IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff v. UNITED STATES OF AMERICA and ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendants	NO. 1:11-CV-01428 (CKK-MG-ESH) THREE JUDGE COURT

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

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GLOSSARY

DCL	Defendants' Conclusions of Law
DFF	Defendants' Findings of Fact
DRCL	Defendants' Reply Conclusions of Law
LULAC	League of United Latin American Citizens
MIR	Request for More Information
Pl. Br.	Florida's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment
V	Volume of the Appendix
VRA	Voting Rights Act of 1965

Florida challenges the constitutionality of Sections 4(b) and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, as amended. Sections 4(b) and 5 are constitutional. Thus, this Court should grant the Attorney General's motion and deny Florida's motion.

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). Almost immediately, jurisdictions throughout the South began systematically disenfranchising black citizens through the use of various discriminatory and dilutive devices. *Id.* at 310-12; *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). Given their success, "[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*, 129 S. Ct. 2504, 2508 (2009) (*Northwest Austin II*). Federal law enacted in 1957, 1960, and 1964 did "little to cure the problem." *South Carolina*, 383 U.S. at 313. Voting rights litigation was "unusually onerous" and "exceedingly slow." *Id.* at 324. Even where it was successful, officials "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," and "defied and evaded court orders." *Id.* at 313-14; *Shelby Cnty.*, 679 F.3d at 854.

In 1965, Congress 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. The 1965 Act combined permanent enforcement measures applicable nationwide with more stringent, temporary measures targeted at areas in which Congress found pervasive voting discrimination. *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 administrative preclearance from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 1965 Act, §5, 79 Stat. 439. Preclearance could be granted only if the jurisdiction showed 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." *Id.*

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. 1965 Act, §4(b), 79 Stat. 438.[1] To respond to over- and under-inclusiveness in the formula, Congress included a "bail-in" provision, under which any jurisdiction found to have violated the Fifteenth Amendment could be

[1] "Test 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." *Id.* §4(c), 79 Stat. 438-39.

ordered to obtain preclearance, and a "bailout" provision, under which a jurisdiction could terminate coverage by showing it had not used a test or device for a prohibited purpose. *Shelby Cnty.*, 679 F.3d at 855.

The Supreme Court upheld Sections 4(b) and 5, finding the provisions appropriate under Section 2 of the Fifteenth Amendment. *South Carolina*, 383 U.S. at 323-37.

2. Congress reauthorized Sections 4(b) and 5 in 1970, 1975, and 1982. The 1970 Reauthorization, Pub. L. No. 91-285, extended coverage to areas that maintained a prohibited test or device on November 1, 1968, and had voter registration or turnout of less than 50% of eligible voters in the 1968 Presidential election. Tit. I, 84 Stat. 315. The 1975 Reauthorization, Pub. L. No. 94-73, extended coverage to areas that maintained a prohibited test or device on November 1, 1972, and had voter registration or turnout of less than 50% in the 1972 Presidential election. Tit. II, 89 Stat. 401. It also expanded the definition of "test or device" to include the provision of "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" only in English in jurisdictions in which more than 5% of voting age citizens were members of a single language minority. Tit. II, 89 Stat. 401-02. The 1982 Reauthorization, Pub. L. No. 97-205, changed the bailout criteria to allow jurisdictions to bail out by complying with nondiscrimination measures for 10 years and substantially expanded the availability of bailout to include "any political subdivision of a covered State" even if that subdivision had not been separately covered. §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.

Georgia v. *United States*, 411 U.S. 526, 535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-82 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-85 (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, Pub. L. No. 109-246, §5, 120 Stat. 577-81. The 2006 Reauthorization was upheld in *Northwest Austin Municipal Utility District Number One* v. *Mukasey*, 573 F. Supp. 2d 221, 235-83 (D.D.C. 2008) (three-judge court), but that decision was vacated in *Northwest Austin II*, which resolved the case on statutory grounds, 129 S. Ct. at 2508, 2513-17. On May 18, 2012, the D.C. Circuit upheld the 2006 Reauthorization as a congruent and proportional remedy to combat racial discrimination in voting in the covered jurisdictions. *Shelby Cnty.*, 679 F.3d at 872-73, 883.

Congress also amended Section 5 in 2006, in response to the Supreme Court's decisions in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*), and *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003). Congress found the decisions "misconstrued Congress' original intent in enacting the [VRA]," "narrowed [Section 5's] protections," and "significantly weakened" the Act. 2006 Reauthorization, §2(b)(6), 120 Stat. 578.

a. In *Bossier II*, the Court interpreted the "purpose" language of Section 5 to reach only retrogressive purpose. 528 U.S. at 328-29. In response to *Bossier II*, Congress added Section 5(c), to make it clear that preclearance should be denied if the proposed voting change was motivated by *any* discriminatory purpose:

> (c) The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose.

2006 Reauthorization, §5(c), 120 Stat. 581. The House Judiciary Committee explained that Congress had always sought, through Section 5, "to prevent covered jurisdictions from enacting and enforcing voting changes made with a clear racial animus, regardless of the measurable impact of such discriminatory changes." H.R. Rep. No. 478, 109th Cong., 2d Sess. 66 (2006) (2006 House Report). "Voting changes that 'purposefully' keep minority groups 'in their place' have no role in our electoral process and are precisely the types of changes Section 5 is intended to bar. To allow otherwise would be contrary to [14th and 15th Amendment] protections * * * and the VRA." *Id.* at 68.

b. The Court's decision in *Ashcroft* concerned Section 5's effects prong. Prior to *Ashcroft*, the Attorney General and lower courts had measured retrogression in the redistricting context by the extent to which minority voters had the ability to elect candidates of their choice. *Ashcroft* held that assessment of retrogression depends on an examination of circumstances, such as the ability of minority voters to elect their candidate of choice, their opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. See 539 U.S. at 479. While the Court recognized that a minority group's ability to elect a candidate of its choice is an "important" factor in determining retrogression, the Court stated that factor "cannot be dispositive or exclusive." *Id.* at 480. Thus, *Ashcroft* held that when redistricting, a State could create either districts in which a minority group constitutes a sufficient majority that it can elect its candidate of choice, or a larger number of districts in which minority voters have a substantial, but smaller population, and thus have only the possibility of electing candidates of their choice or influencing an election's outcome. *Id.* at 480-82.

The House Judiciary Committee found that *Ashcroft* "turn[ed] Section 5 on its head" by directing courts to "defer to the political decisions of States rather than the genuine choice of minority voters regarding who is or is not their candidate of choice." 2006 House Report 69. The Court's "'new' analysis," the Committee stated, "would allow the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give 'influence' to the minority community while removing that community's ability to elect candidates. Permitting these trade-offs is inconsistent with the original and current purpose of Section 5." *Id.* The Committee explained that the pre-*Ashcroft* retrogression standard was responsible for the electoral gains made by minority groups and that *Ashcroft* put those gains at risk. *Id.* at 70. Congress added subsections (b) and (d) to make clear that "ability to elect" is the standard for assessing retrogression in districting and other potentially dilutive plans:

> (b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.
>
> * * * * *
>
> (d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

42 U.S.C. 1973c(b) & (d). The constitutionality of each of the 2006 Amendments was upheld in *LaRoque* v. *Holder*, 831 F. Supp. 2d 183 (D.D.C. 2011), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012).

ARGUMENT

In *Northwest Austin II*, 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." 129 S. Ct. at 2513 (citation omitted); see *Shelby Cnty.*, 679 F.3d at 861-62; *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-53, 657 (1966) (recognizing Congress's discretion in deciding how to exercise its Fourteenth Amendment enforcement authority).

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 areas 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 preclearance, "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. That judgment falls within Congress's authority to enforce the Constitution.

I
SHELBY COUNTY UPHELD THE 2006 REAUTHORIZATION OF SECTIONS 4(b) AND 5 AS A VALID EXERCISE OF CONGRESS'S ENFORCEMENT AUTHORITY UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS

Florida argues that Sections 4(b) and 5 are not an appropriate means of enforcing the voting guarantees of the Fourteenth and Fifteenth Amendments. Yet Florida simply rehashes the facial challenge to Sections 4(b) and 5 rejected in *Shelby County*, which held

that Section 5's current burdens are justified by current needs and that its disparate geographic coverage sufficiently relates to the problem Congress targeted. 679 F.3d at 858-83.[2] Florida's facial challenge to Sections 4(b) and (5) is foreclosed by *Shelby County*, a decision that is binding on this Court.

A. *Shelby County* Held That Section 5's Burdens Are Justified By Current Needs

Florida argues that for Congress to have reauthorized Section 5 in 2006, the record needed to show "unremitting and ingenious defiance" of the Fifteenth Amendment. *Shelby County* rejected this argument, holding that while *South Carolina* described the conditions that made prior federal law ineffective, the constitutionality of Section 5 depends not on "unremitting and ingenious defiance" but rather whether racial

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[2] In *Northwest Austin II*, the 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. 129 S. Ct. at 2512-13. In stating that the provision's "current burdens * * * must be justified by current needs," however, the 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 2512.

