IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant. ERIC KENNIE, *et al.*, Defendant-Intervenors, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Defendant-Intervenors. TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*, Defendant-Intervenors, VICTORIA RODRIGUEZ, *et al.*, Defendant-Intervenors.	CASE NO. 1:12-CV-00128 (RMC-DST-RLW) Three-Judge Court

THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT

Claim Two of the State of Texas's First Amended Complaint alleges that Section

5 of the Voting Rights Act, 42 U.S.C. 1973c, violates the Constitution of the United States. Pursuant to Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), Attorney General Eric J. Holder, Jr. respectfully moves for summary judgment on Claim Two.

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 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); *Paige* v. *Drug Enforcement Admin*, 665 F.3d 1355, 1358 (D.C. Cir. 2012). 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 September 14, 2012 Scheduling Order (Doc. 345), the Attorney General's Memorandum is consolidated with his Opposition to the State of Texas's Motion for Summary Judgment. In support of his opposition to the State's motion, the Attorney General submits a Statement of Genuine Issues.

To the extent that oral argument would assist the Court in resolving the questions presented in instant motion, the Attorney General would be pleased to answer any questions the Court may have.

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General

/s/ *Spencer R. Fisher*
T. CHRISTIAN HERREN, JR.
JESSICA DUNSAY SILVER
MEREDITH BELL-PLATTS
ERIN H. FLYNN
ELIZABETH S. WESTFALL
BRUCE I. GEAR
JENNIFER L. MARANZANO
SPENCER FISHER
RISA BERKOWER
DANIEL J. FREEMAN
Attorneys
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Dated: October 22, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

Jonathan Franklin Mitchell
Adam W. Aston
Matthew Hamilton Frederick
Patrick Kinney Sweeten
Office of the Attorney General of Texas
jonathan.mitchell@oag.state.tx.us
adam.aston@oag.state.tx.us
matthew.frederick@oag.state.tx.us
patrick.sweeten@texasattorneygeneral.gov

Adam K. Mortara
John M. Hughes
Bartlit Beck Herman Palenchar & Scott LLP
adam.mortara@bartlit-beck.com
john.hughes@bartlit-beck.com

Counsel for Plaintiff

John Tanner
john.k.tanner@gmail.com

Nancy G. Abudu
M. Laughlin McDonald
Arthur B. Spitzer
American Civil Liberties Union
nabudu@aclu.org
lmcdonald@aclu.org
artspitzer@gmail.com

Counsel for Texas Legislative Black Caucus Intervenors

Debo P. Adegbile
Leah C. Aden
Elise C. Boddie
Ryan Haygood
Dale E. Ho
Natasha Korgaonkar
NAACP Legal Defense and Education Fund
dadegbile@naacpldf.org
laden@naacpldf.org
eboddie@naacpldf.org
rhaygood@naacpldf.org
dho@naacpldf.org
nkorgaonkar@naacpldf.org

Michael Birney de Leeuw
Douglas H. Flaum
Adam M. Harris
Fried, Frank, Harris, Shriver & Jacobson
douglas.flaum@friedfrank.com
adam.harris@friedfrank.com
michael.deleeuw@friedfrank.com

Counsel for Texas League of Young Voters Intervenors

J. Gerald Hebert
hebert@voterlaw.com

Chad W. Dunn
Brazil & Dunn
chad@brazilanddunn.com

Counsel for Kennie Intervenors

Jon M. Greenbaum
Mark A. Posner
Lawyers' Committee for Civil Rights
mposner@lawyerscommittee.org
jgreenbaum@lawyerscommittee.org

Ezra David Rosenberg
Michelle Hart Yeary
Dechert LLP
ezra.rosenberg@dechert.com
michelle.yeary@dechert.com

Robert Stephen Notzon
Robert@notzonlaw.com

Gary L. Bledsoe
Law Office of Gary L. Bledsoe and Associates
garybledsoe@sbcglobal.net

Myrna Perez
Wendy Robin Weiser
Ian Arthur Vandewalker
The Brennan Center for Justice
myrna.perez@nyu.edu
wendy.weiser@nyu.edu
ian.vandewalker@nyu.edu

Counsel for NAACP Intervenors

Nina Perales
Mexican American Legal Defense & Educational Fund, Inc.
nperales@maldef.org

Counsel for Rodriguez Intervenors

/s/ Spencer R. Fisher
SPENCER R. FISHER
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
spencer.fisher@usdoj.gov

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STATE OF TEXAS,

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VICTORIA RODRIGUEZ, *et al.*,

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CASE NO. 1:12-CV-00128
(RMC-DST-RLW)
Three-Judge Court

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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MISCELLANEOUS:

On August 30, 2012, this Court denied Texas's request for a declaratory judgment that Senate Bill 14 (SB 14), the State's recently enacted photo ID requirement for in-person voters, "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. *Texas* v. *Holder*, No. 12cv128, 2012 WL 3743676, at *1 (D.D.C. Aug. 30, 2012) (three-judge court) (quoting 42 U.S.C. 1973c(a)). As a result of this Court's denial of preclearance based on the State's failure to establish that SB 14 will not have a retrogressive effect, see *id.*, Texas now challenges the constitutionality of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, as reauthorized and amended in 2006. Pl. Mot. 1.[1] Section 5 on its face and "as interpreted by this Court" (Pl. Mot. 1) is constitutional. Accordingly, this Court should grant the Attorney General's motion for summary judgment and deny Texas's motion for summary judgment.

BACKGROUND

1. The Fifteenth Amendment, which prohibits racial discrimination in voting, was ratified in 1870. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310 (1966). Beginning in 1890, some States—located mostly in the South—began systematically disenfranchising racial minorities through the use of various discriminatory and dilutive devices. *Id.* at 310-312; *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012), petition for cert.

[1] "Pl. Mot." refers to Plaintiff's Motion for Summary Judgment in this case. "Pl. Mem." refers to Plaintiff's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment. See Doc. 347, *Texas* v. *Holder*, No. 12cv128 (filed Oct. 1, 2012). "Def. SMF" refers to the Attorney General's Statement of Uncontested Material Facts.

pending, No. 12-96 (filed Jul. 20, 2012). Given the success of such efforts, "[t]he first century of congressional enforcement of the Amendment * * * can only be regarded as a failure." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009). Federal law enacted in 1957, 1960, and 1964 did "little to cure the problem," despite not only authorizing the Attorney General to seek injunctions against public and private interference with voting on racial grounds, join States as party defendants, and gain access to local voting records, but also empowering the federal district courts to register voters in areas where there had been systematic violations and to resolve voting cases expeditiously as three-judge courts. *South Carolina*, 383 U.S. at 313. Congress "repeatedly" sought through each of these measures to "facilitat[e] case-by-case litigation against voting discrimination"; the measures, however, "proved ineffective for a number of reasons," including the "unusually onerous" and "exceedingly slow" nature of voting-rights litigation. *Id.* at 313-314; see also *id.* at 328. Even where litigation succeeded, officials "merely switched to [other] discriminatory devices," "enacted difficult new tests," "defied and evaded court orders," or "closed their registration offices to freeze the voting rolls." *Id.* at 314; see also *Shelby Cnty.*, 679 F.3d at 854.

In 1965, Congress thus exercised its constitutional authority "in an inventive manner" when it passed the Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (1965 Act), to "rid the country of racial discrimination in voting." *South Carolina*, 383 U.S. at 315, 327. The 1965 Act combined permanent enforcement measures applicable nationwide with more stringent, temporary measures targeted at areas in which Congress had found pervasive voting discrimination. See *id.* at 315-316; *Shelby Cnty.*, 679 F.3d at

854. Section 5, a temporary provision applicable only to "covered jurisdictions," provided 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 a determination from either the Attorney General of the United States or a three-judge panel of the United States District Court for the District of Columbia that the proposed change "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." 1965 Act, §5, 79 Stat. 439. By imposing this preemptive measure on jurisdictions that were engaged in egregious voting discrimination and forcing them to show their proposed voting changes were nondiscriminatory before they could take effect, Congress countered the inadequacy of case-by-case litigation and "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina*, 383 U.S. at 327-328; see *Shelby Cnty.*, 679 F.3d at 854-855.

In specifying the geographic scope of Section 5, "Congress identified the jurisdictions it sought to cover—those for which it had 'evidence of actual voting discrimination,' * * * and then worked backward, reverse-engineering a formula to cover those jurisdictions." *Shelby Cnty.*, 679 F.3d at 879. Thus, rather than identify by name the jurisdictions subject to Section 5 based on substantial voting discrimination, Congress described them in Section 4(b) as those jurisdictions that: (1) maintained a prohibited test or device on November 1, 1964; and (2) had registration or turnout rates below 50% of

the voting age population in November 1964. See 1965 Act, §4(b), 79 Stat. 438.[2] To respond to over- and under-inclusiveness in Section 4(b)'s coverage criteria, Congress included a "bail-in" provision, under which any jurisdiction found to have violated the Constitution's prohibition on voting discrimination could be ordered to obtain preclearance, and a "bailout" provision, under which a jurisdiction could terminate its coverage by showing it had not used a test or device for a prohibited purpose. See *Shelby Cnty.*, 679 F.3d at 855.

The Supreme Court upheld the temporary provisions of the 1965 Act, including Sections 4(b) and 5, as appropriate means of enforcing the Fifteenth Amendment's voting guarantees, see *South Carolina*, 383 U.S. at 323-337, noting that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live," *id.* at 337.

2. Congress reauthorized Sections 4(b) and 5 in 1970 (for five years), 1975 (for seven years), and 1982 (for 25 years). See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975 (Act of 1975), Pub. L. No. 94-73, Tit. II, 89 Stat. 400; Voting Rights Act Amendments of 1982 (1982 Amendments), Pub. L. No. 97-205, 96 Stat. 131. Importantly, in 1975, Congress broadened the definition of "test or

[2] "[T]est or device" means "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 1965 Act, §4(c), 79 Stat. 438-439.

device" to include the provision of English-only voting materials in jurisdictions with a substantial population of statutorily-defined "language minorities," thereby extending Section 5's reach to additional jurisdictions, including Texas, that Congress knew to be engaged in widespread discrimination against minority voters. Act of 1975, 89 Stat. 401-402; see also *Shelby Cnty.*, 679 F.3d at 855. Also, in 1982, Congress significantly eased the bailout standard by allowing jurisdictions that complied for ten years with specified nondiscrimination measures to bail out, and by expanding bailout eligibility to include "any political subdivision of [a covered] State," even if that subdivision had not been separately covered. 1982 Amendments, §2(b), 96 Stat. 131.

The Supreme Court reaffirmed the constitutionality of Sections 4(b) and 5 after each reauthorization, finding that circumstances justified the temporary provisions. See *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).

3. In 2006, Congress reauthorized Section 5 for 25 years. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, §5, 120 Stat. 577-581. After holding an extensive series of hearings regarding ongoing voting discrimination in the country and, in particular, the continued need for a preclearance requirement in covered jurisdictions, Congress concluded that, "without the continuation of the [VRA's] 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." *Id.* §2(b)(9), 120 Stat. 578. Although

Congress found that, as a "direct result" of the VRA, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters," Congress determined that "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." *Id.* §2(b)(1)-(2), 120 Stat. 577.

In 2006, Congress also amended Section 5's substantive standard in two ways. The first amendment provides that neither administrative nor judicial preclearance may be granted to a proposed voting change motivated by any racially discriminatory purpose, regardless of whether that change is intended to make racial minorities any worse off than they are under the existing practice. See 42 U.S.C. 1973c(c). That amendment supplanted the Supreme Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000), that changes motivated by a discriminatory purpose, even though unconstitutional, were not a basis for denying preclearance where the jurisdiction acted with a "discriminatory but nonretrogressive purpose." *Id.* at 341. The second amendment provides that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. 1973c(b) and (d). That amendment supplanted the Supreme Court's statutory holding in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), that a proposed redistricting plan was not retrogressive despite reducing minority voters' ability to elect their preferred candidates of choice, because the plan created new districts in which minority voters could potentially influence an election's outcome. In amending Section 5, Congress instructed the Attorney General and the lower courts that, when analyzing

retrogression in districting plans and other potentially dilutive voting changes, they must compare a minority group's ability to elect its preferred candidates of choice before and after a voting change. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 70-71 (2006); see also *Florida* v. *United States*, No. 11cv1428, 2012 WL 3538298, at *10 (D.D.C. Aug. 16, 2012) (three-judge court).

4. Following the 2006 reauthorization, a jurisdiction in Texas filed suit in the United States District Court for the District of Columbia seeking to terminate its Section 5 coverage and, in the alternative, challenging the continued constitutionality of Section 5. A three-judge court held that the jurisdiction was ineligible to apply for bailout and upheld the constitutionality of the 2006 reauthorization. See *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 235-283 (D.D.C. 2008) (three-judge court). On appeal, the Supreme Court reversed the bailout holding, thereby expanding significantly the number of jurisdictions previously thought eligible to bail out under Section 4(a) of the VRA. See *Northwest Austin*, 557 U.S. at 206-211. Accordingly, the Court declined to reach the constitutional question. *Id.* at 205, 211. The Court, however, acknowledged the progress minority voters have made in covered jurisdictions, "no doubt due in significant part to the [VRA] itself." *Id.* at 202. And it stated that "these improvements" may be "insufficient and that conditions [may] continue to warrant preclearance under the Act." *Id.* at 203. The Court warned, however, that for Section 5 to be valid, its "current burdens * * * must be justified by current needs" and its "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Id.*

Within a year of the Supreme Court's decision in *Northwest Austin*, a covered jurisdiction again filed suit in this district court, seeking a declaration that the reauthorization of Sections 4(b) and 5 exceeded Congress's enforcement authority under the Fourteenth and Fifteenth Amendments and that the provisions are therefore unconstitutional, as well as a permanent injunction barring the Attorney General from enforcing both provisions. See *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011). In a comprehensive opinion that reviewed "the extensive 15,000-page legislative record" supporting the 2006 reauthorization, *id.* at 428, the district court rejected the plaintiff's facial constitutional challenge, concluding that "Congress possess[ed] the requisite 'evidence of a pattern of constitutional violations on the part of the States,'" *id.* at 492 (quoting *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721, 729 (2003)), necessary "to justify Section 5's 'strong remedial and preventive measures,'" *id.* (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 526 (1997)). The district court further concluded that Section 5 is a congruent and proportional remedy, particularly in light of the meaningful limits built into Section 5, including its bailout mechanism. *Id.* at 498-503.

On appeal, a divided panel of the D.C. Circuit upheld the 2006 reauthorization of Sections 4(b) and 5 after independently examining the legislative record and concluding that "section 5's 'current burdens' are indeed justified by 'current needs,'" and that Section 4(b), together with the VRA's bail-in and bailout mechanisms, "continues to

single out the jurisdictions in which discrimination is concentrated." *Shelby Cnty.*, 679 F.3d at 873, 883.[3]

ARGUMENT

In *Northwest Austin Municipal Utility District No. One* v. *Holder*, the Supreme Court emphasized both that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [a court] is called on to perform'" and that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 557 U.S. 193, 205 (2009) (citation omitted); see also *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 861-862 (D.C. Cir. 2012), petition for cert. pending, No. 12-96 (filed Jul. 20, 2012); *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-653, 657 (1966) (recognizing Congress's discretion in deciding how to exercise its Fourteenth Amendment enforcement authority). Texas primarily argues that, in continuing to impose the effects prong in the covered jurisdictions, Congress exceeded its enforcement authority under the Fifteenth Amendment. Texas's challenge, however, is foreclosed by *Shelby County* and, moreover, flatly contradicted by established Supreme Court precedent. Because Sections 4(b) and 5 of the VRA are appropriate legislation under the Fourteenth and Fifteenth Amendments to enforce the prohibition against racial

[3] The 2006 reauthorization of Sections 4(b) and 5 also was upheld against a facial challenge in *LaRoque* v. *Holder*, which further held that Congress validly exercised its enforcement authority under the Fourteenth and Fifteenth Amendments when it amended Section 5's substantive preclearance standard in 2006. See 831 F. Supp. 2d 183 (D.D.C. 2011), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012), petition for cert. pending, No. 12-81 (filed Jul. 20, 2012).

discrimination in voting and do not violate equal protection or due process principles, they are constitutional.

I

CONGRESS APPROPRIATELY EXERCISED ITS ENFORCEMENT AUTHORITY UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS WHEN IT REAUTHORIZED SECTIONS 4(b) AND 5 IN 2006

In 2006, based on an evidentiary record of over 15,000 pages, Congress reasonably concluded (a) that racial discrimination in voting continued to exist in those jurisdictions it had previously subjected to preclearance, (b) that such discrimination remained more prevalent in covered areas than in non-covered areas, and (c) that without the preclearance requirement, "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. Texas concedes that its facial challenge to the 2006 reauthorization of Sections 4(b) and 5 simply rehashes the arguments recently made by other covered jurisdictions to the D.C. Circuit, *i.e.*, "[c]overed jurisdictions no longer engage in widespread and systematic evasion of the Fifteenth Amendment, and the coverage formula is based on data that are over 35 years old, causing section 5 to unjustifiably (and unconstitutionally) discriminate among the States." Pl. Mem. 38. Texas also concedes, as it must, that the D.C. Circuit rejected these arguments "in a comprehensive opinion," Pl. Mem. 38, holding that Section 5's current burdens are justified by current needs and that its disparate geographic coverage sufficiently relates to the problem Congress targeted. See *Shelby Cnty.*, 679 F.3d at 858-883.

Yet Texas argues that this Court should undertake its own review of the 2006 legislative record because it is bound only by Supreme Court precedent, not the decisions of the D.C. Circuit. Pl. Mem. 40. Because *Shelby County* governs Texas's facial challenge to Sections 4(b) and 5 and should be treated as a binding decision by this Court (as the State previously conceded), the State's arguments against the sufficiency of the 2006 legislative record fail. Even if this Court determines that it is bound only by Supreme Court precedent, Texas's challenge likewise fails because the State has offered no persuasive rationale for rejecting the D.C. Circuit's thorough analysis in *Shelby County*.[4]

[4] In *Northwest Austin*, the Supreme Court declined to decide the constitutionality of the 2006 Reauthorization as well as whether, in deciding that question, a court should apply rational basis review or congruence and proportionality analysis. See 557 U.S. at 204-205. In stating that the provision's "current burdens * * * must be justified by current needs," however, the Supreme Court emphasized that the 2006 Reauthorization could be upheld under either standard only if current conditions continued to warrant preclearance and the Act's disparate coverage sufficiently targeted that discrimination. *Id.* at 203.

In *Shelby County*, the United States argued that Sections 4(b) and 5 are subject to rational basis review, but that they must be upheld even under congruence and proportionality review. See Brief for the Attorney General as Appellee, *Shelby Cnty.* v. *Holder* (No. 11-5256) (D.C. Cir.) (filed Dec. 1, 2011). In upholding the 2006 Reauthorization of Sections 4(b) and 5, *Shelby County* interpreted *Northwest Austin* as sending a "powerful signal that congruence and proportionality is the appropriate standard of review." 679 F.3d at 859. We apply congruence and proportionality analysis for the purposes of this motion. The D.C. Circuit did not definitely adopt that standard, however, see *id.*, and the government adheres to its view that rational basis review is the proper standard for examining legislation to remedy racial discrimination in voting. See *Tennessee* v. *Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting); *City of Rome* v. *United States*, 446 U.S. 156, 175-177 (1980); *Morgan*, 384 U.S. at 651-653; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966); *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 241-246 (D.D.C. 2008) (explaining why rational basis review applies in this context).

A. The D.C. Circuit's Decision In *Shelby County* Is Binding On This Court

Texas acknowledges that most courts adopt the view that a three-judge court in voting-rights litigation is bound by the decisions of the court of appeals for its circuit. Pl. Mem. 38-39; see also 17A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §4235 (3d ed. 2012). Regardless of whether this should be the default rule in each instance a statutory three-judge court is convened, a three-judge court convened under Section 5 to render a preclearance determination must follow relevant D.C. Circuit precedent, if any exists, as to the constitutional claims over which it exercises pendent jurisdiction. Moreover, according *Shelby County* controlling weight in this case is consistent with the view of another three-judge panel of this Court. See Order at 3, *Florida* v. *United States*, No. 11cv1428 (D.D.C. June 5, 2012) (three-judge court) ("[T]he Court considers itself bound by * * * *Shelby County, Alabama v. Holder*."); cf. *Texas* v. *United States*, No. 11cv1303, 2012 WL 3671924, at *8 n.11 (D.D.C. Aug. 28, 2012) (three-judge court) ("The constitutionality of section 5 was neither briefed nor argued to us, and we express no opinion on this significant point. In fact, our Circuit has recently held that section 5 is constitutional."). It is also consistent with Texas's prior representations in this case. See 3/21/2012 Tr. 7-8 ("[W]e think *Shelby County* would bind this Court and if the D.C. Circuit rejects the facial constitutional challenge in *Shelby County*, that would in our view compel the three judge panel in this case to enter judgment against us on the facial challenge.").

Where a plaintiff seeks declaratory or injunctive relief under Sections 4 or 5 of the VRA, a three-judge court is properly convened only to determine a jurisdiction's bailout

eligibility, to enforce the Section 5 preclearance requirement, or to render a judicial preclearance determination. See 42 U.S.C. 1973b(a)(5), 1973c(a); *LaRoque* v. *Holder*, No. 10cv561, 2010 WL 3719928, at *1 (D.D.C. May 12, 2010). In cases such as this one where the three-judge court is properly convened under Sections 4 or 5 of the VRA to determine a plaintiff's statutory claim and then reaches an alternative constitutional claim upon denying statutory relief, this Court does so only by exercising pendent jurisdiction over the constitutional claim:

> If there is a claim in a case that must be heard by a three-judge court, that court has power to decide other claims in the case that, standing alone, would require only a single judge. It need not exercise this power. If it has disposed of the claim that required three judges, it may dissolve itself and remand to the single judge the other claims.

17A Wright & Miller, *Federal Practice and Procedure* §4235; see also 28 U.S.C. 1367(a) and (c); *Northwest Austin*, 573 F. Supp. 2d at 235 (pendent jurisdiction with bailout claim); *City of Rome* v. *United States*, 472 F. Supp. 221, 236 (D.D.C. 1979) (pendent jurisdiction with preclearance and bailout claims). In all other instances, the constitutional question is determined by a single judge of this Court. See, *e.g.*, *LaRoque*, 2010 WL 3719928, at *1-3 (denying three-judge court); *Arizona* v. *Holder*, 839 F. Supp. 2d 36 (D.D.C. 2012) (same); *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011) (one-judge merits determination); Response to Minute Order, *Alaska* v. *Holder*, No. 12cv1376 (D.D.C. Aug. 22, 2012) (conceding State not entitled to a three-judge court). Importantly, the District Court for the District of Columbia has exclusive jurisdiction to issue any declaratory judgment pursuant to Sections 4 and 5 of the VRA, and to enjoin the execution or enforcement of, or any action of any federal officer or employee

pursuant to, those provisions. See 42 U.S.C. 1973l(b); see also H.R. Rep. No. 227, 97th Cong., 1st Sess. 36 (1981) (1981 House Report) (explaining the basis for this grant of exclusive jurisdiction).

Because Section 5's constitutionality would otherwise be determined by a single judge of the District Court for the District of Columbia who would be bound by the D.C. Circuit's controlling decision in *Shelby County*, a three-judge court exercising pendent jurisdiction to decide the constitutionality of Sections 4(b) and 5, as is the case here, must similarly follow *Shelby County*. Any decision to the contrary would constitute a compelling reason to dissolve the three-judge court and remand the constitutional claim to a single judge of this Court. Cf. 28 U.S.C. 1367(c)(4). The cases Texas cites neither provide guidance in these unique circumstances nor counsel the opposite conclusion. Cf. *United States* v. *Ramsey*, 353 F.2d 650, 658 (5th Cir. 1965) (rendering statutory determinations under federal and state standards); *Parker* v. *Ohio*, 263 F. Supp. 2d 1100, 1105 (S.D. Ohio 2003) (adopting circuit precedent as to the existence of a certain statutory claim under Section 2 of the VRA). Accordingly, this Court should reject Texas's claim that Congress exceeded its enforcement authority under the Fourteenth and Fifteenth Amendments when it reauthorized Sections 4(b) and 5 in 2006. In any event, the D.C. Circuit's conclusion that Section 5 is a congruent and proportional response to ongoing race-based voting discrimination in the covered jurisdictions is amply supported by the legislative record Congress amassed in 2006.

B. The 2006 Legislative Record Demonstrates That Section 5's Current Burdens Are Justified By Current Needs And That Its Disparate Geographic Coverage Is Sufficiently Related To Contemporary Racial Discrimination In Voting

After independently examining the 2006 legislative record, the D.C. Circuit in *Shelby County* recently determined that Congress reasonably identified an ongoing pattern of constitutional violations in the covered jurisdictions and that its 2006 reauthorization of Section 5 (and its retention of the coverage criteria in Section 4(b)) was a congruent and proportional means of enforcing the voting guarantees of the Fourteenth and Fifteenth Amendments. See 679 F.3d at 865-883. Should this Court determine that *Shelby County* is not binding authority and, therefore, reexamine the constitutional questions presented in that case, this Court should nevertheless adopt the D.C. Circuit's comprehensive analysis of the same challenge Texas now raises.

1. In examining the 2006 legislative record for substantial probative evidence of ongoing constitutional violations in the covered jurisdictions, the D.C. Circuit cited "[j]ust a few" of the "numerous" modern instances of "flagrant racial discrimination" and "overt hostility to black voting power by those who control the electoral process." *Shelby Cnty.*, 679 F.3d at 865-866. It also emphasized additional evidence indicative of a pattern of intentional racial discrimination in voting that justified Congress's conclusions that such discrimination remains "serious and widespread" and that Section 5 remains necessary:

- over 700 objections by the Attorney General between 1982 and mid-2006, including at least 423 objections based on discriminatory purpose between 1980 and 2004;

- a consistent number of objections prior to and following the 1982 reauthorization, including 626 objections from 1982 to 2004 and 490 between 1965 and 1982;

- over 800 proposed voting changes withdrawn or modified by covered jurisdictions in response to the Attorney General's "more information requests," from which Congress could reasonably infer at least some discriminatory intent;

- 653 successful Section 2 actions in covered jurisdictions, some with findings of intentional discrimination, providing relief from discriminatory practices in at least 825 counties;[5]

- over 622 separate dispatches of multiple observers to covered jurisdictions (with 300 to 600 observers dispatched annually between 1984 and 2000) based on the likelihood of Fourteenth or Fifteenth Amendment violations;

- at least 105 successful Section 5 enforcement actions against defiant jurisdictions; and

- a roughly constant number of unsuccessful judicial preclearance actions by covered jurisdictions since the VRA's enactment in 1965, including 25 denials of judicial preclearance between 1982 and 2004.

