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 OF *AMICUS CURIAE* NATIONAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Bar Association, is the largest and oldest association of predominantly African-American attorneys and judges in the United States. It was founded in 1925 when there were only 1,000 African-American attorneys in the country and when other national bar associations, such as the American Bar Association, did not admit African-American attorneys. The National Bar Association represents approximately 44,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

The National Bar Association consistently has advocated for voting rights on behalf of African Americans and other minority populations since its founding nearly ninety years ago. It was at the forefront of the Civil Rights movement and played an integral role in helping African Americans secure the rights guaranteed by the United States constitution—particularly the right to vote.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* states that the position it takes in this brief has not been approved or financed by Petitioner, Respondents, or their counsel. Neither Petitioner, Respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission, of this brief. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

The National Bar Association therefore has an interest in and strongly supports the purposes for which Congress originally enacted Section 5 of the Voting Rights Act, *i.e.*, "eliminat[ing] practices denying or abridging opportunities for minorities to participate in the political process."[2] Such practices still exist, and Section 5 remains necessary to combat discrimination and diminution of African American's voting rights. The National Bar Association files this brief to demonstrate that Section 5 of the Voting Rights Act remains necessary to ensure equal access to the fundamental right to vote.

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[2] S. Rep. No. 97–417, at 44, 59 (1982); *see also* H.R. Rep. No. 109–478, at 58 (2006) (noting that Congress intended for the bailout provision to "encourage covered jurisdictions to work to end discriminatory conduct"); J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power 257, 275 (Ana Hernandez ed., 2006) (noting that the bailout provision mirrors Congress' intent in passing the Voting Rights Act).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1965, Congress enacted the Voting Rights Act to protect every American's right to vote. As this Court noted:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[3]

Section 5 of the Voting Rights Act supplemented the retroactive remedy provided in Section 2 by requiring jurisdictions with particularly severe histories of racial discrimination in voting to preclear any change to their voting standards, practices, or procedures. Section 5 thus prevents state and local actors from denying equal ballot access to minority voters.

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[3] *Reynolds v. Sims*, 377 U.S. 533, 555 (1967); *see also* President Lyndon B. Johnson, Remarks at the Signing of the Voting Rights Act, (Aug. 6, 1965), *available at* http://millercenter.org/president/speeches/detail/4034 ("The right to vote is the basic right, without which all others are meaningless.").

Petitioner and certain *amici curiae* contend that the discrimination that previously warranted the imposition of Section 5 no longer exists and, thus, Section 5 is no longer necessary. For example, *amicus curiae* the State of Alabama asserts that "the Alabama of 2013 is not the Alabama of 1965."[4] This assertion is misplaced, however. Although Alabama in 2013 is better than Alabama in 1965, it is not perfect, and progress made to date is due, at least in part, to Section 5. Section 5 is therefore vital to continued progress.

Voting discrimination is not a thing of the past. Although the Voting Rights Act, and particularly Section 5, has resulted in great strides forward from Jim Crow-era disenfranchisement, jurisdictions are still attempting today to restrict the ability of minority voters to exercise their right to vote.

Historically, discrimination in Section 5 jurisdictions was both overt and violent. Modern discrimination, although perhaps more subtle, also is devastating to the voting rights of minorities. Legislatures continue to discriminate against minority voters by means of restrictions on early voting and voter registration drives, onerous voter-identification requirements, and discriminatory redistricting plans. And these discriminatory acts continue to draw objections from the Department of Justice under Section 5. Thus, contrary to Petitioner's and *amici curiae's* contentions, Section

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[4] Br. of State of Alabama as *Amicus Curiae* Supporting Pet'r at 4.

5 remains necessary to protect minorities in covered jurisdictions from discrimination.

Further, Section 2 of the Voting Rights Act is an insufficient remedy to counter continuing discrimination. Unlike Section 5, which prevents and deters discriminatory practices, Section 2 provides minority voters with a *post hoc* remedy for discriminatory conduct. Moreover, unlike administrative proceedings under Section 5, Section 2 lawsuits are complicated, expensive, and time-consuming, and, if successful, provide a more limited remedy. Once a court strikes down an election practice under Section 2, jurisdictions can (and often do) enact new methods of voter discrimination. As the State of Alabama concedes, historically, when the United States government sued Alabama for discrimination, its legislature defied court orders and implemented new discriminatory measures.[5] This "gamesmanship"[6] demonstrates that *post hoc* remedies (like Section 2) are an inadequate, or at least incomplete, means by which to protect equality in voter access.

