. Second, I will discuss how the VRAA, as authorized by these provisions, sufficiently addresses the concerns raised in *Shelby County v. Holder* regarding the deficiencies of the prior coverage formula.²

Congress Has Broad Authority to Regulate Federal Elections Under the Elections Clause and the Fourteenth and Fifteenth Amendments

The Constitution gives Congress broad authority over elections. In addition to its power to enforce the guarantees of the Fourteenth and Fifteenth Amendments, which prohibit racial discrimination in voting and elections,³ the Elections Clause of Article I, Section 4 provides that the states shall choose “[t]he Times, Places, and Manner of holding elections,” for representatives and senators, but subject to Congress’s authority to “make or alter such Regulations.”⁴ As I have argued elsewhere,⁵ this provision forms the basis of our system of federal elections by giving states plenary authority to set the ground rules while Congress retains a veto power over state regulations.⁶ Congress’s authority under the Elections Clause is, in the words of the Supreme Court, “paramount.”⁷

The Elections Clause has been overlooked as a source of authority for the Voting Rights Act of 1965 (“VRA”),⁸ even though the Clause provides additional authorization for its provisions.

¹ See, e.g., FRANITA TOLSON, IN CONGRESS WE TRUST?: THE EVOLUTION OF FEDERAL VOTING RIGHTS ENFORCEMENT FROM THE FOUNDING TO THE PRESENT (forthcoming 2020).

² *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (invalidating the preclearance formula of section 4(b) of the Voting Rights Act of 1965).

³ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁴ U.S. CONST. art. I, § 4. The Elections Clause, in its entirety, 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 [sic] Senators.” U.S. CONST. art. I, § 4, cl. 1.

⁵ See, e.g., Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B. U. L. REV. 317 (2019) (hereinafter, *Spectrum of Congressional Authority*); Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2212 (2018) (hereinafter, *Election Law Federalism*); Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322 (2014); Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

⁶ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (noting that the Elections Clause is a “default provision” that “invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state choices” (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997))).

⁷ *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

⁸ The Elections Clause, in its entirety, 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 [sic] Senators.” U.S. CONST. art. I, § 4, cl. 1. There are

Sections 4(b) and 5 of the Act suspended all changes to state election laws in covered jurisdictions, including nondiscriminatory voter qualification standards and procedural regulations that govern state elections. In *Shelby County v. Holder*, the Supreme Court held that section 4(b) of the Voting Rights Act was unconstitutional because the Act forced certain states to seek federal approval before implementing laws that they were otherwise constitutionally authorized to enact.

In striking down section 4(b), *Shelby County* accorded no significance to the fact that authority for the VRA rested on both the Fourteenth and Fifteenth Amendments.⁹ The Court relegated its discussion of the Fourteenth Amendment to a mere footnote with little explanation in the body of the decision about how either Amendment resolved the constitutional issues present in the case. Instead, the Court contended that section 4(b) failed both rational basis review¹⁰ and the standard derived from its decision in *Northwest Austin Municipal Utility District Number One v. Holder*¹¹ (“*NAMUDNO*”), which “guides [its] review under both [the Fourteenth and Fifteenth] Amendments.”¹² *NAMUDNO*, however, did not articulate a standard of review under these provisions.¹³ Pursuant to this (non)standard, the Court in *Shelby County* held that section 4(b) violated the Constitution’s principle of equal sovereignty, which requires that Congress build a record sufficient to justify legislation that distinguishes between the sovereign states.¹⁴ In making this pronouncement, the Court did not confront the relationship between the Elections Clause, the Reconstruction Amendments, and the VRA in thinking about the scope of congressional enforcement authority, even while consistently expressing concerns about the impact of the VRA on the sovereignty of the states.

Despite having substantial authority over elections, Congress has had difficulty responding to voting rights abuses because the Supreme Court has ignored its earlier precedent and become unduly formalistic in how it interprets federal power, especially in light of the practical realities of election administration and the overlapping, and sometimes conflicting, authority over elections that Congress shares with the states. This ambiguity has created substantial confusion about the level of deference that the Court should accord to Congress when reviewing the legislative record of any federal voting rights legislation.

The presence of multiple sources of congressional power to justify a federal law is germane in

probably more election-related provisions of the Constitution than any other area. See, e.g., *id.* § 2; *id.* § 4; *id.* § 5; *id.* art. II, § 1; *id.* art. IV, § 4; *id.* amend. XXII; *id.* amend. XIV, § 2; *id.* amend. XV; *id.* amend. XVI; *id.* amend. XX; *id.* amend. XXIII; *id.* amend. XXIV; *id.* amend. XXVI.

⁹ In its grant of certiorari, the Court acknowledged that the preclearance regime is based on dual sources of constitutional authority, but otherwise ignored the implications of this fact in assessing the constitutionality of congressional action. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013) (discussing only the Fifteenth Amendment); *Shelby Cty. v. Holder*, 568 U.S. 1006 (2012) (mem.) (acknowledging Fourteenth and Fifteenth Amendments in grant of certiorari).

¹⁰ See *id.* at 2625 (explaining that § 4(b) was rational “in both practice and theory” when adopted but is now irrational). But see *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 327 (1966) (applying rational basis review to assess constitutionality of § 5 of the VRA).

¹¹ 557 U.S. 193 (2009).

¹² *Shelby Cty.*, 133 S. Ct. at 2622 n.1.

¹³ See *NAMUDNO*, 557 U.S. at 204 (“The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. . . . That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test [congruent and proportional or rational basis].” (citations omitted)).

¹⁴ *Shelby Cty.*, 133 S. Ct. at 2623-24 (explaining that VRA departs from “basic principles” of equal sovereignty).

determining whether a remedy is appropriate under the Court's framework in *City of Boerne v. Flores*.¹⁵ The analytical framework of *City of Boerne*,¹⁶ which held that Congress can adopt only those remedies that are congruent and proportional to the harm to be addressed when acting pursuant to the Fourteenth Amendment, was intended to cabin federal power to only remedial fixes in order to protect state sovereignty.¹⁷ In engaging in this analysis, the Court assessed the strength of the legislative record to determine if Congress was trying to address a pattern of unconstitutional behavior on the part of the states.¹⁸ Since *City of Boerne*, the Court has been inconsistent in deciding whether the presence of multiple sources of constitutional authorization affects the means/ends analysis required by that decision.¹⁹

For its part, *City of Boerne* cited the VRA as an appropriate use of congressional power under the Fourteenth Amendment, but ignored that Congress had also enacted the Act pursuant to the Fifteenth Amendment.²⁰ Unlike the Fourteenth Amendment, the Fifteenth Amendment specifically addresses the right to vote free of racial discrimination and can serve as the predicate for far reaching congressional legislation designed to ferret out such discrimination.²¹ It is unclear if *City of Boerne* also applies to the Fifteenth Amendment, which has not perfectly paralleled the Fourteenth Amendment with respect to its development in the caselaw.²²

Congress can reduce the risk that the Supreme Court will invalidate the coverage formula of the VRA by explicitly relying on provisions, like the Elections Clause, that bolster federal power when coupled with Congress' enforcement authority under the Fourteenth and Fifteenth Amendments. The Elections Clause, standing alone, is insufficient to support the full scope of the VRA because the Clause is limited to federal elections, but a legislative record showing that states engaged in discriminatory behavior in violation of the Fourteenth and Fifteenth Amendments, or of any federal voting rights law enacted pursuant to their provisions, becomes more compelling in light of the federal interest in the health and vitality of congressional elections that the Clause protects.

The Elections Clause has its own unique set of values that place a premium on congressional sovereignty, and Congress has, on occasion, imposed substantive requirements that states must follow in structuring federal elections.²³ While the Clause is not frequently invoked in order to

¹⁵ See *City of Boerne v. Flores*, 521 U.S. 507 (1997). At the very least, the presence of an additional source of power arguably expands the universe of means that Congress can employ in furthering the ends of the statute. Cf. *Gonzales v. Raich*, 545 U.S. 1, 38 (2005) (Scalia, J., concurring) ("As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give 'Congress . . . the authority to regulate the internal commerce of a State, as such,' but it does allow Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market, 'although intrastate transactions . . . may thereby be controlled.'" (citations omitted)).

¹⁶ 521 U.S. 507 (1997).

¹⁷ *Id.* at 508 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

¹⁸ *Id.* at 530-32 (searching legislative history for patterns of religious discrimination to justify federal action).

¹⁹ See Tolson, *Spectrum of Congressional Authority*, *supra* note 5.

²⁰ *City of Boerne*, 521 U.S. at 532-33 (discussing Congress's enforcement power to enact VRA).

²¹ See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980).

²² Compare *James v. Bowman*, 190 U.S. 127, 136-39 (1903) (explaining that Fifteenth Amendment is similar to Fourteenth Amendment), with *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (holding that Fourteenth Amendment only reaches discriminatory state action). But see *Ex Parte Yarbrough*, 110 U.S. 651, 665 (1884) (explaining that Fifteenth Amendment reaches private action and limits the power of states).

²³ For example, Congress enacted the Help America Vote Act of 2002 ("HAVA"), 52 U.S.C. §§ 21001 et seq., in response to the controversy over the 2000 election and the statute sets minimum standards for election administration, primarily dealing with upgrades for voting technology. The National Voter Registration Act ("NVRA"), 52 U.S.C. §§

nationalize election administration or to limit state power to a particular substantive area, Congress assumes that well-functioning states will fill in most of the blanks with respect to the nuts and bolts of federal elections, but has been willing to impose uniformity if the need arises. Indeed, the overarching purpose of the Clause is to ensure the continued existence and legitimacy of federal elections, so the text empowers Congress to engage in the quintessentially anti-federalism action of displacing state law and commandeering state officials towards achieving this end.²⁴

The Elections Clause avoids many of the traps that have constrained congressional power under the Reconstruction Amendments. By depriving states of the final policymaking authority that is the hallmark of sovereignty, the Clause is impervious to the federalism concerns that have constrained congressional action under the Fourteenth and Fifteenth Amendments.²⁵ The Clause is also distinct from these provisions because the Clause does not require any evidence of discriminatory intent in order for Congress to intervene, providing further justification for a legislative record that shows that states acted with discriminatory effect or in ways that otherwise abridge or deny the right to vote. Additionally, there is no Eleventh Amendment bar to abrogate state sovereign immunity under the Elections Clause, like that which exists under the Commerce Clause.²⁶ Congress can also “make” law under the Elections Clause, which includes the authority to legislate independent of any action on the part of the states in order to ensure that federal elections are properly administered.²⁷ The very structure of the Elections Clause complicates the federalism narrative that scholars and courts embrace in describing our election system because federalism is not a barrier to aggressive federal action under the Clause seeking to protect the fundamental right to vote in federal elections.²⁸

20503, governs voter registration for federal elections, making it easier for individuals to register at certain state offices including DMVs (which is why the statute is referred to as the “motor voter law”).

²⁴ See Tolson, *Elections Clause Federalism*, *supra* note 5.

²⁵ Compare *Ariz. Inter Tribal*, 133 S. Ct. at 2253 (“The Clause’s substantive scope is broad. ‘Times, Places, and Manner,’ we have written, are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections.’”); *McConnell v. FEC*, 540 U.S. 93, 160, 187 (2003) (upholding ban on soft money as valid use of Congress’s authority under Elections Clause and rejecting argument that ban interfered with states’ authority to regulate their elections) with *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (striking down provisions of the Age Discrimination in Employment Act on grounds that evidence relied on by Congress was too anecdotal and too geographically narrow to justify extension of ADEA to all of states), and *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637-40 (1999) (accepting that state infringement of patents could violate Fourteenth Amendment, but invalidating Patent Remedy Act because Congress did not show that states had been engaging in this behavior).

²⁶ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.”). Under the Elections Clause, Congress can abrogate state sovereign immunity because the Elections Clause implicates federal rights protected by both Article I, Section 2 and the Equal Protection Clause that do not predate the existence of the Union such that the states have some preexisting claim to state sovereignty. *Cf.* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (rejecting the State’s argument that it could add congressional qualifications because the “power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States”).

²⁷ See Tolson, *Election Law Federalism*, *supra* note 5, at 2218 (“Congress has commandeered both state officials and state offices by imposing affirmative obligations on the states to implement the NVRA. Under section 10 of that statute, each state must designate a state officer as the chief state election official responsible for coordinating the requirements of the Act. The NVRA also requires each state to designate as voter registration agencies all offices in the state that provide either public assistance or state-funded programs primarily engaged in providing services to persons with disabilities.”) (internal citations omitted).

²⁸ See *id.* at 2212 (“[B]oth the Supreme Court and legal scholars tend to discuss the Clause in federalism terms, characterizing the exercise of federal power as a rare and somewhat unwelcome intrusion on the states’ relatively broad authority to legislate with respect to federal elections.”).

The historical record supports this broad reading of the Elections Clause. During Reconstruction, the Supreme Court adopted a narrow interpretation of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, resisting the notion that these Amendments changed the fabric of our federal system.²⁹ But that Court expressed a surprising willingness to enforce Congress's broad authority under the Elections Clause, contradicting the traditional narrative that all federal voting rights legislation enacted during this period was constrained by federalism. The Enforcement Act of 1870, typically categorized as Fifteenth Amendment legislation but also enacted pursuant to the Elections Clause, criminalized violations of state law that governed federal elections.³⁰ This exposed state officials to dual liability, creating a category of nationally protected rights, and, in the process, significantly expanding federal authority. In *Ex Parte Siebold* and *Ex Parte Clarke*, the Supreme Court upheld the constitutionality of the Act, explicitly relying on the Elections Clause.

Similarly, the Enforcement Act of 1871, which was also enacted pursuant to these same sources of authority, went further than its counterpart enacted a year earlier, instituting a system of federal oversight for congressional elections that would ferret out both voter fraud and behavior prohibited by the 1870 Act that unlawfully prevented individuals from voting.³¹ As this legislation shows, Congress has enacted, and the Supreme Court has generally endorsed, broad federal legislation under the Elections Clause and the Reconstruction Amendments to regulate federal elections.

Congress has Limited, but Still Substantial, Authority to Regulate State Elections and Voter Qualification Standards under the Elections Clause and the Fourteenth and Fifteenth Amendments

More difficult constitutional questions surround the relationship between the states and the federal government over the regulation of state elections and voter qualification standards. The states, consistent with their authority under the Tenth Amendment, have primary authority over state elections.³² States also have authority, under Article I, Section 2 to set voter qualifications for federal elections. Given this delegation of authority to the states, it is uncontroversial that federal power is at its maximum when Congress seeks to regulate federal elections and at its lowest ebb when it seeks to regulate state elections or nondiscriminatory voter qualification standards. But much of the controversy arises in the "gray" area, where federal election regulations can derive from more than one source of constitutional authority, leaving federal power ambiguous or uncertain, and otherwise permissible state laws can have a deleterious effect on federal elections, even if such laws are

²⁹ See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 556 (1876) ("[R]ight to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."); *United States v. Reese*, 92 U.S. 214, 221-22 (1876) (holding that the Fifteenth Amendment does not extend Congress's power to grant suffrage); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1872) (stating that the adoption of the Fourteenth and Fifteenth Amendments did not change the balance of state and federal power).

³⁰ See Enforcement Act of 1870, § 22, ch. 114, 16 Stat. 140, 145 (1870).

³¹ See Enforcement Act of 1871, ch. 99, 16 Stat. 433, 436 (incorporating Sec. 20 of the 1870 Enforcement Act); see also *Id.* § 2 ("[W]henever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens . . . of different political parties . . . who shall be designated as supervisors of election."); *Id.* at § 5 ("That it shall be the duty of the said supervisors of election, and they, and each of them, are hereby authorized and required . . . to challenge any vote offered by any person whose legal qualifications the supervisors . . . shall doubt"); *Id.* at § 8 (designating marshalls to protect the election supervisors and to arrest individuals who violate the provisions of the Act).

³² *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) ("[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." (quoting *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892))); see also *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2263 (noting that the states, not Congress, have the authority to set voter qualifications for state and federal elections).

nondiscriminatory.³³ Instead of clarifying the “gray,” the Court has simply deferred to the states on federalism grounds, even if such deference is unwarranted.³⁴

State power in this area is constrained by the Fourteenth and Fifteenth Amendments, which give the federal government authority to regulate voter qualifications and state elections, and the Elections Clause can supplement federal power in this domain as well.³⁵ These constitutional amendments recognize that the states had “by degrees subvert[ed] the Constitution” through their sole control over the qualifications of electors, and stand as explicit limitations on state authority.³⁶ Thus, the Court has interpreted Section 1 of the Fourteenth Amendment as encompassing a fundamental federal interest in voting; Section 2 of the Fourteenth Amendment allows Congress to reduce a state’s representation if abridges the right to vote for almost any reason; and Section 1 of the Fifteenth Amendment similarly prohibits states from abridging the right to vote on the basis of race. These amendments, and several others, give Congress substantial authority over voter qualifications, and effectively augment Congress’s power under the Elections Clause.³⁷

Because of this overlapping authority, federal power to make or alter the times, places, and manner of federal elections, protect the right to vote, or remedy racial discrimination in voting is often in tension with the state’s control over voter qualifications or over state elections more generally.

The Court has recognized the difficulty of delineating the “manner” regulations that Congress can reach from the nondiscriminatory voter qualification standards that are within the domain of states. For example, voter registration stands as a paradigmatic hybrid regulation that is both procedural and inextricably linked to voter qualification standards, but the Supreme Court, with little explanation, has held that Congress can regulate voter registration under the Elections Clause.³⁸ In *Arizona v. Inter Tribal Council of Arizona*, the Court held that an Arizona law that required individuals to present documentary proof of citizenship in order to register to vote in state and federal elections was preempted by the NVRA, which only required affirmation of citizenship status, not documentary proof. The Court held that the NVRA required states to “accept and use” the federal form as a “complete and sufficient registration application” and preempted the Arizona law that would require additional documentation.³⁹

Notably, the Court rejected arguments by the dissenting justices that the majority’s interpretation of

³³ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress can regulate constitutional behavior in order to deter constitutional violations). *But see Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2625 (2013) (criticizing Congress for regulating permissible state action in order to deter voting rights violations).

³⁴ See *Shelby Cty.*, 133 S. Ct. at 2627–30 (invalidating section 4(b) of the VRA based in part on tension between the VRA and traditional federalism principles).

³⁵ Besides the Amendments’ explicit nondiscrimination principle, another basis for federal intervention in state elections is where, for example, “the election process itself reaches the point of patent and fundamental unfairness” and therefore implicates the Due Process Clause of the Fourteenth Amendment. *Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (internal quotation marks omitted); see also *Bush v. Gore*, 531 U.S. 1060 (2000). Otherwise, states retain control over their own elections.

³⁶ Notes of James Madison (Aug. 10, 1787), in II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 248, 250 (Max Farrand ed., rev. ed. 1937) (statement of James Madison), http://avalon.law.yale.edu/18th_century/debates_810.asp (arguing that voter qualifications should be fixed by the Constitution because of the concern that states could use this control to undermine the Constitution and empower political factions).

³⁷ *Arizona Inter Tribal*, 133 S. Ct. at 2263.

³⁸ See *id.* at 2253 (noting the “broad” scope of Elections Clause, which includes “regulations relating to ‘registration’”); *Cook v. Gralike*, 531 U.S. 510, 527 (2001) (finding that Missouri’s ballot annotation “unequivocally is not a time or place regulation,” but showing less certainty as to whether it is a manner regulation).

³⁹ *Id.* at 2254, 2257 (“We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is ‘inconsistent with’ the NVRA’s mandate . . .”).

the NVRA interfered with the State's power to enforce its proof-of-citizenship requirement, which is a voter qualification standard within the state's constitutional authority to regulate.⁴⁰ Justice Thomas argued that states have the sole authority to set voter qualifications and the practical effect of preempting the Arizona law is to deprive Arizona of the ability to determine if its voter qualification standards are met.⁴¹ Nevertheless, when regulations like voter registration implicate both voter qualifications and the manner of federal elections, courts have been predisposed to sustain federal power under the Elections Clause so that states cannot use their power over voter qualifications to undermine the legitimacy and health of federal elections.

For example, in 2014 and 2015, Kansas—along with Alabama and Georgia—again requested that a proof of citizenship requirement be added to the federal form's state-specific instructions.⁴² Surprisingly, the Election Assistance Commission, the body responsible for fielding these requests, approved the changes to the federal form at the behest of its new executive director, Brian Newby.⁴³ Residents and organizations in these states filed suit.⁴⁴ On appeal, the Court of Appeals for the D.C. Circuit reversed Director Newby's decision.⁴⁵ While the court acknowledged that its decision would not affect proof-of-citizenship requirements that apply to state and local elections, the court recognized that these requirements made it extremely difficult for organizations to register voters for federal elections as well, leading it to conclude that Director Newby had acted inappropriately in approving the request without requiring the requesting states to come forward with actual proof of significant noncitizen voting to justify their regulations.⁴⁶

As the *Arizona Inter Tribal* litigation shows, there is a line drawing problem that exists between voter qualification standards and manner regulations, and the artificial boundary between the two does not prevent Congress from using its authority under the Elections Clause to address a state's attempt to purposely circumscribe its electorate through its authority over voter qualifications. As I have argued in prior work, there are limited circumstances in which Congress can reach voter qualifications under the Elections Clause: when states implement voter qualification standards that unduly circumscribe the federal electorate, as with proof of citizenship requirements, or, alternatively, fail to set or "under-legislate" with respect to voter qualifications for its own elections.

Congress has attempted to address "under-legislation" with the Uniformed and Overseas Citizens

⁴⁰ *Id.* at 2262 (Thomas, J., dissenting).

⁴¹ *Id.* at 2262, 2264 ("[B]oth the plain text and the history of the Voter Qualifications Clause, U.S. Const., art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied. To avoid substantial constitutional problems created by interpreting § 1973gg-4(a)(1) to permit Congress to effectively countermand this authority, I would construe the law as only requiring Arizona to accept and use the form as part of its voter registration process, leaving the State free to request whatever additional information it determines is necessary to ensure that voters meet the qualifications it has the constitutional authority to establish. Under this interpretation, Arizona did 'accept and use' the federal form.").

⁴² *League of Women Voters of U.S. v. Newby*, 195 F. Supp. 3d 80, 85-86 (D.D.C. 2016), *rev'd*, 838 F.3d 1 (D.C. Cir. 2016).

⁴³ *Id.* at 86 (indicating that Newby approved the states' requests before EAC commissioners formally considered or voted on the requests).

⁴⁴ *Id.* at 88-95 (holding that, per requirements for preliminary injunctive relief, the organizations failed to demonstrate irreparable harm).

⁴⁵ *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 14 (D.C. Cir. 2016).

⁴⁶ *Id.* at 8. To understand how these difficulties were exacerbated, see *Belenky v. Kobach*, No. 2013CV1331, 2016 WL 8293871, at *5-6 (D. Kan. Jan. 15, 2016), which held that Kansas law required qualified federal form applicants to be registered for all elections, and *Kobach v. U.S. Election Assistance Commission*, 6 F. Supp. 3d 1252, 1257 (D. Kan.), *rev'd*, 772 F.3d 1183 (10th Cir. 2014), which allowed the state proof-of-citizenship requirements to be used with the federal form.

Absentee Voting Act (“UOCAVA”),⁴⁷ which is Elections Clause legislation that created a uniform federal ballot specifically for use by a category of voters overlooked by state law—military personnel—that incorporated state voter qualification standards to determine which personnel were entitled to vote.⁴⁸ The earliest attempts to protect military voters revealed that the source of authority pursuant to which Congress could enfranchise these individuals would be a point of contention.⁴⁹ When this issue first arose, the Supreme Court had not decided *Harper v. Virginia State Board of Elections*,⁵⁰ so voting was not yet a fundamental right under the Equal Protection Clause;⁵¹ there was no record of racial discrimination in voting such that the Fifteenth Amendment was implicated;⁵² nor had the Court decided that state laws prohibiting military personnel from voting were unconstitutional.⁵³ In 1952, President Harry Truman wrote a letter to Congress, recognizing the difficulties of enacting a uniform federal regime for overseas voting, but noting that Congress had the authority to act since the states had shirked their duty:

I agree with the committee that, in spite of the obvious difficulties in the use of the Federal ballot, the Congress should not shrink from accepting its responsibility and exercising its constitutional powers to give soldiers the right to vote where the States fail to do so. Of course, if prompt action is taken by the States, as it should be, it may be possible to avoid the use of a Federal ballot altogether. . . . Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.⁵⁴

Over thirty years after Truman’s letter, some states still did not provide for absentee voting in the manner that UOCAVA later required.⁵⁵ As applied to those states, UOCAVA incorporated state

⁴⁷ 52 U.S.C. §§ 20301-20311 (2018). In the House report, representatives argued that they could impose this uniform requirement on the states because of their authority under the Elections Clause. See *Uniformed and Overseas Citizens Absentee Voting Hearing on H.R. 4393 Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 99th Cong. 66 (1986) (statement of Rep. William Thomas) [hereinafter *UOCAVA Hearings*] (“But my concern is that one possible solution is viewed as having the Federal Government impose a degree of uniformity on the States, which then makes it easier to explain what the State procedure is because they’re all the same. My concern is that if the States want to structure their election procedure differently, I think they have every right to. In fact, I don’t think, beyond certain requirements, that we ought to get into the ‘who’ aspect of the voting. But time, place, and manner, to a very great degree, we have that ability under the Constitution.”).

⁴⁸ 52 U.S.C. § 20310 (defining eligible voters as those who, notwithstanding their absence, would otherwise be qualified to vote in last place in which they resided).

⁴⁹ In 1942, Congress used its war powers to adopt the Soldier Voting Act of 1942, which required states to allow active military personnel to vote in federal elections regardless of the voter qualification standards of their home states. See KEVIN J. COLEMAN, CONG. RESEARCH SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 1-2 (2015). In 1944, reluctant to rely on its war power as the conflict was nearing its end, Congress amended the 1942 Act to recommend, but not require, that military voters be allowed to participate in federal elections. *Id.* at 2. In 1955, Congress adopted the Federal Voting Assistance Act, but this law similarly recommended, but did not require, states to allow military personnel to register and vote absentee. See Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584.

⁵⁰ 383 U.S. 663 (1966).

⁵¹ See Franita Tolson, *Offering a New Vision for Equal Protection: The Story of Harper v. Virginia State Board of Elections*, in ELECTION LAW STORIES 63, 64 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

⁵² See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that literacy test requirement for voting was not racially discriminatory).

⁵³ Compare *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (finding Tennessee’s durational residence laws unconstitutional), with *Tullier v. Giordano*, 265 F.2d 1, 4 (5th Cir. 1959) (dismissing voter’s lawsuit against parish for failing to register him to vote because the denial “[did] not constitute such ‘purposeful discrimination between persons or classes of persons’ as would amount to a denial of the equal protection of the laws”).

⁵⁴ *UOCAVA Hearings*, *supra* note 47, at 56 (letter from President Truman to House Committee on Elections, March 22, 1952).

⁵⁵ See *id.* at 71 (letter from Col. Charles C. Partridge to Rep. Al Swift) (noting that “most counties in most states fall short of the 35-day standard which the Department of Defense has recommended as representing the *minimum* time necessary for an absentee ballot to go from a local election official to an overseas voter and back”); *id.* at 60 (article by

voter qualification standards, allowing only those members of the military qualified to vote under their respective state laws to utilize the federal absentee ballot.⁵⁶ For those states that had mechanisms in place for absentee military voting, the statute did not displace these regimes.⁵⁷ The practical effect of UOCAVA, through its incorporation of state voter qualification standards for a category of voters overlooked or insufficiently protected by state law, was to create a new category of voters for purposes of federal elections.⁵⁸

UOCAVA created a voter qualification standard for federal elections, illustrating that the states' authority under Article I, Section 2 cannot be completely segregated from federal power. As the debate over both proof of citizenship requirements and military voters shows, states often used their authority under the Clause to circumscribe the electorate, sometimes deliberately and, other times, through oversight. For this reason, an overly formalistic distinction between voter qualification standards and procedural regulations is not only ahistorical, but also impossible to maintain, thereby justifying federal regulation of voter qualification standards under the Clause in some circumstances.

It is also difficult to insulate procedural regulations that govern state elections from the reach of federal power for many of the same reasons. Not only do voters in state and federal elections have the same qualifications, but states and local governments use many of the same practices in federal elections as they do for state and local elections. For example, voters are registered simultaneously in federal, state, and local elections in most states. Voters also go to the same polling place, at the same time, and vote on one ballot for federal, state, and local elections in most places. As a result, a voting change affecting state and local elections will also affect federal elections. If a voting change will have the effect of undermining the health of federal elections, then the Elections Clause provides sufficient authority for Congress to regulate those changes.

The VRAA as a Constitutional Exercise of Congressional Authority under the Elections Clause and the Fourteenth and Fifteenth Amendments

The VRAA, if enacted pursuant to the Elections Clause and the Reconstruction Amendments with a legislative record that establishes that states have in engaged in recent voting practices that are motivated with discriminatory intent and/or have discriminatory effect, addresses all of the objections lodged against the prior preclearance regime by the Supreme Court in *Shelby County v.*

Jody Powell, *Fight Waged to Guarantee the Right to Vote*, DALLAS TIMES HERALD, Nov. 12, 1983) ("State election laws in most of the 50 states can, and do, deprive many Americans who are serving their country of the right to help select its government. The culprit is the way absentee ballots are handled. Most states send them out so late and require them to be returned so early that voting is a practical impossibility for Americans stationed overseas . . .").

⁵⁶ 52 U.S.C. § 20302(a)(2) (2018) (requiring states to accept absentee ballots from "otherwise valid" military voters).

⁵⁷ *Id.* § 20303(g) ("A State is not required to permit the use of the Federal write-in absentee ballot, if, on and after August 28th, 1986, the State has in effect a law providing that – (1) a State absentee ballot is required to be available to any voter . . . at least 90 days before the . . . election . . . involved; and (2) a State absentee ballot is required to be available to any voter . . . as soon as the official list of candidates . . . is complete."); *see also UOCAVA Hearings*, *supra* note 47, at 90 (testimony of John Pearson, Office of the Secretary of State, Washington) ("As I mentioned earlier in my testimony, we enthusiastically support any efforts that you can make to ensure that service to one's country does not result in an inability to participate in the decisionmaking process. We would ask, however, that Congress keep in mind that some States, such as ours, have already taken steps in this area and that these State efforts should not be superseded by Federal law that might be more restrictive in nature."); *id.* at 80 (testimony of Julia Tashjian, Secretary of State, Connecticut) ("[W]e question the necessity for the imposition of a Federal write-in ballot in States which, like Connecticut, make write-in absentee ballots available to their overseas electors well before the availability of regular absentee ballots. The imposition of an additional early write-in ballot in Connecticut will invite confusion and add to the complexity of administering the absentee voting process.").

⁵⁸ *Cf. Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 170 (1874) (holding that there are no voters of federal creation).

