



Statement of

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Before

Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Justice  
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Hearing on

# **“History and Enforcement of the Voting Rights Act of 1965”**

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Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee:

My name is L. Paige Whitaker and I am a Legislative Attorney with the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify regarding the Voting Rights Act of 1965 (VRA). As requested, my testimony will briefly address the history of the VRA and provide an overview of Sections 2 and 3(c) of the law. My testimony will not address pending legislation, but CRS would be pleased to provide such analysis in the future. Pursuant to congressional guidelines, CRS is available to serve all Members of Congress, and CRS testimony is provided on an objective, non-partisan basis.

## Brief History of the VRA

The VRA was enacted under Congress’s authority to enforce the Fifteenth Amendment to the U.S. Constitution, providing that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude.<sup>1</sup> When transmitting a draft of the legislation to the House of Representatives, President Lyndon B. Johnson stated that the bill would “help rid the Nation of racial discrimination in every aspect of the electoral process and thereby insure the right of all to vote.”<sup>2</sup> Since it was first enacted in 1965,<sup>3</sup> the VRA has evolved through a series of amendments that were enacted in 1970,<sup>4</sup> 1975,<sup>5</sup> 1982,<sup>6</sup> 1992,<sup>7</sup> and 2006.<sup>8</sup> As originally enacted, the VRA contained 19 sections, including the following key provisions, as amended.

Section 2, which applies nationwide, prohibits any voting qualification or practice that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.<sup>9</sup> As originally enacted, Section 2 prohibited voting restrictions based on race or color, but the 1975 amendments expanded its application to include language minority groups.<sup>10</sup> Section 2 is still in effect and is discussed in greater detail in the following section of this testimony.

Section 3(c), known as the “bail in” provision, 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.<sup>11</sup> As originally enacted in 1965, Section 3(c) covered violations of the Fifteenth Amendment justifying equitable relief, but the VRA was amended

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<sup>1</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>2</sup> Communication From the President of the United States Transmitting a Draft of Proposed Legislation Entitled, “A Bill to Enforce the 15<sup>th</sup> Amendment to the Constitution of the United States,” H.R. Doc. 89-120, at 1 (1965).

<sup>3</sup> Voting Rights Act of 1965, Pub. L. No. 89-110.

<sup>4</sup> Voting Rights Act Amendments of 1970, Pub. L. No. 91-285.

<sup>5</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73.

<sup>6</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205.

<sup>7</sup> Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344.

<sup>8</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246.

<sup>9</sup> Codified as amended at 52 U.S.C. §§ 10301, 10303(f).

<sup>10</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73.

<sup>11</sup> 52 U.S.C. § 10302(c).

in 1975 to include violations of the Fourteenth Amendment.<sup>12</sup> Section 3(c) is still in effect and is discussed in greater detail in the following section of this testimony.

Section 4(b), known as the “coverage formula,” prescribed which states and jurisdictions with a history of discrimination were required to obtain preclearance before changing any voting law.<sup>13</sup> It covered any state or political subdivision that 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 in the year in which the state or political subdivision used the test or device.<sup>14</sup> For the 1964 and 1968 dates triggering coverage, the terms “test or device” were defined to include 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, the definition also included providing election information only in English in states or political subdivisions where members of a single language minority constituted more than 5% of the voting age citizens.<sup>15</sup> As originally enacted, Section 4(b) and, by extension, the preclearance requirement in Section 5, discussed below, were scheduled to expire in five years. In a series of amendments, however, the law was reauthorized and most recently, in 2006, was extended for 25 years.<sup>16</sup> As discussed below, in a 2013 ruling, *Shelby County v. Holder*, the Supreme Court invalidated the coverage formula in Section 4(b).<sup>17</sup>