Id. at 866-871; see also *Shelby Cnty.*, 811 F. Supp. 2d at 464-492, 495-496 (citing substantial probative evidence of intentional discrimination). The D.C. Circuit also explained that Congress reasonably concluded that Section 2, which involves "intensely complex[,] * * * costly[,] and time-consuming" litigation, was inadequate to protect minority voters from the serious and widespread intentional discrimination that persisted in covered jurisdictions. *Shelby Cnty.*, 679 F.3d at 872. And the court stated that "Congress had 'some reason to believe that without [Section 5's] deterrent effect on potential misconduct,' the evidence of continued discrimination in covered jurisdictions

[5] Applicable nationwide, Section 2 permits individuals to bring suit against any State or jurisdiction to challenge voting practices that have either a discriminatory purpose or result. See 42 U.S.C. 1973(a); *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986).

'might be considerably worse.'" *Id.* at 871 (citation omitted). The court thus concluded that "overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance" and that "section 5's 'current burdens' are indeed justified by 'current needs.'" *Id.* at 873 (quoting *Northwest Austin*, 557 U.S. at 203).

Satisfied that Congress reasonably concluded, based on the extensive record it amassed in 2006, that racial discrimination in voting persisted in covered jurisdictions and could not be remedied by case-by-case litigation alone, the D.C. Circuit properly deferred to Congress's judgment that Section 5 preclearance remains necessary in the covered jurisdictions. See *Shelby Cnty.*, 679 F.3d at 872-873. As the D.C. Circuit explained, "[t]he point at which section 5's strong medicine becomes unnecessary and therefore no longer congruent and proportional turns on several critical considerations * * * [that] are quintessentially legislative judgments." *Id.* at 873. Because Congress reached reasonable conclusions for each of those considerations—*i.e.*, "the pervasiveness of serious racial discrimination in voting in covered jurisdictions; the continued need for section 5's deterrent and blocking effect; and the adequacy of section 2 litigation"—based on substantial probative evidence in the legislative record, the court of appeals correctly deferred to Congress's primary authority to enforce the Constitution. *Id.*; see also *Northwest Austin*, 557 U.S. at 205 ("The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."); *Morgan*, 384 U.S. at 648-53, 657 (recognizing Congress's discretion in deciding how to exercise its Fourteenth Amendment enforcement authority).

In urging this Court to reject *Shelby County*, Texas argues only that the evidence Congress considered in 2006, and that *Shelby County* cited in support of an ongoing pattern of constitutional violations, fails to show either violations of the Fifteenth Amendment or the continued need for a preclearance remedy. Pl. Mem. 41-43. As an initial matter, Texas emphasizes only the Fifteenth Amendment in its motion. Pl. Mem. 1-3, 7-9, 17. Because Congress expressly relied on its authority to enforce both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 in 2006, however, a pattern of constitutional violations of either Amendment, including intentional vote dilution, is relevant to determining whether Congress reasonably concluded that Section 5 remains necessary to protect the rights of minority voters. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 90 (2006) (2006 House Report); *Shelby Cnty.*, 679 F.3d at 864.

Furthermore, each of the arguments Texas now raises against the sufficiency of the 2006 legislative record has been considered and rejected. Compare Pl. Mem. 41-43 with *Shelby Cnty.*, 679 F.3d at 866-870 (explaining why the categories of evidence Congress considered in 2006 are probative of an ongoing pattern of constitutional violations). First, Congress is not bound by the standards of proof applicable in judicial proceedings; rather, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source." *South Carolina*, 383 U.S. at 330. In addition, Texas's argument that Section 2 litigation and Section 5 enforcement actions demonstrate that minority voters "have the wherewithal to bring the tools of traditional litigation against laws or practices that might violate the Fifteenth Amendment" (Pl. Mem. 43), ignores Section 5's important prophylactic effect as well as its critical burden-shifting

mechanism, which the Supreme Court has consistently upheld as appropriate in light of Congress's "wide berth in devising appropriate remedial and preventative measures for unconstitutional actions." *Lane*, 541 U.S. at 520; see also *City of Rome*, 446 U.S. at 181-182; *South Carolina*, 383 U.S. at 334-335; 2006 House Report 65-66 (finding that burden-shifting has been and remains essential to Section 5's effectiveness). Texas also ignores Congress's considered judgment in 2006, just as in prior reauthorizations of Section 5, that Section 5 remains justified because Section 2 alone is inadequate to protect racial minorities from serious and widespread voting discrimination in the covered jurisdictions.[6] See *Shelby Cnty.*, 679 F.3d at 863-864, 872-873; see also, *e.g.*, 2006 House Report 57; 1981 House Report 33-35; H.R. Rep. No. 196, 94th Cong., 1st Sess. 26-27 (1975) (1975 House Report); H.R. Rep. No. 397, 91st Cong., 1st Sess. 7-8 (1969) (1969 House Report). That inadequacy derives not from a current distrust of federal judges (Pl. Mem. 43), but instead from the "uniquely harmful" nature of racial discrimination in voting: "it cannot be remedied by money damages, and, as Congress found, lawsuits to enjoin discriminatory voting laws are costly, take years to resolve, and

[6] Indeed, the 2006 legislative record is replete with examples of Section 5 objections induced by the attempts of recalcitrant jurisdictions to evade the force of successful Section 2 actions or express findings of intentional discrimination. See, *e.g.*, *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 109th Cong., 1st Sess. 330-332, 340-343, 429-434, 607-608, 678-680, 795-797, 812-814, 907-910, 1141-1144, 1207-1210, 1360-1361, 1384-1386, 1388-1390, 1402-1404, 1516-1521, 1538-1540, 1574-1579, 1730-1732, 1823-1825, 1833-1836, 1935-1937, 1957-1959, 2041-2043, 2212-2213, 2269-2271, 2300-2303, 2307-2311 (2005) (*Scope*).

leave those elected under the challenged law with the benefit of incumbency." *Shelby Cnty.*, 679 F.3d at 861.[7]

Because Texas has asserted no persuasive rationale for disturbing the D.C. Circuit's conclusion in *Shelby County* that Congress was justified in continuing to impose the preclearance requirement on covered jurisdictions, Texas's arguments against the weight of the legislative record fail.[8]

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[7] Congress, for example, heard testimony that most Section 2 actions take two to five years to make their way through the court system, during which time the challenged practice most often remains in place, given the burden to obtain a preliminary injunction. *Scope* 101. Congress also heard that a candidate elected under what turns out to be an illegal voting scheme will nevertheless enjoy the significant advantages of incumbency in future elections. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 109th Cong., 1st Sess. 13-14, 43-44 (2005); *Voting Rights Act: Evidence of Continued Need, Hearing Before Subcomm. on the Constitution of the H. Judiciary Comm.*, 109th Cong., 2d Sess. 97 (2006) (*Continued Need*). In addition, in some cases, an illegal practice must remain in effect for several election cycles before Section 2 plaintiffs can gather enough evidence to show its discriminatory effect. *Scope* 92. Congress also heard that Section 2 places a heavy financial burden on minority voters challenging discriminatory practices, *id.* at 92, 97, especially at the local level and in rural areas, *id.* at 84; 2006 House Report 43. See generally *Shelby Cnty.*, 679 F.3d at 872-873.

[8] Texas's failure to truly engage with the legislative record is hardly surprising given the State's poor performance across all relevant indicators of ongoing constitutional violations. See, *e.g.*, 2006 House Report 29 (20% gap between white and Latino citizens in voter registration in 2004); *Continued Need* 259 (105 Section 5 objections from 1982 to 2004); *Scope* 2194-2530 (copies of Section 5 objections preventing discriminatory changes at all levels of government and in every aspect of voter participation); *Continued Need* 2537, 2552 (1512 more information requests); 2006 House Report 83 (54 withdrawn submissions from 1982 to 2004); *Continued Need* 250 (29 successful Section 5 enforcement actions); *id.* at 207, 251 (206 Section 2 actions by minority plaintiffs with successful outcomes, forcing 197 jurisdictions to change their discriminatory practices); *id.* at 35 (judicial findings of racially polarized voting); *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry, Hearing*
(continued…)

2. The D.C. Circuit also upheld Congress's retention of Section 4(b)'s coverage criteria, emphasizing that Section 5's "disparate geographic coverage * * * depends not only on section 4(b)'s formula, but on the statute as a whole." *Shelby Cnty.*, 679 F.3d at 873. The court explained that a literal reading of Section 4(b) misunderstands not only Congress's use of the triggers to cover specific jurisdictions, but also the way in which the VRA's three coverage-related provisions—Sections 4(b), 3(c), and 4(a)—together isolate those areas in which intentional discrimination in voting persists. *Id.* at 873-883. First, Section 4(b)—"reverse-engineered" to describe in objective terms those jurisdictions Congress knew it wanted to cover because of their long histories of racial discrimination in voting—reaches those jurisdictions with the worst *historical* and *current* records of discrimination. *Id.* at 855, 873-879. Second, Section 3(c), the bail-in provision, captures jurisdictions not covered under Section 4(b) that "nonetheless have serious, recent records of voting discrimination" as shown by violations of the Fourteenth or Fifteenth Amendments. *Id.* at 874. Finally, Section 4(a), the bailout provision,

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Before Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Judiciary Comm., 109th Cong., 2d Sess. Attach. to Statement of Nina Perales (2006) (Voting Rights in Texas, 1982-2006), available at http://judiciary.senate.gov/pdf/7-13-06ninaperales.pdf (last visited Oct. 22, 2012). In 2006, the Supreme Court found that Texas's post-2000 Census mid-decade congressional redistricting plan "bears the mark of intentional discrimination." *LULAC* v. *Perry*, 548 U.S. 399, 440 (2006). In addition, another three-judge panel of this Court recently found that Texas intentionally discriminated against minority voters when it drew new boundaries for its congressional and state senate districts following the 2010 decennial census. See *Texas* v. *United States*, No. 11cv1303, 2012 WL 3671924, at *18-21, *23-26 (D.D.C. Aug. 28, 2012), notice of appeal filed, (D.D.C. Aug. 31, 2012).

accounts for any over-inclusiveness in the coverage criteria and incentivizes jurisdictions with recent records of voting discrimination to comply with specified nondiscrimination measures and work toward bailout. See *id.* at 881-882.

In reviewing Congress's decision to retain the coverage criteria in Section 4(b) rather than develop new coverage triggers, the D.C. Circuit recognized Congress's review of ample evidence of significant, ongoing racial discrimination in voting in the covered jurisdictions (*i.e.*, those jurisdictions described by the criteria in Section 4(b) that had not bailed out from coverage, including Texas) that could not be remedied by Section 2 alone. See Pt. I.B.1., *supra*. To further determine whether voting discrimination remained concentrated in the jurisdictions subject to Section 5 preclearance, the D.C. Circuit examined data comparing Section 2 outcomes in covered and non-covered jurisdictions. See *Shelby Cnty.*, 679 F.3d at 874-878. The court explained that if voting discrimination were distributed evenly throughout the country, one would expect to find fewer Section 2 suits with outcomes favorable to minority plaintiffs in covered jurisdictions, where Section 5 would have blocked the implementation of discriminatory practices. *Id.* at 878.

In fact, the evidence before Congress showed that covered jurisdictions were responsible for 56% of all such reported Section 2 outcomes, or more than twice their share (controlling for population) of such suits between 1982 and 2005. *Shelby Cnty.*, 679 F.3d at 874. The evidence further showed that "the rate of successful [reported] section 2 cases in covered jurisdictions * * * is nearly four times the rate in non-covered jurisdictions," when controlling for population, and that the absolute rate of success is

higher in covered jurisdictions, with "40.5 percent of published section 2 decisions in covered jurisdictions result[ing] in favorable outcomes for plaintiffs, compared to only 30 percent in non-covered jurisdictions." *Id.* at 874-875. The evidence that discrimination remained concentrated in covered jurisdictions became even more pronounced when the court examined settled and unreported Section 2 suits with outcomes favorable to minority plaintiffs. That information, derived from a study before Congress by the National Commission on the Voting Rights Act and supplemented in *Shelby County* with a study by Department of Justice historian Peyton McCrary, showed that 81% of all Section 2 cases with outcomes favorable to minority plaintiffs were in the covered jurisdictions. See *id.* at 875; see also Def. SMF ¶ 69. When the data are broken down by State, there is a high correlation between the jurisdictions with the highest rate of such cases, adjusted for population, and the jurisdictions covered by Section 5. See *Shelby Cnty.*, 679 F.3d at 875; see also Def. SMF ¶¶ 64, 67-69. Significantly, the data also showed that two of the non-covered jurisdictions with a high rate of such Section 2 outcomes have at times been subject to preclearance under the bail-in mechanism. See *Shelby Cnty.*, 679 F.3d at 875-876, 881; see also Def. SMF ¶ 62 (citing to a list of 18 jurisdictions, including the States of Arkansas and New Mexico, ordered to obtain preclearance under Section 3(c)).

In upholding Section 4(b)'s constitutionality, *Shelby County* also emphasized the importance of the "liberalized bailout mechanism" to its congruence and proportionality analysis. 679 F.3d at 882. As interpreted by *Northwest Austin*, the VRA's bailout provision affords any covered jurisdiction (down to the smallest level) that has not

discriminated in voting for ten years an opportunity to terminate coverage, thereby ensuring that preclearance remains targeted at the jurisdictions with the current worst records of discrimination. Thus far, bailout has been granted in 36 cases since the current bailout provision became effective in 1984, including 18 cases in the three years since *Northwest Austin* significantly expanded bailout eligibility. Def. SMF ¶¶ 57, 59. As a result, a total of 30 county-level jurisdictions and 160 smaller jurisdictions (for a total of 190 jurisdictions) have been granted bailout since 1984, with 64% of those jurisdictions having bailed out since *Northwest Austin*. Def. SMF ¶¶ 57-59.[9] There are also two pending bailout actions in which the Attorney General has notified the plaintiff jurisdictions that he will consent to bailout, and another bailout action in which the Attorney General has yet to be served. Def. SMF ¶ 61. The Attorney General fully supports the use of bailout to enable jurisdictions to terminate their preclearance obligations when appropriate.

After considering the evidence of ongoing racial discrimination in jurisdictions covered by Section 4(b), including the Section 2 evidence from covered and non-covered jurisdictions, as well as the important role of bail-in and bailout in fine-tuning Section 5's reach, the D.C. Circuit concluded that Section 4(b) "continues to single out the

[9] The 18 bailouts granted following *Northwest Austin* include the first-ever bailouts from jurisdictions in Alabama, California, Georgia, and Texas; the first bailout from a jurisdiction in North Carolina since 1967; the largest bailout at least since 1984, in terms of population, in Prince William County, Virginia; and the largest bailout at least since 1984, in terms of the number of subjurisdictions, in Merced County, California, which included some 84 such subjurisdictions. Def. SMF ¶ 60.

jurisdictions in which discrimination is concentrated." *Shelby Cnty.*, 679 F.3d at 883. In urging this Court to disturb the judgment of Congress and the court of appeals, Texas argues only that successful Section 2 litigation does not reflect a continued need to impose a preclearance remedy. Pl. Mem. 44. Although *Shelby County* relied on Section 2 outcomes as a means of comparing current levels of voting discrimination in covered and non-covered jurisdictions given Section 5's geographic limits, see 679 F.3d at 879, it cautioned that the data "does not tell the whole story." 679 F.3d at 878. Instead, the court explained that the Section 2 data had to be considered alongside further substantial probative evidence, including Section 5's deterrent and blocking effect, amassed by Congress that showed that serious and widespread voting discrimination persists in the covered jurisdictions despite Section 5. See *id.* at 880-881.

Texas also faults the court of appeals for looking past "the coverage formula's default rule" and emphasizing the importance of bail-in and bailout in defining Section 5's reach. Pl. Mem. 44. Yet Texas cites no authority for its position that the VRA's bail-in and bailout provisions are irrelevant to a court's application of the congruence and proportionality standard in this context. Indeed, in applying congruence and proportionality review, the Supreme Court has repeatedly emphasized the need to consider "[t]he remedy Congress chose," including any meaningful limitations placed on its scope. *Lane*, 541 U.S. at 531-532. The Court has used the VRA's bailout provision as an example of such a meaningful limitation. See *City of Boerne* v. *Flores*, 521 U.S. 507, 533 (1997) ("[L]imitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5."); see also *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S.

721, 738-740 (2003); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 646-647 (1999). And the Supreme Court consistently has referred to Section 5 approvingly in its constitutional-authority cases. See *Lane*, 541 U.S. at 519 n.4; *Hibbs*, 538 U.S. at 737-738; *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373 (2001); *Boerne*, 521 U.S. at 526; see also *Shelby Cnty.*, 679 F.3d at 859. Finally, although Texas argues that no State has successfully relied on the bailout mechanism to terminate coverage (Pl. Mem. 45), it has not shown that "anything about the bailout criteria themselves or how the Attorney General is applying them is preventing jurisdictions with clean records from escaping section 5 preclearance." *Shelby Cnty.*, 679 F.3d at 882. Thus, the D.C. Circuit correctly considered the important role of bail-in and bailout when determining the constitutionality of Section 4(b). Texas's facial challenge to Section 4(b) therefore fails.

II

SECTION 5'S EFFECTS PRONG IS VALID PROPHYLACTIC LEGISLATION

Because it failed to show the absence of a retrogressive effect under these facts, Texas specifically challenges the constitutionality of Section 5's effects prong, or non-retrogression requirement, arguing that the existence of the purpose prong renders the effects prong invalid. Pl. Mem. 3, 16. Since its enactment, however, the Supreme Court consistently has upheld Section 5's dual-pronged preclearance requirement as appropriate legislation to enforce the Fifteenth Amendment. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-337 (1966); *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *City of Rome*, 446 U.S. at 172-183; *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999). In

addition, *Shelby County* upheld, based on the sufficiency of the 2006 legislative record as well as Congress's primary authority to enforce the Fourteenth and Fifteenth Amendments, Congress's decision to continue to prohibit covered jurisdictions from making any change in their voting practices, no matter how minor, without first showing that the 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. 679 F.3d at 853 (quoting 42 U.S.C. 1973c(a)). Although the court of appeals did not address the specific challenge Texas now raises, it held that the continued imposition of Section 5 preclearance for all voting changes in the covered jurisdictions is appropriate legislation to enforce the Fourteenth and Fifteenth Amendments. See *Shelby Cnty.*, 679 F.3d at 861, 873. For that reason alone, this Court should reject Texas's facial attack on the continued constitutionality of the effects prong.[10] Even if this Court considers

[10] Texas characterizes its challenge as an attack on Section 5 "as interpreted by this Court," Pl. Mem. 14, but its brief raises more of a challenge to this Court's decision to deny preclearance than it does an as-applied challenge to the statute's constitutionality in this context. Because the State requests that the Court, at a minimum, declare Section 5 invalid as to all voting changes (Pl. Mem. 2, 9, 45), Texas clearly asserts a facial challenge to the non-retrogression requirement. See *John Doe No. 1* v. *Reed*, 130 S. Ct. 2811, 2817 (2010). Because of the nature of its challenge, Texas bears the heavy burden of demonstrating that there is no set of circumstances under which the legislation would be valid, or at a minimum, that it lacks a plainly legitimate sweep. See *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449-450 (2008).

To the extent Texas seeks to challenge this Court's interpretation of the non-retrogression requirement or its application of Section 5 to the facts of this case, Texas may do so on appeal from this Court's decision to deny preclearance. This brief responds only to Texas's constitutional challenge, and only to the extent it actually asserts such an argument. This brief will not respond to the State's mischaracterization of this Court's

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Texas's argument anew, however, this Court should uphold the effects prong as congruent and proportional legislation designed to remedy and deter intentional voting discrimination.

1. Texas argues that Section 5's effects prong is not congruent and proportional legislation because Congress failed to establish a record of Fifteenth Amendment violations that could be remedied only by a dual-pronged preclearance requirement. Pl. Mem. 9, 17-18. In so arguing, however, Texas misapplies the three-step congruence and proportionality standard. The first step in congruence and proportionality analysis is "to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. In this case, the right is to be free from racial discrimination in voting embodied in the Fourteenth and Fifteenth Amendments. After the right at issue has been defined, the next question is whether Congress identified "a history and pattern" of constitutional violations that justified the exercise of its enforcement authority under the Fourteenth and Fifteenth Amendments. *Id.* at 368. The Supreme Court has recognized that it is "easier for Congress to show a pattern of * * * constitutional violations," where a state actor discriminates in voting on the basis of race, because that violates the most fundamental constitutional right on the most constitutionally suspect basis, and strict scrutiny thus applies. *Hibbs*, 538 U.S. at 736; see also *Lane*, 541 U.S. at 561-563 (Scalia,

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opinion, attempts to relitigate the denial of preclearance, or speculation as to what this Court might have decided had Texas enacted a different law or presented different evidence at trial. See, *e.g.*, Pl. Mem. 1, 14-15, 19-20, 26-33.

J., dissenting). If this Court finds that Congress identified such a pattern of violations, then it must consider whether the challenged legislation (*i.e.*, the dual-pronged preclearance requirement) is a congruent and proportional means of remedying those violations. *Boerne*, 521 U.S. at 520.

In arguing against the continued constitutionality of Section 5's effects prong, Texas conflates the second and third steps of the constitutional analysis by arguing that Congress, in step two, must establish a record of violations that could only be prevented by a preclearance remedy that requires covered jurisdictions to show that their proposed changes lack both a discriminatory purpose and effect. Pl. Mem. 17-18. Properly applied, however, the second step of *Boerne* looks only to the record of constitutional violations Congress amassed in support of its exercise of its enforcement authority, not whether those individual violations could be remedied by either Section 2 alone or a purpose-only preclearance requirement. It is only in the third step of *Boerne* that a court examines the appropriateness of the remedial measure Congress decided upon based on the documented record of constitutional violations. In applying this step, deference is accorded Congress's choice of means to deter and remedy the identified violations. Here, Texas reads out of *Boerne* the third step of the constitutional analysis.

Texas's misapplication of *Boerne* is hardly inadvertent. Congress acts at the peak of its enforcement authority when it legislates to combat racial discrimination in voting. See *Hibbs*, 538 U.S. at 738. And the Constitution assigns to Congress primary authority for determining how to remedy that problem. See *Northwest Austin*, 557 U.S. at 205; see also *Shelby Cnty.*, 679 F.3d at 860-862. For that reason, the Supreme Court has

acknowledged the need for Congress to use "strong remedial and preventative measures" under its enforcement powers "to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *Boerne*, 521 U.S. at 526; see also *Lane*, 541 U.S. at 561-564 (Scalia, J., dissenting). Congress is not without limits in its choices—the choice must be a congruent and proportional response to the identified problem. See *Shelby Cnty.*, 679 F.3d at 859. But it is Congress that has expertise in choosing among available legislative options. That is particularly true—and deference particularly warranted—when Congress "ha[s] already tried unsuccessfully to address" the problem through other legislative means, but has found the problem to be "difficult and intractable," as is the case here. *Hibbs*, 538 U.S. at 737 (citation omitted).

Because the D.C. Circuit in *Shelby County* correctly identified the right Congress sought to enforce when it enacted Section 5, *i.e.*, the prohibition on racial discrimination in voting, as well as a history and ongoing pattern of unconstitutional conduct that supports the need for a preclearance remedy, see Pt. I.B., *supra*, this Court need only decide whether Congress's retention of the effects prong in 2006 was an appropriate response to the identified history and pattern of constitutional violations. See *Lane*, 541 U.S. at 530. This Court should answer that question in accordance with established precedent and uphold Section 5's effects prong as appropriate enforcement legislation.[11]

[11] Texas mistakenly argues that the effects prong incorporates into Section 5 "precisely what the Supreme Court rejected in *City of Boerne*: a decision 'to dispense with proof of (continued…)

2. In challenging the effects prong as invalid prophylactic legislation, Texas primarily argues that a dual-pronged preclearance remedy that requires it to show the absence of both discriminatory purpose and effect cannot be thought to enforce the Fifteenth Amendment because the purpose prong alone ensures the proposed change is constitutional. Pl. Mem. 17-18. But Texas concedes (Pl. Mem. 12, 18), as it must, that Congress may deter and remedy constitutional violations by prohibiting conduct that does not itself violate the Fourteenth or Fifteenth Amendments, see *Lane*, 541 U.S. at 520, *Hibbs*, 538 U.S. at 727-728; *Garrett*, 531 U.S. at 365; *Boerne*, 521 U.S. at 518. Section 5's dual-pronged preclearance requirement does precisely this, and is based on Congress's constitutional authority to deter and remedy persistent discrimination in the covered jurisdictions and to protect the significant progress minority voters have made over the past 45 years, as a direct result of Section 5, despite such discrimination. See 2006 Reauthorization, §2(a)-(b), 120 Stat. 577-578; 2006 House Report 6-12, 65-66.

The Supreme Court's most extensive discussion of the constitutionality of Section 5's effects prong is in *City of Rome*, which involved the denial of judicial preclearance based on the city's failure to show certain electoral changes and annexations would not

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(…continued)
deliberate and overt discrimination and instead concentrate on a law's effects.'" Pl. Mem. 20 (quoting *Boerne*, 521 U.S. at 517). The quoted language from *Boerne*, however, concerns the requirement that Congress demonstrate a record of constitutional violations before exercising its enforcement authority. See 521 U.S. at 517. Once that record is established, Congress can prohibit conduct that is both clearly unconstitutional and merely suggestive of, or indicative of, unconstitutional conduct in order to enforce the Constitution's voting guarantees.

have a discriminatory effect, even after the city showed that the changes and annexations had not been enacted for a discriminatory purpose. See 446 U.S. at 172. The city argued that, despite its plain language, Section 5 "[could] not be read as prohibiting voting practices that have only a discriminatory effect" because to do so would render the statute unconstitutional. *Id.* at 172-173. In rejecting the city's constitutional challenge, the Supreme Court stated that even though the Fifteenth Amendment prohibits only purposeful discrimination, Congress may, under its authority to enforce the Constitution's voting guarantees, prohibit state action that perpetuates the effects of past discrimination. See *id.* at 173, 176. The Court explained that, in upholding Section 5, *South Carolina* had recognized Congress's "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting," *id.* at 174 (quoting *South Carolina*, 383 U.S. at 326), and, thus, to enact legislation "to carry out the objects the [Civil War] amendments have in view, * * * 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," *id.* at 175 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (alteration in original)).

