No. 12-96

IN THE
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

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

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

BRIEF OF HISTORIANS AND SOCIAL SCIENTISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are U.S. historians and other scholars, some of whom have devoted their entire careers to the study of the American South and, in particular, to racial and ethnic minorities' long struggle for equal civil rights in that region.[2] Collectively, *amici* have written more than 50 books and nearly 200 articles or book chapters on those topics. All *amici* agree that the Voting Rights Act of 1965 ("VRA") is the most effective and important civil rights legislation in U.S. history. They also believe that the history of the VRA demonstrates that many of Congress's objectives in enacting and reauthorizing the VRA remain unfinished. *Amici* believe that their expertise will aid the Court's understanding of the indispensable role that the Act, and in particular § 5, has played in promoting and continuing to ensure equal rights in the American South.

In particular, *amici* wish to draw the Court's attention to two important historical considerations that are relevant to this case:

1. Section 5 of the VRA was designed, from its inception, to prevent not just laws that denied racial minorities access to the ballot, but also other discriminatory laws and policies that

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Rockefeller Brothers Fund provided a grant to one *amicus* for research intended to be used in the preparation of this brief. Both petitioner and respondents have consented to the filing of this brief, and letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

[2] A list of the *amici* and their biographical information are included as Appendix A to this brief.

sought to diminish the effectiveness of minority voting strength. Congress's focus on these "second-generation" tactics in the 2006 reauthorization was thus fully consistent with the original purposes of the VRA.

2. The VRA's original geographical coverage provision targeted the states and localities that, prior to 1965, had the most persistent and widespread voting rights abuses. Congress recognized that the covered jurisdictions were both over- and under-inclusive, but this Court has never demanded perfect precision. The law's current coverage provision is substantially as precise as those the Court has upheld in the past.

INTRODUCTION

The VRA has been widely recognized as the most important civil rights act in the nation's history. Professor Pamela S. Karlan, co-author of the leading election-law text, *The Law of Democracy*, described the Act as "the cornerstone of the 'Second Reconstruction.'"[3] Her view of the Act's accomplishments echoed the hopes of President Lyndon B. Johnson at the signing ceremony of the Act in 1965, when he characterized it as "one of the most monumental laws in the entire history of American freedom."[4]

VRA § 5, which originally was scheduled to expire in 1970, has been renewed by Congress four times. The 2006 renewal was endorsed by an overwhelming

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[3] Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 2 (2007).

[4] Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 Pub. Papers 841 (Aug. 6, 1965), *quoted in* Karlan, 44 Houston L. Rev. at 2.

majority of both houses of Congress. The vote in the Senate was 98 to 0, and included Senators from every covered State. Moreover, the original enactment in 1965 and each of the reauthorizations of § 5 in 1970, 1975, and 1982 have been overwhelmingly bipartisan.[5] In light of the polarization between the two parties that prevails in our day, we find the overwhelming bipartisan support for § 5's reauthorization a significant fact.

As we understand the issues before the Court, it must decide whether there is still evidence that racial discrimination affecting voting is a problem great enough in magnitude to justify the preclearance requirement and whether the coverage formula set forth in § 4 of the Act appropriately targets the jurisdictions where racial discrimination affecting voting is concentrated. We believe that the historical evidence in this *amicus* brief will assist the Court in resolving the issues before it.

It is the consensus view of the signatories to this brief – historians and social scientists, much of whose work has focused on the VRA and barriers to voting encountered by racial minorities, most particularly blacks, Latinos, Native Americans, and Asians – that § 5 remains a necessary federal weapon in the long battle to uphold the promise of the Fourteenth and Fifteenth Amendments, given the history of racial discrimination affecting voting, particularly in covered jurisdictions.

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[5] For 1970, 1975, and 1982, see Colin D. Moore, *Extensions of the Voting Rights Act*, *in The Voting Rights Act: Securing the Ballot* 95, 101 (Richard M. Valelly ed., 2006); for 2006, see http://clerk.house.gov/evs/2006/roll374.xml and http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212.

SUMMARY OF ARGUMENT

From its inception, VRA § 5 has been intended – and applied in practice – to prevent changes in voting laws that have the potential to undermine minority voters' effective use of the electoral franchise. In conjunction with § 2 of the Act, § 5 has proven a critical tool in preventing covered jurisdictions from backsliding on their duty to protect minority voting rights, and has helped minority voters in covered jurisdictions press white majorities to gain the full benefit of the electoral franchise. Despite these accomplishments, the persistence of racially polarized voting and vote-dilution tactics in covered jurisdictions demonstrate the continuing need for the robust protections afforded by § 5.

The coverage provision is not and never has been designed to capture every last place in America where racial discrimination in voting exists. Rather, from 1965 through today, the provision has excluded jurisdictions with significant voting discrimination problems. And, in some (but rare) cases, it has included jurisdictions with benign records. Perfection in this area cannot reasonably be expected. However, the provision adopted by Congress captures the jurisdictions with the most significant history of voting discrimination using the best data available.

ARGUMENT

I. The VRA Has Provided and Remains a Critical Tool in Preventing a Wide Array of Minority Vote-Suppression Tactics in Covered Jurisdictions

The VRA was never limited to preventing racial minorities from being literally denied access to the ballot. Rather, Congress always recognized the multiplicity of devices for denying racial minorities the full benefit of the electoral franchise. The history leading up to the VRA's passage, as well as the history of its enforcement, demonstrates that the VRA was always intended to prevent not only "first-generation" tactics that deny access to the vote, but also "second-generation" tactics that seek to dilute minority voting power or diminish the value of minorities' votes.[6]

A. In Enacting the VRA in 1965, Congress Was Confronted with a History of Extensive Vote-Dilution Tactics

Even before the VRA, Southern states had engaged in a wide range of tactics that sought not only to deny racial minorities ballot access but also to diminish the power of their vote. Alabama provides a good illustration of these purposefully discriminatory tactics. In the decades before 1965, Alabama, like most states of the former Confederacy, protected the white monopoly on elective office primarily through onerous voter-registration requirements that disenfranchised the vast majority of the State's black citizens.[7]

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[6] *See* J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 16 (1999).

[7] *See* Peyton McCrary et al., *Alabama* ("McCrary, *Alabama*"), *in Quiet Revolution in the South: The Impact of the Voting*

At Alabama's 1900 state constitutional convention, the delegates "enacted a cumulative poll tax, a literacy test, a long residency requirement, and required gainful employment for the past year" as conditions to registration. McCrary, *Alabama* at 44. And the lucky few black voters who were able to register were prevented from influencing the electoral process by the "white primary" – Alabama's "insurance policy" against black voting rights. *Id.*

After this Court invalidated the white primary in *Smith v. Allwright*, 321 U.S. 649 (1944), removing "probably the most efficacious method of denying the vote to African Americans"[8] from the South's "multilayered system of discriminatory election laws," McCrary, *Alabama* at 45, large numbers of black citizens in the Alabama cities of Mobile, Birmingham, and Tuskegee, *see id.*, were among the "tens of thousands [who] began to line up to register for Democratic primaries throughout the South," Keyssar at 199. Determined not to cede any ground to black voters, Alabama's governor and legislature quickly amended its constitution to give local voter registrars broad discretion to disqualify voters, which was intended to (and did) disenfranchise black citizens. *See* McCrary, *Alabama* at 45. When this law was struck down in 1949, *see Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949) (per curiam), Alabama passed a constitutional amendment requiring its Supreme Court to develop a registration application that was intended to be so complicated that blacks, who generally had less education

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Rights Act, 1965-1990, ch. 2, at 38, 43-45 (Chandler Davidson & Bernard Grofman eds., 1994) ("*Quiet Revolution*").

[8] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 199 (2009 rev. ed.) ("Keyssar").

than whites, would be unable to understand it. *See* McCrary, *Alabama* at 45.