Section 5, known as the “preclearance” requirement, required prior approval or preclearance of a proposed change to any voting law, and applied only to those states or political subdivisions covered under Section 4(b).<sup>18</sup> 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 have the effect, of denying or abridging the right to vote, or diminishing the ability to elect preferred candidates of choice, on account of race, color, or membership in a language minority group.<sup>19</sup> In 2006, Congress amended Section 5 to provide that a proposed voting change would not be granted preclearance if it had the effect of diminishing racial minorities’ “ability . . . to elect their preferred candidates of choice.”<sup>20</sup> This amendment responded to a 2003 Supreme Court ruling, *Georgia v. Ashcroft*, holding that the standard for preclearance was met 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 affect an election, but not necessarily play a decisive role.<sup>21</sup> Section 5 is inoperable as a result of the Supreme Court invalidating the coverage formula in Section 4(b).<sup>22</sup>

Until 2013, when the Supreme Court issued its ruling in *Shelby County*,<sup>23</sup> courts construed Section 5 of the VRA to require several states and jurisdictions covered under Section 4(b) to obtain prior approval or

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<sup>12</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 205.

<sup>13</sup> 52 U.S.C. § 10303(b).

<sup>14</sup> *Id.*

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

<sup>16</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, codified at 52 U.S.C. § 10303(a)(8).

<sup>17</sup> *See* 570 U.S. 529 (2013).

<sup>18</sup> 52 U.S.C. § 10303(a).

<sup>19</sup> *Id.*

<sup>20</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, codified as amended at 52 U.S.C. § 10304(b).

<sup>21</sup> 539 U.S. 461, 483 (2003).

<sup>22</sup> *See* *Shelby County*, 570 U.S. at 557.

<sup>23</sup> 570 U.S. 529 (2013).

preclearance for any proposed change to a voting law, which included changes to redistricting maps.<sup>24</sup> In order to be granted preclearance, the state or jurisdiction had the burden of proving that the proposed map would have neither the *purpose* nor the *effect* of denying or abridging the right to vote on account of race or color, or membership in a language minority group.<sup>25</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>26</sup> Covered jurisdictions could seek preclearance from either the Department of Justice (DOJ) or the U.S. District Court for the District of Columbia.<sup>27</sup> If neither DOJ nor the court granted preclearance, the proposed change to election law could not go into effect.<sup>28</sup>

In 1966, the Supreme Court upheld the constitutionality of the VRA’s preclearance regime in *South Carolina v. Katzenbach*,<sup>29</sup> characterizing it as an “uncommon exercise of congressional power” that was justified by the “exceptional conditions” of the states “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination.”<sup>30</sup> In *Shelby County*, however, in 2013, the Court held that applying the coverage formula to certain states and jurisdictions departed from the “fundamental principle of equal sovereignty” among the states was not justified in light of current conditions.<sup>31</sup> Subjecting states to different burdens is justifiable in certain cases, the Court determined, but departing from the principle of equal sovereignty “requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>32</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.<sup>33</sup> Observing 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, the Court characterized the coverage formula as relying on “decades-old data and eradicated practices” that do not reflect current conditions.<sup>34</sup> While such factors could appropriately be used to divide the country in 1965, the Court stated that the country is no longer divided along those lines.<sup>35</sup> The Court ruled that, in order for Congress to divide the country so as to subject only certain states to preclearance, it must do so on a basis that makes sense “in light of current conditions.”<sup>36</sup>

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<sup>24</sup> See, e.g., *Miller v. Johnson*, 515 U.S. 900, 905-06 (1995) (“The preclearance mechanism applies to congressional redistricting plans, and requires that the proposed change ‘not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.’”) (internal citations omitted).

<sup>25</sup> 52 U.S.C. § 10304 (emphasis added). See also 28 C.F.R. § 51.52(a) (2018).

<sup>26</sup> *Id.* § 10304(d).

<sup>27</sup> *Id.* § 10304(a).

<sup>28</sup> *Id.*

<sup>29</sup> 383 U.S. 301 (1966).

<sup>30</sup> *Id.* at 334-35.

<sup>31</sup> *Shelby County*, 570 U.S. 529, 544 (2013) (characterizing the coverage formula as “based on 40-year old facts having no logical relation to the present day.”) *Id.* at 554. (internal citations and quotations omitted).

<sup>32</sup> *Id.* at 542 (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

<sup>33</sup> See *id.* at 550-51.

<sup>34</sup> *Id.* at 551.

