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 JOAQUIN AVILA, NEIL BRADLEY, JULIUS CHAMBERS, U.W. CLEMON, ARMAND DERFNER, JOSE GARZA, FRED GRAY, ROBERT MCDUFF, ROLANDO RIOS, ROBERT RUBIN, EDWARD STILL, ELLIS TURNAGE, AND RONALD WILSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amicus curiae are long-serving members of the voting rights bar who each bring to bear decades of experience litigating hundreds of actions under Sections 2 and 5 of the Voting Rights Act of 1965 ("VRA"). Amici have represented minority voters before this Court in cases spanning more than 50 years from *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), through *Perry v. Perez*, 132 S. Ct. 934 (2012).

Amici have personally and repeatedly witnessed the efficient and effective interplay between Section 2 litigation and the Section 5 preclearance process in covered jurisdictions; experienced the burdens that Section 2 litigation imposes on minority voters, jurisdictions, and courts; and witnessed firsthand the strong deterrent effect of Section 5 preclearance. Amici provided Congress with extensive evidence of their experiences through testimony and reports submitted during the hearings on the 2006 reauthorization.

Amici submit this brief to urge the Court to give due consideration, as Congress did, to the practical consequences of attempting to fill the void left by Section 5 with case-by-case-litigation under Section 2,

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[1] This brief is filed with the consent of all parties. Blanket consents are on file with the clerk. No counsel for any party authored this brief in whole or in part, nor did any person other than amici and their counsel make a monetary contribution to the preparation or submission of this brief.

including the discrimination it would leave unremedied, as well as the burdens it would place on courts and litigants – including the covered jurisdictions themselves. Amici have a professional interest in the outcome of this case because, if Section 5 were struck down, they – along with the small number of colleagues with the experience and expertise necessary to litigate such cases – would be left to take up the task, as best they could, of enforcing the VRA in covered jurisdictions through case-by-case litigation. Amici submit this brief to support Congress' finding that Section 2 litigation is not yet an adequate substitute for Section 5 preclearance.

SUMMARY OF ARGUMENT

Congress enacted Section 5 in 1965 because voting suits were "unusually onerous to prepare," "exceedingly slow," and, even when successful, could not stop offending jurisdictions from enacting new discriminatory measures. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). Since then, Section 2 litigation and Section 5 preclearance have operated effectively as the sword and shield of voting rights enforcement. Petitioner's assertion that case-by-case litigation under Section 2 can effectively replace Section 5 preclearance ignores the burdens of Section 2 litigation and the benefits of Section 5 preclearance. An extensive legislative record underlies Congress' finding that Section 5 remains necessary.

First, Congress considered evidence that Section 5 performs a distinct, prophylactic function, which case-by-case litigation alone could not replace. While Section 2 seeks to eradicate existing discriminatory election practices, Section 5 preclearance can block discriminatory changes to jurisdictions' voting practices before they take effect. Section 5 maintains the progress achieved through litigation and prevents backsliding, by assigning to covered jurisdictions the burden of demonstrating that proposed changes have no discriminatory purpose or retrogressive effect on minority voting rights. Thus, Section 5 "shift[s] the advantage of time and inertia" from the perpetrators of discrimination to the victims. *Katzenbach*, 383 U.S. at 328.

Second, Congress considered compelling evidence that Section 2 litigation is too cumbersome and expensive to perform Section 5's preemptive role in preventing new discriminatory changes before they take effect. The voting rights bar lacks the numbers and resources to address the current volume of potential Section 2 litigation, let alone to prosecute the vast number of Section 2 lawsuits that would be necessary to block all the discriminatory changes that would be implemented without Section 5. Even when available resources permit investigation and filing a complaint, the slow pace of Section 2 litigation would leave discriminatory voting practices in effect. Challenges of timing, the difficulty of showing a reasonable likelihood of success before discovery, the need for expert analysis, and the natural hesitance of federal

courts to interfere with scheduled elections make preliminary injunctions especially difficult to obtain in Section 2 cases. Candidates elected during the pendency of litigation enjoy the benefits of incumbency, even if litigation is ultimately successful and the election declared illegal. Section 2 litigation is also unusually expensive, both for plaintiffs and ultimately for taxpayers who must bear the expense of defending litigation (including plaintiffs' attorneys' fees, when litigation is successful). On the other hand, Section 2 plaintiffs' recovery of fees and costs is uncertain and often takes years. By comparison, Section 5 submissions are quick and inexpensive for covered jurisdictions to prepare and much more efficient to resolve.

Third, Section 5 preclearance has a deterrent effect that Section 2 litigation does not. Petitioner asserts that Congress' conclusion that Section 5 deters covered jurisdictions from enacting discriminatory practices is based on "supposition and conjecture." The legislative record disproves this assertion. Congress received extensive testimony demonstrating the deterrent effect of preclearance, supported by numerous examples of discriminatory voting changes that covered jurisdictions proposed or considered but ultimately discarded due to concerns that the change might not be precleared. By contrast, Section 2 is a relatively weak deterrent because litigation can only dismantle discrimination on a piecemeal basis, leaving challenged practices in effect until minority voters are able to find the resources to sue and prevail in slow, costly litigation.

In sum, the record before Congress supports the conclusions that a shift from a comprehensive enforcement regime to a purely reactive one, dependent entirely on Section 2, would leave new and backsliding discrimination unaddressed; would overburden not only the Courts but also the covered jurisdictions with expensive litigation; and would unleash discriminatory laws that Section 5 has deterred.

ARGUMENT

I. THE DISTINCT AND COMPLEMENTARY FUNCTIONS OF LITIGATION AND PRECLEARANCE ARE BOTH NECESSARY TO COMBAT PERSISTENT AND WIDESPREAD DISCRIMINATION IN COVERED JURISDICTIONS.

Congress designed the VRA to provide a comprehensive voting rights enforcement scheme that both remedies existing discriminatory practices and preserves resulting gains. *Beer v. United States*, 425 U.S. 130, 140-41 (1976).

