American Civil Liberties Union
Statement Submission For

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

Hearing Before the U.S. Senate Committee on the Judiciary

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Introduction

The American Civil Liberties Union (ACLU), on behalf of its over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, is pleased to submit this statement for today's hearing, *From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act*, to ensure key protections in the Voting Rights Act are restored following the Supreme Court's decision in *Shelby County v. Holder*.[1] We thank the Committee for this hearing and applaud the bipartisan nature of this effort.

[1] Shelby County v. Holder, 133 S. Ct. 2612 (2013).

The ACLU is a nationwide, non-partisan organization working daily in courts, Congress, state legislatures, and communities across the country to defend and preserve the civil rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU works at the federal, state, and local level to lobby, litigate, and conduct public education in order to both expand opportunities and to prevent barriers to the ballot box.

With one of the largest voting rights dockets in the nation, the ACLU's Voting Rights Project, established in 1965, has filed more than 300 lawsuits to enforce the provisions of the Voting Rights Act and the U.S. Constitution. The current docket has over a dozen active voting rights cases from all parts of the United States, including Alaska, California, Florida, Georgia, Iowa, Kentucky, Montana, Pennsylvania, Virginia, Washington, Wisconsin, and Wyoming. The ACLU is also engaged in state-level advocacy on voting and election reform all across the country.

The ACLU was co-counsel in both of the recent Supreme Court cases *Shelby County v. Holder* and *Arizona v. Inter Tribal Council of Arizona* (ITCA), and in *Shelby County,* represented among other clients, the Alabama State Conference of the NAACP, to defend key provisions of the Voting Rights Act.

In addition, the ACLU's Washington Legislative Office is engaged in federal advocacy before Congress and the executive branch on a variety of federal voting matters and was one of the leading organizations advocating for the Voting Rights Act extensions of 1982 and 2006. We issued reports on the continued need for the Act[2] and provided expert testimony on racial discrimination in the then-covered jurisdictions.[3]

The Voting Rights Act of 1965 has proven to be one of the most effective civil rights statutes in eliminating racial discrimination in voting. For almost half a century, the Act has been utilized to ensure equal access to the ballot box by blocking and preventing numerous forms of voting discrimination. Unfortunately, the recent decision in *Shelby County v. Holder* invalidated the coverage formula of Section 4(b), which determines which jurisdictions are subject to preclearance. With the loss of Section 4(b), Section 5 has been rendered virtually obsolete, resulting in the loss of the most innovative and incisive tools against racial discrimination in voting, including preclearance and notice to DOJ of voting changes. The overwhelming evidence of the continued need for the Voting Right Act means that Congress must restore the ability for enforcement of Section 5 through

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[2] Laughlin McDonald and Daniel Levitas, *The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union*, (March 2006), *available at* http://www.aclu.org/voting-rights/case-extending-and-amending-voting-rights-act.; Caroline Fredrickson and Deborah J. Vagins, *Promises to Keep: The Impact of the Voting Rights Act in 2006*, ACLU (March 2006), *available at* http://www.aclu.org/voting-rights/promises-keep-impact-voting-rights-act-2006.

[3] *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before Senate Judiciary Committee*, 109th Cong. (2006) (testimony of Laughlin McDonald, Director, ACLU Voting Rights Project), *available at* http://www.aclu.org/voting-rights/testimony-laughlin-mcdonald-director-aclus-voting-rights-project-house-judiciary-subco; *The Voting Rights Act: Evidence of Continued Need*: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong (2006) (testimony of Nadine Strossen, President, ACLU), *available at* http://www.aclu.org/voting-rights/statement-aclu-president-nadine-strossen-submitted-subcommittee-constitution-regarding.

the creation of a new coverage formula that appropriately captures recent racially discriminatory voting practices.

Following the decision in *Shelby County*, the ACLU will continue to devote substantial energy and resources to defending the right to vote for all. We look forward to working with this Committee in restoring the critical rights we have lost in ensuring all voters have access to the ballot free from discrimination.

