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

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

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

THOMAS E. PEREZ
Assistant Attorney General

T. CHRISTIAN HERREN, JR.
MARK L. GROSS
JOHN ALBERT RUSS IV
ERIN H. FLYNN
ELISE SANDRA SHORE
CATHERINE MEZA
ERNEST A. MCFARLAND
Attorneys
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave. NW
Room NWB-7254
Washington, DC 20530
Telephone: (202) 353-7738
Facsimile: (202) 307-3961

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES: **PAGE**

LEGISLATIVE HISTORY:

GLOSSARY

DCL	Defendants' Conclusions of Law
Def. Br.	Attorney General's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment
Def. SMF	Defendants' Statement of Uncontested Material Facts
LULAC	League of United Latin American Citizens
MIR	Request for More Information
Pl. App.	Plaintiff's Reply Appendix
Pl. Br.	Florida's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment
Pl. Reply	Florida's Reply Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment
Pl. Resp. to Def. SMF	Florida's Response to Defendants' Statement of Uncontested Material Facts
VRA	Voting Rights Act of 1965

INTRODUCTION

Florida raises five arguments challenging the constitutionality of Sections 4(b) and 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c, as amended. Two of those arguments – Florida's facial challenge to Sections 4(b) and 5, and its challenge to requiring covered jurisdictions in non-covered States to seek preclearance for statewide voting changes – are foreclosed by *Shelby County* v. *Holder*, 679 F.3d 848 (D.C. Cir. 2012), and *Lopez* v. *Monterey County*, 525 U.S. 266 (1999). Only three issues remain: the constitutionality of (1) the 2006 Reauthorization of Section 5 in those jurisdictions covered under Congress's 1975 extension of Section 5; (2) the requirement that each covered jurisdiction obtain preclearance of every voting change by demonstrating that such a 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 because an individual "is a member of a language minority group," 42 U.S.C. 1973b(f)(2), 1973c(a); and (3) the 2006 Amendments to Section 5's preclearance standard.

Section 5 is intended to remedy and prevent widespread voting discrimination on the basis of race throughout all of the jurisdictions covered under Section 4(b). In 2006, Congress concluded that jurisdictions covered by Section 5 continued to engage in an unacceptable level of discrimination and that covered jurisdictions as a whole discriminated more than non-covered jurisdictions. In other words, as explained in our opening brief, Congress concluded that "the current burdens imposed by section 5 [are] 'justified by current needs'" and that the "statute's disparate geographic coverage is sufficiently related to the problem that it targets," *Shelby Cnty.*, 679 F.3d at 862, 873

(quoting *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2512 (2009) (*Northwest Austin II*)). Based on those conclusions, this Court should uphold Congress's 2006 determination that the jurisdictions covered under Section 5 at the time of the Reauthorization (*i.e.*, those jurisdictions that had not yet bailed out of coverage) should remain subject to preclearance under Section 5. The 2006 Amendments to Section 5 are a congruent and proportional response[1] to substantial evidence of intentionally discriminatory voting changes and dilutive actions by the covered jurisdictions and do not violate equal protection. Accordingly, this Court should grant the Attorney General's motion for summary judgment.

I

THE 2006 REAUTHORIZATION OF SECTIONS 4(b) AND 5 AS TO ALL COVERED JURISDICTIONS, INCLUDING JURISDICTIONS FIRST COVERED IN 1975, IS A CONGRUENT AND PROPORTIONAL RESPONSE TO PERSISTENT RACIAL DISCRIMINATION AGAINST MINORITY VOTERS IN THOSE JURISDICTIONS

Florida asserts that the question in this case is whether Section 5's "language minority coverage" remains a congruent and proportional response to voting discrimination in covered "language minority jurisdictions." Pl. Reply 1-2. Florida's framing of the question reveals its lack of understanding about both the problem Section 5 is intended to cure and the means Congress chose to cure it. Section 5 is intended to

[1] The United States adheres to its view that rational basis review is the proper standard for examining legislation to remedy racial discrimination in voting. Def. Br. 8 n.2. Nevertheless, if this Court applies congruence and proportionality review, Sections 4(b) and 5 must be upheld even under that heightened standard.

remedy widespread racial discrimination in voting in covered jurisdictions – jurisdictions covered before 1975 *and* jurisdictions initially covered in 1975. The D.C. Circuit recently validated Congress's judgment that Section 5 remains a necessary remedy in covered jurisdictions because discrimination in such jurisdictions remains pervasive, and because case-by-case adjudication under Section 2 of the VRA is not an adequate means of combating such discrimination. Because the record before Congress in 2006 demonstrated serious and widespread racial discrimination in voting against minority groups in all covered jurisdictions, including jurisdictions initially covered under Section 5 in 1975, this Court should reach the same conclusion here.

A. Congress Extended The Reach Of Section 5 In 1975 In Order To Remedy Severe Racial Discrimination In Voting In The Newly Covered Jurisdictions

Florida's argument that Section 5 is no longer an appropriate remedy in jurisdictions initially covered in 1975 is premised on a fundamental mischaracterization of Congress's decision in 1975 to extend the geographic reach of Section 5. Florida argues that the 1975 extension of Section 5 was intended to eliminate English-only elections and discrimination based on limited English proficiency in the newly covered jurisdictions, and was not intended to "remedy[] *racial* discrimination." Pl. Reply 4. Florida is incorrect.

1. Initially, although Florida purports to ground its argument in the text of the statute, its selective quotation of Section 4(f)(1) of the VRA is misleading. See Pl. Reply 4. Florida relies primarily on the portions of Section 4(f)(1) of the VRA that expanded the scope of the "tests and devices" prohibited by Section 4(c). That expansion, the

statute explains, was intended to remedy the exclusion from the electoral system of citizens with limited English proficiency that resulted from the use of English-only election materials. See 42 U.S.C. 1973b(f)(1). In addition, in order to combat the widespread "discrimination against citizens of language minorities" that Congress determined was "pervasive and national in scope," 42 U.S.C. 1973b(f)(1), Congress made explicit in Section 4(f)(2) that the protections afforded in Section 2 of the VRA extend to members of the racial groups defined elsewhere in the statute as "language minority group[s]." 42 U.S.C. 1973b(f)(2); see 42 U.S.C. 1973l(c)(3). But in 1975 Congress also extended Section 5 to cover only selected jurisdictions where discrimination against various racial groups – including African-Americans and the racial groups described in the statute as language minority groups (*i.e.*, Alaskan Natives, Asian Americans, Native Americans, and Latinos) – was pervasive and could not be remedied through application of Section 2's traditional case-by-case adjudication.

2. Thus, Florida fundamentally errs in asserting that Congress's 1975 extension of Section 5 to additional jurisdictions reflected a concern about some citizens' inability to communicate in English. On the contrary, Congress extended Section 5's preclearance remedy to additional jurisdictions in 1975 based on substantial evidence of severe racial discrimination in voting against minority voters in those jurisdictions. The 1975 Amendments extended to all minority voters in the newly covered jurisdictions the same protections Congress had earlier afforded minority voters in those jurisdictions covered in 1965 and 1970, and for the same reason: "to banish the blight of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966).

a. Congress enacted the VRA in 1965 in response to almost a century of disregard in certain areas of the country for the Fifteenth Amendment's prohibition against racial discrimination in voting through the systematic disenfranchisement of black citizens by various discriminatory and dilutive devices. *South Carolina*, 383 U.S. at 308-15; see also H.R. Rep. No. 439, 89th Cong., 1st Sess. 8-13 (1965). Although Congress was primarily concerned in 1965 (and in 1970) with discrimination against black voters in covered jurisdictions, Section 5 by its terms prohibited the adoption or implementation of any voting change that would discriminate on the basis of race or color generally.

