No. 12-96

IN THE
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

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STATEMENT OF INTEREST[1]

Amicus curiae the American Bar Association ("ABA") respectfully submits this brief in support of Respondents. Because Respondents, other amici, and the court below address in detail the congressional record as it relates to Section 5 preclearance, the ABA addresses a corollary issue: Section 5 is essential because the record amply supports the conclusion that Section 2 litigation alone cannot be an adequate and sufficient remedy for voting discrimination in covered jurisdictions.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

As the national voice of the legal profession, the ABA has taken special responsibility for protecting the rights guaranteed by the Constitution and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

fostering the rule of law. In 1973, for example, the ABA created a committee (now the Standing Committee on Election Law) to examine and develop ways to improve the federal electoral process. In 1981, when Congress began hearings on the reauthorization of the Voting Rights Act ("VRA"), this committee held a symposium attended by representatives from congressional committees, civil rights groups, academia, and states covered by the VRA. In recommending that the ABA support reauthorization of the VRA, the committee reported that the Act "has not only enhanced the political posture of minority groups, but it has also advanced the very ideals that make our country's governmental system unique in political history."[3] The committee also reported:

> The Voting Rights Act has been called the most effective civil rights law ever enacted in view of the large number of minority politicians elected to office subsequent to its passage. There is clear evidence that as soon as the Act comes into play, the number of minority politicians elected to office increases dramatically. Also, there is general agreement that the Act has been instrumental in

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[3] *ABA Report with Recommendation #105* (adopted August 1981), published in 106 Annual Report of the American Bar Association 742, 745 (1981), available from the ABA archives. Recommendations for ABA policy and their supporting reports are presented to the ABA's House of Delegates ("HOD"), which is comprised of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. Only recommendations adopted by the HOD become ABA policy. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html.

> developing a political community of interest and awareness in minority communities.[4]

In 2005, the ABA adopted a policy that supported the 25-year extension of the Act that is now before the Court, stating in the accompanying Report that "despite the progress that has been made since the passage of the Act, members of minority groups still face discrimination in exercising their right to vote." *ABA 2005 Report with Recommendation #108* at 1.[5] Reauthorization would "enable continued efforts to prevent and dismantle discrimination in voting[,]" "enhance access to the political process, deter and/or document ongoing abuses and prohibit discriminatory voting practices." *Id.* As the Report concluded, "because of the persistence of discriminatory behavior in the election process," the ABA sought "to ensure that the Act remains a valuable tool in the struggle to preserve and protect voting rights for all Americans." *Id.* at 5.

The ABA reaffirmed this policy in 2006, pursuant to which it participated in the congressional debates on the VRA's 2006 reauthorization, *ABA 2006 Report with Recommendation,*[6] stating that Section 5 is one of the Act's "most important and effective" provisions; that it, along with its companion provisions, "will continue to be important factors and

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[4] *Id.* at 743.

[5] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_108.authcheckdam.pdf.

[6] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_bg_exhibit_2_3.authcheckdam.pdf. Because legislation reauthorizing the VRA was introduced in the United States House of Representatives and Senate in May 2006, but the ABA HOD did not meet until August 2006, this Report with Recommendation was adopted as ABA policy in June 2006 by the ABA's Board of Governors, acting pursuant to ABA by-laws.

safeguards in making available the right to vote to all segments of our population"; and that it therefore "must be reauthorized." *Id.* at 1, 4.[7]

The ABA continues to believe that Section 5's work is not yet complete and that the Act continues to provide critical protections against discrimination in voting. The ABA also believes, as discussed in this amicus brief, that Section 2 litigation alone would not be an adequate and sufficient remedy for voting discrimination in covered jurisdictions.

SUMMARY OF ARGUMENT

The ABA urges the Court to uphold the 2006 reauthorization of the Voting Rights Act as constitutional. The congressional record contains extensive statistical evidence and first-hand accounts demonstrating that the predicates for Section 5 preclearance continue to exist—namely, that unconstitutional voting discrimination continues in covered jurisdictions, that such discrimination would be even more prevalent without Section 5, and that Section 5 is an effective tool to combat it.[8]

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[7] The ABA's participation included letters sent to Congress supporting reauthorization. *See, e.g.,* Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives (June 20, 2006), http://www.abanet.org/poladv/letters/electionlaw/060620letter_vra_reauth_house.pdf; Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to Senate 2 (July 20, 2006), http://www.abanet.org/poladv/letters/election law/060720letter_vra_reauth_senate.pdf.

