

Testimony of
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Subcommittee on the Constitution, Civil Rights and Civil Liberties,
of the U.S. House Committee on the Judiciary

Congressional Authority to Protect Voting Rights After *Shelby County v. Holder*

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Chair Cohen, Vice Chair Raskin, Ranking Member Johnson, and distinguished Members, 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.¹ 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 officials with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution.

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated. I appear today at the request of the Subcommittee, and on behalf of no other person beyond myself. I thank Hannah Bensen, Nairi Dulgarian, and Sara Rohani for their research assistance with this testimony.

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, to bodies like the U.S. Commission for Civil Rights, to state legislative bodies, and to other committees of the U.S. House and Senate. 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, continuing what I hope will become bipartisan action in both chambers to ensure that the franchise remains secure. Voting, the right preservative of all other rights,² “is of the most fundamental significance under our constitutional structure.”³ Constant vigilance is necessary to ensure that the franchise remains equally meaningful for all eligible citizens, regardless of race or ethnicity. Congress has both the specifically enumerated power and the moral responsibility to protect against electoral discrimination. And lamentably, bipartisan Congressional action is now just as important as ever. I am happy to assist in that effort however I can.⁴

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

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

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

⁴ Some of this testimony borrows from testimony given to the Senate Judiciary Committee in the immediate aftermath of the *Shelby County* decision, and to the U.S. Commission on Civil Rights last year. 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>; *An Assessment of Minority Voting Rights Access in the United States: Hearing Before the U.S. Comm’n on Civil Rights* (Feb. 2, 2018) (statement of Justin Levitt), <http://redistricting.ills.edu/other/2018%20Levitt%20testimony.pdf>. Sadly, some of the concerns expressed in that testimony have already proven justified.

⁵ Polls both at the time of the Voting Rights Act and as recently as 2015 showed strong support for the Voting Rights Act, regardless of race. Roper Center for Public Opinion Research, *Public Opinion on the Voting Rights Act*, Aug. 6, 2015, <https://ropercenter.cornell.edu/blog/public-opinion-voting-rights-act>. As discussed in further detail below, the Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), and related judicial decisions and enforcement patterns, have left significant holes in the enforcement structure of the Voting Rights Act — holes within Congress’s power to repair. And consistent with the attitudes above, polls in the wake of *Shelby County* showed that voters disapproved of that decision, regardless of race. See Press Release, ABC News/Washington Post Poll: SCOTUS Decisions, July 3, 2013, <http://www.langerresearch.com/uploads/1144a24SCOTUSDecisions.pdf>.

The Voting Rights Act has also always been an American commitment crossing partisan lines.⁶ The Act was passed in 1965 by substantial majorities of both parties.⁷ Portions of the Act were renewed and updated in 1970,⁸ 1975,⁹ 1982,¹⁰ and 2006;¹¹ on each and every occasion, the renewals were passed by substantial majorities of both parties. To my knowledge, Members of the Committee, only two of you were able to cast a Congressional vote in 2006, but both — Republican and Democrat — voted for the measure to reauthorize the Voting Rights Act. 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.

Presumably, you and your colleagues voted overwhelmingly, and in bipartisan fashion, to reauthorize and update the Voting Rights Act because you and your constituents recognized in 2006 how very far we had come since 1965. That undeniable and positive progress existed in part due to the very protections that the Voting Rights Act offered. And you and your constituents presumably recognized that despite this remarkable progress, the protections of the Voting Rights Act remained unfortunately necessary. Those protections have been degraded by the courts since your vote, but those same courts also issued you an express invitation to rectify the matter. And the continued update of effective measures to prevent discrimination in the franchise are regrettably, and no less undeniably, necessary today.

The continuing need to update the Voting Rights Act

The most serious challenge to the efficacy of the Voting Rights Act stems from the result of the Supreme Court's 2013 opinion in *Shelby County v. Holder*, though the Court in the same

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

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

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

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

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

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

breath expressly acknowledged that Congress could fix the damage.¹² As you know, an essential part at the heart of the Voting Rights Act’s structure is section 5 of the 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.¹³ 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.

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” primarily expressed in section 4 of the Act. Section 4(b) was the primary provision determining where preclearance applied, taking its principal direction from turnout statistics in the 1964 — and then 1968 and 1972 — general elections.¹⁴ 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 4.¹⁵ 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.”¹⁶ The Court struck the geographic coverage for the preclearance mandate of section 5. Which means that today, section 5 is applied nowhere.¹⁷

Which does not mean that it is unnecessary. Despite offering justified praise for the 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”¹⁸ 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

¹² 570 U.S. 529 (2013); *id.* at 557.

¹³ 52 U.S.C. §§ 10304(a), 10303(f)(2).

¹⁴ *See* 52 U.S.C. § 10303(b).

¹⁵ 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).

¹⁶ *Shelby Cty. v. Holder*, 570 U.S. 529, 550-56 (2013).

¹⁷ 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). I discuss this provision in further detail below.

¹⁸ *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality).

violation.”¹⁹ 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.²⁰

These are merely a few salient examples from the recent annals of the U.S. Reports, demonstrating what any observer of recent news knows well: despite progress toward equality, we are decidedly not yet at our goal. In 2019, it should no longer require much convincing to demonstrate that America is not free of invidious discrimination, much less “post-racial.”

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

Difficulty in securing timely, meaningful 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,²¹ and private plaintiffs may also bring claims

¹⁹ League of United Latin American Citizens v. Perry, 548 U.S. 399, 440 (2006).

²⁰ Patino v. City of Pasadena, 230 F. Supp. 3d 667, 728 (S.D. Tex. 2017); Perez v. Abbott, 390 F. Supp. 3d 803, 811-12 (W.D. Tex. 2019) (three-judge court) (bail-in); 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); Veasey v. Abbott, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017), *rev'd in part on other grounds*, 888 F.3d 792, 800 (5th Cir. 2018); N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214-15 (4th Cir. 2016).

Beyond intentional discrimination, there is also lamentably ample evidence of the continuing imposition of electoral policies and procedures with discriminatory effect on the basis of race and language minority status. *See generally, e.g.*, U.S. Comm’n on Civil Rights, An Assessment of Minority Voting Rights Access in the United States (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf; U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights Issues Compendium of Voting Rights Reports by our State Advisory Committees, Oct. 31, 2018, <https://www.usccr.gov/press/2018/20181031%20Notice%20SAC%20Compendium.pdf>; Alaska Advisory Comm. to the U.S. Comm’n on Civil Rights, Alaska Native Voting Rights, June 2019, <https://www.usccr.gov/pubs/2019/09-19-AK-SAC-Voting-Report.pdf>; R.I. Advisory Comm. to the U.S. Comm’n on Civil Rights, Advisory Memorandum on Voting Rights Briefing, Oct. 16, 2018, <https://www.usccr.gov/press/2019/05-15-RI-Voting-Rights.pdf>; Tenn. Advisory Comm. to the U.S. Comm’n on Civil Rights, The Right to Vote and Ex-Felon Disenfranchisement in Tennessee, June 2014, https://www.usccr.gov/pubs/docs/TN_SAC_Ex-Felon-Report.pdf; Ky. Advisory Comm. to the U.S. Comm’n on Civil Rights, Voting Rights in Kentucky, Sept. 2009, <https://www.usccr.gov/pubs/docs/KYVotingRightsReport.pdf>; Nat’l Comm’n on Voting Rights, Voting Landscape: State-by-State Profiles (2015), <http://votingrightstoday.org/ncvr/resources/state-pages>; Nat’l Comm’n on Voting Rights, Protecting Minority Voters: Our Work is Not Done (2015), <http://votingrightstoday.org/ncvr/resources/discriminationreport>; Nat’l Comm’n on Voting Rights, Improving Elections in the United States: Voices from the Field (2015), <http://votingrightstoday.org/ncvr/resources/electionadmin>; 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.

²¹ 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

against discrimination drawn directly from 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 harm in our legal system, including civil rights violations. But electoral harms are not normal harms, and existing “normal” remedies — which might otherwise suffice in the “traditional course of relations between the States and the Federal Government”²² to rectify traditional harms — do not suffice in this arena.

