



**Testimony of Janai Nelson
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Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

**Hearing on
Legislative Proposals to Strengthen the Voting Rights Act**

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I. Introduction

Good morning, Chairman Cohen, Ranking Member Johnson, Chairman Nadler and members of the Subcommittee. My name is Janai Nelson, and I am Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for the opportunity to testify this morning on the constitutionality of Congressional oversight of voting rights legislation and the specific and urgent need for the strong provisions outlined in the Voting Rights Advancement Act (“VRAA”).

Since its founding in 1940 by Thurgood Marshall, LDF has fought to protect and expand voting rights for Black voters and other communities of color. Through litigation, public policy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF was launched at a time when the nation’s aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality in every area of life. Our mission has always remained focused on racial justice and equality. In advancing that mission, protecting the right to vote for African Americans has been the epicenter of our work since our inception. Beginning with *Smith v. Allwright*, our successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting to overcome a myriad of obstacles to ensure the full, equal, and active participation of Black voters.¹

LDF has consistently been a leader in the struggle to secure, protect, and advance voting rights for Black voters and has repeatedly defended the gains and protections won over the course of our nearly 80-year history. For these reasons, we are particularly well-positioned and qualified to definitively state that there is a critical need for Congress to restore and strengthen the Voting Rights Act of 1965 (“VRA”). In each reauthorization of the VRA, LDF has played a critical role: providing testimony at congressional hearings, publishing research detailing places with persistent racial discrimination in voting and defending the right to vote through litigation. Threats to our electoral system are threats to the very foundation of our democracy and require comprehensive remedies. Congress has the explicit constitutional duty to protect the right of every eligible person to vote, and to ensure that each vote counts. Indeed, racial discrimination in voting is so pernicious, so antithetical to our democratic ideals, that we amended the U.S. Constitution to expressly prohibit it and to expressly delegate power to Congress to enforce its protections.²

¹ 321 U.S. 629 (1994).

² U.S. CONST. amend. XV.

Since the Supreme Court’s 2013 decision in *Shelby County v. Holder* there has been a proliferation of discriminatory voting practices across the country.³ By gutting the VRA’s preclearance provision in *Shelby*, the Supreme Court allowed jurisdictions with a history and ongoing record of voting discrimination to change their laws without scrutiny or oversight from any federal authority. Predictably, within hours of the decision, states and jurisdictions formerly covered by Section 5, adopted voter suppression practices that were formerly prevented by preclearance.⁴ Section 5 preclearance was an efficient and effective mechanism for detecting and redressing the many forms of discrimination *before* elections take place—without preclearance, these discriminatory practices now undermine our democratic process. The immense record of discriminatory voting practices enacted since the 2013 *Shelby* decision demands Congress fulfill its constitutional obligation to protect voters from an onslaught of new and “ingenious methods” of voter discrimination.⁵

It is past time for Congress to act. The VRA is universally acknowledged as the most successful and most transformative piece of legislation to emerge from the Civil Rights Movement. It enshrined our most fundamental values ensuring dignity and equality for all citizens by guaranteeing the right to vote, which the Supreme Court has called “preservative of all rights.”⁶ For decades, the VRA authorized Congress to enforce the Fourteenth and Fifteenth Amendments when federal and state governments ignored and circumvented their directives. Congress reauthorized the VRA on four separate occasions—in 1970, 1975, 1982, and most recently in 2006—each time on a bipartisan basis, with overwhelming support.

It is not only imperative that Congress restore the Voting Rights Act, but that it authorizes an act that addresses the modern needs and political climate of the nation. The Voting Rights Advancement Act does precisely that: it establishes a new coverage formula for preclearance that is tied to recent voting rights violations and strengthens other aspects of the VRA to better address the ingenious methods that are, and will be, used to suppress the full voting strength of African Americans and people of color.

II. The Proposed Known Practices Coverage Provision Is Constitutional on its Face and Consistent with Longstanding Supreme Court Precedent

Congress has a critical opportunity to pass the Voting Rights Advancement Act, a measured, flexible and forward-looking effort to update the VRA. Faced with an extensive record of racial discrimination in voting practices, Congress must act

³ *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

⁴ Ed Pilkington, *Texas rushes ahead with voter ID law after Supreme Court decision*, The Guardian (June 25, 2013), <https://www.theguardian.com/world/2013/jun/25/texas-voter-idsupreme-court-decision>.

⁵ U.S. Congress, House, Committee on the Judiciary *Voting Rights*, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 29-Apr. 1, 1965.

⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

swiftly, deliberately and boldly to restore the now-defunct preclearance provision. In *Shelby*, the Supreme Court provided instructions for Congress to act in this very instance. The Court did not overrule the constitutionality of a measured and properly tailored preclearance provision—nor did it render other remedies inherently unconstitutional. Indeed, the Supreme Court found preclearance a “stringent” and “potent” measure, fully available to Congress to deploy as an “extraordinary” tool to confront racial discrimination in elections and voting systems.⁷ Racial and ethnic discrimination is an extraordinary harm that necessitates the extraordinary remedy of preclearance. We urge Congress to employ the full force of its authority in order to protect the American people from such a malicious and extraordinary harm.⁸ The Known Practices Coverage (KPC) provision of the VRAA is a necessary tool to that end.

The KPC provision of the VRAA would require federal preclearance of voting practices that are known to correlate with racial or language-based discrimination only in jurisdictions that have a significant racial or language minority citizen voting age population. Indeed, while the formula applies equally nationwide to all jurisdictions, it is only triggered if a state actor chooses to adopt or pursue one of five categories of voting practices with a known disproportionate, discriminatory impact.⁹ Coverage, therefore, is not based on geography but rather combines a demographic threshold with the prevalence of specific, known practices of voting rights discrimination. Accordingly, KPC is constitutional specifically because its emphasis is decidedly on the practices themselves and not the jurisdictional actor. In this regard, states remain “equal in power, dignity and authority” per the *Shelby County* mandate.¹⁰

Importantly, KPC also does not impose a strict ban on any specific voting practices. Instead, the identified practices are subject to federal preclearance to ensure against potential discrimination based on race or language minority status thereby ensuring compliance with Supreme Court precedent. It is a valid exercise of Congress’s constitutional power to require that practices known to most likely result in racial or language discrimination—practices with entrenched and virulent histories of voting discrimination—can be subject to preclearance.

KPC is a reasonable, flexible response to the very standards articulated by the Supreme Court. It does not arbitrarily subject states or political subdivisions to disparate treatment. Rather, it singles out specifically tailored discriminatory

⁷ *Shelby County*, 133 S. Ct. 2612, slip op. at 11-12.

⁸ *Shelby County*, 133 S. Ct. 2612, slip op. at 11-12.

⁹ Proposed Sec.4(c)(2).

¹⁰ *Shelby County*, 133 S.Ct. at 2623 (citing *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

practices for federal oversight. It has no specific geographic scope and does not require continuing or permanent coverage. It does not offend the principle of equal sovereignty embraced by the majority in the *Shelby* decision. Moreover, as the Court noted in *NAMUDNO v. Holder*, where it first introduced the principle of equal sovereignty as a constraint on congressional power in connection with the VRA, “distinctions can be justified in some cases.”¹¹ The congressional record contains ample evidence and justification for KPC on the basis of persistent and ingenious methods of racially motivated voter suppression.

Furthermore, Congress’s authority to outlaw practices that are not *per se* unconstitutional but are known to perpetuate racial discrimination stands on ample precedent. The Supreme Court has repeatedly found that Congress’s enforcement powers have broad reach. In *South Carolina v. Katzenbach*, the Supreme Court upheld the constitutionality of the VRA and Congress’s power to ban certain discriminatory voting practices as a rational exercise of authority.¹² While the Court recognized that voting practices like literacy tests were presumptively lawful and facially neutral, it held that such practices could still be employed to diminish minority voting power and impede equal political participation. Furthermore, such practices were recognized by judicial and legislative bodies to serve no legitimate purpose other than to perpetuate the exclusion of African Americans from the political process.¹³ The court therefore found that Congress “may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting,” including a nationwide ban of this known discriminatory practice.¹⁴

In *Oregon v. Mitchell*, the Court again affirmed Congress’s authority to overturn state laws governing elections if necessary.¹⁵ The Court found Article 1 Section 4 of the Constitution and the Necessary and Proper Clause gave the States the power to make laws that govern elections and, according to a “long line of decisions in th[e] Court,” gave Congress the “ultimate supervisory power over congressional elections.”¹⁶ Importantly, the Court recognized that the legislative record surrounding the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments also supported the finding that Congress has the authority to prevent racial discrimination in the electorate without infringing on states’ rights.

In *City of Rome v. United States*, the Court found it permissible for Congress to identify and overturn changes to the voting process that had racially discriminatory effects—whether intentional or not.¹⁷ Indeed, while the City of Rome proved it had

¹¹ 557 U.S. 193 (2009).