<sup>35</sup> See *id.* (“In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.”)

<sup>36</sup> *Id.* at 557 (“Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an extraordinary departure from the traditional course of relations between the States and the Federal Government. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”) (internal citation and quotations omitted).

As a result of the Court's decision, nine states and jurisdictions within six additional states, which 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>37</sup>

## Overview of Key Provisions of Current Law

As requested, this section briefly addresses Sections 2 and 3(c), two key provisions of the VRA that remain in effect. As noted above, Section 4(b) was held invalid by the Supreme Court, thereby rendering Section 5 inoperable.

### Section 2

Section 2 of the VRA applies nationwide and authorizes the federal government and private citizens to challenge discriminatory voting practices or procedures, including minority vote dilution, the diminishing or weakening of minority voting power.<sup>38</sup> Specifically, Section 2 prohibits any state or political subdivision from applying or imposing a voting qualification or practice that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.<sup>39</sup> Further, the law provides that a violation is established if, "based on the totality of circumstances," electoral processes "are not equally open to participation" by members of a racial or language minority group in that the group's members "have less opportunity than other members of the electorate to elect representatives of their choice."<sup>40</sup> Courts have most frequently applied Section 2 in the context of challenges to redistricting plans; however, in the past few years, litigants have also invoked Section 2 to challenge certain state voting and election administration laws.<sup>41</sup>

In the redistricting context, under certain circumstances, the VRA may require the creation of one or more "majority-minority" districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority.<sup>42</sup> 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 minority vote dilution by helping ensure that racial or language

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<sup>37</sup> See DEP'T OF JUSTICE, *Jurisdictions Previously Covered By Section 5*, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last visited March 8, 2019). It does not appear, however, that the Court's decision affected Section 3(c) of the VRA, known as the "bail in" provision, discussed *infra*, under which jurisdictions can be ordered to obtain preclearance of voting laws if a court concludes that the jurisdiction has committed a violation of the Fourteenth or Fifteenth Amendments justifying equitable relief. 52 U.S.C. § 10302(c).

<sup>38</sup> 52 U.S.C. §§ 10301, 10303(f).

<sup>39</sup> *Id.* § 10301(a).

<sup>40</sup> *Id.* § 10301(b).

<sup>41</sup> In evaluating a challenge to a law eliminating straight-party voting under Section 2 of the VRA, the U.S. Court of Appeals for the Sixth Circuit observed that Section 2 is most frequently invoked "in assessing vote-dilution claims, rather than vote-denial or vote-abridgement claims." *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, at 667 (6<sup>th</sup> Cir. 2016), *stay denied by Johnson v. Mich. State A. Philip Randolph Inst.*, 137 S. Ct. 28 (2016). See, e.g., *Bartlett v. Strickland*, 556 U.S. 1, 25-26 (2009) (holding that in a vote dilution challenge to a redistricting map under Section 2 of the VRA, a minority group must constitute more than 50% of the voting population in order to satisfy the requirement of geographical compactness sufficient to constitute a majority in a district); see also DEP'T OF JUSTICE, *Cases Raising Claims Under Section 2 Of The Voting Rights Act*, <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0> (last visited March 6, 2019). See generally CRS Report R44675, *Recent State Election Law Challenges: In Brief*, by L. Paige Whitaker (discussing state election laws challenged under Section 2 of the VRA with mixed results).

<sup>42</sup> 52 U.S.C. §§ 10301, 10303(f).

minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.

In its landmark 1986 decision *Thornburg v. Gingles*, the Supreme Court established a three-pronged test for proving vote dilution under Section 2 of the VRA.<sup>43</sup> Under this test, (1) 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; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority group must be able to demonstrate that the majority votes sufficiently as a bloc usually to enable the majority to defeat the minority group's preferred candidate absent special circumstances, such as the minority candidate running unopposed.<sup>44</sup> The *Gingles* Court also opined that a violation of Section 2 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>45</sup> The Court further listed the following factors, which originated in legislative history materials accompanying enactment of Section 2, as relevant in assessing the totality of the circumstances:

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; [and]
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.<sup>46</sup>

Elaborating on the *Gingles* three-pronged test, in *Bartlett v. Strickland*, the Supreme Court ruled that the first prong of the test—requiring a minority group to be geographically compact enough to constitute a majority in a district—can be satisfied if the minority group would constitute more than 50% of the voting

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<sup>43</sup> 478 U.S. 30 (1986).