Many claims of legal harm are, at least in theory, premised on the capacity of the justice system to provide a remedy that attempts to make the aggrieved plaintiff whole if the legal violation is proven. In the event of civil rights claims like employment discrimination or housing discrimination — or more run-of-the-mill common law torts — injunctive relief may correct bad behavior and monetary awards may compensate victims for any damage sustained in the meantime. In contrast, there is no way to compensate for past damage in the electoral arena, and no way to make aggrieved plaintiffs whole. Future contests may be held with the pernicious conditions mitigated or removed. But 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. And that policy includes not only matters of substantive import to the electorate — affecting small local issues and lofty national ones alike — but also the rules for conducting elections themselves, which may amount to means for those unlawfully elected to further retain power. The policies put in place by officials who gain office through discriminatory elections cannot be readily undone. “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.

Moreover, election-based harms cause this irreparable damage on an extraordinarily compressed timeframe. The public may have the impression that the election cycle comes and goes, but those who work in the arena know that there is always an election pending, usually mere months in the future. The legitimate need for local officials to prepare the mechanics of an election on relatively stable terrain has led the Supreme Court to push back against last-minute changes wrought by litigation, which compresses the remedial calendar further.²³ And on the other side of Election Day, an election held under conditions later found to be unlawful works its communicative harm immediately, and the associated substantive policy harm as soon as the election winners are installed, well before normal litigation can undo the damage. Preclearance was designed to stop discrimination before it could have this irremediable impact on local communities.

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.

²² *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (quoting *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500-01 (1992)).

²³ *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also, e.g., Husted v. Ohio State Conference of the NAACP*, 573 U.S. 988 (2014) (staying, on September 29, 2014, preliminary injunction issued by the district court on September 4).

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 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.²⁴ If one particular promulgated practice is struck down, officials have reason to try another, to achieve the same results by different means.²⁵

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. That is, the costs are borne by the taxpayers. 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; for the officials themselves, there is little downside in prolonging the fight. 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*,

²⁴ See, e.g., *Garza v. Cty. 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).

²⁵ 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 et al. as *Amici Curiae* in Support of Respondents at 14-15, *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

and absent further Congressional action, the existing enforcement tools are inadequate to meet the need.²⁶

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.”²⁷ The time required for responsive litigation begins, in many ways, well before litigation itself. Responsive litigation depends on an ability to amass, process, analyze, 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. This takes cost and time.

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 often precedes the awarding of even preliminary relief. Such preliminary relief, according to experienced litigators, is itself quite rare in affirmative voting rights litigation, under the existing standard.²⁸ And as noted above, 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 under traditional equitable standards when there is “inadequate time to resolve . . . factual disputes” before the election proceeds.²⁹

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.³⁰

²⁶ 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.”).

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

²⁸ See Transcript of Oral Argument at 38, *Shelby Cty. 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%”).

²⁹ *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006).

³⁰ Only death penalty habeas cases, environmental cases, civil RICO cases, patent cases, and continuing criminal enterprise drug crimes were deemed more cumbersome. See Federal Judicial Center, 2003–2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial

All of this can translate to extensive periods of justice delayed. There is no systematic study of which I am aware statistically analyzing the time required to secure relief in responsive voting rights litigation.³¹ 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, 2001.³² 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.³³ 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.³⁴ The court issued a decision in favor of plaintiffs in March 2003, with a remedial plan settled by August of that year;³⁵ on appeal, the court's decision was affirmed in April 2004.³⁶ 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 2004.³⁷

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

³¹ 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.

³² *United States v. Charleston Cty.*, 318 F. Supp. 2d 302, 313 (D.S.C. 2002).

³³ *Id.* at 327-28.

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

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

³⁶ *United States v. Charleston Cty.*, 365 F.3d 341 (4th Cir. 2004).

³⁷ 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.

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 voter ID statute to “the ‘full bill.’”³⁸ 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 for these purposes.³⁹ The bill was signed into law on August 12, 2013, and a suit was filed that same day.⁴⁰ 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, 2015.⁴¹ On the eve of trial, the North Carolina legislature amended the law, further delaying trial with respect to those amendments.⁴² It was only on July 29, 2016, that the intentionally discriminatory “full bill” was ultimately struck down.⁴³ 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.

Litigation in Texas reveals 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).⁴⁴ Before *Shelby County*, the law was blocked by the preclearance provision.⁴⁵ But the day of *Shelby County*, Texas began enforcing the law.⁴⁶ 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.⁴⁷ The court of appeals ultimately agreed with the trial court on some grounds and remanded for further consideration of others;⁴⁸ in the meantime, the trial court adopted interim remedial relief on

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

³⁹ *Id.* at 214.

⁴⁰ *Id.* at 218.

⁴¹ *Id.* at 219.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *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 Cty. v. Holder*, 570 U.S. 928 (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.

⁴⁵ 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).

⁴⁶ *Id.* at 227.

⁴⁷ *Id.* at 228.

⁴⁸ *Id.* at 272.

August 10, 2016.⁴⁹ On May 31, 2017, the Texas legislature amended the voter identification law; the Fifth Circuit deemed this amendment sufficient to remove any discriminatory taint, and placing the burden of further challenge on the plaintiffs, found insufficient evidence offered to support a finding that the amendment was problematic on its own.⁵⁰ But for purposes of this testimony, the crucial takeaway in this procedural history is 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 were repeatedly been found by a trial court to have been intended to discriminate.⁵¹

Another aspect of the voting rights litigation in Texas reveals a further shortcoming of the emphasis on affirmative litigation: existing law provides shockingly little incentive for jurisdictions with a history of recalcitrance to change course and chart the right path. I have already discussed the various limitations on the efficacy of affirmative litigation in the election context, where officials fixed on wrongdoing rely on the personalized benefits of time and inertia but socialize the cost of legal defense. But in the past, the prospect of affirmative litigation for jurisdictions not already subject to preclearance at least brought with it the notions of two powerful remedies: muscular injunctive relief and the possibility of customized “bail-in.” Those remedies have also been sharply curtailed.

With respect to injunctive relief, it had once been blackletter law that a jurisdiction, once found to have engaged in racial discrimination, had the responsibility to eliminate the vestiges of that discrimination “root and branch.”⁵² At the very least, a finding of racial discrimination — particularly intentional racial determination — brought broad injunctive relief designed to ensure no traces of the original remained. In the litigation over Texas’s ID provision, however, the Fifth Circuit seemingly confined that “root and branch” responsibility to an as-yet-undetermined subset of intentional discrimination cases.⁵³ Instead, the court required deference to, and a presumption of good faith for, the preferred remedy of the legislative body that had recently engaged in intentional discrimination, as long as the new remedy was not itself proven to be unlawful.⁵⁴ That is: the court required deference in 2017 to the remedial wishes of the legislature that had intentionally set out to discriminate in 2011 and profited from that discrimination in 2014 and 2016.

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

⁵⁰ *Veasey v. Abbott*, 888 F.3d 792, 801-04 (5th Cir. 2018).

⁵¹ 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.

⁵² *Green v. County School Bd. of New Kent Cty., Va.*, 391 U.S. 430, 438 (1968).

⁵³ *Veasey*, 888 F.3d at 801.

⁵⁴ *Id.* at 802. Cf. *Abbott v. Perez*, 138 S. Ct. 2305, 2318, 2325-27 (2018) (faulting an allegedly similar refusal to presume good faith in a redistricting case, while still acknowledging that the discriminatory intent of an earlier legislature could, in context (or in theory), give rise to an inference regarding the intent of a later legislature).

This creates a dangerous incentive. The Fifth Circuit’s standard creates the conditions for intentional racial discrimination to be met with milquetoast rather than muscular relief. A jurisdiction setting out to discriminate on the basis of race can rely on the cumbersome nature of litigation to sustain its efforts for a cycle or two, with the costs of legal defense pushed onto the taxpayers. Once caught, the jurisdiction need only apply a modest Band-Aid, changing its policy (and its communications strategy) not to remove all traces of discrimination, but just enough to make a follow-on challenge to the new rule difficult to prove in court. That constitutes remarkably little disincentive to engage in discrimination in the first instance.

