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# Congressional Redistricting and the Voting Rights Act: A Legal Overview

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## Summary

The Constitution requires a count of the U.S. population every 10 years. Based on the census, the number of seats in the House of Representatives is reapportioned among the states. Thus, at least every 10 years, in response to changes in the number of Representatives apportioned to it or to shifts in its population, each state is required to draw new boundaries for its congressional districts. Although each state has its own process for redistricting, congressional districts must conform to a number of constitutional and federal statutory standards, including the Voting Rights Act (VRA) of 1965.

The VRA was enacted under Congress's authority to enforce the 15<sup>th</sup> Amendment, which provides that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude. Section 2 of the VRA prohibits the use of any voting qualification or practice—including the drawing of congressional redistricting plans—that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority. The statute further provides that a violation is established if, based on the totality of circumstances, it is shown that political processes are not equally open to members of a racial or language minority group in that its members have less opportunity than other members of the electorate to participate and to elect representatives of choice. In decisions including *Thornburg v. Gingles* and *Bartlett v. Strickland*, the Supreme Court further interpreted the requirements of Section 2.

In its 2013 decision, *Shelby County v. Holder*, the U.S. Supreme Court invalidated Section 4(b) of the VRA. Section 4(b) contained a formula prescribing which states and jurisdictions with a history of discrimination were required to obtain prior approval or “preclearance” under Section 5 before changing any voting law, including congressional redistricting plans. Section 5 required those “covered” jurisdictions to preclear their redistricting plans with either the Department of Justice or the U.S. District Court for the District of Columbia before implementation. In order to be granted preclearance, the covered jurisdiction had the burden of proving that the proposed voting change neither had the *purpose*, nor would it have the *effect*, of denying or abridging the right to vote on account of race or color, or membership in a language minority group. Although the Court invalidated only the coverage formula in Section 4, by extension, Section 5 has been rendered currently inoperable. As a result, the nine states and jurisdictions in six other states previously covered under the formula are no longer subject to the VRA's preclearance requirement. Section 2 of the VRA, which applies in all jurisdictions, was not at issue in this case.

In the 114<sup>th</sup> Congress, H.R. 885, the “Voting Rights Amendment Act of 2015,” has been introduced. This bill is identical to companion bills H.R. 3899 and S. 1945, the “Voting Rights Amendment Act of 2014,” which were introduced in the 113<sup>th</sup> Congress. Among other things, the legislation would amend the VRA to reinstitute a coverage formula for Section 5 preclearance.

Bills have also been introduced that would establish certain standards and requirements for congressional redistricting, including H.R. 75, the “Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2015”; identical bills, H.R. 219 and H.R. 1347, the “John Tanner Fairness and Independence in Redistricting Act”; H.R. 934, the “Redistricting and Voter Protection Act of 2015”; and H.R. 1346, the “Redistricting Transparency Act of 2015.”

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The Constitution requires a count of the U.S. population every 10 years.<sup>1</sup> Based on the census, the number of seats in the House of Representatives is reapportioned among the states.<sup>2</sup> Thus, at least every 10 years, in response to changes in the number of Representatives apportioned to it or to shifts in its population, each state is required to draw new boundaries for its congressional districts. Although each state has its own process for redistricting, congressional districts must conform to a number of constitutional and federal statutory standards,<sup>3</sup> including the Voting Rights Act (VRA) of 1965.<sup>4</sup>

The VRA was enacted under Congress's authority to enforce the 15<sup>th</sup> Amendment, which provides that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude.<sup>5</sup> In a series of cases and evolving jurisprudence, the U.S. Supreme Court has interpreted how the VRA applies in the context of congressional redistricting. These decisions inform how congressional district boundaries are drawn, and whether legal challenges to such redistricting plans will be successful.

This report provides a legal overview of Section 2 of the VRA, a key provision affecting congressional redistricting, and selected Supreme Court case law. It discusses Sections 4 and 5, and the recent Supreme Court decision holding Section 4(b) unconstitutional, *Shelby County v. Holder*.<sup>6</sup> Section 4 contained a coverage formula that identified states and jurisdictions that were required to gain federal approval or “preclearance” to proposed redistricting plans under Section 5. The report also provides an overview of selected legislation in the 113<sup>th</sup> and 114<sup>th</sup> Congresses that would establish additional requirements and standards for congressional redistricting, and

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<sup>1</sup> U.S. CONST. art. I, §2, cl. 3 (“The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

<sup>2</sup> U.S. CONST. amend. XIV, §2, cl. 1 (“Representatives shall be apportioned among the several States according to their respective numbers ...”).

<sup>3</sup> While beyond the scope of this report, congressional districts are also subject to the one-person, one-vote equality standard. *See* *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 18 (1964) (interpreting article I, Section 2, clause 1 of the U.S. Constitution that Representatives be chosen “by the People of the several States” and be “apportioned among the several States ... according to their respective Numbers,” to require that “as nearly as is practicable, one man’s vote in a congressional election is to be worth as much as another’s”); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (holding that absolute population equality is the standard unless a deviation is necessary to achieve “some legitimate state objective,” such as “consistently applied legislative policies,” including, for example, “making districts more compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbents.”). In addition, congressional districts might theoretically be subject to claims of partisan political gerrymandering, although the standard that a court could use, to ascertain such a determination and grant relief, remains unresolved. *See* *LULAC v. Perry*, 548 U.S. 399 (2006) (plurality opinion); CRS Report RS22479, *Congressional Redistricting: A Legal Analysis of the Supreme Court Ruling in League of United Latin American Citizens (LULAC) v. Perry*, by L. Paige Whitaker.

