

TESTIMONY OF DR. JAMES THOMAS TUCKER

**Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties
of the U.S. House Committee on the Judiciary**

**“The Need to Enhance the Voting Rights Act:
Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice.”**

June 29, 2021

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Chairman Nadler, Chairman Cohen and Ranking Member Johnson, and Committee Members, thank you for your invitation to testify at the hearing on the need to enhance the Voting Rights Act through preliminary injunctions, bail-in coverage, election observers, and notice. The Native American Rights Fund (NARF) and the Native American Voting Rights Coalition (NAVRC) applaud the Subcommittee for examining this important topic.

I am one of the founding members of NAVRC, which is a coalition of national and regional grassroots organizations, academics, and attorneys advocating for the equal access of Native Americans to the political process.² In addition, I serve as the Pro Bono Voting Rights Counsel to NARF. We are united in our support for this legislation, which is critical to overcoming barriers to voting rights to secure equal access to the political process for all Americans, regardless of their tribal relations, race, ethnicity, or language minority status.

I want to begin by noting that today’s hearing comes just four days after the eight year anniversary of *Shelby County v. Holder*.³ On June 25, 2013, the United States Supreme Court struck down the coverage formula for Section 5, “the heart of the Voting Rights Act” (VRA).⁴ In that decision, a narrow 5-4 majority explained its decision by arguing that “things have changed dramatically,” with “voter turnout and registration rates now approach[ing] parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”⁵

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² For more information about the NAVRC, see NARF, About the Native American Voting Rights Coalition <<https://www.narf.org/native-american-voting-rights-coalition/>>.

³ 570 U.S. 529 (2013).

⁴ U.S. COMM’N ON CIVIL RTS., THE VOTING RIGHTS ACT: TEN YEARS AFTER (“TEN YEARS AFTER”) 5 (Jan. 1975).

⁵ *Id.* at 547.

Our Nation’s experience over the past eight years has shown how wrong *Shelby County* was. Its assault on the Voting Rights Act, the crown jewel of America’s civil rights laws, has come at a high price. In the absence of Section 5 preclearance, previously covered states and political subdivisions have turned back the clock to make the most basic first generation barriers – obstacles that impede the ability to register to vote, to cast a ballot and to have that ballot counted – a reality for an even greater number of Americans.⁶ Many governing bodies have increased their exploitation of racially polarized voting to preserve their waning political power at the expense of existing and emerging groups of minority voters seeking to secure fair and equal representation. In the past eight years, things indeed have changed dramatically.

Against this backdrop, it is appropriate that the Committee has answered the clarion call to renew and restore the Voting Rights Act. H.R. 4, the John Lewis Voting Rights Advancement Act, is named in honor of one of the great champions of American democracy and the civil rights movement. As Congressman Lewis explained in 2019, “The vote is precious. It is almost sacred. It is the most powerful non-violent tool we have in a democracy.” Preserving that fundamental right is what brings us together today.

My testimony today focuses on two provisions in Section 3 of the Voting Rights Act that are little known, but essential to preserving and protecting equal access to the ballot and representation.

I will begin by discussing Section 3(c) of the Act, which allows federal courts to order that jurisdictions that are not covered by Section 5 are “bailed-in” to preclearance to remedy voting rights violations and prevent further discrimination. Today, as a result of *Shelby County*, there is no longer any coverage under Section 4 of the VRA. Section 3(c) bail-in currently is the only way that a State or political subdivision can be required to submit covered voting changes for preclearance. However, the bail-in provision is sparingly used, with *Shelby County*’s legacy and the uncomfortable burden of finding discriminatory purpose leaving a cloud over federal judges reluctant to rely upon Section 3(c) as a remedy to cure voting rights violations.

H.R. 4 makes two changes that directly impact bail-in. First, and most importantly, the John Lewis bill will restore Section 5 coverage under a modernized formula. Second, it will give federal judges the discretion to use the remedial authority in Section 3(c) where any voting discrimination against racial, ethnic or language minority voters is established. Consonant with that discretion and their broad remedial powers, judges will continue to have the authority to set the time frame and the scope of voting changes to which bail-in applies.

⁶ For a comprehensive discussion of first generation barriers to American Indian and Alaska Native voters, see James Thomas Tucker, Jacqueline De Léon & Dan McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* (NARF June 2020) <<https://vote.narf.org/obstacles-at-every-turn/>>.

I will next address federal observer coverage under Sections 3 and 8 of the VRA. Federal observers are an important part of the Act’s comprehensive framework to prevent and remedy voting discrimination. Although observers are limited to observing and documenting discriminatory conduct, their role is key to eliminating disenfranchisement. Often, their mere presence deters discrimination. Where it does not, “observations and reports of observers ... most often provide the factual basis on which the Department of Justice proceeds to prosecute acts of harassment, intimidation, and discrimination.”⁷ In places where voting discrimination is more entrenched, observers help document the progress towards remedying that discrimination. The power of observation can be substantial, benefiting all Americans.

The 2006 reauthorization of the VRA made some modest changes to the requirements for certifying jurisdictions for observer coverage. *Shelby County* had an even greater impact, reducing that coverage to only a small fraction of what it was prior to the decision. In the 2020 Presidential Election, for the first time in decades, the Justice Department was unable to deploy a single federal observer. H.R. 4 will renew and restore the vitality of the federal observer provisions in several ways that I will discuss.

I. The Need for a More Flexible “Bail-in” under Section 3(c) of the VRA.

A. The limited use of the bail-in provision before *Shelby County*

When Congress enacted the Voting Rights Act in 1965, it was aware that the coverage formula would be both over-inclusive and under-inclusive. It resolved these issues by including the Act’s “bailout”⁸ and “bail-in” provisions, respectively.⁹ The bail-in provision addresses the under-inclusiveness of the coverage determinations under Section 4(b) of the Act by applying preclearance to the “so-called ‘pockets of discrimination ... outside the States and political subdivisions as to which the prohibitions of [the Act] were in effect.’”¹⁰ A permanent provision of the VRA, the Section 3(c) bail-in mechanism applies nationwide to reach “denials and abridgements of the right to vote on account of race or color [or language minority status]”¹¹ wherever they may occur throughout the United States.”¹²

⁷ H. REP. NO. 109-478, at 62.

⁸ Bailout is codified in Section 4(a) of the VRA. *See* 52 U.S.C. § 10303(a) (transferred from 42 U.S.C. § 1973b(a)).

⁹ Bail-in is codified in Section 3(c) of the VRA. *See* 52 U.S.C. § 10302(c) (transferred from 42 U.S.C. § 1973a(c)).

¹⁰ H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2454. For that reason, Section 3(c) often is referred to as “the pocket trigger” for Section 5 preclearance coverage.

¹¹ The current language of Section 3(c) applies not just to discrimination “on account of race or color,” but also includes “or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title.” 52 U.S.C. § 10302(c). The latter language was added in the 1975 amendments to the VRA, in which Congress expressed its intent to apply the Act’s protections to language minority voters. *See* Pub. L. 94-73, § 206, 89 Stat. 402 (Aug. 6, 1975). The bracketed addition reflects the current statutory language.

¹² H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2454.

Section 3(c) describes the circumstances under which a jurisdiction may be covered under the bail-in provision:

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 4(f)(2)....¹³

Federal courts interpreting the bail-in provision’s language have concluded that it requires the reviewing court to “determine (1) whether violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred within the State or any of its political subdivisions; and (2) whether, if so, the remedy of preclearance should be imposed.”¹⁴ Stated another way, Section 3(c) “requires that (a) violations of the Fourteenth or Fifteenth Amendments (b) justifying equitable relief (c) have occurred (d) within the State or its political subdivisions.”¹⁵ Therefore, the bail-in provision applies relief, including the determination of which voting changes are to be subject to preclearance, using the “traditional case-by-case approach.”¹⁶

For much of the VRA’s history, Section 3(c) was used sparingly. During the first decade after the VRA was enacted in 1965, no jurisdiction was bailed-in under the provision.¹⁷ By 2013, approximately eighteen jurisdictions had bailed-in under Section

¹³ 52 U.S.C. § 10302(c).

¹⁴ *Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (three-judge panel); *see also* *Perez v. Abbott*, 390 F. Supp.3d 803, 813 (W.D. Tex. 2019) (recognizing that *Jeffers* provides the “most thorough analysis and discussion in the case law of § 3(c) and its requirements” and applying “this same general framework.”).

¹⁵ *Id.*

¹⁶ H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2475.

¹⁷ *See generally* TEN YEARS AFTER, *supra* note 4, at 11 n.3 (“No court has yet used the authority of section 3, however, to impose the special coverage remedies on jurisdictions not covered by the act.”).

3(c): two states, Arkansas¹⁸ and New Mexico¹⁹; twelve counties²⁰; two municipalities²¹; and two school districts.²² Over half of those jurisdictions, ten, were bailed in for discrimination against American Indians, for whom there was little coverage under Section 4(b) and Section 4(f)(4) of the VRA.²³ All but two of the jurisdictions, the State of Arkansas and the Gadsden County School District in Florida, were bailed in as a result of consent decrees.²⁴

The lack of more widespread Section 3(c) coverage can be explained in at least three ways. First, and most obviously, many of the States and political subdivisions that engaged in voting discrimination were covered by Section 5 already.²⁵ Second, non-covered jurisdictions that engaged in voting rights violations often were under one or more court orders that remedied that discrimination.²⁶ Third, the legal standards for securing bail-in can be inordinately difficult for jurisdictions that do not voluntarily consent to the remedy.²⁷

¹⁸ *Jeffers*, 740 F. Supp. at 585.

¹⁹ *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (consent decree).

²⁰ *United States v. Thurston Cty.*, No. 78-0-380 (D. Neb. May 9, 1979) (consent decree); *McMillan v. Escambia Cty.*, No.77-0432 (N.D. Fla. Dec. 3, 1979) (consent decree); *Woodring v. Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983) (Alexander County, Illinois) (consent decree); *United States v. McKinley Cty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986) (consent decree); *United States v. Sandoval Cty.*, No. 88-1457-SC (D.N.M. May 17, 1990) (consent decree); *United States v. Los Angeles Cty.*, Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991) (consent decree); *United States v. Cibola Cty.*, No. 1:93-1134-LH/LFG (D.N.M. Apr. 21, 1994) (consent decree), ECF No. 72; *United States v. Socorro Cnty.*, No. 1:93-1244-JP (D.N.M. Apr. 13, 1994) (consent decree), ECF No. 46; *United States v. Alameda Cty.*, No. 3:95-cv-1266 (SAW) (N.D. Cal. Jan. 27, 1996) (consent decree), ECF No. 13; *United States v. Bernalillo Cty.*, No. 1:98-0156-BB/LCS (D.N.M. Apr. 27, 1998) (consent decree), ECF No. 6; *Kirkie v. Buffalo Cty.*, No. 3:03-cv-3011 (D.S.D. Feb. 12, 2004) (consent decree), ECF No. 23; *Blackmoon v. Charles Mix Cty.*, No. 4:05-cv-4017 (D.S.D. Dec. 4, 2007) (consent decree), ECF No. 144.

²¹ *Brown v. Bd. of Comm'rs of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990) (consent decree); *United States v. Vill. of Port Chester*, No. 1:06-cv-15173 (S.D.N.Y. Dec. 22, 2009) (consent decree), ECF No. 119.

²² *N.A.A.C.P. v. Gadsden City Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984) (Gadsden Cty. Sch. Dist.); *Cuthair v. Montezuma-Cortez Sch. Dist.* No. RE-1, No. 1:89-cv-0964 (D. Col. Apr. 9, 1990) (consent decree).

²³ The ten jurisdictions covered for American Indians include the State of New Mexico; Thurston County, Nebraska; Bernalillo, Cibola, McKinley, Sandoval, Socorro Counties in New Mexico; Buffalo and Charles Mix Counties in South Dakota; and the Montezuma-Cortez School District RE01 in Colorado.

²⁴ *See supra* notes 18-22 and accompanying text.

²⁵ *See* U.S. Dep't of Just., *Jurisdictions previously covered by Section 5 at the time of the Shelby County decision* <<https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>> (updated Sept. 11, 2020).

