

Senate Judiciary Committee Hearing
“From Selma to Shelby County:
Working Together to Restore the Protections of the Voting Rights Act”
Questions for the Record Submitted by Senator Al Franken for Justin Levitt

Question 1. In her dissenting opinion in *Shelby County*, Justice Ginsburg wrote the following:

Congress also 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.

Shelby County v. Holder, 133 S. Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting) (internal citations to Congressional Record omitted).

(a) What are your thoughts about this passage?

* * *

I agree with its characterization.

Congress passed the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 in overwhelmingly bipartisan fashion. And before Congress passed the law, it received plentiful evidence that § 2 of the Voting Rights Act—though a powerful tool—was insufficient to combat the most pernicious forms of racial and ethnic discrimination with respect to the franchise. Congress agreed then, as it had on four previous occasions, that § 2 was inadequate on its own. And though § 2 remains powerful today, it also remains, as presently constructed, inadequate on its own.

The principal limitation of § 2 is, as Justice Ginsburg noted, the fact that it authorizes only responsive litigation. While the preclearance regime was designed to stop discriminatory policies before they were ever implemented, § 2 litigation must necessarily wait for a practice to take lawful effect before it can be challenged. Indeed, a § 2 lawsuit brought to challenge an unsigned bill or potential but nonfinal policy proposal would be dismissed, correctly, as unripe.

Thus, § 2 litigation “occurs only after the fact, when the illegal voting scheme has already been put in place.”

Once a discriminatory practice has become law or local policy, successful responsive litigation requires several steps. Data sufficient to prove dilution of the vote in the totality of circumstances must be gathered; these data often include information under the jurisdiction's control that may only be gathered pursuant to public records requests or through litigation's discovery process. To the extent that the data include demographic and political information, they must be analyzed by experts, which means that an available expert must be located and retained.¹ And lawyers must be sought, which means that either the Department of Justice must be convinced to prioritize the deployment of its resources toward resolving the issue at hand or private attorneys must be found, either by raising sufficient funds or finding pro bono counsel willing and able to devote the time and resources to litigate an exceedingly complex case. (Indeed, as noted in my written testimony, the Federal Judicial Center recently determined that of 63 different forms of litigation, voting rights cases are the 6th most cumbersome: more cumbersome than an antitrust case, and nearly twice as cumbersome as a murder trial.)

There are some occasions when the local victims of discrimination can amass data, experts, and attorneys, and when a thoroughly prepared case can work its way through the courts on an expedited docket, between the time that a discriminatory practice becomes law and the next election to follow.

But often — particularly when a practice is changed shortly before an election or when the change occurs in a jurisdiction where the victims have fewer resources — it will not be possible to prepare and present a thorough case before an election is held on discriminatory terms. Sometimes the problem is simply insufficient time to amass existing data. In other circumstances, the change is sufficiently novel within the jurisdiction that victims may fear a dilution of their vote, but the impact cannot be proven to the certainty demanded by a court until after an election is held and those fears are realized.

The theoretical prospect of temporary relief for a partial case is insufficient in practice. The Supreme Court has instructed lower courts to be wary of enjoining state practices when there is “inadequate time to resolve . . . factual disputes” before an election takes place.² And given how complex responsive voting rights litigation can be, there will often be inadequate time to resolve factual disputes quickly. In those circumstances, as

¹ The availability of an appropriate expert should not be assumed. In 2012, an Alaska trial court described one of the factors contributing to some of its state redistricting body's delay:

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

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

² *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006).

Justice Ginsburg explained, litigation will only reach a practical resolution after a discriminatory rule has produced a tainted election.

* * *

(b) Can you provide examples of situations in which elections have been held before an illegal voting scheme successfully could be challenged through § 2 litigation?

* * *

Yes.

Some of these examples concern litigation to challenge a recent discriminatory change to a voting practice. Others concern litigation to challenge a longstanding rule; though these battles might not have been resolved by a preclearance procedure, they nevertheless help to demonstrate the drawn-out nature of a potential § 2 case and its inability to supply swift relief to the most pernicious discrimination.

I hasten to add that the incidents that follow are but a few recent examples. They do not purport to either canvass or represent the universe of past § 2 litigation, either in the substance of the claims or the geographic scope; they also do not purport to represent the universe of litigation that will have to be brought under § 2 in the absence of a proactive enforcement regime like preclearance. Furthermore, they also do not purport to account for the discriminatory voting practices that in fact violate § 2 but have not been challenged because the victims lack the wherewithal to mount responsive litigation. Not all of these examples would have been prevented by a preclearance procedure as it had been configured in the past, even had the jurisdiction been required to preclear its laws.³ They are indicative only of the cumbersome nature of § 2 litigation, and of the fact that in some circumstances, relief under § 2 may arrive only after intervening elections have been held under discriminatory rules.

One example is the *Black Political Task Force v. Galvin* case, involving a discriminatory redistricting plan designed to favor a particular incumbent at the expense of minority voters.⁴ The complaint was filed on June 13, 2002. After a trial, the plan was enjoined in February 2004, and a remedial plan was implemented in April 2004. The 2002 elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2004.

Another is the *Bone Shirt v. Hazelton* case,⁵ involving another discriminatory redistricting plan. The complaint was filed on December 26, 2001. After a trial, the court ruled in September 2004 that the plaintiffs had proven that the 2001 districts were unlawful. It was not until August 2005, however, that a remedial plan was imposed.

³ I have provided no examples of § 2 litigation to combat retrogressive changes within previously covered jurisdictions, because there should have been no need to file such litigation in previously covered jurisdictions: § 5 should have prevented the retrogressive practice from becoming law in the first place.

⁴ 300 F. Supp. 2d 291 (D. Mass 2004).

⁵ 336 F. Supp. 2d 976 (D.S.D. 2004).

That is, despite the fact that the complaint was filed in 2001, and the fact that plaintiffs had proven by the fall of 2004 that the 2001 districts were unlawful, both the 2002 and 2004 elections were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2006.

In my written testimony, I also urged an attention to local elections when assessing the adequacy of affirmative litigation. One example is the case of *New Rochelle Voter Defense Fund v. City of New Rochelle*,⁶ involving a discriminatory city council districting plan. The plan was adopted on April 29, 2003. A complaint was filed on May 27, 2003. Plaintiffs requested preliminary relief, but that relief was denied because the impending election was too close at hand. In December 2003, the court found for plaintiffs, and a remedial plan was imposed thereafter. The 2003 city council elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held; I believe that those new elections were first held in 2007.

Another example is the *United States v. Charleston County* case referenced in my written and oral testimony. It involved a challenge to the existing at-large election structure of a county council. The complaint was filed on January 17, 2001. Preliminary relief was sought on April 1, 2002; despite a finding that plaintiffs were ultimately *likely* to succeed, the preliminary injunction was denied, and local primaries proceeded in June. After a bench trial, another motion for preliminary relief was filed in September 2002 in advance of the general election, and again relief was denied, allowing the general election to take place. The court issued a decision in favor of plaintiffs in March 2003, with a remedial plan settled by August of that year; on appeal, the court's decision was affirmed in April 2004. Despite the fact that the complaint was filed in January 2001, the fact that both the Department of Justice and private plaintiffs were involved, and the fact that the plaintiffs convinced a court in April and May of 2002 that they were likely to *succeed* in demonstrating discrimination, the 2002 elections were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in June of 2004.

* * *

(c) Why is it significant that § 2 litigation can occur only after the fact, when the illegal voting scheme has already been put in place, whereas voting changes in jurisdictions covered by § 4 cannot go into effect until they have been approved?

* * *

Under the preclearance regime in effect up until the court's decision in *Shelby County*, discriminatory changes in election laws in any jurisdiction subject to preclearance were stopped before they could lawfully be implemented. As long as the Department of Justice or federal courts followed the law, no change for the worse in any covered area would have the opportunity to affect voters in the jurisdiction.

⁶ 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

By contrast, § 2 and other responsive litigation tools are not available to victimized voters or to the government until a new policy takes legal effect. Given the complexity and expense of a § 2 case, some discriminatory policies — particularly ones affecting local jurisdictions — will take effect without the realistic possibility that a challenge can be mustered in the near future at all. Other discriminatory policies will be challenged, but the available data may not allow plaintiffs to meet their burden of proof to show dilution under the totality of the circumstances. Still other discriminatory policies will be challenged successfully, but as indicated above, relief may be granted only after an intervening election or elections.

When elections take place under discriminatory policies, all voters in the jurisdiction are deprived of their right to a fair election on lawful terms. Moreover, candidates who win such elections receive the practical benefits of incumbency; these may continue to provide undue advantage in future elections, even once the challenged discriminatory features of the election structure have been remedied.

Furthermore, even if discriminatory electoral features are eventually remedied and minority voters are able to achieve an equal opportunity to participate in the process and elect their candidates of choice, the elections that have taken place under discriminatory conditions install winning incumbents who are empowered to make policy until new elections are held. Those policies promulgated by the winners of an election held under discriminatory terms may one day be repealed or superseded, but they are never fully remediable. This is, perhaps, the most fundamental limitation of cumbersome responsive litigation, and a reason why responsive litigation is, on its own, less equipped to address the most pernicious election-related harms than it is to address discrimination in any other realm.

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Question 2. Does Congress have constitutional authority, pursuant to § 2 of the Fifteenth Amendment, to enact legislation that outlaws voting practices that are discriminatory in effect?

* * *

In *City of Rome v. United States*, the Supreme Court reiterated that “under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.”⁷

Congress may constitutionally do so pursuant to its expressly delegated and enumerated responsibility to enforce the prohibitions and secure the guarantees of § 1 of the Fifteenth Amendment. Section 1 has been interpreted to prohibit intentional discrimination.⁸ Of course, Congress may, in the exercise of its enforcement authority under § 2 of the Fifteenth Amendment, directly prohibit and provide a cause of action to enjoin

⁷ *City of Rome v. United States*, 446 U.S. 156, 175 (1980).

⁸ *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481 (1997).

intentional discrimination. But the Court has also clearly stated that Congress may also, in the exercise of its enforcement power, remedy past discrimination, including “prohibit[ing] state action that . . . perpetuates the effects of past discrimination.”⁹ And the Court has further stated that Congress may also, in the exercise of its enforcement power, act prophylactically “to prevent and deter” intentional discrimination by prohibiting conduct that is not itself unconstitutional.¹⁰ Such Congressional action need not be confined to voting practices for which immediate proof of intentional discrimination is available.

