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Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee, thank you very much for inviting me here to testify today about the Supreme Court's decision in *Shelby County v. Holder*.

In *Shelby County v. Holder*,[1] the Supreme Court held that the coverage formula subjecting certain jurisdictions to preclearance under section 5 of the Voting Rights Act was unconstitutional. When Congress enacted the Voting Rights Act of 1965,[2] it imposed a novel restriction, known as preclearance, on Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and portions of North Carolina.[3] Those jurisdictions shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average."[4] Congress tailored the original coverage formula to include those States because it found "that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed."[5]

[1] 570 U.S. 529 (2013).
[2] 79 Stat. 437.
[3] *See* 28 C.F.R. pt. 51, App.; South Carolina v. Katzenbach, 383 U.S. 301, 329-30 (1966).
[4] *Katzenbach*, 383 U.S. at 330.
[5] *Id.* at 331 ("There are no States or political subdivisions exempted from coverage under § 4(b) in which the record reveals recent racial discrimination involving tests and devices.").

Texas did not become a covered jurisdiction subject to preclearance until 1975, when Congress reauthorized the Voting Rights Act. In that reauthorization, Congress expanded the coverage formula to include any jurisdiction in which at least five percent of the voting-age citizens were members of a single language-minority group, election materials were printed only in English, and less than fifty percent of voting-age citizens voted or registered to vote in the most recent presidential election.[6] Texas remained subject to preclearance until the coverage formula was held to be unconstitutional in 2013.

The Supreme Court emphasized in *Shelby County* that the Constitution's allocation of power to the Federal Government and the States "preserves the integrity, dignity, and residual sovereignty of the States."[7] The Court explained that the Constitution also incorporates the "fundamental principle of *equal* sovereignty among the States."[8] And the powers reserved to the States by the Framers include broad authority over the conduct of elections.[9] The Supreme Court specifically noted in *Shelby County*: "The Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."[10] That is, "States have 'broad powers to determine the conditions under which the right of suffrage may be exercised.'"[11]

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[6] The 1975 legislation "amended the definition of 'test or device' to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English." *Shelby County*, 570 U.S. at 538 (citing Voting Rights Act Amendments of 1975 § 203, 89 Stat. 400, 401-02).
[7] *Id.* at 543 (quoting Bond v. United States, 564 U.S. 211, 221 (2011)).
[8] *Id.* at 544 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).
[9] *Id.* at 543.
[10] *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)).
[11] *Id.* (quoting Carrington v. Rash, 380 U.S. 89, 91 (1965)).

Preclearance under section 5 of the Voting Rights Act removes those central pillars of federalism by forbidding States to enforce their duly enacted voting laws until they secure permission from the federal government. Preclearance is thus an extraordinary measure that entails, as the Court put it in *Shelby County*, "a drastic departure from basic principles of federalism."[12] In *Northwest Austin*, the Supreme Court held that the very existence of a preclearance requirement raises serious constitutional questions.[13] In *Shelby County*, the Supreme Court made clear that "preclearance" must be reserved for extraordinary situations, in which a jurisdiction is guilty of "'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination" that cannot be remedied through normal litigation.[14]

***Shelby County* Confirms that Preclearance Is Appropriate Only in Extraordinary Circumstances.**

Congress created the preclearance regime in 1965 as a last resort to resolve a constitutional crisis. Congress resorted to extraordinary measures because the States initially subjected to preclearance had engaged in "systematic resistance to the Fifteenth Amendment,"[15] demonstrating time and again that they would not allow black citizens to vote, no matter what the Fifteenth Amendment, Congress, or the federal courts said. Congress determined that preclearance was necessary because existing laws, including recently enacted federal civil rights statutes, had proven ineffective in the face of the targeted jurisdictions' "unremitting and ingenious defiance of the Constitution."[16] As the Supreme Court recognized in *South Carolina v.*

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[12] *Id.* at 535.
[13] *Nw. Austin*, 557 U.S. at 205-06.
[14] *Shelby County*, 570 U.S. at 554.
[15] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).
[16] *Id.* at 309; *see also id.* at 315 (noting Congress's conclusion that the ineffectiveness of existing law provided "the essential justification for the pending bill").

Katzenbach, "Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination."[17] The Court held that preclearance was constitutionally appropriate only because "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting."[18]

The Supreme Court explained in *Shelby County* that a regime that "require[s] States to obtain federal permission before enacting any law relating to voting" represents "a drastic departure from basic principles of federalism."[19] Given the grave constitutional concerns that arise from subjecting a State's laws to federal approval, preclearance must be reserved for the most extraordinary circumstances. In *Shelby County*, the Supreme Court threw out Congress's reauthorization of a preclearance regime because the legislative record failed to show "anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."[20]

The lesson of *Shelby County* is clear: Before imposing a preclearance regime, Congress must make credible findings that a State is so determined to evade the commands of the Fourteenth or Fifteenth Amendment that its citizens will be unable to protect their constitutional rights through traditional litigation under existing law.

