No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

—v.—

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT-INTERVENORS BOBBY PIERSON, WILLIE GOLDSMITH, SR., MARY PAXTON-LEE, KENNETH DUKES, AND ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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RULE 29.6 STATEMENT

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STATEMENT

This case presents a facial challenge to Section 5 of the Voting Rights Act, a critical provision of one of this Nation's landmark civil rights laws.

A. The Statutory Framework

After "enduring nearly a century of systematic resistance to the Fifteenth Amendment," Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). For nearly fifty years, the Voting Rights Act has played a pivotal role in helping to preserve the right to vote for all Americans

Opponents of the Voting Rights Act have challenged its constitutionality since the beginning. In response to those challenges, this Court has upheld the constitutionality of the Voting Rights Act on four occasions spanning more than three decades and involving three separate extensions enacted by Congress for periods ranging from five to twenty-five years.

Katzenbach was the first in that unbroken line of decisions holding that the Voting Rights Act is a constitutionally appropriate exercise of congressional power to remedy past voting discrimination and ensure future voting equality. Both Section 2 and Section 5 of the Voting Rights Act are critical elements of the congressional scheme. Section 2 prohibits discrimination in voting and can be enforced through federal enforcement actions or private suits. 42 U.S.C. § 1973. Section 5 requires

"covered jurisdictions" to "preclear" proposed changes in their voting practices or procedures before they are implemented with either the Department of Justice or the federal district court in Washington, D.C. 42 U.S.C. § 1973c. Under Section 5, it is the State's burden to show that the proposed change has neither a retrogressive effect or a discriminatory purpose.

The preclearance requirement of Section 5 was adopted because Congress recognized that Section 2 alone was inadequate to address the ongoing pattern of voting discrimination in jurisdictions with a long history of denying racial minorities the right to vote. To carefully target the problem it meant to address, Congress created a coverage formula in Section 4(b), 42 U.S.C. § 1973b(b), to define those jurisdictions that were subject to Section 5's preclearance requirement. As originally enacted in 1965, Section 5 only applied to those jurisdictions than used a "test or device" for voting and where less that 50% of voting age residents were registered or voted in the 1964 presidential election. Congress also agreed that Section 5 would expire in five years unless renewed, assuring legislative re-examination of the ongoing need for a preclearance requirement.

In *Katzenbach*, this Court ruled that the Section 4(b) coverage formula was constitutional because it was designed "to describe these areas . . . relevant to the problem of voting discrimination." 383 U.S. at 329. The Court further observed that Congress was "entitled to infer a significant danger of the evil [of voting discrimination] in the few remaining States and political subdivisions covered by § 4(b) of the Act. No more was required to justify

the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.*

Section 5 was extended for an additional five years in 1970, and the Section 4(b) coverage formula was expanded to include the 1968 presidential election. Pub. L. No. 91-285, 84 Stat. 314, 315 (1970). The 1970 extension was upheld in *Georgia v. United States*, 411 U.S. 526 (1973). "[F]or the reasons stated at length in *South Carolina v. Katzenbach*," the Court wrote, "we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Id.* at 535.

Congress again extended Section 5 in 1975 for seven years, and expanded the Section 4(b) coverage formula to include the 1972 presidential election. Pub. L. No. 94-73, 89 Stat. 400, 401 (1975). *City of Rome v. United States*, 446 U.S. 156, 182 (1980), held that the extension was "plainly a constitutional method of enforcing the Fifteenth Amendment." In doing so, it relied upon Congress' conclusions that Section 5 "has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions," that "recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism," and that Section 5 "serves to insure that progress not be destroyed through new procedures and techniques." *Id.* at 181.

Section 5 was extended once more in 1982, this time for 25 years and without altering the coverage formula. Pub. L. No. 97-205, 96 Stat. 131 (1982). Congress, did, however, relax the standards for bailout. *See* p. 41, *infra*. The constitutionality of the 1982 extension was affirmed in *Lopez v.*

Monterey County, 525 U.S. 266, 282 (1999), where the Court noted that "we have specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States."

Most recently, in 2005 and 2006, Congress considered the need for the continuation of Section 5 and the appropriateness of the Section 4(b) coverage formula. It held 21 hearings, heard from more than 90 witnesses, and compiled a massive record of more than 15,000 pages of evidence. H.R. Rep. No. 109-478, 109th Cong., 2d Sess., at 5 (May 22, 2006); S. Rep. No. 109-295, 109th Cong., 2d Sess., at 2 (July 26, 2006). The House Committee on the Judiciary described the record it compiled as "one of the most extensive legislative records in the Committee on the Judiciary's history." H.R. Rep. No. 109-478, at 5 (2006). At the conclusion of its deliberations Congress, by a vote of 390 to 33 in the House and by a unanimous vote in the Senate, extended Section 5 and the Section 4(b) coverage formula for an additional 25 years. 152 Cong. Rec. S8012 (daily ed. July 20, 2006); 152 Cong. Rec. H5143-5207 (daily ed. July 13, 2006); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006). In doing so, Congress invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. H.R. Rep. No. 109-478, at 90 (2006).

Congress also amended Section 5 to restore the longstanding interpretation and application of Section 5 which had been abrogated by *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320 (2000)

("Bossier II"), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In *Bossier II*, the Court held for the first time that the "purpose" prong of Section 5 prohibited only voting changes that were enacted with a discriminatory *and* retrogressive purpose. 528 U.S. at 328. In 2006, Congress explained that *Bossier II's* limitation of the purpose prong was inconsistent with Congress's intent that Section 5 prevents "[v]oting changes that 'purposefully' keep minority groups 'in their place,'" as well as purposefully retrogressive voting changes. H.R. Rep. No. 109-478, at 68 (2006). *See* S. Rep. No. 109-295, at 16 (2006) (*Bossier II* gives "approval to practices that violate the Constitution"). Congress thus restored the pre-*Bossier II* definition of the purpose standard to include "any discriminatory purpose." 42 U.S.C. § 1973c(c).

In *Georgia v. Ashcroft*, the Court changed the preexisting standard for determining whether a voting change had a prohibited retrogressive effect under Section 5. Prior to *Ashcroft*, the effect standard was "'whether the ability of minority groups to participate in the political process and to elect their candidates to office is . . . diminished . . . by the change affecting voting.'" *Beer v. United States*, 425 U.S. 130, 141 (1976) (quoting H.R. Rep. No. 94-196, at 60). In *Ashcroft*, the Court approved a "totality of circumstances" analysis that included whether a minority group could "influence the election of candidates of its choice." 539 U.S. at 479. Congress concluded that the new standard introduced "substantial uncertainty" into the operation of Section 5, which was designed to protect "the effectiveness of minority political participation." H.R. Rep. No. 109-478, at 70 (2006). *See also id.*, at 68 & 70 (*Ashcroft* not only made Section 5

"unadministerable" but "would encourage States . . . to turn black and other minority voters into second class voters"); S. Rep. No. 109-295, at 18 (2006) ("the Georgia standard is unworkable. The concept of 'influence' is vague"). In order to restore the "ability to elect" standard articulated in *Beer*, Congress added the language that a voting change was objectionable under Section 5 if it diminished the ability of minorities "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b) & (d). *See* H.R. Rep. No. 109-478, at 70-1 (2006).[1]

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[1] The constitutionality of the 2006 Amendments is not before the Court. In the court of appeals, "Shelby County neither challenge[d] the constitutionality of the 2006 amendments or even argue[d] that they increase section 5's burdens." Pet. App. 66a. *See also* Pet. App. 76a ("Shelby did not argue that either of these amendments is unconstitutional") (Williams, Judge, dissenting). Thus, as the court of appeals explained, "[t]hese issues . . . are entirely unbriefed, and as we have repeatedly made clear, 'appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" Pet. App. 66a-67a (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)). Since Shelby County did not challenge the constitutionality of the 2006 amendments in the lower courts nor argue that they increased Section 5's burdens, they have waived any such arguments before this Court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below."); *United States v. Jones*, 132 S.Ct. 945, 954 (2012) ("We have no occasion to consider this argument. The Government did not raise it below, and the D.C. Circuit therefore did not address it. . .We consider the argument forfeited.").

B. The Proceedings Below

In April 2010, Shelby County sought a declaration that Sections 5 and 4(b) are facially unconstitutional and a permanent injunction against their enforcement. The district court granted summary judgment to the defendants, Pet. App. 111a-291a, and Shelby County appealed.