I. Bipartisan History of the Voting Rights Act

Congress passed the Voting Rights Act of 1965 to enforce rights guaranteed to minority voters nearly a century before by the Fourteenth and Fifteenth Amendments. Although these amendments prohibited states from denying equal protection on the basis of race or color and from discriminating in voting on account of race or color, African Americans and other minorities continued to face disfranchisement in many states. Poll taxes, literacy tests, and grandfather clauses were used to deny African American citizens the right to register to vote, while all-white primaries, gerrymandering, annexation, and at-large voting were used widely to dilute the effectiveness of minority voting strength.[4]

The passage of the Act represented the most aggressive steps ever taken to protect minority voting rights. The impact was immediate and dramatic. In Mississippi, African American registration went from less than 10% in 1964 to almost 60% in 1968; in Alabama, registration rose from 24% to 57%. In the South as a whole, African American registration rose to a record 62% within a few years of the Act's passage.[5] The Department of Justice (DOJ) has therefore called the Act the "most successful piece of civil rights legislation ever adopted."[6] But the promise of the Act has not yet been fully realized. Progress has been made, but despite the Supreme Court's recent decision, the full gamut of the Act's protections is still needed today.

In the 48 years since its passage, the Voting Rights Act has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. These increases in representation translate to vital and tangible benefits such as much-needed education, healthcare, and economic development for previously underserved communities. Prior to the Act's passage, African American communities had been denied resources and opportunities for many years; their issues were often ignored and discounted. Officials elected when equal voting opportunities are afforded to minority citizens have been more responsive to the needs of minority communities.[7]

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[4] Fredrickson &Vagins, *supra* note 2.
[5] *See* Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 782 (2003).
[6] U.S. Department of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws*, http://www.usdoj.gov/crt/voting/intro/intro.htm.
[7] Fredrickson &Vagins, *supra* note 2, at 2.

As President Ronald Reagan noted upon signing the 1982 reauthorization of the Voting Rights Act, the right to vote is "crown jewel of American liberties."[8] Recognizing this importance, Congress has passed every Voting Rights Act reauthorization and extension by overwhelmingly bipartisan votes. The 1965 Act passed the Senate 77-19, and the House 333-85.[9] The 1970 extension passed the Senate 64-12, and the House 234-179.[10] The reauthorization in 1982 garnered similar support passing 85-8 in the Senate[11] and 389-24 in the House.[12] Congress last extended the Act in 2006, 98-0 in the Senate and 390-33 in the House, concluding that the coverage formula enforced by Section 5 was needed for at least another 25 years. Including the 2006 reauthorization, the last three extensions have been signed by Republican presidents.

In 2006, the congressional fact-finding effort built a strong case for the continuing need to maintain the Voting Rights Act's protections. The resulting record included more than 750 Section 5 objections by DOJ that blocked the implementation of some 2,400 discriminatory voting changes; the withdrawal or modification of over 800 potentially discriminatory voting changes after DOJ requested more information; 105 successful actions to require covered jurisdictions to comply with Section 5; 25 denials of Section 5 preclearance by federal courts; high degrees of racially polarized voting in the jurisdictions covered by Section 5; and reports from tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions.[13] In total, the record included over 15,000 pages of testimony and reports and statements from over 90 witnesses in over a dozen hearings.[14]

Although significant progress has been made as a result of the passage of the Voting Rights Act, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language still deny many Americans their basic democratic rights. Although such discrimination today is often more subtle than it used to be, it is still current and must still be remedied.

II. *Shelby County v. Holder*

Unfortunately, on June 25, 2013, the Supreme Court, in *Shelby County v. Holder*, invalidated the coverage formula in Section 4(b), which defines who is subject to Section 5 pre-clearance.

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[8] Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), *available at* http://www.presidency.ucsb.edu/ws/?pid=42688.

[9] *See Senate Roll Call Vote No. 78* (May 26, 1965); *House Roll Call Vote No. 32* (Feb. 10, 1964), *available at* http://docsteach.org/documents/5637787/detail; *House Roll Call Vote No. 87* (July 9, 1965), *available at* http://www.govtrack.us/congress/votes/89-1965/h87.

[10] *See Senate Roll Call Vote No. 342* (Mar. 13, 1970); *House Roll Call Vote No. 151* (Dec. 11, 1969), *available at* http://docsteach.org/documents/5637787/detail.

[11] *See Senate Roll Call Vote No. 190* (June 18, 1982).

[12] *See House Roll Call Vote No. 242* (Oct. 5, 1981).

[13] Laughlin McDonald, *Don't Strike Down Section 5*, http://www.aclu.org/blog/voting-rights/dont-strike-down-section-5 (Mar. 6, 2013); *see also* H. R. Rep. No. 109-478 (2006); S. Rep. No. 109-295 (2006).

