

Justin Levitt  
Professor of Law  
Associate Dean for Research  
213.736.7417  
[justin.levitt@lls.edu](mailto:justin.levitt@lls.edu)

Testimony of  
Professor Justin Levitt,  
Loyola Law School, Los Angeles

Before the  
United States Commission on Civil Rights

An Assessment of Minority Voting Rights Obstacles in the United States

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Chair Lhamon, Vice Chair Timmons-Goodson, and distinguished Commissioners, thank you for inviting me to testify before you.

My name is Justin Levitt. I am a tenured Professor of Law and the Associate Dean for Research at Loyola Law School, in Los Angeles.<sup>1</sup> I teach constitutional law and criminal procedure, and I focus particularly on the law of democracy, including election law and voting rights — which means that I have the privilege of studying, analyzing, and teaching the Constitution from start to finish, and the election statutes that implement the democratic structures it establishes. From the first words of the Preamble to the final words of the 27th Amendment, our founding document is concerned with how We the People are represented: what we authorize our representatives to do, what we do not permit our representatives to do, and how we structure authority to allow our representatives to check and balance each other in the interest of ensuring that the republic serves us all.

My examination of the law of democracy is not merely theoretical. I have recently returned to Loyola from serving as a Deputy Assistant Attorney General helping to lead the Civil Rights Division of the U.S. Department of Justice. There, I had the privilege to supervise and support much of the federal government's work on voting rights, among other issues. Before joining the Civil Rights Division, I had the chance to practice election law in other contexts as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and have their votes counted in a manner furthering meaningful representation. My work has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution.

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<sup>1</sup> My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated. I appear today at the request of the U.S. Commission on Civil Rights, and on behalf of no other person beyond myself.

I have had the privilege to seek voting rights for clients and constituents, and the privilege to teach others how to do the same. I have had the privilege to pursue research cited by the courts, and to testify as an expert to them — and to this body and at least one of its state advisory committees. And I have had the privilege to advise, and occasionally represent, elected officials and election officials, of both major parties and neither major party, and those whose partisan affiliation I simply do not know.

I am delighted to join you today for this exceedingly important hearing, in a state where the fight over voting rights can occasionally reach fever pitch. There are shared elements throughout this country to the quest for a more perfect democracy — to bend the arc of the moral universe more swiftly and surely toward justice — but they draw particular shape in particular local terrain. And North Carolina soil has been the site of both substantial setbacks and inspiring advances, including some that have resonated nationwide. I think it is altogether appropriate that you continue your national assessment of obstacles to voting rights here today, and I am happy to assist in that task however I can.

In particular, I understand that this panel focuses on the enforcement of the Voting Rights Act, both by the Department of Justice and by private litigants, and the impact of the Supreme Court's decision in *Shelby County* on that enforcement. My thoughts on this vital topic have been informed by my experience at the DOJ, my experience as a private litigant, and my experience as a scholar and analyst of the enforcement process, and I will try to bring all three sources to bear on my testimony today. Of course, what emerges is my own analysis: I no longer speak for the DOJ, and I am not free to comment on internal DOJ process that reflects privileged or confidential matters.

I should also emphasize that enforcement is neither driven nor responsibly measured by raw numbers of filed cases, alone. Any given case may be big or small, warranted or unwarranted, rushed to filing or meticulously prepared — and each of those possibilities may have a very different value. Factual research is vital for public policy, and quantitative analysis is a vital component of accurate factual research, but it is important to acknowledge and remember the inherent limitations of the quantitative analysis in question when attempting to discern broader meaning from the data.

### *Shelby County*<sup>2</sup>

One need not turn to raw numbers of cases in order to see the impact of the Supreme Court's 2013 opinion in *Shelby County v. Holder*.<sup>3</sup> The *Shelby County* decision struck down a provision at the heart of the Voting Rights Act, which has been widely hailed as one of the most successful pieces of civil rights legislation in the country's history. The Voting Rights Act is our most significant shared national commitment to equal participation and equitable political

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<sup>2</sup> Some of this portion of my testimony borrows from testimony given to the Senate Judiciary Committee in the immediate aftermath of the *Shelby County* decision. See *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on Judiciary*, 113th Cong. (July 17, 2013) (statement of Justin Levitt), <https://www.judiciary.senate.gov/imo/media/doc/7-17-13LevittTestimony.pdf>. Sadly, some of the concerns expressed in that testimony have already proven justified.

<sup>3</sup> 133 S. Ct. 2612 (2013).

diversity, based in part on history that allows us to recognize that we all suffer when such a commitment is absent. It is an expression of our fierce commitment to minority representation within a system of majority rule. That is just part of why the Act has enjoyed broad popular support from Americans of all colors and creeds.<sup>4</sup>

The Voting Rights Act has also always been an American commitment crossing partisan lines.<sup>5</sup> The Act — including the preclearance provisions of section 4, at issue in *Shelby County* — was passed in 1965 by substantial majorities of both parties.<sup>6</sup> Those preclearance provisions were renewed in 1970,<sup>7</sup> 1975,<sup>8</sup> 1982,<sup>9</sup> and 2006;<sup>10</sup> on each and every occasion, the renewals were passed by substantial majorities of both parties. Despite occasional disagreements about the meanings of particular statutory terms, members of Congress from both sides of the aisle recognized the power of bipartisan action on the fundamental structure necessary to safeguard the voting rights of each and every eligible citizen.

As you know, part of this structure is section 5 of the Voting Rights Act, which establishes a system of “preclearance.” Certain jurisdictions must submit election changes to a federal court or the Department of Justice before those changes may be implemented, in order to ensure that a change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a defined language minority group.<sup>11</sup> Most crucially, the fact that changes have to be submitted before implementation means that section 5 is able to stop discriminatory laws and policies before they ever take effect.

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<sup>4</sup> In polls following the opinion, self-identified whites, blacks, and Hispanics all disapproved of the *Shelby County* decision, to statistically significant levels. See Press Release, ABC News/Washington Post Poll: SCOTUS Decisions, July 3, 2013, <http://www.langerresearch.com/uploads/1144a24SCOTUSDecisions.pdf>.

<sup>5</sup> Indeed, in the same polls cited above, self-identified liberals, moderates, and conservatives all disapproved of the *Shelby County* decision as well, to statistically significant levels. See *id.*

<sup>6</sup> 79% of Democrats voting on the measure voted in favor of the Act, and 88% of Republicans voting voted in favor of the Act. See 111 CONG. REC. 19,201, 19,378 (1965); House Vote #107 in 1965, <http://www.govtrack.us/congress/votes/89-1965/h107>; Senate Vote #178 in 1965, <http://www.govtrack.us/congress/votes/89-1965/s178>.

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

<sup>8</sup> 92% of Democrats voting on the measure voted in favor, and 75% of Republicans voting voted in favor. See 121 CONG. REC. 24780, 25219-20 (1975); House Vote #328 in 1975, <http://www.govtrack.us/congress/votes/94-1975/h328>; Senate Vote #329 in 1975, <http://www.govtrack.us/congress/votes/94-1975/s329>.

<sup>9</sup> 97% of Democrats voting on the measure voted in favor, and 89% of Republicans voting voted in favor. See 127 CONG. REC. 23,205-06 (1981); 128 CONG. REC. 14,337 (1982); House Vote #228 in 1981, <http://www.govtrack.us/congress/votes/97-1981/h228>; Senate Vote #687 in 1982, <http://www.govtrack.us/congress/votes/97-1982/s687>.

<sup>10</sup> 100% of Democrats voting on the measure voted in favor, and 88% of Republicans voting voted in favor. See 152 CONG. REC. 14,303-04, 15,325 (2006); House Vote #374 in 2006, <http://www.govtrack.us/congress/votes/109-2006/h374>; Senate Vote #212 in 2006, <http://www.govtrack.us/congress/votes/109-2006/s212>.

<sup>11</sup> 52 U.S.C. §§ 10304(a), 10303(f)(2).

The preclearance review of Section 5 is strong medicine, and was put in place only for some areas, based on what became known as the “coverage formula” in section 4 of the Act. Section 4 was the primary provision determining where preclearance applied; it was designed to select those jurisdictions with the most troublesome history of race relations directly affecting the franchise, with flexibility to let jurisdictions out once minority electoral power had sustainably improved, and to bring new jurisdictions in with new instances of bad behavior. In its original incarnation and in each amendment thereafter, section 4 was effectively time-limited; its penultimate iteration was set to expire in 2007. In 2006, Congress reauthorized section 4.<sup>12</sup> It is this reauthorization that was the focus in *Shelby County*. The Court determined that section 4, as reauthorized in 2006, did not sufficiently reflect current conditions, and that the “disparate geographic coverage” reflected in section 4 was no longer “sufficiently related to the [current] problem[s] that it targets.”<sup>13</sup> The Court struck the geographic coverage for the preclearance mandate of section 5. Which means that today, section 5 is applied nowhere.<sup>14</sup>

I teach election law and the law of democracy, and *Shelby County* is a difficult case to teach. I have written extensively about the fact that the decision is premised on a cartoon of the actual statute: a Voting Rights Act that does not really exist.<sup>15</sup> The decision also treats a coordinate branch of government, and its enumerated power to enforce the Fourteenth and Fifteenth Amendments — no less explicit an enumerated power than any of those listed elsewhere in the Constitution — with a striking degree of contempt. Law students are often cynically inclined to believe that Court opinions reflect assertions of power more than jurisprudence. With *Shelby County*, that notion is hard to refute.

