IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA, Plaintiff, v. ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant	Civil Action No. 1:10-cv-00651-JDB

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff brought this action alleging that Section 4(b) and Section 5 of the Voting Rights Act, 42 U.S.C. 1973b(b) and 1973c, are unconstitutional. Pursuant to Rule 56(b), Defendant Eric H. Holder, Jr., respectfully moves this Court for an order granting summary judgment to him as to both of Plaintiff's claims.

A moving party is entitled to summary judgment where, as here, "the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); Local Civ. R. 7(h); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986); *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006). Because there is no genuine triable issue as to any material fact before this Court, the Attorney General is entitled to judgment as a matter of law.

In support of this motion, the Attorney General submits a Statement of Undisputed Material Facts, with accompanying exhibits, and a Memorandum of Points and Authorities in support of the Motion. In accord with the Court's October 29, 2010 Scheduling Order (Dkt. 46), the Attorney General's Memorandum is consolidated with his Opposition to the Plaintiff's Motion for Summary Judgment.

Date: November 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2010, I served a true and correct copy of the foregoing Motion for Summary Judgment, a Statement of Undisputed Material Facts, a Memorandum of Points and Authorities in support thereof (consolidated with the Attorney General's Opposition to the Plaintiff's Motion for Summary Judgment), and accompanying exhibits via the Court's ECF filing system to the following counsel of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA, Plaintiff v. ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant	Civil Action No. 1:10-cv-00651-JDB

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Shelby County alleges that Sections 4(b) and 5 of the Voting Rights Act, 42 U.S.C. 1973b(b), 1973c, are unconstitutional. Plaintiff filed a motion for summary judgment and the Attorney General filed a cross motion for summary judgment. Defendant is entitled to summary judgment because Sections 4(b) and 5 of the Voting Rights Act are constitutional.

BACKGROUND

A. The Voting Rights Act

1. Congress enacted the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). The Fifteenth Amendment, which prohibits racial discrimination in voting, was ratified in 1870. *South Carolina*, 383 U.S. at 310. "The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2508 (2009) (*Northwest Austin II*). Initial federal enforcement of the Amendment was short-lived, and in 1894, most of the federal enforcement provisions were repealed. *South Carolina*, 383 U.S. at 310. Beginning in 1890, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began systematically disenfranchising black citizens by adopting literacy tests applicable to black citizens, while using alternate devices such as the grandfather clause, property qualifications, and good character tests to enable illiterate whites to vote. *Id.* at 310-311.

Over the following decades, the Supreme Court struck down a variety of techniques "designed to deprive Negroes of the right to vote," including the grandfather clause, procedural roadblocks, the white primary, improper voter challenges, racial gerrymandering, and discriminatory application of tests. *South Carolina*, 383 U.S. at 311-312 (citations omitted).

Congress enacted voting rights legislation in 1957, 1960, and 1964. *Id.* at 313. But "these new laws," the Court explained in *South Carolina*, did "little to cure the problem of voting discrimination." *Id*. at 314. Voting rights litigation was "unusually onerous" and "exceedingly slow." *Ibid.* And, even when litigation was successful, voting officials "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or "defied and evaded court orders." *Ibid.*

In 1965, Congress enacted the VRA to address the deficiencies in earlier legislation designed to enforce the Fifteenth Amendment. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965 Act). The VRA includes both temporary provisions, applicable only to certain "covered jurisdictions," and other provisions applicable to the nation as a whole. This case concerns two of the temporary provisions of the VRA – Sections 4(b) and 5, 42 U.S.C. 1973b(b), 1973c, as they were reauthorized in 2006. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §4, 120 Stat. 580; 42 U.S.C. 1973b(b), 1973c (2006 Reauthorization).

Section 4(b) contains the coverage formula that defines the jurisdictions covered by Section 5 and the other temporary provisions. Congress designed this formula to capture States for which the legislative record demonstrated "evidence of actual voting discrimination," and where "federal courts ha[d] repeatedly found substantial voting discrimination." *South Carolina*, 383 U.S. at 329-330. Evidence before Congress revealed that the worst records of discrimination existed in certain southern States that "share[d] two characteristics: * * * the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *South Carolina*, 383 U.S. at 330; see H.R. Rep. No. 439, 89th Cong., 1st Sess. 13-14 (1965) (1965 House Report). Thus, as originally enacted, Section 4(b)

included any jurisdiction that: (1) maintained a test or device on November 1, 1964; and (2) had registration or turnout rates below 50% of the voting age population in November 1964. 1965 Act, § 4(b), 79 Stat. 438. The formula covered Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and 39 counties in North Carolina. 28 C.F.R. Pt. 51 App.

Section 5 provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain administrative preclearance from the Attorney General or judicial preclearance from a three-judge panel of this court. 42 U.S.C. 1973c. In either case, preclearance may be granted only if the jurisdiction demonstrates that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *Ibid.*

Covered jurisdictions may seek to terminate their coverage under Section 5 by bringing a declaratory judgment action in this court. See 1965 Act, § 4(a), 79 Stat. 438. As originally enacted, this "bailout" mechanism was available only to covered States and to jurisdictions, such as counties, "with respect to which such [coverage] determinations have been made as a separate unit." *Ibid.* The purpose of the provision was to remedy overbreadth in the coverage formula, to enable jurisdictions that had not discriminated to escape coverage. 1965 House Report 15; *South Carolina*, 383 U.S. at 331. To terminate coverage, such a jurisdiction was required to prove it had not used a prohibited test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" during the previous five years. *Ibid.*

The Supreme Court upheld the constitutionality of Sections 4(b) and 5 of the 1965 Act in *South Carolina*, 383 U.S. at 323-335, finding that these and other temporary provisions of the Act were valid exercises of Congress's authority under Section 2 of the Fifteenth Amendment.

2. Congress reauthorized Section 5 in 1970 for five years, in 1975 for seven years, and in 1982 for 25 years. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (1970 Reauthorization); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975 Reauthorization); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982 Reauthorization).[1] The Supreme Court reaffirmed the constitutionality of Section 5 after each. *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999).

In 1982, Congress amended the bailout provision of the VRA, substantially expanding the opportunity for covered jurisdictions to terminate coverage to include "any political subdivision of [a covered] State" even if the coverage determination had not been made "with respect to such subdivision as a separate unit." 1982 Reauthorization, § 2(b)(2), 96 Stat. 131. The 1982 Reauthorization also changed the substantive requirements for bailout. Under the revised bailout provision, which is currently in effect, jurisdictions must demonstrate that they have fully complied with Section 5 and other voting rights provisions during the previous ten years. 1982 Reauthorization, § 2(b)(4), 96 Stat. 131-133; see 42 U.S.C. 1973b(a).

[1] The 1970 Reauthorization amended the coverage formula in Section 4(b) to include jurisdictions that maintained a prohibited test or device on November 1, 1968, and had voter registration or turnout of less than 50% of eligible residents in the Presidential election of 1968. Tit. I, 84 Stat. 315. The 1975 Reauthorization amended the coverage formula to include jurisdictions that maintained a prohibited test or device on November 1, 1972, and had voter registration or turnout of less than 50% of voting age residents in the Presidential election of 1972. Tit. II, 89 Stat. 401. The 1975 reauthorization also expanded the definition of "test or device" to include a practice of providing voting materials only in English in jurisdictions in which at least 5% of the voting age population were members of a single-language minority. Tit. II, 89 Stat. 401-402; see 40 Fed. Reg. 43,746 (Sept. 23, 1975).

3. In 2006, Congress again reauthorized Section 5 for 25 years, finding that although progress had been made, the temporary provisions of the Act were still necessary to overcome nearly 100 years of voting discrimination perpetrated in defiance of Fifteenth Amendment. Congress made the following statutory findings:

> (1) Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.
>
> (2) However, vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.
>
> (3) The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.
>
> (4) Evidence of continued discrimination includes—
>
> > (A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multimember districts, from being enacted to dilute minority voting strength;
> >
> > (B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;
> >
> > (C) the continued filing of section 2 cases that originated in covered jurisdictions; and
> >
> > (D) the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), (f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.
>
> (5) The evidence clearly shows the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982, as demonstrated in the counties certified by the Attorney General for Federal

> examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions.
>
> * * * * *
>
> (7) Despite the progress made by minorities under the Voting Rights Act of 1965, the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.
>
> (8) Present day discrimination experienced by racial and language minority voters is contained in evidence, including the objections interposed by the Department of Justice in covered jurisdictions; the section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the Voting Rights Act of 1965.
>
> (9) The record compiled by Congress demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.

2006 Reauthorization, § 2(b), 120 Stat. 577-578.

B. Plaintiff

Shelby County has been subject to Section 5 since 1965, when the State of Alabama was designated for coverage pursuant to Section 4(b)(1). Def. SMF ¶ 6.[2] The Department of Justice has received at least 682 Section 5 submissions involving jurisdictions located in whole or in part in Shelby County, including at least 69 submissions from the County itself. Def. SMF ¶¶ 9-10. The County's most recent submission, a polling place change, was precleared in April 2010, while submissions from the Cities of Birmingham, Calera, Chelsea, and Helena, jurisdictions

[2] "Def. SMF" refers to Defendant's Statement of Undisputed Material Facts. "Pl. Mem." refers to Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment. "Pl. SMF" refers to Plaintiff's Statement of Material Facts.

located in whole or in part within Shelby County, are currently pending. Def. SMF ¶¶ 11-12. The Attorney General has interposed five objections in jurisdictions located wholly or partially in Shelby County: a July 1975 objection to six annexations to the City of Alabaster; a December 1977 objection to two municipal annexations in the City of Alabaster; a May 1987 objection to annexations to the City of Leeds, an August 2000 objection to designation of two municipal annexations to a council district in Alabaster (at the same time 42 annexations adopted between 1992 and 2000 were precleared); and an August 2008 objection to 177 municipal annexations and a redistricting plan in the City of Calera. Def. SMF ¶ 13.

Shelby County and jurisdictions within the County, including Calera, were defendants in statewide litigation under Section 2 of the Voting Rights Act filed in the late 1980's. Def. SMF ¶ 14. The *Dillard* litigation initially challenged at-large election systems used to elect county commissioners in nine Alabama counties. *Dillard* v. *Crenshaw Cnty.*, 640 F. Supp. 1347 (M.D. Ala. 1986). The case later was expanded to include 183 counties, cities, and county school boards throughout the State of Alabama. See *Dillard* v. *Baldwin Cnty.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988).

The district court in *Dillard* found that the Alabama legislature had adopted at-large voting systems for the counties with the intent to deprive black citizens of their voting rights. *Dillard*, 640 F. Supp. at 1356-1360. In the 1950's and 1960's, the court found, the Alabama legislature took a number of actions to discriminate against African-American voters in response to the Supreme Court's decision in *Smith* v. *Allwright*, 341 U.S. 649 (1944), (striking down the all-white primary), and to the enactment of federal voting rights legislation. These legislative actions included authorizing counties to switch from single-member districts to at-large voting,

prohibiting single-shot voting in municipal, at-large elections, and requiring numbered posts in at-large elections. *Dillard*, 640 F. Supp. at 1356-1357, 1359.

In 1990, both Shelby County and the City of Calera resolved the claims against them in the *Dillard* litigation by entering into consent decrees providing for elections from single-member districts. See Def. SMF ¶ 19. In 2007, both cases were dismissed after the State enacted legislation providing state-law authority for the voting changes. Def. SMF ¶ 20.

Less than a year after the Section 2 case against it was dismissed and the injunction dissolved, Calera adopted a redistricting plan that eliminated the only majority-black single-member district in the City, a district that had been adopted pursuant to the City's consent decree in *Dillard*. Def. SMF ¶ 21. The City submitted the redistricting plan for Section 5 review on March 13, 2008, along with 177 annexations that the City had made between 1995 and 2007, but had not previously submitted. Def. SMF ¶ 21. The Attorney General objected to the changes in August 2008. Def. SMF ¶ 22. Citing *City of Rome*, the Attorney General concluded that the City had failed in its obligation to provide reliable, current population data to enable proper examination of the effect of the annexations and the redistricting plan, and that the City had failed to consider alternatives to the redistricting plan that would have provided African-American voters a better opportunity to elect a candidate of their choice. Def. SMF ¶ 23.[3]

Despite the Attorney General's objection, the City conducted an election in August and a run-off election in October, 2008, using the objected-to voting changes and including the electorate of the objected-to annexed territory. Def. SMF ¶ 25. The election resulted in the defeat of the lone African-American member of the City Council. Def. SMF ¶ 26. The United

[3] The Attorney General denied the City's requests to withdraw the objections on November 17, 2008, and March 24, 2009. Def. SMF ¶ 24.

States then brought a Section 5 enforcement action against the City. Def. SMF ¶ 27. The dispute was temporarily resolved through a consent decree that provided for an interim change in the method of election, pending the results of the 2010 Census, and for a new municipal special election. Def. SMF ¶ 28. The Attorney General subsequently withdrew the objection to the 177 annexations, but did not withdraw his objection to the redistricting plan or the designation of the annexed territory to districts. Def. SMF ¶ 29.

ARGUMENT

"[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [a court] is called on to perform.'" *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2513 (2009) (*Northwest Austin II*); *Salazar* v. *Buono*, 130 S. Ct. 1803, 1820 (2010) ("Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality"). In this case, plaintiff seeks to mount the most difficult of all constitutional challenges, contending that 2006 Reauthorization of the VRA is unconstitutional on its face – that is, that it is unconstitutional in all its applications. See *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449-450 (2008); compare, *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004) (declining to consider validity of Title II of the Americans with Disabilities Act in all its applications "[b]ecause we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services") (citing *United States* v. *Raines*, 362 U.S. 17, 26 (1960)); *United States* v. *Georgia*, 546 U.S. 151, 157-159 (2006) (upholding Title II as applied to prohibit actual violations of the Fourteenth Amendment). Thus, this Court must reject plaintiff's challenge if *either* of two circumstances obtains: (1) Sections 4(b) and 5 of the VRA are "appropriate prophylactic legislation" that may be upheld in their entirety, *Nevada Dep't of*

Human Res. v. *Hibbs*, 538 U.S. 721, 728 (2003); *or* (2) Sections 4(b) and 5 appropriately respond to a sufficient record in Shelby County or Alabama that the statute may be upheld as applied to the plaintiff, even if the application of those provisions to other jurisdictions might not be proper. See *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971) (court need not find statute "constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the complaint in this case" but rather need only "identify[] a source of congressional power to reach the [facts] alleged by the complaint in this case"). Because *both* of these circumstances obtain, plaintiff cannot satisfy its heavy burden.

As the Supreme Court emphasized in *Northwest Austin II*, "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 129 S. Ct. at 2513; see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966) ("Congress [is] to be chiefly responsible for implementing the rights created by" the Fifteenth Amendment.). In 2006, Congress "amassed a sizable record in support of its decision to extend the preclearance requirements." *Northwest Austin II*, 129 S. Ct. at 2513. Based upon that record, Congress correctly concluded that, without the preclearance requirement for covered jurisdictions, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization, § 2(b)(9), 120 Stat. 578. See *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 265-268 (D.D.C. 2008) (*Northwest Austin I*) (Congress rationally determined that reauthorization was appropriate); *id.* at 268-278 (finding reauthorization congruent and proportional response to evidence of continued voting discrimination).

Plaintiff nonetheless contends that the legislative record was insufficient to support the 2006 Reauthorization because the types of voting discrimination documented by Congress in 2006 are unlike the type of discrimination that led to enactment of the VRA in 1965. But the kinds of dilutive mechanisms and other means of minimizing the effectiveness of minority voters identified by Congress in 2006 were not new and had been used by the covered jurisdictions to discriminate against minority voters long before 1965. Congress meant to provide a means of preventing the implementation of *all* these types of mechanisms in Section 5. Indeed, the whole purpose of Section 5 is to provide a flexible remedy capable of responding to new and "ingenious" methods of voting discrimination as they emerge. *South Carolina*, 383 U.S. at 309. If the use of tests and similar devices were the only evils to be addressed, there would have been no need for Section 5, since such tests were banned by another provision of the Act.

Plaintiff's challenge to Section 4(b) is similarly without merit. In crafting the coverage formula, Congress defined the geographic reach of Section 5 by using objective criteria that it knew would capture the jurisdictions it had found to be the most egregious discriminators (including Alabama). Because Congress found that voting discrimination was still occurring in the covered jurisdictions in 2006, the coverage formula remains valid. Moreover, the bailout provision provides ample opportunity for covered jurisdictions to terminate coverage. The Supreme Court made it clear that the bailout provision should be interpreted broadly, see *Northwest Austin II*, 129 S. Ct. at 2513-2517, and the Attorney General intends to do just that, applying the provision so as to permit jurisdictions to bail out when they no longer require the strictures of Section 5.

I. SECTION 5 OF THE VOTING RIGHTS ACT IS A VALID EXERCISE OF CONGRESS'S AUTHORITY TO ENFORCE THE FIFTEENTH AMENDMENT

A. Section 5 Is Subject To Rational Basis Review

Congress is empowered to "enforce" the provisions of the Fifteenth Amendment through "appropriate legislation." U.S. Const. Amend. XV, § 2. The Supreme Court's construction of this provision has been consistent: when Congress is legislatively enforcing the Fifteenth Amendment's prohibition on race discrimination with respect to voting, the Court reviews the appropriateness of that legislation under a deferential rationality standard. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966); *City of Rome* v. *United States*, 446 U.S. 156, 175-177 (1980); *Georgia* v. *United States*, 411 U.S. 526, 535 (1973) (upholding validity of Section 5 "for the reasons stated at length in *South Carolina*"); cf. *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999) (relying on *South Carolina* and *City of Rome* to uphold application of Section 5 to legislation enacted by a non-covered State). Legislation that prohibits race or national origin discrimination and that is enacted pursuant to Congress's authority under Section 2 of the Fourteenth Amendment is similarly subject to rational basis review. *E.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656 (1966).

Plaintiff nonetheless contends that Section 5 should be subject to a "congruence and proportionality" test. Pl. Mem. 17 (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). But the Court has applied the congruence and proportionality analysis developed in *Boerne* only to legislation enacted to enforce Fourteenth Amendment rights outside the context of race or national origin. Because Section 5 enforces the Fifteenth Amendment's core prohibition on race discrimination in voting, it is subject to rational basis review.

1. "Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race." *Oregon* v. *Mitchell*, 400 U.S. 112, 126 (1970) (plurality); see *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 344-345,

347 (1879); *Slaughter House Cases*, 83 U.S. (16 Wall) 36, 71-72 (1872); see also *Tennessee* v. *Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting). During the first century after the adoption of the Civil War Amendments, Congress's efforts to enforce the guarantees of the Fourteenth and Fifteenth Amendments were largely limited to laws enforcing the ban on racial discrimination, both in voting and otherwise. See, *e.g.*, *United States* v. *Reese*, 92 U.S. (2 Otto) 214 (1875); *Ex parte Virginia*, 100 U.S. 339; *Civil Rights Cases*, 109 U.S. 3 (1883); *James* v. *Bowman*, 190 U.S. 127 (1903); *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-192 (1964). In those cases, it was easy to determine whether Congress was in fact enforcing the protections of the amendments. As long as the laws in question were directed at race discrimination by state actors, the Court upheld them. *E.g.*, *Ex parte Virginia*, 100 U.S. at 349; *South Carolina*, 383 U.S. at 337. Where the laws were directed solely at private actors or where they were intended to facilitate the right to vote generally, rather than preventing voting discrimination on the basis of race specifically, the Court found them invalid. *James*, 190 U.S. at 139; *Civil Rights Cases*, 109 U.S. 3, 18-19; *Reese*, 92 U.S. at 218.

Race discrimination perpetrated or effectuated by state actors rarely, if ever, passes constitutional muster. Whereas most governmental classifications are entitled to a presumption of constitutionality, classifications based on race or national origin are presumed to be unconstitutional. See, *e.g.*, *McLaughlin*, 379 U.S. at 191-192. It follows that Congress has substantial authority to enact legislation aimed at preventing or remedying discrimination based on race or national origin. Thus, in *South Carolina*, the Court began its analysis with "one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S. at 324. And, in *City of Rome*, the Court made it clear that Congress's authority to

enforce the Fifteenth Amendment permits it to "outlaw voting practices that are discriminatory in effect." 446 U.S. at 173.

2. To be sure, more recent Fourteenth Amendment cases are not irrelevant in determining how this Court should evaluate the constitutionality of Section 5. Although the substantive provisions of the Fourteenth and Fifteenth Amendments differ, the wording of their enforcement clauses is essentially identical, empowering Congress to "enforce" the amendments' provisions "by appropriate legislation." U.S. Const. Amend. XIV, § 2. The Supreme Court has found that the nature of the enforcement authority in Section 5 of the Fourteenth Amendment is the same as that in Section 2 of the Fifteenth Amendment. See, *e.g.*, *Boerne*, 521 U.S. at 518; *James* v. *Bowman*, 190 U.S. at 136-139. Thus, although the amendments in many respects govern different substantive spheres, the terms "enforce" and "appropriate legislation" have the same meaning in each amendment.

The substantive scope of the two Amendments, on the other hand, differs significantly. The Fifteenth Amendment simply prohibits race discrimination in voting, and nothing more. U.S. Const. Amend. XV, § 1. The Fourteenth Amendment reaches much more broadly and covers a diverse array of rights, prohibiting States from infringing citizens' privileges and immunities; from denying them life, liberty, or property; and from denying them equal protection of the laws. U.S. Const. Amend. XIV, § 1. This broader reach of the Fourteenth Amendment, combined with the very different levels of constitutional scrutiny applied to the different rights secured by the Amendment, means that legislation enacted to enforce the Fourteenth Amendment, outside the core prohibitions on race discrimination, may be subjected to closer juridical scrutiny to ensure that it is appropriate enforcement legislation. Cf. *Lane*, 541 U.S. at 561-562 (Scalia, J., dissenting).

It was in this context that the Supreme Court articulated the "congruence and proportionality" standard in *Boerne*, 521 U.S. at 520, which invalidated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq*. Congress enacted RFRA "in direct response to" the Supreme Court's decision in *Employment Division of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), which held that the First Amendment does not exempt citizens from adhering to neutral, generally applicable laws that impose a substantial burden on their exercise of religion. *Boerne*, 521 U.S. at 512-516. Through RFRA, Congress sought to overturn the constitutional result in *Smith* by providing a statutory remedy for those alleging that their religious rights were burdened by such neutral laws. *Id*. at 515-516. *Boerne* recognized that Congress may do more in exercising its Fourteenth Amendment authority than merely prohibit what the amendment itself prohibits. *Id.* at 517-518. But it also reiterated the constitutional norm that it is for the Court, not Congress, to determine what constitutional provisions mean. *Id.* at 519. Acknowledging that the line between enforcement of a constitutional right and its substantive redefinition is not always "easy to discern," the Court for the first time described legislation falling on the appropriate enforcement side of that line as exhibiting "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-520.

The *Boerne* Court's inquiry into whether RFRA was congruent and proportional was simply its way of determining whether the statute "enforc[ed]" the provisions of the Fourteenth Amendment. 521 U.S. at 519 ("In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power 'to enforce' the 'provisions of this article.'"). Because RFRA targeted practices that were presumed valid under the Constitution, the Court did not afford RFRA the same presumption of validity it had afforded to earlier legislation enacted to

enforce the provisions of the Fourteenth and Fifteenth Amendments. Instead, the Court applied a less deferential standard, including more exacting scrutiny of the legislative record documenting a pattern of violations of the right Congress sought to protect. The Court found that record lacking. "In contrast to the record which confronted Congress and the Judiciary in the voting rights cases," the Court wrote, "[t]he history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Id.* at 530.

Following *Boerne*, the Court applied the congruence and proportionality analysis when reviewing other legislation through which Congress sought to protect Fourteenth Amendment rights not subject to heightened constitutional review. In *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the Court closely scrutinized the evidence Congress had amassed of State-sponsored employment discrimination on the basis of age or disability, respectively, because States have leeway to make rational distinctions on these bases. In both cases, the Court found the evidentiary record to be lacking. See *Kimel*, 528 U.S. at 89 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); *Garrett*, 531 U.S. at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."); *id.* at 369 (citing "half a dozen examples from the record" involving employment discrimination by States).

The Supreme Court has also made it clear, however, that such an exacting review of the record of discrimination before Congress is not necessary where Congress enforces a right at or near the core of the Fourteenth Amendment's protections. In *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), the Court upheld the family leave provisions of the

Family and Medical Leave Act (FMLA) as an appropriate means of enforcing the Fourteenth Amendment's prohibition of sex discrimination. Because Congress was enforcing a right subject to heightened constitutional review, the Court stated that it was "easier" for Congress to demonstrate the need for the legislation, just as it had been when Congress enacted Section 5 of the VRA to remedy and prohibit race discrimination in voting. *Id*. at 736 (citing *South Carolina*, 383 U.S. at 308-313). The same was true in *Tennessee* v. *Lane*, 541 U.S. at 528, where the Court upheld the application of Title II of the Americans with Disabilities Act to protect the right of citizens with disabilities to access the courts, a right subject to heightened constitutional protection; and in *United States* v. *Georgia*, 546 U.S. at 157-159, where the Court upheld the application of Title II to prohibit violations of the Eighth Amendment without applying or even mentioning the congruence and proportionality test.

3. Section 5 of the Voting Rights Act enforces the protections at the core of the Fifteenth Amendment and Fourteenth Amendments. The primary purpose of both amendments was to prohibit race discrimination, and both Amendments protect the right to vote. The right to vote is "fundamental" and is "preservative of all rights." *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966); see *Dunn* v. *Blumstein*, 405 U.S. 330, 337 (1972).

Section 5 operates at the intersection of a citizen's most fundamental right and the most constitutionally invidious form of governmental discrimination. Since the target of Section 5 is also the primary target of the Fourteenth and Fifteenth Amendments, Congress is entitled "to exercise its discretion in determining whether" legislation is needed to secure the guarantees of the amendments. *Morgan*, 384 U.S. at 651. Where a statute enforces the core prohibition on race discrimination found in both amendments, a court's role in assessing the appropriateness of the means of enforcement is limited to inquiring whether Congress's choice is rational. *South*

Carolina, 383 U.S. at 326; *Morgan*, 384 U.S. at 650; *City of Rome*, 446 U.S. at 175. As the Supreme Court declared in *Ex parte Virginia*: "Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." 100 U.S. at 345-346. Within the sphere of enforcing the amendments' provisions, Congress's legislative authority "is complete." *Id.* at 348; see also *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976) (Congress's legislative authority "is plenary within the terms of the constitutional grant.").

The Supreme Court has made clear that the standard of "appropriate[ness]" under the amendments is the same as that under the "necessary and proper" clause of Article I. In *South Carolina*, the Court explicitly adopted this standard as the "basic test to be applied in a case involving § 2 of the Fifteenth Amendment":

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

383 U.S. at 326 (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819)); see also *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966) (same); *City of Rome*, 446 U.S. at 175 (same). Notably, in *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999), a majority of the Court relied upon *South Carolina* and *City of Rome* in upholding the 1982 Reauthorization of Section 5, without suggesting that its intervening decision in *Boerne* required a different analysis. 525 U.S. at 282-285; compare *id*. at 293-298 (Thomas, J., dissenting) (doubting the constitutionality

of Section 5 as interpreted by the majority, in light of *Boerne*); see *id.* at 288-289 (Kennedy, J., concurring) (noting "constitutional concerns").[4]

In "determining whether and what legislation is needed to secure the guarantees" of the Fourteenth and Fifteenth Amendments, the Constitution assigns to Congress the task of "assess[ing] and weigh[ing] the various conflicting considerations." *Morgan*, 384 U.S. at 653. Where Congress endeavors to enforce the core protections of the amendments, "[i]t is not for [the Court] to review the congressional resolution of these factors. It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.* at 653; see also *Civil Rights Cases*, 109 U.S. at 14; *South Carolina*, 383 U.S. at 325-326 (the declaration in Section 2 of the Fifteenth Amendment that "Congress shall have the power to enforce this article by appropriate legislation," indicates "that Congress was to be chiefly responsible for implementing the rights created in [Section] 1" of the Amendment). "The power to interpret the Constitution in a case or controversy remains in the Judiciary." *Boerne*, 521 U.S. at 524. But the courts give "substantial deference" to Congress's determination of factual matters underlying its legislative judgments. *Turner Broad. Sys., Inc.* v. *F.C.C.*, 520 U.S. 180, 195-196 (1997); *id.* at 195 (court's "sole obligation is to assure that, in formulating its

[4] Plaintiff seeks to discount the significance of *Lopez* because it presented an as-applied, rather than a facial challenge to the constitutionality of Section 5. Pl. Mem. 26 n.6. But the Court's holding that it was constitutional to apply Section 5 to "States that have not been designated as historical wrongdoers in the voting rights sphere," *Lopez*, 525 U.S. at 282, presupposes its constitutionality when applied to States that have been so designated and, *a fortiori*, defeats a *facial* challenge. The Court stated "that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions." *Id.* at 283; see *Northwest Austin II*, 129 S. Ct. at 2510 ("We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provisions.") (citing *Georgia*, *City of Rome*, and *Lopez*).

judgments, Congress has drawn reasonable inferences based on substantial evidence"); see also *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

B. Congress Rationally Determined That Section 5 Preclearance Is Necessary

In 2006, Congress went to extraordinary lengths to carefully "assess and weigh the various conflicting considerations" associated with reauthorizing Section 5. An overwhelming majority of the people's elected representatives voted to reauthorize the law. See 152 Cong. Rec. 14,303-14,304, 15,325 (2006) (recording that the 2006 Reauthorization passed by a vote of 390-33 in the House and unanimously in the Senate). In so doing, Congress appropriately enforced core constitutional protections against racial discrimination in voting. Congress looked in 2006 to the same evidentiary sources relied upon by previous Congresses and found to be adequate by the Supreme Court. The 2006 Congress found that the same types and patterns of discriminatory behavior found by previous Congresses continue today. This extensive record of voting discrimination, including intentional discrimination, stands in stark contrast to the very minimal records of discrimination that the Court found inadequate to support legislation in other cases. See *Boerne*, 521 U.S. at 530; *Kimel*, 528 U.S. at 89; *Garrett*, 531 U.S. at 368. Thus, the 2006 Reauthorization not only satisfies the rational basis test, but also meets the congruence and proportionality test. See *Northwest Austin I*, 573 F. Supp. 2d at 268-279.