[8] Indeed, as recently as last year, courts continue to reject under Section 5 voting laws that have a discriminatory purpose or effect. *See, e.g.*, *Texas* v. *United States*, __ F. Supp. 2d __, 2012 WL 3671924, at *18 (D.D.C. Aug. 28, 2012) (redistricting plan violated Section 5 because it "was enacted with discriminatory purpose" and would increase representation gap); *Texas* v. *Holder*, __ F. Supp. 2d __, 2012 WL 3743676, at *32 (D.D.C. Aug. 30, 2012) (voter ID law violated Section 5

The congressional record also supports Congress' conclusion that Section 2 litigation alone would be an inadequate and insufficient remedy for voting discrimination in covered jurisdictions. That is the focus of this brief. Voting rights litigation under Section 2, as many ABA members know from front line experience, is extremely complex and costly. During the several years it regularly takes to litigate a Section 2 case, officials who were elected under an improper election regime continue to hold office, implement policies, and make a wide variety of decisions that remain in effect, often long after the election process that brought them to power is found to be discriminatory. Moreover, success in eliminating one discriminatory practice is often followed by the adoption of a new discriminatory practice that must be fought all over again. These effects are real and profound for representative democracy—and they cannot be remediated effectively through the prospective remedies Section 2 litigation characteristically offers.

The congressional record documents the limitations that would result from relying exclusively on Section 2 litigation to fight voting discrimination in jurisdictions with a documented history of discrimination. These limitations underscore the continuing need for Section 5 preclearance. The time, cost, and complexity of prosecuting a Section 2 case cause significant on-going harms that could be minimized by Section 5 preclearance but often cannot be remedied after the fact.

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because it would have retrogressive effect on racial minorities' effective exercise of the right to vote).

ARGUMENT

THE RECORD SUPPORTS CONGRESS' CONCLUSION THAT THE AVAILABILITY OF SECTION 2 LITIGATION IS NOT AN ADEQUATE REMEDY IN COVERED JURISDICTIONS

Petitioner and its *amici* argue that Section 2 litigation and case-by-case enforcement can adequately address present-day discrimination and should lead the Court to strike down Section 5 preclearance. The record compiled during the 2006 reauthorization contradicts that argument and led Congress to the opposite conclusion: that "case-by-case enforcement alone is not enough to combat" voting discrimination in covered jurisdictions. H.R. Rep. No. 109-478 at 57 (2006). Although Section 2 litigation is unquestionably useful, the record documents that many of the harms caused by voting discrimination are not later remediated through Section 2 litigation.

That is because elected officials enact, interpret, and enforce laws and policies, starting on the day they take office. Post-election Section 2 litigation cannot turn the clock back and undo the effects of these legislative choices. The following sections highlight materials in the legislative record that document why Section 2 litigation alone is not a sufficient remedy in jurisdictions with a history of voting discrimination. These materials reinforce why Section 5 preclearance remains necessary to prevent the fundamental harms to representative government that voting discrimination causes.

A. Prospective Remedies From Successful Section 2 Litigation Do Not Undo Substantial Harms Flowing From Past Discriminatory Elections.

Elections held under a discriminatory regime cause significant harms that are not remedied, years later, by forward-looking Section 2 remedies. Congress emphasized the magnitude of harms from abridgements of the right to vote: "The right to vote is the most fundamental right in our democratic system of government because its effective exercise is preservative of all others." H.R. Rep. No. 109-478 at 6 (citing *Reynolds* v. *Simms*, 377 U.S. 533 (1964)). Indeed, "there is no right more fundamental than the right to participate in our democratic form of Government," because, "[t]he ability of our citizens to cast a ballot for their preferred candidate ensures that every voice is heard, most importantly, the right to vote safeguards our freedoms and all other rights enshrined in the Constitution." *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1 (2005) ("*Impact and Effectiveness*") (statement of Congressman Chabot).

