



# Congressional Redistricting and the Voting Rights Act: A Legal Overview

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## Summary

The Constitution requires a count of the U.S. population every 10 years. Based on the census, the number of seats in the House of Representatives is reapportioned among the states. Thus, at least every 10 years, in response to changes in the number of Representatives apportioned to it or to shifts in its population, each state is required to draw new boundaries for its congressional districts. Although each state has its own process for redistricting, congressional districts must conform to a number of constitutional and federal statutory standards, including the Voting Rights Act (VRA) of 1965.

The VRA was enacted under Congress's authority to enforce the 15<sup>th</sup> Amendment, which provides that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude. Section 2 of the VRA prohibits the use of any voting qualification or practice—including the drawing of congressional redistricting plans—that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority. The statute further provides that a violation is established if, based on the totality of circumstances, it is shown that political processes are not equally open to members of a racial or language minority group in that its members have less opportunity than other members of the electorate to participate and to elect representatives of choice. In decisions including *Thornburg v. Gingles* and *Bartlett v. Strickland*, the Supreme Court further interpreted the requirements of Section 2.

Section 5 of the VRA requires certain covered jurisdictions—based on a formula set forth in Section 4(b)—to “preclear” their congressional redistricting plans with either the Department of Justice or the U.S. District Court for the District of Columbia before implementation. In order to be granted preclearance, the covered jurisdiction has the burden of proving that the proposed voting change neither has the *purpose*, nor will it have the *effect*, of denying or abridging the right to vote on account of race or color, or membership in a language minority group.

On February 27, 2013, the U.S. Supreme Court heard oral argument in a case challenging the constitutionality of the VRA's preclearance requirement. In *Shelby County, Alabama v. Holder*, the Court is considering whether Congress's decision in 2006 to reauthorize Section 5 of the VRA under the preexisting coverage formula contained in Section 4(b) exceeded its authority under the 14<sup>th</sup> and 15<sup>th</sup> Amendments, thereby violating the 10<sup>th</sup> Amendment and Article IV of the U.S. Constitution. A decision is expected by the end of June.

In the 113<sup>th</sup> Congress, legislation has been introduced that would establish certain standards and requirements for congressional redistricting, including identical bills H.R. 223 and H.R. 278, the “John Tanner Fairness and Independence in Redistricting Act,” and H.R. 337, the “Redistricting Transparency Act of 2013.”

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The Constitution requires a count of the U.S. population every 10 years.<sup>1</sup> Based on the census, the number of seats in the House of Representatives is reapportioned among the states.<sup>2</sup> Thus, at least every 10 years, in response to changes in the number of Representatives apportioned to it or to shifts in its population, each state is required to draw new boundaries for its congressional districts. Although each state has its own process for redistricting, congressional districts must conform to a number of constitutional and federal statutory standards,<sup>3</sup> including the Voting Rights Act (VRA) of 1965.<sup>4</sup>

The VRA was enacted under Congress's authority to enforce the 15<sup>th</sup> Amendment, which provides that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude.<sup>5</sup> In a series of cases and evolving jurisprudence, the U.S. Supreme Court has interpreted how the VRA applies in the context of congressional redistricting. These decisions inform how congressional district boundaries are drawn, and whether legal challenges to such redistricting plans will be successful.

This report provides a legal overview of two key provisions of the VRA affecting congressional redistricting—Sections 2 and 5—and selected accompanying Supreme Court case law. It examines a pending Supreme Court case, *Shelby County, Alabama v. Holder*, challenging the constitutionality of Section 5. It also provides a summary of selected legislation in the 112<sup>th</sup> and 113<sup>th</sup> Congresses that would establish additional requirements and standards for congressional redistricting.

For further discussion of the process of congressional redistricting and the apportionment of congressional seats, see CRS Report R41357, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, by Royce Crocker.

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<sup>1</sup> U.S. CONST. art. I, §2, cl. 3 (“The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

<sup>2</sup> U.S. CONST. amend. XIV, §2, cl. 1 (“Representatives shall be apportioned among the several States according to their respective numbers ...”).