<sup>4</sup> P.L. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§10101 *et seq.*). For further discussion of the Voting Rights Act, *see* CRS Report R43626, *The Voting Rights Act of 1965: Background and Overview*, by Kevin J. Coleman.

<sup>5</sup> U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”). Since its ratification in 1870, however, the use of various election procedures by certain states diluted the impact of votes cast by African Americans or prevented voting by African Americans entirely. As case-by-case enforcement under the Civil Rights Act proved to be protracted and ineffective, Congress enacted the Voting Rights Act of 1965. *See* H. REP. NO. 89-439, at 1, 11-12, 15-16, 19-20, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-44, 2446-47, 2451-52 (discussing discriminatory procedures such as poll taxes, literacy tests, and vouching requirements).

<sup>6</sup> 133 S. Ct. 2612 (2013).

amend the VRA to, among other things, reinstitute a coverage formula for Section 5 preclearance.<sup>7</sup>

## Section 2 of the Voting Rights Act

Congressional district boundaries in every state are required to comply with Section 2 of the VRA. Section 2 provides a right of action for private citizens or the government to challenge discriminatory voting practices or procedures, including minority vote dilution, the diminishing or weakening of minority voting power.

Specifically, Section 2 prohibits any voting qualification or practice—including the drawing of congressional redistricting plans—applied or imposed by any state or political subdivision that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.<sup>8</sup> The statute further provides that a violation is established if:

based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [members of a racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.<sup>9</sup>

### “Majority-Minority” District Requirement

Under certain circumstances, the creation of one or more “majority-minority” districts may be required in a congressional redistricting plan. A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid racial vote dilution by preventing the submergence of minority voters into the majority, which can deny minority voters the opportunity to elect a candidate of their choice. In the landmark decision *Thornburg v. Gingles*,<sup>10</sup> the Supreme Court established a three-prong test that plaintiffs claiming vote dilution under Section 2 must prove:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district....

Second, the minority group must be able to show that it is politically cohesive....

Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.<sup>11</sup>

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<sup>7</sup> For further discussion of the process of congressional redistricting and the apportionment of congressional seats, see CRS Report R41357, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, by Royce Crocker.

<sup>8</sup> 52 U.S.C. §§10301, 10303(f).

<sup>9</sup> 52 U.S.C. §10301(b).

<sup>10</sup> 478 U.S. 30 (1986).

<sup>11</sup> *Id.* at 50-51 (citation omitted). The three requirements set forth in *Thornburg v. Gingles* for a Section 2 claim apply to single-member districts as well as to multi-member districts. See *Grove v. Emison*, 507 U.S. 25, 40-41 (1993) (“It (continued...)”).

The Court also discussed how, under Section 2, a violation is established if based on the “totality of the circumstances” and “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”<sup>12</sup> In order to facilitate determination of the totality of the circumstances the Court listed the following factors, which originated in the legislative history accompanying enactment of Section 2:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.<sup>13</sup>

## Requirement that Minority Group Constitute More Than 50% of Voting Population in Single-Member District

Further interpreting the *Gingles* three-prong test, in *Bartlett v. Strickland*,<sup>14</sup> the Supreme Court ruled that the first prong of the test—requiring geographical compactness sufficient to constitute a majority in a district—can only be satisfied if the minority group constitutes more than 50% of the voting population if it were in a single-member district.<sup>15</sup> In *Bartlett*, it had been argued that Section 2 requires drawing district lines in such a manner to allow minority voters to join with

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(...continued)

would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district.”) *Id.* at 40.

<sup>12</sup> *Id.* at 44.

<sup>13</sup> *Id.* at 36-37 (quoting S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177). (“Additional factors that in some cases have had probative value as part of plaintiffs’ evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.”) *Id.*

<sup>14</sup> 556 U.S. 1 (2009).

<sup>15</sup> See *id.* at 25-26.

other voters to elect the minority group's preferred candidate, even where the minority group in a given district comprises less than 50% of the voting age population.

Rejecting that argument, the Court found that Section 2 does not grant special protection to minority groups that need to form political coalitions in order to elect candidates of their choice. To mandate recognition of Section 2 claims where the ability of a minority group to elect candidates of choice relies upon "crossover" majority voters would result in "serious tension" with the third prong of the *Gingles* test.<sup>16</sup> The third prong of *Gingles* requires that the minority be able to demonstrate that the majority votes sufficiently as a bloc to enable it usually to defeat minority-preferred candidates.

## Constitutional Limits Under the 14<sup>th</sup> Amendment

### Equal Protection Clause

Congressional redistricting plans must also conform with standards of equal protection under the 14<sup>th</sup> Amendment to the U.S. Constitution.<sup>17</sup> According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations—including compactness, contiguity, and respect for political subdivision lines—then a "strict scrutiny" standard of review is applied. In this context, strict scrutiny review requires that a court determine that the state has a compelling governmental interest in creating a majority-minority district, and that the redistricting plan is narrowly tailored to further that compelling interest. Case law in this area demonstrates a tension between compliance with the VRA and conformance with standards of equal protection.<sup>18</sup>

In *Easley v. Cromartie (Cromartie II)*,<sup>19</sup> the Supreme Court upheld the constitutionality of the long-disputed 12<sup>th</sup> Congressional District of North Carolina against the argument that the 47% black district was an unconstitutional racial gerrymander. In this case, North Carolina and a group of African American voters had appealed a lower court decision holding that the district, as redrawn by the legislature in 1997 in an attempt to cure an earlier violation, was still unconstitutional. The Court determined that the basic question presented in *Cromartie II* was whether the legislature drew the district boundaries "because of race rather than because of political behavior (coupled with traditional, nonracial redistricting considerations)."<sup>20</sup> In applying its earlier precedents, the Court determined that the party attacking the legislature's plan had the burden of proving that racial considerations are "dominant and controlling."<sup>21</sup> Overturning the lower court ruling, the Supreme Court held that the attacking party did not successfully

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<sup>16</sup> *Id.* at 16.

