ELECTION LAW — VOTING RIGHTS ACT — FOURTH CIRCUIT STRIKES DOWN PROVISIONS OF ELECTION LAW ENACTED WITH RACIALLY DISCRIMINATORY INTENT. — *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

The Voting Rights Act of 1965[1] (VRA) — a major triumph of the Civil Rights Movement — was enacted to protect black Americans and other persons of color from state-sanctioned disenfranchisement.[2] To guard against discriminatory voting procedures, section 5 of the VRA established a system of preclearance review, whereby designated jurisdictions were required to submit electoral reforms to either the Attorney General or the U.S. District Court for the District of Columbia for federal approval.[3] In 2013, the Supreme Court in *Shelby County v. Holder*[4] invalidated the formula used to determine which jurisdictions were subject to preclearance review.[5] However, a little-used provision remained in place: section 3(c).[6] This "bail-in" provision allows a court to subject a jurisdiction to limited and temporary preclearance review if the court finds the jurisdiction's election reform law violates the Fourteenth or Fifteenth Amendment.[7]

Recently, in *North Carolina State Conference of the NAACP v. McCrory*,[8] the Fourth Circuit permanently enjoined provisions of North Carolina's 2013 election reform law for violating the ban against discriminatory intent under section 2 of the VRA[9] and the Fourteenth Amendment.[10] Yet the court refused to grant section 3(c) relief, citing the section's rare use and finding the remedy unnecessary because the discriminatory provisions were enjoined.[11] However, according to the VRA, outside circuit precedent, and the Fourth Circuit's dicta citing discriminatory intent as a perpetual problem in North

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1 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

2 *See* Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 840 (Aug. 6, 1965) (President Lyndon B. Johnson calling the VRA "one of the most monumental laws in the entire history of American freedom," *id.* at 841).

3 Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304 (2012)); *see* H.R. REP. NO. 109-478, at 35–40 (2006) (discussing how the Department of Justice used the preclearance requirement to block or deter discriminatory changes in voting procedures); Dale E. Ho, *Voting Rights Litigation After* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 676 (2014) (noting section 5's powerful deterrent effect).

4 133 S. Ct. 2612 (2013).

5 *See id.* at 2630–31 (finding formula unconstitutional for being based on decades-old data).

6 Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437–38 (codified as amended at 52 U.S.C. § 10302(c)).

7 52 U.S.C. § 10302(c).

8 831 F.3d 204 (4th Cir. 2016).

9 Pub. L. No. 89-110, § 2, 79 Stat. 437, 437–38 (codified as amended at 52 U.S.C. § 10301(a)).

10 *See N.C. State Conference*, 831 F.3d at 219, 241.

11 *Id.* at 241.

Carolina's history, *North Carolina State Conference*'s facts exemplify a situation in which section 3(c) relief is appropriate. Therefore, the Fourth Circuit's rejection of section 3(c) should not dissuade other courts from invoking the provision when faced with similar facts.

Following the Supreme Court's 5–4 *Shelby County* opinion, forty North Carolina jurisdictions were no longer subject to mandatory preclearance review, and North Carolina was no longer required to submit its election reform laws for federal approval.[12] Soon thereafter, Governor Patrick L. McCrory signed Session Law 2013-381,[13] which required several changes to the state's voting procedures by 2016.[14] The law accepted a limited pool of photo IDs for in-person voting, reduced the number of early voting days from seventeen to ten, eliminated same-day registration, eliminated preregistration for sixteen- and seventeen-year-olds, and banned out-of-precinct provisional voting.[15] Before ratifying the law, the state legislature had requested and considered racial data showing that black Americans disproportionately relied on all of the voting procedures the law eliminated or restricted[16] and disproportionately used forms of identification the law excluded.[17]

Several separate actions, eventually consolidated in the Middle District of North Carolina, challenged the law as violative of section 2 of the VRA and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.[18] However, before the trial, the legislature enacted Session Law 2015-103,[19] creating an exception to the voter ID provision in cases where "reasonable impediment[s]" prevented voters from obtaining acceptable identification.[20] The district court therefore bifurcated the trial — one half concerning the amended voter ID restriction, the other half concerning the other provisions.[21]

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[12] *See id.* at 215–16.

[13] Voter Information Verification Act, S.L. 2013-381, 2013 N.C. Sess. Laws 1505 (codified as amended in scattered sections of N.C. GEN. STAT.).