<sup>3</sup> While beyond the scope of this report, congressional districts are also subject to the one-person, one-vote equality standard. *See* *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 18 (1964) (interpreting article I, section 2, clause 1 of the U.S. Constitution that Representatives be chosen “by the People of the several States” and be “apportioned among the several States ... according to their respective Numbers,” to require that “as nearly as is practicable, one man’s vote in a congressional election is to be worth as much as another’s”); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (holding that absolute population equality is the standard unless a deviation is necessary to achieve “some legitimate state objective,” such as “consistently applied legislative policies,” including, for example, “making districts more compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbents.”). In addition, congressional districts might theoretically be subject to claims of partisan political gerrymandering, although the standard that a court could use, to ascertain such a determination and grant relief, remains unresolved. *See* *LULAC v. Perry*, 548 U.S. 399 (2006) (plurality opinion); CRS Report RS22479, *Congressional Redistricting: A Legal Analysis of the Supreme Court Ruling in League of United Latin American Citizens (LULAC) v. Perry*, by L. Paige Whitaker.

<sup>4</sup> P.L. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§1971 *et seq.*).

<sup>5</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 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).

## Section 2 of the Voting Rights Act

Congressional district boundaries in every state are required to comply with Section 2 of the VRA. Section 2 provides a right of action for private citizens or the government to challenge discriminatory voting practices or procedures, including minority vote dilution, the diminishing or weakening of minority voting power.

Specifically, Section 2 prohibits any voting qualification or practice—including the drawing of congressional redistricting plans—applied or imposed by any state or political subdivision that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.<sup>6</sup> The statute further provides that a violation is established if:

based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [members of a racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.<sup>7</sup>

### “Majority-Minority” District Requirement

Under certain circumstances, the creation of one or more “majority-minority” districts may be required in a congressional redistricting plan. 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 racial vote dilution by preventing the submergence of minority voters into the majority, which can deny minority voters the opportunity to elect a candidate of their choice. In the landmark decision *Thornburg v. Gingles*,<sup>8</sup> the Supreme Court established a three-prong test that plaintiffs claiming vote dilution under Section 2 must prove:

First, 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....

Second, the minority group must be able to show that it is politically cohesive....

Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.<sup>9</sup>

The Court also discussed how, under Section 2, a violation 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

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<sup>6</sup> 42 U.S.C. §§1973, 1973b(f).

<sup>7</sup> 42 U.S.C. §1973(b).

<sup>8</sup> 478 U.S. 30 (1986).

<sup>9</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 *Grove 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.”) *Id.* at 40.

choice.”<sup>10</sup> In order to facilitate determination of the totality of the circumstances the Court listed the following factors, which originated in the legislative history accompanying enactment of Section 2:

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;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.<sup>11</sup>

## **Requirement that Minority Group Constitute More Than 50% of Voting Population in Single-Member District**

Further interpreting the *Gingles* three-prong test, in *Bartlett v. Strickland*,<sup>12</sup> the Supreme Court ruled that the first prong of the test—requiring geographical compactness sufficient to constitute a majority in a district—can only be satisfied if the minority group constitutes more than 50% of the voting population if it were in a single-member district.<sup>13</sup> In *Bartlett*, it had been argued that Section 2 requires drawing district lines in such a manner to allow minority voters to join with other voters to elect the minority group’s preferred candidate, even where the minority group in a given district comprises less than 50% of the voting age population.

Rejecting that argument, the Court found 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. To mandate recognition of Section 2 claims where the ability of a minority group to elect

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<sup>10</sup> *Id.* at 44.

<sup>11</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). (“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.”) *Id.*

<sup>12</sup> 556 U.S. 1 (2009).

<sup>13</sup> *See id.* at 25-26.

candidates of choice relies upon “crossover” majority voters would result in “serious tension” with the third prong of the *Gingles* test.<sup>14</sup> The third prong of *Gingles* requires that the minority be able to demonstrate that the majority votes sufficiently as a bloc to enable it usually to defeat minority-preferred candidates.