Indeed, Congress has, in the past, determined that facts on the ground rendered it necessary and proper to outlaw voting practices that are discriminatory in effect, in order to ensure adequate remediation or prevention of the denial or abridgment of the right to vote on account of race, color, or previous condition of servitude. The Supreme Court has, without exception, upheld such legislation.¹¹

In ensuring that the exercise of its power is “sufficiently related”¹² to a present need to remedy or deter constitutional violations, Congress has not, to my knowledge, ever used its enforcement power under the Fifteenth Amendment to prohibit practices based purely on a statistical disparity. The preclearance regime of the Voting Rights Act, for example, prohibited discriminatory effects where context demonstrated past misconduct (in need of remediation) and present risk (in need of deterrence). The “results test” of § 2 of the Voting Rights Act is similarly not based purely on electoral results alone; instead, it relies on danger signs demonstrating enhanced risk of perpetuating past or present misconduct. The totality of the circumstances analysis, driven by (but not limited to) the “Senate factors” of the 1982 Senate Judiciary Committee report,¹³ perform this function.¹⁴

That is, when Congress has acted in the past to prohibit practices with a discriminatory effect, it has done so based on at least one of several different ties to the underlying substantive prohibition of the Fifteenth Amendment. Congress has outlawed voting

⁹ *Id.* at 176.

¹⁰ *Tennessee v. Lane*, 541 U.S. 509, 518-19 & n.4 (2004) (noting the existence of this power under both Fourteenth and Fifteenth Amendments); *see also* *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (addressing Fifteenth Amendment enforcement power, relying in part on Congressional ability to deter or remedy violations of the Fourteenth Amendment, even if in the process conduct is prohibited that is not itself unconstitutional).

¹¹ *See, e.g.,* *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (literacy tests).

¹² The “sufficiently related” standard reflects language in *Shelby County*. *Shelby County v. Holder*, 133 S. Ct. 2612, 2622 (2013). The Supreme Court has not yet determined whether this standard is closer to the “congruence and proportionality” standard of the Fourteenth Amendment enforcement power, *see* *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), or the “rational basis” standard previously applied to the Fifteenth Amendment enforcement power, *see* *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), or indeed, whether there is a meaningful difference between the two. *See* *Shelby County*, 133 S. Ct. at 2622 n.1; *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009). Both standards reflect that there must be some relationship between Congressional enforcement power and the underlying constitutional harm, and that Congress has substantial latitude in choosing means to confront the constitutional harm but may not change the substantive definition of that which constitutes a constitutional violation. *See* Justin Levitt, Section 5 as Simulacrum, 123 Yale L.J. Online 151, 172-73 (2013).

¹³ S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06.

¹⁴ Indeed, courts have recognized that, for these reasons, “calling section 2’s test a ‘results test’ is somewhat of a misnomer.” *United States v. Blaine County, Montana*, 363 F.3d 897, 909 (9th Cir. 2004).

practices that are discriminatory in effect based on the recognized difficulty of proving intentional discrimination, which leads to underenforcement of constitutional wrongs; based on the need to stop the perpetuation of the impact of past discrimination; based on the assessment of a contextual risk of present or future discrimination, often with reference to historical patterns; based on the unique and uniquely pernicious incentives that some incumbent policymakers may see in electoral discrimination as a means to preserve power (and a recognition that there are not similarly powerful incentives to discriminate in other arenas); or based on some combination of the above.

**QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY
“FROM SELMA TO SHELBY COUNTY: WORKING TOGETHER TO RESTORE
THE PROTECTIONS OF THE VOTING RIGHTS ACT”**

SENATE JUDICIARY COMMITTEE, JULY 17, 2013

Questions for Professor Levitt:

1. Congress failed to heed the Supreme Court’s 2009 warning that the 2006 preclearance formula might be unconstitutional on Tenth Amendment grounds. In *Shelby County*, the Court indicated that federalism concerns could render unconstitutional Section 5’s prohibition of laws that could have favored minority groups but did not do so for a discriminatory purpose, and not only those redistricting plans that actually harmed minority groups. It also commented that racial considerations that might doom a redistricting plan because of Section 2 of the Act or because of the Fourteenth Amendment are potentially required because of Section 5.

How should we take into account the Supreme Court’s warnings of potential problems with Section 5 in any legislation that we might consider?

* * *

It is first important to note that the portions of *Shelby County* cited in the question, relating to section 5, are dicta. They are not necessary to the holding of the Court — which issued a ruling on only the Section 4 formula determining *which* jurisdictions were subject to preclearance — and thus they are not statements of law binding on either Congress or the courts, including the Supreme Court itself.¹ That said, dicta from the Supreme Court are often given greater weight than dicta by other courts, and it is certainly prudent to seriously consider concerns that the Court articulates.

The first portion of the question seems to refer to the following statement in *Shelby County*: “In 2006, Congress amended § 5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose, *see* 42 U.S.C. § 1973c(c), even though we had stated that such broadening of § 5 coverage would ‘exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5’s constitutionality.’”² This statement has two components. The first is the notion that the 2006 reauthorization “exacerbates” “federalism costs.” To speak of federalism “costs,” rather than simply noting a shift in the allocation of federal-state power, implies a baseline federalism balance; I presume, therefore, that the Court views a shift of historical authority from

¹ *See, e.g.,* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1368 (2013). *See also* Judge Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1255 (2006) (“[C]ourts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding their cases. . . . Giving dictum the force of law increases the likelihood that the law we produce will be bad law.”).

² *Shelby County v. Holder*, 133 S. Ct. 2612, 2626-27 (2013) (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000)).

the state governments to the federal government (or, presumably, from the federal government to the state governments) as a “federalism cost.” If this is true, then any expansion of the preclearance regime “exacerbates” federalism costs, simply because any limitation on the authority of state governments shifts the federal-state balance from the position *ex ante*. Given the Reconstruction Amendments realignment of the federalism balance, and particularly given the Fifteenth Amendment’s express provision *to Congress* of the power to ensure no denial or abridgment of the franchise on account of race or ethnicity, the notion that a particular procedure might exacerbate federalism costs is different from the notion that a particular procedure might exacerbate federalism costs in a manner that causes constitutional concern.

With respect to that latter issue, the Court’s statement is doubly hedged. It says that the broadening of the preclearance regime increases federalism costs, “perhaps” to the extent of “raising concerns” about constitutionality.

In my eyes, the double hedging is warranted in this context. Theoretically, it is possible that Congress could someday exceed its mandate under the Fourteenth and Fifteenth Amendments with respect to the federalism balance struck by those Amendments, by implementing a procedure unrelated to remedying or preventing constitutional violations.³ And as Congress considers further legislation, it should certainly keep that limitation firmly in mind.

However, I do not believe that the identified 2006 amendment to § 5 comes close to that line. Congress did, indeed, expand preclearance protection to encompass election practices undertaken with “any discriminatory purpose” to deny or abridge the right to vote on account of race, color, or language minority status.⁴ But I am at a loss to understand how Congressional prohibition of election-related laws undertaken with such a discriminatory purpose could violate the Constitution, since election-related laws undertaken with such a discriminatory purpose directly violate both the Fourteenth and Fifteenth Amendments of the Constitution.

Before 2006, as construed by the Court, § 5’s intent prong prohibited only practices undertaken with the intent to retrogress.⁵ This meant that changes promulgated with the intent to dilute minorities’ effective exercise of the franchise would be barred by statute, just as they are barred by the constitution.⁶ So, for example, district lines designed to “crack” a minority community, and thereby intentionally reduce their electoral power on account of their race or language minority status, would be

³ I expand on this issue in further detail in my answers to Questions from Senator Franken, related to this same hearing.

⁴ 42 U.S.C. § 1973c(c). The “any discriminatory purpose” standard includes laws undertaken with discriminatory purpose that also have a discriminatory impact, and laws undertaken with discriminatory purpose where the electoral impact is more difficult to discern. It might also include laws that undertaken with discriminatory purpose where it is proven that the law does not have a tangible discriminatory electoral impact, though I am not aware of any objection (from the Department of Justice or from a court) under this standard since 2006.

⁵ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

⁶ Technically, such changes are subject to strict scrutiny — but I cannot conceive of a compelling government interest that would justify an intent to dilute minorities’ effective exercise of the franchise.

prohibited. But Congress recognized that the intent to retrogress is not the only means to achieve harm. Now, after 2006, new district lines designed to limit the electoral power of a minority group to the status quo, fracturing a rapidly growing community so as to maintain their pre-existing power but no more, would also be prohibited, if motivated by the intent to discriminate against that group based on race or language minority status. Consider a city attempting to ensure that the preferred representatives of a burgeoning Latino community could not seize majority control of the city council, and acting accordingly, based on the city leadership's concerted intent to discriminate against the Latino electorate. Such discrimination would directly offend the Constitution. And it is therefore entirely sensible that Congress would prohibit such action as an exercise of its enforcement authority.

Indeed, a change to state or local law or practice, where the nature of the change would have been different but for a discriminatory purpose, would appear to violate the Constitution no matter the electoral effects of the change. Direct and tangible electoral harm to particular victims need not result: the constitutional violation is in the process of promulgating the change, and in the message sent by a system where an impermissible purpose drives the result. That principle underlies decisions like *Shaw v. Reno*.⁷ And it clearly justifies a statute focusing on discriminatory motivation as a means to enforce the parallel constitutional command.

* * *

The second portion of your question seems to refer to the following quotation from *Shelby County*, drawn from Justice Kennedy's concurrence in *Georgia v. Ashcroft*: "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5."⁸ This is no more than a restatement of the Court's jurisprudence that decisions based predominantly on race or ethnicity must be justified by a compelling government interest. This principle, too, is important for Congress to keep in mind as it contemplates further legislation. But I also see no reason why this points to any current "problem" with Section 5, and I do not believe that it will unduly constrain Congressional action in the future.

The Court has determined that electoral decisions based predominantly on race or ethnicity must be narrowly tailored to a compelling government interest.⁹ Such decisions, when not sufficiently justified, are unconstitutional. This is what Justice Kennedy meant by "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2" of the Voting Rights Act. In the past, states and

⁷ 509 U.S. 630 (1993). A similar principle must be the theory supporting the standing of plaintiffs in cases like *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 557 U.S. 701 (2007), and *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

⁸ *Shelby County*, 133 S. Ct. at 2627 (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).

⁹ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 916, 920 (1995).¹

local jurisdictions had drawn districts based predominantly on race without adequate justification, and the courts had struck such districts down.