¹² *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹³ See *Lassiter v. Northampton County Board of Elections* 360 U.S. 45 (1959).

¹⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

¹⁵ *Oregon v. Mitchell*, 400 US 112 (1970).

¹⁶ *Oregon v. Mitchell*, 400 US 112, 124 (1970).

¹⁷ *City of Rome v. United States*, 446 US 156, 177-78 (1980)

not pursued electoral changes with any racially discriminatory purpose, its proposed changes were denied by the Department of Justice as they prevented African Americans from securing local representation. The Court recognized that Congress's power to repeal changes to voting practices, even in the absence of intentional racial discrimination, was derived from the Fifteenth Amendment and ruled in favor of the Department of Justice.

The Supreme Court has continued to affirm the proposition that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power 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.”¹⁸ In both *Tennessee v. Lane* and *Nevada Dept. of Human Resources v. Hibbs*, the Supreme Court found that Congress may enact “prophylactic legislation” to prohibit practices that are facially constitutional but discriminatory in effect.¹⁹ In *Kimel v. Florida Bd. of Regents*, the Court further elaborated that Congress’s “power ‘to enforce’ the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed.”²⁰

Indeed, even after the *Shelby* decision, the Circuit Courts have reaffirmed Congress’s power to enact prophylactic legislation under the Thirteenth, Fourteenth and Fifteenth amendments.²¹ It is well documented and well established in both the legislative record and caselaw that Congress has the authority to identify and prohibit manipulations of the voting process that could be used to disenfranchised minority voters.

In banning these practices, Congress relied heavily on the extensive record of evidence showing depressed voter turnout and registration in jurisdictions in which these measures were used.²² By holding congressional hearings, field hearings and engaging in a detailed fact-finding process, while considering the KPC provision of the VRAA, Congress today operates with the same care and caution.

III. Full restoration of the Voting Rights Act is Critical to the Integrity of Our Democracy

¹⁸ *City of Boerne v. Flores*, 521 U. S. 507, 518 (1997).

¹⁹ *See Tennessee v. Lane*, 541 US 509, 518-20 (2004); *Nevada Dept. of Human Resources v. Hibbs*, 538 US 721, 727-28 (2003).

²⁰ *Kimel v. Florida Bd. of Regents*, 528 US 62, 81 (2000).

²¹ *See, e.g., US v. Metcalf*, 881 F. 3d 641, 644-45 (8th Cir. 2018); *Veasey v. Abbott*, 830 F. 3d 216, 253 n.47 (5th Cir. 2016) (en banc); *US v. Cannon*, 750 F. 3d 492, 503-505 (5th Cir. 2014); *US v. Hatch*, 722 F.3d 1193, 1201 (10th Cir. 2013).

²² *South Carolina*, 383 U.S. at 309-313.

Evidence of widespread discrimination against Black voters is overwhelming and growing, and the need for legislative action to protect the integrity of our democracy is urgent. The 2013 *Shelby* decision has undermined the Voting Rights Act, made our democracy vulnerable and allowed for voter suppression to go unchecked. Even one election in which the right to vote is restricted, threatened, or violated, is one election too many.

Violations of our electoral system are not ordinary harms and must therefore be met with extraordinary remedies. An election with conditions later found to be racially discriminatory, has consequences that existing methods of defense cannot combat. Officials elected under unlawful conditions influence and create policy that affects all constituents in their jurisdiction. They may write and implement legislation that allows them to maintain power or that targets communities with viable claims of discrimination. Even if future elections are not tainted by discriminatory practices, those elected to office under unlawful conditions have already accessed and used powers intended only for candidates who constituents fairly and democratically elected. The inability of the courts to retroactively correct these wrongs further disenfranchises and threatens to disengage voters who may understandably believe that their vote does not matter if discriminatory voting practices are left unchecked. Racially discriminatory practices in the electoral system have consequences that preclearance can prevent and correct. Preclearance was designed as a unique and powerful intervention to stop discrimination *before* elections take place.

While Section 2 of the VRA authorizes plaintiffs to challenge racial discrimination in voting after a discriminatory voting practice is implemented and is a vital tool of enforcement, it cannot redress some of the most egregious voting harms. And, while civil rights groups like LDF continue to actively pursue litigation to protect voting rights under Section 2 of the VRA, we know that litigation alone is insufficient to stymie the innumerable assaults on the right to vote. We know that justice has been delayed and denied for millions of eligible voters across the country.

