American Civil Liberties Union
Statement Submission For

"From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act"

Hearing Before the U.S. Senate Committee on the Judiciary

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Introduction

The American Civil Liberties Union (ACLU), on behalf of its over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, is pleased to submit this statement for today's hearing, *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act*, to ensure key protections in the Voting Rights Act are restored following the Supreme Court's decision in *Shelby County v. Holder*.[1] We thank the Committee for this hearing and applaud the bipartisan nature of this effort.

[1] Shelby County v. Holder, 133 S. Ct. 2612 (2013).

The ACLU is a nationwide, non-partisan organization working daily in courts, Congress, state legislatures, and communities across the country to defend and preserve the civil rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU works at the federal, state, and local level to lobby, litigate, and conduct public education in order to both expand opportunities and to prevent barriers to the ballot box.

With one of the largest voting rights dockets in the nation, the ACLU's Voting Rights Project, established in 1965, has filed more than 300 lawsuits to enforce the provisions of the Voting Rights Act and the U.S. Constitution. The current docket has over a dozen active voting rights cases from all parts of the United States, including Alaska, California, Florida, Georgia, Iowa, Kentucky, Montana, Pennsylvania, Virginia, Washington, Wisconsin, and Wyoming. The ACLU is also engaged in state-level advocacy on voting and election reform all across the country.

The ACLU was co-counsel in both of the recent Supreme Court cases *Shelby County v. Holder* and *Arizona v. Inter Tribal Council of Arizona* (ITCA), and in *Shelby County,* represented among other clients, the Alabama State Conference of the NAACP, to defend key provisions of the Voting Rights Act.

In addition, the ACLU's Washington Legislative Office is engaged in federal advocacy before Congress and the executive branch on a variety of federal voting matters and was one of the leading organizations advocating for the Voting Rights Act extensions of 1982 and 2006. We issued reports on the continued need for the Act[2] and provided expert testimony on racial discrimination in the then-covered jurisdictions.[3]

The Voting Rights Act of 1965 has proven to be one of the most effective civil rights statutes in eliminating racial discrimination in voting. For almost half a century, the Act has been utilized to ensure equal access to the ballot box by blocking and preventing numerous forms of voting discrimination. Unfortunately, the recent decision in *Shelby County v. Holder* invalidated the coverage formula of Section 4(b), which determines which jurisdictions are subject to preclearance. With the loss of Section 4(b), Section 5 has been rendered virtually obsolete, resulting in the loss of the most innovative and incisive tools against racial discrimination in voting, including preclearance and notice to DOJ of voting changes. The overwhelming evidence of the continued need for the Voting Right Act means that Congress must restore the ability for enforcement of Section 5 through

[2] Laughlin McDonald and Daniel Levitas, *The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, (March 2006), *available at* http://www.aclu.org/voting-rights/case-extending-and-amending-voting-rights-act.; Caroline Fredrickson and Deborah J. Vagins, *Promises to Keep: The Impact of the Voting Rights Act in 2006*, ACLU (March 2006), *available at* http://www.aclu.org/voting-rights/promises-keep-impact-voting-rights-act-2006.

[3] *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before Senate Judiciary Committee*, 109th Cong. (2006) (testimony of Laughlin McDonald, Director, ACLU Voting Rights Project), *available at* http://www.aclu.org/voting-rights/testimony-laughlin-mcdonald-director-aclus-voting-rights-project-house-judiciary-subco; *The Voting Rights Act: Evidence of Continued Need*: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong (2006) (testimony of Nadine Strossen, President, ACLU), *available at* http://www.aclu.org/voting-rights/statement-aclu-president-nadine-strossen-submitted-subcommittee-constitution-regarding.

the creation of a new coverage formula that appropriately captures recent racially discriminatory voting practices.

Following the decision in *Shelby County*, the ACLU will continue to devote substantial energy and resources to defending the right to vote for all. We look forward to working with this Committee in restoring the critical rights we have lost in ensuring all voters have access to the ballot free from discrimination.

I. Bipartisan History of the Voting Rights Act

Congress passed the Voting Rights Act of 1965 to enforce rights guaranteed to minority voters nearly a century before by the Fourteenth and Fifteenth Amendments. Although these amendments prohibited states from denying equal protection on the basis of race or color and from discriminating in voting on account of race or color, African Americans and other minorities continued to face disfranchisement in many states. Poll taxes, literacy tests, and grandfather clauses were used to deny African American citizens the right to register to vote, while all-white primaries, gerrymandering, annexation, and at-large voting were used widely to dilute the effectiveness of minority voting strength.[4]

The passage of the Act represented the most aggressive steps ever taken to protect minority voting rights. The impact was immediate and dramatic. In Mississippi, African American registration went from less than 10% in 1964 to almost 60% in 1968; in Alabama, registration rose from 24% to 57%. In the South as a whole, African American registration rose to a record 62% within a few years of the Act's passage.[5] The Department of Justice (DOJ) has therefore called the Act the "most successful piece of civil rights legislation ever adopted."[6] But the promise of the Act has not yet been fully realized. Progress has been made, but despite the Supreme Court's recent decision, the full gamut of the Act's protections is still needed today.

In the 48 years since its passage, the Voting Rights Act has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. These increases in representation translate to vital and tangible benefits such as much-needed education, healthcare, and economic development for previously underserved communities. Prior to the Act's passage, African American communities had been denied resources and opportunities for many years; their issues were often ignored and discounted. Officials elected when equal voting opportunities are afforded to minority citizens have been more responsive to the needs of minority communities.[7]

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[4] Fredrickson &Vagins, *supra* note 2.
[5] *See* Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 782 (2003).
[6] U.S. Department of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws*, http://www.usdoj.gov/crt/voting/intro/intro.htm.
[7] Fredrickson &Vagins, *supra* note 2, at 2.

As President Ronald Reagan noted upon signing the 1982 reauthorization of the Voting Rights Act, the right to vote is "crown jewel of American liberties."[8] Recognizing this importance, Congress has passed every Voting Rights Act reauthorization and extension by overwhelmingly bipartisan votes. The 1965 Act passed the Senate 77-19, and the House 333-85.[9] The 1970 extension passed the Senate 64-12, and the House 234-179.[10] The reauthorization in 1982 garnered similar support passing 85-8 in the Senate[11] and 389-24 in the House.[12] Congress last extended the Act in 2006, 98-0 in the Senate and 390-33 in the House, concluding that the coverage formula enforced by Section 5 was needed for at least another 25 years. Including the 2006 reauthorization, the last three extensions have been signed by Republican presidents.

In 2006, the congressional fact-finding effort built a strong case for the continuing need to maintain the Voting Rights Act's protections. The resulting record included more than 750 Section 5 objections by DOJ that blocked the implementation of some 2,400 discriminatory voting changes; the withdrawal or modification of over 800 potentially discriminatory voting changes after DOJ requested more information; 105 successful actions to require covered jurisdictions to comply with Section 5; 25 denials of Section 5 preclearance by federal courts; high degrees of racially polarized voting in the jurisdictions covered by Section 5; and reports from tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions.[13] In total, the record included over 15,000 pages of testimony and reports and statements from over 90 witnesses in over a dozen hearings.[14]

Although significant progress has been made as a result of the passage of the Voting Rights Act, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language still deny many Americans their basic democratic rights. Although such discrimination today is often more subtle than it used to be, it is still current and must still be remedied.

II. *Shelby County v. Holder*

Unfortunately, on June 25, 2013, the Supreme Court, in *Shelby County v. Holder*, invalidated the coverage formula in Section 4(b), which defines who is subject to Section 5 pre-clearance.

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[8] Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), *available at* http://www.presidency.ucsb.edu/ws/?pid=42688.

[9] *See Senate Roll Call Vote No. 78* (May 26, 1965); *House Roll Call Vote No. 32* (Feb. 10, 1964), *available at* http://docsteach.org/documents/5637787/detail; *House Roll Call Vote No. 87* (July 9, 1965), *available at* http://www.govtrack.us/congress/votes/89-1965/h87.

[10] *See Senate Roll Call Vote No. 342* (Mar. 13, 1970); *House Roll Call Vote No. 151* (Dec. 11, 1969), *available at* http://docsteach.org/documents/5637787/detail.

[11] *See Senate Roll Call Vote No. 190* (June 18, 1982).

[12] *See House Roll Call Vote No. 242* (Oct. 5, 1981).

[13] Laughlin McDonald, *Don't Strike Down Section 5*, http://www.aclu.org/blog/voting-rights/dont-strike-down-section-5 (Mar. 6, 2013); *see also* H. R. Rep. No. 109-478 (2006); S. Rep. No. 109-295 (2006).

[14] Deborah J. Vagins & Laughlin McDonald, *Supreme Court Put a Dagger in the Heart of the Voting Rights Act*, http://www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act (July 2, 2013).

In 2008, the City of Calera, a subsidiary of Shelby County, Alabama, sought to make over 170 annexations, in conjunction with changes to its redistricting plan. Together, these changes would eliminate the city's sole majority African American district, which had elected an African American candidate – who was the City's lone African American councilperson – for the previous 20 years.[15]

In its submission to DOJ, Calera admitted that it had already adopted the annexations without receiving preclearance. DOJ objected to both the unprecleared annexations, as well as the redistricting plan. Notwithstanding this denial, Calera went on to conduct City Council elections with both the annexations and the rejected plan in place, causing the city's sole African American councilmember to lose his seat. DOJ was then compelled to bring an enforcement action under Section 5 to enjoin certification of the results of the illegal election. After a consent decree was reached with a new precleared plan, the city's lone majority African American district was restored, and black voters in Calera succeeded in electing their candidate of choice. Shelby County subsequently challenged Sections 4(b) and 5 of the Voting Rights Act as facially unconstitutional.

The Supreme Court invalidated the coverage formula in Section 4(b), which defines which jurisdictions are subject to Section 5 preclearance. The Court found that while "voting discrimination still exists," Section 4(b) of the Voting Rights Act was unconstitutional, on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination. Therefore, the formula can no longer be used as a basis for subjecting jurisdictions to preclearance.[16] Section 5's continued operation thus depends on establishing new or expanded coverage, which complies with the Court's decision. As the Court noted: "[w]e issue no holding on section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[17] Without congressional action through the creation or expansion of a coverage formula, the kind of discrimination occurring in Calera, Alabama and elsewhere cannot be subject to the preclearance mechanism that stops discriminatory voting changes before they take effect and U.S. citizens lose their right to vote.

III. Recent Examples of the Impact of Section 5

Section 5 has been particularly effective in stopping discriminatory state and local voting changes from going into effect. It is important that the safeguards of Section 5 continue to apply in those jurisdictions with recent and egregious examples of discrimination. The elimination of precincts, changes in polling locations, methods of electing school board or city council members, moving to at-large districts, annexations, and other changes can have the purpose or effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group. Recent examples, since the 2006 reauthorization of the Voting Rights Act, of such discriminatory voting measures blocked by Section 5 are numerous. As the Court acknowledged, "voting discrimination still exists; no one doubts that."[18] In those areas where voting discrimination continues to exist, Section 5 must be enforced, and a coverage formula is needed to achieve this.

[15] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Dan Head,(Aug. 25, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082508.pdf.
[16] Shelby County v. Holder, 679 F. 3d 848 (2012).
[17] *Shelby County*, 133 S. Ct. at 2612.
[18] *Id.*

Without this important function, millions would be disfranchised. What remains of our legal avenues after *Shelby County* is not enough. The following are a few very recent examples:

- In 2006, Randolph County, Georgia, attempted to reassign the African American Board of Education Chair's voter registration district from a seventy percent African American voting population to a seventy percent white voting population.[19] These changes were done in a special closed door meeting the sole purpose of which was to change the voter registration district of the Chair. In a unanimous vote, the all-white members of the Board of Registrars voted for the district change. Section 5 prevented this blatantly discriminatory change from taking place.

- In 2007, Mobile County, Alabama attempted to change the method of selection for filling vacancies on the county commission from a special election to a gubernatorial appointment.[20] After carefully considering information provided by the county, census data, public comments, and information from interested parties, DOJ found that the change would have a retrogressive effect, diminishing the opportunity of minority voters to elect a representative of their choice to the commission. Following the DOJ objection, Mobile County withdrew its request for the voting change.

- In 2007, Buena Vista Township in Allegan County, Michigan attempted to close a voter registration center located at a Secretary of State branch office.[21] The branch offices constituted 79.13% of total voter registrations for the Township, and the specific branch closure would have closed the only branch in a majority-minority township, resulting in the nearest branch being a one hour and forty minute round trip on public transportation with no other viable branch alternative for registering to vote.

- In May 2008, Alaska attempted to eliminate precincts in several Native villages, which would force many Native Alaskans to travel to precincts 33 to 77 miles away, unconnected by roads, and accessible only by air or water.[22] Two weeks after DOJ asked for additional information on why these changes were necessary, the State decided against moving forward with these precinct consolidations.

- In 2009, Georgia implemented an error-filled voter registration verification system that matched voter registration lists with other government databases.[23] Individuals who were identified as failing to match were flagged and required to appear on a specific date and time at the county courthouse with only three days' notice to prove their voter registration. The

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[19] Letter from Wan J. Kim, Assistant Attorney General, to Tommy Coleman (Sept. 12, 2006), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_091206.pdf.

[20] Letter from Wan J. Kim, Assistant Attorney General, to John J. Park, Jr., (Jan. 8, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_010807.pdf.

[21] Letter from Grace Chung Becker, Acting Assistant Attorney General, to Brian DeBano and Christopher Thomas (Dec. 26, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122607.pdf.

[22] Suzanna Caldwell, *Voting Rights Act: What does ruling mean for Alaskans?*, Alaska Dispatch, June 25, 2013, http://www.alaskadispatch.com/article/20130625/voting-rights-act-what-does-ruling-mean-alaskans.

[23] Letter from Loretta King, Acting Assistant Attorney General, to Thurbert E. Baker (May 29, 2009), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_052909.pdf.

verification systems errors disproportionately impacted minority voters. Although representing equal shares of new voter registrants, more than 60% more African American voters were flagged for additional inquiry then white voters. In addition Hispanic and Asian registrants were more than twice as likely to be flagged for further verification as white voter registration applicants. Section 5 stopped this retrogressive voter registration provision from continuing. The objection was later withdrawn on the mistaken premise that the state had significantly changed the database matching system.[24]

- A locality in Texas sought to reduce the number of polling places for local and school board elections in 2006 from 84 polling places to 12.[25] Moreover, the assignment of voters to each polling place was incredibly unbalanced. The polling place with the smallest proportion of minority voters would have served 6,500 voters while the site with the largest proportion of minority voters would have served over 67,000. Following a DOJ complaint, a three judge court entered a consent decree prohibiting the locality from implementing the change without first obtaining preclearance.[26] Section 5 prohibited this change due to the retrogressive effect.

- In Charles Mix County, South Dakota, after the first Native American candidate was poised to become a county commissioner, the county increased the number of county commissioners from three to five.[27] Native Americans would only have been able to elect the candidate of their choice in one of the five new districts as opposed to one of the three original districts. This racially discriminatory impact in addition to comments admitting discriminatory purpose led DOJ to object to the proposed plan.

- Between 2009 and 2012, three Georgia counties proposed redistricting changes to their county commissions and board of education, which would have altered the division of African American populations in the counties, resulting in a retrogression effect on their ability to elect minority members and diluting the current minority representation on the commissions and board.[28] Through Section 5, plans that would have reduced the level of African American voting strength and reduced their ability to elect their candidates of choice were prevented.

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[24] *See generally* Kathy Lohr, *Georgia Allowed to Continue Voter Verification*, NPR, Sept. 14, 2010, http://www.npr.org/templates/story/story.php?storyId=129855592.

[25] Letter from Wan J. Kim, Assistant Attorney General, to Renee Smith Byas (May 5, 2006), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_050506.pdf.

[26] United States v. N. Harris Montgomery Cmty. Coll. Dist., Civil Action No. H 06-2488 (S.D. Tex. Aug. 4, 2006) (consent decree judgment).

[27] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_021108.pdf.

[28] Letter fromThomas E. Perez, Assistant Attorney General, to Walter G. Elliott (Nov. 30, 2009), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_113009.pdf; Letter from Thomas E. Perez, Assistant Attorney General, to Michael S. Green, Patrick O. Dollar, and Cory O. Kirby (Apr. 13, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_041312.pdf; Letter from Thomas E. Perez, Assistant Attorney General, to Andrew S. Johnson and B. Jay Swindell (Aug. 27, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082712.pdf .

