IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General, Defendants, FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*, Defendant-Intervenors, KENNETH SULLIVAN, *et al.*, Defendant-Intervenors, NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA, Defendant-Intervenors.	No. 1:11-cv-1428-CKK-MG-ESH

REPLY MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT-INTERVENORS'
CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

Defendant-Intervenors respectfully submit the following reply brief in support of their cross-motion for summary judgment (Dkt. No. 125) that Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, including Congress's 2006 reauthorization of Section 5, is a constitutional exercise of Congress's authority to adopt "appropriate legislation" to "enforce" the nondiscrimination guarantees of the Fourteenth and Fifteenth Amendments. This brief also serves as further opposition to Florida's motion for summary judgment. (Dkt. No. 98.)

At the outset, it is important to highlight a significant clarification that Florida has made in its Reply Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment (Dkt. No. 139; hereinafter "Fla. Reply") as to the constitutional issues that are before this Court. In its initial brief in support of its summary judgment motion, Florida asserted that the issues for this Court's decision that were not resolved by the D.C. Circuit in *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012) ("*Shelby County*"), or by the Supreme Court in *Lopez v. Monterey County*, 525 U.S. 266 (1999), include: (1) the constitutionality of the 1975 amendments to the Voting Rights Act with regard to their extension of Section 5 coverage to an additional set of jurisdictions, including five Florida counties (the "1975 jurisdictions"); (2) the constitutionality of the 2006 reauthorization insofar as it reauthorized coverage of these particular jurisdictions; (3) the constitutionality of the Section 5 provision (enacted as part of the 1975 amendments) that requires that the 1975 jurisdictions demonstrate that their voting

changes do not discriminate on the basis of race or color; and (4) the constitutionality of the 2006 amendments to the Section 5 "purpose" and "effect" standards. (Dkt. No. 98, Br. at 3-6.)

Florida's clarification relates to the status of the first issue. Defendant-Intervenors argued in their brief in support of summary judgment and in opposition to Florida's motion that Florida's challenge to the 1975 geographic-coverage provisions is moot since, after 1975, Congress twice reauthorized Section 5, in 1982 and most recently in 2006. (Dkt. No. 125-1 at 8-9.) Florida now has agreed that, indeed, it is not challenging Congress's 1975 coverage amendments, and thus is challenging only the continuing coverage of these jurisdictions occasioned by Congress's decision in 2006 to reauthorize coverage of all the Section 5 jurisdictions for an additional period of years. (Fla. Reply at 3.) In this regard, Florida unequivocally states that it "is not challenging the decision to extend the protections of Section 5 to language minorities in 1975," that the record that Congress relied upon in 1975 to amend the coverage formula "is irrelevant" to this case, and that "the 2006 reauthorization must rise or fall on its own record." (*Id.*) Thus, this Court must take as established that Congress acted appropriately in 1975 to extend Section 5's geographic coverage, including extending coverage to five Florida counties.[1]

[1] Florida apparently is not completely comfortable with its concession since, two sentences after declaring that the 1975 record is "irrelevant," it also states that it "discussed the 1975 record [in its initial brief] to show that the reauthorization is built on a weak foundation." (Fla. Reply at 3.) For the reasons set forth in Intervenors' initial brief (Dkt. No. 125-1 at 9-16), that "foundation" was anything but weak; and, as Florida has stated, "the 2006 reauthorization must rise or fall on its own record." This is precisely the analytic approach relied upon by the D.C. Circuit in *Shelby County*, where it upheld the constitutionality of the 2006 reauthorization.

Florida's principal argument in its most recent brief is that Congress failed to compile a record in 2006 sufficient to justify continuing the preclearance requirement for the 1975 jurisdictions. Florida bases its retooled argument almost entirely on an appendix of tables and graphs that are not properly before this Court because Florida failed to include them in its proposed statement of undisputed facts, as required by Fed. R. Civ. P. 56(c). The Court should therefore strike those attachments, which include serious errors. Even if Florida were permitted to introduce these untimely and incorrect exhibits, however, it is foreclosed from asserting a facial challenge based upon the alleged inadequacy of the 2006 congressional record because *Shelby County* upheld Section 5 on its face, taking into account the record as to all covered jurisdictions, including those first covered in 1975. Furthermore, even on its own terms, Florida's argument regarding the 1975 jurisdictions is substantially flawed. Florida's reply/opposition brief also does not support the other claims it is making in its motion.[2]

ARGUMENT

I. *Shelby County v. Holder* Forecloses a Facial Challenge Based Upon the Alleged Insufficiency of the 2006 Record Evidence

Recognizing that it is foreclosed from disputing the holdings in *Shelby County* (*see* Dkt. No. 106 at 3),[3] Florida attempts an "end-run" by fashioning a facial challenge to the 2006 reauthorization that isolates a subset of the jurisdictions which were part of the

[2] Florida does not address its *Lopez* claim in its reply/opposition, and so Defendant-Intervenors likewise do not revisit that claim in this brief.