Moreover, covered jurisdictions know that any discriminatory change to voting rules will be preemptively reviewed under Section 5. This deters covered jurisdictions from proposing discriminatory changes in the first place.

Petitioner and certain *amici curiae* also contend that Section 5 must be held

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[5] *See id.* at 6-7.

[6] *Id.*

unconstitutional because it is not sufficiently narrowly tailored. To the contrary, Section 5 jurisdictions that have corrected past discriminatory practices can "bail out" under Section 4(e) of the Voting Rights Act. It therefore is within a covered jurisdiction's control to demonstrate that voter discrimination *is* a thing of the past. Yet Petitioner has not attempted to avail itself of this option.

Given that discriminatory practices persist in Section 5 jurisdictions, that Section 2 provides only *post hoc* remedies that do not sufficiently protect minorities' right to vote, that Section 5 deters discrimination, and that it is within a covered jurisdiction's control to correct discriminatory practices and end federal oversight under Section 5, this Court should uphold the constitutionality of Section 5.

ARGUMENT

I. SECTION 5 PRECLEARANCE REMAINS NECESSARY

A. Section 5 Jurisdictions Continue To Discriminate Against Minorities

Petitioner and certain *amici curiae* argue that the discrimination that prompted Congress to pass the Voting Rights Act is a thing of the past. That is wrong.

In just the six years since Congress reauthorized the Voting Rights Act, Section 5

jurisdictions have proposed a wave of voting-related rules that abridge the rights of minorities to vote. That the means of discrimination today are less blatant than they were in 1965 does not make them less nefarious.

Jurisdictions subject to Section 5 recently have enacted limitations on voter registration drives and early voting that disproportionately impact minorities. Minorities are significantly more likely than Caucasians to register to vote at registration drives, which several Section 5 jurisdictions, including Florida and Texas, have sought to limit.[7] Minorities also are significantly more likely than Caucasians to vote early. For example, during the 2008 presidential election, African Americans and Hispanics respectively comprised thirty-one percent and twenty-two percent of all citizens who cast votes on the last Sunday of early voting in Florida.[8] The same two groups cast only thirteen percent and eleven percent of votes in that election in total.[9] Proposals to eliminate early voting on the Sunday before Election Day thus targets minority voters.

Section 5 jurisdictions also recently have proposed voter-identification laws that would disenfranchise minority voters, because African-

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[7] *Summary of Voter ID Laws Passed*, The Brennan Center for Justice 5, 12 (2012), http://brennan.3cdn.net/2287283f66edc3a2fe_n3m6b9nvg.pdf.

[8] Editorial, *Florida's Voting Fairness Problem*, Tampa Bay Times, Jan. 31, 2012, *http*://www.tampabay.com/opinion/editorials/floridas-voting-fairness-problem/1213083.

[9] *Id*.

American and Hispanic citizens are statistically less likely than Caucasians to possess the necessary identification required by voter-identification laws. While only eight percent of Caucasian voters do not possess current, government-issued photo identification, sixteen percent of Hispanics and twenty-five percent of African Americans do not possess this form of identification.[10] Discrimination is compounded by the fact that, in states with voter-identification requirements, poll workers are more likely to request identification from African-American and Hispanic voters than from Caucasian voters. During the 2008 election, poll workers asked for identification from seventy percent of African-American voters and sixty-five percent of Hispanic voters, but only fifty-one percent of Caucasian voters.[11] Potential partisan issues aside, Section 5 jurisdictions' application of voter-identification laws reduces the opportunity and/or ability of minorities to exercise their constitutional right to vote.[12]

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[10] *The Right to Vote Under Attack: The Campaign to Keep Millions of Americans from the Ballot Box*, People for the American Way, http://www.pfaw.org/rww-in-focus/the-right-to-vote-under-attack-the-campaign-to-keep-millions-of-americans-from-the-ball (last visited Jan. 29, 2013).