<sup>17</sup> U.S. Const. amend. XIV, §1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

<sup>18</sup> See, e.g., *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 653-57 (1993) (holding that if district lines are drawn for the purpose of separating voters based on race, a court must apply strict scrutiny review); *Miller v. Johnson*, 515 U.S. 900, 912-13 (1995) (holding that strict scrutiny applies when race is predominant factor and traditional redistricting principles have been subordinated); *Bush v. Vera*, 517 U.S. 952, 958-65 (1996) (holding that departing from sound principles of redistricting defeats the claim that districts are narrowly tailored to address the effects of racial discrimination).

<sup>19</sup> 532 U.S. 234 (2001).

<sup>20</sup> *Id.* at 256 (emphasis included).

<sup>21</sup> *Id.* (citing *Miller*, 515 U.S. at 913).

demonstrate that race, instead of politics, predominantly accounted for the way the plan was drawn.

In a recent case, *Alabama Legislative Black Caucus v. Alabama*,<sup>22</sup> the Court clarified that in determining whether race is a predominant factor in the redistricting process, a court must engage in a *district-by-district* analysis instead of analyzing the state as an undifferentiated whole.<sup>23</sup> It further confirmed that in calculating the predominance of race, a court is required to determine whether the legislature subordinated traditional race-neutral redistricting principles to racial considerations. The “background rule” of equal population, however, is not a traditional redistricting principle and therefore should not be weighed against the use of race to determine predominance, the Court held. In other words, the Court explained, if 1,000 additional voters need to be moved to a particular district in order to achieve equal population, ascertaining the predominance of race involves examining which voters were moved, and whether the legislature relied on race instead of other traditional factors in making those decisions.<sup>24</sup>

## Section 4(b) of the Voting Rights Act—Invalidated by U.S. Supreme Court in *Shelby County v. Holder*

In *Shelby County v. Holder*<sup>25</sup> the U.S. Supreme Court invalidated Section 4(b)<sup>26</sup> of the VRA. Section 4(b) contained a formula prescribing which states and jurisdictions with a history of discrimination were required to obtain federal approval or “preclearance” under Section 5 before changing any voting law, including redistricting plans. Section 5 and the Court’s ruling in *Shelby County* are discussed below.

As a result of the Court’s decision, the nine states, and jurisdictions within six states, that were previously covered under the formula are no longer subject to the VRA’s preclearance requirement. The covered states were Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. The six states containing covered jurisdictions were California, Florida, Michigan, New York, North Carolina, and South Dakota.<sup>27</sup> It does not appear, however, that the Court’s decision affected Section 3(c) of the act, known as the “bail in” provision, under which jurisdictions can be ordered to obtain preclearance of voting laws if a court finds that violations of the 14<sup>th</sup> or 15<sup>th</sup> Amendment justifying equitable relief have occurred.<sup>28</sup>

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<sup>22</sup> Nos. 13-895 and 13-1138, slip op. (U.S. March 25, 2015).

<sup>23</sup> See slip op. at 5-12.

<sup>24</sup> See slip op. at 15-19.

<sup>25</sup> 133 S. Ct. 2612 (2013).

<sup>26</sup> 52 U.S.C. §10303.

<sup>27</sup> 28 C.F.R. pt. 51, app. (2012), “Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended.”

<sup>28</sup> 52 U.S.C. §10302(c). For further discussion of the “bail in” provision, see CRS Legal Sidebar WSLG607, What is the “Bail In” Provision of the Voting Rights Act?, by L. Paige Whitaker.

## Coverage Formula

Specifically, the formula contained in 4(b) provided that any state or political subdivision was subject to the Section 5 preclearance requirement if: it maintained a “test or device” as a condition for voting or registering to vote on November 1 of 1964, 1968, or 1972, and either less than 50% of citizens of legal voting age were registered to vote or less than 50% of such citizens voted in the presidential election held in the year in which it used such a test or device. The VRA definition of “test or device” for the 1964 and 1968 dates that triggered coverage included requirements of literacy, educational achievement, good moral character, or proof of qualifications by the voucher of registered voters or others, as a prerequisite for voting or registration. For the 1972 date that triggered coverage, the definition of “test or device” was amended to also include the providing of any election information only in English in those states or political subdivisions where members of a single language minority constitute more than 5% of the citizens of voting age.

