



**LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS  
U N D E R L A W**

**STATEMENT OF JON GREENBAUM  
CHIEF COUNSEL  
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

**U.S. HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL  
LIBERTIES HEARING ON "OVERSIGHT OF THE VOTING RIGHTS ACT:  
A CONTINUING RECORD OF DISCRIMINATION"**

**MAY 27, 2021**

## Introduction

Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House of Representatives Committee on the Judiciary, my name is Jon Greenbaum and I serve as the Chief Counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on oversight of the Voting Rights Act as the Judiciary Committee addresses the issue of whether and how to respond to the Supreme Court's decision *Shelby County v. Holder*,<sup>1</sup> which effectively immobilized the preclearance provisions of Section 5 of the Voting Rights Act by finding its underlying coverage formula unconstitutional.

In my view, Congress needs to respond to the *Shelby County* decision in a manner akin to the bill passed by the U.S. House of Representatives in the previous session of Congress — H.R. 4, the John Lewis Voting Rights Advancement Act, which among other things, included a replacement coverage formula that would be applied to the preclearance provisions of Section 5 and the federal observer provisions of Section 8.

I come to this conclusion based on twenty-four years of working on voting rights issues nationally. From 1997 to 2003, I served as a Senior Trial Attorney in the Voting Section at the United States Department of Justice, where I enforced various provisions of the Voting Rights Act, including Section 5, on behalf of the United States. In the more than seventeen years since, I have continued to work on voting rights issues at the Lawyers' Committee for Civil Rights Under Law as Chief Counsel, where I oversee our Voting Rights Project, and prior to that, when I served as Director of the Voting Rights Project.

The Lawyers' Committee is a national civil rights organization created by President Kennedy in 1963 to mobilize the private bar to confront issues of racial discrimination. Voting rights has been an organizational core area since the inception of the organization. During my time at the Lawyers' Committee, I was intimately involved in the constitutional defense of Section 5 and its coverage formula in *Shelby County* and its predecessor case *Northwest Austin Municipal Utility District No. 1 v. Holder*.<sup>2</sup> I also staffed the National Commission on the Voting Rights Act, which issued a report entitled *The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (2006). The report and record of the National Commission on the Voting Rights Act, which was submitted to the House Judiciary Committee at the Committee's request, was the largest single piece of the record supporting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.

Legislation like the John Lewis Voting Rights Advancement Act originates from Congress's power to enforce the protections against voting rights discrimination found

---

<sup>1</sup> 570 U.S. 529 (2013).

<sup>2</sup> 557 U.S. 193 (2009).

in the Fifteenth and Fourteenth Amendments. The Supreme Court has made clear that such legislation must be rationally related to those enforcement powers<sup>3</sup> and this will necessitate Congress developing a legislative record sufficient to justify any such legislation.

As this Committee embarks on the process of building a legislative record, we are far from working off of a blank slate. A lot of work has been done in the last eight years to compile a current record of voting discrimination. The Lawyers' Committee's own contributions to compiling this record have been substantial and this testimony provides an opportunity to introduce these contributions into the current legislative record.

I have attached the following Lawyers' Committee documents as appendices to my testimony and my testimony draws liberally from them:

- The 2014 report of the National Commission on Voting Rights, *Protecting Minority Voters: Our Work Is Not Done* ("2014 National Commission Report"). The Lawyers' Committee staffed the work of the National Commission, which conducted 25 field hearings and also issued a 2015 report on election administration issues. I have attached the 2014 National Commission Report as Greenbaum Record Item ("GRI") 1 and the transcripts of each field hearing as GRI 2-26.
- The June 25, 2019 testimony of Kristen Clarke, President and Executive Director of the Lawyers' Committee, before this Subcommittee, is attached as GRI 27.
- My September 4, 2019 testimony before this Subcommittee is attached as GRI 28.
- The Lawyers' Committee's *Preliminary Report of Racial and Ethnic Discrimination in Voting, 1994-2019*, is attached as GRI 29.
- A summary of the more than 100 voting cases the Lawyers' Committee has participated in since the *Shelby County* decision is attached as GRI 30.
- The Complaint that the Lawyers' Committee filed as a challenge to the 2021 voter suppression law enacted in Georgia is attached as GRI 31.