[11] *Id.*

[12] Alabama, Florida, Mississippi, and Texas have proposed laws requiring voters to show photo identification at the polls. Wendy Weiser and Nhu-Y Ngo, *Voting Rights in 2011: A Legislative Round-Up*, The Brennan Center for Justice (2011), http://www.brennancenter.org/content/resource/voting_rights_in_2011_a_legislative_round-up/. As of September 2013 in New Hampshire, a voter must produce New Hampshire or United

Section 5 jurisdictions also recently have proposed redistricting schemes that federal courts concluded were drafted with discriminatory intent and would have a discriminatory effect. For example, in August 2012, the United States District Court for the District of Columbia denied preclearance for Texas' proposed redistricting plan for the United States House of Representatives.[13]

States government-issued photo identification or execute an affidavit of identity to vote; no other form of identification will be accepted. *Id.* Virginia recently passed a law that not only requires identification to vote, but also eliminates the option to confirm identity when voting or applying for an absentee ballot by signing an affidavit. *Id.* At least one *amicus curiae* argues that because this Court previously approved a voter-identification law passed in Indiana, which is not subject to Section 5, the Court must hold unconstitutional the Department of Justice's insistence on the necessity of preclearing voter-identification laws in Section 5 jurisdictions. *See generally* Br. of the State of Texas as *Amicus Curiae* In Support Of Pet'r. In *Crawford v. Marion County Election Board*, this Court deferred to the judgment of the Indiana legislature regarding the necessity of a voter-identification law, reasoning that "[i]t is for state legislatures to weigh the costs and benefits of possible changes in their elections codes . . . ." 553 U.S. 181, 208 (2008) (Scalia, J., concurring). If the Court is willing to defer to the Indiana legislature's judgment, despite the minimal amount of evidence on which that judgment was based, this Court likewise should defer to Congress' judgment in reauthorizing Section 5, which was made upon a far more extensive evidentiary record. *See, Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579-80 (2012) ("Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.").

[13] *Texas v. United States*, Civ. A. No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012). The court also denied

Between 2000 and 2010, the population of Texas grew by more than four million people.[14] Texas therefore gained four seats in Congress and needed to redraw its congressional districts.[15] Section 5 required Texas to submit its plan for preclearance. The court found, however, that the proposed plan had a discriminatory intent and would have had a discriminatory effect. Specifically, the court found a discriminatory effect because the proportion of congressional districts in which African Americans and Hispanics had the ability to elect candidates of their choice (often referred to as "ability districts"[16]) decreased under the proposed plan.[17] The court found that the plan had a discriminatory intent because, among other things, Texas had redrawn ability districts in a way that (a) moved their main source of economic growth to non-ability districts, but made no such changes to non-minority districts,[18] and (b) excluded African-American and Hispanic members of Congress from the drafting process.[19] The court therefore denied preclearance for Texas' revised congressional plan.[20]

It is particularly surprising that *amicus curiae* the State of Alabama argues that voter discrimination is no longer a problem because just

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preclearance for Texas' revised districting plans for State Senate and State House of Representatives. *Id.*

[14] *Id.* at *1.

[15] *Id.*

[16] *Id.* at *2 (citing 42 U.S.C. § 1973c(b) (2006)).

[17] *Id.* at *18.

[18] *Id.* at *19-20.

[19] *Id.* at *21.

[20] *Id.* at *37.

last year, under Section 5, the United States District Court for the Southern District of Alabama enjoined Evergreen, Alabama from employing a potentially discriminatory redistricting plan.[21] In 2011 and 2012, Evergreen attempted to implement a new voter redistricting plan after the 2010 census revealed that, since 2000, the city's African-American population had increased and its Caucasian population had declined.[22] The proposed plan packed the African-American population into two of the city's five voting districts, and fragmented the remaining African-American population among the other three districts.[23] The city adopted this plan without any meaningful participation from the African-American community.[24] It also did not submit the plan for preclearance review until June 12, 2012, and failed to provide all of the information necessary for preclearance until July 23, 2012—only 36 days before the August 28, 2012 election.[25]

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[21] *See* Partial Consent Agreement at 5, *Allen v. City of Evergreen, Ala.*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Aug. 20, 2012) [hereinafter *Allen* Consent Agreement].

[22] *Id.* at 3; Complaint at 5, *Allen v. City of Evergreen, Ala.*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Aug. 6, 2012) [hereinafter *Allen* Complaint].

[23] *Id.* at 8.

[24] Brief of Points and Authorities in Support of Motion For Court-Ordered Redistricting Plan at 9, *Allen v. City of Evergreen, Ala.*, C.A. No. 1:12-cv-00496-CB-M (S.D. Ala. Dec. 12, 2012) (stating that "black citizens sought in vain changes in district boundaries which would give them a more equal opportunity to elect candidates of their choice").

