



Department of Justice

**STATEMENT OF
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U.S. DEPARTMENT OF JUSTICE**

**BEFORE THE
SENATE JUDICIARY COMMITTEE**

**FOR A HEARING ENTITLED
PROTECTING A PRECIOUS, ALMOST SACRED RIGHT:
THE JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT**

PRESENTED

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Assistant Attorney General
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**For a Hearing Entitled
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Introduction

Chairman Durbin, Ranking Member Grassley, and Members of the Senate Judiciary Committee. My name is Kristen Clarke, and I serve as the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice (“Department”). Thank you for the opportunity to testify today on the Department’s work to implement and enforce the Voting Rights Act of 1965 and the need for legislation to revitalize and restore the Act.

The Voting Rights Act truly is, as President Johnson said when he signed it into law, “one of the most monumental laws in the entire history of American freedom.”¹ It reflected bold action by Congress when bold action was needed to confront the fact that nearly a century after the Reconstruction Amendments, millions of citizens were still denied the ability to register, to vote, and to participate fully in American democracy because of their race. The Act’s most innovative provisions—for example, the appointment of federal examiners to put people on the rolls in recalcitrant jurisdictions and the preclearance provision that prevented jurisdictions from adopting new provisions to roll back hard-won gains—transformed American democracy.

In the South, more Black voters were added to the rolls in the two years following passage of the Act than in the previous century. And in places from South Carolina to South Dakota, from Alabama to Alaska, minority voters—Black, Hispanic, Asian, Native American, and Alaska Native—elected officials who used government as a mechanism to make all our lives better. When recalcitrant jurisdictions tried to get around these gains with new tactics, preclearance blocked them from doing so.

The issues of fairness and democracy we face today are different, but equally pressing. If the end of the twentieth century was a period of dramatic expansion in voting rights, the twenty-first century has, so far, been a period of rising attacks on the voting rights of people of color. We have seen cutbacks to early voting periods; imposition of additional requirements to cast ballots, either at polling places or with respect to absentee ballots; and new restrictions on the right of civic groups to assist citizens in participating fully in the electoral process. Often, courts have found that jurisdictions adopted such changes for racially discriminatory reasons, applying the same substantive legal standard used to assess discriminatory purpose under Sections 2 and 5

of the Voting Rights Act that apply under the anti-discrimination provisions of the U.S. Constitution. Congressional action is necessary to prevent us from backsliding into a nation where millions of citizens, particularly citizens of color, find it difficult to register, to cast their ballot, and to elect candidates of their choice to offices from the Presidency to members of their local school board.

The 2020 Census numbers show that the United States is an increasingly diverse nation. This raises profound questions about how the next redistricting cycle will be conducted, including whether the officials who draw congressional and legislative maps and decide districts for city councils and county commissions draw districts that are fair to *all* voters.

This round of redistricting is the first since the Supreme Court's 2013 decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), severely cut back on the protections the Voting Rights Act provides. It is now time for Congress to respond, by developing legislation that responds to our current situation, with respect to redistricting and otherwise—a situation in which voting rights are under pressure to an extent that has not been seen since the Civil Rights era. The Department welcomes the opportunity to work with Congress to craft new voting rights legislation that addresses the problems we face today.

In thinking about what new legislation should do, it is important to understand how we got to this point. So in my testimony today, I want to explain the special role the Department has played in protecting the right to vote—particularly in the modern era that began with the creation of the Civil Rights Division in 1957.

That story provides several important lessons. First, case-by-case challenges to restrictive voting practices are not enough. That sort of litigation is complex and resource intensive and gives what the Supreme Court memorably called the “advantage of time and inertia” to jurisdictions that are using practices that deny citizens an equal opportunity to participate in the political process and elect representatives of their choice.

That is why Congress adopted the preclearance requirement of Section 5 of the Voting Rights Act in 1965, and amended and extended that requirement, each time with overwhelming bipartisan support, in 1970, 1975, 1982, and 2006.

Second, preclearance worked well. Covered jurisdictions knew that if they could not show that a proposed voting change—from moving a polling place, to requiring voters to reregister, to deannexing minority neighborhoods, to diluting minority voting strength—had neither a discriminatory purpose nor a discriminatory effect, the Department would block that change. So most jurisdictions decided not to propose such changes in the first place. The deterrence effect of Section 5 was undeniable. But when jurisdictions *did* try those sorts of discriminatory changes, over the half-century preclearance was in effect, the Department's 3,000+ objections protected the rights of millions of citizens.

At the same time, preclearance was fair to covered jurisdictions. Changes that improved the electoral process were swiftly approved. And the Department worked cooperatively with jurisdictions to ensure they were able to implement lawful changes without undue delay.

Third, the costs of losing preclearance have been profound. The *Shelby County* decision has given jurisdictions a green light to adopt new restrictive practices and then sit back until costly litigation proves that the new laws have a discriminatory purpose or effect. I will describe for you how the Department’s enforcement efforts over the past eight years have been negatively affected by the current legal landscape—one in which we have lost a key tool at the very time that the United States has experienced a groundswell of restrictive voting laws.

In 1965, Congress enacted a statute that provided creative and effective mechanisms for enforcing our Constitution’s commitment to ensuring that no citizen’s right to vote would be abridged on account of race or color. We look forward to working with this Congress to complete the task that Congress began.

I. The Department of Justice’s Early Role in Enforcing Federal Voting Rights Statutes and the Enactment of the Voting Rights Act of 1965

Many reasons propelled Congress to enact the Voting Rights Act of 1965—in particular the peaceful demonstrations, marches, and activism led by people of color, historically disenfranchised communities, and civil rights heroes such as John Lewis, in Selma, Alabama and elsewhere. Another critical factor was the experience of Department attorneys who had been working since the creation of the Civil Rights Division in 1957 to protect voting rights using then-existing protections that were simply inadequate.

A. The Department of Justice’s Efforts to Enforce Pre-Voting Rights Act Legislation Were Hampered By Having to Bring Case By Case Litigation

Eight years before the Voting Rights Act was passed, Congress enacted its first major civil rights statute since reconstruction, the Civil Rights Act of 1957, based on a legislative proposal first drafted by the Department. The Civil Rights Act enabled the creation of DOJ’s Civil Rights Division and authorized the Attorney General to bring suit to enjoin voter intimidation and racially discriminatory denials of the right to vote.

The first case against a county registrar for violating the act, *United States v. Lynd*, was brought by John Doar, an attorney who began serving in the Civil Rights Division during the Eisenhower administration.² By 1963, the Department had filed 35 suits challenging discrimination or threats against Black registration applicants in individual counties. But as then-Attorney General Robert Kennedy said, that was a “painfully slow way of providing what is after all a fundamental right of citizenship.” As the Supreme Court later acknowledged in *South Carolina v. Katzenbach*, the Department’s efforts to protect the right to vote were seriously hindered by the burdens inherent in bringing case by case challenges:

Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to

discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and [Black] registration.

South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966).

When considering the legislation that would ultimately become the Voting Rights Act, Congress determined that the existing federal anti-discrimination laws were insufficient to overcome the resistance by some state and local officials to enforcement of the guarantees of the Fifteenth Amendment. Congressional hearings— including by the House Judiciary Committee — showed that the Department of Justice’s efforts to eliminate discriminatory election practices by case-by-case litigation had been unsuccessful in opening up the registration process; as soon as one discriminatory practice or procedure was proven to be illegal and enjoined, a new one would be substituted in its place and litigation would have to commence anew.

B. The Voting Rights Act of 1965 Conferred Particular and Unique Authority On the Department of Justice

In the wake of Bloody Sunday and based on a record developed in large part by the Civil Rights Division’s litigation, Congress met the moment and, in bipartisan fashion, passed the Voting Rights Act, which President Johnson called “one of the most monumental laws in the entire history of American freedom.” The Act was reauthorized and signed by President Nixon in 1970, by President Ford in 1975, by President Reagan in 1982, and by President George W. Bush in 2006.

To address longstanding, rampant discrimination, the Act abolished literacy tests, so-called “good character” tests, and other barriers to voting. It also enacted Section 2, an important and powerful nationwide prohibition against any voting practice or procedure that discriminates on the basis of race or color.