## Release from Coverage

Section 4(a) of the VRA set forth a procedure whereby covered states or political subdivisions, as defined in Section 4(b), could be released from coverage under the Section 5 preclearance provision. Specifically, a covered jurisdiction had to demonstrate, in an action for declaratory judgment in the U.S. District Court for the District of Columbia, that during the previous 10 years and during the pendency of the action:

(A) “no ... test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color”;

(B) “no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the rights to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision”;

(C) “no Federal examiners or observers under this Act have been assigned to such State or political subdivision”;

(D) “such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment”;

(E) “the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5, and no such submissions or declaratory judgment actions are pending; and

(F) “such State or political subdivision and all governmental units within its territory—(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and (iii)

have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.”<sup>29</sup>

## Section 5 of the Voting Rights Act

Section 5 of the VRA was enacted to eliminate possible *future* denials or abridgements of the right to vote. It required prior approval, known as “preclearance,” of a proposed change to any voting qualification, standard, practice, or procedure, including congressional redistricting plans. It applied only to those states or political subdivisions that, as specified by the formula invalidated by the Supreme Court in *Shelby County*, were considered “covered” jurisdictions. Although the Court invalidated only the coverage formula in Section 4, by extension, Section 5 has been rendered currently inoperable.

Before implementing a change to “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting”<sup>30</sup>—which includes congressional redistricting plans—Section 5 required a covered jurisdiction to obtain “preclearance” approval for the proposed change. Covered jurisdictions could seek preclearance from either the U.S. Attorney General or the U.S. District Court for the District of Columbia.<sup>31</sup> In order to be granted preclearance, the covered jurisdiction had the burden of proving that the proposed voting change “neither has the *purpose* nor will have the *effect* of denying or abridging the right to vote on account of race or color,” or membership in a language minority group.<sup>32</sup> Moreover, as amended in 2006, the statute expressly provided that its purpose was “to protect the ability of such citizens to elect their preferred candidates of choice.”<sup>33</sup>

Unlike certain other provisions of the VRA, the preclearance requirements were enacted to be temporary. From its original date of enactment in 1965, and with each subsequent reauthorization in 1970, 1975, 1982, and 2006, the preclearance requirements have contained expiration dates. As a result of the 2006 amendments to the act, the preclearance requirements were scheduled to expire in 2031.<sup>34</sup>

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<sup>29</sup> 52 U.S.C. §10303(a)(1)(A)-(F). A U.S. Department of Justice webpage contains a list of jurisdictions that were once subject to the preclearance requirement, but successfully obtained a declaratory judgment and were released from coverage. See [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php#bailout](http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout). For example, in March 2013, 10 political subdivisions in New Hampshire were released from coverage; see consent judgment and decree at [http://www.justice.gov/crt/about/vot/misc/nh\\_cd.pdf](http://www.justice.gov/crt/about/vot/misc/nh_cd.pdf).

<sup>30</sup> 52 U.S.C. §10304(b).

<sup>31</sup> 52 U.S.C. §10304(a).

<sup>32</sup> 52 U.S.C. §10304 (emphasis added). See also 28 C.F.R. §51.52(a).

<sup>33</sup> 52 U.S.C. §10304(d).

<sup>34</sup> P.L. 109-246, 120 Stat. 577 (2006), codified at 52 U.S.C. 10303(a)(8) (“The provisions of this section shall expire at the end of the twenty-five year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, Cesar E. Chavez, Barbara C. Jordan, William C. Velasquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments of 2006 [effective July 27, 2006].”).

## “Effect” Test

According to the Supreme Court, a redistricting plan would be determined to have a discriminatory effect—and accordingly, preclearance would be denied—if it would lead to retrogression in minority voting strength.<sup>35</sup> In *Beer v. U.S.*,<sup>36</sup> the Court found that a plan that increased the number of African American city council majority districts from one to two enhanced the voting strength of racial minorities and therefore, could not have the effect of diluting voting rights due to race under Section 5.<sup>37</sup> According to the Court, Section 5 is intended to prevent changes in voting procedures that would lead to a diminishing in the ability of racial minorities to exercise their right to vote effectively.<sup>38</sup> Clarifying the retrogression standard, in *City of Lockhart v. U.S.*<sup>39</sup> the Court approved an electoral change that, although it did not improve minority voting strength, did not result in retrogression. Invoking its decision in *Beer*, the Court found that if a new redistricting plan does not diminish the voting strength of African Americans, it would be entitled to preclearance under Section 5.<sup>40</sup> Likewise, in *Reno v. Bossier Parish School Board (Bossier Parish I)*,<sup>41</sup> the Supreme Court affirmed the retrogression standard for Section 5 preclearance when it refused to replace it with a standard of racial vote dilution, which is the standard contained in Section 2 of the VRA. According to the Court, “a violation of § 2 is not grounds in and of itself for denying preclearance under § 5.”<sup>42</sup>

When it amended Section 5 in 2006, Congress added a provision expressly stating that its purpose was “to protect the ability of such citizens to elect their preferred candidates of choice.”<sup>43</sup> According to the legislative history, this amendment was made to address a 2003 Supreme Court decision, *Georgia v. Ashcroft*.<sup>44</sup> In *Georgia*, a Senate report noted, the Court determined that preclearance would be permitted under Section 5 in cases where majority-minority districts, in which minorities had the ability to elect a candidate of choice, were replaced with “influence districts,” in which minorities could impact an election, but not necessarily play a decisive role. Calling the standard established by the Court in *Georgia* “ambiguous,” the Senate report indicated that the intent of the amendment was to restore Section 5 to the “workable” standard

<sup>35</sup> For redistricting plans submitted to the Attorney General for administrative review, Department of Justice regulations provide that a change affecting voting is considered to have a discriminatory effect if it will lead to retrogression in the position of members of a racial or language minority group, that is, members of such groups will be “worse off than they had been before the change.” In order to determine retrogressive effect, a proposed redistricting plan will be compared to a “benchmark” plan. The “benchmark” plan against which a proposed plan is compared is the most recent legally enforceable redistricting plan in force or effect at the time of the submission. 28 C.F.R. §51.54(b),(c) (2011); [http://www.justice.gov/crt/about/vot/sec\\_5/sec5guidance2011.pdf](http://www.justice.gov/crt/about/vot/sec_5/sec5guidance2011.pdf).