Prior to 1975, the Attorney General had therefore already interpreted "race or color" for purposes of Section 5 to apply not only to black voters, but to other racial minority groups as well. See, *e.g.*, *Extension of the Voting Rights Act, Hearings Before Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 94th Cong., 1st Sess. 77 (1975) (1975 House Hearings) (noting the Department had objected to Section 5 submissions from previously covered counties in California and Arizona because the proposed voting changes would abridge the rights of Native Americans and Mexican Americans). Florida's argument that treating "language minority" groups as "racial groups" under Section 5 would render the 1975 Amendments superfluous, see Pl. Reply 5, therefore misses the mark. The 1975 Amendments to Section 5 extended the existing substantive standard under Section 5 to some additional jurisdictions not previously subject to that standard – jurisdictions Congress concluded were engaging in racial discrimination in voting against both black voters and other minority voters. See H.R. Rep. No. 196, 94th Cong., 1st Sess. 3, 16, 22-27 (1975) (1975 House Report).

It is true that each of the racial groups identified in the statute as a language minority group could have been protected on the basis of "race or color" alone; indeed, each of those groups was protected on that basis in the jurisdictions covered in 1965 and 1970. Congress chose in 1975 to designate Alaskan Natives, Asian Americans, Native Americans, and persons of Spanish heritage as members of "language minority group[s]" not to alter the substantive protection of Section 5, but to accurately describe in the amended Section 4(b) the jurisdictions it intended to newly subject to Section 5 based on their egregious histories of voting discrimination. See, *e.g.*, 1975 House Report 22-23; 1975 House Hearings 292-94, 793-94.

b. In arguing that the 1975 Amendments did not address racial discrimination in voting, Pl. Reply 4, Florida misstates the 1975 record and ignores the overriding goal of the VRA "to rid the country of racial discrimination in voting," *South Carolina*, 383 U.S. at 315. Both initially and in each reauthorization, Congress has imposed Section 5 on the covered jurisdictions based on substantial evidence of racial discrimination in voting – discrimination affecting black voters, as well as a number of other racial minority groups.

During the 1975 reauthorization hearings, Congress received evidence of substantial voting discrimination against black voters and other racial minorities, not only in the jurisdictions covered in 1965 and 1970, but also in jurisdictions not yet subject to Section 5. In its report on the status of minority voting rights in jurisdictions covered in 1965 and 1970, for example, the U.S. Commission on Civil Rights indicated that it had uncovered evidence of voting discrimination against minority groups, including black voters, in certain non-covered jurisdictions. See 1975 House Report 16; 1975 House

Hearings 17-60 (testimony and statement of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights).

The Commission acknowledged that Congress was particularly concerned in 1965 with widespread discrimination against black voters in the jurisdictions originally covered by Section 5, but it noted that "current and past data concern[ing] blacks in the South * * * often reflect the situation of other minorities in other areas as well." 1975 House Hearings 20. In particular, the Commission recounted evidence of severe voting discrimination against groups described in the statute as language minority groups. See *id.* at 27-28. Although such discrimination was often compounded by unaddressed language barriers that impeded political participation among minority voters (and that was addressed in 1975 by amendments to Section 4(f) of the VRA), the methods of discrimination were not limited to the use of English-only election materials. See *id.* The Commission stated it had uncovered evidence of voting discrimination in California, New York, Texas, and Arizona. *Id.* at 28-29.

The Commission emphasized, for example, Texas's long history of discriminating against its substantial minority population, made up primarily of both Mexican-American and black voters, "in ways similar to the myriad forms of discrimination practiced against blacks in the South." 1975 House Hearings 28; see also *id.* at 360-86 (statement of George J. Korbel); *id.* at 399-479 (statement of Charles L. Cotrell); *id.* at 804-11 (statement of Leonel Castillo). These forms of voting discrimination included white primaries, poll taxes, restrictive registration systems, inconvenient registration hours and locations, inadequate or nonexistent language assistance, and the use of

dilutive devices such as at-large elections with numbered posts and majority requirements and multi-member districts. *Id.* at 28. Just as in the States originally covered by Section 5, many of these systems were employed despite earlier litigation in which federal courts struck down restrictive voting practices as discriminatory against Latino and black voters. *Id.*; see also 1975 House Report 17-20.

The Commission recognized that Congress's imposition of Section 5's preclearance requirement on jurisdictions in 1965 and 1970 had "been effective in combating discrimination against minorities in the covered States and counties" and had opened the political process to black, Native-American, and Spanish-speaking citizens in the covered jurisdictions. 1975 House Hearings 29. The Commission thus recommended that Section 5 be extended to protect against race-based voting discrimination in jurisdictions not already covered. *Id.* Congress explored the Commission's recommendation during the 1975 hearings and received ample evidence of voting discrimination and vote dilution against black voters and other minority groups in the non-covered jurisdictions, including (but not limited to) evidence that language and literacy barriers often exacerbated that discrimination. See Def. Br. 13-21 (citing the 1975 Committee Reports and evidence received during the 1975 hearings); cf. Ex. 1, Suppl. Decl. Dr. Peyton McCrary ¶¶15-18 (Suppl. McCrary Decl.) (explaining the relevance of educational disparities to the assessment of voting discrimination). All the while the Committees proceeded from the premise that Section 5 "was designed to provide swift administrative relief in those areas of the country where racial discrimination plagued the electoral process." 1975 House Report 4.

c. As the D.C. Circuit recently held in *Shelby County*, Congress described the original scope of Section 5's coverage by "reverse-engineering" a statutory "formula" that described the jurisdictions Congress knew to be the most egregious discriminators without identifying them by name in the statutory text. 679 F.3d at 879. Congress instead described the jurisdictions it wished to cover as those jurisdictions that used a prohibited test or device on November 1, 1964, and had voter registration or turnout of less than 50% in the 1964 election. Def. Br. 2; *Shelby Cnty.*, 679 F.3d at 879; *South Carolina*, 383 U.S. at 328-30. To respond to any over- and under-inclusiveness in the coverage formula, Congress included "bail-in" and "bailout" provisions that would allow for adjustments in coverage over time. Def. Br. 2-3; *Shelby Cnty.*, 679 F.3d at 855. The Supreme Court upheld Sections 4(b) and 5 as appropriate enforcement legislation under Section 2 of the Fifteenth Amendment. *South Carolina*, 383 U.S. at 323-37.

When Congress extended the reach of Section 5 in 1975, it followed the same course by first identifying the jurisdictions that were not covered by Section 5 but engaged in pervasive discrimination against minority voters, and then describing those jurisdictions in objective terms in the statutory text. Florida's assertion to the contrary, see Pl. Reply 16, is belied by the legislative record. The House Judiciary Committee explained in 1975 that Section 5's extension to new jurisdictions was "based on a rational trigger *which describes those areas for which [it] had reliable evidence of actual voting discrimination* in violation of the 14th or 15th Amendments." 1975 House Report 27 (emphasis added); see *id.* at 31 (stating Section 5 would cover "those jurisdictions in which the evidence shows extensive discrimination against language minorities"). Just as

it had in 1965, Congress chose to describe the newly covered jurisdictions with reference to objective voting-related criteria rather than identifying them by name in the statute. Congress accomplished that task by (1) amending the definition of "test or device" to include the provision of English-only voting materials in jurisdictions in which more than 5% of voting age citizens were members of a covered minority group, and (2) expanding coverage to areas that maintained a prohibited test or device and had voter registration or turnout of less 50% as of November 1972. Def. Br. 14-20, 35-36; 1975 House Report 22-24, 26-27. That is exactly the approach Congress took in 1965 to describe the geographic scope of Section 5, an approach the court in *Shelby County* held to be legitimate.