One of the Act’s most powerful innovations involved a preclearance requirement, administered by the Department and targeted at those areas of the country where Congress believed the potential for discrimination to be the greatest. Under Section 5, jurisdictions covered by these special provisions could not implement any change affecting voting until the Attorney General or the United States District Court for the District of Columbia determined that the change did not have a discriminatory purpose and would not have a discriminatory effect. The Act authorized the Attorney General to bring civil actions in response to violations of the Act’s provisions, including Section 5. The Act also permitted the Attorney General to designate jurisdictions subject to Section 5 preclearance for the deployment of trained federal examiners, who could require that qualified persons be added to voter registration lists. Further, in those counties where a federal examiner was serving, the Attorney General could request that trained federal observers monitor activities within polling places. Finally, the Act directed the Attorney General to challenge the use of poll taxes; Virginia’s poll tax was struck down by the Supreme Court on constitutional grounds shortly thereafter.³

Of all the tools available to the Department to protect the right to vote and prevent racial discrimination, Section 5 proved to be the most effective. And in the nearly fifty years of

implementing Section 5, the Department showed itself to be up to the task of enforcing the statute in a manner that respected the effective administration of elections by state and local jurisdictions.

C. The Department of Justice’s Historical Role in Administering Section 5 of the Voting Rights Act

The Attorney General has historically delegated responsibility for preclearance decisions to the Assistant Attorney General who heads the Civil Rights Division.⁴ Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights, called the “Voting Section,” which conducted the factual review for preclearance submissions and made detailed recommendations to the Assistant Attorney General.⁵

Section 5 mandates that all covered jurisdictions seek “preclearance” of any new “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”

Under Section 5, covered jurisdictions could not implement their proposed voting changes until they had received preclearance. The two methods for a covered jurisdiction to comply with the preclearance requirement were (1) administrative review requiring the Attorney General to determine within 60 days of submission whether to object to, and thereby block, a voting change because the submitting jurisdiction failed to show the change was nondiscriminatory, or (2) judicial review, by way of a declaratory judgment action filed by the covered jurisdiction in the United States District Court for the District of Columbia.

The administrative route provided a swift, non-costly path to a preclearance determination. If jurisdictions were unsatisfied with the administrative route, they could choose an alternative path, which involved obtaining a declaratory judgment. That track allowed state or local officials to obtain a de novo determination by filing a declaratory judgment action against the United States, which was heard by a three-judge district court. Unsurprisingly, and showing covered jurisdictions’ confidence in the fairness and efficiency of the Department’s process, covered jurisdictions chose the administrative route for over 99 percent of covered changes.

The Attorney General based his or her Section 5 determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any additional investigation conducted by the Department. The submitting jurisdiction had the burden of demonstrating that the proposed change “neither has the purpose nor will have the effect” of denying or abridging the right to vote on account of race, color or membership in a language minority group.⁶ The effects of proposed voting changes were measured against the previous, or “benchmark,” practice to determine whether they would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”⁷ The discriminatory purpose analysis was based on a number of factors established by the Supreme Court, including the sequence of events leading up to the adoption of the change, the historical background of the action, the impact of the change, and any deviations from normal procedure.⁸

The Attorney General would then respond to the submitting jurisdictions in writing to (1) “preclear” the proposed change, allowing the change to be implemented; (2) request more information from the jurisdiction; or (3) object to the proposed change, providing the reasons supporting that decision.⁹ In those instances where the Attorney General interposed an objection, the submitting jurisdiction had various options, including asking the Attorney General to reconsider its decision, seeking judicial preclearance in the United States District Court for the District of Columbia, abandoning the proposed change and adhering to the benchmark practice, or submitting a new change for review.

The list of covered jurisdictions was not static, as previously covered jurisdictions could be “bailed out” from the special provisions such as the preclearance requirement if they wished to do so and met certain requirements, such as complying with Section 5 for the previous ten years, laid out in the statute. Dozens of jurisdictions did so successfully while Section 5 remained in effect.¹⁰ Section 4(a) of the Act sets out the requirements for the termination of coverage (bailout) under Section 5. At the same time, new jurisdictions could be “bailed in” to the preclearance requirement under Section 3(c) of the Act if a court found violations of the Fourteenth or Fifteenth Amendments justifying equitable relief. Eighteen jurisdictions have been required to seek preclearance for certain changes as a result of Section 3 orders issued by federal courts.¹¹

II. The Attorney General’s Section 5 Review Process Had Benefits For Voters and For Covered Jurisdictions

History proved that Section 5 was an effective tool that blocked the implementation of voting changes that had a discriminatory effect or were adopted with a discriminatory purpose. A few of the benefits of the Section 5 preclearance process are discussed below.

A. Section 5 Review Deterred Jurisdictions From Even Trying To Adopt Voting Changes That Might Have Had A Racially Discriminatory Purpose Or Effect

The mere presence of Section 5 discouraged some jurisdictions from implementing changes that would be certain to raise objections. Out of necessity, the preclearance requirement caused some covered jurisdictions to be more prudent in their approach to adopting voting changes or procedures than they otherwise would have been.

Moreover, covered jurisdictions frequently modified or withdrew proposed voting changes after receiving a formal letter from the Department requesting additional information in support of the preclearance submission. If the information subsequently provided by the submitting jurisdiction was insufficient to establish that the voting change was not discriminatory, the Attorney General would often object to the change.

More than 800 proposed changes were altered or withdrawn in the period after 1982.¹² Empirical studies demonstrate that the Department’s requests for more information had a significant effect on the degree to which covered jurisdictions complied with their obligation to protect minority voting rights.¹³ For example, a study conducted by Luis Ricardo Fraga and Maria Lizet Ocampo of Stanford University found that between 1999 and 2005, more

information requests stopped more than six times as many changes as formal objection letters did.¹⁴

To see how this process worked in the real world, consider the example of Alaskan election officials' submission of a series of precinct and polling place consolidations. These changes – some of which impacted areas with a substantial number of Alaska Native voters – were submitted for Section 5 review in May of 2008. In July, a couple of months later, the Attorney General sent Alaska officials a letter that precleared one polling place change but also stated that additional information was necessary with regard to three remaining consolidations before they could be precleared.¹⁵ The Department requested maps of the consolidations and descriptions of the State's process for determining which precincts and polling places to merge, the purpose of the consolidations, and the State's efforts to seek input from members of the minority community. The State withdrew the proposed consolidations less than three weeks later, meaning that those proposed changes were never used in an election.¹⁶

The preclearance process often resulted in jurisdictions deciding to voluntarily mitigate the impact of potentially discriminatory changes even when the Department did not issue a written request for additional information. One example involves a judicial preclearance case filed in the United States District Court for the District of Columbia in which South Carolina officials sought approval for a 2011 voter identification law. During the trial, South Carolina officials made a major change. They decided to interpret the photo identification requirement in a way that effectively inserted a “reasonable impediment” exception for certain voters who had difficulties obtaining identification, thereby making it “far easier than some might have expected or feared” for South Carolina citizens to cast a ballot.¹⁷ A three-judge panel precleared the law after adopting that interpretation as an express “condition of preclearance.”¹⁸ Two of the judges commented that the case demonstrated “the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.”¹⁹

B. The Department of Justice Blocked Voting Changes That Were Enacted with A Racially Discriminatory Purpose or Would Have Had A Racially Discriminatory Impact

When jurisdictions decided to proceed with racially discriminatory voting changes, the preclearance requirement proved to be effective at halting them before they ever went into effect. Through the Section 5 review process, the Attorney General and the United States District Court for the District of Columbia blocked numerous racially discriminatory voting changes before jurisdictions ever implemented them in an election.

The statistical evidence speaks for itself. Although the Attorney General objected to only about one percent of voting changes submitted under Section 5, this meant that more than 3,000 discriminatory voting changes were blocked between 1965 and June 25, 2013, the date of the *Shelby County* decision.²⁰ The post-2000 Section 5 objection letters, along with an accompanying chart, are attached as an exhibit to this testimony. The Division also includes here certain additional materials for your consideration as part of the record under the Voting Rights Act, including more information request letters, Section 5 enforcement actions and

declaratory judgment actions, and cases under Section 203 and Section 2. All of these materials date from the Civil Rights Division's last submission of similar materials in October 2005 leading up to the 2006 reauthorization of the Act by Congress.