Even when Section 2 litigation results in a finding that an election was discriminatory, a court is ill-equipped to undo the harms that flowed from that election, as lawyers well-versed in the remedies available for Section 2 litigants told Congress. For example, Donald M. Wright, General Counsel for the North Carolina State Board of Elections, testified from his personal experience that during the several years it takes to fully litigate a Section 2 case, "the discriminatory voting change is put into effect, which would not happen under Section 5." *Reauthorizing the Voting Rights Act's Temporary Provisions:*

Policy Perspectives and Views from the Field: Hearing before the S. Comm. on the Judiciary, 109th Cong. 121 (2006) ("*Views from the Field*"). As a result, "even after a successful Section 2 case is brought to stop a discriminatory voting change, the damage is often already done: elections may have been held under an unlawful plan, providing candidates elected under that plan an advantage in terms of incumbency and fundraising under any remedial plan that might be adopted." *Id.*

The congressional record repeatedly emphasizes this incumbency advantage that Mr. Wright highlighted. Several former and then-current elected officials—Republican and Democrat alike—reported to Congress that the incumbency benefits enjoyed by officials elected under a discriminatory regime are unlikely to be remedied by litigation that concludes years after they were elected. Colorado's former Lieutenant Governor testified to that precise point:

> Whether the incumbent achieved it by an illegal scheme, as you characterize it, or was simply elected to the position, the reality is that incumbents enjoy an advantage as it relates to opposition candidates. I mean, that has been proven clearly across the board in terms of the record of incumbency and the ability to hold on to offices.

Voting Rights Act: Evidence of Continued Need: Hearing before the Subcomm. on the Constitution of the House Judiciary Comm., 109th Cong. 97 (2006) ("*Continued Need*") (testimony of Joe Rogers). So did numerous others.[9]

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[9] *See, e.g., Impact and Effectiveness* at 13-14 (testimony of Jack Kemp, former member of Congress and Secretary of Housing and Urban Development); *id.* at 43-44 (testimony of

When it comes to the incumbency advantage, "[i]t does little good to establish months, perhaps years after an election is over that the law was violated and that citizens were deprived of the opportunity to exercise their franchise in a meaningful and effective manner." *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the House Judiciary Comm.,* 109th Cong. 5 (2005) ("*History and Purpose*") (Congressman Nadler). Even if the election regime is changed for future elections as a result of successful Section 2 litigation, "[i]ncumbency can then preclude a subsequent remedy at the polls." *Id.*

Witnesses also made clear that many other harms flow from discriminatory elections during the time it takes to litigate a Section 2 case. *E.g.*, *The Continuing Need for Section 5 Pre-Clearance: Hearing before the S. Comm. on the Judiciary,* 109th Cong. 15 (2006) (testimony of Pamela S. Karlan, Associate Dean, Stanford University School of Law) ("*Continuing Need*") ("Section 2 is not an adequate substitute for Section 5 because it allows the changes to go into effect, and that means you can go through several election cycles while the litigation is going on where the discriminatory change is in effect."); *Views from the Field* at 7 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.) ("but for Section 5, those voting changes, those redistricting plans would have gone into effect and would have served to minimize the opportunity of African-Americans in a State with a long and well-documented history of discrimination to participate

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Marc H. Morial, President and CEO of the National Urban League and former Mayor of New Orleans).

in the political process. They would have been left to try to find lawyers to bring complex Section 2 cases, and all the while they would have suffered from discrimination.").

Decisions in Section 2 cases litigated since the 1982 VRA reauthorization reinforce this point.[10] In one case, for instance, the court found that an at-large election scheme that had been in place *for 27 years* was specifically intended to be racially discriminatory and had "render[ed] the ability of the black voters to elect their representative substantially inferior to that of whites." *Dillard* v. *Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1467 (M.D. Ala. 1988). As a result, "black citizens of Baldwin County have been *effectively left unrepresented* because the school board representatives in the county may for the most part ignore the interests of blacks in the county without fear of political consequences." *Id.* (emphasis added). And, as the evidence established, "the Baldwin County Board of Education has been particularly unresponsive to the black citizens' concern about race relations in the county's schools, in particular concerns arising out of school desegregation and the apparent resulting displacement of black administrators." *Id.* Still, the court-ordered remedy only changed the situation going forward; it could not remedy nearly three decades of black children

[10] A significant portion of the congressional record consists of reports and accounts of voting rights litigation that occurred during 1982-2006. Congress reviewed the litigation reports and examined the underlying case law. *See* S. Rep. No. 109-295 at 65 (2006) (explaining staff's review of the case law). The examples discussed in this brief are drawn from these record materials.

attending school while the school board was free to ignore their interests.