Holder. The Court was concerned that preclearance for covered jurisdictions was determined based on decades old practices, such as literacy tests, and outdated information, such as 1960s and 1970s era voter registration rates, rather than current voting rights violations. The VRAA links preclearance to voting rights violations committed in the state in recent decades, the existence of which illustrates that the state has failed in its obligation to protect the right to vote such that federal intervention is required under the Fourteenth and Fifteenth Amendments.⁵⁹ Under the proposed formula, an entire state can be covered for 25 years if fifteen or more voting violations occur within the state during this time period. The formula also imposes liability where the state itself is an active participant in voting rights violations, further cementing the link between current voting rights violations and the remedy of preclearance. Coverage would be imposed for ten or more violations if the state itself is guilty of at least one voting rights violation, consistent with the Court's recognition of the constitutional significance of discriminatory behavior in which the state is an active participant and Congress's power to deter such behavior.⁶⁰

The formula also allows preclearance to be tailored to a specific political subdivision within the state if that subdivision, rather than the state, commits the violation. In *Shelby County*, the Court expressed concerns about the scope of the prior formula, which singled out southern jurisdictions by requiring them to preclear all voting laws—even those that are constitutional—but not equally guilty northern states.⁶¹ The proposed formula is much more tailored than its predecessor, subjecting a political subdivision to preclearance if it commits 3 or more violations in a 25 year period, regardless of its location. In addition, coverage is rolling, so jurisdictions can be removed or added over time.

The proposed VRAA also addresses constitutional objections that seek to challenge congressional power to premise liability on violations of federal voting rights laws that, unlike constitutional claims, do not require the plaintiff to establish the presence of discriminatory intent.⁶² The proposed coverage formula defines a voting rights violation in several ways including a determination by a court that a state or political subdivision violated federal voting rights law, or a denial of preclearance under section 5 of the Voting Rights Act. Neither sections 2 or 5 of the Act require a showing of discriminatory intent for their terms to be violated. Similarly, the VRAA proposes changes to section 3(c), which would allow courts to bail in jurisdictions upon a finding that the jurisdiction has adopted voting changes that are discriminatory in effect.

Despite Congress's interest in preventing behavior that could circumvent the protections of the Amendments, it is questionable after *Shelby County* if the presence of discriminatory effect—rather

⁵⁹ See *United States v. Morrison*, 529 U.S. 598 (2000) (arguing that Congress can remedy discriminatory conduct where the state has failed to provide adequate state remedies).

⁶⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.”) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)).

⁶¹ *Shelby County v. Holder*, 133 S.Ct. 2612, 2616 (2013) (noting that “despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.”).

⁶² See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 317 (5th Cir. 2015) (*en banc*) (Clement, J., dissenting) (suggesting that the majority’s application of section 2 rendered that statute constitutionally suspect because “a wide swath of racially neutral election measures will be subject to challenge, a previously unthinkable result under the Fourteenth Amendment and the Constitution’s federalist design.”).

than intent—is sufficient to justify voting rights legislation that distinguishes between the sovereign states.⁶³ In assessing the legislative record underlying the VRA, the majority noted that, “Regardless of how to look at the record, however, 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,” suggesting that Congress has a steep hill to climb should it seek to reauthorize a coverage formula relying on some combination of discriminatory intent and effects (both in the legislative record and as a basis of liability).⁶⁴

However, the Elections Clause, when coupled with the Fourteenth and Fifteenth Amendments, provides sufficient constitutional justification for a regime that premises liability on both discriminatory intent and effects.⁶⁵ Many of the regulations that have been found to violate section 2 of the VRA on the grounds that they have a discriminatory effect, such as voter identification laws⁶⁶ and the use of at-large districting to dilute minority voting power,⁶⁷ would deter voting and turnout in federal elections, thereby undermining the health and vitality of federal elections that is of core concern to the Elections Clause. Importantly, there is no requirement of discriminatory intent under the Elections Clause, which decreases the amount of intentionally discriminatory behavior that Congress has to amass in compiling the legislative record for the VRAA.

A preclearance regime based on a mix of discriminatory intent and effect is constitutionally appropriate for another reason. While litigation under section 2 and preclearance under sections 4(b) and 5 made it easier to hold states responsible for deleterious behavior than if suing under the Constitution,⁶⁸ the effects-based statutory regime gave the *Shelby County* Court cover to claim that racism no longer existed.⁶⁹ In *Shelby County*, the Court touted the progress in African-American voter registration and turnout that has been achieved in the years since the Voting Rights Act became law, implying that intentional discrimination was a thing of the past.

However, a finding that a state acted with discriminatory effect is not indicative of the absence of discriminatory intent. Since 2013, courts have found that states acted with discriminatory intent in an increasing number of cases,⁷⁰ but in some instances, courts will not find that a jurisdiction engaged in intentional discrimination, even if there is evidence of intent, because federal voting rights law does not require that showing. In *Veasey v. Abbott*, for example, a panel of the Fifth Circuit Court of Appeals invalidated Texas’s voter identification law as a violation of section 2 of the

⁶³ Compare *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (“The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”), with *NAMUDNO*, 557 U.S. 193, 203 (2009) (“[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”).

⁶⁴ *Shelby County*, 133 S.Ct. at 2617.

⁶⁵ See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980) (stating that Congress has authority to address state action that has a discriminatory effect in enforcing the Fifteenth Amendment).

⁶⁶ *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

⁶⁷ *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017).

⁶⁸ See, e.g., *Bartlett v. Strickland*, 556 U.S. 1 (2009) (stating that section 2 did not protect districts that were less than fifty percent majority-minority); *Reno v. Bossier Parish*, 528 U.S. 320 (2000) (holding that the government had to preclear a redistricting plan enacted with discriminatory, but nonretrogressive, purpose).

⁶⁹ *Shelby Cty.*, 133 S.Ct. 2612 (2013).

⁷⁰ Letter from Sherilyn Ifill to Bob Goodlatte, Request for a Hearing on the Restoration of the Voting Rights Act of 1965, Sept. 7, 2017 (discussing ten instances in which lower courts have found that jurisdictions acted with intentional discrimination against minority voters).

Voting Rights Act, but the district court had found wide ranging evidence of intentional discrimination on the part of the state.⁷¹ Both the Fifth Circuit panel and the *en banc* Fifth Circuit that later reviewed the case also shied away from relying on an intentional discrimination framework, even though they concluded that there might be enough evidence to support a finding of invidious purpose. Both panels concluded that the district court judge erred in analyzing the intent evidence, and remanded with instructions to reassess it.⁷² The Court of Appeals was much more comfortable, for this reason, with assessing the section 2 violation, which relieved plaintiffs of the obligation to prove discriminatory intent.

The VRAA recognizes the reluctance that courts have had in the last three decades of decreeing states guilty of intentional discrimination by premising preclearance on violation of federal law, regardless of motivation. This approach is consistent with Congress's constitutional prerogative, as the Supreme Court has long recognized, to both remedy and deter constitutional violations under the Fourteenth and Fifteenth Amendments. The presence of additional sources of authority gives Congress greater leeway on the deterrence side, especially since the Elections Clause, with its focus on maintaining the legitimacy and health of federal elections, does not require any finding that states act with discriminatory intent to justify federal intervention. With the authority granted by these provisions, Congress's constitutional authority to enact the VRAA is substantial.

Thank you for the opportunity to discuss my research. I welcome any questions that you may have.

⁷¹ *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex.), *stay granted*, 769 F.3d 890 (5th Cir. 2014), *aff'd in part, vacated in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

⁷² *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2015) (*en banc*), *cert. denied*, 137 S. Ct. 612 (2017) ("In sum, although some of the evidence on which the district court relied was infirm, there remains evidence to support a finding that the cloak of ballot integrity could be hiding a more invidious purpose.... [S]ince there is more than one way to decide this case, and the right court to make those findings is the district court, we must remand....").

Mr. RASKIN. Perfect. Thank you, Professor Tolson.

Debo Adebile is a partner at WilmerHale, a member of the U.S. Commission on Civil Rights. He is testifying here today in his personal capacity. At WilmerHale, he co-chairs the anti-discrimination practice. He has served up on the Hill as senior counsel for the Senate Judiciary Committee, advising then committee chair Senator Leahy on a number of issues, including voting rights.

He has worked also for more than a decade for the NAACP Legal Defense and Educational Fund and was its chief litigator. He argued *Shelby County v. Holder* before the Supreme Court in February of 2013.

We are delighted to have you, and you are recognized for 5 minutes.

STATEMENT OF DEBO P. ADEGBILE

Mr. ADEGBILE. Thank you, Mr. Chair, Ranking Member, and members of the committee. It is good to be with you here today. As you have heard, I am here today as a voting rights litigator, a citizen, and somebody who is concerned about the future of voting rights in America, and in my personal capacity and not in any other.

Today I would like to talk to you about and focus my testimony on two broad points. The first is the impact the Court's decision in *Shelby County* has had on our democracy, what we lost as a result of that decision.

The preclearance protections of the Voting Rights Act of 1965 brought profound benefits to American democracy. In many ways, it was the VRA that helped the Nation realize the promise of our democracy for the first time in our history.

Of course, much work remains to be done to improve and guard our democracy. No single law or policy has been more effective than preclearance in guarding equal voting rights and blocking and deterring the scourge of racial discrimination in elections.

We know this because this Congress has passed a number of other statutes previously that did not get the job done. In a sense, the preclearance process served as a sort of democracy checkpoint, keeping the road to the ballot box ahead safe by preventing discrimination from risking serious harm.

Both cars stopped at checkpoints are, of course, not violating any law, and there is an incidental burden imposed on those on the road. But checkpoints stop some cars that are very dangerous. We are glad they do. And knowledge of checkpoints may deter reckless driving.

But our democracy checkpoint is gone, and *Shelby County* is, unfortunately, regarded by some as a green light to impose discriminatory voting measures. The adverse effects are felt inside and, I would argue, outside of the covered jurisdictions.

Inside the formally covered jurisdictions, measures that would have otherwise been blocked, in some cases that had been blocked, went into effect in the absence of preimplementation protection. More broadly, outside the covered jurisdictions, *Shelby County* has had a signaling effect that the Federal Government was in retreat regarding minority voting protections.

We have lost a law that prevented scores of discriminatory laws from going into effect. We have lost a law that gave us transparency and accountability that comes from having a system where election changes are scrutinized before they take effect. We lost the deterrent effects of preclearance, and we lost the signal that preclearance sent that our national government remains what Charles Sumner called the “custodian of freedom” and stands willing and able to stop local governments from subordinating minority groups in the political process.

There is another important aspect of voting discrimination to keep foremost in mind. Voting discrimination usually occurs through laws and practices that affect large numbers of voters, as we have heard today. A single discriminatory polling place change or redistricting map can adversely affect thousands or tens of thousands of voters. And once the benefits of incumbency vest, in many cases it is difficult for litigation to undo or rectify the harm.

Second, I want to address some potential constitutional questions. When Congress reauthorized the VRA in 2006, it legislated against a backdrop of an unbroken line of Supreme Court authority holding in case after case that the VRA’s preclearance protections were constitutional. Indeed, when the Civil War ended, the Reconstruction amendments provided Congress with substantial affirmative power to finally enforce the founding principle of equality.

Those amendments provided new and specific authority for this body to act to ensure that voting rights are protected, stating that Congress “shall have the power to enforce this article by appropriate legislation.” The Elections Clause, as we have heard, is another source of congressional authority.

Those powers remain undiminished by the Shelby County decision, and this body holds the power constitutionally vested in it expressly to continue the fight to protect voters through prophylactic measures.

The Supreme Court decision in Shelby changes none of that, and I argue that the coverage contemplated in the VRAA is responsive to the current conditions guidance that the Court gave us in Shelby. The Supreme Court invited a new measure, a new coverage formula, and that is what this body intends to do with the VRAA.

Importantly, Section 3 lays out a new coverage standard that replaces the old one. The basic rule is that if there are contemporary and persistent voting rights violations, that a State or county meets a threshold, then you will be subject to preclearance, but if you improve, you can change your status and get out of preclearance.

I close with a larger thought about how we should look at all of this. As Congress approaches this legislation, it does so with the knowledge that we are decades away from 1965 and in the tumultuous wake of Shelby. As is the case with the Shelby County opinion, we are too often told that things in America have changed. Thankfully, that is true in many significant ways. But the success of the Voting Rights Act is best understood not as an end point but as a beginning on the road to minority inclusion.

Thank you.

[The statement of Mr. Adegbile follows:]

I. INTRODUCTION

My name is Debo P. Adegbile. I am here in my personal capacity as a citizen, an attorney, a voting rights litigator for several decades and not in any other role. Thank you for inviting me to testify today about an issue that is central to our democracy: Restoring one of the core provisions of the Voting Rights Act.

For more than twelve years I was a litigator at the NAACP Legal Defense Fund, Inc. (“LDF”) and I served in various positions there, including several years as the Director of Litigation. While at LDF, I twice defended the Voting Rights Act from constitutional attack before the United States Supreme Court. First, in 2008 in the *Northwest Austin Municipal Utility District v. Holder* case, and then, in 2013, in the *Shelby County v. Holder* case.

I also had the honor of testifying before this body and before the United States Senate Judiciary Committee Subcommittee on the Constitution in 2006, the last time the Voting Rights Act was reauthorized. That year—not even 15 years ago—an overwhelming bipartisan majority of this House voted to reauthorize the Voting Rights Act, including the Sections 4 and 5 preclearance process that I will focus on today. A unanimous Senate then supported the bill, and President George W. Bush signed it into law.

I want to focus my testimony today on two things.

First, the impact the Court's decision in *Shelby County* has had on our democracy: What we lost as a result of that decision, and what I contend the foreseeable results have been.

The preclearance protections created by the 1965 VRA brought profound changes—and profound benefits—to American Democracy. In many ways, it was the VRA that helped make the promise of *true* American democracy possible, for the first time in our history.¹ To be sure, there remains much more work to be done to perfect our Union. But the VRA made a huge difference. And no single law or policy has been more effective than preclearance in guarding equal voting rights and blocking and deterring the scourge of racial discrimination in elections. We know too that earlier legislative efforts proved unsuccessful.

The Court's *Shelby County* decision stopped the preclearance process in its tracks. And because preclearance has from the start been such a singularly effective policy, its demise demonstrably weakened minority voting rights protections, that has moved us farther away from our core American ideals. We should be motivated to expand and adapt the use of preclearance precisely because

¹ See, e.g., N. Hannah Jones, *Our democracy's founding ideals were false when they were written. Black Americans have fought to make them true.*, NEW YORK TIMES MAGAZINE, Aug. 14, 2019, <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

it is such an effective tool in expanding opportunities to participate in our democracy. The Voting Rights Advancement Act of 2019 does that.

Second, I want to address some potential constitutional questions regarding the Voting Rights Advancement Act of 2019.

When Congress reauthorized the VRA in 2006, it legislated against the backdrop of an unbroken line of Supreme Court authority holding, in case after case, that the VRA's preclearance process was a constitutional means for the Congress to ensure the an equal right to vote.² Indeed, when the Civil War ended, at what Pulitzer Prize winning historian Eric Foner calls our "Second Founding," we as a Nation amended our Constitution to provide Congress with substantial, affirmative power to finally enforce the Founding principle that all are created equal, *especially* when it comes to participation in self-government.³ Each of the Reconstruction Amendments thus provided new, specific authority for this body to act to ensure and defend equal voting rights, stating that "[t]he Congress *shall have* power to enforce this article by appropriate legislation."⁴

² See *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

³ See generally Eric Foner, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

⁴ *E.g.*, U.S. CONST. amend. XV, § 2.

That power remains undiminished. This body has the power and the constitutionally vested responsibility to take action to remedy discrimination in our democracy. That includes the power to impose prophylactic measures to combat discriminatory election laws and practices before they take effect. Congress has broad power to combat pervasive discrimination in our elections, including measures that are tailored to target those jurisdictions where they are most needed. And, the Supreme Court’s decision in *Shelby County* changes none of that.

The Court in *Shelby County* held that the VRA’s preclearance coverage criteria—the rules that say which jurisdictions are “covered” and therefore must have their election law changes scrutinized in advance through the preclearance process—was unconstitutional, because it had not been updated since the 1970s, and therefore was not based on “current conditions.”⁵ But the opinion leaves open substantial room for Congress to establish new criteria, and thereby to fix the constitutional problem that the Court identified. In fact, Chief Justice Roberts invited Congress to do just that.⁶

The bill before you does so:

⁵ *Shelby County, Ala. v. Holder*, 570 U.S. 529, 554 (2013).

⁶ *Id.* at 557.

(1) It creates a dynamic standard, based on each jurisdiction's recent history, whereby geographic coverage will adjust by moving the temporal window of triggering violations forward;

(2) treats all states and jurisdictions as equally eligible to move in or out of preclearance; and

(3) establishes what is effectively a bailout presumption through which covered jurisdictions are no longer subject to preclearance after 10 years unless their continuing violations merit it. This focus on current conditions is exactly what the Court asked for in *Shelby County*. And it comes well within the ample powers that Congress has to legislate in order to enforce the promise of an equal right to vote for all.

Congress approaches this legislation with the knowledge that we are decades away from 1965. We are also often told that things have changed in America since 1965. Thankfully this is true in many significant ways. But the VRA is best understood not as an endpoint, but as a beginning, of a new era of commitment to a robust minority inclusion principle that would give meaning and power to our constitutional promises of equality. As I have explained elsewhere, “[w]e do not dishonor our progress by demanding more it.”⁷ The success of the Voting Rights

⁷ Debo P. Adegbile, *Looking Backward to and Forward from the 2006 Voting Rights Act Reauthorization*, in *THE MOST FUNDAMENTAL RIGHT* 356, 379 (Daniel McCool ed., 2012).

Act should be regarded as an invitation, to all of us, to renew that commitment with each generation, and to continue to perfect our Union. When the Reconstruction Amendments were first passed, the Republican politician and famed abolitionist Charles Sumner announced that they had made the federal government, and Congress in particular, the “custodian of freedom.”⁸ There is perhaps no more important duty in a democratic society. Now is the time to take up that charge once again, and to renew our commitment to this Nation’s highest ideals. I urge this committee and this Congress to pass this important legislation.

II. THE VRA AND PRECLEARANCE: WHAT WE GAINED AND WHAT WE LOST

A. What We Gained: The Reconstruction Amendments and the VRA

The struggle that led to the Voting Rights Act is not unfamiliar to Congress. Respected Congressman John Lewis, often says that he “shed a little blood on that bridge in Selma[,] and friends of [his] gave their lives[,] so that no person would be denied their right to vote.”⁹

The VRA has often been called the “crown jewel” of American liberties.¹⁰ That statement is a testament to both the sacred price paid by those on the front

⁸ See Eric Foner, Testimony before the U.S. Comm’n on Civil Rights, Sept. 13, 2019 (Tr. forthcoming), *available at* https://www.youtube.com/watch?v=sgs_le-EKs0.

⁹ E.g., Rep. John Lewis (@repjohnlewis), TWITTER (Aug. 6, 2018, 4:24 PM), <https://twitter.com/repjohnlewis/status/1026610007251607552?lang=en>.

¹⁰ Herbert H. Denton, *Reagan Signs Voting Rights Act Extension*, WASH. POST, June 30, 1982, <https://www.washingtonpost.com/archive/politics/1982/06/30/reagan-signs-voting-rights->

lines in the fight for an equal right to vote, and to its singular effectiveness as a piece of legislation.

No one disputes that the VRA *worked*. At oral argument in *Shelby County*, Justice Alito, for example, said it was “one of the most successful statutes that Congress passed during the twentieth century.” And it’s critical to understand *why* the VRA, and especially preclearance, has been such an effective tool in combatting the pervasive threat of discrimination in voting.

In the era before the VRA, explicit, pervasive legal discrimination and subjugation on the basis of race was the norm in the South, a place and time, still in living memory, that we refer to as Jim Crow. The right to vote, what the United States Supreme Court has called “a fundamental political right, because [it is] preservative of all rights,”¹¹ was withheld through mechanisms like poll taxes and literacy tests—invariably applied in a discriminatory fashion, as the infamous “grandfather clauses” illustrate—to completely disempower African Americans in the political process and maintain a broader system of segregation.¹²

act-extension/b59370f1-fc93-4e2f-b417-2b614ea55910/ (quoting President Reagan as calling the right to vote “the crown jewel of American liberties”); *see also* Theodore Shaw, *John Roberts Dismantled the ‘Crown Jewel’ of the Civil-Rights Movement*, THE NATION, Sep. 14, 2018, <https://www.thenation.com/article/john-roberts-dismantled-the-crown-jewel-of-the-civil-rights-movement/>.

¹¹ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

¹² *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

The path there was not inexorable. At the end of the Civil War, we as amended our Nation's Constitution, explicitly to make good on the promise of equal justice—and an equal vote—for all. The 15th Amendment, for example, provided that the right to vote “shall not be denied or abridged ... on account of race, color, or previous condition of servitude,” and furthermore that Congress “shall have the power to enforce this article by appropriate legislation.”¹³ Congress took up that charge, passing important civil rights legislation that might have stopped the rise of segregation and protected the right to vote for black Americans in the South. But the Supreme Court struck down much of legislation,¹⁴ and then refused to enforce the Reconstruction Amendments in the context of private litigation.¹⁵ “[R]elief from a great political wrong,” the Supreme Court said, denying voting rights to a black man in Alabama, “must be given [to African Americans] by the legislative and political department of the government of the United States.”¹⁶

As Reconstruction faded and gave way to Jim Crow, Congress needed to act—to reassert its authority under the Reconstruction Amendments and take up its

¹³ U.S. CONST. amend. XV.

¹⁴ See *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁵ See *Giles v. Harris*, 189 U.S. 475, 482 (1903).

¹⁶ *Id.* at 488.

role as a co-equal branch of government and a driver of national policy. That it took Congress so long to react is a tragedy of our history.¹⁷ And it also shows that the history of the right to vote is not a linear one—that it is marked by struggle and by backsliding as well as progress.¹⁸

But Congress’s commitment flowed back from its low ebb, driven in no small part by the path-marking activists who fought for decades in the courts and in the streets for their full right to an effective ballot. Congress ultimately passed new civil rights legislation, in 1957, 1960, and again in 1964, which “authorized and then expanded the power of ‘the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds.’”¹⁹ But none of it was enough to overcome entrenched discrimination.

Justice Ginsburg, recounting the history in her *Shelby County* dissent, called it a “hydra” problem: Groups like the NAACP, the NAACP Legal Defense and Educational Fund, Inc., the Lawyers’ Committee for Civil Rights Under Law, in turn MALDEF, the Department of Justice, and many individual lawyers like Fred Gray of Alabama, A.P. Tureaud of Louisiana, Armand Derfner of South Carolina,

¹⁷ See also Foner, Testimony for the U.S. Comm’n on Civil Rights, *supra* n.8.

¹⁸ See, e.g., Alex Keyssar, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES I* (2000) (“Change was neither linear nor uncontested: the sources of democratization were complex, and the right to vote was itself a prominent political issue....”).

¹⁹ *Shelby County*, 570 U.S. at 56 (Ginsburg, J., dissenting) (quoting *Katzenbach*, 383 U.S., at 313).

to name just a few would bring affirmative litigation challenging one barrier to African-American political participation, but even when they won, the state or local government would often resist and new discriminatory rules would be introduced.²⁰

Preclearance—the system instituted by Sections 4 and 5 of the Voting Rights Act—was designed to address the “hydra” problem. That is, to uproot voting discrimination that had proven particularly persistent and adaptive. Section 5 instituted a new, model of regulation that was far better suited to the problem of discrimination in elections. And Section 4 directly targeted for closer supervision under this new preclearance regime the parts of the country that had been governed under a system of slavery and then apartheid for centuries.

As every Justice on the Court in *Shelby County* acknowledged, and as the Congress expressly found when it reauthorized the VRA, the pre-implementation approach worked where other repeated attempts had failed.²¹ In just the first five years after the VRA was passed, for example, about as many African-American people registered to vote in Alabama, Mississippi, Georgia, Louisiana, and North and South Carolina as had done so in the entire century after the end of the Civil

²⁰ *Id.* at 562–63 (Ginsburg, J., dissenting).

²¹ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (“VRA Reauthorization and Amendments Act of 2006”), Pub. L. No. 109-246, 120 Stat. 577, § 2(b)(1).

War.²² And the VRA's legal basis in the Reconstruction-era Fifteenth Amendment was repeatedly upheld as against constitutional challenges. "As against the reserved powers of the States," the Court explained in the still-seminal decision upholding the VRA, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."²³

The VRA, and especially its prophylactic design, was so successful at moving the Nation away from Jim Crow's subjugation and toward real democracy that it gained broad bipartisan support. It was reauthorized in 1970, 1975, 1982, and then again in 2006, and signed into law by Republican presidents each time.

Through these reauthorization efforts Congress has stayed the course because the impulse to discriminate in elections, or to deny full participation to disfavored groups, or to subordinate African Americans, Latinx, or Asian-American voters, among others, in parts of the country, notwithstanding strong medicine, has not just gone away. The Section 5 preclearance process worked not simply because it deterred jurisdictions from passing discriminatory election laws (though it did that), or because it changed the mindset of those in power (though it may have done that, too in some circumstances), but also because when

²² *Shelby County*, 570 U.S. 562–63 (Ginsburg, J., dissenting) (citing Davidson, *The Voting Rights Act: A Brief History*, in *Controversies in Minority Voting* 7, 21 (B. Grofman & C. Davidson eds. 1992)).

²³ *Katzenbach*, 383 U.S. at 324.

jurisdictions continued to pass discriminatory laws, the preclearance process blocked those laws from going into effect. And to point this out is no slight to those jurisdictions that were covered under the previous Section 4 standard. Change takes time, and change is hard. As James Madison wrote: “If men[/people] were angels, no government would be necessary.”²⁴

The reauthorization efforts in 2006 bear this out. Even four decades after the 1965 VRA, the more than 15,000-page record compiled by the Congress in support of reauthorization showed that discrimination on the basis of race had not disappeared in covered jurisdictions.²⁵ To be sure, it had changed. Many of the most blatant impediments to voter registration had ceased; instead, what Congress in 2006 called “second generation” forms of discrimination, like redistricting maps or changes in the forms of election that dilute the political strength of African Americans or other minority groups, had come to the fore.²⁶ But at least in

²⁴ THE FEDERALIST NO. 51 (James Madison).

²⁵ See generally *Northwest Austin Mun. U. Dist. No. One v. Holder* 573 F. Supp. 2d 221 (D.D.C. 2008), *rev'd and remanded sub nom. Northwest Austin Mun. U. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (including the appendix, found at 289–301, which provides a representative sample of section 5 objections based on discriminatory intent from Alabama, California, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia).

²⁶ VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 577 §§ 2(b)(2)–(3) (2006).

“covered” jurisdictions where preclearance was required, those measures were still being blocked by Section 5.²⁷ The preclearance process was still working.

Congress looked at the facts in 2006, and determined that “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote.” Congress determined that a failure to continue the preclearance regime would “undermin[e] the significant gains made by minorities in the last 40 years.”²⁸

I will address the *Shelby County* decision in more detail. But it is worth noting here that the *Shelby County* Court did not say the voluminous record created during the 2006 reauthorization was inaccurate. The Court’s majority opinion conceded that racial discrimination in our elections remains, as the Congress documented, and also that preclearance works. What that means is that by suspending the preclearance process, the Court effectively ensured that more of the discrimination that fully intact law had stopped would work its way into our laws. A vital lever for protecting our democracy and tool for combatting discrimination was taken away. And as the Congress predicted, the foreseeable happened after the *Shelby County* decision invalidated the current preclearance process.

²⁷ VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 578 § 2(b)(9) (2006).

²⁸ *Id.*

B. What We Lost: After *Shelby County*

The demise of the preclearance process has been harmful.

The U.S. Civil Rights Commission’s 2018 report, *An Assessment of Minority Voting Rights Access in the United States*, lays in detail what we have lost as Nation as a result of the *Shelby County* decision.²⁹ We have lost an effective process that prevented scores of discriminatory laws and rules that would have corrupted democracy in cities, counties, and States across the country from going into effect. We have lost the transparency and accountability that comes from having a system where election law changes are exposed to scrutiny by civil rights experts and the public before they may be imposed on an electorate. We have lost the deterrent effects that the preclearance provided. And we have lost the signal that preclearance sent, that our national government remains the “custodian of freedom,” willing and able to stop state and local governments from subordinating minorities or disfavored groups in the political process.³⁰

The preclearance process was and had been like a checkpoint for our democracy, keeping the road ahead safe by preventing discrimination from even starting its engines. *Shelby County* was unfortunately regarded by some as a green light to impose discriminatory voting measures. Since *Shelby County* was decided,

²⁹ See generally U.S. COMM’N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT (2018).

³⁰ *Id.* at 278–80.

more than 20 states have enacted new, restrictive voting laws, and successful affirmative lawsuits—an surefire indicator of illegal voting rights violations—have *quadrupled*.³¹ These statewide laws—and again, I am just talking about statewide laws, not even county and local measures—include onerous new voter registration requirements like proof of citizenship or government-issued ID, massive voter roll purges, and rollbacks in early voting and ballot box access.³² And they include States that were “covered” under Section 4, but also States that were not.

It’s worth looking in particular at the formerly covered jurisdictions, who were subject to the preclearance process before the 2013 *Shelby County* decision. Look at Texas, where the State enacted and continues to operate using a strict voter ID law that a federal court declared discriminatory against African-American and Latinx voters.³³ Look at North Carolina, where before the ink on the *Shelby County* decision was dry, the legislature passed an “omnibus” election bill that the Fourth Circuit Court of Appeals later held discriminated against African-American voters with “surgical precision.”³⁴ Look at Georgia, where in the wake of long lines, purges, and other irregularities affecting African-American voters during the

³¹ *Id.* at 82, 227.

³² *Id.* at 82–183.

³³ *Id.* at 80 (quoting U.S. Comm’n on Civil Rights Briefing Meeting Feb. 2, 2018 (2018) at 90 (statement by Sherrilyn Ifill)).

³⁴ *Id.* at 12.

2018 election, a federal court has held that the entire state election system is subject to challenge.³⁵

My point is not to relitigate the question of whether the old “covered” jurisdictions deserve some particular scrutiny. That ship has sailed, and the approach in this legislation takes a fresh approach. My point is that those formerly covered jurisdictions provide us with a natural experiment, a “before-and-after” that demonstrates that the preclearance process works, and prevents serious harms to voting rights.

Just as the presence of preclearance sent a signal to jurisdictions that discrimination in voting was unacceptable, the elimination of preclearance sends a message that the federal government is in retreat. In this moment, Congress’s focus and commitment is of paramount importance.

The question, in light of *Shelby County*, is how to put this effective tool back into service.