[25] *Allen* Complaint, *supra* note 22, at 8-9; *Allen* Consent Agreement, *supra* note 21, at 3. Evergreen also failed to request expedited consideration for preclearance, which would

Despite its failure to obtain Section 5 preclearance, Evergreen began to conduct the 2012 election for mayor and council members using the 2012 plan.[26] As a result, the court enjoined further use of the 2012 plan and delayed Evergreen's elections.[27]

Although 2013 is not exactly 1965, as demonstrated above, the vestiges of that damaging period remain strong and discrimination in Section 5 jurisdictions is not a thing of the past.

B. Section 2 Is An Insufficient Remedy To Voting Discrimination

Petitioners and their *amici curiae* also argue that Section 5 is unnecessary because Section 2 provides adequate protection against efforts to infringe minorities' right to vote. But Section 2 of the Voting Rights Act is a backward-looking remedy

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have averted, or at least lessened, the law's potential discriminatory impact. *Allen* Complaint at 8-9.

[26] *Allen* Consent Agreement, *supra* note 21, at 3.

[27] *Id.* at 6. Similarly, a mere matter of weeks ago, the Virginia state Senate passed a redistricting plan that some observers contend is racially motivated. *See* Ryan J. Reilly, *Virginia Redistricting Plan "Shameful," Says State Sen. Henry Marsh*, Huffington Post, (Jan. 23, 2013, 5:31 PM) http://www.huffingtonpost.com/2013/01/22/virginiaredistricting_n_2528519.html. Because Virginia is subject to Section 5, if necessary, the preclearance process would ensure that the plan would not take effect unless the state demonstrated that it has neither a discriminatory purpose nor a discriminatory effect. As addressed below, *infra* Part I.B., if the plan was subject only to a Section 2 *post hoc* challenge, it potentially could impact multiple elections before a challenge was litigated to conclusion.

that, alone, is an insufficient antidote to discriminatory voting practices.

Before Congress enacted the Voting Rights Act of 1965, the Department of Justice brought individual lawsuits against jurisdictions with discriminatory voting practices,[28] similar to the way the Department of Justice and individual plaintiffs can bring lawsuits under Section 2.[29] As this Court has noted, however, litigation of voting rights cases is "exceedingly slow" and "usually onerous to prepare," in part because the plaintiff must collect copious amounts of documentation about the discrimination.[30] Section 2 requires that a discriminatory policy go into effect potentially for several election cycles before there is enough evidence to bring a successful Section 2 challenge.[31]

Further, few potential plaintiffs want to pursue Section 2 cases because they require "huge

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[28] Vernon Francis et al., *Preserving a Fundamental Right: Reauthorization of the Voting Rights Act*, Lawyers' Committee for Civil Rights Under Law 1 (2003), http://faculty.washington.edu/mbarreto/courses/Voting_Rights.pdf.

[29] *See* 42 U.S.C. § 1973 (2006).

[30] *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

[31] *Voting Rights Act: Section 5 of the Act- History, Scope and Purpose: Hearing Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 54 (2005) (statement of Nina Perales, Regional Counsel for the Mexican American Legal Defense and Educational Fund); *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 Wm. & Mary L. Rev. 725, 736 (1998) (internal citation omitted).

amounts of resources in the litigation process to be used, both by the jurisdictions and by the individual citizens."[32] While a few nonprofit organizations represent plaintiffs in voting rights cases, they have limited resources,[33] and the voting rights bar as a whole is very small.[34] Even when a violation of the Voting Rights Act is "blatant," costs can be staggering: in one case with multiple, well established examples of discrimination, a plaintiffs' attorney worked 5,525 hours and spent $96,000 in out-of-pocket expenses, "exclusive of expenses incurred by Justice Department lawyers after the department intervened [in support of the plaintiffs] and the costs of expert witnesses and paralegals."[35]

Because Section 2 requires such massive efforts and imposes such extensive costs, striking down Section 5, and thus having Section 2 as the only remaining means to address discrimination

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[32] *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 15 (2006), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG-109shrg28753.pdf [hereinafter *Continuing Need*].

[33] *See* Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 Hastings L.J. 923, 956 (2011) (citing Gregory A. Caldeira, *Litigation, Lobbying, and the Voting Rights Bar, in Controversies in Minority Voting: The Voting Rights Act in Perspective* 230-57 (Bernard Grofman & Chandler Davidson eds., 1992)).

[34] *Continuing Need*, *supra* note 32, at 15 (statement of Anita Earls, Director of Advocacy, Center for Civil Rights).

