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June 24, 2014

The Honorable Patrick Leahy
Chairman
Senate Judiciary Committee
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Senate Judiciary Committee
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the Anti-Defamation League (ADL), we write to urge the Senate Judiciary Committee to take prompt action to protect Americans' fundamental right to vote by approving S. 1945, the Voting Right Amendment Act (VRAA). We ask that this statement be included as part of the official hearing record for the Committee's June 25, 2014 hearing on "The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to *Shelby County v. Holder*."

ADL is a leading civil rights organization that has been working to secure justice and fair treatment for all since its founding in 1913. Recognizing the Voting Rights Act of 1965 (VRA) as one of the most important and most effective pieces of civil rights legislation ever enacted, the League has strongly supported the VRA and [its extensions](#) since its passage almost 50 years ago. ADL has consistently [filed briefs](#) before the U.S. Supreme Court supporting the constitutionality of the VRA, including in [Shelby County v. Holder](#).¹

In the almost half century since its passage, the VRA has secured and safeguarded the right to vote for millions of Americans. Its success in eliminating discriminatory barriers to full civic participation and in advancing equal political participation at all levels of government is undeniable. Between 1964 and 1968 – the presidential elections immediately before and after passage of the VRA respectively – African American voter turnout in the South jumped by seven percentage points.² The year after passage of the VRA, Edward Brooke became the first African American in history elected to the Senate by popular vote, and the first African American to serve in the Senate since Reconstruction.³ By 1970 the number of African Americans elected to public office had increased fivefold.⁴ Today there are more than 9,000 African American elected officials,⁵ including the first African American president. According to some analyses, in 2012 African American voter turnout matched, or even passed, white voter turnout for the first time in history.⁶

¹ 133 S. Ct. 2612 (2013).

² U.S. Bureau of the Census, *Current Population Reports*, Series P-20, No. 192, "Voting and Registration in the Election of 1968," 1 (1969), available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/1968/p20-192.pdf>.

³ United States Senate, *Ethnic Diversity in the Senate*, https://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm.

⁴ See H.R. Rep. No. 109-478, at 18, 130 (2006), reprinted in 2006 U.S.C.C.A.N. 618.

⁵ H.R. Rep. No. 109-478 at 18.

⁶ Hope Yen, *Black Voter Turnout Rate Passes White in 2012 Election*, Associated Press Apr. 28, 2013, http://www.huffingtonpost.com/2013/04/28/black-voter-turnout-2012-election_n_3173673.html.

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To be sure, §2 of the VRA, which prohibits discrimination based on race, color or membership in a language minority group in voting practices and procedures nationwide, has helped to secure many of these advances. Yet it is undeniable that §5 of the VRA, which requires certain states and political subdivisions with a history of discriminatory voting practices to provide notice and “pre-clear” any voting law changes with the federal government, has played an essential and invaluable role in the VRA’s success. Between 1982 and 2006, pursuant to §5, the Department of Justice (DOJ) blocked 700 proposed discriminatory voting laws, the majority of which were based on “calculated decisions to keep minority voters from fully participating in the political process.”⁷ Proposed laws blocked by §5 included discriminatory redistricting plans, polling place relocations, biased annexations and de-annexations, and changing offices from elected to appointed positions, similar to many of the tactics used to disenfranchise minority voters before 1965.⁸ In addition, states and political subdivisions either altered or withdrew from consideration approximately 800 proposed voting changes between 1982 and 2006, indicating that §5’s impact was much broader than the 700 blocked laws.⁹

It is not coincidental that many of the greatest successes of the VRA are from jurisdictions covered by §5. Before passage of the VRA, African American voter registration rates in many areas of the South were 50 percentage points or more below white voter registration rates. By 2004, in many jurisdictions covered by §5 of the VRA, the registration rates were almost equal.¹⁰ The number of African Americans elected to public office from the six states originally covered by the VRA has increased 1,000 percent since 1965.¹¹ As Chief Justice Roberts concluded, “there is no doubt that these improvements are in large part *because* of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.”¹²