[14] *Id.*; N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 339, 344 (M.D.N.C. 2016).

[15] *See N.C. State Conference*, 831 F.3d at 216–18.

[16] *See id.* at 216–17.

[17] *See id.* at 216.

[18] *Id.* at 218. The Fourteenth Amendment proscribes discriminatory intent, *see, e.g.*, Washington v. Davis, 426 U.S. 229, 239–41 (1976), as does the Fifteenth Amendment, City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion). *See also* U.S. CONST. amends. XIV, XV. The Fourteenth and Twenty-Sixth Amendments limit burdens on voting generally. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 786–88, 786 n.7 (1983) (Fourteenth Amendment); Walgren v. Bd. of Selectmen, 519 F.2d 1364, 1367 (1st Cir. 1975) (Twenty-Sixth Amendment); *see also* U.S. CONST. amends. XIV, XXVI.

[19] Act of June 22, 2015, S.L. 2015-103, 2015 N.C. Sess. Laws 225 (codified in scattered sections of N.C. GEN. STAT.).

[20] *Id.* § 8.(a), 2015 N.C. Sess. Laws at 230; *N.C. State Conference*, 831 F.3d at 219.

[21] *N.C. State Conference*, 831 F.3d at 219.

The district court entered judgment against the plaintiffs on all claims.[22] Judge Schroeder found that "separately and cumulatively," the contested provisions did not impose a discriminatory burden on black Americans.[23] Judge Schroeder also examined the question of discriminatory intent, only to find that the state legislature had sufficient nondiscriminatory reasons — including preventing voter fraud and minimizing voting site confusion[24] — to request racial data and to pass the omnibus bill.[25] Finding no violations,[26] the district court dismissed the plaintiffs' case with prejudice.[27]

The Fourth Circuit reversed.[28] Writing for the court, Judge Motz[29] found that the district court "fundamentally erred" in finding no discriminatory intent.[30] Judge Motz first noted a fact critical to any section 2 intent analysis: that voting in North Carolina is racially polarized.[31] This polarization created the opportunity for legislators to pass laws "targeting [racial] groups unlikely to vote for them."[32] Judge Motz then listed five factors that could be used to scrutinize the legislature's intent: the challenged law's historical background, events preceding the law's passage, departures from normal legislative procedure, the law's legislative history, and the law's disproportionate impact on particular racial groups.[33]

With these factors, Judge Motz assessed the totality of the circumstances and concluded that the election reform law was enacted with racially discriminatory intent.[34] North Carolina's recent history — featuring repeated official attempts to suppress and dilute the black American vote since the 1980s[35] — contextualized why the legislature in 2013 targeted black voters after their unprecedented turnout in the

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[22] N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 530–31 (M.D.N.C. 2016).

[23] *Id.* at 486.

[24] *Id.* at 518.

[25] *Id.* at 502–03.

[26] *Id.* at 486–88, 502–03, 521, 525, 530.

[27] *Id.* at 530–31.

[28] *N.C. State Conference*, 831 F.3d at 214.

[29] Judge Motz was joined by Judges Wynn and Floyd.

[30] *N.C. State Conference*, 831 F.3d at 214 ("[T]he [district] court seems to have missed the forest in carefully surveying the many trees.").

[31] *See id.* at 221–23 ("Racial polarization 'refers to the situation where different races . . . vote in blocs for different candidates.'" *Id.* at 221 (omission in original) (quoting Thornburg v. Gingles, 478 U.S. 30, 62 (1986) (plurality opinion))). *See generally* Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205 (2013).

[32] *N.C. State Conference*, 831 F.3d at 214.

[33] *Id.* at 220–21 (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977)).

[34] *Id.* at 233.

[35] *Id.* at 224–25.

previous election.[36] That the legislature expanded and abruptly passed the historically restrictive bill soon after *Shelby County* further evinced the legislature's invidious intent.[37] Judge Motz also noted that the district court committed clear error by evaluating disparate impact based on the remaining voting and registration alternatives.[38] Instead, it was sufficient that the law restricted or eliminated procedures that black Americans disproportionately relied on to vote.[39] Judge Motz then determined that because discriminatory intent was established, the substantiality of the state's purported nonracial motivations was irrelevant.[40] Instead, she noted that the challenged provisions were insufficiently tailored to achieve the legislature's stated aims[41] and thus concluded that the legislature would not have enacted the provisions but for their disparate impact on black voters.[42]