[3] "[T]he parties should bear in mind that the Court considers itself bound by *Lopez v. Monterey County*, 525 U.S. 266 (1999), and *Shelby County, Alabama v. Holder*, No. 11-5256, 2012 WL 1759997 (D.C. Cir. May 18, 2012)."

reauthorization (the 1975 jurisdictions), and then purports to ask whether the evidence of discrimination as to these particular jurisdictions supported reauthorization. This is not a permissible constitutional attack.

Shelby County upheld the 2006 reauthorization as to *all* the covered jurisdictions, and did not distinguish between those jurisdictions covered in 1965 and 1970, on the one hand, and those covered in 1975, on the other. The D.C. Circuit broadly stated its holding as follows:

> Shelby County, Alabama, a covered jurisdiction, contends that when Congress reauthorized section 5 in 2006, it exceeded its enumerated powers. The district court disagreed and granted summary judgment for the Attorney General. For the reasons set forth in this opinion, we affirm.

679 F.3d at 853. Accordingly, nowhere in *Shelby County* did the D.C. Circuit find it necessary or meaningful to distinguish legislative record evidence of "racial" discrimination in voting from evidence of "language minority" discrimination in voting, or necessary or meaningful to classify or distinguish covered jurisdictions as to whether they were covered in 1965, 1970, or 1975. To the contrary, *Shelby County* discussed the entirety of the 2006 record, and discussed all of the covered jurisdictions. *Id.* at 862-883. Based on this review, the D.C. Circuit held in *Shelby County* that the answers to the "two principal inquiries," *id.* at 858, that the Supreme Court identified in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) ("*Nw. Austin*"), are that "'current needs'" in *all* the covered jurisdictions justify the "burdens" of Section 5 coverage, 679 F.3d at 873 (*quoting Nw. Austin*, 557 U.S. at 203), and Section 5's "'disparate geographic coverage'"

as to *all* the covered jurisdictions "'is sufficiently related to the problem that [Section 5] targets.'" *Id.* at 883 (*quoting Nw. Austin*, 557 U.S. at 203).

Indeed, Florida's concession that it is not challenging the constitutionality of the 1975 coverage provisions exposes the flaw in the purported facial challenge it is attempting here. Since Florida is not claiming that any of the initial coverage determinations were defective – not the 1975 determinations, nor the 1965 or 1970 determinations – there is no principled basis on which to isolate the 1975 jurisdictions so as to assert a fractional facial challenge. And the absence of any basis for fractionalizing Section 5's geographic coverage in a facial challenge is precisely why no such distinction was made by *Shelby County*.[4]

In sum, Florida cannot both fractionalize the 2006 reauthorization and mount a facial challenge to it, and Florida provides no precedent or authority for its *ad hoc* effort to evade *Shelby County* and the standards for facial challenges. Florida's entire line of argument based upon distinctions between "racial" and "language" jurisdictions is foreclosed.[5]

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[4] Florida apparently is cognizant of the central flaw in its argument, and attempts to find a way out by mischaracterizing the *Shelby County* holding. Florida asserts, incorrectly, that "*Shelby County* … upheld Section 5 and [the] Section 4(b) [coverage formula] with respect to those jurisdictions covered based on racial discrimination." Fla. Reply at 1. However, Florida offers no basis for its assertion that the *Shelby County* holding is limited in this fashion.

[5] Arguably, Florida could make an as-applied challenge with respect to its covered counties, but Florida has not pled or argued that type of claim. In this regard, it should be noted that the Section 4(a) bailout procedure, 42 U.S.C. § 1973b(a), which is "an integral part of the coverage mechanism," *Shelby County*, 679 F.3d at 883, also minimizes the need for or likelihood of such an-applied challenge. This is especially true in light of the

II. Congress's Decision to Continue Coverage of the 1975 Jurisdictions Did Not Render the 2006 Reauthorization Unconstitutional

A. *Congress Relied on Relevant, Probative Evidence in Reauthorizing Section 5 in 2006*

Shelby County largely resolved various questions as to whether Congress relied on relevant evidence in the 2006 reauthorization. 679 F.3d at 863-65. Nonetheless, Florida first attacks the reauthorization by claiming that several classes of evidence are irrelevant.

Although less than clear, Florida begins this argument by reiterating its prior assertion that it was inappropriate for Congress to rely on evidence of intentional racial discrimination in voting that occurred in the 1975 jurisdictions, subsequent to the 1982 reauthorization. (Fla. Reply at 3-6.) But since Congress properly prohibited these jurisdictions from implementing voting changes that are racially discriminatory, *see infra* at 16-19, it was entirely appropriate for Congress to examine the extent to which these jurisdictions in fact engaged in racial discrimination in deciding whether to continue Section 5 coverage.[6]

Supreme Court's holding in *Nw. Austin*, 557 U.S. at 211, that every subjurisdiction covered by Section 5 has an independent right to seek to bail out of coverage.

