ORAL ARGUMENT SCHEDULED FOR JANUARY 19, 2012
NO. 11-5256

IN THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

SHELBY COUNTY, ALABAMA,
Plaintiff-Appellant,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Defendant-Appellee

EARL CUNNINGHAM, ET AL.,
Defendant-Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF *DEFENDANT-APPELLEE* AND *DEFENDANT-INTERVENOR-APPELLEE*

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CERTIFICATE AS TO PARTES, RULINGS, AND RELATED CASES

The New York Law School Racial Justice Project certifies as follows:

(A) Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellee-Intervenor.

(B) Rulings Under Review

The ruling under review before this court is the United States District Court for the District of Columbia's September 21, 2011 Order in *Shelby County, Alabama v. Holder Et Al.*, No. 10-0651, wherein the Honorable John D. Bates denied Shelby County's motion for summary judgment and granted the motions for summary judgment filed by the Attorney General and the defendant-intervenors.

(C) Related Cases

This matter has not previously been before this Court or any other court. Currently, there are four related cases pending in the United States District Court for the District of Columbia: *La Roque v. Holder*, 10-cv-561-JDB (D.D.C); *State of Arizona v. Holder*, 11-cv-1559-JDB (D.D.C); *State of Florida v. United States*, 11-cv-1428-CKK-MG-ESH (D.D.C.); *State of Georgia v. Holder*, 11-cv-01788-RBW-DST-BAH (D.D.C.).

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GLOSSARY

1.	ADA	Americans with Disabilities Act
2.	ADEA	Americans with Disabilities in Education Act
3.	FMLA	Family Medical Leave Act
4.	MALDEF	Mexican American Legal Defense Educational Fund
5.	RFRA	Religious Freedom Restoration Act of 1993
6.	VRA	Voting Rights Act of 1973
7.	VRARAA	Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006
8.	DOJ	Department of Justice
9.	MIR	More Information Requests

INTEREST OF AMICUS CURIAE[1]

The New York Law School Racial Justice Project ("the Racial Justice Project") is a legal advocacy organization sponsored by New York Law School that is dedicated to protecting constitutional and civil rights. The Racial Justice Project seeks to increase public awareness of racism, racial injustice, and structural racial inequality in the areas of education, employment, political participation, and criminal justice. To accomplish its mission, the Racial Justice Project engages in litigation, training, and public education and other forms of advocacy that seek to ensure equal access and opportunity. The Racial Justice Project has a continued interest in the development of jurisprudence that guards against racial discrimination and promotes social and political equality for all Americans. Accordingly, the Racial Justice Project has a substantial interest in the outcome of this litigation.

[1] Pursuant to Fed. R. App. P. 29(a), all parties to this appeal have consented to the filing of this *amicus curiae* brief. Pursuant to Fed. R. App.P. 29 (c)(5), this brief was not authored in whole or in part by a party or counsel for a party, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

At issue in this case is the latest attack upon Section 5 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified at 42 U.S.C. § 1973 *et seq.*) ("VRA" or "the Act").

No statutory enactment has been more important in combating minority disenfranchisement and advancing voting rights for all Americans than the VRA. It is the paradigmatic example of appropriate remedial congressional legislation and remains as essential today as it was in 1965. When Congress first enacted the VRA in 1965, it concluded that case-by-case litigation had been wholly ineffective in guaranteeing African-Americans the right to vote and that nothing short of a temporary prophylactic remedial scheme would succeed in eradicating the "insidious and pervasive evil which had been perpetuated in certain parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Thus, Congress placed at the heart of the VRA's temporary remedial scheme Section 5, which prohibits covered jurisdictions from implementing new voting standards, practices or procedures unless the proposed change has been "pre-cleared" by the Department of Justice ("DOJ") or the United States District Court for the District of Columbia. 42 U.S.C. §1973(c)(a).

Prompted by the persistence of modern day voting discrimination, Congress has reauthorized Section 5 four times. With each reauthorization, Congress encountered extreme resistance. Each time, the VRA has withstood constitutional challenge. Indeed, the present challenge to Section 5 is remarkable only in its predictability and lack of originality. From the moment Section 5 was first enacted, jurisdictions that fell within its purview depicted the legislation as an illegitimate intrusion by an all-powerful federal government on state and local sovereignty.[2] Through the years, as Section 5 periodically came up for renewal, covered jurisdictions insisted with great sincerity, as Shelby County does today, that the Act's preclearance provisions were no longer needed. Their arguments maintain paradoxically on the one hand that the Act is an unwarranted abrogation of state authority by the federal government, and on the other hand that the Act has succeeded in doing so much good, covered jurisdictions should be relieved from the "burdens" of preclearance.

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[2] Howard Ball et al., *Compromised Compliance: Implementation of the 1965 Voting Rights Act* 52-53 (1982). In the very first challenge of the pre-clearance provisions, Justice Hugo Black, claimed that Section 5 forced covered states to come on bended knee to "plead," "beg," and "entreat" with the Attorney General or the district court in Washington, "hundreds of miles away" from their homes, before they could put any change in their own election laws into effect, and reduced those states to nothing more than "conquered provinces. *Katzenbach*, 383 U.S. at 359 (Black, J., concurring and dissenting).