1. Evidence Of Ongoing Voting Discrimination By Covered Jurisdictions Justified Previous Reauthorizations

Congress concluded in 1965 that covered jurisdictions had engaged in a pattern of suppressing participation of minority voters through discrimination, intimidation, misinformation, and outright exclusion. In the century between the Fifteenth Amendment and the Voting Rights Act, southern States employed a variety of discriminatory devices including grandfather clauses, white primaries, discriminatory procedural hurdles, discriminatory

challenges and purges, and racial gerrymandering, as well as discriminatory tests. 1965 House Report 8-12; S. Rep. No. 162 (Pt. 3), 89th Cong., 1st Sess. 9-12 (1965) (1965 Senate Report). These States also restricted the times and locations of registration sites so as to prevent minority citizens from registering, H.R. Rep. No. 196, 94th Cong., 1st Sess. 11 (1975) (1975 House Report). In upholding Section 5 in *South Carolina*, the Supreme Court found that this history of voting discrimination identified by Congress justified the remedy of Section 5. 383 U.S. at 308.

When Congress reauthorized Section 5 in 1970, and again in 1975, it concluded that covered jurisdictions continued to employ discriminatory devices and to engage in other discriminatory behavior in order to suppress the participation of minority voters. H.R. Rep. No. 397, 91st Cong., 1st Sess. 6-8 (1969) (1969 House Report); 1975 House Report 16-18. In both years, Congress learned that as barriers to minority registration and voting fell, covered jurisdictions turned to other devices, such as at-large elections, restrictive requirements for candidates, consolidations, and annexations, to "diminish the Negro's franchise and defeat Negro and Negro-supported candidates." 1969 House Report 7; see 1975 House Report 10. In 1975 in particular, the Committees studying the legislation emphasized the importance of Section 5 review of redistricting plans and noted that one-third of the objections interposed by the Attorney General involved redistricting. 1975 House Report 10; S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975) (1975 Senate Report).

When the Supreme Court upheld the 1975 Reauthorization in *City of Rome*, 446 U.S. at 173-183, the Court acknowledged that black voter registration rates had dramatically improved, but recognized that "a bleaker side of the picture yet exist[ed]," *id.* at 180. The Court thus rejected the contention that Section 5 had "outlived [its] usefulness" and "decline[d] * * * to overrule Congress' judgment that the 1975 extension was warranted." *Id.* at 180. The Court

noted that Congress had examined "information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General," before concluding that Section 5 was both responsible for the progress made to date and still necessary to protect the "limited and fragile success." *Id*. at 181 (quoting 1975 House Report 10-11). Notably, *City of Rome* concerned changes in the way the City elected its City Commission and Board of Education, as well as a series of annexations to the City's territory, mechanisms that would have diluted the effectiveness of the minority vote, rather than restrictions designed to suppress the participation of minority voters. *Id.* at 160-161. And, in addition to upholding Section 5 itself, the Court upheld the district court's ruling that the City had failed to prove that the electoral changes and annexations, together with racial bloc voting in the City, would not have a dilutive effect. *Id.* at 183-187.

When Congress reauthorized Section 5 in 1982, it again found actions by covered jurisdictions that suppressed the participation of and limited the effectiveness of minority voters. Congress found that a pattern of intimidation and harassment accompanied the use of discriminatory voting practices. S. Rep. No. 417, 97th Cong. 2d Sess. 14 (1982) (1982 Senate Report); H.R. Rep. No. 227, 97th Cong. 1st Sess. 6, 15 (1981) (1981 House Report). Congress also found that, as registration and participation rates among minority voters improved through enforcement of the VRA, covered jurisdictions shifted their focus from preventing participation to diluting the voting strength of minority voters. Congress noted that the "right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," 1981 House Report 17 (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569 (1969)), and found that "covered jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength," 1982 Senate

Report 10. Those devices included racial gerrymandering, at-large elections, annexations, shifts from elective to appointive offices, majority vote requirements, numbered posts, staggered terms, and full slate voting requirements. 1981 House Report 17-20. In reviewing the Act as amended in 1982, the Supreme Court again upheld Section 5 and held that, although "the Voting Rights Act, by its nature, intrudes on state sovereignty[, t]he Fifteenth Amendment permits this intrusion." *Lopez*, 525 U.S. at 284-285. *Lopez* concerned a series of changes in the County's method of electing municipal judges, resulting in a transition from nine districts to a single, countywide district. *Id.* at 271-273.

2. Evidence Of Ongoing Voting Discrimination By Covered Jurisdictions Justified The 2006 Reauthorization

The voluminous record supporting the 2006 reauthorization reveals three important facts: (1) in 2006, Congress relied on the same types and sources of evidence it had relied upon in previous reauthorizations; (2) Congress concluded that, despite progress, covered jurisdictions continue to discriminate against racial and language minority voters through concerted efforts to suppress the participation of such voters and to dilute their voting strength; and (3) Congress concluded that Section 5 works and must continue to work to stamp out discrimination in voting.

The reauthorizing Congress held extensive hearings to study the effect and operation of the Voting Rights Act. The House of Representatives held ten oversight hearings and two legislative hearings to examine both "the effectiveness of the temporary provisions of the VRA over the last 25 years" and the effect reauthorization of those provisions would have "on continuing the progress that minority groups have made in the last forty years and on protecting racial and language minority voters over the next 25 years." H.R. Rep. No. 478, 109th Cong., 2d Sess. 5 (2006) (2006 House Report). The House heard from 46 witnesses and assembled over 12,000 pages of testimony and documentary evidence. *Ibid.*; *id.* at 11. The Senate held ten

hearings featuring testimony from 40 witnesses, and gathered thousands of pages of evidence. S. Rep. No. 295, 109th Cong., 2d Sess. 2 (2006) (2006 Senate Report).

While the House Committee recognized that "[s]ubstantial progress has been made over the last 40 years," the Committee also found that "[d]iscrimination today is more subtle than the visible methods used in 1965" and continues to result in "a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." 2006 House Report 6. The Committee found that the evidence before it "resembles the evidence before Congress in 1965 and the evidence that was present again [when Congress reauthorized Section 5] in 1970, 1975, 1982, and 1992," and amounts to "abundant evidentiary support for reauthorization of VRA's temporary provisions." *Ibid.*

a. In 2006, Congress Found Evidence Of Voting Discrimination In The Same Evidentiary Sources As Did Previous Congresses

In enacting and reauthorizing Section 5, Congress has repeatedly examined the state of voting rights in covered jurisdictions, and has repeatedly found that jurisdictions covered by Section 5 have engaged in a pattern of suppressing and diluting the voting strength of minority citizens. In making these findings, previous Congresses relied first on the number and types of Section 5 objections interposed by the Attorney General. See, *e.g.*, 1982 Senate Report 10-12; 1981 House Report 11-13; 1975 House Report 9-10; 1975 Senate Report 16-18; 1969 House Report 6-8. Second, they relied on the Justice Department's deployment of observers to monitor elections in covered jurisdictions. 1981 House Report 20-21; 1975 House Report 12; 1975 Senate Report 20-21; 1969 House Report 6. Third, they examined the inadequacies of other legislative remedies for voting discrimination. 1965 Senate Report 5-9; 1965 House Report 8-11. Fourth, they relied on direct evidence of discrimination: anecdotal evidence and evidence from litigation demonstrating that racial and language minority citizens faced discrimination in

voting in covered jurisdictions. See, *e.g.*, 1981 House Report 17-20, 26-28; 1975 House Report 16-24; 1975 Senate Report 25-30; 1965 Senate Report 3-5, 9-12; 1965 House Report 11-13. Finally, they found that registration rates of racial and language minority citizens lagged behind those of white citizens, and continued to do so in some covered jurisdictions long after Section 5 went into effect. See, *e.g.*, 1981 House Report 7-8; 1975 House Report 7; 1975 Senate Report 13-15. In 2006, Congress relied on these same five sources of evidence – the same sources the Supreme Court found to be reliable in *South Carolina* and *City of Rome*.

i. Section 5 Enforcement Since 1982

(a) Section 5 Objections

(1) Rate And Types Of Objections: In 2006, Congress relied on the volume and substance of Section 5 objections. Since the 1982 amendments to the Act went into effect, the Attorney General had interposed objections to more than 700 discriminatory voting changes.[5] 2006 House Report 21-22, 36. Although the annual rate of objections from 1968-1982 was slightly higher than the rate after 1982, *Appendix* to *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 172 (2006) (*H. Appx.*), the rate in several southern states increased in the post-1982 time period. *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 54, 60 (2006) (*Evidence of Continued Need*) (statement of Wade Henderson); *H. Appx*. 259; 2006 House Report 37; *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing*

[5] For a list of the Attorney General's objection letters and copies of some of them, see http://www.justice.gov/crt/voting/sec_5/obj_activ.php; see also *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 105-2295 (2005).

Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong., 1st Sess. 86 (2005) (*History, Scope, & Purpose*) (testimony of Nina Perales).[6]

Throughout the post-1982 period, the Justice Department has interposed objections to a wide variety of voting changes, including annexations, education requirements, election dates, polling locations, majority vote requirements, statewide and local redistricting, staggered terms, and numbered posts. *H. Appx*. 402-404; see also *id*. at 335; see also *History, Scope, & Purpose* 1686-2595 (copies of objection letters sent from 1982 through mid-2003).[7] In Alabama, the Justice Department interposed 46 objections between 1982 and 2004, including objections to a state legislative redistricting plan, a congressional redistricting plan, and three other statewide enactments. *H. Appx.* 259-260; Def. SMF ¶ 30. In Louisiana, "since 1965, not one single Louisiana State House of Representatives redistricting plan as initially submitted to the Justice Department for review, has been precleared." *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 16 (2005) (*Impact & Effectiveness*) (testimony of Marc Morial); see also *H. Appx*. 335 (noting that, in Louisiana, objections have been interposed to voting changes "at every level of government, including the state legislature, the state court system, the state board of education, parish councils, school boards, police juries, city councils, and boards of aldermen"). In Georgia, the 92 objections interposed between 1982 and 2004 covered a variety of election changes, including many that "had been illegally implemented for

[6] See also http://www.justice.gov/crt/voting/sec_5/tx_obj2.php; http://www.justice.gov/crt/voting/sec_5/la_obj2.php; http://www.justice.gov/crt/voting/sec_5/ms_obj2.php

[7] Congress also learned that Section 5 objections "aid small as well as large scale elections, shielding as few as 208 and as many as 215,406 voters with a single objection." *The Continuing Need for Section 5 Pre-clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 58 (2006) (testimony of Anita Earls).

years, or even decades, without Section 5 preclearance." *Evidence of Continued Need* 62 (statement of Henderson). In Texas, the Attorney General objected to redistricting plans at all levels of government, changes in local voting procedures, and changes related to the system of representation. *Id*. at 63-64 (statement of Henderson). In South Carolina, the "objected-to discriminatory practices have covered a wide variety of changes that affected nearly every aspect of black citizens' participation in South Carolina's electoral processes, including redistricting, annexations, voter assistance, changing county boundaries, eliminating offices, reducing the number of seats on a public body, majority vote requirements, changing to at-large elections, using numbered posts or residency requirements, staggering terms, scheduling of elections, changing from nonpartisan to partisan elections and limiting the ability of African-American citizens to run for office." *Id.* at 65-66 (statement of Henderson).

(2) Findings Of Discriminatory Intent: Congress heard testimony that "the clear trend line from the 1970's to the 1980's to the 1990's was that discriminatory purpose increasingly was the basis on which the Department was interposing objections," and that a majority of objections by the Attorney General in 2000 were based on discriminatory purpose. *Voting Rights Act: Section 5 – Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 8 (2005) (*Preclearance Standards*).[8] Similarly, a recent study of Attorney General objections found a "consistent increase over time of objections based on the purpose prong of Section 5." Peyton McCrary et al., *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race & Law 275, 297 (2006). The study found

[8] This trend was reversed following the Supreme Court's decision in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000), which held that Section 5 did not prohibit electoral changes that were enacted with discriminatory purpose unless the purpose was retrogressive.

that 43% of all objections interposed by the Attorney General in the 1990's were based on intent alone and another 31% were based on a combination of intent and effect. *Ibid.*

For example, the Attorney General objected to the post-2000 census redistricting plan of the City of Albany, Georgia, because there was evidence that the plan "was animated by purposeful discrimination to limit the opportunities of minorities." *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 80 (2005) (*The Continuing Need for Section 5*) (testimony of Laughlin McDonald); 2006 House Report 37-38; Letter from J. Michael Wiggins to Al Grieshaber, Jr. (Sept. 23, 2002), in *History, Scope, & Purpose* 845-848. In 1992, the Attorney General refused to preclear a redistricting plan for Selma, Alabama, because the plan "exhibited a purpose to prevent African Americans from electing candidates of their choice by fragmenting the black voting population." *Evidence of Continued Need* 54 (statement of Henderson); see also Letter from John R. Dunne to John E. Pilcher (July 21, 1992), in *History, Scope, & Purpose* 397-399. In 1993, the Attorney General objected to a school board election change in Monterey County, California, because the change "was motivated, at least in part, by a discriminatory animus." *H. Appx.* 351 (describing testimony of Robert Rubin); Letter from Ralph F. Boyd, Jr. to William D. Barr (Mar. 29, 2002), available at http://www.justice.gov/crt/voting/sec_5/ltr/l_040102.php. See also 2006 House Report 23 ("Section 5 has been instrumental in preventing covered jurisdictions from intentionally reenacting and enforcing changes to which the Department of Justice had previously objected.").

In one stark example, the Attorney General interposed an objection to Mississippi's 1991 statewide legislative redistricting plan after concluding that the proposed plan was "calculated not to provide black voters in the Delta with the equal opportunity for representation required by

the Voting Rights Act," and noting that legislative debate about the proposed plan and alternatives was "characterized by overt racial appeals." Letter from John R. Dunne to Hon. Hainon A. Miller (July 2, 1991), in *History, Scope, & Purpose* 1410-1413. Congress heard testimony that, when state legislators defeated an alternative plan that would have increased the number of black majority districts, some of them referred to the alternative plan as the "black plan" when speaking on the floor, and as the "n *** plan" privately. *Modern Enforcement of the Voting Rights Act: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 22 (2006) (*Modern Enforcement of the Voting Rights Act*) (testimony of Robert B. McDuff).

In many instances, the Attorney General found that a jurisdiction enacted a voting change with the specific intent to limit minority voting strength. For instance, in 2001, the Attorney General objected to a Mississippi town's cancellation of an election because the evidence demonstrated that the cancellation was intended to reduce minority voting strength. Letter from Ralph F. Boyd, Jr. to J. Lane Greenlee (Dec. 11, 2001) (re: Kilmichael, MS), in *History, Scope, & Purpose* 1616-1619. No black citizen had ever been elected mayor of the town, and only one black person had ever served on the Board of Aldermen, although black citizens had recently become a majority of the town's population. The town opted to cancel the election, with no notice to the community, after the incumbent all-white town governance learned that the minority community had a chance to win the mayoral election and four out of the five aldermen seats. *Ibid*.; see also *Modern Enforcement of the Voting Rights Act* 22. In 2000, the Attorney General objected to a redistricting plan for the Webster County, Georgia, Board of Education, after finding that the redistricting was undertaken to "intentionally decreas[e] the opportunity of minority voters to participate in the electoral process." Letter from Bill Lann Lee to James M. Skipper, Jr. (Jan. 11, 2000), in *History, Scope, & Purpose* 830-833. The plan was initiated by a

state legislative act after voters elected a majority black school board for the first time. And the Attorney General objected in 1998 to a redistricting plan for the City of Grenada, Mississippi, because the Attorney General found "a purpose to maintain and strengthen white control of a City on the verge of becoming majority black." Letter from Bill Lann Lee to T.H. Freeland IV (Aug. 17, 1998), in *History, Scope, & Purpose* 1606-1612. The Attorney General also objected, in 1987, to a change in the method of election for the board of commissioners of Bladen County, North Carolina, finding that "the board undertook extraordinary measures to adopt an election plan [that] minimizes minority voting strength" in order to "maintain white political control to the maximum extent possible." Letter from William Bradford Reynolds to W. Leslie Johnson, Jr. (Nov. 2, 1987), in *History, Scope, & Purpose* 1760-1763.[9]

A number of the Attorney General's objections highlight significant discrimination in changes to polling place locations. In 1992, the Attorney General interposed an objection to the relocation of a polling place in Johnson County, Georgia, from the county courthouse to the American Legion. Letter from John R. Dunne to Hon. Charlotte Beall (Oct. 28, 1992), in *History, Scope, & Purpose* 726-728. The Justice Department noted that: "[T]he American Legion in Johnson County has a wide-spread reputation as an all-white club with a history of refusing membership to black applicants. Moreover, the American Legion hall, itself, is used for functions to which only whites are welcome to attend." *Id.* at 727. This information led to the unsurprising conclusion that "the atmosphere at the American Legion is considered hostile and

[9] In 2006, after the 2006 Reauthorization, the Attorney General objected on discriminatory-purpose grounds to Randolph County, Georgia's reassignment of the African-American chair of the Board of Education out of his incumbent district. Letter from Wan J. Kim to Tommy Coleman (Sept. 12, 2006), available at http://www.justice.gov/crt/voting/sec_5/ltr/l_050506.php.

intimidating to potential black voters, and it appears that locating a polling place there has the effect of discouraging black voters from turning out to vote." *Ibid*.

In another objection to a polling place change, the Attorney General found the proposed change to be "designed, in part, to thwart recent black political participation." Letter from Deval L. Patrick to James P. Finstrom (Apr. 18, 1994) (re: Marion County, TX), in *History, Scope, & Purpose* 2427-2429. In another instance, the Attorney General concluded that the proposed change was "calculated to discourage turnout among minority voters and, accordingly, to undermine the electoral opportunities created by" a new election system put in place in response to a Section 2 suit, Letter from John R. Dunne to Don Graf (Mar. 19, 1991) (re: Lubbock County, TX), in *History, Scope, & Purpose* 2300-2303. And, shortly before the adoption of the 2006 VRA reauthorization, the Attorney General objected to a community college district's proposal to eliminate 86% of its polling places. Letter from Wan J. Kim to Renee Smith Byas (May 5, 2006) (re: North Harris Montgomery Community College District), available at http://www.justice.gov/crt/voting/sec_5/ltr/l_050506.php; see also *Modern Enforcement of the Voting Rights Act* 83-84 (testimony of McDuff). Under the change, the site with the smallest proportion of minority voters served only 6,500 voters total while the site with the largest proportion of minority voters served more than 67,000 voters.[10]

[10] See also *Northwest Austin I*, 573 F. Supp. 2d at 289-301 (examples of objection letters based on discriminatory or retrogressive intent, 1982-2005); see also, *e.g*., Letter from R. Alexander Acosta to David A. Creed (Apr. 25, 2005) (re: Town of Delhi, LA), available at http://www.justice.gov/crt/voting/sec_5/ltr/l_042505.php; Letter from R. Alexander Acosta to Hon. Phillip A. LeMoine (June 4, 2004) (re: City of Ville Platte, LA), available at http://www.justice.gov/crt/voting/sec_5/ltr/l_060404.php; Letter from Ralph F. Boyd, Jr. to William D. Sleeper (Apr. 29, 2002) (re: Pittsylvania County, VA), in *History, Scope, & Purpose* 2588-2591; Letter from Loretta King to Guy Kenner Ellis, Jr. (Nov. 17, 1995) (re: City of Greenville, MS), in *History, Scope, & Purpose* 1516-1521; Letter from Deval L. Patrick to Sandra Murphy Shelson (Feb. 6, 1995) (re: State of Mississippi), in *History, Scope, & Purpose*

(3) Preventing Back-Sliding: Congress also heard evidence that Section 5 has prevented hundreds of voting changes since 1982 that would have eroded the progress minority voters have made since 1965. In Texas, for example, Latinos reached one-third of the State's total population by 2001. The state legislative redistricting board proposed a redistricting plan for the state House of Representatives that would have minimized Latino voting strength by eliminating four existing majority-Latino districts, while adding only one such district. The Attorney General objected to the proposed plan, and Latino voters in Texas accordingly maintained four majority districts and the opportunity to elect representatives of their choice. *Impact & Effectiveness* 19 (testimony of Ann Marie Tallman); Letter from Ralph F. Boyd, Jr. to Hon. Geoffrey Connor (Nov. 16, 2001), in *History, Scope, & Purpose* 2518-2523.

Similarly, the Attorney General objected to the House and Senate redistricting plans in Arizona in 2002 because the state "pared down Latino majority districts so they no longer provided the opportunity to elect Latino candidates of choice." *History, Scope, & Purpose* 87 (testimony of Perales); Letter from Ralph F. Boyd, Jr. to Lisa T. Hauser & José de Jesús Rivera

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1570-1571; Letter from Deval L. Patrick to James R. Lewis (Oct. 11, 1994) (re: City of LaGrange, GA), in *History, Scope, & Purpose* 798-800; Letter from James P. Turner to Nicholas H. Cobbs (Jan. 3, 1994) (re: Hale County, AL), in *History, Scope, & Purpose* 412-414; Letter from James P. Turner to Philip Henry Pitts (Mar. 15, 1993) (re: City of Selma, AL), in *History, Scope, & Purpose* 402-405; Letter from James P. Turner to Hon. Gregory N. Marcantel (Mar. 8, 1993) (re: City of Jennings, LA), in *History, Scope, & Purpose* 1034-1036; Letter from John R. Dunne to James E. Nelson (Mar. 30, 1992) (re: Monahans-Wickett-Pyote Independent School District in Ward County, TX), in *History, Scope, & Purpose* 2352-2354; Letter from John R. Dunne to Hon. Jimmy Evans (Mar. 27, 1992) (re: State of Alabama), in *History, Scope, & Purpose* 385-387; Letter from John R. Dunne to Tommy M. McWilliams (Oct. 25, 1991) (re: Sunflower County, MS), in *History, Scope, & Purpose* 1468-1470; Letter from John R. Dunne to John B. Farese (Sept. 9, 1991) (re: Benton County, MS), in *History, Scope, & Purpose* 1435-1437; Letter from John R. Dunne to Hubbard T. Saunders, IV (Aug. 23, 1991) (re: Amite County, MS), in *History, Scope, & Purpose* 1428-1430; Letter from James P. Turner to John P. Fox (Feb. 27, 1990) (re: Chickasaw County, MS), in *History, Scope, & Purpose* 1388-1390; Letter from James P. Turner to Garry C. Mercer (Mar. 10, 1986) (re: Wilson County, NC), in *History, Scope, & Purpose* 1730-1732.

(May 20, 2002), in *History, Scope, & Purpose* 496-501. He also objected to Florida's 2002 statewide House redistricting plan because the plan would have made it "impossible" for Hispanic voters in a covered county to elect their candidate of choice. Letter from Ralph F. Boyd, Jr. to Hon. John M. McKay (July 1, 2002), in *History, Scope, & Purpose* 524-529.

Section 5 also played an important role in 2003 in preventing Chilton County, Alabama, from repealing changes it had adopted in 1988 to resolve its part of the *Dillard* litigation. *Evidence of Continued Need* 53; *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 379-380 (2006) (*Renewing the Temporary Provisions)*; see *Dillard* v. *Crenshaw Cnty.*, 640 F. Supp. 1347, 1356-1360 (M.D. Ala. 1986). The County had agreed in 1988 to enlarge its County Commission from four to seven members, and to add cumulative voting in place of its existing at-large election method. *Renewing the Temporary Provisions* 379. Under the cumulative voting plan, the County had elected one African-American commissioner. *Id.* at 380. In 2003, the County Commission asked the state legislature to enact a local act to reduce the size of the Commission from seven to four members, repeal the cumulative voting provision, and restore the probate judge as chair, thereby "ending any opportunity for African Americans to elect a candidate of their choice." *Ibid.* The Attorney General refused to consider the plan for preclearance unless the County was released from its obligations under the 1988 consent decree in *Dillard*. *Ibid.* (citing letter from Joseph D. Rich to John Hollis Jackson and Dorman Walker (Oct. 29, 2003)). In the words of the lone African- American commissioner in the County, "We would be at ground zero without Sec[tion] 5." *Ibid.* Even more recently, in 2008, the Attorney General objected when the City of Calera, in Shelby County, adopted a redistricting plan, shortly

after it was released from its obligations under its consent decree in *Dillard*, that would have eliminated the sole predominantly black ward in the City. See p. 8, *supra*.

In many instances, a covered jurisdiction adopted an election change knowing that the change would diminish the ability of minority voters to elect their candidate of choice. On the heels of a federal court decision finding that the at-large method of electing members of the Charleston County Council violated Section 2 of the Voting Rights Act, *United States* v. *Charleston Cnty.*, 316 F. Supp. 2d 268 (D.S.C. 2003), aff'd, 365 F.3d 341 (4th Cir.), cert. denied, 543 U.S. 999 (2004), the South Carolina legislature (by local act), proposed adopting the same at-large system for electing members of the County's school board. The Attorney General objected, concluding that it "would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process," a retrogressive effect well understood in the County. Letter from R. Alexander Acosta to Havird Jones, Jr. (Feb. 26, 2004), available at http://www.justice.gov/crt/voting/sec_5/ltr/l_022604.php; see *Evidence of Continued Need* 25 (statement of Nadine Strossen); 2006 House Report 39-40.

The Attorney General has frequently objected when a jurisdiction has attempted to implement a voting change that perpetuated past discrimination. In 1993, the Attorney General objected to a proposed change to the candidacy requirements for election to the School Board in Randolph County, Georgia. See Letter from James P. Turner to Jesse Bowles III (June 28, 1993), in *History, Scope, & Purpose* 739-742. The change would have required that school board members possess a high school diploma or GED. Census data demonstrated that 65% of black residents age 25 or older did not possess a high school diploma or GED, compared to only 36% of the relevant white population. *Id*. at 741. The Attorney General found that the change would have a "pronounced disparate impact" on black voters, that a number of black voters'

candidates of choice from previous elections would have been barred from serving on the Board, and that the disparate impact of the change was "well-known" before its adoption. *Ibid*.

(b) More Information Requests And Submission Withdrawals

"Efforts to discriminate over the past 25 years were not just demonstrated by objection letters issued under Section 5 but were also reflected by an administrative mechanism, known as a 'more information request.'" 2006 House Report 40. In some such cases, the Department's request for more information causes the jurisdiction to alter its proposed change after concluding "that the change would be objected to as violating the Act if it were not withdrawn." *H. Appx.* 124; see *History, Scope, & Purpose* 93-94 (testimony of Perales); 2006 House Report 40. The House Committee found that the covered jurisdictions' responses to requests from the Department for more information "are often illustrative of a jurisdiction's motives." *Ibid.* Since 1982, more than 205 voting changes had been withdrawn in response to such information requests. 2006 House Report 41; see also *Northwest Austin I*, 573 F. Supp. 2d at 254-255. And Congress received a study finding that, between 1990 and 2005, requests for more information "affected more than 800 additional voting changes that were submitted for preclearance, compelling covered jurisdictions to either alter the proposal or withdraw it from consideration altogether." 2006 House Report 40-41; see *Evidence of Continued Need* 1847-1848.

(c) Section 5 Injunctive Actions

Congress also considered the recent history of judicial actions seeking injunctive relief under Section 5. The VRA permits both the Justice Department and private citizens to bring Section 5 actions for injunctive relief to compel covered jurisdictions to submit voting changes for preclearance. 42 U.S.C. 1973c, 1973j(f). More than 100 such cases had been brought since

1982. *Evidence of Continued Need* 13 (testimony of Lee); *H. Appx.* 124-125; see also *History, Scope, & Purpose* 2839-2841, 2848-2850.

Witnesses testified that Section 5 enforcement actions often signify that the defendant jurisdiction is resistant to complying with the Act, refusing to submit covered changes for preclearance. *Evidence of Continued Need* 87 (testimony of Rogers). As the House Committee noted, "[p]erhaps the most egregious example of non-compliance" with Section 5 occurred in South Dakota. 2006 House Report 42. In the mid-1970s, when two South Dakota counties were newly covered under Section 5, the State's Attorney General described the preclearance requirement as "a facial absurdity" and advised against compliance with the law. *Ibid.* Despite enforcement actions by the Department of Justice in 1978 and 1979, the State enacted or implemented more than 600 voting changes but submitted fewer than ten for preclearance between 1976 and 2002. *H. Appx.* 172-173; 2006 House Report 42. The result was a series of electoral changes that adversely affected the voting rights of Native Americans. *Ibid.* It was not until members of local tribes brought a Section 5 enforcement action in 2002 that the State agreed to comply with the law by submitting election changes affecting voters in the covered counties for preclearance. *Ibid.* A court subsequently found, in a Section 2 action, that the State had systematically discriminated against Native American voters for many years. *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976, 1023-1024 (D.S.D. 2004); see p. 48, *infra*.[11]

Congress heard other examples of defiant noncompliance with Section 5 as well. Such examples involve covered jurisdictions from California, 2006 House Report 42; Texas, *H. Appx.* 351; Louisiana, 2006 House Report 43; and South Carolina, *ibid.* In addition, Congress was

[11] Thus, contrary to plaintiff's contention (Pl. Mem. 32 n.7), the State's refusal to comply with Section 5 was likely motivated by more than its disagreement "with the idea of stifling federal oversight."

"made aware that unofficial changes to voting practices are routinely made by local elections officials" without preclearance, and that "[l]ocal election officials and poll workers often make arbitrary decisions in polling locations that effectively change voting procedures." *Ibid.*

(d) Judicial Preclearance Actions

Congress also found additional evidence of the continued need for Section 5 in the number of times judicial preclearance of electoral changes was denied. 2006 Reauthorization, § 2(b)(4)(B), 120 Stat. 577-578.