But rather than dwell on the weaknesses of the opinion and the logic behind it, I will turn today to its implications. First, I would like to emphasize two things that the Court did *not* say. The Court did not overrule the constitutionality of a properly tailored preclearance requirement

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<sup>12</sup> Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 (“VRARA”), Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (2006), *amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008).

<sup>13</sup> *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2627-31 (2013).

<sup>14</sup> There is still a provision of the Voting Rights Act providing for preclearance of election-related changes unaffected by *Shelby County*, found in Section 3 of the Act. 52 U.S.C. § 10302(c); see also Travis Crum, *Note, The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010). The provision allows a federal court discretion to impose preclearance upon the finding of a violation of the Fourteenth or Fifteenth Amendment justifying that equitable relief. *Id.* Essentially, it allows courts to impose preclearance requirements, for a scope and duration chosen by the court, after a finding of intentional discrimination; election changes subject to preclearance must be reviewed by the Department of Justice or the court issuing the preclearance order. While various jurisdictions have been placed under Section 3 preclearance over the past few decades, the threshold for proving intentional discrimination is exceedingly high, and such findings are accordingly rare. Only three local jurisdictions are presently subject to the provision: Evergreen, Alabama; Pasadena, Texas; and Charles Mix County, South Dakota. See *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729-30 (S.D. Tex. 2017); *Order, Allen v. City of Evergreen*, No. 1:13-cv-00107 (S.D. Ala. Jan. 13, 2014); *Consent Decree, Blackmoon v. Charles Mix County*, No. 05-cv-04017 (D.S.D. Dec. 4, 2007).

<sup>15</sup> See Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG (June 25, 2013, 10:39 PM) (hereinafter *Shadowboxing*), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>; Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (2013) (hereinafter *Simulacrum*), <https://ssrn.com/abstract=2265729>.

— nor, indeed, did it take other potential remedies and prophylactic tools off of the table. The Court recognized that preclearance is a “stringent” and “potent” measure, an “extraordinary” tool to confront electoral discrimination based on race, ethnicity, and language minority status, which is necessarily an “extraordinary” harm.<sup>16</sup> Indeed, discrimination with respect to the vote is so pernicious that a constitutional Amendment is devoted to nothing else, with power expressly delegated to Congress to enforce its protections.<sup>17</sup> The *Shelby County* Court refused to overturn four previous cases approving preclearance as an appropriate use of that enumerated congressional power where remedies like affirmative litigation proved insufficient.<sup>18</sup> Indeed, the Court emphatically stated that “Congress may draft another formula [determining coverage for a preclearance requirement] based on current conditions.”<sup>19</sup>

Also, despite offering justified praise for the momentous progress that we as a people have made, the *Shelby County* Court did not cast doubt on the stubborn persistence of electoral discrimination on the basis of race, ethnicity, or language minority status. This was not an oversight. Four years earlier, Chief Justice Roberts, Justice Kennedy, and Justice Alito — three members of the *Shelby County* majority — acknowledged that “racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions . . . .”<sup>20</sup> In 2006, the same year that Congress reauthorized section 5, Justice Kennedy wrote for a majority in striking down a redistricting map, noting that “[i]n essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.”<sup>21</sup> More recently, several lower courts have struck regulations of electoral rules that were intended to discriminate on the basis of race, ethnicity, or language minority status, finding even after imposing extraordinary burdens of proof that plaintiffs had demonstrated abuse of government authority on the most pernicious grounds.<sup>22</sup>

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<sup>16</sup> *Shelby Cnty.*, 133 S. Ct. at 2624-25.

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

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

<sup>19</sup> *Shelby Cnty.*, 133 S. Ct. at 2631.

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

<sup>21</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006).

<sup>22</sup> *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 728 (S.D. Tex. 2017); *Perez v. Abbott*, 253 F. Supp. 3d 864, 886, 949, 955 (W.D. Tex. 2017) (three-judge court) (congressional plan), on appeal, No. 17-586 (S. Ct.); *Perez v. Abbott*, 250 F. Supp. 3d 123, 145-46, 148-49, 152-54, 157, 163-64, 169-70, 172, 175-76, 179-80 (W.D. Tex. 2017) (three-judge court) (state House plan), on appeal, No. 17-626 (S. Ct.); *Veasey v. Abbott*, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017), on appeal, No. 17-40884 (5th Cir.); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214-15 (4th Cir. 2016).

These are merely a few salient examples from the recent annals of the U.S. Reports, demonstrating what any observer of the last year’s news knows well: despite progress toward equality, we are decidedly not yet at our goal. In 2018, it should no longer require much convincing to demonstrate that America is not free of invidious discrimination, much less “post-racial.”

### **The impact of *Shelby County***

The *Shelby County* decision, rendering Section 5 inert in the absence of congressional action, has unquestionably impeded the ability to combat discrimination against racial and ethnic minorities. It has done so in at least three ways.

#### *Difficulty in securing timely relief against discriminatory practices*

First, and most important, the absence of preclearance means that discriminatory election rules require enormous time and expense to combat, with harm accruing as litigation plods along. The Voting Rights Act contains several provisions unaffected by *Shelby County* and designed to combat discrimination on the basis of race, ethnicity, and language minority status; other federal statutes may be deployed to similar purpose,<sup>23</sup> and private plaintiffs may also bring claims against discrimination founded on constitutional provisions or state causes of action. But each of these provisions is enforced by affirmative litigation, forcing aggrieved citizens to respond to a particular unlawful policy with a lawsuit. That is, of course, the more familiar means of addressing violation in our legal system. But electoral harms are not normal harms, and existing “normal” remedies do not suffice in this arena.

Election-based harms cause irreparable damage on an extraordinarily compressed timeframe. An election held under conditions later found to be unlawful works its harm immediately. And though future contests may be held with the pernicious conditions mitigated or removed, those elected to office via unlawful procedures not only gain the sheen of incumbency, but are empowered in the interim to promulgate policy binding everyone in the jurisdiction — including means to further retain power. “Elections have consequences,” we are often told. Elections held on unlawfully discriminatory terms have consequences as well, far beyond the ability of affirmative litigation to correct. Preclearance was designed to stop discrimination before it could have this irremediable impact on local communities.

Election-based harms are also more difficult to deter through normal litigation. Through most of our legal system, civil litigation is — at least in theory — not only a means to achieve compensation and alterations in future behavior, but also an *ex ante* incentive to avoid

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<sup>23</sup> Because minority voters are often — but by no means always — voters with lower socioeconomic status, they are often harder hit by electoral regulations that impose burdens across the board; similarly, statutes that provide relief from electoral burdens may end up disproportionately benefiting minority voters. The National Voter Registration Act, for example, is not tailored to address harm to racial or ethnic minorities specifically. But in guaranteeing ready opportunities for eligible voters to register to vote — including in connection with motor vehicle transactions, transactions involving public assistance, and transactions executed by agencies serving individuals with disabilities, 52 U.S.C. §§ 20504, 20506 — the NVRA may, in many areas of the country, provide substantial relief to minority populations.

wrongdoing. The prospect of a lawsuit forces would-be wrongdoers to think twice. That deterrent effect is less likely to materialize when racial discrimination in the election sphere is at stake. As jurists and commentators have frequently noted, the incumbency incentive is immensely powerful; if altering voting structures on the basis of race, ethnicity, or language minority status is seen as an effective means to preserve incumbency, it provides a powerful motivation to engage in a repeated pattern of unlawful behavior.<sup>24</sup> If a promulgated practice is struck down, officials have reason to try another, to achieve the same results by different means.<sup>25</sup>

In other contexts, at least the repeated wear of responsive litigation might be expected to eventually overwhelm the incumbency incentive. But this wear is substantially dispersed in the context of electoral discrimination. The “benefits” of discriminatory election rules accrue to officials, but the transaction costs of litigation, which fall directly on private parties and/or their insurers in normal civil litigation, are borne not by the officials but by their constituents. This often gives the officials who pass discriminatory election rules a natural incentive to fight tooth and nail to preserve those rules, even when it is clear that they persist in a losing cause. And the opportunity for the electorate to correct the misbehavior of their own officials is blunted because the policies at issue concern the very rules of the election itself.

All of this means that there is more need in the election arena than elsewhere to prevent discrimination on the basis of race, ethnicity, or language minority status by means that have expansive substantive breadth but also offer speedy, proactive protection. After *Shelby County*, the existing enforcement tools are inadequate to meet the need.<sup>26</sup>

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<sup>24</sup> See, e.g., *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778-79 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (“When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern—a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. . . . But the record here illustrates a more general proposition: Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge. . . . Today’s case barely opens the door to our understanding of the potential relationship between the preservation of incumbency and invidious discrimination, but it surely gives weight to the Seventh Circuit’s observation that ‘many devices employed to preserve incumbencies are necessarily racially discriminatory.’”) (citations omitted).