That is precisely the situation that Congress faced in 1965. When Congress first devised the preclearance regime, there was no question that officials in the targeted States were deliberately and systematically violating the Fifteenth Amendment, nor was there any question that they would

[17] *Id.* at 313.
[18] *Id.* at 328.
[19] *Shelby County*, 570 U.S. at 534.
[20] *Id.* at 554.

continue to do so unless Congress could stop them. In *Katzenbach*, the Supreme Court noted that "various tests and devices have been instituted with the purpose of disenfranchising [black citizens], have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years. Under these circumstances, the Fifteenth Amendment has clearly been violated."[21] These devices included requirements that registrants pass literacy or "understanding" tests, which were enforced strictly against black citizens but leniently or not at all against white citizens,[22] and a "good morals" requirement that the Supreme Court described in *Katzenbach* as "so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."[23] And when particular methods were enjoined, the targeted States "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."[24]

Traditional litigation was inadequate in 1965 not only because local officials employed such "obstructionist tactics,"[25] but also because federal judges refused to enforce existing civil rights laws. At that time, many federal district judges in the South had received their appointments through the patronage of Senators who supported racial segregation.[26] In those circumstances, case-by-case litigation did not provide an adequate remedy for Fifteenth Amendment violations in

[21] *Id.* at 333-34 (footnote omitted).
[22] *Id.* at 312.
[23] *Id.* at 313.
[24] *Id.* at 335.
[25] *Id.* at 328.
[26] *See* Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 Cap. U. L. Rev. 523, 545 n.194 (2002); N.Y. Times, June 9, 1963, § 6 (Magazine), p. 80, col. 4 ("The delay engaged by the courts in handling . . . civil-rights issues is hardly surprising when one considers that a number of Federal District Judges are segregationists.").

covered jurisdictions—especially when the decision whether to issue an immediate preliminary injunction rests largely in the discretion of the district court.[27]

Traditional litigation was inadequate even when plaintiffs prevailed because jurisdictions either refused to comply with federal court orders or deliberately evaded those orders by erecting new obstacles to minority voting. Congress devised preclearance to thwart the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."[28] As the Supreme Court noted when it upheld the original preclearance regime in *Katzenbach*, "Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration."[29] Recognizing that preclearance was "an uncommon exercise of congressional power," the Court held in *Katzenbach* that "exceptional conditions can justify legislative measures not otherwise appropriate"[30] and that preclearance was appropriate to combat "widespread resistance to the Fifteenth Amendment."[31]

When the Court found the preclearance coverage formula unconstitutional in *Shelby County*, it followed the reasoning *Katzenbach* had applied to uphold the original coverage formula. The Court explained in *Shelby County* that the preclearance regime "was 'uncommon' and 'not otherwise

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[27] *E.g.*, H.R. Rep. No. 89-439 (1965), Additional Views of the Honorable William T. Cahill, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2484, 2485 ("I am fully aware of the problems which the Department of Justice has encountered in trying racial cases before some Federal judges in the South whose opinions can only be explained by the supremacy of personal, social predilections over well-established law.").
[28] Beer v. United States, 425 U.S. 130, 140 (1976).
[29] *Katzenbach*, 383 U.S. at 314.
[30] *Id.* at 334.
[31] *Id.* at 337.

appropriate,' but was justified by 'exceptional' and 'unique' conditions" in 1966.[32] But because those conditions no longer prevailed when Congress reauthorized the coverage formula in 2006, the preclearance regime was no longer an appropriate means of enforcing the Fifteenth Amendment. Under the standard articulated in *Katzenbach* and *Shelby County*, before Congress may upset the constitutional balance by subjecting States to preclearance, it must establish "that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government.'"[33] *Shelby County* confirms that to make that showing, Congress must identify a congruent and proportional constitutional violation—specifically, that any State subjected to preclearance has engaged in rampant, widespread, recalcitrant discrimination so pervasive that it cannot be adequately addressed by traditional judicial remedies.

Preclearance Imposes Substantial Federalism Costs.

