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Committee on House Administration, Elections Subcommittee
Field Hearing on Voting Rights and Election Administration in Georgia
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Thank you for the opportunity to provide remarks on voting rights and election administration in Georgia. My name is Gilda R. Daniels. I am the Litigation Director for the Advancement Project's National Office. Advancement Project is a national racial justice organization that partners with grassroots organizations on the ground to inspire, empower, and develop community-based solutions. The premise for this approach is based on the strategies and courage that produced the landmark civil rights victories of earlier eras that utilized the tools of social activism to create meaningful community change. Here in Georgia, Advancement Project is proud to partner with New Georgia Project to advance voting rights. In addition to my work at Advancement Project, I am also an Assistant Professor at the University of Baltimore School of Law, where my teaching and scholarship focuses on the intersections of race, law and democracy. Prior to becoming a law professor, I served as a Deputy Chief in the United States Department of Justice, Civil Rights Division, Voting Section during the Clinton and George W. Bush administrations. I have been a voting rights attorney for more than two decades. I am a member of the state bar of Georgia and have been involved in monitoring voting issues in Georgia, including during the 2018 General Elections. Accordingly, I have watched the cycles of voting rights ebb and flow from the expansion of voter registration opportunities under the National Voter Registration Act (NVRA) to the proliferation of disenfranchising tools, such as voter ID and proof of citizenship laws that are prevalent today. Through these twists and turns, the primary tool for ensuring the free and nondiscriminatory access to the right to vote has been the Voting Rights Act of 1965.

Protecting the Right to Vote

It is important to note the history of voting in America. In the beginning, the vote was reserved for white men and property owners. The passage of the Civil Rights Amendments expanded the electorate in miraculous ways, providing the right to vote to a previously enslaved people devoid

of any rights of citizenship. Shortly after passage of these freedom-based amendments, white supremacists' groups, particularly throughout the South, including Georgia, used vigilante tactics of violence and terror to destroy the impact and gains that were made in the short period of reconstruction. States across the south followed suit with new voting laws that resulted in dramatic reductions in voting for previously eligible voters, with ten of the eleven southern states passing constitutional amendments to enshrine new voting restrictions. Between 1890 and 1910, African Americans were removed from the voter registration rolls in large numbers and denied the right to vote It would take almost 100 years before this nation would recognize the necessity of passing legislation to would secure the right to vote to its citizens.

Voting Rights Act. The Voting Rights Act is considered one of the most effective pieces of Congressional legislation. It removed the vestiges of slavery and Jim Crow from the voting process. It provided federal observers and registrars to ensure that African Americans could register and vote particularly in places where they were historically forbidden to do so. The Act contained two primary provisions. Section 2 of the Act included a permanent, nationwide prohibition against discrimination in voting. Section 5 was the administrative and temporary portion of the Act that required designated jurisdictions to submit any and all voting changes to either the United States Attorney General or the United States District Court for the District of Columbia for approval or preclearance prior to implementation. The Act designated preclearance for jurisdictions that Congress found had engaged in racially discriminatory voting practices. These "covered jurisdictions" included most of the Old South, e.g., Georgia, Alabama, Louisiana, South Carolina, Texas, parts of North Carolina and Florida, because of their historic and contemporaneous racially discriminatory voting practices.

Section 5 was one of the most important, but temporary, provisions that was subject to Congressional reauthorization. Nonetheless, at each point, Congress overwhelmingly voted to extend the temporary provisions to ensure the continued federal oversight of state and local voting changes and practices. In fact, in 1982 as President Ronald Reagan signed the extension of the Voting Rights Act's temporary provisions, he stated, "[T]he right to vote is the crown jewel of American liberties, and we will not see its luster diminished."[1] In 2007, Congress again overwhelmingly voted to extend the protections in the temporary provisions, finding "[t]he Voting Rights Act of 1965 was enacted to remedy 95 years of pervasive racial discrimination in voting, which resulted in the almost complete disenfranchisement of minorities in certain areas of the country. The Act is rightly lauded as the crown jewel of our civil rights laws because it has enabled racial minorities to participate in the political life of the nation. We recognize the great strides that have been made in the treatment of racial minorities over the last forty years, but extending the expiring provisions of the Voting Rights Act is still necessary to continue to fulfill its purpose."[2]

Whether the jurisdiction chose to submit the change to the Attorney General or the United States District Court for the District of Columbia, it was required to demonstrate that the submitted

[1] "Ronald Reagan, Pres. of the U.S., Remarks on Signing H.R. 3112 Into Law (June 29, 1982), in 18 WKLY.COMPILATION PRESIDENTIAL DOCUMENTS 846, 847 (1982)