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 in *Shelby Cnty.* (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 II* as sending a "powerful signal that congruence and proportionality is the appropriate standard of review." 679 F.3d at 859. We thus 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*, 446 U.S. at 175-77; *Morgan*, 384 U.S. at 651-53; *South Carolina*, 383 U.S. at 324; *Northwest Austin*, 573 F. Supp. 2d at 241-46 (explaining why the rationality standard governs in this context).

discrimination in voting is so widespread and persistent that case-by-case litigation is inadequate. *Shelby Cnty.*, 679 F.3d at 863-64 (citation omitted). Indeed, Section 5 "makes such [previous] tactics virtually impossible." *Id.* at 863. Accordingly, in 2006, Congress correctly considered the degree to which voting discrimination persists in covered jurisdictions and thus makes case-by-case litigation an ineffective remedy, not whether those jurisdictions have continued to contrive new means to disenfranchise voters. *Id.* at 864.

The State next argues that only evidence of direct and intentional interference with the right to register and vote, and not evidence of intentional vote dilution, can justify the continued need for Section 5. *Shelby County* has already rejected that argument. 679 F.3d at 864-65. As the court explained, the Fourteenth Amendment prohibits intentional vote dilution; because Congress invoked both the Fourteenth and Fifteenth Amendments when reauthorizing Section 5 in 2006, it properly considered such evidence when assessing Section 5's continued validity. *Id.* at 864. The court further explained that the consideration of vote-dilution evidence is "especially important" because "so-called 'second generation' tactics like intentional vote dilution are in fact decade-old forms of gamesmanship" that prevent minorities' political participation. *Id.* at 865.

Finally, the State argues despite *Shelby County* that the legislative record in 2006 did not show widespread intentional voting discrimination. But *Shelby County* explained how the evidence before Congress indicated ongoing constitutional violations and, thus, the continued need for preclearance. 679 F.3d at 865-72. Indeed, the court examined ongoing evidence of racial discrimination in voting in *all* of the covered jurisdictions,

including those covered in 1975, and cited "[j]ust a few" of the "numerous" examples of "flagrant racial discrimination" and "overt hostility to black voting power by those who control the electoral process." *Id*. at 865-66. It also found further categories of evidence that supported Congress's conclusion that intentional racial discrimination in voting remains "serious and widespread" and that Section 5 preclearance is still needed:

- over 700 objections by the Attorney General between 1982 and mid-2006, including at least 423 purpose-based objections between 1980 and 2004;
- a consistent number of objections both pre- and post-1982 Reauthorization, including 626 objections from 1982 to 2004 and 490 between 1965 and 1982;
- over 800 proposed voting changes withdrawn or modified in response to MIRs;
- 653 successful Section 2 cases that provided relief from discriminatory practices;
- over 622 separate dispatches of multiple observers (with 300 to 600 observers dispatched annually between 1984 and 2000) to monitor elections;
- at least 105 successful Section 5 enforcement actions against defiant jurisdictions;
- a roughly constant number of unsuccessful judicial preclearance actions since the 1965 Act, including 25 denials between 1982 and 2004.

Id. at 866-71. *Shelby County* also 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 'might be considerably worse.'" *Id.* at 871 (citation omitted). Thus, the court held Section 5 is a congruent and proportional response to race discrimination in voting that persists in covered areas. *Id.* at 873. This Court is bound by *Shelby County*, and Florida's arguments thus fail.

B. *Shelby County* Held That Section 4(b) Targets Jurisdictions In Which Contemporary Racial Discrimination In Voting Is Concentrated

Florida next rehashes the argument that Section 4(b) is invalid because its "decades-old" formula does not capture the current jurisdictions likely to engage in intentional discrimination in voting. *Shelby County* rejected that argument, emphasizing that Section 5's "disparate geographic coverage * * * depends not only on section 4(b)'s formula, but on the statute as a whole." 679 F.3d at 873. The court in *Shelby County* explained that a literal reading of Section 4(b) misunderstands not only Congress's use of the triggers to capture specific areas, but also the way in which the Act's three coverage-related provisions – Sections 4(b), 3(c), and 4(a) – together isolate those jurisdictions in which intentional discrimination in voting persists. *Id.* at 873-83.

As *Shelby County* explained, the "reverse-engineered" Section 4(b) covers those jurisdictions in which Congress found the worst *historical* and *current* records of discrimination. 679 F.3d at 855, 873-79. Because the formula is not perfect, however, Congress included in the 1965 Act, and has retained in each reauthorization, bail-in and bailout mechanisms that allow courts and jurisdictions to fine-tune the scope of Section 5's coverage. *Id.* at 880-82. 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 Amendment's voting guarantees. *Id.* at 874. Section 4(a), the bailout provision, accounts for overbreadth in the formula; it also incentivizes jurisdictions to comply with laws protecting minority voters and thereby work toward bailout. *Id.* at 881-82. Accordingly,

Shelby County held that Section 4(b) sufficiently relates to current racial discrimination in voting in the covered areas and thus is an appropriate exercise of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments. *Id.* at 883. That decision is binding on this Court and Florida's arguments thus fail.

II
THE PROTECTION OF LANGUAGE MINORITIES UNDER SECTION 5 WAS A VALID EXERCISE OF CONGRESS'S FOURTEENTH AND FIFTEENTH AMENDMENT ENFORCEMENT AUTHORITY AND REMAINS SO TODAY

Its primary challenge foreclosed by *Shelby County*, Florida next argues that insufficient evidence of voting discrimination against "language minorities" existed in both 1975 and 2006 and therefore it is unconstitutional to subject jurisdictions covered as a result of the 1975 Reauthorization to Section 5 preclearance on the basis of the 1975 coverage formula.[3] To the contrary, the legislative record before Congress in 1975 easily supported its conclusion that state-sponsored racial discrimination in voting was a severe problem in the newly covered jurisdictions. These jurisdictions not only employed the

[3] "Language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. 1975 Reauthorization, §207, 89 Stat. 402. Because of their recognized race or color characteristics, the Supreme Court has described these minority groups as "racial." See, *e.g.*, *LULAC* v. *Perry*, 548 U.S. 399, 439 (2006); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712 n.2 (2007); see also *Northwest Austin*, 573 F. Supp. 2d at 243-45; *Extension of the Voting Rights Act, Hearings Before Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 94th Cong., 1st Sess. 88-92 (1975) (1975 House Hearings). For the Census Bureau's determinations on "persons of Spanish heritage" based on usage in the 1970s, see H.R. Rep. No. 196, 94th Cong., 1st Sess. 16 n.16 (1975) (1975 House Report), and *Extension of the Voting Rights Act of 1965, Hearings Before Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 86 (1975) (1975 Senate Hearings). The determinations are not judicially reviewable. 42 U.S.C. 1973b(b), (f)(3); see *Briscoe* v. *Bell*, 432 U.S. 404, 409-15 (1977).

same racially discriminatory barriers as covered States in the South but also maintained additional barriers to the franchise, such as English-only ballots, that, like literacy tests in the South, took advantage of unequal, racially disparate educational outcomes. Responding to this evidence of intentional racial discrimination, Congress extended Section 5 preclearance to these jurisdictions. In 2006, the record before Congress showed continued voting discrimination against covered minorities in jurisdictions first covered in 1975, and again Congress reasonably could conclude that "the current burdens imposed by [S]ection 5 [are] 'justified by current needs.'" *Shelby Cnty.*, 679 F.3d at 862 (quoting *Northwest Austin II*, 129 S. Ct. at 2512); see *id.* at 865.

A. Pervasive Voting Discrimination Against "Language Minorities" Justified Congress's 1975 Application Of Section 5 To Newly Covered Jurisdictions

When Congress considered reauthorizing the Act's temporary provisions in 1975, it heard evidence of substantial discrimination against minority voters not only in jurisdictions covered in 1965 and 1970 but also in non-covered jurisdictions. Extensive House and Senate hearings over whether to expand Section 5 preclearance to these non-covered jurisdictions documented "a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English." 1975 House Report 16.[4]

The record showed that these minority citizens, many of whom resided in non-covered jurisdictions with long histories of official discrimination, encountered both

[4] The House and Senate Reports are largely duplicative. See S. Rep. No. 295, 94th Cong., 1st Sess. 24 (1975). We therefore provide citations only to the House Report.

racially discriminatory tactics, often identical to those used against blacks in the South, and English-only elections despite well-documented language and literacy barriers among minority citizens. 1975 House Report 16-22; see 1975 House Hearings 27-29; see *LULAC*, 548 U.S. at 439-40 (Texas's history of discrimination in voting "stretch[ed] back to Reconstruction"); *White* v. *Regester*, 412 U.S. 755, 766-69 (1973). Congress concluded on the basis of that record that "in order to enforce the guarantees of the fourteenth and fifteenth amendments * * * it is necessary to eliminate such [voting] discrimination by prohibiting English-only elections, and by prescribing other remedial devices." 1975 Reauthorization, §203(f)(1), 89 Stat. 401.

