

Testimony of Robert A. Kengle
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Hearing on "The Voting Rights Act After the
Supreme Court's Decision in *Shelby County*"

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Chairman Franks, Ranking Member Nadler, and Members of the House Judiciary Subcommittee on the Constitution and Civil Justice:

Thank you for the opportunity to testify today, on behalf of the Lawyers' Committee for Civil Rights Under Law, concerning the Supreme Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), and its implications. In that case, the Supreme Court held unconstitutional the coverage formula contained in Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), for determining the jurisdictions subject to the preclearance requirements of Section 5 of the Act, 42 U.S.C. § 1973c.

My name is Bob Kengle, and I am Co-Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, a non-partisan, non-profit organization. The Lawyers' Committee was formed in 1963 at the request of President John F. Kennedy to partner with the private bar to advance the cause of civil rights. We continue to work with law firms around the country litigating cases to combat racial inequities and have been very involved in issues impacting voting rights. The Lawyers' Committee played a major role in the 2006 reauthorization of Sections 4(b) and 5 of the Voting Rights Act by organizing the National Commission on the Voting Rights Act. The Commission conducted several fact-finding hearings and submitted a lengthy report to Congress which became a part of the reauthorization record. We also lead Election Protection, the largest non-partisan voter protection program in the country. Finally, the Lawyers' Committee has an active litigation program, including litigating matters under Sections 5 and 2 of the Voting Rights Act and other federal and state voting laws.

With other attorneys at the Lawyers' Committee, I was actively involved in briefing the *Shelby County* case on behalf of a Shelby County resident, Mr. Bobby Lee Harris, who intervened to defend the constitutionality of Sections 4(b) and 5. The *Shelby County* decision has been criticized from a range of legal perspectives, and the Lawyers' Committee believes the case was wrongly decided.

In short, the Supreme Court put form over function by applying an overly literal reading of Section 4(b) as reauthorized in 2006. The evidence in the massive Congressional record in 2006, to which the Lawyers' Committee substantially contributed, showed a recent and persistent pattern of voting discrimination in the Section 4(b) covered jurisdictions since 1982 (when Sections 4(b) and 5 were last reauthorized by Congress), including numerous and repeated Section 5 objections and Section 2 violations. There was overwhelming bipartisan support for the 2006 reauthorization. In my view the Court provided no good reason for giving less deference to Congress' judgment in 2006 concerning current conditions than the Court had done in each of its previous cases upholding the constitutionality of Congress' 1965 enactment of Section 5, and its 1970, 1975, and 1982 reauthorizations.

That being said, my testimony today is not to persuade you that the Supreme Court made what may prove to be a mistake of historic proportions. Instead, my goal is to put the Supreme Court's decision into context and to provide a perspective on its implications based upon my experience and that of the Lawyers' Committee in enforcing federal voting rights laws.

My experience includes over twenty years of service in the Voting Section of the Civil Rights Division at the U.S. Department of Justice. As a line attorney, special counsel and deputy chief I litigated and supervised a broad range of cases under Section 5 and Section 2 of the Voting Rights Act, the Constitution and other federal voting rights laws, and I supervised the review of numerous Section 5 submissions and objections. I have continued to focus on voting rights cases since joining the Lawyers' Committee in 2007.

Everyone here today would surely agree that one of Congress's most important responsibilities is to enact effective federal laws to prevent and deter racial voting discrimination. As the Supreme Court observed over a century ago, the right to vote is fundamental "because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The majority opinion in *Shelby County* recognized that "voting discrimination still exists; no one doubts that." The immediate issue facing us now is what the *Shelby County* decision means for achieving the objective of eradicating racial discrimination in voting in all its forms.

I will begin by discussing what the *Shelby County* decision held and how it affected the law, then note some important legal issues that the decision did not address, discuss the practical impact of the ruling, and finally discuss the implications of the decision for voting rights enforcement.