III. THE VRAA: ANSWERING *SHELBY COUNTY* AND FULFILLING CONGRESS’S ROLE

Congress can fix the problem posed by the Court in *Shelby County*—just as the Court invited Congress to do. Restoring the preclearance process would be a step forward for American democracy that all Americans, regardless of race, creed,

³⁵ *Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018).

or party, could be proud of—just as leaders from both parties proudly supported the VRA’s full re-authorization just over a decade ago. And the Voting Rights Advancement Act does just that, all consistent with the Court’s decision in *Shelby County*.

I will explain the details, but let me give the nutshell version up front: The *Shelby County* decision concerns the VRA provisions that say which state and local jurisdictions are “covered” and subject to preclearance. But *Shelby County* also leaves Congress with ample room to reinstate a preclearance process, by changing the coverage approach to one that is based on “current conditions,” not conditions that are anchored at a fixed point in the past. And that is exactly what the VRAA does.

A. What *Shelby County* Says

When we talk about preclearance, we often think about Section 5 of the VRA. That is the portion of the law that details the preclearance process itself, whereby, any time a “covered” state or political subdivision wants to enact or impose a new rule for voting or elections it must obtain “preclearance” from the civil rights division of the Department of Justice that the new rule being imposed “does not have the purpose and will not have the effect of denying or abridging the right to vote” on account of membership in a protected group.³⁶ In other words, if

³⁶ 52 U.S.C.A. § 10302(c).

a jurisdiction is “covered,” then any changes to its election laws need to be reviewed by civil rights experts to make sure that the change is not discriminatory. Those civil rights experts need to provide prior approval, or “preclearance.” Otherwise, the jurisdiction must go to court and prove its new election law is not discriminatory in order to bring that law into effect.

Shelby County did not hold that Section 5, or similar measures, are unconstitutional. And in fact, the Supreme Court addressed that question after the VRA was first passed, holding in *South Carolina v. Katzenbach* that measures like Section 5 can be a permissible, constitutional exercise of power under the Fifteenth Amendment.³⁷ I’d also note that Article I’s Elections Clause, which accords Congress broad power “to pre-empt state regulations governing the ‘Times, Places and Manner’ of holding congressional elections,” may provide additional, substantial authority to impose the same type of prophylactic process for state election laws, at least so long as they touch on elections for federal office.³⁸

The question is about which jurisdictions are “covered”—and subject to the preclearance process.

The struck coverage approach for the VRA’s preclearance regime is set out in Section 4(b) of the statute. Prior to *Shelby County*, and as the Court focused on

³⁷ *Katzenbach*, 383 U.S. at 327 (citing *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

³⁸ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013).

in that case, the law provided that a state or subdivision (like a county) would be covered if the Attorney General determined that two criteria were met: First, that the state employed a discriminatory “test or device” in voting, like a literacy test, a “good character test,” or some other method of exclusion used in the Jim Crow South. And second, that under 50% of the voting age population was registered to vote or turned out to vote in a presidential election. But those criteria needed to be met only as of particular dates: November 1964; November 1968; or November 1972. If at any of those points the criteria had been met for a particular State or county, then that State or county was covered.³⁹ The result was that much of the former segregated South was covered, as were a number of other jurisdictions that met the criteria in 1968 or 1972, including Texas, Alaska, Arizona and parts of New York.

States and counties were able to “bail out” of coverage by showing a record of non-discrimination, and the Court in its 2009 *Austin* decision expanded the bailout provision to cover towns and other sub-county entities. But it remained the case that whether or not a jurisdiction was covered in the first place was determined by reference to a static point in history—and that the Supreme Court had upheld the VRA preclearance and coverage system time and again for decades up through the 2006 reauthorization.

³⁹ See 52 U.S.C.A. § 10303(b)(c).

In *Shelby County*, the Court found that Section 4(b)'s coverage rule was unconstitutional because it imposed preclearance coverage based on factual criteria that were anchored to fixed points in the past and that the Court perceived to be outdated.

In striking down 4(b), the Court began with two legal principles: First, restricting the autonomy of the States in making election laws imposes “federalism costs.” Second, treating states differently from one another violates a “fundamental principle of equal sovereignty” among the States. From those principles, the Court articulated two interrelated rules for evaluating the VRA’s preclearance coverage: It “must be justified by current needs” and, to the extent that it provides “disparate geographic coverage,” the disparity must be “sufficiently related to the problem that it targets.”⁴⁰

From those premises, the Court concluded that the coverage rule in Section 4 was no longer valid. The Court acknowledged, consistent with the *Katzenbach* decision, that it had once been valid.⁴¹ Of course, a line of Supreme Court decisions made that clear. And it acknowledged that, in reenacting the VRA, Congress had produced reams of evidence that discrimination in voting remained a

⁴⁰ See also *Northwest Austin Mun. U. Dist. No. One v. Holder* 557 U.S. 193, 202–03 (2009).

⁴¹ *Shelby County*, 570 U.S. at 546.

serious problem.⁴² But, the Court stated (and it is worth quoting this language):
 “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”⁴³

The Court said “things have changed dramatically” from the Jim Crow era.⁴⁴ Voter registration and turnout have achieved near parity across racial groups.⁴⁵ Literacy tests and other first-generation forms of discrimination have “been forbidden nationwide for over 40 years.”⁴⁶ Yet, the Court complained, “[c]overage today is based on decades-old data and eradicated practices.”⁴⁷

The Court’s reasoning amounts to a syllogism: The Constitution requires that the imposition of preclearance on certain States be “justified by current needs.” Moreover, the coverage rule imposes preclearance coverage “based on 40-year-old facts.” Therefore, the Constitution is violated.

There are many who disagree with this reasoning. Judge Richard Posner, for one, said that the legal principle of “equal sovereignty” that undergirded much of

⁴² *Id.* at 553.

⁴³ *Id.* at 554.

⁴⁴ *Id.* at 547.

⁴⁵ *Id.* at 551 (citing *Katzenbach*, 383 U.S. at 313, 329–30).

⁴⁶ *Id.* at 547.

⁴⁷ *Id.* at 551.

the opinion does not exist, and that “[t]he opinion rests on air.”⁴⁸ And a comprehensive study of voting rights violations in the U.S. from 1957 on showed that the old coverage standard was in any case “still congruent with proven violations, and that to the extent that recorded violations had decreased, that was not because problems had ended, but because the Supreme Court had made it more difficult to win lawsuits.”⁴⁹ The “40-year-old facts” that the Court pejoratively referenced were in fact directly tied to the facts on the ground in the present day, as Congress had found in the first place after its own painstaking efforts.⁵⁰ Past was, in fact, prologue.

But you of course do not have the luxury of disagreeing. Nor in this context do I. And so my far more important point for you today is that the bill you are considering directly addresses the central logic of the Court in *Shelby County*: by revamping the coverage approach into something that is dynamic, that changes over time, that responds to changes on the ground, and that reflects current conditions. Chief Justice Roberts, in his *Shelby County* opinion, invited Congress to “draft

⁴⁸ Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives' imagination*, SLATE, June 26, 2013, <https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html>.

⁴⁹ Morgan Kousser, *Do The Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?*, TRANSATLANTICA (2015), <http://journals.openedition.org/transatlantica/7462>.

⁵⁰ See also, e.g., DEBO P. ADEGBILE, VOTING RIGHTS IN LOUISIANA 1982–2006.

another formula based on current conditions.”⁵¹ The Voting Rights Advancement Act takes up that invitation.

B. What The VRAA Does

So let me highlight the provisions in the VRAA that I think are particularly responsive to *Shelby County* and its reasoning. And let me start by emphasizing, again, the power of Congress to legislate here in light of the specific grant of authority in the Reconstruction Amendments in particular: “Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting.”⁵² The VRAA’s provisions, all of which tailor the criteria for coverage to recent history and a record of pervasive voting rights violations, are a highly rational means for using the powerful and effective preclearance tool to improve democracy and safeguard rights.

VRAA Section 3

Most importantly, Section 3 of the VRAA lays out a new coverage standard for the preclearance process, replacing the one that the Court in *Shelby County* found unconstitutional. Under VRAA’s new Section 3, the basic rule is this: If there are contemporary and persistent voting rights violations in your State or

⁵¹ *Shelby County*, 570 U.S. at 557.

⁵² *Katzenbach*, 383 U.S. at 324.

county that meet a statutory threshold, then you will be subject to preclearance. But if you improve, your status changes.

Under VRAA Section 3, *statewide* preclearance applies if either (1) 15 or more voting rights violations occurred in the State in the most recent 25-year period; or (2) 10 or more voting violations in the State in the most recent 25-year period with at least 1 of the violations being committed by the State itself. Section 3 provides that a political subdivision within a State will be covered if the State itself commits 3 or more voting violations in the most recent 25-year period. Because it has only a 25-year look back, Section 3 of the VRAA addresses only *recent* discriminatory practices, and it inherently bases coverage on current conditions. A jurisdiction is covered for 16 years after the year of the most recent voting rights violation in the State or subdivision, unless the State or subdivision obtains a “bail-out” under Section 4(a).⁵³ This ensures that coverage is fluid, dynamic—States are not locked into preclearance indefinitely for violations committed long ago. That addresses the central concern in *Shelby County*.

The VRAA’s definition of a “voting rights violation” that counts toward triggering the coverage also ensures that it is not too broad, which again addresses the *Shelby* Court’s concerns about what it perceived as the “federalism costs” associated with preclearance generally. A “voting rights violation” entails a final

⁵³ Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019).

judgment or consent decree that the VRA or the Fourteenth or Fifteenth Amendment has been violated, or a failure to get preclearance for a new election rule.⁵⁴ At the center of the coverage analysis are serious violations that have survived judicial scrutiny. Fifteen such events in the course of 25 years indicate a pervasive problem with discrimination in elections in a particular state, which is consistent with the standard that the Supreme Court embraced in the *Katzenbach* case, and reaffirmed in *Shelby County*.⁵⁵

Indeed, the 25-year lookback is an especially important provision because a shorter period might not be a broad enough window to indicate whether or not voting rights violations have been pervasive under *Katzenbach*, especially given the nature of elections, which are cyclical and occur every two or four years. That is all the more true because election changes tend to happen around the census and redistricting, which occur once a decade.

Another important aspect of the proposed coverage approach is that it has a built-in, ten-year bailout. The period of coverage runs for ten years from the last violation, after which a jurisdiction is no longer covered. Jurisdictions that improve can rapidly move out of coverage, even if discrimination was pervasive 15

⁵⁴ *Id.* at § 3(b)(3).

⁵⁵ *Id.* at § 3(b)(1)(A)(i).

years before. That is a 180-degree difference from the prior system, and it keeps the coverage standard even more tightly confined to “current conditions.”

VRAA Section 4

In addition to a new coverage approach, the VRAA in its Section 4 also does something new: It creates a separate preclearance process that is not jurisdiction-specific, and instead focuses on a particular set of practices that have repeatedly been found to be discriminatory by the courts, like redistricting, or consolidation of polling places that reduces access to the ballot.⁵⁶ As a constitutional matter, this is a much narrower form of preclearance. And of course, the fact that a jurisdiction changes political boundaries, or takes some other action that has been used for discriminatory purposes in the past, is not dispositive; it just triggers a level of oversight that is justified by the known potential of certain legal changes to serve discriminatory ends.

VRAA Section 5

Finally, the VRAA also amends the existing “bail-in” provisions, whereby a court can order a jurisdiction covered by the preclearance process. Under the current VRA, courts can only do so based on a finding of discriminatory intent.⁵⁷

⁵⁶ *Id.* at § 4.

⁵⁷ VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 581 § 5(c) (2006).

The VRAA allows courts to bail a jurisdiction into the preclearance process based on a finding that the State has taken actions with discriminatory effects in violation of federal voting rights laws.⁵⁸ This new bail-in provision provides another mechanism for determining which jurisdictions should be subject to preclearance based on *current conditions*, not historical practices. And because the bail-in provision applies to all jurisdictions, it also does not run afoul of *Shelby County*'s prohibition on equal sovereignty.

Those are just a few of the improvements in the VRAA—specifically the ones that are most closely related to the preclearance system that was at issue in *Shelby County*. All of them contribute to creating a stronger and more durable Voting Rights Act—one which marries the singularly effective preclearance process with a coverage approach that is dynamic and tethered to a recent history of serious voting rights violations. These changes are worthy additions to one of the most important and effective pieces of legislation in our Nation's history. And they are an important step forward towards realizing democracy in America.

IV. CONCLUSION

The history of voting rights since the Reconstruction era is one in which Congress's commitment to the great principle of equal rights and an equal vote for all has ebbed and flowed, often in dynamic tension with the decisions of the

⁵⁸ Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 4A(c) (2019).

Supreme Court. *Shelby County's* signaling and real-world effects are problematic. But the Legislative Branch remains charged with serving as the “custodian of freedom,” in which the power to enforce our commitment to equality is vested by the Constitution.

The Voting Rights Act was never an endpoint. It was and it remains an invitation to make this Union more perfect, by continuing to honor, more fully and more faithfully with time and effort, the principle that all people are created equal, for which so many have fought and died. We cannot walk away from that invitation.

Progress begets progress. In the face of a history of persistent efforts to deny the vote and restrict democracy, the VRA,⁷ and now the VRAA, illuminate the path forward.

I look forward to responding to your questions about this important legislation.

Mr. RASKIN. Thank you, Mr. Adegbile.

Professor Michael Morley teaches at Florida State University College of Law. He also works in the areas of election law, constitutional law remedies in Federal courts. Received his J.D. from Yale Law School in 2003.

And we are delighted to have you with us, Professor Morley. You are recognized for 5 minutes.

STATEMENT OF MICHAEL T. MORLEY

Mr. MORLEY. Mr. Chairman, Ranking Member Johnson, and members of the committee, thank you very much for inviting me here today to testify. It is an honor to have the opportunity to offer thoughts about Congress' authority to protect voting rights in the wake of Shelby County.

The Voting Rights Act is one of the most important strata in the firmament of election law. For decades it has been called a super statute, part of the institutional backdrop against which others law are enacted. Ensuring its continued vitality is a continued priority.

Over recent years, and particularly following the appointments of Justices Gorsuch and Kavanaugh, a majority on the U.S. Supreme Court has placed greater emphasis on enforcing a textualist, originalist, and structuralist approach to constitutional interpretation.

Among other things, this has led the conservative majority on the Court to enforce greater restraints on the scope of the Federal Government's authority, enforcing federalism-based protections for State sovereignty, and limiting the judiciary's ability to enforce its own conception of fairness in the electoral process.

The Court's ruling in *City of Boerne v. Flores* curtailing the scope of Congress' authority under Section 5 of the 14th Amendment was a first warning sign that the majority on the Court would require that laws enacted under that provision be tailored to the protection and enforcement of constitutional rights and that Congress' power to enact prophylactic measures is limited.

The Court sounded an even louder and more urgent warning in *Northwestern Austin Municipal Utility District No. 1 v. Holder* in which the Court voiced concerns about the VRA's formula for identifying covered jurisdictions.

Finally, in Shelby County, the Court invalidated Section 4(b) of the Voting Rights Act, holding that the list of covered jurisdictions, which was up to a half-century old, was too outdated to support the imposition of the strong medicine of preclearance.

As many other witnesses have pointed out, the Shelby County opinion invited a dialogue with Congress on these critical issues, and the Voting Rights Advancement Act of 2019, H.R. 4, reflects an important step toward accepting the Court's invitation. I urge this committee to reflect on the Court's recent precedents, particularly the limitations that the current conservative majority on the court is likely to enforce.

This committee has held hearings across the Nation, heard from scores of witnesses, compiled a voluminous record of tens of thousands of pages, and devoted countless hours to crafting a response to Shelby County. Millions of people's rights hang in the balance. Enacting a law that the current conservative majority is likely to

invalidate would be a pyrrhic victory and a setback in the cause for voting rights.

Boerne and its progeny identify a range of factors that the Court takes into account in deciding whether or not a law falls within the scope of Congress' power under Section 5, or put another way, whether a law is congruent and proportional to preventing violations of constitutional rights.

Among the factors that the Court has placed the greatest weight on is whether the law prohibits a wide range of State action that doesn't itself actually violate the Constitution, whether the law targets and prohibits State action that has a disparate impact on members of certain groups, the breadth of the law, whether the law itself prohibits State action that doesn't intentionally violate constitutional rights, and finally, whether the law is of national applicability.

The more of these factors that apply in a particular case and to a particular statute, the greater the likelihood that it would be invalidated by the current Court under Boerne.

I would point out four main aspects of H.R. 4 that I would urge the committee to consider.

First, H.R. 4's definition of voting rights violations may be too overbroad to satisfy Boerne's congruence and proportionality test, and I am happy to talk about that in the Q&A.

Second, I believe the committee should reconsider the bill's treatment of political subdivisions. As currently drafted, an entire State, including every county and municipality within that State, could become subject to preclearance based on the acts of a handful of other jurisdictions over the quarter of a century, acts in which most of that State's towns and counties, of course, had no involvement and had no power to stop.

Third, the concept of practice-based preclearance, while a creative attempt to address Shelby County, is at risk of being invalidated under Boerne.

And finally, Section 6(e) of the bill, prohibiting changes to State election laws from occurring unless certain disclosures are made, raises questions that the provision should be amended to address.

Thank you very much for your time.

[The statement of Mr. Morley follows:]

**TESTIMONY OF PROFESSOR MICHAEL T. MORLEY
BEFORE THE U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS & CIVIL LIBERTIES**

**Hearing on Congressional Authority to Protect
Voting Rights After *Shelby County v. Holder*
September 24, 2019**

INTRODUCTION

Chairman Cohen, Ranking Member Johnson, and members of the Committee, thank you very much for inviting me here to testify. This Committee has held numerous hearings across the nation, receiving testimony from dozens of witnesses and compiling a voluminous record in support of a critical goal of national importance: amending the Voting Rights Act,¹ a statute that lies at the heart of our nation's democratic infrastructure. Given the manner in which the current conservative majority of the U.S. Supreme Court construes the relevant provisions of the Constitution, it is very likely that several key sections of the proposed Voting Rights Advancement Act ("VRAA") of 2019,² as presently drafted, would be held unconstitutional and enjoined. Modifying some of the VRAA's provisions would substantially increase the likelihood of the current Court upholding the Act.

I. CONSTITUTIONAL BACKGROUND

A. *The Constitutional Right to Vote*

The Constitution of 1789, as originally enacted, treated voting as an almost exclusively political matter primarily within the control of the states and Congress.³ The Fourteenth

¹ Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965).

² H.R. 4, 116th Cong., 1st Sess. (introduced Feb. 26, 2019).

³ See U.S. CONST. art. I, § 2, cl. 1 (providing that the Electors for the U.S. House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); *id.* art. I, § 4, cl. 1 (granting state legislatures and Congress power to regulate federal elections); *id.* art. I, § 5, cl. 1 (empowering each

Amendment established new protections for voting rights,⁴ and subsequent amendments went on to prohibit the Government and states from denying citizens the right to vote on certain specified grounds, such as race,⁵ gender,⁶ failure to pay a poll tax (for federal elections),⁷ or age (for citizens who are at least 18 years old).⁸

The Supreme Court has repeatedly held that the Equal Protection Clause⁹ and Fifteenth Amendment¹⁰ prohibit only intentional racial discrimination, including laws that either contain

chamber of Congress to determine the elections, qualifications, and returns of its members); see also Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. 79, 90-92 (2016).

⁴ Originally, voting rights were protected only by § 2 of the Fourteenth Amendment, which was enforceable through political channels—specifically, Congress’ authority to reduce the number of Representatives allocated to states that violated the right to vote. See U.S. CONST. amend. XIV, § 2; Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. L. FORUM 279, 318-19, 323-24 (discussing the original understanding and intent underlying § 2 of the Fourteenth Amendment). The Supreme Court later reinterpreted the Equal Protection Clause, U.S. CONST., amend. XIV, § 1, as prohibiting not only racial discrimination concerning voting rights but, more broadly, arbitrary or otherwise unwarranted treatment of certain groups of voters, as well. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-28 (1969); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). See generally Michael T. Morley, *Prophylactic Redistricting? Congress’s Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2088-2112 (2018).

⁵ *Id.* amend. XV, § 1 (“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.” (emphasis added)).

⁶ *Id.* amend. XIX, § 1.

⁷ *Id.* amend. XXIV, § 1. The Supreme Court later held that the Equal Protection Clause likewise prohibits states from requiring people to pay a poll tax in order to participate in state or local elections. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

⁸ *Id.* amend. XXVI, § 1. The Seventeenth Amendment also expanded voting rights by establishing direct elections for U.S. Senators, *id.* amend. XVII, § 1, while the Twenty-Third Amendment allowed citizens of the District of Columbia to participate in Presidential elections, *id.* amend. XXIII, § 1.

⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Washington v. Davis*, 426 U.S. 229 (1976); see also *Wisconsin v. City of New York*, 517 U.S. 1, 19 n.8 (1996) (“Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government.”).

¹⁰ *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality op.) (“[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. . . . [R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.”); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (holding that a plaintiff bringing a vote dilution claim under either the Fourteenth or Fifteenth Amendments must “establish that the state or political subdivision acted with a discriminatory purpose.”); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (holding that when a legislature “singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment”); see also *N.W. Austin Mun.*

express racial classifications¹¹ or were enacted for racially discriminatory purposes.¹² The Supreme Court explained, “Discriminatory purpose . . . implies more than . . . awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part ‘because of,’ and not merely ‘in spite of,’ its adverse effects upon a particular group.”¹³ A court will “not assume unconstitutional legislative intent even when statutes produce harmful results.”¹⁴ Accordingly, the Fourteenth and Fifteenth Amendments do not prevent states from adopting facially neutral laws (*i.e.*, laws without race-based categories) for race-neutral purposes, even if they disparately impact members of racial minority communities.¹⁵ Although some scholars, Members of Congress, and even Justices reject this interpretation of the amendments, this is the standard that the current conservative majority on the Supreme Court would apply in reviewing the VRAA’s constitutionality.

Util. Dist. No. 1 (“NAMUNDO”) v. Holder, 557 U.S. 193, 223 (2009) (Thomas, J., concurring in part and dissenting in part) (discussing “the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment”); *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964) (holding that no violation of the Fifteenth Amendment or other voting-rights amendments occurred because the plaintiffs “failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines”); *see, e.g., Rice v. Cayetano*, 528 U.S. 495, 512, 514-15, 517 (2000) (holding that the Fifteenth Amendment prohibits express racial classifications, including those framed in terms of ancestry); *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (holding that a political party violated the Fifteenth Amendment by prohibiting minorities from participating in its primary); *Guinn v. United States*, 238 U.S. 347, 365 (1915) (invalidating literacy test with grandfather clause pegged to a time prior to the Fifteenth Amendment’s ratification, because its only purpose was to circumvent the Fifteenth Amendment’s prohibition against racial discrimination).

¹¹ *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (holding, in a redistricting case, that the Equal Protection Clause prohibits “[l]aws that explicitly distinguish between individuals on racial grounds”).

¹² *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (holding, in a voter identification case, that “without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional”).

¹³ *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (quoting *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

¹⁴ *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

¹⁵ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

B. Congress' Power to Enforce the Constitutional Right to Vote

1. **Historical approach**—The constitutional source and scope of Congress' authority to regulate elections varies based on the type of election at issue.¹⁶ The Constitution expressly grants Congress virtually plenary power over the conduct of congressional elections.¹⁷ The Court has also construed the Constitution as authorizing Congress to exercise similarly broad power over Presidential elections,¹⁸ except states have some degree of autonomy in determining the manner

¹⁶ See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 105-10 (2017).

¹⁷ U.S. CONST. art. I, § 4, cl. 1 (granting Congress power to “make or alter” the “Regulations” governing the “Times, Places and Manner of holding Elections for Senators and Representatives”). The Court has held that the “comprehensive words” of the Elections Clause confer “authority to provide a complete code for congressional elections,” including rules concerning “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.” *Smiley v. Holm*, 285 U.S. 355, 366 (1932); accord *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). The clause grants Congress authority “to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.” *Smiley*, 285 U.S. at 366.

Congress may exercise its power under the Elections Clause regardless of whether a state has enacted its own laws regulating a particular aspect of the electoral process. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (“This grant of congressional power was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”); Ex Parte *Siebold*, 100 U.S. 371, 384 (1880) (holding that Congress’ authority under the Elections Clause may be exercised “at any time”). In the event of a conflict between federal and state law, Congress’ enactment prevails. *Siebold*, 100 U.S. at 384 (“The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.”); see, e.g., *Inter Tribal Council*, 570 U.S. at 15 (holding that the Elections Clause requires a state law conflicting with the National Voter Registration Act to “give way”); *Foster v. Love*, 522 U.S. 67, 74 (1997) (“When Louisiana’s statute is applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void.”).

Congress’ power under the Elections Clause is subject to several limits. First, most obviously, Congress may not use this authority to violate constitutional rights. Second, the Elections Clause does not permit Congress to regulate candidate qualifications, see U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3, or voter qualifications, *id.* art. I, § 2, cl. 1; *id.* amend. XVII, § 1, since other constitutional provisions expressly establish them. See *Inter Tribal Council*, 570 U.S. at 16 (holding the Elections Clause does not grant Congress power to regulate voter qualifications); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832, 835-36 (1995) (same for candidate qualifications). Finally, the Supreme Court has held that the Elections Clause does not confer power to “dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” *Thornton*, 514 U.S. at 833-84; accord *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (invalidating a law requiring a purportedly derogatory label to be included on the ballot near the names of candidates who refused to pledge to support term limits).

¹⁸ *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (per curiam); *Oregon v. Mitchell*, 400 U.S. 112, 124 & n.7 (1970) (“It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.”) (opinion of Black, J.); *Burroughs v. United States*, 290 U.S. 534, 545, 547-48 (1934); Ex Parte *Yarborough*, 110 U.S. 651, 662, 666 (1884); see also U.S. CONST. art. II, § 1, cl. 5 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”).

in which they will choose their presidential electors.¹⁹ Congress' only compulsory authority over state and local elections, in contrast, stems from its power to enforce constitutional amendments guaranteeing the right to vote.²⁰ Most prominently, § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment—the “Enforcement Clauses”—grant Congress power to “enforce” those amendments “by appropriate legislation.”²¹

During the Civil Rights Era, in *Katzenbach v. Morgan*²² (Fourteenth Amendment) and *South Carolina v. Katzenbach*²³ (Fifteenth Amendment), the Supreme Court held that the Enforcement Clauses granted Congress sweeping, plenary authority to enact election-related legislation. Congress' authority under the Enforcement Clauses was as broad as its power under the Necessary and Proper Clause²⁴ as construed in *McCulloch v. Maryland*:²⁵ “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which

¹⁹ U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (“[T]he State legislature’s power to select the manner for appointing electors is plenary . . .”).

²⁰ Congress may also attempt to regulate state and local elections under the Spending Clause, U.S. CONST., art. I, § 8, cl. 1, by offering election-related funding to states or municipalities that agree to abide by Congress’ restrictions on the use of those funds.

²¹ U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.

²² *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (upholding § 4(e) of the Voting Rights Act as a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment because § 4(e) “may be regarded as an enactment to enforce the Equal Protection Clause” and was “plainly adapted to that end” (quotation marks omitted)).

²³ *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (upholding several other provisions of the Voting Rights Act under § 2 of the Fifteenth Amendment because “Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824))).

²⁴ U.S. CONST. art. I, § 8, cl. 18.

²⁵ *Morgan*, 384 U.S. at 650 (“By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.” (citation omitted)); *South Carolina*, 383 U.S. at 326 (“The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.”).

are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²⁶

Under this approach, Congress could “exercise its discretion in determining whether and what legislation is needed” to enforce the constitutional right to vote.²⁷ The Enforcement Clauses authorized Congress to prohibit not only actual violations of Fourteenth and Fifteenth Amendment rights, but other constitutionally valid state laws and conduct that, in Congress’ judgment, impaired those rights.²⁸ The Court would uphold federal voting rights laws so long as it could “perceive a basis” upon which Congress might have believed they promoted the Fourteenth and Fifteenth Amendments’ goals.²⁹ The Supreme Court has never expressly or specifically overturned these cases; to the contrary, it continues to cite them approvingly.

2. **The *Boerne* Standard**—In 1996, however, in *City of Boerne v. Flores*, the Supreme Court substantially narrowed the scope of Congress’ power under § 5 of the Fourteenth Amendment.³⁰ It has not yet similarly revisited the scope of Congress’ authority under § 2 of the Fifteenth Amendment. Since the Enforcement Clauses are phrased and structured identically, and

²⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

²⁷ *Morgan*, 384 U.S. at 651; see also *South Carolina*, 383 U.S. at 324 (“Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

²⁸ *Morgan*, 384 U.S. at 648 (rejecting the argument that a federal statute prohibiting certain state practices “can not be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides” that the prohibited state practices are “forbidden by the Equal Protection Clause itself”); *South Carolina*, 383 U.S. at 327 (rejecting the argument that, under § 2 of the Fifteenth Amendment, “Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms”).

²⁹ *Morgan*, 384 U.S. at 656.

³⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

have traditionally been read *in pari materia* with each other,³¹ it is extremely likely the Court would apply this new interpretation to § 2 of the Fifteenth Amendment, as well.

In *Boerne*, the Court emphasized that Congress' power under § 5 of the Fourteenth Amendment does not include "the power to determine what constitutes a constitutional violation."³² It explained, "Congress does not enforce a right by changing what the right is."³³ Accordingly, the Court drew a "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."³⁴ *Boerne* concluded that, for a law to fall within Congress' power under § 5, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁵

Boerne carefully constrains Congress' power under § 5 of the Fourteenth Amendment to preserve the Supreme Court's role in construing the scope and meaning of constitutional guarantees such as the Equal Protection Clause and Fifteenth Amendment.³⁶ Such constraints are also important because § 5 allows Congress to "assert an authority over the States which would

³¹ Compare *Morgan*, 384 U.S. at 650 (construing § 5 of the Fourteenth Amendment as equivalent to the Necessary and Proper Clause), with *South Carolina*, 383 U.S. at 326 (same for § 2 of the Fifteenth Amendment).

³² *Boerne*, 521 U.S. at 519.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 520.

³⁶ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ("[I]t falls to this Court, not Congress, to define the substantive of constitutional guarantees."); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress to define the substance of constitutional guarantees."); *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.").

otherwise be unauthorized by the Constitution, including abrogation of their sovereign immunity³⁷ and intrusion “into sensitive areas of state and local policymaking.”³⁸ Finally, enforcing limits on the scope of the federal government’s power preserves individual liberty by preventing the concentration and centralization of authority.³⁹

3. Invalidated Statutes—Applying *Boerne*, the U.S. Supreme Court has struck down several provisions of federal law:

- Family and Medical Leave Act of 1993’s self-care provisions, requiring states to provide unpaid sick leave to their employees;⁴⁰
- Title I of the Americans with Disabilities Act (“ADA”), prohibiting states from discriminating against disabled employees;⁴¹
- Violence Against Women Act (“VAWA”), prohibiting, and creating a private right of action for, gender-based violence;⁴²

³⁷ *Alden v. Maine*, 527 U.S. 706, 756 (1999); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (“[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” (internal citation omitted)).