The Supreme Court further explained that, in reviewing Congress's exercise of its broad enforcement power, *South Carolina* had upheld not only Section 5's preclearance requirement, but also Congress's ban on literacy tests, though facially constitutional and even where fairly administered, because of their past discriminatory use and present ability to freeze in place the effect of past discrimination. See *City of Rome*, 446 U.S. at 175-176. The Court stated that its holding reaffirming the constitutionality of the effects

prong was consistent with the Court's previous recognition, in other cases, that Congress enjoyed a broad power to enforce the Fourteenth and Fifteenth Amendments. See *id.* at 176. In particular, the Court cited *Morgan*, in which it upheld legislation to enforce equal protection guarantees, even though the outlawed voting practices might not themselves violate the Fourteenth Amendment, and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), in which it upheld a five-year nationwide ban on literacy tests as appropriate to remedy "earlier, purposeful racial discrimination," regardless of whether the practices were now discriminatory only in effect. *City of Rome*, 446 U.S. at 176-177. The Court stated that, in enforcing the Fifteenth Amendment, Congress may prohibit even constitutional conduct, "so long as the prohibitions attacking racial discrimination in voting are 'appropriate.'" *Id.* at 177. Accordingly, the Court stated it would not "disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from undoing or defeating the rights recently won by [minority voters]." *Id.* at 178 (quotation marks and alterations omitted).

In doing so, the majority in *City of Rome* rejected the dissent's argument (and Texas's argument here, Pl. Mem. 23-24) that Congress could not validly require a jurisdiction to show that its proposed change had no discriminatory effect once that jurisdiction had demonstrated the absence of a discriminatory purpose. See 446 U.S. at 209-214 (Rehnquist, J., dissenting). In that case, the dissent emphasized the district court's finding that the city had not engaged in purposeful voting discrimination *for nearly 20 years*. See *id.* at 211. Even the dissent conceded, however, that Congress's prohibition on state action that "is not purposefully discriminatory may nevertheless be

appropriate remedial legislation under the Civil War Amendments" if the prohibition is "necessary [either] to remedy prior constitutional violations by the governmental unit, or * * * to effectively prevent purposeful discrimination by a governmental unit." *Id.* at 213.

In enacting and retaining a remedial scheme that, *inter alia*, bars new electoral procedures that will have a discriminatory effect on racial minorities, Congress, in 2006, appropriately exercised its enforcement authority under the Fourteenth and Fifteenth Amendments, as it has done in the past, to overcome the continuing effects of past racial discrimination in voting, to prevent its recurrence, and to prohibit conduct as to which a strong inference of discriminatory purpose exists. See, *e.g.*, 2006 House Report 21-24, 65-66; 1981 House Report 3-4, 7-20; 1975 House Report 6-11, 26-27, 57-58; 1969 House Report 3, 6-8; H.R. Rep. No. 439, 89th Cong., 1st Sess. 6, 8-11, 15, 19 (1965) (1965 House Report). Congress's continued reliance on Section 5, including its effects prong, as a preventative and remedial measure is based on its extensive documentation of an identified history and ongoing pattern of intentional voting discrimination in the covered jurisdictions. See Pt. I.B., *supra*. It is also based on Congress's considered judgment that, in order to deter and remedy those constitutional violations and to secure the significant progress minority voters have made in the exercise of their voting rights despite such intentional discrimination, jurisdictions must show that their proposed voting changes will not have a retrogressive effect. See 2006 Reauthorization, §2, 120 Stat. 577-578; 2006 House Report 24-56; see also *City of Rome*, 446 U.S. at 176, 178

(requiring a jurisdiction to show neither discriminatory purpose nor effect is an effective and appropriate means of enforcing the Constitution).

Thus, contrary to Texas's assertion, Section 5's effects prong does not function merely to prevent intentional discrimination that may "slip through the cracks," Pl. Mem. 16, because of, *inter alia*, a difficulty in proving either discriminatory intent or the subtle use of discriminatory techniques.[12] Rather, Section 5's ban on changes that will have a discriminatory effect is also intended to deter and remedy persistent racial discrimination in voting in the covered jurisdictions by precluding new practices that perpetuate the effects of past discrimination and undo the significant progress minority voters have made with respect to their full participation in the electoral process. See *United States* v. *Beer*, 425 U.S. 130, 140-141 (1976) ("Section 5 * * * insure[s] that the gains thus far achieved in minority political participation shall not be destroyed through new discriminatory procedures and techniques.") (citation and alterations omitted); *id.* at 141 (Section 5 "insure[s] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise

[12] Nor does requiring a jurisdiction to show its proposed voting change was not enacted with any discriminatory purpose necessarily preclude all intentionally discriminatory voting changes from taking effect. Pl. Mem. 16. For example, where a covered jurisdiction puts forward a nondiscriminatory reason for a proposed electoral change after having assembled a scant legislative record or made broad assertions of privilege, it may be difficult for litigants, despite the existence of an underlying discriminatory purpose, to effectively challenge the jurisdiction's asserted justification as pretextual. Denying preclearance based on a change's anticipated discriminatory effect, which is itself an "important starting point" for any purpose inquiry, see *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), therefore both deters and protects against intentional racial discrimination.

of the electoral franchise."). Based on a demonstrated pattern of serious and widespread constitutional violations in the covered jurisdictions, Congress could reasonably conclude that enforcing the Constitution's voting guarantees in areas with enduring discrimination required a temporary ban on changes with a racially discriminatory effect, regardless of whether discriminatory purpose, or lack thereof, is shown for any particular voting change. Indeed, in 2006, Congress specifically found "that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." 2006 House Report 24; see also *Shelby Cnty.*, 679 F.3d at 871-872. In fact, two judges of this Court, in response to South Carolina's enactment and proposed administration of its photo ID law, recently noted Section 5's "vital function" in deterring jurisdictions from enacting restrictive, discriminatory voting practices. *South Carolina* v. *Holder*, No. 12cv203, 2012 WL 4814094, at *21 (D.D.C. Oct. 10, 2012) (three-judge court) (Bates, J., concurring); *id.* at *22 ("Section 5 * * * deter[s] problematic, and hence encourag[es] non-discriminatory, changes in state and local voting laws.").

Nor is Section 5 impermissible prophylactic legislation because it differs from the narrower ban on literacy tests and similar registration requirements that Texas cites approvingly in its brief. Pl. Mem. 13-14. Unlike the outright, nationwide ban on literacy tests in state and federal elections, Section 5 applies only to those jurisdictions with extensive records of unconstitutional conduct. Thus, while the nationwide ban on literacy tests reaches only one type of potentially discriminatory practice, it is an absolute prohibition on that practice that applies nationwide; conversely, Section 5 reaches a broad range of voting practices but applies only in those areas with a demonstrated history of

actual voting discrimination and is not an outright ban. Given the broad discretion Congress has to decide on appropriate remedial measures to enforce the Constitution's prohibition on racial discrimination in voting, the Supreme Court has cited both remedies and the cases upholding them, *i.e.*, *South Carolina*, *City of Rome*, and *Mitchell*, approvingly in its constitutional-authority cases. See *Lane*, 541 U.S. at 519 n.4; *Florida Prepaid*, 527 U.S. at 638-639; *Boerne*, 521 U.S. at 518, 526-527, 532-533.[13]

Importantly, in deciding on Section 5's dual-pronged preclearance requirement as the most appropriate remedial measure to combat the extensive record of an ongoing pattern of voting discrimination in the covered jurisdictions, Congress also placed meaningful limitations on Section 5's scope—*e.g.*, its application only to jurisdictions with the worst historical and current records of voting discrimination; its expiration after

[13] Nor does Congress's retention of the effects prong conflict with *Oregon* v. *Mitchell*. Pl. Mem. 21-22. Unlike the nationwide ban on literacy tests upheld in that case, Section 5 is not a blanket prohibition on voter ID laws. Rather, covered jurisdictions, based on their records of intentional discrimination, need only first demonstrate that their proposed voting changes lack a discriminatory purpose or effect. In fact, Texas secured Section 5 preclearance for its preexisting voter ID law. See Def. SMF ¶ 25. Thus, a jurisdiction's failure to gain preclearance "can only be attributed to its own officials, and not the operation of the Act." *City of Rome*, 446 U.S. at 183; *Texas*, 2012 WL 3743676, at *32-33. Also, Section 5 is a response to covered jurisdictions' reliance on numerous and ever-changing discriminatory devices and techniques to intentionally thwart the effective participation of racial minorities in the electoral process. See, *e.g.*, *Beer*, 425 U.S. at 140; *Shelby Cnty.*, 679 F.3d at 853-855; 2006 House Report 65-66; 1975 House Report 10, 26-27, 57-58; 1969 House Report 7-8; 1965 House Report 10-11. Section 5 is limited to those jurisdictions with a history and ongoing pattern of voting discrimination; Congress was not also required to establish a record of constitutional violations as to each type of voting change that a jurisdiction might enact or employ discriminatorily, *e.g.*, photo ID legislation, before subjecting that type of change to preclearance. Compare, *e.g.*, Pl. Mem. 21-22 with *South Carolina*, 383 U.S. at 334-335.

25 years, with congressional review after 15 years; and continued bailout eligibility for jurisdictions that comply with specified nondiscrimination measures for ten years—thereby ensuring its congruence and proportionality to the targeted harm. See *Boerne*, 521 U.S. at 530, 532-533; *Garrett*, 531 U.S. at 373; see also *Shelby Cnty.*, 811 F. Supp. 2d at 498-503. Accordingly, this Court should adhere to established Supreme Court precedent and uphold Section 5's effects prong as appropriate enforcement legislation. Because Section 5 is valid enforcement legislation, it does not violate the Tenth Amendment or Article IV of the Constitution. Cf. Pl. Mem. 6. The Supreme Court has explained that "the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez*, 525 U.S. at 282. See also *id.* at 284-285; *Boerne*, 521 U.S. at 518; *City of Rome*, 446 U.S. at 178-180, 182 n.17.

III

SECTION 5 DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES

Texas also argues that Section 5 violates the Equal Protection Clause because the non-retrogression requirement (a) prohibits only those voting changes that have a discriminatory effect on racial minorities, not those that disproportionately burden non-minority voters, and (b) forces jurisdictions to engage in race-based decisionmaking. Pl. Mem. 24-25. The Fifth Amendment (which incorporates equal protection principles), see *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 213-218 (1995), is not violated by Section 5's non-retrogression principle, which has a race-conscious, but "limited[,] substantive goal: 'to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective

exercise of the electoral franchise,'" *Bush* v. *Vera*, 517 U.S. 952, 982-983 (1996) (quoting *Beer*, 425 U.S. at 141).

1. It is well-settled that the narrowly tailored consideration of race may be warranted to achieve the compelling governmental interest in remedying the effects of identified state-sponsored intentional discrimination for which a strong basis in evidence exists that remedial action is necessary. See, *e.g.*, *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Bush* v. *Vera*, 517 U.S. at 981-983; *Shaw* v. *Hunt*, 517 U.S. 899, 908-910 (1996); *Miller* v. *Johnson*, 515 U.S. 900, 904, 920-921 (1995); *Adarand*, 515 U.S at 227. Section 5's non-retrogression requirement—which is based on Congress's extensive findings of official discrimination against racial minorities in the covered jurisdictions and the need for a strong remedial and preventative measure, see Pts. I.B. & II, *supra*—satisfies strict scrutiny and, therefore, is constitutional.[14]

First, the Supreme Court has long recognized that Congress's enactment of "Section 5 was directed at preventing a particular set of invidious practices that had the effect of undoing or defeating the rights recently won by nonwhite voters." *Miller*, 515 U.S. at 925 (citation, internal quotation marks, and alterations omitted). Thus, the non-

[14] In *LaRoque* v. *Holder*, this Court rejected an equal protection challenge to the 2006 amendments to Section 5. See 831 F. Supp. 2d 183, 231-238 (D.D.C. 2011), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012), petition for cert. pending, No. 12-81 (filed Jul. 20, 2012). In doing so, the court stated both that Congress "has identified historical and ongoing intentional discrimination that strikes at the heart of two of the most important rights protected by the Constitution" and that the government "has a compelling interest in remedying discrimination in voting." 831 F. Supp. 2d at 233; see also *id.* at 235.

retrogression principle of Section 5 has always been race-conscious in that it denies preclearance only to voting changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141; see also 28 C.F.R. 51.54(b). In doing so, the government has properly limited its consideration of race to further its compelling interest in remedying the specific "identified" harm, *i.e.*, voting discrimination by covered jurisdictions against racial minorities. *Shaw*, 517 U.S. at 909 (citation omitted); see also *LULAC*, 548 U.S. at 518-519 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Congress enacted § 5 [as a necessary remedy for identified past discrimination] * * * and that provision applies only to jurisdictions with a history of official discrimination.").

Second, Section 5's effects prong is narrowly tailored to achieve the compelling interest in remedying state-sponsored intentional discrimination. Importantly, Section 5 was enacted only after Congress tried unsuccessfully to address the problem of racial discrimination in voting in particular areas of the country through other means. The non-retrogression requirement applies only in covered jurisdictions, and only for so long as Congress reasonably determines the preclearance remedy remains necessary or until a jurisdiction bails out from coverage. Moreover, the non-retrogression requirement forbids covered jurisdictions only from enacting those voting changes that would worsen the position of minority voters relative to the status quo; it does not require changes to improve electoral opportunities for minority voters. See *Bush* v. *Vera*, 517 U.S. at 982-983; *Beer*, 425 U.S. at 141; cf. *LULAC*, 548 U.S. at 519 (Scalia, J.). Finally, the retrogression standard is a flexible one in which the Attorney General considers, *inter*

alia, "the extent to which a reasonable and legitimate justification for the change exists," 28 C.F.R. 51.57(a), and the ameliorative efforts a jurisdiction has taken to counteract any anticipated retrogressive effect, see 28 C.F.R. 51.57(d). Thus, the Attorney General assesses whether a proposed voting change, when considered against remaining means available to voters, dismantles the progress minority voters have made with respect to their effective exercise of the electoral franchise. Because the effects prong satisfies strict scrutiny, Texas's equal protection claim fails. Cf. *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003) ("Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race.").[15]

2. Texas also argues that Section 5 requires jurisdictions to engage in race-based decisionmaking. Pl. Mem. 25. The opinions Texas cites, however, caution only that Section 5, in the redistricting context, could encourage States to subordinate traditional districting principles to race-based line-drawing. See Pl. Mem. 25 (citing *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), *Miller* v. *Johnson*, and the dissent in *Shelby County*).

[15] Moreover, in photo ID cases such as this one, the denial of preclearance based on a law's likely retrogressive effect on minority voters accrues to the benefit of all voters who lack, or cannot readily obtain, an acceptable form of photo ID. This is generally true in ballot access cases, *e.g.*, voter ID laws, registration requirements, early voting changes, and polling place changes. Likewise, all eligible voters committed to a fair democracy, not simply eligible minority voters, benefit from laws that safeguard election integrity while ensuring the right to vote is not denied or abridged on account of race or color. Cf. *South Carolina* v. *Holder*, 2012 WL 4814094, at *21 (Bates, J., concurring).

This Court, however, must examine what the statute, by its terms, requires; speculation over how Section 5 may be applied by covered jurisdictions in one context is not a basis for invalidating the statute. See *Washington State Grange*, 552 U.S. at 450-451; *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990).[16] Thus, even if the concerns Texas raises with respect to Section 5's application to redistricting were valid, which they are not, Texas "would not have established that no set of circumstances exists," *Shelby Cnty.*, 679 F.3d at 884 (citation and internal quotation marks omitted), under which the effects prong complies with equal protection principles and therefore is facially invalid. Indeed, reaching Texas's challenge in this case "would lead [this Court] into the very kind of speculation and anticipation of constitutional questions that require courts to disfavor facial challenges." *Id.* (citation, internal quotation marks, and alterations omitted); see also *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960).

Moreover, Texas's equal protection argument supposes that the unconstitutional decisionmaking in violation of the Equal Protection Clause would not be by the United States, but by the State itself, under alleged compulsion by the Attorney General. Yet Texas points to nothing in Section 5 that, on its face, purports to authorize or permit the Attorney General to encourage or ratify such unconstitutional conduct by covered jurisdictions. The Supreme Court has made clear that when a jurisdiction adheres to

[16] Had Texas sought to challenge Section 5's application in the redistricting context, it could have done so in its judicial preclearance action for its three most recent redistricting plans; as the district court explained in its opinion denying preclearance, however, Texas never raised a constitutional challenge in the trial court. See *Texas* v. *United States*, No. 11cv1303, 2012 WL 3671924, at *8 n.11 (D.D.C. Aug. 28, 2012) (three-judge court).

traditional districting principles, its failure to create majority-minority districts does not by itself constitute intentional discrimination in violation of Section 5. See *Miller*, 515 U.S. at 924; *Shaw*, 517 U.S. at 911-913. The Attorney General acknowledges that principle and has consistently applied it since the decisions in *Miller* and *Shaw*. See 28 C.F.R. 51.59(b); *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470 (Feb. 9, 2011); *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act*, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).

Moreover, the Supreme Court had already stated prior to *Beer* that Section 5 could not be read as imposing an inflexible prohibition on retrogression. See *City of Richmond* v. *United States*, 422 U.S. 358 (1975). The Attorney General has long recognized that the prohibition on retrogression does not "require the reflexive imposition of objections in total disregard of the circumstances involved or the legitimate justifications in support of changes that incidentally may be less favorable to minority voters." *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 488 (Jan. 6, 1987). The Attorney General also has stated that retrogression can be justified when a redistricting plan that maintains preexisting minority voting strength would violate the Constitution; thus, a retrogressive plan must nonetheless be precleared if the only alternative is a plan that would subordinate traditional districting principles in violation of *Shaw* and *Miller*. See 66 Fed. Reg. at 5413. The Attorney General continues to adhere to statutory and constitutional requirements when making Section 5 determinations. See 76 Fed. Reg. at 7472; 28 C.F.R. 51.55 & 51.56. Because the

concerns Texas raises are not implicated in this case and the State provides no support for its assertions, this Court should deny its equal protection claim and uphold Section 5.

IV

SECTION 5 IS NOT UNCONSTITUTIONALLY VAGUE

Texas also argues that Section 5 is unconstitutionally vague and permits the Attorney General and lower courts unfettered discretion to deny preclearance. Because the legal standard that covered jurisdictions must satisfy to obtain preclearance is well-established, Section 5 complies with due process principles and Texas's argument fails.

"A fundamental principle [of Fifth Amendment due process] is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C.* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (citing *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The "void-for-vagueness doctrine" responds to two primary due process concerns: "first, that regulated parties should know what is required of them so that they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* Cf. Erwin Chemerinksy, *Constitutional Law: Principles and Policies* §11.2.2 (2d ed. 2002) ("Ambiguity is inherent in language, and all laws will have some vagueness."). Section 5, by its terms and as-applied, satisfies those concerns.

Section 5, on its face, mandates that before a covered jurisdiction can implement any voting change, it must obtain an administrative or judicial preclearance determination 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. 42 U.S.C. 1973c. Over 40 years ago, the Supreme Court interpreted Section 5's effects prong to prohibit those voting changes that would worsen the position of racial minorities with respect to their "effective exercise of the electoral franchise," *Beer*, 425 U.S. at 140-142, and the Attorney General has adopted that same standard in regulations governing his administration of Section 5, see 28 C.F.R. 51.52(a) and 51.54(b). Cf. *Lopez*, 525 U.S. at 281 (holding those regulations are entitled to "substantial deference"); *Georgia*, 411 U.S. at 536 (stating the issuance of such regulations shows the Attorney General has not interpreted Section 5 to grant him "unfettered discretion as to procedures, standards, and administration in this sensitive area").[17] Accordingly, this Court has stated that the effects prong prohibits voting changes that disproportionately and materially burden racial minorities as compared to preexisting state or local law or practice. See *Texas*, 2012 WL 3743676, at *13; see also *South Carolina* v. *Holder*, 2012 WL 4814094, at *7, *19 n.13; *Florida* v. *United States*, No. 11cv1428, 2012 WL 3538298, at *9 (D.D.C. Aug. 16, 2012) (three-judge court). Because Section 5, by its terms and as interpreted by the Attorney General and the

[17] The Section 5 regulations explain, *inter alia*, what types of changes must be submitted; the factors the Attorney General considers relevant and the standards by which the Attorney General will be guided in making administrative determinations under Section 5 and in defending judicial preclearance suits; the allocation of the burden of proof to covered jurisdictions; and the form, timing, and required contents of Section 5 submissions. See 28 C.F.R. Pt. 51; 76 Fed. Reg. at 7470; Def. SMF ¶¶ 30-37. Although the Attorney General's Section 5 determination is not judicially reviewable, a covered jurisdiction may seek judicial preclearance *de novo* and take a direct appeal to the Supreme Court if the requested relief is denied. See 42 U.S.C. 1973c(a). As such, Section 5 does not operate akin to a "governor's veto." Pl. Mem. 35.

Supreme Court, clearly requires covered jurisdictions to submit all voting changes for preclearance and to prove, under well-established standards, that those changes lack a discriminatory purpose or effect, it provides fair notice of what is required of covered jurisdictions and therefore complies with due process.[18]

The fact that not all jurisdictions will always know whether every voting change will satisfy the preclearance standard does not make the effects prong unconstitutionally vague. Cf. Pl. Mem. 29. The retrogression standard has to be applied to the particular facts of each case. See 28 C.F.R. 51.54 and 51.57; see also *Georgia*, 411 U.S. at 531 (Section 5 is concerned with "the reality of changed practices as they affect [minority] voters"); 1975 House Report 60 (Section 5 requires "determining * * * whether the ability of minority groups to participate in the political process * * * is augmented, diminished, or not affected by the change affecting voting in view of the political,

[18] Nor does allowing parties to intervene in judicial preclearance suits impose "an unconstitutional penalty on a State's right to seek judicial redress," in violation of due process. Compare Pl. Mem. 36 with *Thunder Basin* v. *Reich*, 510 U.S. 200, 217-218 (1994) (holding that assessment of daily penalties, subject to judicial review, was not sufficiently onerous or coercive to foreclose access to the courts). First, a relatively small number of jurisdictions even seek judicial preclearance, and an even smaller number of those actions included intervenor-defendants. Def. SMF ¶¶ 38-39. Second, for those jurisdictions that seek judicial relief instead of, simultaneous to, or after making a more cost-effective and expeditious administrative submission and end up facing numerous intervening parties, a court can effectively reduce the litigation burden, as in this case, by ordering the parties to avoid duplication of efforts, combining aspects of discovery, and consolidating briefing and argument. Also, even where intervenors seek attorney's fees after a denial of preclearance, such an award is in the discretion of the court and must be limited to reasonable and non-duplicative fees. 42 U.S.C. 1973l(e). The Supreme Court has previously rejected the argument that intervention in Section 5 cases places an unfair burden on jurisdictions. See *Ashcroft*, 539 U.S. at 476.

sociological, economic, and psychological circumstances within th[at] community"). If a voting change is denied preclearance, as was SB 14 in this case, it is because the facts failed to show that the proposed change "would [not] lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer*, 425 U.S. at 141, not because the standard changes from case to case or on account of the submitting jurisdiction.

Texas argues that the effects prong of Section 5 imposes the impossible burden of proving the future effects of a law that has not been implemented. Pl. Mem. 29. But the Supreme Court has long interpreted the retrogression standard to require covered jurisdictions to demonstrate that their proposed voting changes will not worsen the position of minority voters relative to the status quo. See *Beer*, 425 U.S. at 140-142. Any covered jurisdiction enacting a voter ID requirement could easily foresee the Section 5 inquiry in this context. In anticipation of meeting its evidentiary burden, such a jurisdiction likely would consider: (1) which potential voters would not have the newly required form of ID; (2) who in that group would have to obtain acceptable ID (instead of, for example, invoking a disability or religious exception to the requirement); (3) how difficult it would be for those individuals to obtain an ID (because of underlying costs, transportation issues, limited accessibility of government offices, etc.); (4) whether those difficulties would more likely fall on minority voters; and (5) whether anything in the law offsets those burdens. Indeed, some of Texas's own legislators proposed amendments to SB 14 in response to these very concerns. See *Texas*, 2012 WL 3743676, at *33. How

much a jurisdiction ultimately engages with those considerations in an effort to satisfy its Section 5 burden is its choice.

Although the Attorney General or a district court may find a particular consideration dispositive in a given case, depending on the available evidence, evaluating the relevant considerations in this light does not amount to a shifting preclearance standard. Indeed, other covered jurisdictions have been able to show that their voter ID laws will not have a retrogressive effect. See, *e.g. South Carolina* v. *Holder*, 2012 WL 4814094, at *8-9, *15-17 (preclearing South Carolina's photo ID law and noting that Georgia and New Hampshire likewise obtained preclearance for their photo ID laws); Def. SMF ¶ 28 (interposing no objection to voter ID laws enacted by Arizona, Georgia, Louisiana, Michigan, New Hampshire, and Virginia). And even where a covered jurisdiction cannot disprove racial disparities in ID possession based on the evidence it possesses, it still can secure preclearance by demonstrating that the burdens imposed by its law are not material, or have been sufficiently ameliorated, and that the law therefore will lack a retrogressive effect. See *South Carolina* v. *Holder*, 2012 WL 4814094, at *8-9, *15-17 (noting preclearance has been obtained where voters could easily obtain an ID or cast an equally effective ballot through other means); *Texas*, 2012 WL 3743676, at *10 ("some voter ID laws impose only 'minor inconvenience' and present little threat to the 'effective exercise of the electoral franchise'—and would thus be easily precleared"); *id.* at *13 (explaining that a law must impose both a material and disproportionate burden on

minority voters for it to have a prohibited effect).[19] Section 5, however, properly blocks electoral changes by jurisdictions with a long history and ongoing pattern of voting discrimination where those jurisdictions discount, disregard, or ignore a proposed voting practice's potential discriminatory effect on minority voters and therefore fail to satisfy the well-established preclearance standard.[20]

[19] This Court did not act improperly by failing to "provid[e] [Texas] any assurance that [it] would have faced a non-impossible burden of proof had it adopted any [specific] amendments" to SB 14. Pl. Mem. 30-31. Article III of the Constitution limits federal courts to adjudicating "only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Adopting Texas's position would have required this Court to have issued an advisory opinion in violation of Article III.

