LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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STATEMENT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Submitted to:
The Senate Judiciary Committee
Hearing On:

The Voting Rights Amendment Act, S.1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

June 25, 2014

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The Lawyers' Committee for Civil Rights Under Law thanks Chairman Patrick Leahy for conducting this hearing on the Voting Rights Amendment Act (VRAA) (S. 1945) and appreciates this opportunity to provide a statement for the record.

Voting and fair elections are at the center of who we are as a country. As President Lyndon Baines Johnson stated the during the signing of the Voting Rights Act of 1965, *"The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men."* Throughout our history, various communities have organized and exercised this right to achieve equality and greater access to the American Dream. That is why it is particularly distressing when barriers are erected preventing eligible Americans from participating in our democracy and why Congressional leadership is still needed to eliminate these barriers and maintain open and free elections.

This statement will discuss the effect of the Supreme Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), and how the Voting Rights Amendment Act (VRAA) (H.R. 3899/S. 1945), introduced with bipartisan support in January 2014, is a direct response to the Court's opinion in *Shelby*. It is a flexible, modern, nationwide solution to the problem of discrimination in voting. In this statement, we will also address the incorrect claims that Section 2 of the Voting Rights Act is a sufficient replacement for Section 5, including the challenges faced without a functioning Section 5 during a major election season. For example, while the Voting Rights Act (VRA) has been enormously successful in eliminating some of the most egregious forms of discrimination, the reality is that discrimination in voting remains real and immediate. Since 2000, there have been at least 148 separate instances of documented violations of the VRA. These violations have detrimentally affected the right to vote of millions of eligible American citizens.

Background

The Lawyers' Committee has a long history of working to protect the right to vote. Not coincidentally, we were founded in 1963, during the height of the civil rights movement, following a meeting in which President John F. Kennedy

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charged the private bar with the mission of providing legal services to address racial discrimination. The Lawyers' Committee continues to work with private law firms as well as public interest organizations to advance racial equality in our country by increasing educational opportunities, fair employment and business opportunities, community development, fair housing, environmental health and criminal justice, and meaningful participation in the electoral process.

The Voting Rights Project of the Lawyers' Committee integrates litigation, Election Protection, research, advocacy, and voter education. As part of our voting and elections work, the Lawyers' Committee is a leader in the Election Protection coalition. Election Protection works throughout the election cycle to expand access to our democracy for all eligible Americans, educates and empowers voters through various tools, including the 1-866-OUR-VOTE and 1-888-VE-Y-VOTA hotlines, collects data about the real problems with our election system, and puts a comprehensive support structure in place on Election Day. Most recently, the hotline was open for the primaries on Tuesday, June 24th to assist voters. Since its inception, the 1-866-OUR-VOTE hotline has received calls from over half a million voters.

Additionally, the Lawyers' Committee has consistently been at the forefront of legislative efforts to protect voting rights, including all of the reauthorizations of the Voting Rights Act of 1965. The 2006 reauthorization resulted in large part from the advocacy efforts of a voting rights coalition led by a number of civil rights organizations including the Lawyers' Committee. As part of the Lawyers' Committee's contribution to the maintenance of the Voting Rights Act, a non-partisan coalition organization called the National Commission on the Voting Rights Act was constituted to document the record of discrimination in voting. The 2006 Commission created a report which became part of the hearing record and illustrated the continuing need for the protections afforded by the VRA.

The Voting Rights Act and *Shelby County v. Holder*

African Americans secured the right to vote in 1870 with the ratification of the 15th Amendment of the U.S. Constitution, the third of what is known as the Civil War or Reconstruction Amendments. After a flurry of electoral participation and success by African American citizens, a wave of disenfranchisement undermined the 15th Amendment's clear language prohibiting discrimination in the vote "on account of race, color or previous condition of servitude." Poll taxes, literacy tests, and other restrictive local and state laws were widely used – along with violence and intimidation -- to prevent African

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Americans from voting. Decades would then pass before the Voting Rights Act of 1965 began to restore the right to vote in a meaningful way for African Americans and other minority voters. While many of the blatant barriers to the ballot were removed as a result of the Voting Rights Act and other voting rights legislation, a number of states and their political subdivisions pressed forward with repeated attempts to undermine minority voting rights. Section 5 of the Voting Rights Act proved to be tremendously effective in blocking those attempts.

There should be no question that one of Congress's most important responsibilities is to enact effective federal laws to prevent and deter racial voting discrimination. As the Supreme Court observed over a century ago, the right to vote is fundamental "because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The majority opinion in *Shelby County* recognized that "voting discrimination still exists; no one doubts that." The immediate issue facing us now is what the *Shelby County* decision means for achieving the objective of eradicating racial discrimination in voting in all its forms and what is an effective legislative response to the Court's ruling.

The impact of the decision went well beyond invalidating the preclearance coverage formula in Section 4(b). It also essentially eliminated the requirements under Section 5 of the VRA, including the requirement that certain states, counties and other jurisdictions provide notice to their communities regarding new voting changes, and the ability for potentially discriminatory voting changes to be put "on hold" pending a federal determination of whether the proposed change is discriminatory. It also functionally invalidated the federal observer program, which has been an important tool to protect all voters from racial intimidation at the polls. The decision left the work of modernizing the VRA to Congress to ensure that the law is sufficient to guard against the persistent threat of racial discrimination in voting.

