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Testimony of
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Before the
United States Senate Committee on the Judiciary

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

July 17, 2013

Chairman Leahy, Ranking Member Grassley, and distinguished Members of the Committee, thank you for the invitation to speak to you today.

My name is Justin Levitt. After a semester teaching at the Yale Law School, I have returned home to Loyola Law School, in Los Angeles.¹ I teach constitutional law, criminal procedure, and the law of democracy — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the law of democracy is not merely theoretical. I have had the privilege to practice election law as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and have their votes counted in a manner furthering meaningful representation. My work has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution.

I now focus on research and scholarship, confronting the structure of the election process while closely observing and rigorously documenting the factual predicates of that structure. I have analyzed, in detail, the effect of policies and laws that contribute to the burdens on eligible

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

citizens as they attempt to exercise the franchise, or that limit their ability to achieve meaningful and equitable representation even when they are able to cast ballots successfully. I attempt to bring reliable data to bear on the effort to assess the nature and magnitude of the impact of election rules and representational structures. Sometimes this involves collecting data of my own; sometimes it involves assembling and assessing data collected by others, evaluating the merit and weight of raw original sources and sophisticated statistical analyses. It is in this role as researcher and scholar, grounded in reliable data, that I appear before you today.

I thank you for holding this important hearing, initiating what I hope will become bipartisan action in both chambers to ensure that the franchise remains secure. Voting, the right preservative of all other rights,² “is of the most fundamental significance under our constitutional structure.”³ Constant vigilance is necessary to ensure that the franchise remains equally meaningful for all eligible citizens, regardless of race or ethnicity. Congress has both the enumerated power and the moral responsibility to protect against electoral discrimination. And just a few weeks removed from the Supreme Court’s decision in *Shelby County v. Holder*,⁴ bipartisan Congressional action is now more important than ever.

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

The Voting Rights Act has also always been an American commitment crossing partisan lines.⁶ The Act — including the preclearance provisions of sections 4 and 5 at issue in *Shelby County* — was passed in 1965 by substantial majorities of both parties.⁷ Those preclearance

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

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

⁴ 133 S. Ct. 2612 (2013).

⁵ In recent polls, self-identified whites, blacks, and Hispanics all disapprove of the *Shelby County* decision, to statistically significant levels. See Press Release, ABC News/Washington Post Poll: SCOTUS Decisions, July 3, 2013, <http://www.langerresearch.com/uploads/1144a24SCOTUSDecisions.pdf>.

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

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

provisions were renewed in 1970,⁸ 1975,⁹ 1982,¹⁰ and 2006;¹¹ on each and every occasion, the renewals were passed by substantial majorities of both parties. To your credit, Members of the Committee, each of you able to cast a Congressional vote in 2006 — Republican or Democrat — voted for the reauthorization measure. Despite occasional disagreements about the meanings of particular statutory terms, you recognized the power of bipartisan action on the fundamental structure necessary to safeguard the voting rights of each and every eligible citizen.

Presumably, you and your colleagues voted overwhelmingly, and in bipartisan fashion, to reauthorize the preclearance provisions of the Voting Rights Act because you and your constituents recognized how very far we have come since 1965. That undeniable and very positive progress exists in part due to the very protections that the Voting Rights Act offered. And you and your constituents presumably recognized that despite this remarkable progress, the protections of the Voting Rights Act remain unfortunately necessary. The more than 15,000 pages of legislative record that you assembled in 2006 powerfully testify to the regrettable, and no less undeniable, need for continued application of effective measures to prevent discrimination in the franchise.

Just a few weeks ago, the Supreme Court struck down an important portion of your 2006 work. As you know, section 5 of the Voting Rights Act establishes a regime of “preclearance”: certain jurisdictions must submit election changes to a federal court or the Department of Justice before those changes may be implemented, in order to ensure that a change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a defined language minority group.¹² Section 4 of the Act is the primary provision determining where preclearance applies; it establishes the basic conditions governing which jurisdictions are subject to the preclearance requirement. In its original incarnation and in each amendment thereafter, section 4 has been effectively time-limited; its penultimate iteration was set to expire in 2007. In 2006, Congress reauthorized section 4.¹³ It is

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

⁹ 92% of Democrats voting on the measure voted in favor, and 75% of Republicans voting voted in favor. *See* 121 CONG. REC. 24780, 25219-20 (1975); House Vote #328 in 1975, <http://www.govtrack.us/congress/votes/94-1975/h328>; Senate Vote #329 in 1975, <http://www.govtrack.us/congress/votes/94-1975/s329>.