[14] Deborah J. Vagins & Laughlin McDonald, *Supreme Court Put a Dagger in the Heart of the Voting Rights Act*, http://www.aclu.org/blog/voting-rights/supreme-court-put-dagger-heart-voting-rights-act (July 2, 2013).

In 2008, the City of Calera, a subsidiary of Shelby County, Alabama, sought to make over 170 annexations, in conjunction with changes to its redistricting plan. Together, these changes would eliminate the city's sole majority African American district, which had elected an African American candidate – who was the City's lone African American councilperson – for the previous 20 years.[15]

In its submission to DOJ, Calera admitted that it had already adopted the annexations without receiving preclearance. DOJ objected to both the unprecleared annexations, as well as the redistricting plan. Notwithstanding this denial, Calera went on to conduct City Council elections with both the annexations and the rejected plan in place, causing the city's sole African American councilmember to lose his seat. DOJ was then compelled to bring an enforcement action under Section 5 to enjoin certification of the results of the illegal election. After a consent decree was reached with a new precleared plan, the city's lone majority African American district was restored, and black voters in Calera succeeded in electing their candidate of choice. Shelby County subsequently challenged Sections 4(b) and 5 of the Voting Rights Act as facially unconstitutional.

The Supreme Court invalidated the coverage formula in Section 4(b), which defines which jurisdictions are subject to Section 5 preclearance. The Court found that while "voting discrimination still exists," Section 4(b) of the Voting Rights Act was unconstitutional, on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination. Therefore, the formula can no longer be used as a basis for subjecting jurisdictions to preclearance.[16] Section 5's continued operation thus depends on establishing new or expanded coverage, which complies with the Court's decision. As the Court noted: "[w]e issue no holding on section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[17] Without congressional action through the creation or expansion of a coverage formula, the kind of discrimination occurring in Calera, Alabama and elsewhere cannot be subject to the preclearance mechanism that stops discriminatory voting changes before they take effect and U.S. citizens lose their right to vote.

III. Recent Examples of the Impact of Section 5

Section 5 has been particularly effective in stopping discriminatory state and local voting changes from going into effect. It is important that the safeguards of Section 5 continue to apply in those jurisdictions with recent and egregious examples of discrimination. The elimination of precincts, changes in polling locations, methods of electing school board or city council members, moving to at-large districts, annexations, and other changes can have the purpose or effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group. Recent examples, since the 2006 reauthorization of the Voting Rights Act, of such discriminatory voting measures blocked by Section 5 are numerous. As the Court acknowledged, "voting discrimination still exists; no one doubts that."[18] In those areas where voting discrimination continues to exist, Section 5 must be enforced, and a coverage formula is needed to achieve this.

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[15] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Dan Head,(Aug. 25, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082508.pdf.
[16] Shelby County v. Holder, 679 F. 3d 848 (2012).
[17] *Shelby County*, 133 S. Ct. at 2612.
[18] *Id.*

Without this important function, millions would be disfranchised. What remains of our legal avenues after *Shelby County* is not enough. The following are a few very recent examples:

- In 2006, Randolph County, Georgia, attempted to reassign the African American Board of Education Chair's voter registration district from a seventy percent African American voting population to a seventy percent white voting population.[19] These changes were done in a special closed door meeting the sole purpose of which was to change the voter registration district of the Chair. In a unanimous vote, the all-white members of the Board of Registrars voted for the district change. Section 5 prevented this blatantly discriminatory change from taking place.

- In 2007, Mobile County, Alabama attempted to change the method of selection for filling vacancies on the county commission from a special election to a gubernatorial appointment.[20] After carefully considering information provided by the county, census data, public comments, and information from interested parties, DOJ found that the change would have a retrogressive effect, diminishing the opportunity of minority voters to elect a representative of their choice to the commission. Following the DOJ objection, Mobile County withdrew its request for the voting change.

- In 2007, Buena Vista Township in Allegan County, Michigan attempted to close a voter registration center located at a Secretary of State branch office.[21] The branch offices constituted 79.13% of total voter registrations for the Township, and the specific branch closure would have closed the only branch in a majority-minority township, resulting in the nearest branch being a one hour and forty minute round trip on public transportation with no other viable branch alternative for registering to vote.