While all three judges agreed that the challenged provisions were unconstitutional and violated the VRA, they did not agree on the proper remedy.[43] Writing for the court on the issue of remedy, Judge Wynn[44] determined that the later-enacted reasonable impediment exception was not curative since it neither invalidated nor repealed the photo ID provision.[45] The exception instead imposed its own burdens and inconsistencies, requiring voters without appropriate identification to go through a multistep process to cast a provisional ballot that another voter could later challenge.[46] The court therefore "permanently enjoin[ed] all of the challenged provisions."[47] Judge Motz, writing again for the court, declined to grant VRA section 3(a) and 3(c) relief, which would have respectively "impos[ed] poll observers during elections" and "subject[ed] North Carolina to ongoing preclearance re-

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[36] *Id.* at 225–26.

[37] *See id.* at 227–29.

[38] *Id.* at 230.

[39] *Id.* at 230–33. Judge Motz also noted that the district court erred in finding no disparate impact merely because black American aggregate turnout increased by 1.8% between the 2010 and 2014 midterm elections. *Id.* at 232. In fact, as Judge Motz highlighted, "many [black] American votes went uncounted," and the 1.8% increase actually represented an alarming "*decrease* in the *rate* of change" since "in the prior four-year period, [black] American midterm voting had increased by 12.2%." *Id.*

[40] *Id.* at 235.

[41] *Id.* at 235–38.

[42] *Id.* at 238.

[43] *See id.* at 239 (Wynn, J., delivering the opinion of the court); *id.* at 242 (Motz, J., dissenting).

[44] Judge Wynn was joined by Judge Floyd.

[45] *N.C. State Conference*, 831 F.3d at 240 (Wynn, J., delivering the opinion of the court).

[46] *Id.* at 240–41.

[47] *Id.* at 241.

quirements."[48] In doing so, Judge Motz cited the section's rare use and deemed the remedies unnecessary in light of the injunction.[49]

Judge Motz dissented with respect to the permanent injunction.[50] Because the record did not reveal whether the reasonable impediment exception was flawed in practice, she believed the court should have temporarily enjoined the voter ID provision and remanded to the district court to determine if the exception cured the provision's defects.[51]

On its face, the Fourth Circuit's analysis of discriminatory intent in *North Carolina State Conference* aligned with the key principles in civil rights precedent. However, the court's refusal to grant section 3(c) relief marked a significant divergence.[52] With its refusal, the Fourth Circuit ignored highly salient facts: First, when discriminatory intent is found, section 3(c) relief is required because the Fourteenth and Fifteenth Amendments have been violated.[53] Second, the Fourth Circuit's dictum noting North Carolina's history of attempting to pass intentionally discriminatory election laws demonstrates the circumstances that have historically justified prospective equitable relief — here, in the form of preclearance review. Because section 3(c) would thus have been an appropriate remedy in this case, other courts should not be dissuaded from utilizing the provision as a complete remedy when faced with similar facts.

Ever since *Shelby County*, civil rights proponents have been searching for the next best way to preemptively protect citizens' right to vote.[54] This concern became more urgent as several jurisdictions enacted election reform laws that would previously have faced scrutiny for disproportionately affecting the voting rights of racial groups.[55] Members of these groups had the option of pursuing a VRA section 2 lawsuit.[56] However, litigation is time-consuming and costly, and proving discriminatory intent is often an insurmountable burden because it

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[48] *Id.* (Motz, J., delivering the opinion of the court); *see also* 52 U.S.C. § 10302(a), (c) (2012).

[49] *N.C. State Conference*, 831 F.3d at 241 (Motz, J., delivering the opinion of the court) (quoting Conway Sch. Dist. v. Wilhoit, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)).

[50] *Id.* at 242–44 (Motz, J., dissenting).

[51] *See id.* at 243–44.

[52] *See generally* Smith v. Town of Clarkton, 682 F.2d 1055, 1068 (4th Cir. 1982) (describing a court's "broad and flexible equitable powers to fashion a remedy" that redresses a civil rights violation).

[53] *See* 52 U.S.C. § 10302(c); City of Mobile v. Bolden, 446 U.S. 55, 65–68 (1980) (plurality opinion).

[54] *See, e.g.*, Sarah Kellogg, *Voting Rights Act Post Shelby-County*, WASH. LAW. (Dec. 2013), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/december-2013-voting-rights.cfm [https://perma.cc/6V3H-Z8Y2] (noting the Obama Administration's reinvigorated interest in other VRA sections).