In light of the *Shelby County* decision, it is imperative for Congress to conduct a prompt, thorough and bipartisan process to update the 2006 record regarding the nature and extent of current voting discrimination and to assess the legal tools that remain available to combat such discrimination. Based upon our experience and analyses, the Lawyers' Committee submits that this examination will show that the laws on the books will not be effective to stop racially discriminatory voting changes from being implemented and enforced, a task at which Section 5 was singularly successful, and that Congress therefore needs to act to put effective statutory remedies in place. The right to vote free from racial discrimination is protected by two constitutional amendments which Congress has the enumerated power to enforce by appropriate legislation. Congress has ample legal authority – and the moral responsibility – to address the problem.

How the Shelby County decision affected the law

In its *Shelby County* decision the Supreme Court considered a facial challenge to Sections 4(b) and 5 of the Voting Rights Act of 1965, as reauthorized by Congress in 2006. Section 5 requires federal review of changes affecting voting in "covered" jurisdictions before those changes are implemented. Section 4(b) as adopted in 1965, and amended and reauthorized in

1970, 1975, 1982, and 2006, provided a set of formulas to identify which jurisdictions would be “covered”. This approach maintained the electoral status quo in covered jurisdictions so that discriminatory voting practices could be screened out through Department of Justice administrative reviews, or less frequently by judicial review in the U.S. District Court for the District of Columbia. While Section 5 was in force, thousands of discriminatory voting changes were blocked by DOJ objections.

The Supreme Court held that the Section 4(b) coverage formula as reauthorized in 2006 cannot constitutionally be used for enforcing the Section 5 “preclearance” remedy. The Supreme Court’s holding requires preclearance coverage to correspond closely with current evidence of the types of voting discrimination that Congress seeks to prevent or deter. Considering the array of arguments that were advanced to attack the constitutionality of Section 5, this was a narrow decision in legal terms, albeit one with a wide-ranging impact.

The Court gave perhaps the most literal possible reading to the text of the statute and found that the Section 4(b) formula, as reauthorized in 2006, did not relate to current evidence of discrimination. The Court did not find an adequate link between the coverage formula contained in Section 4(b) and Congress’ 2006 findings that an ongoing pattern of voting discrimination has continued in the covered jurisdictions.

The Court highlighted the difference in type between the evidence of depressed voter turnout and voter registration employed for the 1965, 1970 and 1975 coverage determinations, and the more recent evidence in the 2006 record, which primarily concerned minority vote dilution in one form or another.

The Court also stressed the federalism burdens of targeted preclearance coverage in terms of the “sovereignty of the states,” and stated that the 2006 Amendments to Section 5 had increased the federalism burden on covered jurisdictions.

What the Shelby County decision did not do

The Supreme Court did not find Section 5 unconstitutional. Despite the vigorous facial attack mounted against Section 5, the Supreme Court did not hold, nor did the majority opinion even suggest, that Congress lacks the power to adopt a preclearance remedy – that is, to suspend all voting changes in particular jurisdictions pending federal review to screen the changes for racial discrimination. Therefore, the Court did not overrule – or bring into question – the Court’s prior decisions in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *City of Rome v. United States*, 446 U.S. 156 (1980), which strongly upheld the power of Congress to adopt and reauthorize the preclearance remedy.

The Supreme Court did not hold that racial voting discrimination no longer exists. The Court’s opinion explicitly stated that racial voting discrimination still exists. Indeed, at the same time the Supreme Court ruled in *Shelby County*, it had before it an appeal from a Section 5

declaratory judgment action in the U.S. District Court for the District of Columbia, in which a three-judge court unanimously found that parts of Texas' Congressional and State Senate redistricting plans were the product of intentional racial discrimination.

The Supreme Court did not restrict the classes of evidence upon which Congress can rely to target remedial measures such as preclearance. The Court did not adopt certain extreme arguments made by Shelby County that Congress could not employ evidence of minority vote dilution as a basis for reauthorizing preclearance coverage. Similarly, the Court did not adopt Shelby County's comparably extreme arguments that only adjudicated violations of intentional voting discrimination – such as the recent Texas redistricting case – could justify the preclearance remedy. For example, in *City of Rome* the Court credited and highlighted evidence of Section 5 objections in upholding Congress' 1975 reauthorization of Section 5, and the Court gave no indication in *Shelby County* that it meant to overrule or in any manner question that aspect of the *Rome* decision. More broadly, the *Shelby County* Court did not disturb the longstanding principle that Congress can appropriately prevent and deter unconstitutional voting discrimination by prohibiting a somewhat broader class of conduct than what is directly prohibited under the Constitution.