<sup>44</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 *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) ("It 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.")

<sup>45</sup> *Thornburg*, 478 U.S. at 44.

<sup>46</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, 206-07). ("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.")



population in a single-member district.<sup>47</sup> In *Bartlett*, the state officials who drew the map argued that Section 2 requires drawing district lines in such a manner as to allow minority voters to join with other voters to elect the minority group's preferred candidate, even if the minority group in a given district comprises less than 50% of the voting-age population.<sup>48</sup> Rejecting this argument, a plurality of the Court determined 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.<sup>49</sup> 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, the plurality opinion determined, because the third prong requires that the minority be able to demonstrate that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.<sup>50</sup> Therefore, the plurality found it difficult to envision how the third prong of *Gingles* could be met in a district where, by definition, majority voters are needed to join with minority voters in order to elect the minority's preferred candidate.<sup>51</sup>

In sum, in certain circumstances, Section 2 can require the creation of one or more majority-minority districts in a redistricting plan. By drawing such districts, a state can avoid racial vote dilution, and the denial of minority voters' equal opportunity to elect candidates of choice. As the Supreme Court has determined, minority voters must constitute a numerical majority—over 50%—in such minority-majority districts.<sup>52</sup>

### Section 3(c)

Known as the "bail in" provision of the VRA, Section 3(c) provides that if a court determines that violations of the Fourteenth or Fifteenth Amendment<sup>53</sup> to the U.S. Constitution 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.<sup>54</sup> During that period, the state or political subdivision cannot make an electoral change 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.<sup>55</sup> In addition, if the state or political subdivision submits a proposed electoral change to the U.S. Attorney General, who does not object within 60 days, the new election procedure may be enforced.<sup>56</sup>

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<sup>47</sup> 556 U.S. 1, 25-26 (2009) (plurality opinion).

<sup>48</sup> *See id.* at 6-7.

<sup>49</sup> *See id.* at 15.

<sup>50</sup> *Id.* at 16.

<sup>51</sup> *Id.*

<sup>52</sup> In addition to the VRA, however, congressional redistricting plans must also conform to standards of equal protection under the Fourteenth Amendment to the U.S. Constitution. 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 to be applied. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). *See also, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

<sup>53</sup> U.S. CONST. AMEND. XIV § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. AMEND. XV § 1 ("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.")

<sup>54</sup> 52 U.S.C. § 10302(c). *See Travis Crum, The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 992 (2009) (characterizing the Section 3(c) bail in provision as the VRA's "most obscure provision").

<sup>55</sup> *Id.*

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

As federal courts have determined, Section 3(c) requires a finding of intentional discrimination.<sup>57</sup> In contrast to the Section 5 preclearance regime, Section 3(c) preclearance can be imposed by a court in *any* state or political subdivision, and the period of time that the court will subject a jurisdiction to preclearance is within the court’s discretion. For example, a federal district court in 2017 determined that as a starting point, five years could be an appropriate period to retain jurisdiction and require preclearance.<sup>58</sup> Also in contrast to Section 5, at least one federal court has interpreted Section 3(c) to authorize preclearance limited to certain types of voting changes, such as those relating only to majority-vote requirements.<sup>59</sup>

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<sup>57</sup> See, e.g., *Jeffers v. Clinton*, 740 F. Supp. 585, 588-89 (E.D. Ark. 1990), *appeal dismissed* 498 U.S. 1129 (1991).

<sup>58</sup> See *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017) (identifying a five-year period of jurisdiction because it was “likely enough time for demographic trends to overcome concerns about dilution from redistricting.”).

<sup>59</sup> See *Jeffers*, 740 F. Supp. at 586 (requiring preclearance limited to only those proposed changes to “laws, standards, or practices designed to enforce or enhance a majority-vote requirement”).