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**Before the Senate Judiciary Committee
Hearing on “From Selma to *Shelby County*: Working Together to
Restore the Protections of the Voting Rights Act”**

July 17, 2013

On behalf of the Brennan Center for Justice, I thank the Senate Judiciary Committee for the opportunity to submit testimony in connection with this important hearing, “From Selma to *Shelby County*: Working Together to Restore the Protections of the Voting Rights Act.” The Brennan Center is a nonpartisan law and policy institute that focuses on issues of democracy and justice; among other things, we work to ensure fair and accurate voting procedures and systems, and that every eligible American, and only eligible Americans, can participate in elections.¹

Because of the centrality of voting to our system of democracy, and because of the persistence of racial discrimination in the voting process, we urge Congress to work quickly, and in a bipartisan manner, to restore the protections of the Voting Rights Act that were rendered inoperative by the Supreme Court’s recent decision in *Shelby County v. Holder*. The purpose of my testimony is to bring to this Committee’s attention recent research by the Brennan Center that underscores the urgency of congressional action now. Specifically, in *If Section 5 Falls: New Voting Implications*, attached to this testimony, Myrna Perez and Vishal Agraharkar catalog, quantify, and describe some of the substantial number of discriminatory voting changes that officials in covered jurisdictions have previously sought to put in place and may now attempt to put in place in the wake of the Supreme Court’s decision in *Shelby County*.

I. The Supreme Court’s Decision in *Shelby County*

The Supreme Court in *Shelby County* effectively eviscerated the core provision of the Voting Rights Act, leaving millions of voters without the protection of the most effective tool in American law to combat racial discrimination in voting. The Voting Rights Act is widely acknowledged as the most effective piece of civil rights legislation, a cornerstone of American

¹ The Brennan Center has done extensive work on a range of issues relating to voting rights, including work to modernize our voter registration system; remove unnecessary barriers to voter participation; make voting machines more secure and accessible; defend the federal Voting Rights Act; and expand access to the franchise. Our work on these topics has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, litigation to compel states to comply with their obligations under federal and state law. This testimony is submitted on behalf of a Center affiliated with New York University School of Law, but does not purport to represent the school’s institutional views on this or any topic.

law guaranteeing political equality. As political leaders on both sides of the aisle recognized when Congress overwhelmingly reauthorized the law just seven years ago, Section 5 is a critical and necessary element of that Act.²

A robust Voting Rights Act—with a reinvigorated Section 5 at its core—continues to be necessary to secure the equal voting rights promised to all citizens by the Constitution. “[N]o one doubts,” as Chief Justice Roberts declared, that the problem of “voting discrimination still exists” in America,³ especially in places with a history of such discrimination. Congress made substantial findings on this point in 2006, and we expect the evidence before this Committee to further demonstrate the unfortunate persistence of racial discrimination in voting. Although the country has made substantial progress since 1965, the work of the Voting Rights Act is unfinished. Until last month, Section 5 was a critical engine for this progress and a critical deterrent for discriminatory voting practices. Existing laws are simply insufficient to fill the void left by the Supreme Court’s decision.

In *Shelby County*, the Supreme Court expressly left the door open for Congress to restore or replace Section 5.⁴ Although the real-world effect of the Court’s decision was sweeping, the legal ruling was actually relatively narrow. The Court invalidated Section 4 of the Voting Rights, the coverage formula that determined which states were subject to the requirements of Section 5, on the basis of its finding that the formula was outdated and had not been tailored to “current conditions.”⁵ The Court thus rendered Section 5 inoperative in practice, but, for the second time since 2006, it expressly declined to strike down Section 5. The Court expressly acknowledged that the problem of race discrimination in voting has not been eradicated and that Congress may act to remedy that problem.⁶ Indeed, the decision in no way undermined Congress’s express powers, under both the Fourteenth and Fifteen Amendments to the U.S. Constitution, to combat racial discrimination in voting through appropriate legislation. Moreover, in another case this Term, the Court reaffirmed Congress’s “broad” and “paramount” powers to regulate how federal elections are conducted.⁷ Congress thus has an extremely strong basis to pursue much-needed legislative efforts to protect all Americans against the threat of discrimination in voting.

II. Implications of Loss of Section 5 Protections

We commend this Committee for taking up this important issue at this time. We urge Congress to act expeditiously to restore or replace Section 5. As outlined in *If Section 5 Falls: New Voting Implications*,⁸ a Brennan Center report released shortly before the decision in *Shelby*

² See 152 CONG. REC. H5143-02 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner, R-Wis.) (calling the VRA “the most successful civil rights act that has ever been passed”); 152 CONG. REC. S7949-05 (daily ed. July 20, 2006) (statement of Sen. Feinstein, D-Cal.) (calling the VRA “the most important and successful civil rights law of the 20th century”). The 2006 reauthorization of the Voting Rights Act passed the U.S. House of Representatives by a vote of 390-33 and the U.S. Senate by a vote of 98-0.

³ *Shelby Cnty., Ala. v. Holder*, No. 12-96, slip op. at 2 (2013).

⁴ *Id.* at 24.

⁵ *Id.* at 21.

⁶ *Id.* at 2.

⁷ *Arizona v. Inter Tribal Council of Ariz.*, No. 12-71, slip. op. 5, 6 at (2013).