Practical resistance to the other powerful remedy compounds the problem. Section 3 of the Voting Rights Act contains a provision that allows a federal court discretion to impose prospective preclearance upon the finding of a violation of the Fourteenth or Fifteenth Amendment justifying that equitable relief.⁵⁵ Essentially, it allows courts to impose preclearance requirements going forward, for a scope and duration chosen by the court, after a finding of intentional discrimination.⁵⁶ 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.⁵⁷

Indeed, even when intentional discrimination has been proven, and even when there is no sign that a jurisdiction with a repeated history of discrimination based on race has changed its ways or will change its ways, courts have declined to impose bail-in under Section 3. In many ways, Texas is again, unfortunately, the marquee example. As mentioned above, a majority of the Supreme Court in 2006 struck down Texas’s 2003 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.”⁵⁸ In 2011, the Texas legislature redeployed a more sophisticated set of tools to — again — intentionally discriminate against the Latino electorate, in (among other areas) the very same district.⁵⁹ (Indeed, a three-judge federal court found that the Texas legislature “intentionally discriminated in 2011 in numerous and significant ways.”)⁶⁰ That is not the act of

⁵⁵ 52 U.S.C. § 10302(c).

⁵⁶ See, e.g., *Perez v. Abbott*, 390 F. Supp. 3d 803, 813-14 (W.D. Tex. 2019) (three-judge court). Analogous to the procedure under section 5, election changes subject to preclearance based on a Section 3 order must be reviewed by the Department of Justice or the court issuing that order. 52 U.S.C. § 10302(c).

⁵⁷ 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). The Evergreen order runs only for another year and change: though it was occasioned by allegedly discriminatory redistricting in 2012, the Section 3 order expires on December 21, 2020, before the next redistricting cycle. See *Order, Allen v. City of Evergreen*, No. 1:13-cv-00107 (S.D. Ala. Jan. 13, 2014).

⁵⁸ *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006).

⁵⁹ *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); Justin Levitt, *LULAC v. Perry: The Frumious Gerry-Mander, Rampant*, in *ELECTION LAW STORIES* 233, 282-83 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

⁶⁰ *Perez v. Abbott*, 390 F. Supp. 3d at 811, 814-16.

a reformed penitent. It is the act of a hardened recidivist, returning to the scene of the crime to finish the job, wearing only a slightly different mask.

The preclearance regime then in place stopped that 2011 Texas map from taking effect.⁶¹ But there is no preclearance provision currently in place for Texas. And as described above, there is precious little incentive for the Texas legislature of 2021 not to go back to the same well.

Those should have been the ideal conditions for imposing preclearance under Section 3(c) of the Voting Rights Act: a jurisdiction with a record of repeat offenses, caught in the act of intentional discrimination once again, and coming up on another redistricting cycle with a requirement to revisit the status quo and another tantalizing opportunity to offend. Indeed, a three-judge trial court noted that:

This case . . . involves findings of intentionally discriminatory behavior affecting minority voters statewide[.] . . . Numerous counties were drawn with the purpose to dilute minority voting strength in the Texas House plan, as well as CD23 and numerous congressional districts in the Dallas-Fort Worth metroplex in the Congressional plan. Though the Supreme Court may have found no discriminatory purpose in 2013, it did not undermine the findings of purposeful discrimination in 2011. These recent, statewide violations of the Fourteenth Amendment by the State are the type to appropriately trigger the bail-in remedy against the State, and the bail-in remedy sought by Plaintiffs would appropriately redress the violation.⁶²

I have said that the question of bail-in in Texas presented Frank Sinatra’s memorable maxim in reverse: If you can make the case anywhere, you can make it there.⁶³

And yet. The three-judge Texas court accurately noted that “[i]n the wake of Shelby County” — which did not in any way concern Section 3 of the Voting Rights Act — “courts have been hesitant to grant § 3(c) relief.”⁶⁴ And though the court specifically professed “grave concerns about Texas’s past conduct,”⁶⁵ called attention to Texas’s strong incentives for future discrimination,⁶⁶ and specifically said that “[g]iven the fact of changing population demographics, the likelihood increases that the Texas Legislature will continue to find ways to attempt to engage in ‘ingenious defiance of the Constitution’ that necessitated the preclearance system in the first place,”⁶⁷ the court also declined to put Texas back under preclearance via Section 3. It offered little substantive rationale other than “[i]t is time for this round of litigation

⁶¹ *Texas v. United States*, 887 F. Supp. 2d 133, 138, 159 (D.D.C. 2012) (three-judge court), *vacated on other grounds by* 570 U.S. 928 (2013); *LULAC*, 548 U.S. at 440.

⁶² *Perez v. Abbott*, 390 F. Supp. 3d at 816.

⁶³ *Cf.* FRANK SINATRA, *NEW YORK, NEW YORK* (Reprise Records 1980).

⁶⁴ *Perez v. Abbott*, 390 F. Supp. 3d at 819.

⁶⁵ *Id.* at 820.

⁶⁶ *Id.* at 820-21.

⁶⁷ *Id.* at 820 (emphasis added).

to close.”⁶⁸ Texas, it seemed, had successfully run out the clock. And a new round of redistricting awaits. If the record in Texas was insufficient to put Texas back under preclearance, there are real questions about judicial will to enforce Section 3 with respect to any state — and, accordingly, real questions about the ability to deter discrimination. These conditions are crying out for Congressional reappraisal of the enforcement scheme.

The delay required by affirmative litigation in this arena, and its inability to provide substantive deterrence, would each be sufficient for Congress to revisit the enforcement tools of the Voting Rights Act. But beyond these flaws, the time and complexity of litigation 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, expert fees, deposition costs, transcript fees, document production costs, and on and on. Though reliable statistics are difficult to determine, such cases reportedly “require[] a minimum of hundreds of thousands of dollars.”⁶⁹ In the Charleston County, South Carolina, litigation described above, private plaintiffs’ fees and costs amounted to \$712,027.71, in addition to the time and expenses incurred by the Justice Department (and, of course, in addition to the defendant’s costs).⁷⁰ In statewide cases, the meter runs higher still. In the Texas voter ID litigation described above, private plaintiffs’ fees and costs amounted to more than \$8.7 million, in addition to the time and expenses incurred by the Justice Department (and, again, in addition to the defendant’s costs).⁷¹ 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.

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.⁷²

⁶⁸ *Id.* at 821.

⁶⁹ 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>.

⁷⁰ *Moultrie v. Charleston Cty.*, 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 et al. as *Amici Curiae* in Support of Respondents at 25, *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (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 **Error! Bookmark not defined.**

⁷¹ The fees and costs calculations in the text are drawn from several motions submitted between April 11, 2019, and September 19, 2019, in *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex.).

⁷² 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.*

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.⁷³ 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.⁷⁴ 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.

Some might point to the Department of Justice as a counterexample. There is no question that the Department of Justice has the potential to be the elephant in the room. It has a staff of experienced litigators and experts, and a reservoir of institutional expertise, matched by at most a handful of attorneys within any given state, and a handful of national organizations with a few voting rights specialists stretched to capacity.⁷⁵ And the DOJ has funds for enforcement well beyond the reach of the private bar. But affirmative litigation cases as mammoth as those in North Carolina and Texas consume mammoth amounts of time and personnel; while DOJ capacity is sizable, it is not infinite. Data-intensive cases like voting rights cases also often rely heavily on the analysis of expert witnesses, whose time is also limited.⁷⁶ DOJ could not be

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.

⁷³ *Id.*

⁷⁴ *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland Cty., Tex.*, 390 U.S. 474 (1968).

⁷⁵ See Brief of Joaquin Avila et al. as *Amici Curiae* in Support of Respondents at 28-29, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96); 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.”), http://www.brookings.edu/~media/events/2013/7/1%20voting%20rights%20act/20130701_voting_rights_transcript_pt2.pdf.

⁷⁶ 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

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.