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

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

¹² 42 U.S.C. §§ 1973c(a), 1973b(f)(2) (2006).

¹³ Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 (“VRARA”), Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (2006), *amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008).

this reauthorization that was invalidated by the Supreme Court: the Court determined that section 4, as reauthorized in 2006, did not sufficiently reflect current conditions, and that the “disparate geographic coverage” reflected in section 4 was no longer “sufficiently related to the [current] problem[s] that it targets.”¹⁴

There are many notable portions of the *Shelby County* opinion.¹⁵ For today’s purposes, I would like to emphasize two things that the Court did *not* say. First, the Court did not overrule the constitutionality of a properly tailored preclearance requirement — nor, indeed, did it take other potential remedies and prophylactic tools off of the table. The Court recognized that preclearance is a “stringent” and “potent” measure, an “extraordinary” tool to confront electoral discrimination based on race and ethnicity, which is necessarily an “extraordinary” harm.¹⁶ Indeed, racial and ethnic discrimination with respect to the vote is so pernicious that a constitutional Amendment is devoted to nothing else, with power expressly delegated to Congress to enforce its protections.¹⁷ The *Shelby County* Court refused to overturn four previous cases approving preclearance as an appropriate use of that enumerated Congressional power where remedies like affirmative litigation proved insufficient.¹⁸ Indeed, the Court emphatically stated that “Congress may draft another formula [determining coverage for a preclearance requirement] based on current conditions.”¹⁹

Second, despite offering justified praise for the momentous progress that we as a people have made, the *Shelby County* Court did not cast doubt on the stubborn persistence of electoral discrimination on the basis of race or ethnicity. This was not an oversight. Four years earlier, Chief Justice Roberts, Justice Kennedy, and Justice Alito — three members of the *Shelby County* majority — acknowledged that “racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions”²⁰ In 2006,

¹⁴ *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, slip op. at 18, 20-21, 23-24 (2013).

¹⁵ I have written previously about the opinion, *see* Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG (June 25, 2013, 10:39 PM) (hereinafter *Shadowboxing*), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>, and about some of the popular (mis)conceptions of the Act that seem to be reflected in the opinion, *see* Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (2013) (hereinafter *Simulacrum*), <http://yalelawjournal.org/images/pdfs/1173.pdf>. Many other fine scholars have offered their own reactions to the opinion, and will be offering reactions for years to come.

¹⁶ *Shelby County*, 133 S. Ct. 2612, slip op. at 11-12.

¹⁷ U.S. CONST. amend. XV; *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 205 (“The Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is needed to enforce it.”).

¹⁸ *See* *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the 1970 reauthorization); *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding the 1975 reauthorization); *Lopez v. Monterey County*, 525 U.S. 266 (1999) (upholding the 1982 reauthorization).

¹⁹ *Shelby County*, 133 S. Ct. 2612, slip op. at 24.

²⁰ *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality).

the same year that Congress reauthorized section 5, Justice Kennedy wrote for a majority in striking down a redistricting map, noting that “[i]n essence the State took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.”²¹ These are merely a few salient examples from the recent annals of the U.S. Reports, demonstrating that the Court also recognizes what Congress knows well: despite progress toward equality, we are decidedly not yet at our goal. In 2006, the Congressional legislative record of harm justifying reauthorization of the Voting Rights Act ran to 15,000 pages. And even if under *Shelby County* that record did not suffice to support the “formula” of section 4 coverage, it surely bears disturbingly ample witness to present harm, and a present need for action.

