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Restore the Vote:
A Public Forum on Voting Rights
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Members of Congress:

I appreciate the opportunity to testify today regarding restoring the Voting Rights Act.

I am President of the Joint Center for Political and Economic Studies, an organization that was created due to the events of Bloody Sunday and the Voting Rights Act that followed. The Voting Rights Act of 1965 enfranchised hundreds of thousands of black voters, these black voters elected hundreds of new black elected officials, and in 1970 the Joint Center was founded to support these black elected officials. Today, the Joint Center focuses on providing innovative research, ideas, and support to leading elected officials of color nationwide (e.g., Members of Congress, state legislative floor and committee leaders, county executives and commission chairs, mayors and city council presidents, and tribal chairs). The Joint Center also provides infrastructure, support, and community to those who focus on race and policy through activities such as our recent report *Racial Diversity Among Top Senate Staff* and monthly gatherings of fellows of color from various think tanks (e.g., AEI, Brookings, Center for American Progress, Pew, and Urban Institute). Click here for recent and upcoming Joint Center activities.

I am also a tenured Professor of Law at The George Washington University Law School. I regularly teach a voting law course, and in previous years I have taught courses on civil rights and the law of democracy generally. My scholarship focuses on voting rights and other election law issues, and includes a book on voter suppression and several law review articles on voting rights. At the beginning of the Obama Administration, I served as Principal Deputy Assistant Attorney General for Legal Policy at the U.S. Department of Justice, where I worked with officials in the White House to lead the Administration's policy work related to the Voting Rights Act, the Military and Overseas Voter Empowerment Act, and the National Voter Registration Act.

Part I of this written testimony provides background on the U.S. Supreme Court's decision in *Shelby County v. Holder*[1] and subsequent congressional efforts to update the Voting Rights Act. Part II explains that significant voting discrimination persists, and that Congress should update the Voting Rights Act because litigation alone is an insufficient tool to prevent voting discrimination. Further, while "race neutral" election reforms that expand participation are important (e.g., same day registration), such reforms do not adequately prevent all voting discrimination.

I. Background: *Shelby County* and Congressional Efforts to Update the Act

A. *Shelby County v. Holder*

In *Shelby County*, the Court held unconstitutional the Section 4(b) coverage formula that determined which jurisdictions must comply with the preclearance requirements of Section 5 of the Voting Rights Act.

[1] 133 S.Ct. 2612 (2013).

Section 5 requires federal preclearance of changes affecting voting in "covered" jurisdictions before the changes are implemented. Section 4(b) as originally adopted and updated provided formulas that identified as "covered" jurisdictions with a voting test or device and less than 50 percent voter registration or turnout in the 1964, 1968, or 1972 general Presidential elections.[2]

In *Shelby County*, the Court stated "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets," and that "current burdens…must be justified by current needs."

The Court believed that *in the past* the 4(b) coverage formula based on tests and low turnout from 1964, 1968, and 1972 elections was "sufficiently related to the problem,"—that it was "rational in both practice and theory," "reflected those jurisdictions uniquely characterized by voting discrimination," and "link[ed] coverage to the devices used to effectuate discrimination." The Court observed that "[t]he formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both."

In contrast, the Court believed that the coverage formula based on 1964, 1968, and 1972 turnout and tests was not tailored to address discrimination *today*. The Court noted that Congress altered the coverage formula in 1970 (adding counties in California, New Hampshire, and New York), and 1975 (adding the States of Alaska, Arizona, and Texas, and several counties in six other states), but not in 1982 or 2006. Specifically, the Court stated:

> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since.

The Court did not believe that the record Congress amassed in 2006 establishing vote dilution and other discriminatory practices was tied to text of a coverage formula based on turnout, registration rates, and tests from the 1960s and 1970s. Specifically, the Court reasoned:

> Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40–year–old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution…. [W]e are not ignoring the record; we are simply recognizing that it

[2] In 1975 "test or device" was amended to include areas that provided English-only voting materials where at least five percent of voting-age citizens were members of a single language minority group.

played no role in shaping the statutory formula before us today.

The Court explicitly limited its holding to the 4(b) coverage formula based on election data from the 1960s and 70s, and stated that "Congress may draft another formula based on current conditions."