Florida's objection that the amended criteria in Section 4(b) do not "correlate to the problem Congress sought to address," Pl. Reply 15, therefore misses the point. The coverage criteria correlate directly to the problem Congress sought to address because they describe those jurisdictions to which Congress intended to extend Section 5 based on their egregious histories of racial discrimination in voting. See 1975 House Report 23-27, 30-31; see also, *e.g.*, 1975 House Hearings 858-68; *id.* at 922-28. "[L]ike blacks throughout the South," minority voters in the newly covered jurisdictions had to "overcome the effects of [racial] discrimination as well as efforts to minimize the impact of their political participation." 1975 House Report 16-17. In each covered jurisdiction, including previously covered jurisdictions, voting changes would be evaluated with

respect to "each racial, ethnic, or language minority group encompassed by the phrase 'race or color' and by the prohibitions of Title II [of the Amendments]." *Id.* at 27 n.43.[2]

Because Congress sought in 1975 to extend Section 5 coverage to those jurisdictions with substantial minority populations that were using discriminatory and dilutive devices similar to those used in jurisdictions successfully covered by Congress in 1965, its reliance on similar criteria in 1975 to reach such jurisdictions was rational in both theory and practice. Compare Def. Br. 13-21, 35-36 with Pl. Reply 16. See also *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424, 438 (D.D.C. 2011) (citing testimony before Congress in 2006 that the 1965, 1970, and 1975 formulas "served only as a proxy for

---

[2] Because Congress intended to remedy different harms in Title II (coverage under Section 5) and Title III (coverage under Section 203, 42 U.S.C. 1973aa-1a) of the 1975 Amendments, Congress relied on different criteria to describe the jurisdictions subject to the different requirements. As the House Judiciary Committee explained:

> [T]wo distinct triggers were developed to identify areas with differing magnitude of barriers to full participation by [the designated] minorities in the political process. The remedies set in operation by these triggers mirror the differences in the evidentiary record on the severity of voting discrimination against [the designated] minorities. Title II * * * contains the prohibition and remedies for those jurisdictions with the more serious problems, while Title III imposes more lenient restrictions upon areas with less severe voting difficulties.

1975 House Report 23. Because coverage under Section 203 is now revisited every five years, see 42 U.S.C. 1973aa-1a(a)(2), that provision accounts for shifting minority populations and requires bilingual elections in those jurisdictions with substantial populations of limited English proficient citizens. Conversely, Section 5 remedies intentional racial discrimination in voting beyond the provision of English-only election materials. Florida has challenged only the constitutionality of Sections 5 and 4(b); it has not challenged the bilingual election remedies set forth in Section 4(f)(4) or Section 203. Cf. Pl. Reply 15-16.

identifying those 'jurisdictions that had a long, open, and notorious history of disenfranchising minority citizens and diluting their voting strength whenever they did manage to register and cast ballots'").

d. Nor is there merit to Florida's assertion, see Pl. Reply 4, that Congress's invocation of its Fourteenth Amendment authority indicates that its only concern was addressing language barriers to full participation in the electoral system. Initially, both the Fourteenth and Fifteenth Amendments prohibit intentional discrimination in voting on the basis of race. Congress's enactment and subsequent extensions of Section 5 may therefore be justified under either Amendment. Cf. *Shelby Cnty.*, 679 F.3d at 864-65.

In any case, Florida concedes that the Fifteenth Amendment protects races other than blacks and whites, Pl. Reply 3, although it also argues that the Fifteenth Amendment does not protect "language minorities." But because "language minorities" are defined for purposes of Section 5 by their race, *i.e.*, Alaskan Native, Asian American, Native American, and persons of Spanish heritage, and not by their limited English proficiency, Congress could have imposed Section 5 in the newly covered jurisdictions solely under its Fifteenth Amendment authority. See *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey* (*Northwest Austin I*), 573 F. Supp. 2d 221, 244 (D.D.C. 2008) (three-judge court) ("Given that section 5 protects specific language minorities, all identified by ancestry or heritage, Congress could have based the provisions expansion solely upon the Fifteenth Amendment."), rev'd on other grounds, *Northwest Austin II*, 129 S. Ct. at 2508; see also *Northwest Austin I*, 573 F. Supp. 2d at 244 (explaining the Supreme Court has held that "[a]ncestry can be a proxy for race"). Indeed, Congress invoked its Fourteenth

Amendment authority only because it wanted to ensure the constitutionality of Section 5's expansion in the event a court determined that any of the minority groups Congress sought to protect in addition to black voters in the newly covered jurisdictions was not a "race" under the Fifteenth Amendment. See, *e.g.*, 1975 House Hearings 495-97, 603, 769-70, 927. Congress hardly invoked the Fourteenth Amendment as a limiting factor; indeed, Congress cited *both* its Fourteenth and Fifteenth Amendment authority in support of expanding Section 5's geographic scope.

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

Florida argues that discrimination against groups designated by the VRA as "language minorities" is the *only* factor relevant to this Court's determination of Section 5's validity in those jurisdictions first covered in 1975. See, *e.g.*, Pl. Reply 3-8. But Section 5 prohibits voting discrimination against all racial minorities and there is no reason to ignore evidence that such discrimination lingers in covered jurisdictions. On the contrary, because Section 5 is a remedy for intentional racial discrimination in voting, any contemporary evidence of such discrimination in covered jurisdictions, including jurisdictions originally covered in 1975, is relevant to this Court's evaluation of Congress's decision to reauthorize Section 5 and to maintain its existing geographic scope. That is true regardless of whether the record of voting discrimination in those jurisdictions originally covered in 1975 involves Asian-American, Native-American, Alaskan-Native, Latino, or black voters, or a combination of those groups. Cf. Pl. Reply 3, 6, 9.

The record before Congress in 2006 supports its conclusion that Section 5's current burdens are justified by current needs throughout covered jurisdictions, including those jurisdictions first covered in 1975. See Def. Br. 21-34; see also Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2(b)(9), 120 Stat. 578. That judgment is entitled to great weight absent "a plain showing that Congress has exceeded its constitutional bounds." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000); see also *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997); *Shelby Cnty.*, 679 F.3d at 873. Accordingly, this Court should reject Florida's constitutional challenge and uphold the 2006 Reauthorization as a valid exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments. Cf. *Shelby Cnty.*, 679 F.3d at 872-73.