Sensing sweeping federal intervention on the horizon, Alabama politicians took measures to entrench the political power of the State's white citizens by resurrecting vote-dilution laws that had been abandoned decades earlier in favor of wholesale disenfranchisement. *See id.* at 42-44. In one particularly notorious episode in the late 1950s, the Alabama legislature purposefully re-drew the municipal boundaries of Tuskegee to de-annex nearly all of the city's black neighborhoods because "black registrants were sufficiently numerous that they posed a threat to white political control of the city." Keyssar at 233; *see* McCrary, *Alabama* at 45.[9]

Alabama also passed laws to prevent black citizens from pooling their votes to elect a candidate of their choice in at-large municipal elections. The State's 1951 law prevented such "single-shot voting" strategies by requiring all voters to cast ballots for a full slate of the offices to be filled.[10] *See* McCrary, *Alabama* at 46. The legislature amended the law in 1961 to require each candidate to run for a separate numbered place or post. Because voters were required to cast a ballot for each numbered post,

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[9] Though "racial districting had been a common form of political warfare throughout the South, particularly in the years before wholesale disenfranchisement," Keyssar at 233, the unusually flagrant "Tuskegee Gerrymander," McCrary, *Alabama* at 45, was immediately challenged under the Civil Rights Act of 1957 and eventually invalidated by this Court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[10] Even when voting patterns are racially polarized, in a simple at-large system a cohesive minority group can use single-shot voting to elect one representative if several offices are to be filled.

black citizens could no longer band together to elect a candidate of their choice. One Alabama Democratic Party leader explained that these laws were necessary because of the "'increasing Federal pressure' . . . 'to register negroes en masse.'" *Id.*

"By the time the [VRA] was adopted, Alabama had perfected a system of local and state laws that, for most jurisdictions, required at-large elections, numbered places, and a majority vote, making it virtually impossible for blacks to elect candidates of their choice without substantial cross-over voting." *Id.* at 47.

B. VRA § 5 Has Successfully Curtailed Both Vote-Suppression and Vote-Dilution Tactics

1. In his comprehensive history of voting rights in America, Alexander Keyssar explains that the VRA "did not suddenly put an end to racial discrimination in [S]outhern politics. To a considerable degree, the locus of conflict shifted from the *right* to vote to the *value* of the vote." Keyssar at 212 (emphases added). Southern responses to federal intervention in voter registration, like Alabama's Tuskegee Gerrymander, proved to federal officials and Southern blacks alike that, "[i]f the federal government insisted on black enfranchisement, conservative Southerners would attempt to vitiate its consequences by altering the structures of representation." *Id.* at 233.

To do this, white politicians in covered jurisdictions intentionally exploited a well-known fact about Southern politics: given a choice, black voters will generally vote for certain candidates, while white voters will generally prefer different candidates, even within the same party. The practical effect of this

"racially polarized" voting pattern is that the candidate preferred by black voters will not be elected in jurisdictions where white voters are the majority if white voters vote cohesively as a bloc. Thus, white politicians could frustrate black voters' efforts to elect sympathetic representatives simply by configuring electoral structures to ensure that whites were a majority.[11]

Southern whites had many tactics at their disposal to take advantage of racially polarized voting. "In the numerous cities with white majorities but sizable black populations, whites could maintain a monopoly on political power by having all city council members elected 'at large' rather than from single-member districts" or by "insisting on majority runoffs rather than plurality victories." *Id.* at 234. These tactics were especially discriminatory when accompanied by "enhancing devices," such as numbered-place and majority-vote requirements.[12] Southern jurisdictions also annexed and de-annexed territory to change the racial composition of the electorate, or racially gerrymandered electoral districts either to "crack" black voters into different districts to prevent them from gaining a majority in any particular district or to "pack" black voters into a single electoral district to decrease the number of districts in which black voters had a majority. *See id.* at 233-34.

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[11] *See* Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities* ("Davidson, *Recent Evolution*"), *in Quiet Revolution* ch. 1, at 21, 22-24.

[12] Chandler Davidson (ed.), *Minority Vote Dilution* 1, 4-5 (1984); *see* Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 Soc. Sci. Hist. 507 (1990).

The seminal book on the effect of the VRA on minority political power in the South, *Quiet Revolution in the South*, collects a series of studies of voting patterns, electoral structures, and VRA enforcement activity in each of the Southern states covered by § 5. Consistent with an extensive body of research on the subject, the studies published in *Quiet Revolution* demonstrate that VRA § 2 and § 5 – effectuated through Department of Justice ("DOJ") objections to preclearance and § 2 litigation – have worked in tandem to defeat and deter second-generation barriers to minority groups' effective exercise of the electoral franchise.

2. Alabama once again serves as a powerful example. Given Alabama's pre-VRA history, it is unsurprising that DOJ used its § 5 authority repeatedly to prevent municipalities from undermining minority representation. The first DOJ § 5 objection to voting-law changes intended to dilute the effectiveness of black votes in Alabama was interposed in 1971 to stop the legislature from requiring numbered-place voting in the City of Birmingham's at-large elections, shortly after the City Council appointed a black attorney to a vacant seat. *See* McCrary, *Alabama* at 47.

DOJ also interposed objections that prevented 11 of the 16 attempts made by Alabama county commissions to move from single-member-district to at-large electoral schemes during the period from 1965 to 1985. *See id.* at 48. DOJ granted preclearance to the other five because the changes would not have a retrogressive effect on black voting power. *See id.*

In its report on the 1982 reauthorization bill, the House Judiciary Committee discussed two examples of DOJ objections to voting-law changes submitted by

Alabama jurisdictions, including a 1971 attempt by the Clark County Commission to switch from a single-member-district to an at-large system, and a 1968 attempt by the town of Hayneville to incorporate itself with boundaries that made its electorate 85% white even though Hayneville was in a county in which 77% of the residents were black. H.R. Rep. No. 97-227, at 18-19 (1981). DOJ denied preclearance to the Clark County Commission. *Id.* It granted Hayneville preclearance only after the legislature annexed to Hayneville the predominantly black communities it had sought to exclude. *Id.*; U.S. Dep't of Justice, Objection Letter to Hayneville, Lowndes County, Alabama (Dec. 29, 1978).

The history in other states is similar. For example, in 1972, DOJ objected to Twiggs County, Georgia's attempt to change to at-large elections with numbered-post and majority-vote requirements for its county commission, because the move would dilute the voting power of African-Americans, who comprised a majority of the registered voters in one of the existing districts but a minority countywide.[13] Similarly, DOJ objected to North Carolina's constitutional amendment prohibiting the splitting of any county in legislative districting, on the grounds that it effectively required multi-member districts and thus increased the likelihood of minority vote dilution due to the State's pattern of racially polarized voting.[14]

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[13] U.S. Dep't of Justice, Objection Letter to Twiggs County, Georgia (Aug. 7, 1972).

[14] U.S. Dep't of Justice, Objection Letter to State of North Carolina (Nov. 30, 1981) (identifying the change as retrogressive); *see also* U.S. Dep't of Justice, Objection Letter to State of North Carolina (Jan. 20, 1982) (state house); U.S. Dep't of

DOJ also objected to changes from appointive to elective offices where the jurisdiction chose to use at-large elections. For example, it objected to the South Carolina legislature's adoption of at-large elections for the county council of Sumter County to replace a system of gubernatorial appointments after the governor began appointing blacks to the county's governing body.[15] It also objected to a similar change for the school board in a Georgia county on both purpose and retrogression grounds.[16]

Southern states also sought to impose obstacles to single-shot voting similar to the laws enacted in Alabama in 1961. *See* McCrary, *Alabama* at 46. As DOJ explained, minority voters' ability to elect a candidate of their choice through single-shot voting is thwarted "if an otherwise at-large election to fill multiple identical offices is transformed into a number of separate election contests through the use of numbered and residency post requirements and the staggering of terms of office."[17] DOJ has consistently objected to these types of devices. For example, it did so in Clayton County, Georgia, when majority-vote and numbered-place requirements led to the defeat

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Justice, Objection Letter to State of North Carolina (Dec. 7, 1981) (state senate).