The court of appeals affirmed in a 2-1 opinion framed by this Court's observation in *Nw. Austin Mun. Util. Dist No. One v. Holder*, 557 U.S. 193, 203 (2009) that the constitutionality of the 2006 extension "must be justified by current needs," and that "a statute's disparate geographic coverage" requires a showing that it "is sufficiently related to the problem that it targets." Pet. App. 14a-15a. Applying the "congruence and proportionality standard" of *City of Boerne v. Flores* 521 U.S. 507 (1997), the court of appeals upheld the constitutionality of Sections 5 and 4(b).

Writing for the majority, Judge Tatel stressed that "the record contains numerous 'examples of modern' instances of racial discrimination in voting" in the covered jurisdictions relied upon by Congress in amending and extending the Act in 2006. Pet. App. 29a. That evidence included: (1) 626 DOJ objections from 1982 to 2004 to voting changes that had the purpose or effect of discriminating against minorities; (2) "more information requests" from DOJ regarding Section 5 submissions that resulted in the withdrawal or modification of over 800 potentially discriminatory voting changes; (3) 105 successful Section 5 enforcement actions brought against covered jurisdictions between 1982 and 2004; (4) 25 preclearance denials by the District Court for the

District of Columbia between 1982 and 2004; (5) 653 successful lawsuits under Section 2 of the Voting Rights Act between 1982 and 2005 providing relief from discriminatory practices in at least 825 covered counties; (6) tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions; (7) examples of "overt hostility to black voting power by those who control the electoral process;" (8) racially polarized voting; (9) evidence that Section 5 has a strong deterrent effect; (10) litigation by DOJ to enforce the minority language provision of the Act; and (11) evidence that Section 2 was an inadequate remedy for racial discrimination in voting in the covered jurisdictions. Pet. App. 24a, 29a-46a; 120 Stat. 577, Sec. 2(b).

The court of appeals then concluded: "After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference." Pet. App. 48a. *See* 120 Stat. 577, Sec. 2(b) (summarizing the findings and evidence upon which Congress relied in amending and extending the Voting Rights Act).

In his dissenting opinion, Judge Williams did "not reach the constitutionality of § 5 itself." Pet. App. 104a. He also acknowledged that "[i]t goes without question that racism persists, as evidenced by the odious examples offered by the majority." *Id.* Instead, he believed the coverage formula was "obsolete in practice." *Id.*

SUMMARY OF ARGUMENT

The decision by Congress in 2006 to reauthorize Section 5 and the corresponding coverage provisions of the Voting Rights Act was nearly unanimous, amply supported by an extensive legislative record, and just as clearly within the constitutional power of Congress as previous extensions of the Voting Rights Act that this Court has repeatedly upheld.

The legislative record that Congress compiled before voting to reauthorize Section 5 in 2006 focused on two principal questions. First, does voting discrimination remain a significant problem in the United States, despite the undeniable progress that has been made in the years since the Voting Rights Act was initially adopted? Second, does the coverage formula that Congress has devised for Section 5, including the bail-in and bailout provisions of the Act, still effectively identify those jurisdictions where voting discrimination remains an ongoing issue? Congress concluded that the answer to both questions was yes. That factual determination, endorsed by overwhelming majorities in both the House and Senate, is plainly reasonable in light of the legislative record and entitled to deference under this Court's decisions. It is Petitioner's burden to show that the time has come to overturn one of the landmark civil rights laws of the last half-century. Congress clearly felt otherwise and Shelby County has failed to provide this Court with a basis for reversing that considered judgment.

By their express terms, the Fourteenth and Fifteenth Amendments give Congress the power to enforce their provisions "by appropriate legislation."

U.S. Const. Amend. XIV, Sec. 5; U.S. Const. Amend. XV, Sec. 2. Interpreting those provisions, this Court has emphasized that the Constitution "empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Nw. Austin*, 557 U.S. at 205. And, where "Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970).

Nw. Austin stated the question that is now before the Court but it did not answer it. On the one hand, the Court explained that the extension of Section 5 "must be justified by current needs," and that "a statute's disparate geographic coverage" requires a showing that it "is sufficiently related to the problem that it targets." 557 U.S. at 203-04. On the other hand, the Court carefully noted that while there had been improvements in voting rights since passage of the Voting Rights Act in 1965, "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.*

That is precisely what the legislative record in this case demonstrates and the courts below found. Specifically, the record contains numerous examples of modern instances of racial discrimination in voting in the covered jurisdictions. Pet. App. 29a. Those examples are summarized above, *see* p. 7-8, *supra,* and more fully explained below, *see* pp. Point IB, *infra.* While there has been an increase in black elected officials in the covered jurisdictions over the last half-century, the overwhelming majority of black

elected officials have been elected from majority black districts, most of which were created as a result of Section 5 objections and Section 2 litigation. Moreover, Congress found that "gains by minority candidates remain uneven, both geographically and by level of office." H.R. Rep. No. 109-478, at 33 (2006).

In *City of Rome*, 446 U.S. at 177, the Court held "the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." Here, the persistence of intentional discrimination in the covered jurisdictions does not have to be assumed; it is established by the legislative record. As the House Committee Report concluded regarding the 1982-2006 period, "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 (2006).

The 1960s-style discrimination is less common today, but that is because Section 5 has been effective in deterring overt discrimination in voting. *See* H.R. Rep. No. 109-478, at 57 (2006) ("[d]iscrimination today is more subtle than the visible methods used in 1965"). It would be ironic in

the extreme if the effectiveness of Section 5 is now utilized as a rationale to overturn it. A fair reading of the legislative record fully supports the conclusion of Congress that without the continuation of Section 5 "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted," 120 Stat. 578, Sec. 2(b)(9), is amply supported by the legislative record. It is also reinforced by evidence of intentional racial discrimination in recent objections involving Texas, South Carolina, and Florida.

Finally, the bailout provision of Section 5 reduces the possibilities of over-inclusiveness and helps ensure that Congress' means are proportionate to its ends. As of May 9, 2012, 136 jurisdictions had bailed out under a liberalized bailout system by demonstrating that they no longer discriminated in voting. Pet. App. 62a. The bailed-out jurisdictions included 30 counties, 79 towns and cities, 21 school boards, and six utility or sanitary districts. In addition, the Attorney General is actively considering more than 100 additional jurisdictions for bailout. Pet. App. 63a.

Conversely, the availability of bail-in addresses the potential under-inclusiveness of the coverage formula and the possibility that jurisdictions that are in fact engaging in systemic voting discrimination may not be covered by the Section 4(b) formula. Two non-covered states, Arkansas and New Mexico, were subjected to partial preclearance under the bail-in provision, as well as jurisdictions in California, Colorado, Florida, Illinois, Nebraska, New Mexico, New York, South Dakota, and the city of Chattanooga. Pet. App. 61a-62a; J.A.

141a-143a. The legislative record shows that the Section 4(b) formula, together with the statute's provisions for bail-in and bailout, continues to single out the jurisdictions in which discrimination is concentrated. Pet. App. 65a.

ARGUMENT

I. CONGRESS PROPERLY EXERCISED ITS CONSTITUTIONAL AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS WHEN IT REAUTHORIZED THE VOTING RIGHTS ACT IN 2006.

The Fourteenth and Fifteenth Amendments expressly grant Congress the power to enforce their provisions "by appropriate legislation." U.S. Const. Amend. XIV, Sec. 5; U.S. Const. Amend. XV, Sec. 2. As this Court has emphasized, the Constitution "empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Nw. Austin*, 557 U.S. at 205. *See also Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (the "appropriate legislation" clause "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"); *Tennessee v. Lane*, 541 U.S. 509, 519 n.4 (2004) ("measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States"); *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (where "Congress attempts to remedy racial discrimination under its enforcement powers, its authority is

enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments"); *City of Boerne*, 521 U.S. at 535 (when Congress exercises its enforcement authority under the Reconstruction Amendments its judgments about "what legislation is needed . . . are entitled to much deference").

"[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin*, 557 U.S. at 205 (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). In this instance, Congress acted well within its powers to enforce the Fourteenth and Fifteenth Amendments by reauthorizing Section 5 and the coverage formula in 2006 as a remedy for discrimination against racial and language minorities in voting. Its nearly unanimous decision to maintain the preclearance requirement for covered jurisdictions and those that might be bailed-in is fully supported by the extensive legislative record it compiled.