²⁶ For examples of voting rights violations that were remedied already and therefore were found a federal court not to be the proper subject of preclearance, *see generally Jeffers*, 740 F. Supp. at 601 (ordering a limited bail-in for Arkansas for any majority-vote requirements and the state's 1990 redistricting plans because the remaining "constitutional violations found ... have already been remedied by judicial action.").

²⁷ *See infra* notes 38-66 and accompanying text.

B. The difficulty securing bail-in after *Shelby County*

Some commentators have suggested that the Section 3(c) bail-in mechanism can provide a viable alternative in a post-*Shelby* world. Actual experience has proven a much different reality. Since *Shelby County* was decided in June 2013, only a handful of jurisdictions have been bailed in through the Section 3(c) remedy. The two examples I will provide both involve jurisdictions formerly covered by Section 5.

In *Allen v. City of Evergreen, Alabama*, after the plaintiffs successfully challenged a redistricting plan for the city council and the system for determining voter eligibility, they moved for remedies including the appointment of federal observers and bail-in.²⁸ The City agreed to the relief, which “would restore a preclearance requirement which is limited in scope.”²⁹ The federal court ordered preclearance to be in place until December 31, 2020, limiting it to two voting changes: any change in the redistricting plan or method of election for members of the city council and any change in the standards for determining voter eligibility.³⁰ In granting the stipulated relief, the court retained jurisdiction through the end of 2020.³¹

In *Patiño v. City of Pasadena, Texas*, the court found that the city adopted a plan for electing members of its council that intentionally diluted the votes of Latino citizens in violation of Section 2 of the VRA and the Fourteenth Amendment.³² As a result of the finding of intentional discrimination, the court granted the plaintiffs’ request to require the city to submit future changes to its redistricting plan to the Attorney General for preclearance.³³ In addition, the court retained jurisdiction to review any other voting change different from what was in force in the 2013 election.³⁴ The court referred to the six year preclearance period in the *Evergreen* consent order, suggesting that “five years, or through the 2021 election, might be appropriate” for Section 3(c) coverage “because it is likely enough time for demographic trends to overcome concerns about dilution from redistricting.”³⁵ Subsequently, the court adopted a six year preclearance period through June 30, 2023.³⁶ The court explained that would encompass four election cycles and redistricting following the 2020 Census.³⁷

²⁸ Civ. Act. No. 13-0107-CG-M, 2014 U.S. Dist. LEXIS 191739, at **1-2 (S.D. Ala. Jan. 13, 2014).

²⁹ *Id.* at *4.

³⁰ *Id.*

³¹ *Id.* at **4-6.

³² 230 F. Supp. 3d 667 (S.D. Tex. 2017).

³³ *Id.* at 729.

³⁴ *Id.* at 729.

³⁵ *Id.* at 730.

³⁶ *Patiño v. City of Pasadena*, No. H-14-3241, 2017 U.S. Dist. LEXIS 229191, at **5-6 (S.D. Tex. Jan. 16, 2017).

³⁷ *Id.* at *5 n.4.

Requests for Section 3(c) relief have not been granted in other cases for a variety of reasons. One cause is the difficulty in obtaining a finding of discriminatory intent. In *Jeffers*, the court held that to establish a violation of the Fourteenth or Fifteenth Amendment necessary to support bail-in, it required “proof of conscious racial discrimination.”³⁸ *Perez* agreed, concluding that “triggering violations for bail-in relief must be violations of Fourteenth and Fifteenth Amendment protections against racial discrimination in voting.”³⁹

In *Toyukak v. Treadwell*, the plaintiffs developed a strong record supporting a finding of discriminatory intent, including: Alaska’s contention that the Fifteenth Amendment did not apply to Alaska Natives; its position that Alaska Natives were entitled to less voting information than other voters because they were Alaska Natives; purposeful failure to translate ballots into covered languages and dialects; and what state officials euphemistically referred to as “policy decisions” not to provide voting materials and assistance to Alaska Native voters in areas covered by Section 203 of the Act.⁴⁰ The federal court held that the plaintiffs established a Section 203 violation, while also suggesting it was the product of discriminatory intent. The court explained that Alaska’s voting program was “*not designed* to transmit substantially equivalent information in the applicable minority... languages.”⁴¹

Nevertheless, the court declined to reach the question of whether the plaintiffs established that Alaska intentionally discriminated against Native voters, taking under advisement the constitutional claim that served as the basis for the Section 3(c) request to focus on other remedies.⁴² Later, the court directed the parties to mediation to try to resolve the litigation.⁴³ The *Toyukak* court’s reluctance to make a finding of discriminatory intent sufficient to support Section 3(c) relief is consistent with what occurred following the *City of Mobile v. Bolden* decision in 1980.⁴⁴ It is inherently difficult for a federal judge to find that officials in the community in which he or she resides have engaged in purposeful discrimination, regardless of a voting procedure’s discriminatory impact.⁴⁵ The *Toyukak* plaintiffs settled and obtained court oversight over

³⁸ 740 F. Supp. at 589.

³⁹ 390 F. Supp. 3d at 813-14.

⁴⁰ See James Thomas Tucker, Natalie Landreth & Erin Dougherty Lynch, “*Why Should I Go Vote Without Understanding What I am Going to Vote For?*”: *The Impact of First Generation Voting Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327, 358-72 (2017). A copy of the article is provided as Attachment A to this testimony.

⁴¹ *Id.* at 372 (emphasis added).

⁴² *Id.* at 374.

⁴³ *Id.* at 375-76.

⁴⁴ 446 U.S. 55 (1980).

⁴⁵ The Senate reached a similar conclusion in its report accompanying the 1982 amendments to the VRA, noting that because of the reluctance among federal judges to make a finding of intentional discrimination after *Bolden*, “litigators virtually stopped filing new vote dilution cases.” S. REP. NO. 417, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 203.

Alaska’s language program for three census areas through the end of 2020, in lieu of pressing their Section 3(c) claim.⁴⁶

Perez added another wrinkle to the difficulty in establishing discriminatory purpose to secure bail-in: it found that not all violations of the Fourteenth and Fifteenth Amendments meet the burden under Section 3(c).⁴⁷ For example, it concluded that “a *Shaw*-type Fourteenth Amendment claim, without a finding of racially discriminatory purpose, is not a finding that supports bail-in relief.”⁴⁸ The court explained, “[u]nlike an intentional vote dilution claim, a *Shaw*-type racial gerrymandering claim is not focused on abridging the right to vote, but on an improper use of race regardless of discriminatory purpose...”⁴⁹ Similarly, *Perez* rejected “a conclusion that malapportionment and/or one person, one vote (“*Larios*-type claims”) under the Fourteenth Amendment may trigger bail-in relief, absent any finding of purposeful racial discrimination underlying the population deviations.”⁵⁰ Likewise, *Perez* decided that the only Section 5 objections that could support bail-in were those based upon discriminatory intent, reasoning that a “mere finding of discriminatory effect or ‘retrogression’ does not amount to a constitutional violation...”⁵¹

Perez also interpreted the broad language of Section 3(c) narrowly to further limit the constitutional violations that may be considered. The statute provides that the relevant violations are those that “have occurred within the territory of such State or political subdivision.”⁵² In *Jeffers*, the court construed Section 3(c) as meaning what it says:

We agree with plaintiffs that both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments must be taken into account. The statute does not say that the State or its officials must be guilty of the violations, but only that the violations must “have occurred *within the territory*” of the State... And besides, as we have already held, officials of local governments are State

⁴⁶ See Tucker, Landreth & Dougherty Lynch, *supra* note 40, at 376.

⁴⁷ See generally 390 F. Supp. 3d at 813 (“The Court first considers what types of violations of the Fourteenth or Fifteenth Amendments may act as a trigger to impose bail-in relief...”).

⁴⁸ *Id.* at 814.

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Blackmoon*, 505 F. Supp. 2d at 592). *Blackmoon* subsequently settled and Charles Mix County agreed to a consent decree that included bail-in. See *supra* note 20 and accompanying text.

⁵¹ *Id.* at 817-18.

⁵² 52 U.S.C. § 10302(c).

officials for present purposes; local governments are arms of the State and only exist at its sufferance.⁵³

In contrast, *Perez* found that “these violations should at most provide relevant context” to whether a court should grant equitable relief, “and not be used as a trigger for bail-in relief.”⁵⁴ It read the statute differently than *Jeffers*, explaining “it simply makes clear that political subdivisions such as cities may be subjected to § 3(c) relief based on their own violations, and does not mean that a State may be subjected to bail-in based on violations by its political subdivisions.”⁵⁵

Moreover, even where intentional discrimination has been established in violation of the Fourteenth or Fifteenth Amendment, that may be insufficient to result in bail-in. In *Jeffers*, the court emphasized that Section 3(c) requires “violations *justifying equitable relief*.”⁵⁶ Like any other form of equitable relief, a court has considerable discretion, taking into consideration the public interest codified in the VRA. The court suggested several factors to weigh in making that determination:

Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kind of violations that would likely be prevented in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments independent of this litigation, make recurrence more or less likely?⁵⁷

Those factors are to be balanced between “the interest of the plaintiffs in vindication of their constitutional right to vote” against “the interest of the defendants in maintaining the sovereignty of the State.”⁵⁸

Perez cited the *Jeffers* factors with approval, applying them to reach its holding that Section 3(c) bail-in should not be imposed on Texas.⁵⁹ The court made that determination despite its conclusion that there were “recent, statewide violations of the Fourteenth Amendment by the State” that were “the type to appropriately trigger the bail-in remedy against the State, and the bail-in remedy sought by Plaintiffs would

⁵³ 740 F. Supp. at 600 (emphasis in original). *Jeffers* qualified its construction by concluding, “We also think that more than one violation must be shown. The statute uses the plural (‘violations’), and it would be strange if a single infringement could subject a State to such strong medicine.” *Id.*

⁵⁴ 390 F. Supp. 3d at 817.

⁵⁵ *Id.*

⁵⁶ 740 F. Supp. at 601 (emphasis in original).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 390 F. Supp. 3d at 818-21.

appropriately redress the violation.”⁶⁰ In particular, the court described the case as involving

findings of intentionally discriminatory behavior affecting minority voters statewide... Numerous counties were drawn with the purpose to dilute minority voting strength in the Texas House plan, as well as CD23 and numerous congressional districts in the Dallas-Fort Worth metroplex in the Congressional plan.⁶¹

Compounding those violations, the court concluded that although “it could and should also consider the intentional discrimination findings made in the underlying voter ID litigation, it does little to bolster the foundation for bail-in.”⁶² The court explained that the purposeful discrimination “affected only a small portion of minority voters (indigent minority voters),” with “no indication that its effects had not been fully remedied.”⁶³

Remarkably, *Perez* noted its “grave concerns about Texas’s past conduct,” but nevertheless concluded “that ordering preclearance on the current record would be inappropriate...”⁶⁴ The court attempted to justify its holding by explaining, “Even without being subject to preclearance, Texas must still comply with the requirements of the Fourteenth Amendment and § 2 of the VRA in the upcoming redistricting cycle, and undoubtedly its plans will be subject to judicial scrutiny.”⁶⁵ That conclusion is certainly true, but it severely undermines the legislative purpose of Section 3(c): to prevent discriminatory voting changes that are enacted by knowing bad actors like Texas *before* they go into effect.

The reluctance of federal courts to order bail-in to remedy even an exceptionally strong record of discrimination such as the one in *Perez* goes far to explain why Section 3(c) relief rarely has been granted where it is contested.⁶⁶ It may be laudable that many jurisdictions agree to bail-in to cure their intentional discrimination against minority voters. But conditioning coverage for preclearance on a jurisdiction’s consent does little to provide redress from the worst offenders, who, like Texas officials, are recidivists engaging in repeated acts of intentional discrimination designed to suppress the votes of

⁶⁰ *Id.* at 816.

⁶¹ *Id.*

⁶² *Id.* at 820.

⁶³ *Id.*

⁶⁴ *Id.* at 820-21.

⁶⁵ *Id.* at 821.

⁶⁶ *See supra* note 24 and accompanying text; *see also* North Carolina State Conf. of the NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016) (“As to the other requested relief, we decline to impose any of the discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements... Such remedies ‘[are] rarely used’ and are not necessary here in light of our injunction.”) (quoting Conway Sch. Dist. v. Wilhoit, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)).

racial, ethnic and language minorities. It goes far to explain why Section 3(c) is an inadequate remedy for the broader Section 5 coverage proposed by H.R. 4 under a new geographic formula. It also highlights the need for the modest, yet crucial, amendment that the bill makes to the violations that qualify for bail-in under Section 3(c).