The consideration of race and ethnicity required by Section 5, in contrast, does have sufficient justification: it is required in order to comply with a Congressional statute passed pursuant to Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, to prevent or remedy constitutional violations. Local consideration of race to comply with a regime that Congress believes proper to prevent or deter constitutional violations is far different from local consideration of race in the context of a scheme to violate the Constitution, or even local consideration of race in the context of pursuing partisan or personal political advantage — it demonstrates proper regard for a enforcement regime established by the branch of government specifically empowered to enforce the Reconstruction Amendments of the Constitution. That may be why considerations of race or ethnicity in a redistricting plan have been “safe” under Section 5: because the considerations of race or ethnicity have been sufficiently justified. And, accordingly, in the 48-year history of Section 5, the Court has never struck down as unconstitutional a state or local consideration of race or ethnicity undertaken in proper compliance with Section 5.¹⁰

In considering potential legislation now, Congress can and should follow the model of adequate justification. If Congress does require the consideration of race or ethnicity (which may be the only effective means to ensure an absence of discrimination in jurisdictions with the electoral incentive to discriminate), it should do so pursuant to a regime properly enforcing the guarantees of the Fourteenth and Fifteenth Amendments. Congress may perform its due diligence in this regard by tying legislation to evidence supporting an ongoing need to prevent or remedy violations of the Fourteenth or Fifteenth Amendments. Such support would ensure that if a state or local jurisdiction considers race or ethnicity pursuant to Congress's command, the consideration of race or ethnicity will be sufficiently justified.

* * *

2. You mentioned some goals and aspirations in your testimony. What specific language would you propose to amend the Voting Rights Act in light of the Shelby County decision?

* * *

As implied above, I believe that it would be premature to suggest specific language before weighing the evidence gathered to support the present need to prevent or

¹⁰ Occasionally, jurisdictions have misconstrued the requirements of Section 5, and promulgated policies that were ostensibly thought to be required by the statute, but were not actually required by the statute. Some such policies have been challenged, and struck by the Court as actions undertaken predominantly based on race without sufficient justification. For these policies, however, the problem lies with the unwarranted policy itself, and not with the requirements of Section 5.

remedy violations of the Fourteenth and Fifteenth Amendments. Any specific language should arise from the accumulated corpus of evidence — including future hearings and proffered submissions from the public — and not vice versa.

That said, there are several concerns with the existing enforcement regime that Congress should further investigate; proposed statutory language can then be drawn from the results of these investigations. The concerns are particularly salient in light of the unique nature of voting rights violations. In no other arena do elected officials have incentives to discriminate that are quite as direct: discrimination with respect to other civil rights may satisfy personal prejudice or appeal as an issue to prejudiced constituents, but discrimination with respect to the franchise directly determines the composition and strength of a bloc of the electorate that may appear to threaten existing incumbent power. And in no other arena is responsive litigation as likely to be inadequate to address resulting harm.¹¹

First, the pre-*Shelby County* preclearance regime was useful in its ability to extract information about the motivations for and impact of a proposed electoral change. It was comparatively straightforward to review proposed changes, and flag troublesome instances for further follow-up, because covered jurisdictions were responsible for explaining their actions and identifying the consequences. Without an effective preclearance regime, changes may occur without adequate explanation, and without the public presentation of data regarding the impact. The victims of discriminatory practices will be forced to seek this information from their own governments. And while some of the information will be readily available through sources like the U.S. Census, other data or analysis (e.g., racial polarization studies, differential access to electoral prerequisites, differential burdens of particular changes in procedures, ostensible official motive) will be far more difficult to acquire, particularly for victims in local jurisdictions and without substantial means. Congress should investigate different options for ensuring that the information necessary to evaluate potential violations is readily available, and should draft language accordingly.

Second, the pre-*Shelby County* preclearance regime was useful in its ability to resolve disputes quickly and without substantial private expense. The vast majority of potential claims were resolved through the Department of Justice's administrative process, before intervening elections unduly deprived voters of their rights. Without an effective preclearance regime, victims will be dependent on responsive litigation. And while some of this litigation will be taken up by the Department of Justice, they are neither staffed to meet the likely need (and probably could not feasibly be staffed to meet the need), nor are they reliably able to gain relief before a proximate election. Congress should investigate different options to make responsive litigation in the voting arena better able to address the problems above, and should draft language accordingly. These investigations might include inquiry into limits on the implementation of changed practices shortly before an election, provisions to speed

¹¹ I expand on this issue in further detail in my written and oral testimony offered at the July 17 hearing, and in my answers to Questions from Senator Franken, related to this same hearing.

the pace and ease the costs of preliminary relief, or provisions to change the scale of the resources available to public enforcement bodies.

Third, there is an avenue for preclearance in effect after *Shelby County* — the Section 3 “bail-in” determination — but it relies on individual judicial determinations of intentional discrimination, after prolonged responsive litigation. As Congress recognized in 1982, even amidst ample circumstantial evidence of wrongdoing, proof of intentional discrimination is exceedingly difficult to obtain, and courts’ reluctance to brand officials as racists likely leads to underenforcement of constitutional prohibitions. Congress should investigate different options to allow courts to exercise expanded equitable authority to order preclearance in individualized instances, and should draft language accordingly. These investigations might include inquiries into the value of allowing judicial bail-in even in the absence of ironclad proof of intentional discrimination, if circumstances otherwise indicate a pronounced risk of violations in the future.

Finally, Congress should investigate the value of a resurrected preclearance regime not dependent on individualized judicial determinations, and should draft language accordingly. This preclearance regime would not depend on responsive litigation, and would therefore be aimed at preventing or remedying constitutional violations in a manner more effective than the existing enforcement regime after *Shelby County*. Investigations might include the comparative ability or inability of citizens within different jurisdictions to pursue responsive litigation, the comparative lingering effects of past discrimination in different jurisdictions, or the comparative risks of future violations, as evidenced by underlying demographic, sociological, and political data (including a history of conduct that creates enhanced risk for future concern). Any statutory language amending the application of a section 5 preclearance regime should arise out of these investigations, to ensure that the Congressional exercise of its enforcement power is sufficiently related to the remedy or prevention of constitutional violations.

* * *

3. At the hearing, I asked you for contemporary examples, post-2006, of evidence of discrimination in changes in voting laws that could justify a constitutional coverage formula for preclearance. You testified, “I think there are lots of examples that I could give you. I’d be happy to supply further examples, but I don’t know that I have the time at the moment, in counties and local jurisdictions all over the place that have practices that would not be cured by today’s laws that we desperately need Congress to supply us tools to combat.” Please supply those specific examples and their outcomes.

* * *

Below, I list some examples that I had in mind — evidence of discrimination after 2006 that would seem to support appropriate Congressional exercise of its

enforcement power. I hasten to add that these are only pieces of evidence. Not all of these pieces of evidence look to be of equal weight; some may be indications of intentional discrimination and others may not, some practices are more subtle and others more blatant. Additional context may further mitigate or exacerbate the degree to which they indicate problems in need of remedy or deterrence.

I also emphasize that these examples do not, in any way, purport to be a catalog of all election-related discrimination since 2006. They are data points based on the data readily at my disposal, drawn largely from litigation and from official records maintained by the Department of Justice. In the short amount of time available to answer these questions, I have not had the opportunity to canvass all such sources comprehensively. Furthermore, for the reasons explained above, the complexity and cost of responsive litigation mean that some acts of election-related discrimination are never challenged or resolved in the course of litigation, and will not appear on the public record even pursuant to a comprehensive search. Congress should certainly seek to determine the extent of data points well beyond the examples below, including data from individuals and entities with more extensive direct experience of election-related discrimination.

Nor do I believe that the evidence of discrimination supporting Congressional action is or should be limited to examples since the 2006 reauthorization. To be sure, there must be a current need supporting current action. But that current need is informed by past behavior as well as recent behavior. A long record of misconduct may indicate that a 2013 incident is the latest in a pattern signaling increased danger for the future; the absence of such a record may indicate that a 2013 incident is more of an anomaly. Congress need not, and should not, blind itself to context in the course of evaluating its path forward.

This context should also not be limited to specific discriminatory acts. Where there is extreme electoral polarization along racial or ethnic lines,¹² or where underlying sociocultural factors reveal abnormal racial or ethnic prejudice,¹³ there is greater danger that officials will have the incentive to engage in future discrimination. And though parity in registration or turnout does not alone reveal the absence of discriminatory effects, where there are significant disparities in registration or turnout, those disparities may supply further evidence that the impact of past discrimination lingers still.

¹² See, e.g., Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385 (2010) (discussing the extent to which voting preferences are polarized by race and ethnicity); Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205 (2013) (same).

¹³ Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County* (UC Davis Legal Studies Research Paper Series, No. 339, 2013), <http://ssrn.com/abstract=2262954> (discussing the relative extent of stereotyping of racial and ethnic minorities).

I cannot hope to compile all of this context on my own, let alone in the time provided for responding to questions generated by the July 17 hearing. In that spirit, I offer below only some specific examples of evidence responsive to the question. The examples are sorted into nine broad categories; Congress should seek additional evidence in each of the nine categories below, and beyond. The pieces of evidence below are drawn from multiple sources, and encompass only the period from July 27, 2006 — the effective date of the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 — to the present.

* * *

First, there was since 2006 at least one notable proceeding under Section 5 that proceeded entirely through the preclearance regime in the federal courts rather than through the administrative process of the Department of Justice. It arose out of Texas.

Just one month before the 2006 reauthorization of Section 5, the Supreme Court released its decision in *League of United Latin American Citizens v. Perry*.¹⁴ The case concerned Texas’s mid-decade congressional redistricting. As Justice Kennedy explained in his opinion for the Court:

District 23’s Latino voters were poised to elect their candidate of choice. They were becoming more politically active, with a marked and continuous rise in Spanish-surnamed voter registration. . . . In successive elections Latinos were voting against [incumbent Congressman] Bonilla in greater numbers, and in 2002 they almost ousted him. Webb County in particular, with a 94% Latino population, spurred the incumbent’s near defeat with dramatically increased turnout in 2002. . . . In response to the growing participation that threatened Bonilla’s incumbency, the State divided the cohesive Latino community in Webb County, moving about 100,000 Latinos to District 28, which was already a Latino opportunity district, and leaving the rest in a district where they now have little hope of electing their candidate of choice.

The changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive. . . . The District Court recognized “the long history of discrimination against Latinos and Blacks in Texas,” . . . and other courts have elaborated on this history with respect to electoral processes:

“Texas has a long, well-documented history of discrimination that has touched upon the rights of African–Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter

¹⁴ 548 U.S. 399 (2006).

registration time periods are an unfortunate part of this State's minority voting rights history. The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions.” . . .