Some of the present discrimination requiring continued Congressional attention appears, even today, to be based on deep-seated animus. But it is not necessary to find hatred to find troublesome racial and ethnic discrimination in the electoral realm. Chief Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit, often lauded as a leading conservative jurist, expressed the nub of the problem in a case concerning my home of Los Angeles:

When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern—a continuing practice of [drawing districts] to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. The record is littered with telltale signs that reapportionments going back [for at least three decades] were motivated, to no small degree, by the desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population.

But the record here illustrates a more general proposition: Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge. . . . Today’s case barely opens the door to our understanding of the potential relationship between the preservation of incumbency and invidious discrimination, but it surely gives weight to the Seventh Circuit’s observation that “many devices employed to preserve incumbencies are necessarily racially discriminatory.”²²

²¹ League of United Latin American Citizens v. Perry, 548 U.S. 399, 440 (2006).

²² Garza v. County of Los Angeles, 918 F.2d 763, 778-79 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (internal quotations and citations omitted).

Regrettably, Judge Kozinski's observations apply well beyond the facts of that case, and well beyond Los Angeles' borders. Racial and ethnic discrimination, whether an end in itself or a tool to other ends, is both odious and constitutionally impermissible. And though it is neither innate to the political process nor ubiquitous, it is sufficiently widespread to continue to command Congressional attention.

Congress has provided some existing tools to combat discrimination, and they should not be overlooked. In addition to existing legislation governing federal elections, the Voting Rights Act has powerful components untouched by *Shelby County*, including section 2,²³ section 3,²⁴ section 11,²⁵ section 203,²⁶ and section 208.²⁷ These are vital tools.

If men were angels, no more would be necessary.²⁸ But experience continually demonstrates that we are as angelic as we are post-racial.

Accordingly, substantial bipartisan majorities of Congress have repeatedly determined that the provisions above are not alone sufficient in their present form to ensure the effective guarantees of the Fifteenth Amendment. In 2006 no less than 1965, Congress was right to fill that vacuum.

Each of the provisions above is enforced by affirmative litigation, forcing aggrieved citizens to respond to a particular unlawful policy with a lawsuit. That is, of course, the more familiar means of addressing violation in our legal system. But electoral harms are not normal harms, and existing "normal" remedies do not suffice.

As an initial matter, election-based harms cause irreparable damage on an extraordinarily compressed timeframe. An election held under conditions later found to be unlawful works its harm immediately. And though future contests may be held with the pernicious conditions mitigated or removed, those elected to office via unlawful procedures not only gain the sheen of incumbency, but are empowered in the interim to promulgate policy binding everyone in the

²³ 42 U.S.C. § 1973 (prohibiting practices that result in a denial or abridgement of the right to vote on account of racial or language minority status, or that give racial or language minorities less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, but relying on affirmative litigation as an enforcement mechanism).

²⁴ 42 U.S.C. § 1973a (permitting, after affirmative litigation, federal courts to impose a preclearance regime upon a finding of intentional discrimination).

²⁵ 42 U.S.C. § 1973i (prohibiting, inter alia, electoral fraud and intimidation).

²⁶ 42 U.S.C. § 1973aa-1a (requiring voting materials to be provided in multiple languages under certain circumstances).

²⁷ 42 U.S.C. § 1973aa-6 (ensuring that certain voters may be assisted with voting procedures by a person of the voter's choice).

²⁸ Indeed, if men were angels, these provisions would be irrelevant. But government power and responsibility have long been premised on the falsity of this counterfactual. *See* THE FEDERALIST NO. 51 (James Madison).

jurisdiction — including means to further retain power. “Elections have consequences,” we are often told. Elections held on unlawfully discriminatory terms have consequences as well, far beyond the ability of affirmative litigation to correct. Preclearance was designed to stop discrimination before it could have this irremediable impact on local communities.