In light of the *Shelby County* decision, it is imperative for Congress to conduct a prompt, thorough and bipartisan process to update the 2006 record regarding the nature and extent of current voting discrimination and to assess the legal tools that remain available to combat such discrimination. Based upon our experience and analyses, the Lawyers' Committee submits that this examination will show that the laws on the books will not be effective to stop racially discriminatory voting changes from being implemented and enforced, a task at which Section 5 was singularly successful, and that Congress therefore needs to act to put effective statutory remedies in place. The right to vote free from racial discrimination is protected by two constitutional amendments which Congress has

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the enumerated power to enforce by appropriate legislation. Congress has ample legal authority – and the moral responsibility – to address the problem.

Responding to *Shelby* – The Voting Rights Amendment Act (S. 1945)

Members of both the House and Senate have introduced the Voting Rights Amendment Act. It is bipartisan, just as the 1965 Act and every subsequent amendment and reauthorization have been. Because the VRAA reflects a broad range of viewpoints, it contains compromises. While there continue to be efforts to further strengthen the VRAA, it is an important first step to address the loss of vital protections against racial voting discrimination that were provided by the Voting Rights Act of 1965. In summary, the VRAA would require a smaller number of states to be subject to the preclearance requirement than was the case before the *Shelby* decision. However, the VRAA also provides new rules for the timely disclosure of certain voting changes and relevant related information, restores and broadens the Attorney General's ability to assign federal observers where they are needed most, and gives federal courts more authority to order preclearance and to suspend voting changes while litigation is pending.

The VRAA does contain a provision related to photo-ID, that the Lawyers' Committee opposes, which would exclude some types of court findings concerning photo ID requirements from counting as documented voting discriminatory during the annual review required by the law to determine which jurisdictions are required to obtain preclearance for their voting changes. While these ID exemptions are problematic, they do not justify stalling tactics against the movement and ultimate passage of the VRAA. The Lawyers' Committee continues to work with Members of Congress to perfect the VRAA, including the addition of language that would more robustly address concerns of certain communities, particularly in emerging populations such as the Hispanic, Asian and Native American communities and greater oversight for the notice provision in the legislation to make sure that the states fully comply.

A. Section (4) Coverage formula

How does the redesigned preclearance formula directly respond to Shelby?

In its *Shelby County* decision the Supreme Court considered a facial challenge to Sections 4(b) and 5 of the Voting Rights Act of 1965, as reauthorized by Congress in 2006. Section 5 requires federal review of changes affecting voting in "covered" jurisdictions before those changes are implemented. Section 4(b) as adopted in 1965, and amended and reauthorized in 1970, 1975, 1982, and

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2006, provided a set of formulas to identify which jurisdictions would be "covered". This approach maintained the electoral status quo in covered jurisdictions so that discriminatory voting practices could be screened out through Department of Justice administrative reviews, or less frequently by judicial review in the U.S. District Court for the District of Columbia. While Section 5 was in force, thousands of discriminatory voting changes were blocked by DOJ objections.

The Supreme Court held that the Section 4(b) coverage formula as reauthorized in 2006 cannot constitutionally be used for enforcing the Section 5 "preclearance" remedy. The Supreme Court's holding requires preclearance coverage to correspond closely with current evidence of the types of voting discrimination that Congress seeks to prevent or deter. Considering the array of arguments that were advanced to attack the constitutionality of Section 5, this was a narrow decision in legal terms, albeit one with a wide-ranging impact. The Court gave perhaps the most literal possible reading to the text of the statute and found that the Section 4(b) formula, as reauthorized in 2006, did not relate to current evidence of discrimination. The Court did not find an adequate link between the coverage formula contained in Section 4(b) and Congress' 2006 findings that an ongoing pattern of voting discrimination has continued in the covered jurisdictions. The Court highlighted the difference in type between the evidence of depressed voter turnout and voter registration employed for the 1965, 1970 and 1975 coverage determinations, and the more recent evidence in the 2006 record, which primarily concerned minority vote dilution in one form or another.

In response to *Shelby*, the VRAA includes a redesigned 4(b) "rolling trigger" that subjects any state or political subdivision with a pattern of discrimination in the previous fifteen years to coverage under Section 5. To trigger this preclearance, a state must have five violations (including at least one that is statewide), and a political subdivision must have 3 violations. Violations are based on constitutional or statutory violations or objections under Section 5 (if they are already covered). As before, a jurisdiction may petition to be removed from coverage at any time based on its record. The review of voting violations occurs every year. Based upon this formula, the states of Mississippi, Texas, Georgia and Louisiana would be subject to preclearance.

Below, examples from these four states in the past two decades show the present-day need for a preclearance remedy and demonstrate the extraordinary lengths to which some states and local governments will go in order to frustrate minority voters.

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Example 1: Mississippi Dual Registration Systems

- In Mississippi, Section 5 has repeatedly served as a vital tool to prevent the implementation of racially discriminatory voting practices. The Department of Justice has also utilized Section 5 to reinforce protections achieved through Section 2 lawsuits.

  One striking example is the role Section 5 played in blocking Mississippi from reinstituting a discriminatory dual voter registration system. Originally instituted in the state's 1890 constitutional convention, the dual registration system was used for decades to disenfranchise black voters by keeping separate registration rolls for state and municipal elections. After Congress amended Section 2 through the reauthorization of the Voting Rights Act in 1982, a federal court held in a Section 2 suit that the dual registration system violated the Section 2 results test.[i] The court supported its finding by noting the 25 percent disparity in the registration rates of black and white voters.