The State of Louisiana, for example, sought judicial preclearance for its 2001 state House of Representatives redistricting plan. The United States opposed preclearance based on the undisputed evidence that, in drawing the new plan, Louisiana had intentionally eliminated a majority black district in Orleans Parish to advantage white voters in another part of the parish. *Louisiana House of Representatives* v. *Ashcroft*, No. 1:02-cv-62 (D.D.C.) (three-judge). The State, in fact, admitted that its intent was to diminish black electoral opportunity in order to increase the electoral opportunity of white voters. Def.'s Mot. Summ. J. 34-40, *Louisiana House of Representatives* v. *Ashcroft*, No. 1:02-cv-62 (D.D.C. Jan. 17, 2003); see also *Reauthorization of the Voting Rights Act's Temporary Provisions: Policy Perspectives & Views from the Field: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 43-44 (2006) (*Policy Perspectives & Views From the Field*) (statement of Debo P. Adegbile). The case ultimately was resolved when the State withdrew its proposed plan and submitted an alternative plan to the Attorney General for preclearance. See *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2nd Sess. 152-153 (2006) (*Introduction to the Expiring Provisions*) (statement of Theodore M. Shaw). See also *Northwest Austin I*, 573 F. Supp. 2d at 256.

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In summary, Congress heard evidence that, since 1982, more than 1,100 voting changes contained in 650 Section 5 submissions were denied either judicial or administrative preclearance, and 200 submissions were withdrawn; and that, during just part of this period, between 1990 and 2005, more than 855 submissions were affected by requests for more information. *Evidence of Continued Need* 13 (testimony of Lee); 2006 House Report 40-41; *Evidence of Continued Need* 1847-1848. This level of Section 5 activity exceeds that which the Supreme Court found to be more than sufficient to justify the reauthorization of Section 5 in 1975. See *City of Rome*, 446 U.S. at 181; 1975 House Report 10-11 (163 objections interposed by Attorney General between 1965 and 1975); 1975 Senate Report 15-19. As the district court found in *Northwest Austin I*, the legislative record demonstrated that Section 5 had blocked the implementation of discriminatory electoral changes throughout the covered jurisdictions. 573 F. Supp. 2d at 256, 288 (citing *Evidence of Continued Need* 273).

ii. Federal Observer Coverage Since 1982

Congress also learned that "[y]et another indicator of actual or potential vote discrimination is * * * 'observer coverage,' whereby the Attorney General sends federal observers on Election Day to a locale because racial tensions are high and efforts to discriminate may occur." *H. Appx.* 124. The House Committee found that "observers are assigned to a polling location only when there is a reasonable belief that minority citizens are at risk of being disenfranchised." 2006 House Report 44. Between 1965 and 1982, the Justice Department sent observers to monitor a total of 520 elections. *H. Appx.* 124. Since 1982, the Justice Department has sent several thousand observers to monitor elections in more than 600 jurisdictions. *Evidence of Continued Need* 13 (testimony of Lee); *H. Appx.* 124. In each year between 1984

and 2000, the Justice Department sent out between 300 and 600 individual observers. *Evidence of Continued Need* 13 (testimony of Lee). Two-thirds of the elections covered during this period were in five of the six States originally covered by Section 5: Alabama, Georgia, Louisiana, Mississippi, and South Carolina. 2006 House Report 44. The Department of Justice has sent observers to cover 250 elections in Mississippi since 1982, accounting for approximately 40% of the monitor coverage in that time. *H. Appx.* 124; *Evidence of Continued Need* 80 (statement of Henderson). During the same period, Alabama had observers for 67 elections and Georgia had observers for 57. *Id.* at 79 (statement of Henderson). In many covered States, the rate of observer coverage since 1982 has met or exceeded the rate of coverage prior to 1982: for example, 62% of the elections in which South Carolina had monitors occurred after 1982; 66% of the elections in which Georgia had monitors occurred after 1982; and 100% of the elections in which North Carolina had monitors occurred after 1982. *Id.* at 78-80.

Observers are often sent to covered jurisdictions precisely because minority voters have faced discrimination in such jurisdictions in recent elections. For example, observers were sent to Greensboro, Alabama, after white election officials attempted, in 1992, to close the doors of polling places to prevent black voters from entering. *H. Appx.* 182-183, 302. In 1990, the Attorney General sent observers to Pike County, Georgia, for a special election because the originally scheduled election was enjoined after the city held an illegal after-hours voter registration session open to white voters only. *H. Appx.* 3533. In 1993, the Attorney General sent monitors to Humphreys County, Mississippi after finding that polling place officials had harassed black voters and denied illiterate black voters assistance from a person of their choice. *H. Appx.* 3578. In 1996, the Attorney General sent observers to Galveston and Jefferson Counties in Texas because minority voters had been harassed by white poll watchers at previous

elections. *H. Appx.* 3642-3643; see also *Northwest Austin I*, 573 F. Supp. 2d at 262-263.[12] And the observers themselves reported numerous voting rights problems, including failure to provide minority language ballots in jurisdictions required to do so, harassment of voters, instances in which minority voters were required to provide identification when white voters were not, and outright discriminatory statements by poll workers. *H. Appx.* 184.

iii. Section 2 Litigation

Congress found that "[e]vidence of continued discrimination includes * * * the continued filing of section 2 cases that originated in covered jurisdictions." 2006 Reauthorization, § 2(b)(4)(C), 120 Stat. 577; see also *id.* § 2(b)(8), 120 Stat. 578 ("Present day discrimination experienced by racial and language minority voters is contained in evidence, including * * * the section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters."). The House Committee also emphasized the importance of reauthorization to protect the gains minority voters had won through Section 2 litigation. 2006 House Report 53.

The record includes a study that compiled a non-comprehensive list of both reported and unreported Section 2 cases with outcomes favorable to minority voters in the eight southern states fully covered by Section 5, plus North Carolina. *H. Appx.* 125-126. The study identified 653 such successful cases affecting 825 different jurisdictions. *Ibid.*; Def. SMF ¶ 71; cf. *History, Scope, & Purpose* 2835-2839, 2846, 2848 (Section 2 cases in which United States has

[12] See also *H. Appx*. 3532 (1996 Johnson County, GA); *id.* at 3534 (1994 Taliaferro County, GA); *id.* at 3536 (1999 Twiggs County, GA); *id*. at 3551 (1994 East Carroll County, LA); *id.* at 3569 (1995 Carroll County, MS); *id*. at 3576 (1993 Holmes County, MS); *id.* at 3583 (1993 Leflore County, MS); *id.* at 3586 (1999 Monroe County, MS); *id.* at 3589 (1995 Noxubee County, MS); *id.* at 3591 (1993 Quitman County, MS); *id*. at 3592 (1993 Scott County, MS); *id*. at 3593 (1993 Sunflower County, MS); *id*. at 3596 (1993 & 1995 Tallahatchie County, MS); *id.* at 3598 (1995 Tunica County, MS); *id.* at 3601 (1992 & 1995 Wilkinson County, MS); *id.* at 3622 (1996 Chester County, SC); *id.* at 3623 (1996 Williamsburg, SC); *id.* at 3641 (1984 Dallas County, TX); *id.* at 3643 (2004 Waller County, TX).

participated). Texas had the largest number, with 206 Section 2 cases with outcomes favorable to minority voters, affecting 197 jurisdictions and 274 county-level voting practices. *H. Appx.* 207, 251. Alabama followed with 192 such cases affecting 275 jurisdictions. *Id.* at 251.

Reported Section 2 cases include widespread judicial findings of serious voting discrimination by whites against minorities in the covered jurisdictions. *H. Appx.* 208. Congress heard testimony that the use of at-large election schemes to dilute minority votes lasted well into the 1980's and 1990's. *The Continuing Need for Section 5* at 11 (statement of McDonald). Witnesses testified about Section 2 cases in which courts found unlawful discrimination against minority voters throughout covered jurisdictions. See, *e.g.*, *H. Appx.* 340 (South Dakota); *The Continuing Need for Section 5* at 4-5 (South Carolina); *History, Scope, & Purpose* 78 (Texas, North Carolina, Alabama); *Evidence of Continued Need* 14 (North Carolina); *H. Appx.* 251, 283-287 (maps and table showing number of county-level voting practices altered as a result of Section 2 litigation in, *e.g.*, Alabama (275), Texas (274), Georgia (76), Mississippi (74), and North Carolina (56)); see also *Northwest Austin I*, 573 F. Supp. 2d at 259-262 (summarizing Section 2 decisions in the legislative record with findings of intentional discrimination).

As Congress heard, this record of reported Section 2 cases understated the extent of ongoing voting discrimination. First, the reported decisions did not include cases that may have had favorable settlements. *Introduction to the Expiring Provisions* 159 (statement of Shaw). Second, the Section 5 preclearance requirement prevented many instances of discrimination in covered jurisdictions, thereby *reducing* the need for Section 2 litigation. *Impact & Effectiveness* 21 (Statement of Ann Marie Tallman); *id.* at 23 (testimony of Rogers).

An example of the interplay between Section 5, Section 2, and other voting laws involved Mississippi's dual registration system, which required citizens to register separately for state and

federal elections. The dual system was a relic of the State's 1890 constitutional convention and was adopted "for the purpose of disfranchising blacks." *H. Appx.* 176. In 1987, a federal court found that the system violated Section 2 of the Voting Rights Act because it was "adopted for a discriminatory purpose and had a discriminatory effect, accounting, in part, for the 25 percentage-point difference in the registration rates of blacks and whites." *Ibid.*; *Evidence of Continued Need* 87-88 (testimony of Rogers); *Mississippi State Chapter, Operation PUSH* v. *Allain*, 674 F. Supp. 1245, 1263-1268 (N.D. Miss. 1987). In the early 1990's, after enactment of the federal National Voter Registration Act, Mississippi reinstituted a dual registration system and refused to submit the change for preclearance. *H. Appx.* 176, 367-368. Private citizens filed a Section 5 enforcement action, and ultimately, a unanimous Supreme Court held that the State was required to submit the change for preclearance. *Id.* at 368; see also *Young* v. *Fordice*, 520 U.S. 273 (1997). When the State finally submitted the change, the Department of Justice objected, "finding that the state's new dual system was racially discriminatory both in purpose and effect." *H. Appx.* 368; Letter from Isabelle Katz Pinzler to Sandra M. Shelson (Sept. 22, 1997), in *History, Scope, & Purpose* 1599-1605. When the state legislature passed a bill to restore a unitary registration system, the Governor vetoed the bill, leading to further private litigation. *H. Appx.* 368. It was not until 1998 – more than a decade after a federal court struck down the first dual registration system – that Mississippi's new dual registration system was abolished by federal court order. *Ibid.*

iv. Registration And Turnout Of Minority Voters

Congress acknowledged that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters," and that this progress was manifested by increased minority voter registration and turnout, and the election of minority officials. 2006

Reauthorization, § 2(b)(1), 120 Stat. 577. "This progress," Congress found, "is the direct result of the Voting Rights Act of 1965." *Ibid.* Based on the record before it, Congress concluded that Section 5 was still needed to protect "the significant gains made by minorities in the last 40 years." *Id.* § 2(b)(9), 120 Stat. 578.

The House Committee found that, while disparities between white and minority registration and turnout had narrowed or even been eliminated in some covered states by 2004, disparities persisted in others. 2006 House Report 12-17, 25-31. In Virginia, white voter registration exceeded black voter registration by 11 points; the gap between white and black turnout was 14 points. *Id.* at 25. In Texas, white voter registration exceeded Hispanic registration by 20 points. *Id.* at 29. In Florida, white registration exceeded Hispanic registration by 31 points; in turnout, the gap was 24 points. *Ibid*.

Moreover, as the district court found in *Northwest Austin I*, the data in the House Report understated the disparities because it compared registration and turnout rates for blacks to rates for whites, rather than for *non-Hispanic* whites. 573 F. Supp. 2d at 248; see Def. SMF ¶¶ 65-68. Including Hispanic turnout in the white turnout rate lowers the white turnout rate because of very low Hispanic turnout. Def. SMF ¶ 65, 68. When the correct data are used, 2004 black registration and turnout rates in the covered States exceed the rates for whites only in Mississippi. Def. SMF ¶ 66. In Texas, for example, according to the House Report, black registration and turnout exceeded white registration and turnout by 7 and 5 percentage points, respectively. 2006 House Report 12. But use of the correct data reverses the gap: white

registration and turnout exceeded black registration and turnout by 5 and 8 points, respectively. Def. SMF ¶ 67.[13]

b. In 2006, Congress Found Ample Evidence That The Same Types And Patterns Of Voting Discrimination That Supported Enactment And Reauthorization Of Section 5 In The Past Continue Today

The evidence before Congress reveals continuing patterns of discrimination in voting against racial and language minorities in covered jurisdictions. The examples encompass numerous covered jurisdictions, minority populations, aspects of the voting system, and methods of discrimination.

i. Evidence Of Vote Suppression

The record before Congress is replete with examples of intimidation, harassment, and misinformation leveled against minority voters in covered jurisdictions. For example, voting officials in Waller County, Texas, went to great lengths to prevent students at the historically black Prairie View A&M University from voting. In the 1970's, a federal court held that students of the school were entitled to vote in local elections. *United States* v. *Texas*, 445 F.

[13] In addition, because many covered jurisdictions fail to comply with the VRA's language-minority provisions, "there remains an enormous gap in political participation" between language minority citizens and citizens whose primary language is English. *Evidence of Continued Need* 13 (testimony of Lee); see *id.* at 68 (statement of Henderson) (violations of language-minority provisions in Florida); *H. Appx.* 309 (Texas); *id*. at 348 (California); *id.* at 1313 (Alaska); *id*. at 1379 (Arizona); *id*. at 4090 (New York). In 1996, only 29% of Latino voters in Texas cast ballots, compared to 52.7% of white voters. Indeed, turnout among Latino citizens in Texas actually decreased slightly between 1980 and 1996. And in 2004, only 41.5% of Latino citizens in Texas were registered to vote, compared to 61.5% of white citizens. 2006 House Report 29; see also 2006 Senate Report 11. Even when citizenship is taken into account, the gap between white and Hispanic registration rates is 16 points. See *Northwest Austin I*, 573 F. Supp. 2d at 248. The situation in Florida, which contains five covered counties, is similar: in 2004, only 38.2% of Latino citizens in Florida were registered to vote, compared to 64.8% of white citizens; and among registered voters, only 34% of Latinos cast a vote in the 2004 election, compared to 58.6% of whites. 2006 House Report 30.

Supp. 1245 (S.D. Tex. 1978), aff'd, 439 U.S. 1105 (1979). In 2004, when two students from Prairie View A&M decided to run for local office, the white district attorney threatened the predominantly black student body with felony prosecution for illegal voting if they voted. *H. Appx.* 185. The district attorney relented after the campus NAACP chapter and several students brought suit. A month before the election, however, county election officials drastically reduced the availability of early voting at the polling place near campus, without submitting the change for preclearance. *Id.* at 185-186. The county officials abandoned the change only after the campus NAACP chapter filed a Section 5 enforcement action. *Id.* at 186.

Alabama adopted state election policies and procedures in the late nineteenth and early twentieth centuries with the intent of preventing black citizens from voting, including a state policy of poll workers' harassing and intimidating black voters, and a state policy of appointing only whites as poll workers. *Renewing The Temporary Provisions* 368-369, 371-372; *Harris* v. *Siegelman*, 695 F. Supp. 517, 522-526 (M.D. Ala. 1988). A district court found that Alabama counties continued to enforce those policies well into the 1980's. *Id*. at 525.

In 2003, a district court found "significant evidence of intimidation and harassment" at the polls in Charleston County, South Carolina, as late as the 2000 election. *United States* v. *Charleston Cnty.*, 316 F.Supp. 2d at 287 n.23. The court based its finding on testimony by a member of the County Election Commission that she received "complaints from African-American voters concerning rude or inappropriate behavior by white poll officials at every election between 1992 and 2002," as well as first person testimony from this and other witnesses about certain poll managers' intimidating or condescending behavior toward African-American voters and poll managers' interference with African-American voters' right to assistance. *Ibid.*

Congress learned that other minority voters continue to face overt discrimination and harassment at their polling places. Testimony recounted examples in which Asian-American voters were told at polling places, "[i]f you can't speak English, you shouldn't be voting." *H. Appx.* 350. A Latina voter in Arizona was told in 2000 to "go back to Mexico and learn English" and was prevented from voting when she told a poll worker that she did not speak English. *H. Appx.* 3980.[14]

The record also includes many examples of efforts to keep minority voters from the polls. In 2004, at some voting precincts in Maricopa County, Arizona, trucks with megaphones warned Latino voters that they would be deported if they had wrongfully registered to vote. *H. Appx.* 3979. Also in 2004, in Charleston County, South Carolina, letters falsely stating they were from the NAACP warned voters that they could be arrested when they attempted to vote if they had outstanding parking tickets or overdue child support payments. *H. Appx.* 3619-3620. And in two Georgia counties, "there were efforts to wrongfully challenge Latino voters en masse in the 2004 election cycle." *Evidence of Continued Need* 93 (statement of Rogers).[15] Witnesses also testified about campaigns to disseminate misinformation to minority voters to prevent them from

[14] See, *e.g.*, *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 House Comm. on the Judiciary*, 109th Cong., 1st Sess. 12-13 (2005) (*Scope & Criteria for Coverage*) (testimony of Jose Garza) (Latino); *The Continuing Need for Section 5* at 8 (statement of McDonald) (Native American); *Voting Rights Act: Section 203 – Bilingual Election Requirements* (Part I): *Hearing Before the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 18 (2005) (testimony of Margaret Fung) (*Section 203*)(Asian American); *H. Appx*. 140 (Arab American); *H. Appx.* 138 (African American). The House Committee concluded that "Latinos, Asian Americans, Alaska Natives, and Native Americans continue to suffer from discrimination in voting." 2006 House Report 45. Congress heard testimony that many of the same sorts of discriminatory activities that have occurred throughout the South to prevent black citizens from voting also "occurred in Texas, but w[ere] targeted to the Mexican-American community." *Scope & Criteria for Coverage* 12 (testimony of Garza).

[15] See *United States* v. *Long Cnty.*, No. 2:06cv40 (S.D. Ga.).

voting. In Louisiana in 2002, fliers were distributed in African-American neighborhoods advertising the wrong date for a runoff election for a United States Senate seat. *H. Appx.* 3548.

Congress also heard evidence that covered jurisdictions have sometimes attempted to prevent minority voters' candidates of choice from becoming candidates at all. In one example, a district court found that an Alabama town intentionally discriminated on the basis of race, in violation of Section 2 of the Act, by refusing to provide candidate forms to black candidates while providing them to white candidates. *Renewing the Temporary Provisions* 376; see *Dillard* v. *Town of N. Johns*, 717 F. Supp. 1471, 1476 (M.D. Ala. 1989).

ii. Evidence Of Vote Dilution

(a) Employment Of Dilutive Techniques

Congress heard multiple examples of discriminatory voting practices implemented to dilute the voting strength of minority citizens, including "[d]iscriminatory annexations and deannexations; pairing Black incumbents in redistricting plans; refusing to draw majority minority districts; * * * refusing to hold elections following a section 5 objection; * * * packing Native American and African-American voters to dilute their influence; and discriminatory voter identification requirements." *Evidence of Continued Need* 20 (testimony of Strossen). Other examples include "racial gerrymandering, at-large (as distinct from district) election systems, anti-single-shot rules, staggered terms, the majority run-off requirement, [and] annexing predominantly white suburbs while excluding minority areas." *H. Appx.* 123.

In 2006, the Supreme Court found that part of a congressional districting plan adopted by the State of Texas in 2003 bore "the mark of intentional discrimination that could give rise to an equal protection violation" by purposefully diluting the voting strength of a cohesive minority community. *LULAC* v. *Perry*, 548 U.S. 399, 440 (2006). The Court found that Texas divided a

cohesive Latino community precisely because that community had become "more politically active," with greater "Spanish-surnamed registration," and was "poised to elect their candidate of choice." *Id.* at 438-439. The State's intentional splitting of that cohesive minority population "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." *Id*. at 439.

In another example, "a federal court determined [in 2004] that South Dakota discriminated against Native-American voters by packing them into a single district to remove their ability to elect a second representative of their choice to the state legislature." *The Continuing Need for Section 5* at 8 (statement of McDonald). The court found that Native-American voters in South Dakota had long been subjected to discrimination, including "efforts on the part of South Dakota political subdivisions to deny Indians the right to participate in the political process" as recently as 1999 and 2003. *Bone Shirt*, 336 F. Supp. 2d at 1023-1024.

In 1982, the Justice Department objected to a Louisiana state house redistricting plan that reduced the number of majority black districts in Orleans Parish from 11 to 7, even though the proportion of black residents in the Parish had increased from 45% to 55% since the previous redistricting. *Evidence of Continued Need* 58-59 (statement of Henderson). In the Ninth Ward of New Orleans, moreover, the proposed plan contained only one majority black district out of five districts total, although the population of the ward was 61% black. *Id.* at 59. Similarly, through the 1980's and early 1990's, five of the seven justices on the Louisiana Supreme Court were elected from single-member districts. The remaining two justices were elected at large from a majority white district comprising Orleans Parish and three surrounding parishes, although the population of Orleans Parish alone was sufficient to create a district equal in size to the other districts in the State. Orleans was the only majority black parish in the district, and the

three surrounding parishes were more than 75% white. Until that system was abandoned in the early 1990's in response to a Section 2 suit, not a single black person was elected to the Supreme Court of Louisiana. See *Chisom* v. *Roemer*, 501 U.S. 380, 384-386 (1991).

Even where many years have elapsed since the adoption of an intentionally discriminatory election system, courts have found that the maintenance of such systems perpetuates the intended discrimination. In 1986, in Alabama, for example, a district court enjoined the continued use of at-large election schemes adopted in the 1960's for discriminatory reasons. *Dillard* v. *Crenshaw Cnty.*, 640 F. Supp. at 1360. Alabama counties employed numbered place laws that had been enacted "with the specific intent of making at-large election systems more effective and efficient instruments for keeping black voters from electing black candidates." *Ibid*. The court found that these laws were "still having their intended racist impact." *Ibid*. Significantly, on at least two recent occasions, Section 5 objections were instrumental in preserving the gains made as a result of the *Dillard* litigation. See pp. 33-34, *supra*.

(b) Widespread Racially Polarized Voting

Congress heard testimony that racially polarized voting is a necessary element of vote dilution, and that, because of polarized voting, majority minority districts are essential to enable minority voters to elect candidates of their choice. See *H. Appx.* 126 (racial bloc voting is "a necessary precondition for vote dilution to occur"); *Evidence of Continued Need* 18 (explaining that because of polarized voting, "minority voters usually cannot elect candidates of choice unless they are a majority or near majority of the electorate") (prepared statement of Lee); *id.* at 88-89 (polarized voting persists and most minority legislators are elected from majority minority districts) (testimony of Rogers); *id*. at 95 (redistricting, gerrymandering, annexations, combined

with racially-polarized voting result in vote dilution) (testimony of Lee); see also *City of Rome*, 446 U.S. at 183-184 (explaining interplay between racial bloc voting, at-large elections, and majority vote requirement). Congress also heard that, in 2006, most minority legislators, both state and federal, had been elected from majority-minority districts. *Evidence of Continued Need* 89 (testimony of Rogers). Without those districts, drawn as a result of the VRA, many of the limited gains in the number of elected minority officials would not have been realized. See *H. Appx.* 365; *The Continuing Need for Section 5* at 49 (testimony of Richard Engstrom). In Mississippi, no black candidate was elected to Congress for the first 85 years of the 20th century, and the "only reason" a black citizen was finally elected to Congress was "the enforcement of Section 5 of the Voting Rights Act by the Justice Department and litigation under" Section 2. *H. Appx.* 365.

Congress found "continued evidence of racially polarized voting in each of the [covered] jurisdictions." 2006 Reauthorization, § 2(b)(3), 120 Stat. 577. The House Committee found that racially polarized voting ranked as "the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process." 2006 House Report 34. The Committee found that "the degree of racially polarized voting in the South is increasing, not decreasing," and that it "shapes electoral competition" in covered jurisdictions. *Ibid*. The Committee noted that in some States covered by Section 5, such as Mississippi, Louisiana, and South Carolina, which have large African-American populations, African-American voters have yet to elect an African American to an at-large statewide office, despite several serious attempts. *Id.* at 33.

Congress also heard that racially polarized voting takes place in both partisan and nonpartisan elections, *H. Appx.* 355 (describing testimony of Rep. Melvin Watt), and at every

level of government, *id*. at 210 (statement of Engstrom). Congress heard that the existence of racial polarization among voters has not abated in the years since the Voting Rights Act was enacted. *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 84 (2005) (*Scope & Criteria for Coverage*) (statement of Armand Derfner).

The prevalence of racial bloc voting has also been documented in numerous judicial decisions throughout covered jurisdictions. See generally *H. Appx.* 404-409. For example, in 2006, the Supreme Court noted the lower court's finding of racially polarized voting "throughout the State" of Texas. *LULAC*, 548 U.S. at 427 (citation omitted). In South Carolina, a three-judge panel found in 2002 that "[v]oting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections." *Colleton Cnty. Council* v. *McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002). And in 2004, a federal court concluded that "substantial evidence, both statistical and lay, demonstrates that voting in South Dakota is racially polarized among whites and Indians" in some districts. *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d at 1036. In addition to these and other examples, Congress heard voluminous testimony about trends in racial bloc voting. Witnesses testified that racially polarized voting not only exists between black and white voters, but encompasses Latino voters, Asian American voters, and Native American voters as well. See, *e.g.*, *The Continuing Need for Section 5* at 50 (testimony of Richard Engstrom); *H. Appx.* 213-214 (describing testimony of Joaquin Avila); *Evidence of Continued Need* 96 (testimony of Rogers); *id*. at 27-28 (statement of Strossen); 2006 House Report 34.[16]

[16] See also *United States* v. *Charleston Cnty.*, 365 F.3d 341, 343 (4th Cir. 2004); *Teague* v. *Attala Cnty.*, 92 F.3d 283, 291 (5th Cir. 1996); *Clark* v. *Calhoun Cnty.*, 88 F.3d 1393, 1397 (5th

The House Committee also found continued disparities between the numbers of white and minority elected officials. 2006 House Report 32-34. As in 1982, the numbers of black state legislators did not reflect the representation of blacks in the populations of the covered States. *Id.* at 32-33. "For example, in States such as Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, where African Americans make up 35 percent of the population, African Americans made up only 20.7 percent of the total number of State legislators." *Id.* at 33. As the Committee noted, the Supreme Court relied upon such disparities in upholding the 1975 Reauthorization of Section 5. *Id.* at 32; see *City of Rome*, 446 U.S. at 180-181 ("[T]hough the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of

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Cir. 1996); *Hines* v. *Mayor & Town Council of Ahoskie*, 998 F.2d 1266, 1269 (4th Cir. 1993); *Westwego Citizens For Better Gov't* v. *City of Westwego*, 946 F.2d 1109, 1118 (5th Cir. 1991); *East Jefferson Coal. for Leadership & Dev.* v. *Jefferson Parish*, 926 F.2d 487, 493 (5th Cir. 1991); *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1237 & n.6 (4th Cir. 1989); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1249 (5th Cir. 1988); *Citizens For a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 499, 504 (5th Cir. 1987); *Jones* v. *City of Lubbock*, 727 F.2d 364, 380 (5th Cir. 1984); *Saint Bernard Citizens For Better Gov't* v. *Saint Bernard Parish Sch. Bd.*, No. Civ. A. 02-2209, 2002 WL 2022589, at *9 (E.D. La. Aug. 26, 2002); *Houston* v. *Lafayette Cnty.*, 20 F. Supp. 2d 996, 1002 (N.D. Miss. 1998); *Cofield* v. *City of LaGrange*, 969 F. Supp. 749, 776 (N.D. Ga. 1997); *LULAC* v. *North East Indep. Sch. Dist.*, 903 F. Supp. 1071, 1081 (W.D. Tex. 1995); *Clark* v. *Roemer*, 777 F. Supp. 445, 456 (M.D. La. 1990); *Ewing* v. *Monroe Cnty.*, 740 F. Supp. 417, 421-424 (N.D. Miss. 1990); *Williams* v. *City of Dallas*, 734 F. Supp. 1317, 1388-1400 (N.D. Tex. 1990); *Gunn* v. *Chickasaw Cnty.*, 705 F. Supp. 315, 320 (N.D. Miss. 1989); *McDaniels* v. *Mehfoud*, 702 F. Supp. 588, 594 (E.D. Va. 1988); *Neal* v. *Coleburn*, 689 F. Supp. 1426, 1431 (E.D. Va. 1988); *Dillard* v. *Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1464 (M.D. Ala. 1988); *Martin* v. *Allain*, 658 F. Supp. 1183, 1202 (S.D. Miss. 1987); *Jackson* v. *Edgefield Cnty.*, 650 F. Supp. 1176, 1198 (D. S.C. 1986); *Dillard* v. *Crenshaw Cnty.*, 640 F. Supp. at 1353; *Clark* v. *Marengo Cnty.*, 623 F. Supp. 33, 37 (S.D. Ala. 1985); *Jordan* v. *Winter*, 604 F. Supp. 807, 812-813 (N.D. Miss. 1984); *Jordan* v. *City of Greenwood*, 599 F. Supp. 397, 402 (N.D. Miss. 1984); *Sierra* v. *El Paso Indep. Sch. Dist.*, 591 F. Supp. 802, 807 (W.D. Tex. 1984); *Major* v. *Treen*, 574 F. Supp. 325, 351-352 (E.D. La. 1983); *Buskey* v. *Oliver*, 565 F. Supp. 1473, 1482 (M.D. Ala. 1983); *Political Civil Voters Org.* v. *City of Terrell*, 565 F. Supp. 338, 348-349 (N.D. Tex. 1983).

being representative of the number of Negroes residing in the covered jurisdictions."). The Committee found that in 2000, only 35 African Americans held statewide office, and many of these officials had been initially appointed to their offices. 2006 House Report 32. The Committee also found substantial disproportions between the numbers of language-minority elected officials and the language-minority populations. *Id.* at 32-33.