- Also in 2012, Galveston County, Texas submitted a redistricting plan for its commissioners court reducing the number of districts for electing justices of the peace and constables.[29] DOJ found that the process leading up to the proposed plan involved the deliberate exclusion from meaningful involvement in key deliberations of the only member of the commissioners court elected from a minority ability-to-elect precinct. Following changes to the redistricting plan made by the county, DOJ approved the revised plan.[30]

IV. Section 5 Provides Necessary Protections Unavailable In Other Laws

The protections that exist in Section 5, and enforced through Section 4, provide a powerful tool for deterring state and local governments from adopting discriminatory election procedures and preventing discriminatory practices that have been adopted from being enforced.[31] This preclearance requirement is a fundamental element of the Voting Rights Act that does not exist elsewhere, and has been rendered largely useless by the *Shelby County* decision.

There are several unique elements of Section 5 that are particularly valuable in defeating discrimination in voting. First, Section 5 requires those jurisdictions included in a coverage formula to submit all proposed election changes to DOJ or the federal District Court of the District of Columbia prior to implementation.[32] This functions as a notice mechanism giving DOJ a level of knowledge regarding voting changes superior to relying on communities and watchdog groups to identify voting changes as they are proposed. As the examples previously discussed demonstrate, the majority of discriminatory changes take place at the local level where they may be difficult to identify if the reporting onus is removed from the jurisdiction and placed on groups or individual voters.

Second, in evaluating the intent or effect of the change, Section 5 places the burden of proof on the jurisdiction requesting the election change to show that the change does not have a "retrogressive" effect on minority voters.[33] Unlike Section 2, which places the burden on the voter to prove discrimination, Section 5's burden of proof makes it more effective in preventing discrimination by requiring the jurisdiction show any change will not have a discriminatory impact prior to the law taking effect. The purpose of Section 5 is to "shift the advantage of time and inertia from the perpetrators" of discrimination in voting to the voters.[34]

Third, Section 5 targets ongoing discrimination in a relatively low-cost way through an administrative process. By largely avoiding long and drawn out legal battles, Section 5 avoids the

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[29] Letter from Thomas E. Perez, Assistant Attorney General, to James E. Trainor III (Mar. 5, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_030512.pdf.

[30] T.J. Aulds, *Galveston County: DOJ gives green light to county redistricting map*, KHOU, Mar. 24, 2012, *available at* http://www.khou.com/news/neighborhood-news/Galveston-County--DOJ-gives-green-light-to-county-redistricting-map-144092286.html.

[31] *Shelby County, 133 S. Ct. at 2639 (2013) (Ginsburg, J., dissenting) (citing The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006)).*

[32] 42 U.S.C. § 1973c.

[33] Beer v. United States, 425 U.S. 130 (1976).

[34] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

high costs of case-by-case litigation associated with Section 2 claims.[35] Through the simple administrative process covered jurisdictions submit proposed changes in writing to DOJ. Within sixty days, the Attorney General can decide whether to object to the change. If there is no objection, the jurisdiction may implement the change. If an objection is filed, the jurisdiction may submit the changes directly to a three-judge panel of the District Court for the District of Columbia for preclearance without deference to the findings from DOJ.[36] This method allows for instances of discrimination to be identified in real-time, as the change is proposed and before going into effect.

Although Section 2 is a valuable tool in stopping discriminatory voting practices after they occur, it lacks the hallmarks of Section 5 that prevents discrimination from occurring in the first place. Section 2 does not provide notice of the proposed change, nor can it freeze a change and prevent it from going into effect. Section 2 allows victims of discrimination in voting to seek remedies in court, but often only after the discrimination occurs, violating the individual's right to vote. Moreover, no state[37] or federal constitutional claim is an adequate substitute for Section 5 because no other law provides advance notice of the change and uses preclearance to stop the discriminatory practice from going into effect.

Only when the powerful tools of Section 5 can operate under a new regime, can the goals of the Voting Rights Act be accomplished.

Conclusion

The ACLU thanks the Senate Judiciary Committee for holding this important hearing to address the Voting Rights Act following the *Shelby County* decision. The Voting Rights Act's long bipartisan history of protecting the right to vote and rooting out racially discriminatory changes through Section 5 must continue. Therefore, it is crucial that congressional action be taken to restore and redesign its protections and allow the Voting Rights Act to continue to be the crown jewel of civil rights laws. All the other rights we enjoy as citizens depend on our ability to vote; it is necessary that we safeguard access to the ballot for every citizen. We look forward to working with the Committee on new legislative proposals.

[35] Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBlog (June 25, 2013, 10:39 PM), http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/.

[36] 42 U.S.C. § 1973c.

[37] *See, e.g.,* Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 VAND. L. REV. (forthcoming 2014).

ASIAN AMERICANS ADVANCING JUSTICE

Asian American Legal Defense and Education Fund

Joint Statement of
Asian Americans Advancing Justice and
Asian American Legal Defense and Education Fund

Before the
Committee on the Judiciary
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Hearing
"From Selma to *Shelby County*:
Working Together to Restore the Protections of the Voting Rights Act"

July 17, 2013

Introduction

Enforcement of the Voting Rights Act of 1965 (VRA) has been critical in preventing actual and threatened discrimination aimed at Asian Americans in national and local elections. Continuing discrimination in voting and more generally against Asian Americans remain, especially in areas of new growth such as the South and is likely to worsen as a result of the decision in *Shelby v. Holder*. Asian American voters have been left more vulnerable to wrong-doers and have suffered a serious roll-back in their right to vote. Asian Americans Advancing Justice ("Advancing Justice") and the Asian American Legal Defense and Education Fund ("AALDEF") submit this testimony to elucidate the precarious landscape of Asian American voting rights in wake of the Supreme Court's decision in *Shelby v. Holder* and respectfully ask that it be entered into the record.

Organizational Information

Advancing Justice and AALDEF are organizations that promote the constitutional and civil rights of Asian Americans, including the right of Asian Americans to participate in the United States' political process.

Advancing Justice is a national affiliation of four civil rights nonprofit organizations that joined together in 2013 to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. Our member organizations are: Asian Americans Advancing Justice | Chicago (formerly Asian American Institute - the leading pan-Asian organization in the Midwest dedicated to empowering the Asian American community through advocacy, research, education, leadership development, and coalition-building); Asian Americas Advancing Justice | AAJC (formerly Asian American Justice Center - a national organization that advances the civil and human rights of Asian Americans and builds and promotes a fair and equitable society for all

through public education, policy analysis and research, policy advocacy, litigation, and community capacity and coalition building); Asian Americans Advancing Justice | Asian Law Caucus (formerly Asian Law Caucus - the nation's oldest legal organization defending the civil rights of Asians and Pacific Islanders, particularly low-income, immigrant, and underserved communities); and Asian Americans Advancing Justice | Los Angeles (formerly Asian Pacific American Legal Center - the nation's largest legal organization serving Asians and Pacific Islanders, through direct legal services, impact litigation, policy advocacy, and leadership development). Advancing Justice was a key player in collaborating with other civil rights groups to reauthorize the Voting Rights Act in 2006. In the 2012 election, Advancing Justice conducted poll monitoring and voter protection efforts across the country, including in California, Florida, Georgia, Illinois, Texas, and Virginia.

AALDEF is a 39-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has collected valuable data that documents both the use of, and the continued need for, protection under the VRA. In 2012, AALDEF dispatched over 800 attorneys, law students, and community volunteers to 127 poll sites in 14 states to document voter problems on Election Day. The survey polled 9,298 Asian American voters.

Advancing Justice-AAJC and AALDEF filed an amicus brief with the U.S. Supreme Court in *Shelby County, Alabama v. Holder* on behalf of 28 Asian American groups. The brief urged the Court to uphold Section 5 of the VRA, demonstrating that Section 5 was necessary to protect the voting rights of Asian Americans in areas such as political representation and discriminatory voting changes in light of the ongoing discrimination experienced by Asian Americans. This testimony draws heavily on the examples documented in our amicus brief.

Voting Discrimination Against Asian Americans Continues to Exists

Asian Americans[1] continue to face pervasive and current discrimination in voting, particularly in jurisdictions that were previously covered for Section 5 preclearance.

For example, in the 2004 primary elections in Bayou La Batre, Alabama, supporters of a white incumbent running against Phuong Tan Huynh, a Vietnamese American candidate, made a concerted effort to intimidate Asian American voters. They challenged Asian Americans at the polls, falsely accusing them of not being U.S. citizens or city residents, or of having felony convictions.[2] The challenged voters were forced to complete a paper ballot and have that ballot vouched for by a registered voter. In explaining his and his supporters' actions, the losing incumbent stated, "We figured if they couldn't speak good English, they possibly weren't

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[1] The notion of "Asian American" encompasses a broad diversity of ethnicities, many of which have historically suffered their own unique forms of discrimination. Discrimination against Asian Americans as discussed here addresses both discrimination aimed at specific ethnic groups along with the discrimination directed at Asian Americans generally.

[2] *See* H.R. Rep. No. 109-478, at 45; *see also Challenged Asian ballots in council race stir discrimination concern*, Associated Press State & Local Wire, Aug. 29, 2004, *available at* http://news.google.com/newspapers?nid =1817&dat=20040830&id=cc4dAAAAIBAJ&sjid=w6cEAAAAIBAJ&pg=6668,5046184.

American citizens."[3] The Department of Justice (DOJ) investigated the allegations and found them to be racially motivated.[4] As a result, the challengers were prohibited from interfering in the general election, and Bayou La Batre, for the first time, elected an Asian American to the City Council.[5]

In another example, from the 2004 Texas House of Representatives race, Hubert Vo's victory over a white incumbent prompted two recounts, both of which affirmed Vo's victory over the incumbent's request that the Texas House of Representatives investigate the legality of the votes cast in the election. The implication was that Vo's Vietnamese American supporters voted in the wrong district or were not U.S. citizens. Vo's campaign voiced concern that such an investigation could intimidate Asian Americans from political participation altogether.[6] Vo's election was particularly significant for the Asian American community because he is the first Vietnamese American state representative in Texas history.[7]

Also in 2004, New York poll workers required Asian American voters to provide naturalization certificates before they could vote.[8] At an additional poll site, a police officer demanded that all Asian American voters show photo identification, even though photo identification is not required to vote in New York elections. If voters could not produce such identification, the officer turned them away and told them to go home.[9]

Asian American Voters Lose Protection Against Discrimination Due to *Shelby* Decision

Overt racism and discrimination against Asian Americans at the polls persist to the present day and will worsen without Section 5 to combat such behavior. Prior to the Supreme Court's *Shelby* decision, voting rights advocates used Section 5 to protect Asian American voters in redistricting, changes to voting systems, and changes to polling sites. The following are current examples of harmful actions against Asian American voters that were stopped by Section 5, but now that the coverage formula has been struck, and most jurisdictions are no longer covered by

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[3] *See* DeWayne Wickham, *Why renew Voting Rights Act? Ala. Town provides answer*, USA Today, Feb 22, 2006, *available at* http://www.usatoday.com/news/opinion/editorials/ 2006-02-22-forum-voting-act_x.htm.

[4] *See* H.R. Rep. No. 109-478, at 45; *see also* Press Release, U.S. Dep't of Justice, *Justice Department to Monitor Elections in New York, Washington, and Alabama*, Sept. 13, 2004, *available at* http://www.justice.gov/opa/pr/2004/September/04_crt_615.htm ("In Bayou La Batre, Alabama, the Department will monitor the treatment of Vietnamese-American voters.").

[5] *See* Wickham, *supra.*

[6] *See* Thao L. Ha, *The Vietnamese Texans*, in *Asian Texas* 284-85 (Irwin A. Tang ed. 2007).

[7] *See* Test. of Ed Martin, Trial Tr. at 350:15-23, *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011) (hereinafter "Martin Test."); Test. of Rogene Calvert, Trial Tr. at 420:2-421:13, *Perez,* 835 F. Supp. 2d 209; Test. of Sarah Winkler, Trial Tr. at 425:18-426:10, *Perez*, 835 F. Supp. 2d at 209.

[8] New York City has the nation's largest Asian American population for places. Elizabeth M. Hoeffel, Sonya Rastogi, Myoung Ouk Kim & Hasan Shahid, U.S. Census Bureau, *The Asian Population: 2010*, at 12 tbl.3 (2012), *available at* www.census.gov/prod/cen2010/briefs/c2010br-11.pdf. Most of the examples of Section 5's success in this brief draw from the Asian American experience in New York City because of its sizeable Asian American population and because it is one of the few places in the country covered under both Section 5 and Section 203.

[9] *See* Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before the S. Judiciary Comm., 109th Cong. 37 (2006) (testimony of Margaret Fung, AALDEF, Exec. Dir.); Letter from G. Magpantay, AALDEF Staff Attorney, to J. Ravitz, Exec. Dir., New York City Bd. of Elections (June 16, 2005) (submitted to Congress).

Section 5, Asian Americans are once again vulnerable to nefarious discriminatory actions such as these that will weaken their voting rights and power.

For example, discriminatory redistricting plans continue to be drafted in states with large Asian American communities. As shown in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Texas Legislature drafted a redistricting plan, Plan H283, that would have had significant negative effects on the ability of minorities, and Asian Americans in particular, to exercise their right to vote.

Since 2004, the Asian American community in Texas State House District 149 has voted as a bloc with Hispanic and African American voters to elect Hubert Vo, a Vietnamese American, as their state representative. District 149 has a combined minority citizen voting-age population of 62 percent.[10] Texas is home to the third-largest Asian American community in the United States, growing 72 percent between 2000 and 2010. [11]

In 2011, the Texas Legislature sought to eliminate Vo's State House seat and redistribute the coalition of minority voters to the surrounding three districts. Plan H283, if implemented, would have redistributed the Asian American population in certain State House voting districts, including District 149 (Vo's district), to districts with larger non-minority populations.[12] Plan H283 would have thus abridged the Asian American community's right to vote in Texas by diluting the large Asian American populations across the state.[13]

In addition to discrimination in redistricting, Asian American voters have also endured voting system changes that impair their ability to elect candidates of choice. For example, before 2001 in New York City, the only electoral success for Asian Americans was on local community school boards. In each election – in 1993, 1996, and 1999 – Asian American candidates ran for the school board and won.[14] These victories were due, in part, to the alternative voting system

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[10] *See* United States and Defendant-Intervenors Identification of Issues 6, *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53.

[11] Asian American Center for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States 2011*, App. B, at 60 (2011), *available at* http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf. (hereinafter "*Community of Contrasts*").

[12] *See* Martin Test. at 350:25-352:25. District 149 would have been relocated to a county on the other side of the State, where there are few minority voters. *See* http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf.

[13] In fact, it was only due to Section 5 that the Texas Legislature was not able to dilute the Asian American community's right to vote. Advancing Justice-AAJC's partner, the Texas Asian-American Redistricting Initiative (TAARI), working with a coalition of Asian American and other civil rights organizations, participated in the Texas redistricting process and advocated on the District 149 issue. Despite the community's best efforts, the Texas Legislature pushed through this problematic redistricting plan. However, because of Section 5's preclearance procedures, Asian Americans and other minorities had an avenue to object to the Texas Legislature's retrogressive plan, and Plan H283 was ultimately rejected as not complying with Section 5. See Texas v. United States, C.A. No. 11-1303 (D.D.C.), Sept. 19, 2011, Dkt. No. 45, ¶ 3. Indeed, AALDEF submitted an amicus brief to the D.C. District Court illustrating how the Texas plan retrogressed the ability of Asian Americans to elect a candidate of their choice and violated Section 5. However, the U.S. Supreme Court vacated the District Court of the District of Columbia's ruling suspending Texas' redistricting map as moot in light of their decision in *Shelby*.

[14] *See* Lynette Holloway, *This Just In: May 18 School Board Election Results*, N.Y. Times, June 13, 1999, *available at* http://www.nytimes.com/1999/ 06/13/nyregion/making-it-work-this-just-in-may-18-school-board-election-results.html; Jacques Steinberg, *School Board Election Results*, N.Y. Times, June 23, 1996, *available at* http://www.nytimes.com/1996/06/23/nyregion/neighborhood-report-new-york-up-close-school-board-election-

known as "single transferable voting" or "preference voting." Instead of selecting one representative from single-member districts, voters ranked candidates in order of preference, from "1" to "9."[15] In 1998, New York attempted to switch from a "preference voting" system, where voters ranked their choices, to a "limited voting" system, where voters could select only four candidates for the nine-member board, and the nine candidates with the highest number of votes were elected.[16] This change would have put Asian American voters in a worse position to elect candidates of their choice.[17]

Furthermore, the ability of Asian Americans to vote is also frustrated by sudden changes to poll sites without informing voters. For example, ever since AALDEF began monitoring elections in New York City, there have been numerous instances of sudden poll site closures in Asian American neighborhoods where the Board has failed to take reasonable steps to ensure that Asian American voters are informed of their correct poll sites. Voters have been misinformed about their poll sites before the elections or have been misdirected by poll workers on Election Day, thus creating confusion for Asian American voters and disrupting their ability to vote.

