No. 12-96

IN THE

# Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
*Petitioner*,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES, *et al*.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR PROFESSORS RICHARD L. ENGSTROM, THEODORE S. ARRINGTON, AND DAVID T. CANON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PETER BUSCEMI
*Counsel of Record*
DAVID M. KERR
BAHAR SHARIATI
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5190
pbuscemi@morganlewis.com

*Counsel for Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## INTEREST OF THE *AMICI CURIAE*

Professors Richard L. Engstrom, Theodore S. Arrington, and David T. Canon are political scientists who have researched and written extensively on election administration and election reform in the United States.[1] *Amici* take an interest in this case because their research concerns race and voting in federal, state, and local elections. *Amici* believe their expertise may be of use to the Court as it considers Congress's basis for reauthorizing Section 5 of the Voting Rights Act ("VRA") in 2006. Because they have specifically studied and analyzed evidence of racially polarized voting and its effects, *amici* can inform this Court about how the existence of racially polarized voting, which is increasing in covered jurisdictions, creates increased opportunities for unconstitutional intentional voting discrimination. Specifically, voting along racial lines, among other things, can interact with electoral schemes to dilute the minority vote and allow elected officials to ignore the interests of racial minorities without political consequence.

Doctor Engstrom was a professor of political science at the University of New Orleans from 1971 to 2006 and is currently a Visiting Professor of Political Science and Visiting Research Fellow at the Center for the Study of Race, Ethnicity, and Gender in the Social Sciences at Duke University. He has conducted extensive research and is widely published on electoral reform and vote dilution. *See, e.g.*, Delbert A. Taebel, Richard L. Engstrom, and Richard

---

[1] All parties have given blanket consent to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief.

L. Cole, *Alternative Electoral Systems as Remedies for Minority Vote Dilution*, 11 Hamline J. Pub. L. & Pol'y 19 (1990); Richard L. Engstrom & Michael D. McDonald, *Qualitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urb. Law. 369, 374 (Summer 1985); Richard L. Engstrom & John K. Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 Legis. Stud. Q. 465, 465-66 (1977); Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 Ariz. St. L.J. 277, 285-86, 296. Courts have relied upon both his published work and his expert testimony on racially polarized voting and political redistricting. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11, 53 n.20, 71 (1986) (citing three of Dr. Engstrom's articles with approval); *Clark v. Calhoun County*, 88 F.3d 1393, 1397 (5th Cir. 1996) ("[T]he district court's finding that racially polarized voting exists [based in part on Dr. Engstrom's analysis] is beyond question."); *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 731-32 (N.D. Tex. 2009) (concluding that plaintiff, through Dr. Engstrom, had proven the existence of racially polarized voting). Professor Engstrom testified before the House Subcommittee on the Constitution of the Committee on the Judiciary in 2005 when reauthorization of the VRA was being considered.

Doctor Arrington is a professor emeritus in the Department of Political Science and Public Administration at the University of North Carolina at Charlotte. His research concerns primarily voting behavior, voting systems, and redistricting, and has been published in many leading political science journals. *See, e.g.*, Theodore S. Arrington, *Affirmative*

*Districting and Four Decades of Redistricting: The Seats/Votes Relationship 1972-200*8, Politics and Policy 38 (Number 2, 2010) 223-253; Theodore S. Arrington, *Redistricting in the U.S.: A Review of Scholarship and Plan for Future Research*, The Forum 8 (Number 2, Article 7, 2010). Professor Arrington has been retained as an expert witness and given testimony about bloc voting, vote dilution, and redistricting in more than 30 cases in federal courts. *See, e.g.*, *United States v. Charleston Cnty.*, 365 F.3d 341, 350 (4th Cir. 2004) ("[T]he United States' expert, Dr. Arrington, found an even higher overall rate of racially polarized voting."); *Cane v. Worcester Cnty.*, 840 F. Supp. 1081, 1087 (D. Md. 1994) ("The Court qualified Dr. Arrington as an expert to testify on voting behavior, political analysis, party politics and racial voting patterns."). *Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266, 1273 (4th Cir. 1993) (referring explicitly to Dr. Arrington's testimony). He also testified before the Senate Judiciary Committee in 2006 when Congress was considering reauthorization of the VRA.

Doctor Canon is a professor of political science at the University of Wisconsin, Madison. His research interests are in race and representation, political careers, congressional reform, partisan realignments, and the historical analysis of Congress. His major research on the question of racial representation was published in *Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts* (University of Chicago Press 1999). This book was awarded the American Political Science Association's Richard F. Fenno Prize for the best book published on legislative politics in 1999. Professor Canon is the author of approximately 35 scholarly articles and chapters, three scholarly books,

three edited volumes, an introductory American politics textbook (currently in its third edition), and a leading reference work on congressional committees. He has testified as an expert in two voting rights cases in federal court and has served as an expert consultant in three other federal voting rights cases on issues concerning redistricting, racial representation, and retrogression under Section 5 of the VRA (in the remand ordered by *Georgia v. Ashcroft*, 539 U.S. 461 (2003)) and racially polarized voting. He also testified before the Senate Subcommittee on the Constitution, Civil Rights, and Property Rights (of the Senate Judiciary Committee) during the consideration of reauthorization of the VRA in 2006. Professor Canon's ongoing research concerns redistricting, election administration, and election reform.

## SUMMARY OF ARGUMENT

The district court described the substantial evidence of unconstitutional voting discrimination in the legislative record that justifies the 2006 reauthorization of Section 5. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 463-92 (D.D.C. 2011). This includes evidence that racially polarized voting exists and is increasing in the covered states. *Id*. at 487-88. In this brief, *amici* will explain the nature of racially polarized voting, its implications for vote discrimination, and why its persistence supports reauthorization of Section 5 for covered jurisdictions.