Similarly, in *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004), the court held that a 2001 redistricting plan "dilute[d] the Indian vote and violates § 2 of the Voting Rights Act," finding "that Indians in Districts 26 and 27 have been denied an equal opportunity to access the political process." *Id.* at 1052. In reaching this conclusion, the court found that "South Dakota is largely unresponsive to the needs of Indians." *Id.* at 1043. In particular, the court catalogued numerous ways that three legislators from District 26 who took office under the 2001 plan "repeatedly voted against legislation that was of particular concern to, and supported by, Indians." *Id.* The court identified over a dozen pieces of such legislation that one or more of these legislators opposed or helped defeat. *Id.* 1043-46. It described how Indians from District 26 "frequently contact[ed]" another district's representative rather than their own representative. *Id.* at 1046. The remedy for the VRA violation, however, would only apply prospectively. *Id.* 1053. Votes that had been cast contrary to Indian interests were not revisited, and the legislators continued to serve their term in office.

As cases like *Baldwin County* and *Bone Shirt* demonstrate, during the time discriminatory election procedures are utilized, citizens whose votes are marginalized (or worse) may be subjected to the discriminatory policies and practices of improperly elected officials.

Litigation of an extended duration—while improperly elected officials continue to make decisions—is not an anomaly in individual enforcement actions. For example, it took *seven*

years for a court to order Lafayette County, Mississippi to develop a remedial plan to cure a Section 2 violation in how the County Board of Supervisors was elected. *See Houston* v. *Lafayette Cnty.*, 20 F. Supp. 2d 996 (N.D. Miss. 1998). Elections continued to be held under the unlawful plan during the litigation. *Id.* at 998. As a result, improperly elected members of the Board of Supervisors made untold numbers of decisions over the course of nearly a decade that directly impacted Lafayette County's residents. Supervisors are responsible for "adopting the annual budget, setting tax rates, adopting orders, resolutions, or ordinances which involve county affairs, promoting growth and development of Lafayette County, appointing certain individuals to carry out the daily business of the county such as Attorney, Comptroller, County Administrator, Engineer, Purchase Clerk, and Road Manager, and many other duties as mandated by State Law."[11]

In another case, it took the plaintiffs *eight years* to obtain a ruling that a South Carolina legislative delegation system that historically "arose against the backdrop of a white supremacist movement" and "sought to diminish African-American voting power" violated the "one person, one vote" requirement derived from the Fourteenth Amendment's Equal Protection Clause. *Vander Linden* v. *Hodges*, 193 F. 3d 268, 270, 272 (4th Cir. 1999); *see also Continued Need* at 964-68 (Report by Voting Rights Project of the American Civil Liberties Union) ("*ACLU*

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[11] *Board of Supervisors Page, Overview*, Lafayette County, Mississippi, http://lafayettecoms.com/HTML/Main.html?Board of Supervisors Page (last visited Feb. 1, 2013).

Report").[12] Throughout these eight years, the delegations performed numerous governmental functions including "approving or recommending expenditures for various activities, approving local school district budgets, initiating referenda regarding special-purpose governing bodies in public service districts, approving reimbursement of expenses for county planning commissioners, approving county planning commission contracts, altering or dividing county school districts, reducing special school levies, submitting grant applications for park and recreation facilities, and making or recommending appointments." *Id.* at 276. The consequences of years of decisions by the unconstitutional legislative delegations unquestionably lasted long after the unlawful system was dismantled.

As one final example, no mayoral or city council elections were held in Butler, Georgia, *for nine years*, while Section 2 litigation was pending. *Chatman* v. *Spillers*, 44 F.3d 923 (11th Cir. 1995). Ultimately, the Eleventh Circuit had to direct the district court to dissolve its stay and order a special election. When that election occurred, two black candidates were elected to the city council for the first time in the city's history. *Continued Need* at 828-30 (*ACLU Report*).