³⁸ *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

³⁹ *Morrison*, 529 U.S. at 620 (“These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.”).

⁴⁰ Pub. L. No. 103-3, §§ 102(a)(1)(D), 107(a)(2), 107 Stat. 6, 9, 16 (Feb. 5, 1993), *codified at* 29 U.S.C. §§ 2612(a)(1)(D), 2617(a)(2); see *Coleman v. Court of Appeals*, 566 U.S. 30, 39 (2012) (plurality op.) (holding that, although the FMLA’s self-care provision “offers some women a benefit by allowing them to take leave for pregnancy-related illnesses,” the law “is not congruent and proportional to any identified constitutional violations”).

⁴¹ Pub. L. No. 101-336, § 502, 104 Stat. 337, 370 (July 26, 1990), *codified at* 42 U.S.C. § 12202; see *Bd. of Trs. v. Garrett*, 531 U.S. 356, 368 (2001) (“The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational discrimination in employment against the disabled.”).

⁴² Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941 (Sept. 13, 1994), *codified at* 42 U.S.C. § 13981; see *United States v. Morrison*, 529 U.S. 598, 627 (2000) (“Congress’ power under § 5 does not extend to the enactment of [VAWA].”).

- Age Discrimination in Employment Act (“ADEA”), as amended by the Fair Labor Standards Amendments Act of 1974, allowing states to be sued for discriminating against older employees;⁴³
- Trademark Remedy Clarification Act (“TRCA”), allowing states to be sued for false advertising;⁴⁴ and
- Patent and Plant Variety Protection Remedy Clarification Act, allowing states to be sued for patent infringement.⁴⁵

4. **Applying the *Boerne* Standard**—In applying *Boerne*’s “congruence and proportionality” standard, the Court has identified the following factors that weigh against a federal statute’s constitutionality under § 5:

- Prohibiting a substantial amount of state action that does not violate the Constitution—The federal statute is not primarily tailored to prevent constitutional violations, but instead goes far beyond by prohibiting state laws, policies, and conduct that are not actually unconstitutional;⁴⁶

⁴³ Pub. L. No. 93-259, §§ 6(d)(1), 28(a)(2), 88 Stat. 55, 61, 74 (Apr. 8, 1974), *codified at* 29 U.S.C. §§ 216(b), 630(b); see *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (“In light of the indiscriminate scope of the [ADEA’s] substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment.”).

⁴⁴ Pub. L. No. 102-542, § 3(a)-(d), 106 Stat. 3567, 3567-68 (Oct. 27, 1992), *codified at* 15 U.S.C. §§ 1114(1), 1121, 1125(a), 1127; see *College Sav. Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (holding that the Trademark Remedy Clarification Act was not a valid exercise of Congress’ § 5 power because “there is no deprivation of property here,” and so no constitutional rights for Congress to enforce).

⁴⁵ Pub. L. No. 102-560, § 2(a), 106 Stat. 4230, 4230 (Oct. 28, 1992), *codified at* 35 U.S.C. §§ 271(h), 296(a); see *Fla. Prepaid Postsec. Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 630 (1999) (holding that, under *Boerne*, the Patent and Plant Variety Protection Remedy Clarification Act “cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment’s Due Process Clause”).

⁴⁶ See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 372 (2001) (holding that the Americans with Disabilities Act, as applied to state governments, was not within Congress’ power under § 5 of the Fourteenth Amendment, in part because it imposed duties on states to accommodate disabled employees that “far exceed[ed] what is constitutionally required”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (holding that the Age Discrimination in Employment Act, as applied to state governments, exceeded Congress’ power under § 5 of the Fourteenth Amendment because “through its broad restriction on the use of age as a discriminating factor, [the ADEA] prohibit[ed] substantially more

- Targeting state action on the grounds it has a disparate impact on members of certain demographic groups—The federal statute is not aimed at unconstitutional intentional discrimination, but rather facially neutral state laws or policies adopted for non-discriminatory reasons;⁴⁷
- Sweeping scope—The statute prohibits broad swaths of state conduct, rather than discrete, easily identifiable acts.⁴⁸

state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard”); *Fla. Prepaid Postsec. Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 643 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress’ power under § 5 of the Fourteenth Amendment, primarily because “Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations”); *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (“Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”); see also *United States v. Morrison*, 529 U.S. 598, 620-21 (2000) (invalidating VAWA’s civil remedy because private conduct does not violate the Fourteenth Amendment); cf. *United States v. Georgia*, 546 U.S. 151, 159 (2006) (“[I]nsofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” (emphasis in original)).

⁴⁷ See, e.g., *Coleman v. Court of Appeals*, 566 U.S. 30, 42-43 (2012) (plurality op.) (holding that the FMLA’s self-care provision exceeded Congress’ power under § 5 of the Fourteenth Amendment primarily because, “[t]o the extent . . . [it] addresses neutral leave policies with a disparate impact on women, it is not directed at a pattern of constitutional violations”); *Garrett*, 531 U.S. at 372-73 (holding that the ADA, as applied to states, exceeded Congress’ power under § 5 of the Fourteenth Amendment, in substantial part because “[t]he ADA forbids utilizing standards, criteria, or methods of administration that disparately impact the disabled, without regard to whether such conduct has a rational basis,” but such disparate impact “alone is insufficient [to establish a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny” (quotation marks omitted)); see also *Boerne*, 521 U.S. at 535 (holding that the RFRA exceeded Congress’ § 5 power in large part because, “[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry”). But see *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (“When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation prohibiting practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.”).

⁴⁸ See, e.g., *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress’ power under § 5, in large part because, under that Act, “[a]n unlimited range of state conduct would expose a State to claims of direct, induced, or contributory patent infringement,” and Congress made no “attempt to confine the reach of the Act by limiting the remedy to certain types of infringement”); *Boerne*, 521 U.S. at 532 (holding that the RFRA exceeded Congress’ power under § 5 of the Fourteenth Amendment, primarily because its “[s]weeping coverage ensures [the act’s] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter”); see also *Kimel*, 528 U.S. at 86, 91 (holding that the ADEA exceeded Congress’ § 5 power because of its “broad restriction on the use of age as a discriminating factor” and “the indiscriminate scope of the Act’s substantive requirements”); cf. *Lane*, 541 U.S. at 530-31 (upholding § 2 of the ADA by considering only its application to courthouses to enforce the constitutional right of access to courts, and noting that remedy was “limited”); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738-39 (2003) (upholding the FMLA’s family leave provision under § 5 in “significant” part because the law was “narrowly targeted,” “affects only one aspect of the employment relationship,” and contained “many . . . limitations” on its scope, since it required only unpaid leave, applied only to certain

- Prohibiting state action that does not intentionally violate constitutional rights—

The federal statute subjects a state to suit for unintentional or negligent conduct, rather than primarily intentional constitutional violations;⁴⁹

- Shifting the burden of proof—The federal statute requires the state to prove its

conduct is permissible, rather than requiring potential challengers to demonstrate that the state's actions are invalid;⁵⁰

- Ignoring state-level remedies—The federal statute prohibits a state from engaging

in conduct that is already illegal under state law, or for which state-level remedies are available;⁵¹

- National applicability—The federal statute applies across the entire nation, rather

than only to states found to have violated the Constitution;⁵² and

employees, allowed recovery only of actual damages, excluded policymaking officials and their staffs, and guaranteed only 12 weeks of leave).

⁴⁹ See, e.g., *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress' power under § 5 of the Fourteenth Amendment, in part because "Congress did not focus on instances of intentional or reckless infringement on the part of the States. . . . [N]egligent conduct, however, does not violate the Due Process Clause of the Fourteenth Amendment."); cf. *Hibbs*, 538 U.S. at 727-28 (upholding the FMLA's family leave provision under § 5, in part because Congress had evidence that state family leave policies were "applied in discriminatory ways").

⁵⁰ *Garrett*, 531 U.S. at 372 (holding that the ADA exceeded Congress' § 5 powers, in part because the Act required a state employer to demonstrate that accommodating a disabled employee would impose an undue burden, "instead of requiring (as the Constitution does) that the complaining party" demonstrate the employer's decision violated her rights).

⁵¹ *Coleman*, 566 U.S. at 39 (holding that a federal cause of action against state governments is not a congruent and proportional remedy for violations of the U.S. Constitution because existing state-level remedies "would have sufficed"); *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress' power under § 5 of the Fourteenth Amendment, in part because Congress "barely considered the availability of state remedies . . . and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment"); see also *Kimel*, 528 U.S. at 91 (holding that the expansion of the ADEA to state governments exceeded Congress' power under § 5 of the Fourteenth Amendment, noting that "[s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.").

⁵² *Garrett*, 531 U.S. at 374 (holding that the ADA exceeded Congress' power under § 5 of the Fourteenth Amendment, in part because it imposed a "comprehensive national mandate" (quoting 42 U.S.C. § 120101(b)(1)); *Morrison*, 529 U.S. at 626-27 (holding that VAWA exceeded Congress' power under § 5 of the Fourteenth Amendment, in part because "it applies uniformly throughout the nation," despite the fact that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"); *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety

- Indefinite duration—The federal statute does not have a sunset provision.⁵³

Thus, the heart of Congress' authority under the Enforcement Clauses is preventing constitutional violations.⁵⁴ The Court has emphasized that the term "enforce" in these provisions "is to be taken seriously—that the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations."⁵⁵ The Enforcement Clauses also confer a limited prophylactic power to go beyond prohibiting solely constitutional violations, allowing Congress to bar some limited range of other state conduct that is closely associated with such violations.⁵⁶ The Supreme Court, however, has rejected overbroad "prophylaxis-upon-

Protection Remedy Clarification Act exceeded Congress' power under § 5 of the Fourteenth Amendment, in part because "Congress made all States immediately amenable to suit in federal court for all kinds of possible patent infringement," rather than "providing for suits only against States with questionable remedies or a high incidence of infringement"); *see also Kimel*, 528 U.S. at 90 (holding that evidence of unconstitutional age discrimination within one state's agencies "would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union"); *cf. Garrett*, 531 U.S. 373 (noting that *Katzenbach* upheld the Voting Rights Act, in part because it was a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified"); *Boerne*, 521 U.S. at 532 (noting that *Katzenbach* upheld the Voting Rights Act, in part because "the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant").

⁵³ *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding Congress exceeded its § 5 remedial power in part because the statute applied "for an indefinite duration"); *Boerne*, 521 U.S. at 532 (holding that the RFRA exceeded Congress' power under § 5 of the Fourteenth Amendment, in part because it "has no termination date or termination mechanism").

⁵⁴ *Coleman*, 566 U.S. at 36 (holding that laws enacted under § 5 must be "targeted at 'conduct transgressing the Fourteenth Amendment's substantive provisions'" (quoting *Fla. Prepaid Postsec. Educ. Expense Bd.*, 566 U.S. at 36)); *United States v. Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for actual violations of those provisions."); *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("Section 5 authorizes Congress to enforce commands contained in and incorporated into the Fourteenth Amendment."); *Garrett*, 531 U.S. at 368 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions [of § 1 of the Fourteenth Amendment].").

⁵⁵ *College Sav. Bank*, 527 U.S. at 672.

⁵⁶ *Hibbs*, 538 U.S. at 727-28 ("Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. . . . Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."); *Garrett*, 531 U.S. at 365 ("Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence."); *Kimel*, 528 U.S. at 81, 88 ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. . . . [W]e have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation."); *Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within

prophylaxis” measures⁵⁷ that stray too far from the promotion of Congress’ constitutionally permissible objectives.⁵⁸ The only post-*Boerne* cases in which the Court has upheld federal laws as valid exercises of Congress’ power under § 5 involved statutes that the Court construed to prohibit actual constitutional violations,⁵⁹ or that were “narrowly targeted,” featuring numerous “limitations” on both the requirements they imposed on states and the remedies they authorized.⁶⁰

C. *The Supreme Court and § 5 of the Voting Rights Act*

The Supreme Court originally upheld the constitutionality of § 5 of the Voting Rights Act in *South Carolina v. Katzenbach*.⁶¹ It began by holding that Congress’ power under § 2 of the Fifteenth Amendment was as broad as its authority under the Necessary and Proper Clause.⁶² The Court then concluded that § 5 was valid because the “exceptional conditions” and “unique circumstances” in covered jurisdictions justified measures that would not otherwise be appropriate.⁶³ African-American voter registration rates in covered jurisdictions were at least 50

the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . .”).

⁵⁷ *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014); accord *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.).

⁵⁸ *Coleman*, 566 U.S. at 41 (holding that Congress had failed to justify a statute subjecting states to suit “for violations of a provision (the self-care provision) that is a supposedly preventive step in aid of already preventive provisions (the family-care provisions)”).

⁵⁹ *Georgia*, 546 U.S. at 158 (“[I]nsofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” (emphasis in original)).

⁶⁰ *Hibbs*, 538 U.S. at 738 (upholding FMLA’s family leave provision under § 5 of the Fourteenth Amendment); see *Tennessee v. Lane*, 541 U.S. 509, 531, 533 (2004) (upholding Title II of the Americans with Disabilities Act as a “limited,” “reasonably targeted” prophylactic measure).

⁶¹ 383 U.S. 301 (1966).

⁶² *Id.* at 326.

⁶³ *Id.* at 334.

percentage points less than for whites.⁶⁴ The Court emphasized that the Voting Rights Act's preclearance requirements applied only to areas where "there was evidence of actual voter discrimination."⁶⁵

Over the decades that followed, the Court repeatedly cited the Voting Rights Act as an example of a valid exercise of Congress' authority under the Enforcement Clauses.⁶⁶ A half-century later, in *Northwestern Austin Municipal Utility District No. 1 ("NAMUNDO") v. Holder*,⁶⁷ however, the Court raised constitutional concerns with § 5 of the Act. It explained that, by "authoriz[ing] federal intrusion into sensitive areas of state and local policymaking," § 5 imposes "substantial federalism costs."⁶⁸ The Court further noted that § 5's preclearance requirements "go[] beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared."⁶⁹ It further cautioned, "[T]he Act imposes current burdens and must be justified by current needs."⁷⁰ Yet the Act's coverage formula was based on data that was over 35 years old and did not "account for current political conditions."⁷¹ Additionally, the Act requires states and localities to engage in explicitly

⁶⁴ *Id.* at 313.

⁶⁵ *Id.* at 330.

⁶⁶ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736-38 (2003); *Bd. of Tr. v. Garrett*, 531 U.S. 536, 373 (2001); *United States v. Morrison*, 529 U.S. 598, 626 (2000); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518, 525-26 (1997).

⁶⁷ 557 U.S. 193 (2009).

⁶⁸ *Id.* at 201 (quoting *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999)).

⁶⁹ *Id.* at 202.

⁷⁰ *Id.* at 203.

⁷¹ *Id.*

race-conscious decisionmaking regarding the electoral process that can raise serious constitutional concerns.⁷²

A few years later, in *Shelby County v. Holder*,⁷³ the Court resolved many of the constitutional issues raised in *NAMUNDO*. It reaffirmed that the Voting Rights Act's preclearance requirements were "extraordinary measures to address an extraordinary problem."⁷⁴ Requiring states to "obtain federal permission before enacting any law relating to voting" was "a drastic departure from basic principles of federalism."⁷⁵ Similarly, the Act's applicability to only certain states violated the structural constitutional principle of "equal sovereignty."⁷⁶

To impose such unusual measures, Congress "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."⁷⁷ Yet § 4(b) of the Voting Rights Act relied on forty-year-old data to determine the jurisdictions that would be subject to § 5's preclearance requirements. The Court concluded that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."⁷⁸ It concluded by inviting Congress to adopt a new coverage formula for determining which states and localities would be subject to § 5's preclearance requirements. Federal courts retain power under § 3(c) of

⁷² *Id.*

⁷³ 570 U.S. 529 (2013).

⁷⁴ *Id.* at 534.

⁷⁵ *Id.* at 535, 544.

⁷⁶ *Id.* at 535, 544.

⁷⁷ *Id.* at 553.

⁷⁸ *Id.* at 535.

the Act, however, to subject individual jurisdictions that engage in intentional discrimination concerning voting rights to preclearance requirements.⁷⁹

II. CONSTITUTIONAL CONCERNS WITH THE VOTING RIGHTS ADVANCEMENT ACT OF 2019

To maximize the likelihood that the current conservative majority on the U.S. Supreme Court will uphold the constitutionality of H.R. 4, the Voting Rights Advancement Act of 2019, the Committee should consider the following concerns and potential amendments:

A. Sections 2 and 3(a)(1) – Defining “Voting Rights Violations” to Include Violations of § 2 of the Voting Rights Act Under a Disparate Impact Theory

H.R. 4, as presently drafted, subjects states and political subdivisions to preclearance requirements if they engage in “voting rights violations.” The bill defines “voting rights violation” in part as including any violations of the Voting Rights Act. H.R. 4, § 3(a)(1) (*Proposed § 4(b)(3)(B)*). The bill also allows federal courts to “bail in” jurisdictions under § 3(c) of the Voting Rights Act, subjecting them to preclearance requirements on a case-by-case basis, if they violate § 2 of the Act. H.R. 4, § 2(a)-(b). These provisions would allow states and political divisions to be subject to preclearance requirements for violations of § 2 of the Voting Rights Act arising from election-related laws, procedures, or policies with a racially disparate impact that do not violate the Fourteenth or Fifteenth Amendments to the Constitution.⁸⁰ It is very likely that the current conservative majority on the U.S. Supreme Court would conclude that it is unconstitutional to impose preclearance requirements on states or political subdivisions for adopting constitutionally valid election laws that have racially disparate impacts.

⁷⁹ 52 U.S.C. § 10302(c).

⁸⁰ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Preclearance requirements are a prophylactic protection against potentially discriminatory voting laws. The Court has held that they impose substantial federalism costs on states, however.⁸¹ Section 2's prohibition on racially disparate impacts is another prophylactic protection against the type of intentional racial discrimination that the Court has held violates the Fourteenth and Fifteenth Amendments.⁸² It applies to a wide range of state policies that do not amount to constitutional violations. Allowing preclearance requirements to be triggered by violations of § 2 arising from a disparate impact theory of liability impermissibly stacks prophylaxis upon prophylaxis. Accordingly, the current conservative majority on the Court is likely to conclude that § 2 of H.R. 4, as well as *Proposed § 4(b)(3)(B)*, stray too far from the prevention of actual constitutional violations to fall within Congress' authority under the Enforcement Clauses.

B. Section 3(a)(1) – Definition of “Voting Rights” Violations

As noted above, H.R. 4 subjects states and political subdivisions that commit “voting rights violations” to preclearance requirements. The bill defines “voting rights violation” as including:

- (A) constitutional violation: a final judgment in federal court that the jurisdiction denied or abridged the right to vote on account of race, color, or membership in a language minority group in violation of the 14th or 15th amendments;
- (B) VRA violation: a final judgment in federal court that the jurisdiction violated §§ 2 or 203 of the Voting Rights Act;
- (C) failure to obtain preclearance in court: a federal court's denial of the jurisdiction's request for a declaratory judgment approving a change to a voting qualification, prerequisite, standard, practice, or procedure under §§ 3(c) or 5 of the Voting Rights Act;
- (D) failure to obtain preclearance from the Attorney General: the Attorney General objects to a jurisdiction's application to change a voting qualification, prerequisite,

⁸¹ See *supra* note 68 and accompanying text.

⁸² See *supra* notes 9-12 and accompanying text.

standard, practice, or procedure under §§ 3(c) or 5 of the Voting Rights Act, and the objection is not overturned in court; or

- (E) settlement in voting rights case: the jurisdiction enters into a “consent decree, settlement, or other agreement” to amend or repeal a voting practice “that was challenged on the ground that [it] denied or abridged the right . . . to vote on account of race, color, or membership in a language minority group” in violation of the Fourteenth Amendment, Fifteenth Amendment, or §§ 2 or 203 of the Voting Rights Act.

See Proposed § 4(b)(3)(A)-(E).

In addition to the concerns set forth above, *see supra* Section II.A, this definition raises two additional concerns. **First**, *Proposed § 4(b)(3)(C)-(D)* allows a state, as well as every political subdivision within the state, to be subject to preclearance based exclusively on unsuccessful applications for preclearance to the Attorney General or a federal court. The State of Florida, for example, has 67 counties and 412 municipalities. A single unsuccessful application from only 3% of these jurisdictions over a quarter of a century would trigger preclearance requirements throughout the entire state. The Committee should either eliminate *Proposed § 4(b)(3)(C)-(D)*, or include qualifications so that a rejected preclearance application would qualify as a “voting rights violation” only if the Attorney General or court determines the jurisdiction did not present any reasonable arguments in support of its request, or the request facially and indisputably violated §§ 3(c) or 5 of the Voting Rights Act.

Second, *Proposed § 4(b)(3)(E)* treats a “consent decree, settlement, or other agreement” as a “voting rights violation” if the original complaint alleged that the jurisdiction racially discriminated in violation of the Fourteenth Amendment, Fifteenth Amendment, or §§ 2 or 203 of the Voting Rights Act. In effect, this provision treats the mere filing of a voting rights lawsuit—including by politically motivated candidates or political parties—as a voting rights violation unless the defendant jurisdiction prevails. Political subdivisions, however, face tremendous

pressure to settle voting rights suits, regardless of whether they actually violated the Constitution or federal law. Beyond political concerns, defendants run the risk of being held liable to plaintiffs for millions of dollars in attorneys' fees⁸³—a risk many municipalities cannot assume.

Proposed § 4(b)(3)(E) creates substantial incentives for private groups to file dubious lawsuits, and for defendant jurisdictions to continue litigating more substantial matters they otherwise would be willing to settle. Moreover, when each locality bears its own litigation costs, it has no incentive to consider the externalities of settlement: potentially subjecting the state and all of its municipalities to preclearance. A complaint is a pleading, not evidence. A defendant's decision to settle a case may be driven by numerous factors other than the merits of a complaint's allegations. The current conservative majority on the Court is likely to conclude that *Proposed § 4(b)(3)(E)* is too far attenuated as evidence of an actual constitutional violation to support imposition of preclearance requirements. This Committee should either delete *Proposed § 4(b)(3)(E)*, or add the following clause to it:

A consent decree, settlement, or other agreement was entered into, which resulted in the alteration or abandonment of a voting practice anywhere in the territory of such State that was challenged on the ground that the practice denied or abridged the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group in violation of subsection (e) or (f), or section 2 or 203 of this Act, or the 14th or 15th Amendment, if the defendant state or political subdivision admitted liability.

Proposed § 4(b)(3)(E).

C. Section 3(a)(1) – Treatment of Political Subdivisions

Section 3(a)(1) of H.R. 4, as presently drafted, subjects states and political subdivisions to preclearance requirements based on voting rights violations in which they were completely uninvolved, and which they lacked power to prevent. The proposed statutory language provides

⁸³ 42 U.S.C. § 1988(b).

that preclearance requirements apply to “a State and all political subdivisions within the State” if either:

- “15 or more voting rights violations occurred in the State during the previous 25 calendar years,” or
- “10 or more voting rights violations occurred in the State during the previous 25 calendar years at least one of which was committed by the State itself”

Proposed § 4(b)(1)(A)(i)-(ii). A political subdivision also becomes subject to preclearance if it commits three or more voting rights violations within a 25-year period. *Proposed § 4(b)(1)(B).*

Under *Proposed § 4(b)(1)(A)*, a political subdivision can become subject to preclearance if other, completely unrelated political subdivisions—potentially on the other side of the state, controlled by officials of a different political party—commit voting rights violations. Such collective responsibility is especially problematic given *Proposed § 4(b)(3)(C)-(D)*’s sweeping definition of “voting rights violation” as including unsuccessful requests for preclearance to the Attorney General or a federal court. This Committee should not subject all towns and counties throughout a state to preclearance requirements potentially based on a handful of jurisdictions’ unsuccessful attempts to win preclearance for amendments to their election laws that never take effect.

More broadly, a political subdivision committed to fair elections and racial equality should not be subject to preclearance based on the acts of other political subdivisions it may staunchly oppose. Similarly, a state government should not be subject to preclearance based on the acts of county or municipal governments, especially when those entities have home rule or their election officials are independently elected. *Proposed § 4(b)(1)(B)*, which holds each political subdivision accountable for its own voting rights violations, exemplifies a much fairer and constitutionally defensible approach.

D. Section 4 – Practice-Based Pre-Clearance

H.R. 4, as presently drafted, further requires all states, indefinitely, to obtain pre-clearance from either a three-judge district court panel or the Attorney General before implementing a wide range of “covered practices.” *Proposed § 4A(a)(1)(B), 4A(c)*. The list of “covered practices” includes:

- adding at-large seats in racially diverse jurisdictions, *Proposed § 4A(b)(1)(A)*;⁸⁴
- converting one or more seats from a single-member district to one or more at-large seats in racially diverse jurisdictions, *Proposed § 4A(b)(1)(B)*;
- the boundaries of a racially diverse jurisdiction change so that the percentage of the jurisdiction’s voting-age population comprised of any racial or language minority group is reduced by at least 3%, *Proposed § 4A(b)(2)*;
- the boundaries of any election district changes in any state where the population of any racial or language minority group has increased by at least 10,000 people or 20% of the voting-age population over the preceding decade, *Proposed § 4A(b)(3)*;
- any change to voter identification requirements more stringent than those set forth in 52 U.S.C. § 21083(b), *Proposed § 4A(b)(4)*;
- any enhancement to the documentation or identification requirements for registering to vote, *Proposed § 4A(b)(4)*;
- any reduction in multilingual voting materials or change in the manner in which they are provided or distributed that does not also apply to English-language materials, *Proposed § 4A(b)(5)*; and
- any reduction, relocation, or consolidation of any early, absentee, or election-day voting location impacting racially diverse areas, *Proposed § 4A(b)(6)*.

Proposed § 4A(b).

⁸⁴ For purposes of brevity, “racially diverse” is a shorthand used to refer to H.R. 4’s standard that either: (i) two or more racial groups or language minority groups each comprise at least 20% of the relevant jurisdiction’s voting-age population, or (ii) a single language minority group represents at least 20% of the voting-age population on Indian lands in the relevant jurisdiction.

A federal court must enjoin a state or political subdivision from applying any covered practice unless it first obtained preclearance. *Proposed § 4A(d)(2)*. To win preclearance, a state or political subdivision must demonstrate that its covered practice “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.” *Proposed § 4A(c)(1)*. To do so, the state must show the covered practice was not adopted for the purpose, and will not have the effect, of diminishing citizens’ “ability . . . to elect their preferred candidate of choice” on “account of race, color, or membership in a language minority group.” *Proposed § 4A(c)(2)*.

The current conservative majority on the Supreme Court would likely hold that *Proposed § 4A*’s preclearance requirements for covered practices are unconstitutional. *Proposed § 4A* imposes strong federalism costs on states by subjecting a wide list of election-related measures to preclearance. These requirements apply, indefinitely, to any state or political subdivision that adopts any of the covered practices, regardless of its lack of past discriminatory conduct or the extent of minority voter participation or political success there. The covered practices themselves are measures that have been held constitutionally valid, so long as they are not adopted with a racially discriminatory purpose.⁸⁵ Indeed, some of the covered practices, such as the relocation of polling places or changes in voting districts in response to population growth, are completely ordinary and unremarkable features of the election administration process.

⁸⁵ See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (“Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.”); *Cravford v. Marion Cnty. Sch. Bd.*, 553 U.S. 181, 202-03 (2008) (rejecting challenge to voter identification requirements imposing more stringent standards than HAVA); *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971) (“[W]hen the validity of the multi-member district, as such, was squarely presented, we held that such a district is not per se illegal under the Equal Protection Clause.”).

To obtain preclearance, a state or political subdivision must demonstrate, among other things, that the measures do not give rise to a racially disparate impact. *Proposed § 4A* thus imposes a prophylaxis-upon-prophylaxis remedy that raises serious questions under *Boerne*. It creates a strong prophylactic requirement (preclearance) to ensure that states and political subdivisions comply with another prophylactic requirement (satisfying a disparate impact standard), regardless of those jurisdictions' history of racial fairness or the extent of minorities' political participation and success there. The current conservative majority on the Court is likely to hold this measure is too far removed from the protection of Fourteenth and Fifteenth Amendment rights as defined by the Court to fall within Congress' authority under the Enforcement Clauses.

E. Section 5(a)(1) – Prohibition on Enforcing Changes in Election Laws

H.R. 4, as presently drafted, contains three provisions mandating that states and most political subdivisions publicly disclose information concerning changes in their election laws.

First, a jurisdiction must provide “reasonable public notice,” within 48 hours, of changes to any “prerequisite to voting” or “standard, practice, or procedure with respect to voting” in federal elections that is adopted within 180 days of a federal election. *Proposed § 6(a)(1)-(a)(2)*. The notice must explain how the new provision differs from previous law. *Proposed § 6(a)(1)*. The statute does not further specify what information is sufficient to satisfy these requirements.

Second, a jurisdiction must provide information concerning changes to any precinct or polling place within 48 hours of adopting it,⁸⁶ *Proposed § 6(b)(1), (3)*, including:

⁸⁶ The bill is ambiguous as to whether this 48-hour requirement applies only once information concerning the precincts and polling places for an election has been initially disclosed to the public pursuant to *Proposed § 6(b)(1)*, or instead applies continuously (including more than 30 days before federal elections).

- its name or number;
- the voting-age population and number of registered voters in the area it serves, broken down by demographic group if that information is reasonably available;
- the number of voting machines, official poll workers, and volunteers assigned there; and,
- for a polling place, its address, as well as its dates and hours of operation, and whether it is “accessible to persons with disabilities.”

Proposed § 6(b)(2).

Third, a jurisdiction must provide information concerning changes to the “constituency that will participate in an election” or “the boundaries of a voting unit or electoral district” for any federal, state, or local election within 10 days of adopting it. *Proposed § 6(c)(1)*. This information includes:

- the voting-age population, broken down by demographic group, of the affected areas;
- an estimate of the population of the affected areas “which consists of citizens of the United States who are 18 years of age or older,”⁸⁷ broken down by demographic group, if that information is “reasonably available”;
- the number of registered voters affected by the change, if that information is reasonably available; and
- for changes that apply to the entire state or a single political subdivision, the actual or estimated number of votes received by each candidate in every statewide or subdivision-wide election for the past five years.

Proposed § 6(c)(3).

The bill contains a sweeping enforcement mechanism, declaring:

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 political subdivision involved did not meet the applicable requirements of this section with respect to the change.

⁸⁷ The Committee should consider clarifying how this differs from “voting-age population.”

Proposed § 6(e).