[2] see also S. REP. NO. 109-295, at 1 (2006) ((emphasis added) (citation omitted))

change "neither [had] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language minority group]."[3] Section 5's preclearance requirement was preemptive because it mandated that a covered jurisdiction demonstrate, *prior* to the implementation of legislation, that the proposed change was free from any discriminatory purpose or effect. The VRA sought to prohibit race discrimination in voting and served as an effective response to the violence and other barriers that Southern obstructionists placed in the way of the right to vote. Indeed, Section 5 blocked more than 1,500 discriminatory voting laws from going into effect until the Supreme Court's 2013 decision in *Shelby v. Holder* effectively shackled its use.

Challenging Section 5. Legal challenges to the Act began almost at its onset. In *South Carolina v. Katzenbach,* petitioners argued that Congress lacked the authority to pass this impactful legislation. The United States Supreme Court found that Congress was well within its authority pursuant to the Fourteenth and Fifteenth Amendments of the United States Constitution and held the extraordinary requirements of Section 5 necessary to ensure that the right to vote was free of discrimination. The Supreme Court continued to affirm that the Voting Rights Act was within Congress's authority in subsequent challenges.[4] For almost 50 years, the Voting Rights Act increased voter access and the number of minority elected officials. Voter registration, turnout, and representation in communities of color thrived after the VRA.

In 2013, in *Shelby County v. Holder,*[5] the United States Supreme Court found the coverage formula contained in Section 4 of the Act outdated and therefore, unconstitutional. This was significant because Section 4 determined the jurisdictions that were required to make submissions to the federal government under Section 5 of the Act. Without Section 4, Section could not be applied. Consequently, those jurisdictions that were covered under Section 5 almost immediately began to implement laws and practices that in some instances had been previously determined racially discriminatory. For example, in Texas, within hours of the *Shelby* decision, then Attorney General Abbot declared that the state would implement its restrictive voter ID law. Notwithstanding, that a federal court had ruled that the same Texas law could not receive preclearance due to its retrogressive effects on voters of color. Courts have subsequently found the Texas voter ID law intentionally discriminatory. Citing its discriminatory impact on African American and Latino voters – the court found that over 600,000 people lacked the ID needed to vote. Weeks after the *Shelby* ruling, North Carolina – where the DOJ had objected to more than 150 voting practices under the pre-*Shelby* provisions of the Voting Rights Act – passed the nation's most wide-sweeping voter suppression law, eliminating positive measures responsible for expanding access to voters of color.[6] In a legal challenge to that law brought by

[3] 42 U.S.C. § 1973c(a).

[4] *See, e.g., Allen v. State Board of Elections,* 393 U.S. 544 (1969); *Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971).

[5] *Shelby County v. Holder*, 570 U.S. 529 (2013)

[6] HB589 (NC 2013), http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v8.pdf. The law eliminated a week of early voting, a practice used by 70 percent of the state's African American voters, imposed a photo ID

Advancement Project and others, a federal appeals court also found North Carolina's omnibus legislation intentionally discriminatory, finding that North Carolina had acted "with almost surgical precision" to eliminate voters of color.[7]

Clearly, the Court's decision in *Shelby* eliminated a key weapon in the voting rights arsenal. Section 5 served as a safeguard for discriminatory voting changes.[8] It was an important prophylactic that prevented jurisdictions from implementing laws that harmed minority voters. It provided important oversight for voting changes and practices. It prevented jurisdictions from implementing laws without providing notice to minority communities. Without Section 5, jurisdictions are free to pass and put laws into place without considering the impact on its citizens. These laws go into practice and civil rights groups are burdened with the responsibility of learning of these changes that were once routinely submitted to the federal government. More importantly, these legal challenges happen after the changes have occurred not before as under Section 5.

Tools in the Toolbox

While the VRA sought to eliminate the tools of disenfranchisement, such as the poll tax and literacy tests, new mechanisms, such as voter ID and "exact match" voter purges, developed. Restrictive voter identification, voter registration, proof of citizenship laws, and felon disenfranchisement laws have affected voter confidence. In this new millennium, we have witnessed constant attacks on the right to vote. Citizens throughout our country are subjected to suppressive voter activity that consists of challenges to their right to vote, deceptive tactics, e.g., "Republicans Vote on Tuesday, Democrats Vote on Wednesday" or misinformation on the ability to "tweet your vote." Draconian registration procedures, illegal purges, difficult to understand voter registration and Identification laws, felon disenfranchisement, lack of language services, all add up the disenfranchisement of particularly people of color. The cumulative effect of these measures illustrate the need for federal oversight.