⁸ MYRNA PÉREZ & VISHAL AGRAHARKAR, IF SECTION 5 FALLS: NEW VOTING IMPLICATIONS (2013), available at <http://www.brennancenter.org/publication/if-section-5-falls-new-voting-implications> (hereinafter IF SECTION 5 FALLS).

County, there is a serious risk that, without the protections of Section 5, jurisdictions could now attempt immediately to put in place discriminatory voting changes by: re-enacting discriminatory changes that were blocked by Section 5; pursuing policies previously deterred by Section 5; implementing changes that were potentially discriminatory but had not yet been reviewed by the Department of Justice; passing new restrictive voting changes; or enforcing previously blocked changes that remain on the books.

The report makes clear that the magnitude of the problem is substantial. The immediate impact of the decision has been to enable jurisdictions to move forward with voting changes—including those that are potentially discriminatory—with Department of Justice or court review. According to news reports, at the time of the Court’s decision the Department of Justice had 276 submissions of voting changes awaiting its review under Section 5.⁹ Those changes will now go forward without further review to determine if they are discriminatory.

Unless Congress acts, future discriminatory voting changes will also move forward without review. In the run-up to the 2012 elections, state legislatures passed scores of new laws that would have made it harder for eligible Americans to vote.¹⁰ While most of the restrictive new voting laws were blocked, mitigated, or repealed before the elections, efforts to cut back on voting access continue.¹¹ In the most recent legislative session (as of April 29, 2013), 28 restrictive voting bills were introduced in states that were covered wholly or in part by Section 5, and 2 of those bills already passed.¹² To the extent that those bills are discriminatory, Section 5 can no longer function to deter their passage or prevent their implementation.

Another threat in the wake of *Shelby County* is that jurisdictions may seek to re-enact or implement voting changes that have previously been formally blocked by Section 5. Our report identified, among other things:

- thirty-one discriminatory election changes had been blocked by the Department of Justice since Congress reauthorized the Voting Rights Act in 2006;¹³
- three examples in the run up to the 2012 election where federal courts denied preclearance to proposed election changes;¹⁴ and
- multiple cases where Section 5 blocked repeated attempts by a single jurisdiction to dilute minority voting strength.¹⁵

⁹ Bill Barrow, *States Promise Quick Action on Election Laws*, ASSOCIATED PRESS (June 26, 2013), <http://bigstory.ap.org/article/states-promise-quick-action-after-voting-ruling>.

¹⁰ IF SECTION 5 FALLS, *supra* note 8, at 7.

¹¹ See WENDY R. WEISER & DIANA KASDAN, VOTING LAW CHANGES: ELECTION UPDATE (2012), available at <http://www.brennancenter.org/publication/voting-law-changes-election-update>.

¹² IF SECTION 5 FALLS, *supra* note 8, at 8.

¹³ This is the number of submissions of voting changes since July 2006 to which DOJ has interposed an objection. In some cases, objections by DOJ were later withdrawn, or were superseded by a declaratory judgment action for court preclearance in the U.S. District Court for the District of Columbia. See *Section 5 Objection Determinations*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited July 12, 2013) (listing 31 objections since July 2006); see also IF SECTION 5 FALLS, *supra* note 6, at 3.

¹⁴ *Id.* at 3.

¹⁵ For example, within the span of a few months in 2012, Section 5 prevented two separate discriminatory changes to the method of electing trustees of the Beaumont Independent School District in Beaumont, Texas. *Id.*

The report further found that some previously blocked voting changes remain on the books, leading to the possibility jurisdictions could begin enforcing them.¹⁶ For example, the report identifies two discriminatory state laws blocked by Section 5 which remain on the books.¹⁷

Perhaps the largest impact of the *Shelby County* decision will be the loss of the powerful deterrent effect of Section 5 on discriminatory voting practices. To give a sense of the magnitude of this problem, the report pointed out that:

- 153 voting changes were abandoned between 1999 and 2005 after the Department of Justice requested more information about a jurisdiction's Section 5 submission;¹⁸ and
- In several cases in the run up to the 2012 election, Section 5 deterred restrictive voting changes, either through more information requests by the Department of Justice, or when officials were first contemplating changes to their election procedures.¹⁹

These examples only graze the surface of the kinds of voting changes that have been deterred or prevented by Section 5 and that may now move forward more easily. Unless Congress acts, there is a real risk that a significant number of discriminatory voting changes could be put in effect in jurisdictions previously covered by Section 5.

* * *

The Voting Rights Act was a remarkable accomplishment for the nation, ushering in the promise of real political equality after centuries of abuse. The Act has taken on an iconic role, reflecting the country's rejection of the brutality of Jim Crow and embrace of the core constitutional value of political equality. It has simultaneously played a hardworking role, protecting against ongoing discrimination in the voting process. The Supreme Court's decision in *Shelby County* gutted the core of the Voting Rights Act. In doing so, it left a gaping hole in American law and demands an immediate response. While Section 5 has been an enormously successful tool in the struggle to eradicate racial discrimination in voting, the struggle is not over. Strong legal protections are crucial to sustaining the core value of our democracy, reflected in the Declaration of Independence, that we all are created equal. We urge Congress to work together again to restore this critical law to ensure our elections remain free, fair, and accessible for all Americans.

¹⁶ *Id.* at 9.

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ *Id.*