Racially polarized voting exists when there is an empirical correlation between the race of a voter and the way in which the voter votes. Although racially polarized voting is not itself state action, there is a link between racially polarized voting and discriminatory exclusion of minority voters from the demo-

cratic process. Specifically, racially polarized voting makes certain discriminatory voting practices, such as vote dilution, increasingly possible. Vote dilution occurs when the effectiveness of minority voters is minimized or canceled out through state action.

The significant potential for vote dilution, which can violate the Fourteenth and the Fifteenth Amendments, provides an important ground for Congress's reauthorization of the pre-clearance mechanism under Section 5. The VRA protects not merely the right to cast a ballot, but also the right to cast a vote that will be meaningful. Vote dilution, therefore, can affect an individual's right to vote just as an absolute prohibition against casting a ballot would.

There is overwhelming evidence that racially polarized voting not only exists in covered jurisdictions, but also that it is more pronounced in covered jurisdictions than in non-covered jurisdictions. Because racially polarized voting makes minority voters vulnerable to vote dilution, evidence of its prevalence in covered jurisdictions, combined with the documented history of discrimination in those areas, supports the reauthorization of Section 5.

## ARGUMENT

### I. CONGRESS PROPERLY CONSIDERED EVIDENCE OF RACIALLY POLARIZED VOTING IN REAUTHORIZING SECTION 5.

Based on extensive testimony and other evidence, Congress found that "[t]he continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." *See* Fannie Lou Hamer, Rosa

Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(3), 120 Stat. 577 ("Reauthorization and Amendments Act of 2006"). The House Judiciary Committee concluded that "[t]he breadth of racially polarized voting and its impact on minority voters represent a serious concern." H.R. Rep. No. 109-478, at 34 (2006). For the following reasons, *amici* agree with Congress's understanding and conclusions concerning racially polarized voting in the covered jurisdictions and thus believe this Court should not overturn Congress's carefully-considered and well-supported judgment to rely on this factor in reauthorizing Section 5.

### A. That Racially Polarized Voting Occurs Is A Fact.

"[R]acial polarization exists where there is a consistent relationship between [the] race of the voter and the way in which the voter votes, . . . or to put it differently, where black voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21 (internal quotation marks and citation omitted). In other words, racially polarized voting "occurs when voting blocs within the minority and white communities cast ballots along racial lines." H.R. Rep. No. 109-478, at 34.

To be clear, racially polarized voting is an observed correlation. It is *not*, as the Pacific Legal Foundation asserts in its *amicus* brief (at 9), based on the "perception that members of the same racial group . . . think alike." Indeed, this Court properly rejected the argument that "racially polarized voting refers to voting patterns that are in some way *caused by race*, rather than to voting patterns that are merely *corre-*

*lated with the race of the voter . . . .*" *Gingles*, 478 U.S. at 63; *see also LaRoque v. Holder*, 831 F. Supp. 2d 183, 227 (D.D.C. 2011) ("[A] group defined by race can be considered a community of interest for voting purposes only when empirical evidence, rather than stereotypes, demonstrates that members of the minority group vote alike."), *vacated on other grounds*, 679 F.3d 905 (D.C. Cir. 2012). Racially polarized voting, therefore, must be proved, not assumed or supposed. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

As recognized by Congress (*see, e.g.*, H.R. Rep. No. 109-478, at 34-35), federal courts have found numerous instances of racially polarized voting.[2] *See, e.g.*,

---

[2] Section 2 of the VRA is, of course, a very important part of the statute, and findings from Section 2 cases document the continued existence of racially polarized voting. *Amici* disagree, however, with Shelby County's assertion that "Section 2 is now the 'appropriate' prophylactic remedy for any pattern of discrimination that Congress documented in the 2006 legislative record." Pet. Br. 20. Although a full discussion of this issue is outside the scope of this brief, *amici* wish to point out a few of the flaws in petitioner's argument. For one thing, Section 2 is not "prophylactic" at all. Section 2 only works after a discriminatory practice has been put into place and has been challenged in court. Section 5 is far more prophylactic in its ability to protect minority voting rights by stopping such practices from going into effect through the pre-clearance process. In addition, as one of the *amici* submitting this brief (Prof. Canon) explained in his testimony to the Senate Judiciary Committee, petitioner's argument ignores the deterrent effect of Section 5: "There is no doubt that the deterrent effect is real as documented by a recent study by Luis Fraga of the impact of more information requests by the Justice Department on discriminatory voting changes." *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field*, *Hearing Before the Subcomm. on the Const., Civil Rights and Prop. Rights of the S. Comm. on the Judiciary*, 109th Cong. 191 (June 21, 2006) (S. Hrg. 109-822)

*League of United Latin American Citizens v. Perry*, 548 U.S. 399, 426 (2006) ("The District Court found 'racially polarized voting' in south and west Texas, and indeed 'throughout the State.'" (citation omitted)); *Gingles*, 478 U.S. at 61 ("We conclude that the District Court's approach, which tested data derived from three election years in each [North Carolina] district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard."); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("There was also overwhelming evidence of bloc voting along racial lines [in Burke County, Georgia]."); *Clark*, 88 F.3d at 1397 ("In this case, the district court's finding that racially polarized voting exists [in Mississippi] is beyond question."); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D. 2004) ("The court concludes that substantial evidence, both statistical and lay, demonstrates that voting in South Dakota is racially polarized among whites and Indians in Districts 26 and 27."); *Dillard v. Baldwin Cnty. Comm'n*, 222 F. Supp. 2d 1283, 1290 (M.D. Ala. 2002) ("Plaintiffs have shown that black citizens of Baldwin County still suffer from the racially polarized voting."); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002) ("In this case the