<sup>25</sup> This is not ancient history. The congressional record of 2006 contained examples less than six years old in which jurisdictions implemented a discriminatory practice, saw that practice challenged by responsive litigation, and then changed course to implement a different policy aimed at similar ends. See Nina Perales et al., *Voting Rights in Texas 1982-2006*, at 29 (2006), <http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf>; see also Brief of Joaquin Avila, Neil Bradley, Julius Chambers, U.W. Clemon, Armand Derfner, Jose Garza, Fred Gray, Robert Mcduff, Rolando Rios, Robert Rubin, Edward Still, Ellis Turnage, and Ronald Wilson as *Amici Curiae* in Support of Respondents at 14-15, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (U.S. 2013) (No. 12-96).

<sup>26</sup> See H.R. REP. NO. 109-478, at 57 (2006), reprinted in 2006 U.S.C.C.A.N. 618, 658 (recognizing that “a failure to reauthorize the [preclearance regime], given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action.”).

The existing tools essentially revolve around responsive litigation: litigation brought in response to perceived discrimination. As the Supreme Court has recognized — and as Congress understood in 2006 — responsive litigation in the voting rights realm is like an aircraft carrier: quite powerful, but also quite “slow and expensive.”<sup>27</sup> The time required for responsive litigation begins, in many ways, well before litigation itself. Responsive litigation depends on an ability to amass, process, and present substantial information even before filing a complaint — demographic and electoral data, formal legislative records and legislators’ informal comments, and historical context, among others. Some of this data will be generally available to the public, but much of the information — election records and demographic statistics by precinct, documents used and developed in the course of evaluating the merits of a new policy — will be in the government’s possession, and perhaps available only through a cumbersome public records request process.

Once a complaint is filed, litigation provides some additional tools for gathering information, but these, too, are often slow. Responsive litigation often features substantial discovery battles and extended motion practice, all of which may precede the awarding of even preliminary relief. Such preliminary relief, according to experienced litigators, is itself quite rare in affirmative voting rights litigation.<sup>28</sup> And the rarity only increases in the period shortly before an election — when immediate rulings are most necessary to prevent harm — based in part on the Supreme Court’s admonishment that the judiciary should be particularly wary of enjoining enacted electoral rules when there is “inadequate time to resolve . . . factual disputes” before the election proceeds.<sup>29</sup>

This places many voting rights cases in a summary judgment or trial posture. There, the complexity of a voting rights case places even more reliance on extensive data collection and data analysis — which translates to additional time in court. Indeed, when asked to study the amount of judicial time and work required, the Federal Judicial Center determined that of 63 different forms of litigation, voting rights cases are the 6th most cumbersome for the courts: more cumbersome than an antitrust case, and nearly twice as cumbersome as a murder trial.<sup>30</sup>

All of this can translate to extensive periods of justice delayed. There is no systematic study of which I am aware statistically analyzing the time required to secure relief in responsive

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<sup>27</sup> *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

<sup>28</sup> See Transcript of Oral Argument at 38, *Shelby Cnty. v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013) (statement of Attorney General Verrilli) (noting that a preliminary injunction was issued in “fewer than one-quarter of ultimately successful Section 2 suits”); J. Gerald Hebert & Armand Derfner, *More Observations on Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CENTER BLOG (Mar. 1, 2013, 6:01 PM), <http://bit.ly/Z7xvht> (estimating that the true figure is likely “less than 5%”).

<sup>29</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006).

<sup>30</sup> Only death penalty habeas cases, environmental cases, civil RICO cases, patent cases, and continuing criminal enterprise drug crimes were deemed more cumbersome. See Federal Judicial Center, 2003–2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States 5-6 (2005), available at <https://bulk.resource.org/courts.gov/fjc/CaseWts0.pdf>.

voting rights litigation.<sup>31</sup> But extended litigation and delayed relief under Section 2 of the Voting Rights Act — the most prominent of the affirmative litigation causes of action to combat discrimination in voting — is hardly unusual. One example that Congress had before it in 2006 involved a challenge to the at-large election structure of a county council. The complaint was filed on January 17, 2001.<sup>32</sup> Preliminary relief was sought on April 1, 2002; despite a finding that plaintiffs were ultimately *likely* to succeed, the preliminary injunction was denied, and local primaries proceeded in June.<sup>33</sup> After a bench trial, another motion for preliminary relief was filed in September 2002 in advance of the general election, and again relief was denied, allowing the general election to take place.<sup>34</sup> The court issued a decision in favor of plaintiffs in March 2003, with a remedial plan settled by August of that year;<sup>35</sup> on appeal, the court's decision was affirmed in April 2004.<sup>36</sup> Though the complaint was filed in January 2001, the 2002 elections were held under discriminatory conditions, and the winning legislators remained in office until new elections were held in June of 2004.<sup>37</sup>

Regrettably, there have also been ample more recent examples. Literally the day after *Shelby County* was decided, the chairman of the North Carolina Senate Rules Committee announced that the North Carolina legislature was changing course, from a narrowly focused

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<sup>31</sup> Given the variation inherent in litigation, including the quality and experience of the attorneys, the nature of the data, and the quantity and incentives of the litigants, such studies would face significant methodological difficulties in attempting to parse the amount of time to be expected from an “average” successful case.

<sup>32</sup> *United States v. Charleston Cnty.*, 318 F. Supp. 2d 302, 313 (D.S.C. 2002).

<sup>33</sup> *Id.* at 327-28.

<sup>34</sup> *United States v. Charleston Cnty.*, No. 2:01-0155 (D.S.C. Sept. 18, 2002) (doc. 155) (order denying preliminary injunction).

<sup>35</sup> *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268 (D.S.C. 2003); *United States v. Charleston Cnty.*, No. 2:01-0155, 2003 WL 23525360 (D.S.C. Aug. 14, 2003).

<sup>36</sup> *United States v. Charleston Cnty.*, 365 F.3d 341 (4th Cir. 2004).

<sup>37</sup> There were plenty of other ready examples available to the 2006 Congress as well. *Black Political Task Force v. Galvin*, for example, confronted a discriminatory redistricting plan designed to favor a particular incumbent at the expense of minority voters. 300 F. Supp. 2d 291 (D. Mass 2004). The complaint was filed on June 13, 2002. After a trial, the plan was enjoined in February 2004, and a remedial plan was implemented in April 2004. The 2002 elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2004.

Another example is the *Bone Shirt v. Hazelton* case, involving another discriminatory redistricting plan. 336 F. Supp. 2d 976 (D.S.D. 2004). The complaint was filed on December 26, 2001. After a trial, the court ruled in September 2004 that the plaintiffs had proven that the 2001 districts were unlawful. It was not until August 2005, however, that a remedial plan was imposed. That is, despite the fact that the complaint was filed in 2001, and the fact that plaintiffs had proven by the fall of 2004 that the 2001 districts were unlawful, both the 2002 and 2004 elections were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2006.

Still a third example, concerning local elections, is *New Rochelle Voter Defense Fund v. City of New Rochelle*, about a discriminatory city council districting plan. 308 F. Supp. 2d 152 (S.D.N.Y. 2003). The plan was adopted on April 29, 2003. A complaint was filed on May 27, 2003. Plaintiffs requested preliminary relief, but that relief was denied because the impending election was too close at hand. In December 2003, the court found for plaintiffs, and a remedial plan was imposed thereafter. The 2003 city council elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held; I believe that those new elections were first held in 2007.

voter ID statute to “the ‘full bill.’”<sup>38</sup> This “full bill” was later found to “target African Americans with almost surgical precision,” but the fact that it was only later struck down is the most relevant point.<sup>39</sup> The bill was signed into law on August 12, 2013, and a suit was filed that same day.<sup>40</sup> Partial preliminary relief was granted on October 1, 2014, but stayed one week later; the partial preliminary injunction was allowed to go into effect only on April 6, 2015.<sup>41</sup> On the eve of trial, the North Carolina legislature amended the law, further delaying trial with respect to those amendments.<sup>42</sup> It was only on July 29, 2016, that the intentionally discriminatory “full bill” was ultimately struck down.<sup>43</sup> The 2014 midterm primaries and the 2014 general elections were held pursuant to rules intended to discriminate against voters on the basis of their race, and both legislative and presidential primary elections in 2016 were held under some of those rules.

Several cases in Texas reveal a similar pattern. In 2011, Texas revised its voter ID statute, limiting the permissible forms of ID in a manner later determined to be discriminatory (and in a manner which a trial court has found indicated specific discriminatory intent).<sup>44</sup> Before *Shelby County*, the law was blocked by the preclearance provision.<sup>45</sup> But the day of *Shelby County*, Texas began enforcing the law.<sup>46</sup> Plaintiffs filed the first of several lawsuits the next day. The law was enjoined in October 2014, but that injunction was itself stayed pending appeal.<sup>47</sup> The court of appeals ultimately agreed with the trial court on some grounds and remanded for further consideration of others;<sup>48</sup> in the meantime, the trial court adopted interim remedial relief on August 10, 2016.<sup>49</sup> On June 1, 2017, the Texas legislature amended the voter

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<sup>38</sup> N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016).

