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Legal Sidebar

Voting Rights Act: Section 3(c) "Bail-In" Provision

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Congress has recently considered legislation that would amend the Voting Rights Act of 1965 (VRA). For example, during the 117th Congress, the House passed H.R. 4, the John R. Lewis Voting Rights Advancement Act, and H.R. 5746, the Freedom to Vote: John R. Lewis Act. While these pending bills would amend the better-known provisions of the VRA—Sections 2, 4, and 5—they would also amend Section 3(c), known as the *bail-in provision*. Sometimes referred to as VRA's "obscure provision," Section 3(c) has attracted attention recently. Under Section 3(c), if a court determines that a state or political subdivision's electoral processes violate the Fourteenth or Fifteenth Amendments, the court can require the jurisdiction to obtain prior approval or "preclearance" from the court or the U.S. Attorney General before implementing a proposed change to a voting law.

This Legal Sidebar begins, for context, with a review of Sections 2, 4, and 5 of the VRA. It then addresses Section 3(c) and highlights some notable differences between Sections 3(c) and 5. Next, it discusses a recent federal district court ruling that relied on Section 3(c) to require the State of Florida to preclear proposed changes to certain voting laws for a period of 10 years and examines a subsequent stay of that decision issued by an appellate court. The Sidebar concludes with an overview of considerations for Congress.

Background: VRA Sections 2, 4, and 5

Section 2 of the VRA, codified at 52 U.S.C. §10301, authorizes the federal government and private citizens to challenge discriminatory voting practices, including the practice of diminishing or weakening of minority voting power, known as minority vote dilution. Specifically, Section 2(a) prohibits any state or political subdivision from imposing a voting practice that "results in a denial or abridgement of the right … to vote" based on an individual's race, color, or membership in a language minority. Further, Section 2(b) provides that a violation is established if, "based on the totality of circumstances," electoral processes in a state or political subdivision "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." Historically, Section 2 of the VRA has been invoked primarily to challenge redistricting maps, known as *vote dilution* cases. In a 2021 ruling, *Brnovich v.*

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Democratic National Committee, the Supreme Court was asked to interpret Section 2 of the VRA in a new context—state voting laws—known as a *vote denial* case.

Sections 4(b) and 5 of the VRA operated in tandem. Section 4(b), codified at 52 U.S.C. §10303, established criteria—known as the *coverage formula*—prescribing which states and jurisdictions with a history of discrimination were required to obtain preclearance under Section 5 before implementing a change to a voting law or practice. The coverage formula was based on voter turnout and registration data from the 1960s and early 1970s. In a 2013 ruling, *Shelby County v. Holder*, the Supreme Court invalidated the coverage formula in Section 4(b), thereby rendering the preclearance requirements in Section 5 inoperable. At the time *Shelby County* was decided in 2013, nine states and jurisdictions within six additional states were covered under Section 4(b) and, therefore, subject to Section 5 preclearance. Specifically, the Court in *Shelby County* held that the application of the coverage formula to the covered states and jurisdictions was unconstitutional because it departed from the "fundamental principle of equal sovereignty" among the states without justification based on current data. According to the Court, when Congress last reauthorized the coverage formula in 2006, it improperly relied "on decades-old data relevant to decades-old problems, rather than current data reflecting current needs."

Under Section 5 of the VRA, codified at 52 U.S.C. §10304, the covered states and jurisdictions were required to obtain preclearance from either the Department of Justice (DOJ) or a three-judge panel of the U.S. District Court for the District of Columbia before implementing a change to any voting law or practice, including new redistricting maps. To be granted preclearance, jurisdictions had the burden of proving that the proposed law would have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. A proposed change to a voting law would be considered to have a discriminatory effect if it would have led to *retrogression*—that is, members of a racial or language minority group would have been "worse off than they had been before the change." A jurisdiction would remain subject to the preclearance requirement until it instituted a successful lawsuit under Section 4(a), known as *bailout*. To prevail in a bailout suit, a covered jurisdiction needed to show that it met certain criteria demonstrating that voting discrimination had not occurred in the jurisdiction within the 10 years prior to when the lawsuit was filed and while the suit was pending.

VRA Section 3(c): Bail-In Provision

Section 3(c) of the VRA, codified at 52 U.S.C. §10302(c), is known as the *bail-in provision* (or the *pocket trigger*) because, as compared with the Section 5 preclearance regime that was imposed by the coverage formula, the provision authorizes courts to impose preclearance requirements on jurisdictions. Specifically, Section 3(c) provides that if a federal court determines that violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred in a state or political subdivision, the court shall retain jurisdiction for a period of time it deems appropriate. During that period, the state or political subdivision cannot make any change to specified voting laws or practices until the court determines that the change neither has the purpose, nor will have the effect, of denying or abridging the right to vote based on race, color, or language minority status. Moreover, 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 voting law may be enforced. A proceeding under Section 3(c) may be brought by either the Attorney General or an aggrieved person "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." As case law has determined, Section 3(c) requires a finding of intentional discrimination in addition to finding a discriminatory effect.