Against this background, the Latinos' diminishing electoral support for Bonilla indicates their belief he was “unresponsive to the particularized needs of the members of the minority group.” . . . **In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.** . . . The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo.

Furthermore, the reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him. . . . The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. . . . This use of race to create the facade of a Latino district also weighs in favor of appellants' claim. . . . The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district. . . .¹⁵

On remand from the Supreme Court, the district court approved a new congressional map to remedy Texas's violation of the Voting Rights Act, and ordered a special election for November 7, 2006, with a runoff required if no candidate received a majority of the vote. District 23 went to a runoff, which Texas scheduled for December 12: the Feast of the Virgin of Guadalupe, a holy day of special significance to the Latino population of the district, and likely to interfere with Latino turnout. Moreover, early voting for the runoff election was unusually curtailed: the local election administrators attempted to start on the weekend, as permitted by statute, but were ordered by the Secretary of State and the local district attorney to delay until the weekend was over. Only after preclearance proceedings commenced were voting hours extended to allow weekend voting sufficient to allow working Latino citizens an equitable opportunity to vote in the election.

This backdrop is particularly relevant because Texas returned to redistricting just five years later. In 2011, the state drew new state legislative and congressional plans. The

¹⁵ *Id.* at 438-441 (internal citations omitted) (emphasis added).

plans were submitted for preclearance to a three-judge court of the U.S. District Court for the District of Columbia, rather than to the Department of Justice.

That court refused to grant preclearance. After a trial, the court once again found not only retrogression, but intentional discrimination, including many of the same elements present in *LULAC* and, indeed, throughout Texas's history. The court found, again, the use of race to create the mere façade of districts affording Latinos an equitable ability to elect candidates of choice, in the same district challenged in *LULAC*: "The mapdrawers consciously replaced many of the district's active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of CD 23's Anglo citizens. In other words, they sought to reduce Hispanic voters' ability to elect without making it look like anything in CD 23 had changed. . . . We also received an abundance of evidence that Texas, in fact, followed this course by using various techniques to maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness."¹⁶ Nor was this the only such example. Referring to the state House plan, the court found: "The record shows that the mapdrawers purposely drew HD 117 to keep the number of active Hispanic voters low so that the district would only appear to maintain its Hispanic voting strength, and that they succeeded. . . . These incidents illustrate Texas's overall approach in HD 117: Texas tried to draw a district that would look Hispanic, but perform for Anglos. According to the experts, that was the result achieved."¹⁷ The court also concluded that the "economic engines" and official district offices were removed from districts where minorities have the ability to elect candidates of choice, and that "[n]o such surgery was performed on the districts of Anglo incumbents."¹⁸

These and other findings led the court to conclude that the congressional and state Senate maps were enacted with discriminatory intent (it noted "record evidence that causes concern" for the state House maps, but did not ultimately reach the question).¹⁹ Indeed, the court specifically noted that "[t]he parties have provided more evidence of discriminatory intent than we have space, or need, to address here."²⁰

* * *

¹⁶ *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (internal citations omitted), *vacated by* 133 S.Ct. 2885 (2013). Though the conclusions of the preclearance court have been vacated by the Supreme Court's decision in *Shelby County*, the underlying facts are still very much relevant to Congress's deliberations.

¹⁷ *Id.* at 171-72.

¹⁸ *See id.* at 160.

¹⁹ *See id.* at 159 ("[W]e agree that the [congressional] plan was enacted with discriminatory purpose. . . ."); *id.* at 161 ("[W]e are also persuaded by the totality of the evidence that the plan was enacted with discriminatory intent."); *id.* at 162 ("[W]e conclude that the Texas legislature redrew the boundaries for SD 10 with discriminatory intent."); *id.* at 177-78 ("Because of the retrogressive effect of the State House Plan on minority voters, we do not reach whether the Plan was drawn with discriminatory purpose. But we note record evidence that causes concern. . . . This and other record evidence may support a finding of discriminatory purpose in enacting the State House Plan. Although we need not reach this issue, at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental.").

²⁰ *Id.* at 161 n.32.

Second, in the period from July 27, 2006, through *Shelby County*, the Department of Justice offered at least 27 objections under section 5 that were not later withdrawn, and for which preclearance or its equivalent was not later granted by a court.²¹ These 27 objections meant that on at least 27 specific occasions after July 27, 2006, jurisdictions with a history of discriminatory practices failed to show that an election-related change was not put forth with discriminatory intent and that it would not have a retrogressive effect. These examples include:

- A 2006 change in the voting residence of the incumbent African-American chair of the Randolph County, Georgia, Board of Education (#2006-3856). The chair's property straddled district lines. He had long represented district 5, where more than 70% of the voters were African-Americans; despite the fact that the County had represented that he was an eligible voter of district 5 and that a superior court judge had later confirmed his legal residence, the all-white county board of registrars determined — without notice to the chair, and for tenuous reasons — that he was instead a resident of district 4, where more than 70% of the voters were white. One prior objection had been lodged against a change in Randolph County (and another objection had been lodged against a change by a jurisdiction within Randolph County).
- A change in the method of filling a vacancy for a County Commissioner seat, serving from 2006-2008, in Mobile County, Alabama (#2006-6792). The change would have moved from election to gubernatorial appointment, for districted seats that were themselves established by Voting Rights Act litigation. More than 63% of the registered voters in the district in question were African-American; the Governor answered to a much different constituency. Three prior objections had been lodged against changes in Mobile County (and three additional objections had been lodged against changes by jurisdictions within Mobile County).
- A 2007 change in the City Council elections of Fayetteville, North Carolina, from nine districted elections to six districts and three at-large seats, and a change in the configuration of the six remaining districts (#2007-2233). In a racially polarized community, African-Americans constituted about 44% of the electorate; they had shown a consistent ability to elect four candidates of choice in the prior configuration, but would likely have the ability to elect only three candidates of choice after the change. One prior objection had been lodged against a change in Fayetteville.
- A 2007 attempt to close the only Secretary of State branch office in a majority-minority township of Saginaw County, Michigan (#2007-3837). The branch office accounted for nearly 80% of voter registration in Buena Vista Township, and was the only location in Buena Vista to obtain photo identification cards in order to comply with Michigan's state law.

²¹ The following information with respect to objections is drawn from the collection of objections maintained by the Lawyers' Committee for Civil Rights Under Law, at http://www.lawyerscommittee.org/projects/section_5.

- A 2007 change in the number of County Commissioners in Charles Mix County, South Dakota, from three to five (#2007-6012). Native Americans had the ability to elect their candidate of choice in one of the three prior districts, but would have a reasonable ability to elect a candidate of choice in only one of the five new districts, diluting their voice on the county commission. The change was made immediately after the first election of a Native American to the County Commission.²²
- A 2007 change to the qualifications necessary to run for water district supervisor in Texas, requiring supervisors to own land in the district (#2007-5032). In addition to general disparities in land ownership, several existing Hispanic supervisors did not own land in their districts. 20 prior objections had been lodged against changes by the state of Texas (and 177 additional objections not included in this list had been lodged against changes by local Texas jurisdictions).
- A change over several election cycles to the procedures for supplying language assistance in Gonzales County, Texas, where a significant portion of the Hispanic voting-age citizens have limited English proficiency (#2008-3588). The county decreased its bilingual assistance at the polls despite a growth in the Hispanic electorate, and stopped providing many election notices in Spanish; election notices that were provided in Spanish had numerous errors and omissions. One prior objection had been lodged against a change in Gonzales County (and one additional objection had been lodged against a change by a jurisdiction within Gonzales County).
- A 2008 change to Louisiana procedures prohibiting changes in precinct boundaries (#2008-3512). Previous procedures would have frozen precinct boundaries in anticipation of the Census from January 1, 2009, through December 31, 2010; the new procedures would have kept boundaries frozen through December 31, 2013, without any opportunity to adjust precinct boundaries to provide flexibility for redistricting bodies using precincts as the building blocks for districts, including where required by federal law. 21 prior objections had been lodged against changes by the state of Louisiana (and 125 prior objections not included in this list had been lodged against changes by local Louisiana jurisdictions).
- A 2008 redistricting plan for the City of Calera, in Shelby County, Alabama, following on the heels of 177 annexations that had not been submitted for preclearance (#2008-1621). The proposed plan would have eliminated the sole district providing an opportunity for African-Americans to elect candidates of choice: the district was established as the result of a consent decree issued in litigation under the Voting Rights Act, and the plan to eliminate the district was proposed the year after the consent decree was dissolved. Despite the objection, the city unlawfully proceeded with elections under the new plan; the sole African-American member of the City Council

²² This objection was made pursuant to a consent decree obligating Charles Mix County to submit changes for preclearance under section 3(c) of the Voting Rights Act.

was defeated. The DOJ had to bring a separate legal action to prevent the winners of that unlawful election from taking office. A new plan was developed and precleared, allowing voting to proceed at-large using a limited voting method, which would give minority voters the ability to elect a candidate of choice even in the at-large structure.

- A 2009 redistricting plan for County Commission in Lowndes County, Georgia, adding two floterial districts to the three-district commission (#2009-1965). African-Americans had the ability to elect their candidate of choice in one of the three prior districts, but would have a reasonable ability to elect a candidate of choice in only one of the five new districts, diluting their voice on the county commission.
- A 2009 change for county boards of education and municipal school districts in Mississippi, from plurality-win elections to majority-win elections (#2009-2022). 24 prior objections had been lodged against changes by the state of Mississippi (and 145 prior objections not included in this list had been lodged against changes by local Mississippi jurisdictions).
- A change over several election cycles to the procedures for supplying language assistance in Runnels County, Texas, where a significant portion of the Hispanic voting-age citizens have limited English proficiency (#2009-3672). The county decreased its bilingual assistance at the polls despite a growth in the Hispanic electorate and rejected offers of qualified help; there is no testing of the assistance that is provided, and at least one of the individuals asserted to be bilingual was not proficient in Spanish.
- A 2010 appointment of two trustees for the Fairfield County School District, South Carolina, adding to (and diluting the authority of) the existing seven districted trustee positions (#2010-0971). More than 55% of the voting-age population of the county is African-American, but the ad hoc appointment — for a single twelve-year term — would be made by the two existing members of the county’s legislative delegation, neither of whom was the candidate of choice of the African-American community.
- A 2011 redistricting plan for East Feliciana Parish, Louisiana (#2011-2055). In a jurisdiction where African-Americans constituted about 44% of the voting-age population, and had the ability to elect candidates of choice in 4 of the 9 districts for the parish’s governing body, the new plan responded to an increase in African-American registration in one of the four districts by redrawing the district in a way that added a substantially white area and deprived African-Americans of their practical ability to elect candidates of choice. Though the proffered explanation for the change was to increase population equality, the substantial population inequalities produced by the plan suggested pretext. Three prior objections had been lodged against changes by East Feliciana Parish.
- A 2011 redistricting plan for the Board of Supervisors of Amite County, Mississippi (#2011-1660). African-Americans constituted about 40% of the

voting-age population, and had the ability to elect candidates of choice in 2 of the 5 supervisor districts. Faced with an increasing likelihood that African-Americans would actually elect their candidate of choice in one of these districts, the new plan shifted electoral power to deprive the African-American community of their practical ability to elect a candidate of choice in the district in question. Three prior objections had been lodged against changes by Amite County (and one additional objection had been lodged against a change by a jurisdiction within Amite County).