The Supreme Court did not undermine the “retrogression” principle – which serves as the Section 5 effect standard. The Supreme Court also did not adopt the argument advanced in some *amicus* briefs that the Section 5 retrogression standard conflicts with the Equal Protection Clause. Retrogression occurs when a voting change places racial minorities in a worse electoral position than under the existing voting practice. In other words, the retrogression standard protects against backsliding. The Supreme Court itself settled upon the retrogression standard in 1976 in its decision in *Beer v. United States*, 425 U.S. 130 – and repeatedly reaffirmed this standard in subsequent cases – as the proper interpretation of the Section 5 prohibition on voting changes that “have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group].”

The Supreme Court did not set rules for distinguishing “current” evidence of voting discrimination from outdated evidence. This is puzzling in light of the fact that the *Shelby County* opinion hinges upon the conclusion that Congress failed to employ what the Court would consider “current evidence” in the Section 4(b) coverage formula. Although this is a point upon which reasonable people can differ, I hope that this lack of guidance does not unduly complicate Congress' consideration of potential legislation. On an issue of this gravity, I think it was a serious omission on the Court's part to leave “current” undefined, so long as the Court is reluctant to defer to Congress' judgment on the issue.

The implications of the Court's “equality of states” discussion are unclear. The Court did not indicate what effect, if any, this doctrine would have upon any future coverage formula. However, I do not see the Court's discussion adding very much to the Court's reasoning, apart from serving as a means of emphasizing the need for keeping the coverage

formula in step with the times. Thus, I do not believe that this doctrine adds any unique element to what Congress must consider with respect to any new coverage formula that it might consider based upon current evidence of voting discrimination.

The Court's opinion barely mentioned *City of Boerne v. Flores*, 521 U.S. 507 (1997). This surprised many legal observers. The *Boerne* line of cases had formed the core of Shelby County's legal theory, and was the subject of extensive briefing in the lower courts in this case and in the preceding case, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009). However, the Court conducted its review under the standard that it had announced in the *Northwest Austin* case: that Section 5 "imposes current burdens and must be justified by current needs." *Id.* at 203. The Court thus left unresolved the question of whether it considered a *Boerne* analysis necessary to the review of Fifteenth Amendment remedial legislation, or more generally, to legislation combatting racial voting discrimination under either the Fourteenth or Fifteenth Amendment.

The Court's decision did not affect the operation of Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c). Under Section 3(c), informally known as the Act's "bail-in" provision, federal courts may order preclearance for jurisdictions not covered by the Section 4(b) formula as a remedy for adjudicated violations of the Fourteenth or Fifteenth Amendment. There are 17 jurisdictions which have been the subject of Section 3(c) orders (including, for example, Arkansas, New Mexico and Los Angeles County). Several parties in the Texas redistricting cases pending in Washington, D.C. and Texas federal courts have recently filed motions seeking to have the courts impose Section 3(c) coverage on Texas, as a result of the D.C. district court's finding of intentional discrimination in Texas's post-2010 statewide redistrictings.

The practical effect of the invalidation of Section 4(b)

The most prominent effect of the *Shelby County* decision is to suspend Section 5 review indefinitely. That is, Section 5 remains on the books, but no jurisdictions – other than those subject to Section 3(c) court orders – are presently required to obtain preclearance before implementing new voting practices. The Department of Justice has issued "no determination" letters to jurisdictions which had Section 5 submissions pending at the time of the decision, and has posted an advisory on the Voting Section web site regarding the *Shelby County* decision. See <http://www.justice.gov/crt/about/vot/>.