<sup>36</sup> 425 U.S. 130 (1976).

<sup>37</sup> *See id.* at 141.

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

<sup>39</sup> 460 U.S. 125 (1983).

<sup>40</sup> *See id.* at 135-136.

<sup>41</sup> 520 U.S. 471 (1997).

<sup>42</sup> *Bossier Parish I*, 520 U.S. at 483. The Court went on to say that in some circumstances, however, evidence of racial vote dilution in violation of Section 2 may be relevant to establishing the jurisdiction’s intent to cause retrogression to minority voting strength in violation of Section 5. *See id.* at 486.

<sup>43</sup> 52 U.S.C. §10304(d).

<sup>44</sup> 539 U.S. 461 (2003).

that the Court espoused in *Beer*.<sup>45</sup> In *Beer*, the Court inquired whether, under the proposed redistricting plan, the ability of minority groups to elect candidates of choice is diminished.<sup>46</sup>

In *Alabama Legislative Black Caucus v. Alabama*,<sup>47</sup> the Court held that the non-retrogression standard of Section 5 does not require a covered jurisdiction to maintain a particular numerical percentage of minority voters when drawing new district boundaries. Instead, it requires maintaining the minority voters' *ability* to elect a preferred candidate of choice.<sup>48</sup> Notably, the Court opted not to decide whether continued compliance with Section 5 remains a compelling governmental interest in light of its 2013 ruling, discussed below, invalidating the VRA's coverage formula.<sup>49</sup>

## "Purpose" Test

Congress also amended Section 5 of the VRA in 2006 with the intent of expanding the definition of "purpose." Specifically, the law was changed to provide that "[t]he term 'purpose' ... shall include *any* discriminatory purpose."<sup>50</sup> The legislative history indicates that this amendment was made in response to the 2000 decision in *Reno v. Bossier Parish School Board (Bossier Parish II)*<sup>51</sup> where the Supreme Court found that "§ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose."<sup>52</sup> A Senate report accompanying the legislation to amend Section 5 observed that under the standard articulated in *Bossier Parish II*, preclearance could be granted to redistricting plans enacted with a discriminatory purpose, so long as the purpose was only to perpetuate unconstitutional circumstances, and not to make them worse.<sup>53</sup>

According to the Senate report,

The Supreme Court's decision in *Bossier Parish II* has created a strange loophole in the law: it is possible that the Justice Department or federal court could be required to approve an unconstitutional voting practice ... [and the] federal government should not be giving its seal of approval to practices that violate the Constitution. Under this amendment, which forbids voting changes motivated by 'any discriminatory purpose,' it will not do so.<sup>54</sup>

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<sup>45</sup> S. REP. NO. 109-295, at 18 (2006).

<sup>46</sup> *Id.* (quoting *Beer*, 425 U.S. at 141 (1976)).

<sup>47</sup> Nos. 13-895 and 13-1138, slip op. (U.S. March 25, 2015).

<sup>48</sup> *See* slip op. at 19-23.

<sup>49</sup> *See* slip op. at 23.

<sup>50</sup> P.L. 109-246, 120 Stat. 577 (2006), codified at 52 U.S.C. §10304(c) (emphasis added).

<sup>51</sup> 528 U.S. 320 (2000).

<sup>52</sup> *Id.* at 341.

<sup>53</sup> S. REP. NO. 109-295, at 16 (2006) (quoting Pamela S. Karlan, Responses to Written Questions from Sen. Kennedy (submitted for May 16, 2006 hearing)).

<sup>54</sup> *Id.* at 15.

## *Shelby County v. Holder*: Coverage Formula Held Unconstitutional

By a 5 to 4 vote, in *Shelby County v. Holder*,<sup>55</sup> the U.S. Supreme Court decided that Congress's decision in 2006 to reauthorize the Section 5 preclearance requirement, without modifying the coverage formula in Section 4(b), was unconstitutional. The Court determined that the coverage formula's application to certain states and jurisdictions departed from the principle of equal sovereignty among the states without justification in light of current conditions. According to the Court, the coverage formula was "based on 40-year old facts having no logical relation to the present day."<sup>56</sup> Therefore, it concluded that the coverage formula could no longer be used as a basis for subjecting certain states and jurisdictions to the Section 5 preclearance requirement.

### Background

*Shelby County* appears against a historical backdrop of cases in which the Supreme Court repeatedly upheld the constitutionality of the Section 5 preclearance regime. Following enactment of the VRA in 1965, in *South Carolina v. Katzenbach*,<sup>57</sup> the Supreme Court upheld Section 5's constitutionality. Rejecting an argument that it supplants powers that are reserved to the states, the Court found the law to be "a valid means for carrying out the commands of the Fifteenth Amendment."<sup>58</sup> Following the 1975 reauthorization of Section 5, in *City of Rome v. United States*,<sup>59</sup> the Court reaffirmed its holding in *Katzenbach*, and likewise upheld its constitutionality. Similarly, in *Lopez v. Monterey County*,<sup>60</sup> the Court upheld the constitutionality of Section 5 after its 1982 reauthorization, finding that although "the Voting Rights Act, by its nature, intrudes on state sovereignty," nonetheless, "[t]he Fifteenth Amendment permits this intrusion."<sup>61</sup>