[6] Florida somewhat confusingly argues that, in order for this Court to agree that Congress was entitled to rely on racial discrimination in the 1975 jurisdictions, it would need to hold "that the Fifteenth Amendment protects 'language minorities,'" and would have to make a determination that "conflicts with the statute" and "ignore[s] the 1975 expansion." Fla. Reply at 3-5. But there is no dispute that both "racial" discrimination and "language minority" discrimination are prohibited by the Constitution (by the Fourteenth and/or Fifteenth Amendments) and, clearly, "the statute," as amended in 1975, prohibits the 1975 jurisdictions from engaging in racial discrimination.

Next, Florida argues that Congress in 2006 inappropriately relied in part on evidence of illiteracy, limited English proficiency, and discriminatory educational opportunities involving language minority citizens. (Fla. Reply at 6-7.) However, as demonstrated in Defendant-Intervenors' initial brief (Dkt. No. 125-1 at 9-16), Congress appropriately relied on such evidence in 1975, and therefore it was entirely appropriate for Congress to identify and rely upon similar evidence in 2006. Moreover, notwithstanding that Congress has banned English-only elections in the 1975 jurisdictions, Section 4(f)(4), 42 U.S.C. § 1973b(f)(4), it would make no sense for Congress to have ignored that problems remain concerning access to the political process based on language-related difficulties.[7] Likewise, it was appropriate for Congress to take note of evidence of non-compliance with the language provisions of Section 203 of the Act, 42 U.S.C. § 1973aa-1a.

Finally, Florida argues that Congress's consideration of evidence relating to on-going patterns of racially polarized voting was not appropriate. (Fla. Reply at 7-8.) While Florida accurately notes that *Shelby County* did not identify polarized voting as a separate category of evidence supporting the 2006 reauthorization, Congress only discussed the continuing prevalence of polarized voting in the covered jurisdictions because of its direct relationship with intentional discrimination involving method of

[7] Florida mistakenly states that the ban on English-only elections in the 1975 jurisdictions is set forth in Section 4(e)(1), 42 U.S.C. § 1973b(e)(1), rather than Section 4(f)(4). (Fla. Reply at 7.) In this regard, Florida claimed, also mistakenly, in its initial motion papers that the bilingual requirements of the Voting Rights Act that apply to the five covered counties in Florida are only those that are set out in Section 203. Florida thus completely (and inexplicably) missed the requirements of Section 4(f)(4).

election changes, redistrictings, and dilutive annexations. House Rpt. 109-478, 2d Sess. (2006) at 34-35 (hereinafter "2006 House Rpt."); *see also Thornburg v. Gingles*, 478 U.S. 30, 49 n.15 (1986) ("in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters"). Moreover, the D.C. Circuit included in *Shelby County* a lengthy discussion of the significance of discrimination involving vote dilution with regard to the appropriateness of Congress's decision to reauthorize Section 5. 679 F.3d at 864-65.

B. *The Evidence of Continued Voting Discrimination Justified Continued Coverage of the 1975 Jurisdictions in 2006*

Even if this Court concludes that *Shelby County* does not foreclose Florida from challenging the sufficiency of the 2006 record evidence as to the 1975 jurisdictions, the 2006 record regarding voting discrimination in these jurisdictions satisfies the *Shelby County* standards.

Florida begins its discussion at the same place that the D.C. Circuit began its analysis: the D.C. Circuit's determination that "the [legislative] record contains numerous examples of modern instances of racial discrimination in voting." 679 F.3d at 865. Florida notes that the D.C. Circuit discussed several specific examples, and then complains that Defendant-Intervenors and the United States did not "produce a similar list of overt discrimination against language minorities." (Fla. Reply at 9.)

Florida's complaint, however, mischaracterizes the *Shelby County* opinion. After discussing specific examples of voting discrimination, the D.C. Circuit observed that there are "numerous additional examples of intentional discrimination in the legislative

record," citing to the *Shelby County* district court opinion and to the district court opinion in *Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008). 679 F.3d at 866. These additional examples do, in fact, include instances of intentional discrimination against language minority citizens.[8]

Equally unavailing is Florida's attempt to argue that voting discrimination in the 1975 jurisdictions is less severe than in the jurisdictions covered in 1965 and 1970. There are several problems with this analysis.