Yes, 2006 painted a different picture than that which existed in 1965, or 1970, or 1982. However, that electoral portrait remained stained with the blight of racial discrimination. After careful review of a record in excess of 15,000 pages, Congress acted on the continuing need for the VRA, a fact the United States Supreme Court has implicitly acknowledged in its decisions. *See Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 1249 (2009); *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S.Ct. 2504, 2515-16 (2009).

Appellant's misguided attempt to cast doubt on the constitutionality of Section 5 is not supported by United States Supreme Court precedent as the extensive record of electoral discrimination in covered jurisdictions before Congress in 2006 easily satisfies the Supreme Court's decisions in *Katzenbach* and *City of Boerne v. Flores*, 521 U.S. 507 (1997). This brief will address that record.

ARGUMENT

The VRA's success is remarkable and undeniable. Indeed, its enactment was a turning point in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett*, 556 U.S. 1, 129 S.Ct. 1231, 1240 (2009). In the nearly five decades since the Act's passage

minority voters have garnered increasing political power. While considerable progress has been made, the VRA's goal in protecting and bringing about the promise of the Fifteenth Amendment has not been fully realized. Barriers to equal political participation persist; minority citizens are still denied access to the ballot and have had to struggle through increasingly ingenious discriminatory roadblocks.

The efficacy of the VRA's strong medicine is largely attributable to Section 5. Unlike Section 2, which is reactive and places the burden on individual plaintiffs to prove that a practice has a discriminatory effect, Section 5 is preemptive and acts as a barricade to ensure that discriminatory changes are not put into effect. In so doing, Section 5 shifts the burden onto covered jurisdictions to establish, prior to implementation, that a proposed voting change has neither a discriminatory effect nor purpose. By addressing the issue at the earliest possible stage, Section 5 decreases the cost and time associated with litigation. This anticipatory approach ensures that voting rights are not infringed upon in the first instance. Accordingly, Section 5 has played a significant role in deterring voting discrimination and remains vital to the protection of equal political participation.

In 2006, with the impending expiration of the non-permanent provisions of the VRA, Congress began the task of determining whether

Section 5 was still necessary and appropriate to remedy and deter unconstitutional voting discrimination against racial and ethnic minorities. Representative James Sensenbrenner, Chair of the House Judiciary Committee during the 2006 reauthorization process, concluded that the reauthorization process was "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 ½ years that [he had] been honored to serve as a member" of Congress. 152 Cong. Rec. H5143-02. A total of 21 hearings over the course of 10 months were held by the Senate and House of Representatives Judiciary Committees. H.R. Rep. No. 109-478 at 5; S. Rep. No. 109-295 at 2-4. During the hearings, Congress heard testimony from leading scholars, civil rights attorneys, private citizens, members of Congress and federal and state officials. *Id.* After compiling and scouring over 15,000 pages of evidence, Congress concluded that the problem of racial discrimination in voting is a continuing malady that necessitates redress. And although Congress did find that some provisions of the VRA were no longer necessary, by a vote of 390 to 33 in the House and 98 to 0 in the Senate, Congress concluded that 40 years was not enough time to combat 100 years of contempt for the rights protected by the Fifteenth Amendment. *See* 152 Cong. Rec. H5143-H5207; 152 Cong. Rec. S7949-S8012.

Appellant and its *amici* contend that Congress erred in its determination that Section 5 of the VRA is still necessary in light of the progress that has been made. The crux of this contention rests on the following principle: the Act works. This argument is both untenable and misguided. That the Act has begun to cure the malaise of voting discrimination does not render its most powerful tonic superfluous. The acknowledged success of the VRA is not proof that Section 5's usefulness has expired. In fact, it is evidence that Section 5's powerful medicine is working and needs to continue doing just that.

I. *SOUTH CAROLINA V. KATZENBACH* AND *CITY OF ROME V. UNITED STATES* STAND FOR THE PROPOSITION THAT CONGRESS MAY USE ANY RATIONAL MEANS TO EFFECTUATE THE FIFTEENTH AMENDMENT

Section 1 of the Fifteenth Amendment provides that a citizen's right to vote "shall not be denied or abridged by . . . any state on account of race, color, or previous condition of servitude." U.S. Const. amend. XV. Section 2 of the Amendment expressly establishes that "Congress shall have power to enforce this article by appropriate legislation." *Id.* The Supreme Court has twice taken up the measure of congressional authority under the Fifteenth Amendment to enact and reauthorize the preclearance provisions of Section 5 of the VRA. In both instances the Court held that, when acting

under its Fifteenth Amendment enforcement power, Congress is free to adopt all means that are rationally appropriate to guarantee that the right to vote is free from racial discrimination. *See Katzenbach*, 383 U.S. at 325; *City of Rome v. United States*, 446 U.S. 156, 182 (1980). Thus, in *Katzenbach*, the Court held that when it initially enacted the preclearance provisions of Section 5, Congress had Fifteenth Amendment enforcement authority to use "any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S. at 325. In *City of Rome*, the Court concluded that when it reauthorized the preclearance provisions in 1975, Congress had Fifteenth Amendment enforcement authority to "rationally" conclude that Section 5 was "necessary to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination." 446 U.S. at 182. As the Court noted, when acting pursuant to its Fifteenth Amendment power, Congress may do "whatever tends to enforce submission to the prohibitions they contain, and to secure all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion." *Katzenbach* 383 U.S. at 327 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