1. Official disregard for language- and literacy-related barriers in the targeted areas was significant to Congress's decision to expand Section 5's coverage, especially in light of high illiteracy rates among the covered groups and reports that "minority students in the Southwest – Mexican Americans, blacks, American Indians – do not obtain the benefits of public education at a rate equal to that of their Anglo classmates." 1975 House Report 20-21 (citing two reports by the U.S. Commission on Civil Rights and collecting federal cases).[5] Witnesses testified that "an undue focus on language * * * does not begin to [understand] the problem that we are talking about * * * [L]anguage in

[5] See also 1975 House Hearings 862 ("Texas and certain other Southwestern states print all of their registration and electoral materials in the English language only, in spite of the fact that many of the approximately six million American citizens of Mexican ancestry living in the Southwest are functionally illiterate in English."); *id.* at 926-927 (noting education and voting discrimination in California); 1975 Senate Hearings 529 (explaining illiteracy among Alaskan Natives prevented their political participation).

the Southwest is evidence of the problem of discrimination in the way the literacy test was used as evidence of discrimination against blacks in the South." 1975 Senate Hearings 762, 764-66, 913-21. The Committees rationally determined that just as literacy tests were used as a "discriminatory weapon" against minority voters based in part on racially disparate educational opportunities, *Oregon* v. *Mitchell*, 400 U.S. 112, 132-134 (1970) (Opinion of Black, J.); *id.* at 147 (Douglas, J., dissenting), so too were English-only elections used to deny minorities the right to vote and to depress voter registration and turnout. 1975 House Report 22-29; see *Arroyo* v. *Tucker*, 372 F. Supp. 764, 767 (E.D. Pa. 1974); *Torres* v. *Sachs*, 381 F. Supp. 309, 312 (S.D.N.Y. 1974).[6]

The Committees heard that the covered minorities faced specific barriers to voter registration and political participation, many of which were exacerbated by their language and literacy issues, including "inadequate numbers of minority registration personnel, uncooperative registrars, [and the] disproportionate effect of purging laws on non-English-speaking citizens because of language barriers." 1975 House Report 16; see 1975 House Hearings 487 (Hispanic turnout in the Southwest consistently 10 or 20 percent below white turnout); *id.* at 598-601 (absence of bilingual materials, Spanish-

[6] State-sponsored discrimination against minority voters was not fleeting or limited to education; the U.S. Commission on Civil Rights reported about pervasive discrimination against the covered groups. 1975 House Report 21-22 & n.28. The Justice Department also testified in 1975 that it had sought to enjoin officials from discriminating against the covered groups and had "participated in 97 civil suits and initiated 14 criminal actions involving the rights of Spanish-speaking citizens, Asian Americans, and American Indians." *Id.*; 1975 House Hearings 277-79. Based on ample record evidence of official discrimination against such minorities, Congress reasonably could conclude that English-only elections had been used to perpetuate discrimination. 1975 House Report 22-24.

speaking officials, and accessible polling places caused low Puerto Rican turnout in New York). The Committees further found that even after registering to vote, "[these groups] have no guarantee that they may easily cast a ballot." 1975 House Report 17. Because minorities in these jurisdictions are "seldom in positions of influence," the Committees explained, "[m]any obstacles placed by [local] officials frighten, discourage, frustrate, or otherwise inhibit [them] from voting." *Id.*; 1975 Senate Hearings 842, 952-53 (despite large Hispanic populations in Texas and California, and a large Puerto Rican population in New York, representatives from these groups were mostly absent from elected office). "Outright exclusion and intimidation at the polls," the Committees explained, "are only two of the problems [these minorities] face." 1975 House Report 17.

The Committees also heard testimony about discriminatory methods that further hindered minorities' access to the polls, including denial of the ballot by failing to locate voters' names; locating polls at inconvenient or hostile sites; inadequate facilities; the lack of minority poll workers; no bilingual materials; unavailable or inadequate voting assistance; and problems with absentee ballots. 1975 House Report 17-18; 1975 House Hearings 156; *id.* at 806-807 (similar problems in Texas); *id*. at 837 (lack of standard polling arrangements and bilingual officials in areas of Arizona); 1975 Senate Hearings 938 (Letter from Governor of South Dakota supporting coverage of two counties within Indian reservations to help register residents and supervise elections). The Committees also heard about physical intimidation in Texas. 1975 House Report 18; 1975 House Hearings 522 ("[S]heriffs patrol predominantly Mexican American precincts" and "walk around * * * brandishing guns and billy clubs."); 1975 Senate Hearings 752. These

voting barriers in newly covered jurisdictions overlapped almost completely with what the Civil Rights Commission described as "methods used to deny minorities their voting rights" in previously covered States. 1975 House Hearings 949-54.

2. Just as with the 1965 Act, Congress in 1975 was not concerned solely with the criteria listed in Section 4(b), *i.e.*, English-only voting materials and low political participation among the covered groups. Rather, as in 1965, it was responding to discriminatory electoral systems and state-sponsored discrimination that disenfranchised a broad range of minority voters, leaving electoral control in the hands of white voters. The Committees recognized that in Texas, for example, the poll tax and "the most restrictive voter registration procedures in the nation," "operated to effectively deny Mexican Americans access to the political process * * * even longer than the Blacks were formally denied access by the white primary." 1975 House Report 17 (quoting *Graves* v. *Barnes*, 343 F. Supp. 704, 731 (W.D. Tex. 1972), aff'd *sub nom.*, *White* v. *Regester*, 412 U.S. 755 (1973), and citing *Beare* v. *Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971), aff'd, 498 F.2d 244 (5th Cir. 1974), in which such registration procedures were struck down). The Committees also found such minorities "historically suffered from, and continue[d] to suffer from the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others." *Id.* at 22 (quoting *Graves*, 343 F. Supp. at 728). "Indeed, the only reason Texas was not [previously] covered [despite consistently low voter turnout] was that it employed restrictive devices other than a formal literacy [test]." *Id.* at 17. Despite litigation, discrimination in Texas persisted. See 1975 Senate Hearings 234-36, 464-65.

Florida's assertion that the official discrimination minorities faced in Texas did "not even remotely compare to" that African Americans faced across the South is therefore incorrect. Pl. Br. 32. The Committees found "a long history of discrimination against both [Mexican Americans and blacks] in ways similar to the myriad forms of discrimination practiced against blacks in the South." 1975 House Report 16-17; cf. *LULAC*, 548 U.S. at 439-40. Witnesses testified that "patterns of voting rights violations against Mexican Americans and blacks in Texas are identical to those occurring" in the South. 1975 House Hearings 399; *id.* at 360-65. Indeed, by applying Section 5 to jurisdictions that provided English-only voting materials despite a significant number of minorities, Congress also protected black voters who had been subject to these jurisdictions' history of severe voting discrimination. 1975 House Report 27 n.43 (noting each jurisdiction would be required to obtain preclearance on the basis of race, color, and membership in a language minority); 1975 Senate Hearings 247 ("The bill would guarantee to Mexican-Americans and Blacks residing in the newly covered jurisdictions the same special attention to their voting rights now afforded Blacks in the South.").

3. Congress found that even where minorities were able to overcome overt discrimination to register and vote, they still lacked political strength as a result of intentional vote dilution. 1975 House Report 18-19. Congress noted that dilutive voting changes in Texas were "widespread in the wake of recent emergence of minority attempts to exercise the right to vote," that counties effectively "cancelled the voting strength of Mexican Americans and blacks" through the use of multi-member districts, and that cities and school districts frequently used at-large systems to discriminate. *Id.* at 19-20; see

1975 House Hearings 23 (voting discrimination "become[s] readily apparent precisely when the number of minority voters has increased enough to decide elections or when minority candidates mount a campaign to win significant political influence in a jurisdiction whose population is predominantly minority"). The Committees heard about annexations made to intentionally dilute minority voting strength, the use of dilutive tactics against Navajos in Arizona and Puerto Ricans in New York, and jurisdictions in Texas that changed their election systems after minority candidates almost won. 1975 House Report 18-20; 1975 Senate Hearings 940.

4. Thus, apart from the English-only elections that Congress rationally perceived newly covered jurisdictions employed as a discriminatory device against minority voters, the evidence of discrimination in 1975 was remarkably similar to that before Congress in 1965. Compare, *e.g.*, 1975 House Hearings 365-69, 396-98, 923-26, with *Shelby Cnty.*, 679 F.3d at 853. As a response, Congress amended Section 4 to bar States and political subdivisions from denying or abridging the right to vote on the basis of membership in a language minority and included as a "test or device" the provision of English-only voting materials in jurisdictions in which a single language minority comprised more than five percent of voting age citizens. 1975 Reauthorization, §203(f)(2),(3), 89 Stat. 401-02. For Section 5 coverage to apply, a jurisdiction would need not only to have used such a test or device but also to have had less than 50% registration and turnout in the 1972 election. 1975 House Report 24.

Like the original trigger, the amended formula was developed to describe those jurisdictions that Congress in 1975 found had engaged in severe voting discrimination

and erected significant barriers to minority political participation. 1975 House Report 23-24, 27; 1975 House Hearings 164 ("pocket areas" of Spanish speakers in New York, Florida, and the Southwest); *Briscoe*, 432 U.S. at 406. Also like the original formula, the 1975 trigger was not perfect; Congress thus noted the availability of bailout in newly covered jurisdictions that had not used tests or devices to discriminate. 1975 House Report 27. "[T]he impact of the proposed amendments," however, "would be felt in those jurisdictions in which there [was] evidence of the necessity for coverage." 1975 Senate Hearings 1048; cf. *Shelby Cnty.*, 679 F.3d at 880-81.