As a constitutional matter, the Government likely can apply this requirement to federal elections, since it has virtually plenary authority to regulate them. It seems unlikely, however, that the Government may constitutionally enforce *Proposed § 6(e)* for violations of *Proposed § 6(e)(1)* as it applies to state and local elections. *Proposed § 6(e)(1)* applies indefinitely to all states throughout the nation; extends to any changes in jurisdictional boundaries, regardless of whether there is reason to believe a constitutional problem exists; mandates the disclosure of information that states are not constitutionally obligated to gather or release; and completely prohibits enforcement of any such changes, no matter how innocuous, if states fail to comply. The Court is likely to conclude that *Proposed § 6(e)*, as applied to state and local elections under *Proposed § 6(e)(1)*, is unconstitutional.

Putting aside constitutional objections, *Proposed § 6(e)* raises several other troubling policy concerns that this Committee should address before applying it to elections at any level of government. Most significantly, if a state or political subdivision does not disclose statutorily required information within the 48-hour or 10-day timeframes, is it completely prohibited from implementing and applying the changes at issue, or can the entity “cure” the defect by providing the information after the statutory timeframe has expired? The same issue arises if a court determines that a state did not provide sufficient information under *Proposed § 6(a)(1)* about a change to its election laws, or that its disclosures were not “reasonably convenient and accessible to voters with disabilities.” *Proposed § 6(a)(1), (b)(1)*. It is also unclear whether *Proposed § 6(e)* allows voters or candidates to challenge the results of elections by seeking a court order that certain provisional ballots be counted contrary to state law or that a new election be held, based on a state’s failure to provide the statutorily required disclosures. This Committee should amend *Proposed*

§ 6(e) to expressly address these issues now, rather than leaving the issue for courts to resolve in the context of actual elections.

To address these problems, the Committee should amend *Proposed § 6(e)* by adding the underlined sentence below, so that the Subsection reads:

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 political subdivision involved did not meet the applicable requirements of this section with respect to the change. The foregoing sentence shall not apply if a State or political subdivision: posts, publishes, or otherwise makes available disclosures containing immaterial errors; posts, publishes, or otherwise makes available information reflecting scrivener's, typographical, or computational errors; substantially complies with the applicable requirements of this section; or, after failing to meet this section's requirements, cures the violations by belatedly providing the required disclosures in the required formats.

F. Section 7(a)(1) – Creation of Private Rights of Action

H.R. 4, as presently drafted, would amend 52 U.S.C. § 10308(d) to read:

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by ~~section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section~~ *the 14th or 15th Amendment, this Act, or any Federal voting rights law* that prohibits discrimination on the basis of race, color, or membership in a language minority group, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.⁸⁸

The Committee should strengthen this provision and eliminate unnecessary litigation over whether a law falls within its scope by deleting the qualifying phrase, underlined above, “that prohibits discrimination on the basis of race, color, or membership in a language minority group.” Eliminating that qualification would create a private right of action to allow voters and candidates

⁸⁸ Language in strikethrough currently exists in federal law and is deleted by the bill. Language in italics is added by the bill.

with Article III standing to sue to enforce any federal voting rights law. Federal laws comprise a critical part of the backdrop against which elections are held, and voters and candidates should be able to enforce those mandates as necessary to ensure the process occurs in a fair and legal manner.⁸⁹

CONCLUSION

The Voting Rights Enforcement Act of 2019 contains many substantial changes to federal election law. As currently drafted, however, there is a substantial risk the current conservative majority on the U.S. Supreme Court would invalidate several of its major provisions, including:

- the treatment of violations of § 2 of the Voting Rights Act under a disparate impact theory as “voting rights violations” under H.R. 4, § 3(a)(1) (*Proposed § 4(b)(3)(B)*) and grounds for “bail in” under H.R. 4, § 2;
- other components of the definition of “voting rights violations” under H.R. 4, § 3(a)(1) (*Proposed § 4(b)(3)(B)-(E)*);
- the treatment of political subdivisions under H.R. 4, § 3(a)(1) (*Proposed § 4(b)(1)(A)*); and
- the requirement for practice-based preclearance under H.R. 4, § 4 (*Proposed § 4A*).

Other minor changes would eliminate unnecessary ambiguities and strengthen the law’s protections:

- In § 5(a)(1) of H.R. 4, within the *Proposed § 6(c)(1)*, delete the phrase “, State or local”.
- In § 5(a)(1) of H.R. 4, add the following language to the end of *Proposed § 6(e)*: “The foregoing sentence shall not apply if a State or political subdivision: posts, publishes, or otherwise makes available disclosures containing immaterial errors; posts, publishes, or otherwise makes available information reflecting scrivener’s, typographical, or computational errors; substantially complies with the applicable requirements of this section; or, after failing to meet this section’s requirements,

⁸⁹ See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L.J. 113, 157 (2010) (“Allowing a private right of action thus provides a check on potential partisanship by DOJ, as well as state and local election officials.”).

cures the violations by belatedly providing the required disclosures in the required formats.

- In § 7(a)(1) of H.R. 4, delete the phrase “that prohibits discrimination on the basis of race, color, or membership in a language minority group”.

Mr. RASKIN. Thank you very much for your testimony.

Joe Rich retired in 2018 from the Lawyers Community for Civil Rights Under Law, where he served as co-director of its Fair Housing and Community Development Project.

From 1968 until 2005 he was an attorney in the Civil Rights Division of DOJ, acting in various roles, ultimately rising to the position of chief of the Voting Section between 1999 and 2005.

Mr. Rich, welcome, and you are recognized for 5 minutes.

STATEMENT OF JOE RICH

Mr. RICH. Thank you, Mr. Chairman. Thank you for the opportunity to testify today.

As you noted, I worked at the Department of Justice for 37 years; 1999 to 2005 I was chief of the Voting Section. I am testifying today in my individual capacity, not on behalf of the Lawyers Committee or the Department of Justice, and it is based on my long career enforcing civil rights laws that has informed my perspective of the Voting Rights Act and the continuing need for restoring the full protections of the act which were lost as a result of the Shelby case.

The voting Rights Act of 1965 is the most important and successful civil rights law ever passed, but the Shelby County decision gutted the preclearance provisions which are the heart of the act, provisions which have been crucial in stopping discriminatory voting changes and laws before they ever took effect in States with a long history of discrimination.

The most devastating impact of this decision, in my judgment, has been the loss of the deterrent effect of Section 5 that it had on the adoption of discriminatory voting laws in those jurisdictions that were covered by Section 5.

This has been particularly true in the context of redistricting legislation in which racially gerrymandered and discriminatory districting has been created by legislators and their consultants without public participation. For example, the day after the Shelby decision, Texas reinstated a redistricting plan previously objected to by the Department under Section 5.

Another example is set forth in a recent study by the Leadership Conference on Human and Civil Rights which found that some 1,688 polling sites had been closed in the wake of the Shelby County decision, many without notice or input from the communities impacted by these changes. The majority of these changes took place in jurisdictions formerly covered by Section 5, including Texas, Georgia, and Arizona, and many were in majority-minority areas, resulting in a discriminatory impact on voters of color.

Had preclearance provisions been in place, it would very likely have prevented a significant number of these discriminatory closures.

The gutting of Section 5 has also resulted in a loss of transparency. When Section 5 was in effect, the Department of Justice provided on its website valuable information about voting change submissions and the status of Section 5 reviews for the public. Now voters and advocates in the formerly covered States and local jurisdictions are often in the dark about discriminatory voting changes.

The loss of the preclearance provisions has also severely curtailed the ability of the Department of Justice to deploy Federal observers to monitor elections. This was an important provision of the Voting Rights Act that permitted observations of elections by specially trained personnel from OPM inside polling places and where the votes were being counted.

Before Shelby County, jurisdictions that were covered by Section 5 could be certified by the Attorney General for Federal observers in situations where there was evidence of possible racial discrimination. Without Section 5, this authority has been lost.

The proposed legislation will reinstate the Attorney General's authority. Importantly, it will also provide new authority to send Federal observers to Section 203 jurisdictions to ensure that language assistance required by 203 is provided to limited English proficient citizens in a fair manner.

In conclusion, it is now time to enact legislation to restore the important protections that minority voters have lost as a result of the Shelby decision. Reinstatement of a preclearance requirement for jurisdictions found to have had numerous recent voting rights violations will deter and stop discriminatory voting changes before they go into effect. Reinstating the Attorney General's authority to certify Federal observers will help ensure elections free from racial discrimination and provide language minority voters an equal opportunity to vote.

Thank you.

[The statement of Mr. Rich follows:]

STATEMENT OF
JOSEPH D. RICH

U.S. HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES HEARING

“CONGRESSIONAL AUTHORITY TO PROTECT VOTING RIGHTS
AFTER *SHELBY COUNTY V. HOLDER*”

SEPTEMBER 24, 2019

I. Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S House of Representatives Committee on the Judiciary, my name is Joe Rich. Thank you for the opportunity to testify today.

I worked for the United States Department of Justice's Civil Rights Division for almost 37 years. Between 1999 and 2005, I was Chief of the Division's Voting Section. I also served as Deputy Chief of the Housing and Civil Enforcement Section for twelve years and Deputy Chief for the Education Section for ten years. During my nearly 37 years in the Civil Rights Division, I served in Republican administrations for over 24 years and Democratic administrations for slightly over 12 years. After leaving the Department of Justice in 2005, I was employed as the Director of the Fair Housing and Community Development Project of the Lawyers' Committee for Civil Rights Under Law until my retirement in 2018.

I am testifying today in my individual capacity and not on behalf of the Department of Justice or the Lawyers' Committee. My experience as Chief of the Voting Section and my long career enforcing civil rights laws has informed my perspective on the Voting Rights Act and the continuing need for restoring the full protections of the Act, which were curtailed by the *Shelby County v. Holder* decision.

The Voting Rights Act of 1965 was the most important and most successful civil rights law ever passed. It is one of the most important pieces of social legislation in our nation's history. Voting is our most basic civil right and the Voting Rights Act had a tremendous impact in advancing the ability of citizens of color and language minority voters to have an equal opportunity to register to vote, exercise the franchise, and to have the ability to elect candidates of their choice at all levels of government. The success of the Voting Rights Act and the need for its continuing protections were endorsed by an overwhelming majority of both Republicans and Democrats in Congress when the 2006 bill to reauthorize the Act was passed by a vote of 98-0 in the Senate and by a vote of 390-33 in the House.¹

¹ Congress.gov, H.R.9 - Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006), <https://www.congress.gov/bills/109th-congress/house-bill/9/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>.

Notwithstanding the bipartisan support of the Voting Rights Act and its success in ensuring minority voting rights since its passage, the Supreme Court gutted important protections of the Act when it handed down the *Shelby County v. Holder* decision in June 2013.² In the aftermath of this decision, we saw jurisdictions, such as North Carolina and Texas among others, race to enact legislation undermining minority voting rights, including bills mandating strict forms of voter ID, cutbacks to early and absentee voting, and other voter suppression laws which overwhelmingly targeted minority voters.

It is now time to enact legislation to restore the protections lost by the *Shelby* decision in order to ensure that the opportunities for the sort of successes achieved by the Voting Rights Act between 1965 and 2013 are again available, and that voters of color and language minority voters will have an equal opportunity to register to vote, exercise the franchise and elect candidates of their choice to all levels of government.

II. The Importance of Preclearance of New Voting Laws

A. Section 5's Important Deterrent Effect

Jurisdictions subject to the preclearance provisions of Section 5 were required to submit proposed voting changes to the Department of Justice to demonstrate that they did not have a discriminatory purpose or effect.³ “Discriminatory purpose” under Section 5 was based upon the same standard as Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against minority voters.⁴ Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice.⁵ This was also known as retrogression, and in most instances, this standard was easy to measure and apply.

For example, if a proposed redistricting plan maintained the same majority-black districts which elected minority-preferred candidates at the same minority population percentage as the existing plan, DOJ would have been unlikely to have found the plan to be retrogressive. On the other hand, if the plan significantly diminished the minority population percentage in the same districts and diminished the ability of minority voters to elect their preferred candidates of choice, DOJ would have been more likely to have found the plan was retrogressive.

The Section 5 preclearance process played an extremely important role in stopping discriminatory voting changes and laws before they ever took effect. The deterrent effect of Section 5 preclearance is a key reason why the full protections of the Voting Rights Act must be restored now.

² 570 U.S. 529 (2013).

³ 52 U.S.C. § 10304(c).

⁴ *Id.*

⁵ 52 U.S.C. § 10304(b), (d).

During my tenure with the Voting Section, the Attorney General objected to less than one percent of Section 5 submissions received by the Department.⁶ The relatively small number of objections underscored the impact of Section 5 in preventing discrimination. The existence of Section 5 deterred covered jurisdictions from discriminating in the first place, because jurisdictions knew DOJ would be reviewing those changes and would object to them if they had a discriminatory purpose or effect. The Department had built a tradition of excellence and meticulousness in its Section 5 review process, and covered jurisdictions would have to think long and hard before passing laws or adopting voting changes that had a discriminatory impact or purpose.

I often heard of examples of this deterrent effect during my tenure in the Voting Section. For instance, jurisdictions would make changes after careful consideration of discriminatory impact of a voting change during the legislative process. Minority elected officials would remind their white colleagues of the need for Justice Department review of laws and other changes under consideration, prompting changes. Moreover, there would be withdrawal of, or changes made to, preclearance submissions once DOJ sent letters or made inquiries requesting supplemental information (also known as, “More Information Requests” or “MIRs”). In fact, one study found that during the period from 1999 to 2005, MIRs deterred 605% more voting changes than did formal Section 5 objections.⁷ In sum, the deterrent effect of Section 5 was extremely important to the protection of minority rights and the loss of preclearance post-*Shelby* led almost immediately to a proliferation of discriminatory laws and other voting changes largely targeting minority voters that would likely have been stopped or deterred by the Section 5 preclearance process.

B. Section 5 Preclearance Was an Efficient and Transparent Process

Section 5 preclearance was an efficient and cost-effective process designed to proactively root out discriminatory voting changes before they went into effect. The process afforded notice to voters and interested parties of proposed voting changes and of DOJ’s actions on Section 5 submissions. DOJ almost always sought the views of involved minority voters, advocates, community groups, and other interested parties in the process as it assessed whether and to what extent voting changes would impact minority voters. As reflected in the very low percentage of objections, the preclearance process was instrumental in resolving concerns about proposed voting changes without the need for protracted and expensive litigation.

During my tenure with the Voting Section, DOJ received over 4,000 submissions per year from covered jurisdictions containing close to 20,000 voting changes. Review of each of these changes was carefully done pursuant to a preclearance process formally established in DOJ regulations designed to fully and carefully determine whether the jurisdiction had met its burden to demonstrate that the change did “not have the purpose and will not have the effect of denying

⁶ See Luis Ricardo Fraga and Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in Ana Henderson (ed.), *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER*, Berkeley Public Policy Press, Institute of Governmental Studies, University of California, Berkeley 49 (2007), available at https://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf.

⁷ *Id.* at 65.

or abridging the right to vote on account of race or color" or because of membership in a language minority group.⁸

In most instances, after covered jurisdictions submitted proposed voting changes to DOJ for preclearance, DOJ had a relatively short window of sixty days to determine whether it would preclear the voting change.⁹ If DOJ precleared the change or failed to object to it within sixty days, the submitting jurisdiction could implement the change.¹⁰ If DOJ requested additional information from the jurisdiction, which often occurred when DOJ made written or verbal requests to the jurisdiction to supplement its submission, the sixty-day period would be recalculated if the supplemental information was material to the submission.¹¹

If DOJ objected to a voting change, covered jurisdictions were blocked from implementing the change, but were not left without recourse. They could modify the proposed change and re-submit it to DOJ, request reconsideration by DOJ,¹² or file a declaratory relief action in federal court seeking judicial preclearance of the proposed voting change.¹³

As noted above, the preclearance process promoted transparency and participation by community advocates, voters, and other individuals and groups who were called upon by DOJ to weigh in on proposed voting changes and provide background information about their experiences with voting discrimination in the jurisdictions.¹⁴ In addition, DOJ made information about preclearance submissions, determinations and objections available to the public on its website through a registry that provided this information.¹⁵

During my time with the Voting Section, I observed how efficient and effective the Section 5 preclearance process was in preclearing voting changes that did not have a discriminatory purpose or effect, as well as entering objections to prevent discriminatory voting changes from taking effect. Because the vast majority of Section 5 preclearance submissions were resolved by the administrative process rather than litigation, preclearance was a very cost-effective and much less burdensome way to protect the fundamental right to vote. Many discriminatory voting changes were prevented from taking effect through this time-sensitive administrative process, rather than through time-consuming, expensive litigation under Section 2 of the Voting Rights Act or the Constitution. Even when jurisdictions filed declaratory relief actions in the District Court for the District of Columbia seeking judicial preclearance, these proceedings were often relatively short in duration and did not usually require the significant expenditures of manpower and monetary resources that Section 2 or constitutional litigation often does.

⁸ Procedures for the Administration of Section 5 of the Voting Rights Act ("Section 5 Procedures"), 28 C.F.R. § 51.1, *et seq.*

⁹ *Id.*; 52 U.S.C. § 10304(a).

¹⁰ *Id.*; Section 5 Procedures, 28 C.F.R. §§ 51.41-42.

¹¹ Section 5 Procedures, 28 C.F.R. § 51.39.

¹² 28 C.F.R. § 51.45.

¹³ 52 U.S.C. § 10304(a).

¹⁴ *See also*, 28 C.F.R. § 51.29.

¹⁵ *See, e.g.*, Department of Justice, *Section 5 Objection Letters*, available at <https://www.justice.gov/crt/section-5-objection-letters>; Department of Justice, *Notices of Section 5 Submission Activity*, available at <https://www.justice.gov/crt/notices-section-5-submission-activity>.

C. The VRAA's Preclearance Provisions Will Prevent and Deter Jurisdictions from Implementing Discriminatory Voting Changes

There is a compelling need to restore the preclearance now to prevent the continuing erosion of protection of minority voting rights in the post-*Shelby* era. The enactment of the Voting Rights Advancement Act (H.R. 4) would go a long way toward restoring the protections of the Voting Rights Act lost as a result of the *Shelby County* decision. The restoration of the preclearance process for jurisdictions with a history of discrimination in H.R. 4 is based upon current conditions under a new coverage formula and it would play the same crucial role in stopping discriminatory voting changes before they are implemented that Section 5 did.

Since the *Shelby County* decision, enforcement of the Voting Rights Act has fallen primarily upon individual voters, civic engagement and civil rights groups and, to a much lesser extent, the Department of Justice. Unlike the cost-effective and efficient preclearance process of Section 5, civil litigation to enforce the Voting Rights Act tends to be a protracted and very expensive undertaking. Unlike the way changes are reviewed in the preclearance context, plaintiffs in voting rights litigation, rather than the jurisdiction adopting discriminatory changes, bear the burden of proof and face significant exposure to substantial costs if they do not prevail in the litigation.

The gutting of Section 5 by *Shelby County* has also resulted in a loss of transparency. Voters and advocates in the formerly-covered states and local jurisdictions are often left in the dark about discriminatory voting changes and laws as legislators and local officials often purposely draw up these changes behind closed doors and without adequate notice to their constituents.

This is particularly true in the context of redistricting legislation in which racially gerrymandered and discriminatory districting plans are often created by legislators and their consultants without public participation. With the looming redistricting process following the 2020 Census, the need for the restoration of preclearance is especially urgent. Otherwise, we can expect to see jurisdictions across the country such as North Carolina,¹⁶ Alabama,¹⁷ Mississippi,¹⁸ and other states with a history of racial gerrymandering and vote dilution to draw up redistricting plans behind closed doors which are very likely to undermine the ability of people of color to elect their preferred candidates of choice.

In addition, a recent study by the Leadership Conference on Human and Civil Rights found that some 1,688 polling sites have been closed in the wake of the *Shelby County* decision, a move that disrupts our democracy—particularly when these changes are made without notice or input from communities impacted by these changes.¹⁹ The majority of these closures took place in jurisdictions formerly covered under Section 5, including Texas, Georgia, and Arizona; this is a

¹⁶ See, e.g., *Cooper v. Harris*, 137 S.Ct. 1455 (2017) (concluding that two Congressional Districts constituted racial gerrymanders in violation of the Fourteenth Amendment).

¹⁷ See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017) (holding twelve House and Senate Legislative Districts constituted racial gerrymanders in violation of the Fourteenth Amendment).

¹⁸ See, e.g., *Thomas v. Bryant*, No. 19-60133, 2019 WL 4153107 (5th Cir. Sept. 3, 2019) (finding state senate district plan diluted voting strength of Black voters in violation of Section 2 of the Voting Rights Act).

¹⁹ The Leadership Conference on Human and Civil Rights, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019), available at <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

prime example of how the preclearance process under Section 5 would have likely prevented a significant number of these closures in majority-minority areas due to their retrogressive effect on the ability of voters of color to cast ballots.²⁰

III. The Importance of Federal Observers

A. Federal Observers Deterred and Prevented Discriminatory Acts Against Minority Voters and Assisted in the Gathering of Important Evidence for Enforcement Actions

Until the *Shelby County* decision in June 2013, the ability of the Attorney General to assign federal observers to covered jurisdictions under Section 8 of the Voting Rights Act was an extremely important and effective tool to deter voting discrimination on the ground and to uncover evidence of discrimination for potential enforcement actions.

Section 8 mandated that the Attorney General could certify the assignment of federal observers to jurisdictions covered by Section 5 when:

“(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title are likely to occur; or

“(B) in the Attorney General's judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment”²¹

Under Section 8 of the Act, observers were specially trained employees of the Office of Personnel Management, and the OPM Director was responsible for assigning as many observers for each jurisdiction as was deemed appropriate.²² Federal observers were authorized to “(1) enter and attend at any place holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.”²³ Observers were also authorized to conduct investigations and to make reports to the Attorney General.²⁴

²⁰ *Id.* at 12.

²¹ 52 U.S.C.A. § 10305(a)(2).

²² 52 U.S.C.A. § 10305(a)-(c).

²³ 52 U.S.C.A. § 10305(d).

²⁴ 52 U.S.C.A. § 10305(e).

DOJ also sent, and has continued to send since *Shelby County*, Civil Rights Division staff to “monitor” local jurisdiction elections when they have received information of possible voting rights problems. But staff “monitors” are less of a deterrent than Section 8 federal observers because they do not have the right to be present in polling stations where instances of invidious discrimination and harassment oftentimes occurred behind closed doors.

Prior to the *Shelby County* decision in 2013, the Attorney General certified 153 counties and parishes in 11 states for federal observers, including in Alabama (22 counties), Alaska (1) Arizona (4), Georgia (29), Louisiana (12), Mississippi (51), New York (3), North Carolina (1), South Carolina (11), South Dakota (1) and Texas (18).²⁵

Although the Supreme Court in *Shelby* did not directly address the assignment of federal observers, DOJ has taken the position that because the Court declared the Section 4(b) coverage formula used to identify jurisdictions that were subject to Section 5 preclearance to be unconstitutional, DOJ also could not certify such jurisdictions for federal observer coverage.²⁶ The negative impact of the *Shelby* decision on DOJ’s ability to assign federal observers to jurisdictions that had been covered by Section 5 was noted in July 2016 by former Attorney General, Loretta E. Lynch, who said that DOJ’s ability to deploy federal observers had been “severely curtailed” as a result of the *Shelby* decision, and that this meant DOJ would need to rely more upon staff monitors (who have no right to enter polling stations) and that DOJ would be sending “fewer people with fewer capabilities” to monitor the 2016 November general election.²⁷

As in the case of Section 5 preclearance, the Civil Rights Division had developed very careful procedures for determining when to recommend to the Attorney General that a Section 5 jurisdiction be certified for federal observers to be sent to cover an election. The most important factor in recommending observer coverage was evidence of potential Voting Rights Act violations which arose most often in elections pitting minority candidates against white candidates, resulting in increased racial or ethnic tensions.

Federal observers were carefully trained by OPM to observe elections in a neutral manner and to report any voting irregularities to their supervisors who worked closely with Voting Section attorneys while the elections were being covered. Where appropriate, and after consultation with Section management, Voting Section attorneys would often take steps to resolve the irregularities through discussions and negotiations with state and local election officials. Information obtained by observers during their coverage also was crucial if formal legal action was required.

²⁵ Department of Justice, *About Federal Observers And Election Monitoring*, available at <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring#observers>.

²⁶ See Department of Justice, *Fact Sheet On Justice Department’s Enforcement Efforts Following Shelby County Decision*, available at <https://www.justice.gov/crt/file/876246/download>.

²⁷ See Loretta E. Lynch, *Attorney General Loretta E. Lynch Delivers Remarks at the League of United Latin American Citizens National Convention*, Office of the Attorney General, July 15, 2016, <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-league-united-latin-american-citizens>.

The presence of federal observers in polling stations during elections consistently had a calming effect in the voting jurisdiction, particularly during highly charged elections in which there had been allegations of possible Voting Rights Act violations. The observers helped deter discriminatory acts, and on several occasions their observations and evidence gathered on the ground was important for enforcement actions.

A good example of this was a 2004 election in Bayou La Batre, Alabama where federal observers were deployed pursuant to the authority to certify coverage of a Section 5 jurisdiction. Bayou La Batre has a Vietnamese fishing community and in 2004 an Asian-American candidate ran for mayor for the first time against a white candidate in the primary election. During the primary election, many ballots cast by Vietnamese-American voters were challenged and some were illegally forced to produce another registered voter to “vouch” for them in order to cast a ballot. After DOJ learned of the race-based challenges of Vietnamese-American voters in the primary election, federal observers were deployed to monitor the runoff election.²⁸

The important deterrent impact of federal observers was also demonstrated in elections where federal observers had been authorized by court orders. A consent decree in Passaic County, New Jersey required election officials to take specific actions to bring the county into compliance with Section 203 of the Act.²⁹ It also authorized the assignment of federal observers.

Elections held in Passaic from 1999 – 2002 are another good example of the importance of federal observers. James Thomas Tucker’s article, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, contains an excellent case study demonstrating the significant impact federal observers had on protecting the right to vote of Passaic County’s Latino and language minority voters in the face of repeated incidents of discriminatory harassment during elections.³⁰ Speaking to the importance of assignment of federal observers in Passaic County, Tucker notes:

The lengthy federal involvement in Passaic County illustrates the difficulties that can occur in addressing sustained, systemic exclusion of language minorities from the electoral process. The federal Court’s active engagement with these problems and willingness to vigorously enforce its orders played a key role in remedying the County’s violations of federal, and even state, law. Dozens of federal observers were critical in acting as the eyes and ears of the United States, the Court, and later the elections monitor, to identify and document areas of concern during elections. The Court and the parties also had to be flexible in continuously using supplemental orders to tailor remedies to address developing problem areas that existing Court orders failed to resolve. Without the presence of federal observers in the County, it would have been impossible to prevent

²⁸ See Department of Justice, *Justice Department To Monitor Elections In New York, Washington, and Alabama*, Sept. 13, 2004), available at https://www.justice.gov/archive/opa/pr/2004/September/04_crt_615.htm; See also DeWayne Wickham, *Why Renew the Voting Rights Act: Alabama Town Provides Answer*, USA Today, Feb. 22, 2006, https://usatoday30.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act_x.htm.

²⁹ *United States v. Passaic City and Passaic County*, (D.N.J. 1999) (No. 99-2544).

³⁰ James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. OF RACE & L. 227, 254-276, available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1100&context=mjrl>.

voting discrimination, enforce the Voting Rights Act, and measure progress under federal court orders.³¹

As demonstrated in the *Passaic* case, the presence of federal observers inside polling stations was a particularly important tool for protecting minority language voters who are oftentimes subjected to discriminatory practices inside polling stations when they attempt to vote. In fact, federal observer coverage between August 1982 and 2004 in New Mexico, a state with a significant population of language minority voters, was the highest authorized by DOJ, with sixty-nine observer assignments.³²

The need to re-establish the Attorney General's authority to send federal observers to elections is clear from the significant federal observer deployment by the Attorney General prior to the *Shelby* decision, and the substantial decrease in the number of observers and monitors since 2013. The United States Commission on Civil Rights found in its statutory 2018 report, *An Assessment of Minority Voting Rights Access in the United States*, "that the number of federal observers as well as monitors substantially declined following the *Shelby* decision."³³

In 2012, the Commission found that 780 federal observers and 259 election monitors were deployed to 51 jurisdictions in 23 states in 2012.³⁴ However, in 2014, following the *Shelby* decision, the Commission found that DOJ "conduct[ed] in-person monitoring of polling place activities" in only 28 jurisdictions in 18 states and that during the period from 2012 to 2014, the number of federal observers decreased by 592 and the number of election monitors decreased by 204. While the Commission noted that the number of election monitors has increased since 2014, it has still not risen to the level of previous presidential elections during the earlier part of the time period studied.

Between 1990 and 2013, the population of Americans with limited English proficiency (LEP) grew 80 percent from nearly 14 million to 25.1 million.³⁵ Thus, the need for federal observers is particularly acute in jurisdictions covered by Section 203 of the Voting Rights Act that have significant numbers of LEP voters who need to receive oral and/or written language assistance at the polls in order to exercise their right to vote. As increasing numbers of LEP Americans are registering to vote and attempting to exercise the franchise, it is critical to have federal observers assigned to polling places in jurisdictions covered by Section 203 to ensure that that LEP voters receive appropriate language assistance and to protect them against insidious forms of discrimination inside the polls.

B. The VRAA's Observer Provisions Will Help to Prevent, Deter and Remedy Discrimination against Minority Voters and those Needing Language Assistance at the Polls

³¹ *Id.* at 275.

³² Report of the National Commission on the Voting Rights Act, *Protecting Minority Voters*, Map 10(b), Feb. 2006.

³³ United States Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States*, (2018), available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

³⁴ *Id.* at 270-275; Appendices G and H.

³⁵ Jie Zong and Jeanne Batalova, *The Limited English Proficient Population in the United States*, Migration Policy Institute, July 8, 2015, <https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states>.

The VRAA would restore the Section 4(b) formula to include Section 5 covered jurisdictions as among those the Attorney General may certify for federal observers and it adds Section 203 covered jurisdictions to be eligible for Attorney General certification. Authority to certify 203 jurisdictions is an important addition to the Act as it will ensure that voters of color and language minority voters will not face discriminatory and hostile actions at polling stations in jurisdictions with a documented, recent history of discrimination. The authority to certify federal observers for such districts under the program employed pre-*Shelby* will provide much needed oversight inside polling stations and help to ensure that voters with limited English proficiency will receive the crucial oral and/or written language assistance that they need to be able to exercise the franchise and deter malicious, intentionally discriminatory conduct within polling stations toward minority and minority language voters.

Mr. RASKIN. Perfect, with 2 seconds to go. You have done this before clearly.

Ms. Kira Romero-Craft is managing attorney for the Southeast Office for the Latino Justice Puerto Rican Legal Defense and Education Fund. In that role she provides direct representation for clients in civil rights cases, including those with voting rights claims.

Beyond her litigation work, she organizes outside coalitions regarding immigrant rights, voting rights, and criminal justice reform policy and works to educate the public and policymakers about these issues.

Ms. Romero-Craft, welcome. You are recognized for 5 minutes.