[15] U.S. Dep't of Justice, Objection Letter to Sumter County, South Carolina (Dec. 3, 1976); *see also County Council of Sumter Cnty. v. United States*, 596 F. Supp. 35, 37-39 (D.D.C. 1984) (per curiam); Orville Vernon Burton et al., *South Carolina*, *in Quiet Revolution* ch. 7, at 191, 208-09.

[16] U.S. Dep't of Justice, Objection Letter to Baldwin County, Georgia (Sept. 19, 1983).

[17] U.S. Dep't of Justice, Objection Letter to Lancaster County, South Carolina (Oct. 1, 1974).

of a black incumbent,[18] and when municipalities in North Carolina[19] and South Carolina[20] created staggered-term systems to engineer the defeat of black candidates.

3. As these examples illustrate, the VRA was not limited to ending "first-generation" ballot-denial tactics; it was intended and applied to stop "second-generation" forms of indirect, but no less intentional, vote discrimination. This Court also has recognized that the "right to vote" protected by § 5 is not limited to the literal right to cast a ballot, but broadly includes "'all action necessary to make a vote effective.'" *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (quoting 42 U.S.C. § 1973*l*(c)(1) (1964)). Giving effect to § 5's broad scope, *Allen* enjoined enforcement of "a change from district to at-large voting for county supervisors," noting that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569.

After *Allen*, the Court gave broad effect to its holding, denying preclearance to a wide variety of attempts by covered jurisdictions to change voting laws to undermine minority groups' use of the franchise. *See* Davidson, *Recent Evolution* at 32-33; *see*

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[18] U.S. Dep't of Justice, Objection Letter to Jonesboro, Clayton County, Georgia (Feb. 4, 1972).

[19] U.S. Dep't of Justice, Objection Letter to Reidsville, Rockingham County, North Carolina (Aug. 3, 1979).

[20] U.S. Dep't of Justice, Objection Letter to Jefferson, Chesterfield County, South Carolina (Mar. 26, 1984); *see also* U.S. Dep't of Justice, Objection Letter to Lancaster County School District, South Carolina (Apr. 27, 1984); U.S. Dep't of Justice, Objection Letter to Barnwell City Council, Barnwell County, South Carolina (Mar. 26, 1984).

also Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 502-03 (1992) (reviewing and summarizing *Allen*'s progeny). In 1971, the Court extended *Allen* to include a covered jurisdiction's attempt to annex neighboring white communities while excluding minority populations and to change the location of polling places. *See Perkins v. Matthews*, 400 U.S. 379, 390-91 (1971). The *Perkins* Court observed that, "[i]n terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation that changes both the boundaries and ward lines of a city to include more voters." *Id.* at 390.

Although litigants challenged the *Allen* Court's expansive interpretation of § 5's scope in later years, this Court repeatedly reaffirmed *Allen*'s holding that § 5 prohibits second-generation vote-dilution tactics. *See Georgia v. United States*, 411 U.S. 526, 533 (1973) (concluding that Congress's decision to re-authorize VRA and § 5 as written indicated "that *Allen* correctly interpreted the congressional design"). "In other words the purpose of § 5 *has always been* to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976) (emphasis added). Thus, contrary to arguments advanced by petitioner's *amici*,[21] this Court has long recognized that defeating second-generation barriers to minorities' voting rights is a central purpose of § 5.

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[21] *See* Landmark Legal Found. Br. 11-16.

C. The Legislative History of the VRA's Reauthorizations Evidences Congress's Intent To Prevent Both Vote-Suppression and Vote-Dilution Tactics

The legislative history accompanying the VRA's 1970, 1975, and 1982 reauthorizations confirms that Congress intended § 5 to apply expansively so as to prevent new forms of vote discrimination intended to diminish minority groups' voting power and undermine their hard-won gains.

1. ***The 1970 Reauthorization.*** Congress approved of using § 5 to defeat vote-dilution tactics when it first reauthorized the VRA in 1970. In *Perkins*, this Court quoted at length from the remarks made by one member of Congress in 1969:

> "When I voted for the Voting Rights Act of 1965, I hoped that 5 years would be ample time. But resistance to progress has been more subtle and more effective than I thought possible. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointment process has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed.
>
> Section 5 was intended to prevent the use of most of these devices."

400 U.S. at 389 n.8 (quoting *Voting Rights Act Extension: Hearings Before Subcomm. No. 5 of the H.*

Comm. on the Judiciary, 91st Cong. 3-4 (1969) ("1969 House Hr'gs") (remarks of Rep. McCulloch)).

The House Judiciary Committee's report also reflects concern about the "new, unlawful ways to diminish the Negroes' franchise" as "Negro voter registration has increased under the Voting Rights Act." H.R. Rep. No. 91-397, at 7 (1969), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3283. The Committee specifically cited evidence that covered jurisdictions had been "switching to at-large elections where negro voting strength is concentrated in particular election districts and facilitating the consolidation of predominantly negro and predominantly white counties." *Id.*

2. ***The 1975 Reauthorization.*** In 1975, Congress expressly relied on evidence of DOJ's use of § 5 objections to challenge dilutive redistricting plans, *see supra* Point I.B.2, in finding that § 5 remained necessary:

> As registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength. Such other measures may include switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans. In fact, the Justice Department has recently entered objections, at the state and local level, to at-large requirements, . . . majority vote requirements, . . . redistrictings, . . . multimember districts, and annexations. . . . . This past experience ought not be ignored in terms of assessing the future need for the Act. . . . . [I]t is likewise Section 5 which serves to insure that progress not be destroyed through new procedures and techniques.

H.R. Rep. No. 94-196, at 10-11 (1975) (citations omitted).

3. ***The 1982 Reauthorization.*** In 1982, Congress likewise cited numerous examples of second-generation tactics in covered jurisdictions as evidence for the continuing need of § 5. *See* H.R. Rep. No. 97-227, at 17-20. Congress noted that, although non-covered jurisdictions also used electoral structures similar to those targeted in VRA enforcement actions, "in the covered jurisdictions, where there is severe racially polarized voting, they often dilute emerging minority political strength." *Id.* at 18. Citing *Allen*, Congress reiterated that "[t]he Congress and the courts have long recognized that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the elections process as to render votes meaningless." *Id.* at 17.

In sum, Congress consistently has recognized – in the original VRA and every reauthorization since – that the VRA serves not only to prevent actual denial of ballot access, but also to foreclose "second-generation" vote-dilution tactics that have been used to deprive racial minorities of the effective exercise of the franchise.

D. Section 5 Continues To Be Critical To Ensuring Racial Equality at the Ballot Box

The historical evidence demonstrates that § 5 remains critical to ensuring racial minorities effective voting power.

1. To the extent unconstitutional voting-rights deprivations have diminished in covered jurisdictions, that progress is directly attributable to vigor-

ous enforcement of VRA § 2 and § 5. Eliminating § 5 would jeopardize that progress and threaten a return to the intentional vote-dilution tactics that Congress and DOJ have fought so hard to eliminate.