In these cases, and numerous others, the courts ordered forward-looking relief—leaving victims to hope that, in the next election, they would not be denied an equal voice in governance. But the legislative legacies of officials elected through the

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[12] The Fourth Circuit eventually resolved the "one person, one vote" issue in plaintiffs' favor, without needing to reach plaintiffs' other voting claims. *Vander Linden*, 193 F. 3d at 272.

discriminatory practices would undoubtedly be felt long after the next election.

B. The Congressional Record Documents Numerous Obstacles To Individual Voting Rights Actions.

Congress' conclusion that case-by-case enforcement actions would be insufficient to combat voting discrimination in jurisdictions with a history of discrimination is further buttressed by the evidence it compiled documenting impediments to litigating individual actions. Voting rights lawyers told Congress that these cases are especially complex, difficult, time consuming, and expensive. The inordinate amount of resources and expertise it typically takes to successfully litigate such cases creates real obstacles, even to filing suit.

In upholding the VRA in *South Carolina* v. *Katzenbach*, the Court acknowledged the historical fact that case-by-case litigation has previously proven inadequate to stop voting discrimination in some jurisdictions. 383 U.S. 301, 328 (1966) ("Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."). It emphasized this point again in *Northwest Austin Municipal Utility District No. One* v. *Holder*. 557 U.S. 193, 197-98 (2009) ("Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were creative in 'contriving new rules' to continue violating the Fifteenth Amendment 'in the face of adverse federal court decrees.'") (citation omitted).

The 2006 legislative record confirms that the difficult and complex nature of individual voting rights litigation persists as a stumbling block to reliance on Section 2 alone. Section 2 litigation remains "slow and expensive." *Northwest Austin*, 557 U.S. at 197. If anything, testimony from lawyers in the field reveals that such litigation has only gotten slower, more expensive, and more arduous since *Katzenbach*. Section 2 cases are among the most difficult cases to prosecute and have become more complex as voting discrimination has evolved from the blatant forms of discrimination that characterized the 1965 record to subtler but persistent discrimination like vote dilution that is more likely to be at issue today. H.R. Rep. No. 109-478 at 6 ("Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice.").

The following record materials illustrate the nature of individual enforcement actions.

- *Section 2 cases are enormously complex*.

"The Administrative Office of U.S. Courts ranks different types of cases by complexity and Section 2 cases, and voting rights cases in general, have among the highest rating. They are up there with securities cases and antitrust cases in the complexity and time requirements rating. A Section 2 case is not a picnic. It is one of the hardest things to do that there is, and Section 5 was designed exactly to avoid that kind of difficulty." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing before the S. Comm. on the Judiciary,* 109th Cong. 20 (2006)

(testimony of Armand Derfner, Attorney with Derfner, Altman, & Wilborn) ("*Benefits and Costs*").

- *Section 2 cases impose an extraordinary workload on courts and parties.*

"According to a study published by the Federal Judicial Center, voting rights cases impose almost four times the judicial workload of the average case" and "are more work intensive than all but five of the sixty-three types of cases that come before the federal district courts." *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing before the S. Comm. on the Judiciary,* 109th Cong. 141 (2006) (responses of Laughlin McDonald, Director, ACLU Voting Rights Project) ("*Introduction to Expiring Provisions*").

- *Section 2 cases are resource-intensive and take years to litigate.*

"Section 2 requires costly and time-consuming litigation. It also requires the bad change to go into effect and even be implemented for several election cycles before challengers can gather enough evidence to mount a successful court challenge, which is also incredibly costly, and although there is some attorney fees involved, you can never get back the money you put into section 2 cases." *History and Purpose* at 92 (testimony of Nina Perales, Regional Counsel for the Mexican American Legal Defense and Educational Fund).