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

This is not merely ancient history: the Congressional record of 2006 contained examples less than six years old in which jurisdictions implemented a discriminatory practice, saw that practice challenged by responsive litigation, and then changed course to implement a different policy aimed at similar ends. Consider, for example, a jurisdiction in which a growing minority population threatened an incumbent’s reelection, where repeated lawsuits finally forced a redistricting plan responsive to that minority population. It is both shocking and, in some ways, sadly unsurprising that the jurisdiction would change course, cutting off the candidate filing period to leave the incumbent unopposed.²⁹ The incentive to misbehave survives even multiple journeys through the courts. Without a remedy beyond the “normal” toolkit, citizens victimized by the discrimination would be stuck in an endless cycle of litigation.

The examples presented to Congress demonstrate that though the extreme conditions of the 1960s may have materially improved, the basic incumbency incentive structure — the preservation of power — remains. In other contexts, at least the repeated wear of responsive litigation might be expected to eventually overwhelm the incumbency incentive. But this wear is substantially dispersed in the context of electoral discrimination. The transaction costs of litigation, which fall directly on private parties and/or their insurers in normal civil litigation, are borne not by the officials but by their constituents. And the opportunity for the electorate to correct the misbehavior of their own officials is blunted because the policies at issue concern the very rules of the election itself.

All of this means that there is more need in the election arena than elsewhere to prevent discrimination on the basis of race or ethnicity by means that have expansive substantive breadth

²⁹ See Nina Perales et al., *Voting Rights in Texas 1982-2006*, at 29 (2006), <http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf>; see also Brief of Joaquin Avila, Neil Bradley, Julius Chambers, U.W. Clemon, Armand Derfner, Jose Garza, Fred Gray, Robert McDuff, Rolando Rios, Robert Rubin, Edward Still, Ellis Turnage, And Ronald Wilson as *Amici Curiae* in Support of Respondents at 14-15, *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (U.S. 2013) (No. 12-96).

but also offer speedy, proactive protection. After *Shelby County*, the existing enforcement tools are inadequate to meet the need.³⁰

As the Supreme Court has recognized — and as Congress understood in 2006 — responsive voting rights litigation is “slow and expensive.”³¹ The time required for responsive litigation begins, in many ways, well before litigation itself. Responsive litigation depends on an ability to amass, process, and present substantial information even before filing a complaint — demographic and electoral data, formal legislative records and legislators’ informal comments, and historical context, among others. Some of this data will be generally available to the public, but much of the information — election records and demographic statistics by precinct, documents used and developed in the course of evaluating the merits of a new policy — will be in the government’s possession, and available only through a cumbersome public records request process.

Once a complaint is filed, litigation provides some additional tools for gathering information, but these, too, are often slow. Responsive litigation often features substantial discovery battles and extended motion practice, all of which may precede the awarding of even preliminary relief. Such preliminary relief, according to experienced litigators, is itself quite rare in affirmative voting rights litigation.³² And the rarity only increases in the period shortly before an election — when immediate rulings are most necessary to prevent harm — based in part on the Supreme Court’s admonishment that the judiciary should be particularly wary of enjoining enacted electoral rules when there is “inadequate time to resolve . . . factual disputes” before the election proceeds.³³

This places many voting rights cases in a summary judgment or trial posture. There, the complexity of a voting rights case places even more reliance on extensive data collection and data analysis — which translates to additional time in court. Indeed, when asked to study the amount of judicial time and work required, the Federal Judicial Center determined that of 63 different forms of litigation, voting rights cases are the 6th most cumbersome for the courts: more cumbersome than an antitrust case, and nearly twice as cumbersome as a murder trial.³⁴

³⁰ See H.R. REP. NO. 109-478, at 57 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 658 (recognizing that “a failure to reauthorize the [preclearance regime], given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action.”).

³¹ *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

³² See Transcript of Oral Argument at 38, *Shelby County v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013) (statement of Attorney General Verrilli) (noting that a preliminary injunction was issued in “fewer than one-quarter of ultimately successful Section 2 suits”); J. Gerald Hebert & Armand Derfner, *More Observations on Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CENTER BLOG (Mar. 1, 2013, 6:01 PM), <http://bit.ly/Z7xvht> (estimating that the true figure is likely “less than 5%”).

³³ *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006).

