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REPORT ON LEGISLATION BY THE ELECTION LAW COMMITTEE AND CIVIL RIGHTS COMMITTEE

H.R. 3899 **Rep. Sensenbrenner**
S. 1945 **Sen. Leahy**

Voting Rights Amendment Act of 2014

THIS BILL IS APPROVED

INTRODUCTION

The Election Law and Civil Rights Committees of the Association of the Bar of the City of New York ("City Bar") urge Congress to move quickly to enact the Voting Rights Amendment Act of 2014 ("VRAA"), reflected in H.R. 3899 and S. 1945, both introduced on January 16, 2014.

Prior to the Supreme Court's 5-4 decision last year in *Shelby County v. Holder*,[1] a formula in Section 4 of the Voting Rights Act of 1965 ("VRA") designated all or parts of 15 States—including three counties in New York City (Bronx, Kings and New York)—as subject to federal oversight when making and implementing changes in election laws.[2] In turn, Section 5 of the VRA required those jurisdictions identified by the Section 4 coverage formula to secure "preclearance" from the United States Attorney General or a three-judge court in the District of Columbia to ensure that proposed voting law changes did not have the purpose or effect "of denying or abridging the right to vote on account of race or color."[3]

In *Shelby County*, the Court held unconstitutional, and invalidated, Section 4's coverage formula, while expressly withholding judgment as to the constitutionality of Section 5's preclearance requirement. In so doing, the Court, in an opinion authored by Chief Justice John G. Roberts Jr., invited "Congress [to] draft another formula based on current conditions."[4]

[1] 133 S. Ct. 2612 (2013).

[2] 42 U.S.C. § 1973b; *Jurisdictions Previously Covered by Section 5*, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Dec. 4, 2014).

[3] 42 U.S.C. § 1973c(a).

[4] *Shelby Cnty.*, 133 S. Ct. at 2631.

The VRAA is a bipartisan attempt to respond to Chief Justice Roberts's invitation. It includes a new coverage formula for federal preclearance that is narrowly tailored and nationally-focused; and the proposed amendment provides voters with new tools to stop racial discrimination in voting before such procedures can take effect. The VRAA is not a perfect substitute for the preclearance system as it existed before *Shelby County*. It does not, for example, trigger federal oversight of election laws that require voters to show a photo identification, which have been shown to have a racially discriminatory effect. The City Bar vigorously opposes such laws.

The VRAA is nonetheless a critical effort to restore and redesign the VRA's protections as they existed before *Shelby County*. Congress should hold hearings and pass the VRAA without delay.

BACKGROUND ON THE VOTING RIGHTS ACT

I. Generally

The VRA is often credited as one of the most important civil rights bills in American history.[5] As enacted in 1965, the VRA permanently banned racial discrimination in voting, established a private right of action for those whose voting rights had been denied or limited based on race, and, under Sections 4 and 5, temporarily required certain jurisdictions to submit to federal oversight when enacting and implementing election laws.

The VRA's temporary requirement for certain jurisdictions to obtain federal preapproval of changes to election laws has been central to the statute's success. This requirement for "preclearance" helped to ensure that discriminatory election law changes were stopped before taking effect. As originally enacted and subsequently updated, Section 4 of the VRA included a coverage formula to identify jurisdictions with particularly egregious histories of voting discrimination on the basis of race. The formula contained two principal elements: (1) whether, on November 1, 1964, 1968 or 1972 the state or jurisdiction maintained a "test or device" restricting the eligibility of an individual's right to vote; and (2) whether less than 50 percent of persons of voting age were registered to vote on November 1, 1964, 1968 or 1972 or less than 50 percent of persons of voting age voted in the presidential election of November 1964, 1968, or 1972.[6]

Section 5 requires those jurisdictions identified by Section 4's coverage formula to obtain preclearance from the federal government before making changes in voting practices or procedures.[7] Separate provisions of the VRA permit the Department of Justice ("DOJ") to send

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[5] *See*, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 927-28 (1995) (commenting that the VRA "has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions"); George W. Bush, Statement on Legislation to Reauthorize the Voting Rights Act, 42 Weekly Comp. Pres. Docs. 1371 (July 20, 2006) (describing the VRA as "one of the most important pieces of legislation in our Nation's history"); Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982) (referring to VRA as "crown jewel of American liberties"), *available at* http://www.presidency.ucsb.edu/ws/?pid=42688 (last visited Dec. 4, 2014).

[6] 42 U.S.C. § 1973.