  Following the National Voter Registration Act (NVRA) in 1993, however, Mississippi once again attempted to adopt a dual registration system, this time attempting to create separate rolls for voters who registered via the NVRA to vote in federal elections. Mississippi was the only state to try to place such a barrier in the way of citizens who registered to vote at drivers' license offices, public assistance agencies and other NVRA-designated locations, by requiring them to register a second time for state and local elections. The system would have permitted individuals who registered with the circuit clerk to vote in all elections. Mississippi initially refused to submit the change to its registration system to the Department of Justice for preclearance, but was eventually compelled to do so through a Section 5 enforcement action in which the U.S. Supreme Court unanimously required the state to submit its change.[ii] Upon reviewing Mississippi's dual registration system, the Department of Justice objected to the system, concluding that the State had failed to demonstrate the absence of either a racially discriminatory purpose or effect.[iii] Thus, Section 5 protected the gains previously achieved through Section 2 litigation, and thwarted a voting rights violation before it was implemented, without additional litigation.

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Example 2: Racial Gerrymandering in Clinton, Mississippi

- Section 5 blocked a 2012 attempt to racially gerrymander black neighborhoods in Clinton, Mississippi. The Department of Justice concluded that the City of Clinton failed to meet this burden of showing that its redistricting plan had neither a discriminatory purpose nor a discriminatory effect.[iv] The city's 2012 redistricting plan failed to draw any districts in which African American voters, a group that comprised over 34 percent of the city's population, would have the ability to elect their candidates of choice. The Department of Justice found that Clinton's plan dispersed minority population concentrations into three wards, which limited the black share of the voting age population in those three wards to between 37 and 43 percent. Although the city claimed that it was impossible to construct a constitutionally valid plan with a majority-black ward, the Department of Justice review showed that in fact it was readily possible to do so.

  Not only did the city misrepresent whether a fair redistricting plan was possible, but the city also manipulated the redistricting process to prevent the black community from making its case. The city engaged in a rushed redistricting planning process to prevent public consideration of alternative plans that would have included an ability-to-elect ward for African American voters, a strategy that indicated a racially discriminatory purpose behind the city's redistricting plan. The board of aldermen limited its publicity of the planning process to one legal notice, bypassing any requests for input from, or even notifications to, the minority community—the local NAACP only learned of the redistricting proposal through word-of-mouth. After members of the NAACP requested that the board of aldermen postpone its vote to adopt the proposed plan to allow the NAACP time to determine whether it was possible to create an ability-to-elect ward for African American voters, the board of aldermen refused to stay its vote for two weeks.[v] Well aware of the NAACP's interest in establishing a ward comprised of a majority black voting age population, the board later denied the NAACP's second request for an extension, without justifying its refusal with any "objectively verifiable, legitimate reasons."[vi] Clinton promptly approved the redistricting plan even though: (1) there were "no factors" requiring the hasty vote, (2) the board adopted the plan eleven months before the candidate qualifying

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deadline for the next election, and (3) at the time of the vote the city was reviewing a formal challenge to census data which could have compelled the implementation of an alternative plan.

Through its authority under Section 5, the Department of Justice objected to Clinton's discriminatory redistricting plan, concluding that Clinton failed to establish that its proposal, and the process through which it adopted the proposal, lacked a racially discriminatory purpose and effect. Section 5, therefore, protected the city's minority electorate from voting rights violations months before Clinton could implement the plan in the upcoming election. Without the power of Section 5, the federal government could not have effectively identified and prohibited racially discriminatory voting practices like those proposed in Clinton, Mississippi.

This case illustrates how the process of adopting voting changes can be manipulated by a jurisdiction to disadvantage the victims of voting discrimination. Fortunately, the Section 5 process worked as it so often did to limit the advantage that could be gained by such tactics.

Example 3: Texas Statewide Redistricting: The Mark of Intentional Discrimination

- A few days before Congress reauthorized the Voting Rights Act in 2006, the U.S. Supreme Court held that Texas' 2003 redistricting plan violated Section 2 of the Act by diminishing the impact of the Latino vote in Congressional District 23.[vii]

The Supreme Court's opinion was informed by the state's record of ongoing voting discrimination and was decided against a backdrop of a steadily growing Latino community in Texas. Before the state's redistricting in 2003, the Latino share of District 23's citizen voting-age population was 57.5%, and since 1996 the incumbent had received a steadily declining share of Latino support. In response Texas diluted the Latino population of District 23, splitting a county comprised of 94 percent Latinos in half, moving the other half of that county to District 28, and replacing it with a community of predominantly white voters. The Court concluded that the state's actions "b[ore] the mark of intentional discrimination" rejected Texas' attempt to diminish the

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impact of the Latino vote in Congressional District 23.[viii] The Senate cited the case as "strong evidence in favor of reauthorization."

During the next round of redistricting, following the 2010 Census, Texas sought judicial Section 5 preclearance from the U.S. District Court for the District of Columbia for its redistricting plans for Congress, State Senate and the State House. The three-judge panel assigned to the case denied preclearance to each of the three redistricting plans.[ix] Not only did the panel conclude that the Congressional and State House plans had a discriminatory effect in that they reduced minority voting strength, but it also concluded that Texas had failed to show that the Congressional and State Senate plans were free of a racially discriminatory purpose. With regard to the Congressional plan, the panel cited a pattern of removing important parts of majority-minority districts that was not replicated in majority-white districts, the systematic exclusion of minority lawmakers from the redistricting process, departures from the normal decision-making process, and the established history of voting discrimination in Texas. With regard to the State Senate plan, the panel cited the disruption of several districts where minority voters had shown an ability to elect their candidates of choice, the systematic exclusion of lawmakers representing such districts from the process, other procedural irregularities, the majority's conscious decision not to acknowledge or address concerns raised by other members and the state's history of voting discrimination. Moreover, although the panel determined that it did not need to determine whether discriminatory intent was involved in the State House plan, it noted that there was cause for concern in that regard, including the fact that the mapdrawers appeared to manipulate districts to swap out high-turnout minority voters for low-turnout minority voters in order to create the appearance of minority ability districts.[x]

The recent rounds of redistricting in Texas illustrate the fact that for some states the threat of Section 2 litigation does not deter repeat voting rights violations, making preclearance review under Section 5 necessary.