[35] Karlan, *supra* note 31, at 736 (internal citation omitted).

"would quite plausibly leave literally thousands of unconstitutional systems in place."[36]

C. Section 5 Deters Discriminatory Practices

Section 5 deters discrimination by placing the burden and cost of litigating discriminatory practices on covered jurisdictions, rather than placing that burden on victims of discrimination. Under Section 5, covered jurisdictions must prove that a proposed rule has neither a discriminatory intent nor effect. This serves to address the reality of discrimination and the shortfalls of Section 2.[37] In fact, as Congress explained:

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided . . . to shift the advantage of time and inertia from the perpetrators of the evil to its victim[.][38]

Section 5 additionally deters discrimination through its requirement that a covered jurisdiction seeking preclearance must specify the extent to which minorities were involved in its decision-making process.[39] In practice, this requirement

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[36] *Id.*

[37] *See* 42 U.S.C. § 1973c (2006).

[38] *See* Francis, *supra* note 28, at 26 n.113 (quoting H.R. Rep. No. 94–196, at 57-58 (1975)).

[39] *Id.*

deters discrimination by "encourag[ing] local jurisdictions to consult and involve local minority representatives in the preclearance process,"[40] which will highlight the potential for discriminatory effect *before* measures are enacted.

Section 5 also provides that during the preclearance review process, if the Department of Justice preliminarily finds that some aspect of a proposed rule change is discriminatory, or that it needs additional information about a proposed rule change, it will request additional information from the jurisdiction.[41] Congress, scholars, and voting rights attorneys alike have found that such requests (which are referred to as "more information requests" or "MIRs") deter covered jurisdictions from enacting discriminatory procedures because, in practice, many jurisdictions withdraw requests for preclearance when they receive such a request.[42]

Between 1990 and 2005, the Department of Justice issued 885 MIRs in response to which the

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[40] Halberstam, *supra* note 33, at 958.

[41] *Id.* at 963.

[42] *See, e.g.*, Ana Henderson & Christopher Edley, Jr., *Voting Rights Act Reauthorization: Research-Based Recommendations to Improve Voting Access*, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, 9-10 (2006), http://www.law.berkeley.edu/files/Warren_Inst._VRA_policy_report5-5.pdf (citing Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf); H.R. Rep. No. 109–478, at 3.

covered jurisdiction either (i) changed its preclearance submission, (ii) withdrew its request for preclearance, or (iii) ignored the MIRs, which is the functional equivalent of withdrawal because the jurisdiction cannot implement the proposed change.[43] Ultimately, the Department of Justice objected to 365 submissions during that time period.[44]

For example, in Monterey County, California, election officials sought to reduce the number of polling places for a recall election for governor.[45] In response to an MIR, Monterey County withdrew its request for preclearance of five of its proposed precinct consolidations.[46] The Department of Justice ultimately granted preclearance, but as Congress noted, "[a]bsent Section 5 coverage there would not have been a withdrawal of these particular polling place consolidations."[47] As Congress has concluded, the frequency with which MIRs result in preclearance withdrawals demonstrates that Section 5's "strength lies not only in the number of discriminatory voting changes it has thwarted . . . [but also] in the discriminatory voting changes that have never materialized."[48]

Additionally, a jurisdiction must prove that its proposed changes are not discriminatory or the

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[43] Henderson & Edley, *supra* note 42, at 11.

[44] *Id.*

[45] H.R. Rep. No. 109–478, at 41 (internal citation omitted).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 36.

Department of Justice will deny preclearance. This denial of preclearance also prevents discriminatory rules from taking effect.

For example, in 2012, a parish in the State of Louisiana (a Section 5 jurisdiction), enacted a new redistricting plan that would have significantly lowered the percentage of potential African-American voters in one of the districts in the Parish, mainly by adding a new, primarily white, area to the district.[49]

The Parish claimed these changes were necessary to prevent the district from being under-populated, but the United States Department of Justice rejected that argument and noted that the district was only the third-least populated district without the proposed plan, and that adding the new area made it over-populated and violated the Constitution's one-person, one-vote requirement.[50] The Parish did not explain why it had not made simple non-discriminatory changes to the district by adding adjacent areas that had fewer people and were majority African-American. The Department of Justice therefore concluded that the Parish had

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[49] Letter from Thomas E. Perez, Assistant Attorney General, to Nancy P. Jensen, Baton Rouge, Louisiana (October 3, 2011) in Voting Rights Act Objections and Observers Searchable Index, http://lawyerscommittee.org/projects/section_5/ (Search by "Objection Letter"; then "State-Louisiana"; then "Published after 10/01/2011"; click "Search" and then click the PDF icon).