"The costs by minority voters to hire a private attorney under section 2 * * * can run in the millions of dollars." *Impact and Effectiveness* at 42 (testimony of Ann Marie Tallman, President and General Counsel, Mexican American Legal Defense and Educational Fund); *see also Views from the*

Field at 121 (response of Donald M. Wright) (typical voting rights cases can take several years to litigate).[13]

"Adequate legal, financial and human resources did not exist in Mississippi in the past 40 years to bring a lawsuit in lieu of every one of the 169 objections that have been issued. Those resources do not exist today, and given persistent socio-economic disparities between Blacks and whites, I have little hope that this reality will change in the near future." *Modern Enforcement of the Voting Rights Act: Hearing before the S. Comm. on the Judiciary,* 109th Cong. 96 (2006) (response of Robert B. McDuff, Attorney and Vice Chair of the Board of Directors of the Mississippi Center for Justice) ("*Modern Enforcement*").

A private plaintiffs' attorney reported that "we had to put in over 2000 hours representing the plaintiffs, in addition to many more hours that the Justice Department put in" on a successful 2001 suit challenging the method for electing the County Council for Charleston, South Carolina. *Benefits and Costs* at 80 (answers of Armand Derfner); *see*

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[13] Compounding the burden for victims of discrimination, a putative plaintiff must have the resources *up-front* to hire and fund the lawyers, the necessary cadre of experts, and all of the associated litigation costs for multi-year litigation. Petitioner's suggestion that concerns about costs may be addressed by a post-litigation award of fees, Pet. Br. 33, does not comport with reality. Voting rights lawyers repeatedly told Congress that potential litigants simply do not have the resources to take on the substantial expenses that the plaintiff bears—often for years—in these cases and that even in successful cases, voting rights lawyers do not expect to be fully compensated. *History and Purpose* at 92 (testimony of Nina Perales); *Views from the Field* at 121 (response of Donald M. Wright).

also Impact and Effectiveness (statement of Joe Rogers); H.R. Rep. No. 109-478 at 39.

- *Section 2 cases require extensive expert testimony.*

"A typical Section 2 case requires at a minimum a demographer to draw plans to prove geographic compactness, and a statistician to prove political cohesion and legally significant white bloc voting. In addition, a typical case may require the services of a political scientist, a historian, an anthropologist, or other specialist." *Introduction to Expiring Provisions* at 141 (responses of Laughlin McDonald).

"To be appropriately presented, these cases require costly experts including historians, social scientists and statisticians, among others." *Modern Enforcement* at 96 (response of Robert B. McDuff).

Expert fees alone can total "more than one hundred thousand dollars." *Views from the Field* at 121 (response of Donald M. Wright).

- *There is a small bar of attorneys with the experience and qualifications to litigate Section 2 cases.*

"Having litigated a great number of voting rights matters in the State of Mississippi, I know that there are not enough lawyers who specialize in this area to carry the load." *Modern Enforcement at* 96 (response of Robert B. McDuff).

"It is a very small bar of [lawyers] who do Section 2 litigation and who have the expertise to do it." *Continuing Need* at 15 (testimony of Pamela S. Karlan).

Voters in "local communities and particularly in rural areas * * * do not have access to the means to bring litigation under Section 2," even though "they

are often the most vulnerable to discriminatory practices such as racially disparate annexation practices, that have significant impact on their property values, standing[sic] of living and their ability to participate equally in the election process." *History and Purpose* at 84 (statement of Anita Earls, Director of Advocacy, Center for Civil Rights); *see also Continuing Need* at 15 (testimony of Prof. Pamela S. Karlan) ("When you get down to the local level, the national organizations often are not involved, they are not aware of what is going on").

- *Section 2 cases are ill-suited to preserving litigation victories.*

A number of the cases in the legislative record demonstrate that individual enforcement actions require multiple rounds of litigation, as recalcitrant jurisdictions simply change their tactics after initial defeats and continue to employ discriminatory electoral procedures after conceding, or after a court finding, that their election procedures were unlawful under Section 2. When this happens, hard-earned victories and their resultant remedies are of little value unless litigation is reinstituted. And during the reinstituted litigation, discrimination victims continue to be denied their fundamental rights and continue to be subject to the actions and legacy of incumbent officials who continue to be elected based on discriminatory procedures.