## Constitutional Limits Under 14<sup>th</sup> Amendment Equal Protection Clause

Congressional redistricting plans must also conform with standards of equal protection under the 14<sup>th</sup> Amendment to the U.S. Constitution.<sup>15</sup> 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 applied. In this context, strict scrutiny review requires that a court determine that the state has a compelling governmental interest in creating a majority-minority district, and that the redistricting plan is narrowly tailored to further that compelling interest. Case law in this area demonstrates a tension between compliance with the VRA and conformance with standards of equal protection.<sup>16</sup>

In its 2001 decision, *Easley v. Cromartie (Cromartie II)*,<sup>17</sup> the Supreme Court upheld the constitutionality of the long-disputed 12<sup>th</sup> Congressional District of North Carolina against the argument that the 47% black district was an unconstitutional racial gerrymander. In this case, North Carolina and a group of African American voters had appealed a lower court decision holding that the district, as redrawn by the legislature in 1997 in an attempt to cure an earlier violation, was still unconstitutional. The Court determined that the basic question presented in *Cromartie II* was whether the legislature drew the district boundaries “because of race rather than because of political behavior (coupled with traditional, nonracial redistricting considerations).”<sup>18</sup> In applying its earlier precedents, the Court determined that the party attacking the legislature’s plan had the burden of proving that racial considerations are “dominant and controlling.”<sup>19</sup> Overturning the lower court ruling, the Supreme Court held that the attacking party did not successfully demonstrate that race—instead of politics—predominantly accounted for the way the plan was drawn.

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<sup>14</sup> *Id.* at 16.

<sup>15</sup> U.S. Const. amend. XIV, §1 (“No State shall ... deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>16</sup> *See, e.g.*, *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 653-57 (1993) (finding that if district lines are drawn for the purpose of separating voters based on race, a court must apply strict scrutiny review); *Miller v. Johnson*, 515 U.S. 900, 912-13 (1995) (determining that strict scrutiny applies when race is predominant factor and traditional redistricting principles have been subordinated); *Bush v. Vera*, 517 U.S. 952, 958-65 (1996) (finding that departing from sound principles of redistricting defeats the claim that districts are narrowly tailored to address the effects of racial discrimination).

<sup>17</sup> 532 U.S. 234 (2001).

<sup>18</sup> *Id.* at 256 (emphasis included).

<sup>19</sup> *Id.* (citing *Miller*, 515 U.S. at 913).

## Section 5 of the Voting Rights Act

Section 5 of the VRA was enacted to eliminate possible *future* denials or abridgements of the right to vote. It requires prior approval, known as “preclearance,” of a proposed change to any voting qualification, standard, practice, or procedure, including congressional redistricting plans. It applies only to those states or political subdivisions that, in accordance with a formula, are considered “covered” jurisdictions.

### Coverage Formula

The coverage formula is set forth in Section 4(b) of the VRA.<sup>20</sup> Currently, nine states are covered: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. In addition, portions of six other states are covered: California, Florida, Michigan, New York, North Carolina, and South Dakota.<sup>21</sup>

Specifically, the formula provides that any state or political subdivision is subject to the Section 5 preclearance requirement if: it 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 held in the year in which it used such a test or device. The VRA definition of “test or device” for the 1964 and 1968 dates that triggered coverage included 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 that triggered coverage, the definition of “test or device” was amended to also include the providing of any election information only in English in those states or political subdivisions where members of a single language minority constitute more than 5% of the citizens of voting age.

### Release from Coverage

Section 4(a) of the VRA sets forth a procedure whereby covered states or political subdivisions, as defined in Section 4(b), may be released from coverage under the Section 5 preclearance provision. Specifically, a covered jurisdiction must demonstrate, in an action for declaratory judgment in the U.S. District Court for the District of Columbia, that during the previous 10 years and during the pendency of the action:

(A) “no ... test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color”;

(B) “no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the rights to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision”;

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<sup>20</sup> 42 U.S.C. §1973b.