In 2001, primary elections in New York City were rescheduled due to the attacks on the World Trade Center. The week before the rescheduled primaries, AALDEF discovered that a certain poll site, I.S. 131, a school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center attacks. The Board chose to close down the poll site and no notice was given to voters. The Board provided no media announcement to the Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange for the placement of signs or poll workers at the site to redirect voters to other sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under Section 203.[18] With Section 5 no longer applicable in most jurisdictions, disruptive changes to polling sites, voting systems, and redistricting plans can now occur unfettered, wreaking havoc on Asian American voters' ability to cast an effective ballot.

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results.html; Sam Dillon, *Ethnic Shifts Are Revealed in Voting for Schools*, N.Y. Times, May 20, 1993, *available at* http://www.nytimes.com/1993/05/ 20/nyregion/ethnic-shifts-are-revealed-in-voting-for-schools.html.

[15] *See* Thomas T. Mackie & Richard Rose, The International Almanac of Electoral History 508 (3d ed. 1991).

[16] *See* 1998 N. Y. Sess. Laws 569-70 (McKinney).

[17] AALDEF utilized Section 5 to protect Asian American voters in NY by providing comments urging DOJ to oppose the change and deny preclearance as the proposed change would make Asian Americans worse off. DOJ interposed an objection and prevented the voting change from taking effect. *See* Letter from M. Fung, AALDEF Exec. Dir., and T. Sinha, AALDEF Staff Attorney, to E. Johnson, U.S. Dep't of Justice (Oct. 8, 1998) () (submitted to Congress with AALDEF Report and on file with counsel). *See also,* Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearing Before the H. Subcomm. on the Const., H. Judiciary Comm., 109th Cong. 1664-66 (2005) (appendix to statement of the Honorable Bradley J. Schlozman, U.S. Dep't. of Justice) (providing Section 5 objection letter to Board and summarizing changes made to the voting methods, along with overall objections to the changes).

[18] The voters were only protected from this sudden change that would have caused significant confusion and lost votes because DOJ issued an objection under Section 5 and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. *See* AALDEF Report at 41.

Discrimination Against Asian Americans Creates a Barrier to Voting

Discrimination against Asian American populations is of particular concern given the perception of Asian Americans as "outsiders," "aliens," and "foreigners."[19] Based on this perception, at various points in history, Asian Americans were denied rights held by U.S. citizens. Remnants of the sentiment that evoked these denials persist today and continue to harm Asian Americans.

This shameful history of extensive discrimination against the Asian American community in the United States is well known. Until 1943, federal policy barred immigrants of Asian descent from even becoming United States citizens, and it was not until 1952 that racial criteria for naturalization were removed altogether.[20] Indeed, history is replete with examples of anti-immigrant sentiment directed towards Asian Americans, manifesting in legislative efforts to prevent Asian immigrants from entering the United States and becoming citizens.[21]

Legally identified as aliens "ineligible for citizenship," Asian immigrants were prohibited from voting and owning land.[22] Both immigrant and native-born Asians also experienced

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[19] *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them). In 2001, a comprehensive survey revealed that 71% of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001), *available at* http://www.committee100.org/publications/ survey/C100survey.pdf. Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. Cynthia Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women's L.J. 165, 181 (1995); Spencer K. Turnbull, Comment, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 UCLA Asian Pac. Am. L.J. 72, 74-75 (2001); Terri Yuh-lin Chen, Comment, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. Personality & Soc. Psychol. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

[20] *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98, and Immigration Act of 1924, ch. 190, 43 Stat. 153 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 415 (2005).

[21] *See, e.g.*, Philippines Independence Act of 1934, ch. 84, 48 Stat. 456, 462 (imposing annual quota of fifty Filipino immigrants; amended 1946); Immigration Act of 1924, ch. 190, 43 Stat. 153 (denying entry to virtually all Asians; repealed 1952); Scott Act of 1888, ch. 1064, 1, 25 Stat. 504, 504 (rendering 20,000 Chinese re-entry certificates null and void); Naturalization Act of 1790, ch. 3, 1 Stat. 103 (providing one of the first laws to limit naturalization to aliens who were "free white persons" and thus, in effect, excluding African-Americans, and later, Asian Americans; repealed 1795).

[22] *See Ozawa v. United States*, 260 U.S. 178, 198 (1922); *see, e.g.*, Cal. Const. art. II, § 1 (1879) ("no native of China . . . shall ever exercise the privileges of an elector in this State"); *Oyama v. California*, 332 U.S. 633, 662 (1948) (Murphy, J., concurring) (noting that California's Alien Land Law "was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien").

pervasive discrimination in everyday life.[23] Perhaps the most egregious example of discrimination was the incarceration of 120,000 Americans of Japanese ancestry during World War II without due process.[24] White immigrant groups whose home countries were also at war with the United States were not similarly detained and no assumptions regarding their loyalty, trustworthiness and character were similarly made.[25]

Racist sentiment towards Asian Americans is not a passing adversity but a continuing reality, fueled in recent years by reactionary post-9/11 prejudice and a growing backlash against immigrants.[26] Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants.[27] In 2010, the nation's law enforcement agencies reported 150 incidents and 190 offenses motivated by anti-Asian/Pacific Islander bias.[28]

Discriminatory attitudes towards Asian Americans manifest themselves in the political process as well. For example, during a 2009 Texas House of Representatives hearing, legislator Betty Brown suggested that Asian American voters adopt names that are "easier for Americans to deal with" in order to avoid difficulties imposed on them by voter identification laws.[29] Although this statement did not physically obstruct any voters from reaching the polls, it made clear that the Asian American community's voice was unwelcome in American politics and notably cast Asian Americans apart from other "Americans." At a campaign rally during the 2004 U.S. Senate race in Virginia, incumbent George Allen repeatedly called a South Asian

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[23] *People v. Brady*, 40 Cal. 198, 207 (1870) (upholding law providing that "No Indian. . . or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man" against Fourteenth Amendment challenge); *see also Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren).

[24] *See* Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the internment); *see also Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment under strict scrutiny review).

[25] *See Korematsu*, 323 U.S. at 233, 240-42 (Murphy, J., dissenting) (noting that similarly situated American citizens of German and Italian ancestry were not subjected to the "ugly abyss of racism" of forced detention based on racist assumptions that they were disloyal, "subversive," and of "an enemy race," as Japanese Americans were); Natsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 72 Duke F. for L. & Soc. Change 71, 75 (2009) (noting "the presumption made by the military and sanctioned by the Supreme Court that Japanese Americans, unlike German or Italian Americans, could be presumed disloyal by virtue of their national origin").

[26] *See* U.S. Dep't of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, at 4 (Oct. 19, 2011) (noting that the FBI reported a 1,600 percent increase in anti-Muslim hate crime incidents in 2001), *available at* http://www.justice.gov/crt/ publications/post911/post911summit_report_2012-04.pdf.

[27] *See, e.g.*, *id.*, at 7-9 (discussing numerous incidents of post-9/11 hate crimes prosecuted by the DOJ).

[28] Fed. Bureau of Investigation, *Hate Crime Statistics* (2010), *available at* http://www.fbi.gov/ about-us/cjis/ucr/hate-crime/2010/tables/table-1-incidents-offenses-victims-and-known-offenders-by-bias-motivation-2010.xls.

[29] R.G. Ratcliffe, *Texas Lawmaker Suggests Asians Adopt Easier Names*, Houston Chron., Apr. 8, 2009, *available at* http://www.chron.com/news/houston-texas/article/ Texas-lawmaker-suggests-Asians-adopt-easier-names-1550512.php.

volunteer for his opponent a "macaca" – a racial epithet used to describe Arabs or North Africans that literally means "monkey" – and then began talking about the "war on terror."[30]

Incidents of discrimination and racism like these perpetuate the misperception that Asian American citizens are foreigners, and have the real effect of denying Asian Americans the right to fully participate in the electoral process. These barriers will only increase as the Asian American population continues to grow. Asian Americans have become the fastest growing minority group in the United States. While the total population in the United States rose 10 percent between 2000 and 2010, the Asian American population increased 43 percent during that same time span.[31]

The fastest population growth occurred in the South, where the Asian American population increased by 69 percent.[32] With the coverage formula struck and no current Section 5 coverage for these states, Asian Americans are susceptible to extensive discrimination, both in voting and other arenas. When groups of minorities move into or outpace general population growth in an area, reactions to the influx of outsiders can result in racial tension.[33] Thus, as Asian American populations continue to increase rapidly, particularly in the South, levels of racial tension and discrimination against racial minorities can be expected to increase.[34]

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[30] *See* Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology; Name Insults Webb Volunteer*, Wash. Post, Aug. 15, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/ article/2006/08/14/AR2006081400589.html.

[31] *See* Hoeffel *et al.*, *supra* note 5, at 1, 3. The U.S. Census Bureau data in this brief reflects figures for Asian Americans who reported themselves as "Asian alone." Counting the Asian American community's rapidly growing multiracial population, who reported as "Asian alone or in combination," this growth rate is 46 percent. *Community of Contrasts*, *supra*, at 15.

[32] *Id.* at 6.

[33] *See* Gillian Gaynair, *Demographic shifts helped fuel anti-immigration policy in Va.*, The Capital (Feb. 26, 2009), *available at* http://www.hometownannapolis.com/ news/gov/2009/02/26-10/Demographic-shifts-helped-fuel-anti-immigration-policy-in-Va.html (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, N.Y. Times, Feb. 22, 2009 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing), *available at* http://www.nytimes.com/2009/02/22/ nyregion/thecity/22froz.html?_r=3&pagewanted=1; Ramona E. Romero and Cristóbal Joshua Alex, *Immigrants becoming targets of attacks*, The Philadelphia Inquirer, Jan. 25, 2009 (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An Ethnic Shift is in Store*, L.A. Times, Apr. 12, 2007, at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian), *available at* http://articles.latimes.com/2007/apr/12/ local/me-chinohills12.

[34] In 2011, the growth of immigrant communities and rising anti-immigrant sentiment in Alabama led to the passage of H.B. 56, the toughest immigration enforcement law in the country. Also in 2011, state lawmakers in other southern states, including Georgia and South Carolina, launched efforts to deny the automatic right of citizenship to the U.S.-born children of undocumented immigrants. *See* Shankar Vedantam, State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship, Wash. Post, Jan. 5, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html; *see also United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents). At the federal level, Alabama members of the U.S. House of Representatives co-sponsored legislation to enact this restriction. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011). This bill was reintroduced in 2013 and co-sponsored again by Alabama Representatives, as well as legislators from Arizona, Georgia, and Texas. Birthright Citizenship Act of 2013, H.R. 140, 113th Cong., (2013).

Such discrimination creates an environment of fear and resentment towards Asian Americans, many of whom are perceived as foreigners based on their physical attributes. This perception, coupled with the growing sentiment that foreigners are destroying or injuring the country, jeopardizes Asian Americans' ability to exercise their right to vote free of harassment and discrimination. Given the discrimination against Asian Americans and immigrants that persists as these populations continue to grow, the lack of Section 5 protections will be problematic for these communities.

Conclusion

American citizens of Asian ancestry have long been targeted as foreigners and unwanted immigrants, and racism and discrimination against them persists to this day. These negative perceptions have real consequences for the ability of Asian Americans to fully participate in the electoral and political process. Section 5 of the VRA was an effective tool in protecting Asian American voters against a host of actions that threaten to curtail their voting rights. However, the Supreme Court's recent decision dismantling the coverage formula has left a large gap in protections for Asian American voters that requires Congressional action. We look to Congress to work in a bipartisan fashion to respond to the Court's ruling and strengthen the VRA as it did during the 2006 reauthorizations and each previous reauthorization. We respectfully offer our assistance in such a process.

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United States Senate Committee on the Judiciary

From Selma to *Shelby County*:
Working Together to Restore the Protections of the Voting Rights Act

July 17, 2013

Thank you for the opportunity to submit written testimony for today's hearing on restoring the protections of the Voting Rights Act (VRA). Common Cause is a nonpartisan, grassroots organization dedicated to restoring the core values of American democracy, reinventing an open, honest, and accountable government that works for the public interest, and empowering ordinary people to make their voices heard.

The Supreme Court's radical and shameful *Shelby County*[1] decision, striking down Section 4 of the Voting Rights Act, dealt an immeasurable blow to crucial voter protections that took decades to secure and enjoyed nearly universal bipartisan support. Since 1965, the Voting Rights Act, with Section 4 intact, has served as America's most effective weapon against voter discrimination, preventing communities and states with a demonstrated history of racial and ethnic discrimination from impeding minority participation in our democracy. The preclearance requirement of the Voting Rights Act is not the "perpetuation of racial entitlement" suggested by Justice Scalia earlier this year, but a reaffirmation of our commitment to the core value of

[1] *Shelby County, Alabama v. Holder*, No. 12-96 (United States Supreme Court June 25, 2013).

American democracy: that every citizen has the right to participate in the political process and make his or her voice heard.

Common Cause is proud of its history of vigorous support for the VRA, which includes extensive lobbying for the law's 1975, 1982, and 2006 reauthorizations and our submission of an amicus brief to the Supreme Court in support of the Act's constitutionality. Archibald Cox, Common Cause's chairman from 1980-92, defended the original act before the Supreme Court, after helping to develop some of its key provisions as United States Solicitor General. The VRA, including its preclearance requirement, is essential to our nation's continuing effort to foster open, fair and equal access to our elections for all Americans; in light of the *Shelby* decision, it must be revived and strengthened through Congressional action.

"Every American citizen must have an equal right to vote," President Johnson told a joint session of Congress in 1965, and "there is no duty which weighs more heavily on us than the duty we have to ensure that right."[2] With these words, President Johnson helped persuade Congress to assume responsibility for preventing voter discrimination throughout the country. Later that year, passage of the Voting Rights Act inaugurated a preclearance system that required certain states and jurisdictions with histories of discrimination to notify the Department of Justice and get its approval of any proposed changes in election law or procedure. The provision empowered the government to protect voting rights by enforcing Constitutional protections set forth in the 14th and 15th Amendments.

After a half-century during which Congress renewed the preclearance requirement four times, the Supreme Court last month struck down a provision at the heart of the 2006 reauthorization, which passed 98-0 in the Senate and 390-33 in the House. Then-House Judiciary

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[2] President Lyndon B. Johnson, Address Before a Joint Session of Congress (Mar. 15, 1965).

Committee Chairman Jim Sensenbrenner, a witness at this morning's hearing, described the 2006 reauthorization as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years" he had then served.[3] In *Shelby County v. Holder*, the Court gutted the VRA by rejecting the preclearance provision's coverage formula which determined the states and localities subject to preclearance. Importantly, however, *Shelby County* did not strike down the *concept* of preclearance. In other words, Section 5 remains good law but is now without the pre-*Shelby County* formula that allowed our government to apply it most effectively.

Before the VRA's passage, and now in the post-*Shelby* limbo, the Department of Justice could challenge discriminatory voting laws only *after* they went into effect. While this power is undoubtedly constitutional and important, it proved constrictive because post-enactment litigation is slow and costly. Furthermore, states can and have circumvented the effects of adverse judgments by slightly altering and then re-instating the voting law changes in question, thus subjecting the changes to another round of post-enactment litigation. The preclearance provision provided an effective and efficient solution by enabling the Department of Justice to reject discriminatory practices *before* enactment, avoiding many of the costs and challenges of litigation.

In the years after the Voting Rights Act was signed into law, there have been hundreds of attempts to disenfranchise minority voters in jurisdictions covered by the preclearance requirement. In fact, between the 1982 and 2006 reauthorizations of the VRA, the Department of Justice blocked over 700 discriminatory rule changes. As Justice Ginsburg noted in her dissent in *Shelby County*, "Congress found that the majority of these changes were 'calculated decisions to

[3] *Shelby County, Alabama v. Holder*, No. 12-96, slip op. at 36 (U.S. June 25, 2013) (Ginsburg, J., dissenting).

keep minority voters from fully participating in the political process.'"[4] Over 100 additional successful actions were brought during this time by private plaintiffs seeking to enforce the VRA's preclearance requirements. By striking down the coverage formula in Section 4, the Supreme Court rendered Section 5's preclearance requirement functionally void, unless jurisdictions are "bailed in" pursuant to Section 3. This substantially narrowed the federal government's power to block discriminatory voter restrictions.