---

(testimony of Prof. Canon). Finally, without the "ability to elect" retrogression standard that was restored as part of Section 5 in the 2006 VRA reauthorization, minority voters would have little recourse to protect the representational gains achieved under the statute. Therefore, despite petitioner's assertion to the contrary (Pet. Br. 20), Congress reasonably concluded that measures beyond the "traditional remedies" such as 42 U.S.C. §1983 and Section 2 are necessary to solve the problem of ongoing voting discrimination in covered states.

parties have presented substantial evidence that this disturbing fact has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the State and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute."); *Houston v. LaFayette Cnty.*, 20 F. Supp. 2d 996, 1002 (N.D. Miss. 1998) (finding racially polarized voting in LaFayette County, Mississippi); *Cofield v. City of LaGrange*, 969 F. Supp. 749, 756 (N.D. Ga. 1997) ("The single conclusion that can be drawn from the expert testimony is that LaGrange City-Council elections exhibit racially polarized voting."); *DeGrandy v. Wetherell*, 794 F. Supp. 1078, 1079 (N.D. Fla. 1992) ("The parties agree that racially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting."), *aff'd in part and rev'd in part on other grounds sub nom. Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Clark v. Roemer*, 777 F. Supp. 445, 454 (M.D. La. 1990) ("The court would agree that there is, for example, evidence of strong racial polarization in Louisiana statewide."); *Ewing v. Monroe Cnty.*, 740 F. Supp. 417, 423 (N.D. Miss. 1990) ("The court finds that a pattern of voting behavior in county and district races clearly shows 'legally significant' racial polarization among both black and white voters.") *Major v. Treen*, 574 F. Supp. 325, 351-52 (E.D. La. 1983) ("A consistently high degree of electoral polarization in Orleans Parish is proven through both statistical and anecdotal evidence. Particularly as enhanced by Louisiana's majority vote requirement,

racial bloc voting substantially impairs the ability of black voters in this parish to become fully involved in the democratic process." (footnote omitted)).

### B. There Is A Link Between Racially Polarized Voting And Government Discrimination Against Minority Voters.

Congress (and the district court) correctly described the link between racially polarized voting and discriminatory exclusion of minority voters from the democratic process. H.R. Rep. No. 109-478, at 34 ("The Committee finds it significant that the ability of racial and language minority citizens to elect their candidates of choice is affected by racially polarized voting"); 811 F. Supp. 2d at 488 ("Shelby County fails to recognize the close link between racially polarized voting and intentional, state-sponsored minority vote dilution.").

Shelby County's statement that racially polarized voting is "not governmental discrimination" (Pet. Br. 31) misses the point. As far as *amici* are aware, no one has ever claimed that racially polarized voting is state action or even that it is a form of discrimination *per se*. In its legislative findings, Congress did not list racially polarized voting as "*evidence* of continued discrimination." *See* Reauthorization and Amendments Act of 2006 § 2(b)(4) (emphasis added). Instead, as described above, Congress found that minorities are "politically vulnerable" because of racially polarized voting. *Id*. at § 2(b)(3).

Minorities are made vulnerable by racially polarized voting because "[t]he potential for discrimination in environments characterized by racially polarized voting is great." H.R. Rep. No. 109-478, at 35.

Racially polarized voting makes certain discriminatory voting practices possible. For example, racially polarized voting "enables the use of devices such as multi-member districts and at-large elections that dilute the voting strength of minority communities." *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 263 (D.D.C. 2008), *rev'd and remanded on other grounds*, 557 U.S. 193 (2009).

As a result, state electoral changes, some of which might be acceptable in other jurisdictions, can have a discriminatory purpose or effect when made in areas where racially polarized voting exists:[3] "In an environment characterized by racially polarized voting, politicians can predictably manipulate elections—either by drawing districts or setting an issue for a referendum—to 'minimize or cancel out [minority voters'] ability to elect their preferred candidates.'" *United States v. McGregor*, 824 F. Supp. 2d 1339, 1346 (M.D. Ala. 2011) (quoting *Gingles*, 478 U.S. at 48); *see also Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (explaining how racially polarized voting creates an opportunity for state legislatures to dilute the voting strength of politically cohesive minority groups).

The district court was thus correct that "where minorities and non-minorities tend to prefer different candidates, the ability of minorities to elect their

---

[3] *See* 42 U.S.C. § 1973c(b) ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.").

candidates of choice can be intentionally reduced through the adoption of a wide variety of dilutive techniques, including the manipulation of district boundaries, the enactment of discriminatory annexations, and the implementation of majority-vote requirements." 811 F. Supp. 2d at 487 (citing *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcom. on the Const., H. Comm. on the Judiciary*, 109th Cong. 1721 (March 8, 2006) (Serial No. 109-103, Vol. II) (appendix to statement of Wade Henderson). "It is only because of the continued existence of racially polarized voting that covered jurisdictions can structure their electoral processes so as to intentionally diminish the ability of minority voters to elect candidates of their choice." 811 F. Supp. 2d at 488 (citing *Voting Rights Act: The Continuing Need for Section 5, Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 59 (Oct. 25, 2005) (Serial No. 109-75) (prepared statement of Richard Engstrom)).

As such, "[i]f racially polarized voting disappeared entirely—such that there is no correlation between race and voting—it would be virtually impossible for a districting plan to be retrogressive under Section 5." *LaRoque*, 831 F. Supp. 2d at 227 (citing Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 243 (2007)). This gives Section 5 "an elegant, self executing limitation. . . . [S]hould racially polarized voting substantially diminish before twenty-five years have passed—and with it, the ability (and motivation) for legislators to draw dilutive districts—Section 5 will play a dramatically smaller role in state voting procedures even before it officially expires." 831 F. Supp. 2d at 277.