[55] *See, e.g.*, Tomas Lopez, *"Shelby County": One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later [https://perma.cc/5QR4-P8LZ].

[56] *See, e.g.*, Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc).

requires proof of a high-standard, collective mens rea.[57] Given section 2's drawbacks and the coverage formula's defeat, these old protections may no longer be enough.[58]

Section 3(c) of the VRA is the sword that the Fourth Circuit could have wielded, for it provides preclearance protection without the overturned coverage formula's baggage.[59] Unlike the static formula that codified which jurisdictions were subject to preclearance review, section 3(c) is triggered only if a court finds that a state or political subdivision's election reform law or procedure violates the Fourteenth or Fifteenth Amendment.[60] Upon such a finding — and in addition to other equitable relief — the court "*shall* retain jurisdiction for such period as it may deem appropriate" to review subsequent changes to election laws.[61] Section 3(c) would therefore seem to withstand constitutional challenges on two fronts: First, it allows a court to tailor the remedy's scope and duration so that it is congruent and proportional to the injury.[62] Second, it is based only on present state actions and so not subject to *Shelby County*'s concerns about using outdated data.[63]

Both the text and subsequent interpretations of section 3(c) suggest that the Fourth Circuit could have bailed North Carolina into temporary preclearance review. Admittedly, according to the leading case on section 3(c), *Jeffers v. Clinton*,[64] "shall" in this context is not read as "strip[ping] [a court] of all discretion."[65] However, *Jeffers* establishes that civil rights will prevail over claims of state sovereignty "if [constitutional] violations have been found, and if *prospective* relief in the

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[57] *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 595 (3d ed. 2007); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 537–41 (2016).

[58] *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (stating that section 5 "imposes substantial 'federalism costs,'" *id.* at 202, and "differentiates between the States," *id.* at 203); *see also* Shelby County. v. Holder, 133 S. Ct. 2612, 2631–32 (2013) (Thomas, J., concurring) (calling section 5 unconstitutional). *But see id.* at 2649 (Ginsburg, J., dissenting) ("Federal statutes that treat States disparately are hardly novelties."); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007) (arguing the preclearance regime is constitutional for "satisfy[ing] the Court's construction of congressional enforcement powers under the Reconstruction Amendments," *id.* at 4).

[59] *See generally* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

[60] 52 U.S.C. § 10302(c) (2012).

[61] *Id.* (emphasis added).

[62] In the context of federal courts exerting control over state systems, this standard would be similar to the one established in *City of Boerne v. Flores*, 521 U.S. 507 (1997), regarding Congress's Fourteenth Amendment enforcement mechanisms against the States. *Id.* at 520. For more detail on how the *Boerne* standard might be adapted, see Crum, *supra* note 59, at 2021–27.

[63] *See* Crum, *supra* note 59, at 2024–25.

[64] 740 F. Supp. 585 (E.D. Ark. 1990); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 767 (5th ed. 2016).

[65] *Jeffers*, 740 F. Supp. at 600.

form of preclearance is indicated by other factors in the case."[66] A court should, therefore, consider whether the violations have been "persistent and repeated," "recent or distant in time," or "the kinds of violations that would likely be prevented, in the future, by preclearance."[67] The facts of *North Carolina State Conference* suggest that courts should also consider how many discriminatory procedures the legislature intentionally sought to impose and if the political climate makes recurrence more likely.

Though the Fourth Circuit dismissed section 3(c)'s use as rare, plenty of case law supports its invocation. Since its passage, "[section 3(c)] has been used to require two states, six counties . . . and one city to obtain preclearance for periods of time."[68] The Fourth Circuit relied on *Conway School District v. Wilhoit*[69] to foreclose a section 3(c) remedy.[70] However, in quoting *Wilhoit* to deny section 3(c) relief, the Fourth Circuit neglected a key portion of its text: "[t]he preclearance remedy is rarely used, *only being utilized in such a 'systematic and deliberate' case as* Jeffers."[71] Had the Fourth Circuit considered *Jeffers*, it would have seen that an intentional scheme, motivated by discriminatory intent, to dilute black Americans' voting power warranted section 3(c) relief.[72]

The Fourth Circuit's findings and dicta note egregious facts that go beyond section 3(c)'s tipping point. Not only did the state legislature impose restrictions motivated by a desire to disparately impact black Americans, but the Fourth Circuit's findings suggest that these restrictions are part of a pattern in North Carolina that will not end by merely severing the challenged provisions. From 1980 to 2012, while several North Carolinian jurisdictions were subject to preclearance review, the state legislature still attempted to pass laws for the purpose of reducing the voting power of persons of color.[73] Though past

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[66] *Id.* at 601 (emphasis added).