C. H.R. 4 clarifies Congressional intent on bail-in

Section 2(a) of H.R. 4 makes a simple, but essential, change to Section 3(c). Currently, bail-in only is available where the United States or a private litigant establishes discriminatory intent in violation of the Fourteenth or Fifteenth Amendment. That requirement has imposed an insurmountable burden on many plaintiffs, even in the face of a strong record of purposeful discrimination. H.R. 4 corrects that deficiency by striking “violations of the Fourteenth and Fifteenth amendment” and inserting “violations of the Fourteenth or Fifteenth Amendments, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group.”

By amending Section 3(c) to include other forms of voting discrimination against racial, ethnic and language minorities, H.R. 4 gives federal courts greater flexibility to provide bail-in relief where it is warranted. Remedial orders may be adapted to the circumstances present in the jurisdiction, consistent with the case-by-case approach that has been a hallmark of the pocket trigger. It further empowers courts to broadly require preclearance of all voting changes, where a demonstrated history of continued violations of the Constitution or federal law warrants it. At the same time, courts retain the authority to adopt a more targeted approach by limiting the time period during which preclearance remains in effect or the types of voting changes to which it applies.

II. The Devastating Impact of *Shelby County* on Federal Observer Coverage.

On June 25, 2013, the United States Supreme Court issued its decision in *Shelby County v. Holder*, which struck down as unconstitutional the preclearance coverage formula in Section 4(b) of the VRA. Although *Shelby County* did not directly address the separate formula in Section 4(f)(4) of the Act for jurisdictions covered for minority languages, the Justice Department concluded that section also was affected because it was “dependent on a part of the Section 4(b) formula.”⁶⁷ As a result, “[i]n light of *Shelby County*, the department is not enforcing this provision.”⁶⁸

Shelby County has had a devastating impact on federal observer coverage. “Prior to the *Shelby County* decision in 2013, a total of 153 counties and parishes in 11 states were certified by the Attorney General for federal observers: Alabama (22 counties), Alaska (1) Arizona (4), Georgia (29), Louisiana (12), Mississippi (51), New York (3),

⁶⁷ U.S. Dep’t of Just., Fact Sheet on Justice Department’s Enforcement Efforts Following *Shelby County* Decision (“*Shelby* Impact”) at 2 <<https://www.justice.gov/crt/file/876246/download>> (last visited June 20, 2021)>.

⁶⁸ *Id.*

North Carolina (1), South Carolina (11), South Dakota (1) and Texas (18).⁶⁹ Following *Shelby County*, the Justice Department made the following determination:

In light of the *Shelby County* decision, the department is not relying on the Section 4(b) coverage formula as a way to identify jurisdictions for election monitoring. The department will continue to engage OPM observers where there is a relevant court order and will continue to conduct our own monitoring around the country, without relying on the Section 4(b) formula.⁷⁰

In other words, post-*Shelby County*, the only jurisdictions that will be covered for federal observers are those certified for coverage by a federal court under Section 3(a) of the VRA. The Department concluded, “This means that the department will be able to send fewer people than in similar past elections to watch the voting process in real-time.”⁷¹

Recent federal observer coverage confirms that impact. By 2020, just five jurisdictions were covered for federal observers under Section 3(a) of the Act: Evergreen (Conecuh County), in Alabama;⁷² the Dillingham, Kusilvak and Yukon-Koyukuk Census Areas in Alaska, as a result of the NARF litigation;⁷³ and St. Landry Parish in Louisiana.⁷⁴ Despite its continued coverage under Section 3(a), it does not appear that the Justice Department has been as active in sending federal observers to St. Landry Parish after the vote-buying issues that precipitated the litigation in the 1970s were resolved.⁷⁵ Consequently, by the end of 2020, federal observers were available in only a handful of jurisdictions covered under Section 3(a) of the VRA.

⁶⁹ See U.S. Dep’t of Just., Civ. Rts. Div., Voting Sec., *About Federal Observers and Election Monitoring* (“*About Federal Observers*”) (last modified Sept. 11, 2020) <<https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>>.

⁷⁰ *Shelby* Impact, *supra* note 67, at 2.

⁷¹ *Id.*

⁷² See *Allen v. City of Evergreen*, 2014 U.S. Dist. LEXIS 191739, at *4 (S.D. Ala. Jan. 13, 2014) (authorizing the “appointment of federal observers to monitor elections of the City of Evergreen” through December 21, 2020).

⁷³ See *Toyukak v. Mallott*, Case No. 3:13-cv-00137-SLG, Dkt. 282, Stip. and Order at 7-8 (D. Alaska Sept. 30, 2015) (“Pursuant to Section 3(a) of the VRA, 52 U.S.C. § 10302(a) ... Election Observers are appointed and are authorized to attend and observe elections and election activities that federal law authorizes, including training” for the three census areas through December 31, 2020).

⁷⁴ See *United States v. St. Landry Parish Sch. Bd.*, Case No. 76-1062 (W.D. La. Dec. 5, 1979) (authorizing federal observers “until further order of this Court”); see also U.S. COMM’N ON CIVIL RTS., *THE VOTING RIGHTS ACT: UNFULFILLED GOALS* 37 (Sept. 1981) (describing the vote-buying scheme that led to the Justice Department’s litigation against the county).

⁷⁵ See generally GAO, *Department of Justice’s Activities to Address Past Election-Related Voting Irregularities*, GAO-04-1041R, at 69 (Sept. 14, 2004) (“Data from the Voting Section shows that as of August 23, 2003, the court order was still in effect and that no elections were monitored at this parish during calendar years 2000 through 2003.”).

In the November 3, 2020 election, not a single federal observer was dispatched by the Justice Department and the United States Office of Personnel Management (OPM), which is unprecedented for coverage of Presidential Elections in recent decades. The City of Evergreen, Alabama held its municipal elections earlier in the year, on August 25, 2020.⁷⁶ Most of the Alaska Native villages encompassed by Section 3(a) coverage under the *Toyukak* order were closed because of the COVID-19 pandemic; consequently, it was not possible to have federal observers sent to the three covered regions of Alaska. This is a truly incredible sea-change from the hundreds of federal observers dispatched for elections before *Shelby County*.

The absence of federal observer coverage limited the Department of Justice to dispatching “election monitors” to 44 jurisdictions in 18 states.⁷⁷ As the Department explains:

The [Civil Rights] Division also monitors elections in the field for compliance with the federal voting rights laws in jurisdictions not currently eligible for assignment of federal observers. Under these circumstances, one or more attorneys and staff members from the Division may be assigned to monitor the election in the field on election day and maintain contact with state and local officials.⁷⁸

Election monitors are an inadequate substitute for federal observers. Monitors are attorneys and staff employees of the Justice Department, not the non-attorney OPM employees authorized by the VRA.⁷⁹ That limits the Department’s monitors in their activities. Unlike federal observers, they are not statutorily authorized to be present in voting and tabulation locations.⁸⁰ Instead, monitors first must obtain permission from local election officials to enter polling places and ballot counting centers. While that permission often is given, it may be lacking in the places where it is most needed – especially in jurisdictions where election officials reportedly have engaged in actions that limit access for minority voters. The absence of cooperation by election officials may relegate Justice Department monitors to areas outside of polling places, leaving them unable to engage in crucial first-hand observations of many actions that may establish a violation of one or more provisions of federal voting rights laws.

⁷⁶ See Bama Politics, 2020 Evergreen, Alabama Mayoral Election, August 25, 2020 <<https://www.bamapolitics.com/alabama/alabama-elections/2020-alabama-elections/2020-evergreen-al-mayor-election/>>.

⁷⁷ See U.S. Dep’t of Just., *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>>.

⁷⁸ *About Federal Observers*, *supra* note 69.

⁷⁹ See 52 U.S.C. § 10305(d).

⁸⁰ See *id.*

Monitors also lack the statutory imprimatur provided by Section 8 of the VRA to prepare investigative reports that are transmitted to a federal court.⁸¹ While Department attorneys remain free to communicate with federal courts about voting and tabulation problems they observe, their communications are constrained by their capacity as legal counsel and support staff for the United States. Unlike observers, the monitors are less likely to be available as witnesses. Any reports that are prepared by monitors generally are not admissible into evidence. Their reports typically cannot be compelled because they are covered under several exemptions to the Freedom of Information Act.⁸² While the Department’s election monitors broaden observations of elections to jurisdictions not certified for observer coverage, they remain a complimentary option that cannot replicate the critical role performed by federal observers under the VRA.

III. The Continuing Need for Federal Observers under the Voting Rights Act.

The Voting Rights Act of 1965 authorizes federal courts⁸³ and the Attorney General of the United States⁸⁴ to send federal observers to certified jurisdictions “to secure equal voting rights of all citizens.”⁸⁵ Observers serve as the eyes and ears for the federal government and the public it protects to ensure compliance with the Act. Their presence at polling and ballot counting locations makes it less likely voting discrimination occurs on Election Day without it being documented and addressed.⁸⁶ In the course of doing so, they help preserve the fundamental right of all voters to participate in the democratic process.

A. The role and function of the federal observer provisions

The indispensable function of federal observers in the comprehensive protection of voting rights cannot be appreciated without understanding how the provisions that authorize them operate. Federal observers have a unique role in preventing voting discrimination, enforcing the VRA, and measuring progress to remedy violations of the VRA and the Fourteenth and Fifteenth Amendments.⁸⁷

After a jurisdiction is certified for coverage, the Attorney General has to make an administrative determination whether to deploy observers for a particular election. Once

⁸¹ See 52 U.S.C. § 10305(e).

⁸² See U.S. Dep’t of Just., *Department of Justice Guide to the Freedom of Information Act* (updated June 3, 2021) <<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>>.

⁸³ See 52 U.S.C. § 10302(a) (transferred from 42 U.S.C. § 1973a(a)).

⁸⁴ See 52 U.S.C. § 10305 (transferred from 42 U.S.C. § 1973f).

⁸⁵ H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2460.

⁸⁶ See 52 U.S.C. § 10305.

⁸⁷ See generally *Shelby Impact*, *supra* note 67, at 1 (“In general, when trained individuals travel to different locations to watch the election process and collect evidence about how elections are being conducted, they have a unique ability to help deter wrongdoing, defuse tension, promote compliance with the law and bolster public confidence in the electoral process.”).

that decision is made, Justice Department staff must map out a comprehensive strategy to deploy the federal observers in the areas where they are most likely to fulfill their statutory function. The creation of the federal observer report and training of observers on how to use it is key to those efforts. I will briefly describe these important components of the federal observer program.

The role of federal observers is straight-forward: they are non-lawyer employees of OPM authorized to observe “whether persons who are entitled to vote are being permitted to vote” and “whether votes cast by persons entitled to vote are being properly tabulated.”⁸⁸ They are “trained by OPM and the Justice Department to watch, listen, and take careful notes of everything that happens inside the polling place during an election, and are also trained not to interfere with the election in any way.”⁸⁹ In jurisdictions with significant numbers of language minorities, bilingual observers are preferable because they are able to not only observe the manner in which language minority voters are treated, but also can assess the quality of any written language materials and oral language assistance offered to voters in their native language.⁹⁰ When a voter requires assistance to cast a ballot, the observer may accompany that voter behind the curtain of the voting booth if the observer first obtains the voter’s permission.⁹¹

Federal observers are not sent to every certified jurisdiction for every election. Instead, they typically are only dispatched to certified jurisdictions in which it has “been determined that there is ‘a substantial prospect of Election Day problems.’”⁹² The role of federal observers should be viewed in terms of the acronym “PEP”: Prevent, Enforce, and Progress.⁹³

1. Prevention of Vote Denial.

Federal observers “Prevent” vote denial in several respects. According to the 1975 Senate Report, “the role of Federal observers can be critical in that they provide a calming and objective presence which can serve to deter any abuse which might occur.

⁸⁸ See 52 U.S.C. § 10305(d).

⁸⁹ U.S. Dep’t of Just., Civ. Rts. Div., Voting Sec., Frequently Asked Questions (Feb. 25, 2002); see also U.S. OFFICE OF PERSONNEL MGT., MINORITY LANGUAGE CAPTAIN/CO-CAPTAIN MANUAL, app. E (Mar. 1998) (summarizing the training federal observers receive concerning their election-day responsibilities).