A majority of the Department's Section 5 objections included findings of discriminatory intent.²¹ Congress found that many of the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process."²² Critically, the legal framework used by the Department for assessing whether voting changes were enacted with a discriminatory purpose in violation of Section 5 since 2006 – the *Arlington Heights* factors – is the same one traditionally used by federal courts to assess intent claims under the racial discrimination provisions of the U.S. Constitution and Section 2.²³

That said, the vast majority of submitted voting changes were precleared, allowing jurisdictions to institute new voting changes or rules. The Department exercised its authority to object or to ask for additional information judiciously under Republican and Democratic administrations alike, reserving the use of those tools for instances when the purpose or effect of the voting change was actually problematic or truly in doubt. But when jurisdictions failed to submit changes, the Department and affected voters prevailed in more than 100 "coverage" actions that temporarily enjoined voting changes that jurisdictions had been implementing without obtaining preclearance.²⁴

By freezing voting procedures in place until the submitting jurisdiction successfully obtained preclearance, Section 5 often saved voters from having to bear the brunt of racially discriminatory voting changes while litigation was pending or while the impact of a jurisdiction's proposed changes was being sorted out. Because litigation brought under Section 2 or other federal statutes occurs only after a (potentially illegal) voting scheme has already been put in place, voters have already been burdened or disenfranchised and electoral outcomes have been locked in place.²⁵ An illegal voting restriction or redistricting plan might be in place for several election cycles before a plaintiff can gather the evidence necessary to challenge it and succeed in litigation.²⁶

C. A Review of Specific Section 5 Objections Demonstrates the Efficacy of the Section 5 Review Process in Identifying and Blocking Racially Discriminatory Voting Changes

Aggregate nationwide statistics do not do justice to the Department's powerful role in protecting the right to vote in localities around the country while the Section 5 preclearance process was in place. I would like to provide a few specific examples in which the Department recently blocked racially discriminatory voting changes by interposing an objection to a Section 5 submission.

One Section 5 objection restored a municipal election that had been cancelled in Kilmichael, Mississippi.²⁷ After several decades in which no Black candidate had been elected to municipal office due to racially polarized voting, Kilmichael's 2001 general election stood to be a potential watershed moment. Black residents had recently emerged as a majority of the town's registered voters and a number of Black candidates qualified to run for both the mayoral

and board positions. White town officials responded by cancelling the election with no notice to the community. The Department denied the city's preclearance request, concluding that the cancellation was motivated by an intent to diminish minority voting strength. The election ultimately went forward and, in a historic moment, the town elected its first Black mayor as well as three Black aldermen.

Another objection prevented the proposed 2007 closure of a voter registration office in Buena Vista Township, Michigan, which was used heavily by minority voters. The next closest office was an 18-mile round trip away, which, using public transportation, would take at least one hour and 40 minutes to traverse.²⁸

Preclearance also prevented a polling place change by McComb, Mississippi.²⁹ A large group of Black residents in the city had long voted at the Martin Luther King Jr. Community Center, which was close to their homes on the east side of railroad tracks that run through the city. In response, the city tried to move that group's assigned polling place to the American Legion Hut on the west side of the tracks. To cross those tracks, Black voters on the east side—many of whom lacked transportation—would have had to travel substantial distances to find a safe crossing. Recognizing the increased difficulty that Black voters would encounter in exercising their right to vote, the Department blocked the change.

Other Department objections halted statewide changes. One such objection stopped a 2007 Texas statute, which would have imposed a landownership requirement to be able to run for some elected offices.³⁰ The evidence showed that there were Hispanic supervisors who were non-landowning residents of their district who would have been barred from running for reelection if the proposed candidate qualifications were implemented. Moreover, the significant disparity in home and agricultural land ownership rates between white residents and residents of color in Texas meant that a disproportionate number of racial and language minority Texans, many of whom could have been the candidates of choice of racial and language minority voters, would have been barred from running for office in these districts.

Another objection prevented the implementation of a 2009 Mississippi statute that would have imposed a majority-vote requirement for the election of school board candidates in certain school districts, a change that raised substantial concerns regarding a retrogressive effect on racial and language minority voters given the prevalence of racially polarized voting in Mississippi elections.³¹

The Department objected to multiple proposed redistricting plans that improperly reduced minority strength before and during the post-2010 redistricting cycle. In 2007, an objection prevented the imposition of discriminatory changes to the method of electing county commissioners sought by Charles Mix County, South Dakota, shortly after successful Section 2 litigation resulted in the election of the first Native American commissioner in county history.³² After that commissioner was elected, the county pursued a referendum measure expanding the size of the board of commissioners and a redistricting plan that, in tandem, would dilute the voting strength of the county's Native American voters. The Charles Mix County sheriff had actively circulated the referendum petition, collecting signatures while in uniform.

In 2011, the Department interposed an objection to a proposed redistricting plan for East Feliciana Parish, Louisiana’s police jury—the legislative and executive governing body of the parish.³³ That plan would have cut the Black voting age population in District 5, thereby eliminating minority voters’ opportunity to elect a candidate of choice. The cut came after the parish’s demographer met separately with a group of four white “police jurors” at the beginning of the redistricting process but failed to invite the Black police jurors. At that closed-door meeting, the demographer and the white police jurors agreed to move overwhelmingly white population from the “Lakeshore” neighborhood into District 5, while excluding nearby Black population from the district. After the Department interposed an objection, the parish adopted a different plan, which increased the Black voting age population in District 5. Today, District 5 is represented by a Black police juror.

The Department also blocked a 2011 redistricting plan proposed by Nueces County, Texas. That plan would have moved Latino population out of, and Anglo population into, a County Commissioner District, apparently to protect an Anglo incumbent who was not the candidate of choice of the Latino community but had unseated a Latino candidate in the previous election by a very small margin.³⁴ Similarly, a proposed 2012 redistricting plan from Long County, Georgia, sought to dilute the Black population percentage in District 3 by nearly seven percentage points by adding majority-white voting precincts to the district— even though the county could have avoided that result by adding different precincts instead.³⁵ Following the Department’s objection, Long County officials adopted a plan that remedied the problem and, today, District 3 is represented by a Black commissioner.

D. Section 5 Was Effective In Addressing Repeat Offenders’ Frequent Adoption of Discriminatory Voting Changes

Section 5 has served an important function by preventing the frequent imposition of discriminatory voting changes by “repeat offenders” – jurisdictions that make multiple or recurring efforts to make it harder for minority voters to participate in elections on an equal footing. While the Attorney General has repeatedly denied preclearance to several state actors – the States of Mississippi, Louisiana, and Texas have each received 23, 21, and 18 objections, respectively – Section 5’s greatest utility might arguably lie in its ability to thwart the recurring and sometimes innovative efforts of local jurisdictions to discriminate that otherwise would have evaded scrutiny.

Waller County, Texas, provides a textbook example of a jurisdiction that has repeatedly attempted, over the course of decades, to undermine the rights of Black voters in the City of Prairie View and at Prairie View A&M, the county’s HBCU. Local officials’ efforts to deter and reduce student voting strength have included pursuing improper prosecutions of eligible voters, imposing discriminatory voter registration “residency” requirements, cutting early voting opportunities, and adopting racially dilutive redistricting plans, among others. These discriminatory practices have been thwarted only by a combination of three Section 5 objections and repeated case-by-base litigation.³⁶

But Waller County is far from the only repeat offender. Several jurisdictions have adopted numerous racially discriminatory changes within the span of a few years, prompting

multiple objections from the Attorney General to prevent their implementation. Here are some examples:

- Northampton County, Virginia, adopted three discriminatory redistricting plans (and a method of elections change) to which the Attorney General interposed three objections between 2001 and 2003.³⁷
- Beaumont Independent School District in Texas sought to implement several changes relating to the method of electing its school board trustees – including two redistricting plans – that diluted minority voting strength and to which the Attorney General interposed separate objections in 2012 and 2013.³⁸
- Gonzales County, Texas, tried twice to seek preclearance for reductions to the robustness of their Spanish language election procedures, to which the Attorney General interposed separate objections in 2009 and 2010.³⁹

Without Section 5, repeat offenders are free to implement discriminatory voting changes, at least in the short term. Even if such changes are ultimately struck down through expensive, resource-intensive litigation brought under Section 2 or the U.S. Constitution, jurisdictions can then repackage their discriminatory changes and reenact slightly altered versions to evade the prior injunction. Moreover, successful voting rights litigation often takes years to play out before an injunction is issued. In the meantime, minority voters will be disenfranchised or have their rights burdened, causing them to suffer injuries that can never be redressed.