Consequently, racially discriminatory voting changes are no longer suspended before they may be enforced. As discussed in the following section, it now falls to private citizens and the Department of Justice to first identify racially discriminatory voting changes in the Section 4(b) jurisdictions, and then to build an affirmative case against them, based upon other legal provisions, and to do so before those changes are implemented. Congress' longstanding commitment to preventing and deterring racially discriminatory voting changes stems from a

recognition that once such changes are implemented, it is already too late, because they harm a fundamental right that can never be fully restored after implementation has occurred.

One important but less obvious effect of the *Shelby County* ruling will be to cut off the unique and centralized flow of information about changes in voting practices and procedures that had been relied upon by the public and the Department of Justice. In my experience, this centralized flow of information was one of the principal reasons that Section 5 proved to be so remarkably successful in facilitating the enfranchisement of minority citizens in the covered jurisdictions, and in protecting that progress from being subverted by backsliding. I do not believe that the impact of the *Shelby County* decision can truly be understood without discussing this in some detail.

The scope of the Section 5 preclearance requirement was always interpreted broadly by the Supreme Court to encompass any and all “enactment[s] which altered the election law of a covered State in even a minor way.” *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969). As the Supreme Court has repeatedly emphasized, “[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.” *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). The Department of Justice and the public were able to rely upon Section 5 submissions to accurately catalogue the voting changes actually being made in the covered jurisdictions. There was a powerful incentive for covered jurisdictions to comply with the preclearance requirement, because the failure to obtain preclearance before implementing a covered voting change was grounds for a federal court to enjoin the voting change via a preliminary injunction or temporary restraining order. As a result, Section 5 provided a reliable, comprehensive, and up-to-date inventory of voting changes.

There simply is no fallback source for that basic information. No federal procedure requires states and political subdivisions to identify or report voting changes in advance of their use, and I am not aware of any state with such a requirement. While states today typically provide tools on their legislatures’ websites to search and obtain copies of bills and acts, problematic voting changes can be embedded in arcane local legislation or amendments. Since home rule is now the norm in most states, most voting changes are enacted at the local level, and pre-implementation information about voting changes adopted at the local level is hit or miss at best.

Of course, even a comprehensive list of voting changes does not identify which ones might be discriminatory. The Section 5 process was structured to efficiently place the relevant information before the Department of Justice to allow the Department to identify and follow up on potentially discriminatory voting changes, while the great majority of changes were precleared within the initial 60-day review period. Because the submitting jurisdictions had the burden of proof, they were required to provide sufficient information for the Department of Justice to assess the purpose and effect of proposed voting changes. In many cases, relatively

little information was required to preclear, while in other cases (including every objection that I can recall) the Department requested specific and detailed information from the submitting jurisdiction.

The types of information typically needed to conduct a Section 5 review of a potentially discriminatory change varied according to the type of voting change, but frequently a request for additional information would ask for some or all of the following information: population data, maps of political boundaries, election returns, voter registration and turnout data, and precinct boundaries and polling place locations. Information about the voting change's adoption, including minutes, recordings, alternative proposals, and a narrative description, also were requested as needed, especially if the circumstances indicated the possibility of a racially discriminatory purpose. In addition, letters requesting more information typically would formally invite the jurisdiction to explain questionable decisions and to address particular concerns. As a result, neither the Justice Department nor the public was required to race the clock to gather this basic information, while covered jurisdictions had no incentive to stonewall or drag their feet in terms of providing it.

Another benefit of this flow of information was that it permitted the citizens of the covered jurisdictions to learn the full facts about the voting changes that would affect them, and to make informed comments about them. Discriminatory voting changes are frequently enacted by recourse to misinformation, the withholding of relevant information, or a manipulation of the legislative process.

Furthermore, I have no doubt that the knowledge that there would be a federal review process – during which members of the minority community would have the opportunity to learn the details of, and comment upon, proposed voting changes – in fact deterred many discriminatory changes from ever being adopted.