In the meantime, Congress was correct to take into account racially polarized voting when it reauthorized Section 5. Congress observed that instead of decreasing, racially polarized voting is increasing in covered jurisdictions. *See, e.g.*, H.R. Rep. No. 109-478, at 34 ("Testimony presented indicated that 'the degree of racially polarized voting in the South is increasing, not decreasing . . . [and is] in certain ways re-creating the segregated system of the Old South . . . .'"). When racially polarized voting exists, "there is effectively an election ceiling." *Id*. In other words, "[i]n elections characterized by racially polarized voting, minority voters alone are powerless to elect their candidates. Moreover, it is rare that white voters will cross over to elect minority preferred candidates." *Id*. As a result, "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race." *Rogers*, 458 U.S. at 623.

## II. THE CONGRESSIONAL RECORD INCLUDES AMPLE EVIDENCE OF RACIALLY POLARIZED VOTING, AND IN ANY EVENT ANY ALLEGED SHORTCOMING IN THE LEGISLATIVE RECORD DOES NOT HELP PETITIONER.

Petitioner also argues (Pet. Br. 45-49) that the congressional record does not contain enough evidence of racially polarized voting, and thus Congress allegedly failed to address the issue in sufficient detail before reauthorizing Section 5. This argument fails for two reasons.

First, the Constitution does not impose on Congress the obligation to create a "record" to support its

legislation. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 213 (1997) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.") (citations and quotations omitted); *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties."). Indeed, this Court has held that "Congress is not required to build a record in the legislative history to defend its policy choices." *Mansell v. Mansell*, 490 U.S. 581, 592 (1989). "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. . . . Any contrary conclusion would require us to be blind to the realities familiar to legislators." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). This is especially true where, as here, Congress is extending a statute that has been debated, examined, and passed multiple times. *See Fullilove*, 448 U.S. at 503 (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considered action in that area."). Petitioner's arguments regarding the congressional record disregard these basic principles.

Moreover, petitioner ignores the predictive aspect of the legislative task. The issue is not only what *past* facts were available to the Congress that re-

authorized the VRA, but what Congress legitimately could conclude would be likely to occur in the *future* if Section 5's preclearance requirement were to be eliminated in the covered jurisdictions. Congress properly could consider, in other words, not only what has happened during the years that the VRA has regulated behavior, but also what would be likely to happen in the absence of that regulation. As one commentator has observed, "[t]he continuing need for existing legislation like Section 5 requires not documentation of existing unconstitutional conduct but instead speculation about the scope of such conduct absent the preclearance requirement." *See, e.g.*, Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* Voting Rights Act Reauthorization of 2006: Perspectives of Democracy, Participation, and Power 185 (Ana. Henderson ed., 2007). The prophylactic nature of Section 5 and the evidence of its deterrent effect are sufficient. Congress clearly relied on such evidence when it reauthorized Section 5. *See, e.g.*, *Voting Rights Act: The Continuing Need for Section 5 Pre-Clearance*, *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22-23 (May 16, 2006) (S. Hrg. 109-569) ("[W]e really will see a huge impact if Section 5 is lost.") (testimony of Anita Earls).

Second, contrary to petitioner's assertions, the congressional record here includes ample evidence regarding the persistence of racially polarized voting. As an initial matter, there was testimony regarding racially polarized voting in general and how racially polarized voting can create an environment in which an electoral result harming minority voters can be achieved by making changes to voting procedures or practices. *See, e.g.*, *To Examine the Impact and Effec-*

*tiveness of the Voting Rights Act, Hearing Before the Subcomm. on the Const., H. Comm. on the Judiciary*, 109th Cong. 23 (Oct. 18, 2005) (Statement of Joe Rogers, former Lt. Gov. of Colo.) (Serial No. 109-70) ("[I]n many areas of the country, voting continues to be racially polarized. . . . One consequence of racially polarized voting is that minority voters cannot elect candidates of choice or preference perhaps if it is by race or ethnicity. That simply may not be an option unless there is a majority or near majority of the electorate."); *id*. at 28-29 ("In the last decade, federal court cases involving statewide redistricting plans in Georgia, Louisiana, South Carolina, South Dakota and Texas have found racially polarized voting exists in their states. . . . Because of racially polarized voting, a new voting procedure that harms minority voters is likely to achieve the electoral result desired by state actors who make the change."); *Evidence of Continued Need*, at 214-17, 219 (Serial No. 109-103, Vol. I) (emphasizing that the degree of racially polarized voting in the South is increasing, that redistricting presents the "most dramatic manifestations" of vote dilution, and that redistricting is a battle fought "at least once a decade, given the widespread persistence of racially polarized voting."); *id*. at 301-02 (testimony by expert who has conducted studies since 2000 census confirming racially polarized voting); *id*. at 356-57 (summary of testimony on existence of racially polarized voting); *id*. at 2415-50 (including an "Assessment of Racially Polarized Voting For and Against Latino Candidates"); *Voting Rights Act: The Continuing Need for Section 5 Pre-Clearance,* at 14-22 (S. Hrg. 109-569) (testimony by experts on continuing existence of racially polarized voting); *see also* H.R. Rep. No. 109-478, at 34-35

(explaining racially polarized voting, explaining how racially polarized voting can enable vote dilution to occur, and citing post-1980 case law in which courts have found the existence of racially polarized voting in Florida, Texas, South Carolina, South Dakota and Louisiana). The above sampling of evidence before Congress is surely sufficient to provide a basis for Congress's correct finding that racially polarized voting continues to exist and makes minorities politically vulnerable to discrimination.