[50] *Id.*

not established that the plan was adopted without a discriminatory purpose.[51]

Similarly, in Texas, when a Section 5 jurisdiction attempted to decrease the number of polling places from 84 to 12, the Department of Justice objected.[52] Had the proposed change taken effect, it would have disproportionately burdened minority and low-income individuals because they are less likely to have the transportation necessary, or the flexibility to take the time off of work, to travel to the fewer and more distant polling places.[53] Moreover, the Department of Justice found that if the jurisdiction implemented the change, "the site with the smallest proportion of minority voters served just 6,500, while the site that served a population that was 79.2% African American and Hispanic served over 67,000 voters."[54] If not for Section 5, the proposed change would have been enacted and minority voters would have suffered.

II. WHEN SECTION 5 IS NO LONGER NECESSARY IN A COVERED JURISDICTION, THAT JURISDICTION CAN "BAIL OUT" OF SECTION 5

When covered jurisdictions have "eliminate[d] practices denying or abridging opportunities for minorities to participate in the political process,"[55]

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[51] *Id.*

[52] *Continuing Need*, *supra* note 32, at 4.

[53] *Id.*

[54] *Id.* at 4-5.

[55] S. Rep. No. 97–417, at 44, 59.

Section 4(e) of the Voting Rights Act expressly allows such jurisdictions to "bail out" of Section 5. This mechanism—which the congressional record shows is "easily proven for jurisdictions that do not discriminate in their voting practices"[56]—ensures that the means by which Congress seeks to correct past discrimination are "neither permanent nor overbroad."[57] Moreover, hundreds of jurisdictions have "bailed out" of Section 5.[58] In fact, every jurisdiction that has sought to bail out has established that it was entitled to bail out.[59] Petitioner here has not, however, even attempted to bail out or to establish that it has corrected past discrimination.[60]

Under Section 4(e) of the Voting Rights Act, a covered jurisdiction bails out of Section 5 by proving that it currently does not engage in discriminatory practices and has not done so in the past ten

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[56] *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provision the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005).

[57] H.R. Rep. No. 109–478, at 25; *see also City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (noting that the bailout provision of the Voting Rights Act the Voting Rights Act's means are proportionate to its ends).

[58] *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 881 (D.C. Cir. 2012) (citing U.S. Dep't of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 29, 2013)).

[59] *Id.*

[60] *Id.* at 857.

years.[61] Moreover, if, after an independent investigation, the Department of Justice finds that a covered jurisdiction has demonstrated by "objective and compelling evidence" that it satisfied Section 4(e), the Department of Justice may consent to the

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[61] Specifically, the jurisdiction must prove that it currently is seeking to expand minority participation in the political process and has, at no time in the preceding ten years:

(1) used a voter-eligibility requirement that had the purpose or effect of "denying or abridging" the right to vote based on race, color, or membership in a language-minority group;

(2) maintained voting procedures that inhibit or dilute equal access to voting;

(3) had a final judgment entered against it, or entered into a consent decree or settlement agreement, finding that it had employed discriminatory voting practices;

(4) been assigned a federal observer to monitor elections held in the jurisdiction;

(5) failed to timely submit voting changes for preclearance applications or to timely withdraw unapproved changes as required under Section 5;

(6) had any preclearance applications opposed by the Department of Justice and United States District Court for the District of Columbia;

(7) allowed known harassment or intimidation of voters to persist; nor

(8) violated any voting-related provision of the Constitution, state, or federal law (unless such violation was "trivial," "properly corrected," or "not repeated").

See 42 U.S.C. 1973b(a)(1), (a)(3) (2006); *see also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, § 13(d)(2), 120 Stat. 580 (July 27, 2006) (providing additional detail on the enumerated factors); S. Rep. No. 97–417, at 53 (same).

jurisdiction's request to bail out.[62] A jurisdiction that has complied with the Voting Rights Act thus can "exempt itself" from Section 5 quickly and efficiently.[63]

In total, as of May 9, 2012, there were 136 covered jurisdictions and sub-jurisdictions that had successfully bailed out.[64] Indeed, since Congress liberalized bailout in 1982 to "incentiv[ize] jurisdictions to attain compliance with the law and increas[e] participation by minority citizens in the political process in their community,"[65] every single jurisdiction that has sought to bail out has done so

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[62] 42 U.S.C. § 1973b(a)(9). It is worth noting, however, that even if a covered jurisdiction bails out, its declaratory judgment action can be reopened within ten years should the Department of Justice or an aggrieved person allege conduct that would have barred bailout had it occurred during the ten years preceding the jurisdiction's bailout application. *Id.* § 1973b(a)(5).