First, as noted above, this analysis relies entirely on a series of tables and graphs that are not properly before this Court on the parties' cross-motions for summary judgment. Moreover, even if this procedural failing were ignored or overcome, the tables and graphs have several deficiencies that render them unreliable. In this regard, while the tables and graphs rely in part on the 2006 legislative record – and, to that extent, generally are not problematic since that record is before this Court – they also rely on U.S. Census data that have not been properly placed before this Court and which are problematic. Specifically, the tables and graphs use the census data to attempt to compare jurisdictions based on the rates at which various actions have been taken (*e.g.*, Section 5 objections), with the rates calculated as a function of the number of minority

[8] Most prominently, the cited portion of the *Nw. Austin* opinion discussed the Supreme Court's decision in *LULAC v. Perry*, 548 U.S. 399 (2006), which was "issued … only a few weeks before the House and Senate voted on the 2006 Amendments," and found that Texas's congressional redistricting plan was "'damaging to … Latinos,'" bore "'the mark of intentional discrimination that could give rise to an equal protection violation,'" and included a district that was drawn "precisely to divide 'those Latinos who were becoming most politically active.'" 573 F. Supp. 2d at 261-62 (*quoting* 548 U.S. at 440).

residents in various jurisdictions as of 2004. However, Florida calculated the population of each jurisdiction by looking at all residents, citizens and non-citizens, despite the fact that, by definition, discrimination in voting relates only to citizens. This error has the effect of inflating, in particular, the populations of the 1975 jurisdictions, which, in turn, lowers the rates of occurrence for these jurisdictions for the various matters that Florida identifies.

Florida also incorrectly categorizes the coverage status of several of the covered jurisdictions in its tables and graphs. Florida categorizes Arizona as a "language" jurisdiction, but nine of that state's counties were covered in 1965 or 1970, including Pima County where Tucson is located (the state as a whole was not covered until the 1975 amendments). 28 C.F.R. Pt. 51 App. Likewise, Florida categorizes the three New York counties as being "partially covered on the basis of race and language," but all three counties were covered by the 1970 amendments, and while two then were covered again by the 1975 amendments, that repeat coverage is superfluous. These errors artificially decrease the population of the "race" jurisdictions and thus overstate the rates in these jurisdictions, which in turn again results in Florida inflating the differences in rates between the "race" jurisdictions and the "language" jurisdictions.

Putting these problems aside, the fundamental error in Florida's analysis is that, as *Shelby County* made clear, Congress "accord[ed] greater weight to absolute numbers" than it did rates, 679 F.3d at 867, and that judgment was "precisely the kind that a legislature is far better equipped than a court to evaluate." *Id.* at 868 (internal quotation marks omitted). Thus, in summing up the evidence on which Congress relied to conclude

"that serious and widespread intentional discrimination persisted in covered jurisdictions," *id.* at 872, the D.C. Circuit recounted the absolute numbers of actions in the various evidentiary categories, rather than providing information as to rates of occurrence. *Id.*

Therefore, under *Shelby County*, the legislative evidence that is relevant and probative here are the 1975 jurisdictions' absolute numbers of occurrences in the various categories of relevant evidence. In that regard, the evidence as to Texas – the state that, as Florida indicates, encompasses the vast majority of the minority population located in the 1975 jurisdictions – includes the following, for activity post-1982: (1) 105 Section 5 objections (more than any other covered state except Mississippi); (2) ten statewide objections; (3) six Section 5 declaratory judgment actions favorable to minorities (tied for first with Mississippi); (4) 54 submission withdrawals (more than any other covered state); and (5) 206 suits brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and resolved in favor of minority plaintiffs (more than any other covered state). *See* National Comm'n on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005, *cited in* Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong., 2d Sess., at 206, 259-60, & 270-71 (Mar. 8, 2006). Confronted with this evidence, plainly Congress acted appropriately in concluding that Texas should remain covered under Section 5. Indeed, *Shelby County* specifically concluded that Congress was presented with sufficient evidence of discrimination to continue to cover all of the 1975 jurisdictions. 679 F.3d at 880-81.

Finally, a glaring omission in Florida's discussion of the various categories of legislative evidence relates to Section 2 litigation in the covered jurisdictions. Florida argues that, when 69 "successful [reported] Section 2 cases" are examined, a substantial majority (in absolute numbers and "relative to population") "originated in race jurisdictions." (Fla. Reply at 11.) However, Florida ignores the fact that the "successful section 2 litigation" that the D.C. Circuit found persuasive involved "some 653 section 2 suits filed in covered jurisdictions" where "minority plaintiffs obtained favorable outcomes" (which included both the reported decisions cited by Florida and almost 590 additional unreported favorable results). 679 F.3d at 868. Thus, Florida's analysis grossly understates the scope of successful Section 2 cases in the 1975 jurisdictions.[9] For example, as to Texas, Florida cites to only nine reported favorable Section 2 decisions, when, in fact (as indicated above), there were a total of 206 favorable reported and unreported Section 2 cases in Texas.[10]

C. *Congress Properly Differentiated Between the States in Concluding that Section 5 Coverage Is Merited Only for Jurisdictions Previously Covered, Including the 1975-Covered Jurisdictions*

As the D.C. Circuit concluded in *Shelby County*, "the section 4(b) [coverage] formula … together with the statute's provisions for bail-in and bailout – … [which are]

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[9] Florida also makes claims as to the race and ethnicity of the plaintiffs in the 69 cases to which it refers (Fla. Reply at 12), but provides no citation to any evidence that supports its factual assertions.