⁹⁰ See generally COMPTROLLER GENERAL OF THE UNITED STATES, VOTING RIGHTS ACT: ENFORCEMENT NEEDS STRENGTHENING 24-25 (Feb. 1978) (“COMPTROLLER REPORT”) (summarizing complaints received from minority contacts about the absence of minorities serving as federal observers).

⁹¹ See *United States v. Executive Committee of Democratic Party of Greene County*, 254 F. Supp. 543 (N.D. Ala. 1966); *United States v. Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966). There has been at least one case in which, notwithstanding the statutory authority observers have to enter a polling booth with a voter’s permission, the Justice Department has represented that it would not exercise that authority. See *United States v. City of Philadelphia*, 2006 U.S. Dist. LEXIS 85557, at *3 n.1 (E.D. Pa. Nov. 8, 2006).

⁹² UNITED STATES COMMISSION ON CIVIL RIGHTS, A CITIZEN’S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 12 (Oct. 1984) (“CITIZEN’S GUIDE”).

⁹³ See *supra* note 87.

Federal observers can also still serve to prevent or diminish the intimidation frequently experienced by minority voters at the polls.”⁹⁴ In many cases, the mere assignment of federal observers to an election makes people less likely to engage in discrimination because neutral outsiders are watching and documenting their actions.⁹⁵ As one witness has explained, “Few officials discriminate when they are under the microscope.”⁹⁶ Like Section 5 preclearance,⁹⁷ federal observers can stop discrimination before it happens. This element of protection is paramount to furthering the VRA’s underlying purposes. Observers discourage problems by both voters and election officials – they help prevent voter discrimination while making officials more likely to properly comply with the law, thereby facilitating the smooth conduct of elections.⁹⁸ In the process, voters “feel empowered” because they have “a vehicle through which to directly report Election Day problems at their polling place.”⁹⁹

Even when the presence of federal observers does not deter discrimination from happening, the information gathered by observers can be used by the Justice Department to stop it almost immediately. Often, a phone call from a Department attorney to local election officials is sufficient to end the discriminatory conduct; where it is not, the Department may seek to enjoin the conduct on Election Day or in the future.¹⁰⁰ A GAO report explained this process:

⁹⁴ S. REP. NO. 94-295 at 21, *reprinted in* 1975 U.S.C.C.A.N. 787.

⁹⁵ See *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006*, H.R. REP. NO. 109-478, 109th Cong. 2d Sess., at 24-25 (2006); Testimony of Alfred Yazzie, S. HRG. 109-669, at 503; Testimony of Constance Slaughter-Harvey, S. HRG. 109-669, at 390-94, 451, 458-59. 462.

⁹⁶ Slaughter-Harvey Testimony, S. HRG. 109-669, at 391.

⁹⁷ For an overview of Section 5 of the VRA, see generally James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 218-23 (2007).

⁹⁸ Barry Weinberg, who administered federal observer coverage from the 1960s until his retirement, previously described the type of discriminatory treatment that federal observers deter:

The discriminatory treatment of racial and minority language voters witnessed by federal observers... runs the gamut from actions that make those voters feel uncomfortable by talking rudely to them, or ridiculing their need for assistance in casting their ballot, to actions that bar them from voting, such as failing to find their names on the lists of registered voters and refusing to allow them to vote on provisional ballots, or misdirecting them to other polling places.

Testimony of Barry H. Weinberg, *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 24 (2005) [hereinafter *House Observer Hearings*].

⁹⁹ Yazzie Testimony, S. HRG. 109-669, at 500.

¹⁰⁰ See Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 23; GENERAL ACCOUNTABILITY OFFICE, DEPARTMENT OF JUSTICE’S ACTIVITIES TO ADDRESS PAST ELECTION-RELATED VOTING IRREGULARITIES 46-47 (Sept. 14, 2004).

When Voting Section staff monitor elections and receive allegations of or information about voting irregularities while on site, they make efforts to resolve allegations by contacting local election officials immediately. Further investigation of such irregularities is conducted after an election if the allegation was not resolved on Election Day or if it is deemed otherwise necessary to prevent such problems from arising in the future.¹⁰¹

The GAO reported that between 2000 and 2003, the Justice Department closed at least a dozen meritorious cases relating to Election Day voting discrimination, with an additional eight pending cases.¹⁰²

Federal observers likewise can prevent vote denial through their role in documenting training provided to election officials and poll workers. Poll workers are only as good as the training they receive and their willingness to follow that training. Typically, Justice Department employees attend poll worker training sessions, although in some cases officials from the Office of Personnel Management also may do so.¹⁰³ On Election Day, federal observers often ask poll workers about the training they received and observe the election procedures being used and their impact on minority voters. Justice Department employees can communicate that information to local election officials to improve training and facilitate implementation of non-discriminatory practices. If a poll worker refuses to follow their training, then that information can be passed on to allow election officials to refrain from using that poll worker in future elections. As one witness noted, “When federal oversight does not occur, the quality of these training is often insufficient and superficial,” particularly where language assistance must be provided.¹⁰⁴

Federal observers also document evidence of seemingly innocent Election Day practices that have the effect of disenfranchising minority voters. For instance, Hispanic men and women commonly have more than one surname, using their mother’s, father’s, or sometimes both. Federal observers documented numerous instances in which Hispanic voters were denied the right to vote because their name purportedly was not in the voter registration book. In the course of interviewing those voters, federal observers learned that they had registered under a different surname, which was on the voter registration list. The Justice Department used this information to recommend to local election

¹⁰¹ *Id.* at 45.

¹⁰² *Id.* at 48. The twelve meritorious cases were closed as follows: five because the jurisdiction took actions to resolve the issues; four because DOJ provided post-election feedback regarding the discrimination; two because jurisdictions agreed to implement changes for future elections, and one because a state court issued an order addressing the conduct. *Id.* The eight cases that remained open included six pending fulfillment of consent decrees for violations of federal law and two closed because jurisdictions fulfilled the requirements of consent decrees requiring them to remedy violations of federal law. *Id.*

¹⁰³ See Yazzie Testimony, S. HRG. 109-669, at 497-99.

¹⁰⁴ See Yazzie Testimony, S. HRG. 109-669, at 498.

officials that they train poll workers to ask any voter whose name did not appear to be in the voter registration list, “Have you registered under another name?” That simple training suggestion eliminated many instances of vote denial.

2. *Enforcement of the Voting Rights Act.*

In addition to their prophylactic effect, federal observers help “Enforce” compliance with the Voting Rights Act. Observers do not engage in civil enforcement themselves. Instead, they serve as the eyes and ears of the Justice Department and federal courts.¹⁰⁵ Federal observers are a key component of efforts to enforce the Voting Rights Act and the Fourteenth and Fifteenth Amendments because they prepare reports that can be used in subsequent litigation and the observers can testify as witnesses.¹⁰⁶ Observers also conduct their jobs in a neutral and non-partisan manner thus ensuring the integrity of the accounts provided in their reports.¹⁰⁷ Since the reports are prepared contemporaneously to the observed actions by impartial observers, the reports provide evidence that is generally unassailable in court proceedings.¹⁰⁸

There are other uses for information collected in observer reports. Federal observers document the identity of election officials and others engaging in discriminatory conduct. If the person engaging in discrimination is an election official, a Justice Department attorney can communicate that information to local officials to get the person removed from the polling place immediately and for future elections. If the discrimination is a violation of the criminal provisions of the VRA¹⁰⁹ or other federal laws, the evidence gathered by federal observers can be communicated to either the Civil Right’s Division’s Criminal Section or the Criminal Division’s Public Integrity Section to work with local United States Attorneys to prosecute the perpetrators.¹¹⁰ Effective

¹⁰⁵ See generally See H. REP. NO. 109-478, at 25 (“Observers have played a critical role preventing and deterring 14th and 15th amendment violations by communicating to the Department of Justice any allegedly discriminatory conduct for further investigation.”).

¹⁰⁶ See generally 52 U.S.C. § 10305(e) (providing that persons assigned as observers “shall investigate and to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 10302(a) of this title, to the court”); see also S. REP. NO. 94-295 at 21, *reprinted in* 1975 U.S.C.C.A.N. 787 (noting that “observer reports have served as important records relating to the conduct of particular elections in subsequent voting rights litigation”); accord *Frequently Asked Questions* (observers “prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises”). The reports are admissible into evidence under Federal Rule of Evidence 803(8), as a matter observed by the observers “while under a legal duty to report” as provided by Section 8 of the VRA.

¹⁰⁷ Testimony of Ms. Kay Cole James, Hearing Before the Committee on the Judiciary of the United States Senate, *The Continuing Need for Federal Examiners and Observers to Ensure Election Integrity*, S. HRG. 109-669, at 434, 435 (July 10, 2006); Yazzie Testimony, S. HRG. 109-669, at 495.

¹⁰⁸ See *infra* note 106 and accompanying text.

¹⁰⁹ See, e.g., 52 U.S.C. § 10307 (transferred from 42 U.S.C. § 1973i); 52 U.S.C. § 10308 (transferred from 42 U.S.C. § 1973j); 52 U.S.C. § 10505 (transferred from 42 U.S.C. § 1973aa-3); 52 U.S.C. § 10701(b) (transferred from 42 U.S.C. § 1973bb(b)).

¹¹⁰ See Yazzie Testimony, S. HRG. 109-669, at 495-96; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 24.

enforcement of the Act and the guarantees of the Fourteenth and Fifteenth Amendments would not be possible without federal observers.

Berks County, Pennsylvania illustrates how observer reports are used to enforce the Voting Rights Act. In 2003, a federal court found “there is substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials” in the county.¹¹¹ The intentional discrimination was compounded by the county’s failure to recruit bilingual poll workers despite their ready availability, discriminatory poll worker application process, lack of Spanish election materials for Puerto Rican voters, and the county’s denial of assistance to Hispanic voters even when they brought someone with them to render assistance.¹¹² These examples of discriminatory treatment were documented through federal observer reports. As a direct result of that evidence, the federal court concluded that Berks County violated the Voting Rights Act. The court authorized the continued use of federal observers to assess the County’s compliance with orders requiring the elimination of voting discrimination.¹¹³

¹¹¹ See *United States v. Berks County*, 277 F. Supp.2d 570, 575 (E.D. Pa. 2003). The court summarized many of these discriminatory practices by poll officials in the City of Reading:

[They] turned away Hispanic voters because they could not understand their names, or refused to “deal” with Hispanic surnames.

[They] made hostile statements about Hispanic voters attempting to exercise their right to vote in the presence of other voters, such as “This is the U.S.A. – Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name,” and “Dumb Spanish-speaking people ... I don’t know why they’re given the right to vote.”

[They] placed burdens on Hispanic voters that were not imposed on white voters, such as demanding photo identification or a voter registration card from Hispanic voters, even though it is not required under Pennsylvania law.

[They] required only Hispanic voters to verify their address and told Department staff that they did so because Hispanics “move a lot within the housing project.”

[They] boasted of outright exclusion of Hispanic voters to Voting Section staff during the May 15, 2001 municipal primary election.

Hispanic voters stated that this hostile attitude and rude treatment makes them uncomfortable and intimidated in the polling place, and discourages them from voting.

Id. at 575-76.

¹¹² *Id.* at 575-77.

¹¹³ *Id.* at 585. For additional examples of how federal observer reports facilitate enforcement of the VRA, see generally NAT’L COMM’N ON THE VOTING RTS. ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 31, 60-65 (Feb. 2006).