For instance, after plaintiffs challenged the City of Foley, Alabama's at-large election method under Section 2—and won—Foley responded by implementing a racially discriminatory annexation policy, and the plaintiffs had to sue all over again. *Dillard* v. *City of Foley*, 926 F. Supp. 1053 (M.D. Ala.

1995).[14] In that next round of litigation, the city entered into a consent decree acknowledging that the plaintiffs had established a prima facie violation of Section 2 and the Constitution in the annexation policy. *Id.* at 1059.

Similarly, another Alabama jurisdiction—North Jones—conceded that "its at-large system for electing members of the town council was racially discriminatory in violation of [Section] 2" and entered into a consent decree. *Dillard* v. *Town of North Jones*, 717 F. Supp. 1471, 1473 (M.D. Ala. 1989). Despite North Jones' admission, plaintiffs had to return to the district court as a result of the very next election. This time, the court found that North Jones had moved from a discriminatory at-large system to a system in which the mayor intentionally discriminated against black candidates by refusing to provide them with necessary registration forms and refusing to swear them in after they were elected. *Id.* at 1476; *see also* S. Rep. No. 109-295 at 126-27.

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As these examples from the legislative record make clear, the evidence before Congress concerning the modern nature of Section 2 voting rights litigation

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[14] *Foley* was a part of the so-called "Dillard litigation" initiated in the 1980s and continuing through the 2000s that eventually "raised claims against a total of 183 Alabama cities, counties, and school boards that employed at-large methods of election, including Shelby County." *Shelby Cnty.* v. *Holder*, 811 F. Supp. 2d 424, 442 (D.D.C. 2011). Petitioner Shelby County was a party in that litigation. Shelby County entered into a consent decree and agreed to alter its electoral system. *See Dillard* v. *Crenshaw Cnty.*, 748 F. Supp. 819, 821-23 (M.D. Ala. 1990) (describing Shelby County's involvement in the Dillard litigation).

and its remedies was more than sufficient to support Congress' conclusion that Section 2 litigation is not sufficient to address voting discrimination in covered jurisdictions and is not an adequate substitute for Section 5's preclearance requirements.

C. The Record Documents The Efficacy Of Section 5 In Protecting Section 2 Victories, Preventing Additional Harms, And Avoiding New Discriminatory Actions.

Congress compiled extensive evidence that Section 5 fills the gaps left by Section 2 remedies. It "has enabled the Federal Government and court to stay one step ahead of covered jurisdictions that have a documented history of denying minorities the protections guaranteed by the Constitution." H.R. Rep. No. 109-478 at 65. Among other benefits, preclearance prevents relitigation of victories and effectively blocks new discriminatory measures from being implemented before they can result in further injuries. And in so doing, it protects the integrity of future elections and our system of government.

Congress specifically found that Section 5 "ha[s] been and continue[s] to be a shield that prevents backsliding from the gains previously won." *Id.* at 53. It made that finding based on a record that demonstrated Section 5's efficacy in blocking deliberate, repeated attempts by covered jurisdictions to reenact a voting regime that a court previously had struck down as discriminatory. *Id.* at 39-40.

Among others, in 1995, the Mississippi state legislature attempted to resurrect a dual registration system "under the guise of complying with the National Voter Registration Act of 1993 (NVRA)," even though a federal court had struck down the

same system as discriminatory years earlier. *Id.* at 39.[15] But, "[k]nowing that maintenance of the two registration systems had previously been struck down as discriminatory, the State refused to submit the change for preclearance under Section 5." *Id.* Following a Section 5 enforcement action, and a unanimous decision by this Court holding that the state must submit its plan, *see Young* v. *Fordice*, 520 U.S. 273 (1997), Mississippi finally submitted its plan to the Department of Justice ("DOJ") for preclearance. DOJ objected, and the system was not reinstituted. *See Continued Need* at 91 (statement of Joe Rogers).

In a similar fashion, in 2003, South Carolina "'enacted legislation adopting the identical method of elections for the board of trustees of the Charleston County School District that had earlier * * * been found to dilute minority voting strength in violation of Section 2,'" H.R. Rep. No. 109-478 at 39 (quoting *Continued Need* at 401 (*ACLU Report*)). When the DOJ denied preclearance, the state was prevented from re-implementing the same system that previously had been struck down. *Id.* at 40.