E. The Department of Justice Worked Cooperatively With Local Officials To Make the Preclearance Process Speedy and Efficient For Changes That Were Fair To All Voters

To facilitate and expedite the review process, the Attorney General endeavored to make the preclearance process as user-friendly as possible. The “Procedures for the Administration of Section 5 of the Voting Rights Act of 1965” issued by the Attorney General brought transparency and ease to the process. It informed both submitting authorities and other interested parties of the standards by which the Department would be guided in evaluating proposed changes under Section 5.⁴⁰

Jurisdictions could submit their Section 5 submissions by mail, fax, or, in the internet age, an online portal. Department staff worked cooperatively with local officials to make sure preclearance submissions that had neither a discriminatory purpose nor a discriminatory effect would be approved quickly and efficiently. In fact, attorneys general for various states, including Mississippi and North Carolina, which were covered (at least in part) under Section 5 filed an *amicus* brief in the *Shelby* case acknowledging that “DOJ has administered the Section 5 review process with a significant degree of flexibility and latitude, taking into account the unique circumstances and crises that sometimes emerge within the covered jurisdictions.”⁴¹

The Department’s administrative preclearance process did not require covered jurisdictions to retain a lawyer or rely on employees with legal expertise. Over the course of decades, Department staff established positive relationships with local officials such as city

secretaries, town clerks, and county officials who often submitted changes for review. These officials' Section 5 submissions were often brief; voting changes that were clearly beneficial in nature could be precleared based on a page or two of documentation. Department staff would only ask for additional information or documentation when it was truly necessary to determine whether or not the change had a racially discriminatory purpose or effect.

The administrative preclearance process operated in a speedy and efficient manner. The Department had sixty days to respond to preclearance requests, which could be extended by an additional sixty days in certain limited circumstances. If the Attorney General failed to interpose an objection within the allotted time period, or provide another appropriate response such as an additional information request, then any pending changes were considered precleared by operation of law and jurisdictions could go forward with implementing them. However, Department staff precleared voting changes before the 60-day deadline whenever possible. If a submitting jurisdiction asked for expedited consideration – say, for an emergency polling place change that a county adopted shortly before an upcoming election, such as the changes made before the 2012 elections in the wake of Hurricane Sandy – Department staff would endeavor to facilitate a particularly speedy review so that non-discriminatory changes could be precleared and implemented as soon as possible.

III. The Tools Lost To The Department Of Justice As A Result Of The Supreme Court's Decision In *Shelby County v. Holder*

The Supreme Court's decision in *Shelby County v. Holder* has had a substantial effect on the ability of the Department to respond quickly and effectively to prevent the implementation of discriminatory voting changes. That decision struck down the formula provided by Section 4 of the Act for determining which jurisdictions were covered by the preclearance obligation. Without the protections of Section 5 of the Voting Rights Act, voting changes in jurisdictions with documented histories of discrimination go into effect before they can be challenged, disenfranchising many racial or language minority voters and substantially burdening their exercise of the right to vote. The Department has been forced to bring lengthy, resource-intensive litigation under Section 2, which has proven no substitute for the critical prophylactic protection afforded by Section 5. The result is that discriminatory policies have been used in elections and remained in effect for years while legal challenges have been litigated. The loss of the right to vote in those elections, even if subsequently vindicated, can never be fully remedied – nor can the results of elections conducted under racially discriminatory redistricting plans.

A. *Shelby County* Had an Immediate Negative Impact

States wasted no time passing laws that had not or would not have survived the preclearance requirement. On June 25, 2013, the very day that the Supreme Court issued the *Shelby County* opinion, Texas officials announced that they would move forward with implementing a discriminatory and burdensome photo identification statute. That particular photo identification requirement had already been stopped twice due to concerns that it violated the Voting Rights Act: once by a Section 5 objection interposed by the Attorney General and again when a three-judge panel of the U.S. District Court for the District of Columbia denied Texas's request for judicial preclearance following a full trial on the merits.⁴²

The loss of preclearance forced the Department, along with private parties, to file a post-*Shelby* Section 2 suit to enjoin the statute. The lawsuit was ultimately successful but took several years to litigate and consumed substantial resources, including millions of dollars spent by Texas officials to defend the law. In the meantime, untold numbers of voters were burdened or disenfranchised because the photo ID requirement remained in place while the case was pending.

The North Carolina Legislature acted with similar haste to enact an omnibus law imposing multiple voting restrictions. At the time *Shelby County* was before the Supreme Court, North Carolina had been publicly considering a relatively narrow election bill, which included a different voter ID requirement that was much less restrictive than the one that was eventually adopted.⁴³ However, on June 26, 2013, the day after the Supreme Court issued the *Shelby County* opinion, Senator Tom Apodaca, Chairman of the North Carolina Senate Rules Committee, publicly stated that “I think we’ll have an omnibus bill coming out” and that the Senate would move forward with a “full bill.”⁴⁴ The legislature then swiftly expanded its 16 page bill into 57 pages of omnibus legislation that cut early voting hours, imposed a burdensome, strict photo identification requirement, eliminated same-day registration during the early voting period, and eliminated provisional voting for out-of-precinct voters, among other restrictions.⁴⁵ The Department, along with private parties, again was forced to bring a Section 2 challenge in the absence of preclearance. During the pendency of the case, the challenged provisions were in effect for at least one major election (and some provisions were in effect for three years), limiting the rights of North Carolina’s citizens to participate in the political process.

The Texas and North Carolina examples are not the only instances of troubling and unlawful post-*Shelby* voting changes that have had a discriminatory effect or were enacted with a discriminatory purpose.

B. There Is Reduced Advance Notice of Potentially Discriminatory Voting Changes

Section 5 provided indispensable advance notice of those new voting rules, which occurred as a matter of course when jurisdictions submitted proposed changes to the Department for preclearance. One of the underappreciated problems the Department has faced since *Shelby County* is a loss of notice about new voting rules.

There are tens of thousands of jurisdictions, many of them small towns, school districts, or other local jurisdictions, which conduct elections and change practices and laws in ways that can have a retrogressive effect on minority voters. The Department does not have the resources to constantly monitor these jurisdictions to identify discriminatory or unconstitutional voting changes. Such a monitoring program would be less efficient and effective than preclearance. The Civil Rights Division’s investigatory tools are simply insufficient to obtain this information on a broad scale, let alone provide adequate redress for impacted voters. The impossibility of this task means that an assortment of subtle yet critical voting changes made at the local level may be jeopardizing the right to vote of racial and language minority voters in a way that violates the Voting Rights Act and the U.S. Constitution. We cannot know the full extent to which local jurisdictions might be making changes that are discriminatory, for example,

consolidating polling places to increase wait times and make it more difficult for minority voters to vote, annexing or deannexing territory so as to dilute minority voting strength, drawing election districts in ways that deny minority voters the ability to elect candidates of their choice, curtailing early voting hours that would have restricted access for low-income voters of color, or disproportionately purging minority voters from voting lists under the pretext of “list maintenance.”

This concern takes on added urgency at the present moment, as redistricting is about to commence following the decennial census. Without congressional action, the upcoming redistricting cycle will be the first without the full protections of the Voting Rights Act. Virtually every jurisdiction—from state legislatures to county commissions, school boards, and town councils—that elects its members from districts will be required to redraw district boundaries. Without preclearance, the Department will not have access to maps and other redistricting-related information from many jurisdictions where there is reason for concern, even though this kind of information is necessary to assess where voting rights are being restricted or inform how the Department directs its limited enforcement resources.