Enacted in 1965, the VRA was reauthorized by Congress in 1970, 1975, 1982 and, with respect language assistance, in 1992.¹³ Congress compiled a particularly extensive legislative record during consideration of the 2005-2006 reauthorization of the Act. Over the course of the 109th Congress, the House¹⁴ and Senate Judiciary¹⁵ Committees held 21 hearings on the legislation. As one scholar described:

If sheer size were the determining factor, the amount of evidence amassed by Congress also stands as evidence of the particularly deliberative approach during the 2006 reauthorization process. Congress considered more evidence and committed more resources to studying the problem of ongoing voting discrimination in covered jurisdictions than it had to any other issue in several years. It compiled over 20,000 pages of records by the conclusion of hearings in both chambers.¹⁶

The testimony evinced both breadth and depth of expertise:

The evidence compiled in the legislative record underlying the congressional reauthorization of Section 5 generally falls into three material categories: evidence of the success of Section 5 as a statutory tool that combats voting discrimination; evidence of ongoing voting discrimination in

⁷ *Shelby County*, 133 S. Ct. at 2639 (Ginsburg, J. dissenting) (citing H.R. Rep. 109-478 at 21).

⁸ H.R. Rep. No. 109-478, at 36.

⁹ *Shelby County*, 133 S. Ct. at 2639 (Ginsburg, J. dissenting).

¹⁰ *See id.* at 2626.

¹¹ *Id.* at 2625.

¹² *Id.* at 2626.

¹³ S. Rep. No. 109-295, at 7 (2006).

¹⁴ [H.R. Rep. 109-478](#).

¹⁵ [S. Rep. 109-295](#).

¹⁶ Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?* 43 *Harvard C.R.-C.L.L. Rev.*, 386, 402 (2008).

the covered jurisdictions; and legal analyses and studies considering the constitutionality of Section 5 or other doctrinal issues. The evidentiary forms included oral and written testimony, studies, analyses, reports, law review articles, judicial findings from voting rights cases, and objection letters issued by the DOJ. Witnesses included members of Congress, litigators and practitioners, private citizens, scholars and academics, historians, technical experts, local and state officials, and DOJ representatives.¹⁷

A final, dramatic demonstration of the convincing legislative record was the overwhelming, bipartisan support the legislation received on final passage in each chamber: 390 to 33 in the House of Representatives¹⁸ and 98-0 in the Senate.¹⁹

Despite the exhaustive legislative history Congress compiled in 2005-2006 and the undeniable success of the VRA, on June 25, 2013 the U.S. Supreme Court, in a sharply-divided 5-4 ruling in *Shelby County v. Holder*, struck down §4(b) of the VRA, the formula to determine which states and political subdivisions would have to preclear all voting changes with the federal government pursuant to §5. The majority held that “the formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance,”²⁰ but specifically found that “Congress may draft another formula based on current conditions.”²¹ Absent congressional action that creates a new coverage formula, however, the critical protections of §5 have been “immobilized.”²²

In her dissenting opinion in *Shelby County*, Justice Ginsburg noted that the large numbers of voting law changes submitted for preclearance that DOJ declined to approve “augur[ed] that barriers to minority voting would quickly resurface were the preclearance remedy eliminated.”²³ She further observed that “throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”²⁴ One year after the *Shelby County* decision, the evidence strongly suggests that Justice Ginsburg’s predictions were correct.

Within hours of the Supreme Court’s decision in *Shelby County*, Texas Attorney General Greg Abbott announced that the state’s voter ID law and a redistricting plan, both of which had been previously blocked by §5, would go into effect immediately.²⁵ The three judge panel that had reviewed the Texas voter ID law and denied preclearance in 2012 had found that “based on the record of evidence before us, it is virtually certain that these burdens will disproportionately affect racial minorities. Simply put, many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by SB 14, likely be unable to vote.”²⁶ With regard to the redistricting plan, a federal court that had declined to pre-clear the law the previous year concluded that there was “more evidence of discriminatory intent than we have space, or need, to address here.”²⁷ Although [litigation pursuant to §2](#) is ongoing, the discriminatory laws have already gone into effect in the absence of critical §5 protections.

