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SECTION 5 OF THE VOTING RIGHTS ACT AND ASIAN AMERICAN VOTERS*

As Asian American communities grow across the U.S. and demonstrate their voting power, it becomes even more imperative to restore the Voting Rights Act

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Last year's celebration of the 50th anniversary of the Voting Rights Act (VRA) occurred under the shadow cast by the U.S. Supreme Court's decision in *Shelby County v. Holder*. This year marks the third anniversary of the *Shelby County* decision that invalidated the coverage formula for Section 5, the preclearance provision and what is often considered the heart of the VRA. In enacting the VRA in 1965, Congress recognized that previous efforts to litigate discriminatory voting practices were limited in their effectiveness; obstinate jurisdictions would simply replace a discriminatory practice after it was struck down with another, newer discriminatory practice. Responding to the persistent nature of discriminatory schemes in voting, Congress developed a mechanism in the VRA to provide a check on whether proposed voting changes by particularly bad actors would be problematic for minority voters: Section 5 preclearance. The *Shelby County* decision, while leaving the Section 5 mechanism intact, meant that there were no jurisdictions in the country required to obtain approval of their voting changes, thereby leaving the entire country susceptible to problematic voting changes and discrimination. In fact, 2016 will be the first presidential election in 50 years without the full protection of the Voting Rights Act. The *Shelby County* decision has thrown our country back decades in our ability to combat voter discrimination and continues to roll back the progress achieved through the VRA.

What is Section 5 of the Voting Rights Act and what does it do?

Section 5 of the Voting Rights Act prohibits the enforcement or administration by covered jurisdictions of "any voting qualification or prerequisite to voting, or standard, practice, or

procedure with respect to voting” without first receiving approval, or “preclearance,” from the U.S. Department of Justice or the U.S. District Court for the District of Columbia.ⁱ Section 5 applies to numerous voting changes in covered jurisdictions, including redistricting, annexation of other territories or political subdivisions, and polling place changes and consolidations. Voting changes with a discriminatory purpose or with a retrogressive effect will not be pre-cleared and thus Section 5 prohibits the submitting jurisdiction from adopting the voting change.

A change is retrogressive if it puts minorities in a worse position than if the change did not occur. For example, a redistricting plan might be deemed retrogressive if it contains only two majority-minority districts where it previously contained three, or if the line-drawers reduce the minority population percentage of a district to a level that will make it more difficult or impossible for them to continue to elect candidates of their choice. Since 1995, there have been 113 instances of Section 5 violations, including changes regarding redistricting, methods of elections, annexations and ballot access.ⁱⁱ

How has Section 5 helped Asian American voters?

Section 5 helped address discriminatory redistricting plans that continue to be drafted in states with large Asian American communities. As shown in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Texas legislature drafted a redistricting plan, Plan H283, that would have had significant negative effects on the ability of minorities, and Asian Americans in particular, to exercise their right to vote. Since 2004, the Asian American community in Texas State House District 149 has voted as a bloc with Hispanic and African American voters to elect Hubert Vo, a Vietnamese American, as their state representative. District 149 has a combined minority citizen voting-age population of 62 percent.ⁱⁱⁱ Texas is home to the third-largest Asian American community in the United States, growing 72 percent between 2000 and 2010.^{iv} In 2011, the Texas Legislature sought to eliminate Vo’s State House seat and redistribute the coalition of minority voters to the surrounding three districts. Plan H283, if implemented, would have redistributed the Asian American population in certain State House voting districts, including District 149 (Vo’s district), to districts with larger non-minority populations.^v Plan H283 would have diminished the Asian American community’s right to vote in Texas by diluting the large Asian American population across the state.^{vi}

In addition to discrimination in redistricting, Asian American voters have also endured voting system changes that impair their ability to elect candidates of choice. Before 2001 in New York City, the only electoral success for Asian Americans was on local community school boards. In each election—in 1993, 1996, and 1999 Asian American candidates ran for the school board and won.^{vii} These victories were due, in part, to the alternative voting system known as “single transferable voting” or “preference voting.” Instead of selecting one representative from single-member districts, voters ranked candidates in order of preference, from “1” to “9.”^{viii} In 1998, New York attempted to switch from a “preference voting” system, where voters ranked their choices, to a “limited voting” system, where voters could select only four candidates for the nine-member board, and the nine candidates with the highest number of votes were elected.^{ix} This change would have put Asian American voters in a worse position to elect candidates of their choice.^x