Taking Alabama again as the primary example, historical research demonstrates that both enforcement of § 5 through DOJ objections and § 2 litigation have proven critical to the progress achieved since 1965. When the VRA was enacted in 1965, black elected officeholders in the State "were restricted to communities in which blacks constituted a majority of the registered voters." McCrary, *Alabama* at 54. Even five years after passage of the Act, little progress had been made; only two black officials had been elected in at-large elections in white-majority cities by 1970. *Id.* By 1989, black officials held office in Alabama in numbers roughly proportional to black voters' representation in the State's population. *Id.*

As to the cause of these considerable changes, McCrary and his colleagues found that, between 1970 and 1989, 42 of 48 Alabama cities with 6,000 or more persons and populations that were at least 10% black switched from at-large to single-member-district or mixed electoral plans. *Id.* at 55. That change was critical, because, "[a]s long as at-large elections were in place, white majorities voting as a bloc were able to prevent black citizens enfranchised by the Voting Rights Act from winning local office." *Id.* at 56. And the VRA was the critical force behind that change: DOJ objections to preclearance requests prompted 4 of the changes, 27 cities changed their electoral plans in response to litigation, and 11 changed voluntarily, but aware of the possibility of litigation or DOJ opposition. In the six cities that retained at-large electoral plans, three were white-majority cities with

proportional black representation, while the other three were black-majority cities. *Id.* at 55.

Empirical studies of other states further support the conclusion that the VRA has been instrumental to achieving racial equality in voting in the South. Lisa Handley and Bernard Grofman's analysis of data obtained from studies of voting patterns, electoral structures, and VRA enforcement activity in Southern states found that post-VRA gains in the offices held by black voters' preferred representatives in Southern legislatures and congressional delegations were almost entirely attributable to changes in electoral structures caused by VRA enforcement activity.[22] For example, Handley and Grofman found that the increase in black office-holding was mostly attributable to the creation of more majority-black electoral districts and not changing racial attitudes among voters. Handley, *Black Officeholding* at 340-43. Moreover, the authors compared changes in Southern states that were covered by § 5 and those that were not and found that, on average, covered states had 2.8 more black representatives than Southern states that were subject only to § 2. *Id.* at 342-44.

2. Empirical research showing the continued racial polarization of the electorate in the South demonstrates that the VRA remains essential to preventing a return to the types of vote-dilution tactics that historically have been used to diminish minorities' effective franchise. Contrary to the arguments advanced by petitioner's *amici* that the continued

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[22] *See* Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations* ("Handley, *Black Officeholding*"), *in Quiet Revolution* ch. 11, at 335.

prevalence of racial polarization, or racial bloc voting, is an "offensive stereotype" forced on covered jurisdictions by DOJ,[23] racial polarization is a fact that has been proven time and again in litigation and academic studies of voter behavior. "No court has ever found a violation in a voting rights case absent proof, typically presented through expert statistical analysis, that white or Anglo voters routinely defeat the candidates of choice of minority voters." Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. Pa. J. Const. L. 665, 700 (2003).

In trial after trial, expert witnesses across the South showed that white bloc voting kept blacks from electing the candidates of their clear choice, except in districts where they were a substantial majority. During the 2005 congressional reauthorization hearings, Richard Engstrom presented findings that, "[i]n 78 of the 90 [Louisiana] elections analyzed, 86.7 percent, all available estimates show that African Americans cast a majority of their votes, usually extraordinary majorities of them, in support of an African American candidate, while a majority, also usually an extraordinary majority, of the non-African Americans voted for a non-African American candidate."[24] Engstrom also cited decisions issued between 2002 and 2004 by federal courts in South Carolina, Texas, Florida, and Georgia that identified

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[23] *See* Project 21 Br. 18-19; Mountain States Legal Found. Br. 26.

[24] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 58 (2005) ("2005 House 'Need' Hr'g").

significant racial polarization in those states. *See* 2005 House "Need" Hr'g 59-60. The National Commission on the Voting Rights Act's February 2006 report highlighted a University of Michigan analysis of federal court decisions in § 2 cases issued since 1982. Out of 186 published decisions that addressed racial polarization in both covered and non-covered jurisdictions, 91 (49%) included a judicial finding of racially polarized voting.[25]

In reauthorizing § 5, Congress recognized that racial polarization remains a fact of Southern politics. Indeed, Congress found "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, albeit a de facto system with minimal violence rather than the de jure system of late.'" H.R. Rep. No. 109-478, at 34 (2006) (quoting *Protecting Minority Voters* at 95) (alterations in original). And it concluded that, despite § 5, Southern jurisdictions have repeatedly attempted in recent years to make changes to voting laws with the intent of diminishing the influence of minority voters by subsuming them into electoral structures dominated by white majorities. *Id.* at 36-43, 56 (discussing use of § 5 to combat continued discrimination). The conditions underlying second-generation vote-dilution efforts – racially polarized voting – remain prevalent throughout the jurisdictions covered by the VRA. Thus, if § 5 were struck down, there is little doubt that politicians in covered

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[25] Lawyers' Comm. for Civil Rights Under Law, Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 97 (Feb. 2006) ("*Protecting Minority Voters*"), *available at* http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf.

jurisdictions would be able to resuscitate the types of intentional, retrogressive voting-law changes that Congress and DOJ have long fought to eliminate.

II. The Geographical Coverage Provision Always Has Covered States with Persistent and Widespread Abuses

One of the key issues before the Court is the degree to which the § 5 coverage provision accurately targets the locations where racial discrimination affecting voting is greatest. Petitioner and its *amici* criticize the coverage provision for not perfectly capturing the areas where significant voting discrimination problems persist. This is not the first time that argument has been advanced in this Court. In challenging the original VRA, South Carolina contended that the coverage provision was "arbitrary" and "absurd[]" because Florida, Arkansas, Texas, Tennessee, Kentucky, and New York were not covered despite "evidence submitted of known voter discrimination," while South Carolina was covered "even though [Attorney General Katzenbach] testified that South Carolina, unlike [other] states, was free of voter discrimination." Brief of the Plaintiff at 17-18, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22, Orig.) (filed Dec. 20, 1965), 1965 WL 130083.[26]

This Court rejected South Carolina's challenge, recognizing the wealth of evidence of the covered jurisdictions' serious and pervasive efforts to dis-

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[26] Attorney General Katzenbach had testified that "voting discrimination has been unquestionably widespread in all but South Carolina and Virginia, and other forms of racial discrimination, suggestive of voting discrimination, are general in both of these States." *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 12 (1965) ("1965 House Hr'gs").

enfranchise African-American voters, and because of the flexible "bail in" and "bail out" provisions built into the VRA. *Katzenbach*, 383 U.S. at 329-31. As a review of the history of the VRA's enactment makes clear, the coverage provision has never achieved a perfect "fit," and this Court has never expected perfection. Rather, Congress and this Court have appropriately recognized that the provision reflects Congress's legislative judgment to target the jurisdictions with the gravest danger of voting discrimination using the best evidence available.

A. The VRA's Coverage Provision Has Never Achieved 100% Precision

1. The Development of the Original Coverage Provision

The evidence before Congress in 1965 illuminates the degree of "fit" that this Court demanded in upholding the original VRA. Congress had significant evidence of racial discrimination in voting in three states: Louisiana, Mississippi, and Alabama. *See Katzenbach*, 383 U.S. at 329. Prior to 1965, it had brought 26 successful voting rights suits in those states. *See id.* at 312. Yet the results were meager. The registration rates for black citizens had risen from 14.2% to 19.4% in Alabama, from 31.7% to 31.8% in Louisiana, and from 4.4% to 6.4% in Mississippi. *See id.* at 313. DOJ's experience in Dallas County, Alabama, is emblematic. After four years of drawn-out litigation, only 383 out of 15,000 black citizens were registered. *See id.* at 314-15; 1965 House Hr'gs 5-6.

Congress had "more fragmentary" evidence of voting discrimination in three other states: Georgia, North Carolina, and South Carolina. *See Katzenbach*, 383 U.S. at 329-30 & n.39. It primarily consisted of

several suits and investigations.[27] The reason this evidence was "fragmentary" was not for lack of voting discrimination in those three states but rather because DOJ had been too busy in Louisiana, Mississippi, and Alabama. 1965 Senate Hr'gs 28, 39-40; 1965 House Hr'gs 89-90. Congress thus wished to include these states within the coverage formula.