The Supreme Court has consistently noted that preclearance "imposes substantial federalism costs" by upsetting the constitutional balance and depriving certain States of equal sovereignty.[34] But the costs imposed by preclearance are not merely theoretical. Before it may enforce its voting laws, a State subject to preclearance must prove to the Department of Justice or a federal court that its laws have neither the purpose or effect of denying or abridging the right to vote on account of race or membership in a language-minority group. Preclearance thus shifts the burden of proof to the State, relieving challengers of their customary "burden of overcoming the presumption of

[32] *Shelby County*, 570 U.S. at 555 (quoting *Katzenbach*, 383 U.S. at 334, 335).
[33] *Id.*at 557 (quoting Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 500-01 (1992)).
[34] *Id.* at 540.

good faith and proving discriminatory intent."[35] Because the State must prove a negative—that it did not act with a racially discriminatory purpose—preclearance effectively establishes a presumption of bad faith.

Preclearance also exposes States to the burdens of discovery that would be unheard of in ordinary constitutional litigation. For example, after Texas sought judicial preclearance of its voter-identification law, the Department of Justice insisted on extensive discovery of privileged legislative materials, including testimony from legislators and legislative staff. To justify its invasive discovery requests, DOJ cited declarations from four Democratic state legislators who voted against the voter-identification law. These declarations—which were drafted by DOJ attorneys[36]—offered conclusory allegations that the voter-identification bill had been enacted with a racially discriminatory purpose.[37] DOJ argued that "[t]hese statements by first-hand witnesses of the process by which S.B. 14 was developed and enacted are indicia of discriminatory purpose more than sufficient to warrant discovery of legislators and their staff."[38]

The Department of Justice embarked on a massive fishing expedition in the hope of uncovering some evidence of racially discriminatory purpose. DOJ demanded that dozens of state legislators and their staff sit for depositions to explain their reasons for supporting SB 14. DOJ eventually deposed four members of the Texas Senate, eight members of the Texas House of Representatives, two legislative staff members, three current and former members of the Governor's staff, and three

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[35] Abbott v. Perez, 138 S. Ct. 2305, 2325 (2018).
[36] Two of the legislators testified under oath that their declarations had been drafted by attorneys at the Department of Justice. *See* Texas Proposed Findings of Fact and Conclusions of Law ¶¶ 127, 128, *Texas v. Holder*, No. 12-cv-128 (D.D.C. June 20, 2012), ECF No. 202.
[37] United States' Statement in Support of Its Request to Depose and Seek Documents from State Legislators and Staff 11, *Texas v. Holder*, No. 12-cv-128 (D.D.C. Apr. 10, 2012), ECF No. 69.
[38] *See id.* at 12-13.

current and former members of the Lieutenant Governor's staff. Many of these depositions lasted for seven hours, the maximum time allotted under the Federal Rules of Civil Procedure. These legislators were subjected to questioning not only from DOJ's lawyers but also from the different groups of lawyers representing the 25 intervening parties.

It is virtually unheard of for state legislators to be forced to sit for depositions in ordinary constitutional litigation, even when a plaintiff alleges that a state law was enacted with a forbidden purpose.[39] Yet DOJ routinely seeks to depose state legislators in contested preclearance proceedings, even arguing that "contested preclearance actions" are per se "'extraordinary circumstances' in which legislators may be called to the stand."[40]

Preclearance inevitably causes harm to the political process because the hope of defeating preclearance tends to displace legitimate policy debate with claims of racial discrimination. As a three-judge court in Texas warned, when one loses a political battle, "there are large incentives to reach for the seeming certainty of the Equal Protection Clause's familiar condemnation of purposeful racial discrimination and draw upon its comforting moral force."[41] With opponents focused on litigation or review by the Department of Justice, "[t]he incentive to couch partisan disputes in racial terms bleeds back into the legislative process," "as members of the 'out' party—

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[39] *See* Vill. of Arlington Heights v. Metro. Dev. Corp., 429 U.S. 252, 268 (1977) (holding that litigants cannot compel testimony from state legislators absent "extraordinary instances"); Goldstein v. Pataki, 516 F.3d 50, 62 (2d Cir. 2008) (forbidding plaintiffs in an eminent-domain dispute to depose "pertinent government officials" and discover their "emails, confidential communications, and other pre-decisional documents" because this would represent "an unprecedented level of intrusion").

[40] *See* Defendant's Response in Opposition to Plaintiff's Motion for a Protective Order 6, *Texas v. Holder*, No. 12-cv-128 (D.D.C. Mar. 29, 2012), ECF No. 57.