- A 2011 South Carolina law prohibiting eligible voters from casting a valid ballot without particular forms of photo identification (#2011-2495). Minority voters were disproportionately likely to not have a satisfactory type of ID, and to have difficulty procuring the required identification. In follow-on litigation, the procedures were clarified to ensure that voters with a broad range of reasonable impediments to obtaining identification would not be precluded from casting valid ballots; the clarification, amounting to a change in the promulgated policy, was produced largely as a result of the preclearance process. 11 prior objections had been lodged against changes by the state of South Carolina (and 109 prior objections not included in this list had been lodged against changes by local South Carolina jurisdictions).
- A 2011 redistricting plan for the Commissions Court of Nueces County, Texas (#2011-3992). Hispanic citizens had an ability to elect candidates of choice in three districts and the Hispanic population of the county was growing; however, after a narrow victory by an Anglo candidate to provide a majority of the seats on the governing body, the ensuing redistricting was conducted in a manner excluding the Hispanic community, and diminishing the ability of Hispanic citizens to elect their candidate of choice in the narrowly contested district. A new plan was submitted in 2012, and precleared. One prior objection had been lodged against a change by Nueces County (and one additional objection had been lodged against a change by a jurisdiction within Nueces County).
- A 2011 redistricting plan for the Commissioners Court of Galveston County, Texas (#2011-4317). Minority voters had the ability to elect a candidate of choice in one district. Without informing the commissioner for that district in advance of the change, a new map was proposed with changes likely to eliminate the minority voters' ability to elect candidates of choice; an area that had been overwhelmingly Anglo was newly included in the relevant district, with Anglo voters expected to return in the wake of Hurricane Ike and exercise control of the district. A new plan was submitted in 2012, and precleared.
- A 2011 reduction in the number of justices of the peace and constables, and a redistricting plan for those districts, in Galveston County, Texas (#2011-4374). Minority voters had the ability to elect candidates of choice in three of eight justice of the peace districts, in part because of previous Voting Rights Act litigation; in the first redistricting following the release of jurisdiction

under that litigation, the proposed plan provided minority voters with an ability to elect candidates of choice in only one of five districts. Only the precincts where minority voters had the ability to elect candidates of choice were consolidated under the new plan. One prior objection (not including the objection above) had been lodged against a change by Galveston County (and four prior objections had been lodged against changes by jurisdictions within Galveston County).

- A 2011 Texas law implementing a requirement that eligible voters without a particular form of photo ID would not be permitted to cast a valid ballot (#2011-2775). Minority voters were disproportionately likely to not have a satisfactory type of ID, and to have difficulty procuring the required identification, particularly given the relative incidence of minority voters without ID in counties without any operational driver's license offices (resulting in, for some voters, the need to travel 176 miles round-trip — without a driver's license — in order to arrive at an operational office within business hours to get the required identification). In follow-on litigation, a three-judge trial court confirmed that Texas had failed to show that the new law would not have a discriminatory impact. As mentioned above, 20 prior objections not included in this list had been lodged against changes by the state of Texas (and 177 additional objections not included in this list had been lodged against changes by local Texas jurisdictions).
- A 2011 redistricting plan for the City of Natchez, Mississippi (#2011-5368). The new plan marked the third time in a row that the city had redrawn a particular ward, with growing African-American population, to limit the African-American electorate to just below a majority of the district. The city maintained that the change was necessary to support the African-American populations of other wards — including a ward drawn to pack the African-American voting-age population at 97.5%. One prior objection had been lodged against a change by Natchez.
- A 2011 redistricting plan for the Board of Commissioners and Board of Education in Greene County, Georgia (#2011-4687, 2011-4779). African-American voters had the ability to elect candidates of choice in two of the five seats (four of which were districted and one of which is elected at-large). The proposed plan unnecessarily eliminated the minority voters' ability to elect in both of those districts.
- A 2011 change in the school board election structure for the Pitt County School District, North Carolina, over the objections of the local board (#2011-2474). The change effectively added an at-large seat to the school district, diluting the voice of minority voters able to elect a candidate of choice to one of the six districted seats on the board. One prior objection had been lodged against a change by the Pitt County School District; an additional suit had also been brought under section 2 of the Voting Rights Act to challenge an earlier at-large district.

- A 2012 redistricting plan for the Board of Commissioners and Board of Education in Long County, Georgia (#2012-2733, 2012-2734). The existing five-district plan was established as the result of litigation under the Voting Rights Act. The proposed plan decreased the ability of the significant and growing African-American population to elect a candidate of choice. One prior objection had been lodged against a change by the Long County.
- A 2012 redistricting plan for the City of Clinton, Mississippi (#2012-3120). Despite the fact that the African-American population has doubled in the past two decades, with African-Americans now comprising 31% of the voting-age population, the city's new district plan continued to fragment minority communities so that none of the six districted aldermen's wards provide minority voters with an opportunity to elect candidates of choice. The city's claim that it would not be possible to draw a ward in which minority voters had the ability to elect candidates of choice appeared to be false, and easily disproved.
- A 2012 change to the date of the mayoral and commissioner elections in Augusta-Richmond, Georgia, from November to July of even-numbered years (#2012-3262). Voting is racially polarized, and African-American turnout is disproportionately less in July; the state executed the change, over the objections of the local board, just after African-Americans became a majority of the voting-age population. The proffered reasons for the change were not actually accomplished by the change, and appear pretextual. A similar attempt to schedule elections in Augusta and Richmond for July was previously rejected under section 5 of the Voting Rights Act. 19 prior objections not included in this list had been lodged against changes by the state of Georgia (and 152 additional objections not included in this list had been lodged against changes by local Georgia jurisdictions).
- A 2012 proposal to covert two of the seven districted trustee seats for the Beaumont Independent School District, Texas, to at-large elections (#2012-4278). The seven seats were originally implemented as a result of federal voting rights litigation; the proposal would have reverted to the system challenged in that litigation, and in a district of significant racial polarization, would have reduced African-American voters' ability to elect candidates of choice from four of the seven trustee seats to three. One previous objection had been lodged against the Beaumont Independent School District.
- A 2013 series of changes to the Beaumont Independent School District, Texas, "with the effect that in three districts that provide black voters with the ability to elect candidates of choice, the black-preferred incumbent trustees would be removed from their offices and replaced with the candidates they defeated in the last election (and who received virtually no support from black voters), without the incumbent trustees in those three districts having had

notice that an election would be held in their districts or the opportunity to qualify for re-election.” (#2013-895).²³

* * *

Third, in the period after July 27, 2006, there were several suits brought to enjoin election changes that should have been precleared but were not submitted for preclearance; court orders often led to interim relief preventing significant opportunity for dilution. These suits are difficult to identify, and what follows does not purport to be a comprehensive list. But examples include:

- A suit brought in 2008 to enjoin Waller County, Texas, from implementing new voter registration procedures that had not been submitted for preclearance.²⁴ There was a troublesome history of election-related difficulty in Waller County directed at Prairie View A&M, a “historically black university.” The new changes included restrictions on individuals assisting others with voter registration, and new rejections of registration applications for reasons including the absence of a ZIP code and the failure to use the most recent version of a registration form. The vast majority of forms rejected were from Prairie View A&M students. A consent decree reinstated voters whose applications were rejected for immaterial reasons, and expanded opportunities for voter registration.
- A suit brought in 2012 to enjoin municipal elections in Evergreen, Alabama, under a new five-seat redistricting plan that had not been submitted for preclearance.²⁵ While more than 62% of the population is African-American, the proposed plan would “pack” African-American voters into two districts with African-American population greater than 86% in each. The city also excluded register voters who were not billed by the municipal utility system from the list of voters eligible for the municipal election (again, without preclearance). An interim remedial and non-dilutive plan was adopted for a special election in 2013.

* * *

Fourth, Department of Justice records indicate that, after July 27, 2006, at least 25 changes to election laws (in addition to those above) in covered jurisdictions were withdrawn after the DOJ requested more information. This list is drawn from investigation of Notices of Preclearance Activity on the DOJ’s website;²⁶ there are

²³ Objection letter from Thomas E. Perez, Asst. Att’y Gen., U.S. Dep’t of Justice, to Melody Thomas Chappell, Esq., April 8, 2013, at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_040813.pdf.

²⁴ *United States v. Waller County, Tex.*, No. 4:08-cv-03022 (S.D. Tex. 2008).

²⁵ *Allen v. City of Evergreen, Ala.*, 2013 WL 1163886, No. 13-cv-00107 (S.D. Ala. 2013).

²⁶ See U.S. Dep’t of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, <http://www.justice.gov/crt/about/vot/notices/noticepg.php>; U.S. Dep’t of Justice, Archive of Notices of preclearance activity under the Voting Rights Act of 1965, as amended, <http://www.justice.gov/crt/about/vot/notices/votarch.php>.

known errors and omissions in these notices, and as a result, it is likely that the 25 noted changes underrepresent the true number of changes withdrawn after requests for more information. (In the same period, there were at least 220 additional withdrawn submissions; some of these may have been in response to requests for more information that were not noted on the DOJ's website.) Changes to election procedures may be withdrawn by submitting jurisdictions at any time for any reason. However, requests for more information may also flag changes more likely to draw a formal objection, and withdrawals in the face of such requests may represent discriminatory changes deterred by a preclearance regime.