Consequences for voting rights enforcement

Impact on pending appeals. Shortly after the Supreme Court issued the *Shelby County* decision, the Court vacated two Section 5 judgments issued by three-judge courts in the United States District Court for the District of Columbia, one of which denied preclearance to three statewide redistricting plans for the State of Texas (*Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012)), the other of which denied Section 5 preclearance to Texas' 2011 photo identification law (*Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012)). Both cases were pending on appeal to the Supreme Court at the time of the *Shelby County* decision.

Impact on post-2006 Section 5 objections. The *Shelby County* decision did not address the status of Section 5 objections issued after the 2006 reauthorization pursuant to the unconstitutional coverage formula. This important issue may be addressed fairly soon by one or more federal courts.

Implications for future voting rights enforcement. The rationale for Section 5 was always, as the Supreme Court explained in *South Carolina v. Katzenbach*, 383 U.S. at 328, to “shift the advantage of time and inertia from the perpetrators of the evil [of discrimination] to its victims” within the covered jurisdictions. The *Shelby County* decision completely reverses that approach. It now falls to private parties and to the Justice Department to identify discriminatory voting changes in the window between their adoption and implementation, gather enough evidence to state a claim for which private parties and the Justice Department will have the burden of proof, and persuade a court to issue an injunction. If any one of those steps should fail, then the discriminatory change will proceed to be implemented and do its damage unimpeded.

There is currently no source that provides a reliable, comprehensive, and up-to-date canvass of voting changes. For private citizens to attempt to track all of the information that Section 5 did – even with the cooperation of election officials – would be a never-ending task. If election officials are not required to report or cooperate, then there is no possibility of reliably knowing what voting changes are being enacted in which jurisdictions. As it now stands, more discriminatory voting changes can be expected to “slip through the cracks” undetected and to take effect, despite the best efforts of the Justice Department and concerned citizens.

Affected citizens generally lack ready access to the substantial basic information needed for voting rights litigation. This information, which is at the disposal of jurisdictions, will generally not be readily available to affected citizens without Section 5 review. Even in states that have sunshine or freedom of information laws, obtaining such information can involve time lags, expenses, and incomplete production requiring follow up or even litigation. In states lacking such laws, the relevant information may be strategically withheld to deter legal challenges. As a consequence, the process of assembling the necessary factual information to bring an affirmative legal challenge can extend far beyond the implementation date of a voting change. Because many voting rights claims require expert testimony, potential plaintiffs also must shoulder the up-front costs of expert witnesses; while expert fees are compensable to prevailing parties under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the road to that recovery can last years. These burdens in obtaining and developing the evidence can be expected to result in more discriminatory voting changes taking effect than would occur if Section 5 were still operational.

Section 2 of the VRA is not an adequate substitute for Section 5. One of the arguments frequently made against Section 5 is the assertion that Section 2 of the Voting Rights Act provides all of the protections necessary to deal with today’s voting discrimination. Congress considered this question in 2006 when it considered whether to reauthorize the preclearance remedy and disagreed. Based upon my experience in having litigated and supervised a number of both Section 2 cases and Section 5 cases, I also disagree with that contention both on theoretical and real-world grounds. I am confident that the Lawyers’ Committee and other voting rights practitioners can use Section 2 to eventually invalidate some

discriminatory voting changes that would have been blocked from ever taking effect under Section 5. That hardly shows that Section 2 can accomplish all that Section 5 did. The fact is that Section 2 will not do so.

The “results test” under Section 2 of the Voting Rights Act was adopted by Congress in 1982 primarily to address pre-existing vote dilution. The Section 2 “results test” provides a means for the Department of Justice or private plaintiffs to challenge an election practice that has already generated a pattern of racially discriminatory results. It requires a court to ultimately assess the “totality of the circumstances” in order to determine whether “the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [Section 2].” The litigation objective in a Section 2 case is to displace the *status quo* and have the federal court order a non-discriminatory procedure into effect.