C. The Election Administration Process Is No Longer Transparent

The notice resulting from the Section 5 preclearance process provided transparency and benefits to voters, election officials, and communities in covered jurisdictions. Before the *Shelby County* decision, the Department published information regarding Section 5 submissions it received on a weekly basis, pursuant to the Attorney General’s Procedures for the Administration of Section 5 of the Voting Rights Act.⁴⁶ This information was posted online and was publicly available. Interested parties could see when changes had been submitted for preclearance, request copies of submissions and provide written or telephonic comments or input to Civil Rights Division staff, and receive notice of the Attorney General’s preclearance decisions.

Removing the public’s visibility into the voting changes adopted at every level of local and state government has proved to be a massive loss. For each year between 2000 and 2010, for example, the Attorney General published notice of between 4,500 and 5,500 Section 5 submissions, which contained between 14,000 and 20,000 voting changes.

D. The Public No Longer Has A Structured Process For Participating In The Review Of Proposed Voting Changes In Many Cases

The Department’s Section 5 preclearance process encouraged public participation, allowing voters to assess proposed voting changes before they were implemented. Over the course of conducting reviews, the Department received vital input regarding proposed voting changes and invaluable context regarding the communities in which those changes were to be implemented.

While the preclearance requirement was in place, it provided a structured process by which affected citizens and others could provide information and views on the impact of changes to voting rules before they were implemented. This valuable input from members of affected communities is often lost without preclearance.

In the absence of a preclearance requirement, jurisdictions have less incentive to involve community contacts in the elections process and the process of considering and adopting voting changes. Local communities also have less insight into the electoral process and the process of making voting changes. Losing this avenue of participation is particularly harmful for minority voters and the organizations representing their interests.

E. The Department Of Justice’s Election Monitoring Capacity Has Been Diminished By The *Shelby County* Decision

The Department’s election monitoring program has traditionally been one of the important components of its efforts to protect voting rights. The Department’s experience over several decades has shown that when trained nonpartisan monitors watch the electoral process and collect evidence about how elections are being conducted, they have a unique ability to help deter wrongdoing, defuse tension, promote compliance with the law and bolster public confidence in the electoral process.⁴⁷ The *Shelby County* decision, however, has significantly hampered the Department’s ability to perform these critical functions in support of fair and impartial elections.

The Civil Rights Division typically conducts election monitoring for election days around the country each year. Prior to *Shelby County*, much of that monitoring activity involved sending federal election observers to jurisdictions with a need certified by the Attorney General, based in part on the Section 4(b) coverage formula.⁴⁸ Once the Supreme Court struck down the coverage formula in *Shelby County*, the Department stopped deploying federal observers unless they were expressly authorized by a relevant court order under Section 3 of the Voting Rights Act. And there were few such orders in place. As a result, the Department has sent substantially fewer federal observers to watch the voting process in real time since the *Shelby County* decision was issued. The Department looks forward to working with Congress so that it may reinstitute the federal observer program in support of future elections, where appropriate.

IV. The Department of Justice’s Experience Confirms That Bringing Affirmative Case-By-Case Litigation Under Section 2 Of The Voting Rights Act Is An Inadequate Substitute For Section 5

The Department’s experience during the eight years between the Supreme Court’s *Shelby County* decision and today has confirmed that case-by-case litigation is inadequate to protect voting rights. We have seen an upsurge in changes to voting laws that make it more difficult for minority citizens to vote and that is even before we confront a round of decennial redistricting where jurisdictions may draw new maps that have the purpose or effect of diluting or retrogressing minority voting strength.

A. Section 2 Litigation Is Far More Resource-Intensive Than The Administrative Section 5 Review Process

The elimination of Section 5 has increased the cost of protecting voting rights on an order of magnitude similar to the cost of a Ford Fiesta compared to a Boeing 737. Before the *Shelby*

decision, the Department was able to review proposed voting changes quickly and efficiently. The vast majority of Section 5 submissions were handled by small teams consisting of a staff analyst or attorney and a reviewer and were completed within 60 days.

Since Section 5 was rendered inoperable as a result of the Supreme Court's *Shelby County* decision, the primary tool available to the Department to thwart racial discrimination in voting is costly case-by-case litigation under Section 2 of the Voting Rights Act. Whereas the Attorney General's Section 5 review process lasts, at most, a few months, Section 2 litigation often lasts years with multiple stages before multiple courts.

The greater costs of protracted litigation also accrue to governmental entities defending against discrimination claims and are ultimately paid by taxpayers, who include those voters who have been discriminated against. North Carolina lawmakers spent more than \$10.5 million defending their 2013 voting bill, which the Fourth Circuit found to have been enacted with a racially discriminatory intent. Texas spent more than \$3.5 million defending its burdensome photo identification law, which the full Fifth Circuit concluded had a racially discriminatory effect.⁴⁹

Had Section 5 been in place, Texas's discriminatory strict photo identification statute likely never would have been implemented as introduced because the objections interposed by the Attorney General and the three-judge panel of the United States District Court for the District of Columbia would have remained in place. Similarly, North Carolina legislators unveiled the "full bill" imposing numerous discriminatory voting rights restrictions only after the *Shelby County* decision. A Section 5 objection would have avoided the need for the lengthy litigation that ultimately followed.

A detailed account of the pre-*Shelby* review and the lengthy, protracted post-*Shelby* litigation concerning the Texas and North Carolina statutes shows that even though Section 2 remains an important and potent tool, it is insufficient to combat racially discriminatory voting practices and is not, by itself, an adequate replacement for Section 5.

B. The Protracted, Multi-Stage Dispute Over Texas's Photo Identification Statute

In 2011, the Texas legislature passed a statute severely limiting the number of identifying documents for purposes of voting to six forms of photo identification.⁵⁰ As described earlier, because Section 5 was then in effect, Texas sought pre-clearance from the Department, which interposed an objection, blocking Texas from implementing the change.⁵¹ Texas also sought preclearance from the United States District Court for the District of Columbia. That court also refused to preclear the change, finding that it would have a retrogressive effect on Black and Hispanic voters who would be disproportionately burdened in obtaining the required IDs compared to white voters.⁵²

Two days after the decision in *Shelby County*, the Supreme Court vacated the district court's judgment because preclearance was no longer required.⁵³ By that time, Texas had already started moving forward with implementing the statute.⁵⁴

The Department filed a Section 2 lawsuit in federal court, which was consolidated with parallel litigation filed by private parties. The parties then embarked on months of discovery. Ultimately, a two-week trial was held in Corpus Christi in September 2014, where dozens of witnesses testified, including 16 experts— many of whom were retained by the Department.⁵⁵ Months later, the district court ruled that the photo identification bill violated the “results” prong of Section 2 of the Voting Rights Act, because it had a discriminatory effect.⁵⁶ The Court found that Black and Hispanic voters were two to three times less likely to possess the limited forms of identification required by the statute and that it would be two to three times more burdensome for them to get approved IDs than for white voters, due in part to the continuing impacts of past discrimination.⁵⁷

But even so, the statute remained in effect, due to a stay of the District Court’s injunction pending Texas’s appeal to the Fifth Circuit.⁵⁸ Subsequently, a three-judge panel and later the *en banc* Fifth Circuit affirmed the district court’s holding regarding the Section 2 results claim.⁵⁹ In the meantime, voters in all elections in Texas between June 25, 2013 and July 20, 2016 (the date of the Fifth Circuit *en banc* opinion) were subjected to the discriminatory voter identification statute.

Litigation continued on the merits until September 2018, when the district court entered its final judgment in the matter. Meanwhile, the Fifth Circuit just issued an opinion on September 3, 2021, affirming that the private plaintiffs are entitled to the attorney’s fees awarded to them by the district court—more than eight years after Texas decided to move forward with implementing the statute.⁶⁰

Had Section 5 remained enforceable, voters would never have been subjected to the discriminatory ID requirement, and the Department and private litigants would not have been forced to expend tremendous resources to challenge a law that fourteen different federal judges found to be unlawful.