1. Florida attempts to reduce over 15,000 pages of record evidence to a series of bar graphs and comparisons of "race jurisdictions" and "language minority jurisdictions." See Pl. Reply 8-14; Pl. App. For the reasons discussed, separating covered jurisdictions in those terms is misleading because all covered jurisdictions are subject to Section 5's prohibition on the basis of race or color. Such comparisons are thus neither relevant nor informative.[3] Florida's recitation of the evidence and its accompanying charts show only

[3] Both Florida's comparison of "race" and "language minority" jurisdictions, see Pl. Reply 9-14, and its Appendix are improper and should be disregarded by this Court. Florida's Appendix is unsworn and largely unattributed, accompanied by neither a declaration nor affidavit, and inaccurately reflects the sources relied upon and the evidence before Congress in 2006. See, *e.g.*, Pl. App. Tbl. 4 & Fig. 4-1 (omitting South Dakota from Fig. 4-1); Tbl. 6 & Figs. 6-1, 6-2 (representing that the National

(continued…)

that the covered jurisdictions continue to discriminate across all relevant indicators of intentional racial discrimination in voting and that some jurisdictions are worse offenders than others. But that has always been true of the covered jurisdictions. See *Shelby Cnty.*, 679 F.3d at 879-81 (upholding Section 5 despite evidence that some covered jurisdictions have worse records than others of engaging in unconstitutional voting discrimination); *South Carolina*, 383 U.S. at 329-30 (upholding Section 5 despite evidence of varying degrees of unconstitutional voting discrimination among the covered jurisdictions). Nor can Florida overcome Congress's considered judgment that racial discrimination in voting remains serious and widespread throughout covered jurisdictions, including jurisdictions first covered in 1975, and that case-by-case enforcement under Sections 2 and 203 has proven inadequate to fully protect minority voting rights. Cf. *Shelby Cnty.*, 679 F.3d at 872-73.

(…continued)
Commission Report concluded there were no successful Section 5 enforcement actions in Alaska, New York, Michigan, Florida, California, South Dakota, and New Hampshire even though the Commission, 1 *Continued Need* 186, explicitly stated it did not study those States); Tbls. 7, 8 (citing census report for a list of state-by-state voter registration and turnout rates for Hispanic voters where report states that the "[sampled] base is too small to show" such rates for twenty of the States Florida lists); Tbl. 1 (citing the Commission Report, but omitting the Commission Report's statement, 1 *Continued Need* 195, that "[t]he [relatively low] number of [language assistance enforcement] actions * * * should not be taken as a sign that there is widespread compliance * * * the opposite is true"; equating actions brought under Sections 203, 4(e), and 4(f)(4); and relying on "statewide minority population" even for States only partially covered under Sections 203 and 4(f)(4)); Tbl. 5 (incorrectly labeling one column of data as "Observers (1982-2004)," when, per the source for that data, that column of data represents the number of elections monitored by federal observers during the relevant time period, 1 *Continued Need* 180-81). Nor does Florida explain the factual basis for its representations, the validity of its methodology, or the statistical significance of its "results."

The evidence Florida asks this Court to ignore shows substantial racial discrimination in voting in those jurisdictions covered in 1975. That discrimination is apparent from the same categories of evidence *Shelby County* found indicative of a pattern of constitutional violations when the court rejected a facial challenge to the 2006 Reauthorization: Congress's detailed review of Section 5 objections, MIRs, enforcement actions, and judicial preclearance actions; federal observer coverage; Section 2 litigation; racially polarized voting and vote dilution; anecdotal evidence of discrimination; and lingering racial disparities in registration, turnout, and the number of minorities in elected office. See 679 F.3d at 863-73, 880; Def. Br. 21-34. Because "Congress's evaluation of the [2006] evidence extended beyond bare numbers," *Northwest Austin I*, 573 F. Supp. 2d at 251, this Court should likewise take into account the nature and scope of all of the evidence before Congress in 2006. See, *e.g.*, Def. Br. 21-34; *Shelby Cnty.*, 679 F.3d at 865-73.

2. Florida attempts to discount the evidence of ongoing racial discrimination in jurisdictions covered in 1975 and in Texas in particular. Pl. Reply 8-14. But Texas played a significant role in Congress's decision to expand the geographic scope of Section 5 in 1975, and evidence of race-based voting discrimination against both Latino and black voters in Texas remained prominent at the time of the 2006 Reauthorization. Indeed, between the 1982 reauthorization and the 2006 reauthorization, Texas had the second highest number of objection letters, and the most MIRs (between 1990 and 2005), withdrawn submissions, Section 5 enforcement actions, Section 2 outcomes favorable to minority plaintiffs, and failed judicial preclearance actions of *any* covered jurisdiction.

See 1 *Voting Rights Act: Evidence of Continued Need, Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 2d Sess. 251, 259, 270-71, 273, 281 (2006) (*Continued Need*); Def. Br. 25-31; *Northwest Austin I*, 573 F. Supp. 2d at 281. In addition, although Section 2 does not require proof of discriminatory intent, a number of Section 2 cases with outcomes favorable to minority plaintiffs in Texas included findings of intentional discrimination against Latino and black voters. See Def. Br. 31-32; see also *Northwest Austin I*, 573 F. Supp. 2d at 260-62; *LULAC* v. *Perry*, 548 U.S. 399, 440 (2006). Florida also discounts sizeable gaps in voter registration between whites and minority voters in Texas. Def. Br. 22-23.

3. In another distortion of the record, Florida attempts to ignore relevant evidence of intentional voting discrimination in South Dakota (another jurisdiction originally covered in 1975). Florida states, for example, that South Dakota accounted for none of the 105 documented successful Section 5 enforcement actions. Pl. Reply 12-13. But the source Florida relies upon *specifically excludes* the covered counties in South Dakota – it includes only those enforcement actions brought in eight of the nine fully covered States and North Carolina. Compare 1 *Continued Need* 186 (explaining the data reflected in Tbl. 4) and 250 (Tbl. 4) with Pl. Reply 12-13 and Pl. App. Tbl. 6, Fig. 6-2 (mischaracterizing the data in Tbl. 4 by listing States not included in the Commission's study and representing that the Commission had concluded that there were no successful actions in Alaska, Michigan, Florida, New York, New Hampshire, and South Dakota).

Indeed, the House Judiciary Committee singled out South Dakota as "[p]erhaps the most egregious" offender of Section 5's preclearance requirement. H.R. Rep. No.

478, 109th Cong., 2d Sess. 42 (2006) (2006 House Report); Def. Br. 28. In fact, South Dakota deliberately ignored its Section 5 obligations, enacting more than 600 statutes and voting changes between 1976 and 2002 but seeking preclearance fewer than five times. 2006 House Report 42. Only after Native-American plaintiffs from the covered jurisdictions filed a Section 5 enforcement action did the State agree to fulfill its preclearance obligations. *Id.*; see also *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976, 1018-28, 1052 (D.S.D. 2004) (finding the State's 2001 legislative redistricting plan impermissibly diluted Native-American voting strength and describing South Dakota's long history of voting discrimination against Native Americans).

The evidence before Congress also showed that the covered counties in South Dakota accounted for the largest number of Section 2 outcomes favorable to minority plaintiffs per million residents of any covered or non-covered jurisdiction. Compare Def. Br. 37 (citing *Shelby Cnty.*, 679 F.3d at 876 (Tbl.)) with Pl. Reply 11 ("[e]xcluding South Dakota") and Pl. App. Fig. 4-1 (omitting South Dakota). Indeed, even the dissent in *Shelby County* suggested that Congress would be justified in imposing Section 5 preclearance on South Dakota based on that Section 2 data. See 679 F.3d at 897 (Williams, J., dissenting).

4. Florida also seeks to downplay evidence of Section 5 objections and MIRs. Pl. Reply 9-10. As explained in the Attorney General's opening brief, however, Section 5 objections and MIRs have had a significant effect in protecting minority citizens against discriminatory voting changes in those jurisdictions covered in 1975. Def. Br. 23-28. Notably, since the last reauthorization of Section 5 in 1982, the Attorney General has

objected to discriminatory statewide redistricting plans in Texas, Arizona, Alaska, Florida, South Dakota, and New York, thereby preventing discrimination against millions of minority voters. Def. Br. 24-27. The Attorney General also has objected to a variety of discriminatory voting changes at the local level. Def. Br. 23-26; see also *Northwest Austin I*, 573 F. Supp. 2d at 251. Many of these objections were based on evidence of discriminatory intent. Def. Br. 23-24 (citing the complete copies of the objection letters for jurisdictions covered in 1975); see also, *e.g.*, *Northwest Austin I*, 573 F. Supp. 2d at 289-91, 298-99 (providing examples of intent-based objections in California and Texas). Importantly, these objections do not begin to reflect Section 5's indisputable deterrent effect. Def. Br. 23; *Northwest Austin I*, 573 F. Supp. 2d at 264-65.