Once Congress decided which states it wanted to cover, it reverse-engineered the coverage criteria to capture those states. Congress, "[knowing] the states they wanted to 'cover' and, by a process of trial and error, determined the [formula] that would single them out." 1 *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 68 (2005) (statement of Abigail Thernstrom); *see* H.R. Rep. No. 89-439, at 41 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2470 ("[A] target for the bill was selected before the means to reach the mark were devised.") (minority view); *see also Katzenbach*, 383 U.S. at 329 ("[t]he formula eventually evolved to describe [the] areas" where Congress had evidence of voting discrimination).[28]

The final provision covered any state that "maintained on November 1, 1964, any test or device," as defined in § 4(c), with respect to which "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that

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[27] *See* 1965 House Hr'gs 114-16; *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 27-28, 39, 246-48, 1182-83, 1237, 1253, 1300-01, 1336-45, 1353-54 (1965) ("1965 Senate Hr'gs").

[28] Conversely, Congress attempted to change the formula after it became clear that it covered unexpected jurisdictions like Alaska. *See* 1965 Senate Hr'gs 13, 37-38.

less than 50 per centum of such persons voted in the presidential election of November 1964." VRA § 4(b), 79 Stat. 438. As intended, these criteria led to coverage of the seven Southern states in which DOJ knew voting discrimination was rampant – Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and portions of North Carolina. Also included were several other scattered jurisdictions – Alaska, three counties in Arizona, and one county in Idaho.

2. The 1965 Coverage Provision Did Not Achieve a Perfect Fit

Nobody expected the coverage provision to be 100% precise. Congress "knew no way of accurately forecasting whether the evil might spread elsewhere in the future." *Katzenbach*, 383 U.S. at 328; *see* 1965 House Hr'gs 80-81 ("The difficulty . . . is we cannot get completely accurate figures . . . , and in the[ir] absence . . . it seems to me that Congress should make the judgment . . . on the best evidence available.") (statement of Attorney General Katzenbach).[29] In fact, the formula did not cover several jurisdictions with abysmal voting-rights records, namely Texas, Arkansas, Tennessee, and Florida.[30]

Texas. By 1965, "Texas ha[d] a long, well-documented history of discrimination that has

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[29] *See also* 1965 House Hr'gs 27-28, 48, 78, 91-92 ("We don't have racial statistics on registration or on voting for all States that we believe would form the basis for a congressional determination."), 122, 289, 293-94, 419, 693-94; 1965 Senate Hr'gs 147-49, 179, 203, 596, 598-600.

[30] *See* 1965 House Hr'gs 694 ("[T]here are four other States where there is pretty well-known discrimination against Negroes. It runs downhill from Florida and Arkansas to Tennessee and Texas.") (statement of Joseph L. Rauh, Jr., Counsel for the NAACP Legal Defense Fund).

touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods [were] an unfortunate part of this State's minority voting rights history." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439-40 (2006) (internal quotation marks omitted); *see also White v. Regester*, 412 U.S. 755, 765-69 (1973). This discrimination was evidenced in 1965 by a state-wide voting turnout of only 44% in the 1964 presidential election, 17% below the national average. *See* 1965 Senate Hr'gs 33-34.

Arkansas. In 1965, many African Americans in Arkansas were disenfranchised to the same extent as those in neighboring Louisiana and Mississippi. For example in Crittenden County, which borders Memphis and Mississippi, only 1,777 out of 12,871 (13.8%) of African-Americans were registered to vote, compared to 7,299 out of 10,569 (69%) of whites. *See* 1965 House Hr'gs 144; *see also id.* at 405 ("Arkansas has nine counties in which there is not a single Negro registered, yet, Arkansas is not covered."). Arkansas's "long history of invidious discrimination in the election process," *Perkins v. City of West Helena*, 675 F.2d 201, 211 (8th Cir.), *aff'd*, 459 U.S. 801 (1982), eventually led to the entire State being "bailed in" under § 3(c). *See Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990).

Florida. In the 1965 debates, DOJ affirmed to Congress that voting discrimination was ongoing in northern Florida. *See* 1965 House Hr'gs 69, 77, 89-90; 1965 Senate Hr'gs 147. Gadsden County, which borders Alabama, was emblematic. Only 1,425 out of 12,261 (11.6%) African-Americans were registered.

See 1965 House Hr'gs 154, 418-19. Because of this discrimination, Gadsden and Escambia (another northern Florida county) were later "bailed in" under § 3. *See NAACP v. Gadsden Cnty. Sch. Bd.*, 589 F. Supp. 953, 958-59 (N.D. Fla. 1984); *McMillan v. Escambia Cnty.*, No. 77-0432 (N.D. Fla. Dec. 3, 1979) (order).

Tennessee. DOJ had been active in combating voting discrimination in Tennessee in the years leading up to the VRA. *See* 1965 Senate Hr'gs 240. Four years prior, DOJ won an injunction against two Tennessee counties where sharecroppers had been evicted from their homes after attempting to register. *See* 1965 House Hr'gs 667, 681-85. Yet disenfranchisement persisted, as evidenced by the low registration rates for certain counties with significant African-American populations. *See*, *e.g.*, *id.* at 203, 205-06 (registration rates for Davidson, Hardeman, and Haywood counties were 8.7%, 15.3%, and 8.7% lower than the statewide average, respectively). Chattanooga County was eventually "bailed in" under § 3 because of its discriminatory voting practices. *See Brown v. Board of Comm'rs of the City of Chattanooga*, No. 87-388 (E.D. Tenn. Jan. 11, 1990).

The VRA's original coverage provision also included areas for which there was no evidence at that time of voting discrimination – Alaska and portions of Arizona, Hawaii, and Idaho.[31] *See* S. Rep. No. 89-162, pt. 3, at 37-38 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2575-76; H.R. Rep. No. 89-439, at

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[31] While there was no evidence submitted of voting discrimination in Alaska in 1965 (or 1970), there was evidence for the 1975 reauthorization relating to the barriers posed by English-only tests to native Alaskan populations' ballot access. *See* H.R. Rep. No. 94-196, at 20-21.

73, 1965 U.S.C.C.A.N. 2492 (minority view); 1965 House Hr'gs 61, 88, 94, 450-51, 765; 1965 Senate Hr'gs 103. Alaska and Hawaii fell within the provision because they had large alien and military populations that were either ineligible or unlikely to vote, which drove voter turnout below 50% in the 1964 presidential election. *See* 1965 House Hr'gs 277. There were also small pockets in the covered Southern states that had made advances toward voting equality and yet fell within the coverage provision. For example, a few parishes in southern Louisiana had almost reached parity in voting registration for white and black citizens. *See*, *e.g.*, *id.* at 179 (Evangeline Parish), 181 (St. Charles Parish), 183 (Vermillion Parish); *see also id.* at 48, 85-86 ("There has been at least no significant discrimination, no discrimination that I am aware of, in several of the parishes of Louisiana."); 1965 Senate Hr'gs 36-37.

Nonetheless, despite these imperfections, the coverage addressed the "heart of the problem" using "the best evidence available." 1965 House Hr'gs 77, 80-81. Congress minimized the impact of any imperfections by allowing a jurisdiction to "bail out," if it could prove it had not discriminated for a period of time, and by allowing a court to "bail in" a jurisdiction that engaged in voting discrimination. *See* VRA §§ 3(c), 4(a), 79 Stat. 437-38. These provisions proved effective in the years immediately following the VRA's enactment. Jurisdictions for which there was no evidence of voting discrimination – Alaska, two counties in Arizona, and a county in Idaho – successfully "bailed out."[32] And, as noted above, several

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[32] *See Elmore County v. United States*, No. 66-820 (D.D.C. Sept. 22, 1966); *Alaska v. United States*, No. 66-101 (D.D.C.

jurisdictions that had records of voting discrimination – portions of Arkansas, Tennessee, and Florida – were "bailed in."