[10] Florida also incorrectly claims in its tables and graphs that there were no Section 5 enforcement actions filed after 1982 relating to South Dakota's covered counties (covered pursuant to the 1975 amendments). In fact, a major Section 5 enforcement action did occur, which dealt with the failure of the state to seek preclearance for hundreds of voting changes that affected the covered counties. 2006 House Rpt. at 42.

an integral part of the coverage mechanism – continues [sic] to single out the jurisdictions in which discrimination is concentrated." 679 F.3d at 883. Thus, the D.C. Circuit held that the answer to this "critical question" posed by the Supreme Court in *Nw. Austin* is that Section 5's "disparate geographic coverage" is indeed "sufficiently related to the problem that it targets." *Id.* (internal quotation marks omitted). As discussed above, this conclusion fully resolves this question as to all the covered jurisdictions. But even if, as Florida contends, the 1975 jurisdictions may be isolated and examined separately, this conclusion still holds.

Florida first argues that the Section 4(b) coverage formula is irrational in theory because, as to the 1975 jurisdictions, it relies on 1972 data that allegedly are outdated and do not represent current political conditions. (Fla. Reply at 15-16.) But this argument was rejected in *Shelby County* as resting upon "a misunderstanding of the coverage formula." 679 F.3d at 878.[11]

Florida then argues that Congress did not "reverse-engineer" the 1975 coverage, as occurred with the 1965 coverage. *Id.* at 879. Florida asserts that just because Congress listed the jurisdictions in which coverage would be triggered in 1975 *before* it adopted the 1975 amendments, this "does not suggest that Congress started with and intended to target this list of jurisdictions." (Fla. Reply at 16 n.8.) To the contrary, it is hard to

[11] "The question, then, is not whether the formula relies on old data or techniques, but instead whether it, together with bail-in and bailout, continues to identify the jurisdictions with the worst problems. If it does, then even though the formula rests on decades-old factors, the statute is rational in theory because its 'disparate geographic coverage' remains 'sufficiently related to the problem that it targets.'" *Id*. at 879 (*quoting Nw. Austin*, 557 U.S. at 203).

imagine what could more directly "suggest" that Congress intended to target a list of jurisdictions than for it to provide that list in its legislative, pre-enactment reports. House Rpt. 94-196, 1st Sess. (1975), at 24 (hereinafter "1975 House Report"); Senate Rpt. 94-295, 1st Sess. (1975) at 32 (hereinafter "1975 Senate Report").[12]

Florida also seeks to re-litigate the geographic tailoring question; however, it does so by relying on categories of evidence that only the *Shelby County* dissent – not the majority – found relevant and persuasive, *i.e.*, data relating to registration, turnout, minority elected officials, and federal observer assignments (Fla. Reply at 18-19, 21), and also by mischaracterizing the evidence that the *Shelby County* majority did rely upon, *i.e.*, data relating to Section 2 cases brought in covered and non-covered jurisdictions. In the latter regard, Florida asserts that the Section 2 comparison should be undertaken by looking only at the 69 reported successful Section 2 suits discussed above, and another 55 such suits that occurred in non-covered states. (*Id.* at 19-20.)

Florida's claim that the universe of relevant Section 2 litigation is limited to these reported decisions is, again, wrong. In *Shelby County*, the D.C. Circuit merely began its analysis by reviewing these decisions, and concluding that they demonstrated a higher incidence of voting discrimination in covered jurisdictions. 679 F.3d at 874-75. The court then also took into account an additional 686 unpublished decisions (of which "approximately 81 percent were filed in covered jurisdictions" and which were "primarily court-approved settlements"), and concluded that "[t]he difference between

[12] Florida's challenge to the method by which the Census Bureau identified persons of Spanish heritage following the adoption of the 1975 amendments is foreclosed by the Supreme Court's decision in *Briscoe v. Bell*, 432 U.S. 404 (1977).

covered and non-covered jurisdictions becomes even more pronounced when [this is done]." *Id.* at 875. Combining both sets of cases, the court found it particularly persuasive that Congress had applied Section 5 to seven of the eight states in the country with the highest number of successful Section 2 cases per million residents. And one of those states is Texas which, as noted, had the highest number of such cases amongst all the covered jurisdictions.

Furthermore, as the D.C. Circuit emphasized, reliance solely on the Section 2 "data presents an incomplete picture of covered jurisdictions," 679 F.3d at 880, since Section 5 "deters or blocks many discriminatory voting laws before they can ever take effect and become the target of section 2 litigation." *Id.* at 878. In other words, the Section 2 data understate the amount of voting discrimination in covered jurisdictions. A full recounting of discrimination in these jurisdictions requires inclusion of Section 5 objections and, in addition, the number of voting changes withdrawn or not implemented in response to "more information requests" by the Attorney General, and the number of Section 5 enforcement actions. *Id.* at 880.[13]

Finally, the D.C. Circuit underscored the importance of including in the analysis of Section 5's "disparate geographic coverage" the bailout and bail-in provisions of the Voting Rights Act, which are "an integral part of the coverage mechanism," *id.* at 883, and allow covered jurisdictions to bail out of Section 5 coverage and empower federal courts to impose a temporary preclearance requirement on jurisdictions not subject to

[13] Florida attempts to minimize the deterrence argument, but has no answer to *Shelby County's* reliance on the blocking effect of Section 5. (Fla. Reply at 20-21.)