More recently, however, the Supreme Court had expressed concerns with the constitutionality of Section 5. In the wake of the 2006 reauthorization and amendments to Section 5, a municipal utility district in Texas filed suit asking to be released from Section 5 preclearance requirements. In the alternative, the utility district challenged the law's constitutionality, arguing that Congress had exceeded its enforcement power under the 15<sup>th</sup> Amendment. In the resulting 2009 decision of *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*,<sup>62</sup> while the Supreme Court did not answer the question of Section 5's constitutionality, it did caution that the VRA's preclearance requirement and coverage formula "raise serious constitutional questions."<sup>63</sup> On the one hand, the Court acknowledged that while some of the conditions it had relied upon in upholding Section 5 in *Katzenbach* and *City of Rome* had improved, such improvements may be insufficient, thereby continuing to justify the need for preclearance. On the other hand, the Court

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<sup>55</sup> 133 S. Ct. 2612 (2013).

<sup>56</sup> *Id.* at 2629.

<sup>57</sup> 383 U.S. 301 (1966).

<sup>58</sup> *Id.* at 337.

<sup>59</sup> 446 U.S. 156, 183 (1980).

<sup>60</sup> 525 U.S. 266 (1999).

<sup>61</sup> *Id.* at 284-85.

<sup>62</sup> 129 S.Ct. 2504 (2009).

<sup>63</sup> *Id.* at 2513.

announced that the law “imposes current burdens and must be justified by current needs.”<sup>64</sup> By deciding that the utility district was eligible to be released from coverage, in *NAMUDNO*, the Court avoided the constitutional question.<sup>65</sup> In an early 2012 decision on redistricting, the Supreme Court reiterated its observation from *NAMUDNO* that Section 5’s intrusion on state sovereignty “raises serious constitutional questions.”<sup>66</sup>

## Supreme Court Decision

Building on concerns it had articulated in recent cases, in June 2013, the Supreme Court issued its decision in *Shelby County v. Holder*,<sup>67</sup> holding that the coverage formula in Section 4(b) was unconstitutional. Authored by Chief Justice Roberts, the majority opinion began by invoking its determination in *NAMUDNO* that the preclearance regime imposes current burdens that must be justified by current needs, and that departing from the fundamental principle of equal sovereignty among the states requires a showing that disparate geographic imposition of the preclearance requirement must be “sufficiently related to the problem it targets.”<sup>68</sup>

Contrasting voting conditions in 1966 with the current day, the Court observed that when it upheld the constitutionality of the preclearance regime, it was justified by the presence of extensive racial discrimination in voting. At that time, the Court said, the coverage formula made sense because it tailored the preclearance requirement to those geographical areas where there was evidence of voting discrimination. Therefore, the Court had concluded that the coverage formula was “rational in both practice and theory.”<sup>69</sup>

Almost 50 years later, however, the Court observed that “things have changed dramatically,” largely due to the effectiveness of the Voting Rights Act.<sup>70</sup> According to the Court, continuing to base coverage on locales where literacy tests were once imposed, and on low voter registration and turnout statistics from the 1960s and early 1970s, does not make sense. Characterizing the coverage formula as relying on “decades-old data and eradicated practices” that do not reflect current conditions, the Court pointed out that literacy tests have been banned for over 40 years, and that voter registration and turnout statistics in covered jurisdictions now approach parity with non-covered jurisdictions.<sup>71</sup> While such factors could appropriately be used to divide the country in 1965, the Court in *Shelby County* observed that the country is no longer divided along those lines. In order for Congress to divide the states in such a manner that some are subjected to preclearance, while others are not, the Court ruled that it must do so on a basis that makes sense “in light of current conditions.”<sup>72</sup>

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<sup>64</sup> *Id.* at 2512. (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”) *Id.*

<sup>65</sup> *See id.* at 2513.

<sup>66</sup> *Perry v. Perez*, 132 S.Ct. 934, 942 (2012).

<sup>67</sup> 133 S. Ct. 2612 (2013).

<sup>68</sup> *Id.* at 2622.

<sup>69</sup> *Id.* at 2625.

<sup>70</sup> *Id.* at 2627.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2629.

Writing for the dissent, Justice Ginsburg criticized the Court's opinion, arguing that the current coverage formula still accurately identifies the jurisdictions with the worst conditions of voting discrimination, and therefore, Congress should not need to redraft it. The dissent further maintained that second-generation barriers to minority voting rights—such as racial gerrymandering, the redrawing of legislative districts in order to segregate the races for the purposes of voting, and the adoption of at-large voting—have emerged in the covered jurisdictions, thereby continuing to necessitate preclearance.<sup>73</sup> The dissent concluded that the 2006 reauthorization of the VRA satisfied the constitutional standard that Congress may choose any means “appropriate” and “plainly adapted to” a legitimate constitutional end, and therefore, the Court should have deferred to Congress.<sup>74</sup> Justice Thomas wrote a concurrence stating that for the same reasons articulated in the majority opinion, in addition to the coverage formula, he also would have invalidated Section 5.<sup>75</sup>

## Implications for Legislation to Reinstate Section 5 Preclearance

As a result of the Supreme Court's decision to invalidate the coverage formula, the Section 5 preclearance requirement has been rendered inoperable. Should Congress decide to draft a new coverage formula in order to reinstate Section 5 preclearance, the Court cautioned it to ground the formula in *current* voting conditions, and not rely on the past. The Court further emphasized that any formula that distinguishes among the states must be “sufficiently related” to the problem the law seeks to address.<sup>76</sup> The Court's inquiry into whether the coverage formula comports with the principle of equal sovereignty among the states seems to represent a shift from its earlier decisions upholding Section 5 where it considered the extent to which the preclearance requirement infringed on state sovereignty.