3. Congress's Reauthorizations of the Coverage Provision

The history of the VRA's subsequent reauthorizations further demonstrates that the coverage provisions always have approximated – and never perfectly captured – the geographical areas where voting rights abuses were occurring.

In 1970, Congress extended the preclearance regime for all previously covered states for five years. H.R. Rep. No. 91-397, at 6-7, 1970 U.S.C.C.A.N. 3282-83; *see* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315. Despite concerns about the over-inclusiveness of the coverage provision,[33] Congress did not significantly alter it. It extended coverage to any jurisdiction that had a "test or device" as of 1968 and in which the voter turnout was less than 50% in the 1968 presidential election, which had the effect of covering portions of several other states. *See* H.R. Rep. No. 94-196, at 5-6. Congress, however, rejected a proposal to use only the 1968 voting figures after learning that doing so would have excluded Alabama, Louisiana, Mississippi, and Virginia. *See* 1969 House Hr'gs 93.

Aug. 17, 1966); *Apache Cnty. v. United States*, 256 F. Supp. 903 (D.D.C. 1966).

[33] *See* H.R. Rep. No. 91-397, at 14, 1970 U.S.C.C.A.N. 3289 ("Sections 4 and 5 are mischievous because in their application they are promiscuous. They cover some States and counties which are innocent and fail to cover some which are guilty.") (Rep. Poff dissenting); *id.* at 15, 1970 U.S.C.C.A.N. 3289 (complaining that Virginia remained covered even though the Attorney General had not sent any observers or examiners to Virginia).

In 1975, Congress extended the VRA for an additional seven years for already-covered jurisdictions "to insure that that progress not be destroyed through new procedures and techniques" for vote dilution. H.R. Rep. No. 94-196, at 10-11; S. Rep. No. 94-295, at 16-19 (1975).[34] Congress did not undertake a comparative analysis of voting discrimination across the country or endeavor to fix any perceived existing imperfections in the coverage provision. It considered only whether there was a continuing need for the VRA in covered jurisdictions. The reasonableness of Congress's judgment on that issue was again challenged. And, as in *Katzenbach*, this Court rejected that challenge in *City of Rome v. United States*, 446 U.S. 156 (1980).

Although Congress did not remove any already-covered jurisdictions in 1975, it expanded the definition of "test or device" to include the practice of providing English-only voting materials in any jurisdiction where more than 5% of the citizens were of a single-language minority. 1975 Act § 203, 89 Stat. 401 (adding VRA § 4(f)). That change effectively expanded § 5 to new jurisdictions in which Hispanic and Native American voters had suffered voting discrimination. Here, too, the coverage provision was both over-inclusive and under-inclusive. *See* H.R. Rep. No. 94-196, at 27 ("[T]here may be areas

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[34] Similar to the 1970 reauthorization, Congress covered additional jurisdictions that had a "test or device" as of November 1, 1972, and that had a voting turnout less than 50% in the 1972 presidential election. *See* Act of Aug. 6, 1975, Pub. L. No. 94-73, §§ 201-202, 89 Stat. 400, 400-01 ("1975 Act") (amending VRA § 4(a)-(b)). This change was inconsequential. *See Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 53 (1975) ("1975 House Hr'gs").

covered by this [provision] where there has been no voting discrimination."); *id.* at 87 (dissenting view); 1975 House Hr'gs 84-85, 87-88, 503, 621, 884, 934. For instance, it did not cover Los Angeles, which had a recent record of racial gerrymanders that diluted Hispanic voting power. *See* 1975 House Hr'gs 151-55. Once again, the Act's bail-in and bail-out provisions proved effective in curing this imperfection, as Los Angeles County was eventually bailed in. *See Garza v. Los Angeles Cnty.*, Nos. 88-5143 & 88-5435 (C.D. Cal. Apr. 25, 1991) (bailing in Los Angeles).

In 1982, Congress again extended the preclearance regime because of the continued disparity in white and black registration rates, the inability of black politicians to win higher political offices, and the numerous discriminatory voting changes attempted by covered jurisdictions. *See* H.R. Rep. No. 97-227, at 7-10, 13-20. Rather than modifying the coverage provision, Congress modified the bail-out provision.[35] It allowed bailout by jurisdictions that could show substantial improvement in minority voting rights,[36] and it allowed piecemeal bailout by political subdivisions in covered states. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96

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[35] *See Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 468 (1981) ("I have tried to think of a better coverage formula, and I have to admit I have not successfully convinced myself that I know of one. . . . I would think, rather than change the coverage formula, changing the bailout procedure may be a more fruitful thing.") (statement of Professor Richard Engstrom).

[36] Under the 1965, 1970, and 1975 versions of the VRA, jurisdictions could bail out only upon a showing that they had not made discriminatory use of a "test or device" for a specified period of time that extended into the years before 1965.

Stat. 131, 131; H.R. Rep. No. 97-227, at 32-33, 39-45; S. Rep. No. 97-417, at 43-62 (1982); *see Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 209 (2009). These changes assured that any over-inclusiveness could be solved by the covered jurisdictions themselves.

B. The Current VRA Coverage Provision Is Consistent with the Standard Adopted by Congress and Upheld by This Court

Congress's reauthorization of the VRA's coverage provision in 2006 is consistent with its prior findings that the covered jurisdictions continued to experience significantly higher rates of purposeful voting discrimination than other areas of the country. Congress found that significant registration disparities persisted in Virginia and South Carolina, and African-Americans had yet to be elected to statewide office in Mississippi, Louisiana, or South Carolina. *See Shelby Cnty. v. Holder*, 679 F.3d 848, 862-63 (D.C. Cir. 2012). Moreover, second-generation tactics remained prevalent in the covered jurisdictions leading up to the 2006 reauthorization. *Id.* at 865-66 (listing examples in Mississippi, Georgia, Louisiana, and Texas).

As in the past, Congress heeded DOJ's experience in enforcing the VRA: DOJ had lodged at least 626 objections to changes in voting practices by the covered jurisdictions, an average of 28.5 per year, *id.* at 866; it had issued many "more information requests," which prompted submitting jurisdictions to withdraw or modify potentially discriminatory changes, *id.* at 866-68; it had dispatched thousands of examiners to jurisdictions where voting rights abuses were ongoing, *id.* at 869-70; and it had brought 105 successful § 5 enforcement actions, *id.* at 870.

There also had been 653 successful § 2 suits in covered jurisdictions from 1982 to 2005. *Id.* at 868-69. Congress reasoned that the specter of § 5 had prevented many more would-be attempts at voting discrimination. *Id.* at 871.

Placed in historical context, this evidence of continued discrimination in the covered jurisdictions was at least as strong as had been presented in prior reauthorizations. *See id.* at 872 (summarizing the evidence before Congress). Accordingly, Congress determined that preclearance was still necessary for the already-covered states.

In fact, Congress's analysis of the geographical coverage issue was more extensive than in past reauthorizations. Unlike prior reauthorizations, evidence available in 2006 allowed for a comparison between voting discrimination in covered and non-covered jurisdictions. According to the Katz study, 56% of all successful § 2 litigation occurred in covered jurisdictions, despite the fact that those jurisdictions accounted for only 25% of the nation's population. *See To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 974 (2005) (report by Ellen Katz et al.). The results are more pronounced when unpublished § 2 cases were considered: 81% of successful § 2 suits were filed in covered jurisdictions, with covered states having the eight highest per capita rates of successful § 2 suits. *See Shelby Cnty.*, 679 F.3d at 875 (citing Decl. of Dr. Peyton McCrary). This comparative evidence provided more robust support for the coverage provision than existed for prior re-authorizations.