3. Section 5 Is An Effective Remedy

a. Section 5 Effectively Deters Covered Jurisdictions From Adopting Discriminatory Voting Changes

The full measure of Section 5's effectiveness must take into account the strong deterrence provided by the statute. See 2006 House Report 24. The House Committee found that this deterrent effect was "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes." *Ibid.* Congress heard substantial testimony that Section 5 has a vital deterrent effect with respect to retrogressive election changes. One witness testified that "one of the most astonishing things about section 5 preclearance * * * [is] its ability to nudge public officials to act in a positive way and to be more inclusive as they go about reaching a consensus in that decision-making process." *Preclearance Standards* 44-45 (testimony of Gray); see also *Northwest Austin I*, 573 F. Supp. 2d at 264-265. [17]

Congress heard numerous specific examples of Section 5's deterrent effect. A witness from Alabama, for instance, testified about three recent incidents in which the existence of Section 5 had led local officials to avoid restricting minority voting rights. In 2005, the Barbour County Commission sought the witness's support in obtaining Section 5 preclearance for a new

[17] See also *Evidence of Continued Need* 88 (statement of Rogers); *H. Appx.* 127; *The Continuing Need for Section 5* at 81 (testimony of Engstrom); *History, Scope, & Purpose* 84 (statement of Earls); *Modern Enforcement of the Voting Rights Act 8* (testimony of Wan Kim).

redistricting plan and for earlier electoral changes that it had not previously submitted. *Preclearance Standards* 45 (testimony of Gray). The proposed plan had seven single-member districts, including three with a majority of African-American voters, one of which had a white incumbent. *Ibid.* The Commission initially considered reducing the African-American voting age population in the district with a white incumbent by 8%, but the witness was able to persuade the Commission not to do so because of its need to obtain Section 5 preclearance. *Ibid.* In Lanett, Alabama, in 2004, a voter complained to the witness that the city clerk had been denying voters the right to pick up absentee ballots, in violation of Alabama voting procedures. *Ibid.* The clerk relented when the witness advised her that her refusal constituted a change in voting procedures that would require preclearance under Section 5. *Ibid.* Afterward, the City elected its first African-American mayor. *Ibid.* And in Evergreen, Alabama, in 2004, the clerk failed to produce a complete and fair voters list until reminded of the city's obligations under the VRA. *Id.* at 46. Evergreen also subsequently elected its first black mayor. *Ibid.*

In Alabama in 2001, Section 5's non-retrogression mandate "was at the top of the list of the legislative guidelines for redistricting." *H. Appx.* 303 (describing testimony of James Blacksher). African-American legislators, using the Section 5 mandate in negotiations with their white colleagues in the Alabama legislature, were able to "maintain the overall electoral power of blacks, while working with white legislators to consciously balance both racial and partisan interests with fair, neutral districting criteria." *Renewing the Temporary Provisions* 385. As a result, Alabama enacted redistricting statutes for its congressional delegation, state legislature, and state board of education without court supervision for the first time since 1901. *Ibid.* In Georgia's 2005 congressional redistricting, the State adopted resolutions recognizing its need to comply with Section 5 and drew a new plan that maintained the black voting age population in

the two majority black districts in the State as well as in the two other districts that had elected black members of Congress. *H. Appx.* 417. In Alaska, the State's post-1990 redistricting plans for its state house and senate were found to violate Section 5 because they reduced the voting strength of Alaska Natives. After the 2000 census, Alaska officials "took specific measures to ensure that [they] did not reduce Alaska Native voting strength in districts where Alaska Natives had a reasonable opportunity to elect candidates of their choice." *Evidence of Continued Need* 92 (statement of Rogers). Similarly, the Fredericksburg, Virginia, City Council was preparing to dismantle the only majority African-American district in the city in 2002 until the City Attorney warned the Council that such an action would violate Section 5. *Ibid.*; *H. Appx.* 362-363 (describing testimony of Kent Willis).

b. Section 2 Alone Is Inadequate

Congress also heard extensive testimony that Section 2 alone is an inadequate remedy to address discrimination in voting. Section 2 and Section 5 "are meant to work hand in hand," *History, Scope, & Purpose* 92 (testimony of Perales), and neither is sufficient by itself. In upholding the enactment of Section 5, the Supreme Court explained that other legislative remedies had proved inadequate at protecting the voting rights of racial and language minority citizens. See *South Carolina*, 383 U.S. at 309; *City of Rome*, 446 U.S. at 174. The limitations of Section 2 similarly demonstrate the continued need for Section 5's preclearance device.

Witnesses identified three major shortcomings of Section 2 litigation that are not present in Section 5 preclearance. First, Section 2 is purely an after-the-fact remedy, available only to challenge voting practices and procedures that are already in place. Cf. *South Carolina*, 383 U.S. at 314 (case-by-case litigation ineffective); *City of Rome*, 446 U.S. at 174 (same). Most Section 2 actions take two to five years to make their way through the court system, during which time

the challenged practice remains in place. *History, Scope, & Purpose* 101 (testimony of Earls). If, during that time, a candidate is elected under what turns out to be an illegal voting scheme, that person nevertheless will enjoy the significant advantage that comes with incumbency. *Impact & Effectiveness* 13-14 (testimony of Jack Kemp); *Evidence of Continued Need* 97 (testimony of Rogers). In some cases, an illegal voting practice must remain in effect for several election cycles before a Section 2 plaintiff can gather enough evidence to demonstrate its discriminatory effect. *History, Scope, & Purpose* 92 (testimony of Perales). In contrast, under Section 5, discriminatory voting practices are forestalled through a system that takes at most several months. See *id.* at 101 (testimony of Perales).

Second, Section 2 places a heavy financial burden on minority voters challenging illegal election practices and schemes. See *History, Scope, & Purpose* 97 (testimony of Perales); *id*. at 92 (testimony of Perales). Section 5, on the other hand, places the comparatively small financial burden associated with preclearance on covered jurisdictions. See *id.* at 79 (testimony of Earls). This shifting of financial burden is especially important "in local communities and particularly in rural areas, where minority voters are finally having a voice on school boards, county commissions, city councils, water districts and the like." *Id.* at 84 (statement of Earls). In such areas, voters generally "do not have access to the means to bring litigation under Section 2 of the Act, yet they are often the most vulnerable to discriminatory practices." *Ibid*. Moreover, the General Counsel of North Carolina's Board of Elections testified that complying with Section 5's preclearance scheme is much less burdensome in terms of "costs, time, and labor" for covered jurisdictions than defending against Section 2 claims. *Policy Perspectives & Views from the Field* 120 (statement of Donald M. Wright).

Finally, Section 2 leaves the burden of proof on minority plaintiffs with respect to demonstrating discriminatory effect, while Section 5 places the burden on jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *History, Scope, & Purpose* 83 (statement of Earls); *Evidence of Continued Need* 97 (testimony of Rogers). Jurisdictions are in a much better position than individual citizens to amass information about the potentially discriminatory effect or purpose of voting procedures or systems, without incurring undue expense.

C. The Evidence Before Congress Demonstrates That The 2006 Reauthorization Of Section 5 Is Justified By Current Needs

As set forth above, the legislative record plainly supports Congress's finding that the Section 5 preclearance requirement for covered jurisdictions remains necessary. See 2006 Reauthorization, § 2(b)(9) (finding that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years"). Plaintiff's contentions to the contrary are wrong.

1. First, plaintiff erroneously argues that the "second generation barriers" that Congress found are nothing like the voting discrimination that led Congress to enact the VRA in 1965. Pl. Mem. 6. This argument misconstrues the very purpose of Section 5 – to prevent the implementation of all manner of electoral devices with the purpose or effect of restricting minority voting rights. Moreover, there is nothing new about the dilutive techniques and other means of minimizing the effectiveness of minority voters that Congress relied upon in 2006. To be sure, discriminatory administration of voting tests was "the principal method used to bar Negroes from the polls" when the VRA was enacted. *South Carolina*, 383 U.S. at 312. But, as the Court recognized in upholding the Act, southern States had long used a broad range of

techniques, including racial gerrymandering and manipulation of boundaries, to restrict the voting rights of black citizens. *Id.* at 311-312 (citing, *inter alia*, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)). And the Court soon rejected efforts to limit the reach of Section 5 to laws affecting voter registration or turnout. In *Allen*, 393 U.S. 544, the Court ruled that Section 5 applied to a Mississippi statute, enacted in January 1966, that permitted counties to institute at-large election of county supervisors, provided for appointment of previously elected superintendents of education, and imposed restrictions on candidates' ability to run as independents. *Id.* at 550-551, 563-569; see also *Perkins* v. *Matthews*, 400 U.S. 379, 387-395 (1971) (holding that Section 5 applies to changes in polling place locations, changes in municipal boundaries effected by annexations, and changes from ward to at-large elections).

In *Dillard* v. *Crenshaw County*, 640 F. Supp. at 1358, the district court explained how Alabama counties switched back and forth between at-large and district elections in the nineteenth and twentieth centuries, depending on the strength of the black vote. In 1894, after white Democrats had regained power and "redeemed" the State, but black voters had not yet been fully disenfranchised, many Alabama counties adopted at-large elections in order to dilute the black vote. *Ibid.* Later, the district court found, after the State's 1901 Constitutional Convention had completed the process of disenfranchising black voters, Alabama "counties increasingly moved toward single-member districts; since most black persons could no longer vote, the use of single-member districts was obviously fairly 'safe.'" *Ibid.* Even later, after the white primary was eliminated and Congress enacted voting rights legislation in 1957, 1964, and 1965, Alabama counties, with the authorization of the State legislature, once again adopted at-large election schemes. *Id.* at 1359. "Since black voters once again posed a threat to total control of the electoral process by white persons, single-member districts were abandoned and

at-large systems were put into place." *Ibid.* During this same era, the Alabama legislature authorized the City of Tuskegee to redefine its municipal boundaries through annexations and de-annexations in order to eliminate all but a few of the black voters in the City. *Gomillion* v. *Lightfoot*, 364 U.S. at 340-341; see *Renewing The Temporary Provisions* 372-373 (describing *Dillard* court's findings); *id.* at 370 (explaining how the City of Mobile used at-large elections to dilute the black vote in 1911).

Similarly, in 1966, in the wake of the enactment of the VRA, both the Mississippi and Georgia legislatures adopted statutes that facilitated vote dilution by local jurisdictions in their respective States. See *Allen*, 393 U.S. at 550 (describing legislation authorizing Mississippi counties to change from single-member districts to at-large election of County Commissioners); *City of Rome*, 446 U.S. at 160 (describing state legislation altering the method of electing the City Commission by reducing the number of wards, imposing a majority vote requirement, and adopting staggered terms and numbered posts); see *Perkins*, 400 U.S. at 389 (noting testimony before Congress that "State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the [VRA] which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters") (quoting *Hearings on Voting Rights Act Extension before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 17 (1969) (remarks of Mr. Glickstein).

Moreover, Congress relied upon evidence of such dilutive techniques in reauthorizing Section 5 in 1970, 1975, and 1982, finding that such techniques became more common as minority registration and turnout rates increased. See pp. 21-23, *supra*. The Supreme Court expressly relied upon these findings in *City of Rome*: "As registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing

minority voting strength. The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Secton [*sic*] 5 which serves to insure that that progress not be destroyed through new procedures and techniques." 446 U.S. at 181 (quoting 1982 House Committee Report 10). Indeed, each of the cases in which the Court upheld the 1970, 1975, and 1982 Reauthorizations involved dilutive mechanisms. See *Georgia*, 411 U.S. at 528-529 (State legislative redistricting plan with multi-member districts and numbered posts); *City of Rome*, 446 U.S. at 160 (reduction in number of districts, numbered posts, majority vote requirement, staggered terms, annexations); *Lopez*, 525 U.S. at 271-273 (change from multiple districts to single district).

Plaintiff also rejects the significance of Congress's finding that racially polarized voting persists in the covered jurisdictions, arguing that polarized voting is not evidence of state-sponsored intentional discrimination. Pl. Mem. 31. But this contention misses the point; racially polarized voting is significant because it enables vote dilution. See pp. 49-50, *supra*. Correspondingly, the enactment of dilutive mechanisms by covered jurisdictions effectuate and enforce the private discrimination evidenced by racial bloc voting.

Thus, the evidence Congress heard in 2006 that covered jurisdictions continued to use dilutive techniques; that vote dilution continued to be the subject of Section 5 objections, declaratory judgment actions, and Section 2 litigation; and that racially polarized voting persists in the covered jurisdictions (see pp. 25-30, 32-34, 36-37, 47-53, *supra*), supports its finding that Section 5 remains necessary to protect the voting rights of minority citizens in covered jurisdictions.

2. Second, plaintiff discounts the significance of the Attorney General's objections to voting changes submitted for Section 5 review between 1982 and 2006. Pl. Mem. 28, 31-34.

Plaintiff notes that the number and rate of objections for Alabama declined during the period 1982 to 2004, compared to 1965 to 1982, and that the rate of objections has declined overall. Pl. Mem. 28. But, as the district court pointed out in *Northwest Austin I*, 573 F. Supp. 2d at 249, the Supreme Court rejected a similar argument when it upheld the 1975 Reauthorization in *City of Rome*. There, the City informed the Court that the objection rate in 1978 had fallen to 0.8%, compared to a rate of 3 to 4% between 1965 and 1970. *Ibid.* (citing Appellant's Jurisdictional Statement, *City of Rome* v. *United States*, No. 78-1840 (May 2, 1979)). The Court nonetheless concluded that the Attorney General's recent objections documented the continued need for preclearance. *City of Rome*, 446 U.S. at 181. Further, while there were fewer objections to submissions originating in Alabama since 1982, in nine States, the rate of objections increased after 1982. 2006 House Report 73; see pp. 25-26, *supra*.

Moreover, as Congress learned, the number of Attorney General objections alone does not provide a complete picture of the need for or effectiveness of Section 5. See pp. 35-38, *supra*. Each objection may encompass several voting changes; other discriminatory changes are blocked by declaratory judgment actions; and many voting changes are withdrawn or altered by jurisdictions following requests for more information by the Department of Justice. Thus, between 1982 and 2004, more than 1,100 discriminatory voting changes were blocked by the Department of Justice and by three-judge panels of this court, and another 200 voting changes were withdrawn by the submitting jurisdictions. See pp. 38, *supra*. Between 1990 and 2005, more than 800 submissions were affected by requests for more information. See p. 35, *supra*. Whatever the *rate* of objections, Section 5 prevented the implementation of an enormous number of discriminatory voting changes during this period.

Finally, Congress heard testimony that Section 5 effectively deters covered jurisdictions from adopting discriminatory electoral changes, including testimony about specific, recent, examples in which the mere existence of the Section 5 non-retrogression standard prevented the denial of voting rights to minority citizens. See pp. 53-55, *supra*. In fact, the House Committee found that this deterrent effect was "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes." 2006 House Report 24.

Thus, Congress's determination that Section 5 remains necessary is supported by the extensive evidence that discriminatory voting practices have been prevented not only by objections interposed by the Attorney General, but also by changes blocked by declaratory judgment actions, changes withdrawn or altered by jurisdictions, and changes that were never adopted at all because of the existence of Section 5.

3. Third, plaintiff contends that the legislative record lacks sufficient evidence of intentional voting discrimination. Pl. Mem. 30-35. To the contrary, the record included abundant evidence of intentional discrimination. Many of the Attorney General's objections to voting changes were based on findings of intentional discrimination. Indeed, testimony and studies demonstrate that the number of objections based on discriminatory purpose *increased* during the 1980's and 1990's. See pp. 27-31, *supra*.

Similarly, Congress heard evidence of the number of Section 2 cases that resulted in favorable outcomes for minority plaintiffs, including many with findings of intentional discrimination. See pp. 40-42, 44-49, *supra*. Plaintiff notes that Congress identified only 12 published decisions finding intentional racial discrimination by covered jurisdictions between 1982 and 2006. Pl. Mem. 34. But there is no reason to limit consideration to *reported* decisions. Congress also received the results of a study of 651 successful, reported and unreported Section

2 decisions from eight covered States and North Carolina, affecting 825 different jurisdictions, including 192 cases from Alabama. *H. Appx.* 125-126; see p. 40-41, *supra*. As plaintiff notes, a Section 2 violation does not necessarily require a finding of intentional discrimination. Pl. Mem. 34. But, as Congress heard, many of the identified cases did involve such findings. See also *Northwest Austin I*, 573 F. Supp. 2d at 258-262. Plaintiff also seeks to minimize the significance of the unreported cases that were resolved through settlements by suggesting that jurisdictions that enter into such settlements "are looking to comply with the Fifteenth Amendment – not discriminate against voters on the basis of race." Pl. Mem. 34. Of course, if these jurisdictions truly had wished to avoid discrimination, they would have done so before being sued.

4. Finally, Section 5 is limited in significant ways. First, Section 5 has always had, and continues to have, a built-in expiration date. That Congress has extended its life on four separate occasions demonstrates that the temporal limit works, ensuring that Section 5 remains in effect only as long as necessary for securing the voting rights of minority citizens in this country. The 2006 Reauthorization extended the temporary provisions for 25 years, and also directed Congress to reconsider the provisions after 15 years. 2006 Reauthorization, § 4(a)(7) and (8). In 2006, after reexamining the state of voting rights in the last few years, Congress found that Section 5 preclearance was still necessary to preserve minority voting rights. 2006 House Reauthorization, § 2(b); see 2006 House Report 6. That finding was rational and is entitled to deference. *South Carolina*, 383 U.S. at 324; cf. *Eldred* v. *Ashcroft*, 537 U.S. 186, 204-205 (2003) ("defer[ring] substantially" to Congress's judgment on appropriate length of copyright protection). Moreover, Congress understood that directing reconsideration after 15 years and extending Section 5 for an additional 25 years would permit Congress to rely on data from two more decennial redistricting rounds in evaluating whether to further extend the Act. *Introduction*

to the Expiring Provisions 167 (statement of Shaw). After Congress determined that there remains a vital need for Section 5, it was reasonable to extend the provision for a period of time long enough to allow Congress to collect sufficient information to make a careful determination about whether the need for Section 5 continues.

Second, the evidence presented to Congress demonstrates that compliance with Section 5 is not unduly burdensome. Congress heard that the "the task of preparing the [Section 5] submission is usually a fraction of the work involved in making the voting change," and that the preclearance process itself "is probably the most streamlined administrative process known to the federal government." *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 182 (2006) (statement of Armand Derfner) (*Benefits & Costs of Section 5 Pre-clearance*); see also *Policy Perspectives & Views from the Field* 12 (statement of Wright) ("[T]he way preclearance is administered by the Department of Justice is very efficient."). The Department of Justice has taken a number of steps to make the administrative preclearance process as easy as possible for covered jurisdictions, providing assistance to submitting officials on the submission process, considering submissions on an expedited basis when requested to do so by jurisdictions, and receiving submissions by overnight mail, by fax, and by email, and most recently through a completely web-based submission process. See Def. SMF ¶¶ 31-41.

The General Counsel of the North Carolina Board of Elections testified that the preclearance process is not a burden on the average covered jurisdiction; that he "never had any difficulty getting expedited pre-clearance or any reasonable cooperation from the U.S. Department of Justice," *Policy Perspectives & Views from the Field* 11 (statement of Wright); that he "could probably knock out a pre-clearance on a routine matter in a half an hour," *id.* at

12; and that, in his "national meetings with other election administrators," he had "never heard a complaint" about the Department's handling of "the day-to-day submissions," *Ibid*.; see also *History, Scope, & Purpose* 79 (testimony of Earls).

Third, as explained in more detail below, Section 5 is applicable only to those jurisdictions with the worst historical records of voting discrimination. See *South Carolina*, 383 U.S. at 328. And the bailout mechanism permits jurisdictions to terminate their coverage when there is no longer a need for preclearance. *Id.* at 332; see pp. 69-74, *infra*.

II. SECTION 4(b) IS CONSTITUTIONAL

1. Congress designed the coverage formula in the 1965 Act to encompass the jurisdictions with the worst records of voting discrimination. See p. 2, *supra*. In *South Carolina*, the Court specifically upheld the formula because it encompassed the States and political subdivisions for which there was "reliable evidence of voting discrimination" and because the formula "was relevant to the problem of voting discrimination." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 329 (1966). "Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by s 4(b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment." *Ibid.*; see *id.* at 330 (coverage formula is "rational in both practice and theory" because both the use of tests and other devices as prerequisites for voter registration and low rates of registration and turnout are "relevant to voting discrimination"); see *United States* v. *Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 119 (1978) (coverage formula was based on Congress's finding that "that there was a high probability of pervasive racial discrimination in voting in areas that employed literacy tests or similar voting qualifications and that, in addition, had low voter turnouts or registration figures").

The Court found it "irrelevant" that the formula omitted some jurisdictions for which there was evidence of voting discrimination, but that had not used tests or devices to discriminate. *South Carolina*, 383 U.S. at 331. "[W]idespread and persistent discrimination in voting during recent years," the Court explained, "has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed." *Ibid.* (footnote omitted). The Court also noted the availability of the bailout mechanism as a remedy for possible overbreadth, permitting jurisdictions that were covered by the formula, but that had not used tests or other devices to discriminate, to avoid coverage. *Ibid.*

As explained above (pp. 57-60, *supra*), although the use of tests and devices to limit directly the ability of minority citizens to register and vote had been the primary means of voting discrimination when the VRA was passed, covered jurisdictions had long used and continued to adopt other means of limiting minority voting rights. Thus, the Court soon held that the preclearance requirements of Section 5 extended more broadly to include electoral practices such as at-large elections, redistricting, annexations, changes in polling places, and other mechanisms that might limit or dilute minority voting rights. Similarly, the Court reaffirmed the constitutionality of Section 5 in *City of Rome* and *Lopez*, without any suggestion that the coverage formula was deficient, even though in both instances the legislative record indicated that minority registration and turnout – the indicia most directly related to the coverage formula – had increased "dramatically." *City of Rome* v. *United States*, 446 U.S. 156, 180 (1980); see *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); see pp. 21-23, 59-60, *supra*.

2. When Congress reauthorized the VRA in 2006, Congress simply continued to apply Section 5 to the same covered jurisdictions that had been designated pursuant to the 1965 Act and the 1970 and 1975 Reauthorizations. This extension was appropriate Fifteenth Amendment

legislation for two reasons. First, it applies Section 5 to the jurisdictions where, historically, "voting discrimination has been most flagrant." *South Carolina*, 383 U.S. at 315. Second, when it reauthorized Section 5 in 2006, Congress heard abundant evidence and specifically found that Section 5 preclearance was still necessary in the covered jurisdictions. See 2006 Reauthorization, § 2(b)(3), (4), (5), and (8); pp. 23-56, *supra*. Moreover, studies in the legislative record demonstrated, and a recent study confirms (p. 68, *infra*), that voting discrimination, as measured by successful Section 2 litigation, is much more prevalent in covered than in non-covered jurisdictions.

Plaintiff nonetheless argues that the coverage formula is not appropriate enforcement legislation because the evidence before Congress in 2006 is not sufficiently related to the two factors in the coverage formula: the use of discriminatory tests and devices, and low turnout and registration. Pl. Mem. 35-39. But, as the above discussion indicates, the original coverage formula simply identified those jurisdictions where "there was a high probability of pervasive racial discrimination in voting." *Sheffield*, 435 U.S. at 119. When the VRA was enacted, and when the Court first upheld it, there was a close correlation between the coverage formula and "the principal method used to bar Negroes from the polls." *South Carolina*, 383 U.S. at 312. But that correlation had become attenuated as Congress extended the Act and as the Court upheld it. That should be no surprise, since the VRA banned the use of discriminatory tests in the covered jurisdictions. 1965 Act, § 4(a), 79 Stat. 438. Moreover, the purpose of Section 5 was to prohibit covered jurisdictions from enacting "new rules of various kinds for the sole purpose of perpetuating voting discrimination." *South Carolina*, 383 U.S. at 335. Indeed, Congress proved prescient in its expectation that these jurisdictions "might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself."

Ibid. In the wake the enactment of the VRA, Alabama, Mississippi, and Georgia all enacted electoral changes that would have diluted minority voting rights. See p. 59, *supra.* Thus, when Congress reauthorized the VRA in 1970, 1975, and 1982, and when the Court upheld those Reauthorizations, both relied upon evidence of a wide variety of discriminatory voting practices in the covered jurisdictions. See *City of Rome*, 446 U.S. 156, 180-181 (1980); pp. 20-23, 59-60, *supra*. Congress relied upon similar evidence in 2006. And that evidence justifies continued application of Section 5 to the jurisdictions covered under the formula in Section 4(b).

Plaintiff erroneously argues that the legislative record fails to support a finding that voting discrimination is more prevalent in covered than in non-covered jurisdictions. Pl. Mem. 39-41. In particular, plaintiff contends that "Section 2 litigation is equally distributed between covered and non-covered jurisdictions." Pl. Mem. 40. In fact, the legislative record revealed proportionally *more* successful Section 2 litigation in covered jurisdictions than in non-covered jurisdictions. Congress examined a study, conducted by the University of Michigan Voting Rights Initiative, of reported decisions in Section 2 suits filed throughout the country between 1982 and 2005. *Impact & Effectiveness* 964-1124. The study revealed that 64, or 56% of the 114 cases with outcomes favorable to minority voters were filed in jurisdictions covered by Section 5, although those jurisdictions comprised less than one-quarter of the nation's population in 2000. *Impact & Effectiveness* 974; *H. Appx.* 202-203. Thus, covered jurisdictions were subject to more than twice their proportional share of plaintiffs' successful suits in reported Section 2 decisions. A more comprehensive study conducted since the 2006 Reauthorization indicates that this differential is even greater when unreported outcomes are included: 81% of the successful Section 2 cases resolved between 1982 and 2005 occurred in the covered jurisdictions. Def. SMF ¶¶ 69-76. Moreover, such studies of Section 2 actions do not account

for discriminatory voting practices in the covered jurisdictions that were deterred, blocked, or withdrawn as a result of the Section 5 preclearance process. See pp. 25-38, 53-55, *supra*. The very existence of the Section 5 preclearance process, in other words, inevitably reduces the need for Section 2 litigation in the covered jurisdictions.

3. The bailout mechanism provides a remedy for any overbreadth in the coverage formula. See *South Carolina*, 383 U.S. at 331-332. Initially, bailout was only available to jurisdictions that could prove they had not used tests or devices for a discriminatory purpose or with a discriminatory effect during the previous five years. See 1965 Act, § 4(a), 79 Stat. 438. When the VRA was reauthorized in 1970 and 1975, the time period was extended to 10 and 17 years, respectively. See 1970 Reauthorization, § 3, 84 Stat. 315; 1975 Reauthorization, § 101, 89 Stat. 400. In 1982, Congress rewrote the bailout provision to enable jurisdictions to bail out if they had complied fully with the VRA and had not engaged in voting discrimination for a period of ten years. 1982 Reauthorization, § 2(b)(5)(B), 96 Stat. 131-133. The 1982 Reauthorization also significantly expanded the jurisdictions eligible to bailout to include subjurisdictions within covered States. *Ibid.* These changes were enacted to provide "incentives to the covered jurisdictions to comply with laws protecting voting rights of minorities, and to make changes in their existing voting practices and methods of election." 1981 House Report 32.

Covered jurisdictions wishing to terminate their coverage under Section 5 may do so by bringing a declaratory judgment action in this court. 42 U.S.C. 1973b(a)(1). To obtain a declaratory judgment, the jurisdiction must show that it and all governmental units within its boundaries have met the following requirements during the previous ten years:

- No test or device has been used within the jurisdiction for the purpose or with the effect of voting discrimination;

- All changes affecting voting have been reviewed under Section 5 prior to their implementation;

- No change affecting voting has been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory judgment from the District of Columbia district court;

- There have been no adverse judgments in lawsuits alleging voting discrimination;

- There have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice;

- There are no pending lawsuits that allege voting discrimination;

- Federal examiners have not been assigned;

- There have been no violations of the Constitution or federal, state or local laws with respect to voting discrimination unless the jurisdiction establishes that any such violations were trivial, were promptly corrected, and were not repeated.

See 42 U.S.C. 1973b(a)(1) and (3). In addition, the jurisdiction must demonstrate that it has eliminated any voting procedures and methods of elections that inhibit or dilute equal access to the electoral process; that it has made constructive efforts, *e.g.*, to eliminate intimidation and harassment of persons seeking to register and vote, to expand opportunities for voter participation, and to appoint minority officials throughout the jurisdiction and at all levels of the stages of the electoral process. 42 U.S.C. 1973b(a)(1)(F); see Def. SMF ¶¶ 46-52 .

The Supreme Court has indicated that the bailout provision should be interpreted broadly to enable jurisdictions that have complied with the VRA to terminate their coverage under Section 5. *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2514 (2009) (*Northwest Austin II*) (adopting "a broader reading of the bailout provision" in light of "specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns"). Since the *Northwest Austin* decision, the Attorney General has faithfully applied the bailout

criteria with that directive in mind, and has consented to bailout by three smaller jurisdictions including the Northwest Austin District itself. Def. SMF ¶¶ 62-63.

The bailout criteria correspond closely to the very purpose of the Section 5 preclearance requirement. The absence for ten years of discriminatory tests or devices, Section 5 objections, unprecleared electoral changes, the assignment of federal examiners or observers, and other discriminatory voting practices are good indicators that preclearance is no longer necessary. Moreover, the criteria include an exception for violations that were "trivial, were promptly corrected, and were not repeated." 42 U.S.C. 1973b(a)(3).

Requiring jurisdictions to demonstrate that governmental units within their boundaries have fully complied with Section 5 and have not discriminated is a reasonable requirement. As the Senate Committee Report on the 1982 Reauthorization explained, States retain "significant statutory and practical control" over the election practices of counties and other subjuridictions. 1982 Senate Report 56. In Alabama, for example, both the structure of county and municipal governments and the election procedures for counties and municipalities are governed by state statutes. See, *e.g.*, Ala. Code § 11-3-1 (1975) (establishing county commissions); *id.* § 11-43-2 (providing for election of mayors and city councilmen); *id.* § 17-1-3(a) (designating Secretary of State as chief election official for the State); *id.* § 17-3 (establishing standards and procedures for voter registration). Moreover, "the Fifteenth Amendment places responsibility on the states for protecting voting rights." 1982 Senate Report 56; see U.S. Const. Amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by * * * any *State* on account of race, color, or previous condition of servitude.") (emphasis added). Counties also often have substantial control over the conduct of elections within their boundaries, including municipal elections. In Alabama, for example, voter registration and elections are conducted by

county officials. See, *e.g.*, Ala. Code § 17-3-2 (1975) (registration conducted by county board of registrars); *id.* § 17-8-1 (appointment of election officials by county appointing board).