Congress also reviewed evidence of racially polarized voting in the covered jurisdictions, and the evidence showed that racially polarized voting is much more pronounced in covered than in non-covered jurisdictions. *See, e.g.*, H.R. Rep. No. 109-478, at 34 ("Testimony presented indicated that 'the degree of racially polarized voting in the South is increasing, not decreasing.'"); *Evidence of Continued Need*, at 53-54 (Serial No. 109-103, Vol. I) (summarizing report on Alabama that included evidence of racially polarized voting); *id*. at 355 (summarizing testimony on "very high degree of racially polarized voting" in North Carolina and giving example of an election affected by racially polarized voting); *id*. at 362-63 (summarizing testimony on existence of racially polarized voting in Virginia and giving an example of a redistricting meeting in 2002 in which the city council of the City of Fredericksburg instructed the city attorney to find a way to draw the lines to eliminate the African-American majority district); *id*. at 365-67 (summarizing testimony on racially polarized voting in Mississippi and how "racially polarized voting in the state was intense, and had majority-black districts not been drawn, there would be few black lawmakers in office there."); *id*. at 1312, 1349-50 (including evidence that in 2000 redistricting in

Alaska, the redistricting board hired a national voting rights expert who found racially polarized voting in certain areas); *id*. at 1403-10 (explaining electoral actions and changes in Arizona with discriminatory effects that could exist only in the context of racially polarized voting); *Evidence of Continued Need* (Serial No. 109-103, Vol. II) at 1503, 1508, 1510 n.44, 1521 (including evidence that federal courts have continued to find racially polarized voting in Georgia); *id*. at 1601-05, 1607-09, 1614-15, 1618, 1621, 1628, 1637, 1639-40 (including evidence that in the face of "persistent racially polarized voting" in Louisiana, electoral gains have largely come about through the existence of minority-majority districts, and discussing specific examples illustrating the effect of racially polarized voting on elections); *id*. at 1709, 1721-23 (including evidence of racially polarized voting in Mississippi post-1980); *id*. at 1974-75 (emphasizing problem of racially polarized voting in South Carolina and including citations to caselaw making such findings); *id*. at 2012-13 (including evidence discussing a 1984 case from Marengo County, Alabama, in which the court held that racially polarized voting, among other things, led to a depressed level of participation by black voters).

Similarly, in contrast to petitioner's assertion (Pet. Br. 45-46), Congress did hear comparative evidence of racially polarized voting in covered versus non-covered jurisdictions, and it correctly found that racially polarized voting is more pronounced in the former. *See, e.g*., H.R. Rep. No. 109-478, at 34-35 (discussing caselaw in which courts have found the existence of racially polarized voting in Florida, South Carolina, Louisiana, Texas, and South Dakota); *Evidence of Continued Need*, at 351 (Serial No. 109-103, Vol. I) (showing that as recently as 2001,

California passed the California Voting Rights Act of 2001, which "is designed to confront the widespread degree of racially polarized voting in the state and the inability of many Latino voters to elect candidates of their choice."); *id*. at 215-17 (comparing racially polarized voting in covered and noncovered jurisdictions); *id*. at 1856-62 (discussing racially polarized voting in New York). As the district court correctly concluded, "there is evidence in the record indicating that racially polarized voting is much more pronounced in covered than in non-covered jurisdictions." 811 F. Supp. 2d at 507 (citing *The Continuing Need for Section 5 Pre-Clearance*, at 48 (response of Anita Earls) (S. Hrg. 109-569)). This conclusion is confirmed by an analysis of Section 2 case law. *See, e.g*., Katz, *Not Like the South?* 196 ("Of the cases in which courts found legally significant racial bloc voting, courts in covered jurisdictions have documented racial polarization in specific elections that was more extreme than have courts in non-covered ones, and have done so at rates that are statistically significant.").

In addition, Congress heard evidence that although racially polarized voting exists in both covered and non-covered states, its existence in covered states is more of a concern. *See, e.g*., *Voting Rights Act: The Continuing Need for Section 5 Pre-Clearanc*e, at 14 (S. Hrg. 109-569) ("The question is how [racially polarized voting] interacts with election procedures, with the traditions in the community, with a number of things, and so I think just to say that racially polarized voting exists everywhere and therefore there is no difference between the covered and uncovered jurisdictions, is simply not true.") (testimony of Theodore S. Arrington).

Not only did Congress have a sufficient record of racially polarized voting, but more recent data and caselaw confirm the continued existence of racially polarized voting in the covered jurisdictions. In 2007 and 2008, federal courts found racially polarized voting and minority vote dilution in Mississippi, and relied in part on these conclusions in holding that certain electoral schemes violated the VRA. *See Jamison v. Tupelo*, 471 F. Supp. 2d 706, 713 (N.D. Miss. 2007) ("[T]he evidence submitted by both the plaintiffs and defendants supports a determination that racially polarized voting occurs within the city of Tupelo with recognizable regularity."); *United States v. Brown*, 494 F. Supp. 2d 440, 484 & n.72 (S.D. Miss. 2007) ("defendants have admitted that voting in Noxubee County is racially polarized," and the court cited the findings of one of the *amici* submitting this brief (Prof. Arrington) showing the degree to which voting is racially polarized); *Fairley v. Hattiesburg*, No. 2:06cv167-KS-MTP, 2008 WL 3287200, at *9 (S.D. Miss. August 7, 2008) ("In addition to this history of official discrimination, the evidence also established that the City exhibited extreme racial bloc voting and racially polarized voting patterns in each of the last two municipal elections."). Similarly, in *McGregor*, 824 F. Supp. 2d at 1346, the court found that politicians in Alabama "plainly singled out African-Americans for mockery and racist abuse." The court concluded that "[i]n an era when the 'degree of racially polarized voting in the South is increasing, not decreasing,' Alabama remains vulnerable to politicians setting an agenda that exploits racial differences." *Id*. at 1347 (citation omitted). The same conclusion has been reached in South Carolina, where federal courts have emphasized the continued existence of racially polarized voting. *See United*