[63] J. Gerald Hebert & Renata E. B. Strause, *The Future of the Voting Rights Act*, 64:4 Rutgers L. Rev. 953, 965 (2012) (quoting H.R. Rep. No. 89–439, at 15 (1965)).

[64] *Shelby Cnty.*, 679 F.3d at 856 (citing U.S. Dep't of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 29, 2013)). Petitioners and/or their *amici curiae* argue that the prospect of bailout is "illusory" because a state's ability to bailout can be hindered by its subdivision's actions. *See, e.g.*, Br. of Arizona, Georgia, South Carolina, and South Dakota as *Amici Curiae* in Support of Pet'r at 27-30. This is, however, at best an argument for further liberalizing Section 4(e), not for striking down Section 5.

[65] Hebert, *supra* note 2, at 262 (quoting S. Rep. No. 97–417, at 44); *see also Shelby Cnty.*, 679 at 856 (noting that "the 1982 version of the Voting Rights Act made bailout substantially more permissive").

successfully.[66] More than 100 jurisdictions currently have bailout applications pending.[67]

Moreover, the Voting Rights Act does not require jurisdictions to be perfect in order to bail out; a jurisdiction can bail out despite its failure to comply with Section 5 preclearance so long as any such failure was "trivial," "properly corrected," or "not repeated."[68] This flexibility has enabled "once-

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[66] *Shelby Cnty.*, 679 F.3d at 882.

[67] *Id.* Most recently, the Department of Justice and the State of New Hampshire filed a joint motion for a consent decree to the United States District Court for the District of Columbia stating that New Hampshire has met the requirements laid out in Section 4(e), and thus is entitled to bailout. Joint Motion for Entry of Consent Judgment and Decree, *New Hampshire v. Holder*, No. 1:12-cv-01854 (D.C. Cir. Dec. 21, 2012). The District Court's ruling is pending. At least one interest group has sought to intervene in New Hampshire's bailout action (and thus stop preclearance). *See* Ryan J. Reilly, *Conservative Group Attempts to Block New Hampshire's Bailout from Voting Rights Act*, Huffington Post, (Jan. 2, 2013, 4:59 PM) http://www.huffingtonpost.com/2013/01/02/new-hampshire-voting-rights-act_n_2397801.html. The Department of Justice has argued that such permissive intervention should not be granted because the interest group's "purpose appears to be to advance" Petitioner's position in this action, rather than a legitimate concern regarding the merits of New Hampshire's compliance with the Voting Rights Act. *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Heilemann's Motion to Intervene at 15, *New Hampshire v. Holder*, No. 1:12-cv-01854 (D.C. Cir. Dec. 19, 2012).

[68] 42 U.S.C. § 1973b(a)(3); S. Rep. No. 97–417, at 53. *See, e.g.*, Consent Judgment and Decree at 6, *Augusta Cnty., Va. v. Gonzalez*, No. 05-1885 (D.D.C. Nov. 30, 2005) (granting bailout where covered jurisdiction had implemented minor changes to its electoral procedures without first seeking preclearance).

bad actors" who have meaningfully eliminated discrimination to bail out.[69]

For example, on August 31, 2012, the United States District Court for the District of Columbia granted a consent judgment and decree releasing Merced County, California from Section 5.[70] Merced County had been a covered jurisdiction since 1975, when the Attorney General and Director of the Census determined that it fell under the Voting Rights Act's coverage formula because the County provided registration and voting materials only in English and more than five percent of voting-age citizens in the County spoke only Spanish.[71] Since at least 2002, however, (*i.e.*, the ten years preceding the County's bailout), and during the pendency of the bailout action, Merced County provided voter

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For example, the Department of Justice will allow a jurisdiction that inadvertently failed to submit minor rule changes for preclearance to submit such changes for clearance while applying for bail out so long as the jurisdiction establishes that it was not seeking to evade the preclearance process. *See* Hebert, *supra* note 2, at 273.