³⁴ Only death penalty habeas cases, environmental cases, civil RICO cases, patent cases, and continuing criminal enterprise drug crimes were deemed more cumbersome. See Federal Judicial Center, 2003–2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial

All of this can translate to extensive periods of justice delayed. There is no systematic study of which I am aware statistically analyzing the time required to secure relief in responsive voting rights litigation.³⁵ But in 2006, Congress heard ample testimony concerning extended litigation periods in particular circumstances. One striking, though not particularly unusual, example involved a challenge to the at-large election structure of a county council. The complaint was filed on January 17, 2001.³⁶ 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.³⁷ 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.³⁸ The court issued a decision in favor of plaintiffs in March 2003, with a remedial plan settled by August of that year;³⁹ on appeal, the court's decision was affirmed in April 2004.⁴⁰ Though the complaint was filed in January 2001, the 2002 elections were held under discriminatory conditions, and the winning legislators remained in office until new elections were held in June of 2004.

Such time and complexity also amount to substantial expense. A local challenge to districts drawn impermissibly on the basis of race or language minority status will require attorney time, filing fees, deposition costs, transcript fees, document production costs, expert fees, and on and on. Though reliable statistics are difficult to determine, such cases reportedly “require[] a minimum of hundreds of thousands of dollars.”⁴¹ In the litigation described immediately above, plaintiffs’ fees and costs amounted to \$712,027.71 — a sum that litigating plaintiffs or plaintiffs’ groups must be readily prepared to spend to see litigation through.⁴²

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

³⁵ Given the variation inherent in litigation, including the quality and experience of the attorneys, the nature of the data, and the quantity and incentives of the litigants, such studies would face significant methodological difficulties in attempting to parse the amount of time to be expected from an “average” successful case.

³⁶ *United States v. Charleston County*, 318 F. Supp. 2d 302, 313 (D.S.C. 2002).

³⁷ *Id.* at 327-28.

³⁸ *United States v. Charleston County*, No. 2:01-0155 (D.S.C. Sept. 18, 2002) (doc. 155) (order denying preliminary injunction).

³⁹ *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003); *United States v. Charleston County*, No. 2:01-0155, 2003 WL 23525360 (D.S.C. Aug. 14, 2003).

⁴⁰ *United States v. Charleston County*, 365 F.3d 341 (4th Cir. 2004).

⁴¹ J. Gerald Hebert & Armand Derfner, *Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CENTER BLOG (Feb. 28, 2013, 7:07 AM), <http://bit.ly/Y3206a>.

⁴² *Moultrie v. Charleston County*, No. 2:01-0562 (D.S.C. Aug. 9, 2005) (doc. 207) (amended judgment).

In addition to their responsibility for plaintiffs’ costs, the people of Charleston County *also* paid approximately \$2 million to defend the incumbents’ preferred system. *See* Brief of Joaquin Avila, Neil Bradley, Julius Chambers, U.W. Clemon, Armand Derfner, Jose Garza, Fred Gray, Robert McDuff, Rolando Rios, Robert Rubin, Edward Still,

The time and burden would be troublesome on its own for a handful of cases. But the relevant gap in the existing enforcement scheme is likely to be much larger than just a handful. From 1982 to 2006, the Department of Justice interposed 750 objections to requests for preclearance, encompassing 2400 distinct discriminatory changes.⁴³ Over the same period, more than 205 additional changes submitted to the DOJ for preclearance were withdrawn from that process after the DOJ requested additional information.⁴⁴

During that period, restrictive changes in the Court's interpretation of section 5,⁴⁵ and amendments to section 5 responding to the Court's interpretation,⁴⁶ modified the governing standards for preclearance; Department of Justice practice fluctuated accordingly. Since 2000, 73 objections to requests for preclearance were interposed, often (as above) with multiple distinct changes encompassed in a single submission.⁴⁷ In addition to these objections, several changes were (as above) withdrawn after requests for additional information.⁴⁸ To be sure, not every policy that was objectionable under the preclearance regime (or withdrawn before an objection was lodged) would also have been grounds for an affirmative lawsuit. But in a world without an effective preclearance regime, a substantial portion of these practices would likely have required litigation to ensure the absence of discrimination based on race or language minority status.