- In May 2008, Alaska attempted to eliminate precincts in several Native villages, which would force many Native Alaskans to travel to precincts 33 to 77 miles away, unconnected by roads, and accessible only by air or water.[22] Two weeks after DOJ asked for additional information on why these changes were necessary, the State decided against moving forward with these precinct consolidations.

- In 2009, Georgia implemented an error-filled voter registration verification system that matched voter registration lists with other government databases.[23] Individuals who were identified as failing to match were flagged and required to appear on a specific date and time at the county courthouse with only three days' notice to prove their voter registration. The

[19] Letter from Wan J. Kim, Assistant Attorney General, to Tommy Coleman (Sept. 12, 2006), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_091206.pdf.
[20] Letter from Wan J. Kim, Assistant Attorney General, to John J. Park, Jr., (Jan. 8, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_010807.pdf.
[21] Letter from Grace Chung Becker, Acting Assistant Attorney General, to Brian DeBano and Christopher Thomas (Dec. 26, 2007), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122607.pdf.
[22] Suzanna Caldwell, *Voting Rights Act: What does ruling mean for Alaskans?*, Alaska Dispatch, June 25, 2013, http://www.alaskadispatch.com/article/20130625/voting-rights-act-what-does-ruling-mean-alaskans.
[23] Letter from Loretta King, Acting Assistant Attorney General, to Thurbert E. Baker (May 29, 2009), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_052909.pdf.

verification systems errors disproportionately impacted minority voters. Although representing equal shares of new voter registrants, more than 60% more African American voters were flagged for additional inquiry then white voters. In addition Hispanic and Asian registrants were more than twice as likely to be flagged for further verification as white voter registration applicants. Section 5 stopped this retrogressive voter registration provision from continuing. The objection was later withdrawn on the mistaken premise that the state had significantly changed the database matching system.[24]

- A locality in Texas sought to reduce the number of polling places for local and school board elections in 2006 from 84 polling places to 12.[25] Moreover, the assignment of voters to each polling place was incredibly unbalanced. The polling place with the smallest proportion of minority voters would have served 6,500 voters while the site with the largest proportion of minority voters would have served over 67,000. Following a DOJ complaint, a three judge court entered a consent decree prohibiting the locality from implementing the change without first obtaining preclearance.[26] Section 5 prohibited this change due to the retrogressive effect.

- In Charles Mix County, South Dakota, after the first Native American candidate was poised to become a county commissioner, the county increased the number of county commissioners from three to five.[27] Native Americans would only have been able to elect the candidate of their choice in one of the five new districts as opposed to one of the three original districts. This racially discriminatory impact in addition to comments admitting discriminatory purpose led DOJ to object to the proposed plan.

- Between 2009 and 2012, three Georgia counties proposed redistricting changes to their county commissions and board of education, which would have altered the division of African American populations in the counties, resulting in a retrogression effect on their ability to elect minority members and diluting the current minority representation on the commissions and board.[28] Through Section 5, plans that would have reduced the level of African American voting strength and reduced their ability to elect their candidates of choice were prevented.

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[24] *See generally* Kathy Lohr, *Georgia Allowed to Continue Voter Verification*, NPR, Sept. 14, 2010, http://www.npr.org/templates/story/story.php?storyId=129855592.

[25] Letter from Wan J. Kim, Assistant Attorney General, to Renee Smith Byas (May 5, 2006), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_050506.pdf.

[26] United States v. N. Harris Montgomery Cmty. Coll. Dist., Civil Action No. H 06-2488 (S.D. Tex. Aug. 4, 2006) (consent decree judgment).

[27] Letter from Grace Chung Baker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_021108.pdf.

[28] Letter fromThomas E. Perez, Assistant Attorney General, to Walter G. Elliott (Nov. 30, 2009), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_113009.pdf; Letter from Thomas E. Perez, Assistant Attorney General, to Michael S. Green, Patrick O. Dollar, and Cory O. Kirby (Apr. 13, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_041312.pdf; Letter from Thomas E. Perez, Assistant Attorney General, to Andrew S. Johnson and B. Jay Swindell (Aug. 27, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082712.pdf .