The Section 2 results test has a somewhat complicated background. It was adopted by Congress in 1982, in the wake of the Supreme Court’s decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In the *Mobile* case the Supreme Court held that a claim of minority vote dilution brought under the Constitution requires a finding of intentional discrimination. As enacted in 1965, Section 2 tracked the language of the Fifteenth Amendment and essentially served to provide the United States and private plaintiffs with a statutory right of action to bring racial discrimination claims. However, the 1982 amendment of Section 2 (enacted at the same time as a 25-year reauthorization of Sections 4(b) and 5 of the VRA) added what is known as the “results test.” Congress concluded that constitutional litigation under the *Mobile* standards would not be sufficient to address the extent of voting discrimination. The Section 2 results test incorporates the basic constitutional standards for minority vote dilution applied in the Supreme Court’s 1973 decision in *White v. Regester*, 412 U.S. 755 (1973), onto which the Supreme Court engrafted an “intent” element in 1980 in its *Mobile* decision. Many federal courts have upheld the constitutionality of the 1982 amendment to Section 2, although the Supreme Court has not ruled upon the issue.

Section 2 “results” claims can be broken down into two basic categories. One category involves allegations of some form of minority vote dilution, and the other category includes everything else. The great majority of Section 2 litigation has concerned the first category, *i.e.*, one form of vote dilution or another. In particular, dilution claims involving the use of either at-large elections or racially gerrymandered election district boundaries have been the primary targets of attack. The Section 2 legal standards have evolved largely in that context. The 1982 Section 2 amendment had a huge impact in dislodging numerous dilutive at-large election systems in favor of fairly-drawn single-member district election systems. Working in tandem in the covered jurisdictions, Section 2 forced a change in discriminatory election systems, while Section 5 prevented backsliding or evasive tactics from undermining the resulting progress. Much of the electoral success by minority candidates in the covered jurisdictions is due to this interplay between Section 2 and Section 5.

The ability to successfully bring claims not involving minority vote dilution under the Section 2 results test is uncertain. The category of “everything else” (that is, Section 2 results claims not based upon dilution) includes challenges to voter registration procedures, candidate qualifying procedures, voter qualifications and disqualifications, voting methods and locations, poll worker hiring, voter assistance, and prerequisites to voting. These cases under Section 2 have been relatively infrequent and occasionally successful, but the legal standards for them are not nearly so well-developed as for dilution cases. By contrast, a number of Section 5 objections were interposed to these types of voting changes over the years, and the Section 5 retrogression standard showed itself to be well-suited for dealing with these types of problems. I believe that the ability to effectively address discriminatory changes of these types under the current Section 2 results test is uncertain.

Preliminary injunctions under Section 2 will block fewer discriminatory voting changes from going into effect than preclearance reviews under Section 5. While Section 2 can be used to challenge a voting change before it is implemented, for many reasons Section 2 litigation will be unable to consistently block discriminatory changes from going into effect, as Section 5 did so remarkably well.

I have mentioned some of the practical problems with putting together a pre-implementation Section 2 case. One cannot reasonably expect all voting changes to be adequately and timely publicized under current laws. Even for changes that are known, the window between final adoption of a voting change (when a case would become ripe to litigate) and the date on which the change is first to be used will often be quite narrow. Jurisdictions are likely to make that window as narrow as possible if they have concerns about potential litigation. Nor can it reasonably be expected that jurisdictions will make readily available the relevant information to support a motion for a preliminary injunction under Section 2 so as to allow for effective litigation within that window. To the contrary, jurisdictions with concerns about potential litigation have a strong (if not good) motivation to be uncooperative in providing relevant information.

Furthermore, the governing legal standards for Section 2, and the equitable concerns involved in granting preliminary injunctions, make preliminary relief unusual even for the most meritorious cases with well-developed evidentiary records. For example, the Department of Justice was unsuccessful in obtaining a preliminary injunction in its Section 2 vote dilution case against the at-large election system in Charleston County, South Carolina, even though the district court granted summary judgment to the United States with respect to the three *Gingles* preconditions that lie at the heart of a successful Section 2 vote dilution case, and both the district court and the Fourth Circuit eventually found a Section 2 results violation. Similarly, the Department of Justice was unsuccessful in obtaining a preliminary injunction in 1990 in its Section 2 vote dilution case against Los Angeles County’s redistricting plan, even though both the district court and the Ninth Circuit eventually found intentional discrimination.