¹⁷ *Id.* at 401-402.

¹⁸ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, [H.R. 9, 109th Cong. \(2006\) \(enacted\)](#).

¹⁹ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, [H.R. 9, 109th Cong., \(2006\) \(enacted\)](#).

²⁰ *Shelby County*, 133 S. Ct. at 2631.

²¹ *Id.*

²² *Id.* at 2633 n.1 (Ginsburg, J. dissenting).

²³ *Id.* at 2634 (Ginsburg, J. dissenting).

²⁴ *Id.* at 2650 (Ginsburg, J. dissenting).

²⁵ Zachary Roth, *That Was Quick: Texas Moves Ahead with Discriminatory Voting Laws*, MSNBC (Jun. 25, 2013), <http://www.msnbc.com/msnbc/was-quick-texas-moves-ahead-discri>.

²⁶ *Tex. v. Holder*, 888 F. Supp. 2d 113, 141 (D.D.C. 2012).

²⁷ *Texas v. U.S.*, 887 F. Supp. 2d 133, 161 n.32 (D.D.C., 2012).

North Carolina, which before *Shelby County* had been required to pre-clear voting changes in 40 of its 100 counties, passed HB 589 shortly after the Court's decision. The bill, among other things, required government-issued photo identification (voter ID) to vote, made it easier for partisan poll watchers to challenge eligible voters, and greatly reduced the number of early voting days, all of which threaten to disenfranchise minority voters.²⁸ A report from the North Carolina Board of Elections, which found that 613,000 eligible voters in North Carolina lacked the government-issued photo identification required by HB 589, showed that a disproportionate number of those eligible voters were African American.²⁹ The law's expansion of partisan "observers" at the polls similarly threatens to disenfranchise minority voters. History shows that partisan poll watchers ostensibly guarding against voter fraud too often target precincts with high numbers of minority voters, becoming vigilantes who intimidate eligible minority voters. For example, lists from 2012 show that a Pittsburgh poll watching group targeted precincts where nearly 80 percent of registered voters were African American.³⁰ Similarly, poll watching groups in Ohio targeted primarily precincts with high percentages of minority voters, and there were allegations of minority voter intimidation by partisan poll watchers in Texas.³¹ In addition, HB 589's reduction of early voting days threatens to impact even more minority voters. Estimates show that in North Carolina, more than 70 percent of people who vote early are African American, Latino, women or young voters.³² Approximately seven in ten African American voters in North Carolina utilize early voting and cast a ballot before Election Day.³³ By slashing early voting from 17 to 10 days, the new law disproportionately impacts the State's minority voters. Again, [litigation pursuant to §2](#) is ongoing, but the discriminatory law has already gone into effect.

As another example, in 2012 DOJ objected to a proposed statewide law in Georgia that effectively changed the date of the mayoral and commissioner elections in Augusta-Richmond from November to July, concluding that minority voter turnout in July would be lower and the law would have a "retrogressive effect."³⁴ In deciding to decline preclearance, DOJ found, based on previous voting patterns in the jurisdiction, that "in percentage terms, black persons were 55.4 percent less likely to vote in July than in November, while white persons were only 41.4 percent less likely to vote."³⁵ In the wake of the *Shelby County* decision, Georgia Attorney General Sam Olens announced that the election will be held in July of 2014, not November.³⁶ Absent injunctive relief, the law threatens to disproportionately impact African American voters in Georgia next month.

²⁸ 2013 N.C. Sess. Laws 381.

²⁹ *2013 SBOE-DMV ID Analysis*, North Carolina Board of Elections (Jan. 7, 2013) (finding that although African American voters make up 22 percent of the State's population, they represent 30 percent of those who do not have proper photo ID).

³⁰ Dan Froomkin, *New Evidence Shows Poll Watching Efforts Target Minority Precincts*, Huff Post Politics (Nov. 5, 2012), available at http://www.huffingtonpost.com/2012/11/05/poll-watching_n_2078563.html.