Further, the bailout provision creates a workable process for jurisdictions seeking to terminate coverage. The statute authorizes the Attorney General to consent to entry of a declaratory judgment if "he is satisfied that the State or political subdivision has complied with the requirements of" the bailout provision. 42 U.S.C. 1973b(a)(9). Since 1965, 57 (6.04%) of the approximately 943 county, parish and township-level jurisdictions that were originally covered by Section 4, have successfully bailed out and maintained their bailed out status. Def. SMF ¶ 53. One state and several other jurisdictions also successfully bailed out and were later re-covered by new coverage determinations or by new court findings. Def. SMF ¶ 53. Overall, since 1965, there have been 44 cases filed in which bailout was sought under Section 4(a), and 36 cases have resulted in a grant of bailout, all with the consent of the United States (with one having been rescinded by court order). Def. SMF ¶ 53. Since the new bailout standard went into effect in 1984, the United States has consented to bailout in 21 cases – including 18 cases involving county level jurisdictions (with 51 subjurisdictions) and 3 cases involving smaller jurisdictions, for a total of 72 jurisdictions granted bailout since 1984. Def. SMF ¶ 54. The Attorney General has consented to every bailout action filed by a political subjurisdiction since 1984, the effective date of the revised bailout provision. Def. SMF ¶ 55. The Attorney General is currently reviewing the informal bailout requests of numerous jurisdictions. Def. SMF ¶ 56.

Congress heard testimony from an attorney who, at the time of his testimony, had represented nine of the political jurisdictions that had successfully terminated coverage under the revised bailout provisions since 1984. *Scope & Criteria for Coverage* 87-89 (testimony of Hebert); *id*. at 90 (statement of Hebert). The attorney reported that the average cost of obtaining

bailout was approximately $5,000, and that most of the bailout criteria "are easily proven for jurisdictions that do not discriminate in their voting practices." *Id.* at 90; *H. Appx.* 2683. He testified that proving compliance with Section 5 was believed to be the most difficult criterion, but that this requirement had not been a barrier in most cases because of the Attorney General's use of the exception for trivial violations. *Scope & Criteria for Coverage* 91. Where a jurisdiction or one of the governmental units within its territory had inadvertently neglected to submit a voting change or changes, he explained, the Department of Justice would nonetheless consent to bailout once the changes had been submitted and cleared. *Ibid.* While this process was sometimes time-consuming, "it ensures full compliance with the Act and is faithful to the language and spirit of the law." *Ibid.*; see *H. Appx.* 2677-2682 (describing the bailout process). In an article submitted for the record, the attorney described the experience of Shenandoah County, Virginia, which discovered, in the process of seeking to bailout, that a number of municipalities within the County had implemented about two dozen voting changes without first submitting them for Section 5 preclearance. *H. Appx.* 2679. Once the municipalities submitted the changes and they were cleared, the Attorney General consented to bailout and the County successfully terminated its coverage. *Ibid.* The Attorney General has consented to bailout by at least two other Virginia counties where jurisdictions had implemented isolated voting changes prior to submitting them for Section 5 review. Def. SMF ¶ 60.

Plaintiff contends that it is ineligible to bailout because it conducted a referendum election under a law that had not been precleared, and because the Attorney General objected to electoral changes submitted by the City of Calera. Pl. Mem. 41 n.8. Because the Attorney General did not conduct discovery in this case, and has not conducted the usual investigation that occurs when a jurisdiction seeks to bail out, the Attorney General does not have sufficient

information to state definitively whether he would consent if plaintiff sought to terminate coverage. The Attorney General precleared the law providing for the referendum election once it was submitted. Def. SMF ¶ 59. Based upon the facts known to the Attorney General at this time, that isolated instance could fall within the exception for trivial violations and thus would not be sufficient, by itself, to bar plaintiff from terminating coverage.

The City of Calera's failure to comply with Section 5, on the other hand, is far from trivial and would prevent the City from terminating its coverage. The City failed to submit 177 annexations adopted over a period of 12 years. Def. SMF ¶ 21. In 2008, the City conducted a municipal election in defiance of an objection from the Attorney General to a redistricting plan that eliminated the only majority black district in the City. Def. SMF ¶¶ 21-25. Moreover, it adopted that redistricting plan shortly after it was released from an injunction in the *Dillard* litigation, pursuant to which it had adopted the majority black district. Def. SMF ¶¶ 20-21.

It is not clear, however, what, if any, involvement Shelby County had in any of these events or whether they should prevent plaintiff from bailing out. For example, did plaintiff consent to the annexations? Did it have any knowledge of, or input into, Calera's failure to submit these changes over the fifteen year period? Did the County have any involvement in Calera's adoption of the redistricting plan or its decision to implement the plan in the face of the Attorney General's objection? The answers to these questions would be relevant to the Attorney General's determination whether the County is eligible to bail out.

4. Finally, plaintiff contends that the coverage formula violates the principle of equal sovereignty among the States because it treats some States differently from others. Pl. Mem. 43 (citing *Northwest Austin II*, 129 S. Ct. at 2512). Congress found that voting discrimination continues to be a problem in the covered jurisdictions. The legislative record supports a

conclusion that the problem of voting discrimination is more common in those jurisdictions, with the covered States subject to more than twice their proportional share of successful Section 2 lawsuits. "In acceptable legislative fashion," *South Carolina*, 383 U.S. at 328, Congress chose, as it did in 1965, 1972, 1975, and 1982, to limit the requirements of Section 5 to those jurisdictions. Thus, the "statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Northwest Austin II*, 129 S. Ct. at 2512. As the Court held in *South Carolina*, "[t]he doctrine of equality of States * * * does not bar this approach." 383 U.S. at 328.

CONCLUSION

The Attorney General's cross-motion for summary judgment should be granted and plaintiff's motion for summary judgment should be denied.

Date: November 15, 2010

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA, Plaintiff, v. ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant	Civil Action No. 1:10-cv-00651-JDB

DEFENDANT'S STATEMENT OF UNCONTESTED MATERIAL FACTS

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Pursuant to Local Civil Rule 7(h)(1), Defendant Attorney General of the United States submits the following statement of material facts as to which the United States contends there is no genuine issue.

Plaintiff's Background Information

1. Plaintiff, Shelby County, is a county in the State of Alabama. *See* Compl. ¶ 2 (Dkt. 1).
2. Shelby County is located just south of Alabama's largest county (Jefferson County) and the State's largest municipality (Birmingham). A portion of the City of Birmingham is located within Shelby County. *See* Declaration of Dr. Peyton McCrary ("McCrary Decl.") ¶ 8 (Ex. 1).
3. According to the 2000 Census, Shelby County had a total population of 143,293, including 126,951 white (88.6%), 10,570 African American (7.4%), 2,910 Hispanic (2.0%), and 1,465 Asian (1.0%). *See* McCrary Decl. ¶ 9 (Ex. 1).
4. According to the 2006-2008 Census American Community Survey (ACS) estimates, Shelby County's population is 183,014, including 153,649 white (84.0%), 17,621 African American (9.6%), 6,674 Hispanic (3.6%), and 2,894 Asian (1.6%). *See* McCrary Decl. ¶ 10 (Ex. 1).
5. Shelby County's population has grown dramatically since the 2000 Census (an increase of 39,721 persons or 27.7% from its 2000 population). *See* McCrary Decl. ¶ 11 (Ex. 1).

Plaintiff's Section 5 History and Voting Rights Litigation

6. The State of Alabama became wholly covered by the temporary provisions of the Voting Rights Act, based on a coverage determination made by the Attorney

General and the Director of the Census dated August 7, 1965, and published in the Federal Register on August 7, 1965. *See* 30 Fed. Reg. 9897 (Aug. 7, 1965).

7. The State of Alabama and all of its political subunits, such as Shelby County, must receive administrative or judicial preclearance under Section 5 of the Voting Rights Act for all changes affecting voting enacted or implemented after November 1, 1964. *See* 28 C.F.R. part 51, Appendix.

8. At least 31 subjurisdictions located in whole or in part in Shelby County have submitted voting changes for administrative review under Section 5. *See* Declaration of Robert S. Berman ("Berman Decl.") ¶ 3 (Ex. 2).

9. Since Shelby County was first required to comply with Section 5, the Department of Justice has received at least 682 submissions for review involving Shelby County or jurisdictions located in whole or in part in Shelby County. *See* Berman Decl. ¶ 4 (Ex. 2). Of the 682 submissions, 291 were received from 19 jurisdictions located wholly within Shelby County. *See* Id.

10. The Attorney General has received at least 69 submissions for Section 5 review on behalf of Shelby County. *See* Berman Decl. ¶ 5 (Ex. 2).

11. On April 8, 2010, the Department informed county officials that no objection would be interposed to Shelby County's most recent submission, a polling place change. *See* Berman Decl. ¶ 6 (Ex. 2).

12. Section 5 submissions from the Cities of Birmingham, Calera, Chelsea, and Helena, all subjurisdictions located in whole or in part in Shelby County, are currently pending the Attorney General's administrative review. *See* Berman Decl. ¶ 7 (Ex. 2).

13. The Attorney General has interposed five objections to changes affecting voting in jurisdictions wholly or partially contained within Shelby County: a July 7, 1975, objection to six annexations to the City of Alabaster; a December 27, 1977, objection to two annexations to the City of Alabaster; a May 4, 1987, objection to annexations to the City of Leeds; an August 16, 2000, objection to the designation of two annexations to Ward 1 of the City of Alabaster (at the same time 42 annexations adopted between 1992 and 2000 were precleared); and an August 25, 2008, objection to 177 annexations, their designation to districts, and a redistricting plan for the City of Calera. *See* Berman Decl. ¶ 8 (Ex. 2).

14. Shelby County and some jurisdictions within the County, including the City of Calera, were defendants in statewide litigation under Section 2 of the Voting Rights Act filed in the late 1980s. *See Dillard v. Crenshaw Cnty.*, 748 F. Supp. 819 (M.D. Ala. 1990); *Dillard v. City of Calera*, No. 2:87 cv 1167, 2007 WL 1607656 (M.D. Ala. May 9, 2007).

15. The *Dillard* litigation initially challenged at-large election systems used to elect county commissioners in nine Alabama counties. *See Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347 (M.D. Ala. 1986).

16. The case later was expanded to include 183 counties, cities, and county school boards throughout the State of Alabama. *See Dillard v. Baldwin Cnty.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988).

17. The district court in *Dillard* found that the Alabama legislature had adopted the at-large voting systems for the counties with the intent to deprive black citizens of

their voting rights. *See Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-1360 (M.D. Ala. 1986).

18. The *Dillard* court found that in the 1950's and 1960's, the Alabama legislature took a number of actions to discriminate against African-American voters in response to the Supreme Court's decision in *Smith v. Allwright*, 341 U.S. 649 (1944) (striking down the all-white primary), and to the enactment of federal voting rights legislation. These legislative actions included authorizing counties to switch from single-member districts to at-large voting, prohibiting single-shot voting in municipal, at-large elections, and requiring numbered posts in at-large elections. 640 F. Supp. at 1356-1357, 1359.

19. In 1990, both Shelby County and the City of Calera resolved the claims against them in the *Dillard* litigation by entering into consent decrees providing for elections from single-member districts. *See Dillard v. Crenshaw Cnty.*, 748 F. Supp. at 822; *Dillard v. City of Calera*, 2007 WL 1607656.

20. In 2007, both cases were dismissed after the State enacted legislation providing state-law authority for the voting changes. *Dillard v. City of Calera*, 2007 WL 1607656; *Dillard v. Crenshaw Cnty.*, No. 2:85cv1332-MHT, 2007 WL 4289862 (M.D. Ala. Oct. 1, 2007).

21. On March 13, 2008, the City of Calera, a subjurisdiction of Shelby County, submitted a redistricting plan, along with 177 annexations that the City adopted between 1995 and 2007 but had not previously submitted, and their designation to districts to the Attorney General for administrative review under Section 5. *See* Berman Decl. ¶ 9 (Ex. 2). That redistricting plan eliminated the only majority-

black single-member district in the City, a district that had been adopted pursuant to the City's consent decree in *Dillard*. *See* Letter dated August 25, 2008, Attachment A to Berman Decl. (Ex. 2).

22. On August 25, 2008, the Attorney General objected to the voting changes occasioned by the City of Calera's proposed redistricting plan and 177 annexations. *See* Berman Decl. ¶ 10 (Ex. 2) and Attachment A, thereto.

23. Citing *City of Rome*, the Attorney General concluded that the City of Colera had failed in its obligation to provide reliable, current population data to enable proper examination of the effect of the annexations and the redistricting plan, and that the City had failed to consider alternatives to the redistricting plan that would have provided African-American voters a better opportunity to elect a candidate of their choice. *See* Letter dated August 25, 2008, Attachment A to Berman Decl. (Ex. 2).

24. On November 17, 2008 and March 24, 2009, the Attorney General denied the City of Calera's requests to withdraw his objections. *See* Berman Decl. ¶ 14 (Ex. 2) and Attachments D and E thereto (Letters dated Nov. 17, 2008 and Mar. 24, 2009).

25. Despite the Attorney General's objection, the City of Calera conducted an election on August 26, 2008 and a runoff election on October 7, 2008, using the objected to redistricting plan and including the electorate of the objected-to 177 annexations. *See United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. 2008); Berman Decl. at ¶ 11 (Ex. 2) and Attachment C thereto, at 4 (Oct. 29, 2008

Consent Decree in *United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. 2008)).

26. The August 26 and October 7, 2008, elections in the City of Calera resulted in the defeat of the lone African-American member of the City Council. *See* Attachment D to Berman Decl. (Ex. 2), at 4 (Oct. 29, 2008 Consent Decree).

27. On October 24, 2008, the United States filed an action against the City of Calera under Section 5 seeking to enjoin further implementation of changes affecting voting that had not received the requisite Section 5 determination. *United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. 2008); s*ee* Berman Decl. ¶ 12 (Ex. 2) and Attachment B thereto (Complaint, *United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. 2008)).

28. On October 29, 2008, the court temporarily resolved this City of Calera matter through a consent decree that provided for an interim change in the method of election to an interim limited voting election plan, pending the results of the 2010 Census, and for a new special municipal election. *See* Berman Decl. ¶ 13 (Ex. 2) and Attachment C thereto.

29. On September 25, 2009, after the adoption of the interim limited voting election plan, the Attorney General withdrew his objection to the 177 annexations to the City of Calera and also informed city officials that no objection would be interposed to the city's proposed interim voting plan for the 2009 municipal election in Calera. The Attorney General's September 25, 2009, letter did not, however, withdraw his objection to the 2008 redistricting plan or the designation

of annexations to districts. *See* Berman Decl. ¶ 15 (Ex. 2) and Attachment F thereto (Letter dated September 25, 2009).

30. According to the Congressional Record, with regard to voting changes submitted by the State of Alabama and subjurisdictions therein between 1982 and 2004, the Attorney General has interposed 46 objections including objections to a state legislative redistricting plan, a congressional redistricting plan, and three other statewide enactments. *Appendix* to *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 259-260 (2006) (*H. Appx.*).

Section 5 Process

31. The Attorney General endeavors to comply with Congress's intent that the administrative review of voting changes submitted to him or her pursuant to Section 5 be an efficient, convenient, and affordable alternative to seeking a declaratory judgment from a three-judge court in the United States District Court for the District of Columbia. *See* Berman Decl. ¶ 16 (Ex. 2).

32. To that end, the Attorney General has a long-standing policy of providing information to covered jurisdictions concerning the administrative review process by publishing the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 in the Code of Federal Regulations. 28 C.F.R. part 51. These procedures were first promulgated in 1971. 36 Fed. Reg. 18186 (Sept. 10, 1971), and are revised when necessary. *See, e.g.*, 75 Fed. Reg. 332050 (June 10, 2010). *See* Berman Decl. ¶ 17 (Ex. 2).

33. The Attorney General also has created a website that provides information concerning the Section 5 process (http://www.usdoj.gov/crt/voting/). *See* Berman Decl. ¶ 18 (Ex. 2).

34. Section 5 allows submissions to be made by the "chief legal officer" or "other appropriate official" of a jurisdiction. 42 U.S.C. 1973c.

35. The Attorney General's procedures likewise provide that submissions can be made by the "chief legal officer," "other appropriate official of the submitting authority," or "any other authorized person on behalf of the submitting authority." 28 C.F.R. § 51.23.

36. The Attorney General provides a toll-free telephone number for submitting officials to contact Department of Justice staff members, who are available to guide those officials through the submission process. *See* Berman Decl. ¶ 19 (Ex. 2).

37. The Attorney General's procedures have always provided covered jurisdictions the ability to request expedited consideration of voting changes. 28 C.F.R. § 51.34 The Attorney General makes every effort to accommodate covered states and local jurisdictions that experience emergencies prior to elections that require expedited consideration of voting changes. Situations calling for expedited consideration can include events such as fires or natural disasters that affect which polling places can be used in an election, or pre-election litigation that threatens to stop the conduct of an election. In appropriate circumstances the Attorney General has made determinations within 24 hours or less of receipt of a submission. *See* Berman Decl. ¶ 20 (Ex. 2).

38. The Attorney General also allows covered jurisdictions the option of sending Section 5 submissions by overnight delivery. Shelby County availed itself of this option in a 2007 submission, which the jurisdiction sent by overnight delivery to the Attorney General. *See* Berman Decl. ¶ 21 (Ex. 2).

39. For some years, the Department has allowed jurisdictions to make submissions and submit additional information on pending Section 5 submissions by telefacsimile. Shelby County availed itself of these options in 2004 and 2007, respectively, when it faxed a submission and additional information on a pending Section 5 submission to the Attorney General. *See* Berman Decl. ¶ 22 (Ex. 2).

40. The Attorney General allows jurisdictions to make Section 5 submissions through a web-based application (http://wd.usdoj.gov/crt/voting/sec_5/evs/). *See* Berman Decl. ¶ 23 (Ex. 2).

41. The Attorney General allows jurisdictions to submit additional information on pending Section 5 submissions by electronic mail. *See* Berman Decl. ¶ 24 (Ex. 2).

Bailout Administration and History

42. Section 5 covered jurisdictions may seek to terminate their coverage under Section 5 by bringing a "bailout" action, a declaratory judgment action in the United States District Court for the District of Columbia. *See* 1965 Act, § 4(a), 79 Stat. 438.

43. As originally enacted, the "bailout" mechanism was available only to covered States and to jurisdictions, such as counties, "with respect to which such [coverage] determinations have been made as a separate unit." *Ibid.*

44. To terminate Section 5 coverage, a jurisdiction was required to prove it had not used a prohibited test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" during the previous five years. *Ibid.*

45. In 1982, Congress amended the bailout provision of the Voting Rights Act, substantially expanding the opportunity for covered jurisdictions to terminate coverage. In 1982, Congress added a third category of eligible jurisdictions, "any political subdivision of [a covered] State" even if the coverage determination had not been made "with respect to such subdivision as a separate unit." 1982 Reauthorization, § 2(b)(2), 96 Stat. 131; *see* 42 U.S.C. 1973b(a).

46. The 1982 Reauthorization also changed the substantive requirements for bailout. Under the revised bailout provision, currently in effect, jurisdictions must demonstrate that they have fully complied with Section 5 and other voting rights provisions during the previous ten years. 1982 Reauthorization, § 2(b)(4), 96 Stat. 131-133; *see* 42 U.S.C. 1973b(a).

47. To demonstrate compliance with the Voting Rights Act during the ten-year period preceding the filing of the declaratory judgment action under Section 4(a), a jurisdiction seeking bailout must prove the following five conditions: (1) it has not used any test or device with the purpose or effect of denying or abridging the right to vote on account of race or color; (2) no final judgment of any court of the United States has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the jurisdiction and no consent decree, settlement, or agreement has been entered into before or during

the pendency of the declaratory judgment action that results in the abandonment of such a practice; (3) no Federal examiners or observers under the Voting Rights Act have been assigned to the jurisdiction; (4) the jurisdiction has complied with Section 5 of the Voting Rights Act, including the preclearance of all changes covered by Section 5 prior to implementation and the repeal of all covered changes to which the Attorney General has successfully objected or for which the District Court for the District of Columbia has denied a declaratory judgment; and (5) the Attorney General has not interposed any objection not overturned by final judgment of a court and no Section 5 declaratory judgment action has been denied, with respect to any submissions by the jurisdiction, and no such submissions or declaratory judgment actions are pending. 42 U.S.C. 1973b(a)(1)(A)-(E).

48. In addition, a jurisdiction seeking bailout must demonstrate the steps it has taken to encourage minority political participation and to remove structural barriers to minority electoral influence by showing the following: the elimination of voting procedures and election methods that inhibit or dilute equal access to the electoral process; constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Voting Rights Act; and other constructive efforts, such as convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process. 42 U.S.C. 1973b(a)(1)(F)(i)-(iii).

49. To assist the court in determining whether to issue a declaratory judgment, the jurisdiction also must present evidence of minority voting participation, including the levels of minority group registration and voting, changes in those levels over time, and disparities between minority-group and non-minority-group participation. 42 U.S.C. 1973b(a)(2).

50. The jurisdiction must demonstrate that during the ten years preceding judgment, it has not violated any provision of the Constitution or federal, state, or local laws governing voting discrimination, unless it shows that any such violations were trivial, promptly corrected, and not repeated. 42 U.S.C. 1973b(a)(3).

51. The jurisdiction must also publicize its intent to commence a declaratory judgment action and any proposed settlement of the action. 42 U.S.C. 1973b(a)(4).

52. If the jurisdiction shows "objective and compelling evidence" that it has satisfied the foregoing requirements, as confirmed by the Department's independent investigation, the Attorney General is authorized to consent to entry of a judgment granting an exemption from coverage under Section 5 of the Voting Rights Act. 42 U.S.C. 1973b(a)(9).

53. Since 1965, of the approximately 943 county, parish and township-level jurisdictions that conduct voter registration that were originally covered by Section 4, 57 of these jurisdictions (around 6.4%) have successfully bailed out and maintained their bailed out status. One state and several other jurisdictions also successfully bailed out and were later re-covered by new coverage determinations or by new court findings. Overall, since 1965, there have been 44

cases filed in which bailout was sought under Section 4(a), and the United States consented to bailout in 36 cases and bailout was granted (and in one of these cases bailout was later rescinded), there were 3 cases in which the United States opposed bailout and the court denied bailout, and 5 cases in which the jurisdiction dismissed its bailout action voluntarily after the United States opposed the bailout request. *See* Berman Decl. ¶ 26 (Ex. 2).

54. Since the new bailout standard enacted in 1982 went into effect in 1984, the United States has consented to bailout in 21 cases. This included 18 cases involving county level jurisdictions (with 51 subjurisdictions) and 3 cases involving smaller jurisdictions. Hence, a total of 72 jurisdictions have been granted bailout since 1984. *See* Berman Decl. ¶ 27 (Ex. 2).

55. The Attorney General has consented to every bailout action by a political subdivision filed since 1984, the effective date for the revised bailout provision. *See* Berman Decl. ¶ 29 (Ex. 2).

56. Currently, the Attorney General is reviewing the informal requests of numerous jurisdictions to consent to terminate coverage under Section 4. *See* Berman Decl. ¶ 30 (Ex. 2).

57. If a jurisdiction requests termination of Section 4 coverage, the Attorney General conducts an independent investigation concerning whether the jurisdiction can meet the statutory requirements. *See* Berman Decl. ¶ 28 (Ex. 2).

58. The Attorney General's independent investigation includes interviews with minority contacts, reviewing electoral behavior within the jurisdiction, and researching whether there are any unsubmitted voting changes—including

reviewing a jurisdiction's minutes for the last 10 years to see if the jurisdiction has implemented any changes affecting voting that have not received the requisite Section 5 preclearance. *See* Berman Decl. ¶ 32 (Ex. 2).

59. Shelby County advises that it has implemented at least one voting change prior to submitting the change for review. The County admits that it held a referendum election on April 9, 2002, prior to obtaining Section 5 preclearance. *See* Compl. ¶14 (Dkt. 1); Pl.'s Statement of Material Facts 3-4 (Dkt. 5). The County subsequently submitted for review and the Attorney General ultimately precleared under Section 5 the law providing for the April 9, 2002, referendum election. *See* Berman Decl. ¶ 33 (Ex. 2).

60. The Attorney General has entered into consent decrees allowing bailout under Section 4 with other jurisdictions including, but not limited to, Roanoke County, Virginia, Shenandoah County, Virginia, and Frederick County, Virginia, where the jurisdictions had implemented isolated voting changes prior to submitting them for Section 5 review. *See* Berman Decl. ¶ 34 (Ex. 2).

61. The Attorney General has neither conducted discovery in this case nor conducted the statutorily-required independent investigation as to Shelby County's eligibility to terminate Section 4 coverage. Accordingly, the Attorney General is unable to make a determination at this time as to whether Shelby County is eligible to terminate Section 4 coverage. *See* Berman Decl. ¶ 35 (Ex. 2).

62. The Supreme Court has made it clear that the bailout provision should be interpreted broadly. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2513-17 (2009).

63. The Attorney General has consented to bailout by three smaller jurisdictions, including the NW Austin district itself, following the Supreme Court's decision in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009). *See* Berman Decl. ¶ 31 (Ex. 2).

Clarification of Legislative Record

64. Plaintiff points to the Congressional Record in asserting that "African-American voter turnout in the 2004 presidential election was actually higher than white turnout in three fully-covered states and was within 5% in two others." Pl.'s Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. at 5 (citing S. Rep. No. 109-295, at 11 (2006)) (Dkt. 5).

65. The 2006 House Report included data on disparities between white and black turnout and registration. The data in the House Report understated the disparities because it compared registration and turnout rates for blacks to rates for whites, including Hispanics, rather than for white non-Hispanics. Including Hispanic turnout in the white turnout rate lowers the white turnout rate because of very low Hispanic turnout. *See Northwest Austin Municipal Utility District No. One v. Mukasey*, 573 F. Supp. 2d 221, 248 (D.D.C. 2008) (*Northwest Austin I*), rev'd on other grounds, 129 S. Ct. 2504 (2009); *see* May 17, 2006, Senate Hearing, at 131-132 (supplemental testimony of Nathaniel Persily); *see* U.S. Census Bureau, Current Population Survey tbl. 4a (Nov. 2004) (Census Bureau Survey), available at http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls.

66. When the correct data are used, 2004 black registration and turnout rates in the covered States exceed the rates for whites only in Mississippi. *Ibid.*

67. In Texas, for example, according to the House Report, 2004 black registration and turnout exceeded white registration and turnout by 7 and 5 percentage points, respectively. H.R. Rep. No. 478, 109th Cong., 2d Sess. 12 (2006). When the correct data is used, the gap is reversed: white registration and turnout exceeded black registration and turnout by 5 and 8 points, respectively. *See Northwest Austin I*, 573 F. Supp. 2d at 248; *see* Census Bureau Survey available at http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls.

68. In Texas, 2004 Hispanic turnout rate was 29.3% and Hispanic registration rate was 41.5%. The white non-Hispanic turnout rate was 63.4% and the white non-Hispanic registration rate was 73.6%. The white alone (which includes Hispanic population) turnout rate was 50.6% and the white alone registration rate was 61.5%. Thus, adding the Hispanic turnout and registration rates to the white non-Hispanic turnout and registration rates results in an undercounting of the white non minority turnout and registration rates. *See* Census Bureau Survey available at http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls.

69. The vast majority of racially discriminatory election practices remedied by enforcement of Section 2 during the past quarter century has taken place in jurisdictions covered by Section 5 of the Voting Rights Act. McCrary Decl. ¶ 25 (Ex. 1).

70. The study of reported decisions by Ellen Katz and law students at the University of Michigan working under her direction identified 64 Section 2 cases in covered jurisdictions in which plaintiffs were successful. McCrary Decl. ¶ 26 (Ex. 1).

71. The National Commission report, *Protecting Minority Voters*, found a total of 653 cases resolved in a manner favorable to minority voters in covered jurisdictions where there were no reported decisions. *H. Appx.* 125-126; *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 2835-2839, 2846, 2848 (2005); McCrary Decl. ¶ 27 and n.1 (Ex. 1). These cases, some of which were statewide in impact, affected voting practices in 825 counties, parishes, or independent cities covered by Section 5. *Ibid.*

72. Looking at jurisdictions not covered by Section 5, the University of Michigan study found only 50 successful reported outcomes for minority voters (44 percent of the 114 successful reported cases nationwide). *See* McCrary Decl. ¶ 27 (Ex. 1). Thus even in reported decisions a significant majority of successful outcomes were in jurisdictions covered by Section 5. *See id.*

73. Once data for Section 2 settlements are included, however, the disparity between covered and non-covered areas increases dramatically. Looking at unreported decisions, research demonstrates 99 Section 2 settlements in non-covered jurisdictions, as compared with the 587 in areas covered by Section 5 identified in the National Commission report. *See* McCrary Decl. ¶ 28 (Ex. 1). The record before Congress during the 2006 reauthorization of Section 5 demonstrates that at least 61 of these 99 unreported successful settlements in noncovered jurisdictions. *See* McCrary Decl. ¶ 27 (Ex. 1).

74. Eighty six percent of all successful outcomes in cases without reported decisions occurred within jurisdictions covered by Section 5. *See* McCrary Decl. ¶ 27 (Ex. 1).

75. Based on the record before Congress when it adopted the 2006 Reauthorization Act, there were 61 Section 2 cases settled favorably for minority voters in non-covered jurisdictions. *See* McCrary Decl. ¶ 27-28 (Ex. 1). According to the National Commission report provided to Congress in 2006, there were 587 Section 2 lawsuits resulting in favorable outcomes for minority voters in jurisdictions covered by Section 5. Thus the record before Congress shows that 91% of all Section 2 cases settled favorably for minority voters were in covered jurisdictions. See McCrary Decl. ¶ 28 (Ex. 1).

76. Combining all successful outcomes in both reported and unreported cases -- including those on the record before Congress and those identified in the study reported in the McCrary Declaration attached as Exhibit 1 hereto -- shows that 81 percent of all successful outcomes in Section 2 cases occurred in covered jurisdictions. *See* McCrary Decl. ¶ 29 (Ex. 1).