These documents, which are likely to be a mere fraction of the record Congress is likely to compile in its deliberations as to whether to respond the *Shelby County* decision, establish the following in my view:

- The effectiveness and efficiency of Section 5 in preventing voting discrimination prior to the *Shelby County* decision;
- The high level of voting discrimination since the *Shelby County* decision, especially in the jurisdictions formerly covered by Section 5;

---

<sup>3</sup> *Shelby*, 570 U.S. at 554, 556; *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 330-31 (1966).

- The hole the *Shelby County* decision left in the federal enforcement scheme to combat voting discrimination;
- The need for Congress to address *Shelby County* by enacting legislation that will prevent discriminatory voting changes from going into effect in places where voting discrimination is greatest.

### **The State of Affairs Prior to the *Shelby County* Decision**

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided a relatively effective means of preventing and remedying minority voting discrimination. Section 2, which is discussed more fully below, remains as the general provision enabling the Department of Justice and private plaintiffs to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 is in effect nationwide.<sup>4</sup> Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change.<sup>5</sup> From its inception, there was a sunset provision for the formula, and the sunset provision for the 2006 Reauthorization was 25 years.<sup>6</sup>

Jurisdictions covered by section 5 had to show federal authorities that a potential voting change did not have a discriminatory purpose or effect. Discriminatory purpose under Section 5 was the same as the Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against voters of color.<sup>7</sup> Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice.<sup>8</sup> This was also known as retrogression, and in most instances was easy to measure and administer. For example, if a proposed redistricting plan maintained a majority Black district that elected a Black preferred candidate at the same Black population percentage as the plan in effect, it would be highly unlikely to be found retrogressive. If, however, the proposed plan significantly diminished the Black population percentage in the same district, it would invite serious questions as to whether it was retrogressive.

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ precleared the change or did not act in 60 days, the covered jurisdiction could implement the change.<sup>9</sup> The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60 day period if the submitted information

---

<sup>4</sup> 52 U.S.C. § 10301.

<sup>5</sup> 52 U.S.C. §§ 10303(b), 10304.

<sup>6</sup> 52 U.S.C. § 10303(b).

<sup>7</sup> 52 U.S.C. § 10304(c).

<sup>8</sup> 52 U.S.C. § 10304(b), (d).

<sup>9</sup> 52 U.S.C. § 10304(a).

materially supplemented the submission.<sup>10</sup> DOJ could extend the 60 day period once by sending a written request for information to the jurisdiction.<sup>11</sup> This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ,<sup>12</sup> seeking preclearance from the federal court,<sup>13</sup> and modifying the change and resubmitting it.

In the nearly seven years I worked at DOJ, I witnessed first-hand how effective Section 5 was at preventing voting discrimination and how efficiently DOJ administered the process to minimize the burdens on its own staff of attorneys and analysts, and on the covered jurisdictions. The Section 5 Procedures cited above provided transparency as to DOJ's procedures and gave covered jurisdictions guidance on how to proceed through the Section 5 process. Internal procedures enabled DOJ staff to preclear unobjectionable voting changes with minimal effort and to devote the bulk of their time to those changes that required close scrutiny.

The benefits of Section 5 were numerous and tangible. The 2014 National Commission Report provided the following statistics and information regarding DOJ objections:

By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.

Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of

---

<sup>10</sup> Procedures for the Administration of Section 5 of the Voting Rights Act (“Section 5 Procedures”), 28 C.F.R. § 51.37.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 28 C.F.R. § 51.45

<sup>13</sup> 52 U.S.C. § 10304(a)

individual lawsuits.<sup>14</sup>

In addition to the changes that were formally blocked, Section 5's impact on deterring discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and that they had the burden of demonstrating that the changes were non-discriminatory. By the time I began working at DOJ, Section 5 had been in effect for several decades and most jurisdictions knew better than to enact changes which would raise obvious concerns that they were discriminatory – like moving a polling place in a majority Black precinct to a sheriff's office. In the post-*Shelby* world, a jurisdiction is likely to get away with implementing a discriminatory change for one election (or more) before a plaintiff receives relief from a court, as the Hancock County, Georgia voter purge and Texas voter identification cases detailed later illustrate.

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which individuals and groups could subscribe to in order to receive this weekly list from DOJ.<sup>15</sup> For submissions of particular interest, DOJ would provide public notice of the change if it believed the jurisdiction had not provided adequate notice of the change.<sup>16</sup> But even more importantly, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ's Section 5 Procedures requested that jurisdictions with a significant minority population provide the names of minority community members who could speak to the change,<sup>17</sup> and DOJ's routine practice was to call at least one local minority contact and to ask the individual whether she or he was aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.<sup>18</sup>

### **The *Shelby County* Decision**

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act “impose[d] current burdens,” it “must be justified by current needs.”<sup>19</sup> The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later.<sup>20</sup> The four dissenting justices found that Congress had demonstrated that regardless of what data

---

<sup>14</sup> 2014 National Commission Report at 56.

<sup>15</sup> Section 5 Procedures, 28 C.F.R. § 51.32-51.33.

<sup>16</sup> *Id.* at 28 C.F.R. § 51.38(b).

<sup>17</sup> *Id.* at 28 C.F.R. § 51.28(h).

<sup>18</sup> *Id.* at 28 C.F.R. § 51.29.

<sup>19</sup> *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin*, 557 U.S. at 203).

<sup>20</sup> *Shelby County*, 570 U.S. at 545-54.

was used to determine the formula, voting discrimination had persisted in the covered jurisdictions.<sup>21</sup> The majority made clear that “[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”<sup>22</sup>

The consequence of the *Shelby County* decision is that Section 5 is effectively immobilized as, for now, preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. This special preclearance coverage is authorized by Section 3(c) of the Act. Courts have rarely ordered Section 3(c) coverage, and when they do, it is typically quite limited. Indeed, the only jurisdictions I am aware of that have been subject to Section 3(c) coverage since the *Shelby County* decision are Pasadena, Texas and Evergreen, Alabama.<sup>23</sup> In the case of Pasadena, the only changes subject to preclearance relate to the method of election and redistricting.<sup>24</sup>

As a result, Section 5 is essentially dead until Congress takes up the Supreme Court’s invitation to craft another coverage formula. There are compelling reasons for Congress to do so because, as discussed below, voting discrimination has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

### **The Effect of the *Shelby County* Decision**

The year after the *Shelby County* decision was issued, the Executive Summary and Chapter 3 of the 2014 National Commission Report discussed what was lost in the *Shelby County* decision. We identified the following impacts:

- Voting rights discrimination would proliferate, particularly in the areas formerly covered by Section 5;
- Section 2 would not serve as an adequate substitute for Section 5 for numerous reasons:
  - The statutes are not identical but were instead intended to complement one another;
  - Section 5 prevents a discriminatory voting change from ever going into effect whereas discrimination can affect voters in a Section 2 case prior to a court decision or a settlement;
  - Section 2 litigation is time-consuming and expensive compared to Section 5 which is efficient and less-resource intensive;
  - Section 2 is less likely to prevent discrimination than Section 5 because:
    - Under Section 2 plaintiffs have the burden whereas under Section 5, jurisdictions have the burden of proof;
    - Section 2 has a complicated multi-factor test that provides

---

<sup>21</sup> *Id.* at 560 (Ginsberg, J. dissenting).

<sup>22</sup> *Id.* at 556.

<sup>23</sup> *See Patino v. City of Pasadena*, 230 F. Supp. 667, 729 (S.D. Tex. 2017).