A. The Standard Of Review

In *Nw. Austin,* 557 U.S. at 204*,* this Court considered whether a challenge to the constitutionality of Section 5 should be resolved using: (1) the "rational means" standard applied in *South Carolina v. Katzenbach,* 383 U.S. at 324 ("Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting"); or (2) the "congruence and proportionality standard" applied in *City of Boerne*, 521 U.S. at 520, 530. The Court's holding that the municipal utility district was entitled to a statutory bailout from Section 5 coverage made it unnecessary to resolve

which constitutional standard applied. The Court nonetheless observed that the constitutionality of Section 5 "must be justified by current needs" in any future inquiry, and that the Act's "disparate geographic coverage" requires a showing that it "is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203.

At the same time, the Court was careful not to prejudge the outcome of that inquiry. While noting the progress that has been made since 1965 in voting rights, the Court carefully cautioned: "It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.*

Indeed, that was the finding of the district court in *Nw. Austin*, which concluded that the legislative record before Congress in 2006 "document[ed] contemporary racial discrimination in covered states" and that section 5 prevents discriminatory voting changes by "quietly but effectively deterring discriminatory changes." *Id.* at 205. The lower courts in this case reached the same conclusion.

Section 5 is therefore constitutional under any of the standards of review that this Court has articulated for statutes enacted pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendment. Applying the standard announced by this Court in *Nw. Austin*, the extension of Section 5 in 2006 was plainly justified by current needs as set forth in the legislative record, and the statute's coverage formula targets those jurisdictions where minority voting strength remains most vulnerable in the present day.

B. The Legislative Record Convincingly Establishes That Voting Discrimination Is An Ongoing Problem In The Covered Jurisdictions

The legislative record that Congress compiled before voting to reauthorize Section 5 in 2006 was voluminous, to say the least. *See* p. 4, *supra*. As the court of appeals found, it is a record replete with "examples of modern" voting discrimination in the covered jurisdictions. Pet. App. 29a. It is also a record that documents the persistence of voting discrimination in multiple and reinforcing ways. 120 Stat. 577, Sec. 2(b).

i. Section 5 Objections

In considering whether to reauthorize the preclearance provisions of Section 5, Congress understandably looked to the number of Section 5 objections by the Department of Justice in covered jurisdictions. 120 Stat. 577, Sec. 2(b)(4)(A). The sheer number of Section 5 objections documented in the legislative record offers powerful evidence of the continued need for Section 5, whether measured absolutely or comparatively. Since 1982, the Department of Justice has objected to more than 700 voting changes that were determined to be discriminatory, thus preventing them from being enforced by the covered jurisdictions. H.R. Rep. 109-478, at 21 (2006). To place that number in historical perspective, there were more DOJ Section 5 objections between August 1982 and 2004 (626) than between 1965 and the 1982 reauthorization (490), and nine of the covered states received more objections after 1982 than before. Pet. App. 32a;

Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 109th Cong., 2d Sess., Vol. 1, at 172, 259 (March 8, 2006) ("House Hearing, Evidence of Continued Need") (report of National Commission on the Voting Rights Act). The average number of objections per year has remained fairly constant. Pet. App. 34a. H.R. Rep. No. 109-478, at 22 (2006).

The basis for those objections also helps to illuminate the ongoing problem of voting discrimination revealed by the legislative fact-finding. Among the recent voting changes blocked by the statute that Congress reviewed were: state restrictions on registration and voting; discriminatory annexations and deannexations; discriminatory redistricting; voter purges; adoption of at-large elections; high school diploma requirements for holding office; consolidations; anti-single shot provisions; majority vote requirements; re-registration procedures; numbered post requirements; abolition of elected offices; residency requirements; staggered terms; the elimination or relocation of polling places; changing elections from single member districts to at-large voting; and dual registration requirements. H.R. Rep. 109-478, at 36 (2006); Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose, Hearing before the Subcommittee on the Judiciary, House of Representatives, 109th Cong., 1st Sess., Vol. I, at 10104-224 (October 25, 2005) ("House Hearing, History, Scope, and Purpose") (complete list

of Section 5 objections through October 17, 2005).[2]

Many of these objections were based on substantial evidence of purposeful discrimination. From 1980 to 2004, the Attorney General issued objection letters blocking 423 voting changes that appeared to be intentionally discriminatory. Voting Rights Act: Section 5 - Preclearance Standards, Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, House of Representatives, 109th Cong.,

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[2] Since the extension of Section 5 in 1982, DOJ has objected to 46 Section 5 submissions from Alabama, seven from the state and 39 from local jurisdictions. Many of the objections were based upon evidence of purposeful discrimination. House Hearing, History, Scope, and Purpose, Vol. I, at 264, 267, 275, 333, 321, 350, 415, 435 (2005); Senate Hearing, Legislative Options, 109th Cong., 2d Sess., at 383-84 (2006) (Voting Rights in Alabama 1982-2006, report of RenewtheVRA.org). On March 27, 1992, for example, DOJ objected to the congressional redistricting plan enacted by the Alabama legislature on the grounds that the fragmentation of black population concentrations in the state was evidence of "a predisposition on the part of the state political leadership to limit black voting potential to a single district." Senate Hearing, Legislative Options, 109th Cong. 2d Sess., at 384 (2006); House Hearing, History, Scope, and Purpose, Vol. I, at 385 (2005). DOJ further found that: "In light of the prevailing pattern of racially polarized voting throughout the state, it does not appear that black voters are likely to have a realistic opportunity to elect a candidate of their choice in any of the [remaining] districts." *Id.* In *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), to cite another example, the Court affirmed the district court's denial of Section 5 preclearance to two annexations by the City of Pleasant Grove, Alabama, on the grounds that the city had engaged in a racially selective annexation policy. The Court found it "quite plausible to see appellant's annexation[s] . . . as motivated, in part, by the impermissible purpose of minimizing future black voting strength." *Id.* at 471-72.

1st Sess., at 180 tbl. 2 (November 1, 2005) ("House Hearing, Preclearance Standards") (Peyton McCrary, et al.); Pet. App. 33a. As recently as the 1990s, 43% of all objections were based on intent alone, while another 31% were based on a combination of intent and effect. House Hearing, Preclearance Standards, at 136 (2005). *See also Northwest Austin Municipal Utility District Number One v. Mukasey*, 573 F.Supp.2d 221, 252 (D.D.C. 2008), *rev'd and remanded on other grounds sub nom. Nw. Austin*, 557 U.S. at 211. Congress found that "such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21 (2006).

These Section 5 objections, coupled with findings in Section 2 litigation, document the existence of continued intentional discrimination in the covered jurisdictions. *See* House Hearing, Evidence of Continued Need, Vol. I, at 31-3 (2006) (statement of Nadine Strossen, President, American Civil Liberties Union). And, as the House Committee Report concluded regarding the 1982-2006 period, "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans;[3] switching offices

[3] In Georgia, for example, the Chairman of the House Reapportionment Committee told his colleagues on numerous occasions that "I don't want to draw nigger districts." H.R. Rep. No. 109-478, at 67 (2006) (quoting *Busbee v. Smith*, 549 F.Supp. 494, 501 (D.D.C. 1982)). The court in *Busbee* made a specific finding that the Chairman "is a racist." *Id.* at 500. In

from elected to appointed positions; relocating polling places; enacting discriminatory annexations and de-annexations; 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 (2006).

Such 1960s-style discrimination may be less common today than it was in the past, but that is because Section 5 has been effective in deterring overt discrimination in voting. *See* H.R. Rep. No. 109-478, at 57 (2006) ("[d]iscrimination today is more subtle than the visible methods used in 1965"). Given Shelby County's logic, Congress could only reauthorize Sections 5 and 4(b) based upon findings that they had been ineffective. But the fact that Sections 5 and 4(b) have been effective supports, rather than undermines, their appropriateness as a remedy.

Citing *Miller v. Johnson*, 515 U.S. 900, 917 (1995), Shelby County attempts to undermine the relevance of Section 5 objections based upon discriminatory intent by claiming they could have been based on "the Attorney General's mistaken interpretation" of what constitutes a constitutional violation. Pet. Br. at 35. But since the decision in *Miller v. Johnson*, there have been no decisions of this Court invalidating an objection by the Department of Justice to a voting change on the grounds that it was based upon a mistaken interpretation of the Constitution. Section 5 is not

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Mississippi, a plan that would have increased the number of majority black districts was also referred to as the "nigger plan." Pet. App. 31a.

being administered in an unconstitutional manner by the Department of Justice.