*States v. Charleston Cnty. Council*, 316 F. Supp. 2d 268 (D.S.C. 2003) (recounting evidence of severe degree of racial polarization in South Carolina elections); *see also Colleton*, 201 F. Supp. 2d at 641. And similar findings have been made in Texas, *see, e.g., Texas v. United States*, No. 11-1303, 2012 WL 3671924, at *32 (D.D.C. Aug. 28, 2012) ("[t]he Texas OAG's analysis shows that Hispanic and Black voters in HD 149 uniformly prefer the same candidates in general elections and that their preferences consistently diverge from those of the district's Anglo voters."); *Fabela v. City of Farmers*, No. 10-1425, 2012 WL 3135545, at *11 (N.D. Tex. Aug. 2, 2012) ("The court finds that plaintiffs have proved racial bloc voting through statistical evidence from four elections and testimony by witnesses regarding their voting, thus satisfying the second and third prongs of *Gingles*."); *Benavidez*, 638 F. Supp. 2d at 726 ("The Court finds that the statistical evidence shows that racially polarized voting occurred and the degree of polarization was significant in the last three elections involving Hispanic candidates."), and Arizona, *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) ("Arizona continues to have some degree of racially polarized voting.").

Electoral data confirm the continued existence of racially polarized voting in the covered jurisdictions. For example, the House Judiciary Committee found that "in 2000, only 8 percent of African Americans [serving in Congress] were elected from majority white districts." H.R. Rep. No. 109-478, at 34. The Committee also found that "[l]anguage minority citizens fared much worse. As of 2000, neither Hispanics nor Native American candidates have been elected to office from a majority white district." *Id*. Furthermore, "[i]n certain covered States, such as

Mississippi, Louisiana, and South Carolina, African Americans have yet to be elected to any Statewide office." *Id*. at 33. Given this evidence, the Committee concluded that racially polarized voting showed "continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process," *id*., and therefore found that "racial and language minorities remain politically vulnerable, warranting the [Act's] continued protection." 2006 Amendments § 2(b)(3), 120 Stat. at 577.

Exit polling data from the 2008 presidential election confirm this conclusion. In 2008, President Obama won only one fully covered state (Virginia), and "[i]n several of the covered states, he did worse among white voters than the Democratic nominee four years earlier."[4] *Northwest Austin Municipal Utility District Number One v. Holder*, No. 08-322, 2009 WL 526206, at *3 (U.S. Feb. 26, 2009) (Brief for Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III as Amici Curiae on Behalf of Neither Party). His victory was a result of "an increase in his share of the white vote in noncovered jurisdictions and a nationwide increase in his share of the vote cast by racial minorities. Whites in the covered jurisdictions did not cross over in significant numbers to vote for Obama." *Id*. A detailed analysis of the data by state shows that "[t]he six states with the lowest percentages of white respondents who reported voting for Obama are covered states. Three of those states (Alabama, Mississippi, and Louisiana) reported a drop in the white vote for the Democratic

[4] This supports the conclusion by political scientists that partisanship alone does not explain the voting patterns that have been identified in covered jurisdictions.

nominee since 2004. All of the covered states are below the national share of the reported white vote received by Obama." *Id*. at *10. Remarkably, the five states reporting the lowest levels of white voting for Obama and the largest gap between how white citizens and how black citizens voted for Obama (all covered states—Mississippi, Louisiana, Georgia, South Carolina, and Alabama) are also in the top six states in terms of the share of the population that is black. *Id*.

A review of voting trends on the local level confirms that racially polarized voting has increased in some of the covered states. For instance, Dr. Lisa Handley, comparing the voting patterns by race in recent Alaska elections with an analysis she conducted ten years ago, concluded that "[o]verall, voting was more polarized in Alaska this past decade (2002-2010) than in the previous decade." Dr. Lisa Handley, *A Voting Rights Analysis of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts*, at 17, § 2.7, *available at* http://www.akredistricting.org/Files/Final-Report-of-Dr-Lisa-Handley.pdf. "The Alaska Native-preferred candidate did not win any of the statewide contests that were polarized." *Id*. This information confirms Justice Kennedy's observation in *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009), that "racially polarized voting [is] not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."

## III. IN REAUTHORIZING SECTION 5, CONGRESS HAS ATTEMPTED TO ADDRESS DISCRIMINATORY VOTE DILUTION, NOT TO PROHIBIT RACIALLY POLARIZED VOTING.

### A. Racially Polarized Voting Can Create An Environment Conducive to Minority Vote Dilution.

State actions taken in environments of racially polarized voting can result in vote dilution. Vote dilution occurs when a political entity "enact[s] a particular voting scheme . . . [which] 'minimize[s] or cancel[s] out the voting potential of racial or ethnic minorities.'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)).

"There are two classic patterns. Where voting is racially polarized, a districting plan can systematically discount the minority vote either 'by the dispersal of blacks into districts in which they constitute an ineffective minority of voters' or from 'the concentration of blacks into districts where they constitute an excessive majority,' so as to eliminate their influence in neighboring districts." *Bartlett*, 556 U.S. at 28 (Souter, J., dissenting) (quoting *Gingles*, 478 U.S. at 46 n.11).

Vote dilution affects an individual's right to vote: "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969); *see also Continuing Need for Section 5 Pre-Clearance*, at 36 (responses of Theodore S. Arrington) (S. Hrg. 109-569) (explaining that the

VRA has always been "about more than just the mere ability to cast a vote . . . . The vote must be counted and must count."); *cf. Bartlett*, 556 U.S. at 28 (Souter, J., dissenting) ("Treating dilution as a remedial harm recognizes that § 2 protects not merely the right of minority voters to put ballots in a box, but to claim a fair number of districts in which their votes can be effective." (citing *Gingles*, 478 U.S. at 47)) .