Section 5 preclearance was enacted to bolster an ineffective enforcement regime that had relied solely on slow and costly case-by-case litigation to eradicate entrenched discrimination. *See* H.R. Rep. No. 109-478 at 66 (2006) (noting that failing to reauthorize Section 5 "would reverse the burden of proof and restore time consuming litigation as the principal means of

assuring the equal right to vote") (quoting H.R. Rep. No. 91-397 (1970)); *Katzenbach*, 383 U.S. at 314, 327-28; *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (noting the necessity of Section 5 due to "the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation") (internal citations omitted). Section 2 aims to eradicate existing discriminatory voting practices nationwide, 42 U.S.C. §1973(a), while Section 5 preserves those gains and prevents backsliding by blocking jurisdictions with grave records of discrimination from enacting new retrogressive or purposefully discriminatory voting changes, *id.* at §1973c(a). Congress, in repeatedly reauthorizing Section 5, and this Court, in repeatedly upholding it, have been less concerned with instances of gamesmanship than with "the slow, costly character of case-by-case litigation." *Flores*, 521 U.S. at 526. Nonetheless, the legislative record shows that Section 5 continues to thwart attempts by covered jurisdictions to evade judgments and consent decrees that result from Section 2 litigation, in spite of Petitioner's contrary assertion. *See* Pet. Br. 25.

While Section 2 litigation is vital to remedy existing discriminatory voting practices, it is insufficient. *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. 92 (2005) (*History, Scope, & Purpose*); *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th

Cong. 149 (2006) (*Modern Enforcement*). Without Section 5 preclearance to preserve the gains of Section 2 litigation, covered jurisdictions could simply adopt different but equally discriminatory voting procedures and then defy minority voters "to sustain the burden of proving that the new law, too, was discriminatory." H.R. Rep. No. 94-196 (1975) at 57-58; *see History, Scope, & Purpose* 82-83. Even if minority voters can muster the resources to sue, these new discriminatory practices and procedures can remain in effect for years while litigation is pending. *History, Scope, & Purpose* 92, 97, 101; *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 97 (2006) (*Evidence of Continued Need*); *The Continuing Need for Section 5 Preclearance*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (*Continuing Need*). But Section 5 preclearance "shift[s] the advantage of time and inertia" to minority voters by placing a limited burden on covered jurisdictions to demonstrate only that their changes have neither the purpose nor effect of making minority voters worse off. *Katzenbach*, 383 U.S. at 314. Because preclearance submissions are, by orders of magnitude, less expensive than litigation, Section 5 spares minority voters the burden of prosecuting Section 2 cases and spares covered jurisdictions the substantial cost of defending such lawsuits. *See infra* Section I.B.2.

Preclearance also ensures that all proposed changes receive meaningful and expeditious review.

Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the H. Comm. on the Judiciary, 109th Cong. 11-13 (2006) (*Policy Perspectives*). This scrutiny is especially important for local-level changes that might otherwise go unnoticed, but affect matters of daily importance including education, transportation, and property taxation. *See Evidence of Continued Need* 1505; *Continuing Need* 15. Without preclearance, minority voters and the voting rights bar lack the resources to review more than a tiny fraction of the more than 14,000 changes proposed annually by covered jurisdictions. Department of Justice, Section 5 Changes by Type and Year;[2] *Modern Enforcement* 149; *History, Scope, & Purpose* 79, 84. The legislative record supports Congress' finding that Section 2 litigation remains an inadequate substitute for Section 5 preclearance. *See* H.R. Rep. No. 109-478 at 57.

A. Section 5 Continues To Thwart Discrimination In Covered Jurisdictions That Would Evade Section 2 Enforcement.

In 1965, Congress was presented with evidence that state and local officials attempted to circumvent federal court decisions striking down their illegal

[2] http://www.justice.gov/crt/about/vot/sec_5/changes.php.

voting procedures and practices "by simply administering new and novel discriminatory schemes and devices." H.R. Rep. No. 109-478, at 7-8 (2006). In its 2006 reauthorization, Congress considered evidence that Section 5 continues to prevent covered jurisdictions from using novel devices to gut successful voting rights litigation. In each recent example discussed below, Section 5 enabled minority voters to avoid pursuing successive lengthy and costly Section 2 suits against a covered jurisdiction's efforts at circumvention.

In 2004, Section 5 prevented Charleston County, South Carolina from making an end-run around a federal court's ruling that an at-large election system with a majority-vote requirement discriminated against minority voters. H.R. Rep. No. 109-478, at 39-40; S. Rep. No. 109-295, at 314 (2006). Before 2004, the Charleston County school board used an at-large system with no majority requirement. *Evidence of Continued Need* 1946. By contrast, the county council was elected under an at-large system with a majority vote requirement that made it difficult for members of the African-American community to elect their candidates of choice. *Id.*; *United States v. Charleston County*, 316 F.Supp.2d 268, 274, 294 (D.S.C. 2003). In 2001, the federal Department of Justice (DOJ) and minority voters initiated parallel Section 2 actions that finally ended the county council's discriminatory system. *Id.* at 271-72. Against a backdrop of recent and longstanding intentional discrimination against black voters in Charleston County, *id.* at 286 n.23, the

court found the council's at-large system had a discriminatory effect in violation of Section 2, *id.* at 306. A month after the district court held that the county council's method of election violated Section 2, the South Carolina General Assembly, "led by the Charleston legislative delegation," enacted a law that adopted a de facto majority vote requirement for the county school board, "essentially recreating the electoral system for county council." *Evidence of Continued Need* 1946. The Attorney General objected and stopped this attempt at retrenchment before it could take effect. *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act*, *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 80, 85 (2005) (*Scope & Criteria*). As plaintiffs' counsel testified before the House, "[w]e won, and as soon as we won . . . the legislature adopted the exact same election system for the school board." *Id.* at 80.

Section 5 also thwarted the repeated efforts of the city of Seguin, Texas to suppress minority turnout and dilute minority voting strength. Latino voters successfully sued the city for Section 2 violations three times between 1978 and 1993 over redistricting plans designed to maintain an Anglo city council in the majority-minority city. Nina Perales et al., *Voting Rights in Texas: 1982-2006*, 29 (June 2006) (*Texas*

Report).[3] When 2000 census figures showed Latinos poised to elect a majority of the city council, the Attorney General objected to a proposed redistricting designed to preserve the Anglo majority. *Id.* The city subsequently corrected its map, "but then closed its candidate filing period so that [an] Anglo incumbent would run for office unopposed." *Id.* Latino voters then filed a successful Section 5 suit, the election was enjoined, and, after the parties negotiated a new election date, the action was settled, "and today, a Latino majority serves on the Seguin City Council." *Id.*

As a third example, Section 5 has also blocked attempts in Mississippi to backslide on a statewide scale. *See, e.g.*, S. Rep. No. 109-295 at 224. Black voters there were able to bring a successful Section 2 action against the state's century-old dual registration system for state and municipal elections, originally "enacted as part of the 'Mississippi plan' to deny blacks the right to vote following the Constitutional Convention of 1890." *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F.Supp. 1245, 1251 (N.D. Miss. 1987); *Modern Enforcement* 152. The district court ruled the dual-registration system illegal in 1987 and its judgment was affirmed in 1991, prompting the state to adopt a unitary registration system for all elections. *Modern Enforcement* 152. But

[3] *Available at* http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf.

only four years later, Mississippi re-enacted dual-registration for state and federal elections and refused to submit the plan for preclearance until ordered to by this Court. *Modern Enforcement* 16; *Young v. Fordice*, 520 U.S. 273, 275 (1997). "Only after the DOJ objected [to the state's preclearance submission for the dual registration plan] did Mississippi return to the unitary registration system it had adopted after the *Operation PUSH* decision." *Modern Enforcement* 149.

