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To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing before the Subcommittee on the Judiciary,

This case presents a facial challenge to Section 5 of the Voting Rights Act, a critical provision of one RI WKLV 1DWLRQ•V ODQGPDUN FLYLO ULJKWV

$IWHU ·HQGXULQJ QHDUO\ D FHQWXU\ RI UHVLVWDQFH WR WKH)LIWHHQWK $PHQGPH enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) ·WR EDQLVK WKH EOLJKW racial discrimination in voting, which has infected WKH HOHFWRUDO SURFHVV LQ SDUWV RI RX 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

·FRYHUHG MXULVGLFWLRQVµ WR ·SUHFOHDUµ 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 6WDWH•V EXUGHQ WR VKRZ WKDW WKH SURS 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 WKDW ZHUH VXEMHFW WR 6HFWLRQ •V requirement. As originally enacted in 1965, Section RQO\ DSSOLHG WR WKRVH MXULVGLFWLRQV RU GHYLFHµ IRU YRWLQJ DQG ZKHUH OHVV voting age residents were registered or voted in the

WKH DSSOLFDWLRQ WR WKHVH DUHDV RI &
SRZHUV XQGHU WKH)LIWHHQWK $PHQGPHQW

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). ·>)@RU WKH reasons stated at length in South Carolina v. Katzenbach µ WKH &RXUW ZURWH ·ZH UHDIILUP Act is a permissible exercise of congressional power XQGHU RI WKH)LIWHHQWK $PHQGPHQW µ

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 WKDW WKH H[WHQVLRQ ZDV ·SODLQO\ D PHWKRG RI HQIRUFLQJ WKH)LIWHHQWK $PH doing so, it UHOLHG XSRQ &RQJUHVV• FRQFOXVL

Monterey County, 525 U.S. 266, 282 (1999), where the C R X U W Q R W H G W K D W · Z H K D Y H V S H F L I L F D constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the 6 W D W H V µ

Most recently, in 2005 and 2006, Congress considered the need for the continuation of Section 5

(*Bossier II*), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In *Bossier II*, the Court held for the first time

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 IUDPHG E\ WKLV &RXUW•V Nw. Austin Mun. Util. Dist No. One v. Holder, 557 U.S. 193, 203 (2009) that the constitutionality of the 2006 H[WHQVLRQ ·PXVW EH MXVWLILHG E\ FXUUH WKDW ·D VWDWXWH•V GLVSDUDWH JHRJUD UHTXLUHV D VKRZLQJ WKDW LW ·LV VXIILFL WKH SUREOHP WKDW LW WDUJHWV µ 15a. $SSO\LQJ WKH ·FRQJUXHQFH DQG SURS VWDQGDUG 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 WKDW ·WKH UHFRUG FRQWDLQV QXPHURXV PRGHUQ• LQVWDQFHV RI UDFLDO GLVFULPL 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 PLQRULWLHV ·PRUH LQIRUPDWLRQ UHTXH 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 MXULVGLFWLRQV H[DPSOHV RI ·RYHUW K voting power by those who control the electoral SURFHVV µ UDFLDOO\ SRODUL]HG YRWLQ

aU#ca@S9( )-3(t)97( )-61-3( )6(7)-3(,)

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).

7KH FRXUW RI DSSHDOV WKHQ FRQFOX 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 WKDW &RQJUHVV•V MXGJPHQW GHVHUYH GHIHUHQFH µ 3HW ‘a S‘SH *f*@ sX OW*f*‘0

The decision by Congress in 2006 to reauthorize Section 5 and the corresponding coverage provisions of the Voting Rights Act was