3. *Measuring Progress in Curing Voting Rights Violations.*

Observers also measure “Progress” that jurisdictions are making in curing voting rights violations.¹¹⁴ Federal observers often are sent to monitor a jurisdiction’s compliance with the constitutional and statutory protections of the right to vote, as well as court orders enforcing those protections. Systemic violations and deeply ingrained discriminatory practices do not disappear over night. Frequently, federal observers need to be present in jurisdictions for several years to measure what incremental progress, if any, is being made.¹¹⁵ Once the progress is sufficient to demonstrate substantial compliance with all requirements protecting the right to vote, reports from federal observers facilitate determinations by federal courts or the Attorney General to terminate coverage.¹¹⁶

The Native American Rights Fund’s recent experience in three regions of Alaska, the Dillingham, Kusilvak, and Yukon-Koyukuk Census Areas, illustrates how federal observers measure progress. In September 2014, a federal court entered a bench order finding that the plaintiffs established a violation of Section 203, the minority language assistance provisions of the VRA, in the three census areas. The court granted the plaintiff’s request for federal observers under Section 3(a) of the Act, which subsequently was extended when the parties settled in 2015.¹¹⁷

Although the preparation of Alaska’s Division of Elections for the 2016 elections reflected significant progress, reports filed by federal observers suggest its efforts still fell short of fully remedying the Section 203 violations. Some two years after the court’s bench ruling for the Plaintiffs and entry of its interim remedial order, bilingual poll worker training was spotty or lacking for several villages. Federal observers were present for both the August 2016 Primary and November 2016 General Election in villages located in the three census areas. Out of the 120 poll workers interviewed by the federal observers for those elections, only 46 percent (55 poll workers) reported that they had been trained in 2016. In contrast, four percent (5 poll workers) reported receiving training in 2015, ten percent (12 poll workers) reported being trained two or more years earlier, 39 percent (47 poll workers) reported they had never been trained, and one percent declined to answer. Some of the poll workers who did receive training indicated that it was “conducted in English by a non-Native instructor from the Election Office.” Bilingual poll workers or interpreters were not trained on “how to translate the contents

¹¹⁴ See generally See H. REP. NO. 109-478, at 44 (finding that observers “have served a critical oversight function, monitoring and reporting on the actions of voters and poll workers inside the polling locations”).

¹¹⁵ See Yazzie Testimony, S. HRG. 109-669, at 503.

¹¹⁶ See generally *The Power of Observation: The Role of Federal Observers under the Voting Rights Act*, 13 MICH. J. RACE & LAW 227, 254-75 (2008) (explaining how federal observers were used to measure progress in Passaic County, New Jersey).

¹¹⁷ See Tucker, Landreth & Dougherty Lynch, *supra* note 40, at 372-77. The description that follows regarding the observer reports is drawn from that article, which includes all of the citations for the quotes in the description.

of the ballot or how to provide procedural instructions” in the covered Alaska Native languages.

In a marked improvement, most, but not all, of the villages had a bilingual poll worker available. In the August 2016 Primary Election, federal observers reported there was no bilingual poll worker available in three out of the nineteen Native villages they observed. In Koliganek, a bilingual poll worker was only available “on call” and was “not present at the polling place.” No bilingual assistance was available at polling places located in Dillingham, Kotlik, and Marshall during a portion of the time federal observers were there when the observers documented the only bilingual worker took a break or left the polling place. In the November 2016 General Election, federal observers reported there was no bilingual poll worker available in just one of the twelve Native villages they observed. While federal observers were present, they reported that no bilingual assistance was available at Fort Yukon for an hour and twenty minutes when the interpreter left the polling place. In Venetie, one of the Plaintiff villages, the only Gwich’in-speaking poll worker left three and one-half hours before the polling place closed, and did not return.

For both elections in 2016, many voting materials were unavailable in the applicable Alaska Native language and dialect. Almost all signage was in English only. Among the nineteen villages in which federal observers were present for the August 2016 primary election, they observed that no voting materials were available in Alaska Native languages in six villages: Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie. The “I voted” sticker was the only material in an Alaska Native language in Marshall and Mountain Village. Only the Yup’ik glossary was observed in Emmonak. Ten villages had a sample ballot written in Yup’ik, but only two – Koliganek and Manokotak – had written translations of the candidate lists. Only one village, Aleknagik, had a written translation of the OEP available for Yup’ik-speaking voters.

In the November 2016 General Election, federal observers documented that half of the twelve polling places they observed did not have a translated sample ballot available for voters. Five villages – New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie – had no translated sample ballot at all, while the Gwich’in sample ballot in Fort Yukon was “kept at the poll workers’ table” and was not provided by the voting machine where voters could use it. The absence of written voting materials had its greatest impact in villages where a trained bilingual poll worker was not present at all times during the election. The observer reports showed that although Alaska had made significant improvements and committed to changing to better serve its voters, it still fell short because nearly 40 years of violating the VRA cannot be changed overnight.

B. The administrative process to deploy federal observers

The Department of Justice has not issued regulations governing how certified jurisdictions are selected for coverage by federal observers.¹¹⁸ However, the Department

¹¹⁸ CITIZEN’S GUIDE, *supra* note 92, at 12.

has informally stated that the following procedure typically is used: Department employees initially conduct telephone surveys of covered jurisdictions with significant minority populations to determine whether any minority candidates are running; a second telephone survey then is conducted of minority contacts in jurisdictions in which there are minority candidates or where there is information suggesting there may be Election Day problems; if there is sufficient evidence of potential problems, a Department attorney is dispatched to the jurisdiction to conduct an investigation and recommends whether observers should be dispatched; and the decision then is made whether to send observers.¹¹⁹

It is not always possible to send federal observers to areas where coverage may be needed. The Justice Department previously explained, “Sometimes the Department learns of election-related problems that may appear to warrant the assignment of federal observers but there is insufficient time to either arrange for the assignment to or to develop the factual predicate necessary for the certification of the political subdivision.”¹²⁰ Some jurisdictions may not be eligible for federal observers because they have not been certified for coverage. Where this occurs, the Department may assign attorneys to monitor elections either in person or by telephone.¹²¹

Since 1965, more than 30,000 federal observers have monitored elections in certified jurisdictions. Between 1982 and 2006, five of the six states originally covered in their entirety by Section 5 of the VRA accounted for approximately two-thirds of all federal observer coverage,¹²² with Mississippi accounting for the greatest percentage.¹²³ In the years leading up to the 2006 reauthorization, the number of observers increased dramatically as part of the Justice Department’s enforcement activities in jurisdictions covered by the language assistance provisions of the VRA. According to the Justice Department, in 2004 “a record 1,463 federal observers and 533 Department personnel were sent to monitor 163 elections in 105 jurisdictions in 29 states.”¹²⁴ In 2005, an off-election year, the Department deployed 640 federal observers and 191 Department

¹¹⁹ CITIZEN’S GUIDE, *supra* note 92, at 12; COMPTROLLER REPORT, *supra* note 90, at 22-23; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 36-39.

¹²⁰ U.S. Dep’t of Just., Civ. Rts. Div., Voting Sec., *Federal Examiners and Federal Observers* (modified Feb. 28, 2006).

¹²¹ *See id.*

¹²² *See* H. REP. NO. 109-478, at 44.

¹²³ *See generally* Slaughter-Harvey Testimony, S. HRG. 109-669, at 448-49

(“Since 1982, federal observers have been deployed to 48 of the state’s 82 counties. In total, federal observers have monitored elections in Mississippi on more than 250 occasions since the 1982 renewal – the highest number of deployments of all covered states. Indeed, Mississippi accounts for 40 percent of all federal observer deployments since 1982. Moreover, many of those jurisdictions have been the subject of multiple observer deployments during that period.... Multiple observer deployments may provide an indication that a jurisdiction is somewhat hostile to the protections afforded by the Voting Rights Act or illustrate the degree of racial tension and intimidation experienced by voters in an area.”).

¹²⁴ United States Department of Justice press release (June 5, 2006).

personnel to monitor 47 elections in 36 jurisdictions in 14 states.¹²⁵ In June 2006, the Justice Department sent federal observers to eighteen counties in five states, primarily to monitor compliance with federal court orders in language assistance cases.¹²⁶ Between 2001 and 2006, much of the observer coverage was for violations of the VRA's language assistance provisions.¹²⁷

C. Mapping out a deployment plan for a federal observer exercise

The Justice Department tailors federal observer coverage on a case-by-case basis by making calculated determinations about the problems and issues that exist within a particular jurisdiction. Whenever feasible, Department attorneys meet with local election officials to establish lines of communication and describe the role that the federal observers play during the course of the election. Federal observers do not interfere with the local conduct of the election and are prohibited from offering assessments to election officials or others present in the polls.¹²⁸ Rather, observers merely observe and document activity inside the polling place, and communicate this information to a DOJ attorney.¹²⁹

Where necessary, Justice Department attorneys will share information about voting discrimination identified by federal observers to election officials, especially if there is a possibility that a voter may be denied the right to cast a ballot.¹³⁰ Local election officials frequently welcomed federal observers, particularly if they helped establish compliance with the VRA.¹³¹ However, observers remain an enforcement arm of the Justice Department and are not there to interfere with or perform the work of local election officials.¹³²

Federal observer exercises require substantial planning. The planning begins early on, when Department of Justice attorneys and other employees begin documenting evidence that justifies the selection of jurisdictions for coverage.¹³³ Often, this documentation includes summarizing written complaints from voters or community

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See H. REP. NO. 109-478, at 44-45; see also James Testimony, S. HRG. 109-669, at 436 (describing increased observer coverage to protect language minority voters in Arizona, New Mexico, New Jersey, California, Michigan, Pennsylvania, and New York); Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 23 (attributing the increase in observer coverage since 1982 to growing coverage to protect the voting rights of language minority citizens).

¹²⁸ See Yazzie Testimony, S. HRG. 109-669, at 495; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 22.

¹²⁹ See Yazzie Testimony, S. HRG. 109-669, at 495-96.

¹³⁰ See Yazzie Testimony, S. HRG. 109-669, at 495-96; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 39-40; Testimony of Penny Pew, *House Observer Hearing*, *supra* note 98, at 14.

¹³¹ See Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 24.

¹³² See *id.*

¹³³ See *id.* at 37-39.

groups of suspected Election Day problems.¹³⁴ Department attorneys call local contacts to determine whether there is evidence of racial tensions, racial appeals, or efforts to directly or indirectly suppress the voting rights of racial or ethnic minority citizens.¹³⁵ Local press accounts often provide evidence of tense conditions. The presence of racially heated white/black, white/Asian, Anglo/Latino and Native American/non-Native American races is also a significant factor that is considered.¹³⁶ Similarly, elections in which minority voters are in a position to elect candidates of choice for the first time or possibly to gain a majority of seats on in elected body are a strong basis for sending observers.¹³⁷

After the preliminary investigation is completed, the Department may then send an attorney to the jurisdiction to gather supplemental information and assess the situation on the ground. Based upon meetings with local officials and other evidence gathered, the Chief of the Voting Section may forward a written recommendation requesting deployment of federal observers to the Attorney General or his or her designee, who makes the final decision. The entire investigation and recommendation process typically takes at least three weeks, although expedited authorizations can be secured if circumstances dictate. Typically, an investigation is not conducted for jurisdictions being monitored under a federal court order because the evidence already supports continued observer coverage.

D. Creation and use of the federal observer report

When a jurisdiction is approved for federal observer coverage, the responsible Department attorney works with OPM to develop the form report and plan the exercise.¹³⁸ Federal observer reports require documenting information for each covered voting precinct including: the opening and closing times for the polling place; how many poll workers are present at opening and closing; any problems opening or closing the polling place or with poll worker staffing; voters waiting in line at opening or closing; signage and publicity showing the location of the polling place; the number, race, ethnicity, language abilities, position, and training of each poll worker; how the polling place is configured; where all of the poll workers and voting materials are located; polling place accessibility, particularly for handicapped and elderly voters; voter assistance compliance under both Sections 203 and 208 of the Act; and compliance with provisions of HAVA. Reports are “designed to address the relevant issues and specific problems” in the jurisdiction where observers are being deployed.¹³⁹

¹³⁴ See Slaughter-Harvey Testimony, S. HRG. 109-669, at 450.

¹³⁵ See *id.* at 450-57.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See Yazzie Testimony, S. HRG. 109-669, at 495.

¹³⁹ Yazzie Testimony, S. HRG. 109-669, at 495.

In jurisdictions required to provide language assistance, observers also document whether all written materials are provided in the covered language (unless it is an unwritten language), the availability of language assistance, and whether that assistance is available at every stage of the election process. The report also allows observers to report how voters are treated inside and outside of the polling place, whether they are offered provisional ballots if their names are not on the voter registration list, and the availability of voting instructions and assistance using the voting machine or casting a paper ballot. Observers are provided with special forms to complete in the report if a voter is turned away without being allowed to vote, without receiving assistance, or any other action taken against the voter.

Reports are written in objective terms so the observer merely documents what he or she sees, without drawing any conclusions of whether those observations are discriminatory or violations of any constitutional or statutory protections.¹⁴⁰ In places where federal observer coverage has been conducted previously, the report is typically updated to reflect any changes in local election laws or expected Election Day activities from the previous coverage.