While the Court observed that states generally regulate state and local elections and that federal preclearance is "extraordinary," the Court did not find the Section 5 preclearance process unconstitutional. Instead, it explicitly recognized that "voting discrimination still exists," that "any racial discrimination in voting is too much," and that Congress has the power to enforce the Fifteenth Amendment to prevent voting discrimination. Further, the Court's decision did not affect Section 3(c) of the Voting Rights Act, which allows federal courts to order preclearance as a remedy for violations of the Fourteenth or Fifteenth Amendment (commonly known as "bail in").

B. 2014 and 2015 Congressional Efforts to Update the Voting Rights Act

Since Shelby County, legislation has been submitted to update the Voting Rights Act—the Voting Rights Amendment Act of 2014 ("2014 Amendment Act") and the Voting Rights Advancement Act of 2015 ("2015 Advancement Act"). Both bills: 1) tie preclearance to recent instances of discrimination; 2) allow judges to order "bail in" preclearance coverage as a remedy for a voting rights violation even in the absence of intentional discrimination; 3) attempt to deter bad activity by requiring that jurisdictions nationwide provide notice of certain election changes; and 4) make it easier for plaintiffs to obtain a preliminary injunction to block potentially discriminatory election rules before they are used in an election and harm voters.

There are, however, significant differences. Generally, the 2014 Amendment Act based preclearance coverage on jurisdictions with significant voting rights violations over the ***prior 15 years***, while the 2015 Advancement Act focuses on violations over the ***prior 25 years***. Thus, while the 2014 Amendment Act subjected only Georgia, Louisiana, Mississippi, and Texas to preclearance when introduced, the 2015 Advancement Act applied preclearance to those states plus Alabama, Arkansas, Arizona, California, Florida, New York, North Carolina, South Carolina, and Virginia. The 2014 Amendment Act exempts voter identification from violations that justify the expansion of preclearance (either through the coverage formula or bail-in), whereas the 2015 Advancement Act provides no such voter identification exemptions.

The 2015 Advancement Act also contains provisions that do not appear in the 2014 Amendment Act. For example, the 2015 Advancement Act ***requires preclearance nationwide*** for "known practices" historically used to discriminate against voters of color, such as: 1) voter qualifications that make it more difficult to register or vote (e.g., ID or proof of citizenship documentation); 2) redistricting, annexations, polling place changes, and other changes to methods of elections (e.g., moving to at-large elections) in areas that are racially, ethnically, or linguistically diverse; and 3) reductions in language assistance. The 2015 Advancement Act also includes Native American and Alaska Native voting protections that ensure ballot translation, registration opportunities on and off Indian reservations, and annual consultation with the Department of Justice.

II. The Need to Update the Voting Rights Act

Congress needs to update the Voting Rights Act because significant voting discrimination persists, and because litigation and "race neutral" election reforms are insufficient tools to prevent voting discrimination.

A. Litigation Inadequate Substitute for Loss of Preclearance

While the holding in *Shelby County* was limited to invalidating the coverage formula, the decision has a significant impact. It effectively suspends Section 5 preclearance in all jurisdictions other than the handful currently subject to a Section 3(c) "bail in" court order. Absent Congressional action that updates the Act, it will be more difficult to prevent and deter political operatives from manipulating voting rules based on race.

Some have asserted that Section 5 is unnecessary because the Department of Justice or private parties can bring a lawsuit under Section 2 of the Voting Rights Act. This is wrong. While Section 2 is important, litigation is an inadequate substitute for the Section 5 preclearance process.

Litigation Not Comprehensive: Preclearance was comprehensive—it *deterred* jurisdictions from adopting many unfair election rules because officials knew every decision would be reviewed. In contrast, litigation requires that plaintiffs have the information and resources to bring a claim, and therefore litigation misses a lot of under-the-radar manipulation. Even states and localities that post new bills online or are subject to freedom-of-information laws generally do not disclose the unfair aspects of their voting changes.

Litigation More Expensive: Preclearance also put the burden to show a change was fair on jurisdictions—which enhanced efficiencies because jurisdictions generally have better access to information about the purpose and effect of their proposed election law changes. Litigation shifts the burden to affected citizens—who must employ experts and lawyers who fish for information during drawn-out discovery processes. This drives up the cost of compliance to the Department of Justice, to affected citizens, and to jurisdictions.

Litigation Not Tailored to Non-Dilution Claims: Section 2 has well-developed standards to challenge unfair minority vote dilution in the context of at-large elections and racially-gerrymandered election district boundaries. The litigation standards, however, are not sufficiently developed to address non-dilution claims such as challenges to voting locations and candidate qualification procedures. In contrast, the Section 5 retrogression standard was well-suited to address non-dilution claims.