## Pending Supreme Court Case Regarding Redistricting Commissions

In the current term, the U.S. Supreme Court is considering a case involving redistricting commissions. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>77</sup> the Supreme Court is evaluating whether the Elections Clause of the Constitution, Article I, Section 4, and a federal law, codified at 2 U.S.C. Section 2a(c), permit a commission—instead of a state legislature—to draw congressional district boundaries.<sup>78</sup> A ruling is expected by June 2015.

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<sup>73</sup> *See id.* at 2642.

<sup>74</sup> *Id.* at 2639 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

<sup>75</sup> *See id.* at 2631-32.

<sup>76</sup> *Id.* at 2627.

<sup>77</sup> No. 13-1314.

<sup>78</sup> For further discussion, *see* CRS Legal Sidebar WSLG1077, Supreme Court Agrees to Hear Arizona Redistricting Commission Case, by L. Paige Whitaker.

## Congressional Redistricting Legislation<sup>79</sup>

The following provides an overview of selected legislation that would establish additional requirements and standards for congressional redistricting.

### 114<sup>th</sup> Congress

- H.R. 75, the “Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2015,” would prohibit the states from carrying out more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA.
- H.R. 219 and H.R. 1347, the “John Tanner Fairness and Independence in Redistricting Act,” would prohibit the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA, and would require the states to conduct redistricting through independent commissions.
- H.R. 934, the “Redistricting and Voter Protection Act of 2015,” would require any state that, after enacting a congressional redistricting plan following a decennial census and apportionment, enacts a subsequent congressional redistricting plan prior to the next decennial census and apportionment, to obtain a declaratory judgment or preclearance as provided under Section 5 of the VRA in order for the subsequent plan to take effect.
- H.R. 1346, the “Redistricting Transparency Act of 2015,” would require the states to conduct the process of congressional redistricting in such a manner that the public is informed about proposed redistricting plans through a public Internet site, and has the opportunity to participate in developing congressional redistricting plans before they are adopted.

### 113<sup>th</sup> Congress

- H.R. 223 and H.R. 278, the “John Tanner Fairness and Independence in Redistricting Act,” would have prohibited the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA, and would have required the states to conduct redistricting through independent commissions.

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<sup>79</sup> For discussion of the constitutionality of redistricting legislation, see CRS Report RS22628, *Congressional Redistricting: The Constitutionality of Creating an At-Large District*, by L. Paige Whitaker, and for discussion of the constitutionality of mid-decade redistricting, see CRS Report RS22479, *Congressional Redistricting: A Legal Analysis of the Supreme Court Ruling in League of United Latin American Citizens (LULAC) v. Perry*, by L. Paige Whitaker. For discussion of the constitutionality of federal election standards generally, see CRS Report RL30747, *Congressional Authority to Direct How States Administer Elections*, by Kenneth R. Thomas.

- H.R. 337, the “Redistricting Transparency Act of 2013,” would have required the states to conduct congressional redistricting in such a manner that the public is informed about proposed congressional redistricting plans through a public Internet site, and has the opportunity to participate in developing congressional redistricting plans before they are adopted.
- H.R. 2490, the “Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2013,” would have prohibited the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA.
- H.R. 2756, the “Redistricting and Voter Protection Act of 2013,” would have required any state, after enacting a congressional redistricting plan following a decennial census, that enacts a subsequent redistricting plan prior to the next decennial census, to obtain a declaratory judgment or preclearance under Section 5 of the VRA prior to the plan taking effect.
- H.R. 2758, the “Redistricting Reform Act of 2013,” would have prohibited the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA, and would require the states to conduct redistricting through independent commissions.
- H.R. 2928, the “Fair and Independent Redistricting (FAIR) Act,” would have required the Election Assistance Commission to publish a report containing the commission’s best practice recommendations that states may use in establishing and operating independent commissions to develop congressional redistricting plans, to be developed in consultation with states that have implemented, or are considering implementing, such independent commissions.
- H.R. 2978, the “Let the People Draw the Lines Act of 2013,” would have prohibited the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA. It would have required states to conduct redistricting through independent commissions in accordance with certain criteria, including equality among districts, compliance with the VRA, and contiguity, without taking into consideration the political party affiliation of the district’s population or the residence of any House Member or candidate, and with public notice and input; and would have provided payments to states for carrying out redistricting.
- H.R. 3906, the “Fixing America’s Inconsistent Redistricting (FAIR) Act,” would have required the states to conduct congressional redistricting through a plan developed by a nonpartisan agency of the legislative branch of the state government in accordance with certain criteria.
- S. 2910, the “Fairness and Independence in Redistricting Act,” would have prohibited the states from carrying out more than one congressional redistricting after a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA, and would have required states to conduct such redistricting through independent commissions.

## Voting Rights Act Legislation

The following provides an overview of selected legislation that would amend the Voting Rights Act.