[41] Session v. Perry, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004) (per curiam), *vacated on other grounds*, Henderson v. Perry, 543 U.S. 941 (2004).

believing they can win only in court, and only on a race-based claim—may be tempted to spice the legislative record with all manner of racialized arguments, to lay the foundation for an eventual court challenge."[42] And there is no real downside to this strategy, at least not for the accusers. "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed."[43] These incentives increase under a preclearance regime because section 5 shifts the burden of proof to the jurisdiction seeking preclearance. And the burden of proof can determine the outcome, "[p]articularly where race and partisanship can so often be confused."[44]

Preclearance also intrudes on legislative authority by giving the Department of Justice a mechanism to thwart implementation of state laws based on policy disputes. In its letter denying preclearance to Texas's voter-identification law, DOJ criticized Texas's submission because it did not include evidence of "significant" in-person voter fraud occurring in Texas. In a televised interview on NBC's Nightly News, then-Attorney General Eric Holder explained that preclearance was denied because, in his view, "there is no statistical proof that vote fraud is a big concern in this country, in-person vote fraud is a big concern in this country, and as a result, these voter-ID laws are solutions that deal with a problem that does not really exist. . . . [T]here is no proof that our elections are marred by in-person voter fraud."[45] But States do not bear the burden

[42] *Session*, 298 F. Supp. 2d at 473 n.69 (quotation marks omitted).
[43] Tenney v. Brandhove, 341 U.S. 367, 378 (1951).
[44] Abbott v. Perez, 138 S. Ct. 2305, 2330 n.25 (2018).
[45] Extended Interview: Attorney General Holder on Voting Rights, https://www.nbcnews.com/video/extended-interview-attorney-general-holder-on-voting-rights-44573251665 (last visited June 21, 2019).

of proving that their legislative judgments are correct.[46] And demanding such proof was particularly inappropriate in the case of a voter-identification law because the Supreme Court had previously held, in rejecting a constitutional challenge to Indiana's voter-identification law, that evidence of in-person voter impersonation is not required to justify state voter-identification laws.[47] The Court held, to the contrary, that a State's interests in preventing opportunities for fraud and safeguarding public confidence in the integrity of the election process are so strong that they justify a photo-identification requirement even if there is no evidence that voter impersonation has ever occurred in that State.[48] Refusing to preclear Texas's voter-identification law based on the lack of *significant* evidence of in-person voter impersonation was not consistent with the Supreme Court's holding or with DOJ's limited responsibility to ensure compliance with section 5's substantive requirements. This episode demonstrates the potential for abuse of the preclearance process to thwart state laws not because they are unconstitutional but because the Department of Justice deems them unnecessary.

The "nonretrogression" doctrine exacerbates the burdens of preclearance in several ways. First, the "nonretrogression" doctrine is incompatible with the Supreme Court's equal protection jurisprudence. Under the principle of "nonretrogression," section 5 invalidates *every* voting-related law that results in a disparate impact on racial minorities or on any group that is disproportionately composed of racial minorities—regardless of whether those laws violate the

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[46] *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981); *cf.* Frank v. Walker, 768 F.3d 744, 750 (7th Cir. 2014) ("After a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge cannot say as a 'fact' that they do not, even if 20 political scientists disagree with the Supreme Court.").
[47] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194 (2008) (plurality op.); *id.* at 209 (Scalia, J., concurring in the judgment).
[48] *Id.* at 196-97.

Fifteenth Amendment by denying or abridging the right to vote on account of race or color. Through the "nonretrogression" doctrine, section 5 forces covered jurisdictions to engage in race-conscious decisionmaking; that is the only way for covered jurisdictions to ensure that a new voting law will not inadvertently "retrogress" the position of language and racial minorities "with respect to their effective exercise of the electoral franchise."[49] Yet the lodestar of modern equal-protection doctrine is its promise of color-blind government; only in the most extraordinary situations may a State engage in conscious racial classifications.[50] Compelling a State to engage in constitutionally suspect behavior as a condition of enforcing its voting laws is problematic in itself, but it also exposes the State to a substantial risk—assuming it does secure preclearance—that its initial use of race will allow litigants to challenge the same law under the Equal Protection Clause. As Justice Kennedy noted in *Georgia v. Ashcroft*, "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5."[51]

The "nonretrogression" requirement also invites abuse because it is intolerably vague and fails to give covered jurisdictions fair notice of what laws are permitted and what laws are prohibited. It

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[49] Beer v. United States, 425 U.S. 130, 141 (1976); *see, e.g.*, 28 C.F.R. §§ 51.27(n), 51.28(a) (2012) (requiring jurisdictions seeking preclearance to submit racial-impact data to the Department of Justice).

[50] See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730-31 (2007); Johnson v. California, 543 U.S. 499, 505-06 (2005); see also Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").

[51] Georgia v. Ashcroft, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring); *cf.* Bush v. Vera, 517 U.S. 952, 957 (1996) (plurality op.) (noting that the Department of Justice had precleared the State's congressional plan, which the Court held unconstitutional because the Legislature's reliance on race to create new majority-Hispanic and majority-African-American districts was not narrowly tailored to serve a compelling state interest).

empowers the Department of Justice and district court panels to thwart a state's election-related laws by shifting the goalposts and invoking new theories of "nonretrogression" that could not have been anticipated by a State's legislators—or even by its lawyers.