U.S. Const. Amend. XIV, Sec. 5; U.S. Const. Amend. XV, Sec. 2. Interpreting those provisions, this Court KDV HPSKDVL]HG WKDW WKH &RQVWLWXWL ¶&RQJUHVV • QRW WKH &RXUW WR GHWHUP LQVWDQFH ZKDW OHJLVODWLRQ LV QHHGHG Nw. Austin 8 6 DW $QG ZKHUH ·&RQJU attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth,)RXUWHHQWK DQG)LIWHHQWK 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 6HFWLRQ ·PXVW EH MXVWLILHG E\ FXUUHQ WKDW ·D VWDWXWH•V GLVSDUDWH JHRJUD UHTXLUHV D VKRZLQJ WKDW LW ·LV VXIILFL WKH SUREOHP WKDW LW WDUJHWV 04 HW 8 6 the other hand, the Court carefully noted that while there had been improvements in voting rights since SDVVDJH RI WKH 9RWLQJ 5LJKWV $FW LQ that these improvements are insufficient and that conditions continue to warrant preclearance under WKH $FW. Id. µ

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. 0RUHRYHU &RQJUHVV IRXQG WKDW ·JDLQV candidates remain uneven, both geographically and E\ OHYHO RI RIILFH µ +-457 8, at 33 1R (2006).

In City of Rome, 446 U.S. at 177, the Court KHOG ·WKH $FW•V EDQ RQ HOHFWRUDO FK discriminatory in effect is an appropriate method of (op)-5(r) 3(t)9(i)-4(on.)9( )]TJ/C2_0 1 Tf0 -1.21 TD[x2 1-B<r≥301700B73r

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

enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth $PHQGPHQWV µ City of Boerne, 521 U.S. at 535 (when Congress exercises its enforcement authority under the Reconstruction Amendments its judgments about ·ZKDW OHJLVODWLRQ LV QHHGHG DUH GHIHUHQFHµ

· > - @iXGthe constitutionality of an Act of &RQJUHVV LV ¶WKH JUDYHVW DQG PRVW GH WKLV &RXUW LV FDOOHG XSRQ WR DVVXPH ,G DW 557 SHUIRUP •µ 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.

In Nw. Austin, 557 U.S. at 204, this Court considered whether a challenge to the constitutionality of Section 5 should be resolved XVLQJ WKH ·UDWLRQDO PHDQVµ VWDQGD South Carolina v. Katzenbach, 383 U.S. at 324 · &RQJUHVV PD\ tXVH DQ\ UHDVRQDEOH to effectuate the constitutional prohibition of racial discrimination LQ YRWLQJµ RU WKH ·FRQJUXHQFH DQG VWDQGDUGµ City of Boerne, 521 U.S. at 520, 7KH &RXUW•V KROGLQJ WKDW WKH PXQ district was entitled to a statutory bailout from Section 5 coverage made it unnecessary to resolve

.

The legislative record that Congress compiled before voting to reauthorize Section 5 in 2006 was

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

1st Sess., at 180 tbl. 2 (November 1, 2005) (House Hearing, Preclearance Standards); 3HWHUV 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. S. 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 directly enforced or precleared 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 any Democrat districts." S. 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's racially

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

Shelby County also argues that the decline in the ·¶QXPEHU DQG QDWXUH• RI 6HFWLRQ RE further confirms that a prior restraint is XQQHFHVVDU\ µ 3HW %U DW +RZHYHU 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

> 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 FWV &RQJUHVV FRQFOXGHG ·>W@KH HIIH the Voting Rights Act or 1965 has been significantly weakened by the United States Supreme Court decision[] LQ 5HQR Y %RVVLHU 120 Stat. 577, Sec 2(b)(6).

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

In addition to objections by DOJ, Congress found evidence of discrimination in the number of requests for judicial preclearance of voting changes denied by the United States District Court for the District of Columbia. 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, Appendix, Vol. II); 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 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: ·H[DPLQLQJ WKH SDWWHUQ RI RXWFRPHV I 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 DIIHFWLQJ YRWLQJ LV PRVW FRQFHQWUDWH