<sup>24</sup> *Id.*

numerous defenses for jurisdictions, whereas Section 5 has a simple retrogression test

- The *Shelby County* decision and DOJ's interpretation that the decision also bars use of the coverage formula for sending federal observers have left voting processes vulnerable to discrimination.<sup>25</sup>

The subsequent years have demonstrated that the all of the negative impacts we anticipated have come to pass.

### **Voting Rights Discrimination has Proliferated Since *Shelby County*, Particularly in the Areas Formerly Covered by Section 5**

The Lawyers' Committee's Voting Rights Project has never been busier than in the *post-Shelby County* years, during which we have participated as a counsel to a party or as amici in more than 100 voting rights cases. A short summary of each case is attached as GRI 30. Because the Lawyers' Committee has a specific racial justice mission, all of the cases we have participated in implicate race in some fashion in our view even if there are no race claims in the case.

In my 2019 testimony before this Subcommittee, I looked further into the 41 *post-Shelby County* voting rights cases the Lawyers' Committee had filed up to that time. See GRI 28. My testimony reflected that voting discrimination remains alive and well, particularly in the states formerly covered by Section 5. The findings included the following:

- In the thirty-seven cases where we sued state or local governments, twenty-nine (78.3%) involved jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we sued seven of the nine states that were covered by Section 5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as the two states that were not covered but had a substantial percentage of the population covered locally (North Carolina and New York).
- We achieved substantial success. Of the thirty-three cases where there had been some result at the time, we achieved a positive result in 26 of 33 (78.8%). In most of the seven cases where we were not successful, we had filed emergent litigation, either on Election Day or shortly before, where achieving success is most difficult.

This data tells us that voting discrimination remains substantial, particularly in the areas previously covered by Section 5, and especially considering that the Lawyers' Committee is but one organization.

---

<sup>25</sup> 2014 National Commission Report at 12, 55-64.



In 2019, the Lawyers' Committee conducted a 25-year review of the number of times that an official entity made a finding of voter discrimination in the *Preliminary Report of Racial and Ethnic Discrimination in Voting, 1994-2019*, which is attached as GRI 29. This preliminary analysis of administrative actions and court proceedings identified 340 instances between 1994 and 2019 where the U.S. Attorney General or a court made a finding of voting discrimination or where a jurisdiction changed its laws or practices based on litigation alleging voting discrimination. We found that successful court cases occurred in disproportionately greater numbers in jurisdictions that were previously covered under Section 5.

Voter turnout data by race is an additional measure of the distance we have to go in eliminating voting discrimination. In three formerly covered states (Georgia, Louisiana, South Carolina) and in North Carolina, which was partially covered, state election officials maintain voter turnout data that is easily obtainable from the state websites. In the November 2020 election, white voter turnout was substantially greater than Black turnout in each of these four states:<sup>26</sup> Georgia, 73% white to 60% Black;<sup>27</sup> Louisiana, 74% white to 63% Black;<sup>28</sup> North Carolina, 79% white to 68% Black;<sup>29</sup> and South Carolina, 74% white to 66% nonwhite (South Carolina uses white and nonwhite categories).<sup>30</sup>

### **Why Section 2 is an Inadequate Substitute for Section 5**

Prior to the *Shelby County* decision, critics of Section 5 frequently minimized the negative impact caused by its absence by pointing out that DOJ and private parties could still stop discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of *Shelby County* where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its “decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2.”<sup>31</sup>

During the *Shelby County* litigation and the reauthorization process preceding it, defenders of Section 5 repeatedly pointed out why Section 2 was an inadequate

---

<sup>26</sup> The statistics are rounded to the nearest percentile.