5. Florida also ignores relevant evidence put before Congress in 2006 regarding lingering racial disparities between whites and minority voters in registration, turnout, and number of elected minority officials in the jurisdictions covered in 1975. Compare Pl. Reply 14 (providing nationwide rates) with Def. Br. 22-23 (citing the 2006 House Report and providing evidence of significant gaps in Texas and Florida); see also *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d at 468, 492 (discussing evidence of significant racial disparities between whites and minority voters in registration and turnout in Arizona, Florida, Texas, and California); *Northwest Austin I*, 573 F. Supp. 2d at 248. Although significant progress has been made and racial disparities between whites and minority voters have decreased over the last several decades, see Def. Br. 22-23, Congress found that substantial gaps persisted, providing more evidence that Section 5 remains necessary in the covered jurisdictions. In upholding the validity of the 1975 Reauthorization, the

Supreme Court likewise acknowledged significant gains in minority political participation but expressed concern over persisting racial disparities between whites and minority voters and the ability of jurisdictions to resort to dilutive voting measures as minority voting strength increased. See *City of Rome* v. *United States*, 446 U.S. 156, 180-81 (1980).

6. Florida also misunderstands the relevance of evidence of racially polarized voting to Congress's 2006 decision to reauthorize Section 5. Pl. Reply 7-8. Because racially polarized voting is a necessary precondition for dilutive actions to have their intended discriminatory effect, Congress, in reauthorizing Section 5, reasonably relied on evidence of racial-bloc voting across all levels of government and in both partisan and non-partisan elections. Def. Br. 32-33. In other words, Congress would not know whether covered jurisdictions' use of potentially dilutive techniques like at-large voting was discriminatory unless it also knew whether there was racially polarized voting in those jurisdictions. Thus, although polarized voting is not itself evidence of state-sponsored discrimination, whether it exists is clearly relevant to the discrimination inquiry. Though *Shelby County* did not specifically discuss racially polarized voting, the court did emphasize the "especially important" relevance of vote-dilution evidence to Section 5's validity. 679 F.3d at 864-65. In light of the close relationship between racially polarized voting and intentional vote dilution, *Shelby County* hardly discounted the probative value of evidence of racially polarized voting in covered jurisdictions to Congress's decision to continue to impose Section 5 in those jurisdictions. Cf. *Shelby*

Cnty. v. *Holder*, 811 F. Supp. 2d at 487-90; *Northwest Austin I*, 573 F. Supp. 2d at 263-64.

C. The Scope of Section 5's Geographic Coverage, As Reflected In Section 4(b), Sufficiently Relates To Current Voting Discrimination

Florida challenges Congress's continued use of the amended coverage criteria in Section 4(b) to describe the scope of Section 5' preclearance requirement, arguing that Section 4(b) relies on "decades-old" data, does not reflect "current political conditions," and is not tied to "intentional interference with the right of language minority citizens to access the ballot." Pl. Reply 15. *Shelby County* has already rejected those arguments. See 679 F.3d at 864-65, 878-83. Florida concedes that "[*Shelby County*]'s reasoning is controlling here." Pl. Reply 1. Florida's challenge to Section 4(b) thus fails.

1. As explained in both Part I.A., pp. 9-12, *supra*, and the Attorney General's opening brief, Congress chose the criteria in Section 4(b) to describe the jurisdictions it wanted to cover based on substantial evidence of unconstitutional voting discrimination against minority voters in those jurisdictions. Def. Br. 19-20, 35-36. For the reasons explained, that choice was a legitimate exercise of Congress's constitutional authority.

2. Contrary to Plaintiff's assertion that the 1975 formula does not capture the "correct jurisdictions * * * today," Pl. Reply 17, Congress reasonably decided in 2006 to maintain Section 5's existing geographic scope. See Def. Br. 35-39. The data comparing published and unpublished Section 2 outcomes favorable to minority plaintiffs in covered and non-covered jurisdictions demonstrate that racial discrimination in voting remains concentrated in the covered jurisdictions, including those jurisdictions covered in 1975.

Def. Br. 30-32, 36-37; *Shelby Cnty.*, 679 F.3d at 874-78.[4] As *Shelby County* explained, seven of the eight jurisdictions with the highest number of Section 2 outcomes favorable to minority plaintiffs are covered jurisdictions, including Texas and the covered portions of South Dakota, which together account for the highest absolute number of Section 2 outcomes in covered jurisdictions (Texas) and the highest number of successful outcomes per million residents in all jurisdictions (South Dakota). See 679 F.3d at 875; Def. Br. 31, 37.

While it is more difficult to extrapolate from Section 2 data for partially covered jurisdictions such as Florida, Def. Br. 37, the data the court examined in *Shelby County* showed a greater number of favorable Section 2 outcomes for minority plaintiffs in the covered portions of South Dakota, New York, and California than in the non-covered portions of those States. 679 F.3d at 876 (Tbl.). Moreover, although some "middle-range covered states appear comparable to some non-covered jurisdictions" with respect

[4] Florida notes that the state-by-state data that Dr. McCrary provided in *Shelby County* was not provided in this case. Pl. Reply 11 n.4, 20 n.10. Dr. McCrary has provided a supplemental declaration with this brief that includes the same tables that were presented to this Court in *Shelby County*. See Suppl. McCrary Decl. ¶¶5-10. Florida also argues in its Response to Defendants' Statement of Uncontested Material Facts that Dr. McCrary's analysis was not part of the legislative record before Congress in 2006. See Pl. Resp. to Def. SMF ¶¶63-69. As Dr. McCrary explained in his initial declaration, however, "[e]vidence concerning 61 of the 99 settlements [he] found in non-covered jurisdictions (62%) was on the record considered by Congress in adopting the 2006 Reauthorization Act." Def. SMF, Ex. 1 at ¶21. In addition, the court in *Shelby County* relied on Dr. McCrary's analysis in upholding the constitutionality of the 2006 Reauthorization, noting both that the Supreme Court has relied on post-enactment evidence to uphold a law's constitutionality and that the plaintiff in *Shelby County*, like Florida here, "has identified no errors or inconsistencies in the data analyzed by McCrary." *Shelby Cnty.*, 679 F.3d at 877-78.

to Section 2 outcomes, the data do not reflect Section 5's "deterrent and blocking effect [in screening] out discriminatory laws before section 2 litigation becomes necessary." *Id.* at 880. Rather, as *Shelby County* explained, the Section 2 data do not "tell the whole story." *Id.* at 878. Thus, in determining whether racial discrimination in voting remains concentrated in those jurisdictions covered in 1975, this Court should examine the cumulative impact, and the nature and scope, of all of the evidence before Congress in 2006. See *id.* at 880-81; see also Def. Br. 21-37.