A. *City Of Boerne v. Flores* Neither Displaced Nor Overruled The Rationality Standard Of *South Carolina v. Katzenbach* And *City Of Rome v. United States*

In *City of Boerne* the Supreme Court considered the constitutionality of the Religious Freedom Restoration Act ("RFRA") which, *inter alia*, prohibited government from substantially burdening the free exercise of religion absent the government's showing that the burden (1) is in furtherance of a compelling governmental interest; and (2) is the "least restrictive means of furthering said interest." *Id.* at 515-16. This mandate was applied to all laws, including neutral laws of general applicability. The Court concluded Congress had overreached its Fourteenth Amendment enforcement authority because the RFRA was not a congruent and proportional means to combat the injury it aimed to remedy, namely, religious discrimination.

Far from displacing the *Katzenbach* rationality standard, the Court explained that the preclearance provisions of Section 5, as upheld by *Katzenbach*, stood – and still stand – as the quintessential example of Congress using its Reconstruction Amendments enforcement power in a congruent and proportional manner. *Id.* at 533. Specifically, the Court reviewed the legislative record relied upon in the enactment of the RFRA and reasoned that unlike the VRA, the "RFRA's legislative record lacks

examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530. The harm at issue in *City of Boerne* was seemingly conjectural as the testimony and evidence presented to Congress prior to the RFRA's enactment suggested that "laws directly targeting religious practices have become increasingly rare" and "deliberate [religious] persecution is not the usual problem in this country." *Id.* at 530. Without a demonstrable pattern of religious discrimination Congress' action in enacting the RFRA could not be considered remedial or reactive to an unconstitutional ill.

With respect to proportionality, which in essence is a means/ends balancing test, the Court was particularly concerned with the RFRA's time and scope limitations. Unlike the preclearance provisions of the VRA, the RFRA could in no sense be described as narrowly tailored. Of particular concern to the Court was the RFRA's "sweeping coverage" and its displacement effect on areas traditionally left to the states. *Id.* at 532. Additionally, although not dispositive of the question of proportionality, the Court highlighted that the RFRA lacked both "a termination date and a termination mechanism." *Id.* Again, continuing its comparison analysis, the Court turned to the VRA and its previous rejection of a challenge to the preclearance provision of the VRA, reasoning that the provision's scope was

properly limited as the burden was placed solely on those jurisdictions with a history of intentional discrimination in voting. *Id.* at 532-33. Ultimately, the Court found the RFRA "so out of proportion" to its supposed objective of remedying intentional religious discrimination that it could not be sustained as a valid exercise of Congress' enforcement power. *Id.* at 531-32.

Nowhere in *City of Boerne* did the Court state or imply that the rationality standard it had devised in *Katzenbach* and reaffirmed in *City of Rome* to gauge the constitutionality of congressional Enforcement Clause power under the Fifteenth Amendment was now supplanted by the congruence and proportionality inquiry the Court developed to determine whether Congress had overreached its Fourteenth Amendment Enforcement Clause authority. Rather, the constitutionality of congressional enforcement action under the Reconstruction Amendments is subject to a plain rationality standard and an inquiry as to whether congressional action does in fact meet that rationality is guided by a consideration of whether the statute at hand is congruent with and proportional to the harm Congress sought to remedy. In short, *Katzenbach*'s rationality standard is a demarcation of the constitutional outer boundaries of congressional Reconstruction power, whereas *City of Bourne's* congruence and proportionality inquiry serves as a set of analytical lens through which Courts may determine whether a statute

falls within these constitutional boundaries, bearing in mind that a remedial statute need not be strictly congruent nor strictly proportional, only rationally so. Therefore, *City of Boerne* did not alter, much less contract, the constitutional boundaries set by *Katzenbach*, nor did the congruence and proportionality inquiry raise the bar Congress must meet when enacting remedial legislation pursuant to its Reconstruction Amendments power. Prior to *City of Boerne*, rationality was the standard by which the Supreme Court measured the constitutionality of congressional action pursuant to the Reconstruction Amendments. And so it remains today. Prior to *City of Boerne*, the preclearance provisions of the VRA served as the quintessential legislative response to a constitutional harm. And so it remains today.

II. CONGRESS' 2006 REAUTHORIZATION OF SECTION 5 OF THE VRA WAS BASED ON AN UNASSAILABLE RECORD OF CURRENT, SYSTEMIC DISCRIMINATION AGAINST MINORITY VOTERS IN COVERED JURISDICTIONS

When Congress extended the temporary provisions of the VRA in 2006, the legislative record clearly demonstrated an ongoing need for Section 5. Congress found that "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions, relocating polling

places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements." H.R. Rep. No. 109-478, at 36; *see also* S. Rep. No. 109-295, at 15. Although the District Court's 151 page opinion was remarkably thorough in excavating evidence of intentional voting discrimination, there remains in the massive record Congress compiled hundreds of other examples that amply support the ongoing need for Section 5.