Texas's attempt to secure preclearance of its voter-identification law illustrates how the vague and shifting definition of "non-retrogression" denies covered jurisdictions fair notice of the standards against which their election changes will be judged. During the administrative-preclearance process, the Department of Justice told the State of Texas that its Voter-ID law failed the "nonretrogression" test because (according to DOJ) registered voters with Spanish surnames were less likely than registered voters without Spanish surnames to have a state driver's license or personal-identification card issued by the Texas Department of Public Safety.[52] This indicated that Texas would satisfy section 5's "nonretrogression" requirement if it could prove that minority registered voters possess driver's licenses or state-ID cards in percentages that equal or exceed the percentages of Anglo registered voters who possess those forms of state-issued identification.

But once the evidence at trial discredited DOJ's "disparity in state-ID possession" theory, the district court proffered another theory of "nonretrogression." Under that theory, Texas would be unable to implement its photo-ID law even if it could prove perfectly symmetrical rates of photo-ID possession across racial and ethnic groups. According to the court, the Texas law failed the "nonretrogression" test because some registered voters who lacked photo identification might have to travel significant distances to obtain a photo ID, and some registered voters who lacked a photo ID might also lack a copy of their birth certificate and therefore might have to pay to obtain

[52] *See* Letter from Thomas Perez to Keith Ingram (March 12, 2012), *available at* https://www.justice.gov/crt/voting-determination-letter-34.

one in order to get a photo ID. Even though there was no evidence showing how many registered voters fell into either of these categories—or the racial and ethnic breakdown of these voters—the court concluded that the law "will almost certainly have retrogressive effect: it imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty."[53] There is little doubt that if Texas had been capable of acquiring data proving that white, black, and Hispanic registered voters possessed state-issued photo-identification in equal percentages, the Department of Justice could have invoked some other theory of "nonretrogression"—perhaps demanding that the State prove equal rates of ID possession among eligible rather than registered voters. Or, as the district court's opinion suggested, it might have concluded that *any* impact on minority voters constituted retrogression regardless of the corresponding impact on white voters.[54]

Recent experience thus demonstrates that "nonretrogression" is not a concrete standard—it can mean almost anything. Placing the burden of proof on the State to satisfy such a vague and ever-changing standard creates a regime in which the Department of Justice and the federal courts wield a discretionary veto power over election-related laws enacted in covered jurisdictions. That is not consistent with the republican form of government that the Constitution guarantees to the people of every State, nor is it consistent with the dignity that States enjoy as sovereign entities under the Constitution.[55]

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[53] Texas v. Holder, 888 F. Supp. 2d, 113, 144 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013) (Mem.).
[54] *See id.* at 141 ("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 in the next election. This is retrogression.").
[55] *See* U.S. Const. art. IV, § 4; Fed. Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760-61 (2002); New York v. United States, 505 U.S. 144 (1992).

Under Current Conditions, Preclearance Exceeds Congress's Power to "Enforce" the Fifteenth Amendment.

The clear import of *Shelby County* is that placing a sovereign state into federal receivership by automatically delaying the implementation of its duly enacted laws is no longer an "appropriate" means of enforcing the Fifteenth Amendment. That amendment provides:

> Section 1. 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 of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.[56]

Section 1 of the Fifteenth Amendment prohibits only laws or practices that are motivated by a racially discriminatory purpose; that is what "on account of" race or color means.[57] Voting restrictions that merely impact different types of voters in different ways do not violate the Fifteenth Amendment, because they do not deny or abridge the right to vote on account of race or color. This remains true even if these laws affect the right to vote on account of a criterion that happens to be correlated with race. Section 2 of the Fifteenth Amendment empowers Congress to "enforce" section 1 of the Fifteenth Amendment by "appropriate legislation." This means that any statute imposing preclearance on a State must satisfy two independent constitutional requirements. First, preclearance must "enforce" the Fifteenth Amendment's prohibition on purposeful racial discrimination. Second, it must be "appropriate" legislation to enforce the Fifteenth Amendment's guarantee.

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[56] U.S. Const. amend. XV.

[57] *See* City of Mobile v. Bolden, 446 U.S. 55, 61-63 (1980) (plurality op.).