C. The Protracted, Multi-Stage Dispute Over North Carolina’s Omnibus Voting Statute

While the *Shelby County* case was pending in front of the Supreme Court, North Carolina legislators asked state officials for racial data regarding the use of a number of voting practices. Shielded from public view, they were quietly laying the groundwork for a major election bill.⁶¹ On the day after the Supreme Court effectively eliminated North Carolina’s preclearance obligations, a leading state senator suddenly announced an intention to move forward with what he characterized as the “full bill.”⁶² Overnight, an essentially single-issue bill was transformed into omnibus legislation that, among other things, imposed a draconian photo identification requirement, eliminated a week of early voting, ended same-day registration, and eliminated out-of-precinct provisional voting.⁶³ Each of these restrictions disproportionately affected Black voters.

Shortly thereafter, in September 2013, the United States filed a Section 2 lawsuit against the State, alleging that four provisions of the new law were adopted with the purpose, and had the result, of denying or abridging the right to vote on account of race.⁶⁴ Prior to the 2014

midterm election, the Department and other plaintiffs moved for a preliminary injunction against several provisions.⁶⁵ After the district court denied the motion, the Fourth Circuit reversed in part, effectively blocking the elimination of same-day registration and out-of-precinct voting; the Supreme Court then stayed the Fourth Circuit's injunction mandate pending its decision on certiorari, over the dissent of two justices, leaving the law entirely in effect during the 2014 elections.⁶⁶ On April 6, 2015, the Supreme Court denied certiorari, automatically reinstating the preliminary injunction and thereby restoring same-day registration and out-of-precinct voting pending the outcome of trial.⁶⁷

A few weeks before the 2015 trial was scheduled to begin, the North Carolina Legislature enacted a new statute that changed the photo ID requirement by inserting a provision allowing voters to cast a provisional ballot that would count if they completed an affidavit affirming that they had a reasonable impediment to obtaining ID.⁶⁸ Following the addition of this last-second "reasonable impediment" exception, the district court switched course and held two separate trials.⁶⁹ The first, in July 2015, dealt with all provisions except the photo ID requirement; the second, in January 2016, addressed the photo ID requirement as modified by the reasonable impediment exception.⁷⁰ On April 25, 2016, the district court entered judgment rejecting all claims of discrimination.

The Department and the other plaintiffs appealed that decision. On July 29, 2016, nearly three years after the Department had filed its Section 2 lawsuit, the Fourth Circuit held that the challenged provisions were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act; the court concluded that the plaintiffs had proved that the legislation was drafted with "surgical precision" to discriminate against minority voters.⁷¹ On May 15, 2017, the Supreme Court denied North Carolina legislative leaders' petition for review.⁷²

V. The Need For Section 5 Preclearance Is Particularly Urgent Now Because It Thwarts Redistricting Plans That Dilute Minority Voting Strength Accruing From Natural Demographic Changes Since The Last Census

The full protections of the Voting Rights Act are particularly critical at the present moment, given that the Census Bureau recently released 2020 Census data and jurisdictions are in the process of redistricting. States, counties, cities, and other localities are not drawing districts on a blank slate; 2020 Census data shows that population growth in the United States over the past ten years is largely attributable to increases in racial and language minority residents:

Percent Population Change By Race, 2010-2020, U.S. Census⁷³

Race	Percent change, 2010-2020
White alone	- 8.6%
Black or African American alone	+ 5.6%
Am. Indian/Alaska Native alone	+ 27.1%
Asian alone	+ 35.5%
Nat. Hawaiian/Pac. Islander alone	+ 27.8%
Two or More Races	+ 275.7%
Hispanic or Latino	+ 23.0%

An analysis of census data by the Brookings Institute shows that “declining white population shares are pervasive across the nation.” The White alone share of the total population declined in all 50 states, 381 (99.2%) of the nation’s 384 metropolitan areas, and 2,982 (95.0%) of its 3,140 counties.⁷⁴ Moreover, “Black population gains also favor the Sun Belt, led by Texas, Georgia, and Florida.”

Many states have experienced substantial or even transformative demographic changes. In California, the Hispanic or Latino population became the largest racial or ethnic group, increasing from 37.6 percent of the total population in 2010 to 39.4 percent in 2020, while the White alone population declined from 40.1 percent to 34.7 percent, according to decennial census data.⁷⁵ In Texas, the Hispanic or Latino population increased to 39.3 percent of the total population in 2020, nearly matching the state’s White alone population (39.7%) for the first time. The increase in Texas’s Black, Latino, and Asian residents far outpaced that of the state’s White population, according to census data:

Texas Population Change By Race, 2010-2020, U.S. Census⁷⁶

Race	Texas pop change, 2010-2020
White alone	+ 187,252 residents
Black/African Am. alone	+ 557,877 residents
Asian alone	+ 613,092 residents
Hispanic or Latino	+ 1,980,796 residents

Unfortunately, history has shown that, in the context of similar past racial demographic shifts, states have drawn redistricting plans that diluted or thwarted minority voters’ emerging strength. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), for example, the Supreme Court reviewed a redistricting plan that decreased the Latino population in a Texas congressional district in south and west Texas that had seen an “increase in Latino voter registration and overall population” since the last redistricting cycle. *Id.* at 428-29. The Court found that removing Latino voters from that district and eliminating their opportunity to elect a candidate of choice violated Section 2 and raised constitutional concerns, stating:

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.

Id. at 438-49. Similarly, during the last redistricting cycle, lower courts applied this principle to strike down, on intentional discrimination grounds, state legislative and local redistricting plans that diluted minority voting strength in areas experiencing substantial minority population growth. Examples include Texas state house districts in Nueces, Hidalgo, and Bell and Lampasas Counties, as well as the City of Pasadena's redistricting plan.⁷⁷ These cases accord with the bedrock equal protection principle that governments cannot employ policies for the purpose of thwarting or reversing gains accruing (or about to accrue) to its minority residents.⁷⁸

A strengthened Section 5 is an important tool for combatting efforts to reverse or thwart gains in minority voting strength that had naturally accrued due to normal demographic changes since the last redistricting cycle, in contexts where the risk of discrimination is particularly prominent. Indeed, much of the case-by-case litigation that occurred during the last redistricting cycle would not have been necessary if Section 5 had been in place.

VI. The John Lewis Voting Rights Advancement Act

The bill being considered by this Committee today, the John Lewis Voting Rights Advancement Act ("JLVRAA"), addresses many of the problems described above. Some of the key issues or problems that the legislation responds to are as follows:

- (1) The elimination of the preclearance coverage formula: The coverage formula struck down by the Supreme Court, which had been reenacted by Congress in 2006, relied on voter registration and turnout statistics from elections held in 1964, 1968, and 1972.⁷⁹ The *Shelby* Court criticized that formula as being "based on 40-year-old facts having no logical relation to the present day" and it held that Congress failed "to shape a coverage formula grounded in current conditions," while observing that "Congress may draft another formula based on current conditions."⁸⁰ The JLVRAA responds to that call by updating the relevant criteria so that Section 5 coverage is based on more contemporary conduct by state and local jurisdictions and addresses practices that current experience shows may have the potential to discriminate; it also strengthens the "bail in" and "bail out" provisions to better ensure that coverage is narrowly tailored and based on current conditions.
- (2) Need for clarity regarding the appropriate legal standard in Section 2 vote denial cases: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court heard its first-ever Section 2 vote denial case or, in its words, "our first § 2 time, place, or manner case."⁸¹ In *Brnovich*, the Court "identif[ied] certain guideposts" relevant to the consideration of Section 2 vote denial cases.⁸² At the same time, the *Brnovich* Court stated that the appropriate legal test for assessing whether or not a Section 2 violation exists requires considering the "totality of the circumstances" and noted that its own set of guideposts was not "an exhaustive list."⁸³ In fact, "any circumstance that has a logical bearing on whether voting is 'equally open' and affords

‘equal opportunity’ may be considered” as part of the analysis.⁸⁴ Because, under *Brnovich*, Section 2 vote denial claims remain open to multiple potential interpretations by lower courts, the Department believes that further clarification of the substantive legal standard in the JLVRAA is advisable to focus, as the Voting Rights Act has always focused, on the specific context in which the challenged provision is being implemented.