Preclearance Protects Voting Rights in Local Elections: The preclearance process was particularly valuable in local elections, which are often nonpartisan. While national media outlets and political pundits may focus on voting rules that affect federal and state offices, the unfair manipulation of local election rules is a significant problem. At least 86.4% of all unfair election changes blocked by preclearance since 2000 *would not* have affected federal elections.

That is because even when federal, state, and local elections are conducted at the same time, many important changes are confined to the local level, including local redistricting, annexations, and changes to candidate qualifications, the method of elections, and the structure of government.

In Nueces County, Texas, for example, the rapidly-growing Latino community surpassed 56% of the county's population, and in response county officials gerrymandered local election districts to dilute the votes by Latinos.

Without Section 5 protections to block this type of racial manipulation, Americans in many areas like Nueces County will not have the thousands and sometimes millions of dollars needed to bring a lawsuit to stop these unfair changes. Further, much of this local manipulation will not attract significant national media attention and will go unchallenged.

Bail-In Currently Inadequate: The Section 3(c) bail-in process is insufficient to address the problems above because it currently requires a finding of intentional discrimination. Courts often find voting rights violations based on effects without explicitly finding that a jurisdiction engaged in intentional discrimination. Evidentiary problems with proving intentional discrimination drive up litigation costs for the Department of Justice, aggrieved voters, and jurisdictions. Bail-in is often a good solutions-oriented remedy for all parties, but currently bail-in consent decrees generally require that a jurisdiction sign a decree that acknowledges it engaged in unconstitutional activity (intentional discrimination), and the stigma of intentional discrimination can sometimes deter otherwise constructive agreements.

Significant Voting Discrimination Persists: Too many political operatives in previously covered jurisdictions continue to maintain power by unfairly manipulating voting rules based on how voters look or speak. Congress determined as much during the last reauthorization, and such discrimination has occurred since that time in various jurisdictions like Nueces County, Texas. While the Court in *Shelby County* invalidated the coverage formula because it was based on data from the 1960s and 1970s, the Court acknowledged that "voting discrimination still exists" and that "any racial discrimination in voting is too much."

B. Joint Center Report: 50 Years of the Voting Rights Act

In 2015, the Joint Center for Political and Economic Studies published ***50 Years of the Voting Rights Act: The State of Race in Politics***. The 46-page report established that while the Voting Rights Act increased turnout by voters of color, citizen voting age population turnout rates among Latinos and Asian Americans trail African-American turnout by 10-15 percentage points and white turnout by 15-20 points.

The report also found that **racially polarized voting persists, and in some contexts is growing.** Race is the most significant factor in urban local elections, and more decisive than income, education, religion, sexual orientation, age, gender, and political ideology. The 38 point racial gap exceeds even the 33 point gap between Democratic and Republican voters. Further, since 1960, party politics is increasingly polarized by race. Racially polarized voting is

significant because it gives politicians who are not the preferred candidates of voters of color incentives to suppress and dilute the votes of people of color.

The Joint Center report established that the Voting Rights Act dramatically increased the numbers of elected officials of color, but **people of color remain underrepresented in elected office.** Based on the most recent data, African Americans are 12.5% of the citizen voting age population, but they make up a smaller share of the U.S. House (10%), state legislatures (8.5%), city councils (5.7%), and the U.S. Senate (2%). Latinos make up 11% of the citizen voting age population, but they are a smaller share of the U.S. House (7%), state legislatures (5%), the U.S. Senate (4%), and city councils (3.3%). Asian Americans are 3.8% of the citizen voting age population but a smaller share of the U.S. House (2%), state legislatures (2%), the U.S. Senate (1%), and city councils (0.4%). While the Voting Rights Act protects voters rather than candidates of color and these elected officials/population disparities are not dispositive, they are relevant to the ability of voters of color to fully participate in democracy, especially when combined with racially-polarized voting, discriminatory voting practices, and other factors.

C. "Race-Neutral" Election Reforms Alone are Inadequate

Some have argued that Congress should update the Voting Rights Act by passing ambitious election reforms. Such proposals include mandating shorter voting lines, making registration more convenient, and passing less restrictive identification requirements. For example, New York University Law School Professors Sam Issacharoff and Richard Pildes argue that Congress should look beyond the race-discrimination approach and adopt general election reforms that are race-neutral.