Shelby County also argues that the decline in the "'number and nature' of Section 5 objections. . . further confirms that a prior restraint is unnecessary." Pet. Br. at 29. However, in making that claim, Shelby County fails to take into account the impact *Bossier II* had on Section 5 objections. Although there were in fact a significant number of Section 5 objections after 1982, *Bossier II* had the effect of allowing preclearance of changes that would have been objected to under the preexisting standard. *Bossier II* held that the purpose prong of Section 5 "covers only retrogressive dilution." 528 U.S. at 328. Thus, a voting change adopted with an admittedly discriminatory purpose would not be objectionable under Section 5 unless it was adopted with the purpose of making minority voters worse off than they were under the preexisting system.

The legislative history contains a comprehensive study of Section 5 objections, one of whose authors, Peyton McCrary, is an employee of the Voting Section of the Department of Justice. The "principal finding" of the study was:

> [B]y the 1990s, the purpose prong of Section 5 had become the dominant legal basis for objections. Almost half (45 percent) of all objections were based on purpose alone. If we include objections based both on purpose and retrogressive effect, and those based both on purpose and Section 2, the Department's finding of discriminatory purpose was present in 78 percent of all

> decisions to interpose objections in the decade preceding *Bossier II*.

House Hearing, Preclearance Standards, at 177 (2005) (McCrary, Seaman & Valelly "The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act"). As Congress concluded, "[t]he effectiveness of the Voting Rights Act or 1965 has been significantly weakened by the United States Supreme Court decision[] in Reno v. Bossier Parish II." 120 Stat. 577, Sec 2(b)(6).

The McCrary report further concluded that "a purpose finding was present in an astonishing 89 percent of all redistricting objections" in the 1990s. House Hearing, Preclearance Standards, at 177 (2005). The decline in objections over the past decade can be laid in large measure to the limitation on objections imposed by *Bossier II*, rather than a decline in discriminatory behavior by covered jurisdictions or a decline in the need for Section 5.

ii. Requests for More Information

Congress also relied upon "more information requests" (MIRs) by the Department of Justice as evidence of the continued need for Section 5 in the covered jurisdictions. 120 Stat. 577, Sec. 2(b)(4)(A). MIRs resulted in the modification of more than 800 proposed voting changes or their withdrawal from consideration. H.R. Rep. No. 109-478, at 40-1 & n.92 (2006).

A study included in the legislative history found that MIRs advanced two significant goals. First, since MIRs "are issued at far higher rates than are letters of objection . . . they have the potential to

affect a wider range and larger number of changes, relative to objections, submitted to the DOJ for review." House Hearing, Evidence of Continued Need, Vol. II, at 2555 (2006) (Luis Ricardo Fraga and Maria Lizet Ocampo, "More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act"). Second, "the impact of MIRs that were likely to serve as deterrents to the pursuit of procedures and practices that could have a discriminatory effect on African Americans and language minorities demonstrates that MIRs double the number of changes that did not have legal standing to be implemented under Section 5." *Id.* at 255-26.

iii. Section 5 Enforcement Actions

The number of Section 5 enforcement actions provided Congress with additional evidence of the continued need for Section 5 in the covered jurisdictions. 120 Stat. 577, Sec. 2(b)(4)(A). Section 5 enforcement actions have blocked implementation of an extraordinary array of devices that would otherwise have diluted minority voting strength. From 1982 to 2004, plaintiffs succeeded in 105 enforcement actions against jurisdictions that had failed to comply with Section 5. Twenty-two of these successful actions were filed in Alabama alone, the second highest state total. House Hearing, Evidence of Continued Need, Vol. I, at 250 tbl. 4 (2006) (data compiled by the National Commission on the Voting Rights Act). Congress properly cited enforcement actions as "[e]vidence of continued discrimination" in extending Section 5. 120 Stat. 577, Sec. 2(b)(4).

iv. Denials of Preclearance by the D.C. District Court

In addition to objections by DOJ, Congress found "[e]vidence of continued discrimination "based upon "the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia." 120 Stat. 580, Sec. 2(b)(4)(B). During the post-1982 period, 25 requests for judicial preclearance of voting changes were either denied because the submitting jurisdiction failed to carry its burden of proof of no discriminatory purpose or effect, or were withdrawn. House Hearing, Evidence of Continued Need, Vol.1, at 197, 270 (2006) (report of National Commission on the Voting Rights Act). These judicial preclearance actions further document the current need for Section 5 and the important role it continues to play in the covered jurisdictions.

v. Section 2 Litigation

The evidence before Congress showed that of the 114 *published* Section 2 decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing before the Subcommittee on the Judiciary, House of Representatives, 109th Cong., 1st Sess., at 974 (October 18, 2005) ("House Hearing, Impact and Effectiveness"); *see also* H.R. Rep. No. 109-478, at 53 (2006); Pet. App. 49a; J.A. 51a. While the covered jurisdictions contained less than 25% of the country's population, they accounted for 56% of successful Section 2 litigation since 1982. *Id.;* J.A. 48a, 51a. Aside from the number of favorable

outcomes, there was a higher success rate for Section 2 litigation in the covered than in the non-covered jurisdictions. In the covered jurisdictions, 40.5% of published Section 2 decisions resulted in favorable outcomes for plaintiffs, compared to only 30% in non-covered jurisdictions. House Hearing, Impact and Effectiveness, at 974 (2005).

The differences in covered and non-covered jurisdictions is even more pronounced when *unpublished* Section 2 cases are taken into account. According to data compiled by the National Commission on the Voting Rights Act and Department of Justice historian Peyton McCrary, there have been at least 686 unpublished successful Section 2 cases since 1982, amounting to a total of some 800 published and unpublished cases with favorable outcomes for minority voters. Of these, 651 (81%) were filed in covered jurisdictions. Pet. App. 51a; J.A. 51a. Of the eight states with the highest number of successful Section 2 cases per million residents (Alabama, Mississippi, Arkansas, Texas, South Carolina, Georgia, and the covered jurisdictions of South Dakota and North Carolina), all but one was covered in whole or in part. The only exception was Arkansas. Pet. App. 51a-52a. While it was not covered by Section 4(b), Arkansas was bailed-in to Section 5 coverage in 1990 by a court order requiring it to preclear its house and senate redistricting plans following the 1990 census. *See Jeffers v. Clinton*, 740 F.Supp. 585, 601-02 (E.D. Ark. 1990).

Alabama had 192 successful Section 2 cases, Georgia had 69, Louisiana had 17, Mississippi had 67, North Carolina had 52, South Carolina had 33,

Texas had 206, and Virginia had 15. House Hearing, Evidence of Continued Need, at 251 tbl.5 (2006); J.A.147a-148a. Of the uncovered states, 13 had no successful Section 2 cases, six had only one, five had only two, two had only three, and two had only four. Other than Arkansas, the only state with more than 10 successful Section cases was Illinois, which had 11. J.A. 149a-150a. As Dr. McCrary concluded: "examining the pattern of outcomes in Section 2 litigation broken down by states - and by county within partially covered states - reinforces the assessment that the coverage formula set forth in Section 4(b) of the Voting Rights Act targets those areas of the country where racial discrimination affecting voting is most concentrated." J.A. 155a.

As further appears from the legislative history, decisions since 1982 have found numerous and ongoing examples of intentional discrimination in Alabama at the state and local levels. Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry, Senate, 109th Cong., 2d Sess., at 372 (July 13, 2006) ("Legislative Options"), Congress concluded that the need for Section 5 was evident from "the continued filing of section 2 cases that originated in covered jurisdictions," many of which resulted in findings of intentional discrimination. 120 Stat. 577, Sec. 2(b)(4)&(5). The disproportionate number of successful Section 2 suits in covered jurisdictions is even more significant given that Section 5 blocks and deters discrimination in the covered jurisdictions, and one would expect to see fewer Section 2 cases there.

Shelby County argues that "the McCrary declaration should never have been accepted" because Section 5's "constitutionality must be measured against the legislative record alone." Pet. Br. at 53. The National Commission compiled data on unreported cases in the covered jurisdictions, which was included in the legislative record. The data on the unreported cases in the non-covered jurisdictions was compiled by Dr. McCrary. Pet. App. 54a. While Dr. McCrary's declaration was not included in the legislative record, evidence concerning 61 of the 99 settlements he "found in non-covered jurisdictions (62%) was on the record considered by Congress in adopting the 2006 Reauthorization Act." Pet. App. 54a; J.A. 46a-47a.