Section 5. *Id.* at 881-82. Bailout, in particular, "helps to ensure that section 5 is 'sufficiently related to the problem that it targets.'" *Id.* at 882 (*quoting Nw. Austin*, 557 U.S. at 203). Florida seeks to discount this holding by claiming that there is too little difference between the jurisdictions covered in 1975 and non-covered jurisdictions for the bailout and bail-in provisions to "salvage" the coverage mechanism. (Fla. Reply at 21.) But that argument, as discussed above, is built on a badly flawed comparison of these two sets of jurisdictions. At bottom, it appears that Florida's real complaint is the same as Shelby County's, that bailout allegedly "helps only at the margins." *Id.* at 882 (internal quotation marks omitted). But this argument was rejected by the D.C. Circuit. *Id.*

In sum, if Florida's facial challenge to Section 5's geographic tailoring is not foreclosed by *Shelby County*, this Court should hold, as did the D.C. Circuit in *Shelby County*, that the coverage formula reauthorized in 2006 continues to single out the jurisdictions with the greatest incidences of voting discrimination.

III. Congress Acted Within Its Constitutional Authority in Prohibiting All Covered Jurisdictions From Discriminating on the Basis of Race, Color, or Language Minority Status

Section 5, by its terms, prohibits all covered jurisdictions – regardless of whether their coverage was initiated by the 1965 enactment, or by the 1970 or 1975 amendments – from implementing voting changes that discriminate on the basis of race, color, or language minority status. Thus, Congress concluded that there should be one unified set of preclearance standards for all covered jurisdictions. Congress's decision was entirely appropriate because voting discrimination on the basis of race and color, and voting

discrimination on the basis of language minority status, are closely related and, indeed, are so intertwined that it would be difficult to separate them.

First, it is simply wrong for Florida to claim that there is some bright line between "racial" discrimination and "language minority" discrimination. The term "language minorities," as defined by Section 14(c)(3) of the Act, 42 U.S.C. 1973*l*(c)(3), includes "language" categories that often, if not typically, are considered "racial" categories, *i.e.*, persons who are Asian American, American Indian, and Alaskan Native. Likewise, the term "race" may refer to persons of different ethnic backgrounds. As the Supreme Court has noted, the classification of individuals into racial groups has a significant subjective aspect and is not merely a reflection of objective, biological characteristics. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987). Thus, statutes that "only" prohibit racial discrimination have been construed to also prohibit discrimination based on what might typically be viewed as ethnicity or ancestry. *Id.* at 613 (construing 42 U.S.C. § 1981). This holds true with regard to the enforcement of Section 5 since, prior to the enactment of the 1975 amendments, "the Attorney General had consistently treated Indians, Puerto Ricans and Mexican Americans as racial groups." *Nw. Austin Mun. Util District No. 1 v. Mukasey*, 573 F. Supp. 2d at 245 (internal quotation marks and brackets omitted). In other words, while Congress certainly is not required to recognize the elasticity of distinctions based on "race or color" in enacting particular anti-discrimination statutes, it clearly is reasonable for Congress to do so.

Furthermore (as discussed in Defendant-Intervenors' initial brief), Congress found as a factual matter, first in 1975 and more recently in 2006, that the jurisdictions covered

in 1975 have a long history of subjecting African Americans, Hispanics, American Indians, and Alaskan Natives to the same types of discriminatory barriers to full and equal participation in the political process, whether one looks at the pre-coverage history or the more recent history of the enforcement of the Voting Rights Act following the 1975 amendments and the 1982 reauthorization. (Dkt. No. 125-1 at 12-15, 20-29.) *See also* 1975 House Report, at 16-20; 1975 Senate Report at 24-28; 2006 House Rpt. at 21-22, 34-37, 40-45, & 52-53. Thus, it was particularly reasonable for Congress not to draw an artificial line between "racial" discrimination and "language minority" discrimination in establishing the preclearance standards.

The crux of Florida's argument appears to be that, regardless of any relationship between "racial" discrimination and "language minority" discrimination, the "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), only allows Congress to prohibit "language minority" discrimination in jurisdictions that were initially covered pursuant to a coverage test that was based on identifying jurisdictions with a history of discrimination against language minority citizens (and, likewise, Congress only would be permitted to prohibit "racial" discrimination in the 1965 and 1970 jurisdictions). (Fla. Reply at 22.) This is incorrect.