Even when we prevail in Section 2 cases, irreparable damage is already done. In Texas, during the three years we spent challenging the state's voter ID law, elections continued to take place. In that time, and under conditions the court later found impermissible, voters elected a U.S. senator, all 36 members of the Texas delegation to the U.S. House of Representatives, a Governor, a Lieutenant governor, an Attorney General, a Controller, various statewide Commissioners, four Justices of the Texas Supreme Court, candidates for special election in the state Senate, State boards of education, 16 state senators, all 150 members of the state House, over 175 state court trial judges, and over 75 district attorneys. We proved at trial that more than half a million eligible voters were disenfranchised by the ID law but there was no

retroactive solution available. As a result, the voices and votes of thousands were successfully suppressed.

Voters should not have to wait years to ensure that their constitutional right to vote is vindicated. Voters should not have to spend an exorbitant amount of money to litigate a Section 2 case, to ensure their vote has been counted.²³ Litigation is time consuming and expensive.

In addition to KPC, a full restoration of the VRA should include provisions that address other modern challenges to our democracy: the disenfranchisement of formerly incarcerated people and cyber threats to our election systems. We strongly urge Congress to adopt the democracy restoration provisions included in HR 1, For the People Act, along with KPC to further strengthen its impact.²⁴

People of color, specifically African Americans, are disproportionately represented in the prison population. Restoring federal voting rights to returning citizens would roll back unduly restrictive disenfranchisement laws that bar formerly incarcerated people from participating in democracy and fully returning to society. LDF has been instrumental in challenging these restrictive laws across the country. Recently, we filed suit challenging the implementation of a thinly-veiled poll tax designed to invalidate the express intent of Amendment 4 to the Florida Constitution, the Voting Restoration Amendment.²⁵ Congress must do its part to remove obstacles to voting for the nearly 4.7 million disenfranchised citizens who have been released from incarceration and are still denied the right to vote in federal elections.²⁶

Congress must also address how digital platforms are increasingly used to influence elections.²⁷ As our democracy faces new and pervasive threats, we encourage Congress to confront these digital threats within the historic context of race in the public space. HR 1 includes provisions to prevent deceptive cyber-practices and to require the Director of National Intelligence to conduct regular checks on foreign

²³ NAACP LDF, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation* (Feb. 14, 2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf>.

²⁴ See For the People Act, H.R. 1, 116th Cong. Sub. E, Title I, § 1402

²⁵ *Gruver, et al. v. Barton, et al.*, No. 1:19-cv-121 (N.D. Fla. 2019).

²⁶ Morgan McLeod, The Sentencing Project, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, (Oct. 2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/>.

²⁷ NAACP LDF, *LDF Responds to Facebook's New Policy on False Voter Information Ahead of Election* (Oct. 16, 2018) <https://www.naacpldf.org/press-release/ldf-responds-facebooks-new-policy-false-voter-information-ahead-election/>; https://www.washingtonpost.com/opinions/its-time-to-face-the-facts-racism-is-a-national-security-issue/2018/12/18/f9746466-02e8-11e9-b5df-5d3874f1ac36_story.html?utm_term=.8a1252669166.

threats.²⁸ It is critical that Congress act to investigate and legislate these activities that threaten to severely compromise the integrity of our elections.

IV. Conclusion

The mounting record of discriminatory voting changes since the *Shelby* decision requires decisive, comprehensive and restorative Congressional action. Congress has the ultimate and distinguished authority to enforce the anti-discrimination principle articulated in the Fourteenth and Fifteenth Amendments, to protect the vote of every eligible citizen and ensure that their vote counts.

There have been approximately 10 federal court decisions finding that states or localities intentionally discriminated against voters of color since 2013. There is no doubt that racial discrimination in voting continues to be relentlessly pursued. We will continue to fight racial discrimination in electoral systems wherever it may arise, and we will continue to use all the tools provided to us by Congress. But it is imperative that Congress use its authority to strengthen the Voting Rights Act by implementing a new preclearance provision. The Known Practices Coverage provision deftly responds to the Supreme Court's express invitation to Congress to "draft another formula based on current conditions" that demonstrates that "exceptional conditions" to justify federal oversight of state election law practices.²⁹ KPC is a direct, measured, and constitutionally sound response to the current political conditions of an increasingly racially diverse and multi-lingual electorate in a context fraught with voter suppression. This hearing and fact-gathering process are critical to laying the foundation to fully restore the VRA and enable Congress to exercise its vital enforcement powers to protect the right to vote. Thank you.

²⁸ See For the People Act, H.R. 1, 116th Cong. Sub. D, Title I, § 1302.

²⁹ 570 U.S. ___, 133 S.Ct. at 2631.