A. Substantial And Persistent Electoral Discrimination Continues In Alabama

Appellant's and their amici's assertion that electoral discrimination in Alabama is a thing of the past, (Br. of Plaintiff-Appellant at 3; Br. of the State of Alabama as Amicus Curiae at 2-3) is contradicted by the extensive record of continuing discrimination amassed and carefully considered by Congress. Testimony presented to Congress during the 2006 reauthorization revealed that without Section 5's protections, "white-majority state and local governments in Alabama . . . [will] succumb to pressure from their white constituents and . . . return to the racially discriminatory election practices of the past." *Mar. 8, 2006 Hearing*, at 53.

Since 1990, Alabama has received an alarming 84 pre-clearance objection letters from DOJ, the fourth highest of all the covered

jurisdictions. *Id.* at 2561. In 1991, DOJ refused to pre-clear two redistricting plans submitted by the City of Selma because the plans "exhibited a purpose to prevent African Americans from electing candidates of their choice." *Id.* at 54. Section 5's protections allowed DOJ to force the City to amend its redistricting plans in a manner consistent with the goal of the Fifteenth Amendment.

In 2003, Concerned Citizens of Chilton County, an all-white group, pressured the Chilton County Commission to pass a resolution, over the objection of the sole African American commissioner, that reduced "the size of the commission to four; restored the probate judge as *ex official* chair; repealed cumulative voting; and thus end[ed] any opportunity for African Americans to elect a candidate of their choice." *Id.* at 53. Realizing both the clear discriminatory purpose and potential discriminatory effects of this proposed change, the Attorney General refused to pre-clear the resolution. *Id.*

The case of Hale County, Alabama, is particularly illustrative of the crucial role of Section 5. In 1992, during the city of Greensboro's elections, State Senator Bobby Singleton was forced to physically intervene when white voting officials attempted to prevent African American voters from entering the polling sites. *See Mar. 8, 2006 Hearing*, at 83, 182-183.

Attempting to block minority participation, white workers closed the doors and held them shut during election hours to exclude African American voters. *Id.* at 183. Senator Singleton was arrested and jailed after he "snatch[ed] the door[s] open" to allow people to vote. Subsequently, DOJ was compelled to provide election observers to prevent the intimidation of African American voters. *Id.*

Section 5's protection has not only safeguarded the franchise for Alabama's African American population, it has defended other ethnic and racial minority groups facing discrimination at the polls. For example, about one-third of the approximately 2,750 residents of Bayou Le Batre, Alabama are Asian American. During the 2004 primary when an Asian American ran for city council, supporters of the white incumbent deliberately attempted to keep Asian American voters away from the polls by fraudulently claiming that the voters were not U.S. citizens, city residents, or that they had felony convictions. *July 13, 2006 Hearing*, at 121. As a result of these objections, accused voters were forced to complete a paper ballot and have that ballot "vouched for" by a registered voter. *Id.* After investigating the challenges, DOJ found that the allegations were racially motivated and barred the initial challengers from further interference during the general election. *Id.* Without the false and racist accusation from the white incumbent's

supporters, Bayou Le Batre successfully elected its first Asian American to the city council.

From 1982 to December of 2004, Alabama was the subject of 22 successful Section 5 cases, the second highest covered jurisdiction. *See Mar. 8, 2006 Hearing*, at 258. Recently, two Alabama state representatives were reprimanded for "having ulterior motives rooted in naked political ambition and pure racial bias" in connection with their involvement in a "Statehouse vote-buying case." *United States v. McGregor et al*., 2011 U.S. Dist. LEXIS 121794 *9 (M.D. Ala. Oct. 20, 2011). *McGregor* involved allegations of bribery and extortion aimed at securing the passage of Senate Bill 380, which would have authorized a constitutional referendum on legalization of electronic bingo. Under the guise of aiding the FBI to expose the conspiracy, state officials agreed to wear recording devices. *Id.* at *7-8. Judge Thompson found that the elected officials' actions in aiding the FBI were aimed at decreasing African American voter turnout rather than curtailing bribery because the representatives believed the referendum's absence on the ballot would decrease African American voter participation and "demonstrat[ed] a deep-seated racial animus and desire to suppress

black votes by manipulating what issues appeared on the 2010 ballot."[3] *Id.* at *12-13.

B. Widespread Accounts Of Intentional Discrimination In Covered Jurisdictions Is Indicative Of The Continuing Need For Section 5.