Numerous Alabama localities provide a fourth example. In 1986, a federal court found that a defendant class of 183 cities, counties, and school boards in Alabama (including Shelby County) violated Section 2 by switching from single-member to at-large elections and enacting "numbered place" and "anti-single shot" voting procedures "for the purpose of minimizing black voting strength." *Dillard v. Baldwin County Bd. of Educ.*, 686 F.Supp. 1459, 1461 (M.D. Ala. 1988); *see Shelby County v. Holder*, 811 F.Supp.2d 424, 442 (D.D.C. 2011); *History, Scope, & Purpose* 3201. In one spinoff case, the Chilton County Commission admitted that its at-large voting system violated Section 2 and it entered into a court-approved settlement that made temporary changes until the Commission proposed and the state legislature enacted a new set of procedures. *History, Scope, & Purpose* 3202; *Dillard v. Chilton County Bd. of Educ.*, 699 F.Supp. 870, 871 (M.D. Ala. 1988). Over a decade later, the temporary system remained and an all-white group intervened to ask the court to

invalidate the 1988 settlement. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry*, 109th Cong. 379-80 (2006) (*Legislative Options*); *see Dillard v. Chilton County Comm'n*, 447 F.Supp.2d 1273, 1275 (M.D. Ala. 2006). In 2003, the Chilton County Commission adopted a resolution at intervenors' request urging the passage of a local act restoring a voting system that the Commissioners, the plaintiffs, and the district court had *fifteen years earlier* all agreed violated Section 2. *Legislative Options* 379-80. However, Section 5 and the DOJ's refusal to preclear the "new" system prevented its implementation. *Id.* at 380. Section 5 has prevented other *Dillard* jurisdictions from backsliding (and from circumventing settled rules) as well. *See Evidence of Continued Need* 452-55 (discussing post-*Dillard* objections and further litigation against City of Foley and Baldwin County); *Legislative Options* 376-77 (discussing post-*Dillard* objections to proposed changes in Camden and Valley). "The preclearance provisions of Section 5 . . . were indispensable" to preserving the gains of the *Dillard* litigation on a statewide scale. *Legislative Options* 380; *see* S. Rep. No. 109-295, at 127.

The legislative record contains numerous other examples of Section 5 protecting voters in covered jurisdictions from similar evasive maneuvers. *See, e.g.*, H.R. Rep. No. 109-478 at 38 (Section 5 objection in 1989 blocked redistricting plan adopted in Lancaster, South Carolina after settlement of Section 2 claims, which would have added additional city

council seats, watering down influence of black voters and protecting white incumbents); *Texas Report* 23 (after settling Section 2 action by agreeing to implement single-member districts, Haskell Consolidated Independent School District attempted to return to at-large elections but was stopped by DOJ objection); *History, Scope, & Purpose* 82-83 (after settling Section 2 action by agreeing to at-large elections, City of Freeport, Texas drew objection in 2002 for attempting to reinstitute at-large election); *Evidence of Continued Need* 1965-66 (Section 5 objection in 1994 blocked Barnwell, South Carolina's attempt to adopt a discriminatory majority-vote requirement that a district court had enjoined in 1986, after the city ignored Section 5 objection to the city's 1984 proposal to adopt the same majority-vote requirement); *Evidence of Continued Need* 1619 ("Between 1982 and 2003, [eleven Louisiana] parishes were 'repeat offenders,' and thirteen times the DOJ noted that local authorities were merely resubmitting objected-to proposals with cosmetic or no changes").

The import of Section 5 has been confirmed by post-reauthorization experience. After this Court held that Texas' congressional redistricting plan violated Section 2, *League of United Latin American Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 442 (2006), the district court redrew the boundaries and ordered special elections, with runoff elections required if no special election candidate received more than 50% of the vote. Civ. 2:03-CV-354, 2006 WL 3069542 (E.D. Tex. Aug. 4, 2006). After no candidate in district 23

received a majority, the Secretary of State scheduled the runoff election for December 12, which was a Catholic feast day when many Latino voters would attend an after-work mass, but did not submit the date for preclearance. Compl. at 2, *LULAC v. Perry,* No. 5:06-cv-010460 (W.D. Tex. Dec. 1, 2006). The Texas Secretary of State also failed to preclear a drastically shortened early voting period that did not include any weekend days. *Id.* at 2-3. LULAC subsequently filed a Section 5 action to enjoin the election and compel preclearance. *Id.* Within four days, the government relented and modified early voting dates and times. *See* Order, *LULAC v. Perry*, No. 5:06-cv-010460 (W.D. Tex. Dec. 5, 2006).

If case-by-case litigation were the sole means of voting rights enforcement, authorities in covered jurisdictions could have used these means of circumvention to discriminate against minority voters despite not only the presence of Section 2 but also the existence of a Section 2 *judgment*. With effective Section 5 enforcement, these persistent attempts at discrimination were promptly and effectively thwarted.

B. Section 2 Litigation Remains Too Slow And Resource-Intensive To Police Discrimination In Covered Jurisdictions Without Section 5 Preclearance.

The House Committee on the Judiciary "k[new] from history that case-by-case enforcement alone is

not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens," and "f[ound] that Section 2 would be ineffective to protect the rights of minority voters." H.R. Rep. No. 109-478, at 57. Section 2 actions have become increasingly complex and resource-intensive in recent years. Exacerbating those burdens, officials that benefit from incumbency due to a jurisdiction's discriminatory voting practice have an incentive to prolong litigation to keep the practice in effect and access to taxpayer funds to defend themselves. *See Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4-5 (2005) (*Preclearance Standards*). Unfortunately, the burdens of Section 2 litigation can prevent minority voters from pursuing claims altogether. *Evidence of Continued Need* 1620. And even when a minority voter is ready and willing to pursue claims, civil rights organizations and the few members of the voting rights bar may not have the time or funding to take such resource-intensive cases. *Modern Enforcement* 149; *Continuing Need* 15.