When Congress enacts legislation to enforce the Fourteenth Amendment, it must be designed to prevent or remedy actual violations of the Fourteenth Amendment.[58] Congress may not use its "enforcement" power to impose extra-constitutional substantive obligations on the States.[59] The only circumstance in which Congress may prohibit constitutional conduct pursuant to this enforcement power is when prophylactic legislation is needed to prevent or deter state officials from violating the Fourteenth Amendment. And any prophylactic measure of this sort must be "congruen[t]" and "proportion[al]" to the constitutional violations that Congress seeks to prevent.[60] The "congruence" prong requires Congress to demonstrate the need for its prophylactic measure by documenting a pattern of constitutional violations by the States in the legislative record.[61] The "proportionality" requirement prohibits Congress from enacting needlessly over-inclusive prophylactic measures.[62]

The Supreme Court has not explicitly held that the "congruence and proportionality" test governs Congress's power to enforce the Fifteenth Amendment, and the Supreme Court did not resolve this issue in *Northwest Austin*.[63] But there can be no justification for applying a different standard of review when Congress legislates pursuant to its Fifteenth Amendment powers. Section

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[58] *See* City of Boerne v. Flores, 521 U.S. 507, 517 (1997).
[59] *Id.* at 519; *id.* at 527-28 (rejecting the notion that Congress may "enact[] legislation that expands the rights contained in § 1 of the Fourteenth Amendment").
[60] *Id.* at 520.
[61] *See id.* at 530; *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640-41 (1999).
[62] *See City of Boerne*, 521 U.S. at 532 (holding that preventative measures are permissible only when "there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."); *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) (holding that Congress lacked authority under section 5 of the Fourteenth Amendment to enact a nondiscrimination law that "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional").
[63] 557 U.S. 193 (2009).

2 of the Fifteenth Amendment and section 5 of the Fourteenth Amendment are nearly identical in wording.[64] And they were ratified less than two years apart. There is no basis in constitutional text for defining "enforce" and "appropriate legislation" differently across these two constitutional provisions.[65] And it is hard to imagine that the Supreme Court would adopt such an asymmetric regime in defining the scope of Congress's powers to enforce the Reconstruction Amendments.

There are rare situations in which Congress may "enforce" the Fourteenth or Fifteenth Amendments by prohibiting conduct that does not actually violate those constitutional provisions.[66] The effective enforcement of a constitutional command will at times require prophylactic legislation to ensure that the net is cast sufficiently wide to catch all constitutional violations, especially when confronting a history of repeated and longstanding constitutional violations by state officials. Difficulties of proof or ease of administration will sometimes justify a rule that may be slightly overinclusive but that nevertheless ensures full compliance with the constitutional command.[67] For these reasons, the Supreme Court has emphasized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."[68]

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[64] *Compare* U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."), *with* U.S. Const. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").
[65] *See generally* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).
[66] *See City of Boerne*, 521 U.S. at 518.
[67] *See, e.g.*, *id.*; South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); *see generally* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988).
[68] *City of Boerne*, 521 U.S. at 518.

But even when prophylactic legislation is authorized, it must be limited in scope. The Supreme Court has held that Congress may prohibit only "a somewhat broader swath of conduct" than that prohibited by the Fourteenth Amendment.[69] And prophylactic legislation must be "narrowly targeted" to prevent and deter a documented pattern of unconstitutional behavior.[70] Congress could not, for example, "enforce" the Fifteenth Amendment by abolishing all voting qualifications in every State.[71] Even though this type of law would "prevent" violations of the Fifteenth Amendment, it is too overinclusive to qualify as "enforcement" legislation. It would simply impose a new substantive legal obligation on the States that cannot be found in the Constitution.

The congressional prohibitions on literacy tests provide an example of permissible prophylactic legislation under the Fifteenth Amendment. When Congress enacted the Voting Rights Act of 1965, the Supreme Court had previously held that literacy tests did not violate the Fifteenth Amendment.[72] But Congress chose to exercise its prophylactic power by suspending literacy tests for five years in the jurisdictions covered by section 5. This measure extended somewhat beyond the Fifteenth Amendment because it banned literacy tests in covered jurisdictions even if those tests were administered in a race-neutral fashion.[73] Nonetheless, the Court properly upheld this targeted prohibition on literacy tests because the congressional record demonstrated that "in most of the States covered by the Act," literacy tests had been applied in a manner that plainly violated the Fifteenth Amendment "for many years."[74] And because litigation challenging literacy tests on

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[69] *See Kimel*, 528 U.S. at 81, 86 (emphasis added).
[70] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).
[71] *Cf.* Oregon v. Mitchell, 400 U.S. 112, 117-118 (1970).
[72] *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).
[73] *See id.* at 53-54.
[74] South Carolina v. Katzenbach, 383 U.S. 301, 333-34 (1966); *see also id.* at 334 ("Under these circumstances, the Fifteenth Amendment has clearly been violated.").