It was appropriate for the court of appeals to consider the McCrary data. First, as the court found, "a majority of the unpublished cases from non-covered jurisdictions (as well as all from covered jurisdictions) appears in the legislative record." Pet. App. 54a. Second, evidence developed after an act has been enacted and implemented, known as "post-enactment evidence," is admissible and relevant in determining the constitutionality of the act.

In *Tennessee v. Lane*, 541 U.S. at 524-25 nn. 6-9 &13, for example, the Court relied upon evidence consisting of articles and cases published ten or more years after the Act's enactment, as well as recent versions of statutes and regulations, in upholding the constitutionality of Title II of the Americans with Disabilities Act of 1990. The court of appeals in this case properly relied upon *Tennessee v. Lane* in taking into account the report prepared by Dr. McCrary of unpublished cases in non-covered jurisdictions

because it "corroborates the disparities in the level of discrimination between covered and non-covered jurisdictions revealed by the published data." Pet. App. 54a-55a. *Also see Bartnicki v. Vopper*, 523 U.S. 514, 531 n.17 (2001) (relying upon "post-enactment evidence," *i.e.*, the disclosure of the identities of persons responsible for the interception of electronic communications, as undermining the argument that federal and state laws prohibiting disclosure of such communications promoted the purposes of the First Amendment).[4] Third, Shelby County itself relies upon post-enactment evidence to support its argument that preclearance is "difficult to secure." Pet. Br. at 26 (citing *Texas v. United States*, 831 F.Supp.2d 244 (D.D.C. 2011), which denied the state's motion for summary judgment seeking preclearance of its redistricting plans). Evidence compiled since the 2006 extension of Section 5 is relevant in determining its constitutionality.

vi. The Use Of Federal Observers

Congress concluded that the need for Section 5 was also evident from "the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions." 120 Stat. 577, Sec. 2(b)(4)&(5). Since 1982, the Attorney General has assigned between 300 and 600 observers each year. H.R. Rep. No. 109-478, at 44 (2006).

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[4] Circuit court decisions are to the same effect. *See, e.g.*, *Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 410-11 (5th Cir. 2007); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000); *Engineering Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895, 911 (11th Cir. 1997); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993).

Congress found that federal observers were certified by the Attorney General "only when there is a reasonable belief that minority citizens are at risk of being disenfranchised," often through "harassment and intimidation inside polling locations." *Id.* Five of the six states originally covered by Section 5 - Louisiana, Georgia, Alabama, South Carolina, and Mississippi - accounted for about 66% of all the observer coverages since 1982. *Id.* at 24-5. As Congress found, "[o]bservers have played a critical role preventing and deterring 14th and 15th amendment violations by communicating to the Department of Justice any allegedly discriminatory conduct for further investigation." H.R. Rep. No. 109-478, at 25 (2006).

vii. Continued Racial Bloc Voting

When it reauthorized Section 5 in 2006, Congress expressly found that "the continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." 120 Stat. 577, Sec. 2(b)(3). Indeed, the House Judiciary Committee concluded that racial bloc voting was "the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process." H.R. Rep. No. 109-478, at 34 (2006).

The courts, like Congress, have long recognized the relevance of racial bloc voting in making preclearance determinations under Section

5. In *City of Rome*, 446 U.S. at 183, for example, the Court affirmed the denial of preclearance to various voting changes after concluding that the lower court had correctly held "that the electoral changes . . . when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system, would dilute Negro voting strength." Other decisions are to the same effect. *See City of Port Arthur v. United States*, 459 U.S. 159, 163 (1982) (affirming a denial of preclearance on the grounds, *inter alia*, of "severe racial bloc voting" in the jurisdiction); *Busbee v. Smith*, 549 F.Supp. 494, 499 (D.D.C. 1982) (denying preclearance to Georgia's 1980 congressional redistricting after finding, *inter alia*, "racially polarized voting"), *judg. aff'd*, 459 U.S. 1166 (1983). Racial bloc voting is not itself a violation of Section 5, but the existence of racial bloc voting can be critical in determining whether a proposed voting change has the purpose or effect of abridging minority voting strength.

Similarly, racial bloc voting is one of the factors identified in the Senate Report that accompanied the 1982 amendment and extension of the Voting Rights Act as probative evidence of vote dilution under Section 2. *See* S. Rep. No. 97-417, 97th Cong. 2d Sess. at 28-9 (May 27, 1982) (listing the "Senate factors"). As the Court explained in *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." By the same token, in assessing the impact of a voting change under Section 5, it is entirely reasonable to take into

account the conditions under which the change would be implemented and how it would interact with social and historical conditions, including racially polarized voting, in the covered jurisdictions.

The consideration of social and historic conditions in enacting legislation to enforce the Fourteenth and Fifteenth Amendments is not unique to Section 5 of the Voting Rights Act. In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730-31 (2003), the Court noted that Congress relied heavily upon evidence of employment practices in the private sector in sustaining the constitutionality of a challenged provision of the Family and Medical Leave Act..

Shelby County acknowledges that racially polarized voting may be relevant to proving vote dilution but argues that evidence of vote dilution cannot be used to justify Section 5. Pet. Br. at 19, 32. The distinction that Shelby County would like to draw between first-generation voting discrimination and second-generation voting discrimination is one that both this Court and Congress have properly rejected. For example, in *City of Rome*, this Court sustained the 1975 reauthorization of Section 5 based in part on Congress' finding that "[a]s registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength." 446 U.S. at 181. *See also Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969)("[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot);" *Georgia v. United States*, 411 U.S. at 534 (redistricting plans "have the potential for diluting

the value of the Negro vote and are within the definitional terms of § 5"). Although vote dilution may be a more subtle form of voting discrimination than vote denial, Congress has recognized that its "effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." H.R. Rep. No. 109-478, at 6 (2006).

viii. The Deterrent Effect of Section 5

In reauthorizing Section 5, Congress described preclearance as a "vital prophylactic tool" and concluded that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21, 24 (2006). More specifically, Congress found that "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes is the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24. The court of appeals properly declined to "second guess" that congressional finding, which was based on abundant evidence in the legislative record that Section 5 had a strong deterrent effect. Pet. App. 44a. *See Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (courts "are not at liberty to second-guess congressional determinations and policy judgments"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("courts must accord substantial deference to the predictive judgments of Congress"); *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (noting "the heavy presumption of constitutionality to which a 'carefully

considered decision of a coequal and representative branch of Government' is entitled").

The deterrent effect of Section 5 was not, of course, the only basis for its extension. Instead, and as noted above, Congress relied upon a variety of other factors, *e.g.*, Section 5 objections, Section 2 litigation, successful Section 5 enforcement actions, unsuccessful judicial preclearance actions, the use of MIRs, racially polarized voting, etc. Pet. App. 24a, 44a. Congress never took the position, as asserted by Shelby County, that the deterrent effect of Section 5 standing alone would justify its extension "to the crack of doom." Pet. Br. at 39 (quoting Williams, J., dissenting).

C. The Constitutional Validity of the Voting Rights Act Is Not Undermined By Advances In Voting Equality Since 1965.

Both sides in this case agree that the Voting Rights Act has been a success. Shelby County views that success as evidence that Section 5 has outlived its usefulness. Congress saw that success as evidence that Section 5 could continue to play a critical role in helping to address the ongoing problem of voter discrimination. Shelby County offers three arguments in response, none of which can withstand scrutiny

1. Shelby County argues that "Section 4(b)'s formula is no longer an 'appropriate' means of determining the jurisdictions that should be subject to coverage," Pet. Br. at 40, because the rates of minority registration and voting in the covered jurisdictions "now approach parity." *Id.* at 41. That

is, at best, a misleading picture.

Congress examined this question in 2006 and found significant disparities in registration and turnout between minorities and non-minorities in several jurisdictions covered by Section 5. In Virginia, for example, Congress reported that in 2004 the black voter registration rate was about 11% behind the rate for whites, with only 49% of blacks turning out to vote compared to 63% of whites. H.R. Rep. No. 109-478, at 25 (2006). In Texas, Congress found a 20% gap in registration between whites and Hispanics with a greater gap in voter registration. *Id.* at 29; S. Rep. No. 109-295, at 11 (2006). Moreover, these statistics understate the true disparities because in computing them Congress counted Hispanics as whites. Pet. App. 200a. Given the low registration and turnout rates of Hispanics, their inclusion in the "white" category reduced the actual disparity between black and white registration and turnout, as well as the disparity between Hispanic and white registration and turnout. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J.174, 197 (2007) ("once Hispanics are taken out of the white category the picture changes considerably").