To comprehend the importance of Sections 4 and 5 of the VRA, one need look no further than the abhorrent changes these provisions were used to thwart over the past four and one half decades. For example, in 2004, the Richland-Lexington School District No. 5 in South Carolina, which included a rapidly-growing, 15% African-American population, introduced a proposal to change its process for electing school board members. The current system provided for seven at-large board seats awarded to the highest vote getters in each election. The proposed change would have eliminated the at-large seats in favor of numbered seats and a majority vote requirement, "thus eliminating the ability of a cohesive minority [to elect] their candidate of choice."[5] Because South Carolina was a jurisdiction covered under Section 4 of the VRA, the Department of Justice blocked the change, which would have unfairly marginalized the electoral impact of the local African-American community.

In 2001, the all-white city council of Kilmichael, Mississippi, a majority black community, decided to cancel upcoming municipal elections after a number of black candidates qualified to be placed on the ballot. Because Mississippi was subject to the VRA's preclearance

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[4] *Shelby County, Alabama v. Holder*, No. 12-96, slip op. at 13 (U.S. June 25, 2013) (Ginsburg, J., dissenting).

[5] *Real Stories of the Impact of the VRA*, The Leadership Conference, http://www.civilrights.org/voting-rights/vra/real-stories.html#villeplatte (last visited July 16, 2013).

requirements, the Department of Justice used its authority to prevent the cancellation, finding that "the town did not establish that its decision was motivated by reasons other than an intent to negatively impact the voting strength of black voters."[6] Unfortunately, this appalling example of blatant discriminatory intent is far from uncommon.

The VRA has also served the critical function of protecting voters from discrimination in how district lines are drawn. In 2011, for example, the Texas legislature drew new maps in advance of the 2012 elections. The Department of Justice found that the proposed plan was "adopted, at least in part, for the purpose of diminishing the ability of citizens of the United States, on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice to Congress."[7] Federal courts also found not only that the redistricting maps as enacted by the Texas Legislature were "enacted with discriminatory purpose" but also that its voter identification laws were "strict, unforgiving burdens on the poor" and would depress minority turnout. Texas gained over four million new residents in the last decade. Nearly 90 percent of that growth came from minority citizens (65 percent Hispanic, 13 percent African-American, 10 percent Asian).[8] Yet, Texas managed to draw fewer districts that would give minority voters the opportunity to elect a candidate of their choice, shrinking the number from 11 majority minority seats to 10. Further, the court found that the Texas Legislature systematically removed valuable assets from minority districts, such as the university, a rail line, and even the Alamo. It was only because of Section 5 of the Voting Rights Act that these discriminatory laws were not allowed to be implemented.

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[6] *Id.*

[7] United Statse and Defendant-Intervenors Identification of Issues, *Texas v. United States*, Sept. 23, 2011, Civil Action No. 1:11-cv-1303 (D.D.C.).

[8] Ari Berman, *Texas Redistricting Fight Shows Why Voting Rights Act Still Needed*, The Nation, June 5, 2013, http://www.thenation.com/blog/174652/texas-redistricting-fight-shows-why-voting-rights-act-still-needed#.

Until last month, the VRA guarded against these radical infringements upon American minorities' right to vote. After *Shelby County*, the Department of Justice lost the notification requirement that ensured transparency of election administration in historically problematic jurisdictions and lost its ability to efficiently eliminate discriminatory voting laws and practices before their implementation. The Supreme Court's gutting of the preclearance formula essentially gave jurisdictions with a history of racial discrimination freedom to disenfranchise minority voters.

Indeed, less than two days after the *Shelby County* decision, six states[9] previously covered under the preclearance formula proceeded with plans to enact new voting restrictions that will make it harder for millions of Americans to vote - if they vote at all. For example, just two hours after the court's ruling, Texas announced that it was moving forward with a strict new photo identification requirement. Passed by the Texas legislature in 2011 but blocked by a federal court last year, the law could have prevented nearly 795,000 predominantly black and Hispanic voters from casting ballots in the 2012 election.[10] The court said it "imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty."[11] Now, however, without the critical protections of the VRA, Texas and a number of other states can move full speed ahead with requirements that a federal court had

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[9] Texas, Mississippi, Alabama, Arkansas, South Carolina, and Virginia. Joseph Diebold, *Six States Already Moving Forward with Voting Restrictions After Supreme Court Decision*, ThinkProgress.org, http://thinkprogress.org/justice/2013/06/27/2223471/six-states-already-moving-forward-with-voting-restrictions-after-supreme-court-decision/ (last visited July 15, 2013); Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 5, 2013, http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html?pagewanted=all.

[10] Rosa Ramirez, "Does the Texas Voter ID Law Discriminate Against Blacks, Hispanics," NATIONAL JOURNAL, May 29, 2013, http://www.nationaljournal.com/thenextamerica/politics/does-the-texas-voter-id-law-discriminate-against-blacks-hispanics-20120716; Cooper, *supra* note 7.

[11] *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012).

found racially discriminatory and will inevitably prevent tens of thousands of minority voters from casting ballots.

This flood of discriminatory voting restrictions in the wake of *Shelby* underscores the need for Congress to act swiftly to reestablish the protections of the Voting Rights Act. As Congress begins this process, its guiding principle must be that *every* American's right to vote should be unimpeded and protected, regardless of race or ethnicity.

In 1965, while campaigning for the passage of the Voting Rights Act, President Johnson noted that "the existing process of law cannot overcome systematic and ingenious discrimination" and that "no law…on the books…can ensure the right to vote when local officials are determined to deny it."[12]

Unfortunately, those words ring true again today. As Justice Ginsburg observed in her *Shelby County* dissent, the court has upended "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history."[13] It is vital that Congress act immediately to revitalize this landmark legislation and fulfill America's promise to protect every eligible citizen's right to vote.

[12] President Lyndon B. Johnson, Address Before a Joint Session of Congress (Mar. 15, 1965).
[13] *Shelby County, Alabama v. Holder*, No. 12-96, slip op. at 3 (U.S. June 25, 2013) (Ginsburg, J., dissenting).

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Adding Flexibility for Section 2 Voting Rights Act Compliance

Testimony from FairVote – The Center for Voting and Democracy

By Rob Richie, Executive Director and Drew Spencer, Staff Attorney

Presented to the Senate Judiciary Committee, July 16, 2013

About FairVote

FairVote – The Center for Voting and Democracy is a non-partisan, non-profit think tank and advocacy organization working since 1992 on reforms ranging from election administration to electoral systems. Based in Takoma Park, FairVote works locally, statewide and nationally. FairVote has advised non-governmental organizations and policy-makers at all levels on the conduct of elections.

Introduction

We thank you for holding this hearing on an exceptionally important and timely topic: "From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act." We believe that the times demand solutions to protection of voting rights that can be sustained over time and be less vulnerable to who controls the levers of power in a jurisdiction. Federal law should ensure all eligible voters have reasonable access to vote in all elections. Similarly, we must look to methods of elections that are fundamentally fair to all Americans and minimize the impact of how district lines are drawn. Our nation has decades of experience with such fair representation voting alternatives to winner-take-all voting rules; we know they work well for all voters and are consistent with our laws and political history. The importance of fair voting methods has become even clearer in the absence of preclearance protections.

To fully realize the goals of the Voting Rights Act, we recommend statutory changes to clarify that states and localities are able to use fair representation voting methods to uphold minority voting rights. We also recommend changes in voting system certification standards to ensure that no jurisdiction wanting to resolve a voting rights case with a fair voting method is denied from doing so because its voting equipment is not ready to run elections under rules already in place in some American jurisdictions.

The Vulnerability of Protected Racial Minorities with Winner-Take-All Rules

Among the most serious impediments to the ability of racial minorities to have full access to the ballot in places with racially polarized voting are election methods that result in vote dilution for racial minorities. In the past, this has typically been seen in local jurisdictions using winner-take-all at-large or multi-member elections, and it has typically been remedied by the use of single-member districts including some number of "majority-minority" districts, which make it possible for racial minorities to elect candidates of choice. The use of majority-minority districts has largely succeeded at ensuring higher levels of representation in places where racial minorities would otherwise be locked out of elections by dilution of their votes' effectiveness.

However, the use of majority-minority districts suffers from limits that raise questions as to whether single-member districts can really be a lasting remedy to racial minority vote dilution. Most importantly, the fairness of such systems for racial minorities is not intrinsic to their adoption; rather, it depends on how district lines are drawn. In an era when oversight of line-drawing is likely to decline in areas of the country where most racial minorities live, this dependency on the fairness of line-drawing raises concerns. As a result, we need to give greater attention to voting methods that, once adopted, are *intrinsically fair* as long as voter turnout is sufficiently comparable among different groupings of voters.

Further, majority-minority districts require encircling a particular area for racial minority representation, leaving most racial minority voters outside of that area with little chance to elect candidates of choice. In fact, racial minorities in all of the states that were covered by Section Five of the Voting Rights live in congressional districts where they are unlikely to elect preferred candidates. Single-member districts also generally result in fewer women being elected compared to multi-member elections. In addition, where racial minorities are too geographically disparate to be effectively grouped into a majority-minority district, single-member districts do not remedy their vote dilution at all. Finally, the U.S. Supreme Court has held that the use of majority-minority districts may violate the equal protection clause of the Fourteenth Amendment to the Constitution where districts are drawn principally for racial classification rather than based on traditional redistricting criteria.

Fortunately, we have a long history of using fair representation alternatives to winner-take-all elections that do not rely on single-member districts and can remedy vote dilution for far more

racial minority voters. For example, the use of cumulative voting in multi-member elections allows voters to "self district" by electing candidates by separate blocks of voters without respect to where they vote geographically. The system was used for more than a century to elect the Illinois House of Representatives, with one outcome being early election of African Americans in white-majority districts. Cumulative voting today is used in jurisdictions that adopted it to remedy racial minority vote dilution claims brought under Section 2 of the Voting Rights Act in Alabama, New York, South Dakota and Texas. In Chilton County (AL), it has consistently allowed the population to elect a candidate of choice in every election since its first use in 1988 – often winning the highest number of votes of any candidate in the election even though African Americans make up about one in eight county residents. More recently, cumulative voting was adopted in Port Chester, New York, following a lawsuit brought under Section 2 of the Voting Rights Act, with similarly positive results – including a Latino candidate finishing first in the 2013 elections. Appended to this testimony is a law review article co-authored by Rob Richie and Drew Spencer for the *University of Richmond Law Review* which addresses legal questions about such fair representation systems and convincingly makes the case for the use of choice voting as a means to uphold racial minority voting rights at all levels of government.

Recommended Statutory Changes

We recommend statutory changes that would make it easier for jurisdictions to turn to fair representation voting methods at different levels of government:

Amending Section 2 of the Voting Rights Act: Section 2 of the Voting Rights Act should be amended to clarify the standard established by in the U.S. Supreme Court in *Thornburg v. Gingles* that the racial minority population must be sufficiently geographically compact to constitute a majority-minority district. Such a requirement is relevant at the *remedies* stage, should plaintiffs seek the use of majority-minority districts as a remedy, but it should not block litigation at the *liability* stage, especially where jurisdictions may have otherwise remediable vote dilution.

California adopted this approach in 2002 when it passed its own California Voting Rights Act. The California Voting Rights Act explicitly noted that the racial minority population does not need to be geographically compact to find liability. The California Court of Appeals noted in *Sanchez v. Modesto* that this change from the federal Voting Rights Act anticipates the use of fair

representation voting methods. California's experience demonstrates that vote dilution claims can be brought under laws that do not require geographical compactness for a finding of liability.

Improve Voting System Certification Standards: The Election Assistance Commission should be required to include in its voting system federal certification requirements the mandate that voting systems be capable of conducting elections under any electoral rules used anywhere in the United States, including cumulative voting and ranked choice voting. It is problematic for voting machine vendors to operate in the United States without the ability to run elections as currently structured – particularly as we know that all the major vendors can meet this standard.

Furthermore, local jurisdictions considering the adoption of fair voting methods that would promote minority representation should not be impeded by a lack of certified voting systems tested for them. Appended to this testimony is a letter signed by civil rights organizations calling for such flexibility to be part of voting equipment standards.

Permit States to Elect Congressional Representatives by Fair Voting: The U.S. Constitution does not constrain states to electing congressional representatives from single-member districts. Indeed, for much of the nation's history, states elected their congressional delegations by a variety of creative means. Only since 1967 have states been required by federal law to adhere exclusively to election by single-member districts.

The 1967 law requiring that states elect their congressional delegations exclusively from single-member districts should be repealed. In its place, states should be required to use fair representation voting methods like cumulative voting when they elect from multi-member districts. Congressman Mel Watt's States' Choice of Voting Systems Act in 1999 would have made this change; it earned support from both Democrats and Republicans in the House and the Department of Justice. Appended to this testimony is 1999 testimony by law professor Nathaniel Persily and the Department of Justice on Congressman Watt's legislation.

Additional Resources:

Civil rights groups' letter supporting voting equipment flexibility for fair representation voting methods: Letter from civil rights groups discussing the importance of flexibility in voting equipment, including the value of equipment being ready to administer elections under rules already in place in American states and localities. Following the letter is a more detailed description of voting equipment flexibility. Available at http://archive.fairvote.org/administration/flexibility.htm.

Nathaniel Persily's 1999 testimony in support of legislation to allow multi-seat district elections for Congress: In September 1999, Stanford law professor Nathaniel Persily, then a staff attorney at the Brennan Center for Justice, provided testimony before the House Judiciary Subcommittee on the Constitution regarding legal and policy issues raised by the States' Choice of Voting Systems Act. Among his points: "Multi-member districts allow for the possibility that traditional political communities, such as counties or cities or even whole states, could be represented as organic units in the Congress -- a practice that was part of the redistricting 'tradition' before the court imposed the one-person, one-vote rule. Under present law, district boundaries rarely overlap with anything that can be defined as a political community. … Thus, instead of working against the grain of geographic districting, which is a frequently heard critique of multi-member districting schemes, such systems can reinforce regional identities for communities that have historical and political meaning for their inhabitants." Available at http://judiciary.house.gov/legacy/pers0923.htm.

Testimony of the Department of Justice, in support of legislation to allow multi-seat district elections for Congress: Anita Earls, then deputy assistant attorney general for the Civil Rights division, testified in September 1999 before the Committee on the House Judiciary Subcommittee on the States' Choice of Voting Systems Act. She said: "The Department of Justice supports this legislation as a valuable way to give state legislatures additional flexibility in the redistricting process…. Giving states greater flexibility in the redistricting process is an important objective. Redistricting is one of the most difficult and complex jobs that a state legislature ever undertakes. The process brings into play a huge number of variable criteria: the one person, one vote requirement of the U.S. Constitution; the Voting Rights Act's requirement that the votes of racial and language minorities not be diluted; the concerns of incumbent officeholders and the needs of diverse constituencies; geography and population distribution; state laws and policies that constrain the legislature's choices; and a host of other political, social, and economic interests and realities." Available at http://judiciary.house.gov/legacy/hodg0923.htm.

Law review article on fair representation voting methods: *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, From City Councils to Congress*, by Rob Richie and Drew Spencer. This article includes detailed analysis of legal questions involving the Voting Rights Act and potential use of fair representation voting methods. Available at http://lawreview.richmond.edu/wp/wp-content/uploads/2013/03/Richie-473.pdf.

FairVote analysis of impact of fair voting on African American voting rights: *A Representative Congress - Enhancing African American Voting Rights in the South with Choice Voting* shows how many more African American voters would be able to elect preferred candidates with fair representation voting methods in southern states. Available at http://www.fairvote.org/a-representative-congress-enhancing-african-american-voting-rights-in-the-south-with-choice-voting#.UeWXIo3VCYI.

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Testimony of the National Congress of American Indians before The United States Senate Committee on the Judiciary
July 17, 2013

I. Introduction

On behalf of the National Congress of American Indians, thank you Chairman Leahy and Ranking Member Grassley for allowing NCAI to submit testimony on the important topic of today's hearing: *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act*. Established in 1944, NCAI is the oldest and largest national organization representing the interests of all 566 American Indian tribes and Alaska Native villages. Historically, citizens of Tribal Nations have been denied equal access to the ballot box. The Voting Rights Act and all of its resources has been a law that tribal citizens depend on to help balance historical inequities at the polling place. For this reasons, we are encouraged the Committee has scheduled this hearing and would like to share historical perspectives on voting rights from Indian Country, as well as offer some insight on where we go from here – with the collective goal of ensuring we do not take steps backward in providing all citizens equal access to exercise the constitutional right to vote.