<sup>39</sup> *Id.* at 214.

<sup>40</sup> *Id.* at 218.

<sup>41</sup> *Id.* at 219.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Veasey v. Abbott*, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017); *Texas v. Holder*, 888 F. Supp. 2d 113, 144-45 (D.D.C. 2012), *vacated and remanded in light of Shelby Cnty.*, 133 S. Ct. 2886 (2013). Not every means by which voters prove that they are who they say they are is discriminatory or unlawful, but as with virtually any generic type of regulation, the particular contours of a given voter identification statute may be designed so as to be discriminatory. See Justin Levitt, *Voter Identification in the Courts*, in COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2015, at 237, 238 (2015), <http://knowledgecenter.csg.org/kc/system/files/Levitt%202015.pdf>.

Relevant to the timing discussion, the D.C. court evaluating Texas's particular ID provision also found that “efforts to accelerate this litigation . . . were often undermined by Texas's failure to act with diligence or a proper sense of urgency.” *Texas*, 888 F. Supp. 2d at 120.

<sup>45</sup> Both the Department of Justice and a federal court found the law to be unlawfully discriminatory. *Veasey v. Abbott*, 830 F.3d 216, 227 n.7 (5th Cir. 2016) (en banc).

<sup>46</sup> *Id.* at 227.

<sup>47</sup> *Id.* at 228.

<sup>48</sup> *Id.* at 272.

<sup>49</sup> Order Regarding Agreed Interim Plan for Elections, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. Aug. 10, 2016).

identification law, but the trial court deemed this amendment “insufficient to remedy the discriminatory purpose and effects” of its predecessor, and enjoined the legislation as amended.<sup>50</sup> The court’s decision is currently on appeal. But for purposes of this testimony, it is important to understand that the 2014 midterm primaries, 2014 general elections, and 2016 municipal, legislative, and presidential primary elections were all held pursuant to rules that were found by an en banc court of appeals to be discriminatory, and that have repeatedly been found by a trial court to have been intended to discriminate. And seven years after the law was passed, litigation over the law continues.

Texas’s experience with redistricting shows justice similarly delayed. In 2011, the Texas legislature drew new congressional and state legislative district lines. Before *Shelby County*, the plans were blocked by the preclearance provision; indeed, a court found that at least the congressional plans were intended to discriminate against minorities, which is particularly striking given that the Supreme Court found just five years earlier indicia of discriminatory intent in evaluating a previous Texas congressional map.<sup>51</sup> While that preclearance decision was pending, a trial court drew interim lines for the 2012 elections;<sup>52</sup> the compromises contained in those interim maps were essentially adopted by the Texas legislature in 2013.<sup>53</sup> But litigation continued, and it took until May of 2017 to produce a trial court opinion that the 2011 congressional and state House lines were discriminatory, including several districts in each plan drawn with the intent to discriminate against minority communities.<sup>54</sup> It was not until August of 2017 that a court ruled that portions of the 2013 map continued and perpetuated this discrimination.<sup>55</sup> And then relief was stayed, pending appeal to the Supreme Court.<sup>56</sup> A three-judge court has found that the 2012, 2014, and 2016 elections were all held pursuant to district lines found to be discriminatory; indeed, for some of these districts, the discrimination was specifically designed. There is still no final disposition with respect to the district lines drawn seven years ago, and modified five years ago albeit without providing sufficient relief. And it is unlikely that the Supreme Court’s review will arrive in time to prevent these discriminatory lines from governing still another round of elections in 2018. In part due to the complexity of the

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<sup>50</sup> Veasey v. Abbott, 265 F. Supp. 3d 684, 697 (S.D. Tex. 2017).

<sup>51</sup> Texas v. United States, 887 F. Supp. 2d 133, 138, 159 (D.D.C. 2012) (three-judge court); League of United Latin American Citizens (LULAC) v. Perry, 548 U.S. 399, 440 (2006).

<sup>52</sup> Perez v. Texas, 891 F. Supp. 2d 808, 811 (W.D. Tex. 2012) (three-judge court).

<sup>53</sup> Perez v. Abbott, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 3495922, at \*3-4 (W.D. Tex. Aug. 15, 2017) (three-judge court) (congressional plan)

<sup>54</sup> Perez v. Abbott, 253 F. Supp. 3d 864, 886, 949, 955 (W.D. Tex. 2017) (three-judge court) (congressional plan); Perez v. Abbott, 250 F. Supp. 3d 123, 145-46, 148-49, 152-54, 157, 163-64, 169-70, 172, 175-76, 179-80 (W.D. Tex. 2017) (three-judge court) (state House plan).

<sup>55</sup> Perez v. Abbott, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 3495922, at \*15-17, 43-44 (W.D. Tex. Aug. 15, 2017) (three-judge court) (congressional plan), on appeal, No. 17-586 (S. Ct.); Perez v. Abbott, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 3668115, at \*2, 10, 12-13, 25, 36 (W.D. Tex. Aug. 24, 2017) (three-judge court) (state House plan), on appeal, No. 17-626 (S. Ct.).

<sup>56</sup> Abbott v. Perez, 138 S. Ct. 49 (2017).

cases, affirmative litigation has been far too slow to address discrimination before it can do irreparable damage, across multiple election cycles.<sup>57</sup>

Such time and complexity also amount to substantial expense. A local challenge to districts drawn impermissibly on the basis of race or language minority status will require attorney time, filing fees, deposition costs, transcript fees, document production costs, expert fees, and on and on. Though reliable statistics are difficult to determine, such cases reportedly “require[ ] a minimum of hundreds of thousands of dollars.”<sup>58</sup> In the Charleston County, South Carolina, litigation described above, plaintiffs’ fees and costs amounted to \$712,027.71.<sup>59</sup> In statewide cases, the meter runs higher still. Fees for the North Carolina case have, as of this hearing, still not been calculated or awarded. The substantive dispute in both Texas cases is still ongoing, and fee awards are far in the future. But without a preclearance system, when the only tools involve affirmative litigation, litigating plaintiffs or plaintiffs’ groups must be readily prepared to float vast sums in order to procure justice. Few nonprofit organizations can afford a years-long float of this magnitude.

Moreover, capacity to file affirmative lawsuits is limited in other respects as well. The Department of Justice has a reservoir of experienced litigators; indeed, since *Shelby County*, DOJ has been active in each of the affirmative litigation efforts mentioned above, and several others besides.<sup>60</sup> But affirmative litigation cases as mammoth as those in North Carolina and Texas consume mammoth amounts of time and personnel, and while DOJ capacity is sizable, it is not infinite. Private attorneys may also enforce the provisions of the Voting Rights Act and other statutes designed to combat racial and ethnic discrimination in the election process, but at most a handful of attorneys within any given state, and a handful of national organizations with a few

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<sup>57</sup> Still another Texas case shows some of the consequences of *Shelby County* on local elections. Two days after *Shelby County*, the Mayor of Pasadena, Texas, instituted a process that included recommending changes to the composition of the Pasadena city council, including various proposals to change districted seats to at-large seats in a manner likely to decrease representation of Latino communities. *See Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 681 (S.D. Tex. 2017). In part due to the Mayor’s tie-breaking vote, the city council election structure was actually changed in November 2013. *Id.* at 681-82. In January 2017, a trial court found the change to be not only discriminatory in effect, but designed intentionally to achieve that end, and ordered relief. *Id.* at 724-28. But the 2015 elections were held pursuant to districts intended to discriminate against the city’s Latino minority.

<sup>58</sup> J. Gerald Hebert & Armand Derfner, *Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CENTER BLOG (Feb. 28, 2013, 7:07 AM), <http://bit.ly/Y3206a>.

<sup>59</sup> *Moultrie v. Charleston Cnty.*, No. 2:01-0562 (D.S.C. Aug. 9, 2005) (doc. 207) (amended judgment).

In addition to their responsibility for plaintiffs’ costs, the people of Charleston County *also* paid approximately \$2 million to defend the incumbents’ preferred system. *See* Brief of Joaquin Avila, Neil Bradley, Julius Chambers, U.W. Clemon, Armand Derfner, Jose Garza, Fred Gray, Robert McDuff, Rolando Rios, Robert Rubin, Edward Still, Ellis Turnage, And Ronald Wilson as *Amici Curiae* in Support of Respondents at 25, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (U.S. 2013) (No. 12-96). In the absence of a preclearance regime, local governments’ taxpayers must pay doubly dearly for successful claims, covering incumbent officials’ expenses as well as those of the plaintiff citizen victims. *See* Levitt, *Shadowboxing*, *supra* note 15.