a case-by-case basis had not proven effective at preventing these unconstitutional practices, Congress enacted a rule that prohibited some constitutional uses of literacy tests but had the virtue of ensuring that violations of the Fifteenth Amendments would cease. In light of the numerous and persistent constitutional violations involving the use of literacy tests that appeared in the legislative record, Congress was justified in invoking its prophylactic enforcement powers, and the rule that it enacted was "narrowly targeted" to the tests and devices that had been enacted with racially discriminatory purposes or administered in a racially biased manner. Congress went a step further in 1970 when it imposed a nationwide prohibition on literacy tests in state and federal elections, which the Supreme Court upheld after concluding that the discriminatory use of literacy tests "is not confined to the South."[75]

The extraordinary burdens of a preclearance regime could be "appropriate" in a world in which aggrieved citizens are unable to use traditional litigation to secure relief against a State's unconstitutional voting laws. In 1965, Congress found that those conditions existed in the States originally targeted by the preclearance regime.[76] If those conditions exist in any State today, and there is no reason to believe that they do, those conditions most certainly do not exist in Texas.

Recent voting rights litigation in Texas shows, to the contrary, that traditional litigation is more than adequate to identify and prevent violations of the Constitution and the Voting Rights Act. The courts have not hesitated to identify potential legal violations, and the Texas Legislature has acted promptly to address them. In redistricting litigation following the 2010 census, for example, a federal district court ordered interim remedial redistricting plans into effect because the

[75] Oregon v. Mitchell, 400 U.S. 112, 134 (1970) (opinion of Black, J.).
[76] *See Katzenbach*, 383 U.S. at 329-30.

legislatively enacted plans had not been precleared. Consistent with the Supreme Court's instructions in *Perry v. Perez*,[77] the district court conducted only a preliminary review of claims against the State's plans, but the court-ordered interim plans made extensive changes.[78] The Legislature repealed its challenged plans and permanently adopted the court-ordered plans in its next session.[79] Similarly, in litigation over Texas's voter-identification law, the State agreed to a temporary remedial order to address a claim under section 2 of the Voting Rights Act. In the next legislative session, the Texas Legislature amended its voter-identification law to incorporate the court-ordered remedy, which allows individuals who cannot secure a qualifying photo ID to cast a regular in-person ballot by executing an affidavit at the polls.[80] The Fifth Circuit later held that the amended statute provided "an effective remedy for the only deficiencies testified to" in the preexisting law.[81] Those actions bear no resemblance to the conduct that justified preclearance in 1965, when officials in certain States routinely took steps to evade federal court orders and prolong their resistance to the Fifteenth Amendment. Rather than try to stay "one step ahead" of the courts in an effort to defy the Constitution, the State of Texas has followed the courts' lead in an effort to conform its voting laws to the Constitution and the Voting Rights Act. Those current conditions cannot possibly justify imposing preclearance on Texas or any other State.

Statutory Violations and Preclearance Objections Cannot Justify Preclearance.

To qualify as appropriate enforcement legislation under the Fifteenth Amendment, any preclearance regime must address a pattern of persistent constitutional violations. Statutory claims

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[77] 565 U.S. 388 (2012) (per curiam).
[78] Abbott v. Perez, 138 S. Ct. 2305, 2316 (2018).
[79] *Id.* at 2317.
[80] *See* Veasey v. Abbott, 888 F.3d 792, 796 (5th Cir. 2018).
[81] *Id.* at 804.

under section 2 of the Voting Rights Act or preclearance objections under section 5 cannot support preclearance for the obvious reason that they do not establish a constitutional violation. Section 2 of the Voting Rights Act already goes beyond the limits of the Fourteenth and Fifteenth Amendments by prohibiting any voting practice that "results in the denial or abridgment of the right of any citizen of the United States to vote on account of race or color," or on account of membership in a language-minority group.[82] The same goes for section 5, which preemptively invalidates every voting law until a State proves to the satisfaction of the Department of Justice or a federal court that the law does not violate the Constitution and that it will not result in retrogression. A preclearance regime based on violations (or alleged violations) of prophylactic measures that already extend beyond the limits of the Constitution cannot be a "congruent and proportional" remedy for Constitutional violations under *City of Boerne v. Flores*.[83]

Past redistricting cycles could not justify preclearance even if they did reflect current conditions because they do not demonstrate pervasive and flagrant constitutional violations by the State of Texas. To the extent the Supreme Court has found constitutional deficiencies in Texas redistricting plans, none of those deficiencies resulted from intentional racial discrimination. In *White v. Weiser*,[84] the Supreme Court found that the State's congressional districts were malapportioned under Article I § 2. In *White v. Regester*,[85] the Court found that two multimember districts were unconstitutional under a now-superseded effect-based theory of Fourteenth Amendment liability. In *Bush v. Vera*,[86] the Court held that the Legislature's reliance on racial data