And while the DOJ has the capacity to be the elephant in the room, it also has the unfortunate capacity to be little more than a mouse. I have previously mentioned the Texas case concerning voter identification; 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.⁷⁷ Career attorneys at DOJ vigorously litigated the intentional discrimination claim for years, including securing a determination by the trial court that the legislature had, in fact, intentionally discriminated.⁷⁸

On February 27, 2017, the DOJ voluntarily dismissed its claim that the law had intentionally discriminated.⁷⁹ That filing was signed not, as custom in the Civil Rights Division would have suggested, by the career attorney leading the litigation team, but by the new political appointee, in a stark departure from prior practice. 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; at the time, specific action by the Texas legislature was speculative at best (and, indeed, it was three months before any action in fact occurred).⁸⁰ I am not aware of any other 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.

A similar reversal of course attended the Texas redistricting litigation also described above. The Department of Justice had been a defendant in the case during preclearance proceedings, as Texas sought preclearance of discriminatory plans to which the Department objected.⁸¹ Shortly after *Shelby County* eliminated the preclearance requirement for Texas, the Department of Justice entered the case as a plaintiff, to seek Section 3 preclearance bail-in based

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>.

⁷⁷ 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.

⁷⁸ *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).

⁷⁹ *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).

⁸⁰ 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).

⁸¹ *Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012) (three-judge court), *vacated on other grounds by* 570 U.S. 928 (2013);

on the intentional discrimination at the heart of the 2011 maps.⁸² In the years thereafter, Texas maps promulgated in 2013 in the aftermath of an interim judicial compromise were litigated up to the Supreme Court.⁸³ But the Department of Justice never contested the 2013 maps.⁸⁴ And no findings leading to the Department's engagement were ever questioned, much less overturned.⁸⁵ And yet, citing changed circumstances, the Department changed course in 2019, opposing the Section 3 relief it had once expressly sought.⁸⁶ Unlike other briefs in this and other cases, the DOJ briefs opposing Section 3 relief were once again signed not by career attorneys leading the litigation team, but by the political appointee.⁸⁷ The only relevant change in circumstances was the change in Administration.

I do not reflexively believe that every voting-related action of the Department since my departure has been a mistake. The Voting Section of the Civil Rights Division recently settled litigation in Eastpointe, Michigan, with a notable ranked-choice remedy relatively innovative for the DOJ; the case was filed during my tenure at the DOJ, but I applaud the way that it was litigated and I applaud the resolution.⁸⁸ The Voting Section resolved litigation under the National Voting Rights Act in both Kentucky and New York City, and settled NVRA matters out of court with Connecticut and New York; and settled litigation under the Uniformed and Overseas Citizens Absentee Voting Act in Arizona and Wisconsin, and I commend each.⁸⁹

But the two shifts in Texas are notable DOJ abdications of enforcement under the Voting Rights Act, in a zone where enforcement was and is sorely warranted. And there is a third shift more difficult to detect, but perhaps more notable still. Since the resolution of the Eastpointe litigation, I believe that there are no public enforcement matters actively being litigated by the

⁸² United States Complaint in Intervention, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex. Sept. 25, 2013).

⁸³ See *Abbott v. Perez*, 138 S. Ct. 2305, 2325, 2335 (2018).

⁸⁴ United States' Brief Opposing Section 3(c) Relief at 4, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex. Jan. 29, 2019).

⁸⁵ *Perez v. Abbott*, 390 F. Supp. 3d 803, 811-12 (W.D. Tex. 2019) (three-judge court).

⁸⁶ See United States' Brief Opposing Section 3(c) Relief at 4, *supra* note 84.

⁸⁷ See *id.* at 12; Justin Levitt, *The Civil Rights Division Bails Out of Bail-In in Texas*, TAKE CARE, Feb. 8, 2019, <https://takecareblog.com/blog/the-civil-rights-division-bails-out-of-bail-in-in-texas>.

⁸⁸ See, e.g., Consent Judgment and Decree, *United States v. City of Eastpointe*, No. 4:17-cv-10079 (E.D. Mich. June 5, 2019), <https://www.justice.gov/opa/press-release/file/1170156/download>.

⁸⁹ See, e.g., Consent Judgment, *Judicial Watch v. Grimes*, No. 3:17-cv-00094 (E.D. Ky. July 3, 2018), <https://www.justice.gov/crt/case-document/file/1083361/download>; Justin Levitt, *DOJ and the Voter Rolls*, TAKE CARE, July 5, 2018, <https://takecareblog.com/blog/doj-and-the-voter-rolls>; Consent Judgment and Decree, *Common Cause v. Bd. of Elections in the City of New York*, No. 1:16-cv-06122 (E.D.N.Y. Dec. 14, 2017), <https://www.justice.gov/crt/case-document/file/1079171/download>; Memorandum of Understanding Between United States and Connecticut, Feb. 15, 2019, <https://www.justice.gov/opa/press-release/file/1132801/download>; Memorandum of Understanding Between United States and New York, June 20, 2017, <https://www.justice.gov/crt/case-document/file/975901/download>; Consent Judgment and Decree, *United States v. Wisconsin*, No. 3:18-cv-00471 (W.D. Wis. June 20, 2018), <https://www.justice.gov/crt/case-document/file/1075226/download>; Consent Decree, *United States v. Arizona*, No. 2:18-cv-00505 (D. Ariz. Feb. 15, 2018), <https://www.justice.gov/crt/case-document/file/1068676/download>. I also understand the resolution of a difficult piece of NVRA litigation in Louisiana. See Memorandum of Understanding and Settlement Agreement, *United States v. Louisiana*, No. 3:11-cv-00470 (M.D. La. Aug. 21, 2017), <https://www.justice.gov/crt/case-document/file/1075351/download>.

Voting Section of the Department of Justice.⁹⁰ I am not referring merely to enforcement actions under Section 2 of the Voting Rights Act. I believe that, at present, there are no public enforcement matters actively being litigated under any single statute within the enforcement jurisdiction of the Voting Section of the DOJ.⁹¹

I should 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. 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. And litigation is not the only activity of the Voting Section: there may be ongoing investigations, with or without settlement discussions, and there is usually some ongoing monitoring of consent decrees already in place.

But while raw numerical comparisons in other circumstances may mask underlying differences in difficulty or effort or merit, it is difficult to avoid the sense of abdication that is zero. The fact that the Voting Section currently has no active open litigation beyond the monitoring of a few consent decrees is not an indication that there are no active violations of any of the federal statutes within its jurisdiction in need of remedy, and not an indication that there are no active violations of the Voting Rights Act.⁹² It is, rather, an unfortunate reminder that effective enforcement of the Voting Rights Act requires more than a dependence on affirmative litigation by the Department of Justice.

In sum, the affirmative litigation process remaining as the lone practical enforcement mechanism of the Voting Rights Act is not currently up to the task. “Litigation occurs only after

⁹⁰ Within the Civil Rights Division, the Voting Section handles most of the civil rights enforcement work with respect to the voting process. 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.

⁹¹ My assessment is largely taken from the Department of Justice’s list of litigation, <https://www.justice.gov/crt/voting-section-litigation>, from a scan of the Civil Rights Division’s press releases, <https://www.justice.gov/crt/civil-rights-division-press-releases-speeches>, and from a brief review of recent litigation filed in federal court and categorized on the docket as related to voting. 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>.

⁹² *See, e.g.*, Order Granting in Part Plaintiffs’ Motion for Preliminary Injunction, *Rivera Madera v. Lee*, No. 1:18-cv-00152, 2019 WL 2077037 (N.D. Fla. May 10, 2019); Complaint, *McLemore v. Hosemann*, No. 3:19-cv-00383 (S.D. Miss. May 30, 2019); Complaint, *NAACP, Spring Valley Branch v. East Ramapo Central School Dist.*, No. 7:17-cv-08943 (S.D.N.Y. Nov. 16, 2017).

the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency.”⁹³ Data sufficient to prove denial or dilution of the vote in the totality of circumstances must be gathered; these data often include information under the jurisdiction’s control that the jurisdiction will fight to keep, using house money. To the extent that the data include demographic and political information, they must be analyzed by experts, which means that one of the few available experts must be located and retained. And lawyers must be sought, which means that either the Department of Justice must be convinced to deploy its resources toward resolving the issue at hand or private attorneys must be found, either by raising sufficient funds or finding pro bono counsel willing and able to devote the time and resources to litigate one of the six most complex sorts of cases in the whole of the federal docket.