Furthermore, the ability of Asian Americans to vote is also frustrated by sudden changes to poll sites without informing voters. For example, in 2001, primary elections in New York City were rescheduled due to the attacks on the World Trade Center. The week before the rescheduled primaries, the Asian American Legal Defense and Education Fund (AALDEF) discovered that a certain poll site, I.S. 131, a school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center attacks. The Board chose to close down the poll site, but no notice was given to voters. The Board provided no media announcement to Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange for the placement of signs or poll workers at the site to redirect voters to other sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under Section 203.^{xi} With Section 5 no longer applicable in most jurisdictions, disruptive changes to polling sites, voting systems, and redistricting plans can now occur unfettered, wreaking havoc on Asian American voters’ ability to cast an effective ballot.

What happened in the *Shelby County v. Holder* case?

The U.S. Supreme Court weakened the VRA in *Shelby County v. Holder* (“Shelby”). The Court ruled 5-4 that the formula used to determine Section 5 jurisdictions was based on “decades-old data and eradicated practices,” despite the extensive record confirming that these jurisdictions continued to commit acts of voting discrimination.^{xii} Thus, while the Court did not invalidate Section 5, it rendered it useless by invalidating the formula that determined what jurisdictions were required to submit voting changes for preclearance. At the same time, the Court recognized that “no one doubts” that voting discrimination still exists, and invited Congress to pass legislation with a modernized formula.^{xiii}

Since the Court invalidated the key enforcement provision of the Act in 2013, voting discrimination has become harder to stop. In states, counties, and cities across the country, legislators are pushing through laws designed to make it harder for minorities to vote, now that the preclearance protection is no longer in place. For the 2016 election, 17 states including Alabama, Arizona, Georgia, Mississippi, North Carolina, Texas, and Virginia, which were previously covered in full or in part by Section 5, will have new voting restrictions that include strict photo ID requirements, early voting cutbacks, and registration restrictions.^{xiv} These are just the newest restrictions in a broader voter suppression movement that began after the 2010 elections, where almost half of all states have new restrictions in place since then.

In the immediate aftermath of the *Shelby County* decision, North Carolina, where the Asian American population increased by 85 percent between 2000 and 2010, passed H.B. 589. The legislation restricts voting in a staggering range of ways: through a ban on paid voter registration drives; elimination of same-day voter registration; allowing voters to be challenged by any registered voter of the county in which they vote, rather than just their precinct; reduction of early voting by a week; authorization of vigilante poll observers with expanded range of interference; an expansion of the scope of who may examine registration records and challenge voters; a repeal of out-of-precinct voting; elimination of flexibility in opening early voting sites at different hours within a county; and curtailing satellite polling sites for the elderly or voters with disabilities. This law is being challenged through litigation and is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit.^{xv} This litigation would not be necessary if Section

5 were still in full force. Indeed, one state senator noted that it was because of the Court’s decision in Shelby County that the legislature was free to “go with the full bill,” indicating his full awareness that they would never have received approval for the bill under the full protections of the VRA.

How is the Shelby County decision detrimental to Asian Americans?

Asian American voters are among those suffering in the wake of the decision and are left particularly vulnerable as the Asian American voter population grows across the country. The Asian American population in the United States grew 46% between 2000 and 2010, making it the fastest growing racial group in the nation.^{xvi} Asian American communities are expanding from states with historically high concentrations of Asian Americans, such as New York and California, to states with more recently established immigrant populations. It may be surprising to many that over the last decade, Asian American communities have grown most rapidly in Nevada, Arizona, North Carolina, and Georgia.^{xvii}

Asian American populations are also growing in previously-covered Section 5 jurisdictions in the South. Georgia and North Carolina are among the three fastest-growing Asian American populations.^{xviii} In fact, five of the states covered in their entirety and another four states covered partially by Section 5 are among the top 20 states with the fastest-growing Asian American populations. The remaining covered states all experienced growth in their Asian American populations.^{xix}

Whenever a minority group moves into an area, or when its growth outpaces that of the general population, reactions to that influx of “outsiders” can result in racial tension.^{xx} As Asian American populations continue to grow rapidly, particularly in the South, it is a reasonable expectation that levels of racial tension and discrimination against racial minorities will increase, including in the voting context.^{xxi} Such discrimination creates an environment of fear and resentment toward Asian Americans, which jeopardizes Asian Americans’ ability to exercise their right to vote free of harassment or unfair treatment. Asian Americans are potential swing voters^{xxii} and as they become numerous enough to make the difference in certain races, they will

be facing new, more aggressive tactics to minimize their political impact. Section 5 protections are needed more than ever.