Court-ordered preclearance under Section 3(c) stands in contrast to Section 5 preclearance in some notable ways. For example, Section 3(c) authorizes courts to impose a type of preclearance that is "both targeted and limited in duration." In other words, courts have discretion to decide the *time period* that a

jurisdiction will be subject to preclearance and the *types* of proposed changes to voting laws or practices required to be precleared. In comparison, Section 5 has a broader application and required covered states and jurisdictions to obtain preclearance before implementing a change to *any* voting law or practice. The preclearance requirement under Section 5 remained in effect until the jurisdiction instituted a successful bailout lawsuit under Section 4(a). Also in contrast to Section 5 preclearance, courts have invoked Section 3(c) infrequently. According to one legal commentator, between 1965 and 2013, courts ordered Section 3(c) preclearance in 18 jurisdictions and, between 2013 and 2017, in two jurisdictions. For comparison, according to the commentator, between 1965 and 2013, the year when the *Shelby County* decision was issued, DOJ issued 1,084 letters of objection under Section 5 to one or more proposed election changes.

Although the case law interpreting Section 3(c) is sparse, in an often-cited 1990 decision, *Jeffers v. Clinton*, a federal district court identified a non-exhaustive list of factors for determining whether a violation justifies awarding the equitable relief of preclearance under this section. Specifically, the court inquired as to whether the constitutional violations have "been persistent and repeated" or if they occurred recently or in the distant past. The court also considered whether the violations are of a type "that would likely be prevented" by imposing preclearance; whether they had already been remedied by a court or through other means; the probability that the violations would recur; and whether "political developments, independent of [the] litigation" would make recurrence of the violations less or more likely.

In March 2022, in response to a claim for "bail-in relief under section 3(c)," a federal district court imposed preclearance requirements on the State of Florida for a period of 10 years and enjoined certain provisions of a 2021 Florida election law, SB 90. In May 2022, a federal appellate court stayed the ruling pending an appeal on the merits, effectively reinstating the invalidated provisions for the 2022 elections and lifting the preclearance requirements.

In *League of Women Voters of Florida v. Lee*, the district court, among other things, held that several provisions in SB 90 were enacted with the intent to discriminate against Black voters in violation of the Fourteenth and Fifteenth Amendments. Specifically, the court determined that four provisions were unconstitutional: (1) the "registration disclaimer" provision requiring third-party voter registration organizations to make certain notifications to voter registration applicants; (2) the "registration delivery" provision requiring such organizations to deliver registration applications to election officials in the county where the applicant lives within a prescribed period; (3) the "drop box" provision requiring that voting drop boxes be continuously monitored at the Supervisor of Elections' office when available for voting and reducing the availability of drop boxes beyond early voting hours; and (4) the "line warming" or "solicitation" provision prohibiting anyone from intending to influence a voter inside a polling place or within 150 feet of a polling place or drop box, including a prohibition on the "non-partisan provision of aid to voters waiting in line to vote, such as giving out water, fans, snacks, chairs, ponchos, and umbrellas."

To prove an intentional violation of the Fourteenth or Fifteenth Amendments, the district court stated that "the starting point" is applying Supreme Court precedent in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* and that a plaintiff "need only show that race was a motivating factor in adoption of a challenged provision." Further, according to the court, even if a partisan goal is the sole reason for a bill, "racial motivation has been shown" in instances where a disproportionate number of voters affected by the legislation are Black or Latino. In this case, the court identified sufficient evidence of intentional discrimination based in part on socioeconomic disparities—including disparities in unemployment and education—that currently exist between racial groups in Florida, which were created against the backdrop of "a grotesque history of racial discrimination." The court also pointed to the state's voter roll maintenance procedures that disproportionately disenfranchise Black voters and the state's restrictions on early voting, which is a method of voting that is used more frequently by Black voters in Florida than by white voters. In addition, the court found that the legislature enacted SB 90 with an intent to modify Florida election laws in such a manner to provide an advantage to Republicans over Democrats.

Accordingly, the court concluded that to advance its primarily partisan goals, "the Legislature enacted some of SB 90's provisions with the intent to target Black voters because of their propensity to favor Democratic candidates."