There are some occasions when the local victims of discrimination can amass data, experts, and attorneys, and when a thoroughly prepared case can work its way through the courts on an expedited docket, between the time that a discriminatory practice becomes law and the next election to follow. But often — particularly when a practice is changed shortly before an election or when the change occurs in a jurisdiction where the victims have fewer resources — it will not be possible to prepare, present, and prove to the certainty demanded by a court a thorough case before the litigation window closes and an election is held on discriminatory terms. And if discrimination becomes more readily provable only in the aftermath of a discriminatory election, the victims of the discrimination cannot ever be made whole.

Notice regarding changes of concern

All of the above discussion addresses just one aspect of the VRA enforcement regime after *Shelby County*: the difficulty in securing relief against discriminatory electoral policy, and the degree to which the remaining affirmative 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 aspect of the VRA enforcement regime after *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

⁹³ *Shelby Cty. v. Holder*, 570 U.S. 529, 572 (2013) (Ginsburg, J., dissenting).

head off discriminatory practices before they ever became law, or to encourage the mitigation of potentially harmful practices in a dialogue with DOJ officials.⁹⁴

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.

It is true that 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 2017, the United States hosts 3,031 county governments, 35,748 town and municipal governments, 38,542 special districts, and 12,754 independent school districts.⁹⁵ It can fervently be hoped that relatively few of them will turn to discrimination. But the impact of and intent behind last-minute changes in the rules or procedures of these smaller local governments, changes in the locations of or resource allocations within their polling places, or changes in their district lines or geographic scope, is difficult enough to assess with targeted focus on an individual perpetrator. Without a mechanism for notice to the public of the nature of the changes, it may not be possible for the advocates with available tools and expertise to effectively determine where they should look for those that go astray.

Observers at the polls

There is still a third relevant aspect of the Voting Rights Act enforcement regime changed by *Shelby County* and important to mention today: *Shelby County* 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

⁹⁴ See Ellen D. Katz, *South Carolina's "Evolutionary Process,"* 113 COLUM. L. REV. SIDEBAR 55, 60-64 (2013).

⁹⁵ U.S. Census Bureau, 2017 Census of Gov'ts — Organization, tbl. 2: Local Governments by Type and State (2019), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

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.⁹⁶

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.⁹⁷ 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,⁹⁸ 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,⁹⁹ 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*.¹⁰⁰

The handicap matters because observers 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:

[Personnel at the polls] 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

⁹⁶ 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>.

⁹⁷ *Id.*

⁹⁸ See 52 U.S.C. § 10305(a).

⁹⁹ 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>.

¹⁰⁰ 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>. In 2018, the Department did not announce the number of personnel deployed, but announced that it would monitor voting rights compliance in 35 jurisdictions across 19 states. See U.S. Dep't of Justice, Press Release, Justice Department to Monitor Compliance with Federal Voting Rights Laws on Election Day, Nov. 5, 2018, <https://www.justice.gov/opa/pr/justice-department-monitor-compliance-federal-voting-rights-laws-election-day>.

Act; and whether jurisdictions comply with the provisional ballot requirements of the Help America Vote Act.¹⁰¹

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 Rights Act, Section 202 of HAVA, and various components of the ADA and VAEHA.¹⁰² Limiting the practical capacity to deploy observers curtails the means to enforce these other statutory provisions as well.

Congressional authority to update the Voting Rights Act, and H.R. 4

The discussion above reflects the urgent need to update the Voting Rights Act, to provide an enforcement regime with tools adequate to the task. It is abundantly clear that the Constitution provides Congress the authority to do so.

First, with respect to elections for federal office, the Supreme Court has repeatedly emphasized that under the Elections Clause of Article I, Congress has “comprehensive” power over the manner in which federal legislative elections are conducted, exempting only the places of choosing Senators.¹⁰³ Congress may alter state electoral regulations with respect to how elections are conducted “or supplant them altogether,” with the “authority to provide a complete code for congressional elections” if it wishes.¹⁰⁴ And Congress is not limited to an all-or-nothing choice in this respect: it may exercise power over the means and mechanics of Congressional elections “at any time, and to any extent which it deems expedient.”¹⁰⁵ Congress may not use its Elections Clause authority to alter the baseline qualifications that states set for their voters — traits like age, citizenship, and residency.¹⁰⁶ But if the question concerns Congressional authority to set the rules for the procedure of a federal election — whether restrictions on the locations of polling places or the placement of electoral district lines — the answer is a resounding “yes.” And this is just as true whether Congress adopts a command-and-control approach to specifying the particulars of federal election procedure in minute detail, or whether it adopts the significantly less intrusive model of the Voting Rights Act: categorically excluding only a few specified practices and otherwise allowing states the flexibility to design their own election processes as long as those processes do not produce discriminatory inequity.¹⁰⁷

¹⁰¹ Press Release, *supra* note 99.

¹⁰² *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.

¹⁰³ *See, e.g.*, U.S. CONST., art. I, § 4; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013).

¹⁰⁴ *Id.* at 8-9.

¹⁰⁵ *Id.* at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

¹⁰⁶ *Id.* at 16; *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 625-26 (1969).

¹⁰⁷ *See, e.g.*, Justin Levitt, *Performance Standards and Design Standards in New Election Legislation*, TAKE CARE, Nov. 27, 2018, <https://takecareblog.com/blog/performance-standards-and-design-standards-in-new-election-legislation>.

Congress also has the authority to regulate elections — both federal elections and state and local elections — under its power to enforce the Fourteenth Amendment.¹⁰⁸ This is an expressly enumerated power, no less than the power to regulate interstate commerce, or the power to make rules for the regulation of the armed forces, or the power to appropriate spending for the common defense and general welfare of the country. Of particular relevance to the Voting Rights Act, the Fourteenth Amendment requires that similarly situated voters be treated similarly,¹⁰⁹ prohibits invidious discrimination on the basis of race or ethnicity,¹¹⁰ precludes restrictions on the right to vote unrelated to voter qualifications,¹¹¹ and demands that any burden on the right to vote, no matter how slight, be imposed only when “relevant and legitimate state interests [are] sufficiently weighty to justify the limitation.”¹¹²

The Fourteenth Amendment gives Congress the expressly enumerated power to enforce each and every of these requirements and restrictions through appropriate legislation.¹¹³ This “appropriate” federal enforcement legislation certainly includes the creation of a cause of action authorizing courts to enjoin precisely that which the constitution prohibits. But crucially, the Court has repeatedly said that federal enforcement legislation is not limited to the precise contours of the Amendment itself.¹¹⁴ Instead, Congress may also, in the exercise of its enforcement power, remedy past discrimination, “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”¹¹⁵ And Congress may also, in the exercise of its enforcement power, act prophylactically “to prevent and deter” intentional discrimination by prohibiting conduct that is not itself unconstitutional.¹¹⁶ Such Congressional action need not be confined to voting practices for which immediate proof of intentional discrimination is available.

Perhaps because the provisions of the Fourteenth Amendment are so wide-ranging — encompassing not merely the whole of the Equal Protection Clause, but the substantive and procedural protections of the Due Process and Privileges and Immunities clauses as well — the Court has imposed a constraint on Congress’s power to legislate to enforce the Amendment. In *City of Boerne v. Flores*, the Court determined that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹¹⁷ That is, under the Fourteenth Amendment’s enumerated enforcement power, legislation must be reasonably suited to remedying or deterring violations of the Amendment, rather than

¹⁰⁸ U.S. CONST., amend. XIV, § 5.

¹⁰⁹ See, e.g., *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

¹¹⁰ See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

¹¹¹ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) (plurality).

¹¹² *Id.* at 191 (quotation marks and citation omitted).

¹¹³ U.S. CONST., amend. XIV, § 5.

¹¹⁴ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

¹¹⁵ *City of Boerne*, 521 U.S. at 518.

¹¹⁶ *Id.*; *Tennessee v. Lane*, 541 U.S. 509, 518-19 & n.4 (2004).