STATEMENT OF KIRA ROMERO-CRAFT

Ms. ROMERO-CRAFT. Thank you, Chairman Raskin,

Ranking Member Johnson, members of the committee. I am here in my capacity to represent LatinoJustice PRLDEF. We have led the way in ushering bilingual voting systems to the benefit of millions of language minority voters. Today we use litigation and advocacy to protect those rights, to stop discriminatory purges of eligible voters, and to stem the dilution of Latino voting strength.

I thank you for the opportunity to testify before you about the ongoing discrimination and challenges faced by language minority voters in Florida when they attempt to exercise their fundamental right to vote and why reinstatement and expansion of the Federal observer certification by the Attorney General to Section 203-covered jurisdictions as proposed in H.R. 4 is of critical importance to ensure that language minority voters enjoy the full protection of the Voting Rights Act.

I began working with the nonpartisan Election Protection Coalition when I joined LatinoJustice's managing attorney in 2017. As a result, I have fielded many complaints about discrimination suffered by voters of color and language minority voters during elections in Florida and have witnessed firsthand the resistance of election officials to fully comply with the language assistance requirements of the Voting Rights Act.

There is a saying in Spanish [Speaking foreign language]. That translated to English means it is better to ask for forgiveness than to seek permission. That is essentially what the abolishment of the preclearance requirement has done to the voting rights of citizens no longer protected by Section 5 of the VRA.

I am here today to testify specifically about how after the Shelby County decision the U.S. Department of Justice took the position that the Attorney General could no longer certify jurisdictions for the assignment of Federal observers, thereby preventing DOJ from using this important tool to combat discrimination against language minority voters inside of polling places.

An example of a recent case where Federal observers at the polls may have made a difference in Florida involved the failure of the State and numerous Florida counties to provide language assistance to Puerto Rican voters after Hurricane Maria where our State had welcomed an influx of refugees with limited English proficiency in 2018 as required by Section 4(e) of the VRA. And to be clear, Section 4(e) applies across the country.

Our calls to election officials to address their obligations to provide Spanish language assistance under Section 4(e) went substantively unanswered. Our organization, LatinoJustice, and Demos filed a lawsuit against the Florida secretary of state and 32 Florida counties that would have forced Spanish speaking voters to vote in English, a language that many of them do not understand.

Because of our election protection activities, we also learned that polling places and counties named in the lawsuit were failing to provide materials and assistance as per the court orders.

Had Federal observers been stationed in these polling locations, they may have ensured compliance and deterred the continuing violations of law. Federal observers would have had the authority to investigate and report out on these violations.

The court granted our motion to stay the case pending a rule-making process for statewide Spanish language ballots as initiated by the Governor as a result of our litigation. Yet despite the court order and the Governor's mandate, we are still met with resistance in order for the supervisor of elections to obey the law.

Comments made during the May 21, 2009, rulemaking workshop held at the Supervisor of Elections' conference included these: "It is not in the Spanish culture for Latinos to do this type of work. Now my grandmother was 100 percent Cuban. It is my culture. We don't volunteer for these things. I tried to hire people that didn't even have to go to poll worker training. They just had to sit and translate. I paid them. They wouldn't do it." This was met to clapping. "And yet your proposed rule is likely to inflict a lot of financial damage and a lot of inconvenience and a lot of wasted time."

These and many other comments were made by the Supervisor of Elections, and we, as a nonprofit organization, are unable to be inside of the polling station, so we are unable to monitor how these discriminatory acts are taking place.

The H.R. 4 provisions reinstating the ability of the Attorney General to certify jurisdictions for Federal observers and the ability to certify Section 203 jurisdictions for the assignment of observers would undoubtedly help deter and prevent discrimination against language minority voters and ensure that they receive the mandatory language assistance as observers may be stationed inside of the polls to monitor the assistance the voters are entitled to receive under the law.

We lose the trust of voters by not passing this law to reinstitute the preclearance requirements for the States showing a history of violation of voting law. Seeking forgiveness once the harm is done rarely results in an adequate remedy once it comes to voting rights violations, as the professor from Loyola discussed.

In closing, we support passage of H.R. 4 with the goal of improving language access services to language minority voters by supporting coverage under Section 203 and Section 4(e) of the Voting Rights Act.

Thank you very much.

[The statement of Ms. Romero-Craft follows:]



**STATEMENT OF KIRA ROMERO-CRAFT
MANAGING ATTORNEY, LATINOJUSTICE PRLDEF**

**U.S. HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES HEARING ON
“CONGRESSIONAL AUTHORITY TO PROTECT VOTING RIGHTS
AFTER SHELBY COUNTY V. HOLDER”**

SEPTEMBER 24, 2019

I. Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S House of Representatives Committee on the Judiciary, my name is Kira Romero-Craft, and I serve as the Managing Attorney for LatinoJustice PRLDEF. LatinoJustice PRLDEF led the way in ushering bilingual voting systems to the benefit of millions of language-minority voters in Latinx, Native American, and Asian-American communities. Today we use litigation and advocacy to protect those rights, to stop discriminatory purges of eligible voters, and to stem the dilution of Latino voting strength.

Thank you for the opportunity to testify before you about ongoing discrimination and challenges faced by language minority voters in Florida when they attempt to exercise their fundamental right to vote and why the reinstatement and expansion of federal observer certification by the Attorney General to Section 203 covered jurisdictions, as proposed in H.R. 4, the Voting Rights Advancement Act (VRAA), is of critical importance to ensure that language minority voters enjoy the full protection of the Voting Rights Act.

I began working with the nonpartisan Election Protection Coalition when I joined LatinoJustice PRLDEF as managing attorney for our southeast office located in Orlando, Florida in 2017. The national, nonpartisan Election Protection Coalition works year-round to ensure that all voters have an equal opportunity to vote and have that vote count. The Coalition is made up of more than 100 local, state and national partners and uses a wide range of tools and activities to protect, advance and defend the right to vote.

As a result of my work for LatinoJustice and as an Election Protection partner, I have unfortunately fielded many complaints about discrimination suffered by voters of color and language minority voters during elections in Florida and have witnessed first-hand the resistance of election officials to fully complying with the language assistance requirements of Sections 203 and 4(e) of the Voting Rights Act. Thus, the need to reauthorize important protections lost in the wake of the *Shelby County v. Holder* decision is critical today based upon current conditions that continue to negatively impact the ability of language minority voters to exercise their fundamental right to vote.



II. The Need for Federal Observers at the Polls to Ensure that Language Minority Voters Receive Mandated Language Assistance is of Critical Importance

Voters of color and language minority voters in Florida are covered by the Voting Rights Act of 1965 (VRA) and as of 2011, the State of Florida became a covered jurisdiction for the minority language of Spanish under Section 203 of the Voting Rights Act (Section 203). There are also 13 counties in Florida which are subject to minority language requirements for Spanish language under Section 203. They are Broward, DeSoto, Hardee, Hendree, Hillsborough, Lee, Miami-Dade, Orange, Osceola, Palm Beach, Pinellas, Polk and Seminole counties. Florida's Puerto Rican voters of limited English proficiency are also entitled to the protections of the Spanish language assistance provisions of Section 4(e) of the Voting Rights Act.

Despite the theoretical protection of these laws, Florida's language minority voters have continued to face discrimination at the polls and frequently do not receive adequate language assistance they critically need to be able to cast a ballot for their preferred candidates of choice or to make informed decisions when deciding how to cast their votes on ballot initiatives.

As a result of the *Shelby County* decision, the U.S. Department of Justice took the position that the Attorney General could no longer certify jurisdictions for the assignment of federal observers, thereby preventing DOJ from using this important tool to combat discrimination against language minority voters inside polling places. The VRAA's provisions reinstating the ability of the Attorney General to certify jurisdictions for federal observers, which also adds the ability of the Attorney General to certify Section 203 jurisdictions for the assignment of observers, would undoubtedly help to deter and prevent discrimination against language minority voters and ensure that they receive the mandatory language assistance at the polls that they are entitled to receive under the law.

A. The Failure of the State and Counties to Comply with the Language Assistance Provisions in 2018

A prime example of a recent case where federal observers at the polls would have likely made a tangible difference in Florida involved the failure of the State and numerous Florida counties to provide required language assistance to Puerto Rican voters with limited English proficiency in 2018, as required by Section 4(e) of the VRA. As noted above, the State of Florida is also a covered jurisdiction under Section 203 for Spanish language assistance along with 13 counties.

After Hurricane Maria devastated Puerto Rico in 2017, an estimated 160,000 people fled to Florida, joining over half a million people who made the exodus during the previous decade because of the island's economic crisis. The state's Puerto Rican population now totals over one million.¹ Section 4(e) of the Voting Rights Act requires the provision of bilingual voting

¹ David Smiley, Bianca Padro Ocasio & Alex Daugherty, Florida Puerto Ricans Say Trump Response to Hurricane Dorian Won't Ease Maria Memories, Miami Herald, Aug. 30, 2019, <https://www.miamiherald.com/news/politics-government/state-politics/article234547237.html>



materials and assistance for Puerto Rican-educated, limited English proficiency United States citizens, as does Section 203.

My organization, LatinoJustice, along with Demos, sent two rounds of letters about the Section 4(e) language assistance requirements to Florida's election officials and also requested a 5-minute time allotment during the Supervisors of Elections' annual conference in the spring of 2018 to discuss their obligations to provide Spanish language assistance under Section 4(e).

After the Supervisors declined our request to speak at the conference and having received no assurances that limited English proficient Puerto Rican voters would receive adequate Spanish language assistance at the polls, LatinoJustice and Demos filed a lawsuit against the Florida Secretary of State and 32 Florida counties that would have forced Spanish-speaking voters to vote in English-only elections.²

On September 10, 2018, the court granted the most significant components of the relief plaintiffs sought in our motion for a preliminary injunction.³ The court ordered the Secretary of State to issue instructions to the 32 defendant counties, requiring them to provide Spanish-language sample ballots at polling places, on county websites, and by mail to guide voters in marking their ballots, and to publicize the availability of these sample ballots and instructions on how to use them.

As a result of our continuing election protection activities, we learned that polling places in counties named in the lawsuit were failing to fulfill their obligations under the court's order. We also discovered through election protection efforts that the Duval County Supervisor of Elections, Mike Hogan, had not posted nor otherwise made available Spanish language facsimile ballots at early voting polling locations despite the court's order requiring Duval County to do so.

Had federal observers been stationed in these polling locations, it is likely that they would have helped to ensure compliance with the mandated Spanish language assistance under the law and deterred the continuing violations of the same by these counties. Additionally, federal observers would have had the authority to investigate and report out on the violations of the language assistance obligations at the polls, which could have led to enforcement efforts and litigation by DOJ.

As a result of the counties' failure to comply with the law and the court's orders, we were forced to file an emergency motion for a preliminary injunction on November 4, 2018, in advance of the midterm elections. On November 5, the court granted part of our motion, directing the Secretary of State to remind County Supervisors of their required compliance with the court's previous order and to provide facsimile sample ballots in Spanish language to all voters entitled to language assistance under Section 4(e). The Court subsequently granted the Secretary of State's

² *Madera v. Detzner*, No. 1:18-cv-00152 (N.D. Fla. filed Aug. 16, 2018), Doc. 1.

³ *Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. 2018).



motion to stay the case pending a rulemaking process for statewide Spanish ballots that was initiated by the Governor as a result of the litigation.⁴

Incredibly, even after the court made it clear that compliance with Section 4(e) as well as the court's orders was mandatory, many County Supervisors of Election voiced objections to adopting rules to ensure language minorities received adequate language assistance at the polls, including rules that would have required efforts be made to recruit bi-lingual poll workers. Some of the concerning comments made during a rule development workshop on May 21, 2019 at the Supervisors of Elections' annual conference included:

"...it was brought out by the large group asking for Spanish language interpreters at every polling place and all the other things that you listed here, and I'm telling you for the whole world to hear that it is a physical impossibility. We have been trying and trying and trying to recruit bilingual election workers in our county and I cannot invent them." Supervisor Alan Hayes, Lake County;

"Hi it's me again, Joyce from Monroe County. Years ago we had a committee of people that from each supervisors office that were the bilingual poll worker committee. We had a professor come and talk to us and told us it is not in the Spanish [inaudible], it is not in the Spanish culture for Latinos to do this type of work. Now my grandmother was 100 percent Cuban, it's my culture. We don't volunteer for these things. I tried to hire people that didn't even have to go to poll worker training, they just had to sit and translate. I paid them, they wouldn't do it. I couldn't find the people to do it. If I couldn't find them then, I'm not gonna find them now. I have a stack of nine, I have someone from Nicaragua, someone from Panama, and someone from Cuba, the poll workers can call us, I do hire, if I hire a Spanish person we pay them extra and we will put them in the precinct we know gets more of a Spanish turnout. This just isn't gonna work and I think you can see that what you're setting us up for is failure. You're setting us up to be breaking the law unless you say to the Spanish community, this is like jury duty you have to do it. If we can't find enough English speaking people to work at the polls that are not [clapping] [inaudible]." Supervisor R. Joyce Griffin, Monroe County; and,

"And yet your proposed rule is likely to inflict a lot of financial damage and a lot of inconvenience and a lot of wasted time." – Supervisor Alan Hayes, Lake County.

Despite the outcry of Supervisors of Elections regarding the difficulties in providing minority language materials and assistance, it can be done. Take the case of Pinellas county. Pinellas county was notified that it was designated a Section 203 jurisdiction by the DOJ on December 15, 2016. Yet, the county faced a municipal election in March 14, 2017.

The county was forced to comply with minority language materials provisions and assistance requirements under Section 203 in under 2 months because the DOJ was overseeing the change and monitoring compliance. Election monitoring by the DOJ continued for Pinellas County during the November 2018 elections. While this was an instance involving DOJ monitors and not

⁴ *Madera v. Detzner*, No. 1:18-cv-00152 (N.D. Fla. ordered May 10, 2019), Doc. 131.



federal observers, it serves as an example of the importance of DOJ oversight in ensuring minority language assistance and that having federal observers present in polling stations would help to deter and prevent incidents of discrimination in the first instance.

The reinstatement and expansion of the federal observer provisions of the VRA that are proposed by Section 6 of the VRAA, would have likely deterred the violations of the Spanish language assistance requirements at the subject polling stations that we saw in 2018 and would have helped avoid time consuming and expensive litigation.

Federal observers would have also likely made a difference in another serious incident that occurred during the 2018 election cycle in Florida. During the early voting period in November 2018, while LatinoJustice was conducting election protection monitoring, we received a call from a voter who said he was forced to vote a blank ballot in Orange County, Florida. Both Orange County and the State are covered jurisdictions for Spanish language assistance under Section 203.

The voter relayed the experience of being shuttled to a scanning machine by a poll worker and told to cast a blank ballot, without having had the opportunity to mark his ballot in secrecy. The voter reported being a naturalized citizen who could not speak English and reported that a couple of other voters were told to do the same.

At the time of the call, the voter was incensed by the action taken by the white, male poll worker which he perceived to have been intentional. Because of our Election Protection model, we were able to contact counsel for the county and the voter was eventually able to cast a provisional ballot which was ultimately counted. While our election protection efforts saved this elector's vote, the presence of federal observers inside polling locations could have deterred this conduct in the first instance.

The case of Osceola County serves as another illustrative example about how the reinstatement of the Attorney General's ability to certify Section 203 jurisdictions under the VRAA for the assignment of federal observers would play an important role in ensuring compliance with Section 203 in Florida.

Osceola County is a jurisdiction covered for Spanish language assistance under Section 203. Despite a long history of voting rights violation, including voting rights litigation brought by DOJ in 2002, 2005 and 2008, there were reports as recently as the 2018 election regarding the complete lack of bilingual poll workers in the Buena Ventura Lakes precinct—which has over 40% Hispanic/Latino registered voters.

Had federal observers been deployed to this precinct, they would have been able to investigate whether and to what extent the county was complying with the language assistance requirements of Section 203 and whether the lack of bi-lingual poll workers was preventing Spanish speaking voters from obtaining the language assistance they needed at the poll.

These are just several instances of how minority language voters would benefit from expanded federal observer coverage under the VRAA. There are, unfortunately, many more instances of



discrimination that take place inside of the polls that we never learn about through our Election Protection coalition, since we cannot be stationed inside the polls in Florida. The reinstatement of and expansion of the observer program to Section 203 covered jurisdictions would go a long way to ensure compliance with the language assistance provisions of the law, and to deter discrimination against language minority voters at the polls.

B. The Re-Authorization of Federal Observers in the VRAA

Under the VRAA, Section 203 covered jurisdictions would be added to the jurisdictions that the Attorney General would be able to certify for the assignment of federal observers. Additionally, the Attorney General would have the authority to certify jurisdictions for the assignment of observers in jurisdictions subject to preclearance, including when the Attorney General believes doing so is otherwise necessary to enforce the guarantees of the 14th or 15th Amendment, any provision of the VRA or "any other Federal law protecting the right of citizens of the United States to vote."

This would be an incredibly impactful update to the Voting Rights Act because it would put non-partisan, trained observers inside polling stations to potentially deter and prevent the disenfranchisement of language minority voters needing critical language assistance at the polls. Federal observers would also play an important role in deterring and preventing other forms of discrimination against voters of color and language minority voters.

In closing, we support passage of the VRAA with the goal of improving language access services to language minority voters by supporting coverage under Section 203 and Section 4(e) of the Voting Rights Act, and all other provisions of the law which support assistance to voters needing it.

Thank you very much for your time and attention and for the opportunity to speak on behalf of language minority voters today.

Mr. RASKIN. And thank you very much for your testimony.

We will proceed now under the infamous 5-minute rule for questions that each of our members will have.

I am picking up a drift that most of the members of the panel are skeptics of the Supreme Court's decision in *Shelby County v. Holder*, and I think it was abominable, myself. However, is there anybody who thinks that the Supreme Court, the current Supreme Court, is in any mood to reverse itself and to get rid of the Shelby County holding?

It doesn't look like it. Okay. So we have to work, then, within the structure created by the Court in Shelby County. There is something of a straitjacket that was imposed upon us, although one of the multiple flaws of the decision is that it was rather vague and inarticulate about what exactly the standard was for defining the legitimacy of congressional action under the 14th and 15th Amendments here.

Let me pose this question. Does everybody agree that *City of Boerne v. Flores* is the controlling regulatory standard that we need to meet this congruence and proportionality test?

I see, Mr. Adegbile, you are shaking your head.

Mr. ADEGBILE. No. So, as I read in Shelby County, the Court spent a lot of time analyzing Katzenbach and the rationality standard, and the standard it articulated is much more consistent with Katzenbach than it is with Boerne.

There was not an extended discussion of Boerne and its progeny. In fact, I know—because I submitted the briefs—that in the underlying briefs, both in Northwest Austin and in Shelby County, there were extensive discussions of the standard, but the Court in both Northwest Austin and in Shelby County did not take up and frame the standard in those terms.

Mr. RASKIN. All right. So you don't think that the majority on the Court today would bring a congruence and proportionality prism to interpreting the constitutionality of whatever we enact in Congress?

Mr. ADEGBILE. As the chairman knows, predicting exactly what a new Supreme Court will do—it has different personnel now than it did at the time—is a very difficult exercise. However, when these issues have been put to the Court in the context of the last reauthorization, the Court did not expressly adopt the Boerne standard, and it had many opportunities to do so.

Mr. RASKIN. All right. But we want something that is going to hold up. I mean, is it better for us to err on the side of caution in terms of thinking about this?

Professor Levitt.

Mr. LEVITT. So I just want to—"yes" is the short answer, but I think H.R. 4 amply does that.

I will also say, there is some sense to the distinction—

Mr. RASKIN. Could you just take us quickly through H.R. 4, through a congruence and proportionality analysis?

Mr. LEVITT. Sure. And in this area, they are related. What the Court is concerned with is that Congress is trying to redefine—the Court doesn't want to let Congress redefine the substantive violations of a constitutional amendment. But I don't think that H.R. 4 comes anywhere near doing that. It takes steps that are tailored

to current conditions in a way that is designed to either remedy the present effects of past intentional discrimination or to prevent and deter, in the present tense, intentional discrimination immediately on the horizon.

And I think each of the provisions of H.R. 4—the coverage provision for preclearance, notice requirements, the requirement to adjust equitable relief standards—each of those are tailored, in fact. Even though I agree with Mr. Adegbile, I don't think they have to be under Boerne, I think each of those are actually tailored to Congress's enforcement authority, not just under the 15th Amendment but under the 14th Amendment and, as my colleague has said, under the Elections Clause.

Mr. RASKIN. Okay.

The opponents of the Voting Rights Act say that Section 2 lacks constitutional authority under the 14th Amendment because the amendment requires a showing of purpose but Section 2 applies to both deliberate and effective discrimination. And so, in turn, they say that a new preclearance formula cannot be based on the existence of Section 2 violations.

Justice Thomas seems to believe that the Voting Rights Act does not protect against discriminatory vote dilution based on race or ethnicity, and he said as much in *Cooper v. Harris*.

So, Professor Tolson, let me come to you. Is there any reading of Shelby County that casts doubt on the constitutionality of Section 2? And what is your response to the issue of whether Section 2 violations should form the basis for activating the Section 5 coverage formula?

Ms. TOLSON. I don't think Shelby County stands for the proposition that Congress doesn't have the authority to legislate based on discriminatory effects. I think that the Court is looking for a legislative record that is a mix of both.

One thing I want to point out that I think is quite pertinent here is the fact that we are focusing a lot on the 15th Amendment—right?—this focus on race. There is also a branch of equal protection jurisprudence that deals with the right to vote as a fundamental right that does not focus on or require a showing of intentional racial discrimination.

So if there is evidence that States are abridging or denying the right to vote and the legislative record reflects that, Congress can legislate based on that authority.

Mr. RASKIN. Okay.

Finally, let me close on this question to you, which is: Do you think we have reason to worry that we will jump through all of these hoops to create a better coverage formula and then the next sweeping attack on the Voting Rights Act will be to dismantle Section 5, saying the preclearance requirement itself is unconstitutional?

Ms. TOLSON. All you can do is your job.

Mr. RASKIN. Yeah. But is there a way that we can prepare for that?

Ms. TOLSON. I think that H.R. 4, as it stands, is consistent with current understanding of the Constitution. We can't predict what a Justice Kavanaugh or a Justice Gorsuch might do, and I don't think that—

Mr. RASKIN. Do we need to thicken up the legislative record about Section 5 to say that it is still needed, that the preclearance—

Ms. TOLSON. Right. And I also think that Congress needs to be clear about the sources of authority pursuant to which it is acting. Force the Court to articulate if it is exceeding the scope of congressional authority under the Elections Clause, under the 14th and 15th Amendments. Not just race, though. Right? It is also about voting.

Mr. RASKIN. Thank you very much.

I am over my time, and I am happy to recognize the ranking member for his questioning.

Mr. JOHNSON of Louisiana. Thank you.

And, Professor Tolson, I tell him to do his job all the time, okay?

I have a few questions for Professor Morley.

What are some of the features about a Federal law that makes the Supreme Court more likely to strike it down as exceeding the scope of Congress's power under Section 5 of the 14th Amendment?

Mr. MORLEY. So if you look at the Supreme Court's precedents after *City of Boerne v. Flores* in which it considered some very well-known laws as they applied to State governments, laws such as the Age Discrimination in Employment Act, laws such as the Americans with Disability Act, Family and Medical Leave Act, the types of features that the Court took into account in determining congruence and proportionality included comparing the scope of the law, how much State action, how many State laws, how many State acts the Federal law prohibited, comparing that to the subset of actually unconstitutional State action.

So, basically, the broader the law went, the broader the range of its prophylactic protection, the more State action that wasn't actually unconstitutional the Federal law covered. That weighed more heavily against it, and that required a proportionally greater showing by Congress that such sweeping prophylactic relief is necessary.

And if you look at some of the reasons why those other laws were deemed to be overbroad under the congruence and proportionality standard, it was because, in part, they applied to all State conduct, not only intentionally discriminatory conduct but State actions that had a disparate impact against members of certain groups. It applied to all State actions, not just intentional discrimination or not just intentional violations of constitutional rights but also negligent or inadvertent State actions.

And the Court also looked to the applicability of the law, that if the law was made nationally applicable, if there wasn't an attempt to try to cabin it to places where there actually was evidence of constitutional violations, that also tended to weigh against the validity of the law under Section 5.

Mr. JOHNSON of Louisiana. Specifically, are there any constitutional concerns with the Voting Rights Advancement Act's proposed definition of a voting rights violation? And what are the consequences of designating something a voting rights violation under the act?

Mr. MORLEY. So if political subdivisions of a State or the State itself engages in voting rights violations, enough of those over specified periods of time—and the bill has different criteria depending

on whether the State itself was involved in a violation—but, basically, enough voting rights violations, and the State or a political subdivision will be subject to preclearance requirements under the bill.

And so the definition of voting rights violations under the bill includes violations of Section 2 of the Voting Rights Act, including violations that arise under a disparate impact theory of liability. So Section 2 of the VRA, insofar as it applies to disparate impact, is already a prophylactic protection. Preclearance is another prophylactic protection. And so imposing preclearance requirements based on disparate impact violations of Section 2 of the VRA is stacking prophylaxis upon prophylaxis.

That was one of the main reasons in *Coleman v. the Maryland Court of Appeals* the Supreme Court held Congress had exceeded its Section 5 powers. And it was, in fact, drawing from campaign finance law. That concept of prophylaxis upon prophylaxis led the Supreme Court to strike down aggregate contribution limits.

So the more prophylactic protections you are stacking on top of each other, the further you are away from that core of an actual constitutional violation.

Another main concern about the definition of voting rights violations is the fact that it is triggered by a consent decree or a settlement or an agreement in any case where the plaintiffs alleged in complaint that the jurisdiction had violated the Constitution or had violated the VRA.

So even if the parties settle without an admission of liability, even if a court never finds that the Constitution was violated, simply by entering into a settlement agreement, that counts as a Voting Rights Act violation—excuse me—as a voting rights violation.

So, from a policy matter, you are going to be incentivizing jurisdictions to continue fighting cases they would otherwise be willing to settle. You are incentivizing potentially frivolous litigation simply because even a settlement would be enough to count as a strike against the State. And particularly because States and political subdivisions are often litigating under the threat of being hit with attorneys' fees, they will often be willing to settle even if they believe that what they did wasn't actually unconstitutional or didn't actually violate the VRA.

Mr. JOHNSON of Louisiana. And I am out of time, unfortunately. Thank you. I yield back.

Mr. RASKIN. Very good.

The gentlelady from Texas, Representative Sheila Jackson Lee, is recognized for her 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, thank you.

And thank you to all of the witnesses that are here before us today.

Let me ask about your response to Professor Morley. And here is my question. Is it layered upon layer? Do you feel States would be so generous that if you just gave them less of a layering they would respond generously, as has been noted?

And then let me ask the question, as we know, Section 2 is the hit-and-run. You have already been hit, the car has already escaped, and you are laying on that side of the highway, bleeding,

and maybe an ambulance will come and rescue you. How do you perceive this analysis as it relates to where we are today?

Mr. ADEGBILE. Thank you for the question.

I would say in the first instance that the bill contemplates a range of conduct, all of which can lead to a finding that a jurisdiction needs oversight.

Much of the conduct could be intentional. There are voting rights violations that can be determined through the use of an effects standard under Section 2.

But when you look at what you need to do to prevail in a Section 2 case, the indicia and the proof in the underlying statute is essentially like intent-light, in some ways. There are many specific things that are indicative of an intentional conduct, or conduct certainly that has impact, that is framed in the context of specific behavior.

Ms. JACKSON LEE. You are already harmed. You are already harmed.

Mr. ADEGBILE. And, of course, there is an impact and a minority voting harm.

So this is not a statute that leans entirely on one side or the other. As we said earlier, the prophylactic power of Congress to enforce the underlying right is very substantial. And in the Boerne cases that my colleague cites, repeatedly, all of those cases pointed to Section 5 of the VRA as being the iconic statute, the statute that was——

Ms. JACKSON LEE. The gold standard.

Mr. ADEGBILE [continuing]. The statute, right?

So to take the idea that the Boerne cases somehow disable a statute designed to protect voters against discrimination in a preclearance way is inconsistent with the jurisprudence, no matter how you slice it.

As to your point about Section 2, Section 2 is very important, but it is a post-implementation remedy. And both Professor Levitt and I spoke about the difficulty of that timing difference. When you have a Section 2 case, they are very expensive; they take a long time. Very often, the benefits of incumbency have vested, and you can't unring the bell.

That is what has been lost with the preclearance protection. In jurisdictions that have patterns over time of discriminatory voting conduct, you need a different measure. And, in fact, the history has been that those two measures work together.

Ms. JACKSON LEE. That is the point I was making when I said the hit-and-run and you are waiting for an ambulance, which is you have already been harmed under Section 2. So you bifurcated the answer and then responded to my Section 2 question, and I appreciate your response.

Professor Tolson, I am impressed with your work suggesting our broad authority in the 14th and 15th Amendments and our ability to regulate elections.

Do you think that we could have had a different decision if the Court had included your analysis as part of their assessment on the Shelby case?

Ms. TOLSON. Yes, ma'am. I do think that—I did file a brief with a group of law professors arguing that the Elections Clause pro-

vided additional authority for the predecessor to H. R. 4, but the Court didn't discuss the Elections Clause. And I just think the Court was kind of committed to striking down the preclearance regime. So, yeah, I do think that we could have had a different outcome.

Can I make one other point, ma'am—

Ms. JACKSON LEE. Go right ahead.

Ms. TOLSON [continuing]. With respect to your other question?

I just want to point out that a lot of courts don't find intent because they don't have to, but that doesn't necessarily mean that intent is not present. So if you look at the Texas voter ID case, the lower courts found that intent was present even though a panel of Fifth Circuit later just relied on the Section 2 analysis.

And so I think that the question of relying on Section 2, whether or not it is constitutional, is actually quite complex, because a lot of courts, because Section 2 does not require it, they do not use an intent analysis. And so I think that the current bill takes that into consideration.

Ms. JACKSON LEE. Thank you so very much.

Mr. Levitt, let me pose again Mr. Morley's long discussion. The chilling effect that H. R. 4 would provide, it quashed the generosity of jurisdictions. How do you respond to that?

Mr. LEVITT. Well, I think it only chills discrimination. And so I am not against the chilling effect on discrimination.

The preclearance regime is designed to see whether a provision is discriminatory or not. It is a simple check before the provision has the opportunity to do damage in the real world, to execute the hit-and-run, as you suggest.

It is the sort of grappling with Federal Government authority that is baked into the 14th Amendment, that is baked into the 15th Amendment, that is baked into the Election Clause, which all give Congress the not only authority but responsibility to make sure that local jurisdictions administering elections aren't discriminating.