Federal observer training includes going over the observer's role, reviewing the report, role-playing to demonstrate proper and improper methods of observation, and driving through the jurisdiction to familiarize each observer team with their polling place location(s).¹⁴¹ Observers are instructed to request a voter's permission before accompanying them into the voting booth, including the least intrusive way of making that request. Although many OPM employees have participated in observer coverage for several years, they are required to complete the daylong training like all of the other observers to ensure uniformity and consistency during the exercise.

Usually, two observers are paired together as a team. If the observers are in a jurisdiction to document language assistance compliance, efforts will be made to ensure that at least one of the observers is fluent and can read and write in the language they are there to observe. Bilingual observers are important for several reasons. They can observe and document the language abilities of poll workers, usually by engaging the poll workers in a short conversation when voters are not present. In addition, they are able to observe communications between poll workers and voters in the covered language.

Observers do not make any judgments on the quality of language assistance that is offered, but merely document their observations. Occasionally, OPM must hire contract employees if it does not have sufficient employees proficient in the covered languages for an observer exercise, particularly for American Indian languages. Observers are selected because of their communication skills, attention to detail, and writing abilities.

¹⁴⁰ Yazzie Testimony, S. HRG. 109-669, at 495.

¹⁴¹ See Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 40.

A Department attorney and OPM captain establish a command center to receive reports from co-captains and observer teams as activities develop in the field.¹⁴² Election coverage usually commences at least one hour before the polls open and ends after all of the polls close. Sometimes, federal observers will be present during the counting and final tabulation of ballots, including absentee and provisional ballots and any other ballots or voter challenges addressed during the canvassing process.

Immediately after coverage of the polling places and/or ballot-counting ends, observers work with Department attorneys and OPM managers to finalize their reports while the information is still fresh in their minds. In most cases, the original versions of the reports are maintained either by OPM or the Department of Justice. Copies of the reports are usually submitted to a supervising federal court, redacting any information necessary to protect voter identity. The Department of Justice provides local elections officials with a summary of information gathered by the observers.¹⁴³

Training and reports highlight that observer coverage is not one-sided. Reports from observer coverage may vindicate a jurisdiction by documenting the absence of voting discrimination. For example, observer reports aided a federal court in determining that election irregularities in Humphreys County, Mississippi, were insufficient to warrant setting aside the election results.¹⁴⁴ The court described the important evidentiary role that the reports played in weighing contradictory evidence:

It is impossible for the court to satisfactorily resolve many irreconcilable evidentiary disputes without resort to the federal observers' reports. These reports... were compiled by disinterested persons almost immediately following the election; they were submitted in the regular course of official duty and are regarded as highly credible.¹⁴⁵

Contrary to what the plaintiffs alleged, federal observers documented that ballots “were rejected without overtones of racial discrimination” because unclear ballots for both white and black candidates were disregarded.¹⁴⁶ The court reasoned, “Any contrary conclusion, which contradicts the basic findings of the federal observers, is without credible support and must be rejected as inconsistent with the plainly established facts.”¹⁴⁷ Therefore, the court held that “white officials, while rendering assistance at the polls, did not mislead, intimidate or coerce black assisted voters contrary to their

¹⁴² See Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 22-23.

¹⁴³ See Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 23.

¹⁴⁴ *James v. Humphreys County Bd. of Election Comm'rs*, 384 F. Supp. 114 (N.D. Miss. 1974).

¹⁴⁵ *Id.* at 125.

¹⁴⁶ *Id.* at 122.

¹⁴⁷ *Id.* at 125.

wishes.”¹⁴⁸ On the other hand, federal observers also provide an important tool to identify and stop voting discrimination where it occurs.¹⁴⁹

IV. Certification for Federal Observers up to the 2006 VRA Reauthorization.

The federal observer and examiner provisions originally were codified as Sections 3, 6-9, and 13 of the VRA. Under that statutory framework, a jurisdiction first had to be certified for federal examiners before federal observers could be dispatched to cover its elections. Certification occurred through two different mechanisms.

If a jurisdiction was covered under either Section 4(f)(4) or Section 5 of the Act, then certification occurred under Section 6. That Section provided that the Attorney General could certify the jurisdiction for federal examiners if he or she either had received twenty meritorious written complaints from residents in the jurisdiction alleging voting discrimination or if their appointment was necessary to enforce voting rights protected under the Fourteenth and Fifteenth Amendments to the U.S. Constitution.¹⁵⁰ Nearly all of the certifications were based upon the Attorney General’s determination that certification was necessary to cure a constitutional violation.¹⁵¹

If a jurisdiction was not covered by Sections 4(f)(4) or 5, then certification occurred under Section 3(a). That Section permits a federal court to certify a jurisdiction for federal observers “for such period of time ... as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment.”¹⁵² Federal courts were authorized to certify a jurisdiction for coverage as part of any “interlocutory order”¹⁵³ or “as part of any final judgment,” as long as “the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred” in the jurisdiction being covered.¹⁵⁴ Like the “pocket trigger” for Section 5 coverage,¹⁵⁵ this pocket trigger for observer coverage allows private parties, as well as

¹⁴⁸ *Id.* at 129.

¹⁴⁹ *See infra* notes 94-117 and accompanying text.

¹⁵⁰ *See* 42 U.S.C. § 1973d, *repealed by* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

¹⁵¹ *See About Federal Observers, supra* note 69.

¹⁵² 52 U.S.C. § 10302(a).

¹⁵³ An interlocutory order encompasses any preliminary relief awarded before a full hearing on the merits.

¹⁵⁴ *See* 52 U.S.C. § 10302(a). Appointment of observers did not have to be authorized if the violations of the right to vote: “(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.” *Id.*

¹⁵⁵ The “pocket trigger” for Section 5 coverage allows a court to require that a jurisdiction not subject to Section 5 to submit future voting changes to the Attorney General for an “appropriate time” until violations of the fourteenth and fifteenth amendments have been eliminated. *See* 52 U.S.C. § 10302(c). More detailed discussion of this bail-in mechanism is provided in Part I.

the Attorney General, to request certification of a jurisdiction not otherwise subject to the VRA's special provisions (including the observer provisions).¹⁵⁶

Certified jurisdictions could petition for termination of federal examiner coverage. Section 13 provided that a jurisdiction certified under Section 6 could petition the Attorney General to request the Director of the Census to take a census or survey of voter participation. The Attorney General could terminate the certification if: (1) the Director of the Census determined more than 50% of the nonwhite persons of voting age are registered to vote; (2) all persons listed by an examiner had been placed on the voter registration lists; and (3) there was no longer reasonable cause to believe that persons would be denied the right to vote on account of race or color or on the basis of their language.¹⁵⁷ In the alternative, a certified jurisdiction could file a declaratory judgment action seeking termination in the District Court of the District of Columbia.¹⁵⁸ A jurisdiction certified under Section 3(a) could petition the court that issued the order to terminate certification.¹⁵⁹

Under the framework of the original 1965 Act, federal examiners were authorized to examine voter registration applicants concerning their qualifications for voting, to create lists of eligible voters to forward to the local registrar, and to issue voter registration certificates to eligible voters.¹⁶⁰ The provision originally was included in the 1965 Act because at that time, eligible minority voting age citizens in the South, primarily African-American citizens, were subjected to widespread discriminatory registration procedures. Those procedures included literacy tests, "moral character" requirements, denial of voter registration materials, limited registration hours, slow registration processing,¹⁶¹ voter purges, threats, intimidation, violence, and social pressure against applicants including loss of employment, eviction, and even denial of food and water in a particularly egregious example from Mississippi.¹⁶² Federal

¹⁵⁶ See 52 U.S.C. § 10302(a); see also *Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585, 590 (D.S.D. 2007) ("Section 3 of the Voting Rights Act was amended in 1975 to allow private parties the same remedies under Section 3 that were previously afforded only to the Attorney General" and noting that the "legislative history defines the term 'aggrieved person' as 'any person injured by an act of discrimination.'").

¹⁵⁷ See 52 U.S.C. § 10309 (transferred from 42 U.S.C. § 1973k).

¹⁵⁸ See *id.*

¹⁵⁹ See 52 U.S.C. § 10302(a).

¹⁶⁰ See 42 U.S.C. § 1973e, *repealed by* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

¹⁶¹ For example, in many southern counties, voter registration sites were only open for a few hours each month or deliberately slowed down the pace of registration of African-American voting age citizens. See generally H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2447 (summarizing evidence of discrimination in voter registration in Alabama and Louisiana).

¹⁶² See James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote*, 43 How. L.J. 343 (2000); see also Slaughter-Harvey Testimony, S. HRG. 109-669, at 442-45 (summarizing the history of voting discrimination in Mississippi that led to the passage of the federal observer provisions).

examiners were authorized under the VRA to “examine applicants concerning their qualifications to vote” and to register them if they met the qualifications “prescribed by State law not inconsistent with the Constitution and the laws of the United States.”¹⁶³

The federal examiners provision proved to be extraordinarily successful in achieving its goal of allowing eligible minority citizens to register to vote.¹⁶⁴ Although federal examiners initially accounted for a large percentage of black voters registered in the South after passage of the VRA in 1965, they were “used sparingly in recent years” and no new voters had been added since 1983.¹⁶⁵ The additions of other federal statutes, including the National Voter Registration Act (NVRA),¹⁶⁶ the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA),¹⁶⁷ and the Help American Vote Act (HAVA),¹⁶⁸ likewise have contributed to the tremendous increase in voter registration. By 2006, the federal examiner provision was used only as a mechanism to certify a jurisdiction as eligible for federal observers, and not for its original purpose of registering voters. Therefore, the provision was no longer needed.

The Voting Rights Act Reauthorization Act of 2006 (VRARA)¹⁶⁹ made several changes to the existing framework of the federal examiner and observer provisions to update the certification process to contemporary needs and usage.¹⁷⁰ Section 3(c) of the VRARA repealed the federal examiner provisions in Sections 6, 7, and 9 in their entirety because those provisions had outlived their utility.¹⁷¹ Section 3(d) of the VRARA substituted references to “observers” for references to “examiners” in the remaining Sections of the Act.¹⁷² Section 3(a) of the VRARA used the two existing certification methods, with some slight modifications, but applied them to federal observers in Section 8 of the Act.¹⁷³ Section 3(d) of the VRARA updated the process for terminating

¹⁶³ 42 U.S.C. §§ 1973e(a)-(b), *repealed by* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

¹⁶⁴ *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson ed., 1994) (summarizing the dramatic increases in minority voter registration under the provisions). For a good summary of the impact the federal examiner program had on black voter registration in the South, *see* Weinberg Testimony, *House Observer Hearing, supra* note 98, at 21-22.

¹⁶⁵ S. REP. NO. 94-295 at 20, *reprinted in* 1975 U.S.C.C.A.N. 786. As of December 31, 2005, there were only 112,078 federally registered voters remaining in five southern states: Alabama (50,566), Georgia (2,253), Louisiana (12,289), Mississippi (42,388), and South Carolina (4,582).

¹⁶⁶ 52 U.S.C. §§ 20501 to 20511 (transferred from 42 U.S.C. §§ 1973gg to 1973gg-10).

¹⁶⁷ 52 U.S.C. §§ 20301 to 20311 (transferred from 42 U.S.C. §§ 1973ff to 1973ff-6).

¹⁶⁸ 52 U.S.C. §§ 20901 to 20906 (transferred from 42 U.S.C. §§ 15301 to 15545).

¹⁶⁹ Pub L. No. 109-246, 120 Stat. 577 (2006).

¹⁷⁰ For a discussion of the 2006 amendments to the VRA, *see generally, The Politics of Persuasion, supra* note 97.

¹⁷¹ *See* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

¹⁷² *See* VRARA § 3(d), *enacted as* Pub L. No. 109-246 § 3(d), 120 Stat. 580.