Congress intended Section 5 to help level the playing field. Section 5 compensates for Section 2's shortcomings by shifting the burden to covered jurisdictions and the federal government to work cooperatively and expediently to protect the right of minority voters to cast a fair ballot in every election.

1. Section 5 Preclearance Is Necessary Because Case-by-Case Enforcement Alone Remains Too Inefficient to Protect Minority Voting Rights.

The "unusually onerous" nature of voting rights litigation has always been the key reason for the preclearance remedy. *Katzenbach*, 383 U.S. at 314. Ferreting out evidence of discriminatory intent requires rigorous investigation into official decision-making. *See Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("[D]etermining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") (citation and internal quotation marks omitted).

Congress also considered evidence that litigation is more onerous today because modern voting discrimination, including vote dilution, is "more subtle than the visible methods used in 1965." H.R. Rep. No. 109-478, at 6. Although modern discrimination may be more subtle, Congress and this Court have each long recognized that vote dilution is no less effective than its antecedents at denying minorities effective political participation. *See id.*; *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *see also City of Rome v. United States*, 446 U.S. 156, 181 (1980) ("'As registration and voting of minority citizens increases [sic], other measures may be resorted to

which would dilute increasing minority voting strength'") (quoting S. Rep. No. 94-295, at 15-16 (1975), 1975 U.S.C.C.A.N 782-785). Therefore, Congress amended the VRA in 1982 to fight vote dilution by permitting Section 2 claims to be proven on the basis of discriminatory results alone. *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. 7 (2005) (*Impact and Effectiveness*). But proving discriminatory effect requires not only rigorous investigation, but expert testimony on numerous factors, including geographic compactness; political cohesion; racially-polarized voting; the history of discrimination; discrimination-enhancing devices; candidate slating processes; the effect of socioeconomic disparities on political participation; racial campaign appeals; the extent of minority office holding; responsiveness to minority needs; and the policy underlying the challenged practice. *See Thornburg v. Gingles*, 478 U.S. 30, 36-38 (1986); *Continuing Need* 9. "[I]n a typical voting rights case, you need probably three experts: a demographer, to draw plans; a statistician, to analyze voting patterns; and a political scientist or historian, to talk about what . . . the present-day impact of race is in a jurisdiction." *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 69 (2005).

The Federal Judicial Center's analysis of tens of thousands of cases confirms that voting cases are not

only among the most time- and resource-intensive, but that they have become significantly more so in recent years. Federal Judicial Center, "2003-2004 District Court Case-Weighting Study," Table 1 (2005) (concluding that voting cases consumed the sixth-most judicial resources out of sixty-three types of cases). The study assigned voting cases a weight of 3.86 – meaning such cases take nearly four times the work of an average case. *Id.* In comparison, antitrust cases were assigned a weight of 3.45. *Id.* The FJC also concluded that voting cases had become much more burdensome over time, finding voting case weights "increased significantly" from 1993 to 2004. *Id.* at App'x Z, at 4 & attach. 2.

In practical terms, Section 2 litigation often operates without regard to the urgency of the political process, leaving elections to be held under illegal conditions as cases crawl through the courts. *Continuing Need* 15; *Evidence of Continued Need* 92. Preliminary injunctions in Section 2 cases are extraordinarily difficult to obtain in practice. To begin, gathering the evidence necessary to establish at the preliminary injunction stage plaintiffs' likelihood of success on the merits can be an insurmountable challenge in the short timeframe before an imminent election. *See, e.g.*, *Williams v. McKeithen*, Civ. A. 05-1180, 2005 WL 2037545, at *3 (E.D. La. Aug. 8, 2005) (denying preliminary injunction motion filed against a special election qualifying period because "Plaintiffs might very well prevail on their claims following a trial on the merits but at this time

Plaintiffs are relying far too heavily on the results obtained in other cases, all of which were determined following a full trial on the merits and not on a motion for a preliminary injunction.").

Moreover, experience confirms that it asks a great deal of a district court judge, with an incomplete record and limited time, to intervene to stop or alter an upcoming election, even if the plaintiffs' case is meritorious. For example, in one such case the district court denied plaintiffs' request for a preliminary injunction against a discriminatory at-large election system, notwithstanding its a finding that plaintiffs were likely to succeed on the merits. *United States v. Charleston County*, 2:01-cv-00155-PMD, at 4 (D.S.C. May 24, 2002). "[A]ssum[ing] a posture of deference to the established electoral scheme," the court expressed its confidence that the county would respond promptly if violations were established and noted that the cost of staying the scheduled election and holding a special election could amount to $100,000. *Id.* After trial, the court found a violation, but the county did not rush to a remedy; instead attempting to delay elections for the new majority-minority districts, fighting the suit for another two years, and spending $2 million of public funds – or the cost of 20 special elections – to do so. *Scope & Criteria* 84-85. However, the district court rejected the county's proposed election schedule, noting that it "would have the effect of postponing a full and complete remedy nearly six years from the filing of

this lawsuit." *Charleston County*, 2003 WL 23525360, at *3 (D.S.C. Aug. 14, 2003)

Indeed, in the Fifth Circuit, which contains three of the states that have drawn the most objections, precedent dictates that "district courts should not enjoin state or municipal elections if there is 'other corrective relief [that] will be available at a later date in the ordinary course of litigation,' " such as a special election. *Williams v. City of Dallas*, 734 F.Supp. 1317, 1367 (N.D. Tex. 1990) (finding liability and ordering special election after having denied preliminary injunction) (quoting *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988)). But that leaves the results of a discriminatory election in place while the case is litigated and allows its effects to linger afterwards. As Congress heard, a candidate elected under discriminatory conditions still "enjoys an advantage" as the incumbent entering a special election. *Evidence of Continued Need* 97.

Courts' reluctance to grant preliminary injunctions in voting cases has resulted in numerous illegal elections. Minority voters in Texas initiated a Section 2 action challenging the state's congressional redistricting plan in 2003 and prevailed in 2006, but the 2004 congressional elections were held using a map that this Court recognized "bears the mark of intentional discrimination [against Latino voters] that could give rise to an equal protection violation," *LULAC*, 548 U.S. at 440. In Attala County, Mississippi, black voters were denied a preliminary injunction and endured elections under a discriminatory map

over five years of litigation before the Fifth Circuit rendered judgment in their favor, noting that the county's evidence had failed to "explain why blacks *alone* [had] been essentially shut out of the political processes in the county." *Teague v. Attala County*, 92 F.3d 283, 294-295 (5th Cir. 1996) (emphasis in original); *see Teague v. Attala County*, Civ. A.191CV209DD, 1995 WL 1945387 (Mar. 1, 1995) (order denying preliminary injunction). In Cordele, Georgia in 1987, black voters were denied a preliminary injunction notwithstanding significant evidence of discriminatory effect and expert historical evidence that the city commission's at-large system was instituted with discriminatory intent. *Evidence of Continued Need* 674-75. Elections continued during the two-year litigation, which ended in a consent decree instituting four-single member-districts – two of which were majority-black – in place of the at-large system that had elected only one African-American commissioner in history. *Id.* Cordele's example demonstrates that the theoretical availability of preliminary relief is, in many cases, fool's gold.