<sup>60</sup> *See, e.g.*, Complaint, *United States v. City of Eastpointe*, No. 2:17-cv-10079 (E.D. Mich. Jan. 10, 2017), <https://www.justice.gov/crt/case-document/file/947551/download>.

voting rights specialists, can match the institutional expertise of the Department of Justice.<sup>61</sup> Perhaps none can match the Department's resources. Data-intensive cases like voting rights cases also often rely heavily on the analysis of expert witnesses, whose time is also limited.<sup>62</sup> Private entities with developed expertise in voting rights litigation may be able to muster a challenge to at most a few policies at a time, and often no more than one.<sup>63</sup> They could not be expected to deliver justice everywhere that it was warranted even in a regime with the deterrence of preclearance, much less in a new world without.

Given finite resources, more prominent disputes — for example, statewide redistricting battles — are likely to draw more substantial attention in responsive litigation. There is a far greater risk that smaller jurisdictions like counties, towns, villages, constable districts, and school boards will be comparatively neglected. Yet such jurisdictions create much of the concern. Between 2000 and the *Shelby County* decision in 2013, only 14% of the objections lodged by the Department of Justice under section 5 concerned statewide changes. 32% concerned county-level changes, and 55% concerned changes in municipalities, school boards, or special districts.<sup>64</sup>

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<sup>61</sup> See Brief of Joaquin Avila, Neil Bradley, Julius Chambers, U.W. Clemon, Armand Derfner, Jose Garza, Fred Gray, Robert McDuff, Rolando Rios, Robert Rubin, Edward Still, Ellis Turnage, And Ronald Wilson as *Amici Curiae* in Support of Respondents at 28-29, *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (U.S. 2013) (No. 12-96).

<sup>62</sup> The availability of an appropriate expert should not be assumed. In 2012, an Alaska trial court described one of the factors contributing to some of its state redistricting body's delay:

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

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

<sup>63</sup> See, e.g., Voting Rights after *Shelby County v. Holder*: A Discussion & Webcast on the Supreme Court's Voting Rights Act Decision, Roundtable at the Brookings Institution, Transcript pt. 2, at 18 (July 1, 2013) (remarks of Thomas Saenz, Pres. & Gen. Counsel, MALDEF) ("I really appreciated those who believed that the LDF's of the world have the resources to challenge every state redistricting that might be a problem, but it's not true. I mean the simple fact is that my organization can probably pursue one statewide redistricting case at a time. So, we made a choice that Texas was more important for example, than California where we believe that there was at least one problem at the congressional level, and at least two at the legislative level. But the cost of pursuing two statewide cases at the same time was simply too high."), available at [http://www.brookings.edu/~media/events/2013/7/1%20voting%20rights%20act/20130701\\_voting\\_rights\\_transcript\\_pt2.pdf](http://www.brookings.edu/~media/events/2013/7/1%20voting%20rights%20act/20130701_voting_rights_transcript_pt2.pdf).

<sup>64</sup> Figures compiled from data available at U.S. Dep't of Justice, Civil Rights Div., Section 5 Objection Letters, <https://www.justice.gov/crt/section-5-objection-letters>. The figures from 2000 to 2013 are similar to the breakdown of objections between the 1982 and 2006 reauthorizations of the preclearance system: only 14% of the objections lodged by the Department of Justice under section 5 concerned statewide changes; 39% concerned county-level changes, and 48% concerned changes in municipalities, school boards, or special districts. *Id.*

The calculations above, of course, do not account for litigable cases that did not arise from changes in election procedures, or from changes in *non*-covered jurisdictions. Still, it seems reasonable to predict that given past practice, and given the sheer volume of counties and local governments, such jurisdictions are likely to be responsible for a substantial majority of litigable violations going forward.

And the real wave of post-*Shelby County* concern in local jurisdictions has not yet arrived. Of the county- and municipal-level objections above, 75% of the objections concerned redistricting, switches in the numbers of districts or from districts to at-large elections, or annexations.<sup>65</sup> Beginning in 2021, after the next Census, jurisdictions across the country will redraw their district lines to abide by the Constitution's equal representation mandate.<sup>66</sup> In so doing, many local governments will never tread close to the line of discriminatory practice. But experience teaches, regrettably, that many others will. After *Shelby County*, current enforcement tools leave a substantial danger that discriminatory changes, particularly in local electoral policy, will take effect before under-resourced victims have an adequate opportunity to assemble a reasonably robust litigation response. If elections occur before sufficient proof of the wrong can be gathered, the officials elected under the improper regime are then empowered to make policy until plaintiffs overcome financial, logistical, and natural litigation hurdles to achieve a viable remedy.

*Notice regarding changes of concern*

All of the above discussion addresses just one impact of *Shelby County*: the difficulty in securing relief against discriminatory electoral policy, and the degree to which litigation tools sufficient in other civil rights contexts may be insufficient in the electoral realm. But the particular impact on local jurisdictions highlights still another impact of *Shelby County*. Without a preclearance system, it will be more difficult to learn about and draw appropriate attention to discriminatory policies, so that the few entities with sufficient resources and expertise know where to litigate in the first place.

In requiring the preclearance of electoral changes in covered jurisdictions, Section 5 did not only thwart the discriminatory practices before they could be deployed to pernicious effect. In order to determine which practices were discriminatory, it also created a system of review for every practice, discriminatory or not, in jurisdictions with a demonstrated history of trouble that left lingering concern for the present. Jurisdictions were responsible for preparing descriptions of each electoral change for review by federal authorities; given the less time-consuming and less costly mechanisms of administrative review as compared to judicial review, this usually meant preparing packages for the Department of Justice. These packages would have to demonstrate that the change was neither intended to, nor would actually, undermine effective minority exercise of political power. And this usually meant that jurisdictions would recount the extent to which representatives from the minority community had been consulted regarding the change, as well as amass the hard data showing the tangible impact of the proposed change on minority populations. Sometimes, the process (or prospect) of preclearance may have been sufficient to head off discriminatory practices before they ever became law, or to encourage the mitigation of potentially harmful practices in a dialogue with DOJ officials.<sup>67</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland Cnty., Tex.*, 390 U.S. 474 (1968).

<sup>67</sup> See Ellen D. Katz, *South Carolina's "Evolutionary Process,"* 113 COLUM. L. REV. SIDEBAR 55, 60-64 (2013).

In the absence of preclearance, the above responsibilities simply do not exist. Jurisdictions no longer need affirmatively report changed electoral practices to any watchdog organization, provoking the fear that discriminatory changes will be overlooked. There is no longer a forum in which jurisdictions will regularly be expected to recount consultation with minority communities, provoking the fear that such dialogue will no longer occur. And there is no longer a forum in which jurisdictions will regularly be expected to accumulate the data assessing the impact of a change on minority communities, provoking the twin fears that jurisdictions will either turn a blind eye to practices with serious discriminatory impact or that they will actively seek to harm minority communities but be less than forthcoming with the data that makes that harm clear.

These concerns are somewhat less pressing (though not absent) for statewide changes. When a state changes the rules for casting or counting a ballot, or when a state draws new legislative or congressional district lines, there is usually ample attention brought to bear, and government and nonprofit entities generally muster the resources to diagnose any problems that exist, even if those same resources are, as described above, insufficient to secure timely redress. Fifty may not be too large a number to lose focus.

However, as of 2012, the United States hosts 3031 county governments, 35879 town and municipal governments, 38266 special districts, and 12880 independent school districts.<sup>68</sup> Few of them will turn to discrimination. But the impact of and intent behind changes in the location of polling places within these smaller local governments, or changes in their district lines, is difficult enough to assess with targeted focus on an individual perpetrator. Without preclearance, it may not be possible for the advocates with available tools and expertise to effectively determine where they should look for the few that go astray.

### *Observers at the polls*

*Shelby County* had still a third impact important to mention today: it made it significantly more difficult for the federal government to effectively monitor the polls, limiting both a powerful deterrent to electoral violations and a powerful means to collect evidence when they do occur. In 2016, the Department of Justice explained that before *Shelby County*, there were three means by which they monitored the elections process at the polls, in local, state, and federal elections year-round:

First, the department sent our own personnel to watch the voting process. Second, the department sent federal election observers who are specially recruited and trained by the Office of Personnel Management (OPM), to jurisdictions that are subject to a pertinent court order. Third, the department sent these federal election observers from OPM to jurisdictions with a need certified by the Attorney General, based in part on the Section 4(b) coverage formula. Much of the federal election monitoring before *Shelby County* was in this third category.<sup>69</sup>

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<sup>68</sup> U.S. Census Bureau, 2012 Census of Gov'ts Org. Tables: Final tbl. 2 (2013).

<sup>69</sup> U.S. Dep't of Justice, Civil Rights Div., Fact Sheet on Justice Department's Enforcement Efforts Following *Shelby County* Decision (2016), <https://www.justice.gov/crt/file/876246/download>.