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) ·/HJLVODWLYH 2SWLRQVµ &RQJUHVV FRQF QHHG IRU 6HFWLRQ ZDV HYLGHQW IURP ·W filing of section 2 cases that originated in covered MXULVGLFWLRQV µ PDQ\ RI ZKLFK UHVXOWHG intentional discrimination. 120 Stat. 577, Sec. rb))-199(o-240(c)-3(2(d)-4(.2i)-1021-5710043(>5301500-59i)23l.2-6.7l)87004C>MC[-su( )]TJ]TJ0 --6esf6

6KHOE\ &RXQW\ DUJXHV WKDW ·WKH GHFODUDWLRQ VKRXOG QHYHU KDYH EHH EHFDXVH 6HFWLRQ ionality · mRQ VtLWXW PHDVXUHG DJDLQVW WKH OHJLVODWLYH UHF 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. $SS D :KLOH ’U 0F&UDU\•V GHFODUDWLR included in the legislative record, evidence FRQFHUQLQJ RI WKH VHWWOHPHQWV KH covered jurisdictions (62%) was on the record considered by Congress in adopting the 2006 5HDXWKRUL]DWLRQ $FW µ 3 47a. $SS D - $

It was appropriate for the court of appeals to consider the McCrary data. First, as the court found, ·D PDMRULW\ RI WKH XQSXEOLVKHG FDVH covered jurisdictions (as well as all from covered MXULVGLFWLRQV DSSHDUV LQ WKH OHJLVOD App. 54a. Second, evidence developed after an act KDV EHHQ HQDFWHG DQG LPSOHPHQWHG NQ HQDFWPHQW HYLGHQFH µ LV DGPLVVLEOH D 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 \HDUV DIWHU WKH $FW•V HQDFWPHQW DV 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. Lanein taking into account the report prepared by Dr. McCrary of unpublished cases in non-covered jurisdictions

Congress found that federal observers were certified by the Attorn H\ *HQHUDO ·RQO\ ZKHQ WKHUH reasonable belief that minority citizens are at risk of EHLQJ GLVHQIUDQFKLVHG µ RIWHQ WKURXJK DQG LQWLPLGDWLRQ LQVLGH SROOLQJ ORFD 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 &RQJUHVV IRXQG ·>R@EVHUYHUV KDYH SO role preventing and deterring 14th and 15th amendment violations by communicating to the Department of Justice any allegedly discriminatory condu FW IRU IXUWKHU LQYHVWLJDWLRQ µ H.R. Rep. No. 109-478, at 25 (2006).

vii. Continued Racial Bloc Voting

When it reauthorized Section 5 in 2006, &RQJUHVV H[SUHVVO\ IRXQG WKDW ·WKH 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 YRWLQJ ZDV ·WKH FOHDUH and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and WKHLU SUHIHUUHG FDQGLGDWHV LQWR WKH 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

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 ·HIIHFW DQG UHVXOWV DUH WKH VDPH GLPLQLVKLQJ RI WKH PLQRULW\ FRPPXQLW\ fully participate in the electoral process and to elect their preferred candidatHV RI FKRLFH H.R. Rep. No. 109-478, at 6 (2006).

viii. The Deterrent Effect of Section 5

In reauthorizing Section 5, Congress

considered decision of a coequal and representative EUDQFK RI *RYHUQPHQW• LV HQWLWOHG µ

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 VWDQGLQJ DORQH ZRXOG MXVWLI\ LWV H[WHQVLRQ RI GRRP µ 3HW %U DW TXRWLQJ dissenting).

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

6KHOE\ &RXQW\ DUJXHV WKDW ·6HFWLRQ IRUPXOD LV QR ORQJHU DQ ¶DSSURSULDWH determining the jurisdictions that should be subject WR FRYHUDJH µ 3HW %U the laws of EHFDXVH minority registration and voting in the covered MXULVGLFWLRQV ·QRZ Id. at 41. That SDULW\ µ

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, WKHLU LQFOXVLRQ LQ WKH ·ZKLWHµ FDWHJ 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) ·RQFH +LVSDQLFV DUH WDNHQ I the white category the picture changes FRQVLGHUDEO\µ