The two years from complaint to resolution in Cordele was quick for a Section 2 suit. Because "2 to 5 years is a rough average," multiple illegal elections could occur during the pendency of ultimately successful Section 2 litigation. *History, Scope, & Purpose* 101. Moreover, a challenged practice may remain in effect for several election cycles before generating "the evidence [necessary] to persuade the court that the challenged election mechanism is dilutive." *Id.*

By contrast, Section 5 enables prompt responses when time is of the essence. For example, in *Symm v. United States*, 439 U.S. 1105 (1979), this Court upheld that the students at historically-black Prairie View A&M University had the right to register and vote in Waller County. S. Rep. No. 109-295, at 334. In 2004, the white district attorney threatened Prairie View students with prosecution for illegal voting if they voted in an election in which a fellow student was running for a seat on the county commissioner's court. *Id.* The district attorney backed down after the students sued; however, at the last minute, the county governing body reduced the availability of early voting at the polling place near Prairie View A&M – an important change because the primary election was scheduled during the students' spring break. *Id.* The NAACP filed a Section 5 enforcement action to enjoin the county from implementing this change without preclearance, and county officials abandoned the change. *Id.*

When Section 2 operates in concert with Section 5, covered jurisdictions can work with the federal government and minority voters to implement new, non-discriminatory practices in a timely manner. For example, in September 2003, minority voters in Tangipahoa Parish, Louisiana brought a Section 2 suit challenging that year's redistricting plan for failing to reflect black voting strength. *See Tangipahoa Citizens for Better Government v. Parish of Tangipahoa*, No. Civ. A.03-2710, 2004 WL 1638106, at *1 (E.D. La. July 19, 2004). By November 2003, the

parish had submitted and been denied preclearance for both its original and a revised map. *Id.* Upon receiving two objection letters, the parish designed an amended plan to address the Attorney General's concerns and held three public hearings on the new plan. *Id.* The amended plan was precleared in January 2004. *Id.* The parish held special elections under the precleared plan in March, a mere seven months after plaintiffs' filed their Section 2 complaint, and the plaintiffs' did not oppose defendants' motion to dismiss the Section 2 action as moot. *Id.* at *1-2. Section 5 prevented the implementation of the objectionable plan and timely protected against the consequences of an illegal election.

2. The High Cost of Section 2 Litigation Makes Case-by-Case Enforcement of the Voting Rights Act Impracticable and More Burdensome for Covered Jurisdictions.

Congress considered evidence that neither minority voters nor the "very small" voting rights bar can afford the "huge amounts of resources" necessary to prosecute the volume of additional Section 2 cases that would arise in the absence of Section 5 preclearance. *Continuing Need* 15. Section 2 cases regularly require minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs for claims that promise no damage awards. *Impact and Effectiveness* 42. These costs have only grown as the complexity of Section 2

litigation has increased. Testifying before the House, former DOJ voting section chief J. Gerald Hebert "estimate[d] that the cost . . . to bring a vote dilution case through trial and appeal, runs close to a half a million dollars." *Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act Of 2006 (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 65 (2006). Mr. Hebert's estimate is a conservative one – especially considering that taxpayers are not only responsible for the costs of defending jurisdictions in Section 2 litigation, but for paying fee awards to plaintiffs as well. In *Charleston County*, the court awarded Plaintiffs' counsel $712,027.71 in fees and costs after four and half years of litigation, inclusive of nearly 1800 hours from three attorneys – but exclusive of the fees and costs accrued by DOJ attorneys prosecuting the parallel action for the United States. *See* Order at 11, *Moultrie v. Charleston County*, No. 2:01-cv-00562-PMD (D.S.C. Aug. 8, 2005). The cost of the county's defense, which relied on more than double the number of attorneys, *id.* at 10, was upwards of $2 million. *Scope & Criteria* 85.

In a recent successful challenge to the State of Texas' redistricting plans, plaintiffs expended fees and costs in the amount of $2,096,397.36 – inclusive of fees for 4461.38 hours for eight attorneys and a paralegal; expert witness fees of $186,966.47; and

out-of-pocket costs of $101,614.39.[4] If the state's costs of defending the suit approach plaintiffs', Texas taxpayers may be on the hook for more than $4 million.[5]

By comparison, preclearance submissions are a bargain. *Policy Perspectives* 313. "To submit the

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[4] Plaintiffs' Mot. for Interim Attorneys' Fees and Costs at 18-21, *Perez v. State of Texas*, No. 11-CA-360-OLG-JES-XR (W.D. Tex. June 19, 2012).

[5] Attorney fee awards for Section 2 litigation are not windfalls. *Continuing Need* 15 ("And let me tell you, from having litigated the cases and having litigated the attorneys' fees issues after the cases, this is not a way of getting rich. It is not even a way of making a living."). More accurately they represent long overdue pay for years of work and reimbursement for dearly paid expert witness fees and costs. *See, e.g.*, *Mississippi State Chapter Operation PUSH v. Mabus*, 788 F.Supp. 1406, 1407, 1414, 1423-24 (N.D. Miss 1992) (prevailing party recovered $145,149 in fees and $23,728 in costs more than seven years after litigation initiated, reduced from requests for $933,633 in fees and $92,264 in costs); *Major v. Treen*, 700 F.Supp. 1422, 1453 (E.D. La. 1988) (prevailing party recovered $335,864 and $28,288 in costs five years after a favorable judgment); *Harper v. City of Chicago Heights*, Nos. 87 C 5112, 88 C 9800, 2002 WL 31010819, at *3 (N.D. Ill. Sept. 6, 2002) (awarding $385,661.84 in fees after a decade of litigation). Plaintiffs and counsel who bring claims risk partial or total non-recovery, *see History, Scope, & Purpose* 92 ("although there is some attorney fees involved, you can never get back the money you put into Section 2 cases"); *see, e.g.*, *Dillard v. City of Greensboro*, 213 F.3d 1347, 1354 (11th Cir. 2000) (reducing fee award for "700 hours of lawyer time for nearly ten years of litigation" to $61,969, less than a quarter of the $253,530 plaintiff's counsel requested, because even though plaintiffs prevailed, the district court did not agree entirely with their proposed plan), and also risk the possibility that costs may be assessed against them, even where plaintiff's case has merit.

paperwork for a major election-law change can cost a local government $1,000 to more than $5,000, and for a minor one, $500 to $1,000. . . .” Peter Hardin, *Bailouts from US Voting Laws: State Localities Win Relief from Having to Get Federal Clearance for Each Change in Election Laws*, Rich. Times Dispatch, Mar. 16, 2006, at B-1; *see Evidence of Continued Need* 2683 (estimating average cost of submissions at $500). Moreover, many covered jurisdictions understand preclearance to be an efficient, cost-effective, and cooperative process that offers insurance against costly litigation. *See Policy Perspectives* 13, 312-14 (testimony of Donald Wright, Gen. Counsel, North Carolina State Board of Elections); *see generally* Brief for New York, et al., as *Amici Curiae* in Support of Respondent.