<sup>21</sup> 28 C.F.R. pt. 51, app. (2012), “Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended.”



(C) “no Federal examiners or observers under this Act have been assigned to such State or political subdivision”;

(D) “such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment”;

(E) “the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5, and no such submissions or declaratory judgment actions are pending; and

(F) “such State or political subdivision and all governmental units within its territory—(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.”<sup>22</sup>

## **Preclearance Requirement**

Before implementing a change to “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting”<sup>23</sup>—which includes congressional redistricting plans—Section 5 requires a covered jurisdiction to obtain “preclearance” approval for the proposed change. Covered jurisdictions can seek preclearance from either the U.S. Attorney General or the U.S. District Court for the District of Columbia.<sup>24</sup> In order to be granted preclearance, the covered jurisdiction has the burden of proving that the proposed voting change “neither has the *purpose* nor will have 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 provides that its purpose is “to protect the ability of such citizens to elect their preferred candidates of choice.”<sup>26</sup>

Unlike certain other provisions of the VRA, the preclearance requirements are temporary. From its original date of enactment in 1965, and with each subsequent reauthorization in 1970, 1975, 1982, and 2006, the preclearance requirements have contained expiration dates. Currently, as a

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<sup>22</sup> 42 U.S.C. §1973b(a)(1)(A)-(F). A U.S. Department of Justice webpage contains a list of jurisdictions that were once subject to the preclearance requirement, but successfully obtained a declaratory judgment and were released from coverage. See [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php#bailout](http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout). Most recently, on March 1, 2013, 10 political subdivisions in New Hampshire were released from coverage; see consent judgment and decree at [http://www.justice.gov/crt/about/vot/misc/nh\\_cd.pdf](http://www.justice.gov/crt/about/vot/misc/nh_cd.pdf).

<sup>23</sup> 42 U.S.C. §1973c(b).

<sup>24</sup> 42 U.S.C. §1973c(a).

<sup>25</sup> 42 U.S.C. §1973c (emphasis added). See also 28 C.F.R. §51.52(a).

<sup>26</sup> 42 U.S.C. §1973c(d).

result of the 2006 amendments to the act, the preclearance requirements are scheduled to expire in 2031.<sup>27</sup>

### **“Effect” Test**

According to the Supreme Court, a redistricting plan will be determined to have a discriminatory effect—and accordingly, preclearance will be denied—if it will lead to retrogression in minority voting strength.<sup>28</sup> In *Beer v. U.S.*,<sup>29</sup> the Court found that a plan that increased the number of African American city council majority districts from one to two enhanced the voting strength of racial minorities and therefore, could not have the effect of diluting voting rights due to race under Section 5.<sup>30</sup> According to the Court, Section 5 is intended to prevent changes in voting procedures that would lead to a diminishing in the ability of racial minorities to exercise their right to vote effectively.<sup>31</sup> Clarifying the retrogression standard, in *City of Lockhart v. U.S.*<sup>32</sup> the Court approved an electoral change that, although it did not improve minority voting strength, did not result in retrogression. Invoking its decision in *Beer*, the Court found that if a new redistricting plan does not diminish the voting strength of African Americans, it is entitled to preclearance under Section 5.<sup>33</sup> Likewise, in *Reno v. Bossier Parish School Board (Bossier Parish I)*,<sup>34</sup> the Supreme Court affirmed the retrogression standard for Section 5 preclearance when it refused to replace it with a standard of racial vote dilution, which is the standard contained in Section 2 of the VRA. According to the Court, “a violation of § 2 is not grounds in and of itself for denying preclearance under § 5.”<sup>35</sup>

When it amended Section 5 in 2006, Congress added a provision expressly stating that its purpose is “to protect the ability of such citizens to elect their preferred candidates of choice.”<sup>36</sup> According to the legislative history, this amendment was made to address a 2003 Supreme Court decision, *Georgia v. Ashcroft*.<sup>37</sup> In *Georgia*, a Senate Report noted, the Court determined that preclearance would be permitted under Section 5 in cases where majority-minority districts, in which

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<sup>27</sup> P.L. 109-246, 120 Stat. 577 (2006), codified at 42 U.S.C. 1973b(a)(8) (“The provisions of this section shall expire at the end of the twenty-five year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, Cesar E. Chavez, Barbara C. Jordan, William C. Velasquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments of 2006 [effective July 27, 2006].”).