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 FRXUW RI DSSHDOV KHOG ·$VLGH IURP 1R 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-+LVSDQLF ZKLWHV µ 3HW $SS D

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

opportunity to exercise their right to vote, or will

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candidates remain uneven, both geographically and
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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
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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
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given the record established, would leave minority citizens with the inadequate remedy of a Section 2 actiRQ µ + 5 5HS-478Rat 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 · &RQJUHVV KDG IRXQG WKDW FDVH-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 ODZVXLWV µ 8 see also id. at 313-15 (explaining why case-by-case OLWLJDWLRQ KDG ·SURYHQ LQHIIHFWXDO City of Rome DOVR IRXQG WKDW · >F@DVH-by-case adjudication had proved too ponderous a method WR UHPHG\ YRWLQJ GLVFULPLQDWLRQ µ Accord, Boerne, 521 U.S. at 526 (Section 5 was · GHHPHG QHFHVVDU\ because of the ineffectiveness of the existing voting rights laws, and the slow, costly

[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),

character of case-by-case litigation. Georgia v. United States, 411 U.S. at 526. The purpose of § 5 was to shift the burden of proof with respect to racial discrimination in voting, id. at 526, similar findings in Tennessee v. Lane, 541 U.S. at 531, to sustain the constitutionality of a challenged statute, id. at 528, and with considerable evidence of shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable problem warranted decisive prophylactic measures in response." Id. at 526 (internal 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 Section 2 litigation are borne 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 majority 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" 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

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 IXUWKHU OLEHUDO]HG EDLORXW E\ UX SROLWLFDO VXEGLYLVLRQV µ DQG QRW RQ 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 loc9( )]TJT*[(a)-.2n70urisdictions .

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.

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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
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various local conditions which have nothing to do
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describe these areas . . . relevant to the problem of
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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

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with all phases of a problem in the same way, so long as the distinctions drawn have some basis in
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interpreted to apply to voting measures enacted by

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.

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excluded completely from the process of drafting new plans, while the preferences of Anglo members were
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The court denied preclearance to the Senate SODQ EHFDXVH LW ·ZDV HQDFWHG ZLWK G SXUSRVH DV WR Id. at **26. That purpose was evident from numerous factors, including that the ·OHJLVODWXUH GHSDUWHG from typical redistricting procedures and excluded minority voices from the process even as minority senators protested that VHFWLRQ ZDV EHLQJ IRXQ URXJKVKRG µ Id.

The court denied preclearance to the House plan because it had a retrogressive effect. However, LW FRQFOXGHG WKDW ·UHFRUG HYLGHQFH finding of discriminatory purpose in enacting the 6WDWH +RXVH Id. at **30-37. µThe evidence of discriminatory purpose included ignoring the dramatic growth in minority population, ·D deliberate, race-FRQVFLRXV PHWKRG WR PDQLSXOD +LVSDQLF YRWH DQG WKH IDFW WKDW ·F cracked VTDs [voter tabulation districts] along racial OLQHV WR GLOXWH PLQRULW\ YRWLQJ SRZHU Id. at **36-37.

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

objection by DOJ to South &DUROLQD•V SKRWR ,' ODZ 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

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

1155, 1168 (N.D. Fla. 2012), issued a preliminary injunction against enforcement of the most controversial restrictions on third party voter UHJLVWUDWLRQ DFWLYLWLHV 7KH FRXUW F statute and rule impose burdensome record-keeping and updating requirements that serve little if any purpose, thus UHQGHULQJ WKHP XQFRQVWLWXWLRQDO at 1158.

On August 16, 2012, the three-judge court issued a decision objecting to the reduction in days IRU HDUO\ YRWLQJ EHFDXVH ·WKH 6WDWH satisfy its burden of proving that these changes will nRW KDYH D UHWURJUHVVLYH HIIHFW RQ PL 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

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.

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 WR YRWH LV ·D IXQGDPHQWDO ULJKW EHFDX RI DOO UHVW 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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