[20] If this Court were to strike down any portion of Section 5, the remainder of the Act would easily survive. See 42 U.S.C. 1973p; see also *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-3162 (2010).

CONCLUSION

This Court should grant the Attorney General's motion and deny Texas's motion.

Date: October 22, 2012

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General

/s/ *Erin H. Flynn*
T. CHRISTIAN HERREN, JR.
JESSICA DUNSAY SILVER
MEREDITH BELL-PLATTS
ERIN H. FLYNN
ELIZABETH S. WESTFALL
BRUCE I. GEAR
JENNIFER L. MARANZANO
SPENCER FISHER
RISA BERKOWER
DANIEL J. FREEMAN
Attorneys
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530
(800) 253-3931

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant. ERIC KENNIE, *et al.*, Defendant-Intervenors, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Defendant-Intervenors. TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*, Defendant-Intervenors, VICTORIA RODRIGUEZ, *et al.*, Defendant-Intervenors.	CASE NO. 1:12-CV-00128 (RMC-DST-RLW) Three-Judge Court

THE ATTORNEY GENERAL'S STATEMENT OF UNCONTESTED MATERIAL FACTS

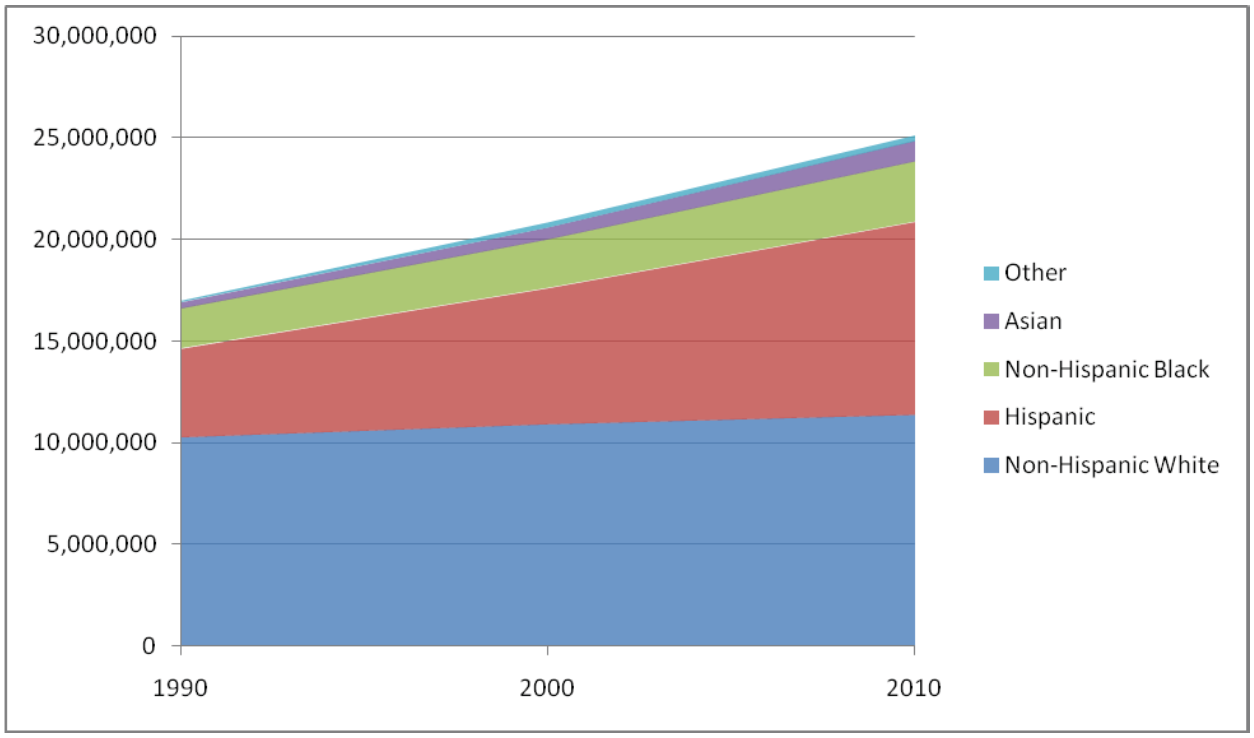
Pursuant to Local Civil Rule 7(h)(1), Attorney General Eric J. Holder, Jr., submits the following statement of material facts as to which the Attorney General contends that there is no genuine issue.

Background Information on the State of Texas

1. According to the 2010 Census, the State of Texas has a total population of 25,145,561 persons, including 11,397,345 non-Hispanic white persons (45.3%), 9,460,921 Hispanic persons (37.6%), 2,975,739 non-Hispanic black persons (11.8%), and 1,027,956 non-Hispanic Asian persons. Request for Judicial Notice ¶ 6 (June 21, 2012) (Doc. 219); *see also* Minute Order (July 3, 2012) (granting request for judicial notice).
2. According to the 2010 Census, the State of Texas has a voting-age population of 18,279,737, including 9,074,684 non-Hispanic white persons (49.6%), 6,143,144 Hispanic persons (33.6%), 2,102,474 non-Hispanic black persons (11.5%), and 758,636 non-Hispanic Asian persons (4.2%). Request for Judicial Notice ¶ 7.
3. According to the 2008-2010 American Community Survey ("ACS"), the State of Texas has a citizen voting-age population of 15,564,014 persons, including 8,871,710 non-Hispanic white persons (57.0%), 4,032,800 Hispanic persons (25.9%), 2,006,756 non-Hispanic black persons (12.9%), and 449,648 non-Hispanic Asian persons (2.9%). Request for Judicial Notice ¶ 8.
4. Texas's population grew by approximately 4.3 million in the past decade, an increase of 20.6%. Approximately 89% of this growth was from non-Anglo

minorities: Hispanics comprise 65% of the increase, black persons 13.4%, and Asian-Americans 10.1%. *Texas* v. *United States*, ___ F. Supp. 2d ___, No. 1:11-cv-1303, 2012 WL 3671924, at *17 (D.D.C. Aug. 28, 2012).

Figure 1: Texas Population 1990-2010 by Race



5. According to the 2000 Census, the State of Texas had a total population of 20,851,820 persons, including 10,933,313 non-Hispanic white persons (52.4%), 6,669,666 Hispanic persons (32.0%), 2,399,083 non-Hispanic black persons (11.5%), and 594,932 non-Hispanic Asian persons (2.8%). Request for Judicial Notice ¶ 3.

6. According to the 2000 Census, the State of Texas had a voting-age population of 14,965,061 persons, including 8,426,166 non-Hispanic white persons (56.3%), 4,282,901 Hispanic persons (28.6%), 1,639,173 non-Hispanic black persons (11.0%), and 437,215 non-Hispanic Asian persons (2.9%). Request for Judicial Notice ¶ 4.
7. According to the 2000 Census, Texas had a citizen voting-age population of 13,299,845 persons, including 8,305,993 non-Hispanic white persons (62.5%), 2,972,988 Hispanic persons (22.4%), 1,590,832 non-Hispanic black persons (12.0%), and 225,374 non-Hispanic Asian persons (1.7%).
8. According to the 1990 Census, the State of Texas had a total population of 16,986,510 persons, including 10,291,680 non-Hispanic white persons (60.6%), 4,339,905 Hispanic persons (25.5%), 1,976,360 non-Hispanic black persons (11.6%), and 303, 825 non-Hispanic Asian persons (1.8%). Request for Judicial Notice ¶ 1.
9. According to the 1990 Census, the State of Texas had a voting-age population of 12,150,671 persons, including 7,828,352 non-Hispanic white persons (64.4%), 2,719,586 Hispanic persons (21.1%), 1,336,688 non-Hispanic black persons (11.0%), and 213, 294 non-Hispanic Asian persons (1.8%). Request for Judicial Notice ¶ 2.
10. In Texas, the poor are disproportionately racial minorities. *Texas* v. *Holder*, ___ F. Supp. 2d ___, No. 1:12-cv-128, 2012 WL 3743676, at * 28 (D.D.C. Aug. 30,

2012).

11. According to the 2008-2010 ACS, the State of Texas has a poverty rate of 17.0%. Non-Hispanic white persons have a poverty rate of 8.8%; Hispanic persons, 25.8%; non-Hispanic black persons, 23.3%; and non-Hispanic Asian persons, 11.9%. Request for Judicial Notice ¶ 9.
12. According to the 2008-2010 ACS, 19.7% of Texans 25 years of age and older lack a high school diploma or equivalent. 8.3% of Non-Hispanic white persons lack a high school diploma, whereas 41.5% of Hispanic persons, 14.6% of non-Hispanic black persons, and 13.0% of non-Hispanic Asian persons lack a high school diploma. Request for Judicial Notice ¶ 10.
13. According to the 2008-2010 ACS, the median household income in the State of Texas is $49,585. The median income is $60,856 for non-Hispanic white persons, $36,957 for Hispanic persons, $36,731 for non-Hispanic black persons, and $64,245 for non-Hispanic Asian persons. Request for Judicial Notice ¶ 11.
14. According to the 2008-2010 ACS, the State of Texas had an unemployment rate of 7.4%. The unemployment rate was 5.8% for non-Hispanic white persons, 8.2% for Hispanic persons, 11.9%, for non-Hispanic black persons, and 6.3%, for non-Hispanic Asian persons. Request for Judicial Notice ¶ 12.
15. According to the 2008-2010 ACS, 6.0% of the total persons in the State of Texas have no vehicles available to them. 3.8% of Non-Hispanic white persons do not have a vehicle available compared to 7.3% of Hispanic persons, 13.0% of non-

Hispanic black persons, and 4.6% of non-Hispanic Asian persons. Request for Judicial Notice ¶ 13.

16. According to the 2008-2010 ACS, 64.2% of the total persons in the State of Texas reside in an owner-occupied housing unit. 72.2% of non-Hispanic white persons reside in an owner-occupied unit as do 57.7% of Hispanic persons, 45.2% of non-Hispanic black persons, and 61.9% of non-Hispanic Asian persons. Request for Judicial Notice ¶ 14.

17. According to the 2008-2010 ACS, 11.2% of all households in the State of Texas receive Supplemental Nutrition Assistance Program ("SNAP") benefits. 5.3% of non-Hispanic white households receive SNAP benefits as do 19.4% of Hispanic households, 19.5% of non-Hispanic black households, and 5.5% of non-Hispanic Asian households. Request for Judicial Notice ¶ 15.

Plaintiff's Section 5 History and Voting Rights Litigation

18. Texas has a long, well-documented history of official discrimination affecting voting that has been remedied only by federal intervention. See *Texas* v. *United States*, 2012 WL 3671924, at *18-21 (redistricting); *White* v. *Regester*, 412 U.S. 755, 768 (1973) (poll tax); *Terry* v. *Adams*, 345 U.S. 461 (1953) (private primary); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (white primary); *Nixon* v. *Herndon*, 273 U.S. 536 (1927) (exclusion of minorities).

19. As a result of the 1975 Amendments to the Voting Rights Act, Texas became covered under Section 4 of the Act, 42 U.S.C. 1973b(b). As a consequence, Texas

became subject to the requirements of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

20. The State of Texas is also subject to the Spanish language election requirements of Section 4(f)(4) of the Voting Rights Act, 42 U.S.C. 1973b(f)(4), and Section 203 of the Act, 42 U.S.C. 1973aa-1a. In addition, 89 of the 254 counties in Texas are individually covered by Section 203 for Spanish language election requirements, and three counties are covered for Asian or Native American election requirements. See 76 Fed. Reg. 63,602 (Oct. 13, 2011). The requirements of Section 4(f)(4) apply to every county in Texas, cf. *United States* v. *Bd. of Comm'rs*, 435 U.S. 110 (1978), whereas the requirements of Section 203 do not apply to those counties that are not independently covered by that provision. See 76 Fed. Reg. 63,602.

21. At least 254 counties,1,209 municipalities, 1,117 school districts, 2,902 special purpose districts, 483 state and local political parties, and 89 state courts located in Texas have submitted voting changes for administrative review under Section 5. Declaration of Robert S. Berman ("Berman Decl.") (Ex. 1) at ¶ 4

22. Since Texas jurisdictions were first required to comply with Section 5, the Department of Justice has received at least 56,537 submissions for review involving the State of Texas or jurisdictions located in Texas. Berman Decl. ¶ 4. As with all Section 5 submissions, the Attorney General reviewed these changes to ensure that they had neither the purpose nor would have the effect of

discriminating on the basis of race, color, or membership in a language minority group. Berman Decl. ¶ 4.

23. The Attorney General has interposed 138 objections to changes affecting voting in the State of Texas. Berman Decl. ¶ 5.

24. The Attorney General has interposed 12 objections to statewide changes affecting voting in Texas. Berman Decl. ¶ 5.

25. The State of Texas had voter identification requirements that were in force or effect on November 1, 1972, the trigger date for coverage under Section 4. Prior to the passage of Senate Bill 14, Texas had submitted two substantive changes to statewide voter identification requirements. In 1997, the State submitted House Bill 331 (1997), which eliminated an affidavit procedure for voters lacking their registration certificate and required that such voters provide either an affidavit signed by an election worker attesting to the voter's identity or one of numerous forms of photographic and non-photographic identification. [Submission Number 1997-2145]. In 2003, Texas submitted House Bill 1549 (2003), which eliminated the procedure under which an election worker could identify a voter and both added to and subtracted from the list of permissible forms of identification. [Submission Number 2003-3619]. The Attorney General did not interpose an objection to either submission. Berman Decl. ¶ 21.[1]

[1] The State has submitted three additional voting changes concerning voter identification. In 1985, the Texas Legislature recodified the Texas Election Code and—in so doing—made non-substantive amendments to voter identification requirements. (House Bill 616

26. On July 25, 2011, Texas submitted Senate Bill 14 to the Attorney General for administrative review under Section 5. Senate Bill 14 amended the Texas Election Code and the Texas Transportation Code to require voters to present one of several enumerated forms of photographic identification to qualify to vote in person on Election Day. The submission was assigned File No. 2011-2775. The Attorney General requested additional information on September 23, 2011 and followed up on that request on January 9, 2012. Texas responded to the request on January 12, 2012 and continued to provide information through February 17, 2012. Berman Decl. ¶ 22.

27. On March 12, 2012, the Attorney General interposed an objection to Sections 9 and 14 of Senate Bill 14 and did not object to the remainder of the Bill. Berman Decl. ¶ 22.

Preclearance of Voter Identification Statutes

28. The Attorney General has declined to interpose objections to voter identification statutes including, for example, those enacted by the States of Arizona, Georgia, Louisiana, Michigan, New Hampshire, and Virginia. Berman Decl. ¶¶ 14-20.

(1985) [Submission Number 1985-0898]. In 1995, the State passed legislation implementing the National Voter Registration Act of 1993, 42 U.S.C. 1973gg to 1973gg-10. Although the Attorney General interposed an objection to portions of the legislation, she did not object to the non-substantive amendment to the State's voter identification requirements. (House Bill 127 (1995) [Submission Number 1995-2017]. Finally, in 1997, Texas submitted House Bill 330 (1997), which contained changes identical to those that had already been precleared during review of House Bill 331. [Submission Number 1997-2396]. As a result, the Attorney General made no determination concerning those portions of House Bill 330 that related to voter identification requirements. Berman Decl. ¶ 19.

29. On September 19, 2011, the Department consented to the entry of the relief requested by the State of Texas with regard to the 2011 redistricting plans for the Texas Senate and the State Board of Education. See Answer, *Texas* v. *United States*, No. 1:11-cv-1303 (D.D.C. Sept. 19, 2011) (Doc. 45). On August 28, 2012, this Court denied preclearance to the 2011 redistricting plans for the Texas delegation to the U.S. Congress, the Texas House, and the Texas Senate. See *Texas* v. *United States*, ___ F. Supp. 2d ___, No. 1:11-cv-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012).

The Administrative Review Process

30. 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. Berman Decl. ¶ 6.

31. 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. See 28 C.F.R. 51.1-.67. These procedures were first promulgated in 1971, see 36 Fed. Reg. 18,186 (Sept. 10, 1971), and are revised when necessary, see, e.g., 75 Fed. Reg. 33,205 (June 11, 2010); see also Berman Decl. ¶ 7.

32. The Attorney General has created a website that provides information concerning the Section 5 process, which is located at http://www.justice.gov/crt/about/vot/. Berman Decl. ¶ 8.

33. 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. Berman Decl. ¶ 9.

34. 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. Berman Decl. ¶ 10.

35. The Attorney General also allows covered jurisdictions to send Section 5 submissions by overnight delivery. Berman Decl. ¶ 11.

36. For some years, the Attorney General has allowed jurisdictions to make submissions and submit additional information on pending Section 5 submissions by telefacsimile. Berman Decl. ¶ 12.

37. The Attorney General allows jurisdictions to submit additional information on pending Section 5 submissions by electronic mail. Berman Decl. ¶ 13.

Declaratory Judgment Actions Under Section 5 in the United States District Court for the District of Columbia

38. Between August 1984 and July 2006, 41 jurisdictions filed declaratory judgment actions under Section 5 in this Court. The Court entered an order denying or granting the requested relief in ten actions. Many of these actions sought a determination on more than one voting change and the Court's resolution may have addressed only a subset of those changes. In one of these actions the United States consented to judgment on some or all the claims. With regard to the outcome in the remaining actions:

    a. In 22 instances, the jurisdiction voluntarily dismissed the action prior to trial; and

    b. In nine instances, the jurisdiction voluntarily dismissed the action after making an administrative submission of a subsequently-enacted change to which the Attorney General did not interpose an objection.

In 15 of the actions indentified in this paragraph, the Court permitted one or more parties to intervene as defendants; in four actions, parties intervened as either plaintiffs or defendants; and in two cases, parties were unsuccessful in gaining intervention. Berman Decl. ¶ 24.

39. Since July 2006, 23 jurisdictions have filed declaratory judgment actions under Section 5 in this Court. The Court entered an order denying or granting the

requested relief on one or more claims in five actions, including two in which the United States consented to judgment on some or all the claims. The Court, for a variety of reasons, did not reach a judicial resolution in the remaining 18.

a. In 16 actions, the jurisdiction made a parallel administrative submission of the change(s) to the Attorney General and dismissed the some or all claims in that action after being informed that no objection would be interposed; in two of these actions, the jurisdiction responded to the Attorney General's objection to one or more changes at issue by submitting a subsequently-enacted change to the Attorney General to which no objection was interposed, after which the action was dismissed in its entirety;

b. In one instance, the jurisdiction voluntarily dismissed the action and

c. In one instance, the jurisdiction voluntarily dismissed the action after making an administrative submission of a subsequently-enacted change to which the Attorney General did not interpose an objection.

In five of the actions identified in this paragraph, the Court permitted one or more parties to intervene as defendants; in two instances, parties were unsuccessful in gaining intervention. Berman Decl. ¶ 25.

Termination of Coverage Under the Special Provisions of the Voting Rights Act

40. Jurisdictions covered by Section 4 of the Act may seek to terminate their requirement to comply with Section 5 by bringing a "bailout" action, a declaratory

judgment action in the United States District Court for the District of Columbia. See 42 U.S.C. 1973b(a). A jurisdiction that has "bailed out" is relieved of the responsibility of complying with Section 5 and Section 4(f)(4) but must continue to conform to requirements set by other provisions of the Voting Rights Act, including Section 203. 42 U.S.C. 1973b(a)(1); see also Berman Decl. ¶ 26.

41. 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." Voting Rights Act of 1965, Pub. L. No. 89-110, 4(a), 79 Stat. 437, 438 (1965).

42. 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. *Id.*

43. In 1982, Congress amended the bailout provision of the Voting Rights Act, substantially expanding the opportunity for covered jurisdictions to terminate coverage, effective August 5, 1984. Specifically, Congress added a third category of eligible jurisdictions, permitting "any political subdivision of [a covered] State" to bail out, even if the coverage determination had not been made "with respect to such subdivision as a separate unit." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131, 131 (1982); see also 42 U.S.C. 1973b(a) (current language).

44. The 1982 Reauthorization also changed the substantive requirements for bailout. Under the revised bailout provision—which remains in effect—jurisdictions must demonstrate that they have fully complied with Section 5 and other voting rights provisions during the previous ten years. Voting Rights Act Amendments of 1982 § 2(b)(2), 96 Stat. at 131; see also Berman Decl. ¶ 27; 42 U.S.C. 1973b(a) (current language).

45. To demonstrate compliance with the Voting Rights Act, a jurisdiction must demonstrate that during the ten-year period preceding the filing of a declaratory judgment action seeking a "bailout": (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 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 subsequently overturned by the final

judgment of a court, no Section 5 declaratory judgment has been denied, and no such submissions or declaratory judgment actions are pending. 42 U.S.C. 1973b(a)(1)(A)-(E).

46. 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: (1) the elimination of voting procedures and election methods that inhibit or dilute equal access to the electoral process; (2) constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Voting Rights Act; and (3) 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)(l)(F)(i)-(iii).

47. 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 nonminority group participation. 42 U.S.C. 1973b(a)(2).

48. 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 such violations were trivial,

promptly corrected, and not repeated. 42 U.S.C. 1973b(a)(3).

49. 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).

50. 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).

51. In *Northwest Austin Municipal Utility District Number One* v. *Holder*, the Supreme Court adopted a still "broader reading of the bailout provision," which permits covered subjurisdictions, rather than covered counties and states exclusively, to petition for bailout from Section 4 coverage. 557 U.S. 193, 207 (2009); see also Berman Decl. ¶ 28.

52. If a jurisdiction requests termination of Section 4 coverage, the Attorney General conducts an independent investigation into whether the jurisdiction meets the statutory requirements. Berman Decl. ¶ 29.

53. The Attorney General's independent investigations involve interviewing community members, reviewing electoral behavior within the jurisdiction, and researching whether there are any unsubmitted voting changes, including reviewing a jurisdiction's minutes for the last ten years to see if the jurisdiction has implemented any changes affecting voting that have not received the requisite

Section 5 determination. Berman Decl. ¶ 30.

54. Overall, since 1965, there have been 62 bailout cases filed under Section 4(a) in the D.C. District Court. Berman Decl. ¶ 31. A chronological listing of all actions seeking to terminate coverage under Section 4(a) is appended at Attachment C. The results of these cases are described in greater detail below. A listing of the currently bailed out jurisdictions also appears on the Voting Section's website at http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout.

55. Since 1965, 70 of the approximately 943 county-level jurisdictions that were originally covered by Section 4—*i.e.*, those that conduct voter registration—have successfully terminated that coverage and remain bailed out since 1965, along with hundreds of subjurisdictions within their borders. One state and several other jurisdictions also successfully bailed out but were later re-covered by new coverage determinations or new court findings. Berman Decl. ¶ 32.

56. Prior the effective date of the new statutory bailout standard in 1984, there were 23 bailout actions filed under Section 4. The United States consented to and the Court has granted bailout in 15 cases. Of the remaining eight actions, the court denied three requests after the Attorney General opposed them, the requesting jurisdiction voluntarily dismissed four cases after the Attorney General declined to consent to a bailout, and the requesting jurisdiction stipulated to a dismissal in one case in the wake of an unfavorable court decision. Berman Decl. ¶ 33.

57. Between the August 1984 effective date of the new bailout standard enacted by

Congress in 1982 and the present, this Court has granted bailout in 36 cases, to 30 county-level jurisdictions (with 154 included subjurisdictions), and 6 separately bailed out sub-county jurisdictions (for a total of 190 jurisdictions). Berman Decl. ¶ 34. These bailouts are described in greater detail below.

58. Between the August 1984 effective date of the new bailout standard enacted by Congress in 1982 and the Supreme Court's decision in *Northwest Austin* in June 2009, the Attorney General had consented to – and this Court had granted – requests for bailout in 18 cases, resulting in 18 county level jurisdictions (with 51 included subjurisdictions) receiving bailouts from Section 4 coverage (for a total of 69 jurisdictions). Berman Decl. ¶ 35.[2]

59. Since the Supreme Court's decision in *Northwest Austin* in June 2009, the Attorney General has consented to—and this Court has granted—requests for bailout in 18 cases, resulting in 12 county-level jurisdictions (with 103 included

[2] In *Northwest Austin*, the Supreme Court observed that 17 jurisdictions had bailed out since the August 5, 1984, effective date of the 1982 amendments. See 557 U.S. at 211 (citing Br. for Jurisdictions that Have Bailed Out as *Amici Curiae*, at app. 3). This statement is inaccurate for two reasons. First, the source upon which the Court relied for that number failed to list the bailout obtained by Pulaski County, Virginia. See Br. for Jurisdictions That Have Bailed Out as Amici Curiae, at app. 3, *Nw. Austin Mun. Utility Dist. No. 1* v. *Holder*, No. 08-322 (Mar. 25, 2009); *see also* Consent Judgment and Decree, *Pulaski County, Virginia* v. *Gonzales*, 1:05-cv-1265 (Sept. 27, 2005 D.D.C) (Doc. 8). Second, it equates the number of bailout cases with the number of covered jurisdictions. However, when a county-level jurisdiction bails out, coverage is terminated for all the subjurisdictions within the county. Thus a single bailout case often results in termination of coverage for several jurisdictions. Many subjurisdictions within the 17 county-level jurisdictions noted by the Supreme Court had also been removed from Section 4 coverage. See U.S. Dep't of Justice, *Section 4 of the Voting Rights Act, at* www.justice.gov/crt/about/vot/misc/sec_4.php.

subjurisdictions) and 6 smaller jurisdictions that filed separate bailout cases, receiving bailouts from Section 4 coverage (for a total of 121 jurisdictions). Berman Decl. ¶ 36.

a. The 12 county level jurisdictions that have bailed out include: the City of Manassas Park, Virginia; Rappahannock County, Virginia (including two subjurisdictions); Bedford County, Virginia (including one subjurisdiction); the City of Bedford, Virginia; Culpeper County, Virginia (including two subjurisdictions); James City County, Virginia (including one subjurisdiction); the City of Williamsburg, Virginia; King George County, Virginia (including one subjurisdiction); Prince William County, Virginia (including five subjurisdictions); Wythe County, Virginia (including three subjurisdictions); Grayson County, Virginia (including four subjurisdictions); and Merced County, California (including some 84 subjurisdictions). Berman Decl. ¶ 36b.

b. The 6 sub-county jurisdictions bailed out in their own separate bailout actions include: Northwest Austin Municipal Utility District, Texas; the City of Kings Mountain, North Carolina; the City of Sandy Springs, Georgia; Jefferson County Drainage District Number Seven, Texas; Alta Irrigation District, California; and the City of Pinson, Alabama. Berman Decl. ¶ 36a.