[67] *Id.*

[68] ISSACHAROFF ET AL., *supra* note 64, at 766–67.

[69] 854 F. Supp. 1430 (E.D. Ark. 1994).

[70] *N.C. State Conference*, 831 F.3d at 241.

[71] *Wilhoit*, 854 F. Supp. at 1442 (emphasis added).

[72] In *Jeffers* the court applied the section 3(c) bail-in provision upon finding the majority-vote run-off statutes in Arkansas's municipal and county offices "represent[ed] a systematic and deliberate attempt to reduce black political opportunity," 740 F. Supp. at 595, and therefore violated the Fourteenth and Fifteenth Amendments. *See id.* at 601. The smoking gun, the legislature's invidious intent, was evidenced by the legislature's pattern of passing laws requiring a majority vote for office in response to black Americans winning a seat in the previous election. *See id.* at 592–95. The laws were intended to and effectively did prevent black Americans from winning office again. *Id.*

[73] *N.C. State Conference*, 831 F.3d at 223–25; *see also id.* at 225 (noting that it was due only to several bouts of section 2 litigation and the "robust protections of [section] 5" that those efforts were blocked).

wrongdoing does not always predict future offense, an ongoing pattern may necessitate a more active approach. Just as convicted persons may be subject to probation, states like North Carolina that intend to rob citizens of their federally guaranteed voting rights should be subject to temporary federal review.

Moreover, discrimination is especially difficult to eradicate because it can be motivated not only by "race-based hatred,"[74] but also by "political gamesmanship."[75] In jurisdictions like North Carolina where voting is racially polarized, voters of color are uniquely vulnerable targets of elected officials' efforts to entrench themselves by reducing the voting power of opposing groups.[76] An injunction without federal supervision allows the state legislature to continue its attempts largely unimpeded. Instead of forcing aggrieved citizens to spend their time and money on litigation — losing faith in the electoral process along the way[77] — providing prospective section 3(c) relief would have proven the more effective alternative.

Section 3(c) is needed now more than ever.[78] Given the gridlock of modern politics, it is uncertain when or how Congress will reform the VRA. Until then, it is up to the judiciary to protect the integrity of the electoral process. Judges should do this by striking down election reform laws that violate the VRA and the Constitution;[79] and when discriminatory intent is found, they must bail jurisdictions into preclearance review via section 3(c). Though the Fourth Circuit failed to do so in *North Carolina State Conference*, other courts should feel empowered — and even obligated[80] — to use their equitable powers and protect every citizen's constitutional right to vote.

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[74] *Id.* at 222.

[75] *Id.* at 226; *see also id.* at 222 ("[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party . . . constitutes discriminatory purpose.").

[76] *See id.* at 214; *see also* Karlan, *supra* note 58, at 2–3 (noting that black Americans are disenfranchised by "offender disenfranchisement statutes," "restrictive voter identification . . . requirements," *id.* at 2, and "deliberately constructed majority-minority districts," *id.* at 3).

[77] *See* Jim Rutenberg, *A Dream Undone*, N.Y. TIMES MAG. (July 29, 2015), https://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html [https://perma.cc/M53A-7K68].

[78] *See* Paul M. Wiley, Note, Shelby *and Section 3: Pulling the Voting Right Act's Pocket Trigger to Protect Voting Rights After* Shelby County v. Holder, 71 WASH. & LEE L. REV. 2115, 2152–53 (2014); *see also* Defendant-Intervenors' Motion for Leave to File Amended Answer and Counterclaim at 2–4, Texas v. Holder, No. 1:11-cv-1303 (D.D.C. July 3, 2013) (seeking to invoke section 3(c) against Texas for passing election reform law with discriminatory intent).

[79] *Cf.* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 72 (2014) (advocating an "equal protection standard which requires substantial evidence justifying a burden on voters before a law would be considered constitutional").

[80] *Cf.* Stokely Carmichael, *What We Want*, N.Y. REV. BOOKS (Sept. 22, 1966), http://www.nybooks.com/articles/1966/09/22/what-we-want [https://perma.cc/DQU5-PBPJ] ("For racism to die, a totally different America must be born.").