I am not aware of further information concerning such submissions that is available in the absence of a public records request; I would not have been able to receive the results of such a request before offering this response to questions for the record of the July 17 hearing. I do suggest that the Committee further investigate these and other withdrawn submissions, to see whether they reveal likely discrimination. The changes withdrawn after requests for more information include:

- Bilingual procedures adopted for the Springlake-Earth Independent School District, Texas (#2007-2807).
- Bilingual procedures adopted for Alaska (#2008-1726).
- A redistricting plan for Foley, Alabama (#2008-2327).
- A redistricting plan and precinct realignment for the Edwards Aquifer Authority, Texas (#2008-2646).
- A redistricting plan for the Warren County School District, Georgia (#2008-2885).
- A redistricting plan and change to the voting method of the Edwards Aquifer Authority, Texas (#2008-4709).
- An annexation and redistricting for Gretna, Louisiana (#2008-5848).
- Several changes to the terms of office and recall procedures for Arizona (#2009-2458).
- A change to the requirements for submitting referenda in Louisiana (#2009-2690).
- A change to the number of officials, method of election, and redistricting plan for Telfair County, Georgia (#2009-3258).
- Several changes to the method of election, term of office, and nominating procedures for officials in Arizona (#2010-2512).
- A change to the ballot format of Monroe County, Florida (#2010-2867).
- A change to the location of a polling place in Lowndes County, Georgia (#2010-2884).
- A change to absentee voting procedures in Arizona (#2011-1619).

- A redistricting plan and precinct alignment for the Board of Supervisors of Cumberland County, Virginia (#2011-1770).
- A redistricting plan for the Cumberland County School District, Virginia (#2011-1874).
- A change to absentee voting procedures and the administration of elections in Arizona (#2011-2283).
- A redistricting plan and precinct alignment for Marlin, Texas (#2011-3394).
- A change in the form of government, including the number of officials and a redistricting plan for Decatur, Alabama (#2011-4375).
- A change in the method of election and a redistricting plan for Decatur City School District, Alabama (#2011-4690).
- A change in the method of election and the number of officials, and a redistricting plan for those officials, in the Sumter County School District, Georgia (#2011-3249, 2011-4261).
- A change to the location of a polling place in Gonzales County, Texas (#2011-5346).
- A change to voter registration procedures in Alabama (#2011-5037).
- A change to voter qualifications in Alabama (#2012-5304).

* * *

Fifth, there have been several lawsuits in the period since July 27, 2006, successfully challenging election procedures under section 2 of the Voting Rights Act. These show a denial or abridgment of the right to vote on account of race, color, or language minority status; in the totality of circumstances, members of a minority group were denied an equal opportunity to participate in the political process and elect representatives of their choice. Some of them reflect new changes in law or practice; others reflect existing structures newly challenged. I have not had the opportunity to compile a list of all such successful cases (not all of which result in published decisions), and what follows does not purport to be a comprehensive list. But examples include:

- A suit brought in December 2006 against the at-large structure used to elect the six Trustees of the Village of Port Chester, New York. Though Hispanics constituted about 28% of the citizen voting-age population, no Hispanic candidate had ever been elected as a Trustee, in part because voting is racially polarized. After recounting a history of some discrimination against Hispanics, a federal court found for plaintiffs, and approved the village's proposed cumulative voting system as a means to remedy the violation. In the next election, a Hispanic candidate was elected as a Trustee for the first time.

- A judgment in 2007 against the at-large structure of two of the nine seats for the city council of Tupelo, Mississippi; the other seven seats were districted.²⁷ Voting in Tupelo is racially polarized. A federal court found for plaintiffs, which I believe led to the elimination of the two at-large seats.
- A judgment in 2007 against the structure of the Euclid, Ohio, City Council, which elected four members from districted seats and five at-large.²⁸ Evidence showed both a history of discrimination and substantial “racial divisiveness,” including responses to general surveys about issues of concern to voters that featured “complaints, of varying invective, about the growing African–American population”; a council member had introduced legislation by noting that it was “an opportunity to do something that could attract individuals, young yuppies, white people that the City wants to bring in here.”²⁹ A 2006 mid-decade redistricting reduced the African-American percentage of the voting-age population in the ward with the highest concentration of African-American voters; despite the fact that 30% of the city’s population was African-American, no African-American candidate had ever been elected to the city council, in part because voting is racially polarized. A federal court found for plaintiffs, leading to the imposition of eight districted seats with one president elected at-large. In the next election, an African-American candidate was elected to the city council for the first time in the city’s history.
- A suit brought in 2007 against the at-large structure of the eight seats of the Irving, Texas, city council.³⁰ Despite a sizable Hispanic population, only one Hispanic candidate had ever been elected to a city council seat, in part because voting is racially polarized. (The single successful candidate, James Dickens, “did not have a Spanish surname and did not publicly acknowledge his Hispanic background until after the election.”)³¹ A federal court found for plaintiffs, leading to the imposition of six districted and two at-large seats.
- A suit brought in 2008 against the at-large structure of the Euclid City School Board, Ohio.³² Though African-Americans constituted about 40% of the voting-age population, no African-American had ever been elected to the school board, in part because voting is racially polarized. The city stipulated to liability, and a federal court implemented a limited-voting system designed to address the dilution of the African-American vote.

²⁷ *Jamison v. Tupelo, Miss.*, 471 F. Supp. 2d 706 (N.D. Miss. 2007).

²⁸ *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

²⁹ *Id.* at 600, 601 n.22.

³⁰ *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709 (N.D. Tex. 2009). A different federal court determined that a similar suit against the Irving Independent School District did not show sufficient evidence of threshold minority population size to proceed with a Section 2 claim. *See Benavidez v. Irving Ind. Sch. Dist.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010).

³¹ *Benavidez*, 638 F. Supp. 2d at 727.

³² *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009).

- A suit brought in 2008 against the at-large structure of the nine seats of the Georgetown County School District, South Carolina.³³ African-Americans constituted about 34% of the voting-age population. The litigation prompted a consent decree, yielding seven districted seats (three of which offered African-Americans an opportunity to elect candidates of choice) and two at-large seats.
- A suit brought in 2008 against the district plan for the school board of Osceola County, Florida.³⁴ The Department of Justice had prevailed in a Section 2 lawsuit against Osceola County's Board of County Commissioners two years earlier. The school board then moved from an at-large to a single-district structure, but despite the fact that Hispanic citizens constituted 34% of the registered voters in Osceola County, none of the school board's five districts offered an equitable opportunity for Hispanic voters to elect candidates of choice. No Hispanic candidate had ever been elected to the school board, in part because voting is racially polarized. Pursuant to a consent decree, the school board redrew its district plan to create a district in which Hispanic citizens had the opportunity to elect a candidate of choice.
- A suit brought in 2009 against the at-large structure for electing the mayor and four commissioners for the Town of Lake Park, Florida.³⁵ Though African-Americans constituted about 38% of the citizen voting-age population, no African-American candidate had ever been elected to a commission seat, in part because voting is racially polarized. Pursuant to a consent decree, the town adopted a limited voting system intended to give the African-American community an equal opportunity to elect candidates of choice.
- A suit brought in 2010 against the at-large structure of the Farmers Branch, Texas, city council.³⁶ Though Hispanics constituted about 24% of the citizen voting-age population, no Hispanic candidate had ever been elected as mayor or to one of the five city council seats under the at-large system, in part because voting is racially polarized. A federal court found for plaintiffs, leading to the imposition of districts — and to the election of the first Hispanic city council member.
- A suit brought in 2011 challenging new redistricting plans for the Wisconsin state legislature.³⁷ A federal court found that two state Assembly districts drawn in the Milwaukee area “cracked” the Latino population, diluting their ability to elect candidates of choice.
- A suit brought in 2011 against the at-large structure of the Fayette County Board of Commissioners and the Fayette County Board of Education, in

³³ Consent Decree, *United States v. Georgetown County School District*, No. 2:08-cv-00889 (D.S.C. Mar. 21, 2008).

³⁴ Consent Judgment and Decree, *United States v. Sch. Bd. of Osceola County*, No. 6:08-cv-00582 (M.D. Fla. Apr. 23, 2008).

³⁵ Consent Judgment and Decree, *United States v. Town of Lake Park*, No. 9:09-cv-80507 (S.D. Fla. Oct. 26, 2009).

³⁶ *Fabela v. City of Farmers Branch, Tex.*, 2012 WL 3135545, No. 3:10-cv-01425 (N.D. Tex. 2012).

³⁷ *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 854-58 (E.D. Wis. 2012).

Georgia.³⁸ Though African-Americans constitute about 20% of the citizen voting-age population, no African-American candidate had ever been elected to either board, in part because voting is racially polarized. The court found that the Board of Commissioners “is not politically responsive to African-American voters,” whose votes were diluted under the totality of the circumstances.³⁹ Remedial proceedings are pending.

- A suit brought in 2012 against inequitable early voting availability in Shannon County, South Dakota, which is entirely within the boundaries of the Pine Ridge Indian Reservation.⁴⁰ Early voting is statutorily required for 46 days before election day; in most counties, voters are able to use early voting at their county courthouse, but officials planned to make early voting available within Shannon County (which has no courthouse) for only six days. On all other days, Shannon County citizens would have to travel to Fall River County, which is up to 2 hours and 45 minutes away, in order to vote. After the suit was brought, the state committed to a full period of voting in Shannon County.

* * *

Sixth, there have been several lawsuits or other proceedings in the period since July 27, 2006, successfully resolving challenges to election procedures under language minority provisions of the Voting Rights Act.⁴¹ These sections ensure, *inter alia*, adequate access to intelligible election-related materials for significant populations of citizens who speak other languages but have limited English proficiency; often, and particular for older Americans, the limited English proficiency can be traced to a history of discriminatory educational opportunities. The sections also ensure that individuals in need of language assistance can bring trusted individuals with them to the polls to translate ballot materials. As above, some of the actions below reflect challenges to new changes in laws or practices; others reflect existing structures newly challenged. I have not been able to compile a list of all such successful cases (not all of which result in published decisions), and what follows does not purport to be a comprehensive list. But examples include:

- A judgment in the fall of 2006 against Cochise County, Arizona, based on the failure to provide sufficient translation and language assistance to Spanish-speaking citizens.⁴² The county entered into a consent decree requiring, *inter alia*, the provision of translated materials and expanded access to language assistance.

³⁸ Order, *Ga. State Conference of the NAACP v. Fayette County Bd. of Comm’rs*, __ F. Supp. 2d __, 2013 WL 2948147 (N.D. Ga. May 21, 2013).

³⁹ *Id.* at *25.

⁴⁰ Order, *Brooks v. Gant*, 2012 WL 4748071, No. 5:12-cv-05003 (D.S.D. Oct. 4, 2012).