Indeed, while Petitioners make much of the “federalism costs” of Section 5, they fail to consider the costs to covered jurisdictions of the alternative: case-by-case litigation of Section 2 claims. There can be no serious dispute that the Section 5 preclearance process is a far more efficient and less costly way to resolve potential disputes than full-scale litigation in federal courts. The fees and costs incurred by covered jurisdictions in one significant litigation would pay for several hundred, if not more than a thousand, preclearance applications.

3. The Lack of Experienced Voting Rights Attorneys Makes Enforcement by Section 2 Alone Impracticable.

Congress considered evidence that there is only "a very small bar of people who do Section 2 litigation and who have the expertise to do it." *Continuing Need* 15. The costs and risks described above make Section 2 litigation generally "undesirable." Order at 11, *Moultrie*, No. 2:01-cv-00562-PMD (noting that voting rights cases are generally undesirable due to their controversial nature and risk of non-recovery). As few attorneys make themselves available for these cases, minority voters are often left without anyone to bring their claims. The unavailability of experienced voting rights attorneys and of sufficient financial resources is even more acute for minority voters in rural communities and for claims against local governments. *History, Scope, & Purpose* 84 ("Voters in these communities do not have access to the means to bring [Section 2] litigation"); *Continuing Need* 15 ("When you get down to the local level, the national organizations often are not involved, they are not aware of what is going on."); *Evidence of Continued Need* 1620 (noting local communities' "limited access to the expertise and resources of the handful of organizations and attorneys with VRA experience"). For example, since 1995 only two attorneys in Mississippi, Ellis Turnage and Robert McDuff, have brought Section 2 cases resulting in reported decisions. *See* Ellen Katz & The Voting Rights Initiative, VRI

Database Master List (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls (Katz Database). "The legal resources did not exist in Mississippi in the past forty years to bring a lawsuit in lieu of every one of the 169 objections that have been issued, and they will not exist in the future." *Modern Enforcement* 149.

Indeed, many Section 2 cases would not be possible without the assistance of a small group of national civil rights law firms. In South Dakota, Native American voters have had difficulty finding members of the local bar who are willing to represent them in Section 2 actions without the resources and expertise of the ACLU. *See Bone Shirt v. Hazeltine*, Civ. 01-3032-KES, 2006 WL 1788307, at *3 (D.S.D. June 22, 2006). Resources of these organizations are limited, however, and the scope of their work is national. *Continuing Need* 15; *Evidence of Continued Need* 1620. In fact, two of the major firms, the NAACP Legal Defense and Education Fund and the Lawyers' Committee for Civil Rights Under Law have only four and five lawyers, respectively, dedicated to their respective voting rights practices.[6] The voting rights bar and minority plaintiffs are simply not equipped with the money or personnel to take on significantly more Section 2 litigation. *Continuing Need* 15. Congress accordingly recognized that "Section 2 would be ineffective to protect the rights of minority voters,

[6] *See* "Our Staff," http://www.naacpldf.org/staff; "About us," http://www.lawyerscommittee.org/about?id=0002.

especially in light of the increased activity under Section[ ] 5 . . . over the last 25 years." H.R. Rep. No. 109-478 at 57.

C. Only Section 5 Preclearance Can Keep Up With The Volume Of Discrimination That Takes Place At The Local Level.

Section 5 preclearance continues to be necessary because most illegal practices occur at the local level, where they receive the least scrutiny – and where national organizations focused on "impact" litigation are least likely to offer assistance. Indeed, local governments have drawn the overwhelming majority of Section 5 objections. *See* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act,* 84 NEB. L. REV. 605, 612-13 (2005) (observing that 37 of 40 Section 5 objections from 2000 to 2005 pertained to local voting changes); *see also Evidence of Continued Need* 1505 ("[I]t is important to note first that the great majority of Section 5 objections have affected local governments."). Congress considered evidence that the continued need for Section 5 is most evident on the local level, where proposed changes receive the least scrutiny and Section 2 litigation is rarely a practical option. *See Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11-12 (2006) (*Benefits and Costs*).

Section 5 preclearance has brought to light and corrected acts of voting discrimination that would have otherwise gone unnoticed and unchallenged. *Evidence of Continued Need* 1623-24 (listing instances in which minority voters learned of discriminatory changes due only to Section 5). Moved polling places present the most obvious example. In 1994, the St. Landry Parish Police Jury moved a polling place from a black neighborhood to a location preferred by white voters, after a white alderman told the police jury that whites were uncomfortable walking into a black neighborhood to vote. *Evidence of Continued Need* 1623. The police jury moved the polling place "[w]ithout holding a public hearing, seeking any further public input, or advertising the change in any way." *Id.* The move did not receive scrutiny until DOJ officials reviewed the preclearance submission and subsequently informed leaders in the black community, who "expressed vehement opposition" because the new polling place "had been the site of historical racial discrimination and many African-American citizens did not feel welcome there." *Id.* The Attorney General objected to the change. *Id.*

"In situations such as this, Section 2 litigation, which is very expensive, complex, and time consuming, is no substitute for Section 5 preclearance." *Id*. Moreover, in the case of a moved polling place, preventative litigation could be impossible because voters may not even notice a polling place has moved until "[t]he abstract right to vote . . . becomes a reality at the polling place on election day." *Perkins v.*

Matthews, 400 U.S. 379, 387 (1971). The scale of review necessary to ensure that such changes are not discriminatory is enormous. Between 2000 and 2009, the DOJ reviewed 31,522 changes to polling places.[7] In fact, between 2000 and 2009, DOJ records show that covered jurisdictions submitted 170,223 proposed changes, the overwhelming majority of them local. *Id.* There can be no doubt that absent preclearance, no more than a tiny fraction of these proposed changes would receive any review at all. Only Section 5 preclearance can make manageable the otherwise unmanageable task of spotting and investigating discrimination in covered jurisdictions.