A study of published lawsuits involving more than 100 instances of intentionally discriminatory acts since the last reauthorization shows that since 1982, more than half of the successful Section 2 lawsuits originated in covered jurisdictions, even though the total population in covered jurisdictions is significantly less than the population in non-covered jurisdictions. *See Oct. 18, 2005 Hearing*, at 974; *see also* H.R. Rep. 109-478, at 53. Despite the electoral progress for minority voters ushered in by Section 5, the Congressional Record revealed covered jurisdictions continue to use wide-ranging and sophisticated devices to discriminate against minority voters including, among other things, defiance, discriminatory redistricting plans, at-large elections, intimidation, and fraud.

i. Defiance

When covered jurisdictions' subtle attempts fail, the jurisdictions revert back to the "not-so-subtle attempts to maintain white control." *July*

[3]For example, Senator Beason expressed agreement with warnings that "'if [a pro-gambling] bill passes and we have a referendum in November, every black in this state will be bused to the polls.'" And, "'[e]very black, every illiterate' would be 'bused on HUD financed buses.'" *Id.* at *10.

13, 2006 Hearing, at 245. Perhaps no worse example can be found in the Record that the fact that after the devastation of Hurricane Katrina, Louisiana pushed for early special elections without seeking preclearance. Of the 442 precincts, 300 were unavailable for voting, with the majority located in African-American neighborhoods. *See Mar. 8, 2006 Hearing*, at 4. Louisiana's defiance is neither unique nor aberrant. For instance, South Dakota passed over 600 voting laws affecting the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties from 1976 to 2002 without seeking preclearance. *See May 8, 2008 Hearing*, at 172-73; H.R. Rep. 109-478, at 102. During this 26-year period, South Dakota submitted fewer than ten laws for preclearance. *Id.* Only after local Native Americans filed a lawsuit did South Dakota comply with Section 5. *Id.* The House of Representatives concluded that South Dakota's defiance negatively affected the Native American Tribes. *See Id.*

Frequently, covered jurisdictions seek to limit minority political power when it is evident that the minority group constitutes the majority in the respective region. For example, in 2002, the Mexican American Legal Defense and Educational Fund ("MALDEF") filed a Section 5 suit against the City of Segnin when the City attempted to prevent Latinos from gaining a majority in the City Council. *Oct. 25, 2005 Hearing*, at 86. The 2000

Census showed the growth in the Latino population would tip the City Council from four-four, Latino-Anglo, to five-three, Latino-Anglo. *Id.* Segnin sought to eliminate the fifth Latino district, but DOJ indicated that it would object because of the obvious retrogressive effect. *Id.* Segnin complied with DOJ, but "promptly closed the candidate filing period so no Latino could run in the election for that district." *Id.* MALDEF again sued Segnin under Section 5 and successfully secured an injunction against the rushed election timetable. *Id.* Because of Section 5, Latinos "elected their candidate of choice to a majority of seats on the Segnin City Council." *Id.*

In 1997, the City of Grenada, Mississippi conducted a special census at the behest of City officials which revealed that African Americans comprised the majority of the voting-age population. *Id.* Fueled by worry that African American voters would garner more voting power, the City went to great lengths to delay the electoral consequences of the population shift; in fact, the City did not hold any elections until compelled to do so by the Mississippi Supreme Court. *Id.* The City also defied DOJ by responding to requests with incomplete submissions—ultimately leading to a federal court granting summary judgment to the DOJ in 1998 on the City's Section 5 violation. *Id.* That same year, DOJ "blocked three actions by Grenada County in relation to the election of city council members: an

annexation, a cancellation of a general election, and a redistricting plan for the city of Grenada." *Id.* at 246. Grenada's persistent VRA violations prompted DOJ to send federal observers in the 2000 elections, contributing to the total of 171 observers in the county since 1967. *Id.*

ii. Discriminatory Redistricting Plans

Discriminatory redistricting plans seek to dilute minority voters' political influence by concentrating minorities into few districts, if not one. This technique is often referred to as "packing." Louisiana is notorious for its efforts to dilute the minority vote through packing. The majority of Louisiana's 96 Section 5 objections since 1982 have involved redistricting. *See Mar. 8, 2006 Hearing*, at 1614. After the 2000 U.S. Census, Louisiana developed new district maps as a response to a loss in population. *May 16, 2006 Hearing*, at 28. Although the African American population in New Orleans increased and the white population decreased, the Louisiana legislature chose to reduce the number of majority-African American districts and maintained the number of majority-white districts. *Id.* Because of Section 5's protections, DOJ was able to object to Louisiana's original plan and compel the state to adopt a non-discriminatory plan that reflected New Orleans's actual population loss. *Id.*

Redistricting efforts to dilute minority voting strength did not begin after the 2000 Census. In 1991, Mississippi legislators rejected redistricting plans that would have afforded minorities greater opportunity to elect representatives of their choice. *See* S. Rep. 109-295, at 14. During a debate on the House floor, one plan was referred to publicly as the "black plan," but privately as "the n-plan." *Id.* Determining that the opposition to the redistricting plan was motivated by racial discrimination, DOJ objected. *Id.* Appellant's contention that "vote dilution simply is not reliable evidence of actual voting discrimination within the meaning of the Fifteenth Amendment" is false. Appellant Br. at 10. In fact, the Mississippi example demonstrates that vote dilution is often the direct product of intentional discrimination. *See e.g., Nov. 9, 2005 Hearing*, at 54 (Joe Mack Wilson, chair of the Georgia house reapportionment committee, commenting that he did not "want to draw nigger districts").