<sup>28</sup> For redistricting plans submitted to the Attorney General for administrative review, Department of Justice regulations provide that a change affecting voting is considered to have a discriminatory effect if it will lead to retrogression in the position of members of a racial or language minority group, that is, members of such groups will be “worse off than they had been before the change.” In order to determine retrogressive effect, a proposed redistricting plan will be compared to a “benchmark” plan. The “benchmark” plan against which a proposed plan is compared is the most recent legally enforceable redistricting plan in force or effect at the time of the submission. 28 C.F.R. §51.54(b),(c) (2011); [http://www.justice.gov/crt/about/vot/sec\\_5/sec5guidance2011.pdf](http://www.justice.gov/crt/about/vot/sec_5/sec5guidance2011.pdf).

<sup>29</sup> 425 U.S. 130 (1976).

<sup>30</sup> *See id.* at 141.

<sup>31</sup> *Id.*

<sup>32</sup> 460 U.S. 125 (1983).

<sup>33</sup> *See id.* at 135-136.

<sup>34</sup> 520 U.S. 471 (1997).

<sup>35</sup> *Bossier Parish I*, 520 U.S. at 483. The Court went on to say that in some circumstances, however, evidence of racial vote dilution in violation of Section 2 may be relevant to establishing the jurisdiction’s intent to cause retrogression to minority voting strength in violation of Section 5. *See id.* at 486.

<sup>36</sup> 42 U.S.C. §1973c(d).

<sup>37</sup> 539 U.S. 461 (2003).

minorities had the ability to elect a candidate of choice, were replaced with “influence districts,” in which minorities could impact an election, but not necessarily play a decisive role. Calling the standard established by the Court in *Georgia*, “ambiguous,” the Senate Report indicated that the intent of the amendment was to restore Section 5 to the “workable” standard that the Court espoused in *Beer*.<sup>38</sup> In *Beer*, the Court inquired whether, under the proposed redistricting plan, the ability of minority groups to elect candidates of choice is diminished.<sup>39</sup>

### **“Purpose” Test**

Congress also amended Section 5 of the VRA in 2006 with the intent of expanding the definition of “purpose.” Specifically, the law was changed to provide that “[t]he term ‘purpose’ ... shall include *any* discriminatory purpose.”<sup>40</sup> The legislative history indicates that this amendment was made in response to the 2000 decision in *Reno v. Bossier Parish School Board (Bossier Parish II)*<sup>41</sup> where the Supreme Court found that “§ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.”<sup>42</sup> A Senate report accompanying the legislation to amend Section 5 observed that under the standard articulated in *Bossier Parish II*, preclearance could be granted to redistricting plans enacted with a discriminatory purpose, so long as the purpose was only to perpetuate unconstitutional circumstances, and not to make them worse.<sup>43</sup>

According to the Senate report,

The Supreme Court’s decision in *Bossier Parish II* has created a strange loophole in the law: it is possible that the Justice Department or federal court could be required to approve an unconstitutional voting practice ... [and the] federal government should not be giving its seal of approval to practices that violate the Constitution. Under this amendment, which forbids voting changes motivated by ‘any discriminatory purpose,’ it will not do so.<sup>44</sup>

### **Constitutionality**

On February 27, 2013, the U.S. Supreme Court heard oral argument in a case challenging the constitutionality of the VRA’s preclearance requirement. In *Shelby County, Alabama v. Holder*,<sup>45</sup> the Court is considering whether Congress’s decision in 2006 to reauthorize Section 5 of the VRA under the preexisting coverage formula contained in Section 4(b) exceeded its authority under the 14<sup>th</sup> and 15<sup>th</sup> Amendments, thereby violating the 10<sup>th</sup> Amendment and Article IV of the U.S. Constitution. A decision is expected by the end of June.