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA, Plaintiff, v. ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant	Civil Action No. 1:10-cv-00651-JDB

Declaration of Dr. Peyton McCrary

Pursuant to 28 U.S.C. § 1746, I, Peyton McCrary, make the following declaration:

1. My name is Peyton McCrary. I am an historian employed since August, 1990 by the Voting Section, Civil Rights Division, of the Department of Justice. My responsibilities include the planning, direction, coordination, and performance of historical research and statistical analysis in connection with litigation. On occasion I am asked to provide written or courtroom testimony on behalf of the United States.

2. I received B.A. and M.A. degrees from the University of Virginia and obtained my Ph.D. from Princeton University in 1972. My primary training was in the history of the United States, with a specialization in the history of the South during the 19th and 20th centuries. For 20 years I taught courses in my specialization at the University of Minnesota, Vanderbilt University, and the University of South Alabama. In 1998-99 I took leave from the Department of Justice to serve as the Eugene Lang Professor in the Department of Political Science,

Swarthmore College. For the last four years I have co-taught a course on voting rights law as an adjunct professor at the George Washington University Law School.

3. I have published a prize-winning book, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978), six law review articles, six articles in refereed journals, and four chapters in refereed books. Over the last quarter century my published work has focused on the history of discriminatory election laws in the South, evidence concerning discriminatory intent or racially polarized voting presented in the context of voting rights litigation, and the impact of the Voting Rights Act in the South. Over the last three decades I have published numerous reviews of books in my areas of specialization and served as a scholarly referee for numerous journals and university presses. I continue to publish scholarly work on these topics while employed by the Department of Justice. A detailed record of my professional qualifications is set forth in the attached curriculum vitae (Attachment A), which I prepared and know to be accurate.

4. My publications most relevant to the issues discussed in this declaration include: *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race & L. 275 (2006) (co-authored with Christopher Seaman and Richard Valelly), *reprinted in Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 96-181 (2005); *How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005*, 57 S.C. L. Rev. 785 (2006); *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. Pa. J. Const. L. 665 (2003); *Alabama*, in *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 38 (Chandler Davidson and Bernard Grofman eds., 1994) (co-authored with

Jerome A. Gray, Edward Still, and Huey Perry); *South Carolina, in Quiet Revolution in the South, supra,* at 397 (co-authored with Orville Vernon Burton, Terence R. Finnegan, and James W. Loewen); *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom,* 14 Soc. Sci. Hist. 507 (1990); *Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits,* 28 How. L.J. 463 (1985); and *History in the Courts: The Significance of City of Mobile v. Bolden, in Minority Vote Dilution* 47 (Chandler Davidson ed., 1984).

5. I have presented courtroom testimony as an expert witness in 15 voting rights cases, for the most part before joining the staff of the Civil Rights Division. In one instance, however, I testified on behalf of the United States as amicus curiae. In addition, I have presented sworn written testimony in seven cases, including three since my employment by the Department of Justice. I was retained as an expert in another 19 cases prior to my employment with the Civil Rights Division that settled before trial; 14 of these were Section 2 lawsuits. I was retained in two other Section 2 cases that settled after a trial court granted a preliminary injunction. In these cases my testimony has often dealt with legislative intent in adopting or maintaining at-large elections, numbered place or majority vote requirements, and methods of appointing local governing bodies, as well as with the history of racial discrimination in regard to voting. I have not testified in cases during the past four years.

6. The cases in which I testified that are most relevant to this declaration include: *Dillard* v. *Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986); *Harris* v. *Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984); *Brown* v. *Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd* ,706 F.2d 1103 (11th Cir. 1983); and *Bolden* v. *City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982). In each of these cases brought under Section 2 of the Voting

Rights Act I testified as an expert witness for the plaintiffs. The trial court decided the two *Mobile* cases before the 1982 revision of Section 2 of the Voting Rights Act and thus under the intent standard applied in constitutional challenges after *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

7. I have been asked by attorneys for the Department of Justice: 1) to describe some basic characteristics of Shelby County, Alabama, and 2) to investigate factual evidence relevant to the allegations by Shelby County as to the coverage formula for Section 5 of the Voting Rights Act. In my investigation I have drawn on my familiarity with the record assembled by House and Senate committees during the hearings preceding passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, which I first examined when assisting attorneys for the United States in *Northwest Austin Municipal Utility District Number One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008), *vacated sub. nom. Northwest Austin Municipal Utility District Number One* v. *Holder*, 129 S. Ct. 2504 (2009).

Shelby County: Background

8. Shelby County is located south of Alabama's largest county, Jefferson County, and the State's largest municipality, the City of Birmingham, in the northern part of the state. A small portion of the state's largest municipality, Birmingham, is located within Shelby County and the county is included, in part, within the Birmingham Standard Metropolitan Statistical Area. There are also numerous towns and small cities within the county that have existed as separate municipalities for many years.

9. According to the 2000 Census, Shelby County had a total population of 143,293, including 126,951 whites (88.6%), 10,570 African Americans (7.4%), 2,910 Hispanics (2.0%),

and 1,465 Asians (1.0%). U.S. Census Bureau, PL 94-171 (2000), Shelby County, Alabama.

10. According to the 2006-2008 estimates provided by the Census American Community Survey ("ACS"), Shelby County's total population was 183,014, of which 153,649 were white (84.0%), 17,621 were African American (9.6%), 6,674 were Hispanic (3.6%), and 2,894 were Asian (1.6%). U.S. Census Bureau, American Community Survey (ACS) 2006-2008 (3-year estimates), Shelby County, Alabama.

11. Comparing the 2006-2008 estimates provided by the American Community Survey with 2000 Census results, the total population of Shelby County has increased significantly from 2000 to 2008, from 143,293 to 183,014, an increase of 39,721 (27.7%) from its 2000 population.

12. According to the 2000 Census, Shelby County had within its borders the following municipalities: 1) Alabaster (city); 2) Birmingham (city, part); 3) Calera (city, part); 4) Chelsea (town); 5) Childersburg (town, part), 6) Columbiana (city); 7) Harpersville (town); 8) Helena (city, part); 9) Hoover (city, part); 10) Indian Springs Village (town); 11) Leeds (city, part); 12) Montevallo (city); 13) Pelham (city); 14) Vestavia Hills (city, part); 15) Vincent (town, part); 16) Wilsonville (town); and 17) Wilton (town). U. S. Census Bureau, American Fact Finder, Alabama, GCT-Pl. Race and Hispanic or Latino: 2000. In 2001 the municipality of Westover was incorporated.

13. Shelby County and six of its municipalities, including the City of Calera, were among the defendants in the complex *Dillard* litigation, and each agreed to alter its at-large election system in favor of an election plan fair to minority voters. *See, e.g.*, *Dillard* v. *Crenshaw County*, 748 F. Supp. 819 (M.D. Ala. 1990); *Dillard* v. *Town of Calera*, No. 2:87cv1167, 2007 WL 1607656 (M.D. Ala. May 9, 2007); *Dillard* v. *Town of Columbiana*, No. 2:87cv1189 (M.D. Ala.); *Dillard* v. *Town of Harpersville*, No. 2:87cv1228 (M.D. Ala.); *Dillard*

v. *Town of Vincent*, No. 2:87cv1305 (M.D. Ala.); *Dillard* v. *Town of Wilsonville*, No. 2:87cv1315 (M.D. Ala.); *Dillard* v. *Town of Wilton*, No. 2:87cv1316 (M.D. Ala.).

Settlements in Section 2 Litigation, Covered vs. Non-covered Jurisdictions

14. I have examined the evidence in two studies considered by Congress when it reauthorized Section 5 of the Voting Rights Act in 2006: (1) Ellen Katz, et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (2005), *reprinted in To Examine Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16, 964-1124 (2005) [hereinafter *Documenting Discrimination in Voting*]; and (2) Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005* (2006), *reprinted in Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 104-289 (2006) [hereinafter *Protecting Minority Voters*].[1] The study by Professor Katz and law students working under her direction at the University of Michigan assembled data regarding all reported decisions in Section 2 litigation from 1982 to 2005. Among other evidence provided in its report, the staff of the National Commission gathered data regarding Section 2 litigation other

[1] In its analysis the National Commission report utilized a version of the Michigan study directed by Professor Katz – known as the Voting Rights Initiative (VRI) – available on the VRI website as of Jan. 16, 2006. Thus the numbers in *Protecting Minority Voters*, *supra*, at 251 tbl. 5, drawn from the Michigan study, differ slightly from the numbers on the record before Congress. In my analysis I have relied on the numbers from the Michigan study on the record before Congress and the numbers calculated by the National Commission staff. *Id.* Because I use the number of reported decisions favorable to minority voters in covered jurisdictions reported to the House (64) instead of the 66 such favorable outcomes identified in *Protecting Minority Voters*, at 251 tbl. 5, my total for reported decisions and court-ordered settlements is 651, rather than the 653 used by the National Commission. The slight differences in the numbers reported in different versions of the Michigan study do not affect the conclusions to be drawn from the data. A finalized set of numbers, which I believe are the most accurate, appeared in the version of the study published at 39 U. Mich. J.L. Reform 643 (2006).

than in reported decisions. The Commission's research utilized docket information contained on Lexis and the federal courts' Public Access to Court Electronic Records ("PACER") system; cases cited in the tables of *Quiet Revolution in the South*, *supra*; data supplied from the files of voting rights attorneys; and a search of the Department of Justice's Submission Tracking and Processing System ("STAPS") database, which records every Section 5 submission involving a change in the method of election since 1980. *See Protecting Minority Voters*, *supra*, at 240 n.280.

15. The Michigan study of reported decisions permits a detailed comparison of the enforcement of Section 2 in jurisdictions covered by Section 5 and enforcement in the rest of the country. Thus it provides useful evidence regarding the degree to which the Section 5 coverage formula captures jurisdictions in which racial discrimination in voting is most serious. On the other hand, as the Michigan study points out, many Section 2 cases have been settled by the parties to the advantage of minority voters in court-entered settlement agreements that are not reported by the courts. Professor Katz and her colleagues gathered lists of settled cases from various voting rights attorneys that suggested that the total volume of Section 2 litigation was at least four times as great as reflected in reported decisions. *See Documenting Discrimination in Voting*, *supra*, at 974.

16. The National Commission staff sought to collect data regarding the large volume of "all Section 2 claims – reported and unreported – resolved in a manner favorable to minority voters since 1982." *Protecting Minority Voters*, *supra*, at 205. Their search was, however, restricted to jurisdictions covered by Section 5 (excluding one covered state, Alaska). *See id.* The Commission staff recognized that this list of unreported settlements was incomplete but offered it as a "best effort" at a comprehensive accounting. *Id.*

17. A more comprehensive picture of the total volume of successful enforcement of Section 2 would include a similar list of settlements since 1982 for all jurisdictions *not* covered by Section 5. In order to obtain a more comprehensive assessment, I undertook a systematic search for Section 2 settlements in non-covered jurisdictions, utilizing the following methodology: I began with a list of all lawsuits catalogued in PACER as concerning "Civil Rights: Voting" (Code No. 441). I used LexisNexis CourtLink to search by docket number for all cases in non-covered jurisdictions. Four staff members working under my direction reviewed docket sheets to screen for possible Section 2 lawsuits and to print them for my review. After my initial review, two staff attorneys examined additional information from PACER about particular lawsuits suspected of being Section 2 settlements. In my final review, I did not include any case for which the docket sheet or case documents electronically linked to the dockets failed to provide some evidence that the case was resolved under Section 2 of the Voting Rights Act, whether by reference to the federal code section or by reference to "voting rights issues" or similar language. I also required some reference to settlement of the case, whether by consent decree, consent judgment, consent order, or a simple reference to "settlement."

18. In addition, I used certain publicly available documents to supplement information from the electronic docket sheets. Laughlin McDonald & Daniel Levitas, *Vote: The Case for Extending and Amending the Voting Rights Act* (2006*), reprinted in Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 378-1269 (2006), provides detailed information about the outcome of Section 2 cases brought by the American Civil Liberties Union. The Voting Section of the Civil Rights Division of the Department of Justice maintains a routinely updated list of voting rights cases brought by it from 1976 to the present. Similar lists were made part of the record before

Congress when the Voting Rights Act was amended in 1970, 1975, and 1982.[2]

19. My goal was to identify all Section 2 settlements in non-covered jurisdictions. I recognize, however, that because of the limitations of PACER and CourtLink – which did not begin receiving documents from district courts until the late 1980s – my list of Section 2 settlements may be under-inclusive. The Michigan study documents that reported decisions in Section 2 cases were most numerous in the first decade following the creation of the Section 2 results test in 1982. *Documenting Discrimination in Voting*, *supra*, at 975. The studies of Section 5 covered jurisdictions in *Quiet Revolution in the South* indicate that Section 2 lawsuits in Southern states generated numerous orders and settlements during the 1980s requiring the adoption of single-member districts or cumulative or limited voting plans. Some docket sheets are available in the PACER database beginning in 1985, but not consistently until the early 1990s. Until the last decade, moreover, few docket sheets included links to complaints or consent decrees, either in CourtLink or in PACER. The under-inclusiveness of CourtLink and PACER also necessarily affects the study of Section 2 settlements in covered jurisdictions conducted by the National Commission staff. *Protecting Minority Voters*, *supra*, at 204-08, 239-40, and 251 tbl. 5.

20. I can think of no plausible reason why district courts in covered jurisdictions, mostly in the South, would have been *more likely* to send information about voting cases to PACER than district courts in the rest of the country. Counting each jurisdiction equally and rounding to the nearest year, the average jurisdiction covered by Section 5 began reporting to PACER in 1992. The average non-covered jurisdiction began reporting in 1991. The average partially

[2] I drew on the personal knowledge of Department of Justice attorneys in determining that two New Mexico cases, *United States v. Chaves County* and *United States v. Roswell Indep. Sch. District*, were settled by changing the method of election in the defendant jurisdictions.

covered jurisdiction began reporting in 1989. Thus, to the extent that dates at which reporting began reflect the availability of information in PACER, non-covered jurisdictions should be over-represented, if anything.

21. I found a total of 99 Section 2 settlements in non-covered jurisdictions. Twenty-four of these cases were in Arkansas alone; thirteen were in California; eleven were in the non-covered counties of Florida; thirteen in the non-covered counties of North Carolina; and the rest scattered around the country. Evidence concerning 61 of the 99 settlements I found in non-covered jurisdictions (62%) was on the record considered by Congress in adopting the 2006 Reauthorization Act. *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. 2835-57 (2005), 2835-39; *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 321-22, 487-91, 500-02, 923-24, 953-54, 1150, 1171-73, 1200-03, 1246, 1252, 1484-85, 1491-92, 1763, 1773-74, 1779, 1782-89, 1794-95, 1875, 1889, 1986, 1999-2000, 4014-15, 4026-35, 4058-59, 4064, 4067-68, 4072-73, 4080-82, 4086, 4099, 4118-21, 4127, 4129, 4133-34, 4138, 4313-25, 4348, 4359-60, 4373, 4384, 4391-92, 4403-04, 4425, 4438, 4451-56, 4462, 4479, 4505-06, 4512-14, 4552, 4564-81, 4583, 4594, 4726, 4731-34, 4747, 5536-5544 (2006). *See* Attachment B to this declaration.

22. The 99 settlements in non-covered jurisdictions contrasts with the 587 cases resolved favorably to minority voters in covered jurisdictions found in the National Commission report.[3] Even if the under-inclusiveness of my research protocol led me to find only *half* of the Section 2

[3] Calculated from the numbers in *Protecting Minority Voters*, *supra*, at 251 tbl. 5 (*see* footnote 1, *supra)*.

settlements in non-covered jurisdictions – a hypothetical 194 settlements – there would still be *393 more* settlements resolved favorably for minority voters in areas covered by the preclearance requirements of the Voting Rights Act than in the rest of the country. Based on my training and experience as a historian and 30 years of experience doing research for voting rights litigation, I am confident that the number of court-ordered settlements in non-covered jurisdictions is unlikely to be greater than twice the number I have identified here. Furthermore, jurisdictions covered by Section 5 account for less than a quarter of the nation's population, a number that highlights the disparity in court-ordered settlements. *Id.* at 83.

23. I have compared the number of Section 2 settlements in non-covered jurisdictions with the consent decrees resulting from the court decision in *Dillard* v. *Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), where the trial court enjoined further use of at-large elections in nine Alabama counties, one of which was Shelby County. The court found, relying in part on my expert testimony, that the *Dillard* plaintiffs had shown a substantial likelihood of prevailing on the merits by producing evidence that the Alabama legislature "has engaged in a pattern and practice of using at-large systems as an instrument of race discrimination." *Crenshaw County*, 640 F. Supp. at 1361.

24. The *Dillard* plaintiffs subsequently amended their complaint to add municipalities and local school boards, so that the number of defendants eventually totaled 183. Of these defendants, 176 entered into interim consent decrees with the plaintiffs. The parties agreed to have the court deal with 165 of the defendants in separate lawsuits, with separate files and civil action numbers, with the remaining 18 jurisdictions treated as defendants in *Dillard v. Crenshaw County*. See *Dillard* v. *Baldwin County*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988). In short, the number of Section 2 settlements in the *Dillard* litigation alone was 1.8 times as great as the

99 settlements I have identified in non-covered jurisdictions.

Conclusions

25. Considering cases resolved not only by reported decisions but also by court-ordered settlements gives a more comprehensive picture of the scope of litigation enforcing Section 2 of the Voting Rights Act than simply looking at reported decisions in Westlaw or Lexis. Once the number of court-ordered settlements is added to the reported decisions, it becomes clear that the vast majority of racially discriminatory election practices ended by enforcement of Section 2 during the past quarter century has taken place in jurisdictions covered by Section 5 of the Act. The pattern is in fact quite stark.

26. The study of reported decisions by Ellen Katz and law students at the University of Michigan included in the House record identified 64 Section 2 cases in covered jurisdictions in which plaintiffs were successful. *Documenting Discrimination in Voting*, *supra*, at 974-75.[4] The National Commission report found 587 cases which it characterized as resolved in a manner favorable to minority voters in covered jurisdictions where there were no reported decisions. *Protecting Minority Voters*, *supra*, tbl. 5.[5] These cases, some of which were statewide in impact,

[4] While the version of the Michigan study before the House identified 64 Section 2 cases in covered jurisdictions in which minority plaintiffs were successful, and 50 cases in non-covered jurisdictions in which plaintiffs prevailed, the finalized, published version of the study concludes that there were 68 cases with successful outcomes for minority plaintiffs in covered jurisdictions and 55 such cases in non-covered jurisdictions (44.7% of the total). *See* 39 U. Mich. J.L. Reform 643, 656 (2006). The list of Section 2 cases identified in the published Michigan study is available at http://sitemaker.umich.edu/votingrights/final_report. In both the initial and finalized versions of the Michigan study, more than half of all Section 2 cases in which minority plaintiffs prevailed were in covered jurisdictions.

[5] The National Commission identified 66 reported cases that it characterized as being resolved favorably for plaintiffs, rather than the 64 in the Michigan data on the record before Congress. As noted in Footnote 1, supra, the Commission relied on an interim dataset from the Michigan study. *See Protecting Minority Voters*, *supra*, tbl. 5.

affected voting practices in 825 counties, parishes, or independent cities covered by Section 5. *Id.*

27. Looking at jurisdictions not covered by Section 5, the University of Michigan study before the House found only 50 reported cases with outcomes that the authors characterized as favorable for minority voters. *Documenting Discrimination in Voting*, *supra*, at 974-75. Even though more than three-fourths of the nation's population lives in non-covered jurisdictions, *id*., only 50 (44%) of the 114 reported decisions before Congress that were favorable for minority voters came from these non-covered jurisdictions. Looking at unreported cases, I found only 99 Section 2 settlements in non-covered jurisdictions, as compared with the 587 in areas covered by Section 5 identified in the National Commission report. *Protecting Minority Voters*, *supra*, tbl. 5. Evidence regarding 61 of the 99 Section 2 settlements was on the record before Congress. Adding the settlements in covered and non-covered jurisdictions gives a total of 686 successful outcomes in cases without reported decisions, of which 86% fall within jurisdictions covered by Section 5, as demonstrated in the following Table:

	Covered Jurisdictions	Non-Covered Jurisdictions	Total
Favorable Reported Decisions	64 (56%)	50 (44%)	114 (100%)
Court-Ordered Settlements	587 (86%)	99 (14%)	686 (100%)
Total	651 (81%)	149 (19%)	800 (100%)

28. Based on the record before Congress when it adopted the 2006 Reauthorization Act, 61 Section 2 cases settled favorably for minority voters in non-covered jurisdictions. *See* Paragraph 21, *supra*. According to the National Commission report provided to Congress in 2006, 587 Section 2 lawsuits resulted in favorable outcomes for minority voters in jurisdictions

covered by Section 5. Thus the record before Congress shows that 91% of all Section 2 unreported cases settled favorably for minority voters were in covered jurisdictions.

29. Combining all successful outcomes in both reported and unreported cases – including those on the record before Congress in 2006 and those I have identified in the study reported here – shows that 81 percent of all successful outcomes in Section 2 cases occurred in covered jurisdictions. *See* Table in paragraph 28, above.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of November, 2010.

Peyton McCrary

ATTACHMENT A

CURRICULUM VITAE: PEYTON McCRARY

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Principal Functions: Research in connection with voting rights litigation; identifying consultants and expert witnesses to be used in cases; working with attorneys and experts to prepare for direct testimony and cross-examination; supervising the preparation of contracts and processing the reimbursement of consultants and expert witnesses; drafting presentation of factual evidence in memoranda, briefs, and proposed findings of fact; legislative history research.

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PERSONAL: Born, Danville, Virginia, 1943.

EDUCATION: University of Virginia: B.A. (Honors), 1965
M.A., History, 1966

Princeton University: Ph.D., History, 1972

FIELDS: Minority Voting Rights; Law and the Political Process; U.S. History; History of the South; Southern Politics; Civil War and Reconstruction; American Political Parties and Voting Behavior; Theory and Methods of Historical Analysis

ACADEMIC APPOINTMENTS:

Adjunct Professor, George Washington University Law School, Washington, D.C., 2006 -

Eugene Lang Professor [Visiting], Department of Political Science, Swarthmore College, Swarthmore, Pennsylvania, 1998-1999.

Distinguished Scholar, Joint Center for Political and Economic Studies, Washington, D.C., 1987-1988.

Associate Professor of History, 1978-82, Professor of History, 1982-90, University of South Alabama, Mobile, Alabama..

Assistant Professor of History, 1976-1978, Vanderbilt University, Nashville, Tennessee

Instructor, Assistant Professor of History, 1969-1976, University of Minnesota, Minneapolis, Minnesota

BOOK:
Abraham Lincoln and Reconstruction: The Louisiana Experiment (Princeton, N.J., Princeton University Press, 1978), 423 pages. Winner, Kemper Williams Prize, Louisiana Historical Association, 1979.

BOOK CHAPTERS:

"The Law of Preclearance: Enforcing Section 5," co-authored with Christopher Seaman and Richard Valelly, in David Epstein, et.al. (eds.), *The Future of the Voting Rights Act* (New York, Russell Sage Foundation, 2006), 20-37.

"Alabama," co-authored with Jerome A. Gray, Edward Still, and Huey Perry, and "South Carolina," co-authored with Orville Vernon Burton, Terence R. Finnegan, and James W. Loewen, in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994), 38-66, 397-409. Winner, Richard Fenno Prize, American Political Science Association.

"History in the Courts: The Significance of *City of Mobile v. Bolden*," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., Howard University Press, 1984), 47-65.

LAW REVIEW ARTICLES:

"How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005," *South Carolina Law Review*, 57 (Summer 2006), 785-825.

"The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," co-authored with Christopher Seaman and Richard Valelly, *Michigan Journal of Race & Law*, 11 (Spring 2006), 275-323. [An unpublished version was printed in *Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. On the Constitution, H. Comm. On the Judiciary, 109th Cong., 96-181 (2005)(Serial No. 109-69).]*

"Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990," *University of Pennsylvania Journal of Constitutional Law*, 5 (May 2003), 665-708.

"Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case," *Chicago-Kent Law Review*, 70 (No. 3, 1994), 1275-1305.

"Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases," co-authored with J. Gerald Hebert, *Southern University Law Review*, 16 (Spring 1989), 101-28.

"Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits," *Howard Law Journal*, 28 (No. 2, 1985), 463-93.

JOURNAL ARTICLES:

"The Struggle for Minority Representation in Florida, 1960-1990," *Florida Historical Quarterly*, 86 (Summer 2007), 93-111.

"Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting," co-authored with Steven F. Lawson, *Journal of Policy History*, 12 (No.3, 2000), 293-320.

"The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1946-1986," *Journal of Urban History*, 25 (Jan. 1999), 199-225.

"Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom," *Social Science History*, 14 (Winter 1990), 507-31.

"The Party of Revolution: Republican Ideas About Politics and Social Change, 1862-1867," *Civil War History*, 30 (December 1984), 330-50.

"Class and Party in the Secession Crisis: Voting Behavior in the Deep South, 1856-1861," co-authored with Clark Miller and Dale Baum, *Journal of Interdisciplinary History*, VIII (Winter 1978), 429-57.

REVIEW ESSAYS:

"Race and Misrepresentation: Review of Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice*," H-Net, Feb. 2002. www.h-net.msu.edu/reviews/showrev.cgi?path=214111015008351.

"Review of David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interest in Congress*," H-Net, May 1998. www.h-net.msu.edu/reviews/showrev.cgi?path=23313895266679.

"Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act," co-authored with Pamela S. Karlan, *Journal of Law and Politics*, IV (Spring 1988), 751-77.

"The Political Dynamics of Black Reconstruction," *Reviews in American History*, 12 (March 1984), 51-57.

ENCYCLOPEDIA ARTICLE:

"The Reconstruction Myth," in Charles Reagan Wilson and William Ferris (eds.), *Encyclopedia of Southern Culture* (Chapel Hill, University of North Carolina Press, 1989), 1120-21 [reprinted in Jonathan Birnbaum and Clarence Taylor (eds.), *Civil Rights Since 1787: A Reader on the Black Struggle* (New York, New York University Press, 2000), 150-53.]

BOOK REVIEWS: American Historical Review, Journal of Interdisciplinary History, Journal of Southern History, Social Science History, American Review of Politics.

COURTROOM TESTIMONY AS AN EXPERT WITNESS:

(United States as Amicus Curiae), *SCLC v. Evans*, M.D.Ala. (Montgomery), December 1991. [Challenge to the method of electing certain circuit judges in Alabama]

(Plaintiffs), *Vereen v. Ben Hill County*, M.D.Ga. (Macon), December 1989. [Challenge to the state law requiring appointment of county school boards by the local grand jury, as applied in more than a dozen counties]

(Plaintiffs), *Hall v. Holder*, M.D.Ga. (Macon), December 1989.
[Challenge to the sole commissioner form of government in Bleckley County, Georgia.

(Plaintiffs), *Irby v. Fitzhugh*, E.D.Va. (Richmond), June 1988.
[Challenge to the appointment of all school boards in the Commonwealth of Virginia]

(Plaintiffs), *Dillard v. Crenshaw County, et.al.*, M.D.Ala. (Montgomery), Preliminary Injunction Hearing, March 1986. [Challenge to the at-large election of public officials in more than 180 Alabama counties, municipalities, and school boards]

(Plaintiffs), *Whitfield v. Clinton*, E.D.Ark. (Helena), March 1988. [Challenge to the use of the statewide majority vote requirement in Phillips County, Arkansas]

(Plaintiffs), *Dent v. Culpepper*, M.D.Ga. (Macon), Preliminary Injunction Hearing, November 1987.
[Challenge to the at-large election of the City Commission in Cordele, Georgia]

(Plaintiffs), *Jackson v. Edgefield County, School District*, D.S.C. (Columbia), April 1986. [Challenge to the at-large election of the Edgefield County School Board]

(Plaintiffs), *Harris v. Graddick*, M.D.Ala. (Montgomery), February 1985. [Challenge to the procedures by which election officials are selected and elections conducted in Alabama]

(Plaintiffs), *Woods v. Florence*, N.D.Ala. (Birmingham), August 1984. [Challenge to the method of appointing the Jefferson County Personnel Board]

(Plaintiffs), *Collins v. City of Norfolk*, E.D.Va. (Norfolk), May 1984. [Challenge to the at-large election of the Norfolk City Council]

(United States), *County Council of Sumter County, S.C. v. U.S.*, D.D.C., February 1983. [Defense of Section 5 Objection to the at-large election of the Sumter County Council]

(United States), *U.S. v. Dallas County Commission*, S.D.Ala. (Selma), October 1981. [Challenge to the at-large election of the Dallas County Commission]

(Plaintiffs), *Bolden v. City of Mobile*, S.D.Ala. (Mobile), May 1981. [Challenge to the at-large election of the Mobile City Commission]

(Plaintiffs), *Brown v. Board of School Commissioners of Mobile County*, S.D.Ala. (Mobile), April 1981. [Challenge to the at-large election of the Mobile County School Board]

SWORN WRITTEN TESTIMONY AS AN EXPERT WITNESS:

(United States as Defendant-Intervenor) July 31, 1996, *Cook v. Marshall County, Mississippi, and United States*, C.A. No. 3:95 CV 155-D-A, N.D. Miss. [Defense of Marshall County's redistricting plan]

(United States as Defendant-Intervenor) July 19, 1994, *Hays v. State of Louisiana*, C.A. No. 92-1522S, W.D. La. (Shreveport). [Defense of Louisiana's congressional redistricting plan]

(United States) March 25, 1991, *State of Georgia v. Thornburg* C.A. No. 90-2065, D.D.C. [Defense of Section 5 Objection to the method of electing certain superior court judges in Georgia]

(Plaintiffs) January 20, 1988, *Irby v. Fitzhugh*, C.A. No. 87-0633-R, E.D.Va. (Richmond). [Challenge to the appointment of all school boards in the Commonwealth of Virginia]

(United States) June 25, 1984, *U.S. v. Halifax County, N.C.*, C.A. No. 83-88-CIV-8, E.D.N.C. (Wilson). [Challenge to the at-large election of the Halifax County Commission]

(Plaintiffs) April 22, 1983, *Wilson v. Powell*, C.A. No. 383-14, S.D.Ga. (Dublin). [Challenge to the appointment of the Johnson County School Board by the county grand jury]

(United States) September 28, 1982, *County Council of Sumter County, S.C. v. U.S.*, C.A. No. 82-0912, D.D.C. [Defense of Section 5 Objection to the at-large election of the Sumter County Council]

CONGRESSIONAL TESTIMONY:

"Written Testimony of Dr. Peyton McCrary," in *Extension of the Voting Rights Act: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives*, 97th Cong., 1st Sess., Serial No. 24 (3 vols., Washington, D.C., G.P.O., 1982), III, 2749-76.