Vote dilution is not new. As the district court pointed out, such so-called "second generation barriers" actually have been used in covered jurisdictions since minorities began voting after the Civil War. *See, e.g.*, 811 F. Supp. 2d at 490 ("[V]ote dilution 'consists of mechanisms employed by whites since the First Reconstruction in the nineteenth century'" (citing *Evidence of Continued Need for Section 5* at 209 (Serial No. 109-103, Vol. I))); *id*. ("[D]ilutive tactics were 'widely used in the Nineteenth Century when black males could vote.'" (citing *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 206 (May 9, 2006) (S. Hrg. 109-458) (prepared statement of Chandler Davidson)). Vote dilution tactics were also an immediate response to widespread black enfranchisement during the 1960s. *Id*. (citing *Introduction to Expiring Provisions* 206 ("[Vote dilution] began to be used once more in the mid-Twentieth Century, particularly after the abolition of the white primary, as increasing numbers of blacks began to be able to exercise the franchise.")).

In fact, each time it has reauthorized Section 5, Congress has relied on the use (or attempted use) of vote dilution tactics in covered areas. H.R. Rep. No. 109-478, at 36 ("The Committee finds that voting

changes devised by covered jurisdictions [since 1982] resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; . . . enacting discriminatory annexations and deannexations; . . . changing elections from single member districts to at-large voting and implementing majority vote requirements.").

This time the situation is no different. The House and Senate Judiciary Committees heard testimony "suggesting that, due to the interaction of racially divergent voting patterns and certain electoral structures, minorities in the covered jurisdictions are less likely to elect their preferred candidates." *See, e.g.*, *The Continuing Need for Section 5*, at 49 (statement of Richard Engstrom) (Serial No. 109-75); *The Continuing Need for Section 5 Pre-Clearance*, at 14, 26 (responses of Theodore S. Arrington) (S. Hrg. 109-569); *id*. at 48 (response of Anita Earls).

### B. Racially Polarized Voting Is A Necessary Precondition For Vote Dilution To Occur.

Because vote dilution can occur only in an environment of racially polarized voting, racially polarized voting (even though, as discussed above, not itself state action) is one of the elements of a vote dilution claim under Section 2: "[C]ourts and commentators agree that racial bloc voting is a key element of a vote dilution claim."[5] *Gingles*, 478 U.S. at 55 (citing cases). Specifically, to establish vote dilution under Section 2, the minority group, as an initial matter, must be able to demonstrate that

[5] "The terms 'racially polarized voting' and 'racial bloc voting' are used interchangeably." 478 U.S. at 52 n.18.

(1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id*. at 50-51.

In a decision issued a month before the VRA was reauthorized, this Court recognized the association between racially polarized voting and a vote dilution claim: "[G]iven the presence of racially polarized voting—and the possible submergence of minority votes—throughout Texas, it makes sense to use the entire State in assessing proportionality." *League of United Latin American Citizens*, 548 U.S. at 438.

### C. Redistricting Can Be Used to Effect Vote Dilution.

Redistricting is the most obvious example of the importance of racially polarized voting to the Section 5 analysis, as redistricting in areas where racially polarized voting occurs can have the effect of unconstitutional discrimination. For example, redistricting to eliminate minority-majority districts in areas where racially polarized voting occurs can deprive minority citizens of a meaningful, effective vote and can prevent minorities from obtaining office.

Several of the *amici* briefs submitted in support of Shelby County assert that supporting minority-majority districts increases racial polarization. *See, e.g*., Brief of the Center for Constitutional Jurisprudence as *Amicus Curiae* in Support of Petitioner at 14 ("[I]f Section 5 affects racial polarization at all, it likely exacerbates it rather than diminishes it."). According to the Center for Constitutional Jurispru-

dence, "[b]y retaining Section 5 pre-clearance, the government would perpetuate the precise racially polarized voting tendencies that the government purports to condemn." (CCJ Br. 15.) None of the *amici* making such an argument, however, provides any empirical evidence to support its claim.

In reality, the assumption that minority-majority districts are racially polarizing is false. David T. Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts* (University of Chicago Press 1999). Based on his study of sponsorship and co-sponsorship of legislation, speeches on the floor, roll call voting, committee assignments, leadership positions, constituency newsletters, district office location, and coverage of the member's activities in local press reports addressing how legislators represent racial interests, one of the *amici* submitting this brief (Professor Canon), found that African-American members of Congress spent more of their time representing the interests of all of their constituents, while white members of Congress (who had at least 25% of their constituents who were African American) were not as balanced in their legislative behavior. *Id*. at 143-242.

The reason for this, as Professor Canon has explained, is that in primary elections white voters in black majority districts become swing voters who ultimately decide the winner. *Id*. at 126-39. Thus, in Democratic primaries (given that black majority districts are strongly Democratic) in which several African American candidates compete against each other, it is the "commonality" candidate who can appeal to white and black voters alike who is more likely to win. *See id*., ch. 3. Minority-majority districts, therefore, promote a "politics of commonality" rather

than a "politics of difference." *Id*. at 42-51. In short, rather than perpetuating racial polarization, minority-majority districts give African Americans a greater voice in the political process while simultaneously helping promote the effective representation of white voters in such districts.

## IV. VOTE DILUTION DOES JUSTIFY PRECLEARANCE.

Petitioner argues that vote dilution does not justify pre-clearance, and provides two bases for this argument. Pet. Br. 32. First, petitioner maintains that it is improper to consider evidence of intentional minority vote dilution in justifying reauthorization of Section 5 because Section 5 enforces the Fifteenth Amendment and "vote dilution does not violate the Fifteenth Amendment." *Id*. Second, petitioner contends that "the character of modern vote dilution cannot justify preclearance . . . [because] whereas the South during the 1960s was plagued with vote-denial schemes interfering with ballot access, modern vote dilution claims involve diminishing the effect of ballots once cast." *Id*. Both arguments fail for the same reasons expressed by the lower courts.