### 114<sup>th</sup> Congress

H.R. 885, the “Voting Rights Amendment Act of 2015” would:

- Modify the current “bail in” provision in Section 3(c) of the VRA.<sup>80</sup> Under current law, Section 3(c) generally provides that if a court finds that violations of the 14<sup>th</sup> or 15<sup>th</sup> Amendment justifying equitable relief have occurred in a state or political subdivision, the court shall retain jurisdiction for a period of time that it deems appropriate and during that period, no electoral change can be made until the court determines that the change neither has the purpose, nor will it have the effect, of denying or abridging the right to vote based on race, color, or language minority status; in addition, if the state or political subdivision submits a proposed electoral change to the Attorney General, and the Attorney General has not issued an objection within 60 days, the new electoral procedure may be enforced. The legislation would add to the types of violations that would qualify for “bail in.” Under the legislation, violations of the following would qualify for “bail in”:
  - the 14<sup>th</sup> or 15<sup>th</sup> Amendment;
  - the VRA, with the exception of violations of Section 2(a) that are based on a requirement that an individual provide photo identification as a condition of receiving a ballot; or
  - any federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group.
- Establish a new coverage formula for Section 5 preclearance. The formula would cover any state, and all its political subdivisions, that during the past 15 years had five or more voting rights violations, at least one of which was committed by the state itself (as opposed to a political subdivision within the state). It would also cover specific political subdivisions that during the past 15 years had three or more voting rights violations, or one or more voting rights violations and “persistent, extremely low minority turnout,” to be determined by specified voter turnout data from the past 15 years.
  - Each calendar year, the Attorney General would be required to update the list of voting rights violations attributable to each state and political subdivision for the previous calendar year.
  - The legislation would provide that a voting rights violation occurred in a state or political subdivision if, in a final judgment:

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<sup>80</sup> Codified at 52 U.S.C. §10302(c).

- any court of the United States determined that a denial or abridgment of the right to vote on account of race, color, or membership in a language minority group in violation of the 14<sup>th</sup> or 15<sup>th</sup> Amendment occurred; or
  - any court of the United States determined that a voting qualification or standard, practice, or procedure was imposed “in a manner that resulted or would have resulted in the denial or abridgement of the right to vote based on race or color, or in contravention of the guarantees set forth in subsection (f)(2), in violation of Section 2” of the VRA;<sup>81</sup> or
  - any court of the United States denied a request for a declaratory judgment under Section 3(c) or 5 of the VRA; or
  - the Attorney General interposed an objection under Section 3(c) or 5, other than an objection to a voting qualification requiring photo identification
- Require public notice of voting changes. Within 180 days of an election, if a state or political subdivision changes any prerequisite to voting or standard, practice, or procedure that affects voting in federal elections, the legislation would require the state or political subdivision, within 48 hours of such change, to provide reasonable public notice in the state or political subdivision, and on the Internet. It would require public notice of the allocation of polling place resources, and changes relating to demographics and electoral districts, including redistricting and changing from district-based elections to at-large elections.
  - Provide authority to assign observers. The legislation would amend Section 8(a)(2)(B) of the VRA<sup>82</sup> to provide that observers could be assigned if, in the Attorney General’s judgment, the assignment is necessary to enforce, in addition to the 14<sup>th</sup> or 15<sup>th</sup> Amendment, any provision of the VRA or any other federal law protecting the right of citizens to vote. It would amend Section 8(a) of the VRA<sup>83</sup> to provide that observers could be assigned if the Attorney General certifies, with respect to a political subdivision, receipt of meritorious complaints that efforts to violate Section 203 of the VRA,<sup>84</sup> (bilingual election requirements), are likely to occur or, in the Attorney General’s judgment, such assignment is necessary to enforce the guarantees of Section 203.
  - Modify standards under which a court can grant injunctive relief. Under current law, the Attorney General can institute an action for injunctive relief in cases where there has been or is about to be a violation of Section 2, 3, 4, 5, 7, 10, 11, or 12(b) of the VRA. The legislation would amend Section 12(d)<sup>85</sup> in such a manner to permit, in addition to the Attorney General, an aggrieved person to

<sup>81</sup> 52 U.S.C. §10303(f)(2) provides: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.”

<sup>82</sup> Codified at 52 U.S.C. §10305(a)(2)(B).

<sup>83</sup> Codified at 52 U.S.C. §10305(a).

<sup>84</sup> Codified at 52 U.S.C. §10503.

<sup>85</sup> Codified at 52 U.S.C. §10308(d).

institute an action for injunctive relief; and that violations of the following would qualify for injunctive relief: the 14<sup>th</sup> or 15<sup>th</sup> Amendment, the VRA, or any federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group. It would require a court to grant relief if it determines that, on balance, the hardship imposed on the defendant by the relief will be less than the hardship imposed on the plaintiff if the relief were not granted.<sup>86</sup> In making its determination, a court would be required to consider several factors, including whether

- the qualification, prerequisite, standard, practice, or procedure in effect prior to the change was adopted as a remedy for a federal court judgment, consent decree or admission, or served as a ground for dismissal or settlement of a claim, regarding discrimination based on race or color in violation of the 14<sup>th</sup> or 15<sup>th</sup> Amendment, a violation of the VRA, or voting discrimination based on race, color, or membership in a language minority group in violation of any other federal or state law;
- the change was adopted less than 180 days prior to the election; and
- the defendant failed to provide adequate notice of the change as required under federal or state law.

## 113<sup>th</sup> Congress

H.R. 3899 and S. 1945, the “Voting Rights Amendment Act of 2014,” were identical to the bill introduced in the 114<sup>th</sup> Congress, discussed above.

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<sup>86</sup> This provision does not appear to address the other three factors that are generally required at common law for the granting of a preliminary injunction: likelihood of success on the merits; irreparable harm in the absence of the preliminary relief; and that an injunction is in the public interest. *See, e.g.,* *Winters v. Nat’l Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).