- (3) Impediments to the Attorney General’s authority to investigate voting rights violations: As described above, in the absence of Section 5, it has become much harder for the Department to learn of and investigate voting-related changes that might run afoul of the Voting Rights Act. Post-*Shelby*, the Department has frequently encountered challenges obtaining documents and information about voting changes through voluntary requests. The JLVRAA would grant much-needed authority to the Department to compel the production of documentary materials relevant to investigations of potential voting rights violations prior to filing an enforcement action.

The JLVRAA includes other important reforms that are critical for strengthening the Department’s enforcement work in the post-*Shelby* environment. Those changes include strengthening the federal observer program, reaffirming that private parties have a right of action under the VRA, and providing a funding source to small jurisdictions to help them comply with transparency requirements. The Department is committed to assisting however possible as Congress considers the JLVRAA and other reforms to address these issues, further protect voting rights, and strengthen our democracy.

Conclusion

The right to vote is sacred, particularly to people of color and historically disenfranchised communities for whom voting and participation in the democratic process is a declaration of citizenship and belonging. Their activism in Selma, Alabama and elsewhere was instrumental in animating the passage of the Voting Rights Act of 1965, which transformed American democracy. Ninety-five years after the Fifteenth Amendment’s ratification, the Voting Rights Act breathed life into the Amendment’s promise that the right to vote should not be denied because of race, color or previous condition of servitude.

We know that much work remains to be done to achieve fully the goals that motivated Congress’s passage of the Voting Rights Act. Unfortunately, many Americans’ right to vote remains under threat notwithstanding the progress that we have made.

The Department looks forward to working with Congress to support its renewed consideration of federal legislation that meaningfully and fully protects voting rights. The Department will continue to use its existing tools to enforce the current laws. But that does not change the harsh reality that the *Shelby County* decision eliminated critical mechanisms for protecting voting rights. On behalf of the Attorney General, we ask Congress to pass appropriate legislation that will restore and improve the Voting Rights Act. Legislation like the John Lewis Voting Rights Advancement Act will restore the Department’s ability to protect the right to vote in the twenty-first century.

¹ <https://www.congress.gov/116/crec/2020/08/04/modified/CREC-2020-08-04-pt1-PgS4731.htm>

² *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962).

³ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

⁴ Peyton McCrary, Christopher Seaman, & Richard Valelly, *The End Of Preclearance As We Knew It: How The Supreme Court Transformed Section 5 Of The Voting Rights Act*, 11 Mich. J. of Race & Law 275, 281 (2006). For the sake of consistency and simplicity, I refer to enforcement by the “Attorney General” in my testimony today.

⁵ *Id.*

⁶ *Georgia v. United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52.

⁷ *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁹ In rare instances, the Attorney General might also make no determination regarding the change (often because the submission was unnecessary or inappropriate for some reason).

¹⁰ For a list of jurisdictions that successfully bailed out from coverage, see Section 4 of the Voting Rights Act, available at <https://www.justice.gov/crt/section-4-voting-rights-act#bailout>. The list includes jurisdictions from Alabama, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Massachusetts, Maine, North Carolina, New Hampshire, New Mexico, Oklahoma, Texas, Virginia, and Wyoming.

¹¹ See Br. for the Federal Respondents Appendix A, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 315242.

¹² H.R. Rep. No. 109-478, at 40-41.

¹³ 2 Evidence of Continued Need 2555.

¹⁴ Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effects of Section 5*, in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power*, 65 (Ana Henderson ed., 2007), available at http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf.

¹⁵ DOJ File No. 2008-2739. Ltr. From Chief Christopher Coates to Dir., Div. of Elections Gail Fenumiai, Esq., July 14, 2008. This letter can be found in the supplemental materials appended to this testimony along with other letters requesting additional information.

¹⁶ See DOJ File No. 2008-2739. Ltr. From Chief Christopher Coates to Dir., Div. of Elections Gail Fenumiai, Esq., Sept. 10, 2008.

¹⁷ *South Carolina v. United States*, 898 F. Supp. 2d 30, 37 (D.D.C. 2012).

¹⁸ *Id.* at 37-38.

¹⁹ *Id.* at 54 (opinion of Bates, J.).

²⁰ Section 5 Objection Letters, United States Department of Justice, available at <https://www.justice.gov/crt/section-5-objection-letters>.

²¹ *Shelby County, Ala. v. Holder*, 679 F.3d 848, 867 (D.C. Cir. 2012), *rev'd on other grounds*, 570 U.S. 529 (2013).

²² H.R. Rep. 109-478, at 21 (2006), 2006 U.S.C.C.A.N. 618, 631.

²³ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

²⁴ 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary (“Evidence of Continued Need”), 109th Cong., 2d Sess., p. 186, 250 (2006).

²⁵ 1 Evidence of Continued Need 97.

²⁶ 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005).

²⁷ DOJ File No. 2001-2130. Ltr. From Ass't Att. Gen. Ralph F. Boyd, Jr. to J. Lane Greenlee, Esq., Dec. 11, 2001, *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/MS-2680.pdf>.

²⁸ DOJ File No. 2007-3837. Ltr. From Acting Ass't Att. Gen. Grace Chung Becker to Director of Elections Christopher Thomas & Chief Operating Officer Brian DeBano, December 26, 2007, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_071226.pdf.

²⁹ DOJ File No. 1997-3795. Ltr. From Acting Ass't Att. Gen. Bill Lann Lee to John H. White, Jr., Esq., June 28, 1999, *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/MS-2670.pdf>.

³⁰ DOJ File No. 2007-5132. Ltr. From Ass't Att. Gen. Thomas E. Perez to Texas Sec'y of State Phil Wilson, Aug. 21, 2008, *available at* <https://www.justice.gov/crt/voting-determination-letter-28>.

³¹ DOJ File No. 2009-2022. Ltr. From Ass't Att. Gen. Thomas E. Perez to Special Ass't Att. Gen. Margarette L. Meeks, Mar. 24, 2010, *available at* <https://www.justice.gov/crt/voting-determination-letter-19>.

³² DOJ File No. 2007-6012. Ltr. From Acting Ass't Att. Gen. Grace Chung Becker to Sara Frankenstein, Feb. 11, 2008, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_080211.pdf. Notably, Charles Mix became subject to the preclearance requirement as a result of the county's having consented to "bail in" under Section 3 as part of a settlement of a separate voting rights case. *See* Consent Decree, *Blackmoon v. Charles Mix County*, No. 05-4017 (D.S.D. Dec. 4, 2007).

³³ DOJ File No. 2011-2055. Ltr. From Ass't Att. Gen. Thomas E. Perez to Nancy P. Jensen, Oct. 3, 2011, *available at* <https://www.justice.gov/crt/voting-determination-letter-5>.

³⁴ DOJ File No. 2011-3992. Ltr. From Ass't Att. Gen. Thomas E. Perez to Joseph M. Nixon, Dalton L. Oldham, & James E. Trainor, Feb. 7, 2012, *available at* <https://www.justice.gov/crt/voting-determination-letter-31>.

³⁵ DOJ File No. 2012-2733. Ltr. From Ass't Att. Gen. Thomas E. Perez to Andrew S. Johnson & B. Jay Swindell, Aug. 27, 2012, *available at* <https://www.justice.gov/crt/voting-determination-letter-51>.

³⁶ *See, e.g.*, Consent Decree, *United States v. Waller Cty.*, No. 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008) and Consent Order, *Prairie View Chapter of NAACP v. Kitzman*, No. 04-459 (S.D. Tex. Feb. 24, 2004); *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (three-judge court), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979); *see also Veasey v. Perry*, 71 F. Supp. 3d 627, 635-36 (S.D. Tex. 2014), *aff'd in part, and rev'd in part on other grounds* 830 F.3d 216 (5th Cir. 2016) (en banc) (aggregating cases and instances of discrimination); DOJ File No. 2001-3951, Ltr., from J. Michael Wiggins, Acting Ass't. Att. Gen., to Atty. for Waller Cty., June 21, 2002, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_020621.pdf; DOJ File No. A4416, Ltr. From Drew S. Days III, Ass't. Att. Gen., to Richard G. Sedgeley, Mar. 10, 1978, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1450.pdf>; DOJ File No. X2129, Ltr. From Stanley Pottinger, Ass't. Att. Gen., to Atty. for Waller Cty., to Hayden Burns, July 27, 1976, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1250.pdf>.