II. History of Voting Rights and American Indians and Alaska Natives

Although American Indians and Alaska Natives understand that the best way to protect their rights is through active participation in the political system, efforts have been made to limit the American Indian vote. There are approximately 1.9 million tribal members that make up the total enrollment of America's 566 federally recognized Indian tribes.[1] In 2004, American Indians voted in record numbers and their participation was credited as outcome determinative in several races.[2] Historically, however, American Indians and Alaska Natives have been forced to resort to the courts to protect their ability to participate in local, state, and federal elections and combat burdensome time, place, and manner voting regulations that effectually disenfranchised them.[3]

American Indians "have experienced a long history of disenfranchisement as a matter of law and of practice."[4] It was not until Congress passed the Indian Citizenship Act of 1924 that all Indians were granted United States citizenship.[5] Prior to 1924,

[1] BIA, *American Indian Labor Force Report,* Tribal Enrollment, at iii (2005).

[2] *See, e.g.*, Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 177-183 (2007); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 270-271 & n.7 (2004) (quoting Michael Barone, Grant Ujifusa & Douglas Matthews, THE ALMANAC OF AMERICAN POLITICS 1468 (2004)).

[3] *See Harrison, et al. v. Laveen,* 67 Ariz. 337 (1948)(Native Americans are "residents of the state" and qualified to participate in state elections) overturning *Porter v. Hall*, 34 Ariz. 308 (1928); *Trujillo v. Garley,* No. 1353 (D.N.M. 1948); *Allen v. Merrell*, 353 U.S. 932 (1957).

[4] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

Indians were denied citizenship and the right to vote and could only become citizens through naturalization "by or under some treaty or statute."[6] The 1924 Act ended the period in United States history in which obtaining United States citizenship required an Indian to sever tribal ties, renounce tribal citizenship and assimilate into the dominant culture.[7] With the passage of the Indian Citizenship Act and by operation of the Fourteenth Amendment, an Indian who is a United States citizen is also a citizen of his or her state of residence.[8]

Notwithstanding the passage of the Indian Citizenship Act, some states continued to deny Indians the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.[9] It took nearly forty years for all fifty states to recognize American Indians' right to vote. For years, Arizona denied Indians the right to vote because they were "under guardianship," placing them on par with convicted felons, the mentally incompetent, and the insane.[10] In other places, Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties.[11] In 1956, Utah was one of the last states to ban a statute that prevented Indians residing on the reservation from voting because it did not count them as citizens of the State.[12] This was over 30 years after the Indian Citizenship Act was passed by Congress, and only several years prior to passage of the VRA in 1965.[13]

Since the passage of the VRA, at least seventy-three cases have been brought under either the Voting Rights Act or the Fourteenth or Fifteenth Amendments in which Indian interests were at stake.[14] The discrimination trends that emerge from these cases closely track the experience of African Americans, with discrimination shifting from *de jure* to *de facto* over time. Recent cases focus on the discriminatory application of voting rules with respect to registration, polling locations, and voter identification requirements,[15] as well as general overt hostility to Native voting. For example, in 2002 a South Dakota State legislator stated on the floor of the State Senate that he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty."[16]

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[5] An Act of June 2, 1924, 43 Stat. 253, Pub. L. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)).
[6] *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).
[7] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.01[3], n. 42-44 (2012 Ed.).
[8] U.S. CONST. amend. XIV, § 1.
[9] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).
[10] *Harrison, et al. v. Laveen*, 196 P.2d 456 (1948).
[11] California limited voting rights to white citizens; Idaho, New Mexico and Washington withheld the right to vote from Indians not taxed. The North Dakota Constitution limited voting to "civilized" Indians who have severed tribal relations. Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 10 (2007).
[12] *Allen v. Merrell*, 353 U.S. 932 (1957).
[13] *Id*.
[14] Daniel McCool, Susan M. Olson & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 45 (2007).
[15] *Id.* at 46; *see id.* at 48–68 (collecting cases).
[16] *Boneshirt v. Hazeltine*, 336 F. Supp. 2d 976, 1046 (D.S.D. 2004) (quoting Rep. John Teupel).

On a national level, in *Bush v. Gore*, the Supreme Court noted that “the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”[17] It is our belief that this statement stands for the idea that no matter where an individual comes from, and regardless of how much property an individual owns, each citizen is entitled to exercise their constitutionally guaranteed right to vote.

III. Section 4(b) of the Voting Rights Act

Unfortunately, this Nation has a history of disenfranchisement at the polling place. Section 4(b) of the Voting Rights Act, which was recently struck down as unconstitutional by the Supreme Court in *Shelby County v. Holder*, put in place criteria to identify areas within the United States where Congress noted a need for greater protections – preemptive protections to be specific, for one’s right to cast a ballot in elections. Under that Section, Congress looked to areas where voting disparities between white and non-whites were so great, as to evidence significant marginalization at the polling place. Also, Congress identified areas where overt tests or devices were used to abridge one’s right to vote, such as literacy tests which disproportionately affected low-income minorities, as well as American Indians and Alaska Natives whose first language was not English, and many of which did not speak, let alone read, English at all. These jurisdictions became known as “covered jurisdictions”, and encompassed counties and – in some instances, entire states. As covered jurisdictions, any change in voting laws needed to either: a) be pre-cleared by the Department of Justice; or b) approved by a three-panel DC Circuit court.

With the recent holding in *Shelby County v. Holder*, the Voting Rights Act loses a critical component which placed the burden on historically discriminatory jurisdiction to prove their changes in voting laws could pass muster, or – in other words—were not veiled attempts to circumvent individuals’ voting rights.

This process was important in several respects. First, it ensured that “covered jurisdictions” think hard before enacting changes to their voting laws. After all, if a “covered jurisdiction” sought changes for upcoming elections, it would undoubtedly want to make sure such laws would pass the pre-clearance process in order to be enacted. This arguably led to better law.

Relatedly though, it isolated the review process in the legislative field. In other words, real votes were not affected until the new law was pre-cleared or approved by the DC court. This cannot be emphasized enough because it places the cost and time burdens on the legislative body and not the individual voters, as Section 2 arguably does.

However, and perhaps most important, Section 4(b) and its counterpart Section 5 are familiar to “covered jurisdictions” and to the voters they sought to protect. The Court attributed much of its decision on the fact that voting demographics in “covered jurisdictions” had improved significantly since their inception. However, instead of applauding the effectiveness of the preclearance process, the Court instead veered down a path where the preclearance processes’ own

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[17] *Bush, et al. v. Gore, et al.,* 121 U.S. 525, 530 (2000), *See*, *e.g.*, *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

effectiveness eventually became its worst enemy: the Court concluded the formula used to identify covered jurisdictions was no longer needed. Many suspect this analysis could not be further from the truth. Unfortunately, the American Indian and Alaska Native vote will represent a large portion of those affected to discern the validity of the Court's analysis.

IV. Conclusion

In conclusion, NCAI calls on Congress to act in filling the gap left by the *Shelby* decision. While the Court held the tests used under Section 4(b) were no longer useful, it also left the door open for Congress to determine a new test, one which reflects the modern challenges for historically disenfranchised voters. NCAI asks that Congress work with voting rights advocates and scholars to determine what that more modernized test encompasses. Once again, we thank the Committee for this opportunity to comment on this issue and hope to continue the dialogue toward better and more effective voter protection law.

Sincerely,

Jefferson Keel
NCAI, President

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July 17, 2013

The Honorable Patrick Leahy
Chair, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

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

Dear Chairman Leahy and Ranking Member Grassley,

We strongly welcome the Senate Judiciary Committee hearings on the aftermath of the Supreme Court's June 25 *Shelby County v. Holder* decision, which we believe is a major setback to the progress we have made in civil rights over the last 50 years. We appreciate the opportunity to provide the views of the Anti-Defamation League (ADL), and would ask that this statement be included as part of the hearings record.

ADL is a leading civil rights organization that has been working to secure justice and fair treatment for all since its founding 100 years ago. Recognizing the Voting Rights Act of 1965 (VRA) as one of the most important and most effective pieces of civil rights legislation ever passed, ADL has strongly supported the VRA and its extensions since its passage almost 50 years ago.

The success of the VRA is undeniable. It has helped to eliminate discriminatory barriers to full civic participation for millions of Americans, and has sparked significant advances for equal political participation at all levels of government. In the years immediately after passage of the VRA, African American voter registration increased dramatically, and the number of African Americans elected to public office increased fivefold in five years.[1] Today there are more than 9,000 African American elected officials,[2] including the first African American president. Many of these elected officials are from jurisdictions that were protected by the preclearance provisions of Section 5 of the VRA.[3] Surely, the United States would not have made such progress without the VRA.

The success of the VRA in improving minority voter participation and increasing the number of African American elected officials is not a demonstration that the protections of the VRA are no longer necessary. To the contrary, extensive Congressional testimony from 2006 before passage of the Act's latest extension and subsequent evidence show that Section 5's preclearance requirements continue to serve as a crucial safeguard for the right to vote for millions of citizens. In 2006 Congress found that "the hundreds of objections interposed [and] requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by [Section 5]" evidenced continued discrimination,[4] and that many of the laws blocked by the Department of Justice pursuant to Section 5 closely resembled attempts to disenfranchise voters before passage of the VRA. Proposed laws blocked by Section 5 have included discriminatory redistricting plans, polling place relocations, biased annexations and de-annexations, and changing

[1] See H.R. Rep. No. 109-478, at 18, 130 (2006), reprinted in 2006 U.S.C.C.A.N. 618.
[2] *Id.* at 18.
[3] *See* Chandler Davidson & Bernard Grofman, The Voting Rights Act and the Second Reconstruction, in Quiet
Revolution in the South 378, 381-86 (Chandler Davidson & Bernard Grofman eds., 1993).
[4] Pub. L. No. 109-246, § 2(b)(4)(A).

Anti-Defamation League, 605 Third Avenue, New York, NY 10158-3560, T 212.885.7700 F 212.867.0779 www.adl.org

offices from elected to appointed positions.[5] After extensive hearings and very thorough consideration, the House concluded that these proposed voting changes, successfully prevented by Section 5 of the VRA, were "calculated decisions to keep minority voters from fully participating in the political process," showing that "attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future."[6]

Seven years later, the protections of Section 5 continue to be just as necessary. Actions by a number of covered states in the hours and days immediately following the *Shelby County* decision striking down the formula in Section 4 of the VRA, effectively gutting Section 5, demonstrate how crucial Section 5's preclearance provision continues to be in protecting minority voting rights. Shortly after the decision, Texas Attorney General Gregg Abbott announced that the state's voter ID law and a redistricting plan, both of which had been previously blocked by Section 5, would go into effect immediately. The three judge panel that had reviewed the Texas voter ID law and denied preclearance in 2012 found that "based on the record evidence before us, it is virtually certain that these burdens will disproportionately affect racial minorities. Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote."[7] Without Section 5 safeguards, that discriminatory voter ID bill is now in effect. Similarly, unnecessarily restrictive voter ID laws in North Carolina, South Carolina, Alabama, Mississippi and Virginia are all moving forward, despite scant evidence of in-person voter fraud and the great potential to disparately impact minority voters. Another pending bill in North Carolina threatens to reduce college age voting by preventing students' parents from claiming them as dependents on their tax returns if the student registers to vote at his school address. In less than one month since the Supreme Court struck down the preclearance formula -- effectively ending preclearance unless and until Congress creates a new formula -- laws that threaten to reverse the progress made by the VRA are moving forward.

History provides important, sobering lessons about what can happen when protections for minority voting rights are rolled back. After the Civil War, Congress moved swiftly and decisively to enfranchise African American men. Under the supervision of federal troops, more than 700,000 African American men were registered to vote in the South by 1868, a 75 to 95% registration rate. The 15th Amendment was ratified in 1870, and the Enforcement Act of 1870 prohibited discrimination in voter registration and created criminal penalties for interfering with voting rights. These combined efforts and federal protections led to unprecedented rates of African American participation in elected government. By the end of Reconstruction, 18 African Americans had served in statewide office in Southern states, there were eight African Americans in Congress from six different states, and more than 600 African Americans served in state legislatures.[8] When Reconstruction ended in 1877 and the Supreme Court struck down key portions of the Enforcement Act, progress quickly reversed. Southern states began implementing racial gerrymandering, followed by more brazen efforts to disenfranchise African American voters, including poll taxes, literacy tests, whites-only primaries, and grandfather clauses. By the early 1900's, 90 percent of African Americans in the Deep South had been disenfranchised by these schemes. The widespread, insidious disenfranchisement of African American voters only ended in 1965, with passage of the VRA.

To be sure, the United States is very different today than it was after Reconstruction. Yet the possibility of repeating history by reversing decades of progress on improving minority voting rights looms large. The Supreme Court majority in *Shelby County* ignored extensive congressional findings of ongoing election discrimination – instead substituting its own view that a muscular VRA is no longer needed. We certainly hope that one day the protections of the Voting Rights Act will no longer be necessary and that

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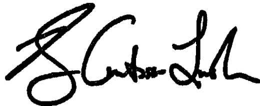
[5] H.R. REP. NO. 109-478, at 36.
[6] *Id.* at 21.
[7] No. 12-cv-128, 2012 U.S. Dist LEXIS 127119, at *86 (D.D.C. Aug. 30, 2012).
[8] Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 353, 355, 538 (1988).

all eligible voters will be able to vote, free from discriminatory barriers. Unfortunately, that day has not yet come. Congress must act to create a new formula, restoring the safeguards of Section 5 preclearance and protecting minority voting rights.

In his speech proposing the VRA, President Lyndon Johnson said, "Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen can and must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs on us more heavily than the duty we have to ensure that right."[9]

Almost 50 years later, President Johnson's words ring true today. We urge Congress to work swiftly and decisively to enact a new formula for Section 4 of the VRA, restoring the Act's crucial voting rights protections and ensuring to every American citizen an equal right to vote.

Sincerely,



Barry Curtiss Lusher
National Chair

Abraham H. Foxman
National Director

[9] President Lyndon B. Johnson, Special Message to the Congress: The American Promise, 1 Pub. Papers 281, 282 (March 15, 1965), available at http://lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise.

Statement of

Sherrilyn Ifill
President & Director-Counsel

&

Ryan P. Haygood
Director, Political Participation Group

&

Leslie M. Proll
Director, Washington Office

NAACP Legal Defense and Educational Fund, Inc.

United States Senate
Committee on the Judiciary

Hearing on
"From Selma to Shelby County:
Working Together to Restore the
Protections of the Voting Rights Act"

Dirksen Senate Office Building, Room 226
July 17, 2013
1:00 p.m.

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we are pleased to submit this statement to the Senate Judiciary Committee in connection with the hearing, "From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act." We are grateful to Chairman Patrick J. Leahy, Ranking Member Charles Grassley, and Members of the Judiciary Committee for holding this important hearing in response to the United States Supreme Court's devastating ruling last month in *Shelby County, Alabama v. Holder*, and we welcome this essential dialogue about the value and imperative of political inclusion and equality, principles that the Voting Rights Act was enacted to protect. Passed at the height of the Civil Rights Movement, the Voting Rights Act is widely regarded as one of the greatest pieces of civil rights legislation in our nation's history. It continues to be of critical importance to LDF's clients, and to voters of color more broadly, as an essential protection in defending and expanding the right to vote for voters of color, as well as language minorities.[1]

Notwithstanding the Voting Rights Act's essential role as our democracy's discrimination checkpoint, and our continuing need for its critical protections, on June 25, 2013, the United States Supreme Court in *Shelby County, Alabama v. Holder*

[1] Founded under the direction of Thurgood Marshall, LDF has been a pioneer in the efforts to secure, protect, and advance the voting rights of people of color in this nation, particularly those of Black Americans. LDF has been involved in nearly all of the precedent-setting litigation relating to the voting rights of people of color since its founding in 1940. LDF also has played a significant advocacy role in the enactment of the Voting Rights Act of 1965 and its subsequent reauthorizations in 1970, 1975, 1982, and 2006. LDF defended the Voting Rights Act before the Supreme Court most recently in *Shelby County, Alabama v. Holder*.