<sup>27</sup> General Election Turnout By Demographics November 2020, Georgia Secretary of State, [https://sos.ga.gov/index.php/elections/general\\_election\\_turnout\\_by\\_demographics\\_november\\_2020](https://sos.ga.gov/index.php/elections/general_election_turnout_by_demographics_november_2020)

<sup>28</sup> State Wide Post Election Statistical Report, Election Date 11/03/2020, Louisiana Secretary of State, [https://electionstatistics.sos.la.gov/data/Post\\_Election\\_Statistics/statewide/2020\\_1103\\_sta.pdf](https://electionstatistics.sos.la.gov/data/Post_Election_Statistics/statewide/2020_1103_sta.pdf)

<sup>29</sup> NC Voter Turnout Statistics, 2020 General Election, North Carolina State Board of Elections, [https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Voter%20Turnout%20Statistics/voter\\_turnout\\_stats\\_20201103.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Voter%20Turnout%20Statistics/voter_turnout_stats_20201103.pdf)

<sup>30</sup> Voter History Statistics for Recent SC Elections, South Carolina Board of Elections, <https://www.scvotes.gov/data/voter-history.html>

<sup>31</sup> *Shelby County*, 570 U.S. at 556.

substitute. Eight years of experience demonstrate this.

This is hardly a surprise given that Section 5 and Section 2 were designed by Congress to complement one another as part of a comprehensive set of tools to combat voting discrimination. Section 5 was designed to prevent a specific problem: to prevent jurisdictions with a history of discrimination from enacting new measures that would undermine the gains minority voters were able to secure through other voting protections, including Section 2. The Section 5 preclearance process was extremely potent, but also efficient and surgical in its limited geographic focus and sunset provisions. It was also relatively easy to evaluate because the retrogressive effect standard — whether minority voters are made worse off by the proposed change — is simple to determine in all but the closest cases. Section 5 is designed to protect against discriminatory changes to the status quo.

Section 2 is quite different. It evaluates whether the status quo is discriminatory and thus must be changed. The test for liability should be, and is, rigorous because it is a court-ordered change. Although Section 2 (results) and Section 5 (retrogression) both have discriminatory impact tests, they are distinct. As discussed above, the Section 5 retrogression test is quite straightforward in determining whether a jurisdictional-generated change should be blocked: will minority voters be worse off because of the change?

In contrast, the Section 2 results inquiry is complex and resource-intensive to litigate. The “totality of circumstances” test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in applying the totality of circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).<sup>32</sup> On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*,<sup>33</sup> before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that a minority group is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (minority voters are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting), and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, courts have also added an additional test, with the developing majority view requiring that plaintiffs demonstrate that the challenged law imposes a discriminatory burden on members of a protected class and that this “burden must be in part caused by or linked to social conditions that

---

<sup>32</sup> See e.g., *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

<sup>33</sup> *Id.* at 50-51.

have or currently produce discrimination against members of the protected class.”<sup>34</sup>

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*,<sup>35</sup> which I litigated at the Department of Justice, was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though we had prevailed on the *Gingles* preconditions on summary judgment,<sup>36</sup> and needed to litigate only the totality of circumstances in the district court.

Four specific examples from the Lawyers’ Committee’s litigation record illustrate why Section 2 is an inadequate substitute for Section 5. The first and most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the *Shelby County* decision.<sup>37</sup> The afternoon that *Shelby* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.<sup>38</sup> Several civil rights groups, including the Lawyers’ Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2 and DOJ filed its own suit under Section 2. All of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts testified. Prior to the November 2014 election, the District Court ruled that SB 14 violated the “results” prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court’s injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law — now deemed to be discriminatory — remained in effect.<sup>39</sup> Subsequently, a three-judge panel and later an en banc panel of the Fifth Circuit Court of Appeals, affirmed the District Court’s finding as to discriminatory result.<sup>40</sup> In the absence of Section 5, elections that took place from June 25, 2013 until the Fifth Circuit en banc opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The District Court awarded private plaintiffs \$5,851,388.28 in attorneys’ fees and \$938,945.03 in expenses, for a total of \$6,790,333.31. The fee award is currently on appeal. As of June 2016, Texas had

---

<sup>34</sup> *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)); see also, *Ohio State Conference for the NAACP v. Husted*, 786 F.3d 524, 554 (6th Cir. 2014).