60. Since the Supreme Court's decision in *Northwest Austin*, jurisdictions in Alabama,

California, Georgia, and Texas have bailed out for the first time, and a jurisdiction in North Carolina has bailed out for the first time since 1967. Moreover, earlier this year this Court granted the largest bailouts, at least since the 1982 bailout standard went into effect in August 1984, both in terms of population—Prince William County, Virginia—and in terms of the number of included subjurisdictions —Merced County, California. Berman Decl. ¶ 39.

61. The Attorney General has informed Carroll County, Virginia, and Craig County, Virginia, that he will consent to their pending requests for bailout. Berman Decl. ¶ 37. The Browns Valley Irrigation District in Yuba County, California, has also filed a declaratory judgment action in this Court seeking to terminate coverage under Section 4, but the jurisdiction has not yet effectuated service in that matter. Berman Decl. ¶ 38.

Section 3(c) of the Voting Rights Act

62. Since 1975, at least 18 jurisdictions have been required pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. 1973a (c), to seek review of changes affecting voting before they may be implemented ("bail in"). Berman Decl. ¶ 40.

Clarification of the Legislative Record

63. Among the extensive evidence Congress considered in reauthorizing Section 5 of the Voting Rights were two studies: (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*]. 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 than in reported decisions. See Declaration of Dr. Peyton McCrary ¶¶ 8-10 ("McCrary Decl.") (Ex. 2).

64. Even though more than three-fourths of the nation's population lives in non-covered jurisdictions, only 50 of the 114 reported decisions favorable for minority voters that were before Congress—approximately 44%—came from these non-covered jurisdictions. *Documenting Discrimination in Voting*, *supra*, 974-75; McCrary Decl. ¶ 21.

65. Dr. McCrary has also examined the history of Section 2 litigation from 1982 to 2006, including the settlement of Section 2 cases in jurisdictions not covered by Section 5, as outlined in his declaration. See McCrary Decl. ¶¶ 8-26.

66. Dr. McCrary identified 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 62 of these 99 settlements (63%) was on the record considered by Congress in adopting the 2006 Reauthorization Act. See *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, 1484-85, 1773-74, 1779, 1782-84,1794-95,1875,1889, 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, 4359-60,4373,4384,4391-92,4403-04,4425,4451-56,4479,4505-06, 4512-14,4552,4564-81,4583,4594,4726,4731-34,4747,5536-5544 (2006); see also McCrary Decl. ¶ 15.

67. By way of comparison, the report of the National Commission on the Voting Rights Act found 587 cases under Section 2 that had been resolved favorably to minority voters in jurisdictions covered by Section 5 of the Voting Rights Act, even though covered jurisdictions contain less than a quarter of the nation's population. McCrary Decl. ¶ 16.

68. Therefore, Dr. McCrary's analysis found 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. When settlements in covered and noncovered jurisdictions are combined, there are 686 successful outcomes in cases without reported decisions, of which 86 percent fall within jurisdictions covered by Section 5. McCrary Decl. ¶ 21 & tbl.1.

69. Combining all successful outcomes in both reported and unreported cases shows that 81 percent of all successful outcomes in Section 2 cases occurred in covered jurisdictions, which again contain only a quarter of the population of the United States. McCrary Decl. ¶ 22 & tbl.1.

70. The State of Texas has been the locus of more Section 2 cases with a favorable outcome to minority plaintiffs than any other state, with seven reported cases and 206 settlements, for a total of 213 cases. McCrary Decl. ¶ 23 & tbl.2. This is over six times as many cases as any state not covered by Section 5 of the Voting Rights Act. McCrary Decl. ¶ 24 & tbl.3.

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General

/s/ Spencer R. Fisher
T. CHRISTIAN HERREN, JR.
JESSICA DUNSAY SILVER
MEREDITH BELL-PLATTS
ERIN H. FLYNN
ELIZABETH S. WESTFALL
BRUCE I. GEAR
JENNIFER L. MARANZANO
SPENCER FISHER
RISA BERKOWER

DANIEL J. FREEMAN
Attorneys
Voting Section, Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Date: October 22, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

Jonathan Franklin Mitchell
Adam W. Aston
Matthew Hamilton Frederick
Patrick Kinney Sweeten
Office of the Attorney General of Texas
jonathan.mitchell@oag.state.tx.us
adam.aston@oag.state.tx.us
matthew.frederick@oag.state.tx.us
Patrick.sweeten@texasattorneygeneral.gov

Adam K. Mortara
John M. Hughes
Bartlit Beck Herman Palenchar & Scott LLP
adam.mortara@bartlit-beck.com
john.hughes@bartlit-beck.com

Counsel for Plaintiff

John Tanner
john.k.tanner@gmail.com

Nancy G. Abudu
M. Laughlin McDonald
Katie O'Connor
Arthur B. Spitzer
American Civil Liberties Union
nabudu@aclu.org
lmcdonald@aclu.org
koconnor@aclu.org
artspitzer@gmail.com

Counsel Texas Legislative Black Caucus Intervenors

Debo P. Adegbile
Leah C. Aden
Elise C. Boddie
Ryan Haygood
Dale E. Ho
Natasha Korgaonkar
NAACP Legal Defense and Education Fund
dadegbile@naacpldf.org
laden@naacpldf.org
eboddie@naacpldf.org
rhaygood@naacpldf.org
dho@naacpldf.org
nkorgaonkar@naacpldf.org

Michael Birney de Leeuw
Douglas H. Flaum
Adam M. Harris
Fried, Frank, Harris, Shriver & Jacobson
douglas.flaum@friedfrank.com
adam.harris@friedfrank.com
michael.deleeuw@friedfrank.com

Counsel for Texas League of Young Voters Intervenors

Jon M. Greenbaum
Mark A. Posner
Lawyers' Committee for Civil Rights
mposner@lawyerscommittee.org
jgreenbaum@lawyerscommittee.org

Ezra David Rosenberg
Michelle Hart Yeary
Dechert LLP
ezra.rosenberg@dechert.com
michelle.yeary@dechert.com

Robert Stephen Notzon
Robert@notzonlaw.com

Gary L. Bledsoe
Law Office of Gary L. Bledsoe and Associates
garybledsoe@sbcglobal.net

Myrna Perez
Wendy Robin Weiser
Ian Arthur Vandewalker
The Brennan Center for Justice
myrna.perez@nyu.edu
wendy.weiser@nyu.edu
ian.vandewalker@nyu.edu

Counsel for NAACP Intervenors

Nina Perales
Amy Pederson
Mexican American Legal Defense & Educational Fund, Inc.
nperales@maldef.org
apederson@maldef.org

Counsel for Rodriguez Intervenors

J. Gerald Hebert
hebert@voterlaw.com

Chad W. Dunn
Brazil & Dunn
chad@brazilanddunn.com

Counsel for Kennie Intervenors

/s/ Spencer R. Fisher
SPENCER R. FISHER
Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,

Defendant.

ERIC KENNIE, *et al.*,

Defendant-Intervenors,

TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Defendant-Intervenors,

TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*,

Defendant-Intervenors.

TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*,

Defendant-Intervenors,

VICTORIA RODRIGUEZ, *et al.*,

Defendant-Intervenors.

CASE NO. 1:12-CV-00128
(RMC-DST-RLW)
Three-Judge Court

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, 42 U.S.C. 1973c. I have been employed as an attorney in the Department of Justice for over 34 years with more than 21 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. As a result of the 1975 amendments to the Voting Rights Act, the State of Texas was covered under Section 4.

4. Since the effective date of the 1975 amendments, the Department of Justice has received at least 56,537 submissions for review from the State of Texas or its political subdivisions. Of that number, the State made approximately 740 submissions, its 254 counties made 9,588 submissions; at least 1,209 municipalities made 17, 588 submissions; approximately 1,117 school districts made 12,584 submissions; at least 483 state and local political parties have made 4,117 submissions; approximately 2,902 special purpose districts made 11,948 submissions, and at least 89 courts within the state made 144 submissions. As with all Section 5 submissions, the Attorney General

reviewed these changes to ensure that they had neither the purpose nor would have the effect of discriminating on the basis of race, color, or membership in a language minority group.

5. The Attorney General has interposed 138 objections to submissions from the State of Texas since it became subject to Section 5. This includes 12 objections to submissions of state-wide changes. A complete list of these objections, along with a description to which the objection was interposed, and the date it was interposed is maintained on the Justice Department's website at http://www.justice.gov/crt/about/vot/sec_5/tx_obj2.php .

The administrative review process

6. 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.

7. 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.*, 76 Fed. Reg. 21239 (April 15, 2011).

8. The Attorney General has created a website that provides information concerning the Section 5 process (http://www.justice.gov/crt/about/vot/).

9. 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.

10. 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.

11. The Attorney General also allows covered jurisdictions to send Section 5 submissions by overnight delivery.

12. For some years, the Attorney General has allowed jurisdictions to make submissions and submit additional information on pending Section 5 submissions by telefacsimile.

13. The Attorney General allows jurisdictions to submit additional information on pending Section 5 submissions by electronic mail.

Administrative review of voter identification requirements as a prerequisite to voting

14. On November 21, 1994, the Attorney General interposed an objection Act 10 (1994) of the State of Louisiana. [Submission number 1994-2922]. On September 27, 1999, the Department informed state officials in Louisiana that no objection would be interposed to Act 254 (1999) [Submission Number 1999-2338]. Copies of the determination letters are contained in Attachment A.

15. On November 17, 2003, the Department notified officials in the State of Alabama that no objection would be interposed to Act 2003-313. [Submission Number 2003-2245]. A copy of the determination letter is contained in Attachment A.

16. On January 24, 2005, the Department notified officials in the State of Arizona that no objection would be interposed to the submitted portions of Proposition 200. [Submission Number 2004-5004]. A copy of the determination letter is contained in Attachment A.

17. On August 26, 2005, the Department informed officials in the State of Georgia that no objection would be interposed to Act 53(H.B244) (2005) [Submission Number 2005-2029]. On June 27, 2006, the Department informed Georgia officials that no objection would be interposed to Act No. 432 (S.B. 84) (2006) [Submission Number 2006-4890]. Copies of the determination letters are contained in Attachment A.

18. On December 26, 2007, the Department informed officials in the State of Michigan that no objection would be interposed to Public Act 73 (S.B. 513)(2005).

[Submission Number 2007-3837]. A copy of the determination letter is contained in Attachment A.

19. On September 4, 2012, the Department informed officials in the State of New Hampshire that no objection would be interposed to New Hampshire Laws 2012, C.284, S.B. 289 [Submission Number 2012-3869]. A copy of the determination letter is contained in Attachment A.

20. On August 20, 2012, the Department informed officials in the Commonwealth of Virginia that no objection would be interposed to Chapter 839 (S.B. 1) (2012), [Submission Number 2012-3558]. A copy of the determination letter is contained in Attachment A.

21. The State of Texas has previously submitted voter identification legislation under Section 5. In 1985, it submitted HB 616 (1985), a recodification of the state election code. [Submission Number 1985-0898]. On August 16, 1985, the Department informed state officials that no objection would be interposed to that submission. In 1995, the State passed legislation implementing the National Voter Registration Act of 1993, 42 U.S.C. 1973gg to 1973gg-10. Although the Attorney General interposed an objection to portions of the legislation on January 16, 1996, she did not object to the non-substantive amendment to the voter identification requirements in H.B. 1227 (1995) [Submission Number 1995-2017]. In 1997, the State submitted H.B. 331. On September 2, 1997, the Attorney General did not interpose an objection to those changes related to the voter identification requirements. On November 20, 2003, the Department informed

state official that no objection would be interposed to the voting changes contained in Chapter 1315 (2003). [Submission Number 2003-3619]. A copy of those determination letters are contained in Attachment A.

22. On July 25, 2011, Texas submitted Senate Bill 14 to the Attorney General for administrative review under Section 5. Senate Bill 14 amended the Texas Election Code and the Texas Transportation Code to require voters to present one of several enumerated forms of photographic identification to qualify to vote in person on Election Day. The submission was assigned Submission Number 2011-2775. The Attorney General requested additional information on September 23, 2011, and followed up on that request on January 9, 2012. Texas responded to the request on January 12, 2012, and continued to provide information through February 17, 2012. On March 12, 2012, the Attorney General interposed an objection to Sections 9 and 14 of Senate Bill 14 and did not object to the remainder of the legislation.

Declaratory judgment actions under Section 5 in the United States District Court for the District of Columbia

23. Attachment B lists those declaratory judgment actions filed under Section 5 seeking judicial review of voting changes.

24. Between August 1984 and July 2006, 41 jurisdictions have filed declaratory judgment actions under Section 5 in this Court. The Court entered an order denying or granting the requested relief in 10 actions. Many of these actions sought a determination on more than one voting change and the Court's resolution may have addressed only a

subset of those changes. In one of these actions, the United States consented to judgment on some or all the claims. With regard to the outcome in the remaining actions:

a. In 22 instances, the jurisdiction voluntarily dismissed the action prior to trial; and

b. In nine instances, the jurisdiction voluntarily dismissed the action after making an administrative submission of a subsequently-enacted change to which the Attorney General did not interpose an objection.

In 15 of the actions indentified in this paragraph, the Court permitted one or more parties to intervene as defendants; in four actions, parties intervened as either plaintiffs or defendants; and in two cases, parties were unsuccessful in gaining intervention.

25. Since July 2006, 23 jurisdictions have filed declaratory judgment actions under Section 5 in this Court. The Court entered an order denying or granting the requested relief on one or more claims in five actions, including two in which the United States consented to judgment on some or all the claims. The Court, for a variety of reasons, did not reach a judicial resolution in the remaining 18.

a. In 16 actions, the jurisdiction made a parallel administrative submission of the change(s) to the Attorney General and dismissed the some or all claims in that action after being informed that no objection would be interposed; in two of these actions, the jurisdiction responded to the Attorney General's objection to one or more changes at issue by submitting a subsequently-enacted change to the

Attorney General to which no objection was interposed, after which the action was dismissed in its entirety;

b. In one instance, the jurisdiction voluntarily dismissed the action; and

c. In one instance, the jurisdiction voluntarily dismissed the action after making an administrative submission of a subsequently-enacted change to which the Attorney General did not interpose an objection.

In five of the actions identified in this paragraph, the Court permitted one or more parties to intervene as defendants; in two instances, parties were unsuccessful in gaining intervention.

Termination of coverage under the Act's special provisions

26. A jurisdiction may seek to terminate coverage under Section 4 of the Act ("bail out"), and thereby be relieved of the responsibility of complying with Section 5, but must continue to comply with other provisions of the Voting Rights Act, including Section 203. 42 U.S.C. 1973b(a)(1).

27. In 1982, Congress amended the bailout provision, substantially expanding the opportunity for covered jurisdictions to terminate coverage. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131. The new bailout standard became effective on August 5, 1984. *Ibid.*

28. In *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193 (2009), the Supreme Court adopted a still "broader reading of the bailout provision." The

Court's reading permits any covered subjurisdictions, rather than covered counties and states exclusively, to petition for bailout from Section 4 coverage.

29. If a jurisdiction requests termination of Section 4 coverage, the Attorney General conducts an independent investigation into whether the jurisdiction meets the statutory requirements.

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

31. Overall, since 1965, there have been 62 bailout cases filed under Section 4(a) in the D.C. District Court. A chronological listing of all actions seeking to terminate coverage under Section 4(a) is appended at Attachment C. The results of these cases are described in greater detail below. A listing of the currently bailed out jurisdictions also appears on the Voting Section's website at http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout.

32. Since 1965, 70 of the approximately 943 county-level jurisdictions (*i.e.*, those that conduct voter registration) that were originally covered by Section 4 have successfully terminated that coverage and are currently bailed out, plus many more subjurisdictions within their borders. One state and several other jurisdictions also

successfully bailed out, but were later either re-covered by new coverage determinations or by new court findings.

33. Prior the effective date of the new statutory standard in 1984, there were 23 actions filed under Section 4. The United States consented to and the Court has granted bailout in 15 cases. Of the remaining eight actions, the court denied three requests after the United States opposed them; in four cases, the requesting jurisdiction voluntarily dismissed the action when the United States refused to consent; and, in one case, the jurisdiction stipulated to a dismissal in the wake of a court decision.

34. Between the August 1984 effective date of the new bailout standard enacted by Congress in 1982 and the present, this Court has granted bailout in 36 cases, to 30 county-level jurisdictions (with 154 included subjurisdictions), and 6 separately bailed out sub-county jurisdictions (for a total of 190 jurisdictions). These bailouts are described in greater detail below.

35. Between the effective date of the new bailout standard in August 1984 and the Supreme Court's decision in *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 557 U.S. 193 (2009), the United States had consented to and this Court had granted bailout in 18 cases brought by 18 county-level jurisdictions, which also affected 51 included jurisdictions, located within their geographic boundaries, resulting in a total of 69 jurisdictions that were no longer covered by Section 4.*

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* In *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 211 (2009), the Supreme Court noted that 17 jurisdictions had bailed out since the August 5,

(continued...)

36. Subsequent to the Supreme Court's *Northwest Austin* decision in 2009, the Attorney General, in another 18 cases, has consented to, and this Court has granted, the bailout requests by 12 county-level jurisdictions , which also affected 103 included jurisdictions located within their geographical boundaries. It also granted the separate bailout requests filed by 6 sub-county jurisdictions. In total, these more recent actions resulted in an additional 121 jurisdictions no longer being covered by Section 4, and are more fully described as follows :

a. six smaller, sub-county jurisdictions in six cases: the Northwest Austin Municipal Utility District, Texas; the City of Kings Mountain, North Carolina; the City of Sandy Springs, Georgia; Jefferson County Drainage District Number Seven, Texas; the Alta Irrigation District, California; and the City of Pinson, Alabama; and

b. 12 county level jurisdictions and their 103 included subjurisdictions in twelve cases: the City of Manassas Park, Virginia; Rappahannock County, Virginia

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1984, effective date of the 1982 amendments. This statement does not present a complete picture for two reasons. First, the source upon which the Court relied for that number (Appendix to Brief for Jurisdictions That Have Bailed Out as Amici Curia, at page 3) failed to list the bailout obtained by one county-level jurisdiction: *Pulaski County, Virginia* v. *Gonzales*, No. 1:05-cv-1265 (Sept. 27, 2005 D.D.C)). Second, it compares the number of bailout cases at the time (17) to the number of covered jurisdictions. However, when a county-level jurisdiction bails out, coverage is terminated for all the subjurisdictions within its territory as well. So a single bailout case may result in termination of coverage for several jurisdictions. There were many subjurisdictions within these 17 county-level jurisdictions that also bailed out. List of Jurisdictions Currently Bailed Out, available at http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout.

(including the Rappahannock County School Board and the Town of Washington); Bedford County, Virginia (including the Bedford County School Board); City of Bedford, Virginia; Culpeper County, Virginia (including the Culpeper County School Board and the Town of Culpeper); James City County, Virginia (including the Williamsburg-James City County School Board); City of Williamsburg, Virginia; King George County, Virginia (including the King George County School Board); Prince William County, Virginia (including the Prince William County School Board and the Towns of Dumfries, Haymarket, Occoquan, and Quantico); Wythe County, Virginia (including the Wythe County School Board and the Towns of Rural Retreat and Wytheville); Merced County, California (including some 84 subdivisions); and Grayson County, Virginia (including the Grayson County School District and the Towns of Independence, Fries, and Troutdale .

37. Two additional actions have been filed seeking to terminate coverage under Section 4. They are *Carroll County* v. *Holder*, 1:12-cv-01166 (D.D.C.) and *Craig County* v. *Holder*, 1:12-cv-01179 (D.D.C.). The Attorney General has advised those jurisdictions that he will consent to their bailout.

38. On September 26, 2012, the Browns Valley Irrigation District in Yuba County, California filed a declaratory judgment action in this Court seeking to terminate coverage under Section 4. *Browns Valley Irrigation District* v. *Holder*, No. 1:12-cv-

01597 (D.D.C.). The jurisdiction has not yet effectuated service on the United States in this matter.

39. The jurisdictions that have bailed out since the Supreme Court's *Northwest Austin* decision include the first-ever bailout from jurisdictions in Alabama, California, Georgia, and Texas; the first bailout from a jurisdiction in North Carolina since 1967; the largest bailout since at least 1984, in terms of population, in Prince William County, Virginia; and the largest bailout since at least 1984, in terms of included subjurisdictions (84), in Merced County, California.

40. Since the new bailout standard became effective in 1984, the United States has consented to bailout, and this court has entered the proposed consent decrees so far in 36 of 39 cases. This includes cases involving both county level jurisdictions and cases involving smaller subjurisdictions. As a result, a total of 30 county level jurisdictions and 160 smaller jurisdictions (for a total of 190 jurisdictions) have been granted bailout since the new bailout standard became effect in 1984. With regard to the remaining bailout actions, in two cases, the United States has advised those two jurisdictions that he will consent to bailout, though the parties have not yet presented a proposed consent decree to the court in those two cases and, in the third case, the United States has yet to be served.

Section 3(c) of the Voting Rights Act

41. Since 1975, at least 18 jurisdictions have been required pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. 1973a (c), to seek review of changes affecting voting before they may be implemented ("bail in"). Attachment D lists those jurisdictions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of October 2012.

Robert S. Berman

Attachment A

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

November 21, 1994

Sheri Marcus Morris, Esq.
Assistant Attorney General
P. O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Morris:

This refers to the submission to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, of Act No. 10 (1994) of the State of Louisiana, which adopts changes (listed in Attachment A) to voter registration and related procedures to, inter alia, implement the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg et seq. We received your response to our September 6, 1994, request for additional information on September 22, 1994; supplemental information was received on November 16 and 17, 1994.

We have given careful consideration to the information you provided, as well as Census data and information and comments from other interested persons. Except as set forth below, the Attorney General does not interpose any objection to the specified changes. However, 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 the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41). In this regard, the granting of Section 5 preclearance does not preclude the Attorney General or private individuals from filing a civil action pursuant to Section 11 of the NVRA, 42 U.S.C. 1973gg-9.

We cannot reach the same conclusion with respect to the requirement that first-time voters who register by mail in order to identify themselves at the polls present a current driver's license or other picture identification card. The state indicates that persons who do not present such identification will not be permitted to vote. Currently, voters are not required to present picture identification in order to vote. Presentation, for example, of a voter's current voter registration card or other non-picture identification card will suffice.

According to the 1990 Census, the State of Louisiana has a total population of 4,219,973 of whom 30.6 percent are black. Our review of relevant socio-economic data and information on the number of currently licensed drivers in the state indicates that black persons are four to five times less likely than white persons in the state to possess a driver's license or other picture identification card, such as the picture identification cards we understand are issued by some employers or institutions of higher education. Consequently, the imposition of the driver's license/picture identification requirement is likely to have a disproportionately adverse impact on black voters in the state, and will lessen their political participation opportunities. Thus, under the proposed change, minority voters -- the very group of voters whose political participation in federal elections the NVRA seeks to encourage through increased access to voter registration opportunities -- will be less likely to vote than white voters. It appears, therefore, that the proposed driver's license/picture identification requirement will eliminate certain of the gains to minority voters mandated by Congress in enacting the NVRA and "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained with regard to the specified picture identification requirement. Therefore, on behalf of the Attorney General, I must object to the driver's license/picture identification requirement for first-time voters who register by mail proposed by Act No. 10.