¹¹⁷ *City of Boerne*, 521 U.S. at 520.

redefining the protections of the Amendment itself. Without such a limit, the Court was concerned that Congress would simply accrue to itself unlimited Congressional power.¹¹⁸

If the Fourteenth Amendment's protections are wide-ranging, and hence subject to concern that Congressional enforcement be delimited by congruence and proportionality so as not to become literally all-encompassing, the Fifteenth Amendment's protections are narrow — and might well imply that Congressional enforcement runs significantly deeper, without precisely the same constraints imposed by *City of Boerne*.¹¹⁹ While the Fourteenth Amendment protects against many different forms of state imposition on individual rights, the Fifteenth Amendment has one purpose and one purpose alone: to eradicate discrimination on the basis of race and ethnicity in the exercise of the franchise.¹²⁰ The Fifteenth Amendment also gives Congress the expressly enumerated power to enforce this specific prohibition through appropriate legislation, and there is little concern that Congress would accrue unbounded power in so doing.¹²¹

As with the Fourteenth Amendment, the federal enforcement power of the Fifteenth Amendment is not limited to the precise contours of the Amendment itself.¹²² Instead, Congress

¹¹⁸ *Id.* at 529.

¹¹⁹ *Cf.* *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (acknowledging that the standards of review under the Fourteenth Amendment and Fifteenth Amendment might be distinct).

¹²⁰ U.S. CONST., amend. XV, § 1. We know that the Fourteenth Amendment's Equal Protection Clause prohibits invidious racial discrimination in redistricting, *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 617 (1982), and hence supports Congressional legislation on the subject, but there is apparently some dispute about whether the Fifteenth Amendment applies to redistricting as well. The dispute concerns the difference between vote denial (like restrictions on the ability to cast a ballot) and vote dilution (like redistricting decisions that do not impair the ability to cast a ballot, but render that act less meaningful by restricting the plausible ability to elect preferred candidates). It is clear that acts taken to restrict voters' ability to cast a ballot because of their race or ethnicity violate the Fifteenth Amendment, which specifically prohibits the discriminatory denial or abridgment of the right "to vote." But there is somewhat less agreement about whether the Fifteenth Amendment encompasses claims of vote dilution as well. As I have described in *Race, Redistricting, and the Manufactured Conundrum*, 50 *LOY. L.A. L. REV.* 555, 560 n.13 (2017), claims that the Fifteenth Amendment reaches only vote denial and not vote dilution seek to rewrite precedent in a rather unconvincing manner.

In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court faced a claim that the city boundaries of Tuskegee, Alabama, had been drawn to excise African-American voters from the city electorate. Eight Justices found a clear violation of the Fifteenth Amendment, 364 U.S. at 346; one agreed that the boundaries were unconstitutional but found the Fourteenth Amendment more apt, *id.* at 349 (Whittaker, J., concurring). Years later, Justice Scalia asserted that *Gomillion* concerned only the complete denial of the municipal franchise, and therefore claimed that the Court has never directly addressed the application of the Fifteenth Amendment to redistricting. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000).

Justice Scalia's gloss on *Gomillion*, however, is difficult to credit. The Tuskegee voters removed from the city limits by the boundary redrawing invalidated in *Gomillion* did not entirely lose the ability to vote on local officials. The redrawing removed their ability to vote in Tuskegee elections, but not the elections of Macon County, or the elections of a newly incorporated municipality should they have sought to create one. That is, the Tuskegee redrawing shifted the representation of African-American voters from one local representative to another, in a manner calculated to send a message of exclusion based on race—but it did not deny the right to cast a ballot for local representatives. Seen in this light, *Gomillion* is no more a case about vote denial than any other case predicated on moving voters from one legislative district to another. If the Fifteenth Amendment does not apply to redistricting, the eight Justices of *Gomillion* were mistaken.

¹²¹ U.S. CONST., amend. XV, § 2.

¹²² *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).

may also, in the exercise of its enforcement power, remedy past discrimination, including “prohibit[ing] state action that . . . perpetuates the effects of past discrimination.”¹²³ And Congress may similarly act prophylactically “to prevent and deter” intentional discrimination, including by prohibiting conduct that is not itself unconstitutional.¹²⁴ For example, in *City of Rome v. United States*, the Supreme Court reiterated that “under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.”¹²⁵

Indeed, Congress has, in the past, determined that facts on the ground rendered it necessary and proper to outlaw voting practices that are discriminatory in effect, in order to ensure adequate remediation or prevention of the denial or abridgment of the right to vote on account of race or ethnicity. The Supreme Court has, without exception, upheld such legislation.¹²⁶

In ensuring that the exercise of its power is sufficiently related to a present need to remedy or deter constitutional violations, Congress has not, to my knowledge, ever used its enforcement power under the Fifteenth Amendment to prohibit practices based purely on a statistical disparity. The preclearance regime of the Voting Rights Act, for example, prohibited discriminatory effects where context demonstrated past misconduct (in need of remediation) and present risk (in need of deterrence). The “results test” of § 2 of the Voting Rights Act — an unfortunate misnomer¹²⁷ — is similarly not based purely on electoral results alone; instead, it relies on danger signs demonstrating enhanced risk of perpetuating past or present misconduct. The totality of the circumstances analysis, driven by (but not limited to) the “Senate factors” of the 1982 Senate Judiciary Committee report,¹²⁸ performs this function.¹²⁹

That is, when Congress has acted in the past to prohibit electoral practices with a discriminatory effect, it has done so based on at least one of several different ties to the underlying substantive prohibition of the Fifteenth Amendment. Congress has outlawed voting practices that are discriminatory in effect based on the recognized difficulty of proving intentional discrimination, which leads to underenforcement of constitutional wrongs; based on the need to stop the perpetuation of the impact of past discrimination; based on the assessment of a contextual risk of present or future discrimination, often with reference to historical patterns; based on the unique and uniquely pernicious incentives that some incumbent policymakers may see in electoral discrimination as a means to preserve power (and a recognition that there are not

¹²³ *City of Rome v. United States*, 446 U.S. 156, 176 (1980).

¹²⁴ *Tennessee v. Lane*, 541 U.S. 509, 518-19 & n.4 (2004) (noting the existence of this power under both Fourteenth and Fifteenth Amendments); *see also* *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (addressing Fifteenth Amendment enforcement power, relying in part on Congressional ability to deter or remedy violations of the Fourteenth Amendment, even if in the process conduct is prohibited that is not itself unconstitutional).

¹²⁵ *City of Rome*, 446 U.S. at 175.

¹²⁶ *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (literacy tests).

¹²⁷ *See, e.g.*, *United States v. Blaine Cty.*, 363 F.3d 897, 909 (9th Cir. 2004); Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FL. ST. U. L. REV. 573, 587 n.69.

¹²⁸ S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06.

¹²⁹ *See* Levitt, *supra* note 127, at 587 & n.69.

similarly powerful incentives to discriminate in other arenas); or based on some combination of the above.

Together, then, the Elections Clause and the enforcement clauses of the Fourteenth and Fifteenth Amendments present an abundance of authority for Congressional regulation of the election process relevant to the Voting Rights Act.¹³⁰ Each of these sources of federal power inherently involves federal entry into default state procedures, yes, but that federal presence and the yielding of contrary state or local regulation is thoroughly and expressly contemplated as part of the constitutional design. To the extent there may be federalism costs in the abstract, the constitutional Framers have already built them in to the calculus ... and into the text. The Fourteenth and Fifteenth Amendments contain express federal restrictions on state authority, bought at the cost of a Civil War, with express constitutional permission to Congress to effectuate them. The Elections Clause contains a similarly express grant of power for Congress to override any state default in the context of a federal election. When Congress acts in this arena, it has ample constitutional backing.