("*Shelby County*"), in a radical act of judicial overreach, struck down a key provision—Section 4(b) (also known as the "coverage provision")—of the Voting Rights Act.[2] In so doing, the Supreme Court effectively rendered Section 5 of the Voting Rights Act, the "preclearance provision," inapplicable.[3]

By invalidating Section 4(b)'s coverage provision, the Supreme Court disregarded Congress's authority under the 14th and 15th Amendments to enact legislation to defend those amendments' guarantees—an authority appropriately invoked by Congress in its 2006 reauthorization of the Voting Rights Act. Congress, in reauthorizing the Voting Rights Act, undertook an extensive examination, based on many months of hearings, to identify the places that exhibited the kind of persistent racial discrimination in voting that required the specific prophylaxis offered by Section 5's preclearance structure. The Supreme Court's decision in *Shelby County* has left millions of minority voters without a key protection to stop discrimination in voting *before* it occurs, in places that require strong medicine to address the effects of both the history and ongoing reality of racial discrimination in voting.

Responding to the Supreme Court's *Shelby County* decision must be a top priority for Congress. In the hours following the decision, a number of officials from jurisdictions formerly covered by Section 5, including Texas, Mississippi, and North

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[2] 570 U.S. ____ (2013) (slip op., at 24).

[3] Section 4(b) identified 15 places that Section 5 protected including: Alabama, Texas, Mississippi, Louisiana, Arizona, North Carolina, South Carolina, Georgia, Florida, Alaska, South Dakota, Virginia, Michigan, New York, and California because of the longstanding and ongoing nature of racial discrimination in voting in these areas.

Carolina, made clear their intentions to move forward with voting changes that will adversely affect access to political participation among communities of color.[4] It is, therefore, imperative that Congress respond aggressively and expeditiously to safeguard the rights of Black, Latino, Asian American, American Indian, and Alaska Native voters in those situations in which they are the most vulnerable to discrimination in voting.

This statement will address three topics that are central to Congress's response to the Supreme Court's *Shelby County* decision: (1) the expansive 2006 Congressional record that reflects the need for strong protections for voters of color from discrimination in those places formerly covered by Section 5 of the Voting Rights Act; (2) the problem that, left without Section 5's protections, communities of color in formerly covered jurisdictions are vulnerable to the myriad of discriminatory voting changes, particularly at the local level, that will arise in jurisdictions now emboldened by the Supreme Court's *Shelby County* decision; and, (3) Congress's ability to address the *Shelby County* decision and to protect vulnerable communities from racial discrimination in voting.

[4] *See, e.g.*, Ryan K. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Act Ruling*, THE HUFFINGTON POST, June 25, 2013, http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html (Texas Attorney General announcing, within hours of the Shelby decision, that "the state's voter ID law will take effect immediately," as may redistricting maps); Geoff Pender, *Next June, Miss. Voters must have ID: Secretary of State reveals time for implementation*, THE CLARION LEDGER, June 25, 2013, http://www.clarionledger.com/article/20130626/NEWS01/306260018/Next-June-Miss-voters-must-ID (Mississippi Secretary of State expressing his intention to move forward to implement Mississippi's voter ID law in June 2014); *Statement from Attorney General Roy Cooper on U.S. Supreme Court Decision on Voting Rights Act*. June 25, 2013, http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Statement-from-Attorney-General-Roy-Cooper-on-U-S.aspx (North Carolina Attorney General expressing that the State General Assembly is "now considering legislation that . . . would limit early voting and require voter I.D.") .

The 2006 Congressional record reflects the need for strong protections for voters of color in those places formerly covered by Section 5 of the Voting Rights Act.

In 2006, during the last reauthorization period, Congress received more testimony and information about the voting experience of citizens of color, both in and outside the jurisdictions covered by Section 5, than it had during any prior reauthorization. Over a ten-month period, the House and Senate Judiciary Committees held 21 hearings, received testimony both in support of and against reauthorization from over 90 witnesses—including state and federal officials, litigators, scholars, and private citizens—and amassed more than 15,000 pages of record evidence. A bipartisan Congress ultimately determined—by the overwhelming vote of 98-0 in the Senate and 390-33 in the House[5]—that persistent and adaptive voting discrimination remained a pervasive problem in the now formerly-covered jurisdictions, and that without Section 5 "minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[6] As today's witness, Representative James Sensenbrenner, then-Chair of the House Judiciary Committee, observed, the 2006 reauthorization of the Voting Rights Act was based on "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a

5 *See* 152 Cong. Rec. 14,303-304, 15,325 (2006).
6 Pub. L. No. 109-246, 120 Stat. 578, § 2(b)(9) (2006).

Member of this body."[7] The expansive record before Congress demonstrated that, while voters of color have made undeniable progress, unconstitutional discrimination remained common, persistent, and adaptive in the then-covered jurisdictions. Between 1982 and 2006, the Department of Justice blocked over 600 voting changes under Section 5 after determining that the changes were discriminatory.[8] Evidence in the Congressional record revealed that a majority of these objections were based, at least in part, on purposeful discrimination.[9]

Without Section 5's protections, voters of color are vulnerable to the myriad discriminatory voting changes that will arise in formerly covered jurisdictions now emboldened by the Supreme Court's *Shelby County* decision.

Notwithstanding Congress's carefully-considered judgment in reauthorizing Section 5 of the Voting Rights Act in 2006, the Supreme Court's *Shelby County* decision has deprived voters of color of a vital tool necessary to prevent racial discrimination in voting. Even as our country has made significant progress in combating racial discrimination in our political system—in great measure because of the protections afforded under the Voting Rights Act—the ongoing record of racial discrimination makes plain that there are continuing efforts in many places to deny voters of color the opportunity to participate equally in our shared democracy. These efforts require an aggressive response. Within hours of the *Shelby County* decision, for example, Texas Attorney General Greg Abbott announced that the State planned to "immediately"

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[7] 152 Cong. Rec. 14,230 (2006).

[8] H. R. Rep. No. 109–478, at 21.

[9] November 1, 2005 Hearing, at 180-81.

implement a 2011 voter-identification law which had previously been blocked by a Section 5 federal court as the most discriminatory measure of its kind in the country.[10] Abbott likewise announced that the State may implement redistricting maps.[11] Mississippi and North Carolina quickly followed suit, announcing that they also planned to adopt discriminatory voting changes that Section 5 may have blocked.[12] These changes threaten to undermine hard-fought gains to expand democracy for people of color.

These are not isolated post-2006 efforts to discriminate in formerly covered jurisdictions. In 2008 in Alaska, Section 5 rejected plans to eliminate precincts in several Native villages, which would have required voters to travel by air or sea to cast a ballot.[13] In 2008 in Calera, Alabama, the county in which the *Shelby County* case originated, Section 5 reinstated the city's only African American city council member after he lost his seat when the Black voting-age population was inexplicably reduced from 79% to just 29%.[14] Attempts to dilute or deny voters of color full access to the political process threaten to take root in an accelerated basis across the country, and particularly in

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[10] *See supra* n. 4.

[11] *Id*.

[12] *Id*.

[13] Br. of Alaska Federation of Natives, *et al*. as Amici Curiae in Supp. of Resp'ts, at App. 32-36, *available at* http://www.naacpldf.org/files/case_issue/Shelby-Brief%20of%20Amici%20Curiae%20the%20Navajo%20Nation.pdf.

[14] Br. of Resp't.-Intervenors Earl Cunningham, *et al*., at 19-20, *available at* http://www.naacpldf.org/files/case_issue/12-96%20bs%20Earl%20Cunningham%20et%20al..pdf.

formerly-covered jurisdictions, now emboldened by the *Shelby County* decision, which do not have Section 5 to operate as an initial check on discriminatory voting changes.

In particular, in the wake of the *Shelby County* decision, two of the gravest risks to voters of color in formerly-covered places arise from the fact that, without the prophylactic protections of Section 5, (1) officials in formerly covered jurisdictions will now make changes to voting laws without providing notice to voters, and (2) discriminatory voting measures will now have to be challenged *after*, rather than *before*, such changes take effect. The challenges are likely to be particularly pronounced for voters of color at the local level, where Section 5 blocked more than 85% of proposed voting changes between 1982 and 2006, rather than at the state-level.[15] For example, in Kilmichael, Mississippi, in 2001, the white mayor and all-white Board of Alderman attempted to take the extraordinary step of cancelling elections to prevent Black citizens from electing the candidate of their choice after the 2000 Census showed that Blacks had become a majority of the City and were poised, for the very first time, to elect their candidates of choice to the city counsel.[16] Voters of color in places like Kilmichael, and scores of local communities in the previously covered jurisdictions across the United States more broadly, are vulnerable to future attempts to dilute or deny their right to vote. It is precisely in those local communities where Section 5 has been so transformative by giving voters of color opportunities to robustly participate in the political process.

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[15] Justin Levitt, *Section 5 as Simulacrum*, YALE L.J. ONLINE 151 (2013), http://yalelawjournal.org/2013/06/07/levitt.html.

[16] October 25, 2005 (History) Hearing, at 1616-19.

At the same time, in the absence of Section 5's application anywhere because of the *Shelby County* decision, discriminatory voting measures now will have to be challenged through litigation *after* they take effect, through case-by-case litigation under Section 2 of the Voting Rights Act (and perhaps state law) that is time-consuming, costly, and permits racial discrimination to take root in the electoral process *before* it can be remedied. Congress made clear during the 2006 reauthorization that Section 2 litigation by itself is an inadequate response to the persistent and adaptive problem of racial discrimination in voting in certain parts of our country.[17]

Congress can and must protect vulnerable communities from racial discrimination in voting in the wake of the *Shelby County* decision

Congress can and must respond aggressively to protect voters of color from racial discrimination following the Supreme Court's ruling in *Shelby County*. Today's witness, Representative John Lewis, who was severely beaten during the Selma to Montgomery March that led to the passage of the Voting Rights Act, has described the Supreme Court's decision in *Shelby County* "as a dagger to the heart of the Voting Rights Act."[18] Congress, however, has the power to respond, as it did in 2006, to protect voters of color from the material harm resulting from the Supreme Court's *Shelby County* decision.

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17 H. R. Rep. No. 109–478, at 57.

18 Press Release, *Rep. John Lewis Calls Court Decision 'a Dagger' in the Heart of Voting Access*, June 25, 2013, http://johnlewis.house.gov/press-release/rep-john-lewis-calls-court-decision-%E2%80%9C-dagger%E2%80%9D-heart-voting-access.

Today is an important first step of a bipartisan effort to address the *Shelby County* decision. Since its enactment in 1965, the Voting Rights Act has enjoyed overwhelming bipartisan support. Every reauthorization has been signed into law by a Republican president. We fully hope and expect that Congress can cast partisanship aside, and take action to ensure that the cornerstone of our democracy is as strong as ever. We urge Congress to respond aggressively, intentionally, and expeditiously to ensure that voters of color can equally and fully participate in the democratic process.

Thank you for the opportunity to submit this statement.

National
Urban League

Empowering Communities.
Changing Lives.

Statement for the Hearing Record

Before the

Senate Judiciary Committee Hearing:

"From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act"

July 17, 2013

Chairman Leahy, Ranking Member Grassley, members of the Committee, thank you for the opportunity to present our views on what must be the highest priority for this Congress and our nation - preserving our democratic process by restoring the protections of the Voting Rights Act. Vital protections that were stripped by the U.S. Supreme Court in its devastating 5-4 decision on June 25, 2013, in *Shelby County, Alabama v. Holder*. ***The National Urban League has one unequivocal message to both houses of Congress – suspend gridlock, come together as in the past, and fix the Voting Rights Act NOW!***

The Supreme Court's decision in *Shelby* is, quite frankly, ominous for our democracy, and yes, for African Americans who know all too well the high and often tragic price that was paid to secure their right to vote. It is beyond irony that as we commemorate the 50th anniversary of the Great March on Washington - at the height of the Civil Rights Movement – we still find ourselves fighting to ensure that every U. S. citizen can exercise this most fundamental right.

The Voting Rights Act was necessary in 1965 and remains so in 2013. If the voter suppression tactics employed by numerous states in the 2012 elections aren't evidence enough, consider that in the first four months of this year alone, restrictive voting bills have been introduced in more than half the states. In fact within two hours of the Supreme Court's decision, the state of Texas declared it would now implement the voter ID law that had previously been ruled the most discriminatory law of its kind in the country. The State is also considering implementing a 2011 redistricting plan that was found to be discriminatory against the state's minority voters.

According to the NAACP Legal Defense Fund, which is closely monitoring how states subject to the Section 4 formula are responding to the Shelby

decision, a still growing list of states indicate they do intend to implement new discriminatory voting changes. The states include Florida, Georgia, Mississippi, North Carolina, South Carolina and Texas.[1]

The Supreme Court's decision is a direct blow to 50 years of progress towards voter equality and to the dream that Dr. Martin Luther King so passionately and purposefully shared with us in 1963. As Georgia Congressman John Lewis, who was brutally beaten during the Selma to Montgomery march that led to the passage of the Voting Rights Act of 1965 put it, "the Supreme Court put a dagger in the heart of the law."

Some point to the reelection of President Obama and the record voter turnout as a reason to say "All's well" without acknowledging that these achievements have occurred ***because of the VRA***, which is all the more reason to immediately restore its protections. Moreover, with 16 months to go until the 2014 midterm elections and with states--including Texas and others -- rushing to enact voter suppression measures, we cannot afford business as usual with our political system at continuous logger heads.

In the majority opinion, Chief Justice Roberts wrote that the coverage formula today is based on decades-old data and racist practices. Yet, Judge Roberts ignored thousands of pages of evidence presented over the course of 20 hearings that resulted in a bipartisan Congress overwhelmingly re-authorizing the Voting Rights Act in 2006. Justice Roberts also passed over new evidence in the 2012 election: the long lines at the polls, onerous voter ID requirements and registration procedures, and other measures clearly designed to make voting more difficult for certain communities that proved that discrimination and racism are still threats to democracy and efforts to protect the right to vote are still sorely needed.

The National Urban League is acutely aware of the importance of the voting franchise. In response to the unprecedented campaign in dozens of states to make it more difficult to vote through restrictive ID requirements, onerous registration procedures, cut-backs in poll hours, early voting and other measures, the Urban League launched its Occupy the Vote effort, which reached more than 150,000 citizens around the country.

The National Urban League will remain as diligent as ever in defending and protecting the rights that were so hard fought - and died - for during the Civil Rights Movement of the 1950's and 1960's. We will mobilize our communities to push Congress to abandon party lines and partisanship and act immediately in the best interest of our nation and our democracy by enacting a new and responsible 21st Century formula for Section 4. We cannot focus on a

[1] "How Formerly Covered States Are Responding To The Supreme Court's Voting Rights Act Decision," NAACP Legal Defense Fund, July 1, 2013.

celebration of progress until we ensure a continuation of the very equality and opportunity that are at the core of the country.

Established in 1910, the National Urban League is the nation's oldest and largest civil rights and direct services organization serving over 2 million people each year in urban communities in 35 states and the District of Columbia.

Testimony of U.S. Public Interest Research Group Democracy Advocate Blair Bowie:

Section 4 of the Voting Rights Act was a critical piece of legislation that helped ensure the ability of eligible voters to cast a ballot regardless of race, age or gender. The Court's decision is a blow to voters' rights and will have a real impact on voters. U.S. PIRG has been working to make it as easy as possible for citizens to vote for more than 35 years and will continue to secure our hard-won victories to promote voter registration. U.S. PIRG urges Congress to immediately update the formula that is used to determine which state and local governments must comply with the preclearance provisions of the act.

Blair Bowie
U.S. PIRG Democracy Advocate
7.16.13

The Leadership Conference
on Civil and Human Rights

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STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

"FROM SELMA TO SHELBY COUNTY: WORKING TOGETHER TO RESTORE THE PROTECTIONS OF THE VOTING RIGHTS ACT"

SENATE COMMITTEE ON THE JUDICIARY

JULY 17, 2013

Chairman Leahy, Ranking Member Grassley, and Members of the Committee: I am Wade Henderson, President and CEO of the Leadership Conference on Civil and Human Rights. Thank you for the opportunity to submit testimony for the record on the need to restore the protections of the Voting Rights Act (VRA).

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations represent persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, collective bargaining rights in the workplace, economic opportunity, and financial security. The right to vote is fundamental to the attainment and preservation of each of these rights. It is essential to our democracy. Indeed, it is the language of our democracy.

The VRA has been one of the most successful pieces of civil rights legislation, and has enjoyed broad, bipartisan support every time it has come up for reauthorization. In fact, since it was passed in 1965, the last four reauthorizations of the VRA were signed into law by Republican Presidents. In each instance, members of both parties recognized the ongoing importance of protecting minority voters from discrimination and during the most recent renewal in 2006, they worked together to amass an extensive record to establish the ongoing need for these protections.