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 has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. 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 of Columbia Court is obtained, the objected-to change continues to be legally unenforceable. See Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

Finally, we note that the preclearance of those provisions of Act No. 10 that enable or permit the state or its political subdivisions to adopt future voting changes does not constitute preclearance of those future changes and, accordingly, Section 5 review will separately be required when those changes are adopted or finalized. See 28 C.F.R. 51.15. The matters for which Section 5 review will be required include, but are not limited to, the following: the designation of additional locations where registration may occur or changes in existing locations; the statewide voter registration application (including mail registration application) and any other forms or notices developed to implement the NVRA; and any rules or regulations promulgated to implement the NVRA.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Louisiana plans to take concerning this matter. If you have any questions, you should call Ms. Zita Johnson-Betts, an attorney in the Voting Section, at (202) 514-8690.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

Attachment A -- Changes Enacted by Act No. 10 (1994)

1. Assignment of responsibility to the Louisiana Commissioner of Elections to coordinate the state's implementation of the NVRA;

2. Adoption of the registration form prescribed by the Federal Election Commission (R.S. 18:103(A));

3. Amended voter registration procedures for the state Department of Public Safety and Corrections so as to make voter registration services available at all driver's license facilities in the state (including the adoption of procedures by the Louisiana Commissioner of Elections and a voter registration application form pursuant to R.S. 18:114(E) and (I));

4. Voter registration by mail (including the promulgation of a state mail voter registration form by the Louisiana Commissioner of Elections pursuant to R.S. 18:115(A)(1));

5. Voter registration at "voter registration agencies," including every office that provides public assistance, every office that provides state funded programs primarily engaged in providing services to persons with disabilities, every armed forces recruitment office, and other offices to be designated by the Louisiana Commissioner of Elections (including promulgation of a voter registration inquiry/declination form pursuant to R.S. 18:116(C)(1)(b));

6. Standards governing the receipt of voter registration applications and the acceptance of voter registration applications, and the preparation of voter registration lists;

7. Procedures for determining voter eligibility where the applicant registers by mail, including the use of verification mailing procedures and requiring first-time voters who register by mail to vote in-person and present photo identification;

8. Amended procedures when insufficient information is provided on a voter registration application;

9. Amended procedures governing changes of address, name changes, and party affiliation changes;

10. Amended procedures concerning registrants who move or whose registration record reflects that they have moved;

11. Amended complaint procedures for persons denied registration to include claims concerning NVRA violations;

12. Administrative procedures for the Louisiana Commissioner of Elections and registrars of voting, including the

development of all voter registration training programs concerning acceptance of voter registration applications and the provision of training to personnel in the state Department of Public Safety and Corrections, and voter registration agencies;

13. Standards governing the inspection of voter registration applications;

14. Procedures for notifying the Louisiana Commissioner of Elections of persons convicted of a felony in federal court (for purposes of determining voter qualifications);

15. Amended procedures for voter registration list maintenance, including the placement of registrants on and the use of an inactive registration list, and the removal of names from the list of eligible registered voters;

16. Amended procedures governing challenges to the eligibility of persons to register and vote;

17. Amended procedures for federal postcard registration applications;

18. Abolition of the prior system of volunteer deputy registrars; and

19. Penalties for unlawful voter registration conduct.

U.S. Department of Justice

Civil Rights Division

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

IKP:DHC:MEG:tlb
DJ 166-012-3
97-2338

September 29, 1997

Angie Rogers LaPlace, Esq.
Assistant Attorney General
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005

Dear Ms. LaPlace:

This refers to Act No. 779 (1997), which amends procedures for identifying voters at the polls so as to require presentation of a picture identification card or, in lieu thereof, a signed affidavit (the affidavit form to be supplied by the Louisiana Secretary of State), and the provision of either a current registration certificate, the voter's date of birth or other information from the precinct register, for the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on July 31, 1997; supplemental information was received on September 23, 1997

The Attorney General does not interpose any objection to the specified changes. However, 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 the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

U.S. Department of Justice

Civil Rights Division

JDR:TCH:TAR:jdh
DJ 166-012-3
2003-2245
2003-3434

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

November 17, 2003

Charles B. Campbell, Esq.
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130

Dear Mr. Campbell:

This refers to Act 2003-313, which makes a number of changes, inter alia, to implement the Help America Vote Act of 2002, 42 U.S.C. 15301 to 15545 ("HAVA"), including: designating the Secretary of State as the chief election official in the State to carry out various responsibilities with the assistance of certain boards and committees; enabling the Secretary of State to promulgate administrative rules, instructions, guidance, and forms to implement various statutes; moving the Office of Voter Registration and its responsibilities under the Office of the Secretary of State; designating the probate judge as the chief election official in each county and chair of the canvassing board; revising procedures for voters on the inactive list to re-identify; revising procedures on absentee voting; revising procedures for registration and absentee voting by military and overseas voters; revising provisions related to registrars; revising procedures for voter information posters; creating procedures for mail-in registrants to provide voter identification; requiring a statewide computerized voter registration list meeting specific standards which will serve as the official list for the conduct of all elections; requiring the statewide list be coordinated with driver license and social security records; creating procedures for provisional voting, including procedures for all voters who fail to provide identification to be notified and allowed to provide identification up to six days after election day; requiring a free access system for voters to determine if their provisional ballot was counted; extending post-election canvass and reporting deadlines; requiring administrative procedures for hearing complaints under Title III of HAVA; creating a state Help America

Vote Fund; creating criminal penalties for providing false information in registering or voting; requiring voting systems to satisfy certain standards on or before January 1, 2005; requiring adoption of standards for what constitutes a vote on each voting system; repealing procedures for marking voters' hands; and repealing certain challenged ballot procedures; Section 1(c) of Act 2003-381, which provides that voters who vote by mail must include a copy of one form of voter identification specified in that Act; the Alabama Attorney General's Opinion of May 30, 2003, which provides that the Secretary of State is the chief State election official under HAVA, and that HAVA requires the Secretary to implement a statewide voter registration list according to specific standards; and the Alabama Attorney General's Opinion of July 31, 2003, which clarifies that existing challenged ballot procedures, rather than provisional balloting procedures in Act 2003-313, will apply to in-person and absentee voters in municipal elections, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on September 17, 2003; supplemental information was received on November 13, 2003.

The Attorney General does not interpose any objection to the specified changes. However, 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 the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Act 2003-313 includes provisions that are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to this legislation require Section 5 review (e.g., rules, instructions, guidance and forms promulgated by the Secretary of State). See 28 C.F.R. 51.15.

Sincerely,

for Joseph D. Rich
Chief, Voting Section

U.S. Department Justice

Civil Rights Division

JDR:RPL:ANS:jdh
DJ 166-012-3
2004-5004

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

January 24, 2005

Jessica G. Funkhouser, Esq.
Special Counsel
Office of Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

Dear Ms. Funkhouser:

This refers to Sections 3, 4, and 5 of Proposition 200 for the State of Arizona, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on December 10, 2004; supplemental information was received through January 7, 2005. The State of Arizona requested expedited consideration of the submission because of local elections scheduled for March 8 and early voting scheduled to begin on February 3, 2005.

The Attorney General does not interpose any objection to the specified changes. However, 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 the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Any regulations adopted by the State to implement the provisions of this initiative require Section 5 review. 28 C.F.R. 51.15.

Sincerely,

Joseph D. Rich
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JKT:RSB:AZ:HMM:maf
DJ 166-012-3
2005-2029

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

August 26, 2005

Thurbert Baker, Esq.
Attorney General
Dennis R. Dunn, Esq.
Deputy Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

Re: Your File No. 2005-03

Dear Messrs. Baker and Dunn:

I am writing in reference to Act No. 53 (H.B. 244) (2005), which, as set forth in your submission, amends and provides:

(1) the definition of election terms;
(2) summaries of proposed constitutional amendments;
(3) duties of municipal governing authorities;
(4) training requirements for election officials and poll workers;
(5) candidate qualification schedule and procedures, nonpartisan election schedule and procedures, format and provision of ballot procedures;
(6) voter registration procedures, provision of polling places and election equipment, voting method and machines for municipalities;
(7) absentee voting procedures;
(8) poll watchers electioneering prohibitions;
(9) provisional voting requirements and procedures;
(10) voter information at polling places, majority vote requirement;
(11) special election procedures, penalties for violation of the election code;
(12) Uniformed and Overseas Citizens Absentee Voting Act changes; and
(13) voter identification requirements.

The State submitted these changes to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on June 13, 2005, and supplemental information was received through August 26, 2005.

The Attorney General does not interpose any objection to the specified changes. However, 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 the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Sincerely,

John Tanner
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JKT:RPL:SMC:maf
DJ 166-012-3
2006-4890

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

June 27, 2006

Mr. Thurbert Baker
Attorney General
Mr. Dennis R. Dunn
Deputy Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

Re: Your File No. 2006-15

Dear Messrs. Baker and Dunn:

This refers to the implementation of Georgia's voter photo identification requirements, as amended under Act No. 432 (S.B. 84) (2006), which, as set forth in your submission:

(1) provides the rules and regulations adopted by the State Elections Board for the issuance of the free photo voter identification cards;
(2) requires each county board of registrar's main or primary office to serve as the location within each county where the registrar shall provide for the issuance of the free photo voter identification cards;
(3) requires the State Elections Board to provide each county board of registrars the necessary equipment, forms, supplies, and training to produce the photo voter identification cards;
(4) provides for the required forms and applications related to the photo voter identification requirement; and,
(5) requires the State Elections Board's formation and conduct of a voter education program regarding the availability of the photo voter identification cards for qualified individuals,

for the State of Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on June 19, 2006; supplemental information was received on June 20, 2006.

Our analysis indicates that the voter education program formulated by the State Elections Board does not constitute a change subject to the preclearance requirement of Section 5. Voter education programs are a regular part of the duties of the Secretary of State, and the Supreme Court has made clear in *Presley v. Etowah County Commission*, 502 U.S. 491, 502-03 (1992) that such shifts in responsibility among State officials and fluctuations in budget fall are not subject to the requirements of Section 5. *See Procedures for the Implementation of Section 5 of the Voting Rights Act* (28 C.F.R. 51.35.).

The Attorney General does not interpose any objection to the remaining specified changes. However, 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 the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Sincerely,

John Tanner
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

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

December 26, 2007

Mr. Brian DeBano
Chief of Staff and Chief Operating Officer
430 West Allegan, 4th Floor
Lansing, Michigan 48918

Mr. Christopher Thomas
Director of Elections
P.O. Box 20126
Lansing, Michigan 48901

Dear Messrs. DeBano and Thomas:

This refers to the relocation and subsequent closure of the Buena Vista Township Secretary of State's branch office ("Buena Vista office") and the photo identification procedures contained in Public Act 71 (S.B. 513) (2005) ("PA 71"), for Buena Vista and Clyde Townships in Saginaw and Allegan Counties, for the State of Michigan, submitted to the Attorney General, pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our September 18, 2007, request for additional information on September 28, 2007, October 13, 2007, and October 26, 2007. Additional information was received on November 9, 2007, November 27, 2007, December 7, 2007, December 12, 2007 and December 21, 2007.

Buena Vista Office Closure

With relation to the Buena Vista office, we note that there are actually two unprecleared changes that require review under Section 5, the office's relocation and the office's closure. The Department first precleared the creation of a voter registration site at a Secretary of State branch office in Buena Vista on September 13, 1993. While no street address for the Buena Vista office was submitted by the Township, Christopher Thomas, Michigan Director of Elections, indicated in a December 7, 2007 e-mail that the first Secretary of State branch office in Buena Vista was located at 3890 Dixie Highway, Saginaw, MI and existed as early as 1990. Mr. Thomas further explained that this office was relocated to the current address, 4212 Dixie Highway, Saginaw, MI 48601, some time in or around 1999. Our records indicate that this relocation was never submitted for preclearance.

In order for the Department to render a determination on the Buena Vista office closure, the Department must first issue a decision governing the relocation. Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. § 51.22. The December 7 e-mail from Christopher Thomas, however, provides adequate information for the Attorney General to review the relocation. The Attorney General does not interpose any objection to the Buena Vista office relocation that occurred in or around 1999. However, 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 the change. 28 C.F.R. § 51.41.

Turning to the office closure, the last precleared change is now the relocation of the Buena Vista office to its current location. This is the benchmark by which the office closure is measured. Your contention that the Buena Vista office closure does not constitute a change under Section 5 is contradicted by federal case law. You argue that the Department's guidelines provide that the benchmark for all voting changes is the practice or procedure in force or effect at the time the relevant jurisdiction became covered under Section 5. Under this interpretation, you assert that the office closure does not constitute a change because there was no branch office in Buena Vista when the Township became subject to Section 5. This interpretation of the benchmark standard is incorrect. Federal courts have stated that the benchmark for purposes of defining a change under Section 5 constitutes the last precleared change occurring after the date of coverage. *See Young v. Fordice*, 520 U.S. 273, 281 (1997); *Holder v. Hall*, 512 U.S. 874, 883-84 (1994) (plurality opinion); *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992); *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1336 (M.D. Ala. 2006), *appeal pending*, No. 07-77; *Dotson v. City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981), *aff'd summarily*, 456 U.S. 1002 (1982); *NAACP v. Georgia*, 494 F. Supp. 668, 677-79 (N.D. Ga. 1980). The Department's guidelines also state that the benchmark by which a change is measured is the "last legally enforceable practice or procedure used by the jurisdiction." 28 C.F.R. § 51.54. Accordingly, the Secretary of State's reliance upon there being no branch office in the Township on the date of Section 5 coverage is misplaced. Indeed, the fact that the Township submitted the creation of a voter registration site at a Buena Vista Secretary of State office in 1993 undermines any argument that the appropriate benchmark is the absence of such an office.

With respect to the Buena Vista office closure, we have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing 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. *Georgia v. United States*, 411 U.S. 526 (1973); *see also* 28 C.F.R. § 51.52. "A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of the members of a racial or language minority group (*i.e.*, will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively." 28 CFR § 50 1.54(a) (citing *Beer v. United States*, 425 U.S. 130, 140-42 (1976)).

Several factors establish that the State has failed to sustain its burden of showing that the closure of the Buena Vista office will not have a retrogressive effect on minority electoral participation. First, the Buena Vista office closure will impair the ability of minorities to register to vote. The Buena Vista office conveniently allows citizens to register to vote or update their voter registration while using other Secretary of State services. While you have argued that there are numerous alternative registration locations throughout the County, registration statistics in your submitted materials indicate that Secretary of State branch offices are the primary source of voter registrations for Buena Vista residents. Since 2002, Secretary of State branches have accounted for 79.13% of total registrations for the Township, approximately four times the number of registrations as all other sources combined. These numbers demonstrate that closure of the Buena Vista office, which is the only branch office in a majority-minority township in the County, will significantly lower minority registration.

The next closest Secretary of State branch office for Buena Vista residents is the Saginaw Northwest office, an 18-mile round-trip from the Buena Vista office. Our analysis indicates that travel to the Saginaw Northwest office for Buena Vista residents will be significantly more difficult than visiting the current location. Public transportation between the Buena Vista branch office and the Saginaw Northwest office is time-consuming. Our analysis indicates that a round-trip between the two offices on public transportation would take a minimum of one hour and 40 minutes, assuming no delays. Additionally, contacts in Buena Vista have informed us that the drive to the Saginaw Northwest branch entails travel along highly-congested streets.

The Frankenmuth and St. Charles branch offices are not viable alternatives to the Saginaw Northwest office. These offices are even farther away from Buena Vista Township in more rural parts of the county. According to submitted materials, the Frankenmuth office is a 24-mile round-trip from the Buena Vista branch, and the St. Charles office is a 42-mile round-trip from the branch. Both offices are in townships in which every census block has less than 35% black or Latino representation.

Second, the closure of the Buena Vista office will make it more difficult for minorities in Buena Vista who wish to comply with PA 71's ID requirement by showing photo identification, in lieu of signing an affidavit attesting to their identity, to obtain Michigan IDs. The Secretary of State's office is the only issuer of Michigan driver's licenses and personal identification cards ("PIDs"). Thus, closing the Buena Vista branch will require Buena Vista residents, 55.6% of whom are black and 9.6% of whom are Latino, to visit one of the other County or state branches to obtain an ID.

In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object the closure of the Buena Vista office.

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 of Columbia Court is obtained, the closure of the Buena Vista Township Secretary of State's branch office continues to be legally unenforceable. *Clark v Roemer*, 500 US 646 (1991); 28 C.F.R. § 51.10.

Photo ID Requirement

With respect to the photo identification procedures contained in PA 71, we note that you have supplemented your submission with materials reflecting the Secretary of State's interpretation and planned implementation of the ID requirement. According to the materials you provided, acceptable identification under the new requirement includes: a Michigan driver's license, a Michigan chauffeur's license, a Michigan PID, a current driver's license or personal identification card from another state, a current federal or state government-issued photo identification card, a current U.S. passport, a current military photo identification card, a current student photo identification card or a current tribal photo identification card. Your materials state that individuals without one of the acceptable forms of identification, regardless of whether they do not have identification at all or merely did not bring it to the polls, will be able to vote on a regular ballot if they sign an affidavit affirming their identity. Your materials confirm the fact that signing the affidavit in lieu of showing identification is not an independent basis for challenging a voter.

The Attorney General does not interpose any objection to the photo identification requirement and accompanying implementation procedures. However, 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 the changes. In this case, where our decision not to object rests in part on the detailed implementation procedures you provided, and on effective education of poll workers and voters as to the new procedures, any change from these procedures must be precleared under Section 5. Further, to the extent that PA 71 includes provisions that are enabling in nature, any changes affecting voting that are adopted pursuant to this legislation require Section 5 review. *See* C.F.R. § 51.15.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the Secretary of State plans to take concerning this matter. If you have any questions concerning this letter, 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

U.S. Department of Justice
Civil Rights Division

TCH:RSB:RP:JP2
DJ 166-012-3
2012-3558

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

August 20, 2012

Joshua N. Lief, Esq.
Senior Assistant Attorney General
900 East Main Street
Richmond, VA 23219

Dear Mr. Lief:

This refers to Chapter 839 (S.B. 1) (2012), Executive Order No. 45 (2012), the Virginia State Board of Elections Voter Education and Outreach Plan (2012), and Virginia State Board of Elections Regulation, 1 Virginia Administrative Code 20-60-60 (2012), for the Commonwealth of Virginia, 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 19, 2012; additional information was received through August 6, 2012.

Under current law, a registered voter may cast a regular ballot in person in Virginia by presenting one of the following forms of identification: a non-photographic Virginia voter registration card issued to all voters upon registering to vote, a social security card, a valid Virginia driver's license, any identification card issued by a government agency of the Commonwealth, one of its political subdivisions or the United States, or a valid employee photo identification card. Under the proposed law, Chapter 839, the list of acceptable forms of identification that a voter may present to cast a regular ballot in person would be expanded to include, in addition to the preceding categories, a valid student identification card issued by any institution of higher education in the Commonwealth; or a copy of a current utility bill, bank statement, government check, or paycheck that shows the name and address of the voter. Your submission notes that this latter category of allowable documents is intended to track the requirements of the federal Help America Vote Act of 2002 (for identification for first-time voters who registered to vote by mail). 42 U.S.C. 15483(b). Executive Order No. 45 provides for a one-time mailing of voter registration cards, which may be used for voting, to all Virginia voters by October 1, 2012.

In addition, under current law, voters without identification may vote a regular ballot by signing a sworn affirmation of identity. Under the proposed law, Chapter 839, a voter who is unable to present one form of identification as specified in state law, as described above, will be allowed to vote only by a provisional ballot, which shall be counted if the voter thereafter submits identification to the electoral board by fax, e-mail, in person, United States Postal Service, or commercial mail delivery, to be received by the electoral board by noon on the third day after the election. Chapter 839 provides that registrars shall notify voters in writing whose provisional ballots are not counted. Chapter 839 also provides that the State Board of Elections [SBE] shall establish procedures for the handling and counting of provisional ballots for voters

[SBE] shall establish procedures for the handling and counting of provisional ballots for voters who lack identification. Executive Order No. 45 and SBE's Voter Education and Outreach Plan would establish a voter outreach campaign regarding the new identification requirements; and direct that the SBE track and report provisional votes cast and counted by category at the precinct level for the next two general elections. State Board of Elections Regulation 1 VAC 20-60-60 permits registrars to contact voters who cast provisional ballots because they did not present identification and remind them to provide identification by the deadline.

Current law also provides that a voter whose eligibility to vote is challenged, because the poll book shows that the voter has already voted in that election, may vote a regular ballot after presenting identification, and signing the challenge form. The proposed law, Chapter 839, provides that a voter in these circumstances will vote by provisional ballot.

The Attorney General does not interpose any objection to the specified changes. However, 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 the changes. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.41.

Chapter 839 includes provisions that are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to this legislation will be subject to Section 5 review (*e.g.*, procedures for the handling and counting of provisional ballots for voters who lack identification). Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.15.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

TCH:RSB:JER:LSQ:par
DJ 166-012-3
2012-3869
2012-3915

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

September 4, 2012

J. Gerald Hebert, Esq.
191 Somervelle Street, #405
Alexandria, Virginia 22304

Stephen B. Pershing, Esq.
1416 E Street, N.E.
Washington, D.C. 20002

Dear Messrs. Hebert and Pershing:

This refers to Chapter 284 (S.B. 289) (2012), Chapter 289 (H.B. 1354) (2012), and the revised Challenged Voter Affidavit form for the State of New Hampshire, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submissions on July 5 and 6, 2012; additional information was received on July 12, 2012.

Under existing law, an election-day voter must announce his or her name to the ballot clerk. The ballot clerk verifies the name on the registered voter checklist, reads the address on the checklist to the voter for verification, and enters corrections to the address, if appropriate. At this point, if the voter is not challenged under RSA 659:27-33, the voter may cast a regular ballot.

Chapter 284 amends the benchmark procedure to require in-person voters to present photographic identification at the polling place. Under Chapter 289, a voter who is unable to present any form of allowable identification specified in Chapter 284 at the polling place is nonetheless entitled to execute a "challenged voter affidavit," which entitles the voter to cast a regular ballot. This affidavit does not have to be notarized, does not require an excuse, and requires only that voters affirm that they are who they claim to be, are qualified to vote, and have a legal domicile in the applicable town or ward. After September 1, 2013, voters who elect to sign the challenged voter affidavit will have their picture taken at the polling place by an election official and will then be allowed to cast a regular ballot. Voters who object to having their picture taken for religious reasons will be allowed to complete an affidavit of religious exemption in lieu of being photographed. In addition, if, for some reason, a photograph cannot be taken, the voter may cast a regular ballot.

Prior to September 1, 2013, the identification requirement may be satisfied by a New Hampshire driver's license or a driver's license from any other state, regardless of expiration date; a voter identification card issued under the provisions of RSA 260:21; a United States

armed services identification card; a United States passport, regardless of expiration date; a valid student identification card; or any other valid photo identification issued by federal, state, county, or municipal government. In addition to these forms of identification, a voter may present any photographic identification determined to be legitimate by the supervisors of the checklist, the moderator, or the town or city clerk. If a voter does not have photographic identification, the voter's identity may also be verified by a moderator or supervisor of the checklist or the town or city clerk.

After September 1, 2013, the identification requirement will be satisfied by a driver's license issued by any state or the federal government; a non-driver's identification card issued by the motor vehicles authority of any state; a United States armed services identification card; or a United States passport. Photographic identification presented after September 1, 2013 may not have an expiration date exceeding five years, and the name on the identification must substantially conform to the name in the registration record.

Chapters 284 and 289 also make changes respecting procedures for executing an affidavit of religious exemption, notice and education regarding the identification requirements, penalties relating to voter fraud, procedures for obtaining a free voter identification card, and election fund expenditures.

With respect to the provision in Chapter 284 which allows voters without the requisite identification to execute a qualified voter affidavit, you have advised us that this change was superseded by the change in Chapter 289, which replaces the "qualified voter affidavit" with a "challenged voter affidavit" described above. Accordingly, no determination by the Attorney General is required or appropriate concerning this matter. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.35.

The Attorney General does not interpose any objection to the remaining specified changes. However, 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 the changes. 28 C.F.R. 51.41.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

WBR:SSC:ELB:sw:dvs
DJ 166-012-3
M3065

August 16, 1985

Honorable Myra A. McDaniel
Secretary of State of Texas
Capitol Station
P. O. Box 12887
Austin, Texas 78711

Dear Ms. Secretary:

This refers to Senate Bill No. 616 (1985) which amends various provisions of the election code for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on May 29, 1985. Supplemental information was provided on June 20, June 21, June 26, and July 24, 1985.

The Attorney General does not interpose any objections to the voting changes occasioned by Senate Bill No. 616 (1985) as set forth in your letter of May 28, 1985. We note, however, that you have referred to, and incorporated by reference, various previously submitted changes, as well as certain Acts that have not been submitted by the State of Texas. We would like to point out that the failure to object to the provisions of Senate Bill No. 616 (1985) as indicated above should not be construed as a consideration of, or as a decision not to object to, any changes which may have been enacted by the State through other legislation, especially those that have not been reviewed by the Attorney General. Also, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the changes here under submission. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.42 and 51.48).

We also note that many of the provisions of S.B. No. 616 authorize officials of the State of Texas and its political subdivisions to make changes affecting voting. These sections are viewed as enabling legislation. A list of these enabling sections includes, but is not limited to, the following: Section Nos. 2.025, 13.040(e), 31.031(a), 31.071(a), 32.056, 41.001(b), 41.005(c), 42.001, 42.008, 42.009, 42.031, 42.032, 42.061, 42.062, 43.002, 43.003, 43.004, 43.005, 85.001, 85.002, 85.006, 85.061, 85.062, 85.064, 85.065, 85.066, 123.001, 123.002, 123.003, 123.004, 123.006, 123.007, 124.031, 141.003, 143.003, 143.005, 161.010, 163.002, 171.002, 173.007, 201.053, 203.004, 203.013, and 271.001 through 271.014. Therefore, officials of the State of Texas and its political subdivisions are not relieved of their responsibility to seek preclearance, pursuant to the requirements of Section 5, of any changes affecting voting (e.g., voting precinct lines, polling places, special election dates and procedures, voter or candidate eligibility requirements, etc.) implemented as a result of the provisions of S.B. No. 616. See also 28 C.F.R. 51.14.

Finally, during the course of our analysis of the changes submitted, we noted that Section 52.070(d) which was not listed among the changes involved, in fact has the potential for effectuating an anti-single-shot requirement where none previously existed, thus constituting a change within the meaning of the Act. However, in view of the assurance communicated to the Department by your letter dated July 24, 1985, that, as authorized by the state legislature, the Office of the Secretary of State will, by administrative rule, change the wording of the ballot instructions to read "vote for no more than" followed by the number of candidates to be elected, we have not given further consideration to this section of S.B. No. 616 since the administrative rule would have the effect of rendering this provision of Section 52.070(d) moot. Of course, the formal promulgation of this rule change as well as any future legislation enacted to codify the Secretary of State's directive will be subject to Section 5 review.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

Gerald W. Jones
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

January 16, 1996

The Honorable Antonio Garza
Secretary of State
State of Texas
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Chapter 797 (1995), insofar as it authorizes agency employees to make determinations of an individual's eligibility to register based on citizenship information contained in the agency's file; eliminates the requirement that agency employees must request the completion of a declination form each and every time an individual is offered registration and refuses; authorizes cancellation of registration immediately upon a voter's written indication of residence outside the county; authorizes cancellation of registration on the November 30th following the second general election for state and county officers rather than on the November 30th following the second general election for federal officers; and relocates voter registration assistance requirements as part of the implementation of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg to 1973gg-10, for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for additional information on November 14, 1995.

With regard to the authorization to cancel registration immediately upon a voter's written indication of residence outside the county; the authorization to cancel registration on the November 30th following the second general election for state and county officers rather than on the November 30th following the second general election for federal officers; and the relocation of voter registration assistance requirements, the Attorney General does not interpose any objection. However, 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 the these changes. See Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

With regard to the provision which allows agency employees to make determinations of an individual's eligibility to register based on citizenship information contained in the agency's file, we have reviewed the information provided by the State, as well as information from the 1990 Census and other sources, including the Immigration and Naturalization Service. According to the 1990 Census, minority persons represent 34 percent of the State's total population (14,229,191) and 30 percent of its voting age population (9,923,085). Hispanic persons comprise the largest minority group (21 percent of the total population). Data from the INS indicate that nearly 70,000 applications for citizenship are currently pending in Texas and that between fiscal years 1993 and 1994, over 51,000 Texas residents became citizens. Two-thirds of those who became citizens in 1993 and 1994 were of Hispanic or Asian ancestry.