³¹ Dan Harris and Melia Patria, *Is True the Vote Intimidating Minority Voters from Going to the Polls?*, ABC News Nightline (Nov. 2, 2012), available at <http://abcnews.go.com/Politics/true-vote-intimidating-minority-voters-polls/story?id=17618823>.

³² Peter Hamby, *Micro-Targeting Offers Clues to Early Vote Leads*, CNN Politics (Oct. 26, 2012), available at <http://politicalticker.blogs.cnn.com/2012/10/26/micro-targeting-offers-clues-to-early-vote-leads/>.

³³ *Id.*

³⁴ Complaint at 19, *Howard et al. v. Augusta-Richmond Cnty.*, No. 14-00097 (S.D.Ga. filed Apr. 18, 2014), available at <http://redistricting.ills.edu/files/GA%20howard%2020140414%20complaint.pdf>.

³⁵ *Id.*

³⁶ The Leadership Conference, *The Persistent Challenge of Voting Discrimination: A Study of Recent Voting Rights Violations By State*, 28 (June 2014), available at <http://www.civilrights.org/press/2014/Racial-Discrimination-in-Voting-Whitepaper.pdf>.

Two months after the *Shelby County* decision, Arizona Attorney General Tom Horne opined that “duly enacted statutes that were submitted for preclearance but later withdrawn are enforceable.”³⁷ Six statutes or policies that had been submitted for preclearance by Arizona or political subdivisions of the state but later withdrawn when DOJ requested more information, therefore, went into effect on June 25, 2013.³⁸ Among those was HB 2261, which requires the addition of two at-large seats on the Governing Board of the Maricopa Community College District.³⁹ The Supreme Court “has long recognized that multimember districts and at-large voting schemes may ‘operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.’”⁴⁰ Although there is ongoing litigation about the constitutionality of the voting law change there as well, absent injunctive relief this November there will be elections for the two at-large seats. Similarly, the city of Decatur, Alabama, which had withdrawn a preclearance request in 2011 when DOJ asked for more information about its proposed voting law, changed its election method from five single-member districts to three single-member districts and two at-large seats shortly after the *Shelby County* decision.⁴¹

These examples of discriminatory voting laws and practices documented in the year since *Shelby County* are far from an exhaustive list. Rather, they are illustrative of the kinds of laws that have either been conceived since *Shelby County* or given new life in the absence of §5’s essential protections. Since the 2010 elections, new voting restrictions have been passed in 22 states, including nine of the 15 states previously covered by §5.⁴² In 15 states, the elections this November will be the first federal elections with these new restrictive laws in place that threaten to disenfranchise American voters and disproportionately impact voters of color.⁴³ Although it is hard to point to quantifiable statistics about how many voters have been impacted by the lack of preclearance protections from §5, one thing is certain: the impact will only grow over time.

The efforts over the last few years to restrict voting rights around the country are unprecedented in modern America. The United States has not seen such a major legislative push to limit voting rights since right after Reconstruction.⁴⁴ That history presents a sobering lesson about what can happen when protections for minority voting rights are erased. After the Civil War Congress moved swiftly and decisively to enfranchise African American men. Under the supervision of federal troops, more than 700,000 African American men were registered to vote in the South by 1868, a 75 to 95 percent registration rate.⁴⁵ The 15th Amendment was ratified in 1870, and the Enforcement Act of 1870 prohibited discrimination in voter registration and created criminal penalties for interfering with voting rights. These combined efforts and federal protections led to unprecedented rates of African American participation in elected government. By the end of Reconstruction, 18 African Americans had served in statewide office in Southern states, there were eight African Americans in Congress from six different states, and more than 600 African Americans served in state legislatures.⁴⁶ When Reconstruction ended in 1877 and the Supreme Court struck down key portions of the Enforcement Act, however, progress quickly reversed.