Next, as required under Section 3(c), the district court considered whether the constitutional violations "justify[] equitable relief." Applying the considerations outlined in *Jeffers*, the court determined that Florida had "repeatedly, recently, and persistently" denied Black voters in Florida access to voting—as the court outlined in its constitutional analysis—and that a preclearance requirement would prevent future violations. In addition, the court concluded that the violations were likely to recur in light of political developments, stating that "the Governor's Mansion and the Legislature are controlled by a party that, in the words of its own expert witness, stands to gain 'if voting were to decrease among African-Americans.'" The court was also guided by a 1966 ruling, *South Carolina v. Katzenbach*, where the Supreme Court first upheld the constitutionality of the Section 5 preclearance regime. According to the district court, *Katzenbach* identified four obstacles that resulted from enforcing the Fifteenth Amendment on a case-by-case basis: "(1) litigation is expensive, (2) litigation takes time, (3) jurisdictions quickly change tactics in the face of unfavorable rulings, and (4) jurisdictions may disobey unfavorable rulings." Treating the obstacles identified in *Katzenbach* as factors to inform its equitable relief analysis, the court determined that the plaintiffs had challenged the Florida statute "at great cost"; the litigation had already taken a year; and Florida was poised to repeal portions of SB 90's "most obviously unconstitutional provisions." After deciding that three of the four *Katzenbach* factors were present, the court declined to address the fourth. Hence, the court concluded that Section 3(c) relief was warranted in this case and ordered Florida to preclear any proposed law or regulation governing third-party voter registration organizations, voting drop boxes, and "'line-warming' activities," as outlined above, for the next 10 years.

In May 2022, in a case captioned *League of Women Voters of Florida v. Florida Secretary of State*, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) stayed the district court's ruling pending appeal. The stay, in effect, reinstates the four disputed provisions of Florida election law and lifts the preclearance requirements. Instead of applying the "traditional test for a stay" outlined by the Supreme Court in *Nken v. Holder*, the court found that when a district court has enjoined a state's election law close to the date of an election, the *Purcell* principle applies. Based on a 2006 Supreme Court ruling, *Purcell v. Gonzalez*, the *Purcell* principle stands for the proposition that in determining whether to enjoin or modify an election law close to Election Day, courts must consider the risk of "voter confusion and consequent incentive to remain away from the polls." According to *Purcell*, that risk increases as the election draws nearer. Quoting Justice Kavanaugh's concurrence in a recent Supreme Court ruling, *Milligan v. Merrill*, the Eleventh Circuit stated that "the *Purcell* principle teaches that 'federal district courts ordinarily should not enjoin state elections laws in the period close to an election'" and if a court issues an injunction nonetheless, an appellate court should stay such an injunction. In *Milligan*, the Supreme Court decided that the *Purcell* principle applied when the impending election was approximately four months away. Therefore, the Eleventh Circuit in *Lee* reasoned that the *Purcell* principle applies in this case because at the time the district court issued its injunction, the election was scheduled to begin in less than four months. In addition, the court generally identified "two flaws" in the district court's ruling. First, the court criticized the district court for improperly relying on "old, outdated intentions of previous generations," and second, the court determined that the district court failed to appropriately consider "the presumption of legislative good faith."

Considerations for Congress

As discussed, the Supreme Court in *Shelby County* held that the application of the VRA's Section 4(b) coverage formula to the covered states and jurisdictions was unconstitutional because it departed from the "fundamental principle of equal sovereignty" among the states without justification based on current data. According to the Court, "a departure from the fundamental principle of

equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." Hence, it appears that should Congress decide to enact a new coverage formula, it would need to comport with this principle to withstand constitutional challenge.

In lieu of redrafting a coverage formula in Section 4(b) to reinstate the Section 5 preclearance regime, some legal scholars have argued for Congress to expand the scope of Section 3(c). For example, one legal scholar has opined that Section 3(c) could be amended to "accomplish most of the work of a new coverage formula, without raising [the] equal-sovereignty concerns" articulated by the Court in *Shelby County*. In that vein, H.R. 4 and H.R. 5746 in the 117th Congress would amend Section 3(c) to expand the circumstances under which a court is authorized to impose preclearance beyond violations of the Fourteenth and Fifteenth Amendments. Specifically, the bills would authorize a federal court to impose preclearance for violations of any provision of the VRA or any other "Federal law that prohibits discrimination on the basis of race, color, or membership in a language minority group." In contrast, another scholar, for example, has maintained that unlike the circumstances present in 1965, justification for preclearance of state election laws no longer exists. Further, the scholar argues that Section 2 of the VRA sufficiently guards against discriminatory voting laws, thereby abrogating the need for expanding the authorization of preclearance.

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