In sum, the 1975 Reauthorization applied Section 5 preclearance and examiner and observer coverage to the newly covered jurisdictions and mandated bilingual elections. 1975 House Report 3. The imposition of preclearance was justified by extensive evidence of discrimination other than English-only elections. *Id.* at 26-27. And requiring bilingual elections enabled minority citizens with limited English proficiency to cast an informed ballot and responded to "the kind of voting discrimination against language minorities disclosed by the record." *Id.* at 24-27. Bilingual elections were a natural extension of the nationwide ban on literacy tests upheld in *Oregon* v. *Mitchell*, 400 U.S 112 (1970), and the protections afforded Puerto Rican voters under Section 4(e) of the Act, which was upheld in *Morgan* as an appropriate exercise of Congress's Fourteenth Amendment enforcement authority. 1975 House Report at 27-29; *Morgan*, 384 U.S. at 652-56; 1975 Senate Hearings 790-93. The 1975 Reauthorization thus wedded the

protections upheld in *South Carolina* and *Morgan* to appropriately respond to the types of discrimination minority voters faced in the newly covered areas and therefore was valid.[7]

B. Contemporary Voting Discrimination Against Protected Minorities In Areas Covered In 1975 Justifies Section 5's Current Burdens In Those Jurisdictions

In 2006, Congress found that minorities needed Section 5's continued protection because racially polarized voting left them "politically vulnerable" and ongoing discriminatory barriers prevented them from fully participating in the political process. 2006 Reauthorization, §2(b), 120 Stat. 577-78. Congress also found 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).

As *Shelby County* held, the 2006 record supports Congress's finding of widespread, contemporary voting discrimination in the covered jurisdictions. 679 F.3d at 865-73. That record also documents ongoing and pervasive voting discrimination against protected minorities in areas first covered in 1975. Discrimination is apparent from the same categories of evidence *Shelby County* found indicative of a pattern of constitutional violations when it upheld Section 5 against a facial challenge: Congress's detailed review of Section 5 objections, enforcement actions, and judicial preclearance actions; observer coverage; Section 2 litigation; racially polarized voting and vote dilution;

[7] Florida cites the testimony of Assistant Attorney General J. Stanley Pottinger. See Pl. Br. 33. Although the Department of Justice did not take a formal position on whether Congress should expand Section 5, it stated that such a decision would be constitutional. See 1975 Senate Hearings 543-45, 1042-50; 1975 House Hearings 288-92.

anecdotal evidence of discrimination; and lingering disparities in registration, turnout, and the number of minorities in elected office. *Id.* at 863-73.

1. Florida's challenge can best be understood as attempting to carve out jurisdictions first covered in 1975 from Section 5 preclearance. Its argument fails, however, because current needs justify Section 5's current burdens in those jurisdictions. As an initial matter, the evidence considered in *Shelby County* encompasses discrimination encountered by minority voters in jurisdictions covered in 1975 as well as discrimination faced by language minority groups in previously covered areas. *Shelby Cnty.*, 679 F.3d at 865-73; pp. 9-10, *supra*. See 1 *Voting Rights Act: Evidence of Continued Need, Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 2d Sess. 327-28 (2006) (*Continued Need*) (describing intimidation of Latinos in Georgia and North Carolina); *The Continuing Need for Section 5 Pre-Clearance, Hearing Before Senate Judiciary Comm.*, 109th Cong., 2d Sess. 66-67 (2006) (*Pre-Clearance*) (describing intimidation of Asian Americans in Georgia).

The House Judiciary Committee specifically found that "language minorities" had made substantial progress since 1982 with respect to registration, turnout, and presence in elective office. 2006 House Report 6, 18-20. Yet the Committee concluded that Section 5 preclearance remained necessary to protect these voters, given lingering disparities in voter registration and turnout, continued discrimination and vote dilution, and non-compliance with bilingual election requirements. *Id.* at 6, 21, 25, 45-46, 52; *id.* at 29-31 (disparities between minorities and whites in voter turnout and registration in Florida and Texas); *id.* at 33-34 (nationwide disparities in the number of minority officials elected to

office relative to minority groups' share of the population); see also 1 *Continued Need* 156-169. In Texas, for example, Congress found a 20 percent gap between white and Latino citizens in voter registration in 2004. 2006 House Report 29. The situation in Florida is similar: in 2004, only 38.2 percent of Latino citizens in Florida were registered to vote, compared to 64.8 percent of white citizens; and among registered voters, only 34 percent of Latinos cast a vote in the 2004 election, compared to 58.6 percent of whites. *Id.* at 30; see also *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424, 468, 492 (D.D.C. 2011).

2. The Committee also noted that, since 1982, the Department had objected to over 700 discriminatory voting changes submitted for preclearance. 2006 House Report 36. Such objections, however, do not begin to capture Section 5's "strong deterrent effect," which the Committee explained to be "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes." *Id.* at 24. While the Committee did not isolate objections by type of minority voter, it did find that most objections occurred in areas "heavily populated by minority voters." *Id.* at 37; see *id.* at 73. The 124 objections interposed between 1982 and 2004 in jurisdictions first covered in 1975 support the conclusion that discrimination in those jurisdictions has persisted and evolved in order to keep minorities from fully participating in the political process. 2006 House Report 73; see also 1 *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 440-529, 1622-66 (2005) (*Scope*) (copy

of objection letters for Arizona, Alaska, Florida, and New York); 2 *Scope* 2098-2530, 3308-22 (copy of objection letters for South Dakota, Texas, and California).[8]

These objections have prevented discriminatory changes affecting voting at all levels of government and touching every aspect of voter's participation in the democratic process. Many of the objections protected the ability of covered minorities to register to vote and cast a ballot. See, *e.g.*, 1 *Scope* 462-64, 468-74 (in Arizona, the elimination of polling places, use of rotating polling sites, voter cancellation procedures, and lack of Navajo language assistance discriminated against Native Americans); *id.* at 518-22 (in Florida, proposed administration of absentee ballots discriminated against minorities based on its heavy emphasis on literacy skills, ability to provide a social security number, and witness verification); *id.* at 1647-54 (in New York, objecting to two voting changes as discriminatory against Chinese-language voters).

The objections also prevented the erosion of minority voters' gains by protecting against discriminatory redistricting plans and other retrogressive voting changes. See,

[8] Congress received reports commissioned by the Leadership Conference on Civil Rights about voting rights compliance in States fully or partially covered under the Act. See 1 *Continued Need* 1308-62 (Voting Rights in Alaska, 1982-2006); *id.* at 1363-1453 (Voting Rights in Arizona 1982-2006); 2 *Continued Need* 1456-98 (Voting Rights in Florida 1982-2006); *id.* at 1836-1927 (Voting Rights in New York 1982-2006); *id.* at 1986-2029 (Voting Rights in South Dakota, 1982-2006); *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry*, *Hearing Before Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 103-19 (2006) (*Legislative Options*) (Voting Rights in California, 1982-2006); *id.* Attach. to Statement of Nina Perales (Voting Rights in Texas, 1982-2006), available at http://judiciary.senate.gov/pdf/7-13-06ninaperales.pdf (last visited June 15, 2012).

e.g., 1 *Scope* 440-45 (redistricting in Alaska would have diminished Alaskan Natives' ability to elect candidates of their choice); *id.* at 460-61, 465-67, 475-89, 496-502 (in Arizona, multiple objections to retrogressive changes, fragmenting of Native Americans, including Navajo and Hopi voters, and Hispanic voters, and statewide redistricting); *id.* at 514-17, 524-29 (in Florida, objecting to 1992 and 2002 statewide redistricting as discriminatory against covered minorities); *id.* at 1632-46, 1655-66 (in New York, objecting to multiple redistricting plans and the system for electing judges as discriminatory toward blacks and Hispanics); 2 *Scope* 2100-01 (in South Dakota, objecting to redistricting as discriminatory toward Native Americans); *id.* at 2102-04 (in South Dakota, objecting to voting change that nullified a federal court decision by "return[ing] [covered] counties to a position of dependence on [neighboring counties] for governmental services, while being without electoral participation in either of those counties"); *id.* at 3306-22 (in California, objecting to redistricting, annexations, and changes in the method of elections as discriminatory toward Hispanics). In many instances, individual objections protected a large number of minority voters. See, *e.g.*, *Pre-Clearance* 58 (noting that two objections in Arizona had protected 163,647 Hispanic and Native-American voters and that six objections in Texas had protected 359,978 African-American and Hispanic voters). As a result of these objections, jurisdictions subsequently enacted and precleared new plans that avoided fragmenting minorities and reducing their voting strength. See *Legislative Options* 107-08; 1 *Continued Need* 177.

Of the jurisdictions covered in 1975, Texas drew the largest number of Section 5 objections – 105 objections between 1982 and 2004. 1 *Continued Need* 259; 2 *Continued*

Need 2194-2530. The objections involved, *inter alia*, statewide and local redistricting plans, annexations, the adoption of numbered positions and majority-vote requirements for elections, changes between single-member districts and at-large systems, election date changes, polling place and absentee voting location changes, the absence of bilingual election materials and voter language assistance, and incomplete or poor Spanish-language translations. *Id.* For example, a school district removed one of two polling places and the absentee voting location from a heavily-populated black area while adding multiple new polling places to a less-populated white area without any credible reason. *Id.* at 2209-11. It also combined its polling sites with city election sites in the white area, but declined to make similar arrangements for black voters. *Id.*; see *id.* at 2300-03, 2326-28, 2427-29 (additional polling site objections concerning black and Hispanic voters). Another jurisdiction sought to delay the implementation of its single-member district school board plan in order to perpetuate the discrimination against Hispanics found to have existed under its at-large election system. *Id.* at 2212-13. The Attorney General also objected to the proposed delay of a May 1991 municipal election that was specifically ordered in a Section 2 case against the City of Dallas, "in order to remedy the adverse effects of the 8-3 system – the denial of equal access to the City's political process – which [minorities] have suffered in Dallas, for some 10-15 years." *Id.* at 2297 (citation omitted).