3. In addition, just as the D.C. Circuit in *Shelby County* examined the statute as a whole, this Court must consider the important role the bail-in and bailout provisions play in adjusting Section 5's coverage, particularly with respect to those jurisdictions that can demonstrate discrimination-free voting practices. 679 F.3d at 881-83; see Def. Br. 37-39. As *Shelby County* explained, "in determining whether section 5 is sufficiently related to the problem that it targets, [a court must] look not just at the section 4(b) formula, but at the statute as a whole, including its provisions for bail-in and bailout." 679 F.3d at 881 (internal quotation marks omitted). "The importance of th[e] significantly liberalized bailout mechanism [afforded under *Northwest Austin II*] cannot be overstated." *Id.* at 882. By including a bailout mechanism in the VRA, Congress gave covered jurisdictions the power to terminate their own coverage by establishing a record of not discriminating for ten years.

Because any covered jurisdiction can now seek bailout once it demonstrates it has not discriminated in voting for 10 years, an increased number of jurisdictions have been able to terminate coverage under Section 5 in recent years, thereby ensuring that

preclearance remains targeted at those jurisdictions with the worst current records of discrimination. *Shelby Cnty.*, 679 F.3d at 881-82; Def. Br. 37-38. Indeed, since the filing of the Attorney General's opening brief, the United States has filed a notice of consent to bailout by Merced County, California. See Ex. 2, Suppl. Decl. Robert S. Berman ¶¶4-5. Merced County includes approximately 84 subjurisdictions, which also would be granted bailout if the court adopts a proposed consent decree in that case. See *id.* ¶6. In addition, two covered counties in Virginia recently filed declaratory judgment actions seeking to terminate coverage, and the Attorney General has advised those jurisdictions that he will consent to their bailout. See *id.* ¶7. The covered counties in Florida, like other covered jurisdictions, are eligible to seek bailout on their own, if they meet the objective criteria in Section 4(a), 42 U.S.C. 1973b(a). Moreover, covered jurisdictions that maintain clean voting records for 10 years and successfully bail out from coverage can largely relieve non-covered States that act as their submitting authority, like Florida and the covered counties in this case, from Section 5's slight administrative burden.

Taking the statute as a whole, Congress's decision in 2006 to continue using the existing coverage criteria in Section 4(b) was a congruent and proportional response to unconstitutional racial discrimination in voting that remains concentrated in covered jurisdictions, including those jurisdictions originally covered in 1975.

II

REQUIRING PRECLEARANCE AS TO EACH OF SECTION 5'S PROTECTED GROUPS IS A CONGRUENT AND PROPORTIONAL RESPONSE TO RACIAL DISCRIMINATION IN VOTING IN THE COVERED JURISDICTIONS

The record belies Florida's statement that "Congress amended the coverage formula [in 1975] not because of some general propensity in these jurisdictions to discriminate against non-White voters, but because it believed there was a problem regarding language minorities." Pl. Reply 23. As already explained in Part I, *supra*, and in our opening brief, Def. Br. 13-21, Section 5 was imposed in those jurisdictions covered in 1975 based on substantial evidence of intentional voting discrimination against black voters and the covered language minorities, all of whom are racial minorities, in violation of the Fourteenth and Fifteenth Amendments. The evidence before Congress in 2006 showed that racial discrimination in voting has persisted in those jurisdictions, which have continued to use discriminatory and dilutive devices against a broad range of minority voters and especially those voters in a position to challenge white-dominated electoral systems. See Def. Br. 19, 32 (citing testimony in both 1975 and 2006 that intentional voting discrimination is most apparent when the number of minority voters has increased enough to decide elections or exert significant influence).

Notwithstanding Florida's assertion to the contrary, see Pl. Reply 23, the 2006 evidence before Congress showed that covered jurisdictions often engage in race-based discrimination against multiple minority groups. See, *e.g.*, 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. 514-23 (2006)

(*Scope*) (objection letters based on voting discrimination against Latino and black voters in Florida); *id.* at 1622-66 (objection letters based on voting discrimination Latino, Asian-American, and black voters in New York); 2 *Scope* 2204-11, 2214-18, 2230-44, 2247-53, 2259-77, 2280-2314, 2338-58, 2378-85, 2390-2402, 2419-21, 2427-50, 2457-59, 2489-93, 2500-12, 2518-30 (objection letters based on voting discrimination against Latino and black voters in Texas). See also 1 *Scope* 454-505 (objection letters based on voting discrimination against Latino and Native-American voters in Arizona); Def. Br. 29-30 (describing discriminatory actions witnessed by federal observers); *LULAC*, 548 U.S. at 439; *DeGrandy* v. *Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992). Accordingly, requiring Section 5 preclearance on the basis of race, color, and membership in a protected minority group is a congruent and proportional response to evidence of racial discrimination in voting in the covered jurisdictions and, therefore, is a valid exercise of Congress's Fourteenth and Fifteenth Amendment enforcement authority.

III

THE 2006 AMENDMENTS TO SECTION 5 ARE CONSTITUTIONAL

For the reasons explained in the Attorney General's opening brief, Florida lacks standing to challenge the 2006 Amendments to Section 5's substantive standard, *i.e.*, subsections (b), (c), and (d). See Def. Br. 40-41, 45; see also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449-50 (2008); *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960); *Shelby Cnty.*, 679 F.3d at 883-84. Even if this Court were to reach the merits of Florida's arguments, this Court should uphold the 2006 Amendments because

they are valid enforcement legislation under the Fourteenth and Fifteenth Amendments and do not violate equal protection. Def. Br. 40-50; see also *LaRoque* v. *Holder*, 831 F. Supp. 2d 183 (D.D.C. 2011), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012).

Florida does not seriously contest its lack of standing, arguing only that it is able to challenge Section 5's "increased federal burden" and that the Attorney General should have raised its constitutional arguments sooner. Pl. Reply 25-26. Of course, there was no reason for the Attorney General to address Florida's constitutional challenge to the 2006 Amendments during the statutory phase of this case. Regardless, the Attorney General's position, both that Florida acted with a retrogressive purpose and that the retrogressive effect of its ballot access measures must be evaluated under Section 5(a), is evident from that briefing. See, *e.g.*, DCL ¶¶23-48, 51-71, 98, 106-07. And contrary to Florida's assertion that it is "too late" for the Attorney General to challenge Florida's lack of standing, Pl. Reply 25, it is never "too late" to raise a jurisdictional argument.

1. In any event, the amended purpose prong is valid enforcement legislation and does not violate equal protection. Def. Br. 42-44; see also *LaRoque*, 831 F. Supp. 2d at 207-14, 232. Through the amended purpose prong, Congress has exercised its enforcement authority to prohibit only that conduct that is itself unconstitutional. Def. Br. 42-43.[5]

[5] Florida argues that the 2006 Amendments to Section 5's purpose and effect prongs expanded Section 5's substantive preclearance standard and imposed an "increased federalism burden." Pl. Reply 25, 27-28 & n.13. As explained in *LaRoque*, however, "even if the amendments are an expansion of Section 5's preclearance standard, [which is (continued…)

Florida argues that the Attorney General's application of the amended purpose prong requires it to show "the *absence* of every conceivable kind of evidence that could be used to show discriminatory purpose." Pl. Reply 27. To the contrary, once Florida has established that it had a legitimate, nondiscriminatory reason for adopting a proposed voting change, it need only rebut any affirmative evidence offered by the Attorney General or Defendant-Intervenors tending to show discrimination. Def. Br. 43 & n.11. Nor is Section 5's burden-shifting mechanism, under which Florida bears the ultimate burden to show it did not enact a proposed voting change with a discriminatory purpose, unconstitutional. Cf. Pl. Reply 26. Indeed, Section 5's burden-shifting mechanism has been upheld repeatedly by the Supreme Court. Def Br. 43.