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- ³⁷ DOJ File No. 2001-1495, Ltr. From Ralph F. Boyd, Jr., Ass't. Att. Gen., to Bruce D. Jones, Jr., Cty. Att'y, Sept. 28, 2001, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1280.pdf>; DOJ File No. 2002-5693, Ltr. From Ralph F. Boyd, Jr., Ass't. Att. Gen., to Bruce D. Jones, Jr., Cty. Att'y, May 19, 2003, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1310.pdf>; DOJ File No. 2003-3010, Ltr. From J. Michael Wiggins, Acting Ass't. Att. Gen., to Bruce D. Jones, Jr., Cty. Att'y, May 19, 2003, Oct. 21, 2003, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1320.pdf>.
- ³⁸ DOJ File No. 2012-4278, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Melody T. Chappell, Wells, Peyton Greenberg & Hunt, Dec. 21, 2012, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_121221.pdf; DOJ File No. 2013-0895, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Melody T. Chappell, Wells, Peyton Greenberg & Hunt, Apr. 8, 2013, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_130408.pdf.
- ³⁹ DOJ File No. 2008-3588, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Robert T. Bass, Allison, Bass & Associates, Ms. Lee Riedel, Cty. Clerk, Mar. 24, 2009, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090324.pdf; DOJ File No. 2009-3078, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Robert T. Bass, Allison, Bass & Associates, Mar. 12, 2010, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_100312.pdf.
- ⁴⁰ Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended, 28 C.F.R., Part 51, <https://www.ecfr.gov/cgi-bin/text-idx?SID=49999f502e2e525507274fa4e433b622&mc=true&node=pt28.2.51&rgn=div5#sp28.2.51.f>.
- ⁴¹ Brief for the States of New York, California, Mississippi, and North Carolina in Support of Respondents 7, *Shelby County, Ala. v. Holder*, 2013 WL 432966 (No. 12-96).
- ⁴² *Texas v. Holder*, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013). The U.S. Supreme Court vacated and remanded the decision when it issued *Shelby County*.
- ⁴³ *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 227 (4th Cir. 2016).
- ⁴⁴ *Id.*
- ⁴⁵ *Id.* at 216-18.
- ⁴⁶ Part 51 of Title 28 of the Code of Federal Regulations.
- ⁴⁷ Fact Sheet On Justice Department's Enforcement Efforts Following *Shelby County* Decision, *available at* <https://www.justice.gov/crt/file/876246/download>.
- ⁴⁸ *Id.*
- ⁴⁹ Jim Malewitz & Lindsay Carbonell, *Texas' Voter ID Defense Has Cost \$3.5 Million*, The Texas Tribune, June 17, 2016, <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/>.
- ⁵⁰ *Veasey v. Abbott*, 830 F.3d 216, 225-26 (5th Cir. 2016) (en banc).
- ⁵¹ *Texas v. Holder*, 888 F. Supp. 2d 113, 144-45 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013). The U.S. Supreme Court vacated and remanded the decision when it issued *Shelby County*.
- ⁵² *Id.*
- ⁵³ *Texas v. Holder*, 570 U.S. 928 (2013).

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- ⁵⁴ *Veasey*, 830 F.3d at 227 & n. 7.
- ⁵⁵ *See, e.g., Veasey v. Perry*, 71 F. Supp. 3d 627, 659-67 (2014), *aff'd in part*, *Veasey*, 830 F.3d at 265.
- ⁵⁶ *Id.* at 633.
- ⁵⁷ *Id.* at 661.
- ⁵⁸ *See Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014) (granting stay).
- ⁵⁹ *Veasey*, 830 F.3d at 265.
- ⁶⁰ *See Veasey v. Abbott*, --- F.4th ----, 2021 WL 4022650 (5th Cir. Sept. 3, 2021), *aff'g, Veasey v. Abbott*, No. 2:13-cv-00193, 2020 WL 9888360 (S.D. Tex. May 27, 2020) (awarding attorneys' fees to private plaintiffs).
- ⁶¹ *Id.* at 214-16.
- ⁶² *Id.* at 216.
- ⁶³ *Id.*
- ⁶⁴ *Id.* at 218.
- ⁶⁵ *Id.*
- ⁶⁶ *League of Women Voters of N.C. v. North Carolina*, 997 F. Supp. 2d 322, 339 (M.D.N.C. 2014), *rev'd in part*, 769 F.3d 224, 248-49 (4th Cir. 2014), *stayed pending appeal, North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014).
- ⁶⁷ *North Carolina v. League of Women Voters of N.C.*, 575 U.S. 950 (2015).
- ⁶⁸ 831 F.3d at 219.
- ⁶⁹ *Id.*
- ⁷⁰ *Id.*
- ⁷¹ *Id.* at 214.
- ⁷² *North Carolina v. North Carolina State Conference of NAACP*, 137 S.Ct. 1399 (2017).
- ⁷³ Nicholas Jones, et. al, 2020 Census Illuminates Racial and Ethnic Composition of the Country, U.S. Census Bureau, Aug. 12, 2021, *available at* <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>; 2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity, U.S. Census Bureau, Aug. 12, 2021, *available at* <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html>.
- ⁷⁴ William H. Frey, *New 2020 census results show increased diversity countering decade-long declines in America's white and youth populations*, Brookings Institute, Aug. 13, 2021, *available at* <https://www.brookings.edu/research/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/>.
- ⁷⁵ Eric Jensen et. al, *2020 U.S. Population More Racially and Ethnically Diverse Than Measured in 2010*, U.S. Census Bureau, Aug. 12, 2021, *available at* <https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html>. Note that this data comes from the race/Hispanic cross, whereas the data in the table labeled "Percent Population Change By Race, 2010-2020, U.S. Census" are not crossed.
- ⁷⁶ William H. Frey, *New 2020 census results show increased diversity countering decade-long declines in America's white and youth populations*, Brookings Institute, Aug. 13, 2021, *available*

at <https://www.brookings.edu/research/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/>.

⁷⁷ See, e.g., *Perez v. Abbott*, 250 F. Supp. 3d 123, 174-76, 217 (W.D. Tex. 2017) (holding that mapdrawer “intentionally racially gerrymandered [two Texas House] districts to dilute the minority vote by moving minority population out of HD54 and moving Anglo population in, thus cracking and diluting the minority vote” after “Anglo CVAP [had] decreased in HD54 [] due to the fact that minority population growth accounted for more than 70% of the growth in Bell and Lampasas Counties”); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 725 (S.D. Tex. 2017) (finding “a substantial reason—the intended purpose—of enacting [the redistricting plan] was to dilute Latino voting strength” and “to delay the day when Latinos would. . . have an equal opportunity to elect Latino-preferred candidates to a majority of City Council seats” in Pasadena, which experienced “[r]ecent population shifts and growth in the Latino citizen voting-age. . . population”).

⁷⁸ See, e.g., *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 994, 1011-13 (11th Cir. 2018) (rejecting secession effort from public school district by predominantly white community, following significant demographic changes in the school district’s student body, which would ensure “a less racially diverse student population”); *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016) (affirming finding that shift in zoning policy “reflected race-based animus” in light of the city’s “racial makeup” and “the likely number of minorities that would have lived in affordable housing” absent the change); see also *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016) (en banc) (noting district court’s intent finding supported by “the fact that the extraordinary measures accompanying the passage of SB 14 occurred in the wake of a ‘seismic demographic shift,’ as minority populations rapidly increased in Texas”).

⁷⁹ See 52 U.S.C. § 10303(b).

⁸⁰ *Shelby County*, 570 U.S. at 555, 557.

⁸¹ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2337 (2021).

⁸² *Id.* at 2336.

⁸³ *Id.* at 2338.

⁸⁴ *Id.*