Until very recently, the Supreme Court repeatedly referred to the Voting Rights Act as a model use of Congressional power. At the original enactment of the Voting Rights Act, and upon the next three reauthorizations and updates, the Court confirmed that Congress had properly utilized its constitutional authority.¹³¹ Indeed, even in decisions otherwise trimming Congressional enforcement power under the Fourteenth Amendment in other non-electoral arenas, the Court repeatedly held up the Voting Rights Act as the lawful counterexample.¹³²

Then came *Shelby County*.¹³³ *Shelby County* faulted Congress for the 2006 reauthorization legislation that took turnout data from 1964, 1968, and 1972 as the ostensibly primary referents for preclearance “coverage.”¹³⁴ The Court believed that Congress’s calculations concerning which jurisdictions to submit to preclearance were simply based on outdated criteria. It held that if Congress were to require a preclearance procedure for some states and not others, those choices had to be “sufficiently related” to the problems Congress was

¹³⁰ There are, of course, other Constitutional provisions that provide additional sources of support for electoral regulation. I omit them here simply because they may not be as directly relevant as the sources of authority addressed in the text to the legislation presently pending before this Committee. *See, e.g.*, U.S. CONST. amend. I, V, XVII, XIX, XXIII, XXIV, XXVI; *see also* U.S. CONST. art. I, § 8, cl. 18 (“Necessary and Proper Clause”); art. II, § 1; amend. XII, XX, XXII.

¹³¹ *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).

¹³² *City of Boerne v. Flores*, 521 U.S. 507, 518, 525-27, 532-33 (1997).

¹³³ 570 U.S. 529 (2013).

¹³⁴ In assessing the legislation’s responsiveness to current conditions, the *Shelby County* Court essentially ignored the presence or effect of the bail-in and bail-out provisions of the Act. *See* Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG (June 25, 2013, 10:39 PM), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>; Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (2013), <https://ssrn.com/abstract=2265729>.

actually targeting, based on current conditions.¹³⁵ And it found, instead, that the ostensible coverage formula reauthorized in 2006 was irrational because it was rooted in “40-year-old data.”¹³⁶

The Court offered little further elaboration of this “sufficiently related” standard, or whether it is meaningfully different from the “rational basis” standard the Court has previously applied to the Fifteenth Amendment enforcement power.¹³⁷ Indeed, in critiquing the 2006 reauthorization’s reliance on turnout data in part from 1964, the Court critiqued a formula “having *no logical relation* to the present day” and cited the alleged “*irrationality*” of turnout statistics to vote dilution concerns: critique that sounds in rational basis review.¹³⁸ But whether there is a difference or not, the legislation presently before the committee should readily meet either standard. The *Shelby County* Court was concerned that there must be a logical relationship between the exercise of a Congressional enforcement power and the underlying constitutional harm. And it made clear that though Congress may not change the substantive definition of that which constitutes a constitutional violation, it has substantial latitude in choosing multiple means to confront the constitutional harm.¹³⁹ As the D.C. Circuit put the matter: “When Congress seeks to combat racial discrimination in voting—protecting both the right to be free from discrimination based on race and the right to be free from discrimination in voting, two rights subject to heightened scrutiny—it acts at the apex of its power.”¹⁴⁰

What the *Shelby County* Court did *not* say is also quite significant. The Court did not overrule the constitutionality of a properly tailored preclearance requirement — nor 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ To the contrary: the

¹³⁵ *Shelby Cty.*, 570 U.S. at 551, 556; *see also* *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 203-04 (2009).

¹³⁶ *Shelby Cty.*, 570 U.S. at 556.

¹³⁷ *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 330 (1966).

¹³⁸ *Shelby Cty.*, 570 U.S. at 554, 556 (emphasis added).

¹³⁹ *Levitt, Section 5 as Simulacrum*, *supra* note 134, at 172-73.

¹⁴⁰ *Shelby County v. Holder*, 679 F.3d 848, 860 (D.C. Cir. 2012), *rev’d on other grounds*, 570 U.S. 529 (2013).

¹⁴¹ *Shelby Cty.*, 570 U.S. at 545-46.

¹⁴² 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.”).

¹⁴³ *See supra* note 131.

Court emphatically stated that “Congress may draft another formula [determining coverage for a preclearance requirement] based on current conditions.”¹⁴⁴

It certainly appears that the approach in H.R. 4 would qualify. In line with the Court’s admonition, that approach “is not designed to punish for the past; its purpose is to ensure a better future.”¹⁴⁵ And as such, it is relentlessly focused on current conditions: either the current need to avoid perpetuating the current effects of past intentional discrimination, or the current presence of danger signs indicating either present intentional discrimination or the urgent need to prevent or deter intentional discrimination on the immediate horizon.

I have spoken, above, to the present need for preclearance. We may perhaps look with optimism to a future free of discrimination on the basis of race or ethnicity, but discrimination is not yet a sepia-stained relic of the past: in some pockets of the country, it displays stubborn persistence, and in others, it is fashioned anew. Unlike other discriminatory harms, electoral harms are distinct; unlike other remedial contexts, the electoral cycle is distinct; and unlike other governmental action, officials’ incentives in the electoral arena are distinct. All of these factors indicate the desperate need for a distinct remedial structure — not 50 years ago, but now. In the jurisdictions where danger signs point to a proclivity to discrimination, preclearance is the only structure with the power to stop the discrimination before it happens.

Section 3 of H.R. 4 speaks to the basic standard of preclearance coverage under an updated Voting Rights Act, and it is abundantly tied to current conditions. It recognizes that preclearance is a “potent” measure, and it does not apply that potency to one-time offenders or jurisdictions that may have stumbled across a stray violation. Instead, it creates a trigger based only upon demonstrated patterns and proclivities that show a likelihood of future misconduct: it seeks to identify recidivists for whom more potent medicine may be necessary, based on facts rather than assumptions. Political subdivisions would send new electoral practices or procedures for preclearance review if they were caught up in three strikes; a State as a whole would send changed new electoral practices or procedures for preclearance review if there had been 15 different violations, or 10 violations amid a violation by the State itself. Those triggers are patterns of conduct signaling a strong present need.

Moreover, the preclearance structure in the bill is time-limited, forward and backward. Because it is responsive to both vote denial and vote dilution concerns, it is based on violations occurring in a period spanning two redistricting cycles. And unlike the preclearance formula struck by *Shelby County*, the reference point for H.R. 4 continues to move as time does: because it looks to a set number of years from the present, rather than to a particular date, there is no danger that the formula becomes stale by the passage of time. It will always be as current as it is the day that it is passed. Furthermore, unlike the preclearance of old, review in the new structure comes with a predetermined expiration date as well: no more than one redistricting cycle into the future.

¹⁴⁴ *Shelby Cty.*, 570 U.S. at 557. This Court’s recognition of Congressional power to draft another preclearance formula demonstrates that the supposed “equal sovereignty” principle of *Shelby County* does not preclude the differing federal treatment of different state or local jurisdictions based on those jurisdictions’ own conduct.

¹⁴⁵ *Shelby Cty.*, 570 U.S. at 553.

The preclearance structure of H.R. 4 also retains flexibility for States and subdivisions to move into or out of preclearance based on individualized intervening conduct not tied to the broader pattern of violations. Courts have the discretion to place jurisdictions under even more tailored preclearance standards — either for an even more customized time period or for a customized category of electoral procedures¹⁴⁶ — based on individual acts of discrimination in voting on the basis of race or ethnicity. And courts retain the discretion to release jurisdictions from preclearance if jurisdictions that once demonstrated a pattern of worrisome conduct have refrained from discriminatory acts and have demonstrated improvement with respect to the facilitation of or support for minority voting. The overall structure of preclearance in H.R. 4 not only builds in reference to current conditions, it builds in breathing room. Preclearance — which simply entails speedy review of new electoral practices to ensure the absence of discrimination, in jurisdictions where there are strong warning signs of a contrary need — is designed to encompass the jurisdictions that display the most pressing signs of present trouble, and to release the jurisdictions that do not. The Constitutional provisions expressly authorizing Congressional action in this arena abundantly empower Congress to erect such a structure.

Other salient provisions of H.R. 4 encompassed in today’s hearing are similarly well within Congress’s constitutional authority. For example, section 7 of H.R. 4 would provide an express private cause of action for enforcing the provisions of federal law prohibiting discrimination on the basis of race or ethnicity, in addition to the public enforcement power currently in 52 U.S.C. § 10308(d). This provision is merely more specific than the general private right of action in 42 U.S.C. § 1983, and no less within Congress’s constitutional authority.