The dissenting opinion in the court below offered numerous criticisms of the 2006 coverage criteria based on statistical data for covered and non-covered states. Some of those criticisms – for example, that there is no "positive correlation" between low black registration or voter turnout rates and inclusion in the provision, *id.* at 891 (Williams, J., dissenting) – ignore the fact that the primary discriminatory tactic that exists today (vote dilution) remains pervasive despite higher minority registration and turnout rates. Moreover, the suggestion that the coverage provision is irrational because covered jurisdictions have a high rate of minority elected officials is misleading, because whites still dominate major political offices, while many black officials hold local positions. *Id.* at 892 fig. 3 (Williams, J., dissenting); *see id.* at 862 (majority); H.R. Rep. No. 94-196, at 7.

The dissenting judge also contended that the coverage provision was unsustainable because some uncovered jurisdictions have worse records with respect to published successful § 2 suits than some of the covered jurisdictions. But that criticism is no different from the one lodged against the original VRA, and every reauthorization since. Just as Texas, Arkansas, Tennessee, and Florida were not included in the VRA's coverage provision in 1965, it may well be that certain uncovered states today experience significant incidence of purposeful discrimination in voting. But the fact that the coverage provision is *under-inclusive* certainly does not mean inclusion of the *covered* jurisdictions is arbitrary or irrational, especially in light of the law's flexible "bail in" and "bail out" provisions.

In sum, the VRA's coverage provision is as precise as it has been in the past, and Congress repeatedly

has reaffirmed it as appropriate because it concentrates on areas of demonstrated need. That need is confirmed by the history of purposeful discrimination in the covered jurisdictions and the very real risk that invalidating § 5 will result in retrogression in those areas. This Court has twice – in *Katzenbach* and *City of Rome* – upheld Congress's judgment as an appropriate exercise of its authority under the Fourteenth and Fifteenth Amendments. It should do so again.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

List of Amici
(titles and institutional affiliations are provided for identification purposes only)

Chandler Davidson, Tsanoff Professor of Public Affairs Emeritus, Rice University

Professor Davidson was co-director, along with Professor Bernard Grofman of the University of California at Irvine, of perhaps the most comprehensive scholarly effort to assess the impact of the Voting Rights Act of 1965 in the South. The project involved almost thirty political scientists, historians, sociologists, and voting rights lawyers. The resulting book, *Quiet Revolution in the South* (Princeton University Press, 1994), was awarded the Richard Fenno Prize by the American Political Science Association. In 2005-06, Davidson served on the National Commission on the Voting Rights Act and was the primary drafter and author of the Commission's 2006 report, Protecting Minority Voters. Davidson's scholarship on voting rights has been cited at least seven times in U.S. Supreme Court opinions and numerous times in lower court opinions.

Alexander Keyssar, Matthew W. Stirling, Jr. Professor of History and Social Policy, Kennedy School of Government, Harvard University

Professor Keyssar is a historian who has specialized in the study of voting in the United States. His book, *The Right to Vote: The Contested History of Democracy in the United States* (2000), was named the best book in U.S. history by both the American Historical Association and the Historical Society; it was also a finalist for the Pulitzer Prize and the Los Angeles Times Book Award. In 2004 and 2005, Keyssar chaired the Social Science Research Council's National Research Commission on Voting and Elections.

Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University

Professor Katznelson's work has straddled comparative politics and political theory as well as political and social history. His most recent books are *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*; *Black Men, White Cities: Race, Politics and Migration in the United States, 1900-1930, and Britain, 1948-1968*; *Schooling for All: Class, Race, and the Decline of the Democratic Ideal* (with Margaret Weir). Professor Katznelson was President of the American Political Science Association for 2005-2006. Previously, he served as President of the Social Science History Association and Chair of the Russell Sage Foundation Board of Trustees. He has been a Guggenheim Fellow and is a Fellow of the American Academy of Arts and Sciences and the American Philosophical Society.

James Wayne Flynt, Distinguished University Professor Emeritus, Auburn University

Professor Flynt has written 11 books that focus largely on the historical, economic and social fabric of Alabama, including *Poor But Proud: Alabama's Poor Whites* (1990), and he co-wrote *Alabama: A History of a Deep South State*, both of which were nominated for Pulitzer Prizes. He is editor-in-chief of the online *Encyclopedia of Alabama*, a partnership of Auburn University and the Alabama Humanities Foundation.

George Korbel, Esq., San Antonio, Texas

Mr. Korbel was the Litigation Coordinator for Texas Rural Legal Aid, Inc. from 1981 to 1985 and has been the Director of the Constitutional and Civil Rights Litigation Project for Texas Rural Legal Aid since 1985. He has been involved in Texas redistricting litigation for much of his career, including *NAMUDNO v. Holder*, 557 U.S. 193 (2009), and *LULAC v. Perry*, 548 U.S. 399 (2006).

Nicolaus Mills, Professor of American Studies, Sarah Lawrence College

Professor Mills is the author of *Like a Holy Crusade: Mississippi 1964 – The Turning of the Civil Rights Movement in America* – a book documenting the "Summer Project" of 1964 where thousands of Northern white college students were recruited to come south that summer in an effort to "break" Mississippi and secure voting rights for its black citizens.

Minion K.C. Morrison, Professor and Head, Department of Political Science and Public Administration, Mississippi State University

Professor Morrison's professional work focuses on electoral politics in the South. His publications include three books, and numerous articles and book reviews. He is the past President of the National Conference of Black Political Scientists and has served on the editorial board of the American Political Science Review.

Richard M. Valelly, Professor of Political Science, Swarthmore College

Professor Valelly is an expert on American party politics, election law, voting rights, and the institutional development of the House and the Senate. Among many other works, he is the author of *The Two Reconstructions: The Struggle for Black Enfranchisement* (University of Chicago Press, 2004), which won the Ralph Bunche and J. David Greenstone book awards of the American Political Science Association, and the V.O. Key, Jr., book award of the Southern Political Science Association.

Michael McDonald, Associate Professor, Department of Public and International Affairs, George Mason University

Professor McDonald received his Ph.D. in Political Science from University of California, San Diego and B.S. in Economics from California Institute of Technology. His research includes voting behavior, redistricting, Congress, American political development, and political methodology. He has written numerous articles in edited volumes and in scholarly journals.

Lorraine Minnite, Associate Professor of Public Policy and Administration, Rutgers University

Professor Minnite's research is concerned with issues of inequality, social and racial justice, political conflict, and institutional change. She is the author or co-author of two books on electoral rules and racial and class politics in the U.S., *The Myth of Voter Fraud*, and *Keeping Down the Black Vote: Race and the Demobilization of American Voters*.

Orville Vernon Burton, Professor of History and Computer Science, Clemson University

Professor Burton's research and teaching focuses on the American South, especially race relations and community, and the intersection of humanities and social sciences. He has 16 authored or edited books and more than one hundred eighty articles. His book, *The Age of Lincoln* (2007), won the Chicago Tribune Heartland Literary Award for Nonfiction.

James Loewen, Emeritus Professor of Sociology, University of Vermont

Professor Loewen has taught race relations for twenty years at the University of Vermont and, before that, at Tougaloo College in Mississippi. His books include *Mississippi: Conflict and Change* (co-authored), which won the Lillian Smith Award for Best Southern Nonfiction but was rejected for public-school text use by the State of Mississippi, leading to the path-breaking First Amendment lawsuit, *Loewen, et al. v. Turnipseed, et al.* He also wrote *Lies My Teacher Told Me*, a winner of the 1996 American Book Award.

David Richards, Esq., Austin, Texas

David Richards has broad experience in Texas voting rights litigation. Among his more notable cases is *White v. Regester*, 412 U.S. 755 (1973). He has also been an adjunct professor of law at the University of Texas Law School and served as an attorney with the U.S. Commission on Civil Rights. From 1982 to 1985, he was Executive Assistant Attorney General of Texas supervising the State's litigation.