<sup>35</sup> 316 F. Supp. 2d 268 (D.S.C. 2003), *aff’d*, 365 F.3d 341 (4th Cir.), *cert. denied*, 543 U.S. 999 (2004).

<sup>36</sup> *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002).

<sup>37</sup> *Veasey*, 830 F.3d at 227 n.7.

<sup>38</sup> *Id.* at 227.

<sup>39</sup> *Id.* at 227-29, 250.

<sup>40</sup> *Id.* at 224-25.

spent \$3.5 million in defending the case.<sup>41</sup> Even with no published information from DOJ, more than \$10 million in time and expenses were expended in that one case.

Second, in *Gallardo v. State*,<sup>42</sup> the Arizona legislature passed a law that applied only to the Maricopa County Community College District and added two at-large members to what was previously a five-single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a “more information” letter based on concerns that the addition of two at-large members would weaken the electoral power of minority voters on the board, in light of racially polarized voting in Maricopa County. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the *Shelby County* decision did they move forward, precipitating the lawsuit brought by the Lawyers’ Committee and its partners. We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona’s constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

Third, in 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of “challenge proceedings” to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers’ Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples’ Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register.<sup>43</sup> Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that will remedy the violations, and required the county’s policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly Black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died. This case also reflects the importance of the notice component of Section 5 as the county only provided notice of the purge vaguely in meeting agendas.

The fourth matter is ongoing and reflects the significant present-day impact of the *Shelby County* decision and the loss of Section 5. It involves a law that Georgia, a previously covered jurisdiction, enacted this year, SB 202, a 53 section, 98-page law

---

<sup>41</sup> Jim Malewitz & Lindsay Carbonell, Texas' Voter ID Defense Has Cost \$3.5 Million, *The Texas Tribune* (June 17, 2016), <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/>.

<sup>42</sup> 236 Ariz. 84, 336 P.3d 717 (2014).

<sup>43</sup> *Georgia State Conference of the NAACP v. Hancock County*, Case No. 15-cv-414 (M.D. Ga. 2015).

that changes many aspects of Georgia elections. It has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers' Committee is counsel in one of these suits and the Complaint from that case is attached as GRI 31.

The litigation will unquestionably be resource-intensive even if the various cases are fully or partially consolidated and the Plaintiffs engage in substantial coordination. It will require numerous experts and extensive fact discovery. There will be elections — and possibly multiple cycles of elections — that will occur before Plaintiffs will have the evidence needed to establish a constitutional or Section 2 violation and the court will set aside the time to hear and decide the claims. If Plaintiffs prevail, Georgia will undoubtedly appeal and even more time will pass.

But for the *Shelby County* decision, SB 202 would not have been allowed to take effect until there was an opportunity to determine its impact on voters of color. Indeed, but for the *Shelby County* decision, there would be no SB 202, at least not in its current form because at least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place. This is perhaps most clearly demonstrated by Georgia introducing several restrictions focused on voting by mail:

- The new absentee ballot ID requirements mandate that voters include a Georgia Driver's license number or Georgia State ID number on their absentee ballot application. If they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.
- The bill also prohibits public employees and agencies from sending unsolicited absentee ballot applications to voters, yet threatens private individuals and organizations who are not so prohibited with a substantial risk of incurring hefty fines for every application they send to an individual who has not yet registered to vote or who has already requested a ballot or voted absentee.
- SB 202 significantly limits the accessibility of absentee ballot drop boxes to voters. While all counties would be required to have at least one, the placement of drop boxes is limited to early voting locations and drop boxes are available only to voters who can enter the early voting location during early voting hours to deposit their ballot inside the box. Thus, drop boxes are essentially useless to voters who can vote early in-person or who cannot access early voting hours at all due to work or other commitments during early voting hours.
- The bill also mandates an earlier deadline of 11 days before an election to request an absentee ballot, leaving some voters who become ill or have to

travel out of the area in the lurch if they cannot vote during early voting and are unable to meet the earlier deadline to apply for a ballot.<sup>44</sup>