And with respect to the prophylaxis, really, all of these patterns, as Professor Tolson said, as Mr. Adegbile said, are looking for patterns of discrimination, warning signs that more is on the way, that intentional discrimination is on the way. You are not looking for exact "gotcha" moments so much as an overall pattern that leaves deep concern. That is the reason for the deterrence; that is the reason for the prophylaxis. And I think it is amply within congressional power, as Mr. Adegbile pointed out.

Ms. JACKSON LEE. Thank you.

Thank you, Mr. Chairman. I yield back.

Mr. RASKIN. Thank you very much.

Let's see. We are recognizing now Mr. Cline.

Mr. CLINE. Thank you, Mr. Chairman. I am happy to yield my time to the ranking member, Mr. Johnson.

Mr. JOHNSON of Louisiana. I thank Mr. Cline for yielding.

I am going back to Professor Morley again.

You gave such great answers earlier, we will keep going.

Why would you say—this whole argument is framed about Congress's power under Section 5 of the 14th Amendment being the main issue here. And I am wondering why Congress can't sim-

ply enact the Voting Rights Advancement Act under its other constitutional powers, like the Elections Clause or Section 2 of the 15th Amendment.

Mr. MORLEY. So the City of Boerne narrowed the scope of Congress's power under Section 5 of the 14th amendment. The Court has never revisited its rulings about Section 2 of the 15th Amendment. I believe the Court is likely to construe Section 2 of the 15th Amendment the same way as it interpreted Section 5 of the 14th Amendment in Boerne for a few reasons.

Those two provisions, Section 5 of the 14th Amendment and Section 2 of the 15th Amendment, they have materially the same language. They are structured the same way. They were adopted roughly contemporaneously with each other as part of the Reconstruction amendments.

The purposes, the original intent underlying these amendments about empowering Congress to enforce the guarantees provided by the substantive constitutional amendments themselves were the same.

Historically, Section 5 and Section 2 were read in *pari materia* with each other. So during the first round of cases in which the Court upheld the Voting Rights Act, the Court analogized both Section 5 and Section 2 to the Necessary and Proper Clause—right?—“let the ends be legitimate,” as it construed both of those provisions as giving Congress virtually plenary authority over the area.

And so, particularly given their virtually identical language, structure, history, as well as history of interpretation, I think it is overwhelmingly likely the Court would apply that Boerne analysis to Section 2 of the 15th Amendment.

With regard to the Elections Clause, yes, Congress has far greater power over Federal elections than it has over State and local elections. The congruence and proportionality analysis of Boerne is relevant insofar as Congress is trying to target State and local elections rather than just Federal elections. So, certainly, were Congress only regulating Federal elections, as it has under many other laws, like the National Voter Registration Act, it would have much greater flexibility.

And I will also note that, historically, States have generally chosen to apply Federal laws that regulate just Federal elections to State and local elections as well, even though they weren't required to, simply because they don't want to run two separate sets of election systems in parallel to each other.

Mr. JOHNSON of Louisiana. So if Congress doesn't adopt a new statutory formula for preclearance, what other mechanisms exist to ensure that States and localities don't violate voting rights?

Mr. MORLEY. So one option, which several other witnesses mentioned, is the notion of *ex post facto* litigation, where a locality enacts a statute and then either affected voters, civil rights groups, other plaintiffs go to court and obtain a restraining order, obtain a preliminary injunction. Obviously, the Department of Justice is also in a position to do that.

The other main option, though, and one which has been very heavily underutilized is, under current law, Section 3 of the Voting Rights Act allows for bail-in. And this is an option that some courts have been reluctant to utilize. This is an option where, if a court

finds that a jurisdiction has engaged in an intentional discrimination, it can bail-in that jurisdiction to preclearance. And so you have an actual constitutional violation, and you would be then subjecting that offender, that jurisdiction, to preclearance.

As I mentioned, courts have been reluctant to do this. This committee could consider the option of strengthening Section 3 of the VRA to either a presumption of bail-in or even mandatory bail-in when a court finds intentional discrimination.

Mr. JOHNSON of Louisiana. And the amendment to that language would be a pretty simple statute, wouldn't it? It would just be a couple of lines, right?

Mr. MORLEY. Yes.

Mr. JOHNSON of Louisiana. You are just changing a couple of terms.

Mr. MORLEY. Yes.

Mr. JOHNSON of Louisiana. I will yield back, Mr. Chairman.

Mr. RASKIN. Thank you very much.

Ms. Escobar, you are recognized for 5 minutes.

Ms. ESCOBAR. Thank you, Mr. Chairman.

And thanks so much to all of our panelists.

Mr. ADEGBILE, since you argued the Shelby County case for the respondents, for the average American, can you please describe in layman's terms what the Supreme Court held?

Mr. ADEGBILE. In layperson's terms, the Supreme Court did not like the standard that Congress had adopted and reauthorized to subject certain places in the country to preimplementation review of their voting changes.

That is to say, States and localities everywhere pass voting laws and change voting practices somewhat regularly. Some places in the country have histories of lots of discrimination in voting. And so the Section 5 preclearance system was designed to focus on those places, because filing individual cases was not enough. Why? Because after people won those cases, the jurisdiction would find another way to discriminate against the targeted population.

And so Section 5 changed the game, because it said, rather than presume that you get to implement these things, we are going to look at them first, we are going to kick the tires, to make sure that you are not visiting discrimination on the communities that have long suffered under this system, and we are going to make you come forward and show that you don't discriminate intentionally or it doesn't have a discriminatory effect.

The Supreme Court didn't like the way that Congress identified those places that would be subjected to this system. And that is why, today, we are talking about the new way in which Congress is intending to have a more current system of identifying the places that could be subjected to this. And, frankly, this bill makes everybody eligible to be under the preclearance regime but also has a clear path to get out. And it is sort of dynamic and renewing.

Ms. ESCOBAR. Excellent. Thank you so much.

And Ms. Romero-Craft, I hail from the great State of Texas, where we have legislators and a—we have leadership that has chosen to make voting much more difficult for minority communities and minority groups. And I was really taken by your description of what you witnessed in Florida and the impact that this has had

on voters, specifically voters who are recent immigrants and whose rights really have been violated.

And so I would like to give you the remainder of this time. I think it is so important, through these hearings, for the American public to understand the impact, the human impact, of changes in law or changes in policy. So can you describe for the American public more of what you have seen in Florida as a result of what the Supreme Court upheld?

Ms. ROMERO-CRAFT. Sure. Thank you. And thank you for the time.

So we are actually out in the field a lot. Thanks to the coalition members, we are able to run election protection activities to the extent our resources allow. But what we find is the current climate—specifically for the Latino community, there is a lot of fear about exercising rights.

Even for folks that are citizens. Take, for example, Puerto Rican citizens. It is not just relegated to Florida. We travel to other southern States. And so what we find is that folks are hesitant to ask for assistance. Even if they raise an issue that could be and that in some cases is specifically a violation of voting rights law, they are hesitant to bring anything forward.

So all of this has a chilling effect. And if individuals think that they are not going to be protected or heard—we have had folks even at the registration phase, where they are trying to register to vote, where they are met with folks that are unable or unwilling to provide them the language assistance that they require and is mandated under law. They won't register to vote.

So all of this is to say that it is very difficult even to create this relationship when you are looking for folks that have issues so that they trust you and that they trust that you are doing the best under what the law provides and that the folks that are elected officials also should be mandated to do their work. It is a very difficult position to find yourself in a room full of elected officials who are resisting to make changes that are required under the law.

And something I think that folks should understand, as well, is that, you know, Section 4(e) applies throughout the country. So any voter who was educated in Puerto Rico in Spanish has the right to ask for language assistance to all of the materials related to the election in Spanish.

So I think that is very important to know, and as well as the Section-203-covered jurisdictions. We still see violations, even though a lot of those jurisdictions are constantly reminded of their continuing obligation to language-minority voters.

Ms. ESCOBAR. Thank you so much.

My time has expired. I yield back.

Mr. RASKIN. The gentlelady's time has expired.

Thank you very much.

And I now recognize Mr. Armstrong from North Dakota.

Mr. ARMSTRONG. Thank you, Mr. Chairman.

First of all, Professor Tolson, I am stealing "all you can do is your job." I think I would have liked taking your class in law school. I am a big fan of Teddy Roosevelt and the arena, but it is a little verbose. And that is fantastic.

And, along those lines, when we are talking about current make-up of the Court, I am reminded of what an old trial lawyer told me when I started, and that was, "Win the jury trial, and then you don't have to worry about the appeal." Unfortunately, in these cases, we don't have it.

But I want to go back to something Mr. Morley said, in that we always think of these cases in wins and losses, and we don't always account for settlements. And so, when we are talking about, like, the definitions in 3(a)(1)—I come from the only State without voter registration. We have complete vote-by-mail counties in some areas. I always use the line, "There is no such thing as a Federal election. There are just local elections that elect Federal officers."

But when you are talking about DOJ and, I mean, the opportunity for mischief—and I am going to bring in the private right of action, because you actually write in your testimony to strengthen that.

But my concern is, I mean, just on a resource and discovery and paper and all of those types of issues, primarily, when you take a State as big as North Dakota and deal with one issue, I mean, you could very easily see a small rural county settling the case immediately just because they simply do not have the resources to deal with the issue. And so that one county in north-central North Dakota could essentially trigger an opt-in for the whole State.

Am I reading this right?

Mr. MORLEY. Yes, depending on how many other voting rights violations have occurred from other political subdivisions in the State. Yes, that would count as a strike then. That would apply not just to that political subdivision but then to others as well within the State.

Mr. ARMSTRONG. And the settlement—I mean, settlement would be a part of that conversation, right? This isn't all just wins and losses in those areas.

Mr. MORLEY. Right. Under the proposed language in H. R. 4, if a jurisdiction enters into a consent decree, a settlement, or any other agreement, even if there is no admission of liability, as long as that initial complaint had an allegation that there was a constitutional violation or a Voting Rights Act violation, that settlement would count as a strike, it would count as a voting rights violation.

Mr. ARMSTRONG. So, then, would even a decision to, like, amend the voting practice, that could do it as well, right?

Mr. MORLEY. If that were part of the settlement agreement or part of the consent decree, absolutely.

Mr. ARMSTRONG. Okay.

And, now, how does the private right of action work? Or how do you envision it working? Because, I mean, far be it for me, but, I mean, having—because you strengthen it in your testimony. I mean, you give some great things. I am not worried about when it works well; I am worried about when, potentially, people are interested in creating mischief.

Mr. MORLEY. So one of the provisions of H. R. 4 allows current provisions of certain Federal voting rights laws that currently are only enforceable by the Attorney General to be enforced by private litigants as well. And the way H. R. 4 is currently drafted, only vot-

ing rights laws that are aimed at preventing discrimination on the basis of race or color would be subject to private enforcement.

My suggestion for the committee to consider is, in allowing private enforcement of voting rights laws, essentially extend this private right of action not just to voting rights laws aimed at racial discrimination but at all voting rights laws, precisely because, on the one hand, you would still have Article III standing limitations on who is allowed to sue. So you couldn't have a random person just walk in off the street and start suing jurisdictions. It would have to be someone who suffered an injury in fact. So an adversely affected candidate, an adversely affected voter, potentially a political party.

And by allowing private enforcement of voting rights laws, you ensure that the rules of the road, the fundamental rules governing the election, will be enforced and that enforcement isn't hung up and cases aren't thrown out of court on technical, non-merits-related grounds, such as what happened in 2008 in a case brought about maintenance of Ohio's voter registration lists, *Ohio Republican Party v. Brunner*, where the Court says: There is no cause of action, so we are not even going to bother looking at whether election officials are violating Federal law or not.

Mr. ARMSTRONG. But I am assuming that a private course of action—same thing, right? There are not just wins and losses; there can be settlements. And they would qualify in the same way as if it is brought in any other way, correct?

Mr. MORLEY. Absolutely. Under H.R. 4, if there is a settlement and if one of the allegations in the original cause of action involved racial discrimination in violation of the Constitution or in violation of Federal voting rights laws, then any attempt to settle that case would—or a successful settlement, I should say, would count as a strike, would count as a voting rights violation.

Mr. ARMSTRONG. Thank you.

And then I am going to just ask Mr. Rich to comment on that, just about, I mean, how can we assure this is narrowly tailored enough that it does what we want it to do without having this area where—I mean, I can't have rural districts settling just because they have to settle type of thing. I mean, I am not even sure I disagree with the private action. I just want to make sure that we are thinking about not only the ways in which it is used properly but the ways in which it is used improperly.

Mr. RICH. Well, I—

Mr. ARMSTRONG. You have done this for decades.

Mr. RICH. I am of the opinion that there is a private right of action to enforce most of the Voting Rights Act, and it has worked over the years. There are all sorts of protections in the courts for private rights of actions brought against jurisdictions. Indeed, I think the jurisdictions have more resources, usually, than the private plaintiff does. So I don't see that as a major problem.

Mr. ARMSTRONG. And thank you. My time is up. I agree with that in most jurisdictions, just probably not most jurisdictions in my district.

Ms. JACKSON LEE [presiding]. The gentleman's time has expired.

Mr. Rich, before we conclude and before I express appreciation for all the witnesses that are here and thank the ranking member

for his presence and his thoughtful questions, let me editorialize and say that I think the Shelby case is one of the most significant moments in history that really makes lifeless some of the promises of the Constitution and particularly some of the amendments in the Bill of Rights. So I think it is important for this Congress, in a non-partisan and bipartisan manner, be able to give the tools back to not only individual voters but to governmental entities.

One of those points was a comment that Attorney General Lynch made regarding the DOJ's ability to send observers. And let me be very clear. I am in a voting rights district. I have never had a district that has been drawn without either court approval or instruction. And that means, every election, I am asking for observers, because my constituents are calling ahead of time about the fear of being suppressed.

So her point was that Federal observers have been severely curtailed as a result of the Shelby decision, impacting elections from November 2016 onward.

What has been the role and importance of Federal observers in protecting minority voting rights? And how has the loss of most of the Federal observers impacted elections on the ground in States like Florida and Texas?

And might I say, they give you an 800-number or I am calling ahead of time, and I truly feel the impact in the smaller number of observers who are able to be out in the field.

Mr. Rich.

Mr. RICH. There is no question that the Federal-observer provision is one of the important parts of the Voting Rights Act. If you go back to when the Voting Rights Act was passed, the importance of having Federal observers at those elections was crucial. And you are still seeing it in your district. You need them, because there are racial tensions at these elections.

Shelby County reduced the number of observers that could be certified by the Attorney General considerably. The only way you can get Federal observers now is if there is a court order authorizing the Attorney General to certify them. Because under the interpretation that the Department of Justice has given to the observer provision in the 1965 act is because there are no longer any Section 5 jurisdictions, which were always the jurisdictions that could be certified for Federal observers, that is gone, and, therefore, there is no way to certify Federal observers for formerly Section 5 jurisdictions.

I just think losing that is not as important as preclearance, in my judgment, but pretty close. And over the history of the voting rights enforcement by the Federal Government, the Federal observer program has been one of the most important that we have. And the procedures and efforts that have gone into it have been considerable. OPM trains observers to be neutral. They are able to be in voting places and where votes are counted to be sure there is no fraud or discrimination. And so I fully agree with what former Attorney General Lynch said, that losing this has been a real step backward.

Ms. JACKSON LEE. Well, let me thank each and every witness—thank you, Mr. Rich, for your answer. I think the other telling point is that, in 2020, Section 5 districts will be going into redis-

tricting without that protection. And let's hope we will have some protection before then.

Again, let me thank each and every one of the witnesses for what I think has been an insightful—and not inciting, but insightful contribution to the task that Congress has, which is to set the record.

Before I close, Mr. Ranking Member, I want to—without objection, the opening statement of the chairman of the full committee will be entered into the record, Mr. Jerry Nadler.

Without objection.

[The statement of Chairman Nadler follows:]

MS. JACKSON LEE FOR THE OFFICIAL RECORD

**Statement of the Honorable Jerrold Nadler for the Hearing on
“Congressional Authority to Protect Voting Rights After *Shelby County v. Holder*” Before the Subcommittee on the Constitution,
Civil Rights, and Civil Liberties**

**Tuesday, September 24, 2019 at 2:00 p.m.
2237 Rayburn House Office Building**

When Congress passed the Voting Rights Act in 1965, it aimed to deliver on what had long been an empty promise to African Americans and other people of color: the right to participate in our democracy as equal citizens. The Act not only prohibited states from denying the right to vote on the basis of race, but also required certain states and other local jurisdictions that had practiced the most severe forms of discrimination to get approval from the Justice Department, or from a court, before making any changes to their voting laws.

Congress enacted this “preclearance” requirement to address what the Supreme Court called an “unremitting and ingenious defiance of the Constitution” by states determined to suppress the vote.

States would enact laws designed to disenfranchise black voters, like literacy tests; and when those laws were struck down by the courts after years of litigation the states would simply switch to some other method of voter suppression, like poll taxes.

This relentless game of whack-a-mole meant that black voters could be shut out of the polling place even if they were successful in every lawsuit they brought because by the time they succeeded in striking down a discriminatory law, a new one would already be in place to keep them from the ballot box. So, as the Supreme Court explained when it first upheld the Voting Rights Act in *South Carolina v. Katzenbach*, Congress put in place the preclearance requirement “to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”

For decades afterward, the ability of African Americans and other people of color to cast votes and to run for office improved dramatically. But because many state and local governments persisted in attempting to suppress the vote in communities of color—or to dilute their votes through racial gerrymandering—Congress reauthorized the Voting Rights Act in 1970, 1975, 1982, and 2006. Each time, the legislation passed by overwhelming bipartisan margins. And each time, Congress kept essentially the same “coverage formula” for determining which jurisdictions would be subject to preclearance.

Six years ago, however, the Supreme Court gutted the Voting Rights Act in its disastrous decision in *Shelby County v. Holder*. Despite the fact that this Subcommittee—of which I was the Ranking Member at the time—heard from dozens of witnesses and assembled thousands of pages of evidence of ongoing discrimination when it last reauthorized the Act in 2006, the Supreme Court decided to substitute its own judgment for that of Congress.

By a 5 to 4 vote, the Court essentially held that the law was a victim of its own success: in the Court's view, because things had improved in the jurisdictions subject to preclearance, Congress could no longer justify imposing preclearance on those jurisdictions.

Justice Ruth Bader Ginsburg put it this way in her dissent: "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." She was right.

The *Shelby County* decision unleashed a deluge of voter suppression laws across the nation, including in many states and local jurisdictions that had been subject to preclearance before *Shelby County*. Within 24 hours, Texas and North Carolina moved to reinstitute draconian voter ID laws, both of which were later held in federal courts to be intentionally racially discriminatory. We have heard evidence about these and other ongoing voter suppression laws in five hearings before this Subcommittee so far this year.

Another troubling aspect of the Court's reasoning in *Shelby County* was its emphasis on the supposed "equal sovereignty" of the states and on states' authorities to administer elections—even when they have abused that authority to deny the right to vote. The Court's reasoning barely acknowledged that the Constitutional Amendments enacted after the Civil War, during Reconstruction, fundamentally re-ordered Congress's relationship to the states when it comes to protecting the civil rights of all Americans.

As we will be discussing today, the Fourteenth Amendment guarantees equal protection under the law; and the Fifteenth Amendment prohibits any state from denying the right to vote on the basis of race. Crucially, both Amendments give Congress the power to enforce these rights "by appropriate legislation." In its decision in *Katzenbach*, the Supreme Court held that this authority under the Fifteenth Amendment means Congress "may use any rational means" to make laws protecting the right to vote.

But in *Shelby County*, the Court appeared to depart from that standard and applied a different, heightened form of scrutiny. The *Shelby County* decision left substantial confusion in its wake, while giving states free reign to enact stringent voter ID laws, to purge their voter registration rolls, and to engage in a host of other measures designed to roll back the achievements of the Voting Rights Act.

Nonetheless, Congress has the power—and indeed the obligation—to reverse this tide. The Fourteenth and Fifteenth Amendments expressly empower us to enact laws protecting the right to vote and guaranteeing the equal protection of all citizens. And although the Supreme Court’s decision in *Shelby County* did great damage, the Court made clear that it was not striking down preclearance altogether. Rather, it invalidated the part of the law that determines *which* jurisdictions are subject to preclearance. It explained it was doing this because Congress had not substantially updated that formula for several decades. In fact, the Court expressly said that Congress could “draft another formula based on current conditions.”

So that is what we have set out to do. We have already held a series of hearings documenting ongoing and pervasive threats to voting rights in various parts of the country. If we can target those jurisdictions that have been the worst offenders in recent years—those that have enacted discriminatory voter ID laws; shut down polling places; purged voter rolls; or diluted minority voting power—then there is every reason to believe that Congress has full authority to act.

We can no longer afford to wait. The right to vote lies at the very core of our democracy and is foundational to the rule of law. I look forward to hearing from today's witnesses and to forging a path ahead to protect the sacred right to vote for all Americans.

Ms. JACKSON LEE. This concludes today's hearing.

I want to thank all of our witnesses for appearing today.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Ms. JACKSON LEE. With great thanks, this hearing is adjourned.

[Whereupon, at 3:29 p.m., the subcommittee was adjourned.]

APPENDIX

Michael T. Morley, "Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote," *William & Mary Law Review*, Vol. 95:2053:<https://docs.house.gov/meetings/JU/JU10/20190924/HHRG-116-JU10-20190924-SD001.pdf>

Michael T. Morley, "Remedial Equilibration and the Right to Vote under Section 2 of the Fourteenth Amendment," *University of Chicago Legal Forum*, Vol. 2015, Article 10:<https://docs.house.gov/meetings/JU/JU10/20190924/109995/HHRG-116-JU10-20190924-SDOO2.pdf>



T 213.736.1000 | 919 Alamy Street
F 213.380.3769 | Los Angeles, CA 90015-1211
www.lls.edu

Justin Levitt
Associate Dean for Research and Professor of Law
Gerald T. McLaughlin Fellow
213.736.7417
justin.levitt@lls.edu

Answers to Questions for the Record
from the Honorable Steve Cohen, Chairman

Professor Justin Levitt,
Loyola Law School, Los Angeles

Before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties,
of the U.S. House Committee on the Judiciary
Hearing Date: September 24, 2019

Congressional Authority to Protect Voting Rights After *Shelby County v. Holder*

Question 1: What are the differences between voting rights and election violations when compared to other types of civil violations?

As further elaborated in my written testimony (with more extensive citation), there are several differences between election-related violations and other types of civil harms.

First, election-related harms are among the most difficult to deter or remedy using tools more efficacious in staving off other civil harms. Many elected officials undeniably have strong preferences concerning various individual policies in other arenas: taxes, education, jobs, the environment, health care, housing, and on and on. But the rules governing the election process affect elected officials both directly and personally, most often to an unmatched extent. More than in any other arena, the rules governing the election process may affect whether an individual candidate is elected to office, and whether an incumbent is returned to office. And for individuals whose elected status lies at the core of their livelihood or their identity, or both, that prospect may seem of existential magnitude.

The fact that candidates and elected officials have a direct and personal stake in disputes over the rules governing the election process means that incumbents may have personal incentives, beyond legitimate policy disputes, to engage in discrimination perceived to help them win elections. And officials elected under discriminatory systems are often prepared to fight tooth and nail to preserve the discriminatory systems that resulted in their election. When they fight, the costs of defensive litigation are dispersed onto the taxpayers as a whole. Public choice theory recognizes that these sort of concentrated benefits and dispersed costs offer prime conditions for the vigorous pursuit of rent-seeking behavior, and there are numerous examples (including several cited in my written testimony) of official actions bearing out the theory in practice.

Moreover, in other arenas, if recalcitrant officials repeatedly engaged in behavior generating expensive and burdensome litigation, voters might be expected to vote the offenders out of

office. But discriminatory rules governing the elections process affect the very conditions under which voters are able to exercise that oversight authority. That is, when all else fails and mobilization at the polls is the last recourse against the bad behavior of elected officials, discriminatory election rules uniquely blunt the ability of the electorate to fight back.

Second, election-related harms may be more difficult than other types of civil violations to detect in a fashion that provides for adequate remedy. Someone denied a job or an apartment or access to the classroom knows when they have been denied the opportunity they were seeking, and can at least begin the process of determining whether the denial was unlawful. If the action is later found unlawful, litigation can seek both prospective and retrospective relief to make the victim whole.

But in the election process, there is vanishingly little opportunity for retrospective relief, and never the opportunity to make victims whole. In truly egregious cases, some elections marred by rampant discrimination have been re-run, but such cases are extraordinarily rare — and even in the event of a new election, scheduling a special election means that the electorate for the rematch is unlikely to be the same as the electorate for the initial contest. The far more usual course for election-related remedies is to correct the problem prospectively, in time for the next election. It is unquestionably better to have a fair future election than to continue the damage of the past. But while waiting for the new and lawful process, incumbents elected in a discriminatory election are seated, with the authority to enact new policies not undone by a legitimate election down the road. The policy of the meantime — in the space between a discriminatory election and one in which that discrimination has been remedied — makes election violations different.

All of the above means that the only truly timely intervention for discriminatory election practices is before the election is held. But unlike other harms, the voters affected by a discriminatory election practice may not know about the discrimination until it is too late to correct. Modest changes to polling places or district lines or election day procedures may not be apparent until election day; changes to voter registration practices may not be apparent until registration forms are rejected, including forms rejected after a state's registration deadline. This is particularly, but not exclusively, true with respect to local changes in the rules governing the election process. And that combination of late discovery and the absence of meaningful retroactive remedy renders election-related harms different from other types of civil harms.

Third, election-related harms are more difficult to litigate. Part of that difficulty comes from the compressed schedule: there is always an election of some kind around the corner, and the combination of late discovery and the need to intervene before the next election is held creates a unique time crunch. That crunch is made worse by Supreme Court doctrine unique to the election context: as mentioned in my written remarks, cases like *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and stays issued pursuant to *Purcell*, establish that courts will be increasingly reluctant to grant relief as the election approaches. That crunch is also made worse by the above-mentioned personal incentives of incumbents to fight election litigation tooth and nail.

And that crunch is also made worse by the amount of data that must be gathered and analyzed to win several different types of voting-rights claims, including particularly claims under section 2 of the Voting Rights Act. Voting Rights Act claims depend not only on the gathering and analysis of demographic and socioeconomic data, but often on the painstaking collection and

analysis of local election results, compilation of localized instances of historical discrimination, deep qualitative testimony pertaining to the affected community, and evidence of the considerations of the officials responsible for the challenged policy, which may be under the control of the officials themselves and which officials are often quite reluctant to relinquish. I mentioned, in my written testimony, the Federal Judicial Center's study of the time required to litigate 63 different types of federal cases. Only five sorts of actions — death penalty habeas, environmental, civil RICO, patent, and continuing criminal enterprise drug crime cases — were deemed more cumbersome than voting rights litigation. All of this makes election-related violations different from other sorts of civil harms.

Question 2: How is it different for the federal government and advocates to protect voting rights under Section 2, rather than through Section 5 preclearance?

In part, the answer to this question relies on the analysis above, and on related analysis in my written testimony. Section 2 of the Voting Rights Act is a responsive remedy. It is available only after a law has been enacted and is legally operative. It requires those who will be adversely affected in an election to know that they will be adversely affected before that election occurs, and often with respect to policies announced to very little fanfare — or not announced at all. And while quite powerful, Section 2 litigation is also quite expensive and cumbersome, and frequently resisted with vigor by incumbents; it requires substantial resources that only a few organizations possess, and which can only be deployed in a few jurisdictions at a time. Moreover, this unusually cumbersome litigation must be pursued on an unusually compressed timeline; even when relief is achieved, it is often unjustly delayed, without the opportunity to make affected communities whole for the discriminatory elections of the meantime.

Preclearance on a model like Section 5 was designed instead to “shift the advantage of time and inertia from the perpetrators of the evil to its victims,” *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). It does so by addressing each of the aspects in which election-related harms are distinct, mentioned above. Preclearance, applied to jurisdictions with a pattern of conduct indicating the need for serious remedy or deterrence, requires a jurisdiction seeking to change its electoral practices to affirmatively bring those changes to a neutral decisionmaker's attention, along with data sufficient for the decisionmaker to evaluate the intent and impact of the change. It is also designed to speedily approve changes not deemed discriminatory, and to block discriminatory changes before they take effect, substantially reducing the risk that an election will be held under discriminatory terms that are impossible to fully remedy. Unlike regular responsive litigation, preclearance uniquely responds to the exceptional conditions of election-based harm, where that harm is particularly likely to occur.

Question 3: What was the primary constitutional concern expressed by the majority in *Shelby County*, and given the lack of a clear standard in the opinion, what are the bounds of constitutional authority to protect voting rights after *Shelby County*?

The *Shelby County* opinion reviewed the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. García Voting Rights Act Reauthorization and Amendments Act of 2006. The opinion's primary constitutional concern was what it deemed to be an inadequate tie of current conditions to the coverage formula

for preclearance reflected in that 2006 reauthorization. Specifically, as mentioned in my written testimony, the Court felt that turnout data from 1964, 1968, and 1972 were retained in 2006 as the primary referents for jurisdictions subject to preclearance, and that this choice was insufficiently related to the problems that Congress was targeting in 2006, because it was rooted in “40-year-old data” — data that the Court felt to be outdated.

As suggested in the question, the Court in *Shelby County* did not expressly offer a standard of review for gauging the constitutionality of Congressional action to prevent discrimination in voting rights. But much of the Court’s language suggests that it felt that the 2006 reauthorization of coverage failed “rational basis review,” normally the most deferential of review standards, and the standard of review applied in each of the Court’s prior evaluations of the passage of the Voting Rights Act and the statutes reauthorizing preclearance coverage. See *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27, 330-31 (1966) (upholding the preclearance regime); *Georgia v. United States*, 411 U.S. 526, 535 (1973) (upholding the 1970 reauthorization); *City of Rome v. United States*, 446 U.S. 156, 175-77 (1980) (upholding the 1975 reauthorization); *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999) (upholding the 1982 reauthorization). The Court critiqued the 2006 reauthorization by stating that it “reenacted a formula based on 40-year-old facts having no logical relation to the present day,” *Shelby County, Ala., v. Holder*, 570 U.S. 529, 554 (2013) (emphasis added), and highlighted what it deemed the “irrationality” of that formula, *id.* at 554, 556. Those are, typically (and as the language itself suggests), hallmark phrases of rational basis review.

As explained in further detail in my written testimony, this standard should leave Congress plentiful constitutional authority to protect voting rights. (Indeed, even with respect to a coverage formula for preclearance — the primary perceived flaw in the 2006 Act — the *Shelby County* Court expressly and emphatically stated that Congress could draft another based on current conditions. See *Shelby County*, 570 U.S. at 557.) With respect to federal elections, Congress has “comprehensive” power over the manner in which federal legislative elections are conducted, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). State and local elections involve an incremental measure of state sovereignty, but the Fifteenth Amendment permits intrusion on these interests to confront discrimination on the basis of race or ethnicity in the voting process. See *Lopez*, 525 U.S. at 284-85. Indeed, the Fifteenth Amendment permits Congress not only to confront the intentional discrimination in voting directly prohibited by the Amendment, but also to remedy past discrimination, including “prohibit[ing] state action that . . . perpetuates the effects of past discrimination.” *City of Rome*, 446 U.S. at 176. And Congress may similarly act prophylactically “to prevent and deter” intentional discrimination in voting, including by prohibiting conduct that is not itself unconstitutional, but has a discriminatory effect. See *Lopez*, 525 U.S. at 282-84. Congress has done so in the past with respect to jurisdictions evincing past discrimination or warning signs of present or future discrimination in voting, and up until *Shelby County*, the Supreme Court upheld each and every such authorization.