As the Mississippi and South Carolina examples (and others[16]) demonstrate, Section 5 prevented the victims of past voting discrimination from having to use Section 2 litigation to challenge—again—the same discriminatory system a court had already

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[15] The earlier victory had required plaintiffs to endure seven years of litigation. *See Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400 (5th Cir. 1991); *Mississippi State Chapter, Operation PUSH, Inc.* v. *Allain*, 674 F. Supp. 1245, 1241 (N.D. Miss. 1987).

[16] For additional examples of Section 5 objections spurred by a jurisdiction's attempt to evade or undermine the effect of a successful Section 2 action, *see* Federal Resp.'s Br. at 36 n.5.

struck down and from having to live under it again while they did so.

Congress also considered numerous reports from witnesses, many of them lawyers on the front lines of voting rights litigation, documenting examples of new or additional discriminatory actions that Section 5 effectively blocked, often without first demanding that the victims suffer the discriminatory voting practice.

For example, Albany, Georgia submitted a proposed redistricting plan following the 2000 census that was rejected by the DOJ under Section 5. In its objection, the DOJ noted that the black population in Ward 4 had steadily increased over two decades, but redistricting had decreased the black population in Ward 4 "'in order to forestall the creation of a majority black district.'" *Continued Need* at 400 (*ACLU Report*) (quoting Letter from J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr. (Sept. 23, 2002). The DOJ's objection concluded that the plan was implicitly designed "'with the purpose to limit and retrogress the increased black voting strength in Ward 4.'" *Id.* Absent Section 5, these "elections would have gone forward under a plan in which purposeful discrimination was 'implicit,' and which could only have been challenged in time consuming vote dilution litigation under Section 2." *Id.* at 400-01; *see also* H.R. Rep. No. 109-478 at 37-38.

In another example, in Kilmichael, Mississippi, three weeks before a 2001 municipal election with an "unprecedented number" of black candidates, "the town's mayor and the all white five-member Board of Aldermen canceled the election." *Continued Need* at 1282 ("Promises to Keep: The Impact of the Voting Rights Act in 2006"). In objecting to this change

under Section 5, the DOJ found "that the cancellation occurred after Census data revealed that African Americans had become a majority in the town." *Id.* After the town failed to reschedule the election, DOJ directed it to hold one in 2003, where Kilmichael's first black mayor was elected. *Id.*; *see also* H.R. Rep. No. 109-478 at 36-37.

As a final example, in Waller County, Texas, two students at historically black Prairie View A&M University were candidates for local office in 2004. "[A] month before the election, the Waller County Commissioners' Court voted to reduce the availability of early voting at the polling place closest to campus, from seventeen hours over two days to six hours in one day." *Continued Need* at 185 (Report by the National Commission on the Voting Rights Act). Early voting was crucial, because the election was scheduled during spring break. After a Section 5 action was filed seeking to prevent the county from implementing this change without preclearance, "[c]ounty officials abandoned the change and restored the additional eleven hours," which mooted the suit but provided relief before the election. *Id.* at 186. As a result, "[a]bout three hundred Prairie View students took advantage of the early voting period, compared to the sixty who would vote on the day of the primary, and the Prairie View student running for a seat on the commissioners' court narrowly prevailed." *Id.*

As these examples and all the others in this brief reinforce, the record Congress compiled in 2006 documents in detail the continuing need for Section 5 and the reasons that victims of voting discrimination cannot rely solely on Section 2 litigation to fight discrimination in covered jurisdictions. Based on the record it compiled, Congress reasonably concluded

that there remains a continuing need for Section 5 preclearance.

* * *

As Chairman Sensenbrenner aptly put it, "[t]here is no more fundamental right than the right to vote because in a democracy, only the right to vote can protect all the other rights." H.R. Rep. No. 109-478 at 117. The ABA agrees that no right is more "central to our system of Government" than the right to vote, *id.*, and it urges the Court to uphold the VRA reauthorization.

CONCLUSION

For the foregoing reasons and those in Respondents' briefs, the Court should affirm the decision of the D.C. Circuit and uphold the constitutionality of the 2006 Voting Rights Act reauthorization.

Respectfully submitted,

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