"Testimony Before the Subcommittee of National Parks and Public Lands, Committee on the Interior, U.S. House of Representatives, June 14, 1988.

UNPUBLISHED CONFERENCE PAPERS:

“From *Gomillion v. Lightfoot* to *City of Pleasant Grove v. United States*: Annexations, De-annexations, and the Voting Rights Act.” Constitution Day Conference, San Francisco State University, September 2010.

“Two Kinds of Vote Dilution: From *Baker v. Carr* to *White v. Regester*.” Organization of American Historians, April 2010.

"How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005," University of South Carolina School of Law, October 2005; [revised version, Southern Historical Association, November 2005].

"Bringing Equality to Power: Federal Courts and the Transformation of Southern Electoral Politics, 1960-2000." Organization of American Historians, April 2002.

"Why the Voting Rights Act Worked: A Judicial Model of Policy Implementation." Social Science History Association, October 1997; [revised version, Association of Public Policy Analysis and Management, November 1997].

"Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case." Southern Historical Association, November 1992.

"The Impact of the Voting Rights Act in Alabama," co-authored with Jerome Gray, Edward Still, and Huey Perry. American Political Science Association, 1989 [revised version presented at a Conference on the Impact of the Voting Rights Act, Rice University, Houston, Texas, May 1990].

"Taking History to Court: The Issue of Discriminatory Intent in Southern Voting Rights Cases." Joint Center for Political and Economic Studies, Washington, D.C., June 13, 1988.

"Keeping the Courts Honest: Expert Witnesses in Voting Rights and School Desegregation Cases," co-authored with J. Gerald Hebert. Southern Historical Association, November 1986.

"Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits." Conference on Voting Rights Law, Howard University School of Law, Washington, D.C., January 1985.

"The Subtle Gerrymander: Discriminatory Purposes of At-large Elections in the South, 1865-1982." Organization of American Historians, April 1983.

"The Party of Revolution: Republican Ideas About Politics and Social Change, 1861-1868." Southern Historical Association, November 1980.

"After the Revolution: American Reconstruction in Comparative Perspective." American Historical Association, December 1979.

"The Civil War Party System, 1854-1876: Toward a New Behavioral Synthesis?" Southern Historical Association, November 1976.

CHAIRPERSON, PANELIST, OR COMMENTATOR:

Alabama Association of Historians, 1983.
Alabama Department of Archives and History, 1988.
American Political Science Association, 1987, 2003.
Brookings Institution, 1990.

National Association of Secretaries of State, 1983.
Organization of American Historians, 1979, 1995.
Social Science History Association, 1981, 1987, 1996, 1997, 1999.
Southern Historical Association, 1973, 1985.
University of Alabama, 1983.
University of Utah, 2007.

ACADEMIC REFEREE:

Book-length manuscripts: Princeton University Press, University of North Carolina Press, University of Tennessee Press, University of Alabama Press, Louisiana State University Press, University of Georgia Press.

Article-length manuscripts: Journal of American History, American Historical Review, Sociological Spectrum, Gulf Coast Historical Review, Social Science History.

CONSULTANT:

Test Design: College Board Achievement Test, American History; Educational Testing Service, Princeton, N.J., 1979-1983

Archival: Re-organization of Section 5 Objection Files, Civil Rights Division/Voting Section, U.S. Department of Justice, Washington, D.C., January-July, 1989.

Litigation Research: Civil Rights Division/Voting Section, U.S. Department of Justice, Washington, D.C., August 1989 to August 1990.

FELLOWSHIPS AND GRANTS:

John D. and Catherine T. MacArthur Foundation, 1987-1988: Distinguished Scholar, Joint Center for Political and Economic Studies, Washington, D.C.

American Philosophical Society, 1983: Research Travel Grant.

Rockefeller Foundation, 1982-1983: Research Fellowship.

Carnegie Corporation of New York, 1982-1983: Research Fellowship.

National Endowment for the Humanities, 1980: Summer Research Stipend.

University of South Alabama, 1978-1987: Faculty Research Grants; Research Council Grant.

Vanderbilt University, 1976-1978: Manuscript Preparation Grant.

University of Minnesota, 1969-1976: Faculty Research Grants.

Princeton University, 1966-69: University Fellow; Herbert Osgood Fellow; NDEA Fellow.

University of Virginia, 1961-1966: Echols Scholar; Du Pont Scholar; Ford Foundation Fellow.

ATTACHMENT B

Attachment B: Section 2 Cases Settled by Consent Decrees in Non-Covered Jurisdictions

The following *99* cases are confirmed Section Two settlements in non-covered jurisdictions.

The *61* **s**ettlements in Section 2 cases listed in bold are identified in the record of congressional hearings. Citations are to the following hearing volumes: *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. 2835-57 (2005) [hereinafter *History, Scope, and Purpose*]; *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 104-289 (2006) [hereinafter *Evidence of Continuing Need*].

Settlements in cases that had minority language claims under Section 203 or 4(e) as well as Section 2 claims are listed in italics. Because these cases are identified in the record of congressional hearings, they are also listed in bold.

Where a civil action number is unknown, the date of filing is listed in brackets.

Arkansas (24)

United States v. Mississippi County, E.D. Ark. [10-15-1986]

Townsend, et al v. Watson, 1:89cv1111 (W.D. Ark. 1998)

James v. Snowden, 2:89cv54 (E.D. Ark. 1990)

Hunt v. Arkansas, 5:89cv406 (E.D. Ark. 1991)

Baxter v. Smith, 5:89cv416 (E.D. Ark. 1990)

Blunt v. Knight, 5:89cv417 (E.D. Ark. 1991)

U.S. v. City of Magnolia, W.D. Ark. [4-26-1990] [*History, Scope, and Purpose*, **2837**]

Penn v. Hazen Education Bd., 4:90cv793 (E.D. Ark. 1991)

Teal v. Womack, 5:90cv364 (E.D. Ark. 1990)

Hill v. Rochelle, 5:90cv602 (E.D. Ark. 1992)

Bell, et al v. Galloway, 6:90cv6089 (W.D. Ark. 1991)

Jones v. City of Camden, 1:91cv1110 (W.D. Ark. 1992)

Govan v. Huttig School District, 1:91cv1153 (W.D. Ark. 1993)

Reed v. Coles, 2:91cv12 (E.D. Ark. 1991)

Henderson v. Pickens, 4:91cv4025 (W.D. Ark. 1992)

Brown v. Grumbles, 5:91cv628 (E.D. Ark. 1993)

Childs v. Diemer, 5:91cv646 (E.D. Ark. 1993)

Jones v. City of Lonoke, 4:92cv539 (E.D. Ark. 1992)

Kemp, et al v. Hope Ar, City Of, et al., 4:92cv4124 (W.D. Ark. 1993)

Montgomery v. Mcgehee School District, 5:92cv18 (E.D. Ark. 1993)

Montgomery v. City of Mcgehee, 5:92cv25 (E.D. Ark. 1992)

Norman v. Dumas School District, 5:92cv345 (E.D. Ark. 1993)

Gordon v. City of Hot Springs, 6:93cv6070 (W.D. Ark. 1993)

Cox v. Donaldson, 5:02cv319 (E.D. Ark. 2003)

California (13)

United States v. City of Los Angeles, C.D. Cal. [11-26-1985] [*History, Scope, and Purpose*, **2836**]

Reyes v. Alta Hosp. Dist., No. 1:90cv620 (E.D. Cal.)

Reyes v. City of Dinuba, No. 1:91cv168 (E.D. Cal.)

Espino v. Cutler-Orosi Unified Sch. Dist., No. 1:91cv169 (E.D. Cal.)

Reyes v. Dinuba Elementary Sch. Dist., No. 1:91cv170 (E.D. Cal.)

Elizondo v. Dinuba Joint Union High School, No. 1:91cv171 (E.D. Cal.)

Martinez v. City of Bakersfield, No. 1:91cv590 (E.D. Cal.)

Mendoza v. Salinas Valley Mem. Hosp., No. 5:92cv20462 (E.D. Cal.)

United States v. Alameda County, N.D. Cal. [4-13-1995] – Also a Sec. 203 Case [*History, Scope, and Purpose*, **2838**]

Garcia v. City of Los Angeles, No. 2:96cv7661 (C.D. Cal.)

United States v. City of Santa Paula, No. 2:00cv3691 (C.D. Cal.) [*History, Scope, and Purpose*, **2838**]

United States v. Upper San Gabriel Valley Municipal Water District, No. 2:00cv7903 (C.D. Cal.) [*History, Scope, and Purpose*, **2838**]

Common Cause v. Jones, No. 2:01cv3470 (C.D. Cal.)

Colorado (1)

Martinez v. Romer, No. 1:91cv1972 (D. Colo.)

Connecticut (1)

Bridgeport Coalition for Fair Representation v. City of Bridgeport, No. 3:93cv1476 (D.Conn.). **[***Evidence of Continuing Need,* **4064, 4067-68]**

Florida (11)

Williams v. City of Leesburg, No. 83-66-CIV-OC-14 (M.D. Fla. 1985). **[***Evidence of Continuing Need,* **1484]**

Madison Co. Chapter NAACP v. Madison County, No. TCA-84-7234 (M.D. Fla. 1986)**[** *Evidence of Continuing Need,* **1484]**

Potter v. Washington County, 653 F. Supp. 121 (N.D. Fla. 1986) **[***Evidence of Continuing Need***, 1484, 4565]**

Bradford Co. Branch NAACP v. Bradford Co. School Board, No. 86-4-CIV-J-12 M.D.Fla.1986). **[***Evidence of Continuing Need,* **1484-85]**

Bradford Co. Branch NAACP v. Bradford Co. Commission, No. 86-4-CIV-J-14 (M.D.Fla.1986). **[***Evidence of Continuing Need,* **1484-85]**

Tallahassee Branch NAACP v. Leon County, 827 F.2d 1436 (11th Cir. 1987). **[***Evidence of Continuing Need,* **1484, 4566]**

Coleman v. Fort Pierce City Council, No. 2:92cv14157 (S.D. Fla.) **[***Evidence of Continuing Need,* **487-91]**

Anderson v. West Palm Beach City, No. 9:94cv8135 (S.D. Fla.) **[***Evidence of Continuing Need,* **500-02]**

George v. City of Cocoa, No. 6:93cv257 (S.D. Fla.). **[***Evidence of Continuing Need,* **477-81, 4575]**

NAACP v. Harris, No. 1:01cv120 (S.D. Fla.) **[***Evidence of Continuing Need,* **1200-03, 1491-92]**

United States v. Osceola County*, Fla**., M.D. Fla. [6-28-2002] – Also a Sec. 203 Case **[Evidence of Continuing Need,* **4581;** *History, Scope, and Purpose,* ***2839*****]**

Illinois (2)

Banks v. City of Peoria, No. 2:87cv2371 (C.D. Ill.)

Black v. McGuffage, No. 1:01cv208 (N.D. Ill.). **[***Evidence of Continuing Need,* **4462, 4348]**

Indiana (3)

Dickinson v. Indiana State Election Bd., 817 F. Supp. 737 (S.D. Ind. 1992). **[***Evidence of Continuing Need,* **4359-60]**

Anderson v. Morgan, No. 1:94cv1447 (S.D. Ind.)

Hines v. Marion Co. Election Bd., 166 F.R.D. 402 (S.D. Ind. 1995). **[***Evidence of Continuing Need,* **4359]**

Maryland (3)

United States v. City of Cambridge, D. Md. [12-5-1984]. **[***Evidence of Continuing Need,* **5540;** *History, Scope, and Purpose*, **2836]**

United States v. Dorchester County, D. Md. [12-5-1984] **[***History, Scope, and Purpose*, **2836**]

Conaway v. Maryland, No. 1:90cv610 (D. Md.)

Massachusetts (2)

United States v. City of Lawrence, D. Mass. [11-5-1998] – Also Sec. 203 **[***Evidence of Continuing Need,* **4072-73, 4080**; *History, Scope, and Purpose,* ***2838*****]**

United States v. City of Boston, No. 05-11598 (D. Mass. 2005) – Also Sec. 203 **[***History, Scope, and Purpose*, **2839]**

Michigan (1)

United States v. City of Hamtramck, No. 2:00-73541 (E.D. Mich.) **[***Evidence of Continuing Need,* **321-22, 4373;** *History, Scope, and Purpose*, **2838]**

Missouri (1)

Rojas v. Moriarty, 1994 Lexis 4033 (W.D. Mo. 1994) **[***Evidence of Continuing Need,* **4384]**

Montana (3)

Matt v. Ronan School District, No. 99-94 (D. Mont.) **[***Evidence of Continuing Need,* **1150, 1252]**

Alden v. Bd. of County Comm'rs of Rosebud County, 1:99cv148 (D. Mont.) **[***Evidence of Continuing Need,* **1150, 1246]**

United States v. Roosevelt County, No. 1:00cv50 (D. Mont.) **[***History, Scope, and Purpose*, **2838]**

New Jersey (1)

United States v. Passaic City and Passaic County, D.N.J. [6-2-1999] – Also Sec. 203, 208 **[***Evidence of Continuing Need,* **4133-34, 4138,** *History, Scope, and Purpose*, **2838]**

New Mexico (7)

United States v. Chaves County, D.N.M. [1-10-1985] [*History, Scope, and Purpose*, **2836]**

United States v. Roswell Independent School District, D.N.M. [3-12-1985] **[***History, Scope, and Purpose*, **2836]**

United States v. McKinley County, No. 86-0028 (D.N.M.1986) – Also Sec. 203 **[***Evidence of Continuing Need,* **4026-28, 4035;** *History, Scope, and Purpose*, **2836]**

United States v. State of New Mexico and Sandoval County, No. 88-1457 (D.N.M. 1990) – Also Sec. 203 **[***Evidence of Continuing Need,* **4029-30, 4035;** *History, Scope, and Purpose*, **2837]**

United States v. Cibola County, No. 93-1134 (D.N.M. 2004) – Also Sec. 203 **[***Evidence of Continuing Need,* **4033-35;** *History, Scope, and Purpose*, **2837]**

United States v. Socorro County, No. 93-1244 (D.N.M. 1994) – Also Sec. 203 **[***Evidence of Continuing Need,* **4030-31;** *History, Scope, and Purpose*, **2837]**

United States v. Bernalillo County, No. 98-156 (D.N. M. 1998) **[***History, Scope, and Purpose*, **2838]**

New York (3)

United Parents Association v. Bd. Of Elections, No. 89 CIV 0612 (E.D.N.Y.) **[***Evidence of Continuing Need,* **1889]**

Arbor Hill Concerned Citizens Neighborhood Ass'n, No. 1:03cv502 (N.D.N.Y.)

Montano v. Suffolk County Legislature, No. 2:03cv1506 (E.D.N.Y.)

North Carolina (13)

NAACP v. City of Statesville, 606 F. Supp. 569 (W.D.N.C. 1985) **[***Evidence of Continuing Need,* **1763, 1785-86]**

NAACP v. Forsyth County, No. 6:86cv803 (M.D.N.C.) **[***Evidence of Continuing Need,* **1764, 1787]**

NAACP v. City of Thomasville, No. 4:86cv291 (M.D.N.C. 1987) **[***Evidence of Continuing Need,* **1764, 1786]**

NAACP of Stanley Co. v. City of Albemarle, No. 4:87cv468 (M.D.N.C.) **[***Evidence of Continuing Need,* **1784]**

NAACP v. Richmond County, No. 3:87cv484 (M.D.N.C.) **[***Evidence of Continuing Need,* **1788]**

NAACP v. Duplin Co., No. 88-5-CIV-7 (E.D.N.C.) **[***Evidence of Continuing Need,* **1786]**

Hall v. Kennedy, No. 88-117-CIV-3 (E.D.N.C.) **[***Evidence of Continuing Need,* **1773-74]**

Johnson v. Town of Benson, No. 88-240-CIV-5 (E.D.N.C.) **[***Evidence of Continuing Need,* **1779]**

Patterson v. Siler City, No. C-88-701 (M.D.N.C.) **[***Evidence of Continuing Need,* **923-24]**

Sewell v. Town of Smithfield, No. 89cv360 (E.D.N.C.) **[***Evidence of Continuing Need,* **1794]**

Montgomery County Branch of the NAACP v. Montgomery County, No. 3:90cv27 (M.D.N.C.) **[***Evidence of Continuing Need,* **1782-83]**

NAACP v. Rowan-Salisbury Bd. of Educ., No. 4:91cv293 (M.D.N.C.) **[***Evidence of Continuing Need,* **1789]**

Rowsom v. Tyrrell County Bd. of Comm'rs, No. 2:93cv33 (E.D.N.C.) **[***Evidence of Continuing Need,* **953-54]**

North Dakota (1)

United States v. Benson County, D.N.D. [3-6-2000] **[***History, Scope, and Purpose*, **2838]**

Pennsylvania (1)

United States v. Berks County*,** E.D. Pa. [2-25-2003] – Also Sec. 4(e), 208 **[Evidence of Continuing Need,* **4118, 4120-21, 4127;** *History, Scope, and Purpose*, **2839]**

Rhode Island (1)

Metts v. Almond, No. 1:02cv204 (D.R.I.) **[***Evidence of Continuing Need,* **4081-82, 4086]**

Utah (1)

United States v. San Juan County, No. C-83-1286 (D. Utah, 1984) – Also Sec. 203 **[***Evidence of Continuing Need,* **4058-59;** *History, Scope, and Purpose*, **2835]**

South Dakota (4)

Buckanaga v. Sisseton Independent School District, South Dakota, 804 F.2d 469 (8th Cir. 1986) **[***Evidence of Continuing Need,* **1999, 4514, 4731]**

United States v. Day County and Enemy Swim Sanitary Dist., No. 1:99cv1024 (D.S.D.) **[***Evidence of Continuing Need,* **2000, 4403-04, 4425;** *History, Scope, and Purpose*, **2838]**

Weddell v. Wagner Community School District, No. 4:02-4056 (D.S.D.) **[***Evidence of Continuing Need,* **1172-73]**

Kirkie v. Buffalo County, No. 3:03cv3011 (D.S.D.) **[***Evidence of Continuing Need,* **1171-72, 4734]**

Tennessee (2)

United States v. City of Memphis, W.D. Tenn. [2-15-1991] **[***History, Scope, and Purpose*, **2838, 2837]**

United States v. Crockett County, No. 1:01cv1129 (W.D. Tenn.) **[***History, Scope, and Purpose*, **2839]**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA, Plaintiff, v. ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant	Civil Action No. 1:10-cv-00651-JDB

DECLARATION OF ROBERT S. BERMAN

I, Robert S. Berman, pursuant to 28 U.S.C. 1746, declare as follows:

1. I am an attorney who currently serves as a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. I have supervisory responsibility for the administrative review of voting changes submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. I have been employed as an attorney in the Department of Justice for 32 years with over 20 years of service in the Voting Section.

2. I have personal knowledge of the information contained in this declaration based upon my review of relevant records maintained by the Department of Justice, as well as my professional experience with, and personal knowledge of, Department of Justice policies and procedures.

3. At least 31 subjurisdictions located in whole or in part in Shelby County have submitted voting changes for administrative review under Section 5.

4. Since Shelby County was first required to comply with Section 5, the Department of Justice has received at least 682 submissions for review involving Plaintiff Shelby County or jurisdictions located in whole or in part in Shelby County. Of the 682 submissions, 291 were received from 19 jurisdictions located wholly within Shelby County.
5. The Attorney General has received at least 69 submissions for Section 5 review on behalf of Plaintiff Shelby County.
6. On April 8, 2010, the Department informed county officials that no objection would be interposed to Shelby County's most recent submission, which included a polling place change.
7. Section 5 submissions from the Cities of Birmingham, Calera, Chelsea, and Helena, all subjurisdictions located in whole or in part in Shelby County, are currently pending the Attorney General's administrative review.
8. The Attorney General has interposed five objections to changes affecting voting in jurisdictions wholly or partially contained within Shelby County: a July 7, 1975, objection to six annexations to the City of Alabaster; a December 27, 1977, objection to two annexations to the City of Alabaster; a May 4, 1987, objection to annexations to the City of Leeds; an August 16, 2000, objection to the designation of two annexations to Ward 1 of the City of Alabaster (at the same time 42 annexations adopted between 1992 and 2000 were precleared); and an August 25, 2008, objection to 177 annexations, their designation to districts, and a redistricting plan for the City of Calera.
9. On March 13, 2008, the City of Calera, a subjurisdiction of Shelby County, submitted a redistricting plan, along with 177 annexations that the City adopted between 1995 and 2007

but had not previously submitted, and their designation to districts, to the Attorney General for administrative review under Section 5.

10. On August 25, 2008, the Attorney General interposed an objection to the voting changes occasioned by the City of Calera's proposed redistricting plan and 177 annexations. The letter, which is dated August 25, 2008, and provides the factual and legal basis for the Attorney General's decision to interpose an objection, is appended as Attachment A.

11. On August 26, 2008, and October 7, 2008, the City of Calera conducted elections under the redistricting plan, which included the electorate of the objected-to 177 annexations, that was the subject of the Attorney General's August 25, 2008, objection. Attachment C at 4 (Consent Decree in *United States* v. *City of Calera*, CV-08-BE-1982-S (N.D. Ala. Oct. 29, 2008)).

12. On October 24, 2008, the United States filed an action against the City of Calera under Section 5 seeking to enjoin further implementation of changes affecting voting that had not received Section 5 preclearance. Attachment B (Complaint, *United States* v. *City of Calera*, CV-08-BE-1982-S (N.D. Ala. Oct. 24, 2008)).

13. On October 29, 2008, the court temporarily resolved this City of Calera matter through a consent decree that provided for an interim change in the method of election to an interim limited voting election plan, pending the results of the 2010 Census and a new special municipal election. *United States v. City of Calera*, CV-08-BE-1982-S (N.D. Ala. 2008); Attachment C (Oct. 29, 2008 Consent Decree).

14. On November 17, 2008 and March 24, 2009, the Attorney General denied the City of Calera's requests to withdraw his objections. Attachments D and E (Nov. 17, 2008 and Mar. 24, 2009 letters).

15. On September 25, 2009, after the adoption of the interim limited voting election plan, the Attorney General withdrew his objection to the 177 annexations to the City of Calera and also informed city officials that no objection would be interposed to the city's proposed interim voting plan for the 2009 municipal election in Calera. The Attorney General's September 25, 2009, letter did not, however, withdraw his objection to the 2008 redistricting plan or the designation of annexations to districts. The September 25, 2009, letter is appended as Attachment F.

The Administrative Review Process

16. The Attorney General endeavors to comply with Congress's intent that the administrative review of voting changes submitted pursuant to Section 5 be an efficient, convenient, and affordable alternative to seeking a declaratory judgment from a three-judge court in the United States District Court for the District of Columbia.

17. To that end, the Attorney General has a long-standing policy of providing information to covered jurisdictions concerning the administrative review process by publishing the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 in the Code of Federal Regulations. 28 C.F.R. part 51. These procedures were first promulgated in 1971. 36 Fed. Reg. 18186 (Sept. 10, 1971), and are revised when necessary. *See, e.g.*, 75 Fed. Reg. 332050 (June 10, 2010).

18. The Attorney General also has created a website that provides information concerning the Section 5 process (http://www.usdoj.gov/crt/voting/).

19. The Attorney General provides a toll-free telephone number for submitting officials to contact Department of Justice staff members, who are available to guide those officials through the submission process.

20. The Attorney General's procedures have always provided covered jurisdictions with the option to request expedited consideration of voting changes. 28 C.F.R. § 51.34. The Attorney General makes every effort to accommodate covered states and local jurisdictions that experience emergencies prior to elections that require expedited consideration of voting changes. Situations calling for expedited consideration include events such as fires or natural disasters that affect which polling places can be used in an election, or pre-election litigation that threatens to stop the conduct of an election. In appropriate circumstances, the Attorney General has made determinations within 24 hours or less of receipt of a submission.
21. The Attorney General also allows covered jurisdictions to send Section 5 submissions by overnight delivery. Shelby County availed itself of this option in a 2007 submission, which the jurisdiction sent by overnight delivery to the Attorney General.
22. For some years, the Department has allowed jurisdictions to make submissions and submit additional information on pending Section 5 submissions by telefacsimile. Shelby County availed itself of these options in 2004 and 2007, respectively, when it faxed a submission and additional information on pending Section 5 submissions to the Attorney General.
23. The Attorney General allows jurisdictions to make Section 5 submissions through a web-based application (http://wd.usdoj.gov/crt/voting/sec_5/evs/).
24. The Attorney General allows jurisdictions to submit additional information on pending Section 5 submissions by electronic mail.

Termination of Coverage Under the Act's Special Provisons

25. A jurisdiction may seek to terminate coverage under Section 4 of the Act, and thereby be relieved of the responsibility of complying with Section 5. 42 U.S.C. 1973b(a)(1).

26. Since 1965, of the approximately 943 county, parish, and township-level jurisdictions that conduct voter registration and were originally covered by Section 4, 57 of these jurisdictions (around 6.4%) have successfully bailed out and maintained their bailed out status. One state and several other jurisdictions also successfully bailed out and were later re-covered by new coverage determinations or by new court findings. Overall, since 1965, there have been 44 cases filed in which bailout was sought under Section 4(a). The United States consented to bailout in 36 of those cases and bailout was granted (and in one of these cases bailout was later rescinded); in three cases, the United States opposed bailout and the court denied bailout; in five cases, the jurisdiction dismissed its bailout action voluntarily after the United States opposed the bailout request.
27. Since the new bailout standard enacted in 1982 went into effect in 1984, the United States has consented to bailout in 21 cases. This included 18 cases involving county level jurisdictions (with 51 subjurisdictions) and three cases involving smaller jurisdictions. Hence, a total of 72 jurisdictions have been granted bailout since 1984.
28. If a jurisdiction requests termination of Section 4 coverage, the Attorney General conducts an independent investigation into whether the jurisdiction meets the statutory requirements.
29. The Attorney General has consented to every bailout action by a political subdivision filed since 1984, the effective date for the revised bailout provision.
30. Currently, the Attorney General is reviewing the informal requests of numerous jurisdictions to consent to terminate coverage under Section 4.
31. Since the Supreme Court's decision in *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2513-17 (2009), the Attorney General has consented to bailout by three smaller subjurisdictions, including the Northwest Austin Municipal Utility District itself.

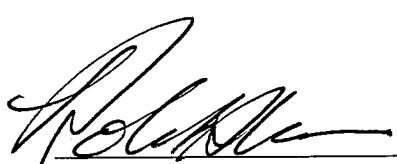
32. The Attorney General's independent investigations involve interviewing minority contacts, reviewing electoral behavior within the jurisdiction, and researching whether there are any unsubmitted voting changes, including reviewing a jurisdiction's minutes for the last 10 years to see if the jurisdiction has implemented any changes affecting voting that have not received the requisite Section 5 preclearance.

33. Shelby County advises that it has implemented at least one voting change prior to submitting the change for review. The County admits that it held a referendum election on April 9, 2002, prior to obtaining Section 5 preclearance. Complaint at 14; Pl. Statement of Material Facts 3-4. The County subsequently submitted for review and the Attorney General ultimately precleared under Section 5 the law providing for the April 9, 2002, referendum election.

34. The Attorney General has entered into consent decrees allowing bailout under Section 4 with other jurisdictions including, but not limited to, Roanoke County, Virginia, Shenandoah County, Virginia, and Frederick County, Virginia, where the jurisdictions had implemented isolated voting changes prior to submitting them for Section 5 review.

35. The Attorney General has neither conducted discovery in this case nor conducted the statutorily-required independent investigation as to Shelby County's eligibility to terminate Section 4 coverage. Accordingly, the Attorney General is unable make a determination at this time as to whether Shelby County is eligible to terminate Section 4 coverage.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 15, 2010.



Robert S. Berman

ATTACHMENT A

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

August 25, 2008

Dan Head, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear Mr. Head:

This refers to 177 annexations, their designations to districts, and the 2008 redistricting plan for the City of Calera in Shelby County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 7, 2008, request for additional information on June 24, 2008; additional information was received through August 18, 2008.

According to the 2000 Census, the City of Calera has a total population of 3,158 persons, of whom 628 (19.9%) were identified as African American. We understand that the city has experienced sizeable growth since that time, due primarily to residential development on the 177 annexations now under review. The city has provided estimates that its population is at 10,806 persons as of December 2006, of whom 20 percent are identified as African American.

The submitted annexations and redistricting plan would eliminate the city's sole majority African-American district. This district and the single-member district method of election were adopted pursuant to a consent decree approved 18 years ago by the court in Dillard v. City of Calera, Civil Action No. 2:87cv1167-MHT. Under this arrangement, the district has elected an African-American candidate for the last 20 years.

We have carefully considered the information you have provided, as well as information and materials from other interested parties. Under Section 5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577 (2006) ("Voting Rights Act"), the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See also Georgia v. Ashcroft, 123 U.S. 2498 (2003); Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.52 (c). As discussed further below, I cannot conclude that the city has sustained its burden of showing that the proposed change does not have a discriminatory purpose or effect. Therefore, based on the information available to us, I object to the voting changes on behalf of the Attorney General.

The United States Supreme Court has held that where annexations decrease minority voting strength, the reasons for the annexations must be objectively verifiable and legitimate,

and the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community in the expanded city. City of Richmond v. United States, 422 U.S. 358, 370-3 (1975); see also, City of Pleasant Grove v. United States, 479 U.S. 462 (1987); City of Port Arthur v. United States, 459 U.S. 159 (1982); City of Rome v. United States, 446 U.S. 156 (1980).

For 13 years, the city has failed to submit their adopted annexations for Section 5 review. Our Department has not received an annexation submission from the city since 1993, and the city admits that it is at fault for not submitting the 177 annexations. The only submission in the last 13 years was a proposed redistricting plan based on the 2000 Census which included no mention of the missing annexations.