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Example 4: Targeting Black Elected Official in Randolph County, Georgia

- In Georgia, Section 5 preclearance thwarted an attempt by the Randolph County Board of Registrars to prevent African-American voters from having an opportunity to re-elect a prominent member of the County Board of Education. After the 2000 Census, the district boundaries for the Board of Education were redrawn. An issue arose as to the district assignment of Board Chair Henry Cook, who is black, whose property was split during the redistricting between the district he represented, District 5 (which was 70% black), and another district, District 4 (which was 70% white). At that time, Mr. Cook was permitted to register to vote and run for election in District 5, and that decision was affirmed in 2002 by a state court judge.

  Nonetheless, three years later, in January of 2006, the County Board of Registrars held a special meeting for the sole purpose of determining anew Mr. Cook's proper voter registration district. Neither Mr. Cook nor his family received notification that the meeting was to occur, nor were they invited to provide evidence or testimony on their own behalf. At the meeting, the all-white Board of Registrars voted unanimously to change the voter registration status for Mr. Cook and his family from District 5 to District 4. The stated bases for the decision, that the house was encircled by District 4 and that the decision was made to prevent voting in multiple districts, were found by the Department of Justice to be factually inaccurate and unjustified, in light of the absence of any basis for concluding that multiple district voting was a threat. The Department of Justice objected to the change that resulted from this "unusual" sequence of events. Without Section 5, Randolph County either would have succeeded in preventing Mr. Cook from running for re-election in 2006 from District 5, or would have prompted another round of litigation in which Mr. Cook or other plaintiffs would have to bear the burden of proof and litigation expenses.

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Example 5: Attempted Evasion of Consent Decree For Louisiana Supreme Court

- Louisiana and the recent litigation, *Chisom v. Jindal,* involving the Chief Justice position on the Louisiana Supreme Court, is one example of how voting discrimination cannot be dismissed as relic of the past. In July 2012, counsel for now-Chief Justice Bernette Johnson filed suit in federal court to enforce a decades-old Section 2 consent judgment in order to vindicate her right to assume the Chief Justice position based on her seniority on the bench. The recent phase of the case was born out of a struggle for equal voting rights for African Americans that originated more than twenty years earlier.

  The Consent Judgment that initially resolved the *Chisom* litigation dealt with the election of members of the Louisiana Supreme Court. In 1986, a group of African American voters filed *Chisom v. Roemer*, claiming Louisiana's policy to engulf Orleans Parish into a two-member district for electing Louisiana Supreme Court justices diluted the vote of African Americans, thus violating the United States Constitution and the Voting Rights Act.[xi] At the time of the suit, no African American had ever served on the state Supreme Court. Orleans Parish is majority African American in population, but the two-member district in which it was submerged was majority white. Under the Consent Judgment, that district was divided, so that all justices would be elected from single-member districts going forward. In addition, a new district was created, comprised of most of Orleans Parish and a portion of neighboring Jefferson Parish.

  In order to allow two sitting justices to complete their terms, the Consent Judgment also provided for a temporary eighth justice (the "*Chisom* justice") who would be elected from the new Orleans and Jefferson Parishes District. It further established that this justice "shall receive the same compensation, benefits, expenses and emoluments of offices as now or hereafter are provided by law for a justice of the Louisiana Supreme Court." Most importantly, the new justice's tenure and seniority were to be recognized in the same manner as that of the other justices.[xi] Justice Johnson was elected to this seat in 1994, and has continuously served on the Court since then.

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Under Louisiana law, the Chief Justice position is filled by the Court's longest-serving justice. In May 2012, the sitting Chief announced her retirement, and Justice Johnson, who was second in seniority, announced plans to prepare to assume the position. Soon thereafter, however, the Court indicated that it might not credit the portion of her service on the Court when she was the *Chisom* justice, and that therefore she might not become Chief Justice. What followed was a racially-charged fight to enforce the Consent Judgment and ensure Louisiana's first African American Chief Justice would not be denied her rightful place on the Court. This included an unprecedented proceeding announced by the Court, through which Justice Johnson would have borne the burden of proving to her colleagues why she deserved and had clearly earned her position as the next Chief Justice according to the stipulations in the *Chisom* Consent Judgment and Louisiana Constitution.

On September 1, 2012, the federal district court issued an order enforcing the terms of the Consent Judgment, holding that Justice Johnson's service as the *Chisom* justice must be credited in determining her tenure on the Supreme Court. As a result, the Louisiana Supreme Court thereupon issued an order certifying Justice Johnson as the next Chief Justice, the first African American to serve in that position in the history of the State. Chief Justice Johnson entered into office on February 1, 2013.

The examples discussed above represent recent discriminatory voting practices that show the ongoing need for Section 4(b) and Section 5 coverage in Mississippi, Texas, Georgia and Louisiana. While other states have recent records that would also warrant the preclearance remedy, these four states have the worst records of documented recent voting discrimination. Texas in particular demonstrates that Section 2 litigation alone is not sufficient to deter the state from voting discrimination.