Beyond the measures above that *were* promulgated, it is further likely that the very existence of the preclearance process deterred changes that were *not* promulgated, in at least some of the thousands of jurisdictions covered by the preclearance regime before *Shelby County*.⁴⁹ If the preclearance process achieved any incremental deterrence at all, it is reasonable

Ellis Turnage, And Ronald Wilson as *Amici Curiae* in Support of Respondents at 25, *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (U.S. 2013) (No. 12-96). In the absence of a preclearance regime, local governments' taxpayers must pay doubly dearly for successful claims, covering incumbent officials' expenses as well as those of the plaintiff citizen victims. *See* Levitt, *Shadowboxing*, *supra* note 15.

⁴³ Brief for the Federal Respondent at 22, *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (U.S. 2013) (No. 12-96).

⁴⁴ *Id.* at 30.

⁴⁵ *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

⁴⁶ Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA"), Pub. L. No. 109-246, § 2(b)(6), § 5, 120 Stat. 577, 578, 580-81 (2006), *amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008).

⁴⁷ These totals are drawn from data at *Voting Rights Act: Objections and Observers*, LAWYERS' COMM. FOR CIV. RTS. UNDER LAW, http://www.lawyerscommittee.org/projects/section_5.

⁴⁸ As of the date of this testimony, I know of several submissions that were withdrawn, but I have not yet been able to determine precisely how many preclearance submissions were withdrawn since 2000. I would be happy to pursue this inquiry further at the Commission's request.

⁴⁹ As of March 2013, accounting for bailouts, there were 816 counties, 3733 municipalities, 2175 school districts, and 5017 special districts within jurisdictions covered by the preclearance requirement. U.S. Dep't of Justice, *Jurisdictions Currently Bailed Out*, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout; Dept. of

to expect such policies to crop up in the absence of preclearance. Those policies further add to the press for attention of affirmative litigation.

It is impossible to estimate the quantum of affirmative litigation necessary to achieve full compliance in the absence of a preclearance provision. But “The Nation’s Litigator” should not be expected to meet all of the new need under the post-*Shelby County* regime, at least given staffing at the current order of magnitude. The preclearance process primarily entailed an obligation to evaluate a steady flow of demographic, electoral, procedural, and historical information from covered jurisdictions. As a result, staff devoted to preclearance at the Department of Justice included talented analysts, demographers, historians . . . and as I understand it, comparatively few attorneys. A unit well-suited to the preclearance process cannot merely be re-tasked with an equivalent volume of affirmative litigation, much less the volume needed to compensate for the absence of an effective deterrent.

Fortunately, the Department of Justice is not the only entity authorized to enforce federal law; at least for the core protections of the Voting Rights Act, private citizens and organizations may bring causes of action as well. Yet if the concerns above create difficult pragmatic conditions for the federal government’s primary law enforcement body under the current voting rights enforcement regime, those difficulties are compounded manifold for private plaintiffs. At most a handful of attorneys within any given state, and a handful of national organizations with a few voting rights specialists, can match the institutional expertise of the Department of Justice.⁵⁰ Perhaps none can match the Department’s resources. These private entities with specialties in voting rights litigation may be able to muster a challenge to at most a few policies at a time, and often no more than one.⁵¹ They could not be expected to deliver justice everywhere that it was warranted even in a regime with the deterrence of preclearance, much less in a new world without.

Given finite resources, more prominent disputes — for example, statewide redistricting battles — are likely to draw more substantial attention in responsive litigation. There is a far greater risk that smaller jurisdictions like towns, villages, constable districts, and school boards

Commerce, Bureau of Census, 2002 Census of Governments, Vol. 1, No. 1, pp. 1, 22–60. It is not clear how many of the special districts are elected, and thereby required to submit changes for preclearance.

⁵⁰ See Brief of Joaquin Avila, Neil Bradley, Julius Chambers, U.W. Clemon, Armand Derfner, Jose Garza, Fred Gray, Robert McDuff, Rolando Rios, Robert Rubin, Edward Still, Ellis Turnage, And Ronald Wilson as *Amici Curiae* in Support of Respondents at 28-29, *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (U.S. 2013) (No. 12-96).