Because *Shelby County* invalidated the Section 4(b) formula as the basis for preclearance, the DOJ concluded that it would not rely on the 4(b) coverage formula as a way to identify jurisdictions for election monitoring.<sup>70</sup> As DOJ acknowledged, this cut off what had been the bulk of the federal election monitoring to date, not least because it engaged OPM observers drawn from a much broader pool than simply Civil Rights Division personnel,<sup>71</sup> and who were therefore free to engage in election observation without detracting from other ongoing civil rights enforcement activities. In November of 2016, DOJ announced that it had mustered more than 500 personnel to observe the election process in 67 jurisdictions in 28 states,<sup>72</sup> but this required a significant shift of resources given the loss of OPM observers sent to jurisdictions based in part on the preclearance coverage formula. And even with that effort, as expected, the observation force was less robust than it had been before *Shelby County*.<sup>73</sup>

The handicap matters because monitors at the polls serve several exceedingly important functions. Observers watch the process, and although they do not themselves enforce the law, the simple fact of a federal presence to observe proceedings may help to deter discrimination and other electoral misconduct, including by third parties. Similarly, the simple fact of a federal presence may help to defuse tension and promote public confidence that the elections were conducted without discrimination and other electoral misconduct. And should misconduct actually occur, observers provide an unmatched trained and professional means to bear witness to that misconduct for future enforcement activity. As DOJ recounted:

[Monitors] will gather information on, among other things, whether voters are subject to different voting qualifications or procedures on the basis of race, color or membership in a language minority group; whether jurisdictions are complying with the minority language provisions of the Voting Rights Act; whether jurisdictions permit voters to receive assistance by a person of his or her choice if the voter is blind, has a disability or is unable to read or write; whether jurisdictions provide polling locations and voting systems allowing voters with disabilities to cast a private and independent ballot; whether jurisdictions comply with the voter registration list requirements of the National Voter Registration Act; and whether jurisdictions comply with the provisional ballot requirements of the Help America Vote Act.<sup>74</sup>

As the list indicates, observers at the polls constitute one of the DOJ's best sources of firsthand information about compliance with Section 2 of the Voting Rights Act, but also various other federal statutes with distinct application at the polls, like Section 203 and 208 of the Voting

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<sup>70</sup> *Id.*

<sup>71</sup> See 52 U.S.C. § 10305(a).

<sup>72</sup> U.S. Dep't of Justice, Press Release, Justice Department to Monitor Polls in 28 States on Election Day, Nov. 7, 2016, <https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day>.

<sup>73</sup> See, e.g., U.S. Dep't of Justice, Press Release, Justice Department to Monitor Polls in 23 States on Election Day, Nov. 2, 2012, <https://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day>.

<sup>74</sup> U.S. Dep't of Justice, Press Release, Justice Department to Monitor Polls in 28 States on Election Day, Nov. 7, 2016, <https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day>.

Rights Act, Section 202 of HAVA, and various components of the ADA and VAEHA.<sup>75</sup> Limiting the practical capacity to deploy observers curtails the means to enforce these other statutory provisions as well.

### **Restoring the Voting Rights Act**

For all of the reasons above, it should be clear that *Shelby County* has seriously hampered the country's ability to deter and correct racial and ethnic discrimination in the voting process, in ways large and larger still. Even after *Shelby County*, there remain powerful federal statutes — including those enforced by the Department of Justice and those enforced by private parties — and powerful state statutes as well, that could be and have been deployed to this purpose.<sup>76</sup> But these tools, powerful as they are, are insufficient: it is too hard to get information about new discriminatory practices, and too difficult to respond in time when and where those practices occur. I eagerly look forward to the day when tools beyond those that currently exist are unnecessary. As experience since *Shelby County* has amply proven, we are not there yet.

And so I wholeheartedly support the calls for restoration of the Voting Rights Act to its full strength, including a preclearance system for the jurisdictions most in need. *Shelby County* made clear that any such preclearance system had to be tailored to current conditions, and for that reason, I believe that it would be premature to suggest specific language before weighing the evidence gathered to support congressional action, which will give more specific shape to the present need to prevent or remedy violations of the Fourteenth and Fifteenth Amendments. Any specific language or formula should arise from the accumulated corpus of evidence, some of

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<sup>75</sup> See, e.g., 42 U.S.C. § 12132; 52 U.S.C. §§ 10503, 10508, 20102, 20104, 21082; 28 C.F.R. §§ 35.130, 35.160.

<sup>76</sup> As noted above, there are federal statutes that do not specifically target discrimination on the basis of race, ethnicity, or language minority status that may nevertheless benefit minority communities. See *supra* note 23. These statutes — like the National Voter Registration Act — tend to require certain procedures rather than certain outcomes: they are design specifications rather than performance specifications. They are, unquestionably, valuable as supplements for statutes focused specifically on race, ethnicity, and language minority status. But they cannot substitute for such statutes. Part of the genius of Section 2 of the Voting Rights Act is that it recognizes that there may be many different legitimate models for holding an election or apportioning political power. Among these choices, Section 2 is agnostic — except that whatever the local choice, that choice cannot deny or abridge the right to vote on an impermissible basis. It is not possible to replace this flexibility with restrictive race-neutral design specifications without first coming to agreement on how the regulated process should work. And when there are multiple legitimate goals — as in redistricting — asking for a single design specification is far more restrictive and far less attainable than targeting the evil of racial discrimination directly. The problem can be seen most readily in trying to design a statute governing local redistricting that also ensures the equitable representation of minority communities: without expressly targeting discrimination on the basis of race, ethnicity, or language minority status, or mandating districts drawn solely around the proportional representation of minority communities, it is exceedingly difficult to envision how such a statute might be drafted.

which has already been compiled by nonprofit organizations<sup>77</sup> and by academic researchers like myself,<sup>78</sup> and not vice versa.

That said, there are several elements that should be considered in any effort to restore the Voting Rights Act; many of these have been fleshed out further by others or appear in bills that have been introduced.

First, as mentioned above, any restored enforcement process should assist citizens in extracting information from their own representatives about the motivations for and impact of a proposed electoral change. Before *Shelby County*, covered jurisdictions were responsible for explaining their actions and identifying the consequences. Without an effective preclearance system, changes may occur without adequate explanation, and without the public presentation of data regarding the impact. And while some of the information will be readily available through sources like the U.S. Census, other data or analysis (e.g., racial polarization studies, differential access to electoral prerequisites, differential burdens of particular changes in procedures, ostensible official motive) will be far more difficult to acquire, particularly for victims in local jurisdictions and without substantial means. Gathering this information consumes much time and energy in the affirmative litigation process. Congress should investigate different options for ensuring that the information necessary to evaluate potential violations is readily available.

Second, the pre-*Shelby County* preclearance system authorized the deployment of OPM observers to jurisdictions chosen from within a pool of the jurisdictions covered by Section 4, but Section 4 coverage was not synonymous with observer deployment. In order to deploy OPM observers to locations not covered by a court order, the Attorney General had to certify that she had received meritorious complaints from local residents, officials, or organizations indicating the likelihood of efforts to deny or abridge the right to vote on the basis of race, ethnicity, or language minority status, or that the assignment of observers was otherwise necessary to enforce the guarantees of the Fourteenth or Fifteenth Amendments.<sup>79</sup> Only a subset of the jurisdictions covered by Section 4 ever received such a certification.<sup>80</sup> But there appears to be no reason why such certifications must inherently be limited to jurisdictions also covered for preclearance purposes. The assignment of skilled and trained federal observers to watch the process, without more, represents no disruption to either tangible operations or abstract notions of sovereignty; indeed, because of their potential to deter misconduct and defuse tension, most local jurisdictions have welcomed federal observers with open arms. Congress should investigate restoration of the

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<sup>77</sup> See, e.g., Nat'l Comm'n on Voting Rights, *Voting Landscape: State-by-State Profiles*, <http://votingrightstoday.org/ncvr/resources/state-pages>; Nat'l Comm'n on Voting Rights, *Protecting Minority Voters: Our Work is Not Done*, <http://votingrightstoday.org/ncvr/resources/discriminationreport>; Nat'l Comm'n on Voting Rights, *Improving Elections in the United States: Voices from the Field*, <http://votingrightstoday.org/ncvr/resources/electionadmin>.

<sup>78</sup> See, e.g., Responses to Questions for the Record from Senator Charles E. Grassley to Professor Justin Levitt, *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act: Hearing Before the S. Comm. on Judiciary*, 113th Cong. (July 17, 2013), <http://redistricting.ils.edu/files/%20Levitt%20responses%20to%20Grassley%20QFRs.pdf>.

<sup>79</sup> 52 U.S.C. § 10305(a).

<sup>80</sup> See U.S. Dep't of Justice, Civil Rights Div., *Federal Observers*, <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring#observers>.

OPM observer process, contingent on transparent and reasoned certification by the Attorney General, wherever there may be efforts to deny or abridge the right to vote on the basis of race, ethnicity, or language minority status.

Third, the pre-*Shelby County* preclearance system was useful in its ability to resolve disputes relatively quickly and without substantial private expense. The vast majority of potential claims were resolved through DOJ's administrative process, before intervening elections unduly deprived voters of their rights. Without an effective preclearance system, as noted above, victims are dependent on slow and cumbersome responsive litigation, which is only occasionally designed to provide effective relief before a proximate election. Congress should investigate different options to make responsive litigation in the voting arena better able to address the problems above. These investigations might include inquiry into limits on the implementation of changed practices shortly before an election, provisions to speed the pace and ease the costs of preliminary relief, or provisions to change the scale of the resources available to public enforcement bodies.