Congress reported that in five of the 16 states covered in whole or part by § 4(b) - California, Georgia, Mississippi, North Carolina, and Texas - black voter registration and turnout was higher among blacks than whites. Pet. App. 200a-201a; S. Rep. No. 109-295, at 11 (2006). But when registration and turnout rates for blacks are compared to the rates for non-Hispanic whites, only

one of these states (Mississippi) had higher registration and turnout rates for blacks. As the court of appeals held: "Aside from North Carolina, Alabama, and Mississippi, all of the remaining 14 states covered in whole or in part by Section 4(b) had lower voter registration *and* turnout rates for blacks. than for non-Hispanic whites." Pet. App. 201a n.12.

These disparities may be less today than they were in the past, but progress toward the goal of voting equality that Section 5 was meant to achieve is not the same as reaching that goal. It would be inconsistent with that purpose to conclude that the partial amelioration of voting discrimination in the covered jurisdictions now renders Section 4(b) unconstitutional. Sections 5 and 4(b) were designed to banish, not merely to ameliorate, the blight of racial discrimination in voting.

In addition, there is a correlation between inclusion in Section 4(b)'s coverage formula and numerous other factors showing the continuing need for Section 5 and justifying its extension in 2006. In reauthorizing Section 5 in 1975, "Congress acknowledged that largely as a result of the Act, Negro voter registration had improved dramatically since 1965. H.R. Rep. 109-478 at 6; S. Rep. 109-295 at 13. Congress determined, however, that 'a bleaker side of the picture yet exists.'" *City of Rome,* 446 U.S. at 180. The legislative history of the 2006 extension of Section 5 demonstrates that "a bleaker side of the picture" continues to exist, *see* Point IB, *supra,* and that there was ample basis for Congress to conclude that that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the

opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 120 Stat. 577, Sec. 2(b)(9). As the court of appeals held, Section 4(b) "continues to identify the jurisdictions with the worst problems." Pet. App. 57a.

2. Next, Shelby County argues that the increase in black elected officials in the covered jurisdictions is further proof that the preclearance requirement is no longer needed. Just the opposite is true. The overwhelming majority of black officials have been elected from majority black districts, most of which were created as a result of Section 5 objections and Section 2 litigation. As Congress found, in 2000 only 8% of African Americans were elected from majority white districts. Language minority citizens fared much worse. As of 2000, no Native Americans or Hispanics had been elected to office from a majority white district. H.R. Rep. No. 109-478, at 34 (2006).

In Alabama, two African Americans who were initially appointed to the state Supreme Court were defeated in 2000 by white opponents. Every African American member of the Alabama Legislature was elected from a single member district with an effective black voter majority. House Hearing, History, Scope, and Purpose, Vol. II, at 3199 (2005) (statement of James U. Blacksher). *See also* James U. Blacksher, et al., *Voting Rights in Alabama:1982-2006*, 17 So. Cal. Rev. Law & Soc. Just. 249, at 249 (2008)("voting remains largely racially polarized, and black candidates rarely are elected in majority-white districts"). And most of the majority black districts had to be ordered by federal courts. *Id.* at 260. *et seq.*

Congress also found that "gains by minority candidates remain uneven, both geographically and by level of office." *Id.* at 33. In three of the six originally covered states - Mississippi, Louisiana, and South Carolina - no African American had ever been elected to state-wide office. *Id.*; Pet. App 23a. The House committee further reported that African Americans accounted for only 21% of state legislators in six southern states where the black population averaged 35% - Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina. H.R. Rep. No. 109-478, at 33 (2006). In addition, the committee found that the number of Latinos and Asian Americans elected to office nationwide "has failed to keep pace with [the] population growth" of those two communities. *Id.*

3. Finally, Shelby County argues that preclearance under Section 5 is no longer necessary because the ongoing problems of voting discrimination can now be adequately addressed through Section 2 litigation initiated after discriminatory voting changes have gone into effect. Congress found otherwise, stating in 2006 that the "failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action." H.R. Rep. No. 109-478, at 57 (2006).

This conclusion was based on extensive testimony that Section 2 litigation places the burden of proof on the victims of discrimination rather than its perpetrators, imposes a heavy financial burden on minority plaintiffs, is heavily work-intensive, cannot prevent enactment of discriminatory voting

measures, and allows discriminatorily elected officials to remain in office for years until litigation is concluded. Pet. App. 45a-46a. *See*, *e.g.*, House Hearing, History, Scope, and Purpose, Vol. I, at 92, 97, 101 (2005) (testimony of Nina Perales); id. at 79, 83-84 (testimony of Anita Earls); House Hearing, Evidence of Continued Need, Vol. 1, at 97 (2006) (testimony of Joe Rogers). A Federal Judicial Center study found that voting cases required nearly four times more work than the average district court case and ranked as the fifth most work-intensive of the 63 types of cases analyzed. Pet. App. 45a.[5]

In *Katzenbach*, the Court stressed that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." 383 U.S. at 328; *see also id.* at 313-15 (explaining why case-by-case litigation had "proved ineffective"). *City of Rome* also found that "[c]ase-by-case adjudication had proved too ponderous a method to remedy voting discrimination." 446 U.S. at 174. *Accord*, *Boerne*, 521 U.S. at 526 (Section 5 was "deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly

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[5] In *Large v. Fremont County, Wyo.*, 709 F.Supp.2d 1176 (D. Wyo. 2010), for example, plaintiffs filed their Section 2 complaint in October 2005, but did not get a decision on the merits until April 2010, some five years later. In *Levy v. Lexington County, South Carolina*, 589 F.3d 708 (4th Cir. 2009), the plaintiffs filed their Section 2 complaint in September 2003, but did not get a decision on the merits until February 2009, which was subsequently vacated and remanded for consideration of two intervening election cycles.

character of case-by-case litigation"); *Georgia v. United States*, 411 U.S. at 538 n.9 ("[t]he very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting"). The Court relied on similar findings in *Tennessee v. Lane*, 541 U.S. at 531, to sustain the constitutionality of a challenged statute: "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" (alteration in original) (quoting *Hibbs*, 538 U.S. at 737).

Despite these legislative findings, Shelby County contends that Section 2 is an effective remedy because "'plaintiffs' costs for § 2 suits can in effect be assumed by' the Department of Justice." Pet. Br. at 15 (citing Williams, J., dissenting). The evidence shows, however, that the burdens and costs of Section 2 litigation have been borne primarily by private plaintiffs, and not the Department of Justice. According to one report: "The vast bulk of section 2 actions were brought by minority plaintiffs, often acting through civil rights or civil liberties organizations. Within the eight states covered by our study, section 2 litigation brought solely by the Department of Justice played only a minor role in effecting changes in local election systems." Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 81 (C. Davidson et al. eds., Princeton Univ. Press 1994). Another report shows that from 1977 through 2004 of the 5,348 voting rights cases filed in U.S. District Courts, 5,100 (95.4%) were filed by private parties, with only 248

(4.6%) filed by the Department of Justice. Daniel McCool, Susan M. Olson, & Jennifer L. Robinson, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 39 (Cambridge Univ. Press 2007). The role of the Department of Justice in bringing Section 2 suits in covered jurisdictions has not improved. Since the 2006 extension of Section 5, the Department of Justice has brought only one Section 2 suit in a covered jurisdiction, a school district in Georgetown County, South Carolina. *See* http://www.justice.gov/crt/about/vot/litigation/recent_sec2 (last visited January 23, 2012).

D. The Bailout and Bail-In Provisions of the Voting Rights Act Reinforce the Constitutionality of the Coverage Formula

Shelby County portrays the coverage formula as in inflexible rule that cannot adjust to changing circumstances. It is not. Jurisdictions initially subject to preclearance under Section 4(b) can "bailout" by demonstrating that they no longer engage in voting discrimination. Jurisdictions that were not initially subject to preclearance based on their history can be "bailed-in" by engaging in discriminatory behavior. These statutory adjustment mechanisms are designed to "ensure [that] Congress' means are proportionate to [its] ends," *Boerne,* 521 U.S. at 533, and must be considered in any constitutional evaluation of Section 5. The court of appeals did precisely that, explaining that "we look not just at the section 4(b) formula, but at the statutes as a whole, including its provisions for bail-in and bailout." Pet. App. 61a.