II. THE DETERRENT EFFECT OF SECTION 5 CANNOT BE MINIMIZED OR IGNORED.

"[T]he existence of Section 5 itself functions as a deterrent to both retrogression and broader forms of voting discrimination in the covered jurisdictions." *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Related to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 160 (2006) (Introduction to the Expiring Provisions); *see Modern Enforcement* 8, 25. In addition to giving minority voters the burden of proof and expense, Section 2 litigation can only confront discrimination on a piecemeal basis and only after the

[7] Department of Justice, Section 5 Changes by Type and Year, http://www.justice.gov/crt/about/vot/sec_5/changes.php.

challenged practice has taken effect. *Preclearance Standards* 4-5. By shifting those burdens to covered jurisdictions and ensuring all proposed changes receive careful review before they take effect, Section 5 performs a deterrence function that Section 2 cannot.

Petitioner dismisses Congress' finding that Section 5 deters covered jurisdictions from enacting discriminatory laws as "supposition and conjecture" that cannot justify its reauthorization. (Pet. Br. 39 (quotation marks omitted).) Petitioner is wrong: Congress' finding is based on substantial evidence in the legislative record, including proposed voting changes withdrawn in response to "more information request" letters ("MIRs") issued by the DOJ and statements of witnesses testifying to Section 5's deterrent effect at both the state and local level.

A. Substantial Evidence Supports Congress' Finding That Section 5 Deters Covered Jurisdictions From Enacting Discriminatory Practices.

Congress considered ample evidence that preclearance has deterred numerous VRA violations not only through objection letters, but also MIRs and the submission process itself. Petitioner's focus on the number of objections "underestimates the critical role that the DOJ [plays] in directing jurisdictions to comply" with the VRA by issuing MIRs to evaluate the potential retrogressive effect of proposed changes.

Evidence of Continued Need 2541; *Impact and Effectiveness* 64-65 (MIRs deterred 605% more changes than objections between 1999 and 2005, and recent trends in the number of objections and MIRs "suggest[ ] that MIRs are providing Section 5 with strong deterrent effect that is lost by examining only objections"). An MIR "represents a DOJ signal that the voting change might be found retrogressive (and denied preclearance) unless the jurisdiction allays the DOJ's concerns." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L. J. 174, 200 (2007). Further, a jurisdiction's decision to withdraw a proposed change in response to an MIR "is frequently a tacit admission of one or more proposed discriminatory changes," *Evidence of Continued Need* 178. For example, withdrawals in Texas, "include[d] at least fifty-four instances in which the State eliminated discriminatory voting changes after it became evident they would not be precleared by the DOJ." *Texas Report* 3; *see, e.g.*, *Evidence of Continuing Need* 1625 (concluding that "the DOJ has deterred and/or effectively blocked additional discriminatory voting changes in Louisiana" by issuing MIRs and that, "but for the prophylactic scrutiny of the Section 5 preclearance process, white officials would have successfully shut African-American citizens out of decisions with substantial impact on voters").

Section 2 litigation has no effective counterpart to MIRs. Section 2 places no obligations on jurisdictions until after a proposed change has taken effect

and a complaint has been filed. While jurisdictions have to comply with DOJ requests to receive preclearance, Section 2 litigation rewards recalcitrance by leaving in place a discriminatory practice until minority voters can spot a violation and gather enough evidence to convince a court to enjoin it. *Policy Perspectives* 314; *Preclearance Standards* 4-5. Far from an effective deterrent, an enforcement scheme relying solely on Section 2 "would essentially create a perverse incentive to pass illegal plans with no immediate recourse." *Preclearance Standards* 4-5.

Moreover, without preclearance, most discriminatory changes would go unreviewed and thus unchallenged. The number of changes submitted for preclearance has increased from roughly 35,000 between 1965 and 1981 to 387,673 between 1982 and July 2005. *Evidence of Continued Need* 2540. Section 5 dramatically increases the likelihood that discriminatory changes will be caught by sending each submission to a department that "has built a tradition of excellence and meticulousness in its Section 5 review process," which makes covered jurisdictions "think long and hard before passing laws with discriminatory impact or purpose." *Impact and Effectiveness* 66 (statement of Joseph Rich, former chief, DOJ Voting Section). As a result, the submission process itself acts as a deterrent, ensuring that all proposed changes receive meaningful review, *Modern Enforcement* 8, and exposure to public scrutiny – "the best of disinfectants . . . the most efficient policemen." Louis Brandeis, Other People's Money 62 (1933). If Section

2 litigation were the only available remedy, minority voters would bear sole responsibility for costly fact-gathering on thousands of proposed changes annually to determine their impact. *Impact and Effectiveness* 42.

Section 2 casts a lesser deterrent shadow than other private rights of action because, as discussed above, the costs of Section 2 litigation are great; the number of practitioners available to pursue claims is miniscule; and the number of voting changes makes it unlikely that any one change will be challenged. Without preclearance, offending jurisdictions are more likely to discriminate, knowing that they are less likely to get caught and any discriminatory changes will remain in effect until voters successfully prosecute a Section 2 suit, which may take years. *See id*. at 43-44.

But even with the submission process and MIRs, DOJ objected to nearly three times the number of changes since the 1982 reauthorization (2,282 from 1982 through mid-2005) than between 1965 and 1981 (815 from 1965 to 1981). Congress likewise found that the absolute number of objections had not declined since the 1982 reauthorization. *Evidence of Continued Need* 172; *see* H.R. Rep. No. 109-478, at 21. Each objection represents a violation that may affect as few as several hundred voters to as many as several hundred thousand. *Continuing Need* 58-59 ("Section 5 objections have functioned to aid small as well as large scale elections, shielding as few as 208 and as many as 215,406 voters with a single objection.").

Based on such evidence, not "supposition and conjecture," Congress reasonably found that "[Section 5's] strength lies not only in the number of discriminatory voting changes it has thwarted, but . . . also [in] the submissions that have been withdrawn from consideration [and in] the submissions that have been altered by jurisdictions in order to comply with the [VRA]." H.R. Rep. No. 109-478, at 36.

B. Section 5's Deterrent Effect Is Critical At The Local Level Where Voters Are Most Vulnerable To Discrimination And Have The Least Access To The Resources To Bring Section 2 Suits.