Statewide redistricting in Texas repeatedly discriminated against minority voters. In 1991, for example, the Attorney General objected to the State's house plan because it unnecessarily packed and fragmented Hispanic voters (often in areas that were also

heavily black), thereby minimizing minority voting strength. *Id.* at 2319-23. In 2001, while Latinos reached one-third of Texas's total population, the State's proposed house plan eliminated four existing majority-Hispanic districts while adding only one such district. The Attorney General objected, and Hispanic voters thus maintained their opportunity to elect representatives of their choice. *Id.* at 2518-23. In 2006, the Supreme Court struck down a congressional districting plan the State had enacted in 2003, holding that the plan diluted Latino voting rights in violation of Section 2. *LULAC*, 548 U.S. at 409, 427, 442. A preclearance determination on Texas's most recent plans is pending in this court. See *Texas* v. *United States*, No. 11cv1303 (D.D.C.) (three-judge court).

3. The Committee also noted the effect of the Attorney General's MIRs, which the Attorney General issues when there is insufficient information to determine whether a jurisdiction has met its statutory burden under Section 5 and which often result in covered areas withdrawing or modifying potentially discriminatory changes. See *Shelby County*, 679 F.3d at 866-68 ("Congress had evidence indicating that the Attorney General sometimes uses [MIRs] to 'send signals to a submitting jurisdiction about the assessment of their proposed voting change' and to 'promote[ ] compliance by covered jurisdictions.'") (quoting 2 *Continued Need* 2541). MIRs affected over 800 voting changes between 1990 and 2005, with over 205 proposed changes withdrawn from consideration altogether. 2006 House Report 40-41; *id.* at 83 (showing 65 withdrawn submissions, including 54 in Texas, between 1982 and 2004 in areas covered in 1975). Congress found that a jurisdiction's response to an MIR is "often illustrative of [its] motives" and that the high number of withdrawals and modifications to MIRs thus

constituted additional evidence of discriminatory efforts against minority voters. *Id*. at 40-41; see *Shelby Cnty.*, 679 F.3d at 866-68. Of all covered jurisdictions, Texas was issued the largest number of MIRs, a total of 1,512. 2 *Continued Need* 2537, 2552 (MIR Study). Other States covered or partially covered as a result of the 1975 Reauthorization prompted another 867 requests. *Id*. at 2564 (Tbl. 7).

4. Though much of the information before Congress concerned administrative preclearance under Section 5, the 2006 record also showed that jurisdictions had unsuccessfully sought judicial preclearance. Congress received evidence, for example, that jurisdictions covered in 1975 had brought seven unsuccessful judicial preclearance actions. 1 *Continued Need* 177-78, 235 n.197, 270; 2 *Scope* 2858-68. In addition, some jurisdictions covered in 1975 had simply ignored the preclearance requirement altogether, thus prompting Section 5 enforcement actions. Between 1976 and 2002, South Dakota "enacted more than 600 statutes and voting changes," many of which diluted the voting strength of American Indians, but submitted fewer than ten for preclearance. 2006 House Report 42; 1 *Continued Need* 172-73. A court subsequently found that the State had systematically discriminated against Native-American voters for many years. *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004). Successful Section 5 enforcement actions also have been brought against jurisdictions in Arizona (3) and Texas (29). 1 *Continued Need* 250, 281. Some of these actions were prompted when covered counties attempted to implement redistricting plans to which the Attorney General had objected. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess.

1410, 1420-21 (2005) (*Impact*). Others enjoined Texas counties and school districts from implementing unprecleared plans to which the Attorney General subsequently objected. *Id.* Multiple actions spanning decades also have been filed against Waller County, Texas – home of the historically black Prairie View A&M University – where black voters have repeatedly faced intentional voting discrimination. 1 *Continued Need* 185-86.

5. In addition, the House Judiciary Committee recognized the "critical role [of federal observers in] preventing and deterring discrimination inside polling locations over the last 25 years." 2006 House Report 24. Observers monitor whether eligible voters are being permitted to vote and whether their votes are being properly tabulated, and they communicate any allegedly discriminatory conduct to the Attorney General for further investigation. 2006 House Report 25; 42 U.S.C. 1973f(d). Between 1982 and 2006, the Attorney General dispatched 2710 federal observers to monitor 84 elections in 15 jurisdictions in Arizona, New York, and Texas, all based on a reasonable belief that minority voters were at risk of being disenfranchised. Def. SMF ¶52; 2 *Scope* 2869-70; see 42 U.S.C. 1973f(a)(2). The need for observer coverage, the Committee explained, showed continued harassment and intimidation against minorities, including voters who required language assistance. 2006 House Report 44. The Committee noted important observer coverage in New York and Texas to protect Asians and Latinos. *Id.* at 44-45.

Evidence from the observer program demonstrated ongoing harassment and intimidation. Discrimination against minorities that observers witnessed included

> actions that make [minority] voters feel uncomfortable by talking rudely to them, or ridiculing their need for assistance in casting their ballot, to actions that bar them from voting, such as failing to find their names on the lists of

> registered voters and refusing to allow them to vote on provisional ballots, or misdirecting them to other polling places.
>
> Minority language voters suffer additional discriminatory treatment when people who speak only English are assigned as polling place workers in areas populated by minority language voters. The polling place workers fail to communicate the voting rules and procedures to the voters, or fail to respond to the voters' questions. In some instances, qualified registered voters have been told that they are not permitted to vote because they have not furnished necessary information, such as their address, even when they have provided the information; the poll worker was unable to understand what the voters were saying, but a speaker of the minority language would have understood.

Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong., 1st Sess. 24 (2005). In Texas and Southern Arizona, for example, registered Hispanic voters were forced to provide proof of citizenship before being provided a ballot and were admonished for speaking Spanish in polling places and providing assistance to other voters. *Id.* at 34. Observers also witnessed the lack of Chinese-language assistance in New York and California and unaddressed language barriers in Arizona. *Id.* at 35-37.

6. Congress also found in 2006 that "[e]vidence of continued discrimination includes * * * continued filing of section 2 cases * * * in covered jurisdictions." 2006 Reauthorization, §2(b)(4)(C), 120 Stat. 577-78. The House Committee recognized the importance of Section 2 litigation in protecting minority voters, especially with respect to vote dilution, and emphasized that reauthorization of Section 5 was critical to protect the gains won in such cases. 2006 House Report 52-53; 1 *Continued Need* 201-08; cf. *Shelby Cnty.*, 679 F.3d at 868-69. The record includes two studies of Section 2 cases since 1982: the Katz Study of reported Section 2 cases with favorable outcomes for minority

plaintiffs, see *Impact* 964-1124; and the National Commission on the Voting Rights Act study on reported and unreported Section 2 cases with outcomes favorable to minority voters in eight states entirely covered by Section 5, plus North Carolina, 1 *Continued Need* 125-26; see also *Shelby Cnty.*, 679 F.3d at 868-69, 874-76.

Of the fully covered States, Texas had the highest number of Section 2 suits in which minority plaintiffs were successful – 206. 1 *Continued Need* 251. Thus, Texas alone accounts for almost one-third of the 653 successful Section 2 suits against covered areas between 1982 and 2005. *Id.* The success of these 206 cases forced 197 jurisdictions to change their discriminatory voting procedures. 1 *Continued Need* 207. Most of the successful suits occurred in West and Central Texas, "where the Latino population is growing in size and political aspirations." *Id.* Plaintiffs in Arizona also prevailed in two cases. *Id.* Through the Katz study, Congress also received evidence of, *inter alia*, successful Section 2 outcomes in partially covered jurisdictions. See, *e.g.*, *Impact* 975. In an action challenging South Dakota's 2001 legislative redistricting as diluting Native American voting strength, for example, the court found the plan impermissibly diluted minority votes. *Bone Shirt*, 336 F. Supp. 2d at 1052. The court described additional discriminatory action against Native Americans, such as retaliation for increased registration and turnout, refusal to register voters, and failure to provide enough voter registration cards to enable minority voter registration drives. *Id.* at 1018-28 (reciting South Dakota's long history of voting discrimination, including its denial of American Indians from voting and holding office, and from running for certain offices, in violation of equal protection). While Section 2 does not require proof of discriminatory

intent, several cases included findings of intentional discrimination. See, *e.g.*, *Impact* 988-91, 1097-98 n.497; cf. *LULAC*, 548 U.S. at 440 (vote dilution in Texas bore "the mark of intentional discrimination that could give rise to an equal protection violation").