¹⁷³ *See* VRARA § 3(a), *enacted as* Pub L. No. 109-246 § 3(a), 120 Stat. 578-79. For one of the certification methods, the VRARA substitutes a requirement of “written meritorious complaints” from “residents,

certifications by the Attorney General based solely upon evidence that “there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color.”¹⁷⁴ A federal court continues to retain the authority to terminate certifications made under the pocket trigger for observer coverage.¹⁷⁵ The VRARA’s elimination of the federal examiner provisions enhanced opportunities for observer coverage in jurisdictions by streamlining the certification process to focus on those places where it is needed. In the process, Congress made clear that the “traditional functions of the federal observers remain unchanged.”¹⁷⁶

V. Restoration of Robust Federal Observer Coverage under H.R. 4.

The Justice Department has noted that following *Shelby County*, “the department is still committed to using all of the tools at our disposal to enforce the federal voting rights laws – including working with Congress in ways that may increase our capacity.” H.R. 4 would accomplish that goal in three ways.

First, H.R. 4 would renew and restore Section 5 of the VRA by enacting a new coverage formula. The effect of that new formula would make the covered states and political subdivisions subject to the preclearance requirements. Once subject to preclearance, a jurisdiction would be eligible for certification by the Attorney General under Section 8 of the VRA. This fix, by itself, would lead to the restoration of much of the federal observer coverage lost from *Shelby County* because the vast majority of that coverage was due to the Attorney General’s certifications.¹⁷⁷

Second, H.R. 4 would make a modest, but important, conforming amendment to observer coverage by federal courts under Section 3(a) of the Act. Currently, that section authorizes federal observer coverage “for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment...”¹⁷⁸ Section 2(a) of H.R. 4 would amend Section 3(a) by striking “violations of the fourteenth or fifteenth amendment” and inserting “violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,”.

That change would make it easier for federal courts to authorize observers because it would relieve the Attorney General or private litigant from having to establish

elected officials, or civic participation organizations” in place of the current requirement of 20 such complaints from “residents” of the jurisdiction. The other method of certification under Section 6 is identical, except for the substitution of “observer” for “examiner.” *Cf. id.* with 42 U.S.C. § 1973d.

¹⁷⁴ See VRARA § 3(d), enacted as Pub L. No. 109-246 § 3(d), 120 Stat. 580.

¹⁷⁵ See *id.*

¹⁷⁶ H. REP. NO. 109-478, at 63.

¹⁷⁷ See *supra* notes 69-71 and accompanying text.

¹⁷⁸ 52 U.S.C. § 10302(a).

the likelihood of a constitutional violation, which implicates a higher burden of proof.¹⁷⁹ Under the modified language, a violation of the VRA or any federal law prohibiting voting discrimination on the basis of race, color or language minority status would suffice. This would eliminate the need for litigants to bring a separate constitutional claim. As long as a litigant establishes the requisite voting rights violation, including those under federal laws such as the VRA, they would be entitled to the appointment of federal observers unless the jurisdiction establishes that voting rights violations “(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.”¹⁸⁰

Third, Section 6 of H.R. 4 would amend Section 8 of the VRA¹⁸¹ to expand the Attorney General’s discretion to assign federal observers in jurisdictions covered by the Act’s preclearance provisions. Currently, Section 8(a) of the VRA provides:

Whenever –

(1) a court has authorized the appointment of observers under section 10302(a) of this title for a political subdivision; or

(2) the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 10303(b) of this title, unless a declaratory judgment has been rendered under section 10303(a) of this title, that—

(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title are likely to occur; or

(B) in the Attorney General’s judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the

¹⁷⁹ See *supra* notes 13-66 and accompanying text (describing the burden for establishing a constitutional violation to secure bail-in under Section 3(a) of the VRA).

¹⁸⁰ 52 U.S.C. § 10302(a).

¹⁸¹ 52 U.S.C. § 10305.

14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment;

the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.¹⁸²

H.R. 4 would leave Section 8(a)(1) intact. It would amend Section 8(a)(2)(B) to parallel the change in Section 3(a) of the Act to include not only circumstances necessary to enforce the guarantees of the 14th or 15th Amendment, but also “any provision of this Act or any other Federal law protecting the right of citizens of the United States to vote; or”. Furthermore, it would add a new subparagraph 8(a)(3) to duplicate the process for certification by the Attorney General to also include instances in which “in the Attorney General’s judgment, the assignment of federal observers is necessary to enforce the guarantees of section 203” of the VRA.

Taken together, H.R. 4 makes these much-needed changes to the VRA to restore and renew the federal observer protections, which were severely undermined by the *Shelby County* decision.

VI. Constitutionality of the Federal Observer Provisions.

In *City of Boerne v. Flores*, the United States Supreme Court set the parameters for congressional exercise of its remedial powers under the Fourteenth and Fifteenth Amendments.¹⁸³ According to the Court, “While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved” considered “in light of the evil presented.”¹⁸⁴ *Boerne* cited the evidence of racial discrimination supporting the VRA as the type of record necessary to meet the congruence standard.¹⁸⁵

Where that record is established, Congress has “wide latitude” in determining appropriate deterrent or remedial legislation,¹⁸⁶ “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”¹⁸⁷ This is particularly true for legislation such as the VRA in which “the possibility of overbreadth” is reduced by limiting its applications “to those cases in which constitutional violations were most likely” and

¹⁸² 52 U.S.C. § 10305(a).

¹⁸³ See generally 521 U.S. 507, 517-19 (1997) (noting that the “positive grant of legislative power” given to Congress under the Enforcement Clause of the Fourteenth Amendment was “remedial” in nature).

¹⁸⁴ *Id.* at 530.

¹⁸⁵ See *id.* at 530, 532-33.

¹⁸⁶ *Id.* at 519-20.

¹⁸⁷ *Id.* at 518 (citing several examples from the VRA that are constitutional).

terminating it when the danger subsided.¹⁸⁸ Following *Boerne*, the Court confirmed that congressional power is at its apex for legislation protecting fundamental rights afforded heightened constitutional scrutiny.¹⁸⁹

The federal observer provisions fall squarely within Congress's powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments.¹⁹⁰ Federal courts have found the provisions are constitutional, even where they appear to conflict with state ballot secrecy laws. As explained above, there is substantial evidence demonstrating that effective enforcement of the VRA requires use of federal observers. Consequently, in the 2006 reauthorization, the federal observer provisions were extended without any objections from any members of Congress.

A. Preservation of ballot secrecy

In *South Carolina v. Katzenbach*, the United States Supreme Court declined to rule on the constitutionality of the federal observer provisions in Section 8 of the VRA, noting that judicial review would have to wait for subsequent litigation.¹⁹¹ It did not take long for federal courts to accept *Katzenbach's* invitation.

Shortly following that decision, three Alabama counties challenged Section 8 as an unconstitutional exercise of federal power.¹⁹² The counties had prohibited federal observers from entering polling places because they claimed that the federal observer provisions were contrary to state law protecting the right of voters to cast a secret ballot.¹⁹³ The federal court rejected the counties' argument. The court explained:

The purpose of federal observers, as stated by one of the sponsors of that portion of the act, is "to observe and report back any corrupt practices which prevent persons certified as eligible voters from casting a ballot and having their votes counted." In this context, the function of a federal observer appears to be a constitutional exercise of Congress's authority to enforce the Fifteenth Amendment

¹⁸⁸ *Id.* at 533 (citing several examples from the VRA).

¹⁸⁹ See generally *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding congressional abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act because it protected the fundamental right of access to the courts); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the congressional abrogation of state sovereign immunity under the Family Medical Leave Act because the Act prevented sex discrimination).

¹⁹⁰ U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

¹⁹¹ 383 U.S. 301, 316 (1966).

¹⁹² *United States v. Executive Committee of Democratic Party of Greene County*, 254 F. Supp. 543 (N.D. Ala. 1966). Marengo County, one of the three counties challenging Section 8, had a lengthy history of discriminating against Black voters, detailed in *Clark v. Marengo County*, 469 F. Supp. 1150, 1172-74 (S.D. Ala. 1979).

¹⁹³ *Greene County*, 254 F. Supp. at 544, 546.

within the standards set by *State of South Carolina v. Katzenbach*.¹⁹⁴

The court acknowledged that Alabama had an important state interest in preserving the secrecy of the ballot, but balanced that against the substantial federal interest in using observer coverage to ensure compliance with the Fifteenth Amendment. The court reasoned that the state's concern was adequately addressed if a voter consented to having a federal observer present while casting a ballot.¹⁹⁵ Therefore, the court concluded that the "Supremacy Clause of the United States Constitution requires that this procedure of Alabama law give way to enforcement of the Voting Rights Act of 1965."¹⁹⁶

Other federal courts agreed with this reasoning. In *United States v. Louisiana*, the court enjoined the state and local defendants from interfering with federal observers in the performance of their duties under Sections 8 and 14 of the VRA.¹⁹⁷ The court explained, "Contrary to the understanding of some persons, the federal observers observe; they do not render assistance to illiterates."¹⁹⁸ Upon the consent of the voter, observers were even permitted to go into the voting booth with the voter to observe the process.¹⁹⁹ Ballot secrecy would be maintained by placing the observer "under the same duty to preserve the secrecy of the ballot" as election officials authorized to render assistance to illiterate voters.²⁰⁰ Equally important, the *Louisiana* court held that federal courts have no authority to enjoin the use of federal observers in properly certified jurisdictions.²⁰¹ Instead, Section 8 expressly provides that "the appointment of observers is a matter of executive discretion and is not subject to judicial review."²⁰²

B. The continuing need for federal observers

Federal observer coverage is key to ensuring that jurisdictions comply with the VRA and the Fourteenth and Fifteenth Amendments.²⁰³ It allows the Justice Department and federal courts to observe discrimination that might otherwise go undetected on Election Day. Federal observers are able to monitor every aspect of an election, from the

¹⁹⁴ *Id.* at 546.

¹⁹⁵ *Id.* at 546-47.

¹⁹⁶ *Id.* at 547.

¹⁹⁷ 265 F. Supp. 703, 713 (E.D. La. 1966).

¹⁹⁸ *Id.* at 715.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Sections 3 and 13 of the VRA, as amended by the VRARA, provide for judicial review of the process of certifying and terminating observer coverage.

²⁰² *United States v. Louisiana*, 265 F. Supp. at 715.

²⁰³ For an extended discussion of some of the evidence establishing the constitutionality of the federal observer provisions under the VRA, both as initially enacted in 1965 and as reauthorized in 2006, see generally Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 27-37.

time the voter enters the polling place to the moment that he or she casts her ballot, and even thereafter when the ballots are tabulated. In the process, federal observers can document voter treatment by election officials and others both outside and inside polling places; the availability of voting materials and assistance (particularly for language minority, first time, elderly, illiterate, and handicapped voters); and the extent to which all voters have an equal opportunity to participate in the electoral process.

In 2005 and 2006, Congress developed a “substantial volume of evidence” of racial discrimination to demonstrate the continued need for federal observers.²⁰⁴ That evidence, summarized in Section 2 of the VRARA, included “vestiges of discrimination” such as “second generation barriers” to minority voting.²⁰⁵ It also encompassed “continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions” that made racial and language minorities “politically vulnerable.”²⁰⁶ The evidence showed that in jurisdictions covered by the temporary provisions, there was substantial non-compliance with Section 5, many had been denied bailout, minorities continued to file Section 2 cases, and the Department of Justice had to actively enforce the language assistance provisions.²⁰⁷ Similarly, there had been widespread use of federal observers in certified jurisdictions to document and prevent voting discrimination.²⁰⁸

Despite substantial progress under the Act, forty years was insufficient “to eliminate the vestiges of discrimination following nearly 100 years of disregard” for the Constitution.²⁰⁹ The findings from the 2006 reauthorization and the hearings in support of H.R. 4 demonstrate the continuing need for federal observers and present a compelling basis for the amended provisions under the *Boerne* line of cases.²¹⁰

VII. The Importance of Keeping Federal Observers Neutral and Impartial.

Recently, there have been reports about increasing efforts to expand the access that partisan poll watchers have to the voting process.²¹¹ It is well established that there is no First Amendment right for candidates, campaigns or political parties to have partisan poll watchers inside the polling places absent authorization.²¹² Far too often,

²⁰⁴ H. REP. No. 109-478, at 64.

²⁰⁵ VRARA § 2(b)(2), enacted as Pub L. No. 109-246 § 2(b)(2), 120 Stat. 577.

²⁰⁶ VRARA § 2(b)(3), enacted as Pub L. No. 109-246 § 2(b)(3), 120 Stat. 577.