What can be done to rectify the decision and restore the VRA?

The U.S. Supreme Court left it up to Congress to create new formulas for Section 5 coverage. Two bills have been introduced in Congress that would do just that and restore the protections of the VRA.

First, we saw the bicameral introduction of the Voting Rights Amendment Act of 2014 (VRAA) on January 16, 2014, to address the *Shelby* decision. The House bill (H.R. 3899) was introduced by Representatives James Sensenbrenner (R-WI), John Conyers (D-MI), Bobby Scott (D-VA), and John Lewis (D-GA). The Senate version (S. 1945) was introduced by Judiciary Committee Chairman Patrick Leahy (D-VT). In February 2015, Representatives Sensenbrenner and Conyers reintroduced the bipartisan Voting Rights Amendment Act of 2015 in the House of Representatives. The bill's provisions would create a flexible, nationwide formula updated annually and based on current voting rights violations to do the following: determine which jurisdictions require preclearance for voting changes; enhance the power of federal courts to stop discriminatory voting changes from being implemented and to order preclearance remedies as needed; create new nationwide transparency of certain voting changes to keep communities informed about voting changes that raise concerns; and strengthen and expand the federal observer program, an effective tool critical to combating discrimination directly at the polls.

On June 24, 2015, the Voting Rights Advancement Act (Advancement Act) was introduced in the Senate (S.1659) and the House (H.R.2867). The Advancement Act has received broad and vocal support from the civil rights community because it responds to the unique, modern-day challenges of voting discrimination that have evolved in the 50 years since the Voting Rights Act first passed. The Advancement Act recognizes that changing demographics require tools that protect voters nationwide—especially voters of color, voters who rely on languages other than English, and voters with disabilities. It also requires that jurisdictions make voting changes public and transparent. The Voting Rights Advancement Act would modernize the preclearance formula to cover states with a pattern of discrimination that puts voters at risk, ensure that last-

minute voting changes won't adversely affect voters, protect voters from the types of voting changes most likely to discriminate against people of color and language minorities, enhance the ability to apply preclearance review when needed, and expand the effective Federal Observer program and improve voting rights protections for Native Americans and Alaska Natives.

Conclusion

In the three years since the *Shelby* decision, Congress has failed to restore the Voting Rights Act, and voters have been subject to more discrimination than at any time in the past 50 years. Congress now has two bills it could use as vehicles for restoring the Voting Rights Act. The time is now for Congress to take up and debate these two bills. Congress must come together, as it has each time the Voting Rights Act has been before it, to restore the protections of the VRA.

ⁱ 52 U.S.C. 10304 (formerly 42 U.S.C. § 1973c). The following States are covered by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Only certain counties or towns in the following states are covered under Section 5: California, Florida, Michigan, New York, North Carolina, and South Dakota. It must be noted, however, that even if only a part of a jurisdiction is covered by Section 5, congressional and state legislative redistricting plans for the entire state must be submitted for review. For a detailed listing of counties and towns covered, please visit http://www.justice.gov/crt/about/vot/sec_5/covered.php.

ⁱⁱ National Commission on Voting Rights, Protecting Minority Voters 2014: Our Work Is Not Done, 42 (2014), <http://votingrightstoday.org/ncvr/resources/discriminationreport>.

ⁱⁱⁱ See United States and Defendant-Intervenors Identification of Issues 6, *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53.

^{iv} Asian American Center for Advancing Justice, *A Community of Contrasts: Asian Americans in the United States 2011*, App. B, at 60 (2011), http://www.advancingjustice.org/sites/default/files/Community_of_Contrast.pdf (hereinafter “*Community of Contrasts*”).

^v See Martin Test. at 350:25-352:25. District 149 would have been relocated to a county on the other side of the State, where there are few minority voters. See <http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf>.

^{vi} In fact, it was only due to Section 5 that the Texas Legislature was not able to dilute the Asian American community's right to vote. Advancing Justice-AAJC's partner, the Texas Asian-American Redistricting Initiative (TAARI), working with a coalition of Asian American and other civil rights organizations, participated in the Texas redistricting process and advocated on District 149. Despite the community's best efforts, the Texas Legislature pushed through this problematic redistricting plan. However, because of Section 5's preclearance procedures, Asian Americans and other minorities had an avenue to object to the Texas Legislature's retrogressive plan, and Plan H283 was ultimately rejected as not complying with Section 5. See *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 19, 2011, Dkt. No. 45, ¶ 3. Unfortunately, the U.S. Supreme Court vacated the District Court of the District of Columbia's ruling suspending Texas' redistricting map as moot in light of their decision in *Shelby*.