I do not presently have a comprehensive listing of cases in which courts have granted Section 2 preliminary injunctions or temporary restraining orders. My best estimate at this time is that the total number of such cases since 1982 is in the range of 10 to 15 – no more than a tiny fraction of all Section 2 cases.

I litigated two such cases. One case involved a blatant effort to retroactively disqualify two Hispanic candidates for mayor in Cicero, Illinois. Because that case featured a “smoking gun” admission by the incumbent mayor’s spokesman that one of the Hispanic candidates had been targeted, it is not typical of current voting discrimination, which usually takes more subtle forms. The other case involved a majority vote requirement for the City of Memphis, Tennessee, which was preliminarily enjoined in 1992 on the basis of two very extensive expert witness reports and numerous declarations and exhibits. The evidence of intentional discrimination was extremely strong in that case, but the majority vote requirement had been enacted by referendum in 1966 when public debate about the law was not very circumspect.

As you know, under Section 2 the burden of proof lies with the plaintiff, at the preliminary injunction stage no less than at trial. This of course is the general rule in civil litigation and for most purposes it is the logical approach. However, this burden works against the objective of blocking discriminatory voting changes before they can harm voters. Section 5, in contrast, by design froze the status quo while all new voting practices could be screened for discrimination with the relevant information in hand. Because the submitting jurisdictions had the burden of proof, in both administrative reviews and Section 5 declaratory judgment actions, stopping discriminatory voting changes was not a game of “catch me if you can.” Where a jurisdiction has a current record of voting discrimination, or there otherwise is reason to believe that a voting change is racially discriminatory, it makes sense to shift the burden, at least to some extent, from the citizen to the jurisdiction.

The costs and repercussions of Section 2 litigation are far greater than Section 5 administrative review. In those cases where Section 2 litigation successfully blocks a discriminatory voting change, the cost to all involved – in terms of judicial resources, attorney costs, and expert witness costs – will routinely exceed the costs that Section 5 administrative review would have entailed by a very large margin. In addition, a jurisdiction that loses a Section 2 case will have less discretion in shaping a remedy than a jurisdiction attempting to overcome a Section 5 objection. And, a jurisdiction that loses a Section 2 case on the grounds of discriminatory purpose may well find itself back under preclearance under Section 3(c). While previously covered jurisdictions should be wary of rushing to adopt voting changes that had been deterred by Section 5 if only for these practical reasons, my expectation is that a number of such jurisdictions will take the *Shelby County* decision as a green light to forge ahead with discriminatory voting changes and take their chances in Section 2 litigation.

Constitutional litigation cannot compensate for the suspension of Section 5 review. In addition to Section 2, racial discrimination claims can be brought under the Fourteenth and

Fifteenth Amendments. Such claims require proof of a racially discriminatory purpose. Congress explicitly recognized the difficulties that this requirement poses for addressing problems of minority vote dilution when it passed the Section 2 results test in 1982. Since that time, federal courts have become increasingly open to claims of legislative or deliberative privilege, which pose a major barrier to a plaintiff being able to fully develop a discriminatory purpose case, even after discovery has been completed. In my experience the deposition testimony of decision-makers under oath can play the critical role in getting to the bottom of voting discrimination. On occasion there may be sufficient circumstantial evidence to build a purpose case without such testimony, but there is no doubt that shielding legislators from testifying about discussions and events during the legislative process substantially insulates discriminatory voting changes from the scrutiny they deserve.

For these reasons, Congress must act in keeping with the bipartisan tradition of the Voting Rights Act to weigh the current evidence of voting discrimination, reject the complacent suggestion that inaction will suffice, and enact appropriate legislation to effectively prevent and deter discriminatory voting changes from taking force.

Once again, on behalf of the Lawyers' Committee, I respectfully thank the Chair, the Ranking Member and the Members of the Subcommittee for the opportunity to submit this testimony and to testify today.