²⁰⁷ VRARA § 2(b)(4), enacted as Pub L. No. 109-246 § 2(b)(4), 120 Stat. 577.

²⁰⁸ VRARA § 2(b)(5), enacted as Pub L. No. 109-246 § 2(b)(5), 120 Stat. 577.

²⁰⁹ VRARA § 2(b)(7), enacted as Pub L. No. 109-246 § 2(b)(7), 120 Stat. 577.

²¹⁰ See H. REP. No. 109-478, at 57-58.

²¹¹ See Nick Corasaniti, *G.O.P. Seeks to Empower Poll Watchers, Raising Intimidation Worries*, N.Y. TIMES (May 1, 2021) <<https://www.nytimes.com/2021/05/01/us/politics/republican-pollwatchers.html>>.

²¹² See generally *Burson v. Freeman*, 504 U.S. 191, 214, 216 (1992) (Scalia, J., concurring) (finding that polling locations are not public fora for speech outside of casting a ballot, observing that statutes restricting

when state and local governments have given their approval, poll watchers are “used to intimidate voters and harass election workers” in a manner that can target “communities of color and stoke fears that have the overall effect of voter suppression.”²¹³

Nevertheless, during the 2006 reauthorization debate on the VRA, there was at least one modest effort to amend the Act to provide for partisan poll watchers in place of or in addition federal observers.²¹⁴ It would have injected federal observers squarely into partisan pitched battles for the first time. Contrary to such an ill-advised proposal, partisan poll watchers are not interchangeable with federal observers authorized under the VRA. Therefore any proposals that may be made to amend H.R. 4 to provide for partisan poll watchers should be rejected. The reason is best explained through the many differences between federal observers and partisan poll watchers.

First, partisan poll watchers are precisely that: partisan. They work for a particular political party, candidate, or organization with a vested interest in the outcome of the election. The manner in which they approach their activities inside and outside polling places is influenced by the partisan objectives that they bring to the table. On the other hand, federal observers are neutral outsiders who have no stake in the election.²¹⁵ Except in extremely rare cases, a federal observer is not even deployed to observe elections in the jurisdiction where they reside.²¹⁶ Every effort is made to ensure that federal observers maintain their objectivity and are not associated with a particular candidate or election outcome. Instead, federal observers work as an extension of the United States Department of Justice or federal courts supervising implementation and compliance with the VRA.²¹⁷

campaigning during polling hours have a long history and “the streets and sidewalks around polling places have traditionally not been devoted to assembly and debate”); *see id.* at 220 n.4 (Stevens, J., dissenting) (“[T]here is no disagreement that the restrictions on campaigning within the polling place are constitutional; the issue is not whether the State may limit access to the ‘area around the voter’ but whether the State may limit speech in the area around the polling place.”). Therefore, federal courts applying *Burson* have concluded “the interior of a polling place, is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort. The only expressive activity involved is each voter’s communication of his own elective choice...” *E.g.*, *Marlin v. District of Columbia Bd. of Elections and Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001).

²¹³ Corasaniti, *supra* note 211.

²¹⁴ *See* Testimony of Mark F. (Thor) Hearne, II, Hearing Before the Committee on the Judiciary of the United States Senate, *The Continuing Need for Federal Examiners and Observers to Ensure Election Integrity*, S. HRG. 109-669, at 417, 431 (July 10, 2006).

²¹⁵ *See supra* notes 88-91 and accompanying text.

²¹⁶ In some cases involving language minority voters for which there may be a particularly small pool of available federal observers, an exception might be made. However, these exceptions are extremely rare. For example, for Navajo language coverage in Arizona, New Mexico, and Utah, Navajo federal observers are deployed to communities other than those where they reside despite the more limited pool of persons available to serve as observers.

²¹⁷ *See supra* notes 83-86 and accompanying text.

Second, partisan poll watchers not only are trained to inject themselves into the election process, they may be expected and encouraged to do so. Many state laws specifically provide for partisan poll watchers to challenge voters about their qualifications to vote.²¹⁸ Partisan poll watchers often take advantage of those laws by aggressively challenging any voter who is not on a pre-printed list of registered voters supporting their party, candidate, or issue. Partisan poll watchers regularly engage poll workers with comments or criticisms about the voters they are allowing to cast ballots and how the poll workers are conducting the election. In sharp contrast, federal observers are specifically trained to refrain from participating in the election process, including providing any feedback to poll workers.²¹⁹

Third, partisan poll watchers routinely make value judgments such as whether, in their opinion, particular voters should be allowed to cast a ballot or whether poll workers are complying with federal, state, or local law. Conversely, federal observers are trained to not make any value judgments at all.²²⁰ Federal observers dispassionately document their observations without rendering any conclusions about whether those observations demonstrate compliance with the law. Federal observers scrupulously record their observations in comprehensive reports that allow them to recreate what transpired in the polling place or ballot counting location.

Therefore, any proposal to make federal observers partisan is severely flawed, would undermine Justice Department enforcement, and might facilitate voter intimidation and discrimination. For example, it has been argued by some that observers “should be trained in the requirements of federal election law and the relevant state’s election law and procedure.”²²¹ On the surface, that suggestion seems alluring. However, it overlooks the fact that federal observers, unlike partisan watchers, are not there to make value judgments. Instead, they are simply there to observe “whether persons who are entitled to vote are being permitted to vote” and “whether votes cast by persons entitled to vote are being properly tabulated.”²²² It is not the role of federal observers to evaluate whether election officials are complying with the law.

Another proposal that observers “should be free to communicate with the press and others outside of the election facility” is even more problematic.²²³ Under the VRA, federal observers are present at polling sites and ballot tabulation centers to perform a law enforcement function. They are extensions of the United States Attorney General or the

²¹⁸ Common bases for challenging voters include failure to register to vote, failing to update voter registration records to reflect changes of address, no longer residing in the jurisdiction, age, citizenship, status as a convicted felon whose civil rights have not been restored, the voter is deceased, or the voter has already cast an absentee ballot or otherwise voted previously.

²¹⁹ See *supra* notes 89-91 and accompanying text.

²²⁰ See *supra* notes 128-32 and accompanying text.

²²¹ Hearne Testimony, S. HRG. 109-669, at 431.

²²² See 52 U.S.C. § 10305.

²²³ Hearne Testimony, S. HRG. 109-669, at 431.

federal courts in places that are certified under Section 3(a) of the VRA.²²⁴ Authorizing federal observers to communicate with persons outside of the Justice Department and the Office of Personnel Management would undermine the evidence they are gathering to measure compliance with the VRA and destroy the “highly credible” reports they produce.²²⁵ It would open up the objectivity of their observations to attack from statements taken out of context, or even worse, mischaracterized or misquoted by the press. Federal observers would become distracted by outside influences instead of focusing on documenting what they are observing. It also would make it more likely that voter confidentiality and ballot secrecy would be compromised and in the process render the federal observer program unconstitutional.²²⁶ In short, all of the qualities that make federal observer reports unassailable and the role of the observer constitutional would be eliminated.

For similar reasons, a suggestion that federal observers “should have the means to provide a timely objection to election misconduct by communication with senior election officials or law enforcement authorities” also is erroneous.²²⁷ Federal observers do not work for local election officials or state officials. They work for the Office of Personnel Management as an extension of the United States Attorney General.²²⁸ Vesting discretion in federal observers to report their observations to state or local officials ignores their unique role and would encourage them to engage in value judgments that they are supposed to avoid.²²⁹ Moreover, such an action could impair their ability to observe and receive candid information from voters because they could be perceived as merely an extension of election officials who may be engaging in discriminatory conduct. It also is completely unnecessary. Justice Department attorneys already may communicate observations to local election officials in a real-time manner, particularly if there is a possibility of vote denial. By doing so, it keeps federal observers free to perform their sole function: to observe.

Some of the strongest evidence against any proposal to federalize partisan poll watchers comes from how poll watchers have functioned in practice. For example, in 2006, the Department of Justice successfully sued Long County, Georgia for permitting partisan poll watchers to discriminatorily challenge only Latino voters in an effort to discourage them from voting.²³⁰ Law enforcement officials and others serving as partisan

²²⁴ See 52 U.S.C. § 10302(a); 52 U.S.C. § 10305.

²²⁵ *Humphreys County*, 384 F. Supp. at 125.

²²⁶ See *Greene County*, 254 F. Supp. at 546-47; *United States v. Louisiana*, 265 F. Supp. at 715. In both cases, federal courts specifically upheld the federal observer provisions because of the substantial steps that had been taken to preserve the First Amendment right of voters to cast a secret ballot. See *supra* notes 191-202 and accompanying text.

²²⁷ Hearne Testimony, S. HRG. 109-669, at 431.

²²⁸ See 52 U.S.C. § 10305.

²²⁹ See *supra* notes 128-32 and accompanying text.

²³⁰ See *United States v. Long County, Georgia*, Case No. CV206-040 (S.D. Ga. Feb. 8, 2006).

challengers in Passaic County, New Jersey engaged in similar discriminatory conduct.²³¹ In elections Sunflower, Mississippi, white poll watchers “were encouraged to aggressively challenge Black voters,” contributing to “lackluster voter turnout.”²³²

In November 1999, Arabic U.S. citizens in Hamtramck, Michigan were targeted for disenfranchisement by partisan workers after an Arab-American announced his candidacy for mayor.²³³ A group of non-Arab voters formed an organization called “Citizens for Better Hamtramck” to register individuals to be present in polling places to challenge the citizenship of voters who “looked” Arab, had dark skin such as Bengali voters, or who had distinctly Arab or Muslim names.²³⁴ The intimidating and harassing actions of these partisan workers resulted in substantially depressed voter participation by members of the Arab and Bengali community, leading to lengthy federal oversight assisted by non-partisan federal observers.²³⁵

In summary, it is commonplace for partisan poll watchers to threaten, intimidate, and to otherwise discourage minority voters from registering or casting a ballot. Regardless of their party, the presence of partisan poll watchers is far more likely to lead to VRA violations than to prevent them. For that reason, Congress should ensure the continuing impartiality of federal observers to be free of the value judgments and bias implicit in any proposal to make federal observers partisan. As the former director of OPM testified, the federal observer program needs to be kept “free from political interference.”²³⁶ Federalizing partisan poll watching would turn the VRA on its head and promote, rather than prevent, voting discrimination.

²³¹ See Robert Ratish & Josh Gohlke, *Violence Mars Election*, NORTH JERSEY HERALD & NEWS, Nov. 3, 1999, at A8; Maia Davis, *FBI Probing Election Day Attacks, Reviewing Incidents for Civil Rights Violations*, BERGEN RECORD, Feb. 5, 2000.

²³² Slaughter-Harvey Testimony, S. HRG. 109-669, at 394-95.

²³³ See <http://www.usdoj.gov/opa/pr/2000/August/456cr.htm>.

²³⁴ See *id.* In many cases, Arab or Bengali voters were pulled out of voting lines before even submitting their names or any other identifying information. See *id.* Even when Arab or Bengali voters were able to produce United States passports as proof of citizenship, they were asked to take citizenship oaths; no non-Arab voters were challenged or asked to take an oath. See *id.*

²³⁵ In August 2000, Hamtramck entered into a consent decree with the Justice Department that designated the City for federal observer coverage to monitor the City’s efforts to remedy the discrimination. See *id.* Federal observers were sent to Hamtramck eight times by the end of 2003 to monitor the City’s progress under the court order. The State of Michigan also “issued a memorandum to all election clerks in the state instructing them that discriminatory challenges should not be allowed to proceed, and reminding clerks that they have the power to expel challengers who abuse the challenge process.” *Id.* In 2005, the City settled a discrimination suit brought by fifteen of the Arab-American voters by paying them \$150,000 in damages. See http://hamtramckstar.com/index.php/2005/05/11/hamtramck_settles_voter_discrimination_suit.

²³⁶ James Testimony, S. HRG. 109-669, at 436.

VIII. Conclusion.

NARF and the NAVRC look forward to working with the House Judiciary Committee and the Subcommittee on the Constitution, Civil Rights and Civil Liberties to overcome the barriers to voting rights in *Shelby County*'s wake. There can be no greater tribute to the legacy of Congressman Lewis than passage of H.R. to renew and restore the vitality of the Voting Rights Act, including the bail-in and federal observer provisions.

Thank you very much for your attention and your commitment to making voting fully accessible for all Americans. I welcome any questions you may have.