⁴¹ When the Department of Justice brings such actions, a consent decree or other settlement often follows in short order. I do not know whether private plaintiffs’ experience is similar.

⁴² Consent Decree, Order and Judgment, *United States v. Cochise County*, No. 06-cv-00304 (D. Ariz. Oct. 12, 2006).

- A suit brought in the fall of 2006 against Philadelphia, for failure to provide sufficient language assistance to Spanish-speaking citizens.⁴³ Philadelphia disputed the allegations, but after the suit was filed, Philadelphia established a plan to increase Spanish-language support for the proximate election; a settlement agreement later provided further extensive enhancements to the language assistance program.
- A suit brought in the fall of 2006 against the City of Springfield, Massachusetts, for failure to provide sufficient language assistance to Spanish-speaking citizens.⁴⁴ The city disputed the allegations, but the parties entered an agreement requiring, inter alia, expanded access to translated materials and translators.
- A judgment in 2007 against Cibola County, New Mexico, stemming from a suit filed in 1993 concerning election practices adversely affecting Native Americans who primarily speak Keresan and Navajo.⁴⁵ Despite Department of Justice observation, the county conceded that they remained “in violation of the VRA and the Court’s decree,” 14 years later. The County additionally failed to process complete and timely voter registrations and failed to provide adequate provisional ballot envelopes, disenfranchising dozens of individuals, most of whom cast ballots on American Indian reservations.
- A suit brought in 2007 against Galveston County, Texas, for failure to provide sufficient language assistance to Spanish-speaking citizens.⁴⁶ The county entered into a consent decree requiring, inter alia, expanded access to translated materials and translators.
- A suit brought in 2007 against the City of Earth, Texas, for failure to translate appropriate materials into Spanish.⁴⁷ The district entered into a consent decree requiring, inter alia, expanded access to translated materials and translators.
- A suit brought in 2007 against the Littlefield Independent School District, in Texas, for failure to translate appropriate materials into Spanish.⁴⁸ The district entered into a consent decree requiring, inter alia, expanded access to translated materials and translators.

⁴³ Settlement Agreement, *United States v. Philadelphia*, No. 2:06-cv-04592 (E.D. Pa. Apr. 26, 2007).

⁴⁴ Revised Agreed Settlement Order, *United States v. Springfield*, No. 3:06-cv-30123 (D. Mass. Sept. 15, 2006).

⁴⁵ Second Order Extending and Modifying Stipulation and Order Originally Entered April 21, 1994, *United States v. Cibola County*, No. 1:93-cv-01134 (D.N.M. Mar. 19, 2007).

⁴⁶ Consent Decree, Judgment, and Order, *United States v. Galveston County*, No. 3:07-cv-00377 (S.D. Tex. July 20, 2007).

⁴⁷ Consent Decree, Order, and Judgment, *United States v. City of Earth*, No. 5:07-cv-00144 (N.D. Tex. Sept. 4, 2007).

⁴⁸ Consent Decree, Order, and Judgment, *United States v. Littlefield Ind. Sch. Dist.*, No. 5:07-cv-00145 (N.D. Tex. Sept. 4, 2007).

- A suit brought in 2007 against the Post Independent School District, in Texas, for failure to translate appropriate materials into Spanish.⁴⁹ The district entered into a consent decree requiring, inter alia, expanded access to translated materials and translators.
- A suit brought in 2007 against the Seagraves Independent School District, in Texas, for failure to translate appropriate materials into Spanish.⁵⁰ The district entered into a consent decree requiring, inter alia, expanded access to translated materials and translators.
- A suit brought in 2007 against the Smyer Independent School District, in Texas, for failure to translate appropriate materials into Spanish.⁵¹ The district entered into a consent decree requiring, inter alia, expanded access to translated materials and translators.
- A suit brought in 2007 against Kane County, Illinois, for failure to provide sufficient language assistance to Spanish-speaking citizens.⁵² The county disputed the allegations, but entered into an agreement requiring, inter alia, the provision of translated materials and expanded access to language assistance.
- A suit brought in 2007 against Walnut, California, for failure to provide sufficient language assistance to citizens speaking Chinese and Korean, but with limited English proficiency.⁵³ The city disputed the allegations, but entered into a consent decree requiring, inter alia, the provision of translated materials and expanded access to language assistance.
- A suit brought in 2007 on behalf of Alaska Native citizens whose first and primary language is Yup'ik.⁵⁴ Alaska failed to provide effective language assistance, including failing to provide qualified bilingual pollworkers and effective translations of ballots or personnel capable of translating ballots into Yup'ik; pollworkers also prohibited Yup'ik speakers from seeking assistance from private translators under section 208. A federal court found that the evidence for this latter point “appears to go well beyond” isolated instances of election-related misconduct.⁵⁵ The litigation resulted in preliminary relief, and a final settlement.
- A suit brought in 2008 against the city of Penns Grove and Salem County, New Jersey, for failure to provide sufficient language assistance to Spanish-

⁴⁹ Consent Decree, Order, and Judgment, *United States v. Post Ind. Sch. Dist.*, No. 5:07-cv-00146 (N.D. Tex. Sept. 4, 2007).

⁵⁰ Consent Decree, Order, and Judgment, *United States v. Seagraves Ind. Sch. Dist.*, No. 5:07-cv-00147 (N.D. Tex. Sept. 4, 2007).

⁵¹ Consent Decree, Order, and Judgment, *United States v. Smyer Ind. Sch. Dist.*, No. 5:07-cv-00148 (N.D. Tex. Sept. 4, 2007).

⁵² Memorandum of Agreement, *United States v. Kane County*, No. 1:07-cv-05451 (N.D. Ill. Sept. 26, 2007).

⁵³ Agreement and Order, *United States v. City of Walnut*, No. 2:07-cv-02437 (C.D. Cal. Nov. 9, 2007).

⁵⁴ Order, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska Feb. 16, 2010).

⁵⁵ Order re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants 9, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska July 30, 2008).

speaking citizens.⁵⁶ The city and county disputed the allegations, but entered into a consent decree requiring, inter alia, the provision of translated materials and expanded access to language assistance.

- A memorandum of understanding undertaken in 2008, between the Department of Justice and Massachusetts, with respect to Spanish-speaking voters of Puerto Rican descent in the City of Worcester. For election-related materials that the state provides to Worcester, the state agreed to provide materials in both English and Spanish.⁵⁷
- A suit brought in 2009 against Fort Bend County, Texas, for failure to provide sufficient language assistance to Spanish-speaking citizens.⁵⁸ The county did not admit to the allegations, but entered into a consent decree requiring, inter alia, the provision of translated materials and expanded access to language assistance.
- A suit brought in 2010 against Riverside County, California, for failure to provide sufficient language assistance to Spanish-speaking citizens.⁵⁹ The county disputed the allegations, but entered into an agreement requiring, inter alia, the provision of translated materials and expanded access to language assistance.
- A memorandum of agreement undertaken in 2010, between the Department of Justice and Shannon County, South Dakota, with respect to American Indian citizens who primarily speak Lakota.⁶⁰ The Department of Justice claimed violations of law that the county disputed. The parties entered into an agreement expanding access to oral translations of election-related materials, and to other language assistance.
- A suit brought in 2010 against Cuyahoga County, Ohio, for failure to provide sufficient language assistance to Spanish-speaking citizens of Puerto Rican descent.⁶¹ The county disputed the allegations, but entered into a consent decree requiring, inter alia, the provision of translated materials and expanded access to language assistance.
- A suit brought in 2011 against Lorain County, Ohio, for failure to provide sufficient language assistance to Spanish-speaking citizens of Puerto Rican descent.⁶² The county had provided no bilingual election-related materials until a Department of Justice investigation in 2010. The county entered into

⁵⁶ Settlement Agreement, *United States v. Salem County*, No. 1:08-cv-03276 (D.N.J. July 29, 2008).

⁵⁷ Memorandum of Understanding Between United States and Commonwealth of Massachusetts, Sept. 22, 2008, at http://www.justice.gov/crt/about/vot/sec_203/documents/worcester_mou.pdf.

⁵⁸ Consent Decree, Judgment, and Order, *United States v. Ft. Bend County*, No. 4:09-cv-01058 (S.D. Tex. Apr. 13, 2009).

⁵⁹ Memorandum of Agreement, *United States v. Riverside County*, No. 2:10-cv-01059 (C.D. Cal. Jan. 21, 2010).

⁶⁰ Memorandum of Agreement Between the United States of America and Shannon County, South Dakota, Apr. 23, 2010, at http://www.justice.gov/crt/about/vot/sec_203/documents/shannon_moa.pdf.

⁶¹ Agreement, Judgment, and Order, *United States v. Cuyahoga County Bd. of Elections*, No. 1:10-cv-01949 (N.D. Ohio Sept. 3, 2010).

⁶² Memorandum of Agreement Between the United States of America and Lorain County, Ohio, *United States v. Lorain County*, No. 1:11-cv-02122 (N.D. Ohio Oct. 7, 2011).

an agreement requiring, inter alia, the provision of translated materials and expanded access to language assistance.

- A suit brought in 2011 against Alameda County, California, for failure to provide sufficient language assistance to citizens speaking Spanish and Chinese, but with limited English proficiency.⁶³ In 1995, the Department of Justice had also filed a suit against the county with respect to Chinese-speaking citizens, resolved by consent decree. In 2011, the county entered into a further consent decree requiring, inter alia, the provision of translated materials and expanded access to language assistance.
- A suit brought in 2012 against Colfax County, Nebraska, for failure to provide sufficient language assistance to Spanish-speaking citizens.⁶⁴ The county disputed the allegations, but entered into a consent decree requiring, inter alia, the provision of translated materials and expanded access to language assistance.
- A suit brought in 2012 against Orange County, New York, for failure to provide sufficient language assistance to Spanish-speaking citizens of Puerto Rican descent.⁶⁵ The county entered into a consent decree requiring, inter alia, the provision of translated materials and expanded access to language assistance.

* * *

Seventh, there have been several lawsuits in the period since July 27, 2006, successfully challenging election procedures under the Constitution or other statutes, with facts indicating discriminatory intent or a disproportionate effect on minorities. As above, some of these challenges reflect new changes in laws or practices; others reflect existing structures newly challenged. I have not been able to compile a list of all such successful cases (not all of which result in published decisions), and what follows does not purport to be a comprehensive list. But, for example:

- In 2006, a federal court enjoined a provision of Ohio law requiring naturalized citizens — but not any other citizens — to show documentation of their citizenship when challenged.⁶⁶ The court explained: “This Court has personally presided over numerous naturalization ceremonies and has witnessed firsthand the joy of these new Americans and their intense desire to participate in this nation's democratic process. There is no such thing as a second-class citizen or a second-class American. Frankly, without naturalized citizens, there would be no America. It is shameful to imagine that this statute

⁶³ Consent Decree, Judgment, and Order, *United States v. Alameda County*, No. 3:11-cv-03262 (N.D. Cal. Oct. 19, 2011).