[7] 42 U.S.C. §§ 1973b-1973c.

federal observers to polling places in covered jurisdictions where the DOJ has reason to believe voting discrimination on the basis of race or membership in a language minority group will occur.[8]

II. Nationally

In the years prior to *Shelby County*, the VRA's reach was extensive, allowing possible discriminatory voting practices to be identified and prevented before going into effect. For example, when Congress last reauthorized the VRA in 2006, it found that from 1982 to 2006, the preclearance system established by Sections 4 and 5 had resulted in 626 Attorney General objections blocking discriminatory voting changes, over 800 proposed voting changes that had been withdrawn or modified in response to DOJ requests for more information in aid of DOJ's Section 5 enforcement, 105 successful Section 5 enforcement actions, and a significant deterrent effect from the mere existence of Section 5, i.e., "the number of voting changes that have never gone forward as a result of Section 5."[9]

The gains achieved by Sections 4 and 5 continued following the 2006 reauthorization. According to one analysis, between 2006 and January 2013, jurisdictions covered by Section 5 proposed 37 voting changes that resulted in objections from the Attorney General and 5 changes that were blocked by the District Court for the District of Columbia.[10] Fourteen of the thirty-seven proposed changes that were objected to by the Attorney General reflected evidence of discriminatory intent, as did two of the five proposed changes rejected by the district court.[11]

Following *Shelby County*, voters in states and local jurisdictions previously covered by Sections 4 and 5 lack the clear, federal protections of the VRA.

III. New York City

New York City's voters have long benefited from the VRA's protections. Section 4's coverage formula required three counties in New York City—Bronx, Kings and New York Counties—to comply with Section 5's preclearance requirement,[12] which, as a practical matter, subjected all City-wide voting changes to pre-clearance In addition, seven other counties in the State are covered under Section 203 of the VRA, requiring language assistance in voting for certain language minority citizens.[13]

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[8] 42 U.S.C. § 1973a; 42 U.S.C. § 1973f.

[9] *Shelby Cnty. v. Holder*, 679 F.3d 848, 872 (D.C. Cir.), *rev'd* 133 S. Ct. 2612 (2013).

[10] Amicus Br. for Marcia L. Fudge, Member of Congress and Chair of the Congressional Black Caucus, et al., *Shelby Cnty. v. Holder*, No. 12-96, at 20-21 (S. Ct. Feb. 1, 2013).

[11] *Id*.

[12] *See Jurisdictions Previously Covered by Section 5*, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Dec. 4, 2014).

[13] Bronx County (Spanish-language assistance); Kings County (Chinese- and Spanish-language assistance); Nassau County (Spanish-language assistance); New York County (Chinese- and Spanish-language assistance); Queens County (Chinese-, Korean-, and South Indian- Spanish-language assistance); Suffolk County (Spanish-language assistance); and Westchester County (Spanish-language assistance).

The continuing need for an effective tool to combat racial and language-minority discrimination in voting is evidenced by recent VRA violations in New York City. In February 2014, the Board of Elections of the City of New York settled a case that had alleged failure by the Board of Elections to comply with its obligation under Section 203 of the VRA to provide language assistance to Bengali voters in Queens County, which has been covered under Section 203 since October 13, 2011.[14] Specifically, a putative class contended that the Board of Elections had failed to provide ballots translated into Bengali in any of the four elections the Board of Elections had administered since Queens County became subject to Section 203 with respect to Bengali voters.[15] And, as alleged by the plaintiffs, language assistance other than translated ballots proved inadequate.[16]

The VRA's positive effect on New York City voters is also evidenced by the fact that, during primary and general elections held in 2006, 2008 and 2012, federal observers have been sent to all or some of Bronx, Kings and New York Counties to protect voters from discrimination.[17] Federal observers were also sent to monitor the 2014 general election in Queens County this past November.[18] As acknowledged by the City itself in an amicus brief to the Supreme Court in support of the VRA's preclearance provisions, the presence of the VRA and its enforcement tools "assist[] the City in perfecting its electoral processes."[19]

IV. New York State

Gains have also been achieved under the VRA in other parts of New York State. Recent litigation has shown the following:

- In 2003, following the 2000 Census, a putative class of African-American and Latino voters alleged that Albany County's redistricting plan violated Section 2 of the VRA by failing to create a sufficient number of County Legislature districts from which minority voters could elect a candidate of their choice. Pursuant to a Consent Decree entered in August 2004, the County agreed to a new redistricting plan that took effect for elections in 2007.[20]

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[14] *See Alliance of S. Asian Am. Labor v. Bd. of Elections in the City of New York*, 13-CV-3732-RDA-JMA (E.D.N.Y. Feb. 27, 2014) , ECF No. 20 (stipulation of dismissal); 76 Fed. Reg. 63602, 63605 (Oct. 13, 2011).