The effort to update the Voting Rights Act, however, should focus on preventing voting discrimination—not general election reforms. Promoting broader access is a critical democratic goal, but it is distinct from the goal of preventing voting discrimination. By analogy, a tax deduction for mortgage interest promotes access to home ownership, but separate laws are still needed to prevent banks from engaging in predatory lending—different problems require different solutions. As established above, voting discrimination is real, and broad election reform is not sufficient to address it.

The argument for general election reform is that today's primary problems are long lines and other barriers that affect all Americans rather than discrimination against minorities. Black voter turnout sometimes exceeds white turnout, the argument goes, and our nation has elected an African-American president.

Voting discrimination, however, persists. In many parts of the country, political operatives continue to maintain power by manipulating election rules to diminish minority votes. Redistricting, changing election dates, eliminating bilingual voting materials, and erecting barriers that make voting harder are just a few examples.

High minority turnout does not prove an absence of discrimination—rather, it often triggers discrimination. In 2010, for example, African Americans in Augusta-Richmond, Georgia, made up a much larger percentage of the electorate in elections held in November (52

percent) than in elections held in July (43 percent). So officials moved local elections from November back to July. Another example: In November 2009, following rapid Latino growth, officials in Runnels County, Texas, failed to put a single bilingual poll worker at any county polling place despite a court order mandating a bilingual poll worker at *every* polling place. And in 2010, FBI wires recorded Alabama state senators discussing the need to stop a gambling-related referendum from being placed on the ballot because it could increase turnout by African Americans (whom the senators called "Aborigines").

In fact, discriminatory practices can diminish the impact of minority votes without lowering turnout. For example, while the discriminatory gerrymander in Nueces County split up the votes of Latinos, it did not reduce the number of Latinos who voted. Similarly, city officials in Calera, Alabama, redrew the only majority African-American city council district in 2006 so that it dropped from 69 percent to 29 percent African-American. In the next election, the city council lost its sole African-American member.

Some proponents of general election reform assert that their approach is the best way to protect minority voters. Reducing long lines, for example, disproportionately helps minority voters because, as a study by MIT Professor Charles Stewart found, wait times for African Americans (23 minutes) and Latinos (19 minutes) are longer than those for whites (12 minutes). General election reform, however, does not stop politicians from manipulating election rules based on race. A federal mandate requiring shorter lines, for example, would not prevent Nueces County from redrawing local districts to diminish Latino voting strength. Rolling back a strict photo-identification requirement would not prevent Runnels County politicians from failing to provide bilingual poll workers. American democracy is unique because state and local politicians have great discretion with respect to election rules. Even with federal election reform, we would still need effective voting-rights protections to ensure that state and local politicians do not abuse that discretion.

At least 86 percent of all election changes blocked by Section 5 of the Voting Rights Act since 2000 *could not* have been prevented by federal election reform regulations. That's because even when federal, state, and local elections are conducted simultaneously, many important changes would not be regulated by federal election reform, such as local redistricting, changes to local candidate qualifications, and reductions in the number of members on a county commission. The Fourteenth and Fifteenth Amendments, however, give Congress clear power over federal, state, and local elections to prevent voting discrimination. As a result, an updated Voting Rights Act can effectively prevent politicians from manipulating rules based on race—not only in federal elections, but also in state and local contests. Effective voting-rights protections for local elections—which often are nonpartisan—are particularly important. Unfair local changes often go unnoticed by national media and political groups, and voters often lack the significant sums needed to bring a lawsuit to challenge an unfair local change.

Expanding participation through broad election reform is a worthwhile project, but it is incomplete because it fails to prevent many types of discrimination. Congress should also update the Voting Rights Act.

III. Conclusion

In the last 51 years the United States has made significant progress on voting rights. Unfortunately, after *Shelby County v. Holder* political operatives have more opportunity to unfairly manipulate election rules based on race. The Court in *Shelby County* stated that the purpose of the Fifteenth Amendment is "to ensure a better future," but the future will be worse if Congress fails to act.

Fortunately, Congress has the power to prevent discrimination and update the Voting Rights Act. An updated Voting Rights Act will help not just voters of color, but our nation as a whole. Protecting voting rights provides legitimacy to our nation's efforts to promote democracy and prevent corruption around the world. We all agree that racial discrimination in voting is wrong, and Congress should update the Voting Rights Act to ensure voting is free, fair, and accessible for all Americans.