⁶⁴ Consent Order, *United States v. Colfax County*, No. 8:12-cv-00084 (D. Neb. Mar. 2, 2012).

⁶⁵ Consent Decree, *United States v. Orange County Bd. of Elections*, No. 7:12-cv-03071 (S.D.N.Y. Apr. 19, 2012).

⁶⁶ *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006).

is an example of how the State of Ohio says ‘thank you’ to those who helped build this country.”⁶⁷

- In 2007, a federal court placed the Noxubee County, Mississippi, Democratic primary elections under the supervision of a manager appointed by the court for a four-year term, removing Ike Brown and the county party’s executive committee from the process of running the election.⁶⁸ The court found that Brown and his confederates intentionally discriminated against white voters, who were the minority racial group in the county; it concluded that Brown “engaged in improper, and in some instances fraudulent conduct, and committed blatant violations of state election laws [] for the purpose of diluting white voting strength,”⁶⁹ including through absentee ballot fraud and unlawful coercion and fraudulent voting by poll workers. Indeed, the improper behavior continued even after a finding of liability by the court.
- In 2011, Florida increased restrictions on individuals and organizations assisting others with voter registration. This was the latest in a series: Florida increased restrictions in 2005 in a law that was struck down, increased restrictions in 2007 in a law that was upheld after challenge, and again increased restrictions in 2011. A federal court struck some of these latest restrictions, finding that the state’s procedures “impose a harsh and impractical 48-hour deadline for an organization to deliver applications to a voter-registration office and effectively prohibit an organization from mailing applications in. And the statute and rule impose burdensome record-keeping and reporting requirements that serve little if any purpose”⁷⁰ The court found that the state’s requirements “could have no purpose other than to discourage voluntary participation in legitimate, indeed constitutionally protected, activities.”⁷¹ Minority voters are disproportionately likely to register (and re-register after moving) through the voter registration drives targeted by Florida’s law.⁷²
- Since July 27, 2006, several actions have been brought against at-large election structures in local California jurisdictions, under the California Voting Rights Act. This state cause of action is related to its federal counterpart, but specifically targets dilutive at-large structures: it provides that “[a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters” in a racial or language minority

⁶⁷ *Id.* at 827.

⁶⁸ *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007), *aff’d* 561 F.3d 420 (5th Cir. 2009).

⁶⁹ *Id.* at 485.

⁷⁰ *League of Women Voters v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012).

⁷¹ *Id.* at 1164.

⁷² Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 100 (2012).

group.⁷³ And like its federal counterpart, it focuses on polarized voting. I believe that most cases that have been brought under the CVRA since 2006 have been resolved by settlement or consent decree; there is no single official repository of such cases of which I am aware. News reports or collected court filings indicate that at-large structures have been modified since 2006 pursuant to the CVRA in the City of Modesto, Madera Unified School District, Cerritos Community College District, Tulare Local Healthcare District, Ceres Unified School District, City of Compton, and San Mateo County Board of Supervisors; a court recently issued a tentative finding of liability in the City of Palmdale, and it is expected that the suit will progress to a remedy phase.⁷⁴ Several other cases are pending.

* * *

Eighth, nonpartisan nonprofit organizations have monitored general (and often primary) elections in every federal cycle after July 27, 2006. Some of these organizations have collected reports from the field in states where the organizations are most active, of incidents on or around election day for which a lawsuit would not have brought effective relief. Many of these incidents involve pollworkers or other officials, and even when they do not constitute changes in official policy, they may well inform deliberations about the jurisdictions or practices most at risk for discriminatory activity.⁷⁵ In the time available to answer these questions for the record, I have not been able to fully mine either the summary compendia of such incidents or the underlying repositories of incident reports⁷⁶ for specific acts indicating discrimination, but I believe these reports will be a valuable source of information for Congress.⁷⁷ Such incidents include, in just a smattering from 2012:

⁷³ CAL. ELEC. CODE § 14027. Unlike its federal counterpart, the California Voting Rights Act does not demand that minorities in the jurisdiction live in a compact community in order to seek relief.

⁷⁴ Statement of Decision, *Jauregui v. City of Palmdale*, No. BC 483039 (Cal. Super. Ct., Los Angeles County July 23, 2013).

⁷⁵ Academic compendia have also surveyed the electorate, and these surveys similarly reveal evidence of troublesome disparities in experience by race or ethnicity. *See, e.g.*, R. Michael Alvarez et al., 2008 Survey of the Performance of American Elections: Final Report 41-46 (2008), *available at* <http://www.pewcenteronthestates.org/uploadedFiles/Final%20report20090218.pdf>.

⁷⁶ *See, e.g.*, Our Vote Live, at <http://electionawareness.appspot.com/reports>.

⁷⁷ *See, e.g.*, Asian American Legal Defense and Education Fund, Asian American Access to Democracy in the 2006 Elections (2008), http://www.aaldef.org/docs/Election_2006_Report_AALDEF.pdf; Election Protection, 2008 Primary Report: Looking Ahead to November (2008), <http://www.866ourvote.org/newsroom/publications/document/0019.pdf>; Asian American Legal Defense and Education Fund, Asian American Access to Democracy in the 2008 Elections (2009), <http://www.aaldef.org/docs/AALDEF-AA-Access-to-Democracy-2008.pdf>; Election Protection, Election Protection 2008: Helping Voters Today, Modernizing the System for Tomorrow (2009), <http://www.866ourvote.org/newsroom/publications/body/0077.pdf>; *The 2008 Election: A Look Back on What Went Right and Wrong: Hearing Before the Comm. on H. Admin., Subcomm. on Elections*, 111th Cong. (Mar. 26, 2009) (statement of Arturo Vargas, Exec. Dir., Nat'l Assn. of Latino Elected and Appointed Officials Educ. Fund); Asian American Legal Defense and Education Fund, Language Access for Asian Americans Under the Voting Rights Act in the 2012 Elections (2012), <http://aaldef.org/AALDEF%20Election%202012%20Interim%20Report.pdf>; Election Protection, Our Broken Voting System and How to Repair It: The 2012 Election Protection Report (2013)

- In 2012, a pollworker in New Orleans incorrectly informing citizens with limited English proficiency whose primary language is Vietnamese that they were not entitled to bring assistants with them to help translate.⁷⁸
- In 2012, a pollworker in Kansas City “asked a voter’s interpreter to leave the premises and threatened the interpreter with arrest.”⁷⁹
- In 2012, in Panorama City, California, the headset intended to provide Spanish translation was not working, causing Spanish-speaking voters to leave in frustration.⁸⁰
- In 2012, in El Cajon, California, a Hispanic voter gave his name to the pollworker, and the pollworker reportedly responded, “You are a wetback.”⁸¹
- In 2012, in San Bernadino, California, the polling place supervisor “ordered two Latino Election Protection volunteers to be removed from the premises, stating that he did not want anyone who did not speak his language there. The supervisor then stated that if the volunteers wanted to do anything about it ‘he had a shotgun.’”⁸²

* * *

Ninth, there are some disturbing reports of racial prejudice by legislative and executive officials more generally, not directly connected to voting regulations. Even though these go beyond particular changes to specific electoral practices, they do indicate very troubling attitudes of public officials toward their own constituents, and provide additional incremental grounds for greater review of local action. For example, consider a recent Alabama case, involving a federal prosecution on various counts amounting to abuse of public office. During the case, the federal government used several informants, including several Alabama state legislators. The court found these legislators were not motivated by cleaning up corruption, but rather by “reducing African-American voter turnout” and “purposeful, racist intent.”⁸³ One legislator — in 2010 — referred to African-Americans as “Aborigines”; another bemoaned the fact that if a gambling referendum were on the ballot, “every black in this state will be bused to the polls.”⁸⁴ As the court noted, the state legislators

[hereinafter 2013 Election Protection Report], <http://www.866ourvote.org/newsroom/publications/document/EP-2012-Full-Report.pdf>; Asian Americans Advancing Justice, *Voices of Democracy: Asian Americans and Language Access During the 2012 Elections* (2013), <http://www.advancingjustice-aajc.org/sites/aajc/files/Full-layout-singlesv1-072313.pdf>.

⁷⁸ 2013 Election Protection Report, *supra* note 77, at 44.

⁷⁹ *Id.* at 45.

⁸⁰ *Id.* at 45.

⁸¹ *Id.* at 10; Report #65099, OURVOTELIVE.ORG, (Nov. 6, 2012, 11:23 PM), <http://electionawareness.appspot.com/report/65099>.

⁸² 2013 Election Protection Report, *supra* note 77, at 10, 58.

⁸³ *United States v. McGregor*, 824 F. Supp. 2d 1339, 1345 (M.D. Ala. 2011).

⁸⁴ *Id.*

“plainly singled out African–Americans for mockery and racist abuse.”⁸⁵ The court further explained:

To some extent, “[t]hings have changed in the South.” *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504, 2514 (2009). Certain things, however, remain stubbornly the same. In an era when the “degree of racially polarized voting in the South is increasing, not decreasing,” Alabama remains vulnerable to politicians setting an agenda that exploits racial differences. . . . The Beason and Lewis recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem in this State. Today, while racist sentiments may have been relegated to private discourse rather than on the floor of the state legislature, see *Busbee v. Smith*, 549 F.Supp. 494, 500 (D.D.C.1982) (Edwards, J.) (labeling a state lawmaker a “racist” for using racial slurs to refer to majority-minority districts), it is still clear that such sentiments remain regrettably entrenched in the high echelons of state government. . . .

[T]he discriminatory intent expressed by [the legislators] represents another form of corruption infecting the political system. [O]pposition to the bill was not grounded in impartial evaluation of the merits of SB380. Rather, they were motivated by a fear of who might turn out to vote. The purpose of their competing scheme was to maintain and strengthen white control of the political system. It is intolerable in our society for lawmakers to use public office as a tool for racial exclusion and polarization. This form of race discrimination is as profoundly damaging to the fabric of democracy as is the bribery scheme the government seeks to punish.⁸⁶

⁸⁵ *Id.* at 1346.

⁸⁶ *Id.* at 1347-48 (some internal citations omitted).