[15] *See Alliance of S. Asian Am. Labor v. Bd. of Elections in the City of New York*, 13-CV-3732-RDA-JMA (E.D.N.Y. July 2, 2013) , ECF No. 1 (complaint), at ¶¶ 16–19.

[16] *Id*. at ¶ 29.

[17] *See* Lawyers' Comm. For Civil Rights under Law, Voting Rights Act: Objections and Observers (index of VRA objections and observer coverage), *available at*: http://www.lawyerscommittee.org/projects/section_5/ (last visited Dec. 4, 2014).

[18] *See* Press Release, Justice Dep't to Monitor Polls in 23 States on Election Day (Nov. 2, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day (last visited Dec. 4, 2014).

[19] Amicus Br. for City of New York, et al., *Shelby Cnty. v. Holder*, No. 12-96 (S. Ct. Feb. 2, 2013).

[20] *Arbor Hill Concerned Citizens Neighborhood Assoc. v. County of Albany*, 03-CV-502 (N.D.N.Y. Aug. 19, 2004) (consent decree and judgment).

- In 2004, the DOJ filed suit against Suffolk County, its Board of Elections and the Board of Elections' commissioners.[21] The DOJ alleged that the defendants' failure to provide Spanish-language election materials and to recruit and to train bilingual election staff failed to comply with Section 203 of the VRA.[22] Pursuant to a Consent Decree entered in September 2004, the defendants agreed to provide Spanish-language election materials, to conduct outreach to Spanish-language voters with limited English proficiency, and to continued federal oversight of elections through January 2008.[23]

- In 2005, the DOJ filed suit for violation of Section 203 of the VRA and Section 302 of the Help America Vote Act, 42 U.S.C. §§ 15482, 15511, against Westchester County, its Board of Elections and the Board of Elections' commissioners.[24] Specifically, the DOJ alleged a failure to provide language assistance to voters with limited English proficiency and proficiency in Spanish.[25] Pursuant to a Consent Decree entered shortly after litigation was initiated, the defendants agreed to provide Spanish-language election materials, bilingual poll workers, a Spanish language advisory group, increased training and reporting, and federal oversight of elections through August 2007.[26] The district court subsequently granted a motion by the DOJ to continue federal oversight through December 31, 2008 to ensure compliance with the Consent Decree.[27] The DOJ has subsequently deployed federal observers to monitor elections in Westchester County in each of the 2008, 2010 and 2012 elections.[28]

- In 2006, the DOJ filed suit against the Village of Port Chester, alleging that Port Chester's at-large system of electing its board of trustees violated Section 2 of the VRA by diluting the voting strength of the Village's Latino voters.[29] Following a bench trial finding the Village liable and an appeal affirming the district court's ruling, a Consent Decree was entered in April 2011 under which the Village

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[21] *United States v. Suffolk Cnty.*, 04-CV-2698 (E.D.N.Y June 29, 2004), ECF No. 1 (complaint).

[22] *Id*.

[23] *United States v. Suffolk Cnty.*, 04-CV-2698 (E.D.N.Y. Sept. 27, 2004), ECF No. 10 (consent decree requiring defendants to comply with bilingual language requirements of Section 203 of the VRA and authorizing appointment of federal examiner and observers until January 31, 2008).

[24] *United States v. Westchester Cnty.*, 7:05-CV-650 (S.D.N.Y. July 19, 2005), ECF No. 1 (complaint).

[25] *Id*.

[26] *United States v. Westchester Cnty.*, 7:05-CV-650 (S.D.N.Y. July 19, 2005), ECF No. 4 (consent decree requiring compliance with Section 203 of the VRA and Section 302 of the Help America Vote Act, 42 U.S.C. §§15482, 15511, and authorizing appointment of federal examiners and observers through August 7, 2007).

[27] *United States v. Westchester Cnty.*, 05-CV-650 (S.D.N.Y. Jan. 3, 2008), ECF No. 31 (extending federal oversight of consent decree through December 31, 2008).

[28] *See* Lawyers' Comm. For Civil Rights under Law, Voting Rights Act: Objections and Observers (index of VRA objections and observer coverage), *available at*: http://www.lawyerscommittee.org/projects/section_5/ (last visited Dec. 4, 2014).