In *City of Rome v. United States*, 446 U.S. 156 (1980), the Supreme Court considered the analogous question of whether Section 5 may prohibit voting changes that have a discriminatory effect even though the Fifteenth Amendment would only prohibit intentional discrimination. The Court upheld the "effect" standard, reasoning that "Congress could rationally have concluded that, because electoral changes by

jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Id.* at 177.

Likewise, in identifying the types of discrimination Section 5 prohibits with regard to protected classifications, Congress concluded that there is a cognizable risk that jurisdictions with a history of intentional "language minority" discrimination in voting may also engage in "racial" discrimination in voting, and vice versa. Congress's judgment in this regard was rational, and thus fully appropriate and constitutional.

IV. Florida's Challenge to the 2006 Amendments to the Section 5 Substantive Standards Should be Rejected

A. *Florida May Not Bring Either a Facial or an As-Applied Challenge to the 2006 Amendments*

Florida claims that it may bring a facial challenge to the 2006 amendments regarding the Section 5 "purpose" and "effect" standards insofar as it is asserting that the amendments result in an "increased federalism burden." (Fla. Reply at 25.) But this is flatly inconsistent with the D.C. Circuit's decision in *Shelby County*. As Florida itself acknowledges, its "federalism burden" argument is precisely the argument that Judge Williams made in his *Shelby County* dissent. (*Id.* (*citing* 679 F.3d at 886-88).) But since the *Shelby County* majority rejected Judge Williams's concerns because they did not "satisf[y] the standards for mounting a facial challenge," 679 F.3d at 883, Florida's argument does not provide a basis on which to advance a facial claim here. In other words, Florida simply ignores the majority's holding in *Shelby County* in claiming that it may assert a facial challenge in this case.

Florida's as-applied challenges to the 2006 amendments fare no better. As to the 2006 amendment to the Section 5 "purpose" standard, Florida notably does not assert in its reply/opposition brief that the "purpose" issue in this case is whether Florida acted with a discriminatory non-retrogressive purpose. But that is exactly the issue that must be present in this case in order for Florida to assert an as-applied challenge.[14] Instead, Florida attempts to paper over the fact that this case only deals with retrogressive purpose by claiming that Defendant-Intervenors and the United States essentially waived this fact by saying in a prior filing that Florida acted with a "discriminatory" purpose. (Fla. Reply at 25.) This is nothing more than word play. Retrogressive purpose is a form of discriminatory purpose, and Florida has failed to set forth how Congress's 2006 amendment to the "purpose" standard is implicated by the facts of this case.

With regard to Congress's amendment to the retrogression standard, Florida says only that the application, or non-application, of the re-instituted "ability to elect" standard to ballot access changes "has been fully briefed." (Fla. Reply at 26.) In this, Defendant-Intervenors agree. And, for the reasons Defendant-Intervenors and the United States previously stated, the "ability to elect" standard concerns, most particularly, redistricting

[14] As explained in the Defendant-Intervenors' initial memorandum, the Supreme Court in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 341 (2000), held that the Section 5 "purpose" standard was limited to prohibiting only retrogressive purpose, and Congress responded in 2006 by specifying that the standard covers both this type of discriminatory purpose and non-retrogressive discriminatory purpose as well. (Dkt. No. 125-1 at 5.) As a result, the 2006 amendment is only implicated in those Section 5 reviews where the issue is whether the jurisdiction was motivated by a non-retrogressive discriminatory purpose, *i.e.*, the type of discriminatory purpose that Congress put back into the "purpose" standard in 2006.

plans and election method changes, and no factual issue as to "ability to elect" has been raised here. *See* United States' and Defendant-Intervenors' Joint Submission Concerning Proposed Findings of Fact and Conclusions of Law (Dkt. No. 95), at CL 51-59 (hereinafter "Proposed FF/CL").

B. *Congress's 2006 Amendments to the Section 5 Substantive Standards Are Constitutional*

As Defendant-Intervenors argued in their initial memorandum, should this Court conclude that Florida has made out a proper as-applied challenge to the constitutionality of Congress's "purpose" and/or "effect" amendments, the Court should follow the carefully reasoned analysis of Judge Bates in *LaRoque v. Holder*, 831 F. Supp. 2d 183 (D.D.C. 2011), *vacated as moot*, 679 F.3d 905 (D.C. Cir. 2012), to uphold the 2006 amendments. Judge Bates conducted an exhaustive review of "the abundant Congressional record and the Supreme Court's case law on Congress's enforcement powers and equal protection principles," and, based on that review, concluded that they unambiguously demonstrate "that the 2006 amendments to Section 5 are a careful solution to a vitally important problem." *Id.* at 189.