^{vii} See Lynette Holloway, *This Just In: May 18 School Board Election Results*, N.Y. Times, June 13, 1999, <http://www.nytimes.com/1999/06/13/nyregion/making-it-work-this-just-in-may-18-school-board-election-results.html>; Jacques Steinberg, *School Board Election Results*, N.Y. Times, June 23, 1996, <http://www.nytimes.com/1996/06/23/nyregion/neighborhood-report-new-york-up-close-school-board-election-results.html>; Sam Dillon, *Ethnic Shifts Are Revealed in Voting for Schools*, N.Y. Times, May 20, 1993, <http://www.nytimes.com/1993/05/20/nyregion/ethnic-shifts-are-revealed-in-voting-for-schools.html>.

^{viii} See Thomas T. Mackie & Richard Rose, *The International Almanac of Electoral History* 508 (3d ed. 1991).

^{ix} See 1998 N. Y. Sess. Laws 569-70 (McKinney).

^x See, Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearing Before the H. Subcomm. on the Const., H. Judiciary Comm., 109th Cong. 1664-66 (2005) (appendix to statement of the Honorable Bradley J. Schlozman, U.S. Dep’t. of Justice) (providing Section 5 objection letter to Board and summarizing changes made to the voting methods, along with overall objections to the changes).

^{xi} The voters were only protected from this sudden change that would have caused significant confusion and lost votes because DOJ issued an objection under Section 5 and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. See Asian Am. Legal Def. & Educ. Fund, Asian Americans and the Voting Rights Act: The Case for Reauthorization 41 (2006), <http://www.aaldef.org/docs/AALDEF-VRAReauthorization-2006.pdf>.

^{xii} Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2627 (2013).

^{xiii} Id. at 2619.

^{xiv} Brennan Center for Justice, Webpage on New Voting Restrictions in Place for 2016 Presidential Election, <http://www.brennancenter.org/voting-restrictions-first-time-2016>.

^{xv} American Civil Liberties Union, Webpage on League Of Women Voters Of North Carolina, Et Al. V. North Carolina, <https://www.aclu.org/cases/league-women-voters-north-carolina-et-al-v-north-carolina>.

^{xvi} *Community of Contrasts* at 6-7.

^{xvii} See id. at 8.

^{xviii} Terry M. Ao, Alyson Hong, & Sophia Lai, Census 2000: Asian Population Demographic Data, 10 (2002), http://www.advancingequality.org/files/census_handbook.pdf.

^{xix} Id.

^{xx} See James Angelos, *The Great Divide*, N.Y. Times, Feb. 22, 2009 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing),

<http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?r=3&pagewanted=1>; Ramona E. Romero and Cristóbal Joshua Alex, *Immigrants becoming targets of attacks*, The Philadelphia Inquirer, Jan. 25, 2009 (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An Ethnic Shift is in Store*, L.A. Times, Apr. 12, 2007, at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian), <http://articles.latimes.com/2007/apr/12/local/me-chinohills12>.

^{xxi} In 2011, the growth of immigrant communities and rising anti-immigrant sentiment in Alabama led to the passage of H.B. 56, the toughest immigration enforcement law in the country. Also in 2011, state lawmakers in other southern states, including Georgia and South Carolina, launched efforts to deny the automatic right of citizenship to the U.S.-born children of undocumented immigrants. See Shankar Vedantam, State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship, Wash. Post, Jan. 5, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html>; see also *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents). At the federal level, Alabama members of the U.S. House of Representatives co-sponsored legislation to enact this restriction. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011). This bill was reintroduced in 2013 and co-sponsored again by Alabama Representatives, as well as legislators from Arizona, Georgia, and Texas. Birthright Citizenship Act of 2013, H.R. 140, 113th Cong., (2013).

^{xxii} See Carl Hum, The Invisible Vote, ASIAN AMERICANS ADVANCING JUSTICE AAJC 1, 3 (2014), http://www.news.advancingequality.org/sites/aajc/files/Issue%20Brief_1_2.pdf.