[29] *United States v. Village of Port Chester*, 06 Civ. 15173 (S.D.N.Y. Dec. 15, 2006), ECF No. 1 (complaint).

agreed not to implement its at-large voting system and, instead, to implement a cumulative voting system.[30]

- In April 2012, the DOJ filed suit against the Orange County Board of Elections and its commissioners for failure to provide language assistance to Puerto Rican voters in compliance with Section 4(e) of the VRA.[31] Specifically, the DOJ alleged that Orange County had failed in the 2009, 2010 and 2011 elections to provide Orange County voters who were born and educated in Puerto Rico, and who had limited English proficiency, with bilingual poll workers and Spanish-language election materials.[32] In a Consent Decree entered shortly after initiation of the suit, the defendants agreed to provide for translation and dissemination of Spanish language election materials, bilingual poll workers, a Spanish language advisory group, increased training and reporting, and to federal observer oversight.[33] The DOJ subsequently deployed federal observers to monitor the 2012 federal primary and general elections, as well as the 2014 general election, in Orange County.[34]

As illustrated by the examples above, violations of the VRA in New York State are not a thing of the past. New Yorkers have benefited both from the VRA's minority-language assistance protections, as well as measures to guard against vote dilution and every voter's right to cast an effective ballot. Federal protection of voting rights remains necessary.

THE VOTING RIGHTS ACT TODAY AND *SHELBY COUNTY*

On June 25, 2013, in *Shelby County v. Holder*, the Supreme Court held unconstitutional the VRA's coverage formula that determined which jurisdictions must comply with the preclearance requirement of Section 5.[35] While the Court accepted that Section 4's coverage formula based on discriminatory tests and devices and minority voter turnout from elections in 1964, 1968 and 1972 was "sufficiently related" to voting discrimination in the past, it criticized the formula as inadequately linked to discrimination in the present.[36] The Court also declared

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[30] *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 446-47 (S.D.N.Y. 2010) (holding that at-large voting scheme violated Section 2 of the VRA and ordering cumulative voting system); *United States v. Village of Port Chester*, 06 Civ. 15173 (S.D.N.Y. Apr. 21, 2011), ECF No. 151 (judgment).

[31] *United States v. Orange Cnty. Bd. of Elections*, No. 12-Civ-3071 (ER) (S.D.N.Y. Apr. 18, 2012), ECF No. 1 (complaint).

[32] *Id*.

[33] *United States v. Orange Cnty. Bd. of Elections*, No. 12-Civ-3071 (ER) (S.D.N.Y. Apr. 24, 2012), ECF No. 2 (consent decree requiring county to implement comprehensive bilingual elections program consistent with Section 203 of VRA).

[34] *See* Lawyers' Comm. For Civil Rights under Law, Voting Rights Act: Objections and Observers (index of VRA objections and observer coverage), *available at*: http://www.lawyerscommittee.org/projects/section_5/; Press Release, Justice Dep't to Monitor Polls in 23 States on Election Day (Nov. 2, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day (last visited Dec. 4, 2014).

[35] *Shelby Cnty.*, 133 S. Ct. at 2631.

[36] *Id*. at 2627.

that the coverage formula as it existed in 2013, applying as it did only to a portion of the States, violated what the majority referred to as "the fundamental principle of equal sovereignty" among the States.[37]

Notably, the Court limited its holding to the coverage formula in Section 4, stating that "Congress may draft another formula based on current conditions."[38] Indeed, the opinion flatly acknowledged that "voting discrimination still exists"[39] and expressly stated that its holding "in no way affects the permanent, nationwide ban on racial discrimination found in § 2"[40] of the VRA or Section 5 itself.

The effect of the decision, however, was not only to invalidate the coverage formula, but also to render obsolete Section 5 and the federal observer program—both of which apply only to jurisdictions covered by the formula. Without any coverage formula in place, in those States and local jurisdictions that were previously subject to federal oversight of the election process, voters' primary tool to enforce the VRA's promise is now the private right of action provided by Section 2 of the VRA.

THE VOTING RIGHTS AMENDMENT ACT OF 2014

The VRAA is a direct response to *Shelby County*. The proposed legislation is not a full substitute for preclearance as it existed before *Shelby County* but provides several tools to protect voters from racial discrimination in voting.