We do not take the position that persons who are clearly not citizens should be registered to vote or even encouraged to register. However, with the rapid rate at which minority persons are becoming citizens, there is a strong likelihood that some of the citizenship information contained in agency files may be outdated or incorrect. We are concerned that persons who have become citizens since they last filled out forms at a particular agency will not be offered registration. There are no provisions or safeguards in the legislation to deal with situations in which the citizenship information in the file is outdated or wrong. Because the law makes no provisions for informing potential registrants that the reason they were not offered registration is that their file indicates non-citizen status, there is no opportunity for potential registrants to provide any relevant or updated information. Moreover, there are no mechanisms to explain to potential registrants who ask to register and are refused that the reason for the refusal is because of information in the file indicating non-citizen status.

Because minority persons represent the majority of persons attaining citizenship in Texas and the information contained in agency files is unlikely to keep pace with their citizenship rate, allowing agency employees to make eligibility determinations based on citizenship information contained in those files is likely to have a retrogressive effect on minority persons. Beer v. United States, 425 U.S. 130, 141 (1976); 28 C.F.R. 51.54. As a result, I cannot conclude, as I must under the Voting Rights Act, that your burden under Section 5 has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Chapter 797 insofar as it authorizes agency employees to make determinations of an individual's eligibility to register based on citizenship information contained in the agency's file.

We note 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 has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the change in the method of election continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10 and 51.45.

With regard to the elimination of the requirement that agency employees must request the completion of a declination form each and every time an individual is offered registration and refuses, we have been informed that the Secretary of State's Office will promulgate rules to implement the procedures that will be used to document offers of registration and record declinations and will provide a training program, including a detailed memorandum and a video tape, pertaining to these procedures. When these procedures and training program are finalized, they should be submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act. It is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. Clark v. Roemer, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

Because the elimination of the requirement that agency employees must request the completion of a declination form each and every time an individual is offered registration and refuses and the implementation procedures to be utilized by the Secretary of State are directly related, they must be reviewed simultaneously. Accordingly, it would be inappropriate for the Attorney General to make a preclearance determination on the instant change until the related changes have been submitted for Section 5 review. See 28 C.F.R. 51.22(b) and 51.35.

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the procedural guidelines. At that time we will review all changes simultaneously; however, any documentation previously provided need not be resubmitted.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning these matters. If you have any questions, you should call Colleen M. Kane (202-514-6336) of our staff. Refer to File Nos. 95-2017 and 96-0054 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

IKP:GS:NG:gmh:maj
DJ 166-012-3
97-2145

September 2, 1997

The Honorable Antonio O. Garza, Jr.
Secretary of State
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Chapter 1349 (1997), which establishes statewide procedures for selecting election judges; authorizes the appointment of election judges for two-year terms; and amends procedures relating to voter registration, voter identification, ballot format, candidate qualifications and qualifying procedures, election administration, selection of poll workers and other election officials, county and precinct chairs, and poll watchers, the conduct of primaries, petition requirements, and early voting (including the authority to reduce the hours of operation of temporary branch polling places and the prohibition on the use of "movable" locations in certain elections) for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on July 1, 1997; supplemental information clarifying the meaning of "movable" early voting locations was received on August 29, 1997.

With regard to the prohibition on the use of "movable" temporary branch polling places in certain elections, the information received on August 29, 1997, materially supplements your submission and is necessary for us to complete our review of this change. Accordingly, this information recommences the sixty-day review period under Section 5. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.39).

The Attorney General does not interpose any objection to the remaining specified changes. However, 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 the changes. See 28 C.F.R. 51.41.

Chapter 1349 includes provisions that are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to this legislation by the State of Texas or by local jurisdictions will be subject to Section 5 review (e.g., procedures prescribed by the Secretary of State pursuant to various sections of the act regarding, e.g., early voting, computerized voting systems; appointment of election judges for two-year terms, election of county and precinct chairs by plurality vote, the conduct of joint primaries, changes in the hours of operation of temporary branch polling places). See 28 C.F.R. 51.15.

Sincerely,

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

By:

Elizabeth Johnson
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:MJP:LLO:par
DJ 166-012-3
2003-3619

Voting Section - NWB.
950 Pennsylvania Avenue, N.W., Room 7254
Washington, DC 20530

November 20, 2003

Ann McGeehan, Esq.
Director of Elections
Secretary of State's Office
P.O. Box 12060
Austin, Texas 78711-2060

Dear Ms. McGeehan:

This refers to Chapter 1315 (2003), which makes numerous changes to comply with the Help America Vote Act of 2002, 42 U.S.C. 15301 to 15545 ("HAVA"), including, inter alia: the establishment of a statewide voter registration database, provisional voting, and an administrative complaint procedure, changes in voting method and election administration, and changes in voter registration, early voting, polling place, and voter identification procedures; changes in the voter registration form to comply with HAVA; and Chapter 1316 (2003), which makes numerous revisions to the Election Code, including, inter alia: the changes in election administration and in the procedures for voter registration, early voting, candidate qualifying, joint elections, and referenda, for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on September 23, 2003; supplemental information was received on October 3, 2003.

The Attorney General does not interpose any objection to the specified changes. However, 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 the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Chapters 1315 and 1316 include a number of provisions that are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to these chapters will be subject to Section 5 review. See 28 C.F.R. 51.15.

Sincerely,

Joseph D. Rich
Chief, Voting Section

Attachment B

SECTION 5 DECLARATORY JUDGMENT ACTIONS

(UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
City of Petersburg v. U.S.	Annexation	03/71/72	City of Petersburg, VA	10/24/72	Denied	354 F. Supp. 1021 (D.D.C. 1972) aff'd mem., 410 U.S. 962 and mem. sub nom. Diamond v. U.S., 412 U.S. 901 (1973)
	Annexation and districting plan.			04/13/73	Granted without opposition	No. 509-72, (D.D.C.) aff'd mem. sub nom. Diamond v. U.S., 412 U.S. 901 (1973)
Vance v. U.S.*	Party rules	07/31/72	AL Democratic Party	11/30/72	Granted without opposition	No. 1529-72 (D.D.C.)
City of Richmond v. U.S.	Annexations	08/25/72	City of Richmond, VA	05/29/74	Denied	376 F. Supp. 1344, (D.D.C. 1974) vacated and remanded, 422 U.S. 358 (1975)
				08/10/76	Granted on remand	No. 1718-72 (D.D.C.)
Beer v. U.S.	Redistricting	07/25/73	City of New Orleans, LA	03/15/74	Denied	374 F. Supp. 363, (D.D.C. 1974) rev'd, 425 U.S. 130 (1976)
				07/29/76	Granted on remand	No. 1495-73 (D.D.C.)

*The jurisdiction filed this declaratory judgment action before seeking a determination from the Attorney General.

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Griffith v. U.S.	Redistricting (congressional and legislative)	04/26/74	Kings and New York Counties, NY	05/03/74	Dismissed (lack of standing)	No. 74-648, appeal dismissed, No. 74-1486 (2d Cir. Sept. 23,1974)
Glynn County v. U.S.	Majority vote, staggered terms	01/07/76	Glynn County, GA	07/07/76	Dismissed voluntarily	No. 76-0028 (D.D.C.)
Wilkes County School District v. U.S. consolidated with Wilkes County v. U.S.	At-large election	06/14/76	Wilkes County School District, GA	04/20/78	Denied	450 F. Supp. 1171, (D.D.C. 1978) aff'd mem., 439 U.S. 999 (1978)
Whitfield v. U.S.	Redistricting	09/01/76	Grenada County, MS	03/31/78	Dismissed (subsequent change reviewed administratively)	No. 76-1636 (D.D.C.)
Hale County v. U.S.	At-large election	02/16/77	Hale County, AL	09/04/80	Denied	496 F. Supp. 1206 (D.D.C. 1980)
City of Rome v. U.S.	Annexations; method of election	05/09/77	City of Rome, GA	04/04/79	Denied	472 F. Supp. 221, (D.D.C. 1979) aff'd, 446 U.S. 156 (1980)
Horry County v. U.S.	At-large election	09/27/77	Horry County, SC	12/11/78	Dismissed (subsequent change reviewed administratively)	449 F. Supp. 990 (D.D.C. 1978)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Apache County High School District No. 90 v. U.S.	Polling places; minority language assistance	10/20/77	Apache County, AZ	06/12/80	Denied	No. 77-1815 (D.D.C.)
Donnell v. U.S.*	Redistricting	03/07/78	Warren County, MS	07/31/79	Denied	No. 78-0392, (D.D.C.), aff'd mem., 444 U.S. 1059 (1980)
Charlton County Bd. of Ed. v. U.S.	Method of election (at-large)	03/29/78	Charlton County, GA	11/01/78	Granted	No. 78-0564 (D.D.C.)
Mississippi v. U.S.	Redistricting (legislative)	08/01/78	State	06/01/79	Granted	490 F. Supp. 569,(D.D.C. 1979) aff'd mem., 444 U.S. 1050 (1980)
City of Dallas v. U.S.*	Redistricting	09/05/78	City of Dallas, TX	12/07/79	Dismissed (subsequent change reviewed administratively)	482 F. Supp. 183 (D.D.C. 1979)
Mississippi v. U.S.	Method of election (open primary)	12/27/79	State	04/29/82	Dismissed (failure to prosecute)	No. 79-3469 (D.D.C.)
Commissioners Court of Medina County v. U.S.	Redistricting	01/25/80	Medina County, TX	12/18/80	Dismissed (subsequent change reviewed administratively)	No. 80-0241 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
City of Lockhart v. U.S.	Numbered posts; staggered terms	02/06/80	City of Lockhart, TX	07/30/81	Denied	No. 80-0364, (D.D.C.) vacated, 460 U.S. 125 (1983)
				07/15/83	Dismissed on remand	No. 80-0364
City of Port Arthur v. U.S.	Consolidation; redistricting	03/12/80	City of Port Arthur, TX	06/12/81	Denied	517 F. Supp. 987, (D.D.C. 1981) aff'd, 459 U.S. 159 (1982)
South Dakota v. U.S.	County organization	08/06/80	Todd and Shannon Counties, SD	12/01/81	Granted in part and denied (consent decree)	No. 80-1976 (D.D.C.)
City of Pleasant Grove v. U.S.	Annexations	10/09/80	City of Pleasant Grove, AL	10/25/85	Denied	623 F. Supp. 782, (D.D.C. 1985) aff'd, 479 U.S. 462 (1987)
Colleton County v. U.S.	Method of election	11/04/81	Colleton County, SC	04/28/82	Granted (consent decree)	No. 81-2664 (D.D.C.)
Senate of California v. Smith*	Redistricting (state senate)	11/17/81	State	04/26/82	Granted without opposition	No. 81-2767 (D.D.C.)
Busbee v. Smith	Redistricting (congressional)	03/08/82	State of Georgia	07/22/82	Denied	549 F. Supp. 494, (D.D.C. 1982) aff'd mem., 459 U.S. 1166 (1983)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
County Council v. U.S.	Method of election (at-large)	04/01/82	Sumter County, SC	05/25/84	Denied	596 F. Supp. 35 (D.D.C. 1984)
Mississippi v. Smith	Redistricting (congressional)	04/07/82	State	04/11/83	Dismissed (subsequent change reviewed administratively)	541 F. Supp. 1329 ((D.D.C. 1982), appeal dismissed, 461 U.S. 912 (1983)
Mississippi v. U.S.*	Redistricting (legislative)	09/20/82	State	01/13/83	Dismissed (subsequent change reviewed administratively)	No. 82-2673 (1988 WL 90056 (D.D.C.))
Baldwin County School District v. Smith	At-large election	10/31/83	Baldwin County School District, GA	09/13/84	Dismissed (subsequent change reviewed administratively)	No. 83-3240 (D.D.C.)
South Carolina v. U.S.*	Redistricting (state senate)*	12/06/83	State	09/04/84	Dismissed (subsequent change reviewed administratively)	No. 83-3626 (D.D.C.)
Halifax County v. U.S.	Method of election	05/17/84	Halifax County, NC	03/06/85	Dismissed voluntarily	No. 84-1551 (D.D.C.)
Brunswick-Glynn County Charter Comm. v. U.S.	Consolidation	02/03/86	Glynn County, GA	07/22/86	Dismissed (lack of standing)	No. 86-0309 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
North Carolina v. U.S.	Staggered terms (judges)	05/30/86	State	10/02/87	Dismissed voluntarily	No. 86-1490 (D.D.C.)
Grenada County v. U.S.*	Redistricting	04/07/87	Grenada County, MS	07/30/87	Dismissed voluntarily	No. 87-0962 (D.D.C.)
Bladen County v. U.S.	Method of election	11/03/87	Bladen County, NC	05/16/88	Dismissed	No. 87-2974 (D.D.C.)
Mississippi v. U.S.	Method of election (judges)	12/21/87	State	12/29/88	Dismissed voluntarily	No. 87-3464 (D.D.C.)
City Council v. U.S.	Consolidation of city and county	01/24/90	City of Augusta and Richmond County, GA	08/24/92	Dismissed	No.1:90-cv-00171 (D.D.C.)
Georgia v. Reno	Creation of 62 additional superior court judicial positions	08/24/90	State	02/03/95	Granted	881 F. Supp. 7 (D.D.C 1995)
Louisiana v. U.S.	Creation of 2 additional at-large judicial positions	01/18/91	16th Judicial District Court	06/15/93	Dismissed (prior objection withdrawn upon administrative review of change in method of election)	No. 1:91-cv-00122 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Bolivar County v. U.S.	Redistricting	08/26/91	Bolivar County, MS	12/20/94	Dismissed (D.J. granted to settlement redistricting plan & new polling place)	No. 1:91-cv-02186 (D.D.C.)
Texas v. U.S.	Redistricting (congressional, legislative, & state board of education)*	09/20/91	State	09/17/92	Granted without United States opposition to senate plan (no objection to other plans after administrative review)	802 F. Supp. 481 (D.D.C. 1992)
Walker v. U.S.*	Redistricting	02/24/92	Gregg County, TX	05/19/92	Dismissed (subsequent change reviewed administratively)	No. 1:92-cv-00480 (D.D.C.)
Ellis County v. U.S.	Redistricting	05/11/92	Ellis County, TX	10/06/92	Dismissed (subsequent change reviewed administratively)	No. 1:92-cv-01110 (D.D.C.)
Calhoun County v. U.S.	Redistricting	08/18/92	Calhoun County, TX	12/10/92	Dismissed voluntarily (plan superseded by interim court-approved plan and no objection after administrative review)	No. 1:92-cv-01890 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Lee County v. U.S.	Redistricting	04/06/93	Lee County, MS	04/26/94	Dismissed voluntarily	No. 1:93-cv-00708 (D.D.C.)
Monterey County v. U.S.*	Consolidation of municipal & justice courts with judges elected at large	08/11/93	Monterey County, CA	11/07/93	Dismissed voluntarily	No. 1:93-cv-1639 (D.D.C.)
Castro County v. U.S.	Redistricting	08/25/93	Castro County, TX	04/26/97	Dismissed (subsequent change reviewed administratively)	No.1:93-cv-01782 (D.D.C.)
Texas v. U.S.	Elected to appointed board for water district	03/09/94	Edwards Underground Water District, TX	06/01/95	Dismissed (subsequent change reviewed administratively)	No. 1:94-cv-00465 (D.D.C.)
Bossier Parish School Board v. Reno	Redistricting	07/11/94	Bossier Parish School District, LA	11/02/95	Granted	907 F. Supp. 434, (D.D.C. 1995) rev'd, 520 U.S. 471 (1997)
				05/04/98	Granted	7 F. Supp. 2d 29, (D.D.C. 1998) aff'd, 528 U.S. 320 (2000)
Texas v. U.S.	Creation of seven additional judicial positions	07/14/94	Fort Bend, Harris, Midland & Tarrant Counties, TX	07/10/95	Granted	No. 1:94-cv-01529 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Baton Rouge and Parish of East Baton Rouge v. U.S.*	Annexations (19)	09/23/94	Baton Rouge, LA	06/23/95	Dismissed (no objection to changes after administrative review)	No. 1:94-cv-02048 (D.D.C.)
Arizona v. Reno	Creation of four additional judicial positions	09/26/94	Coconino and Navajo Counties, AZ	03/6/96	Granted (consent decree)	No. 1:94-cv-02054 (D.D.C.)
New York v. U.S.*	Creation of addition judicial positions to supreme court	10/13/94	Bronx and Kings Counties, NY	12/22/94	Granted	874 F. Supp. 394, reconsideration denied, 880 F. Supp. 37 (D.D.C 1994)
Georgia v. Reno	Creation of ten additional judicial positions	06/01/95	State	09/21/95	Dismissed (no objection to changes after administrative review)	No. 1:95-cv-01046 (D.D.C.)
Georgia v. Reno	Creation of 29 additional judicial positions	07/25/95	State	12/06/95	Dismissed (no objection to changes after administrative review)	No. 1:95-cv-01379 (D.D.C.)
City of Andrews v. Reno	Cumulative voting by plurality; length of terms; implementation schedule	08/07/95	City of Andrews, TX	01/29/96	Granted (consent decree)	No. 1:95-cv-01477 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Alabama v. Reno	Creation and expansion of courts of criminal and civil appeals; expansion of state supreme court	02/20/96	State	03/25/96	Dismissed (prior objection withdrawn)	No. 1:96-cv-00316 (D.D.C.)
Baton Rouge and East Baton Rouge Parish v. U.S.*	Special election procedures (referendum election ratifying creation of consolidated metropolitan council)	04/29/96	Baton Rouge, LA	07/15/96	Dismissed (no objection to change after administrative review)	No. 1:96-cv-00987 (D.D.C.)
Texas v. U.S.	Temporary replacement of elected school boards*	06/07/96	State	03/17/97	Dismissed (not ripe)	No. 1:96-cv-01274 (D.D.C.), aff'd, 523 U.S. 296 (1998)
Mississippi v. Reno	Annexation procedures	07/23/96	State	07/24/98	Dismissed (objection withdrawn and no objection interposed to change after administrative review	No. 1:96-cv-01711 (D.D.C.)
Louisiana v. U.S.	Annexations	02/04/97	Shreveport City Court	12/01/97	Dismissed (prior objection withdrawn upon change in method of election)	No. 1:97-cv-0241 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Virginia v. Reno	Redistricting procedures	04/10/00	State	10/17/00	Dismissed (not ripe)	117 F. Supp. 2d 46, (D.D.C. 1900) aff'd mem., 531 U.S. 1062 (2001)
City of Zachary v. Reno	Creation of district; method of election	09/01/00	City of Zachary, LA	11/02/00	Dismissed (no objection to changes after administrative review)	No. 1:00-cv-2122 (D.D.C.)
Georgia v. Ashcroft	Redistricting (congressional and legislative)*	10/10/01	State	04/05/02 02/20/04	Denied (senate); Granted (congressional and house) Dismissed on remand	195 F. Supp. 2d 95 (D.D.C 2002); denial of declaratory judgment vacated and remanded 539 U.S. 431 (2003)
Louisiana House of Representatives v. Ashcroft*	Redistricting (house of representatives)	01/14/02	State	05/21/03	Dismissed (subsequent change reviewed administratively)	No. 1:02-cv-0062 (D.D.C.)
State of Florida v. Ashcroft*	Redistricting (congressional)	05/14/02	State	06/13/02	Dismissed (no objection interposed to the change after administrative review)	No. 1:02-cv-00941 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
State of North Carolina Board of Elections v. Ashcroft*	Redistricting (legislative)	06/13/02	State	08/02/02	Dismissed (no objection interposed to the changes after administrative review)	No. 1:02-cv-01174(D.D.C.)
State of North Carolina v. Ashcroft*	Redistricting (legislative)	11/26/03	State	04/01/04	Dismissed (no objection to the changes after administrative review)	No. 1:03-cv-02477 (D.D.C.)
State of Georgia v. Holder	Voter registration -- verification of voter provided information	06/21/10	State	11/02/10	Dismissed (subsequent change reviewed administrativly	No. 1:10-cv-01062 (D.D.C.)
State of Georgia v. Holder*	Voter registration -- affirmative showing of citizenship	11/15/10	State	03/31/11	Dismissed (no objection to the changes after administrative review)	No. 1:10-cv-01970 (D.D.C)
State of Lousiana v. Holder**	Redistricting (house of representatives)	04/21/11	State	06/21/11	Dismissed (no objection to the change after administrative review)	No. 1:11-cv-00770 (D.D.C.)

** The jurisdiction filed this action at the same time it was seeking an administrative determination from the Attorney General.

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
Commonwealth of Virginia v. Holder**	Redistricting (legislative)	05/09/11	State	06/20/11	Dismissed (no objection to the changes after administrative review)	No. 1:11-cv-00885 (D.D.C.)
State of Texas v. U.S.*	Redistricting (congressional, legislative, and board of education)	07/19/11	State	09/22/11 08/28/12	Granted (board of education) Denied as to the other plans	No. 1:11-cv-01303 (D.D.C.)
State of Florida v. Holder	Voter registration, election administration (voting hours and petition procedures	07/29/11	State	03/23/12 08/16/12	One claim dismissed (no objection after administrative review) Granted as to one claim; One claim dismissed without prejudice after retrogression finding	No 1:11-cv-01428 (D.D.C.)
Harrell (State of South Carolina) v. U.S.**	Redistricting (house of representatives)	08/09/11	State	10/13/11	Dismissed (no objection to the change after administrative review)	No. 1:11-cv-1454 (D.D.C.)
Harrell (State of South Carolina) v. U.S.**	Redistricting (congressional)	08/30/11	State	10/31/11	Dismissed (no objection to the change after administrative review)	No. 1:11-cv-01566 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
State of North Carolina v. U.S.**	Redistricting (congressional and legislative)	09/02/11	State	11/08/11	Dismissed (no objection to the changes after administrative review)	No. 1:11-cv-01592 (D.D.C.)
State of Alabama v. Holder**	Redistricting (congressional and board of education)	09/09/11	State	11/21/11	Dismissed (no objection to the changes after administrative review)	No. 1:11-cv-01628 (D.D.C.)
Nueces County v. U.S.**	Redistricting (commissioners court, justice of the peace and constable)	10/06/11	Nueces County, TX	02/23/12;	Dismissed (justice of the peace and constable plans after administrative review)	No. 1:11-cv-01784 (D.D.C.)
				03/21/12	Dismissed (commissioners court after subsequent change reviewed administratively	
State of Georgia v. Holder**	Redistricting (congressional and legislative)	10/06/11	State	01/03/12	Dismissed (no objection to the changes after administrative review	No 1:11-cv-01788 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
McConnell (State of South Carolina) v. U.S.**	Redistricting (senate)	10/07/11	State	11/15/11	Dismissed (no objection to the change after administrative review	No. 1:11-cv-01794 (D.D.C.)
Williamson County v. U.S.**	Redistricting (commissioners court, justice of the peace and constable)	10/17/11	Williamson County, TX	12/21/11	Dismissed (no objection to the change after administrative review	No. 1:11-cv-01836 (D.D.C.)
Galveston County v. U.S.**	Redistricting (commissioners court)	10/17/11	Galveston County, TX	03/26/12	Dismissed (subsequent change reviewed administratively)	No. 1:11-cv-01837 (D.D.C.)
State of Michigan v. U.S.*	Redistricting (congressional and legislative)	11/03/11	State	02/28/12	Granted	No. 1:11-cv-01938 (D.D.C.)
State of Texas v. Holder**	Voter registration (Photographic identification req.)	01/24/12	State	08/30/12	Denied	No. 1:12-cv-00128 (D.D.C.)
Commonwealth of Virginia v. Holder**	Redistricting (congressional)	01/27/12	State	03/15/12	Dismissed (no objection to the change after administrative review)	No. 1:12-cv-00148 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER
State of South Carolina v. Holder	Voter registration (Photographic identification req.)	02/08/12	State	10/10/12	Granted	No. 1:12-cv-00203 (D.D.C.)
State of Florida v. U.S.**	Redistricting (congressional and legislative)	03/12/12	State	05/01/12	Dismissed (no objection to the change after administrative review)	No. 1:12-cv-0380 (D.D.C.)
State of New York v. U.S.**	Redistricting (senate)	03/16/12	State	04/27/12	Dismissed (no objection to the change after administrative review)	No. 1:12-cv-0413 (D.D.C.)
State of New York v. U.S.**	Redistricting (assembly)	03/30/12	State	05/18/12	Dismissed (no objection to the change after administrative review	No. 1:12-cv-0500 (D.D.C.)
State of Alabama v. Holder**	Redistricting (legislative)	07/26/12	State	10/05/12	Dismissed (no objection to the change after administrative review	No. 1:12-cv-01232 (D.D.C.)