A single DOJ objection can be critical. Take for example, a redistricting plan in Alaska's District 36. *May 10, 2006 Hearing*, at 81. District 36 represents a majority of the Native communities in the interior of the state. *Id.* In 1990, District 36 sought to alter the districting map to reduce Native American voting strength. *Id.* DOJ objected to the

redistricting, protecting the franchise for countless Native Alaskan voters. *Id.*

iii. At-Large Elections

The persistence of racially polarized voting enables jurisdictions to further their discriminatory efforts by instituting at-large elections. Prior to 2001, St. Bernard Parish's school board consisted of eleven single-member districts. *Mar. 8, 2006 Hearing*, at 1618. In 2001, the Louisiana legislature reduced the school board to five single-member districts and created two at-large seats for the school board. *Id.* Upon review, DOJ concluded the plan diluted minority voting strength because the plan eliminated the only majority-minority district. *Id.* The proposed change was not surprising considering the behavior of Senator Lynn Dean, the highest ranking public official in St. Bernard parish, who testified in a Section 2 hearing that he hears and uses the word "nigger" in the parish. *Id.*

In covered jurisdictions across the country, attempts to discriminate against and dilute minorities' right to vote are at its height when political gains are achieved. In the 1970's the South Carolina Legislature sought to institute at-large elections despite being ordered to implement single-member districts after the last poll resulted in the election of five African Americans to Charleston County's nine member school board. *May 17,*

2006 Hearing, at 23. Although a similar law for city council elections was invalidated by federal courts in *United States v. Charleston Cnty, South Carolina*, 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd* 365 F.3d 341 (4th Cir. 2004), the discriminatory law was passed. *May 17, 2006 Hearing*, at 23. Because of Section 5's protections, DOJ later intervened and objected to the law. *Id.*

iv. Intimidation

Section 5 opponents contend that "the emergency is over" and "Bull Connor is dead." *May 17, 2006 Hearing*, at 16. Such assertions overlook the continuous intimidation tactics used throughout covered jurisdictions, ranging from deliberate dissemination of misinformation to the burning of homes. The Texas Chapter of the NAACP held hearings regarding the 2000 and 2002 elections, in which various kinds of intimidation directed at blacks were reported, including the burning to the ground of the home of a campaign staff treasurer of an African American candidate for sheriff in Wharton, Texas. *March 8, 2006 Hearing*, at 298. The treasurer's husband, a former county commissioner, narrowly escaped the fire. *Id.* Shortly before the fire, the treasurer received threatening phone calls warning there would be repercussions "if she did not get that [n-word] sign out of her yard." *Id.* The events of Wharton, Texas evoke Faulkner's famous quote,

"the past is never dead, it's not even past." William Faulkner, *Requiem for a Nun* 80 (1951).

In 1993 David Dinkins, an African American, ran for re-election as Mayor of the City of New York and was met with blatant attempts of intimidation. *Oct. 18, 2005 Hearing*, at 62. On election day, white off-duty police officers were armed outside polling sites in African American neighborhoods with the intent to discourage African American voters from re-electing David Dinkins. *Id.*

Despite the Supreme Court affirming students' right to vote at Prairie View A&M University, a historically black college,[4] in 2004, the white district attorney of Waller County, Texas threatened to prosecute Prairie View students as felons if they voted in the upcoming primary election. *July 13, 2006 Hearing*, at 252. The prosecutor's bald animus prompted the local NAACP to file a lawsuit, causing him to withdraw his threats. *Id.* However, the county persisted in its discriminatory efforts by shortening the early voting period and changing the election day to occur during Prairie View's spring break. *Id.* The NAACP again filed a lawsuit claiming Section 5 violations, forcing the county to abandon its discriminatory plans. *Id.* As a result, over 300 students voted during the early voting period, and an

[4] *See Symm v. United States*, 439 U.S. 1105 (1979).

African American student won the primary election for Waller County Commissioners Court. *Id.*

The forms of intimidation vary, but all are centered on a central concept, prohibiting minorities from accessing the franchise. Congress received reports where voting officials misinformed African Americans by stating ballots were unavailable and they were not allowed to vote. *Mar. 8, 2006 Hearing*, at 306. In one case, a precinct judge told a voter she was ineligible to vote because she did not live in city limits, despite her having voted at that very precinct for 12 years. *Id.* at 307. Another voter was asked her name without being asked for identification, and was told she was ineligible to vote. *Id.* The congressional record was filled with variations of these forms of intimidation. *See Id.* at 306-07.

v. Fraud

Racial animus in covered jurisdictions is often so embedded that officials have resorted to fraud to prevent a minority candidate from winning an election. In 1994, after South Carolina House District 12 was redrawn into a majority-African American district, white incumbent Jennings McAbee defeated African American candidate Willie N. Norman, Jr. by 277 votes with the help of 1,009 votes from his home county, McCormick County. *Mar. 8, 2006 Hearing*, at 1973. A year later, McCormick County's

Clerk of Board Registration was criminally indicted for "voting early and often." *Id.*