Numerous, repeated, and deeply disturbing instances of discrimination and discriminatory laws compel the need for swift bipartisan congressional action to restore the efficacy of the VRA. Although the days of poll taxes, literacy tests, and brutal physical intimidation are behind us,

efforts at disenfranchisement of voters of color continue to this day. These modern day efforts include such strategies as mandatory voter identification laws and racially-biased gerrymandering that disproportionately impact communities of color. That is why the Supreme Court's ruling in *Shelby County v. Holder* was devastating not only to communities who have been protected by Section 5, but also to our nation's democratic process. The Court undermined Congressional authority and wrongly gutted one of the most important protections the VRA contains. By striking down Section 4(b) of the Act—the coverage formula—the Court effectively removed the ability of Section 5 to do its job. Section 2 alone is insufficient to protect the rights of minorities and other marginalized groups. Accordingly, we now must look to Congress to renew its efforts to ensure that all voters are able to participate in the democratic process.

I. Introduction

Voting changes such as strategic redistricting to minimize the influence of black and Latino voters, shortened early voting periods, limits on poll worker assistance, proof of citizenship requirements, and restrictions on community-based registration, disproportionately impact communities of color and are examples of tools used to abridge the right to vote today.

The VRA—specifically Section 5 and its coverage formula under Section 4(b) – was able to keep many of these changes at bay, but the Supreme Court's recent holding in *Shelby County* has put at risk much of what we have accomplished over the course of the past half-century. Notably, in *Shelby County*, the Supreme Court did not invalidate Section 5's preclearance requirements; however, the majority did hold unconstitutional Section 4(b).[1] Without a formula by which to identify jurisdictions where Section 5 will be applied, the protections of that section will go unenforced.

According to the Court, Section 4(b) exceeded Congress' power to enforce the Fourteenth and Fifteenth Amendments because the formula was based on old data that was not rationally related to the present day.[2] The majority took note of the great improvement in voter registration racial parity between 1965 and 2004. Despite recognizing that these changes were "in large part *because* of the Voting Rights Act," it used them as a basis upon which to weaken the Act.[3] In addition, by focusing solely on statistics, the Court ignored an extensive record compiled by Congress, including dozens of deeply disturbing incidents indicating very real discrimination and the very real need for the VRA. Justice Ginsburg's dissent supplies a long list of such examples, including cases in which counties attempted to purge voter rolls of Black voters, suspend or postpone elections in which Black candidates were expected to win, and selectively prosecute Black candidates.[4]

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[1] *See Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, *24 (2013).
[2] *Id.* at *17.
[3] *Id.* at *15.
[4] *Id.* at *15-17 (Ginsburg, J., dissenting).

The Leadership Conference

It was only through Section 5 that these efforts were stopped before they could taint the electoral process; other provisions, such as Section 2, which the Court did not strike down, would not have been effective in preventing racial discrimination at the outset. Although Section 2 provides some protections for voters throughout the country against discrimination, these cases are long, expensive, and complex. In some instances, it can take years before a remedy is provided, well after the law has been implemented and has had a negative impact on voters. By contrast, Section 5's pre-clearance provision stops discriminatory voting laws before they can take effect.

In applying Section 5 to areas of the country with a history of discrimination, using the formula prescribed in Section 4(b), Congress ensured that its strongest remedy was reserved for the places it was most needed. As Justice Ginsburg wrote, "just as buildings in California have a greater need to be earthquake proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination."[5]

II. The Importance of the VRA – Section 4(b) and 5

In 2010, state legislators across the country introduced and passed an unprecedented number of voting measures that threatened our democracy by suppressing voter participation. Photo ID requirements, shortened early voting periods, and community-based registration, among other barriers, have been estimated to disenfranchise more than five million Americans, and disproportionately impact communities of color.[6]

In 2011, the Department of Justice blocked South Carolina's strict voter ID law, which required that any person wishing to vote present a government-issued ID In response to Section 5 litigation, South Carolina revised its law to create exemptions and reduce its discriminatory impact. Without Section 5, thousands of people of color would have continued to be disenfranchised. The law had already prevented many voters from exercising their right to vote – including 82-year-old Hanna White, who never had a birth certificate, and was therefore unable to get a state-issued ID.

Likewise, during Texas' redistricting process in 2011, lawmakers sought to draw political boundaries that discriminated against Latino and African-American voters. Over the course of the past decade, Texas' population has grown by 4.2 million people, 89 percent of which was the result of an increase in its racial minority population. Despite this, the Texas legislature drew the boundaries of its congressional districts in such a way as to minimize the number of seats in which Latinos or African Americans could elect a candidate of their choice. Thanks to Section 5, however, a district court denied preclearance to the plan, and the state's discriminatory plan was not used in the 2012 election cycle.

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[5] *Id.* at *21 (Ginsburg, J., dissenting).
[6] Wendy R. Weiser and Lawrence Norden, *Voting Law Changes in 2012* (Brennan Center for Justice at New York University School of Law 2012). *Available at*: http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf.

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As a result of the Supreme Court decision in *Shelby County*, however, the voting rights of millions of minority voters are in danger. Any doubt that Latinos, African Americans, and other groups would face disenfranchisement without Section 5 of the VRA has been laid to rest as numerous state and local governments have already begun implementing policies that would have otherwise not been allowed to take effect.

In addition to promulgating new legislation, since the decision in *Shelby County*, some states previously covered under Section 4(b) have announced their intent to enforce legislation previously blocked by the Justice Department. For example, in the lead-up to the 2012 election, the state of Texas passed the most severe and discriminatory voter ID law in the country. The law would have placed a significant burden on all voters, and in particular, racial minorities, by requiring that any person wishing to vote produce one of three types of government-issued photo identification. While a handgun license would have been an acceptable form of identification under the law, neither a college ID nor a state employee ID would have been accepted. All told, the law would have precluded 795,000 voters from participating in the election. However, Texas was covered under Section 4(b) and thus subject to pre-clearance, allowing the Justice Department to block the law's implementation and thereby preventing tens of thousands of Latino and African-American voters from being disenfranchised in the 2012 election. Immediately after the Supreme Court issued its decision in *Shelby County*, however, Texas officials announced that they would begin strictly enforcing that very law.[7]

Texas is the first example of how the striking down of the coverage formula under Section 4(b) has not only impacted the ability to use Section 5 as a tool to stop the implementation of discriminatory voting legislation, but has also eliminated the deterrent effect that it had on state and local governments. Thus, we can expect even more efforts than before to prevent underrepresented groups from exercising their right to vote.[8]

III. Conclusion

The VRA has been incredibly successful at protecting minority voters from discrimination, in large part because of the pre-clearance provision in Section 5.[9] For decades, Section 4(b) and Section 5 of the VRA have been vital to combating some of the most egregious violations of the right to vote. In large measure as a result of those sections, in most states in the South, African Americans and Whites have reached parity in voter registration. The Supreme Court's decision in *Shelby County* has now put at risk the very progress it used to justify its opinion.

Without congressional action, decades of progress in combating racial discrimination in our electoral system is now at risk. Time and again, Congress has reauthorized the VRA on a

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[7] Matt Vasilgambros, *That Was Quick: Texas Moves Forward With Voter ID Law After Supreme Court Ruling*, THE NATIONAL JOURNAL, (June 25, 2013, 12:59 PM), http://www.nationaljournal.com/politics/that-was-quick-texas-moves-forward-with-voter-id-law-after-supreme-court-ruling-20130625

[8] Myrna Perez and Vishal Agraharkar, *If Section 5 Falls: New Voting Implications* (Brennan Center for Justice at New York University School of Law 2013). *Available at*: http://www.scribd.com/doc/147170166/If-Section-5-Falls-New-Voting-Implications.

[9] *Shelby Cnty*, 113 S. Ct.. at *3 (Ginsburg, J., dissenting).

bipartisan basis – most recently in 2006. At that time, both parties worked together to thoroughly investigate the use of and need for the VRA. The two houses of Congress together held a total of 21 hearings on the VRA and received numerous investigative reports and other documentation. In total, the legislative record filled more than 15,000 pages.[10] This is an effort this Congress must reproduce in order to protect one of the most basic rights in a democracy – the right to vote.

We look forward to working with members of both parties to achieve this result. Thank you for your leadership on this crucial issue.

[10] *Id.* at *7 (Ginsburg, J., dissenting).

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Statement of

Gary R. Redding, Legal Fellow

On behalf

of the Rural Coalition

for

The United States Senate Committee on the Judiciary

For inclusion in the record in the record for the Hearing Entitled, "From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act"

Washington, D.C.
July 24, 2013

Assuring Voting Rights for Rural and Farm Communities

For forty-eight years, the Voting Rights Act has been a historic law benefitting the masses of U.S. citizens in their quest to participate equally in America's democratic political process. The current and potential threats to citizens' voting rights inform us that the Act is necessary even today. We must now modernize the Act to reflect the realities of today's political landscape. This statement provides a brief overview of past and present voting conditions and limitations in rural and farm communities, the implications of Section 2 of the Voting Rights Act in the wake of the *Shelby County, Alabama v. Holder* U.S. Supreme Court decision, and provides conclusions and recommendations for updating Section 4 of the Voting Rights Act and making the process for reporting voting rights violations more straightforward and practical.

The Voting Rights Act, a codification of the Fifteenth Amendment to the U.S. Constitution, prohibits states from requiring any "voting qualification or prerequisite to voting, or standard, practice, or procedure ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Prior to the Act's passage, non-white citizens and some poor whites in rural America had to satisfy certain preconditions before voting, such as paying a poll tax or passing an oral or written literacy test that required they demonstrate fluency in English, interpret or read the U.S. Constitution to the satisfaction of the registrar, name local or national elected officials, and more. Thanks to workers in the Civil Rights Movement and citizens particularly in rural communities, many of whom are still active in the Rural Coalition, the Voting Rights Act was enacted in 1965 and has been continually reauthorized, most recently in 2006.

Yet in 2013, many residents in rural and farm communities across America continue to face many of the voting challenges in local, state, and national elections that people in 1965 faced when the Voting Rights Act was passed. Even today, a high percentage of people remain who have difficulty acquiring information about the candidates and the issues. Factors that impede their participation include poor and oftentimes still segregated education systems that have left them unable to fully read and comprehend information about candidates and issues. Lack of access to electricity, computers, and the Internet in their homes and communities also limits their ability to follow news, watch political debates, and otherwise acquire critical information. Senior citizens, especially, still struggle to find transportation to and from voting precincts, which can sometimes be thirty or more miles away from their rural homes. Furthermore, the political process that is supposed to promote voter turnout often discourages or prevents people from voting.

In 1993, the U.S. Congress enacted the National Voter Registration Act (NVRA) to make voting more convenient and accessible by providing a NVRA form for prospective voters to register to vote, update their registration information, or register with a particular political party. In order to establish residency in a state, voting applicants are required to swear and affirm that they are a U.S. citizen.

Despite these federal provisions and protections, proponents of restrictive voting requirements at the state level have in recent times proposed numerous laws to make

voting even more difficult. Though each state differs in the particulars, the overall effect reduces voter participation. Opponents of these restrictive voting requirements and others also argue that they disproportionately target communities of color, the elderly, and youth.

Beginning on January 1, 2013, the Kansas Secure and Fair Elections (SAFE) Act required Kansas citizens registering to vote for the first time to prove their U.S. citizenship. This law poses a challenge for rural residents without a car or a ride to a certified location, like a post office, to get a government or state issued ID or the funds to pay for one. In Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming, former incarcerated citizens with certain felony convictions may be permanently deprived of the right to vote, even after they have been successfully paroled. In Florida, Hawaii, Idaho, Louisiana, Michigan, South Dakota and New Hampshire, all residents must produce a photo ID to cast a ballot. The hurdles here are similar to those who have to provide proof of citizenship to register.

In 2004, the Arizona legislature passed Proposition 200, the Arizona Taxpayer and Citizen Protection Act, to require prospective voters to present documentary proof of citizenship to register to vote and a photo identification before receiving a ballot at a precinct. In *Arizona v. The Inter Tribal Council of Arizona, Inc.*, the Supreme Court invalidated Proposition 200. The majority reasoned that it violated the NVRA, which mandates that States “accept and use” the standard federal voter registration form, and that the additional requirements would-be voters in Arizona had to satisfy were not included in the federal form. *Arizona v. The Inter Tribal Council of Arizona*, 133 S.Ct. 2247, 2252 (2013). However, the Supreme Court suggested that Arizona and other states could propose that Congress enact additional requirements for the NVRA form. *The Inter Tribal Council*, 133 S.Ct. at 2261.

In addition to such widespread attempts to weaken federal voting rights protections with new or excessive requirements and restrictions, some states are trying to nullify it altogether. *Shelby County, Alabama v. Holder* is the most recent case to come before the Supreme Court. Shelby County, a mostly white suburb of Birmingham, sought to invalidate Sections 4 and 5 of the 1965 Voting Rights Act by claiming they were being punished unfairly for decades old discrimination. Section 5 requires all or parts of sixteen states with a history of racial discrimination in voting to get federal approval before implementing changes to their voting laws. It applied to all or part of the following: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; forty counties in North Carolina, five in Florida, four in California, three in New York, two in South Dakota, as well as ten towns in New Hampshire, and two townships in Michigan. Congress chose all or parts of these sixteen states using a formula in Section 4 to identify where racially discriminatory voting practices had been more prevalent. In 2006, Congress reauthorized Sections 4 and 5 of the Voting Rights Act for another twenty-five years.

Shelby County argued that Sections 4 and 5 should be discontinued because its current political conditions are no longer racially discriminatory. The Supreme Court voted 5-4 to strike down Section 4 of the Voting Rights Act as unconstitutional. Its formula can no

longer be used as a basis for requiring certain jurisdictions to "preclear" changes to their voting laws with the federal government. Supreme Court Chief Justice John Roberts, writing for the majority, explained that Section 4's "coverage [formula] today is based on decades-old data and eradicated practices," and "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions." *Shelby Cnty., Alabama v. Holder*, 133 S.Ct. 2612, 2628, 2619 (2013). Furthermore, no holding was issued "on [Section] 5 itself, only on the coverage formula." *Id* at 2632. Conversely, Supreme Court Justice Ruth Bader Ginsburg wrote in her dissent that "the record for the 2006 reauthorization makes abundantly clear [that] second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted substitutes for the first-generation barriers that originally triggered preclearance in those jurisdictions." *Id* at 2652. Since the decision, numerous proposals have been made to replace Section 4, the most popular probably being to rely solely on Section 2 of the Voting Rights Act.

Advocates for Section 2 point out that it applies nationally, whereas Section 5 (and 4) only applies to certain covered jurisdictions. Chief Justice John Roberts writes in *Shelby*,

> Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in [Section] 2. The current version forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) , and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U.S.C. § 1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Id at 2632, 2620.

Thus, in order to protest a voting rights violation, a person has the right to injunctive relief under Section 2. However, this can only be done by filing a lawsuit through the courts, whereas under Section 4 and 5 action is taken through an administrative process through the U.S. Department of Justice.

These same advocates against revitalizing Section 4 believe that Section 2 is underutilized and provides enough protection to prevent racial discrimination in voting. Former career attorney in the Voting Section at the United States Department of Justice and House Judiciary Committee Voting Rights Act hearing witness J. Christian Adams believes "if discrimination in voting remains a problem, you would hardly know based on recent Section 2 enforcement activity. Either discrimination in voting doesn't exist anymore at levels necessary to justify federal oversight under Section 5, or the Justice Department has decided not to vigorously enforce the law." *The Voting Rights Act after the Supreme Court's Decision in Shelby County* before the U.S. House Judiciary Committee's Subcommittee on the Constitution and Civil Justice, 113th Cong. 10 (2013). Constitutional attorney and Senate Judiciary Committee Voting Rights Act hearing witness Michael Carvin contends that Section 2 "broadly and effectively precludes all actions with a discriminatory 'result'." *From Selma to Shelby County: Working Together*

to Restore the Protections of the Voting Rights Act before the U.S. Senate Judiciary Comm., 113th Cong. 6 (2013). These testimonies fail to acknowledge that litigation under Section 2 of the VRA is untimely, incredibly expensive, and lengthy.