In addition to the clear value of Section 5 preclearance in blocking discriminatory changes that already have been adopted, the deterrent effect of Section 5 cannot be overstated. Section 5 regularly dissuaded jurisdictions from enacting discriminatory laws and procedures, because they understood that there was little chance they would be precleared, and that it would merely waste time and resources to try to do so. U.S. District Judge John Bates, in his concurring

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opinion in a Section 5 declaratory judgment concerning a South Carolina voter identification law, specifically noted the salutary and deterrent effects of Section 5. In discussing the major modifications legislators made to the law to make it less onerous, he wrote:[xii]

> …[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive. Several legislators have commented that they were seeking to structure a law that could be precleared. See Trial Tr. 104:18-21 (Aug. 28, 2012) (Harrell) ("I was very aware at the time that we were doing this that whatever we would have to do would have to be subject to the Voting Rights Act because that would be the basis for the Department of Justice preclearing the bill for us."); id. at 105:15-18 ("[I] ask[ed] the staff who drafted the bill for me to please make sure that we are passing a bill that will withstand constitutional muster and get through DOJ or through this court."); Trial Tr. 108:23-25 (Aug. 27, 2012) (Campsen) (agreeing that he was "interested in what voter ID legislation had been precleared" in drafting R54); id. at 148:10-15 (discussing senators' statement that "[t]he responsible thing to do was to fix [the bill] so that it would not fail in the courts or get tripped up by the Voting Rights Act"); Trial Tr. 141:9-12 (Aug. 28, 2012) (McConnell) (discussing his efforts on behalf of a bill that "had a better chance of getting preclearance"); id. at 182:18-20 (on the Senate floor "[t]here was discussion about" how "to craft a bill that would comply with the voting rights amendment"). The key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions of Act R54, particularly the reasonable impediment provision, subsequently presented to this Court were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act.
>
> …The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of Act R54 demonstrates 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.

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As Justice Ginsburg now-famously observed in her *Shelby County* dissent, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[xiii] Congress' longstanding commitment to preventing and deterring racially discriminatory voting changes stems from a recognition that once such changes are implemented, it is already too late, because they harm a fundamental right that can never be fully restored after implementation has occurred.

B. Section (6) Transparency and Notice

One important but less obvious effect of the *Shelby County* ruling is that it cut off the unique and centralized flow of information about changes in voting practices and procedures that had been relied upon by the public and the Department of Justice. This centralized flow of information was one of the principal reasons that Section 5 proved to be so remarkably successful in facilitating the enfranchisement of minority citizens in the covered jurisdictions, and in protecting that progress from being subverted by backsliding.

The scope of the Section 5 preclearance requirement was always interpreted broadly by the Supreme Court to encompass any and all "enactment[s] which altered the election law of a covered State in even a minor way."[xiv] This was critical because, as the Supreme Court has emphasized, "[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination."[xv] The Department of Justice and the public were able to rely upon Section 5 submissions to accurately catalogue all voting changes actually being made in the covered jurisdictions. As a result, Section 5 provided a reliable, comprehensive, and up-to-date inventory of voting changes.

There simply is no fallback source for that basic information. No federal procedure requires states and political subdivisions to identify or report voting changes in advance of their use, and we are not aware of any state with such a requirement. While states today typically provide tools on their legislatures' websites to search and obtain copies of bills and acts, problematic voting changes can be embedded in arcane local legislation or amendments. Since home rule is now the norm in most states, most voting changes are enacted at the local level, and pre-implementation information about voting changes adopted at the local level is hit or miss at best.

Another benefit of this flow of information was that it permitted the citizens of the covered jurisdictions to learn the full facts about the voting changes

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that would affect them, and to make informed comments about them. Discriminatory voting changes are frequently enacted by recourse to misinformation, the withholding of relevant information, or a manipulation of the legislative process.

For these reasons, the inclusion of the notice and transparency provision in the VRAA is particularly necessary and responsive to the broad goal under the Voting Rights Act of preventing and deterring discriminatory voting changes. Section 4 of the VRAA requires that all jurisdictions give public notice of certain voting changes no later than 30 days after the change is enacted. This does not interfere with the ability to change laws, but simply allows for the public to receive notice of such changes at least 180 days before a federal election.

The examples below further elaborate on the importance of effective public notice and evidence the more expansive need for such transparency beyond the Section 4(b) covered states and jurisdictions.

Example 1: Lack of adequate notice for polling place change in Section 4(b) covered state: Fulton County, Georgia

- In May 2014, some of Fulton County's voters faced confusion and frustration after learning that their original polling place at the All Saints Episcopal Church had been moved without election officials informing them about this change.[xvi] Voters showed up at their original polling place upset that their voter registration cards did not make this change clear. Though there were two locations listed on voters' registration cards, there was no indication that Georgia Tech was the new polling place for Fulton County voters. Election officials left a MapQuest printout at All Saints Church with directions to the Georgia Tech campus, but voters pointed out that the new polling place was still difficult to find. Additionally, there were neither signs nor indication until later in the day that the Georgia Tech parking lot was free for voters; some had to take parking tickets to get into the lot. The sudden change of polling place without clear transparency to voters may have had a negative impact on how many Fulton County residents participated in this year's election, possibly even discouraging them from voting because some had to, essentially, pay to vote.