Another example of fraudulent activity directed towards preventing the election of African Americans can be seen in Miller County in Texarkana, Texas. In 1998, Haze Hudson, an African American, ran for elected office in Miller County. *Mar. 8, 2006 Hearing*, at 3062. Hudson was in the lead by approximately six boxes of votes after nearly half the ballots were counted. *Id.* Upon receiving this information, the wife of Hudson's opponent telephoned the director of Miller County elections. *Id.* Shortly after this telephone call, an election official opened "the back of the [voting] machine and sprayed the surface with a substance to help the machine tally the votes easier," and the machine immediately shut down. *Id.* The remaining votes were overlaid with a number two pencil and Hudson lost the election by over 300 votes. *Id.*

vi. Continuing Prevalence Of Section 5 Objections

In *City of Rome*, the Supreme Court relied on Section 5 DOJ objections as evidence of the "continuing need for this preclearance mechanism." 446 U.S. at 181. In 2006 Congress received evidence of the more than 700 Section 5 objections interposed between 1982 and 2006. H.R. Rep. No. 109-478, at 21; S. Rep. No. 109-295 at 13. For instance, in 2004 the City Clerk

of Evergreen, Alabama produced an incomplete voter list, which omitted, among others, a 94-year-old African American female. *See Nov. 1, 2005 Hearing*, at 46. After being reminded of an incident in 1980 in which Section 5 requirements revealed that the city switched from single-member to at-large districts with the intent to discriminate against minority voters and Section 5's continued requirements, the City Clerk produced a new voters list. *Id.* As a result, the 2004 Evergreen Mayoral election had a 95 percent voter turnout and elected its first African American mayor. *Id.*

C. The Congressional Record Established That Section 5 Has A Powerful Deterrent Effect In Combating Widespread Intentional Discrimination In Covered Jurisdictions.

The House of Representatives found Section 5's deterrent effect substantial. H.R. Rep. No. 109-478, at 24. In fact, the House report points to a 2005 Georgia redistricting plan in which the legislature adopted resolutions requiring compliance with Section 5's non-retrogression standard. *Id.* The House concluded that "Section 5 encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process." *Id.*

Appellant characterizes DOJ's recent objection rate as minimal. *See* Appellant Br. at 10. Although the number of objection letters may appear

minimal on its face, the number of voters protected from discriminatory voting practices is not. Objection letters "since 2000 have protected 8,764 voters in Virginia, 10,518 voters in Georgia, 12,756 voters in North Carolina, 96,143 voters in South Carolina, 63,647 voters in Arizona, and 359,978 voters in Texas—totaling in 663,503 minority voters protected in a six-year time span." *May 16, 2006 Hearing*, at 58. This number is in no sense minimal. Furthermore, the number of voting change withdrawals and more information letters from DOJ illustrate the continued need for Section 5 coverage. *Id.* at 59.

Robust and integrative political gains spurred by Section 5's protections are insufficient to ensure full political participation without continued protection. For example, in Walker County, Texas, a group of African Americans and Latinos developed a politically cohesive group that elected candidates of their choice, oftentimes defeating white candidates backed by white supporters. *See July 13, 2006 Hearing*, at 252. Walker County sought to "carve[] apart" the minority coalition. DOJ objected to this change and several others including redistricting plans, voting precinct changes, polling place switching and elimination, and early voting changes in Walker County. *Id.* The DOJ concluded that the proposed changes would have a retrogressive effect on minority voting strength. *Id.* Without Section

5 protections, the gains made by the minority coalition may have disappeared altogether.

DOJ also objected to several explicitly discriminatory proposed changes. For example, after the 2000 census, DOJ rejected Albany, Georgia's redistricting plan, reasoning that while the African American population in this area had increased, the proposed plan would decrease the African American population "in order to forestall the creation of a majority black district." H.R. Rep. 107-478, at 37. Again, in 2000, DOJ rejected an annexation plan in the Town of Alabaster, Alabama that would have completely eliminated the town's only black district. *May 17, 2006 Hearing*, at 103.

In 1998, DOJ rejected a redistricting plan for Tallapoosa Alabama County's Commission, stating that the plan "impaired the ability of black voters to elect a candidate of choice in order to protect a white incumbent." *Id.* Additionally, DOJ objected to Alabama's 1992 redistricting plan stating that the fragmentation of cohesive black populations illustrated the "predisposition on the part of the state political leadership to limit black voting potential to a single district.'' *Id.*

It is undeniable that Section 5 protections provide minority voters access to the franchise, particularly where discrimination had previously

functioned as a total bar. For example, from 1965 to 2001, the town of Kilmichael, Mississippi did not elect an African American to the Board of Aldermen and only one African American ran for mayor. *May 16, 2006 Hearing*, at 60. The 2000 Census suggested that the town became majority African American with the potential to elect several members to the Aldermen board and Mayor in the next election. *Id.* The all-white council—without notifying the now-majority African American community—cancelled the general elections three weeks prior to its scheduled date. *Id.* The council stated the elections were cancelled to develop a single-member ward system, but because the cancellation was not pre-cleared the elections were reinstated. *Id.* If Section 2 were the only remedy, the discriminatory voting change would have been implemented.