Section 5's deterrent effect is most pronounced at the local level. *Benefits and Costs* 11-12. Although Petitioner largely ignores state and local voting dynamics, Section 5 represents perhaps the only line of defense minority voters have against local-level discrimination that escapes the scrutiny of the media and would otherwise require prohibitively expensive Section 2 litigation to challenge. *Continuing Need 15*; *Evidence of Continued Need* 1618-20.

Further examples of Section 5's deterrent effect on proposed local-level changes are found throughout the covered jurisdictions. In 2002, local officials in Fredericksburg, Virginia scrapped a proposal to eliminate the sole majority-black district after the city attorney explained the proposal would violate the VRA. *Evidence of Continuing Need* 362. Section 5's

deterrent effect is visible throughout covered jurisdictions. *See, e.g., id.* at 1729 (noting withdrawal of submission to modify election system put in place after Section 2 litigation in *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991)); *Legislative Options* 111 (noting Monterey County, California's withdrawal of proposed polling place reductions after DOJ voiced concerns over long travel distances from minority neighborhoods to proposed sites); *see also* Pitts, *supra*, 84 NEB. L. REV. 605, at 613-14 ("Having looked at literally hundreds of redistrictings submitted to the Attorney General, I can attest to the fact that the documents provided by local officials – whether they be meeting minutes or descriptions of redistricting criteria – amply demonstrate that local officials and their demographers are acutely cognizant of the standards for approval and typically try to steer very clear of anything that would raise concerns with the Attorney General.").

Section 5 also provides an important incentive for officials to include minority voters and their representatives in contemplated changes that may have an impact on minority voting strength. *See History, Scope, & Purpose* 3200-01; Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 24 (2007) (noting that Section 5 "increases the minority community's . . . leverage in demanding accommodation of minority concerns"). For example, when the city of Rocky Mount, North Carolina annexed predominantly white neighborhoods nearby but refused

to annex the traditionally African-American community of Battleboro, Battleboro residents used the prospect of a Section 5 objection to preempt this discriminatory policy and gain the benefits of municipal services and the ability to vote in local elections. *See History, Scope, & Purpose* 85.

Additionally, Congress heard extensive testimony confirming that Section 5 operates "under the radar screen [in ways] that may not appear easily in statistics." *Introduction to Expiring Provisions* 17 (testimony of Theodore Shaw); *Impact and Effectiveness* 66 (statement of Joseph Rich) (referring to "careful consideration of [the] discriminatory impact of a voting change during the legislative process, and minority elected officials reminding white officials of the need for [DOJ] review of laws under consideration"); *Continuing Need* 31 ("consultant who has had a role in drawing maps and the process," testified that "section 5 looms seriously over political cartographers and decision makers when it comes to plans."). Accordingly, Congress reasonably found, on evidence of the sort discussed herein and throughout the 15,000-page legislative record – that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 24; *see id.* (concluding that "the number of voting changes that have never gone forward as a result of Section 5" is "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes"). Section 5 "ensures that such voting

changes do not discriminate against minority voters, and has been an effective shield against new efforts employed by covered jurisdictions"; and Section 5 is a "vital prophylactic tool[ ]." H.R. Rep. No. 109-478, at 21 (internal footnote omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A

Listing of Amici Curiae

Joaquin Avila is Executive Director of the National Voting Rights Advocacy Institute and Distinguished Practitioner in Residence at the Seattle University, School of Law, and a former President-General Counsel of MALDEF. Professor Avila has 39 years of experience prosecuting actions under the VRA, including *Lopez v. Monterey County*, 519 U.S. 9 (1996).

Neil Bradley is an attorney in Atlanta, Georgia and a former Associate Director of the ACLU Voting Rights Project. Mr. Bradley has 41 years of experience prosecuting actions under the VRA, including *Lucas v. Townsend*, 486 U.S. 1301 (1988).

Julius Chambers is an attorney in Charlotte, North Carolina and a former director-counsel of the NAACP Legal Defense Fund. He has argued numerous cases before this Court, including *Thornburg v. Gingles*, 478 U.S. 30 (1986).

U.W. Clemon is an attorney in Birmingham, Alabama and a former member of the Alabama State Senate. Mr. Clemon was Chief Judge of the United States District Court for the Northern District of Alabama for 29 years before his retirement in 2009.

Armand Derfner is an attorney in Charleston, South Carolina. Mr. Derfner has nearly 50 years of experience prosecuting actions under the VRA, including *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and *United States v. Charleston County*, 316 F. Supp.

2d 268, 272 (D.S.C. 2003), *aff'd* 365 F.3d 341 (4th Cir. 2004), cert. denied, 543 U.S. 999 (2004).

Jose Garza is an attorney in San Antonio, Texas and former Program Director for MALDEF. He has been prosecuting actions under the VRA for 30 years, including *Perez v. Perry*, 132 S. Ct. 934 (2012).

Fred Gray is an attorney in Tuskegee, Alabama. Mr. Gray has been prosecuting civil rights and voting rights cases since before the enactment of the VRA, including *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Robert McDuff is an attorney in Jackson, Mississippi. Mr. McDuff has nearly 30 years of experience prosecuting actions under the VRA, and has argued several cases before this Court, including *Clark v. Roemer*, 500 U.S. 646 (1991).

Rolando Rios is an attorney in San Antonio, Texas and former General Counsel for the Southwest Voter Registration and Education Project. Mr. Rios has 35 years of experience prosecuting actions under the VRA, including *LULAC v. Perry*, 126 S. Ct. 2594 (2006).

Robert Rubin is an attorney in San Francisco, California and the former Legal Director of the Lawyers' Committee for Civil Rights Under Law of the San Francisco Bay Area. Mr. Rubin has more than 20 years of experience prosecuting actions under the VRA, including *Lopez v. Monterey County*, 525 U.S. 266 (1999).

Edward Still is an attorney in Birmingham, Alabama. Mr. Still has over 40 years of experience prosecuting actions under the VRA, including *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Dillard v. Chilton County Comm'n*, 447 F. Supp. 2d 1273 (M.D. Ala. 2006).

Ellis Turnage is an attorney in Cleveland, Mississippi. Mr. Turnage has 30 years of experience prosecuting actions under the VRA, including *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996) and *Citizens for Good Gov't v. City of Quitman*, 148 F.3d 472 (5th Cir. 1998).

Ronald Wilson is an attorney in New Orleans, Louisiana. Mr. Wilson has nearly 30 years of experience prosecuting actions under the VRA, including Chisom v. Roemer, 111 S. Ct. 2334 (1991) and *Tangipahoa Citizens for Better Government v. Parish of Tangipahoa*, No. Civ.A.03-2710, 2004 WL 1638106 (E.D. La. July 19, 2004).