Bailout addresses the potential over-inclusiveness of the statute. A covered jurisdiction is entitled to bailout from Section 5 if it can show that it has not used a discriminatory test or device within the preceding ten years, has fully complied with the Voting Rights Act, and has engaged in constructive efforts to facilitate equal access to the electoral process. 42 U.S.C. § 1973b(a); S. Rep. No. 417, at 43-62 (1982). In 1982, Congress altered the bailout formula so that jurisdictions down to the county level could bail out independently. One of the main purposes of the new bailout provision was to provide local jurisdictions with an incentive to change their voting practices by eliminating structural and other barriers to minority political participation. *Nw. Austin* further liberalized bailout by ruling that "all political subdivisions," and not only those that conduct voter registration, are entitled to seek exemption from Section 5. 557 U.S. at 211.

As of May 9, 2012, 136 jurisdictions had bailed out after demonstrating that they no longer discriminated in voting. Pet. App. 62a. The jurisdictions included 30 counties, 79 towns and cities, 21 school boards, and six utility or sanitary districts. In addition, the Attorney General is actively considering more than 100 additional jurisdictions for bailout. Pet. App. 63a. Since 1984, the Attorney General has consented to every bailout action brought by a political subdivision. J.A. 84a. One of the jurisdictions that DOJ has consented to bailout is the state of New Hampshire, which has ten covered local jurisdictions. *See The State of New Hampshire v. Holder*, Case No. 1:12-cv-01854 (D.D.C. filed Dec. 5, 2012). Bailout is obviously not, as Shelby County contends, "a mirage." Pet. Br. at 54 (quoting

Nw. Austin, 557 U.S. at 215 (Thomas, J., concurring and dissenting).

The availability of bail-in addresses the potential under-inclusiveness of the coverage formula and the fact that some bad-acting jurisdictions may not be covered by the Section 4(b) formula. Pet. App. 65a. Pursuant to 42 U.S.C. § 1973a(c), a court that has found a violation of the Fourteenth or Fifteenth Amendment may retain jurisdiction for an appropriate period of time and subject a jurisdiction to the preclearance requirements of Section 5. Two non-covered states, Arkansas and New Mexico, were subjected to partial preclearance under the bail-in provision, as well as jurisdictions in California, Colorado, Florida, Illinois, Nebraska, New Mexico, New York, South Dakota, and the city of Chattanooga. Pet. App. 61a-62a; J.A. 141a-143a. As the court of appeals concluded, "the legislative record shows that [the Section 4(b) formula], together with the statute's provisions for bail-in and bailout . . . continues to single out the jurisdictions in which discrimination is concentrated." Pet. App. 65a. Accordingly, the court saw "no principled basis for setting aside the district court's conclusion that section 5 is 'sufficiently related to the problem that it targets,' *Nw. Austin*, 129 S.Ct. at 2512." Pet. App. 65a-66a.

In addition to allowing bailout and bail-in, Section 5 contains a number of other limitations on its coverage which further argue for the rationality as well as the congruence and proportionality of the statute: confinement to those regions of the country where voting discrimination had been most flagrant; limitation to a discrete class of state laws, *i.e.*, state

voting laws; and, the existence of a coverage termination date. *Boerne* held that while legislation implementing the Fourteenth Amendment did not require "termination dates" or "geographic restrictions . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." 512 U.S. at 533.

E. An Unbroken Line of Cases From This Court And Lower Courts Have Upheld The Constitutionality Of Section 5 Over Many Decades.

Shelby County's argument that Section 5 can no longer be justified by current conditions is not a new one. Similar arguments were rejected in *South Carolina v. Katzenbach*, 383 U.S. at 303, *Georgia v. United States,* 411 U.S. at 535, *City of Rome v. United States*, 446 U.S. at 182, and *Lopez v. Monterey County*, 525 U.S. at 282. Of course, conditions can change. But the constitutional significance of any changes can and should be informed by how this Court has approached that question in the past.

The plaintiffs in *Katzenbach* challenged the coverage formula as being defective because it was "awkwardly designed . . . and . . . disregard[ed] various local conditions which have nothing to do with racial discrimination." 383 U.S. at 329. The Court held "[t]hese arguments . . . are largely beside the point" because Section 4(b) was designed "to describe these areas . . . relevant to the problem of voting discrimination." *Id.* Congress was "entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4(b) of the Act. No more was required to justify

the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.* The Court further held that "[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Id.* at 331.

In *Georgia v. United States*, 411 U.S. at 531, the state argued that Section 5 did not apply to reapportionment. The Court disagreed and held "for the reasons stated at length in *South Carolina v. Katzenbach* . . . we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Id.* at 535.

The City of Rome argued that even if the preclearance requirements were constitutional when enacted in 1965, "they had outlived their usefulness by 1975." *City of Rome*, 446 U.S. at 180. The Court noted that black voter registration "had improved dramatically since 1965," and "the number of Negro elected officials had increased since 1965." *Id.* at 180. But it upheld the extension of Section 5 as "plainly a constitutional method of enforcing the Fifteenth Amendment." *Id.* at 182. In doing so, it relied upon Congress's conclusions that Section 5 "has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions," that "recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism," and that Section 5 "serves to insure that that progress not be destroyed through new procedures and techniques." *Id.* at 181.

In 1999, the State of California argued "§ 5 could not withstand constitutional scrutiny if it were

interpreted to apply to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere." *Lopez v. Monterey County*, 525 U.S. at 282. The Court disagreed:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.

Id. at 282-83 (quoting *Boerne*, 521 U.S. at 518).

And a month before the extension of Section 5 in 2006, this Court decided *LULAC v. Perry*, 548 U.S. 399 (2006), which found a Texas redistricting plan diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. In reaching its decision, all eight justices who addressed the issue agreed that compliance with the preclearance requirement was a "compelling state interest." *Id*. at 475 n.12, 485 n.2, 518.

In *City of Boerne*, moreover, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that was constitutional. It noted that the seven year extension of Section 5 in 1975 and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States." *Id.* And, it described Section 5 as an "appropriate" measure "'adapted to the mischief and wrong which the

[Fourteenth] [A]mendment was intended to provide against'." *Id.* at 532 (quoting *The Civil Rights Cases*, 109 U.S. 3, 13 (1883)).

The Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 639 (1999), another case involving Section 5 enforcement of the Fourteenth Amendment, expressly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race. *See also Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 373 (2011) (describing the Voting Rights Act as "a remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment"); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. at 738 (citing as "valid exercises of Congress' § 5 power [under the Fourteenth Amendment]" the "preclearance requirement for changes in State's voting procedures"). As the court of appeals held, citing *Hibbs*, 538 U.S. at 736, "[w]hen Congress seeks to combat racial discrimination in voting . . . it acts at the apex of its powers." Pet. App. 19a.

The *Boerne* line of cases confirms the constitutionality of Section 5 of the Voting Rights Act and the coverage formula. To the extent they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality.

Challenges to the constitutionality of Sections

5 and 4(b) have also been consistently rejected by lower courts. The District Court for the District of Columbia rejected a challenge to the constitutionality of Section 5 as reauthorized in 1982 in *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694 (D.D.C. 1983). The county claimed the 1982 extension was unconstitutional because the coverage formula was outdated. It pointed out that as of May 28, 1982, more than half of the age eligible population in South Carolina and Sumter County was registered, facts which it said "distinguish the 1982 extension as applied to them from the circumstances relied upon in *South Carolina v. Katzenbach*, *supra*, to uphold the 1965 Act." *Id.* at 707. The three-judge court rejected that argument, concluding that Section 5 "had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent." *Id* at 707-08. In support of its conclusion, the court noted that "Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982." *Id.* at 707 n.13.

The same court rejected a challenge to the constitutionality of Section 5 in *Giles v. Ashcroft*, 193 F.Supp.2d 258, 261 (D.D.C. 2002). It declined to reexamine the coverage formula and concluded "[t]he Supreme Court's previous decisions upholding the Voting Rights Act have in effect foreclosed such challenges to Section 5." *Id.* at 263.