[82] 52 U.S.C. § 10301(a); *id.* § 10303(f)(2).
[83] 521 U.S. 507, 520 (1997).
[84] 412 U.S. 783, 790–93 (1973).
[85] 412 U.S. 755, 765–70 (1973).
[86] 517 U.S. 952, 957 (1996) (plurality op.).

to create new majority-Hispanic and majority-African-American congressional districts was not narrowly tailored to serve a compelling state interest and therefore failed strict scrutiny. In *LULAC v. Perry*,[87] private litigants successfully challenged a portion of a congressional redistricting plan under section 2, but they failed to prove any constitutional violations. And in *Abbott v. Perez*, the Court affirmed a finding that the Legislature impermissibly relied on race in a single state legislative district when it adopted an amendment "offered by the then-incumbent . . . precisely because it fixed an objection . . . that the district's Latino population was too low."[88] The Court noted, however, that "[t]he Legislature adopted changes to HD90 at the behest of *minority groups*, not out of a desire to discriminate."[89] If anything, previous redistricting cycles show that the State has consistently worked to reconcile its electoral maps with court orders, adopting court-ordered plans in whole or in part in all but one decennial redistricting cycle since 1970.[90]

Preclearance objections under section 5 cannot support preclearance, either, because a denial of preclearance under section 5 does not prove that a constitutional violation occurred. A finding

[87] 548 U.S. 399 (2006).
[88] Abbott v. Perez, 138 S. Ct. 2305, 2329 (2018).
[89] *Id.* at 2329 n.24.
[90] *See, e.g.*, Act of May 31, 1975, 64th Leg., R.S., Ch. 537, 1975 Tex. Gen. Laws 1390 (adopting a court-ordered congressional redistricting plan with a modification to the boundary between two districts); Act of May 10, 1983, 68th Leg., R.S., Ch. 185, 1983 Tex. Gen. Laws 756 (adopting modifications to the LRB's 1981 House redistricting plan ordered in *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982)); Act of May 28, 1983, 68th Leg., R.S., Ch. 531, 1983 Tex. Gen. Laws 3086 (enacting court-ordered congressional plan from *Seamon v. Upham* with changes to seven districts); Act of May 8, 1997, 75th Leg., R.S., Ch. 133, 1997 Tex. Gen. Laws 258 (enacting a Texas House settlement plan entered in *Thomas v. Bush*, No. 1:95-cv-186 (W.D. Tex. Sept. 15, 1995), with minor changes to Collin, Jefferson, and Williamson Counties). These bills are available, together with every redistricting bill introduced in the Texas Legislature between 1881 and 2013, from the Legislative Reference Library of Texas at http://www.lrl.state.tx.us/legis/redistricting/redistrictingBills.cfm (last visited Jan. 29, 2019).

of discriminatory effect or "retrogression" is not a constitutional violation.[91] And an objection based on discriminatory purpose shows only that the covered jurisdiction failed to prove the absence of discriminatory purpose to the satisfaction of the Attorney General—a standard that does not necessarily incorporate constitutional rules.[92] As one election-law scholar has explained, "A number of DOJ objections over the years have been based on the DOJ's aggressive theories about how Section Five should be enforced."[93]

And violations by subjurisdictions such as cities and counties cannot justify preclearance for the State of Texas because the State is not responsible for the acts of other governmental entities. In any event, imposing preclearance on the State would not prevent other jurisdictions from violating the Constitution.[94] Subjecting a State to preclearance based on the conduct of other governmental entities could not possibly be a congruent and proportional remedy.

Conclusion

The U.S. Supreme Court's decision in *Shelby County* recognized that the Voting Rights Act "employed extraordinary measures to address an extraordinary problem."[95] As Congress revisits the Voting Rights Act, it must adhere to the constitutional principles the Supreme Court

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[91] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980) (plurality op.).
[92] *See, e.g.*, *Abbott*, 138 S. Ct. at 2330 n.25 ("In assessing the significance of the D.C. court's evaluation of intent, it is important not to forget that the burden of proof in a preclearance proceeding was on the State.").
[93] Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 Ohio St. L.J. 177, 192 (2005).
[94] *Cf.* Veasey v. Abbott, 830 F.3d 216, 232 (5th Cir. 2016) (en banc) ("[I]n a state with 254 counties, we do not find the reprehensible actions of county officials in one county . . . to make voting more difficult for minorities to be probative of the intent of legislators in the Texas Legislature . . . .").
[95] Shelby County v. Holder, 570 U.S. 529, 534 (2013).

articulated in *Shelby County* that limit the power of the federal government to impede on fundamental principles of federalism and disturb the coequal sovereignty of the States.