These restrictions were adopted right after the November 2020 election during which voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.<sup>45</sup> Given this seemingly disproportionate impact on voters of color, I believe that if Georgia were subject to Section 5, these provisions would have been found retrogressive, and never would have been in effect. Instead, these provisions will be contested through time- and resource-intensive litigation under complex legal standards.

### **The Impact on the Loss of Observer Coverage**

A less discussed impact of the *Shelby County* decision is on the loss of federal observer coverage. Under Section 8 of the Voting Rights Act,<sup>46</sup> the federal government had the authority to send federal observers to monitor any component of the election process in any Section 4(b) jurisdiction provided that the Attorney General determined that the appointment of observers was necessary to enforce the guarantees of the 14th and 15th Amendments.<sup>47</sup> A federal district court can also authorize the use of observers when it deems it necessary to enforce the guarantees of the 14th or 15th Amendments as part of a proceeding challenging a voting law or practice under any statute to enforce the voting guarantees under the 14th or 15th Amendment.<sup>48</sup>

In the 2014 National Commission report, we determined that the Attorney General had certified 153 jurisdictions in eleven states for observer coverage and that the Department of Justice had sent several thousand observers to observe several hundred elections from 1995 to 2012.<sup>49</sup>

While not officially stating this, the practice of the Department of Justice has been to apply the Supreme Court's finding that the Section 4(b) coverage formula is unconstitutional not just to preclearance but to observer coverage. The *Shelby County* decision has reduced observer coverage to a trickle. The Department of Justice has instead employed what it calls "monitors."<sup>50</sup>

The difference between federal observers and monitors is dramatic. Under the Voting Rights Act, "Observers shall be authorized to — (1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons

---

<sup>44</sup> GRI Doc. No. 31 at 21-23,

<sup>45</sup> GRI Doc. No. 31 at 29-33.

<sup>46</sup> 52 U.S.C. § 10305.

<sup>47</sup> 52 U.S.C. § 10305(a)(2).

<sup>48</sup> 52 U.S.C. §§ 10302(a), 10305(a)(2).

<sup>49</sup> 2014 National Commission Report at 180-82.

<sup>50</sup> See e.g., Press Release, U.S. Dep't. of Justice, "*Justice Department Again to Monitor Compliance with the Federal Voting Rights Laws on Election Day*," (Nov. 2, 2020), <https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day>.

who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.” Monitors have no such rights: a jurisdiction does not need to provide any access to the voting process to any monitor.

It is not difficult to see the difference in how this plays out in practice. In a year where legislatures in formerly covered states like Arizona<sup>51</sup> and Texas<sup>52</sup> are conducting audits of election results or considering restricting the ability of election officials to limit the conduct of partisan poll watchers, it becomes vitally important for the federal government to have discretion to send observers to places with a history of voting discrimination for the purpose of ensuring that processes are fair and that voters of color are not disenfranchised.

## **Conclusion**

The eight years since the Supreme Court decision in *Shelby County v. Holder* have left voters of color the most vulnerable to voting discrimination they have been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared — that without Section 5, voting discrimination would increase substantially. Without legislation like the John Lewis Voting Rights Advancement Act that addresses the hole in the Voting Rights Act left by the *Shelby County* decision, our democracy is at risk.

---

<sup>51</sup> See *Maricopa County v. Fann*, No. CV 2020-016840, 2021 WL 804446, at \*2 (Ariz. Super. Feb. 25, 2021) (discussing action of Arizona Senate to issue subpoenas requiring Maricopa County to produce election records of the November 2020 election).

<sup>52</sup> SB 7, Tex. Legis. 87th Cong. 2021 (pending Conf. Comm.).