Likewise, in *Janis v. Nelson*, 2009 WL 5216902 at **7-8 (D. S.D. 2009), the District Court for the District of South Dakota rejected a challenge to the constitutionality of the 2006 extension of Section 5 as applied to Shannon County. The state

argued that Section 5 was now outdated because Shannon County was experiencing high voter registration rates and above national average voter turnout rates. The court dismissed these arguments, concluding that "South Dakota's history of discriminating against Native Americans and the risk that such discrimination will increase in the absence of the preclearance requirement set forth in Section 5 of the Voting Rights Act compels the court to reject state defendants' argument that Section 5 of the Voting Rights Act is unconstitutional as applied to Shannon County." *Id.* at *8.

Nothing in the legislative history of the 2006 reauthorization provides a reason to depart from these precedents. To the contrary, the evidence considered by Congress in 2006 abundantly supports the extension of Section 5 as an appropriate tool to combat ongoing discrimination.

II. RECENT SECTION 5 OBJECTIONS FURTHER DEMONSTRATE THE CONTINUING NEED FOR SECTION 5.

The continued need for Section 5 and the appropriateness of Section 4(b)'s coverage are evident from recent objections involving Texas, South Carolina, and Florida.

1. In denying preclearance to Texas' 2011 Congressional plan, the court concluded it was both "retrogressive" and had been adopted "with discriminatory intent." *Texas v. United States*, 2012 WL 3671924 **14, 21 (D.D.C. Aug. 28, 2012). It based its finding of discriminatory intent upon numerous factors, including "Texas's history of failures to comply with the VRA," and the fact that

Black and Hispanic members of Congress "were excluded completely from the process of drafting new plans, while the preferences of Anglo members were frequently solicited and honored." *Id.* at **20-1.

The court denied preclearance to the Senate plan because it "was enacted with discriminatory purpose as to SD 10." *Id.* at *26. That purpose was evident from numerous factors, including that the "legislature departed from typical redistricting procedures and excluded minority voices from the process even as minority senators protested that section 5 was being run roughshod." *Id.*

The court denied preclearance to the House plan because it had a retrogressive effect. However, it concluded that "record evidence may support a finding of discriminatory purpose in enacting the State House Plan." *Id.* at *37. The evidence of discriminatory purpose included ignoring the dramatic growth in minority population, "a deliberate, race-conscious method to manipulate" the Hispanic vote, and the fact that "map drawers cracked VTDs [voter tabulation districts] along racial lines to dilute minority voting power." *Id.* at **36-7.

But for the presence of Section 5, these discriminatory plans would have gone into effect, confirming the judgment of Congress of the continuing need for preclearance in the covered jurisdictions.

2. In 2011, South Carolina enacted a new photo ID requirement for in-person voting. Following an objection by DOJ, the state filed an action for judicial preclearance. The experts for South Carolina and the defendants agreed that as of

April 2012, some 130,000 registered voters in the state lacked a photo ID acceptable under the new law, and those voters were disproportionately likely to be members of a racial minority. *South Carolina v. Holder*, 2012 WL 4814094 *20 (D.D.C. Oct. 10, 2012). The three-judge court denied preclearance of the photo ID requirement for the November 2012 election because there was not adequate time to implement it to ensure the law would not have a discriminatory effect on African American voters. It granted preclearance for subsequent elections but only because the state ultimately agreed during the protracted course of the litigation that the law "allows citizens with non-photo registration cards to still vote without a photo ID so long as they state the reason for not having obtained one." *Id.* at *1.

In a concurring opinion, Judge Bates underscored "the vital function that Section 5 of the Voting Rights Act has played [in the litigation]. Without the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive." *Id.* at *21. The state's agreement to modify the ID law was driven by "South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act." *Id.* As Judge Bates concluded: "The Section 5 process here . . . demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* at *22.

3. Texas enacted a new photo ID requirement for in-person voting in 2011, and submitted it to the Department of Justice for preclearance under Section 5. While the submission was pending, and after an

objection by DOJ to South Carolina's photo ID law, Texas filed an action for judicial preclearance in the District Court for the District of Columbia. It subsequently added a claim that Section 5 as extended in 2006 was now unconstitutional. *Texas v. Holder*, 2012 WL 3743676 *4 (D.D.C. Aug. 30, 2012).

On August 30, 2012, the district court ruled that the photo ID requirement was in violation of Section 5. It concluded that Texas had failed to meet its burden of showing the law would not have a retrogressive effect upon minority voters (and thus found it unnecessary to reach the question of whether the law was also enacted with a discriminatory purpose). The court based its holding upon three basic facts: "(1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty. Accordingly, SB 14 will likely 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' *Beer*, 425 U.S. at 141." *Texas v. Holder*, 2012 WL 3743676 *26.

As in South Carolina, in the absence of Section 5, Texas' discriminatory photo ID requirement would have gone into effect, and the only way it could have been challenged was through costly and time-consuming litigation under Section 2 of the Voting Rights Act and the Constitution. The important role of Section 5 and its current needs are apparent.

4. Florida enacted HB 1355 in 2011 which, *inter alia*, reduced the number of days for early

voting from 14 days to eight days, required third-party voter registration organizations to submit voter registration applications within 48 hours of receipt instead of ten days and imposed a fine of $50 for each failure to comply with the deadline, and imposed fines up to $1,000 for failing to comply with other provisions. *Florida v. Unite States,* 820 F.Supp.2d 85, 88 (D.D.C. 2011); *Florida v. United States*, 2012 WL 3538298 *3 (D.D.C. 2012).

The proposed changes would have had a discriminatory impact on minorities in the five Florida counties covered by Section 5. In the 2008 election, for example, 52% of African American voters in the five covered counties cast an early in-person ballot, compared to only 28% of white voters. *Florida v. United States*, 2012 WL 3538298 *18. And according to the League of Women Voters, black and Hispanic voters registered with third party groups at twice the rate of other voters. *Voting Law's Sunday Punch*, Sarasota Herald-Tribune, June 15, 2011. available at http://www.heraldtribune.com/article/20110615/OPINION/110619722/-1/news?title=voting-law-s-sunday-punch. As a result of passage of HB 1355, it was reported that the League of Women Voters "has halted registration in Florida" because of the severe penalties imposed by the new law. *Id.*

Florida submitted the voting changes for judicial preclearance to the District Court for the District of Columbia. *Florida v. United States*, 2012 WL 3538298 *3. Florida filed an amended complaint on October 11, 2011, to include a claim that Section 5 as extended in 2006 was now unconstitutional. *Id.*

On May 31, 2012, the court in a related case, *League of Women Voters v. Browning*, 863 F.Supp.2d

1155, 1168 (N.D. Fla. 2012), issued a preliminary injunction against enforcement of the most controversial restrictions on third party voter registration activities. The court concluded that "the statute and rule impose burdensome record-keeping and updating requirements that serve little if any purpose, thus rendering them unconstitutional." *Id.* at 1158.

On August 16, 2012, the three-judge court issued a decision objecting to the reduction in days for early voting because "the State has failed to satisfy its burden of proving that these changes will not have a retrogressive effect on minority voters." *Id* *2. The state submitted a revised version of the third party voter registration provisions that responded to the objections made by the court in *League of Women Voters*, and on August 22, 2012, DOJ granted preclearance. *Florida v. United States*, CA No. 11-01428 (D.D.C.) (Doc. #162). The state also made changes to its early voting provisions, and on September 12, 2012, DOJ precleared 96 hours of early voting over an eight day period from 7:00 am to 7:00 pm. *Id.* Doc. #161.

The important role played by Section 5 in the adoption of new voting practices and procedures in Florida is apparent. Because of Section 5, the state was required to restructure its early voting procedures so that they would not have a retrogressive effect on minority voters. It was also required to abandon its discriminatory restrictions on third party voter registration activities. As Florida demonstrates, Section 5 continues to play an important and indispensable role in guarding against racial discrimination in voting in the covered

jurisdictions.

The recent Section 5 objections involving Texas, South Carolina, and Florida have run the gamut from blatant discrimination to more subtle forms of minority voter suppression. But they all underscore the continuing need for Section 5.

CONCLUSION

Given the extensive record before it of continued discrimination in voting, Congress concluded with near unanimity that the extension of Section 5 of the Voting Rights Act was necessary "to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution." 120 Stat. 577, Sec. 2(a). The right to vote is "a fundamental right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The considered judgment of Congress that this fundamental right should continue to be protected by Section 5 is supported by the legislative record and is entitled to deference by this Court. The decision of the court of appeals should be affirmed.

Respectfully submitted,

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