7. The Committee also emphasized the significant effect racially polarized voting had on election outcomes and how it negatively affected the ability of covered groups to elect their candidates of choice. It described racially polarized voting as "the clearest and strongest evidence [it had] before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process." 2006 House Report 34; see 1 *Continued Need* 209-17. It also reported judicial findings of racially polarized voting in Florida, Texas, and South Dakota, all of which were either fully or partially covered in 1975, *id.* at 35, and received state-specific reports that discussed racially polarized voting in jurisdictions covered in 1975. See n.6, *supra* (listing reports); 1 *Continued Need* 211, 213-14. Witnesses further testified that racially polarized voting not only exists between black and white voters, but affects Hispanics, Asian Americans, and Native Americans. 1 *Continued Need* 212-14. Congress also heard that racially polarized voting in covered jurisdictions exists in both partisan and nonpartisan elections, *id.* at 355-57, and at every level of government, *id.* at 210. Congress further heard that for Latinos, the greatest number of election changes blocked under Section 5 involved jurisdictions in which Latino voters had become numerous enough to elect their preferred candidates of choice. *Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 133 (2005).

The existence of racially polarized voting is significant because it is a necessary precondition for vote dilution techniques to have their intended discriminatory effect. 1 *Continued Need* 209. Thus, Florida misses the point when it complains racially polarized voting is not probative evidence of the continued need for Section 5 because it is not state action. Indeed, the Supreme Court has repeatedly explained the central role of racial-bloc voting in allowing jurisdictions to dilute the effectiveness of minority voting strength. See *City of Rome*, 446 U.S. at 183-84; *Thornburg* v. *Gingles*, 478 U.S. 30, 46-51 (1986); *Rogers* v. *Lodge*, 458 U.S. 613, 616 (1982); 1 *Continued Need* 404-09 (lower courts).

8. Finally, the Committee emphasized continued limited English proficiency, linguistically isolated households, and high illiteracy rates among the covered groups that created barriers to their political participation. 2006 House Report 45-46, 59-61. "[D]egraded educational opportunities" reinforced such barriers; in Alaska, for example, Native Alaskans graduated at a far lower rate than other students and were discriminated against in school funding. *Id.* at 50-51. Furthermore, "[s]ince 1992, ten lawsuits have been filed [on behalf of English language learners because of unequal educational opportunities], with cases pending in three States that are covered statewide" under the 1975 formula – Texas, Alaska, and Arizona – and in "Florida and in other States with large language minority populations, including California and New York." *Id.* at 51.

Congress also cited non-compliance with Section 203's language assistance provisions, 42 U.S.C. 1973aa-1a, especially in Pima County, Arizona, and areas in New York, Alaska, Texas, California, and South Dakota. 2006 House Report 52. Non-compliance with Section 203 in jurisdictions also covered under Section 4(f)(4) – *e.g.*,

Alaska, Texas, Arizona, and parts of New York, California, and South Dakota – demonstrated that covered jurisdictions have yet to adequately respond to the needs of minority voters, despite being subject to bilingual elections and preclearance since 1975. *Id.*; see 1 *Continued Need* 13; *id.* at 68 (violations of language-minority provisions in Florida); *id.* at 309 (Texas); *id.* at 348 (California); *id.* at 1313 (Alaska); *id*. at 1379 (Arizona); 3 *Continued Need* 4090 (New York).

Just as with the 1975 record, the 2006 record of pervasive voting discrimination shows that Section 2 litigation and Section 203 coverage has not sufficed to protect covered minorities from discrimination and vote dilution in covered jurisdictions. While Section 203's language assistance provisions can help language minorities gain meaningful access to the ballot in compliant jurisdictions, those provisions – unlike Section 5 – protect against neither the use of discriminatory devices, harassment, and intimidation to reduce minority voters' participation nor intentional efforts to dilute a minority group's voting strength once their ballots have been cast.

Given the extensive 2006 record of widespread contemporary discrimination in voting against covered minorities, Congress readily could conclude that Section 5 is necessary to secure those minorities' full participation in the political process, and that Section 2 – with its more onerous, costly, and time-consuming litigation that lacks a prophylactic effect – is inadequate. 2006 House Report 57; *Shelby Cnty.*, 679 F.3d at 872-73. Accordingly, Congress was justified in 2006 in continuing to protect minority voters in the jurisdictions originally covered by Section 5 in 1975.

C. The 1975 Formula Sufficiently Relates To Current Voting Discrimination

Florida challenges Congress's continued use of the 1975 coverage formula to impose Section 5 preclearance, arguing that it relies on "decades-old" data and is an unreliable indicator of intentional voting discrimination. *Shelby County* has already rejected that argument, albeit looking at the 1965 formula. See Pt. I.B, *supra*. Florida mistakenly fixates on the 1975 triggers to the exclusion of the other coverage-related provisions. As *Shelby County* stated, determining whether the statute's disparate geographic coverage is sufficiently related to persistent racial discrimination in voting "depends not only on section 4(b)'s formula, but on the statute as a whole, including its mechanisms for bail-in and bailout." 679 F.3d at 873. The question is "whether the statute as a whole * * * ensures that [areas] subject to section 5 are those in which unconstitutional voting discrimination is concentrated." *Id.* at 874.

Section 4(b), and the 1975 formula in particular, is congruent and proportional legislation to enforce the Fourteenth and Fifteenth Amendments. First, like the formula "reverse-engineer[ed]" in 1965, the 1975 formula captures jurisdictions with a known history of intentional discrimination against minority voters and subjects those jurisdictions to continued preclearance on the basis of current evidence of serious voting discrimination. Cf. *Shelby Cnty.*, 679 F.3d at 855, 878-79. Congress knew that by relying on the use of English-only voting materials in combination with voter registration and turnout, it would reach pockets of discrimination around the country, as well as areas of the Southwest with large Hispanic, Native-American, and black populations victimized

by the same sorts of discriminatory devices used in the South. See Pt. II.A, *supra*; 1975 House Report 23-24, 27.

Importantly, Congress knew the 1975 formula would cover Texas, which until then had escaped Section 5 coverage despite its long history of intentional voting discrimination against blacks and Hispanics. Congress also knew that the 1975 formula would apply Section 5 to all of Arizona, only parts of which were already covered, as well as additional areas of voting discrimination in New York, California, and Florida. Finally, the formula would also reach Alaskan Natives and American Indians in South Dakota, who Congress knew had experienced a history of voting discrimination and poor political participation as a result of intentional racial discrimination and language and literacy barriers. Thus, like the original formula, Congress designed the 1975 formula to describe the areas it wanted to cover on the basis of actual evidence of discrimination in voting, including, but not limited to, the discriminatory use of English-only materials. See 1975 House Report 23-24; cf. *Shelby Cnty.*, 679 F.3d at 879-81. Where such evidence was lacking, bailout was likewise available and would present only a relatively minor burden to jurisdictions that had not discriminated. 1975 House Report 27.

In 2006, Congress received ample evidence of significant, ongoing discrimination in voting in many of the areas covered as a result of the 1975 Reauthorization.[9] See Pt.

[9] Jurisdictions covered as a result of the 1975 Reauthorization that remain covered today include Alaska, Arizona, Texas, three counties in California, five counties in Florida, two counties in New York, two counties in South Dakota, and two townships in Michigan. 28 C.F.R. Pt. 51 App.

II.B., *supra*. As *Shelby County* found, the 2006 record, including in particular the studies on Section 2 outcomes, also showed that voting discrimination remained more prevalent in covered than in non-covered jurisdictions. 679 F.3d at 874-78; Def. SMF ¶¶65-69. Although one might expect to find fewer successful Section 2 suits in covered jurisdictions because Section 5 blocks and deters the implementation of discriminatory voting practices, the evidence before Congress showed that covered jurisdictions were responsible for more than twice their share (controlling for population) of such suits between 1982 and 2005. *Shelby Cnty.*, 679 F.3d at 874. These findings also applied to jurisdictions covered in 1975. Texas, for example, had evidence of continued unconstitutional racial discrimination in voting. See *id.* at 881. The data examined in *Shelby County* also showed that covered jurisdictions in South Dakota had the highest number of successful Section 2 cases per million residents of any covered or non-covered jurisdiction. *Id.* at 876 (Tbl.). The court also noted evidence of continued discrimination in Arizona and the covered parts of New York, California, and Florida. *Id.* at 881. Although it is more difficult to extrapolate from Section 2 data for partially covered States, the evidence showed that despite Section 5, the covered portions of New York, South Dakota, and California (along with covered portions of North Carolina) had more successful Section 2 outcomes per million residents than their non-covered counterparts. See *id.* at 876 (Tbl.); Def. SMF ¶69.

Importantly, bailout affords jurisdictions that have not discriminated in voting for 10 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 34 cases since the current bailout provision became effective in 1984, including 16 cases in the three years since *Northwest Austin II* significantly expanded bailout eligibility. Def. SMF ¶¶46, 50. As a result, a total of 28 county-level jurisdictions and 72 smaller jurisdictions (for a total of 100 jurisdictions) have been granted bailout since the new bailout standard became effective in 1984. Def. SMF ¶50. In upholding Section 4(b)'s constitutionality, *Shelby County* emphasized the importance of the "liberalized bailout mechanism" in the congruence and proportionality analysis. 679 F.3d at 882. Indeed, the 16 bailout cases following *Northwest Austin II* include the first-ever bailouts from jurisdictions in Alabama, California, Georgia, and Texas; the first bailout from a jurisdiction in North Carolina since 1967; and the largest-ever bailout, in terms of population, in Prince William County, Virginia. Def. SMF ¶49. The Attorney General is reviewing a number of informal bailout requests and fully supports the use of bailout to enable jurisdictions to terminate their preclearance obligations when appropriate.