The House of Representatives concluded the lodged objections between 1982 and 2004 "did not encompass minor inadvertent changes" and that "the changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." H. R. Rep. 109-478, at 21. The House further explained that the increased activity shows "attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future." *Id.* Moreover, the Senate received evidence showing that between 1965 and 1981 DOJ lodged

815 objections, and between 1982 and 2005 objections totaled 2,282. *May 16, 2006 Hearing*, at 57-58. Ms. Anita S. Earls explained that "while the percentage of submissions that were not pre-cleared may have lowered in the last twenty-five years, the number of objections has actually almost doubled from an average of fifty-one per year from 1965 to 1982 to an average of ninety-nine per year from 1982 to 2005." *Id.* at 58. Lastly, Ms. Earls referenced a recent Stanford University study found that "MIRs (More Information Requests) contributed to the deterrent effect of Section 5 by 51%." *Id.* at 59. The study also found that 13,697 MIRs and 3,120 follow-up requests were sent to covered jurisdictions between 1982 and 2005. *Id.* The number of objections, MIRS, and follow-up letters viewed in the aggregate show covered jurisdictions use evolving techniques to exclude minorities from the political process.

D. Covered Jurisdictions' Continued Disregard For Section 2 Evidences The Current Need For Section 5 And The Ineffectiveness Of Case-By-Case Litigation To Protect The Rights Of Minorities.

Section 5 remains the last, best hope for full political participation when covered jurisdictions continue to find ways to circumvent court-ordered Section 2 remedies. In 1987, a federal court ordered Mississippi to end its dual-registration system which required citizens to register separately in both the city and the county in order to vote in state, federal, and local

elections. *Mar. 8, 2006 Hearing*, at 87. The court held that the plan was discriminatory under Section 2. *Id.* In 1993, after Congress enacted the National Voter Registration Act, Mississippi sought to reenact the dual-registration system by restricting "motor-voter registrants to voting only in Federal Elections." *Id.* DOJ objected to the changes and the Supreme Court ordered Mississippi to submit the "motor-voter" plan for preclearance. *Id.* at 87-88. This example illustrates Section 5's importance in enforcing past Section 2 judgments and the continued need for federal oversight in areas with a history of discrimination.

In Elizabeth City, North Carolina, Section 5 was used to enforce a consent decree requiring the City to implement single-member districts, as opposed to at-large districts. *See NAACP v. Elizabeth City*, No. 83-39-CIV-2 (E.D.N.C. 1984); *May 16, 2006 Hearing*, at 145. The City, however, implemented a district plan featuring four single-member districts and four at-large residency districts. *Id.* DOJ objected finding the plan "would elect half the governing body 'in a manner identical to that which the decree was designed to eliminate.'" *Id.* DOJ further explained "the very features that characterized the plan abandoned by the consent decree [were] adopted over readily available alternatives that would allow some at-large representation without unnecessarily limiting the potential for African Americans to elect

representatives of their choice to office." *Id.* (internal citations omitted). Section 5 provides "a long-term guarantee that the promises made in Section 2 suits are actually implemented." *Id.*

Section 2 protections are insufficient to ensure minority access to the franchise. Section 2 litigation is time consuming, expensive, and elected officials enjoy the fruits of their fraud while the discriminatory voting practices are being litigated. *See Oct. 18, 2005 Hearing*, at 42-44. Voters seeking to challenge election laws under Section 2 must hire an attorney, engage in extensive fact-gathering, hire experts, and pay costs associated with filing a lawsuit, which can cost millions of dollars. *Id.* at 42. Furthermore, state actors are entitled to an additional benefit under Section 2 because the burden of proving discrimination lies with the private plaintiff. *Id.* at 43.

Significantly, discriminatory laws remain in effect throughout the Section 2 litigation, giving the state actor all the benefits of elected office even if the discriminatory practice is ruled unconstitutional. *Id.* Incumbents have name recognition, the ability to raise money, an established network of relationships, and a legislative record. *Id.* at 44. Section 5 prohibits the discriminator from benefiting from discriminatory practices, and also prohibits individuals from being elected in districts where they could not

have been elected originally. *Id.* Section 2, alone, cannot secure minority voting rights in covered jurisdictions because pervasive and consistent racial discrimination continues to exist.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This *amicus curiae* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and District of Columbia Circuit Rule 32(a)(7)(B) because it contains 6,718, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts. The certificate was prepared in reliance on the word count option in the tools menu of the Microsoft Office Word 2008 word-processing software program that was used to prepare this brief.

2. This *amicus curiae* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typeface requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word, 2008 in fourteen-point Times New Roman typeface.

Dated this 6th day of December, 2011.

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December 7, 2011

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. 25(d)(2), that the foregoing brief was timely filed in accordance with Fed. R. App. P. 25(a)(2)(B) with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by sending eight (8) paper copies to the Office of the Clerk on December 7, 2011.

I further certify that all other participants in the case are registered CM/ECF users and that service will be accomplished by appellate CM/ECF system.

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