CASE TITLE	SUBJECT	DATE FILED	JURISDICTION	DATE OF DECISION	DECISION	CITATION OR CASE NUMBER

Attachment C

Bailout cases before August 5, 1984

1. *Alaska v. United States*, No. 101-66 (D.D.C. Aug. 17, 1966) (U.S. consented to judgment) (state later partially re-covered based on new coverage determinations after 1970 VRA amendments, and fully re-covered based on new coverage determinations after 1975 VRA amendments); [1]

2. *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966) (Apache, Coconino, and Navajo Counties) (Arizona) (U.S. consented to judgment) (counties later re-covered based on new coverage determinations after both 1970 and 1975 VRA amendments); [2]

3. *Elmore County v. United States*, No. 320-66 (D.D.C. Sept. 22, 1966) (Idaho) (U.S. consented to judgment) (county later re-covered based on new coverage determinations after 1970 VRA amendments); [3]

4. *Wake County v. United States*, No. 1198-66 (D.D.C. Jan. 23, 1967) (North Carolina) (U.S. consented to judgment); [4]

5. *Gaston County v. United States*, 288 F. Supp. 678 (D.D.C. 1968), *aff'd*, 395 U.S. 285 (1969) (North Carolina) (bailout denied);

6. *Nash County v. United States*, No. 1702-66 (D.D.C. Sept. 26, 1969) (North Carolina) (county stipulated to dismissal in wake of Gaston County decision);

7. *Alaska v. United States*, No. 2122-71 (D.D.C. Mar. 10, 1972) (election districts 8 (Anchorage), 11 (Kodiak), 12 (Aleutian islands), and 16 (Fairbanks-Fort Yukon)) (U.S. consented to judgment) (state later fully re-covered based on new coverage determinations after 1975 VRA amendments); [5]

8. *New York v. United States*, No. 2419-71 (D.D.C. Apr. 13, 1972), *aff'd on other grounds sub nom. NAACP v. New York*, 413 U.S. 345 (1973) (Bronx, Kings, and New York Counties) (U.S. consented to judgment); termination of coverage rescinded (Orders of Jan. 10 and Apr. 30, 1974), *aff'd mem.* 419 U.S. 888 (1974) (counties re-covered by D.D.C. on motion of U.S. based on a finding in related case, *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974), that counties had used discriminatory test or device) (Bronx and Kings Counties were later covered a second time based on new coverage determinations after 1975 VRA amendments); [6] [later rescinded]

9. *Virginia v. United States*, 386 F. Supp. 1319 (D.D.C. 1974), *aff'd*, 420 U.S. 901 (1975) (bailout denied);

10. *Yuba County v. United States*, No. 75-2170 (D.D.C. May 25, 1976) (California) (Jurisdiction dismissed action);

11. *New Mexico v. United States*, No. 76-0067 (D.D.C. July 30, 1976) (Curry, McKinley, and Otero Counties) (U.S. consented to judgment); [7]

12. *Maine v. United States*, No. 75-2125 (D.D.C. Sept. 17, 1976) (Towns of Cadwell, Limestone, Ludlow, Nashville, Reed, Woodland, Connor, New Gloucester, Sullivan, Winter Harbor, Chelsea, Sommerville, Carroll, Charleston, Webster, Waldo, Beddington, and Cutler) (U.S. consented to judgment); [8]

13. *El Paso County v. United States*, No. 77-0815 (D.D.C. Nov. 8, 1977) (Colorado) (Jurisdiction dismissed action);

14. *Choctaw and McCurtain Counties v. United States*, No. 76-1250 (D.D.C. May 12, 1978) (Oklahoma) (U.S. consented to judgment); [9]

15. *Alaska v. United States*, No. 78-0484 (D.D.C. May 10, 1979) (Jurisdiction dismissed action);

16. *City of Rome v. United States*, 472 F. Supp. 221 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980) (bailout denied);

17. *Campbell County v. United States*, No. 82-1862 (D.D.C. Dec. 17, 1982) (Wyoming) (U.S. consented to judgment); [10]

18. *Massachusetts v. United States*, No. 83-0945 (D.D.C. Sept. 29, 1983) (Towns of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and Wrentham) (U.S. consented to judgment); [11]

19. *Alaska v. United States*, No. 84-1362 (D.D.C. May 1, 1984) (Jurisdiction dismissed action);

20. *Connecticut v. United States*, No. 83-3103 (D.D.C. June 21, 1984) (Towns of Groton, Mansfield, and Southbury) (U.S. consented to judgment); [12]

21. *Board of County Commissioners v. United States*, No. 84-1626 (D.D.C. July 30, 1984) (El Paso County, Colorado) (U.S. consented to judgment); [13]

22. *Waihee v. United States*, No. 84-1694 (D.D.C. July 31, 1984) (Honolulu County, Hawaii) (U.S. consented to judgment); and [14]

23. *Idaho v. United States*, No. 82-1778 (D.D.C. July 31, 1984) (Elmore County) (U.S. consented to judgment). [15]

Bailout cases after August 5, 1984

1. *City of Fairfax v. Reno*, No. 97-02212 (D.D.C. Oct. 21, 1997) (including the City of Fairfax School Board) (Virginia) (U.S. consented to judgment); [1]

2. *Frederick County v. Reno*, No. 99-00941 (D.D.C. Sept. 10, 1999) (including the Frederick County School Board; the Towns of Middletown and Stephens City; and the Frederick County Shawneeland Sanitary District) (Virginia) (U.S. consented to judgment); [2]

3. *Shenandoah County v. Reno*, No. 99-00992 (D.D.C. Oct. 15, 1999) (including the Shenandoah County School Board; the Towns of Edinburg, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock; the Stoney Creek Sanitary District; and the Toms Brook-Maurertown Sanitary District) (Virginia) (U.S. consented to judgment); [3]

4. *Roanoke County v. Reno*, No. 00-01949 (D.D.C. Jan. 24, 2001) (including the Roanoke County School Board and the Town of Vinton) (Virginia) (U.S. consented to judgment); [4]

5. *City of Winchester v. Reno*, No. 00-03073 (D.D.C. June 1, 2001) (Virginia) (U.S. consented to judgment); [5]

6. *City of Harrisonburg v. Reno*, No. 02-00289 (D.D.C. Apr. 17, 2002) (including the Harrisonburg City School Board) (Virginia) (U.S. consented to judgment); [6]

7. *Rockingham County v. Reno*, No. 02-00391 (D.D.C. May 24, 2002) (including the Rockingham County School Board and the Towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford, and Timberville) (Virginia) (U.S. consented to judgment); [7]

8. *Warren County v. Ashcroft*, No. 02-01736 (D.D.C. Nov. 26, 2002) (including the Warren County School Board and the Town of Front Royal) (Virginia) (U.S. consented to judgment); [8]

9. *Greene County v. Ashcroft*, No. 03-01877 (D.D.C. Jan. 19, 2004) (including the Greene County School Board and the Town of Standardsville) (Virginia) (U.S. consented to judgment); [9]

10. *Pulaski County v. Gonzales*, No. 05-01265 (D.D.C. Sept. 27, 2005) (including the Pulaski County School Board and the Towns of Pulaski and Dublin) (Virginia) (U.S. consented to judgment); [10]

11. *Augusta County v. Gonzales*, No. 05-01885 (D.D.C. Nov. 30, 2005) (including the Augusta County School Board and the Town of Craigsville) (Virginia) (U.S. consented to judgment); [11]

12. *City of Salem v. Gonzales*, No. 06-00977 (D.D.C. July 27, 2006) (Virginia) (U.S. consented to judgment); [12]

13. *Botetourt County v. Gonzales*, No. 06-01052 (D.D.C. Aug. 28, 2006) (including the Botetourt County School Board and the Towns of Buchanan, Fincastle, and Troutville) (Virginia) (U.S. consented to judgment); [13]

14. *Essex County v. Gonzales*, No. 06-01631 (D.D.C. Jan. 31, 2007) (including the Essex County School Board and the Town of Tappahannock) (Virginia) (U.S. consented to judgment); [14]

15. *Middlesex County v. Gonzales*, No. 07-01485 (D.D.C. Jan. 7, 2008) (including the Middlesex County School Board and the Town of Urbanna) (Virginia) (U.S. consented to judgment); [15]

16. *Amherst County v. Mukasey*, No. 08-00780 (D.D.C. Aug. 13, 2008) (including the Town of Amherst) (Virginia) (U.S. consented to judgment); [16]

17. *Page County v. Mukasey*, No. 08-01113 (D.D.C. Sept. 15, 2008) (including the Page County School Board and the Towns of Luray, Stanley, and Shenandoah) (Virginia) (U.S. consented to judgment); [17]

18. *Washington County v. Mukasey*, No. 08-01112 (D.D.C. Sept. 23, 2008) (including the Washington County School Board and the Towns of Abington, Damascus, and Glade Spring) (Virginia) (U.S. consented to judgment); [18]

19. *Northwest Austin Municipal Utility District Number One v. Mukasey*, No. 06-01384 (D.D.C. Nov. 3, 2009) (Texas) (U.S. opposed on ground that jurisdiction was not a political subdivision and bailout was denied on that ground by D.D.C. on May 30, 2008. On appeal, the Supreme Court reversed on that ground on June 22, 2009, and held that the jurisdiction was a political subdivision. On remand, the U.S. consented to judgment.); [1]

20. *City of Kings Mountain v. Holder*, No. 10-01153 (D.D.C. Oct. 22, 2010) (North Carolina) (U.S. consented to judgment); [2]

21. *City of Sandy Springs v. Holder*, No. 10-01502 (D.D.C. Oct. 26, 2010) (Georgia) (U.S. consented to judgment); [3]

22. *Jefferson County Drainage District Number Seven v. Holder*, No. 11-00461 (D.D.C. June 6, 2011) (Texas) (U.S. consented to judgment); [4]

23. *Alta Irrigation District v. Holder*, No. 11-00758 (D.D.C. July 15, 2011) (California) (U.S. consented to judgment); [5]

24. *City of Manassas Park v. Holder*, C.A. No. 11-00749 (D.D.C. Aug. 3, 2011) (Virginia) (U.S. consented to judgment); [6]

25. *Rappahannock County v. Holder*, C.A. No. 11-01123 (D.D.C., Aug. 9, 2011) (including the Rappahannock County School Board and the Town of Washington) (Virginia) (U.S. consented to judgment); [7]

26. *Bedford County v. Holder*, No. 11-00499 (D.D.C., Aug. 30, 2011) (including the Bedford County School Board) (Virginia) (U.S. consented to judgment); [8]

27. *City of Bedford v. Holder,* No. 11-00473 (D.D.C. Aug. 31, 2011) (Virginia) (U.S. consented to judgment); [9]

28. *Culpeper County v. Holder*, No. 11-01477 (D.D.C. Oct. 3, 2011) (including the Culpeper County School Board and the Town of Culpeper) (Virginia) (U.S. consented to judgment); [10]

29. *James City County v. Holder*, No. 11-01425 (D.D.C. Nov. 9, 2011) (including the Williamsburg-James City County School Board) (Virginia) (U.S. consented to judgment); [11]

30. *City of Williamsburg v. Holde*r, No. 11-01415 (D.D.C. Nov. 28, 2011) (Virginia) (U.S. consented to judgment); [12]

31. *King George County v. Holder*, No. 11-02164 (D.D.C. April 5, 2012)(Virginia) [13] (U.S. consented to judgment)

32. *Prince William County v. Holder,* No. 12-00014 (D.D.C. April 10, 2012 (Virginia) [14] (U.S. consented to judgment)

33. *City of Pinson v. Holder*, No. 12-00255 (D.D.C. April 20, 2012) (Alabama) (U.S. consented to judgment) [15]

34. *Wythe County v. Holder*, No. 12-00719 (D.D.C. June 18, 2012) (including the County School Board and the Towns of Rural Retreat and Wytheville) (Virginia) (U.S. consented to judgment) [16]

35. *Grayson County v. Holder*, No. 12-00718 (D.D.C. July 20, 2012) (including the County School Board and the Towns of Independence, Fries and Troutdale) (Virginia) (U.S. consented to judgment) [17]

36. *Merced County v. Holder*, No. 12-00354 (D.D.C. August 31, 2012) (including 84 other jurisdictions) (California) (U.S. consented to judgment) [18]

37. *Carroll County v. Holder*, No. 12-01166 (D.D.C. filed July 17, 2012) (including the County School Board and the Town of New Castle)(Virginia)

38. *Craig County v. Holder,* No. 12-01179 (D.D.C. filed July 18, 2012) (including the County School Board and the Town of Hillsville)(Virginia)

39. *Browns Valley Irrigation District v. Holder*, No. 12-01597 (D.D.C. filed Sept. 26, 2012)(California)

Attachment D

Orders in Cases Granting Relief under Section 3(c) of the Voting Rights Act (Requiring Preclearance of Voting Changes)

1) United States v. Thurston County, C.A. No. 78-0-380 (D. Neb. May 9, 1979).
(minority group: American Indian)

2) McMillan v. Escambia County, C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979).
(minority group: African American)

3) Woodring v. Clarke, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983).
(minority group: African American)

4) N.A.A.C.P. v. Gadsden Cty. Sch. Bd., 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984).
(minority group: African American)

5) Sanchez v. Anaya, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984).
(minority groups: American Indian and Hispanic)

6) United States v. McKinley County, No. 86-0029-C (D.N.M. Jan. 13, 1986).
(minority group: American Indian)

7) United States v. Sandoval County, C.A. No. 88-1457-SC (D.N.M. filed Dec. 5, 1988).
(minority group: American Indian)

8) Brown v. Board of Commissioners of the City of Chattanooga, No. CIV-1-87-388 (E.D. Tenn. Jan. 11, 1990).
(minority group: African American)

9) Cuthair v. Montezuma-Cortez School District Number RE-1, No. 89-C-964 (D.Col. Apr. 9, 1990).
(minority group: American Indian)

10) Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990), appeal dismissed, 498 U.S. 1129 (1991).
(minority group: African American)

11) Garza and United States v. Los Angeles County, C.A. Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex)(C.D. Cal. Apr. 26, 1991).
(minority group: Hispanic)

12) United States v. Cibola County, C.A. No. 93-1134-LH/LFG (D.N.M. filed Oct. 22, 1993).
(minority group: American Indian)

13) United States v. Socorro County, C.A. No. 93-1244-JP (D.N.M. filed Oct. 22, 1993).
(minority group: American Indian)

14) United States v. Alameda County, C.A. No. C 95-1266 (SAW) (N.D. Cal. filed Apr. 13, 1995).
(minority group: Chinese)

15) United States v. Bernalillo County, C.A. No. 93-156-BB/LCS (D.N.M. filed Feb. 26, 1998).
(minority group: American Indian)

16) Kirke v. Buffalo County, C.A. No. 03-CV-3011 (D.S.D. filed Mar. 20, 2003).
(minority group: American Indian)

17) Blackmoon v. Charles Mix County, C.A. No. 05-CV-4017 (D.S.D. filed Jan. 27, 2005).
(minority group: American Indian)

18) United States v. Village of Port Chester, C.A. No. 06-CV-15173 (S.D.N.Y. filed Dec. 15, 2006).
(minority group: Hispanic)

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant. ERIC KENNIE, *et al.*, Defendant-Intervenors, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Defendant-Intervenors. TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*, Defendant-Intervenors, VICTORIA RODRIGUEZ, *et al.*, Defendant-Intervenors.	CASE NO. 1:12-CV-00128 (RMC-DST-RLW) Three-Judge Court

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 six 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 six 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. For more than 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, researched and written on my own time, 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 Constitutional Foundations of the 'Preclearance' Process: How Section 5 of the Voting Rights Act Was Enforced, 1965-2005*, in Daniel McCool (ed.), The Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act (Bloomington, Indiana University Press, 2012), 34-64; *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 Continued Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L.J. 463 (1985); *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 at trial on behalf of the United States as amicus curiae. In addition, I have presented sworn written testimony in ten cases, including six since my employment by the Department of Justice. Prior to my employment with the Civil Rights Division I was retained as an expert in another 19 cases 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 testified by Declaration in three cases during the past four years, *Shelby County* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), *Laroque* v. *Holder*, 831 F. Supp. 2d 183 (D.D.C. 2011), and *State of Florida* v. *United States*, C.A. No. 1:11-CV-01428 (D.D.C.).

6. The cases in which I testified before joining the Department in 1990 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 either the Fourteenth Amendment or Section 2 of the Voting Rights Act, I testified as an expert witness for minority plaintiffs regarding the intent underlying the adoption or maintenance of election laws. 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). In addition I testified, both by Declaration and in trial testimony, in a Section 5 declaratory judgment action, *County Council of Sumter County, South Carolina v. United States*, 596 F. Supp. 35 (D.D.C. 1984), regarding the purpose underlying the voting change at issue.

7. I have been asked by attorneys for the Department of Justice to investigate factual evidence regarding 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). In this Declaration I include much of the evidence I provided to the trial court in Declarations on November 15, 2010, and February 16, 2011, *Shelby County, Alabama, v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011, *aff'd*, 679 F.3d 848 (D.C, Cir. 2012).

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

8. As initially reported in my Declarations in *Shelby County* v. *Holder*, 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 Continued 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

[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).

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 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.

9. 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.

10. 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.*

11. 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."

12. 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 Continued 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.

13. 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.

14. 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.

15. 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 62 of the 99 settlements I found in non-covered jurisdictions (63%) was on the record considered by Congress in adopting the 2006 Reauthorization Act.[2] *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 321-22, 1484-85, 1773-74, 1779, 1782-84, 1794-95, 1875, 1889, 1986, 1999-2000, 4014-15, 4026-35, 4058-59, 4064, 4067-68, 4072-73, 4080-82,

[2] In my Declarations of November 15, 2010, and February 16, 2011, in *Shelby County, Alabama, v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), I reported that 61 of the 99 settlements in Section 2 cases in non-covered jurisdictions were identified in the record before Congress. In preparing the declaration in the present case, I found an additional settlement in non-covered jurisdictions that was identified on the record before Congress. This means that 63% of the settlements in non-covered jurisdictions (rather than the 62% I reported in prior declarations) were on the record before Congress. This correction also changes the percentage of Section 2 settlements in jurisdictions covered by Section 5 from 91% to 90% of all Section 2 settlements.

4086, 4099, 4118-21, 4127, 4129, 4133-34, 4138, 4313-25, 4348, 4359-60, 4373, 4384, 4391-92, 4403-04, 4425, 4451-56, 4479, 4505-06, 4512-14, 4552, 4564-81, 4583, 4594, 4726, 4731-34, 4747, 5536-5544 (2006). See Attachment B to this declaration.

16. 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 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 over 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.

17. The number of Section 2 settlements in non-covered jurisdictions should be compared with the number of consent decrees resulting from the court decision in *Dillard* v. *Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986). In that case the trial court enjoined further use of at-large elections in nine Alabama counties. The court found, relying in part on my expert testimony, that the *Dillard* plaintiffs had shown a substantial

[3] Calculated from the numbers in *Protecting Minority Voters*, *supra*, at 251 tbl. 5. See Footnote 1, *supra*.

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 Cnty.*, 640 F. Supp. at 1361.

18. 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 Cnty.*, 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.

Analysis of the Results

19. 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.

20. 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 974-975.[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, affected voting practices in 825 counties, parishes, or independent cities covered by Section 5. *Id.*

21. 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 974-975. 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. The contrast becomes much greater if we examine the pattern of unreported cases. I found only 99 Section 2 settlements in non-covered jurisdictions, as compared

[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.

with the 587 in areas covered by Section 5 identified in the National Commission report. *Protecting Minority Voters*, *supra*, tbl. 5. Adding the settlements in covered and non-covered jurisdictions gives us 686 successful outcomes in cases without reported decisions. Of these successful outcomes, *86%* fall within jurisdictions covered by Section 5, as demonstrated in Table 1:

Table 1. Comparison of Section 2 Outcomes in Covered and Non-Covered Jurisdictions			
	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%)

22. Combining all successful outcomes in both reported and unreported cases shows that 81 percent of all successful outcomes in Section 2 cases occurred in covered jurisdictions and only 19% in the rest of the country. See Table 1 above. This seems a more realistic estimate of the likelihood of Section 2 violations in covered jurisdictions – as compared with those *not* covered by the preclearance requirement.

23. If we break down these findings by covered states, it becomes clear that the number of Section 2 cases settled without trial by an election method favored by minority plaintiffs was greatest in the states of the deep South – plus Texas. The data reported in Table 2 below indicate that Texas had by far the greatest number of outcomes that favored minority plaintiffs (206). The only other state that came close was Alabama, with 192 Section 2 settlements.

Table 2: State-by-state Pattern of Section 2 Cases With Outcomes Favorable to Minority Plaintiffs in States Entirely Covered by Section 5		
Covered States	No. Cases Reported	No. Cases Reported & Unreported
Alabama	12	192
Alaska	0	0
Arizona	0	2
Georgia	3	69
Louisiana	10	17
Mississippi	18	67
South Carolina	3	33
Texas	7	206
Virginia	4	15
Total	57	601

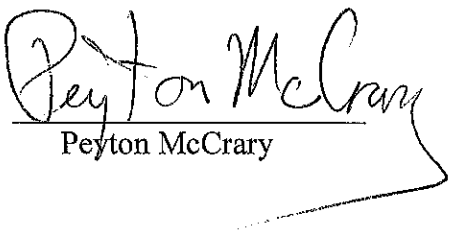
24. When we look at states that include no covered jurisdictions, we find a dramatically different pattern (see Table 3). Only Arkansas – surrounded on three sides by Mississippi, Louisiana, and Texas – has a substantial number of Section 2 settlements (28). Illinois has 11 court-ordered settlements. The remaining non-covered states are all in the single digits.

Table 3. State-by-State Pattern of Section 2 Cases With Outcomes Favorable to Minority Plaintiffs in States Not Covered by Section 5		
Non-Covered States	No. Cases Reported	No. Cases Reported & Unreported
Arkansas	4	28
Colorado	2	3
Connecticut	1	2
Delaware	1	1
Hawaii	1	1
Idaho	0	0
Indiana	1	4
Iowa	0	0
Illinois	9	11
Kansas	0	0
Kentucky	0	0
Maine	0	0
Maryland	2	5
Massachusetts	1	3
Minnesota	0	0
Missouri	1	2
Montana	2	5
Nebraska	1	1
Nevada	0	0
New Jersey	1	2
New Mexico	0	7
North Dakota	0	1
Ohio	2	2
Oklahoma	0	0
Oregon	0	0
Pennsylvania	3	4
Rhode Island	1	2
Tennessee	4	6
Utah	0	1
Vermont	0	0
Washington	0	0
West Virginia	0	0
Wisconsin	1	1
Wyoming	0	0
Total	38	92

25. The contrast appears even starker if restricted to the record before Congress when it adopted the 2006 Reauthorization Act. In the record before Congress there were, as we have seen, only 62 Section 2 cases settled favorably for minority voters in non-covered jurisdictions. See Paragraph 21, *supra*. In contrast, 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 90% of all Section 2 cases settled favorably for minority voters were in covered jurisdictions. The largest number of Section 2 cases settled in a way favorable to minority voters – all of which were on the record before Congress – was in Texas.

26. Whether we restrict our view to the record before Congress or broaden the search to seek *all* court-ordered settlements in Section 2 cases, it is clear that the jurisdictions covered by Section 5 witnessed by far the most Section 2 cases resulting in voting changes favorable to minority plaintiffs (or the United States). The contrast is far greater than revealed by the reported cases examined by the Michigan study, although even the reported cases displayed a greater degree of minority success in covered jurisdictions. By examining the outcomes for both reported and unreported cases, my analysis provides a more comprehensive view of the relationship between Section 2 litigation and the coverage formula that identifies jurisdictions subject to preclearance.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of October, 2012.



Peyton McCrary

Attachment A

CURRICULUM VITAE: PEYTON McCRARY

Historian, U.S. Department of Justice, 1990- (202) 307-6263 (O)
Civil Rights Division, Voting Section
1800 G Street, N.W, Room 7267
Washington, D.C. 20006 peyton.mccrary@usdoj.gov

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.

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

CAREER RECOGNITION:

Maceo Hubbard Award, U.S. Department of Justice, Civil Rights Division, 2011

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 Constitutional Foundations of the 'Preclearance' Process: How Section 5 of the Voting Rights Act Was Enforced, 1965-2005," in Daniel McCool (ed.), *The Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act* (Bloomington, Indiana University Press, 2012), 36-66.

"Race and Municipal Reform in the Progressive Era: The Adoption of At-large Elections in Norfolk, Virginia, 1914-1918," in Orville Vernon Burton, et.al. (eds.), *The Struggle for Equality: Essays on Sectional Conflict, the Civil War, and the Long Reconstruction* (Charlottesville, University Press of Virginia, 2011), 238-53.

"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.

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"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) June 25, 2012, and July 20, 2012, *State of Florida v. United States*, C.A. No. 1:11-cv-01428, D.D.C. [Defense of the constitutionality of Section 5 of the Voting Rights Act]

(United States) August 1, 2011, *Laroque v. Holder*, C.A. No. 1:10-0561, D.D.C. [Defense of the constitutionality of Section 5 of the Voting Rights Act]

(United States) November 15, 2010, and February 16, 2011, *Shelby County, Alabama, v. Holder*, C.A. No. 1:10-cv-00651, D.D.C. [Defense of the constitutionality of Section 5 of the Voting Rights Act]

(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:

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

"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.

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 2 settlements in non-covered jurisdictions.

The ***61*** settlements 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,* **82-86, 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;** *Evidence of Continuing Need,* **4034**]

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**]

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**]

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**]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendant. ERIC KENNIE, *et al.*, Defendant-Intervenors, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, TEXAS LEAGUE OF YOUNG VOTERS EDUCATION FUND, *et al.*, Defendant-Intervenors. TEXAS LEGISLATIVE BLACK CAUCUS, *et al.*, Defendant-Intervenors, VICTORIA RODRIGUEZ, *et al.*, Defendant-Intervenors.	CASE NO. 1:12-CV-00128 (RMC-DST-RLW) Three-Judge Court

THE ATTORNEY GENERAL'S STATEMENT OF GENUINE ISSUES

Pursuant to Local Civil Rule 7(h)(1), Attorney General Eric J. Holder, Jr., submits the following statement of genuine issues in response to the statement of material facts filed by the State of Texas in support of the State's motion for summary judgment.

1. The scope 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 (2006), is an issue of law that is not properly included in a statement of undisputed material facts. To the extent that the Court deems this issue to be factual in nature, the Attorney General disputes that the 2006 Act reauthorized the Voting Rights Act in its entirety. Most provisions of the Voting Rights Act do not expire. See, *e.g.*, 42 U.S.C. 1973.
2. The scope of facts material to Texas's motion for summary judgment and the admissibility of the evidence supporting those facts are issues of law that are not properly included in a statement of undisputed material facts. To the extent that the Court deems these issues to be factual in nature, the Attorney General disputes that the full scope of facts material to the resolution of the State's motion are contained within the text of the Voting Rights Act of 1965 (as amended) and the congressional record. The State relies on numerous additional factual claims, including allegations concerning the administrative preclearance process, expert testimony in this case, and the frequency of intervention by civil rights groups in Section 5 declaratory judgment actions. Pl. Mem. 26-37. In addition, numerous facts relevant to the resolution of the instant motion are not included in the State's

statement of material facts. See A.G. Statement of Material Facts.

Respectfully submitted,

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

THOMAS E. PEREZ
Assistant Attorney General

/s/ Spencer R. Fisher
T. CHRISTIAN HERREN, JR.
JESSICA DUNSAY SILVER
MEREDITH BELL-PLATTS
ERIN H. FLYNN
ELIZABETH S. WESTFALL
BRUCE I. GEAR
JENNIFER L. MARANZANO
SPENCER FISHER
RISA BERKOWER
DANIEL J. FREEMAN
Attorneys
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Dated: October 22, 2012