[69] Hebert & Strause, *supra* note 63, at 967. In fact, Congress expressly acknowledged that the preclearance provision should apply only to jurisdictions so long as those jurisdictions were unable to correct discriminatory practices on their own, and thus liberalized the bailout provision. *See* H.R. Rep. No. 109–478, at 10, 25; *see also* Hebert & Strause, *supra* note 63, at 955-56 (noting that when Congress renewed the Voting Rights Act in 1982, it did not change the coverage formula, but it did amend the provisions under which jurisdictions can bail out).

[70] Consent Judgment and Decree at 14, *Merced Cnty., Cal. v. Holder*, No. 1:12-cv-00354 (D.C. Cir. Aug. 31, 2012) [hereinafter *Merced County* Consent Judgment and Decree].

[71] *Id.* ¶ 40; *see also* 40 Fed. Reg. 43,746 (Sept. 23, 1975).

registration materials in both English and Spanish, provided in-person bilingual assistance at all polling places, and printed all signs, ballots, and sample ballots in both English and Spanish.[72]

Although Merced County had failed to submit several potential voting changes for preclearance during the ten years preceding its bailout action, the Department of Justice determined after an independent investigation that "the [County's] failure to make such submissions prior to implementation was inadvertent or based on a good faith belief the changes were not covered by Section 5 [rather than] the product of any discriminatory reason."[73] Additionally, as soon as the Department of Justice notified Merced County of these errors, the County submitted those proposed rule changes to the Department of Justice for approval.[74] The Department of Justice did not object to the late-submitted requests and found that "objective and compelling evidence" demonstrated that Merced County, including its eighty-four political subdivisions, had met the requirements of Section 4(e).[75] The Department of Justice therefore agreed

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[72] *Merced County* Consent Judgment and Decree, *supra* note 70, ¶¶ 22-23.

[73] *Id.* ¶ 29.

[74] *Id.*

[75] *See* 42 U.S.C. § 1973b(a)(9). The Department of Justice found that Merced County met all other enumerated requirements to bail out. For example, Merced County had submitted 252 preclearance requests in the preceding ten years. *See Merced County* Consent Judgment and Decree, *supra* note 70, ¶ 29. The Department of Justice had not objected to a preclearance request from Merced County for

that Merced County had corrected its previous language-related discriminatory voting practice and was entitled to bail out of Section 5's preclearance requirement.[76] The District Court agreed and entered judgment for Merced County.[77]

Unlike Merced County and the hundreds of other jurisdictions that have been excused from Section 5 by correcting past discrimination, Petitioner has never sought to bail out.[78] This is not surprising, given that the Department of Justice recently has objected to annexations and redistricting plans proposed in Shelby County and because the County recently has failed to seek preclearance on multiple occasions.[79] Discrimination therefore persists in Shelby County[80]—as it does in many Section 5 jurisdictions—and Petitioner should not be permitted to escape its obligations under the Voting Rights Act. If and when Petitioner "eliminate[s] practices denying or abridging opportunities for

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over ten years. *Id.* ¶ 19. Although Merced County did have one Section 5 suit filed against it in 2006, that case did not go to judgment, and thus did not preclude bailout. *See id.* ¶ 28; *see also Lopez v. Merced Cnty., Cal.,* 473 F. Supp. 2d 1072 (E.D. Cal. 2007). The Court also found that Merced County had "engaged in a variety of constructive efforts" to correct prior discrimination. *See Merced County* Consent Judgment and Decree, *supra* note 70, ¶ 40 (citing 42 U.S.C. § 1973b(a)(1)(F)(iii)).

[76] *See Merced County* Consent Judgment and Decree, *supra* note 70*,* ¶¶ 7-9, 13, 31.

[77] *See id.* at 16.

[78] *Shelby Cnty., Ala.*, 679 F.3d at 882.

[79] *Id.*

[80] *Id.* at 857.

minorities to participate in the political process,"[81] then it can bail out of Section 5.

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As demonstrated above, discrimination against minority voters persists and Section 5 deters jurisdictions from enacting voting procedures that have discriminatory intent or effect in a way that *post hoc* litigation cannot do. Moreover, to the extent a covered jurisdiction demonstrates that is has corrected past discriminatory practices—which Petitioner has not even attempted to do—that jurisdiction will no longer be subject to federal oversight under Section 5. Section 5 thus remains a meaningful and proportionate guardian of the fundamental right to vote and should be upheld.

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Respectfully submitted,

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[81] S. Rep. No. 97–417, at 44, 59.