Section 7 would also provide a specific statutory standard for preliminary equitable relief in voting rights cases. This standard may be slightly distinct from the general common-law standard, but it too is no less within Congressional authority. The common-law standard generally applied by the courts considers the merits of the alleged violation and the balance of harms to the parties and the public.¹⁴⁷ But as long as an alternative comports with constitutional due process, Congress may tweak that standard if it chooses, raising or lowering the merits threshold or recalibrating consideration of the balance of harms.¹⁴⁸ And indeed, Congress has exercised this authority on numerous occasions, sometimes by contracting the availability of preliminary relief and sometimes by expanding it.¹⁴⁹

¹⁴⁶ See, e.g., Crum, *supra* note 17, at 2007-08.

¹⁴⁷ See, e.g., *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

¹⁴⁸ See, e.g., *Yakus v. United States*, 321 U.S. 414, 441-42 (1944) (“Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. . . . The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity.”) (internal quotation marks and citations omitted); see also *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 496-97 (2001) (emphasizing that “[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.”); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (emphasizing that a court’s equitable powers permit the exercise of discretion along traditional lines “[u]nless otherwise provided by statute” or “in the absence of a clear and valid legislative command”).

¹⁴⁹ See *id.* at 442 n.8 (collecting instances in which Congress had regulated the authority of the federal courts to grant temporary injunctions); see also *Miller v. French*, 530 U.S. 327, 350 (2000) (ratifying Congress’s power to reshape the equitable discretion of the courts in the context of the Prison Litigation Reform Act, by passing § 18

Here, Section 7 would ask the courts to consider the merits of the alleged violation (in the present draft, courts are instructed to determine whether “the complainant has raised a serious question” concerning a violation), as well as the balance of hardships to plaintiff and defendant. These standards specifically echo those deployed by Congress to alter the common-law referent for preliminary injunctions in other statutory provisions.¹⁵⁰ They refer specifically to the context of the procedure being challenged, including the amount of time between the adoption of the new procedure and the impending election. And presumably, in keeping with common-law principles of equitable relief generally, federal courts applying this standard would continue to be far more likely to issue prohibitory than mandatory injunctions, effectively ensuring that a sudden change raising serious questions of discrimination and imposing serious hardship would not disrupt a forthcoming election, by returning the jurisdiction to the status quo ante at least for the moment.¹⁵¹

Each of these elements is appropriately responsive to the distinct nature of election litigation, reviewed more fully above. True, in jurisdictions where current conditions demonstrate a pattern indicating special concern about discrimination, preclearance coverage will mitigate the need for much affirmative litigation, and render the preliminary relief structure in H.R. 4 unnecessary. But jurisdictions without such warning signs of trouble, beyond the scope of preclearance coverage, may also err in the imposition of individual discriminatory policies. And in those instances, the cost and difficulty of amassing evidence and expertise sufficient to secure timely preliminary relief in a voting case often remains greater than in most other contexts, the clock often remains shorter, and the damage of a discriminatory election remains irreparable. It is rational that Congress might wish to establish a standard for the granting of preliminary injunctive relief designed to address these distinct characteristics in election cases — and in so doing, reduce the litigation expense for all concerned. And that renders the basic structure of preliminary relief in H.R. 4 similarly within Congress’s constitutional authority.

The basic structure of Section 5 of H.R. 4 is similarly within Congress’s constitutional authority. I noted, above, that one of the consequences of *Shelby County* is a lack of public information and explanation about changes in the voting process, and the enforcement difficulties attending that absence of information. Section 5 would respond to the general need by requiring basic notice and transparency for the electoral changes that jurisdictions make, particularly when those changes are likely to jeopardize the constitutional rights of the voting public through confusion or discrimination. The structure in the bill does not restrict any

U.S.C. 3626(b)(2)); 20 U.S.C. § 1415(j) (a provision of the Individuals with Disabilities Education Act departing from the common-law standard and effectively directing the issuance of a preliminary injunction under certain circumstances); *cf.* *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187-88, 193-95 (recognizing, in the context of permanent injunctive relief, that the Endangered Species Act overrides the exercise of common-law equitable authority).

¹⁵⁰ *See, e.g.*, 15 U.S.C. § 2805(b)(2) (a provision of the Petroleum Marketing Practices Act directing the issuance of a preliminary injunction upon a particular injury if “there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation,” and if the balance of hardships indicates that an injunction should issue).

¹⁵¹ In the event of a redistricting change, preliminary relief might have to account for the potential malapportionment in a return to the status quo ante, and may instead appropriately seek a least-change modification of the status quo. *See, e.g.*, *Perry v. Perez*, 565 U.S. 388, 392-94 (2012).

jurisdiction’s substantive choices, nor does it even demand information about each and every change that each and every jurisdiction may make to its electoral system. Instead, it aims to provide citizens with additional information about the electoral pinch points where gathering the data about jeopardy to voting rights has proved most problematic in the past: changes at the last minute before an election,¹⁵² changes in the polling place resources available for a given election, and changes in the district lines determining the electorate for a given election.¹⁵³ Even Justice Scalia, who took a fairly narrow view of Congressional power, recognized that the enforcement provisions of the Civil Rights Amendments would authorize Congress to create “reporting requirements that would enable violations of the Fourteenth [and, presumably, Fifteenth] Amendment to be identified.”¹⁵⁴ The choices in Section 5 of the bill are decidedly related to the real-world lacunae in information that inhibit resolution of discriminatory changes, and are decidedly within Congressional authority.

Finally, Section 6 of H.R. 4 helps to remedy the final consequence of *Shelby County* noted above, in a way that is similarly well within Congress’s constitutional authority. Federal observers trained and deployed by OPM and DOJ — simply to serve as eyes and ears at the polls — were vital to deterring discrimination and other unlawful electoral conduct, and to promoting public confidence that the elections were conducted without discrimination or other unlawful electoral conduct. Indeed, because of their potential to deter misconduct and defuse tension, most local jurisdictions welcomed federal observers with open arms. And federal observers trained and deployed by OPM and DOJ were vital to collecting evidence of misconduct for later enforcement activity when misconduct did occur.

By invalidating Section 4(b) of the Voting Rights Act, *Shelby County* seriously limited the federal government’s practical capacity to enforce federal law and deter violations. H.R. 4 would restore Section 4(b), once again permitting the deployment of federal observers to any jurisdiction covered for preclearance, contingent on transparent and reasoned certification by the Attorney General that observers are necessary there.¹⁵⁵ And while the Voting Rights Act had previously focused the certification process on constitutional guarantees, leaving the gathering of evidence for other federal voting law enforcement as an incidental benefit,¹⁵⁶ Section 6 of H.R. 4 simply clarifies that observers may be certified based on the need to watch for violations of any federal voting rights laws. The ability to gather evidence for the enforcement of federal laws is clearly and directly related not only to the authority to pass those laws themselves but also to Congress’s power to spend funds to create the Department of Justice and its enforcement apparatus. And as such, there is no doubt that it too is constitutionally appropriate.

¹⁵² The Supreme Court has itself identified the potential disruption and confusion occasioned by last-minute changes in the electoral process without sufficient notice to the public. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

¹⁵³ For the smallest municipalities and school districts, H.R. 4 would make voluntary the provision of public information with respect to new redistricting plans, while still capturing the sorts of jurisdictions responsible for the bulk of the objections lodged under the old preclearance process. *See supra* text accompanying note 72 and note 72.

¹⁵⁴ *Tennessee v. Lane*, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting); *cf. Citizens United v. FEC*, 558 U.S. 310, 368-71 (finding “no constitutional impediment” to basic disclosure and transparency requirements, even in the context of the protected speech of private persons).

¹⁵⁵ Only a subset of the jurisdictions covered by Section 4 ever received such a certification. *See* U.S. Dep’t of Justice, Civil Rights Div., Federal Observers, <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring#observers>.

¹⁵⁶ *See, e.g.*, 52 U.S.C. § 10305(a)(2)(B).

* * *

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. 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.

I hope that this testimony today assists the Committee in assessing the power and duty of the Congress to update and restore the Voting Rights Act. The structure evinced in H.R. 4 is not the only way in which Congress may address the pressing need, but the salient aspects of the bill teed up for discussion in today's hearing are well within Congress's constitutional authority. I thank you again for the opportunity to testify before you, and look forward to answering any questions that you may have.