First, the VRAA updates the coverage formula in Section 4. Under the proposed formula, States would be subject to preclearance if the State or its political subdivisions committed five or more "voting rights violations" during the previous 15 years, at least one of which was committed by the State itself.[41] A political subdivision would be subject to preclearance if it committed three violations in the previous 15 years, or one or more violations occurred in the subdivision during the previous 15 years and the political subdivision experienced persistently low minority voter turnout during that time.[42] A "voting rights violation" for purposes of the formula would include: a final judgment that a State or political subdivision violated the guarantees of the Fourteenth or Fifteenth Amendments; a final judgment that a violation of Section 2 of the VRA occurred; a final judgment that a violation of Section 5 of the VRA occurred; and a denial of preclearance by the DOJ.[43] Exempted from the definition of "voting rights violations" would be past denials of preclearance for voter identification laws.[44]

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[37] *Id*. at 2627 (quoting *Northwest Austin Mun. Utility Dis. No. One v. Holder*, 129 S. Ct. 2504, [25]12 (2009)).

[38] *Id.* at 2631.

[39] *Id*.

[40] *Id*.

[41] VRAA § 3.

[42] *Id*.

[43] VRAA § 3(b)(3).

[44] VRAA § 3(b)(3)(D).

The proposed coverage formula would be dynamic and based on current conditions. On an annual basis, the DOJ would be required to perform an annual assessment of which States and political subdivisions meet the criteria of the new coverage formula.[45] Jurisdictions that meet the coverage formula's criteria would remain subject to preclearance for 10 years.[46]

Second, the VRAA strengthens Section 3 of the VRA—a tool to combat voting discrimination that was previously little-used. In its current form, Section 3 permits a court to "bail-in" a State or local jurisdiction to the requirements of preclearance and oversight by federal election observers if the court finds that the jurisdiction engaged in intentional racial discrimination in voting.[47] As amended, Section 3 would permit a court also to bail-in a jurisdiction upon a finding that a jurisdiction's conduct caused a discriminatory result.[48] Similar to the VRAA's proposed new coverage formula, its proposed amendment to the bail-in provision exempts as a trigger for "bail-in" any finding that a voter identification law violates the VRA.[49]

Third, the VRAA restores the DOJ's ability to send federal observers to monitor elections in jurisdictions covered by the new formula.[50] It also expands the authority of the DOJ to send observers to jurisdictions covered by the VRA's language minority provisions.[51]

Fourth, the VRAA provides increased transparency for changes in election laws nationwide. It mandates that jurisdictions throughout the country provide notice in the local media and online of any voting change that affects a federal election and occurs within 180 days of an election.[52] Moreover, 30 days prior to a federal election, each jurisdiction must provide notice and describe resources allocated for each polling place and/or precinct, including the name of the polling place or precinct, its location, the voting-age population of the area served by the polling place or precinct (broken down by demographic group, if reasonably achievable), the number of registered voters assigned to the polling place or precinct (broken down by demographic group, if reasonably achievable), the number of voting machines assigned, the number of poll workers, and the dates and hours of operation.

Fifth, the VRAA creates a new standard for preliminary relief against potentially discriminatory voting laws. Under this standard, a preliminary injunction is authorized if "the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted."[53] This standard would be a departure from the traditional preliminary injunctive test that takes into account the likelihood of success on the merits, whether the

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[45] VRAA § 3(b)(5).

[46] VRAA § 3(b)(2).

[47] 42 U.S.C. § 1973a.

[48] VRAA § 2(a).

[49] *Id.*

[50] VRAA § 5.

[51] *Id.*

[52] VRAA § 4(a).

[53] VRAA § 6(b).

plaintiff will suffer irreparable harm in the absence of relief, and the public interest.[54] The VRAA specifies that a court should take into account the following factors when a plaintiff seeks preliminary relief from "a change" in voting practice: whether the former voting practice was adopted as a remedy in, or as ground for the dismissal or settlement of, previous voting rights litigation; whether the change was adopted fewer than 180 days before the election for which the change is to take effect; and whether the defendant provided timely or complete notice of the adoption of the change under federal or state law.[55]

CONCLUSION

The VRAA is a bipartisan bill that restores some of the voting rights protections that were lost as a result of the Supreme Court's decision in *Shelby County*. The City Bar recognizes that the VRAA is an important compromise. Although the VRAA does not adequately protect voters from voter identification laws that have a discriminatory effect, the City Bar nonetheless supports passage of the VRAA. Now is the time for Congress to enact this legislation that ensures the promise of the VRA is fulfilled.

Election Law Committee
Sarah K. Steiner, Chair

Civil Rights Committee
Sebastian Riccardi, Chair

December 2014

[54] *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

[55] VRAA § 6(b)(2)(B).