Without expressly overruling any of the authority above, *Shelby County* added just one limitation on the constitutional authorization described above and in my written testimony: the measures undertaken by Congress have to be sufficiently related to current conditions, rather than tailored to conditions forty years ago. That leaves ample room for Congress to act to protect voting rights.

Despite the existence of the Elections Clause and Fifteenth Amendment as ample bases for Congressional action to protect voting rights against discrimination based on race, some have suggested that Congress should act as if the Court would hold legislation on voting rights to the standard of review for Fourteenth Amendment legislation expressed in *City of Boerne v. Flores* and its progeny: that there must be “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). As mentioned in my written testimony, to the extent that *City of Boerne* articulates a standard of review distinct from the standard used to appraise the exercise of every other constitutionally enumerated power, the Court may have reasoned that the protections of the Fourteenth Amendment — embracing, among other principles, equal protection and due process in every field of governmental action — are sufficiently wide-ranging to require slightly more vigorous review lest Congressional power over other governments become effectively unlimited. The Fifteenth Amendment needs no such policing: it responds narrowly to eradicate racial and ethnic discrimination in the exercise of the franchise. And with that narrow focus, there is no equivalent concern that Congress through Fifteenth Amendment legislation would grant itself plenary power over all aspects of state and local government. Indeed, the *Shelby County* majority did not cite *City of Boerne*, and did not suggest any intent to overrule each of the cases mentioned above applying rational basis review to the Voting Rights Act or subsequent reauthorization legislation.

Still, even if the Court were to change course, overrule precedent, and apply the *City of Boerne* standard to Fifteenth Amendment legislation, such a decision would nevertheless leave ample room for Congress to protect voting rights. *City of Boerne* responded to a perceived overreach by Congress — not to enforce the Fourteenth Amendment, but to change its substantive provisions by “correcting” the Court as to what the Constitution actually prohibited. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). But as long as Congress is not attempting to redefine the substance of constitutional provisions, *City of Boerne* permits ample latitude for Congress to determine how best to exercise its enforcement power. For example, *City of Boerne* cast no doubt on Congress’s ability not only to prohibit unconstitutional conduct, but also to prevent future unconstitutional conduct or remedy unconstitutional conduct of the past. See, e.g., *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003). Upon appropriate warning signs indicating the perpetuation of the impact of past discrimination, or indicating the meaningful potential for discrimination on the horizon, Congress remains empowered to act.

Moreover, even in limiting the reach of other federal legislation enacted under the Fourteenth Amendment, the Court has consistently and repeatedly praised the Voting Rights Act as appropriately tailored legislation, including in *City of Boerne* itself. See *City of Boerne*, 521 U.S. at 518, 525-27, 532-33; see also, e.g., *United States v. Morrison*, 529 U.S. 598, 626-27 (2000). And a sufficient tie to current conditions — necessary in any event to comply narrowly with *Shelby County* — should also be sufficient to ensure that any future reauthorization or restoration of provisions in the Voting Rights Act remains “congruent” to the targeted injury.

Question 4: Does the Supreme Court’s *Shelby County* decision tell us anything about what kind of evidence the Court will accept if or when it reviews a new coverage formula?

As my answer above may suggest, it is clear from *Shelby County* that in reviewing a new coverage formula for the preclearance of election-related decisions, the Court will be quite wary of evidence of harm from forty years ago, without an express connection to current conditions.

However, just as “history did not end in 1965,” *Shelby County, Ala. v. Holder*, 570 U.S. 529, 552 (2013), *Shelby County* does not imply that history must begin anew in 2019. Past discrimination does have lingering impact, and evidence of that current lingering impact can help establish a predicate for present Congressional action. Similarly, patterns of unlawful conduct can help indicate both future danger and current need; historical evidence shining a revealing explanatory light on recurring present conduct, or a continuing series of relatively recent unlawful acts suggesting a heightened need for present local deterrence, can also establish a predicate for present Congressional action.

And that is merely a nonexhaustive subset of categories of historical evidence that should still be relevant to the judicial assessment of a new coverage formula given the concerns in *Shelby County*. A Court abiding by *Shelby County* would certainly also want to consider evidence of current unlawful conduct or the incentives for unlawful conduct, or current conditions impeding effective relief for voting rights violations. For example, evidence of recent unconstitutional actions, or multiple violations of the Voting Rights Act, or acts immediately following *Shelby County* that were themselves only belatedly revealed to violate the remaining provisions of the Voting Rights Act, or a degree of racially polarized voting highly correlated with a record of voting rights violations, would all help establish danger signs of the conditions for likely future violations and a predicate for present Congressional action. And evidence of the expense or other burden of discovering or litigating responsive voting rights cases, or the difficulty of securing effective and comprehensive relief in such cases, would also help establish a predicate for present Congressional action. I know that ample such evidence was offered at and in connection with the September 24 hearing in which I took part — including but certainly not limited to my own written testimony — and I believe that ample such evidence has been offered at other recent voting rights hearings as well.

Given the historical deference that the Court has shown when Congress is acting pursuant to one of its enumerated constitutional powers — particularly with respect to a narrowly focused enumerated power like the enforcement clause of the Fifteenth Amendment — I do not mean to suggest that Congress must necessarily assemble all of the sorts of evidence mentioned above. But I believe that under *Shelby County*, it should all be accepted by a Court as useful in establishing the predicate for Congressional action.

Question 5: Would the Court—or should the Court—give any measure of deference to Congress about what kinds of evidence it relies on when it assesses which jurisdictions should be subject to preclearance?

It is difficult to predict the nature or extent of deference that the Court will give to Congress in this arena. The Court has repeatedly stated that “[d]ue respect for the decisions of a coordinate branch of Government demands that [it] invalidate a congressional enactment only upon a plain

showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). And when evaluating the propriety of legislation, including legislation relating specifically to the enforcement of voting rights, the Court frequently refers to the evidence that Congress does amass, suggesting that the Court believes that the Congressional factfinding role and process is important. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09, 327-30, 334 (1966); *City of Rome v. United States*, 446 U.S. 156, 180-82 (1980); *Shelby County, Ala. v. Holder*, 570 U.S. 529, 547-49, 551, 553-54 (2013); see also *Tennessee v. Lane*, 541 U.S. 509, 528-29 (2004). The Court has also specifically determined that “[i]n identifying past evils, Congress obviously may avail itself of information from any probative source,” *Katzenbach*, 383 U.S. at 330; that basic principle has never been contravened.

That said, it certainly does not appear that the Court gave the same degree of deference to the record that Congress amassed in making its assessment about the coverage formula in *Katzenbach* and the record amassed in *Shelby County*. The former opinion seems to be written from the vantage point of seeking to uphold Congressional action if possible; the latter seems to be written from the vantage point of a court determined to strike it down. But the Court did not elaborate that it was reviewing the Congressional record with any different degree of deference, nor did it provide any reason why such a difference would be appropriate — and so it is not clear what to make of the apparent distinction as a matter of governing law.

It is also not clear what guidance this particular inquiry should provide to Congress as it undertakes its task. As my colleague Vice Dean Franita Tolson said at the September 24 hearing, to the express agreement of both Vice Chair Rankin and Representative Armstrong, “All you can do is your job.” I heartily agree. Congress should assemble all of the evidence it can muster with respect to current voting rights conditions and incentives, with respect to current limitations on the ability to effectively enforce existing law, with respect to the lingering present impact on voting rights of past discrimination, and with respect to patterns of voting rights violations that may suggest or create concern with respect to violations ahead, and the need to prevent or deter those violations. I believe that the hearings Congress has held, and those still to come, and the evidence adduced at those hearings, show an institution acting in good faith to remedy the lingering impact of past unconstitutional conduct and to prevent or deter future unconstitutional conduct, well within the substantive latitude provided by the expressly enumerated powers of the Elections Clause and the enforcement clauses of the Fourteenth and Fifteenth Amendments.

Question 6: How does HR 4, the Voting Rights Advancement Act, address the concerns of the majority in the *Shelby County v. Holder* decision?

As explained above, the *Shelby County* majority was concerned that when Congress reauthorized the coverage formula for preclearance in 2006, the basis for the states that were “covered” and those that were not was thought to be insufficiently tied to current conditions. The majority thought that the basis for preclearance coverage in 2006 turned on turnout data from 40 years before, and deemed that decision to be irrational.

In contrast, and as explained in more detail in my written testimony, the provisions of HR 4 that I reviewed for the September 24 hearing appear firmly rooted in current conditions, in a manner directly responsive to the *Shelby County* majority’s expressed concerns. HR 4 responds to the

current need to avoid perpetuating the current effects of past intentional discrimination, or the current presence of danger signs indicating either present intentional discrimination or the urgent need to prevent or deter intentional discrimination on the immediate horizon, or in some instances, both.

Consistent with the *Shelby County* majority's determination that "Congress may draft another formula [determining coverage for a preclearance requirement] based on current conditions," *Shelby County, Ala. v. Holder*, 570 U.S. 529, 557 (2013), HR 4 would do so. It reflects current evidence that electoral harms are distinct, and still distinctly averse to adequate resolution through normal responsive litigation tools, and hence retains a preclearance remedy. Section 3 of HR 4 determines where that preclearance is justified: because preclearance is a "potent" measure, HR 4 would not apply it to one-time offenders or jurisdictions that may have stumbled across a stray violation. Instead, it creates a trigger based only upon demonstrated current patterns and proclivities that show a danger of future recidivist misconduct.

Moreover, the coverage structure in HR 4 is time-limited, forward and backward. Because coverage is premised on patterns of misbehavior, it must stretch beyond merely the latest violation if it is designed to capture the conditions for most grave concern — and because the Congressional authority includes both vote denial and vote dilution concerns, that period for patterns spans two redistricting cycles. Furthermore, the preclearance review of HR 4 comes with a predetermined expiration date as well: no more than one redistricting cycle into the future. Thus, unlike the preclearance formula struck by *Shelby County*, the reference point for H.R. 4 continues to move as time does: because it looks to a set number of years from the present, rather than to a particular date, there is no danger that the formula will become stale by the passage of time. This structure ensures that preclearance coverage will always be as current as it is the day that it is passed.

Other provisions of HR 4 are similarly responsive to current conditions. Section 7, for example, provides a distinct statutory standard for preliminary equitable relief in voting rights cases. And Section 5 provides for reporting and notice requirements with respect to changes in electoral practices. I have addressed in my written testimony the ample constitutional authority on which Congress's power to enact these provisions rests. But they are also rooted in current conditions, in a manner responsive to *Shelby County*: they attempt to capture the ways, addressed in part above, in which responsive litigation is — at present — often insufficient to address voting rights violations in a timely fashion. Both of these provisions address current deficiencies in the enforcement apparatus of the Voting Rights Act, in a way decidedly tailored to current litigation conditions.

Finally, Section 6 of HR 4 addresses the deployment of federal observers, to detect and deter violations of law. In my written testimony, I explained at much greater length the constitutional authority to deploy observers, the present restrictions attending the deployment of observers in the aftermath of *Shelby County*, and the current difficulties that the lack of deployment creates for adequate enforcement of multiple federal voting rights statutes, including but not limited to enforcement of the Voting Rights Act itself. Section 6 of HR 4 is thus also tailored to current conditions, in restoring the federal government's ability to send trained observers to detect violations where current conditions create the most extensive cause for concern.

Question 7: In *Shelby County v. Holder*, the Court said: “we issue no holding on §5 itself” only on the section 4 coverage formula. “Congress may draft another formula based on current conditions” as a prerequisite to a determination that exceptional conditions exist making preclearance consistent with principles of federalism.

Despite this position, is there a concern that any challenge to a Section 5 coverage formula will pivot to a challenge of the overall constitutionality of Section 5 preclearance itself? What are the arguments for the continuing constitutionality of Section 5?

It seems foolhardy to attempt to predict the basis of any future challenge to federal legislation, or the portion of that legislation to which the Supreme Court may turn its attention. Instead, Congress would be wise to secure the constitutionality of each of the provisions it enacts, as best it can given the current state of the law.

With respect to the constitutionality of preclearance as a concept — independent of any particular coverage provision — the Court has on at least four different occasions found preclearance to be constitutional. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966); *Georgia v. United States*, 411 U.S. 526, 535 (1973); *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980); *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999). That list may well be joined by *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013), in which the Court expressly stated that “Congress may draft another [coverage] formula [for preclearance] based on current conditions.” *Id.* at 557.

True, the *Shelby County* majority noted — as Courts before had noted — that preclearance is an exceptional measure that must be justified by “exceptional conditions” justifying an “extraordinary departure from the traditional course of relations between the States and the Federal Government.” *Id.* at 557. But racial discrimination in the electoral process is, it must be hoped, precisely such an exceptional condition. Indeed, racial discrimination in the electoral process justified one of just 27 constitutional Amendments in the history of the country, wholly devoted to that topic and no other. The Fifteenth Amendment was passed in the immediate wake of the Civil War, and authorized Congress expressly to depart from the “traditional course of relations between the States and the Federal Government” to eradicate the blight of racial discrimination in the franchise. *Lopez*, 525 U.S. at 284-85; *City of Rome*, 446 U.S. at 178-80.

Moreover, the answers above, and my written testimony in more detail, explain precisely why racial discrimination, though pernicious everywhere, is in the electoral process more of an exceptional condition than elsewhere, and more properly subject to exceptional remedial and deterrent measures. More traditional remedial litigation, powerful though it may be, is alone simply not up to the task. In fashioning rules for the electoral process, officials’ incentives to discriminate are likely to be more direct and personal than in other arenas, their vulnerability to electoral deterrent in the event of misconduct is likely to be more attenuated, their defenses of discrimination are likely to be more tenacious, and the available traditional tools to prevent and remedy damage are likely to be less effective. As the Court has repeatedly explained in a heretofore unbroken line of precedent, a preclearance remedy continues to be constitutionally appropriate because, while exceptional, it represents an entirely rational and well-tailored response to an exceptional problem: a problem so pernicious that it required a constitutional Amendment all its own. The current conditions supplying the context for remedial litigation lamentably underscore the need for more potent measures where the risk of constitutional harm

is greatest. And when attached to a coverage provision determining the geographic location of that greatest risk, that is precisely what a preclearance provision like Section 5 attempts to accomplish, with ample constitutional backing.

U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Hearing on
“Congressional Authority to Protect Voting Rights after *Shelby County v. Holder*”

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Answers for the Record to Questions from the Honorable Steve Cohen, Chairman of the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Franita Tolson
Professor of Law and Vice Dean for Faculty and Academic Affairs*
University of Southern California Gould School of Law
699 Exposition Blvd.
Los Angeles, CA 90089
213-740-5502
ftolson@law.usc.edu
<https://gould.usc.edu/faculty/?id=73521>

*affiliation for identification purposes only

1. How is Congressional authority under the Elections Clause different from Congressional authority under the 14th and 15th Amendments?

Congress has broader authority to regulate the times, places and manner of federal elections under the Elections Clause than pursuant to the Fourteenth and Fifteenth Amendments. The Clause is not limited by the same federalism concerns that constrain Congress's power under the Amendments. The Elections Clause empowers Congress to "make or alter" state regulations, allowing Congress to disregard state sovereignty in enacting, enforcing, and resolving the constitutionality of legislation passed pursuant to the Clause.¹ However, federal power is significantly weaker in the context of voter qualification standards and state/local elections, all of which states have broad authority to regulate. The Supreme Court typically views our system of federalism as requiring that states be able to regulate these domains free of federal interference, subject only to exceptions outlined in provisions such as the Fourteenth and Fifteenth Amendments.

The breadth of congressional power under the Elections Clause lies in Congress's ability to veto state law at will, a feature that is at odds with most of the prevailing views of federalism that influence the Court's interpretation of the Fourteenth and Fifteenth Amendments. Traditional federalism doctrine prioritizes experimentation in governance dispersed among the fifty states—a variation that emerges, in part, from limiting the reach of the federal government. Unlike the Reconstruction Amendments, the Elections Clause has its own unique set of values that place a premium on congressional sovereignty. According to the Supreme Court, Congress's authority over setting the "Times, Places and Manner" of federal elections "is paramount,"² and this body has, on occasion, imposed substantive requirements that states must follow when structuring federal elections.³ While Congress assumes that well-functioning states will fill in most of the blanks with respect to the nuts and bolts of federal elections, it has been willing to impose uniformity if the need arises.⁴ Indeed, the Clause's overarching purpose is to ensure the continued existence and legitimacy of federal elections, so the text empowers Congress to engage in the quintessentially "anti-federalism action of displacing state law and commandeering state officials toward achieving this end."⁵ Comparatively, Congress cannot commandeer state officials in the course of enforcing the Fourteenth and Fifteenth Amendments⁶ nor can Congress displace state law under these provisions

¹ The Elections Clause, in its entirety, 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." U.S. CONST. art. I, § 4, cl. 1.

² *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1 (2013).

³ The Help America Vote Act (HAVA) sets minimum standards for election administration, primarily dealing with upgrades for voting technology. *See, e.g.*, 52 U.S.C. §§ 20141-43, 20151-53. The National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg (2012) (current version at 52 U.S.C. §§ 20501-20511 (Supp. III 2016)), governs voter registration for federal elections, making it easier for individuals to register at certain state offices including DMVs (which is why the statute is referred to as the "motor-voter" law).

⁴ *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (plurality opinion) (describing the Apportionment Acts of 1842, 1862, and 1901, which required, at various points, that members of the House be elected from single member districts that are compact, contiguous, or have equal populations).

⁵ Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1246-47 (2012) (arguing that the anti-commandeering principle does not apply to the Elections Clause); Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2212 (2018) (same). *See also Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 8 (2013) (stating that the Elections Clause imposes a nondiscretionary duty on the states to set the time, place, and manner of federal elections).

⁶ *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress cannot commandeer state legislatures into enacting a federal regulatory program); *Printz v. United States*, 521 U.S. 898, 924-25 (1997) (same for state officials).

unless it builds a legislative record illustrating a pattern of constitutional violations on the part of the states.⁷

Concerns about federalism have hampered voting-rights enforcement in recent decades, famously culminating in *Shelby County v. Holder*'s invalidation of Section 4(b) of the VRA, which subjected mostly southern jurisdictions with abysmal records on voting rights to federal oversight.⁸ The Court's approach in *Shelby County* is a nod to nineteenth century cases in which the Court limited the reach of the Fourteenth and Fifteenth Amendments on federalism grounds, a problem that rarely affects the Court's interpretation of the Elections Clause. During Reconstruction, the Court adopted a narrow interpretation of Congress's enforcement authority under the Amendments, resisting the notion that these provisions changed the fabric of our federal system.⁹ The same Reconstruction era Supreme Court that sought to limit the scope of the Fourteenth and Fifteenth Amendments expressed a surprising willingness to enforce Congress's broad authority under the Elections Clause, bucking the idea that all federal voting rights legislation enacted during this period was constrained by federalism.¹⁰

Because congressional power under the Elections Clause is not subject to federalism constraints or any requirement that federal legislation remediate unconstitutional state action, Congress does not have to build a legislative record that is as extensive under the Clause than when acting solely under the Fourteenth and Fifteenth Amendments. Congress's authority under the Elections Clause can be a powerful bulwark against discriminatory state laws that are usually defended on the grounds of state sovereignty against Fourteenth and Fifteenth Amendment challenges.

2. How does the Elections Clause implicate the regulation of state and local elections, beyond federal elections?

It is difficult to insulate state and local elections from the reach of federal power under the Elections Clause. Not only do voters in state and federal elections have the same qualifications, but states and local governments use many of the same practices in federal elections as they do for state and local elections. Individuals register to vote, go to the same polling place, at the same time, and vote on one ballot for federal, state, and local elections in most places. In order to avoid the reach of federal authority, states would have to run separate election systems—one for state and local elections,

⁷ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

⁸ *Id.* (holding that Section 4(b)'s disparate application to mostly southern states and not equally culpable northern jurisdictions violated the equal sovereignty principle); see also Franita Tolson, *The Equal Sovereignty Principle as Federalism Sub-Docline: A Reassessment of Shelby County v. Holder*, in *CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY* (Christopher P. Banks ed., 2018) (referring to the equal-sovereignty principle as "aggressive pro-federalism doctrine designed to shift previously delegated authority over elections from the federal government back to the states").

⁹ See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 556 (1876) (invalidating convictions under the Enforcement Act of 1870 on the grounds that African-Americans were not disenfranchised on the basis of race in violation of the Fifteenth Amendment); *United States v. Reese*, 92 U.S. 214, 221-22 (1876) (invalidating Section 4 of the Enforcement Act of 1870 on the grounds that it exceeded the scope of Congress's authority under the Fifteenth Amendment); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1872) (stating that the adoption of the Fourteenth and Fifteenth Amendments did not change the balance of state and federal power over the protection of individual rights).

¹⁰ See, e.g., *Ex Parte Siebold*, 100 U.S. 371 (1879) (upholding portions of the Enforcement Act of 1870 as a lawful exercise of congressional power under the Elections Clause); *Ex Parte Clarke*, 100 U.S. 399 (1879) (same). See also Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 100, 144-146 (2019) (discussing the federalism implications of *Siebold* and *Clarke*).

another for federal elections—which is a prospect that few states could afford. As a result, a voting change affecting state and local elections will also affect federal elections. If a voting change will have the effect of undermining the health of federal elections, then the Elections Clause provides sufficient authority for Congress to regulate those changes.¹¹

Because federal law under the Elections Clause often touches on voter qualifications and state/local elections, this can create confusion about which level of government has constitutional authority to legislate. Such confusion tends to inflate the federalism concerns that have traditionally accompanied the exercise of federal power over elections. In *Arizona v. Inter Tribal Council of Arizona*, for example, the Supreme Court held that the National Voter Registration Act’s requirement that voters affirm their citizenship in order to register to vote for federal elections preempted an Arizona law requiring documentary proof of citizenship in order to register. While voter registration is a manner regulation that falls within the scope of federal power under the Elections Clause, the Court recognized that the proof of citizenship requirement is a voter qualification standard subject to state authority.¹² Nonetheless, the Court concluded that the Clause’s text, allowing Congress to “make or alter” state regulations, permitted Congress to implement “a complete code for congressional elections” that can displace or augment state law for any reason or no reason. Rejecting arguments by dissenters that the NVRA impermissibly interfered with the state’s authority over voter qualifications, the Court held that the Elections Clause allowed Congress to lawfully regulate voter registration even when such regulation has an incidental effect on voter qualifications standards predominantly within the domain of the states.¹³ As *Inter Tribal Council* illustrates, the text and structure of the Clause point to federal power that is robust, significant, and, most importantly, unencumbered by federalism.

3. In *Shelby County v. Holder*, the Court said: “we issue no holding on §5 itself” only on the section 4 coverage formula. “Congress may draft another formula based on current conditions” as a prerequisite to a determination that exceptional conditions exist making preclearance consistent with principles of federalism.

Despite this position, is there a concern that any challenge to a Section 5 coverage formula will pivot to a challenge of the overall constitutionality of Section 5 preclearance itself? What are the arguments for the continuing constitutionality of Section 5?

There are concerns among legal scholars that any challenge to a new coverage formula could pivot to a challenge to the overall constitutionality of Section 5 preclearance. When the Supreme Court first confronted the constitutionality of the preclearance regime in *Northwest Austin Municipal District Number One v. Holder* in 2009, the Court did not distinguish between the coverage formula and the remedy of preclearance in suggesting that Section 5 was unconstitutional (but ultimately avoiding the question).¹⁴ Although *Shelby County* struck down the coverage formula, ostensibly giving Congress an opportunity to draft a replacement, Justice Thomas argued in his concurring opinion that, “While

¹¹ Tolson, *Spectrum of Congressional Authority*, *supra* note 10 (detailing the limited circumstances in which Congress can regulate voter qualification standards and state elections under the Elections Clause).

¹² *Inter Tribal Council of Ariz.*, 570 U.S. at 17 (noting that the states, not Congress, have the authority to set voter qualifications for state and federal elections).

¹³ *Id.*

¹⁴ 557 U.S. 193, 202 (2009).

the Court claims to ‘issue no holding on § 5 itself,’ its own opinion compellingly demonstrates that Congress has failed to justify ‘current burdens’ with a record demonstrating ‘current needs.’¹⁵ Personnel changes on the Court may result in a majority of the justices agreeing with Justice Thomas, and holding that the remedy of preclearance is itself unconstitutional.

The caselaw also raises concerns about the constitutionality of preclearance as a remedy. In *City of Boerne v. Flores*, the Court changed the standard that it uses to review the constitutionality of federal legislation under the Fourteenth Amendment from the more permissive rational-basis review outlined in cases like *South Carolina v. Katzenbach*¹⁶ to the congruence-and-proportionality test, which requires that Congress establish a record of constitutional violations on the part of the states and select a remedy closely tailored to addressing the violations.¹⁷ Under *City of Boerne*, the quantum of proof that Congress must amass to show that legislation is “appropriate” is more extensive than under pre-*City of Boerne* precedent, posing a problem for all federal voting-rights legislation. In the years since *City of Boerne*, the Court has been decidedly less deferential to Congress in its decision to reauthorize the preclearance regime of the Voting Rights Act.¹⁸

Given this precedent, it is not surprising that there is anxiety among legal scholars about the constitutionality of preclearance as a remedy going forward.¹⁹ *Shelby County* reserved the question of whether the congruence and proportionality test applies to the Fifteenth Amendment. In addition, the Court did not directly address the plaintiff’s argument that preclearance is justified only if the legislative record shows that racial discrimination is as rampant now as it was in 1965, when Congress first passed the Act.²⁰ Section 5 of the VRA operates to block unconstitutional conduct ex

¹⁵ *Shelby Cnty. v. Holder*, 570 U.S. 529, 559 (2013) (Thomas, J., concurring).

¹⁶ 383 U.S. 301, 326 (1966) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

¹⁷ *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). To determine whether there is a fit between the remedy imposed by Congress and the evil to be addressed, the Court will “identify with some precision the scope of the constitutional right at issue,” and then the Court will “examine whether Congress identified a history and pattern of unconstitutional . . . discrimination.” *Id.* See also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 368 (2001).

¹⁸ See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193, 201 (2009).

¹⁹ See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013) (arguing that no matter what the outcome in *Shelby County*, voting-rights advocates should prepare for a future without section 5); Ellen D. Katz, *How Big is Shelby County?*, SCOTUSBLOG (June 25, 2013, 6:31 PM), <http://www.scotusblog.com/2013/06/how-big-is-shelby-county/> (“[T]he Court[] refus[ed] to defer in any significant way to Congress’s judgment that the preclearance regime remains necessary . . .”).

²⁰ See Petition for a Writ of Certiorari at 24–25, *Shelby Cnty.*, 570 U.S. 529 (2013). The Court invalidated the coverage formula because of the lack of overt discrimination, but did not resolve whether the same type of record is required in order to impose the remedy of preclearance more generally. See *Shelby Cnty.*, 570 U.S. at 554 (noting that, with respect to the congressional record, “no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965” (quoting *Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193, 201 (2009); *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 331 (1966))). Much of the evidence of discrimination amassed by Congress in 2006 is based on violations of Section 2 of the Voting Rights Act and administrative denials of preclearance by the Attorney General, neither of which requires a finding that the jurisdiction acted with discriminatory intent. Nevertheless, there are some instances in the legislative record of official actions taken with discriminatory intent. See, e.g., *Shelby Cnty.*, 570 U.S. at 571 (Ginsburg, J., dissenting) (noting that “between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory” and “Congress found that the majority of DOJ objections included findings of discriminatory intent”); *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2006) (statement of Wan J. Kim, Assistant Atty Gen., Civil Rights Division, Department of Justice); *id.* at 21, 82 (statement of Robert McDuff, Attorney, Jackson,

ante, so, understandably, Congress has had trouble compiling a record of discrimination similar to that present in prior reauthorizations. It is difficult to square the reality of improved racial circumstances with *Shelby County's* suggestion that a showing of pervasive and widespread discrimination might be required to impose the remedy of preclearance.²¹

In light of these concerns, the Elections Clause is an important source of authority that, in addition to the Fourteenth and Fifteenth Amendments, could help establish the constitutionality of preclearance as a remedy by providing more constitutional support for congressional action in this context. In the past, the Court has resolved legal challenges to statutes implicating more than one source of constitutional authority, with the presence of multiple sources increasing the Court's deference to Congress.²² Thus, the fact that preclearance could be sustained under more than one constitutional provision should be a net positive in the face of any legal challenges. But *Shelby County v. Holder* ignored that the constitutionality of the Voting Rights Act rested on dual sources of authority—the Fourteenth and Fifteenth Amendments—and could be further sustained based on a third: the Elections Clause.

For this reason, Congress has to be explicit that authorization for both the new coverage formula as well as the remedy of preclearance itself rests on all of these constitutional provisions. The Court is less likely to interpret congressional power as limited to enacting only remedial legislation designed to address intentional racial discrimination if such legislation is also premised on the Elections Clause, which is not constrained by the same concerns about federalism and intentional discrimination as the Fourteenth and Fifteenth Amendments. If the Court credits the full range of congressional power in this area by analyzing the legislative record in light of Congress's authority under the Elections Clause as well as the Fourteenth and Fifteenth Amendments, the federalism justifications touted by the *Shelby County* Court become significantly less compelling.

Mississippi).

²¹ *Shelby Cty.*, 570 U.S. at 546 (noting the parity between covered and noncovered jurisdictions in minority voter turnout and registration); *Northwest Austin*, 557 U.S. at 203–04 (same). See also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (striking down provisions of the Age Discrimination in Employment Act (ADEA) on the grounds that the evidence relied on by Congress was too anecdotal and too narrow geographically to justify extension of the ADEA to all of the states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643, 647 (1999) (accepting that state infringement of patents could violate the Fourteenth Amendment, but invalidating the Patent Remedy Act because Congress did not show that states were engaging in this behavior).

²² See, for example, *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding Section 4(e) of the Voting Rights Act, which barred literacy tests for individuals from Puerto Rico, under the Fourteenth Amendment but noting numerous other provisions that could have sustained this provision including the Treaty power and the Territorial Clause of Article III). See also *Legal Tender Cases*, 79 U.S. (1 Wall.) 457 (1870); see *id.* at 534 (holding it is “allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred”); *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316 (1819); see *id.* at 407–12 (finding that Congress's power to charter a bank stems from its “great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies” as supplemented by the Necessary and Proper Clause).