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<sup>38</sup> S. REP. NO. 109-295, at 18 (2006).

<sup>39</sup> *Id.* (quoting *Beer*, 425 U.S. at 141 (1976)).

<sup>40</sup> P.L. 109-246, 120 Stat. 577 (2006), codified at 42 U.S.C. §1973c(c) (emphasis added).

<sup>41</sup> 528 U.S. 320 (2000).

<sup>42</sup> *Id.* at 341.

<sup>43</sup> S. REP. NO. 109-295, at 16 (2006) (quoting Pamela S. Karlan, Responses to Written Questions from Sen. Kennedy (submitted for May 16, 2006 hearing)).

<sup>44</sup> *Id.* at 15.

<sup>45</sup> 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3264 (U.S. November 29, 2012) (No. 12-96).

This case arises from an appeal to a D.C. Court of Appeals decision in which the court, by a vote of 2 to 1, upheld the constitutionality of Section 5.<sup>46</sup> According to the court, Congress's decision in 2006 to extend Section 5 until 2031 was reasonable and deserving of judicial deference. While acknowledging that the preclearance requirement is "severe," the court determined that it remains "congruent and proportional" to the problem of voting discrimination in covered jurisdictions.<sup>47</sup> In contrast, the dissent criticized the coverage formula as outdated with insufficient justification for distinguishing among those jurisdictions that are covered and those that are not.<sup>48</sup>

In its petition for writ of certiorari, Shelby County argued that when Congress extended the law in 2006, it failed to justify the preclearance requirement by documenting patterns of racial voting discrimination in violation of the 15<sup>th</sup> Amendment, and that the coverage formula no longer only applies to jurisdictions in which there is intentional racial voting discrimination. Accordingly, Shelby County argued that the law fails the congruence and proportionality standard of review and is unconstitutional.<sup>49</sup>

This litigation appears against a historical background of cases in which the Supreme Court has repeatedly upheld the constitutionality of Section 5. Following the enactment of the VRA in 1965, in *South Carolina v. Katzenbach*,<sup>50</sup> the Supreme Court upheld Section 5's constitutionality. Rejecting an argument that it supplants powers that are reserved to the states, the Court found the law to be "a valid means for carrying out the commands of the Fifteenth Amendment."<sup>51</sup> Following the 1975 reauthorization of Section 5, in *City of Rome v. United States*,<sup>52</sup> the Court reaffirmed its holding in *Katzenbach*, and likewise upheld its constitutionality. Similarly, in *Lopez v. Monterey County*,<sup>53</sup> the Court upheld the constitutionality of Section 5 after its 1982 reauthorization, finding that although "the Voting Rights Act, by its nature, intrudes on state sovereignty," nonetheless, "[t]he Fifteenth Amendment permits this intrusion."<sup>54</sup>

In more recent cases, however, the Supreme Court has expressed concerns with the constitutionality of Section 5. In the wake of the 2006 reauthorization and amendments to Section 5, a municipal utility district in Texas filed suit asking to be released from Section 5 preclearance requirements. In the alternative, the utility district challenged the law's constitutionality, arguing that Congress exceeded its enforcement power under the 15<sup>th</sup> Amendment. While not answering the question of Section 5's constitutionality, in the 2009 decision of *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*,<sup>55</sup> the Court cautioned that the VRA's preclearance regime and coverage formula "raise serious constitutional questions."<sup>56</sup> Although acknowledging that some of the conditions it had relied upon in upholding Section 5 in *Katzenbach* and *City of Rome* are better, the Court pointed out that these improvements may be

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<sup>46</sup> See *Shelby County, Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

<sup>47</sup> *Id.* at 884.

<sup>48</sup> See *id.* at 884-902.