Florida's principal complaint about the revised "purpose" standard is that Section 5 places the risk of non-persuasion on Section 5 jurisdictions. (Fla. Reply at 26.) However, this has been the rule since 1965 when Section 5 was enacted, and was approved by the Supreme Court in 1966 in *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 335 (1966). Moreover, as Judge Bates emphasized, "such burden-shifting seems far less intrusive than the abrogation of sovereign immunity approved in [*United States v.*

Georgia, 546 U.S. 151, 158-59 (2006)]," 831 F. Supp. 2d at 213, where the Supreme Court upheld congressional legislation authorizing litigation against the states based on discriminatory purpose together with an abrogation of sovereign immunity.

Florida also asserts that Defendant-Intervenors and the United States allegedly are arguing that "for purely racial reasons, Florida cannot make non-discriminatory voting changes." (Fla. Reply at 27.) But that, of course, is not the "purpose" argument being made here, and even if it was, that would not implicate what Congress did in amending the "purpose" standard in 2006.[15]

With regard to the "ability to elect" standard, Florida first contends in its reply/opposition (at 27-28) that, in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Supreme Court adopted its new multi-factor test because the Court allegedly "understood" that the "ability to elect" standard is burdensome and difficult to satisfy. But the Court made no such finding; instead, the Court simply concluded that its multi-factor test provided a better and more complete definition of retrogression in the context of redistricting plans. *Id.* at 479-85. As Judge Bates documented in *LaRoque*, Congress

[15] Similarly, Florida repeats its assertion that the revised "purpose" standard is constitutionally defective because Defendant-Intervenors and the United States allegedly have argued that Florida must make a showing that goes beyond what is required to demonstrate the absence of a discriminatory unconstitutional purpose. (Fla. Reply at 26-27.) This also is a "straw" claim since Defendant-Intervenors and the United States agree that the Section 5 "purpose" standard is co-extensive with constitutional discriminatory purpose (subject to the burden shifting), *see* Proposed FF/CL at CL 9-14, 100-01, and Florida misstates and embroiders on specific "purpose" arguments made by Defendant-Intervenors and the United States in this case. In any event, as noted, these claims as to alleged missteps by Defendant-Intervenors and the United States in construing the "purpose" standard say nothing about what Congress did in amending the standard in 2006.

subsequently reviewed both standards, and concluded that the *Ashcroft* standard was difficult to apply for both covered jurisdictions and the Attorney General, which was one reason Congress decided to return to the pre-*Ashcroft* "ability to elect" approach. 831 F. Supp. 2d at 218-19.[16]

Florida further contends that the "ability to elect" standard violates equal protection because the standard allegedly requires covered jurisdictions to guarantee that minority voters will be able to elect their preferred candidates. However, the retrogression standard, by its terms, simply requires that whatever level of an "ability to elect" existed in a prior redistricting or other voting provision must continue to be present in the new plan or provision (within constitutional bounds), and does not otherwise guarantee any level of electoral opportunity.[17]

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[16] Similarly, in the pending Section 5 litigation regarding Texas's statewide redistricting plans, this Court rejected the State's argument that the "ability to elect" standard, as construed by the Attorney General, "is elusive and expensive," noting that "[c]overed jurisdictions, including Texas, have been able to preclear voting plans under its various iterations." *Texas v. United States*, 831 F. Supp. 2d 244, 265-66 (D.D.C. 2011).

[17] In attempting to buttress its "equal protection" argument, Florida blatantly misrepresents what this Court said in the *Texas v. United States* redistricting litigation. Florida claims this Court concluded that, as a legal matter, the 2006 amendment "requires covered jurisdictions to 'essentially guarantee[] that … a cohesive minority group will be able to elect its candidate of choice.'" (Fla. Reply at 28.) But what this Court actually said, as merely a descriptive matter, was that a supermajority district ("with a minority voting majority of sixty-five percent (or more)") would provide such a guarantee. 831 F. Supp. 2d at 263. This observation was included in this Court's discussion of the types of evidence to be considered in assessing whether a particular election district offers minority voters an "ability to elect," and was not part of any discussion as to the level of electoral opportunity required by the "effect" standard. *Id.* at 262-66.

CONCLUSION

For all of the above reasons, as well as those set out in the Defendant-Intervenors' opening brief (Dkt. No. 125-1), this Court, like the D.C. Circuit Court before it, should conclude that Section 5 of the Voting Rights Act, including Congress's 2006 reauthorization, continues to be a fully constitutional exercise of Congress's authority to remedy discrimination in voting.

As it did in its initial brief, Florida also segues in its reply/opposition brief (at 29-30) from discussing the 2006 "ability to elect" amendment to an argument that rehashes its preclearance theory, *i.e.*, its claim that the retrogression standard allows Florida to retrogress the opportunity of minority voters to utilize particular means of ballot access so long as minority voters have "a reasonable and fair opportunity to cast a ballot." (Fla. Reply at 30.) As previously noted, this argument is essentially a restatement of the argument the Supreme Court rejected in *Ashcroft*, 539 U.S. at 478-79, that a voting change putatively is not retrogressive if it satisfies the Section 2 "equal opportunity" standard. That argument is thus foreclosed here.

Respectfully submitted on July 20, 2012,

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