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Example 2: Need for transparency in non-covered Section 4(b) state: Ohio

- Before the November general election in 2004, the Election Protection coalition worked with election officials to eliminate barriers to the ballot box, while simultaneously battling decisions and tactics that would increase the likelihood of widespread disenfranchisement.[xvii] As a result of this ongoing communication and notification through the Election Protection network, the Election Protection Coalition was successful in resolving many challenges in favor of voters, including tackling issues that occurred pre-election. "[Election Protection] attempted to counter pre-election decisions from Secretaries of State and local election officials that affected voter registration procedures and potentially disenfranchised thousands of voters before they ever made it on to the registration rolls or into the voting booth. Some issues were peculiar to a state or locality. One example was Ohio Secretary of State Kenneth Blackwell's assertion that registration applications be printed on 80-pound paper, before public outcry, led by local and national Election Protection partners, forced him to back down."[xviii]

- Additionally, "Election Protection lawyers successfully challenged the Ohio Secretary of State's directive refusing to allow voters who requested absentee ballots, including many who never received those ballots, to cast a provisional ballot at their polling place. In addition to violating the Help America Vote Act, this directive was particularly nefarious considering that many counties across the state were unable to send absentee ballots to voters in time for those ballots to be cast and counted."[xix]

C. Section 2 of the Voting Rights Act is not a replacement for Section 5 coverage

It is incorrect to suppose that Section 5 coverage is unnecessary because the Supreme Court left Section 2 of the Voting Rights act intact, and because the Department of Justice and private plaintiffs can file suit against discriminatory voting practices. Case-by-case litigation is not an adequate protection against the special problems and harms of voting discrimination when states are determined to try to put them into effect. Section 5 regularly stopped voting discrimination before its insidious effects could take hold. This is a particular concern in light of current efforts to retrench on access to the polling place and voter registration.

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One of the arguments frequently made against Section 5 is the assertion that Section 2 of the Voting Rights Act provides all of the protections necessary to deal with today's voting discrimination. Congress considered this question in 2006 when it considered whether to reauthorize the preclearance remedy and disagreed.[xx] Although the Lawyers' Committee and other voting rights practitioners can use Section 2 to eventually invalidate some discriminatory voting changes that would have been blocked from ever taking effect under Section 5, that hardly proves that Section 2 will accomplish all that Section 5 did.

a. Preliminary Injunction Standard Under the VRAA

The *Shelby* ruling effectively left case-by-case litigation as the only tool to prevent the implementation of discriminatory voting changes. As a result of the nullification of the original Section 4 (b) coverage formula, Section 2 is the principal federal law available to block discriminatory voting changes before they take effect. However, compared to Section 5 preclearance, obtaining preliminary injunctions under Section 2 is a far more burdensome and uncertain process, even in the most meritorious cases.

Recognizing these limitations, Section 6 of the VRAA clarifies the standards for preliminary injunctive relief and gives courts a statutory direction to freeze voting changes likely to be discriminatory pending litigation, particularly changes that occur right before elections or in response to past lawsuits. This revised standard is particularly important in light of the elimination of the essential power of Section 5 preclearance.

While Section 2 can be used to challenge a voting change before it is implemented, there are a number of reasons why Section 2 litigation alone will not be as effective as Section 5 in consistently blocking discriminatory changes. Lack of notice about proposed and newly-implemented changes poses challenges for plaintiffs seeking a preliminary injunction. As noted previously, one cannot reasonably expect all voting changes to be adequately and timely publicized under current laws. Even for changes that are known, the window between final adoption of a voting change (when a case would become ripe to litigate) and the date on which the change is first to be used will often be quite narrow. Jurisdictions are likely to make that window as narrow as possible if they have concerns about potential litigation. Nor can it reasonably be expected that jurisdictions will make readily available the relevant information to support a motion for a preliminary injunction under Section 2 so as to allow for effective litigation within that window. To the contrary, jurisdictions with concerns about

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potential litigation have a strong (if not good) motivation to be uncooperative in providing relevant information.

Example 1: Preliminary injunctions denied: Charleston County, South Carolina

- Even in the strongest cases, obtaining injunctive relief under the current standard can be extremely difficult in Section 2 cases. For decades, racially polarized voting patterns dominated the election process for the Charleston County Council. Black and white voters regularly preferred different candidates and the white-preferred candidates almost always defeated black-preferred candidates, despite a large minority population in the county. Since 1970, only three of the 41 people elected to the County Council were minorities. Not only did the County's at-large election system reduce the impact of the black vote, but other features of the system, including the County's very large size, the de facto majority vote requirement enforced through the use of partisan elections, and the imposition of residency requirements all worked to deter and disenfranchise minority voters.

  In January 2001, the United States filed a lawsuit (later consolidated with a similar case brought by private plaintiffs) against the County, claiming that the at-large election of its Council diluted minority voting strength in violation of Section 2. The United States sought a preliminary injunction in advance of the June 2002 primary and again in advance of the November 2002 general election, both of which the federal district court denied. In between those two denials of preliminary relief, in July 2002, the federal district judge granted partial summary judgment to the United States, holding that the three *Gingles* preconditions had been satisfied; in other words, the preliminary injunction was denied despite the fact that the plaintiffs had already prevailed–not merely that they were likely to prevail--on the central elements of a Section 2 case. More than two years after the case was filed, and after the 2002 elections had occurred, the federal district court ruled in favor of the United States after a bench trial, concluding that the County's record of egregious voting polarization, its particular electoral structure, and its substantial size combined to deprive minority voters of an equal opportunity to elect their preferred representatives. *United States v. Charleston Cnty.*, 365

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F.3d 341, 343 (2004). The Fourth Circuit Court of Appeals affirmed.

Not long after the Fourth Circuit's decision, however, the County changed the election method for the County School Board to the identical method that the court had just invalidated in the context of the County Council. Pursuant to its authority under Section 5, the Department of Justice objected to the change, emphasizing that the new election format would decrease minority voting strength. In contrast to the County Council case that was brought under Section 2, where it took the United States several years to obtain an injunction despite extremely strong evidence of a violation, the School Board plan was stopped before it started. Moreover, while a Section 2 lawsuit demands numerous years of labor and hundreds of thousands—and often millions--of dollars in resources for each new suit, Section 5 equips the Department of Justice with the authority to take swift and effective action to protect minority voters and advocate for equal access to the ballot box.