Florida also argues that the Attorney General's position in this case shows that the amended purpose prong violates equal protection because, according to Florida, the Attorney General has claimed that "race must be decisive," *i.e.*, "for purely racial reasons, Florida cannot make non-discriminatory voting changes." Pl. Reply 27. That is an obvious distortion of the preclearance inquiry. The Attorney General has argued that Florida has not met its burden of showing that the proposed changes neither have the

---

(…continued)
not at all clear,] that does not ipso facto make them unconstitutional." 831 F. Supp. 2d at 205-06; see also *id.* at 205-07. Rather, once Congress amasses substantial evidence of racial discrimination in voting, it "has a range of options for remedial legislation that would be congruent and proportional to the problem." *Id.* at 205. "[T]he question before this Court is whether the legislative response Congress chose is within that range, not where it falls in the range relative to past legislation." *Id.* at 206. "So long as current needs justify the current legislation," the district court explained, "it does not matter whether Congress is legislating more or less assertively than it has in the past." *Id.*

purpose nor will have the effect of discriminating on the basis of race or color – not that the State cannot enact changes that have no discriminatory purpose or effect.

2. The amendments to Section 5's effect prong also are valid enforcement legislation and do not violate equal protection. Def. Br. 45-50; see also *LaRoque*, 831 F. Supp. 2d at 214-28, 232-38. In its reply, Florida ignores the Attorney General's argument that the Department's retrogression analysis, including any analysis under the ability-to-elect standard, is a flexible one that takes into account not only natural demographic shifts and traditional districting principles but also the extent to which there is a reasonable and legitimate justification for the proposed voting change. Compare Pl. Reply 28 with Def. Br. 45-50. For that reason, the Department compares both the old and new plans, as they would operate under current conditions, when conducting its retrogression analysis. Def. Br. 47. Thus, contrary to Florida's assertion, Pl. Reply 28, Section 5 requires the preservation of ability-to-elect districts only to the extent that it is the voting change, and not a demographic shift or the violation of equal protection principles, that causes the loss of such a district. As such, the amended retrogression standard neither violates *Boerne* nor equal protection.

Florida also argues that the Fifteenth Amendment does not protect the right to use certain "means that the State has provided to aid voters in their exercise of the franchise." Pl. Reply 30. Of course, the Fifteenth Amendment protects voters from racial discrimination in voting. If curtailing the means by which a voter may cast a ballot has a racially discriminatory effect, Congress can invoke its enforcement authority under

Section 2 of the Fifteenth Amendment to prohibit that practice. See, *e.g.*, *Lopez*, 525 U.S. at 282-83; *City of Rome*, 446 U.S. at 173-76; *South Carolina*, 383 U.S. at 327-28.

CONCLUSION

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

Respectfully submitted,

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

THOMAS E. PEREZ
Assistant Attorney General

/s/ *Erin H. Flynn*
T. CHRISTIAN HERREN, JR.
MARK L. GROSS
JOHN ALBERT RUSS IV
ERIN H. FLYNN
ELISE S. SHORE
CATHERINE MEZA
ERNEST A. MCFARLAND
Attorneys
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave. NW
Room NWB-7254
Washington, D.C. 20530
Telephone: (202) 305-7738
Facsimile: (202) 307-3961

Dated: July 20, 2012

Exhibit 1
Supplemental Declaration
of Dr. Peyton McCrary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff v. THE UNITED STATES OF AMERICA and ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendants, FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*, Defendant-Intervenors, KENNETH SULLIVAN, *et al.*, Defendant-Intervenors, and NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA, Defendants-Intervenors.	NO. 1:11-CV-01428 (CKK-MG-ESH) THREE JUDGE COURT

Supplemental Declaration of Dr. Peyton McCrary

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

1. My name is Peyton McCrary, and I reside in Arlington, Virginia. I am an historian employed since August, 1990, by the Voting Section, Civil Rights Division, of the Department of Justice. My responsibilities include the planning, direction, coordination, or performance of

historical research or statistical analysis in connection with litigation. On occasion I am asked to provide written or courtroom testimony on behalf of the United States.

2. My initial declaration in this case was filed June 25, 2012. I incorporate by reference the summary of professional qualifications provided in that declaration, including the attached Curriculum Vitae, which I prepared and know to be accurate.

3. In response to issues raised by the state of Florida in its Reply Memorandum of Points and Authorities, attorneys for the Department of Justice have asked me to clarify certain empirical facts regarding the course of Section 2 litigation that were part of the record before Congress in 2005-2006. In addition I have been asked to address factual issues regarding evidence of racial disparities in education raised by the state's reply brief.

4. Because Section 2 litigation is nationwide and not restricted to jurisdictions covered by Section 5, it offers a means of comparing racial discrimination affecting voting in covered with non-covered jurisdictions. In my initial declaration I documented two key characteristics of Section 2 litigation: 1) the volume of cases settled in favor of minority plaintiffs was substantially larger in unreported cases than in cases with reported decisions; and 2) the volume of cases settled in favor of minority plaintiffs in both reported and unreported cases was substantially larger in jurisdictions covered by Section 5 than in non-covered jurisdictions. In that declaration, I also documented that this pattern was evident in the record before Congress when it reauthorized Section 5 in 2006.

5. In this supplemental declaration I have broken these data into separate patterns by state. The purpose is to provide empirical evidence – from the record before Congress in 2006 – concerning the coverage formula set forth in Section 4 of the Act. Tables 1 and 2 in this

declaration are the same state-by-state tables that were submitted in my February 16, 2011 declaration to the Court in *Shelby County v. United States*, 1:10-cv-651 (D.D.C.).

6. Table 1 provides the number of reported Section 2 cases with outcomes favorable to minority plaintiffs in states that are entirely covered by the formula set forth in Section 4(b) of the Voting Rights Act. These data are taken from Ellen Katz, et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (2005), *reprinted in To Examine Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16, 964-1124 (2005), and finalized as published at 39 U. Mich. J.L. Reform 643 (2006). I have used the numbers from the finalized database. Table 1 also identifies for each of the covered states the number of favorable outcomes in unreported Section 2 cases, taken from Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005* (2006), *reprinted in Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 104-289 (2006).[1] Table 1 does *not* consider the pattern for covered jurisdictions in partially covered states, which is discussed in my initial declaration.

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

Table 1: State-by-state Pattern of Section 2 Outcomes in States Entirely Covered by Section 5

Jurisdictions	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported)	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported & Unreported)
Entirely Covered States		
Alabama	12	192
Alaska	0	0
Arizona	0	2
Georgia	3	69
Louisiana	10	17
Mississippi	18	67
South Carolina	3	33
Texas	7	206
Virginia	4	15
Total (covered states)	***57***	***601***

7. Table 2 below relies on the Michigan study once again for outcomes in reported cases in non-covered states. The numbers for outcomes in unreported cases in non-covered states are taken from Attachment B to my initial Declaration of June 25, 2012, relying in part on summaries of cases in the record before Congress (cited in my initial declaration).

8. As the data in Tables 1 and 2 make clear, looking only at liability findings of a Section 2 violation gives a skewed picture of Section 2 litigation. In states entirely covered by Section 5 (see Table 1) the 57 favorable outcomes in reported decisions represented only 9.5% of the total outcomes (601) in both reported and unreported cases. For Alabama, reported decisions account for only 6.3% of the total favorable outcomes.