The Act's bail-in provision also has provided the covered minority groups with additional protection from intentional discrimination in voting by jurisdictions not covered by Section 4(b). For example, both New Mexico and Arkansas, the two non-covered states with a high number of Section 2 outcomes favorable to minority plaintiffs, have been at times subject to preclearance under Section 3(c). See *Shelby Cnty.*, 679 F.3d at 881; Def. SMF ¶¶59-60 (citing to a list of 18 jurisdictions bailed-in under Section 3(c), 13 of which were found to have discriminated against a language minority group). Thus, just as Sections 3(c) and 4(a) fine-tune the scope of Section 4(b)'s 1965 formula

upheld in *Shelby County*, they also ensure that the 1975 formula continues to single out jurisdictions in which voting discrimination persists. Taking the statute as a whole, Section 4(b)'s current use of the 1975 formula is a congruent and proportional response to unconstitutional voting discrimination in covered areas.[10]

III
REQUIRING PRECLEARANCE AS TO EACH OF SECTION 5'S PROTECTED GROUPS IS A CONGRUENT AND PROPORTIONAL RESPONSE TO THE HARM TARGETED IN COVERED JURISDICTIONS

We interpret Florida's argument against preclearance on "racial grounds" to mean that it should not have to satisfy its statutory burden as to black voters. Whenever a jurisdiction subject to Section 5 "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from" the existing practice, it must show that such 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. 42 U.S.C. 1973c(a).

In affording protection in all covered jurisdictions to each group protected under Section 5 regardless of when a jurisdiction first became covered, Congress recognized that jurisdictions often subject different minority groups to the same discriminatory barriers to the full exercise of their voting rights, whether in registering to vote, casting an effective ballot, having that ballot counted, or having that vote weighed equally with

[10] If this Court were to strike down preclearance on the basis of membership in a language minority or use of the 1975 formula in 2006, the remainder of the Act easily survives. See *United States* v. *Booker*, 543 U.S. 220, 258-59 (2005); see also 42 U.S.C. 1973p; 1975 Reauthorization, §208, 89 Stat. 402; 1975 House Report 29.

other voters. See, *e.g.*, 1975 House Hearings 23-25. Indeed, both the 1975 and 2006 records clearly establish that covered jurisdictions with more than one discernible minority group often discriminate against non-white groups in equal force, particularly where minority voting strength is emerging. See, *e.g.*, Pts. I.A. & II.B, *supra*; *LULAC*, 548 U.S. at 439; *DeGrandy* v. *Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992).

Consistent with evidence before Congress in 1975 and 2006 and Section 5's statutory goal of protecting minority voters from intentional voting discrimination in jurisdictions with a record of past and present discrimination against non-whites, Congress has required that each covered jurisdiction show its proposed voting changes do not have a discriminatory purpose or effect with respect to any of the protected groups. Given the record before Congress in 2006 of intentional discrimination in voting against multiple minority groups in some covered jurisdictions, requiring covered jurisdictions to demonstrate that their proposed changes do not discriminate against any protected group is appropriate enforcement legislation under the Fourteenth and Fifteenth Amendments.

IV
THE 2006 AMENDMENTS TO SECTION 5 ARE CONSTITUTIONAL

Florida argues that the 2006 Amendments are unconstitutional. To succeed on a facial challenge, Florida must show that there are no set of circumstances under which the 2006 Amendments would be valid, or, at a minimum, that the Amendments lack a plainly legitimate sweep. See *Shelby Cnty.*, 679 F.3d at 883-84; *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008). Because Florida seeks preclearance of specific voting changes, it must demonstrate that the 2006

Amendments are unconstitutional as applied to those changes. See *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960). Florida lacks standing to assert a facial challenge to the Amendments because it has not demonstrated that the Amendments are causing it injury by preventing preclearance of these changes or that a ruling that the Amendments are unconstitutional would redress that injury. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Given their retrogressive purpose, the voting changes at issue would have failed even under *Bossier II*. Thus, subsection (c) is not implicated in this case and Florida lacks standing to challenge that amendment. Moreover, the three voting changes at issue are retrogressive in effect under the pre-2006 version of Section 5 (now embodied in Section 5(a)). Thus, the new "ability to elect" standard is not implicated in this case. Florida therefore also lacks standing to challenge subsections (b) and (d).

In any event, Florida fails to show that the Amendments are unconstitutional either facially or as applied. *First*, the change to Section 5's purpose prong – the new subsection (c) – simply incorporates the Supreme Court's standard for determining discriminatory purpose under the Constitution itself. Thus, it directly enforces the Constitution and does not exceed Congress's authority. *Second*, the change to Section 5's retrogression prong – the new subsections (b) and (d) – simply restores the preclearance standard long enforced by the Attorney General and lower courts in vote dilution cases, a standard which Congress found to be essential to the protection of minority voting rights. Subsections (b) and (d) neither make obtaining preclearance more difficult nor require a jurisdiction to violate the Constitution in order to secure preclearance.

A. The Amended Purpose Prong Is Valid Enforcement Legislation And Does Not Violate Equal Protection

Section 5(c) provides that preclearance must be denied to a voting change that is motivated by "any discriminatory purpose." 2006 Reauthorization, §5(c), 120 Stat. 581. "Discriminatory purpose" is, of course, the Supreme Court's test for identifying unconstitutional discrimination. See *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Congress acted squarely within its enforcement power by requiring preclearance to prevent covered jurisdictions from engaging in such unconstitutional conduct. See *South Carolina*, 383 U.S. at 324, 326.

Section 5, as amended, is a congruent and proportional response to continued evidence of intentional discrimination in voting, see Pts. I.A. & II.B., *supra*, as well as testimony before Congress about the detrimental effects of *Bossier II* on the purpose inquiry. See 2006 House Report 66-68. This testimony included, *inter alia*, a description of intentionally discriminatory, and therefore unconstitutional, voting changes that would have taken effect had Section 5 been limited to non-retrogessive purpose; the preclearance of many intentionally discriminatory procedures that would have drawn objections before *Bossier II*; the detrimental practical effect of relying on Section 2 to thwart intentionally discriminatory voting changes otherwise subject to Section 5 review; and the overarching purpose of Section 5 to stop intentional discrimination in voting. *LaRoque*, 831 F. Supp. 2d at 208-12. Because Section 5(c) authorizes the denial of preclearance only when a jurisdiction engages in purposeful, and therefore

unconstitutional, discrimination, it *must* be valid enforcement legislation. See *id.* at 212-13; *United States* v. *Georgia*, 546 U.S. 151, 158 (2006).

Subsection (c) imposes on covered jurisdictions no substantive requirements beyond those that the Constitution itself imposes. The only difference between the standard under Section 5(c) and that under ordinary litigation to enforce the Constitution is procedural: Section 5 shifts the burden of proof to the submitting jurisdiction. But the Supreme Court has consistently held that shifting the burden of proof to jurisdictions with a significant history of discrimination is appropriate in light of Congress's "wide berth in devising appropriate remedial and preventative measures for unconstitutional actions." *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004). See *City of Rome*, 446 U.S. at 181-182 (holding that placing burden on covered jurisdictions properly responds to their history of discrimination); *South Carolina*, 383 U.S. at 334-335 (upholding Section 5's burden-shifting procedure). Moreover, this burden is not onerous; it merely requires the jurisdiction to show it has a legitimate, nondiscriminatory reason for adopting the proposed change. See 28 C.F.R. 51.54, 51.57(a), and 51.59(a)(5)-(7). If such a reason exists, that information is readily available to the jurisdiction.[11]

[11] The Department rejects Florida's reliance on *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), Pl. Br. 43, in disregard of its statutory burden. DCL ¶¶12-14. Nor does the purpose inquiry require Florida to "disprove each of the [*Arlington Heights*] factors," Pl. Br. 43; rather, once Florida has established a *prima facie* case of no discriminatory purpose, it need only rebut any circumstantial evidence of such purpose that would preclude it from meeting its burden. DCL ¶¶15-17. And Florida may assert any privileges that do not yield to the federal interest in enforcing Section 5, but it does so at the risk of failing to meet its burden. DCL ¶¶20, 107F; DRCL ¶ 107F.

Florida also asserts that Section 5(c) "creates a serious equal-protection problem" because it enables the Attorney General to force jurisdictions to engage in race-based decisionmaking. Pl. Br. 44. Yet it points to nothing in Section 5(c) that, on its face, purports to authorize or permit the Attorney General to encourage or ratify such unconstitutional conduct. The Court made clear in *Miller* v. *Johnson*, 515 U.S. 900 (1995), and *Shaw* v. *Hunt*, 517 U.S. 899 (1996), that when a jurisdiction adheres to traditional districting principles, its failure to create majority-minority districts does not constitute intentional discrimination and does not violate 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); 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001). Florida cites no evidence to the contrary. Moreover, if this Court applies Section 5(c) to deny preclearance in this case, such a decision would not run afoul of the Constitution.[12]

Because Section 5(c) merely prohibits intentionally discriminatory voting changes, its enactment is well within Congress's enforcement authority and neither violates the Constitution on its face nor under these facts.