Example 2: Flawed voter purging in Georgia

- Shortly before the 2008 general election, civil rights groups learned that county election officials were informing certain voters that they would be removed from the voter registration lists unless they appeared and presented proof of their U.S. citizenship. Georgia had implemented—without Section 5 preclearance—a new, statewide voter registration verification procedure. Civil rights groups filed a Section 5 enforcement action in Georgia to prevent the state from using this program without Section 5 preclearance.[xxi] The federal district court issued a preliminary injunction against the Secretary of State, finding that the new verification procedure had been implemented without federal preclearance, in violation of Section 5 of the Voting Rights Act. The court prohibited the State from relying upon the procedure to permanently deny any voter registration applications or permanently remove any existing voter registrants from the rolls, unless and until preclearance was obtained.

  The Department of Justice then denied Georgia's initial preclearance request, finding that: "[t]his flawed system frequently subjects a disproportionate number of African-American, Asian,

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and/or Hispanic voters to additional and, more importantly, erroneous burdens on the right to register to vote."[xxii] DOJ encouraged the state to utilize alternatives to reduce or eliminate the discriminatory effect of the new policy, and in 2010, DOJ precleared a revised version of Georgia's verification law. The precleared version reflected a significant improvement that resulted in a more accurate and less discriminatory verification process. *Morales* provides another example of the salutary effect of Section 5 that was highlighted by in Judge Bates' in his opinion in *South Carolina v. United States*, discussed above.

Moreover, the absence of Section 5 would have made it much more difficult for Plaintiffs to enjoin implementation of the verification procedure, on the eve of the election, when many of its details and flaws were undisclosed. Through the preclearance process, DOJ was able to obtain information on the discriminatory impact of the voter verification process. Under the existing Section 2 preliminary injunction standard, litigants would not necessarily have access to the same information or be able to analyze the potential effect of such laws prior their implementation.

b. ***Costs and Additional Limitations of Section 2 Litigation***

Section 2 is also an insufficient substitute for Section 5 because of the often-steep costs associated with litigating under this provision of the VRA. The costs of Section 2 litigation are far greater than those typically incurred by private litigants that participate in Section 5 administrative review. In those cases where Section 2 litigation successfully blocks a discriminatory voting change, the cost to all involved – in terms of judicial resources, attorney costs, and expert witness costs – will routinely exceed the costs that Section 5 administrative review would have entailed by a very large margin.

In addition, a jurisdiction that loses a Section 2 case will have less discretion in shaping a remedy than a jurisdiction attempting to overcome a Section 5 objection. And, a jurisdiction that loses a Section 2 case on the grounds of discriminatory purpose may well find itself back under preclearance under Section 3(c). While previously covered jurisdictions should be wary of rushing to adopt voting changes that had been deterred by Section 5 if only for these practical reasons, the Lawyers' Committee expects that a number of such jurisdictions will take the *Shelby County* decision as a green light to forge ahead with discriminatory voting changes and take their chances in Section 2 litigation.

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This prediction has already been realized in Texas where, after the *Shelby* ruling, the state immediately moved forward with a voter identification law previously declared found in violation of Section 5.[xxiii] In North Carolina, a photo ID bill that was pending in the state legislature at the time of the *Shelby County* decision was amended to add a number of new restrictive provisions that are now the subjects of three federal lawsuits.

D. Federal Observers

Under the Voting Rights Act, federal observers provided another important mechanism for guaranteeing access to the ballot for racial or ethnic minorities and combating voting discrimination at the polling places. The nullification of Section 4 of the VRA by the *Shelby* decision undercut the ability of the Department of Justice to deploy federal observers, thus requiring Congressional action. Under the Voting Rights Act, the Department of Justice was permitted "to send federal examiners and observers to polling places in covered political subdivisions that the Department has reason to believe will engage in electoral discrimination based on race on color." This may take the form of fraud, intimidation or disparate treatment of minority voters. It may also take the form of non-compliance with federal law, in particular the language minority requirements in Section 203 of the Voting Rights Act.

Federal observers are important actors in stopping voting discrimination. Their presence at polling places allows voter discrimination to be documented, helps to deter it in the first place, and helps ensure that every voter has the ability to cast their ballot with confidence and without interference. Observer coverage is a useful indicator of where voter discrimination issues have arisen, even if a lawsuit was not filed.

In hearings held by the National Commission on the Voting Rights Act in 2005, there was testimony about prejudiced attitudes, sometimes escalating into harassment and intimidation, by poll workers and other officials toward language minorities on Election Day. Federal observers were often assigned to document concerns that legally-mandated language assistance was not being provided, and to ensure that language minorities did not face harassment or discrimination when casting their ballots. Under Section 203 of the Voting Rights Act, "when a language-minority population is eligible under either coverage formula for language assistance, it is the duty of the election officials in those jurisdictions to ensure that all needed election material is provided in the specific language."

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Federal observers are effective because they provide detailed contemporaneous first-hand reports of what occurs in polling places. In the event of voting irregularities, these records are available to Department of Justice attorneys, who can contact the official in charge of the election to investigate. If the official does not solve the voting irregularity, the Department of Justice may file a civil action under the Voting Rights Act, after the elections are over. The presence of federal observers also has a deterrent effect against misconduct, and were requested by local officials in tense situations to provide a stabilizing influence. Unlike ordinary poll watchers authorized by state or local laws, federal observers are allowed inside the polling place, as well as where the ballots are counted. Between 1966 and 2005, roughly 25,000 observers were deployed in over 1,100 elections.[xxiv]

In 2004 alone, the Department of Justice had dispatched a total of 898 federal observers and monitors to 85 jurisdictions.[xxv] In 2012, the Department dispatched over 780 federal observers and monitors to 51 jurisdictions within 23 states to look for potential voting rights violations.[xxvi] The number of observers, 780, was similar to the number deployed for the 2008 presidential election.[xxvii]

In response to this loss of coverage because of the *Shelby* decision, and in order to remedy the more limited ability to monitor election activities in the states, Section 5 of the VRAA expands the use of federal observers to not only jurisdictions that are subject to the preclearance requirements, but also to jurisdictions that are required provide election materials in more than one language under Section 203.