⁵¹ See, e.g., *Voting Rights after Shelby County v. Holder: A Discussion & Webcast on the Supreme Court’s Voting Rights Act Decision*, Roundtable at the Brookings Institution, Transcript pt. 2, at 18 (July 1, 2013) (remarks of Thomas Saenz, Pres. & Gen. Counsel, MALDEF) (“I really appreciated those who believed that the LDF’s of the world have the resources to challenge every state redistricting that might be a problem, but it’s not true. I mean the simple fact is that my organization can probably pursue one statewide redistricting case at a time. So, we made a choice that Texas was more important for example, than California where we believe that there was at least one problem at the congressional level, and at least two at the legislative level. But the cost of pursuing two statewide cases at the same time was simply too high.”), available at http://www.brookings.edu/~media/events/2013/7/1%20voting%20rights%20act/20130701_voting_rights_transcript_pt2.pdf.

will be comparatively neglected. Yet such jurisdictions create much of the concern. Between the 1982 and 2006 reauthorizations of the preclearance regime, only 14% of the objections lodged by the Department of Justice under section 5 concerned statewide changes. 39% concerned county-level changes, and 48% concerned changes in municipalities, school boards, or special districts.⁵² After *Shelby County*, current enforcement tools leave a substantial danger that discriminatory changes in local electoral policy will take effect before underresourced victims have an adequate opportunity to assemble a reasonably robust litigation response. If elections occur before sufficient proof of the wrong can be gathered, the officials elected under the improper regime are then empowered to make policy until plaintiffs overcome financial and logistical hurdles to make their case before a court.

Statewide changes affect many more voters at once, to be sure. But that is little consolation to the citizen denied equitable access to the election process for municipal government, acting on the vital kitchen-table issues that impact each of us most tangibly from day to day. Many local governments will never tread close to the line of discriminatory practice. But experience teaches, regrettably, that many others will. And we must continue to recognize that particularly in this arena, “injustice anywhere is a threat to justice everywhere.”⁵³

Congress can and should act to prevent such injustice. There is a present pragmatic need to supplement the existing legal framework for safeguarding voting rights, to prevent electoral discrimination on the basis of race, ethnicity, or language minority status. Voting rights are not only fundamental, but as explained above, uniquely resistant to normal modes of enforcement; they are extraordinary rights in need of extraordinary protection. Congress recognized as much in 2006 when it reauthorized the preclearance regime; absent an effective preclearance regime today, that need has returned.

In the weeks ahead, I trust that you will hear various proposals for action, to ensure that justice is neither too expensive nor too long delayed. Some will likely focus on replicating the role of the preclearance process in extracting information about the impact of a proposed change. Some will likely focus on structures to ease the costs or other burdens of responsive litigation. Some will likely focus on enhanced judicial management of an individualized preclearance procedure. Some will likely focus on a formula to replace section 4, based on recent transgressions or current sociopolitical conditions. It may be that some combination of the above is most appropriate to meet the need. But what is clear to pragmatists above all is that there is a need, and that the need must be met.

⁵² Levitt, *Simulacrum*, *supra* note 15, at 164 n.47. Given the deterrence function that preclearance served, it is not possible to predict, from the comparative mix of preclearance objections, the precise relative mix of cases warranting affirmative litigation in a world absent preclearance. And the calculations above do not account for litigable violations from *non*-covered jurisdictions that did not attract sufficient resources to see litigation through even while the preclearance regime was in place. Still, it seems reasonable to predict that given past practice, and given the sheer volume of counties and local governments, *see supra* note 49, such jurisdictions are likely to be responsible for a substantial majority of litigable violations going forward.

⁵³ MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 77, 79 (1963).

In this arena, since 1965, Congress has led, and it has done so with bipartisan action yielding bipartisan success. It is time for Congress to lead again. And so it is that I am delighted to appear at the hearing signaling Congressional resolve to take up its constitutional responsibility once more.

I thank you again for the opportunity to testify before you, and look forward to answering any questions that you may have.