³⁷ Effect of *Shelby County* on Withdrawn Preclearance Submissions, Op. Att’y Gen. No. I13-008 (Aug. 29, 2013), available at <https://www.azag.gov/sites/default/files/I13-008.pdf>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

⁴¹ The Leadership Conference, *supra* note 36, at 10.

⁴² Wendy Weiser and Erik Opsal, *The State of Voting in 2014*, Brennan Center for Justice at New York University School of Law, 3 (June 2014), available at http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf.

⁴³ *Id.* at 1.

⁴⁴ *Id.* at 2.

⁴⁵ ELLIOTT ROBERT BARKAN, *A NATION OF PEOPLES: A SOURCEBOOK OF AMERICA’S MULTICULTURAL HERITAGE* 27 (1999).

⁴⁶ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 353, 355, 538 (1988).

Southern states began implementing racial gerrymandering, followed by more brazen efforts to disenfranchise African American voters, including poll taxes, literacy tests, whites only primaries, and grandfather clauses. By the early 1900s, 90 percent of African Americans in the Deep South had been disenfranchised by these schemes. The widespread, insidious disenfranchisement of African American voters only stopped in 1965, with passage of the VRA.

To be sure, the United States is very different today than it was after Reconstruction. Yet the possibility of repeating history by reversing decades of progress on improving minority voting rights looms large. In the short year since the Supreme Court's decision in *Shelby County* immobilized the essential §5 preclearance protections, the United States has already seen countless efforts to restrict voting, disenfranchise voters, and roll back the extraordinary progress made since Congress first passed the VRA in 1965.

The nationwide ban on voter discrimination based on race in §2 is not sufficient alone to protect voting rights. As the Supreme Court rightly recognized in the first challenge it heard to the VRA, "Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 manhours spent combing through registration records in preparation for trial. Litigation [is] exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings."⁴⁷ In the meantime, as is the case with many of the discriminatory laws put in place since *Shelby County*, voting rights are in peril while court cases slowly wind their way through the process. Just as in 1965 "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits,"⁴⁸ litigation pursuant to §2 is once more inadequate to address the flood of restrictive voting laws across the country. It is, therefore, imperative that Congress take swift and decisive action to restore the full protections of the VRA, including the preclearance requirements.

Although not perfect, S. 1945, the Voting Rights Amendment Act (VRAA) creates a modern, flexible, rolling formula to determine which states and political subdivisions will have to pre-clear their laws with the federal government. The formula will not require preclearance in all of the political subdivisions that have moved to restrict voting rights in the past year, including some of the examples above, but, over time, the rolling formula will sweep in many of the most problematic jurisdictions. It will restore critical safeguards, preventing enactment of discriminatory voting laws by once more "shift[ing] the advantage of inertia and time from the perpetrators of the evil to the victims."⁴⁹

Congress has both the power and the imperative to pass the VRAA and restore critical voting rights protections. The Fifteenth Amendment to the U.S. Constitution proclaims that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."⁵⁰ Section 2 of the Amendment expressly declares that "Congress shall have the power to enforce this article by appropriate legislation."⁵¹ As the Supreme Court has recognized, "by adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in §1,"⁵² and "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."⁵³ Passage of the VRAA is not

⁴⁷ *S.C. v. Katzenbach*, 383 U.S. 301, 314 (1966).

⁴⁸ *Id.* at 328.

⁴⁹ *Id.* at 328.

⁵⁰ U.S. CONST. amend. XIV, §1.

⁵¹ *Id.* at §2.

⁵² *Katzenbach*, 383 U.S. at 325-26.

⁵³ *Id.* at 324.

only rational. It is critical to enforcing the constitutional prohibition on racial discrimination in voting and protecting the fundamental right to vote for all Americans.

We strongly welcome these hearings on the need for the VRAA and appreciate the opportunity to present ADL's views. We urge the Committee to promptly approve this vital legislation.

Sincerely,

A handwritten signature in black ink that reads "Deborah M. Lauter". The signature is written in a cursive, flowing style.

Deborah M. Lauter
Director, Civil Rights