James E. Alt, Frank G. Thomson Professor of Government, Harvard University

Professor Alt is the author, co-author, or editor of numerous books and articles on American politics, with a focus on political parties. He is the founding director of the Center for Basic Research in the Social Sciences. He is or has been a member of the editorial boards of the American Journal of Political Science, British Journal of Political Science, Political Studies, American Political Science Review, and other journals, and has been a member of the Political Science Panel of the National Science Foundation. He was a Guggenheim Fellow 1997-98 and is a member of the American Academy of Arts and Sciences.

Michael Jones-Correa, Professor of Government, Cornell University

Professor Jones-Correa is the author of numerous books and more than two dozen articles and chapters on immigration, race, ethnicity and citizenship in the United States. Jones-Correa has been a visiting fellow at the Russell Sage Foundation 1998-1999, the Woodrow Wilson International Center for Scholars 2003-2004, and the Center for the Study of Democratic Politics at Princeton University in 2009-2010. In 2004-2005 he served on the Committee on the Redesign of US Naturalization Test for the National Academy of Sciences, in 2009 was elected as vice president of the American Political Science Association, and was appointed in 2010 to the American National Election Studies (ANES) Board of Overseers.

Rebecca J. Scott, Charles Gibson Distinguished University Professor History and Professor of Law, University of Michigan

Professor Scott is the author of *Degrees of Freedom: Louisiana and Cuba after Slavery* (Harvard University Press, 2005), which received the Frederick Douglass Prize and the John Hope Franklin Prize. Professor Scott received an A.B. from Radcliffe College, an M.Phil. in economic history from the London School of Economics, and a Ph.D. in history from Princeton University. She is a recent recipient of the Guggenheim Fellowship and a member of the American Academy of Arts and Sciences.

David A. Bositis, Senior Political Analyst, Joint Center for Political and Economic Studies, Washington, D.C.

Dr. Bositis is a voting rights and redistricting expert, who has published widely in this area, and has appeared as an expert witness in both state and federal court. Since 1997, Dr. Bositis has also been the author of the Joint Center series on black elected officials entitled *Black Elected Officials: A Statistical Analysis*. Since 1992, Dr. Bositis has designed and managed 29 national surveys for the Joint Center, which have included national and state surveys of the African American and Hispanic populations and the general population, as well as specialized national surveys of black elected officials, young adults, black churches, minority owned businesses, black professionals, and social workers.

Charles M. Payne, Frank P. Hixon Distinguished Service Professor, University of Chicago

Professor Payne is the author of *I've Got the Light of Freedom: The Organizing Tradition in the Mississippi Civil Rights Movement* (1995), which won awards from the Southern Regional Council, *Choice* Magazine, the Simon Wisenthal Center, and the Gustavus Myers Center for the Study of Human Rights in North America. He is also co-author of *Debating the Civil Rights Movement* (1999) and co-editor of *Time Longer Than Rope: A Century of African American Activism*, 1850-1950 (2003).

Lisa Handley, Ph.D., Co-founder and President, Frontier IEC, Washington, D.C.

Dr. Lisa Handley has over twenty-five years of experience in the areas of redistricting and voting rights, as both a practitioner and an academician, and is recognized nationally (as well as internationally) as an expert on these subjects. She has advised numerous jurisdictions and other clients on redistricting and has served as an expert in dozens of redistricting and voting rights court cases. Her clients have included scores of state and local jurisdictions, redistricting commissions, civil rights organizations, and the U.S. Department of Justice, as well as such international organizations as the United Nations. In addition, Dr. Handley has been actively involved in research, writing, and teaching on the subjects of voting rights and redistricting. She holds a Ph.D. in political science from George Washington University.

Paula McClain, Professor of Political Science and Public Policy, Duke University

Professor McClain's research focuses on racial minority group politics, particularly inter-minority political and social competition, and urban politics, especially public policy and urban crime. Among other publications, she is co-author, with Steven Tauber, of "American Government in Black and White," which was honored by the American Political Science Association. She is also the former president of the Southern Political Science Association and vice president of the American Political Science Association.

Lorn S. Foster, Charles and Henrietta Johnson Detoy Professor of American Government and Professor of Politics, Pomona College

Professor Foster's scholarly research includes campaigns and elections, civil rights, urban politics, and the Voting Rights Act. His publications include "Section 5 of the Voting Rights Act: The Implementation of an Administrative Remedy," *Publius*, 17-29, Fall 1996, and "The Voting Rights Act: Political Modernization and the New Southern Politics," *Southern Studies*, 266-287, Fall 1984. He was also the editor of *The Voting Rights Act: Consequences and Implications* (Praeger Special Studies, 1985) and chapter, "Political Symbols and the Enactment of the 1982 Voting Rights Act."

Thomas Pettigrew, Research Professor of Social Psychology, University of California Santa-Cruz

Professor Pettigrew has published more than 300 articles and book chapters on racism and intergroup relations. Pettigrew has twice received the Gordon Allport Intergroup Relations Prize from the Society for the Psychological Study of Social Issues. He has also received lifetime achievement awards from the American Sociological Association, the Society for Psychological Study of Social Issues, the Society for Experimental Social Psychology, the International Society of Political Psychology, and the International Academy for Intercultural Research.

Michael Perman, Professor of History Emeritus, University of Illinois at Chicago

Michael Perman has studied the history of the American South, the Civil War and Reconstruction, and slavery and race relations. He has published a number of books in those areas, including *Pursuit of Unity: A Political History of the American South* (University of North Carolina Press, 2010), and *The Southern Political Tradition* (Louisiana State University Press, 2012).

Michael Benedict, Professor Emeritus of History, Ohio State University

Professor Benedict is a recognized authority in Anglo-American constitutional and legal history, the history of civil rights and liberties, the federal system and the Civil War and Reconstruction. He has written several books and more than 40 essays on American history. Professor Benedict is a fellow of the Society of American Historians and Parliamentarian of the American Historical Association.

Steven F. Lawson, Professor Emeritus of History, Rutgers University

Professor Lawson's areas of research have been the history of the civil rights movement, especially the expansion of black voting rights and black politics. His major publications include: *Black Ballots: Voting Rights in the South, 1944-1969*; *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982*; *Running for Freedom: Civil Rights and Black Politics in America Since 1941*; and *Debating the Civil Rights Movement* (with Charles Payne).

Frances Fox Piven, Professor of Political Science, City University of New York

Professor Piven's scholarly research focuses on political movements and electoral politics. She is the past Vice-President of the American Political Science Association and past president of the Society for the Study of Social Problems. She is currently President of the American Sociological Association. She is the recipient of numerous awards, including the President's Award of the American Public Health Association, and the American Sociological Association's Career Award for the Practice of Sociology, as well as their award for the Public Understanding of Sociology.

Gracia Hillman, CEO and Principal Consultant, G.M. Hillman & Associates, Inc.

Ms. Hillman served as a commissioner, Chair, and Vice Chair of the U.S. Election Assistance Commission from 2003 to 2010. She has also served as the Executive Director of the League of Women Voters of the United States.

Peter H. Argersinger, Professor of History, Southern Illinois University

Professor Argersinger earned his Ph.D. from the University of Wisconsin in 1970 and has also taught at the University of Maryland Baltimore County. He has written several books on American political history.

Tova Andrea Wang, Senior Democracy Fellow, Demos

Tova Andrea Wang is an expert on election reform and political participation in the United States and internationally. She is Senior Democracy Fellow at Demos, a Fellow at The Century Foundation, and a consultant to organizations working to improve democracy around the world, such as the National Democratic Institute and The Carter Center. She is the author of the 2012 book *The Politics of Voter Suppression: Defending and Expanding Americans' Right to Vote* (Cornell University Press). She has also worked for the National Commission on Federal Election Reform.

Spencer A. Overton, Professor of Law, George Washington University

Professor Overton specializes in voting rights and campaign finance. He has written numerous articles and books in those areas, including *Stealing Democracy: The New Politics of Voter Suppression.*