### A. Vote Dilution Can Be Used As Evidence To Sustain The Reauthorization Of Section 5.

Although this Court has never expressly considered whether vote dilution violates the Fifteenth Amendment, it also has not, as petitioner wrongly argues, held that "vote dilution does not violate the Fifteenth Amendment." Pet. Br. 32. At all events, the argument that evidence of minority vote dilution cannot be relied upon in upholding the constitutionality of

Section 5 is belied by this Court's previous decision in *City of Rome v. United States*, 446 U.S. 156 (1980). *See Shelby Cnty.*, 811 F. Supp. 2d at 489.

In *City of Rome*, the Court relied on evidence of minority vote dilution in upholding the constitutionality of Congress's reauthorization of Section 5 under the Fifteenth Amendment. 446 U.S. at 181-82. In holding that "[t]he extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment," the Court focused, in part, on the following language by Congress to justify extension of the Act:

> The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. *As registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength*.

*Id*. at 181 (emphasis added) (citations omitted). This language is contained within the Court's discussion of the Fifteenth Amendment right specifically.

In addition, as the court of appeals explained here, although previous decisions upholding Section 5 have focused on Congress's power under the Fifteenth Amendment, "the same 'congruent and proportional' standard, refined by the inquiries set forth in *Northwest Austin*, appears to apply 'irrespective of whether Section 5 is considered [Fifteenth Amendment] enforcement legislation, [Fourteenth Amendment] enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments.'" *Shelby Cnty. v. Holder*, 679 F.3d 848, 864 (D.C. Cir. 2012) (citations omitted). This rationale is consistent with

Congress's understanding, as it invoked its authority under both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 in 2006. *Id*.

### B. The Right To Vote Involves More Than Mere Access To Casting A Ballot, And Includes The Right To A Meaningful Vote.

Petitioner argues that vote dilution does not justify Section 5's pre-clearance requirement because modern vote dilution claims do not involve interference with ballot access, but rather "involve diminishing the effect of ballots once cast." Pet. Br. 32. This is a distinction without a difference, as a diluted and ineffective vote is a vote that does not count. It should go without saying that provision of ballot access to minorities is meaningless if their votes are not given the same meaning and effect as votes cast by persons in the majority group. Thus, "modern vote dilution claims" address the same problem as past vote dilution claims involving interference with ballot access, and provide a sound basis for Section 5's pre-clearance requirement.

Indeed, Congress made clear in its 2006 reauthorization of the VRA that "[t]he purpose of this Act is 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." Pub. L. No. 109-246, § 2(a), 120 Stat. 577 (emphasis added). Similarly, this Court has recognized that Section 5 bars electoral changes interfering with a citizen's right to cast a meaningful vote. *See Allen*, 393 U.S. at 569 ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.").

As one of the *amici* submitting this brief (Prof. Arrington) explained in his testimony before the Senate Judiciary Committee on the reauthorization of the VRA, the interplay between racially polarized voting and election procedures can cause vote dilution, precluding the right to cast a meaningful vote:

> When the candidates chosen by the minority voters and those chosen by the majority group differ, election systems and arrangements must be able to provide equal opportunity for the minority voters to elect representatives of their choice. Section 5 of the Voting Rights Act requires covered jurisdictions to consider whether minority voters have such an equal opportunity. Section 2 of the Voting Rights Act provides a mechanism for assuring such equal opportunity throughout America. Both parts of the Voting Rights Act are still needed because seemingly racially neutral election procedures such as at-large voting, major vote requirements, and anti-single-shot provisions may combine with racially polarized voting to erect effective barriers to the ability of minority voters to have an equal opportunity to participate in the political process and an equal opportunity to elect representatives of their choice.

*Continuing Need for Section 5 Pre-Clearance*, at 8 (S. Hrg. 109-569) (statement of Theodore S. Arrington); *see also Shelby Cnty.*, 679 F.3d at 865 ("Consideration of this evidence is especially important given that so-called 'second generation' tactics like intentional vote dilution are in fact decades-old forms of gamesmanship.").

"The history of Section 5 demonstrates that it addresses changes in state law intended to perpetuate the exclusion of minority voters from the exercise of political power." *Georgia v. Ashcroft*, 539 U.S. at 494 (Souter, J., dissenting). Vote dilution perpetuates the exclusion of minority voters from participating on a level playing field in our democratic process. Section 5 never had the limited purpose petitioner claims, and minority vote dilution properly served as a basis for Congress's reauthorization of that statutory provision. This Court recently recognized its duty to save an act of Congress, if such an interpretation exists: "'[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

Congress established a substantial legislative record justifying the renewal of pre-clearance under the VRA for another 25 years. The extension passed with overwhelming bipartisan support in a House and Senate controlled by the Republican Party. The House passed the Act by a 390-33 vote, the Senate passed it by a unanimous 98-0 vote, and it was signed into law by President George W. Bush. In this period of extreme partisan politics, which has reached record levels in recent years, it is difficult to get such strong bipartisan support for anything.

Of course, there are some who disagree with the extension. None of their criticism, however, rises to the level of establishing that the extension is unconstitutional. Both the district court and the court of

appeals properly deferred to Congress's judgment: "After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 pre-clearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference." *Shelby Cnty.*, 679 F.3d at 874. *Amici* urge this Court to recognize Congress's power under the Constitution to continue the pursuit of true voting equality in this country and to grant the 2006 extension "the full measure of deference owed to federal statutes." *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PETER BUSCEMI
*Counsel of Record*
DAVID M. KERR
BAHAR SHARIATI
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5190
pbuscemi@morganlewis.com

*Counsel for Amici Curiae*

February 1, 2013