- Also in 2012, Galveston County, Texas submitted a redistricting plan for its commissioners court reducing the number of districts for electing justices of the peace and constables.[29] DOJ found that the process leading up to the proposed plan involved the deliberate exclusion from meaningful involvement in key deliberations of the only member of the commissioners court elected from a minority ability-to-elect precinct. Following changes to the redistricting plan made by the county, DOJ approved the revised plan.[30]

IV. Section 5 Provides Necessary Protections Unavailable In Other Laws

The protections that exist in Section 5, and enforced through Section 4, provide a powerful tool for deterring state and local governments from adopting discriminatory election procedures and preventing discriminatory practices that have been adopted from being enforced.[31] This preclearance requirement is a fundamental element of the Voting Rights Act that does not exist elsewhere, and has been rendered largely useless by the *Shelby County* decision.

There are several unique elements of Section 5 that are particularly valuable in defeating discrimination in voting. First, Section 5 requires those jurisdictions included in a coverage formula to submit all proposed election changes to DOJ or the federal District Court of the District of Columbia prior to implementation.[32] This functions as a notice mechanism giving DOJ a level of knowledge regarding voting changes superior to relying on communities and watchdog groups to identify voting changes as they are proposed. As the examples previously discussed demonstrate, the majority of discriminatory changes take place at the local level where they may be difficult to identify if the reporting onus is removed from the jurisdiction and placed on groups or individual voters.

Second, in evaluating the intent or effect of the change, Section 5 places the burden of proof on the jurisdiction requesting the election change to show that the change does not have a "retrogressive" effect on minority voters.[33] Unlike Section 2, which places the burden on the voter to prove discrimination, Section 5's burden of proof makes it more effective in preventing discrimination by requiring the jurisdiction show any change will not have a discriminatory impact prior to the law taking effect. The purpose of Section 5 is to "shift the advantage of time and inertia from the perpetrators" of discrimination in voting to the voters.[34]

Third, Section 5 targets ongoing discrimination in a relatively low-cost way through an administrative process. By largely avoiding long and drawn out legal battles, Section 5 avoids the

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[29] Letter from Thomas E. Perez, Assistant Attorney General, to James E. Trainor III (Mar. 5, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_030512.pdf.
[30] T.J. Aulds, *Galveston County: DOJ gives green light to county redistricting map*, KHOU, Mar. 24, 2012, *available at* http://www.khou.com/news/neighborhood-news/Galveston-County--DOJ-gives-green-light-to-county-redistricting-map-144092286.html.
[31] *Shelby County, 133 S. Ct. at 2639 (2013) (Ginsburg, J., dissenting) (citing The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006)).*
[32] 42 U.S.C. § 1973c.
[33] Beer v. United States, 425 U.S. 130 (1976).
[34] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

high costs of case-by-case litigation associated with Section 2 claims.[35] Through the simple administrative process covered jurisdictions submit proposed changes in writing to DOJ. Within sixty days, the Attorney General can decide whether to object to the change. If there is no objection, the jurisdiction may implement the change. If an objection is filed, the jurisdiction may submit the changes directly to a three-judge panel of the District Court for the District of Columbia for preclearance without deference to the findings from DOJ.[36] This method allows for instances of discrimination to be identified in real-time, as the change is proposed and before going into effect.

Although Section 2 is a valuable tool in stopping discriminatory voting practices after they occur, it lacks the hallmarks of Section 5 that prevents discrimination from occurring in the first place. Section 2 does not provide notice of the proposed change, nor can it freeze a change and prevent it from going into effect. Section 2 allows victims of discrimination in voting to seek remedies in court, but often only after the discrimination occurs, violating the individual's right to vote. Moreover, no state[37] or federal constitutional claim is an adequate substitute for Section 5 because no other law provides advance notice of the change and uses preclearance to stop the discriminatory practice from going into effect.

Only when the powerful tools of Section 5 can operate under a new regime, can the goals of the Voting Rights Act be accomplished.

Conclusion

The ACLU thanks the Senate Judiciary Committee for holding this important hearing to address the Voting Rights Act following the *Shelby County* decision. The Voting Rights Act's long bipartisan history of protecting the right to vote and rooting out racially discriminatory changes through Section 5 must continue. Therefore, it is crucial that congressional action be taken to restore and redesign its protections and allow the Voting Rights Act to continue to be the crown jewel of civil rights laws. All the other rights we enjoy as citizens depend on our ability to vote; it is necessary that we safeguard access to the ballot for every citizen. We look forward to working with the Committee on new legislative proposals.

[35] Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBlog (June 25, 2013, 10:39 PM), http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/.
[36] 42 U.S.C. § 1973c.
[37] *See, e.g.,* Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 VAND. L. REV. (forthcoming 2014).