Fourth, there is an avenue for preclearance in effect after *Shelby County*, and not dependent on a coverage "formula," found in Section 3 of the Act.<sup>81</sup> This provision, however, relies on individual judicial determinations of intentional discrimination, after prolonged responsive litigation: Texas districts drawn in 2011 were determined to be infected with intentional racial discrimination, but seven years later, there has not yet been even a judicial hearing about the prospect of Section 3 preclearance. And the threshold for establishing such a determination is extraordinary: as Congress recognized in 1982, even amidst ample circumstantial evidence of wrongdoing, proof of intentional discrimination is exceedingly difficult to obtain, and courts' reluctance to brand officials as racists likely leads to underenforcement of constitutional prohibitions. Congress should investigate different options to allow courts to exercise expanded equitable authority to order preclearance in individualized instances. These investigations might include inquiries into the value of allowing judicially imposed preclearance even in the absence of ironclad proof of intentional discrimination, if circumstances otherwise indicate a pronounced risk of violations in the future.

Finally, Congress should investigate the value of a resurrected preclearance system not dependent on individualized judicial determinations: the analog to the coverage "formula" of old. Such a system should include flexibility for drawing jurisdictions into preclearance or releasing jurisdictions from preclearance, as circumstances on the ground warrant. And it should clearly be based on the desire to prevent or remedy constitutional violations, and the permissible zone of congressional prophylaxis in furtherance of those aims. The standard for coverage may well be multifarious, and may include the comparative ability or inability of citizens within different jurisdictions to pursue responsive litigation, the comparative lingering effects of past discrimination in different jurisdictions, or the comparative risks of future violations, as evidenced by underlying demographic, sociological, political, and legal data (including a history of conduct that creates enhanced risk for future concern, and including but not limited to a history of repeated violations of federal law).

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<sup>81</sup> 52 U.S.C. § 10302(c); *see also supra* note 14.

## DOJ enforcement

It should also be apparent from the summary above that the Department of Justice has shifted its enforcement priorities in the wake of *Shelby County*. I am not at liberty to divulge particular nonpublic logistical or personnel details, but the public materials of the Civil Rights Division indicate some of the magnitude of the change.

Within the Civil Rights Division, the Voting Section handles most of the civil rights enforcement work with respect to the voting process.<sup>82</sup> In the immediate run-up to *Shelby County*, in addition to work on investigations, monitoring of consent decrees, the filing of amicus briefs and statements of interest, and affirmative litigation, the Voting Section was tasked with evaluating and recommending action on administrative preclearance requests (including a flood of redistricting activity in the immediate aftermath of the Census), engaging in actions requesting judicial preclearance for particular changes, participating in actions seeking declaratory judgments of “bail-out” removal from the preclearance process, and defending the preclearance provisions themselves against constitutional attack from various quarters.<sup>83</sup> A budget submission for FY 2011 reveals that at the time, the Civil Rights Division had 118 positions authorized for voting rights enforcement, including 43 attorneys.<sup>84</sup>

After *Shelby County*, of course, many of the activities related to preclearance and bail-out were no longer necessary. A budget submission for FY 2016 reveals that at the time, after *Shelby County*, the Civil Rights Division had 73 positions authorized for voting rights enforcement, including 38 attorneys.<sup>85</sup>

Preclearance did not end entirely after *Shelby County*: as explained above, there are still a few small jurisdictions subject to court-ordered preclearance under Section 3 of the Voting Rights Act, and those jurisdictions may still submit electoral changes to the DOJ for preclearance. But it is reasonable to surmise that the relative emphasis on investigations, monitoring of consent decrees, the filing of amicus briefs and statements of interest, and affirmative litigation increased with the absence of an active Section 5.<sup>86</sup> It is also reasonable to

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<sup>82</sup> Some other sections within the Civil Rights Division may also have a hand in enforcement work relevant to voting rights: the Disability Rights Section, for example, may work on cases involving access to the elections process for individuals with disabilities, and the Criminal Section may work on cases involving criminal violations of the civil rights statutes on racial grounds. Other violations of federal voting statutes, including prosecution of other election misconduct, is generally the primary responsibility of the Criminal Division of the DOJ. See 28 C.F.R. § 0.50.

<sup>83</sup> U.S. Dep’t of Justice, FY 2014 Performance Budget: Civil Rights Division at 38, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/11/crt-justification.pdf>.

<sup>84</sup> General Legal Activities, Civil Rights Division (CRT) at 3, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/07/fy11-crt-bud-summary.pdf>.

<sup>85</sup> General Legal Activities, Civil Rights Division (CRT) at 2, [https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/16\\_bs\\_section\\_ii\\_chapter\\_-\\_crt.pdf](https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/16_bs_section_ii_chapter_-_crt.pdf). A report by the National Academy of Public Administration noted that as of October 4, 2014, the Voting Section had 36 attorneys, 21 other professionals, and 9 clerical personnel actually on board. Nat’l Acad. of Public Admin., *Department of Justice Civil Rights Division: A Strategic Management Framework for Building on the Past, Moving to the Future* 37 (2015), [https://www.napawash.org/uploads/Academy\\_Studies/DOJ\\_CRT\\_Report.pdf](https://www.napawash.org/uploads/Academy_Studies/DOJ_CRT_Report.pdf).

<sup>86</sup> Some of these activities are comparatively within the control of the Civil Rights Division, but others may not be. The enforcement of consent decrees, for example, may depend on action instigated by the courts, or by private

surmise that the efforts to field a robust election monitoring program with a radically altered role for OPM personnel, as discussed above, occupied a portion of this energy — and to assume, despite these efforts, that the changes to the election monitoring program also yielded a less robust record for future enforcement, particularly for potential violations at the polls.

It is also important to understand that the resources necessary for preclearance do not necessarily translate one-for-one into either investigations or affirmative litigation: it is not reasonable to expect DOJ enforcement before and after *Shelby County* to involve a straightforward one-for-one swap of jobs and tasks. The assessment of preclearance submissions requires the evaluation of a steady incoming flow of demographic, electoral, procedural, and historical information from covered jurisdictions. This work is heavily reliant on talented analysts, demographers, and historians, among other professionals, and comparatively less heavily reliant on attorneys. The same mix of personnel may or may not be appropriate for staffing any given investigation. And for obvious reasons, affirmative litigation efforts generally require comparatively more attorney time.

Enforcement priorities in the aftermath of *Shelby County* have also been driven to some degree by the path-dependence of individual matters: the public mix of work at any point may or may not reveal underlying enforcement priorities. Some investigations resolve quickly, either with or without a finding of likely legal violation; some may take multiple election cycles to resolve.<sup>87</sup> Once an investigation yields evidence of a legal violation, some jurisdictions may be relatively quick to engage in settlement discussions, while others drag their feet. The decision to litigate may be driven by any number of factors, including but not limited to the degree of the potential for legal or practical impact, the flagrancy of the individual violation, the availability of incremental resources at the time, and the comparative ability or will of other potential litigants to take up the banner instead.<sup>88</sup> And when the DOJ commits to litigate any case, it commits to litigating to its own exacting standards; few cases are straightforward, but even among forms of litigation known to be time-consuming, some voting rights cases may require outsized effort due to the inherent complexity of the case, or official intransigence and dilatory tactics, or both. DOJ's enforcement docket at any one time will always reflect litigation information available to the public and nonpublic information pertaining to investigations and settlement discussions, and this totality always includes resource allocations determined at least in part by the progress of investigations and cases in process.

For similar reasons, it is a bit difficult to compare enforcement apples to enforcement apples in litigation before and after *Shelby County*. There are a few instances when the impact of

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parties responsible for the decree. And when the Office of the Solicitor General seeks to file a brief, including an amicus brief, concerning voting rights or federal voting statutes, Civil Rights Division personnel with relevant expertise are as a matter of course engaged to assist that effort.

<sup>87</sup> Often, Section 2 investigations in smaller jurisdictions are of the latter sort: many such cases turn on the degree to which voting is polarized, and the limits of electoral data in some smaller jurisdictions may in some circumstances yield less statistical power, rendering polarization trends more difficult to discern without multiple cycles of returns. These difficulties are especially prominent when there are few precincts, when those precincts are less racially or ethnically homogenous, and/or when the mix of multimember ballots and particular candidates vying for the support of communities of color render voting patterns less clear.

<sup>88</sup> See Nat'l Acad. of Public Admin., *supra* note 85, at 51.

*Shelby County* is abundantly clear. For example, when election practices put in place before *Shelby County*, and blocked during preclearance, are later determined to be impermissibly discriminatory, the belated nature of a remedy can be traced directly to *Shelby County*. In Texas, the immense expenditure of resources involved in litigating challenges to the voter identification provision and the congressional and state House district maps is a direct result of *Shelby County*; far more disturbing is the equally direct consequence that elections conducted pursuant to discriminatory rules have yielded a tainted “representative” process responsible for years of binding policy.