In 2006, Justice Ginsburg explains in her dissent, "Congress received evidence that litigation under §2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after 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. An illegal scheme might be in place for several election cycles before a §2 plaintiff can gather sufficient evidence to challenge it." *Holder,* 133 S. Ct. at 2640. In addition, Justice Kennedy has pointed out that "Section 2 cases are very expensive. They are very long. They are very inefficient. I think this section 5 preclearance device has – has shown – has been shown to be very very [sic] successful." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S.Ct. 2504, 2509 (2009). Thus, we need to stop voting rights violations before they occur.

Reporting on voting rights violations poses special challenges for the estimated "46.2 million people, or 15 percent of the U.S. population, [who] reside in rural counties." Hope Yen and Hannah Dreier, Census: Rural US loses population for the first time, Yahoo News, June 13, 2013, http://news.yahoo.com/census-rural-us-loses-population-first-time-040425697.html.

The following hypothetical situation is based on a composite of actual experience encountered by our members in rural communities. It features Larry and is used to illustrate the barriers and challenges to voting faced by people who live in rural communities, and the impact on someone who is denied his rightful chance to vote.

Larry, 38 years old, married, father of ten-year-old twin boys, and a minimum wage factory worker, drives with his family twenty-five miles from his rural community to his polling place to vote. On the way, Larry stops for gas and pays $3.67 a gallon for regular unleaded gas, the current national gas average. After purchasing $25 for gas for only 6.81 gallons, the family proceeds to the polling place.

It is now 10:00 AM. Larry and his wife decide to each take a child into their respective voting booths. His wife goes into hers but before Larry can make it to his, a poll worker stops him. The poll worker tells Larry that his name is not on the voter roll. Unbeknownst to him, his name had been removed because his voter identification card was returned as undeliverable (as happened and was ruled unconstitutional in *U.S. Student Ass'n Found. et al. v. Land et al.*). Larry and his wife registered to vote last year during a door-to-door registration drive in their rural community.

Unable to vote or convince the poll worker that he is eligible to vote even though his wife was able to, Larry and his family return home, having driven fifty miles round-trip, only to have one of two votes counted for the family.

Larry and his wife sit at the kitchen table and ponder what to do. They are unaware that a Section 2 complaint is filed with the United States Department of Justice. The United States Department of Justice's website instructs people to "contact the Voting Section at Voting.Section@usdoj.gov to make a complaint concerning a voting matter." The "Voting.Section@usdoj.gov" link is an email address. Even if they were aware, they could not send the email from their home.

The rural area Larry's family lives in does not have Internet access. Why?

National private cable providers are either refusing to provide Internet service to rural areas or planning to install it one or two roads a year. Bruce Hall, the owner of Freedom Wireless Broadband, explains, "The problem is that many people live away from cable lines which could provide broadband (internet access). Comcast and Verizon can offer to build a line in order to provide broadband, but the cost to build the line to provide the service is astronomical. The broadband company would likely never recoup the costs. It costs whatever it does to build that network and (broadband providers are) not ever going to make it back in that monthly charge." Kelcie Pegher, Rural areas struggle to find internet providers, The Daily Record, February 26, 2013, http://thedailyrecord.com/2013/02/26/rural-areas-struggle-to-find-internet-providers/. Some communities have attempted to establish their own public Internet companies and have seen their efforts thwarted or complicated by cable companies working in tandem with state legislatures.

In May 2011, the North Carolina General Assembly, heavily influenced by Time Warner Cable, passed its bill entitled "An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business" that will allow "Time Warner Cable [to] build networks anywhere in the state but the public sector is limited to its political boundaries or very close to them. A public network must to [sic] price its communication services based on the cost of capital available to private providers. This means that if a city can borrow at a lower rate it cannot use this lower cost to offer a lower price." David Morris, Why is Mighty Time Warner So Scared of Tiny Salisbury, NC, Huffington Post, June 24, 2011, http://www.huffingtonpost.com/david-morris/time-warner-public-competition_b_883223.html. So, Time Warner Cable can refuse to expand its internet service to rural communities in North Carolina and these same rural communities who want to build an infrastructure themselves cannot or will be hindered by the law's geographical or rate restrictions.

A few hours later, Larry and his wife try to recall a local community citizen's organization that could possibly help but one does not exist in their community. It is now 2 PM and both have to work in the morning at the local factory, so they scratch the idea of driving to an organization in a neighboring county. Besides, it would require more gas to drive the sixty miles to reach the organization's office.

His wife suggests they call a neighbor who lives two miles away and has dial-up Internet or travel twenty-five miles to the closest library. They decide to call the neighbor and Larry is invited over. Larry sits down at the computer and the dial-up connection fails to

connect. The neighbor tells Larry to give it five or so minutes and the connection is slow. Once online, Larry doesn't know where to go.

If Larry did, he would have to go to http://www.justice.gov/ or use a search engine to find the site. Once there, he would have to first find on the homepage where the link to "submit a complaint" is under the "Department of Justice Action Center" section. Second, he would have to know to click on the link. Third, he would have to scroll down to find the "voting rights discrimination" link and know to click on it. Fourth, he would come to a page titled "How To File A Complaint" and either click on the "Voting Section" link at the top of the page or have to scroll down to the very bottom to find the "Voting" section. Fifth, Larry would read that he "can register a complaint [by sending] an email message to the Voting Section at Voting.Section@usdoj.gov." Even for a computer savvy person, successfully completing all these steps might prove to be daunting.

Let's say that Larry completed all the aforementioned steps. Larry may see the word "complaint" and believe he is unprepared to compose a formal email explaining why he was denied the right to vote. Furthermore, he may not have an email address because it hasn't made sense to have one since he does not have Internet access at home and therefore no computer.

So, Larry heads back home. It is now 5:00 PM.

Larry decides to call a local attorney to ask for assistance in filing a complaint. The attorney's office is thirty-five miles away and his law firm specializes in local civil and criminal law, not civil rights law. Despite this fact, the attorney invites Larry to his office but informs him that he will be charged $75.00 an hour for the consultation and drafting of the complaint.

Larry gives up. He also decided not to vote in the local school board election that occurred ten days later.

These are typical situations faced by our diverse rural, farm member communities in rural areas around the country.

Although Chief Justice Roberts acknowledged in *Shelby* that "voting discrimination still exists; no one doubts that," some members of Congress appear to be against working in a bipartisan effort to update the Voting Rights Act. *Holder,* 133 S. Ct. at 2620. Senate Minority Leader Mitch McConnell (R-KY) called the Voting Rights Act "an important bill that passed back in the '60s at a time when we had a very different America than we have today." Susan Davis, Congress Unlikely to act on voting rights ruling, USA Today, June 25, 2013, http://www.usatoday.com/story/news/politics/2013/06/25/congress-reacts-voting-rights-rulling/2456477/. Rep. Goodlatte (R-VA), chairman of the U.S. House Judiciary Committee, said that even though Section 4 has been ruled unconstitutional, "it's important to note that under the Supreme Court's decision in *Shelby County (v. Holder)* other very important provisions of the Voting Rights Act remain in place,

including Sections 2 and 3." Tom Curry, Conservatives not keen on effort to revise key section of Voting Rights Act, NBCNews, July 18, 2013, http://nbcpolitics.nbcnews.com/_news/2013/07/18/19540938-conservatives-not-keen-on-effort-to-revise-key-section-of-voting-rights-act?lite. Section 3 also requires judicial intervention to impose preclearance requirements on a jurisdiction that enacts discriminatory voting procedures or laws. What Sen. McConnell, Rep. Goodlatte, and others fail to consider, however, are the geographical distinctions that create different challenges for voters in urban and rural areas.

Participation in the voting process is especially critical for rural and farm communities because the lack of resources in these areas often correlates directly with lower engagement in the voting process and voter turnout. Not only do our votes need to be counted, but our children need to see us vote in person.

Conclusions and Recommendations

While Section 2 may provide tools to remedy discrimination for those with the resources to access legal assistance and the courts, it is not sufficient to prevent discrimination and other tools must be provided to assist communities such as those mentioned here.

Renewing preclearance and other administrative options that can be used in a proactive matter is essential to the protection of voting rights. Section 4 needs to be reviewed, and expanded to more areas and situations. Below are some of our recommendations and we urge the committee to seek additional input and work quickly to renew this important section of the law.

(1) **A new preclearance formula for Section 4 of the Voting Rights Act should be created by the U.S. Congress.** Chief Justice Roberts noted in *Shelby*, "Congress may draft another formula based on current conditions." We believe this formula should include new factors, including data on changes in election participation rates as compared to population by race, gender, age and ethnicity data from 2006 to the present. Review factors should include all or parts of U.S. States that have been previously required to have preclearance, or which have a persistent record of racial discrimination at the polling places. Whether rural communities have real access, including Internet access, to the voter registration system in place in a particular locality should also be a factor.

(2) **The section should mandate that citizens who believe their voting rights have been violated based on race, age or other factors, may file a petition either on paper or online, and the U.S. Department of Justice should be required to invoke preclearance based on the receipt of such petition.** This option would allow citizens to report voting rights violations and to mobilize others to sign-on so voting rights violations can be addressed immediately through an administrative process.

(3) **The U.S. Department of Justice should create an ombudsman position to solely investigate and address complaints of maladministration or voting rights violations.** A voter who believes their rights have been violated should be able to immediately call the ombudsman on election day on a toll-free number with access to a fully staffed office that is open 24-hours a day to submit voting rights complaints. This office should also be open throughout the year.

(4) **A "Voter Bill of Rights" should be created and posted in all registrars' offices and in each polling place that includes what a citizen can do if he or she is denied the right to vote.** These options should include clear information on what to do to submit provisional ballots, and on using the U.S. Department of Justice's website to file a complaint or having a phone number that can be called immediately to file a complaint. Furthermore, the U.S Department of Justice should provide a more user-friendly way for people to report voting rights violations on its website. The link to the "Voting Section" should be placed in a more prominent location and the "Voting Section" should have its own webpage within the site. On that page, it should be explained that people without Internet access can submit a complaint by calling the department.

(5) The U.S. Department of Justice should keep records of the locations from which all complaints, whether by phone, mail or electronically, and be mandated to investigate and invoke preclearance in areas where complaints exceed a set level that should be specified in the revision of the law.

The Rural Coalition, born of the civil rights and anti-poverty rural movements, has worked for 35 years to assure that diverse organizations from all regions, ethnic and racial groups and gender have the opportunity to work together on the issues that affect them all. The foundation of this work is strong local, regional and national organizations that work to assure the representation and involvement of every sector of this diverse fabric of rural peoples and communities.

I am Jim Dickson, Acting Co-Chair of the National Council on Independent Living's (NCIL) Voting Rights Working Group. I have two disabilities, I am blind and I am blunt.

The National Council on Independent Living is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals including: Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the human and civil rights of people with disabilities throughout the United States.

I have 29 years experience with election administration and nonpartisan voter registration and education issues. I am immediate past chair of the United States Election Assistance Commission's Board of Advisors. I've been privileged to be part of the disability and civil rights leadership teams which played major roles in both the drafting and passage of the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA).

NCIL is testifying to urge the Committee to adopt legislation

to restore the effectiveness of main enforcement provisions in the Voting Rights Act of 1965 (VRA). Legislation is needed because the Supreme Court's recent decision in Shelby County v. Holder, [1]. has the effect of overruling VRA requirements that States and counties with a record of racially discriminatory voting procedures must seek preclearance from the Department of Justice before changing their procedures. Experience has shown that preclearance is the most effective process in the VRA to stop discriminatory practices.

The VRA prohibits voting procedures that restrict the rights of citizens to vote on the grounds of race or color. Protecting the rights of citizens of all races to vote is a vital part of our democracy. But the VRA also plays an important role in protecting the rights of people with disabilities to vote. Many of the practices which have been stopped by the VRA preclearance procedures limit not only the voting rights of people of different races and colors, but also the rights of people with disabilities.

Many people with disabilities face special challenges in

[1] http:// supremecourt.gov/opinions/12pdf/12-96_6k47

exercising their rights to vote. They may find it difficult to get to registration sites and polling places because they are unable to drive themselves, and find public transportation challenging or unavailable. Many people with disabilities are unable to stand in line for long periods as was required in many polling places in the 2012 elections.
Voters with visual difficulties may find it difficult to read ballots and displays on voting machines.

As a result of these and other difficulties, people with disabilities vote at lower rates than other citizens. Numerous studies have shown this. Professor Douglas Kruse of Rutgers University recently concluded that this disability gap was about 12% in 2012. He has concluded that "Closing the disability gap could add 2.2 million voters in the near term, and 3.0 million voters over the longer term".[2]

Without preclearance requirements, States and counties would be likely to go forward with changes in voting practices that would make it more difficult for people with disabilities to vote, and widen the disability gap

[2] http://smlr.rutgers.edu/research-centers/disability-and-voter-turnout.

An important example is new requirements for voters to show government issued photo ID at the polls. Before the Shelby case, the Department of Justice had refused to grant preclearance to a Texas law requiring voters to show a driver's license or one of two other acceptable forms of ID. College and State employee ID were not acceptable.[3]

Photo ID requirements would be likely to reduce voting by people with disabilities. A significant number of people with disabilities are unable to drive and therefore do not have the most widely used photo ID, a driver's license. These citizens may find it difficult to learn about and obtain other photo IDs. It has been estimated that more than 11% of citizens with disabilities lack government issued photo IDs.[4]

Another type of restriction which has been blocked in VRA preclearance cases are reductions in the number of polling places, requiring voters to travel great distances to vote. These types of restrictions will limit voting by people with disabilities who may be

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[3] **STATEMENT OFWADE HENDERSON, PRESIDENT & CEO THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS,SENATE COMMITTEE ON THE JUDICIARY ,JULY 17, 2013**

[4] http://www.brennancenter.org/analysis/voter-id

unable to drive themselves and may find public transportation to far-off sites to be unavailable or difficult to use. In an extreme case, the VRA was used to block an Alaska proposal to eliminate polling places in Native American villages and require those voters to travel 33-77 miles to polling places accessible only by air or water.[5]

Fewer polling places are likely to result in longer waits standing in line to vote, which will discourage voting by many people with disabilities.

Similarly, States and counties subject to Section 5 may propose unwarranted limitations on early voting and voting by mail . These procedures are of great importance and widely used by people with disabilities.

A study by Professor Kruse's of the 2012 election found that

"People with disabilities may especially benefit from more flexible opportunities to vote, including the chance to vote before election day at a more convenient time (e.g., when accessible transportation is more

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[5] **American Civil Liberties Union Statement Submission For "The Voting Rights Act after the Supreme Court's Decision in *Shelby County*", Hearing Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution and Civil Justice, ,July 18,2013**

easily available) or to vote by mail, which may be of special value for those with mobility impairments who have difficulty getting to a polling place"

Professor Kruse found that in 2012, voters with disabilities in were more likely to vote early in a polling place or election office (42.1% did so compared to 30.4% of voters without disabilities). Similarly, voting by mail was also higher among those with disabilities: over one-fourth (28.4%) of voters with disabilities did so, compared to one-sixth (17.3%) of voters without disabilities. [6]

Limitations on early voting and voting by mail are likely to discourage a significant number of people with disabilities from voting..

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Significantly, a number of the States which were subject to VRA preclearance before the Supreme Court's decision are States in which people with disabilities have had the greatest difficulties in voting. The coverage provision which the Supreme Court overruled made 9 States subject to preclearance (Alabama, Alaska, Arizona, Georgia, Louisiana,

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[6] See study cited in note 2

Mississippi, South Carolina, Texas and Virginia) , as well as a large number of counties in North Carolina and some counties in other States. Many of the 9 covered States have high disability gaps (the gap between turnout rates for people with disabilities and those without). Ranking all the States by disability gaps with 50 being the largest gap, Professor Kruse's study found that South Carolina has the 24th highest disability gap , Georgia the 35th,Mississippi the 36th, Arizona the 42d, and Virginia the 46th.[7]

Moreover, the nine covered States include States with a high percentage of people with disabilities in their overall populations. One of the covered States, Alabama, has the second highest percentage of people with disabilities of all states, and Mississippi has the third highest percentage . Louisiana and South Carolina also have percentages considerably above the national average. [8]

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[7] Study cited in note 2.

[8] Data compiled by Cornell University from U.S. Census Bureauhttp://www.disabilitystatistics.org/reports/acs.cfm?statistic=1

In conclusion, NCIL urges reinstatement of the preclearance procedures of the VRA. These procedures are an invaluable means of preventing discriminatory changes in voting practices. Preclearance protects the right to vote, not only for racial minorities, but also for the more that 50 million of our citizens who have disabilities. As Thomas Paine and many others have said the right to vote is the foundation for all of the rights we Americans treasure.

Thank you for the opportunity to present NCIL's views to the Committee

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