After *Shelby*, new restrictions on voting have been implemented in Southern states that were previously covered by the VRA's preclearance provisions. Georgia, in particular instituted a number of retrogressive and arguably discriminatory practices, such as voter identification and proof of citizenship requirements, cuts to early voting, closed hundreds of polling places in communities of color and undertook massive voter purges. Leading into the 2018 General Elections, it placed more than 50,000 voter registrations on hold, provided inoperable voting machines and untrained poll workers for its elections. It also designated eligible voters as noncitizens and required them to prove otherwise in a precarious and opaque system. It instituted restrictive voter ID and proof of citizenship laws. In an effort to capture voters of color, Georgia held 53,000 voter registrations, due to lacking an "exact match" in name, Social

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requirement and eliminated same day registration, out of precinct voting, straight ticket voting and even preregistration of 16 and 17-year olds.

[7] *North Carolina State Conference of the NAACP v. McCrory,* 831 F.3d 204 (2016)

[8] Daniels, Gilda, Unfinished Business: Protecting Voting Rights in the Twenty-First Century (August 7, 2013). Available at SSRN: https://ssrn.com/abstract=2405974 or http://dx.doi.org/10.2139/ssrn.2405974

Security number and other minor discrepancies, e.g., an extra space, a missing hyphen or other typographical errors in the spelling or spacing of their names. While Georgia's population is 32 percent Black, African American voters made up more 70 percent of the names on that list, and 80 percent of applicants on that list were Black, Asian or Latino. Secretary of State Kemp's office also purged approximately 1.5 million registered voters between 2012 and 2016. The state closed nearly 214 polling places during the same period. Many of those voting precincts were located in communities of color and disadvantaged areas. Between 2016 – 2018, Georgia purged more than 10 percent of its voters, – nearly 670,000 registrations were cancelled in 2017 alone.

Prior to the dismantling of the VRA in the *Shelby* decision, Section 5 would have required Georgia and its sub-jurisdictions to seek preclearance prior to implementing these changes. If Georgia had been subject to Section 5 many, if not all of these practices, would have never been introduced. It would have had the burden of demonstrating that the proposed practice did not impede the right to vote. The years of litigation and frustration would have been avoided had the protections of the Voting Rights Act remained in place. Without Section 5, civil rights groups and individuals face the costly task of litigating voting practices after they have adversely affected communities of color.

I saw some of these problems manifest first hand while monitoring voting in Georgia during the November 2018 midterm elections. We received a number of calls from persons who requested absentee ballots but did not receive them. Long lines were also a problem. For example, at the Pittman Park voting station, we received calls lines that were reportedly 300 people deep with a wait time of 3.5 hours. Long lines and broken or inoperable voting machines also led to people getting turned away or given provisional ballots. Ultimately, I was involved in advocacy and litigation to extend the hours of several polling locations in Fulton County, Georgia, that particularly impacted Atlanta University Center students at Morehouse, Spelman, and Clark Atlanta University at the Booker T. Washington High School polling place locations.

The Road Ahead.

It is imperative that we develop a federal solution that eliminates discriminatory barriers to the ballot box. Ideally, Congress should restore federal oversight over voting changes. This may require an expansion of the number of covered jurisdictions beyond the previously covered states and sub jurisdictions. Additionally, we need an explicit affirmative right to vote in the Constitution. While we have more amendments that address the right to vote more than any other right, post-*Shelby* shenanigans illuminate that the right to vote is not absolute. States and municipalities routinely place restrictions on registration and access to the ballot. More restrictions, in fact, than we currently have, for example, with the right to bear arms.

The federal constitution needs an affirmative right to vote. It is the right upon which all other rights are built. Yet, state and local lawmakers have the ability to change the laws and make it harder to access the ballot box. We need to elevate the right to vote over the right to bear arms. A right to vote amendment is needed which instead of including a list of thou shall nots

provides the citizens of these United States the ability to participate in the democracy. Let us reverse course and make the right to vote free and fair.

Thanks to Chairwoman Marcia Fudge and the Subcommittee on Elections, Committee on House Administration for holding this field hearing. It is time for Congress to act by reinstating the pre-clearance provisions of the Voting Rights Act to restore protections for voters of color. Moreover, we must enshrine an explicit right to vote at the federal level. The right to vote protects all other rights. Legal protection for voting is needed now more than ever, both to safeguard hard-fought progress and to defeat persistent and ongoing attempts to narrow the franchise.

Thank you.