Table 2: State-by-State Pattern of Section 2 Outcomes in States Not Covered by Section 5

Jurisdictions	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported)	Section 2 Cases With Outcomes Favorable to Minority Plaintiffs (Reported & Unreported)
Non-Covered States		
Arkansas	4	28
Colorado	2	3
Connecticut	1	2
Delaware	1	1
Hawaii	1	1
Idaho	0	0
Indiana	1	4
Iowa	0	0
Illinois	9	11
Kansas	0	0
Kentucky	0	0
Maine	0	0
Maryland	2	5
Massachusetts	1	3
Minnesota	0	0
Missouri	1	2
Montana	2	5
Nebraska	1	1
Nevada	0	0
New Jersey	1	2
New Mexico	0	7
North Dakota	0	1
Ohio	2	2
Oklahoma	0	0
Oregon	0	0
Pennsylvania	3	4
Rhode Island	1	2
Tennessee	4	6
Utah	0	1
Vermont	0	0
Washington	0	0
West Virginia	0	0
Wisconsin	1	1
Wyoming	0	0
Total (non-covered states)	***38***	***92***

9. The data reported in Table 2 above also reflect a disparity between reported and unreported cases. The number of favorable outcomes in reported cases (38) represents 41.3% of total favorable outcomes (92).

10. A comparison of the data in Tables 1 and 2 makes clear that minority plaintiffs brought many more successful Section 2 cases in covered states than in non-covered states. Looking just at reported cases, covered states accounted for 57 favorable outcomes and non-covered states for only 38. Looking at the total of both reported and unreported cases, the disparity was much greater: states covered by Section 5 accounted for 601 Section 2 cases with favorable outcomes to minority plaintiffs – *more than six times* the 92 favorable outcomes in non-covered states.

11. As I noted in my initial declaration in this case, the pattern in states only partially covered by the formula in Section 4(b) – such as Florida – does not lend itself to a meaningful comparison of covered and non-covered counties. Only one of the partially covered states contains more than a handful of covered jurisdictions: North Carolina. Forty of North Carolina's 100 counties are subject to Section 5 review. According to the 2000 Census, these covered counties contain only 36.2% of the state's population.[2] Looking at reported decisions, six of the 10 favorable outcomes (60%) were in covered counties. The disparity is even greater when examining all Section 2 cases in North Carolina, both reported and unreported; 36 of 55 favorable outcomes (65.5%) occurred in covered counties.[3] Thus a comparison of Section 2

---

[2] These and all references to the population of jurisdictions are taken from Census 2000, Summary File 1, Table P1.

[3] See the case summaries for North Carolina in *Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 109th Cong. 923-33, 937-42, 944, 947, 951-60, 1769-77, 1779, 1781-95, 1797-98, 1800-02 (2006) [hereinafter *Evidence of Continuing Need*].

litigation outcomes in covered and non-covered counties in North Carolina reveals a pattern similar to that when comparing covered and non-covered states.

12. For the most part, however, the great population disparities between covered and non-covered jurisdictions in partially covered states make it difficult to compare the quantity of Section 2 litigation outcomes in each category, as explained in Paragraphs 30-33 of my June 25th Declaration.

13. The population in Florida's covered counties is – as I explained in my initial Declaration - only 8.7% of the state's population. In light of this population disparity, it is inconceivable that Florida's covered counties could have as many Section 2 settlements favoring minority voters as the state's non-covered counties.

14. In short, examining the pattern of outcomes in Section 2 litigation broken down by state is the only meaningful basis for comparing the pattern of Section 2 settlements in covered and non-covered jurisdictions. Such a comparison reinforces the assessment in my initial report that the coverage formula set forth in Section 4(b) of the Voting Rights Act targets those areas of the country where racial discrimination affecting voting is most concentrated.

15. In its reply brief, at pp. 6-7, the state has also challenged the relevance of racial and ethnic disparities in education to the assessment of voting discrimination. As part of my official responsibilities, I have reviewed virtually all expert witness reports and sworn testimony in the voting rights litigation conducted by the Voting Section over the last 22 years, with the exception of the nine months in 1998-1999 when I took a leave of absence from the government to serve as the Eugene Lang [Visiting] Professor in the Department of Political Science at Swarthmore College. Based on this broad familiarity with expert witness testimony and my own knowledge of the relevant political science literature, I make the following observation about the

relationship between educational disparities and unequal opportunities to participate in the political process.

16. In most cases brought under Section 2 of the Voting Rights Act, and in many Section 5 declaratory judgment actions, the Department has provided expert testimony documenting racial or ethnic disparities in educational achievement and other socio-economic characteristics documented in reports of the Bureau of the Census, in conjunction with documenting racial disparities in voter registration and voting. In litigation involving jurisdictions with a history of official discrimination in education and voting, expert testimony has routinely documented that history.

17. Among the least disputed propositions in political science is that there is a strong correlation between levels of education and levels of political participation. In their classic study of the determinants of political participation in the United States, Raymond Wolfinger and Steven Rosenstone list as the "core finding" of their heavily quantitative research what they call "the transcendent importance of education." Wolfinger and Rosenstone, *Who Votes?* (New Haven, Ct., Yale University Press, 1980), 102. "Education increases one's capacity for understanding complex and intangible subjects such as politics, as well as encouraging the ethic of civic responsibility. Moreover, schools provide experience with a variety of bureaucratic problems, such as coping with requirements, filling out forms, and meeting deadlines." *Id.*

18. After three decades of extensive political science research, this finding of Wolfinger and Rosenstone remains largely undisputed. See, for example, Warren E. Miller and J. Merrill Shanks, *The New American Voter* (Cambridge, Ma., Harvard University Press, 1996), 51-57, 84-87. For a recent literature review, see Benjamin Highton, "*Voter Registration and Turnout in the United States*," 2 Perspectives on Politics 507 (2004).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of July, 2012.

Peyton McCrary

Exhibit 2
Supplemental Declaration
of Robert S. Berman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff v. THE UNITED STATES OF AMERICA and ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendants, FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*, Defendant-Intervenors, KENNETH SULLIVAN, *et al.*, Defendant-Intervenors, and NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA, Defendants-Intervenors.	NO. 1:11-CV-01428 (CKK-MG-ESH) THREE JUDGE COURT

Supplemental Declaration of Robert S. Berman

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

1. I am an attorney who currently serves as a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. I have supervisory responsibility for the administrative review of voting changes submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. I have been employed as an attorney in the Department of Justice for over 34 years with more than 22 years of service in the Voting Section.

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

3. My initial declaration in this case was filed on June 25, 2012. The current declaration supplements the information provided in that declaration

4. In paragraph 33 of my June 25th declaration, I refer to a declaratory judgment action filed by Merced County, California, seeking to terminate coverage under Section 4 of the Voting Rights Act. *Merced County, California* v. *Holder*, No. 1:12-cv-00354 (D.D.C.).

5. On July 10, 2012, the United States filed a notice that it would consent to the relief requested by Merced County and that it would work with it on a proposed consent decree.

6. Merced County includes approximately 84 subjurisdictions, which would also be granted bailout if the court adopts a proposed consent decree in the *Merced County* case.

7. Since the date of my initial declaration, two additional actions have been filed seeking to terminate coverage under Section 4. They are *Carroll County, Virginia* v. *Holder*, 1:12-cv-1166 (D.D.C. July 17, 2012) and *Craig County, Virginia* v. *Holder*, 1:12-cv-01179 (D.D.C. July 18, 2012). The Attorney General has advised those jurisdictions that he will consent to their bailout.

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

Executed on this 20th day of July 2012.

Robert S. Berman