The Urgency of Now

The rationale for Section 5 was always, as the Supreme Court explained in *South Carolina v. Katzenbach*, 383 U.S. at 328, to "shift the advantage of time and inertia from the perpetrators of the evil [of discrimination] to its victims" within the covered jurisdictions. The *Shelby County* decision completely reverses that approach. It now falls to private parties and to the Justice Department to identify discriminatory voting changes in the window between their adoption and implementation, gather enough evidence to state a claim for which private parties and the Justice Department will have the burden of proof, and persuade a court to issue an injunction. If any one of those steps should fail, then the discriminatory change will proceed to be implemented and do its damage unimpeded.

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The introduction of the Voting Rights Amendments Act is directly responsive to the concerns expressed in *Shelby* and will help restore the ability of the federal courts, the Department of Justice, and the public to prevent the imposition of discriminatory voting changes that would disenfranchise eligible American voters. As a result of *Shelby*, the state of voting rights is as follows:

- **Currently, there is no ongoing federal or court oversight of those states or jurisdictions with recent histories of repeated racial discrimination in voting;**
- **There is currently no source that provides a reliable, comprehensive, and up-to-date canvass of voting changes;**
- **There is no uniform requirement that States provide notice and transparency to voters about voting changes; and**
- **There limited ability to send federal observers to monitor potentially discriminatory election activities.**

The VRAA follows the path of its predecessor and is bipartisan compromise that reflects the current state of voting rights. It restores and updates many of the protections lost as a result of *Shelby County*, and is an important first step to address the loss of vital protections against racial voting discrimination that were provided by the Voting Rights Act of 1965. The Lawyers' Committee supported introduction of the legislation because it offers much to restore the lost protections of the Voting Rights Act and we will continue to work with Members to pass the Voting Rights Amendment Act immediately.

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[i] Operation PUSH v. Allain, 674 F. Supp. 1245, 1252 (N.D. Miss. 1987).
[ii] Young v. Fordice, 520 U.S. 273, 291 (1997).
[iii] *See* Determination Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, U.S. Dept. of Justice to Sandra M. Shelson, Special Assistant Attorney General, Mississippi (Sept. 22, 1997), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/l_970922.php.
[iv] *See* Determination Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dept. of Justice to Kenneth Dreher, Esq. & David Wade (Dec. 3, 2012), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/MS/l_121203.php.
[v] *See* Ruth Engram, No majority black ward possible, aldermen say of redistricting, JACKSON CLARION-LEDGER, April 19, 2012, at 4B.
[vi] *See* City of Richmond v. United States, 422 U.S. 358, 384 (1975) (Brennan, J., dissenting).
[vii] LULAC v. Perry, 548 U.S. 399, 423-42 (2006).
[viii] LULAC, 548 U.S. at 440.
[ix] Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2012).
[x] The Supreme Court vacated and remanded the three-judge panel's decision in light of the Shelby County decision. Texas v. United States, 133 S.Ct. 2885 (2013).

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[xi] Chisom Consent Judgment, civil Action No. 86-4075, available at http://www.lawyerscommittee.org/admin/site/documents/files/Consent-Judgment-8-21-1992_1.pdf.
[xii] South Carolina v. United States, No. 12-203, 2012 WL 4814094, at *21 (D.D.C. Oct. 10, 2012) (Bates, J., concurring).
[xiii] 570 U. S. ____ (2013) at 64.
[xiv] Allen v. State Board of Elections, 393 U.S. 544, 566 (1969
[xv] Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).
[xvi] Voters confused after finding polling place moved to Georgia Tech campus, WSB-TV Channel 2 (May 20, 2014), http://www.wsbtv.com/news/news/local/voters-confused-after-finding-polling-place-moved-/nf4T4/.
[xvii] *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, ELECTION PROTECTION 2004, at 4, available at http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0022.pdf.
[xviii] *Id.* at 3.
[xix] *Id.* at 4.
[xx] *See* Kristen Clarke, The Congressional Record Underlying the 2006 Voting Rights Act, 43 HARV. C.R.-C.L.L. REV. 385, 415—17 (2008).
[xxi] Morales v. Kemp, Civ. No. 1:08-CV-3172 (N.D. Ga. Oct. 27, 2008).
[xxii] *See* Determination Letter from Loretta King, Acting Assistant Attorney General, U.S. Dept. of Justice to Thurbert Baker Attorney General, Georgia (Sept. 22, 1997), available at http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/l_090529.php.
[xxiii] Myrna Pérez, After 'Shelby County' Ruling, Are Voting Rights Endangered?, BRENNAN CENTER FOR JUSTICE (September 23, 2013), http://www.brennancenter.org/analysis/after-shelby-county-ruling-are-voting-rights-endangered.
[xxiv] 2006 Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 109th Cong. 10 (2005), available at http://commdocs.house.gov/committees/judiciary/hju24606.000/hju24606_0f.htm.
[xxv] 2006 Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 109th Cong. 64 (2005), available at http://commdocs.house.gov/committees/judiciary/hju24606.000/hju24606_0f.htm.
[xxvi] Terry Frieden, DOJ sends voting rights monitors, observers to 23 states, http://politicalticker.blogs.cnn.com/2012/11/02/justice-department-to-deploy-election-observers/.
[xxvii] *Id.*