And there are some instances when election practices were put in place after *Shelby County* that, it is relatively clear, would have been blocked by the preclearance system — and indeed, in some cases, were perhaps put in place after *Shelby County* because they would have been blocked by the preclearance system. In North Carolina, and in Pasadena, Texas, the discriminatory elections held under discriminatory rules are also fairly direct consequences of *Shelby County*.

But in most other circumstances, it is a bit more difficult to know what to make of raw numerical comparisons. The volume or success of litigation in any one time or place depends not only on the particular election practices in place there, but also the state of the law and changing interpretations over time; surrounding historical, political, and demographic context; the strategic choice of causes of action and strategic choices involving in developing the case; the facts available to prove the particular violations alleged; the availability of resources, skill, and expertise to diagnose the problem, muster the necessary facts, and embark on extended litigation; individual evidentiary and legal decisions made by individual judges; competing priorities and the opportunity costs represented by alternative litigation options elsewhere; and a host of other factors.

So without particular comparisons, here is what is publicly known about Voting Section enforcement activity since *Shelby County*.<sup>89</sup> The Section has filed four Section 2 cases: the three massive cases in North Carolina and Texas described above, and a case against the city of Eastpointe, Michigan; the Texas and Eastpointe cases are still ongoing. It resolved a matter under the language access provisions of Section 203 in Napa County, California, in anticipation of litigation. It similarly resolved matters under the National Voter Registration Act in Alabama, Connecticut, and New York, and litigated NVRA cases to a settlement in Louisiana<sup>90</sup> and to a consent decree in New York City.<sup>91</sup> It litigated and resolved cases against Alabama, Georgia, Illinois, and West Virginia under the Uniformed and Overseas Citizen Absentee Voting Act, and

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<sup>89</sup> The summary is largely taken from the Department of Justice’s list of litigation, <https://www.justice.gov/crt/voting-section-litigation>, and from a scan of the Civil Rights Division’s press releases, <https://www.justice.gov/crt/civil-rights-division-press-releases-speeches>. The Civil Rights Division states that it publicly announces all newly filed cases and resolutions. See U.S. Dep’t of Justice, Civil Rights Div., Does the Division Announce Cases and Resolutions?, <https://www.justice.gov/crt/does-division-announce-cases-and-resolutions>.

<sup>90</sup> Memorandum of Understanding and Settlement Agreement, United States v. Louisiana, No. 3:11-cv-00470 (M.D. La. Aug. 21, 2017).

<sup>91</sup> Consent Judgment and Decree, Common Cause New York v. Bd. of Elections in the City of New York, No. 1:16-cv-06122 (E.D.N.Y. Dec. 14, 2017).

reached a settlement with Palm Beach County, Florida, in anticipation of litigation under the ADA and the Help America Vote Act.<sup>92</sup> The Section filed 13 statements of interest assisting trial courts with the proper interpretation of the law, and assisted with 13 other amicus briefs in courts of appeal or the Supreme Court.<sup>93</sup> The Section has also monitored existing consent decrees, deployed personnel to watch various local, state, and federal elections around the country, and tracked absentee ballot delivery to military and overseas citizens under UOCAVA and the MOVE Act. And the Section has also engaged in various investigations of violations of the federal civil rights voting statutes, some of which may have led to the jurisdictions resolving the issue on their own, some of which may have yielded little properly actionable fruit, some of which may still be ongoing. Those investigations presumably include inquiries into jurisdictions with new responsibilities as of December 2016 under Section 203 of the Voting Rights Act, after the Census Bureau made new determinations triggering new compliance obligations in various localities.<sup>94</sup> I will hope that those investigations that have revealed actionable proof of violations will soon become consent decrees or active litigation.

Within this activity, it is worth drawing attention to one particular enforcement approach that stands out among DOJ activity in recent months. I have mentioned that the Texas case concerning voter identification is still proceeding, with pending Fifth Circuit review of the trial court's findings. But the Department of Justice's approach in that litigation has shifted quite dramatically.

In August 2013, the DOJ filed a complaint alleging, inter alia, that Texas had intentionally discriminated on the basis of race in passing the particular voter identification bill that it adopted.<sup>95</sup> The complaint sought relief from the statute, and also the imposition of preclearance on Texas under Section 3(c) of the Voting Rights Act, the predicate to which is a constitutional violation: in this context, a finding of intentional discrimination.<sup>96</sup> Career attorneys at DOJ vigorously litigated the intentional discrimination claim for years, including a determination by the trial court that the legislature had, in fact, intentionally discriminated.<sup>97</sup>

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<sup>92</sup> The Division also litigated an ADA case regarding polling place access to a consent decree in Augusta County, Virginia, and continues to litigate an ADA case regarding polling place access in Harris County, Texas. *See, e.g.*, Consent Decree, *United States v. Augusta Cnty., Va.*, No. 5:15-cv-00077 (W.D. Va. Nov. 4, 2015), [https://www.ada.gov/augusta\\_county/augusta\\_cd.html](https://www.ada.gov/augusta_county/augusta_cd.html); Complaint, *United States v. Harris Cnty., Tex.*, No. 4:16-cv-02331 (S.D. Tex. Aug. 4, 2016), [https://www.ada.gov/harris\\_co/harris\\_co\\_complaint.html](https://www.ada.gov/harris_co/harris_co_complaint.html).

<sup>93</sup> U.S. Dep't of Justice, Civil Rights Div., Appellate Briefs and Opinions, <https://www.justice.gov/crt/appellate-briefs-and-opinions>.

<sup>94</sup> *See* Dep't of Commerce, Bureau of the Census, *Voting Rights Act Amendments of 2006, Determinations Under Section 203*, 81 Fed. Reg. 87532 (Dec. 5, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-12-05/pdf/2016-28969.pdf>.

<sup>95</sup> Complaint, *United States v. Texas*, No. 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013), [https://www.justice.gov/sites/default/files/crt/legacy/2013/08/26/tx\\_comp\\_sec2.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/08/26/tx_comp_sec2.pdf).

<sup>96</sup> *Id.* at 13.

<sup>97</sup> *Veasey v. Perry*, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2014). The decision was vacated and remanded in relevant part for the court to re-evaluate the evidence presented, 830 F.3d 216, 234-35 (5th Cir. 2016) (en banc), and the district court, upon re-weighing, again found that the law had been enacted with discriminatory intent, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017).

On June 1, 2017, after a second trial court finding that the identification law was intentionally discriminatory, Texas amended its identification law.<sup>98</sup> The DOJ then asserted, in a brief signed by the new political appointee, that Texas had fully remedied any Voting Rights Act violation of the statute.<sup>99</sup> I vigorously disagree with this approach, which allows an unrepentant legislature to retain the stain of legislation designed to discriminate against individuals on the basis of their race, ethnicity, or language minority status as long as they can mitigate the impact of such a law to fall below a threshold of provable disparity, rather than eradicating the stain of racial discrimination, as the Supreme Court has commanded, “root and branch.”<sup>100</sup> But the issue of the proper remedy for intentional discrimination is now on appeal, and will be addressed by the courts in due course. Instead, I want to focus on an earlier DOJ decision. On February 27, 2017, when specific action by the Texas legislature was speculative at best (and, indeed, three months before any action in fact occurred), the DOJ, in another brief signed by the new political appointee, voluntarily dismissed its claim that the law had intentionally discriminated.<sup>101</sup> It cited, as its only rationale, a bill introduced in the Texas legislature six days before, which had not yet had a single hearing or been considered by a single committee.<sup>102</sup> I am not aware of another circumstance in which the United States government has abandoned a fiercely litigated claim of intentional racial discrimination based on the potential prospect of eventual hypothetical legislation, much less a claim of intentional racial discrimination validated by the findings of a federal court.

I hope that this testimony today assists the Commission in assessing the enforcement of the Voting Rights Act, particularly by the Department of Justice, and the impact of the Supreme Court’s decision in *Shelby County* on that enforcement. I thank you again for the opportunity to testify before you, and look forward to answering any questions that you may have.

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<sup>98</sup> Texas Legislature Online, Actions: SB 5, <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=85R&Bill=SB5>.

<sup>99</sup> United States’s Brief Regarding Remedies, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. July 5, 2017); *see also* Brief of the United States as Appellee, *Veasey v. Abbott*, No. 17-40884, 2017 WL 5068621 (5th Cir. Oct. 26, 2017).

<sup>100</sup> *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 438 (1968).

<sup>101</sup> United States’s Motion for Voluntary Dismissal of Discriminatory Purpose Claim Without Prejudice, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. Feb. 27, 2017).

<sup>102</sup> Texas Legislature Online, Actions: SB 5, <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=85R&Bill=SB5>. Because the United States’ motion for voluntary dismissal was unopposed, the district court granted the motion, but in the same order rejected the purported legal basis for the dismissal. *See* Order on Government’s Motion for Voluntary Dismissal of Discriminatory Purpose Claim and Assertion of Mootness, *Veasey v. Abbott*, 248 F. Supp. 3d 833 (S.D. Tex. 2017).