<sup>49</sup> See Brief for Petitioner, *Shelby County, Alabama v. Holder*, (No. 12-96), [http://www.supremecourt.gov/orders/courtorders/110912zr\\_d18e.pdf](http://www.supremecourt.gov/orders/courtorders/110912zr_d18e.pdf).

<sup>50</sup> 383 U.S. 301 (1966).

<sup>51</sup> *Id.* at 337.

<sup>52</sup> 446 U.S. 156, 183 (1980).

<sup>53</sup> 525 U.S. 266 (1999).

<sup>54</sup> *Id.* at 284-85.

<sup>55</sup> 129 S.Ct. 2504 (2009).

<sup>56</sup> *Id.* at 2513.

insufficient, and therefore, preclearance requirements may still be necessary. Nevertheless, the Court pointed out that the law “imposes current burdens and must be justified by current needs.”<sup>57</sup> In *NAMUDNO*, the Court avoided the constitutional question by deciding that the utility district was eligible to be released from coverage.<sup>58</sup> In an early 2012 decision, the Supreme Court reiterated its observation from *NAMUDNO* that Section 5’s intrusion on state sovereignty “raises serious constitutional questions.”<sup>59</sup>

## Congressional Redistricting Legislation

The following provides an overview of selected legislation that would establish additional requirements and standards for congressional redistricting.

For discussion of the constitutionality of redistricting legislation, see CRS Report RS22628, *Congressional Redistricting: The Constitutionality of Creating an At-Large District*, by L. Paige Whitaker, and for discussion of the constitutionality of mid-decade redistricting, see CRS Report RS22479, *Congressional Redistricting: A Legal Analysis of the Supreme Court Ruling in League of United Latin American Citizens (LULAC) v. Perry*, by L. Paige Whitaker. For discussion of the constitutionality of federal election standards generally, see CRS Report RL30747, *Congressional Authority to Standardize National Election Procedures*, by Kenneth R. Thomas.

### 113<sup>th</sup> Congress

- H.R. 223 and H.R. 278 (113<sup>th</sup> Congress), the “John Tanner Fairness and Independence in Redistricting Act,” would prohibit the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act, and would require the states to conduct redistricting through independent commissions.
- H.R. 337 (113<sup>th</sup> Congress), the “Redistricting Transparency Act of 2013,” would require the states to conduct congressional redistricting in such a manner that the public is informed about proposed congressional redistricting plans through a public Internet site, and has the opportunity to participate in developing congressional redistricting plans before they are adopted.

### 112<sup>th</sup> Congress

- H.R. 419 (112<sup>th</sup> Congress), the “Redistricting Transparency Act of 2011,” would require the states to conduct congressional redistricting in such a manner that the public is informed about proposed congressional redistricting plans through a public Internet site, and has the opportunity to participate in developing congressional redistricting plans before they are adopted.

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<sup>57</sup> *Id.* at 2512. (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”) *Id.*

<sup>58</sup> *See id.* at 2513.

<sup>59</sup> *Perry v. Perez*, 132 S.Ct. 934, 942 (2012).

- H.R. 453 (112<sup>th</sup> Congress), the “John Tanner Fairness and Independence in Redistricting Act,” would prohibit the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act, and would require the states to conduct redistricting through independent commissions.
- H.R. 590 (112<sup>th</sup> Congress), the “Redistricting Reform Act of 2011,” would prohibit the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act, and would require the states to conduct congressional redistricting through independent commissions.
- H.R. 3846 (112<sup>th</sup> Congress), the “National Commission for Independent Redistricting Act of 2012,” would establish a National Commission for Independent Redistricting that would prepare congressional redistricting plans for all states and hold meetings open to the public, would require congressional redistricting to be conducted in accordance with the Commission’s plan, and would prohibit the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act.
- S. 694 (112<sup>th</sup> Congress), the “Fairness and Independence in Redistricting Act,” would prohibit the states from carrying out more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the Voting Rights Act, and would require the states to conduct redistricting through independent commissions.

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