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[12] Florida cannot support its assertion that the Attorney General "appears intent on using the 'purpose' prong to prevent Florida from making sensible and non-discriminatory voting changes because DOJ favors certain alternate procedures strictly for race-based reasons." Pl. Br. 44. Regardless, courts do not normally invalidate a statute on its face based on the possibility that it could be unconstitutionally applied. See, *e.g.*, *Washington State Grange*, 552 U.S. at 449-50. Nor has Florida shown that Section 5(c) operates in this case to prohibit anything other than unconstitutional conduct.

B. The Amended Retrogression Prong Is Valid Enforcement Legislation And Does Not Violate Equal Protection

Florida also contends that the amended effects prong in Sections 5(b) and (d) exceeds Congress's enforcement authority and denies equal protection. Pl. Br. 44-49. To assert this claim, Florida must demonstrate that the voting changes at issue here would have been precleared but for Sections 5(b) and (d). See pp. 40-41, *supra*. It has not made such a showing, and thus lacks standing to challenge the amendments. In any event, the amendments are a congruent and proportional response to ample evidence of intentional discrimination in voting that has occurred in the covered jurisdictions, particularly with respect to unconstitutional redistricting, and the testimony Congress heard regarding the negative impact *Ashcroft* would have on Section 5 enforcement given its unworkable and unpredictable standard. See *LaRoque*, 831 F. Supp. 2d at 214-16, 218-19.

Florida further argues that the amendments increase federalism costs and make it more difficult for jurisdictions to secure preclearance. Pl. Br. 44-46. That is not so. The amendments merely restore the preclearance standard long enforced by the Attorney General and lower courts that Congress in 2006 found to be essential to the protection of minority voting rights. See 2006 House Report 65-72. Florida argues that the "ability to elect" standard requires a "complex inquiry" into a majority-minority district's ability to elect its candidate of choice. Pl. Br. 45. It ignores testimony that *Ashcroft*'s "totality of the circumstances" test is unworkable, easily manipulated, and far more complex than the "ability to elect" standard, thereby hindering the Attorney General's ability to reach a preclearance determination in the statutorily prescribed 60 days. See *LaRoque*, 831 F.

Supp. 2d at 218-20; 2006 House Report 94 (describing *Ashcroft*'s test as "hopelessly unadministrable"); see also *Texas* v. *United States*, 831 F. Supp. 2d 244, 265-66 (D.D.C. 2011) (three-judge court) (holding that the ability-to-elect standard in redistricting is not unduly complicated or burdensome for covered jurisdictions). Indeed, Florida recently obtained expedited administrative preclearance for its statewide redistricting plans under the simpler "ability to elect" standard. Notice, *State of Florida* v. *United States*, No. 1:12-CV-00380 (D.D.C. Apr. 30, 2012) (three-judge court). Regardless, Florida's argument is irrelevant in this case and more appropriately addressed in a case involving the application of the "ability to elect" standard to redistricting efforts.

Florida also argues that the amendments "deviate[ ] too far from the constitutional standard" by requiring favorable electoral results for minorities, thus departing from "the proper role of an 'effects' test in rooting out intentional discrimination." Pl. Br. 46. But the amendments neither guarantee electoral success nor ensure particular electoral outcomes. Rather, they merely protect the proven ability of minority voters to elect their candidates of choice against discriminatory redistricting efforts and other potentially retrogressive changes aimed at preventing a sufficiently sizeable, cohesive, and concentrated group of minority voters from exercising its voting strength. 2006 House Report 68-71. As the House Report explained, "Section 5, if left uncorrected, would now allow States to turn black and other minority voters into second class voters who can influence elections of white candidates, but who cannot elect their preferred candidates." 2006 House Report 70. A major purpose of Section 5 has always been "to insure that [gains in minority political participation] shall not be destroyed through new

[discriminatory] procedures and techniques." *Beer* v. *United States*, 425 U.S. 130, 140-41 (1976) (quoting 1975 Senate Report 19). That purpose is unchanged. The amendments simply clarify, in the wake of *Ashcroft*, that jurisdictions may not destroy minority voting strength by reducing the number of districts from which those voters are able to elect their candidates of choice and replacing them with districts in which they may do no more than potentially influence an election. 2006 House Report 69-70; *LaRoque*, 831 F. Supp. 2d at 220-21.

Indeed, the retrogression analysis is a flexible one that takes account of shifting demographics and thus would allow a jurisdiction to dismantle an ability-to-elect district where its minority population has decreased to the point that its ability to elect its preferred candidate of choice no longer exists. The analysis does not ensure particular electoral outcomes or minority success. Rather, it compares a proposed voting change against the existing practice to determine how each practice would currently affect minority voters and it ensures that minority ability-to-elect, where it exists, is not destroyed. When the prohibited discriminatory effect is limited to changes with a *retrogressive* impact – *i.e.*, those changes that demonstrably undo the gains minority voters have realized with respect to their full political participation and ability to elect their preferred candidates of choice – there is all the more reason to suspect discriminatory intent. See *Beer*, 425 U.S. at 140-41. Sections 5(b) and (d) are not only a congruent and proportional response to measures that are intentionally discriminatory but also valid prophylactic legislation to enforce the voting guarantees of the Fourteenth and

Fifteenth Amendments. See *LaRoque*, 831 F. Supp. 2d at 225-28; cf. *Lopez*, 525 U.S. at 282-83; *City of Rome*, 446 U.S. at 173-78; *South Carolina*, 383 U.S. at 333-37.

Nor do subsections (b) and (d) violate equal protection, either facially or as applied in this case. Although Section 5(b) overturns the *Ashcroft* test, it did not disturb the principle that even retrogressive changes must nonetheless be precleared in certain circumstances. 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 also took the position, well before *Ashcroft*, 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. 486, 488 (Jan. 6, 1987); see, *e.g.*, p. 47, *supra*. The Attorney General also has long recognized that retrogression can be justified when a plan that maintains preexisting minority voting strength would violate the Constitution. The Department of Justice had stated prior to *Ashcroft* that a retrogressive redistricting 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 *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act*, 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; see also *LaRoque*, 831 F. Supp. 2d at 236-38.

Finally, Florida mistakenly argues that the Attorney General equates "disparate impact" with retrogression. While "disparate impact" may be relevant in determining discriminatory purpose under *Arlington Heights*, 429 U.S. at 266, the Attorney General has long recognized that the standard for the effect prong is retrogression, *i.e.*, whether minority voters will be worse off as compared to the benchmark practice. See *Beer*, 425 U.S. at 141; 28 C.F.R. 51.54(b). Nor does the amended retrogression prong increase Florida's statutory burden beyond what the Supreme Court and the D.C. Circuit have already upheld. Subsections (b) and (d) responded to Congress's concern over the meaning of retrogression in redistricting; they did not alter the standard as it has always been applied to ballot access cases. See DCL ¶¶40, 51-57, 60-62; 2006 House Report 65-72. Thus, Florida is required to devote no more "substantial resources to complex statistical analysis," Pl. Br. 47-48, than what any covered State has been required to do since the enactment of Section 5, the effects prong of which has repeatedly been upheld.

In applying *Beer*'s retrogression standard, 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 DCL ¶70 (citing 28 C.F.R. 51.57(d)); see V17 9657. Retrogression analysis does not occur in a vacuum; rather, it assesses whether proposed changes, when considered against remaining means available to voters, dismantle the gains minority voters have made with respect to full political participation and effective exercise of the electoral franchise. See DFF ¶¶57-57H, 66, 68-72, 87-98P; DCL ¶¶93-94, 106. Such an inquiry merely requires jurisdictions to explain the effect of their

legislative decisions. The retrogression standard is valid prophylactic legislation to prevent unconstitutional discrimination and does not violate equal protection. Nor does Florida explain how subsections (b) and (d) in this case violate equal protection.[13]

V
REQUIRING COVERED JURISDICTIONS IN NON-COVERED STATES TO OBTAIN PRECLEARANCE FOR STATEWIDE VOTING CHANGES DOES NOT EXCEED CONGRESS'S ENFORCEMENT AUTHORITY

Florida argues that requiring non-covered States to obtain preclearance for statewide voting changes exceeds Congress's enforcement authority. That argument is foreclosed by *Lopez*. See 525 U.S. at 269, 282-85. Florida also urges limiting *Lopez* to statewide voting changes enacted at a covered jurisdiction's request. *Lopez* rejected this limitation, stating that preclearance is required "even where the jurisdiction exercises no discretion in giving effect to a state-mandated change," *id.* at 278, and does not prompt the voting change, see *id.* at 279, 282, 285.

CONCLUSION

The Attorney General's motion for summary judgment should be granted and Florida's motion for summary judgment should be denied.

[13] If this Court were to strike down any portion of the 2006 Amendments, the remainder of the Act would easily survive. 42 U.S.C. 1973p; see *LaRoque*, 831 F. Supp. 2d at 200-01. Nor would striking down the reauthorization as to "language minorities" or the amendments invalidate Section 5 as applied to federal elections. Congress has plenary authority to dictate and oversee federal election procedures. U.S. Const. Art. I, § 4, Cl. 1.

Respectfully submitted,

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