In a similar situation, the United States Supreme Court in City of Rome v. United States, 446 U.S. at 186, made it clear that the current population of the annexations needs to be included for Section 5 review:

> Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data.

The Supreme Court found that the City of Rome failed to provide the necessary information about total population, voting age population, and a racial composition for each. *Id.* Likewise, the City of Calera also has failed to provide any reliable current population information about the 177 annexations here.

The demographic data provided by the city regarding total population and voting age population in the city as a whole is also unreliable. Beginning with total population, the city used certificate of occupancy data to estimate total population in December 2006 of 10,806. The city arrived at this number by decreasing the persons per household multiplier of 2.3 significantly from the 2000 Census without explanation. Had the city used the 2000 Census number, the population estimate would have been approximately 12,000 persons. The United States Census Bureau estimated the population in July 2006 at 8,329 and in July 2007 at 9,398. The city has not explained why its population estimate is substantially higher than the Census estimate. Likewise, the city fails to provide reliable voting age population.

The estimate of racial composition in the city has no basis. The city has claimed that the population is 20 percent black throughout the newly annexed areas, but no attempt has been made to determine their composition. Simply because black population in the city was 20 percent of the population in 2000, does not mean that would be the percentage of black population in the newly annexed areas. In fact, both city-wide voter registration and school data in recent years appear to show growth in the black population. In failing to provide adequate numbers to evaluate the annexations and concomitant redistricting plan, the city fails to meet its burden of proof.

The City of Calera also appears to have failed to consider how the African-American population would be fairly reflected in the post-annexation election system moving forward. In March 2007, three months prior to the adoption of the proposed redistricting plan, the State of Alabama and plaintiffs filed a Joint Motion to Show Cause asking why the case should not be dismissed. In that order to show cause, they stated that the Alabama legislature in Act No. 2006-252 provide that the Calera City Council can increase the size of the city council under the single-member district method of election by general or local law in the future. The court dissolved the consent decree on May 9, 2007. According to the geographer hired by the city, he was willing to provide information for the city to consider alternative methods of election that would have provided black voters a better opportunity to elect a candidate of choice, but the city council expressed no interest in these alternatives.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the annexations and concomitant redistricting plan will continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Calera plans to take concerning this matter. If you have any questions, you should call Eric Rich (202-305-0107), an attorney in the Voting Section.

Sincerely,

Grace Chung Becker

Grace Chung Becker
Acting Assistant Attorney General

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE CITY OF CALERA, ALABAMA; GEORGE W. ROY, Mayor of City of Calera; JERRY DAVIS, ERNEST MONTGOMERY, BOBBY JOE PHILLIPS, DAVID BRADSHAW and MILE ROBERSON, Council members of City of Calera; LINDA STEELE, City Clerk for City of Calera;

Defendants.

CV-08-BE-1982-S

COMPLAINT

The United States of America, plaintiff herein, alleges:

1. This action is brought on behalf of the United States by the Attorney General pursuant to Sections 5 and 12(d) of the Voting Rights Act of 1965, as amended 42 U.S.C. 1973c and 1973j(d), and pursuant to 28 U.S.C. 2201, to enforce rights guaranteed by Section 5 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 42 U.S.C. 1973c, 42 U.S.C. 1973j(f), and 28 U.S.C. 1345. Venue properly lies in this Court under 28 U.S.C. 1391(b)(1), (2). The City of Calera, Alabama, lies within this Judicial District and is the place

where the events giving rise to the claim occurred. Defendant City of Calera officials also reside and perform their official duties in this Judicial District. Upon information and belief, all Defendants reside in the State of Alabama.

PARTIES

3. The Attorney General, representing plaintiff United States of America, is charged by the Voting Rights Act with the statutory responsibility both for the Act's Administrative preclearance process, and with bringing actions in Federal court to enforce the Act's requirements. See 42 U.S.C. 1973j(d).

4. Defendant City of Calera, Alabama, is charged with the responsibility of ensuring that its elections laws, as applied, comply with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c ("Section 5").

5. Defendant George W. Roy is the Mayor of the City of Calera and in that capacity serves as the head of the Executive Branch of city government. Defendant Roy is charged with the responsibility of legislating and enforcing compliance with city ordinances, including drawing voting districts and annexations pertaining to the establishment of city municipal election districts. Defendant Roy is sued in his official capacity.

6. Defendants Jerry Davis, Ernest Montgomery, Bobby Joe Phillips, David Bradshaw and Mile Roberson are Council Members of the City of Calera City Council and in that capacity charged with the responsibility of legislating ordinances, including drawing voting districts and annexations pertaining to the establishment of city municipal election districts. Defendants Davis, Montgomery, Phillips, Bradshaw and Roberson are sued in their official capacities.

7. Defendant Linda Steele is the City Clerk for the City of Calera and in such capacity presides over the election process, including voter registration, candidate qualifying, running of the municipal elections, and certifies results of elections as well as actions taken by the City of Calera City Council. Defendant Steele is sued in her official capacity.

ALLEGATIONS

8. The defendants named herein have authority under Alabama law to enact or administer voting qualifications or prerequisites to voting, or standards, practices, or procedures with respect to voting different from those in force or effect on November 1, 1964.

9. The City of Calera, Alabama, is subject to the preclearance requirements of Section 5.

10. Section 5 states that any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect in the City of Calera, Alabama, on November 1, 1964, may not be lawfully implemented unless the State of Alabama, or other appropriate authority with the power to enact or administer voting changes such as the City of Calera, obtains a declaratory judgment from the United States District Court for the District of Columbia that the changes does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. However, such change may be implemented without such judgment if it has been submitted to the United States Attorney General, and the Attorney General has not interposed an objection within sixty days. 42 U.S.C. 1973c.

11. According to the U.S. Census Bureau, in 2000, Calera had 3,158 residents, of whom 628 (19.9%) are African American, 60 (1.9%) are Hispanic, 27 (0.9%) are Native

American, and 18 (0.6%) are Asian. The voting-age population totaled 2,314 residents, with 404 (17.5%) African Americans, 33 (1.4%) Hispanics, 22 (1.0%) Native Americans, and 9 (0.4%) Asians. According to the Census Bureau, as of July 2004, the City of Calera's population was 5,918; as of July 2006, the population was 8,329; and as July 2007, the population estimate indicates there is a population of 9,398. The City of Calera estimated that as of December 2006, its populations was 10,806, of whom 20.24 percent are African American.

12. As of August 10, 2004, the City of Calera had 3,027 registered voters, of whom 400 (13.2%) were identified as African American, and 43 (1.4%) identified as "other." As of July 30, 2008, Shelby County, wherein the City of Calera is located, reported that there are 4,680 registered voters in the City of Calera, of whom 773 (16.5%) are African American, 11 (0.2%) are Hispanic, 1 (0.02%) is Native American, 3 (0.1%) are Asian, and 84 (1.7%) are listed as "other."

13. The City of Calera is governed by a mayor and five council members. The mayor is a voting member of the Council and is elected at-large for a four-year term. Council members are elected from single-member districts to serve concurrent four-year terms. General elections occur in August of Presidential election years.

14. The City of Calera's five single-member districts were created by a consent decree in the case of Dillard v. City of Calera, M.D. Alabama, Civil Action No. 2:87cv1167-MHT(WO, in which the Court found evidence of racially polarized voting. The parties agreed to change the City of Calera's form of government for the election of its Council members from at-large, numbered posts to the current five single-member district plan, with one majority African American district. The consent decree was entered on January 3, 1990.

15. On March 7, 2007, the State of Alabama and plaintiffs in the case filed a Joint Motion to Show Cause asking why the case should not be dismissed. In that order to show cause, the parties argued that the Alabama legislature in Act No. 2006-252 provided that the City Council for the City of Calera could thereafter increase the size of the city council under the single-member district method of election by general or local law. Act No. 2006-252 also provided authority for the city to have single-member districts. Given the ability of the city to change the size of its body with the single-member district method of election, there was no reason for the court to retain jurisdiction to administer the consent decree, and thus, the Court dismissed the case on May 9, 2007.

16. The City of Calera submitted for review under Section 5 177 annexations to the district boundaries and jurisdiction of the City that had been implemented between 1993 and 2008. The City of Calera also submitted for review under Section 5 a concomitant redistricting plan which provided for a change in the boundaries of the City Council's voting districts. The proposed redistricting maintained five single-member districts, but had the effect of dissolving the only majority-minority district. The redrawn district 2 reduced the African American registered voters in the district from 70.9% to 29.5%.

17. On August 25, 2008, the Attorney General interposed a timely objection under Section 5 to the submitted annexations to the City of Calera's redistricting plan and the 177 annexations on the grounds that the submitting authority had failed to meet its burden of establishing that the proposed changes would not have a discriminatory purpose and effect on minority voters. The objection letter is attached as Exhibit A.

18. The City of Calera held an election for mayor and council members on

August 26, 2008 and a run-off election on October7, 2008 using the objected-to district boundaries and electorate that included the objected-to annexations.

19. Defendants have not obtained a judgment from the United States District Court for the District of Columbia pursuant to Section 5 declaring that the proposed districts and annexations have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color.

20. The failure of defendants to obtain Section 5 preclearance of the proposed district boundaries and annexations renders these voting changes legally unenforceable.

21. Unless enjoined by this Court, defendants will continue to violate the Voting Rights Act by continuing to administer and implement the objected-to change in district boundaries and electorate by certifying the results of the August 26, 2008 and October 7, 2008 elections. The prevailing candidates will be sworn into office on November 3, 2008.

WHEREFORE, the United States of America prays that a court of three judges be convened to hear this action pursuant to 42 U.S.C. 1973c and 28 U.S.C. 2284 and thereafter enter a judgment:

(1) Declaring that the changes in district boundaries and electorate for City of Calera elections constitute changes affecting voting within the meaning of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, and are legally unenforceable because they have not received the requisite preclearance under Section 5 of the Voting Rights Act;

(2) Declaring that implementation of the changes in district boundaries and electorate for City of Calera elections violates Section 5 of the Voting

Rights Act of 1965, as amended, 42 U.S.C. 1973c; and

(3) Enjoining defendants, their successors in office, their agents and all persons acting in concert or participation with them, from administering or implementing the district boundaries and electorate to which the Attorney General has interposed a timely objection unless and until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42, U.S.C.1973c, is obtained; and

(4) Enjoining defendants, their successors in office, their agents and all persons acting in concert or participation with them, from certifying the results of the August 26, 2008, and October 7, 2008 municipal elections, which was based on the district boundaries and electorate to which the Attorney General has interposed a timely objection unless and until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42, U.S.C.1973c, is obtained; and

(5) Enjoining defendants, their successors in office, their agents and all persons acting in concert or participation with them, from swearing in the prevailing candidates on November 3, 2008, which would be based on the district boundaries and electorate to which the Attorney General has interposed a timely objection unless and until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42, U.S.C.1973c.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

MICHAEL B. MUKASEY
Attorney General

GRACE CHUNG BECKER
Acting Assistant Attorney General
Civil Rights Division

ALICE H. MARTIN
United States Attorney

Sharon D. Kelly
Chief, Civil Division
U.S. Attorneys Office

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ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, v. THE CITY OF CALERA, ALABAMA, et al.; Defendants.	CIVIL ACTION NO. **CONSENT DECREE** Three-Judge District Court CV-08-BE-1982-S

The Attorney General of the United States of America ("Attorney General") filed this action pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c (Section 5"). The Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 42 U.S.C. 1973C and 1973j(f). In accordance with the provisions of 42 U.S.C. 1973c and 28 U.S.C. 2284, the Section 5 claim must be heard and determined by a court of three judges. The events relevant to this action occurred in the City of Calera, Alabama, which is located in the United States District Court for the Northern District of Alabama, Southern Division. See 28 U.S.C. 124.

The Attorney General, representing plaintiff United States of America, is charged by the Voting Rights Act with the statutory responsibility both for the Act's administrative preclearance process, and with bringing actions in Federal court to enforce the Act's requirements. See 42 U.S.C. 1973j(d).

The State of Alabama and its subdivisions are subject to the preclearance requirements of Section 5. See 42 U.S.C. 1973c; see also 28 C.F.R. Part 51, Appendix. Section 5 provides that any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect in the State of Alabama or its subdivisions

on November 1, 1964, may not be lawfully implemented unless such change has been submitted to the Attorney General, and the Attorney General has not interposed an objection within sixty days, or the jurisdiction obtains a declaratory judgment from the United States District Court for the District of Columbia that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 42 U.S.C. 1973c.

Defendant City of Calera ("City") is a subdivision of the State of Alabama and is therefore subject to the Section 5 preclearance requirements. The City is governed by a mayor, elected at large, and a five-member city council, elected from five single-member districts, each for four-year concurrent terms.

Defendant Mayor and City Council members are the governing body for the City and, along with the City Clerk, are responsible for implementing and administering voting changes and conducting elections for the City.

On March 18, 2008, the City submitted for Section 5 review 177 annexations to the district boundaries of the City that had been implemented between 1993 and 2008 and a concomitant redistricting plan which provided for a change in the boundaries of the City Council's voting districts. On May 7, 2008, the Attorney General informed the City of Calera that determination was not possible in that supplementary information was required. On July 24, 2008, the City submitted that additional information to enable the Attorney General to conduct his review.

On August 25, 2008, the Attorney General interposed a timely objection under Section 5 to the submitted annexations to the City of Calera's redistricting plan and the 177 annexations on

the grounds that the submitting authority had failed to meet its burden of establishing that the proposed changes would not have a discriminatory purpose or effect on minority voters.

On August 26, and October 7, 2008, the City proceeded with municipal elections using the district boundaries and electorate that included the annexations objected to by the Attorney General under Section 5 of the Voting Rights Act.

To avoid protracted and costly litigation, the parties have agreed that this lawsuit should be resolved through the terms of this Consent Decree ("Decree"). Accordingly, the United States and the Defendants hereby consent to the entry of this Decree, as indicated by the signatures of counsel at the end of this Decree. The parties waive a hearing and entry of findings of fact and conclusions of law on all issues involved in this matter. Each party shall bear its own costs and fees. Defendants are committed to fully complying with all the Section 5 preclearance requirements in the future. Accordingly, the United States and Defendants stipulate and agree to the following:

1. The City of Calera, Alabama is a covered jurisdiction within the meaning of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

2. The 177 annexations and the concomitant redistricting plan submitted by the City of Calera to the Attorney General constitute voting changes within the meaning of Section 5. The voting changes are legally unenforceable unless they receive the requisite preclearance under Section 5 of the Voting Rights Act. See Clark v. Roemer, 500 U.S. 649 (1991); 28 C.F.R. 51.10.

3. On August 25, 2008, the Attorney General interposed a timely objection to the 177 annexations and the concomitant redistricting plan submitted by the City of Calera. These annexations and the redistricting plan have not received preclearance from the United States

District Court for the District of Columbia or the United States Attorney General, as required under Section 5 of the Voting Rights Act.

4. Defendants' conducted the August 26, and October 7, 2008, City of Calera municipal elections based on the unprecleared voting changes, including the annexations and the concomitant redistricting plan. The candidates who prevailed in those elections would be sworn into office on November 3, 2008.

5. Irreparable harm would be caused by Defendants' continued administration and implementation of the unprecleared voting changes.

6. On September 16, 2008, Defendants sought reconsideration of the August 25, 2008, objection, and the Attorney General has committed to providing a decision by no later than November 17, 2008. The Attorney General will issue a decision by October 31, 2008, if it is possible.

Accordingly, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. In the event that the Attorney General withdraws the August 25, 2008, objection, the United States agrees that the necessary Section 5 preclearance will have been obtained, and the candidates prevailing in the August 26, and October 7, 2008 elections may be sworn into office.

2. In the event that the Attorney General has not made a decision by October 31, 2008, the Defendants, their agents, their successors in office, and all persons acting in concert with them, are ENJOINED from allowing the candidates prevailing in the August 26, and October 7, 2008 elections to be sworn into office, unless the Attorney General subsequently withdraws the August 25, 2008 objection, or unless the United States District Court for the

District of Columbia preclears the annexations and redistricting plan.

3. In the event that the Attorney General continues the August 25, 2008, objection, Defendants, their agents, their successors in office, and all persons acting in concert with them, are PERMANENTLY ENJOINED from allowing the candidates prevailing in the August 26, and October 7, 2008 elections to be sworn into office, unless the Attorney General subsequently withdraws the August 25, 2008 objection, or unless the United States District Court for the District of Columbia preclears the annexations and redistricting plan.

4. Defendants, their agents, their successors in office, and all persons acting in concert with them, are ENJOINED from administering or attempting to administer any election using the 177 annexations and concomitant redistricting plan until Defendants obtain Section 5 preclearance.

5. If the August 25, 2008 objection is not withdrawn, Defendants shall reschedule the August 26, and October 7, 2008 municipal elections to a special election date in 2009. Defendants shall follow state law requirements in conducting the election, and Defendants shall submit the special election date for the necessary Section 5 preclearance.

6. This decree is final and binding between the parties and their successors in office regarding the claims raised in this action. This Decree shall remain in effect through December 31, 2009, or until the annexations and redistricting plan are precleared, whichever occurs first.

7. The Court shall retain jurisdiction of this case to enter further relief or such other orders as may be necessary for the effectuation of the terms of this agreement and to ensure compliance with Section 5 of the Voting Rights Act.

Agreed to this 29 day of October, 2008.

AGREED AND CONSENTED TO:

For Plaintiff:

MICHAEL B. MUKASEY
Attorney General

GRACE CHUNG BECKER
Acting Assistant Attorney General
Civil Rights Division

CHRISTOPHER COATES
Chief, Voting Section
TIMOTHY F. MELLETT
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ALICE H. MARTIN
United States Attorney

Sharon D. Kelly
Chief, Civil Division
U. S. Attorneys Office

For Defendants:

FRANK ELLIS, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

JUDGEMENT AND ORDER

This Court, having considered the United States' claim under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, and having determined that it has jurisdiction over this claim, has considered the terms of the Consent Decree, and hereby enters the relief set forth above and incorporates those terms herein.

ENTERED and ORDERED this 29th day of October, 2008.

Rosemary Barkett
UNITED STATES CIRCUIT JUDGE
by KOB with permission

Karon O. Bowdre
UNITED STATES DISTRICT JUDGE

J. Clemon
UNITED STATES DISTRICT JUDGE

ATTACHMENT D

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

November 17, 2008

Frank C. Ellis, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear Mr. Ellis:

This refers to your request that the Attorney General reconsider and withdraw the August 25, 2008, objection interposed under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to 177 annexations, their designation to districts, and the 2008 redistricting plan for the City of Calera in Shelby County, Alabama. We received your request on September 16, 2008, with additional information received through November 7, 2008.

We have reconsidered our earlier determination in this matter. We based this review on the information and arguments you have advanced in support of your request, along with the other information in our files and comments received from other interested parties. The city submitted data from a demographic survey conducted subsequent to our objection. The survey purports to indicate population, by race, that has been added to the city as a result of post-2000 residential development. The survey was sent to 3,055 households in 32 new housing developments. There were 21 new housing developments in the annexed areas and 11 new housing developments within the 1993 boundaries of the city. The survey requested information about total population, voting age population, registered voters, and whether survey respondents were "white" or "non-white." The city received 990 responses, a 31 percent return rate. According to survey data, 12.7 percent of the population in respondent households is nonwhite. The city cites this result as evidence that it would have been impossible to reapportion the city's five districts while maintaining the black majority in District 2.

Although the information provided does increase the understanding of the population growth in the City of Calera, the city has failed to provide information necessary to the review of

the submitted changes. We have requested that the city provide reliable estimates for the entire area of annexed territory. These projections should include the total and voting-age population, broken out by race. Our guidelines identify the information necessary to the review of annexations and redistricting plans. In particular, 28 C.F.R. 51.28 (a)(1) requires that jurisdictions provide the "Total and voting-age population of the affected area before and after the change, by race and language group;" and subsection (a)(3) requires "Any estimates of population, by race and language group, made in connection with the adoption of the change." The jurisdiction failed to provide these estimates.

The city did not use the survey results to estimate the population for the districts in the proposed redistricting plan. The city also failed to provide the racial breakdown in each district. This would have allowed the city to determine if adding or removing different developments may have avoided the resulting elimination of the ability of black voters to elect a candidate of choice.

The city also has failed to address a key concern as to whether the survey data supports the city's assertion that a less retrogressive district plan could not have been drawn. The results of the August 26, 2008, election demonstrate the impact of the changes on the minority franchise in the city. Prior to this election, voters in District 2 had elected an African-American councilman for 20 years. In the election under the objected-to district lines, the African-American incumbent was defeated, although the prevailing candidate has been enjoined by a three-judge court from taking office. *United States v. City of Calera*, 2:08-cv-1982-KOB (N.D. Ala.) (October 29, 2008). The city has not provided any analysis demonstrating that it could not develop a proposed plan that would increase the black population in District 2. Thus, the city has failed to demonstrate that the retrogression was unavoidable.

Finally, the city has failed to consider alternative election methods for mitigating the impact of the proposed changes. The Supreme Court has held that where annexations decrease minority voting strength, the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community in the expanded city. *City of Richmond* v. *United States*, 422 U.S. 358, 370-3 (1975); see also, *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987); *City of Port Arthur* v. *United States*, 459 U.S. 159 (1982); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

In light of these considerations, I remain unable to conclude that the City of Calera has carried its burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 411 U.S. 526 (1973): 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must decline to withdraw the objection to the 177 annexations, their designations to districts, and the 2008 redistricting plan.

As we previously advised, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. We remind you that unless the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the annexations, their designations and the concomitant redistricting plan will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Calera plans to take concerning this matter. If you have any questions, you should call Mr. Eric Rich (202-305-0107), an attorney in the Voting Section.

Because the Section 5 status of the changes is before the Court in *United States v. City of Calera*, 2:08-cv-1982-KOB (N.D. Ala.), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

Grace Chung Becker

Grace Chung Becker
Acting Assistant Attorney General

ATTACHMENT E

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

March 24, 2009

Frank C. Ellis, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear Mr. Ellis:

This refers to your second request that the Attorney General reconsider and withdraw the August 25, 2008, objection interposed under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to 177 annexations, their designation to districts, and the 2008 redistricting plan for the City of Calera in Shelby County, Alabama. We received your request on January 23, 2009; supplemental information was received through March 10, 2009.

On September 16, 2008, the Department received the city's first request for reconsideration of the August 25, 2008 objection. On November 17, 2008, the Department continued the August 25, 2008 objection, finding that the city failed to provide necessary information in a number of key areas. We received your second request for reconsideration on January 23, 2009. In this latest reconsideration request, the city submitted analysis of the demographic survey data and responses to our November 17, 2008 letter.

Having reviewed these materials, I remain unable to conclude that the City of Calera has carried its burden of showing that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973): 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must again decline to withdraw the objection to the 177 annexations, their designations to districts, and the 2008 redistricting plan.

According to the 2000 Census, the City of Calera has a total population of 3,158 persons, of whom 628 (19.9%) were identified as African American. The city has experienced sizeable growth since that time, due primarily to residential development on the 177 annexations now under review. In the latest reconsideration request, the city's analysis showed, "approximately 13%, or 995 persons, of an estimated 7, 648 residents who have moved into the City of Calera

are minority residents." January 22, 2009 letter, Exhibit 1 at 2. If these figures are added together, the total population is 10,806, of whom 1,623 (15%) were identified as non-white.[1]

The city states that the survey data demonstrates a dramatic drop in the city's nonwhite population as a percentage of the city as a whole since the 2000 Census. The city also has revised the numbers for its proposed districts based on new analysis by its geographer. The analysis shows that the proposed District 2 would have a 31.5 percent nonwhite population, a drop from the city's estimate in its initial submission.

Although the city claims that African-Americans have become a smaller percentage of the population as a whole over the years, the city does not adequately account for the fact that, both citywide voter registration and school data in recent years have shown that the black population has become a larger percentage of the population. For example, in 2004 the non-white voter registration was 14.7 percent and the black registration was 13.2 percent of total registrants. Registration data obtained from the November 2008 general election show that non-white registration is 21.3 percent of Calera's registrants and black registrants comprise nearly 19 percent of the total. In contrast, the city's estimates show a total minority population of 15 percent. There has been no evidence presented to show that black voters are more likely to register to vote than white voters in the City of Calera.

The question of reliability is highly relevant in light of the fact that the submitted annexations and redistricting plan would eliminate the city's sole majority African-American district. This district and the single-member district method of election were adopted pursuant to a consent decree approved 18 years ago by the court in *Dillard* v. *City of Calera,* Civil Action No. 2:87cv1167-MHT. As you are aware, the black incumbent lost his bid for reelection in an election that was held under the new district lines, even though the city had not obtained Section 5 preclearance for the annexations and districting plan.

Once again, the city has failed to appropriately consider alternative election methods for mitigating the impact of the proposed changes. The Supreme Court has held that where annexations decrease minority voting strength, the post-annexation election system must fairly reflect the post-annexation voting strength of the minority community in the expanded city. *City of Richmond* v. *United States*, 422 U.S. 358, 370-3 (1975); see also, *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987); *City of Port Arthur* v. *United States*, 459 U.S. 159 (1982); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

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[1] The city failed to estimate the total population and the minority population in a consistent manner. The city arrived at a total population estimate by using 2000 Census total population and adding an estimate for the total population based upon building permit and certificate of occupancy data from 2006. The city determined the estimate for the percentage of minority population by using the survey data from 2008. The city then used the minority population percentage from the survey and applied it to the total population data from 2006 to arrive at the number of minority persons in the five proposed districts.

The consent decree in *Dillard* v. *City of Calera* was dissolved because, *inter alia*, the State of Alabama had adopted law that allowed jurisdictions to maintain minority representation by increasing the size of the governing body or by other methods. The city can increase the number of seats to provide representation and then draw a district that will allow black voters to elect a candidate of choice. The city states that it could only achieve a majority-minority district by implementing a 15-district plan. Our analysis of registered voters show that a viable district is possible under an eight-district plan. Moreover, our analysis suggests that alternatives are available even under a five-district plan to mitigate retrogression.

As we previously advised, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. We remind you that unless the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the annexations, their designations and the concomitant redistricting plan will continue to be legally unenforceable. *Clark* v. *Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the City of Calera plans to take concerning this matter. If you have any questions, you should call Mr. Eric Rich (202-305-0107), an attorney in the Voting Section.

Because the Section 5 status of the changes is before the Court in *United States* v. *City of Calera*, 2:08-cv-1982-KOB (N.D. Ala.), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

Loretta King

Loretta King
Acting Assistant Attorney General

ATTACHMENT F

U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

SEP 25 2009

Dan Head, Esq.
Wallace, Ellis, Fowler & Head
P.O. Box 587
Columbiana, Alabama 35051

Dear Mr. Head:

This refers to your third request that the Attorney General reconsider and withdraw the August 25, 2008, objection to 177 annexations interposed under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. This also refers to the interim voting plan for the 2009 municipal election, which consists of a change in method of election from five single-member districts to an at-large, limited voting plan, an increase in the number of council members from five to six, and a plurality vote requirement; and five additional annexations with one technical correction to a previously submitted annexation, for the City of Calera in Shelby County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on July 29, 2009; supplemental information was received through August 25, 2009.

On September 16, 2008, the Department received the city's first request for reconsideration of the August 25 objection. On November 17, 2008, the Department continued the objection, finding that the city failed to provide necessary information in a number of key areas. We received your second request for reconsideration on January 23, 2009. On March 24, 2009, the Department once again continued the objection, with similar findings.

In this latest reconsideration request, the city submitted an interim voting plan for the 2009 municipal election that will be used in lieu of a single-member district plan. We have reconsidered our earlier determination regarding the 177 annexations based on the information and arguments you have advanced in support of your request, along with other information in our files and comments received from other interested persons.

The city's adoption of the at-large, limited voting plan with six councilmembers for the 2009 municipal election reflects a good faith effort to effectively remedy the concerns raised in our objection and subsequent objection continuations. The interim plan does not depend upon the location of minority populations in order to provide African-American voters a meaningful opportunity to elect a candidate of choice. Instead, the voting system proposed here will preserve African-American voting strength so long as these voters equal or exceed a specific percentage of the electorate, known as the "threshold of exclusion." Our review of voter registration and turnout data shows that the interim voting plan will provide African-American voters with the opportunity to elect a candidate of choice to the city council.

Accordingly, pursuant to the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.48(b), the objection interposed against the 177 annexations is hereby withdrawn. No other portion of the August 25 objection has been withdrawn (i.e. the 2008 redistricting plan or the designation of the 177 annexations to districts).

With regard to the interim voting plan for the 2009 municipal election, which consists of a change in method of election from five single-member districts to an at-large, limited voting plan, an increase in the number of council members from five to six, and a plurality vote requirement; as well as five additional annexations with one technical correction to a previously submitted annexation, the Attorney General does not interpose any objection to the specified changes. Approval of this interim plan does not change the benchmark (submission no 2004-3101) for any plans submitted after the 2010 Census. In addition, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of all of the submitted changes. 28 C.F.R. 51.41.

Sincerely,

Loretta King

Loretta King
Acting Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA, Plaintiff, v. ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant	Civil Action No. 1:10-cv-00651-JDB

ORDER

Upon consideration of the cross-motions for summary judgment filed under Rule 56, Fed. R. Civ. P., by all parties to this action, and upon consideration of the record as a whole in this action, the Court hereby concludes that:

The preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and the coverage formula contained in Section 4(b) of the Voting Rights Act, *id.* § 1973b(b), are constitutional exercises of Congressional power. *See Lopez v. Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); *City of Rome v. United States*, 446 U.S. 156, 177-178 (1980); *Georgia v. United States*, 411 U.S. 526, 535 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966); *Reaves v. U.S. Dep't of Justice*, 355 F. Supp. 2d 510, 516 (D.D.C. 2005); *Giles v. Ashcroft*, 193 F. Supp. 2d 258 (D.D.C. 2002); *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983).

There is no genuine issue of material fact, and Defendant and Defendant-Intervenors are entitled to judgment as a matter of law.

Accordingly, it is **ORDERED** that:

The Motions for Summary Judgment filed by the Attorney General and Defendant-Intervenors are **GRANTED**.

The Motion for Summary Judgment filed by Plaintiff is **DENIED**.

SO ORDERED.

_____
JOHN D. BATES
United States District Judge

Dated: _____