

**Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and
Educational Fund, Inc. to Written Questions from Senator John Cornyn
June 9, 2006**

1. *What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions v. non-covered jurisdictions?*

This question apparently assumes that the relevant constitutional inquiry associated with the foreseeable legal challenges to Sections 4 and 5 of the Voting Rights Act (“VRA”)¹ involves a detailed comparison between impediments to voting in covered and non-covered jurisdictions. That assumption, however, is unwarranted in light of Supreme Court’s interpretations of the provision both pre and post-*City of Boerne v. Flores*, 521 U.S.507 (1997).

I divide my response into two parts representing the Court’s interpretations before and after *Boerne* to illustrate that the Court has not approached the constitutional inquiry in the way that the question suggests in either period. Accordingly, there is no reason to believe that the Court will do so following renewal of the present bill.

Prior to *Boerne*, constitutional challenges to the structure and scope of Section 5 reached the Court on 2 occasions -- once following initial passage of the VRA, and then again following the 1975 renewal. In its first opportunity to address the constitutionality of the trigger -- the Congressional method of including-some jurisdictions and excluding others -- the Court in *South Carolina v. Katzenbach*, reasoned that the Section 4 trigger was reasonably targeted to require preclearance of voting changes in jurisdictions with some of the most serious histories of voting violations under the Fourteenth and Fifteenth Amendments.² In reaching this conclusion, the Court reasoned that “[l]egislation need not deal with all phases of a problem in the same, way as long as the distinctions drawn have some basis in practical experience.”³ In *City of Rome v. U.S.*, 446 U.S. 156 (1980), the Court reaffirmed its holdings in *Katzenbach*, citing with approval the *Katzenbach* court's reasoning that “[i]n response to its determination that 'sterner and more elaborate measures' were necessary, Congress adopted the Act, a 'complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant[.]’”⁴

Although *Boerne* requires that Congress carefully establish a record to justify legislation under the enforcement provisions of the Civil War Amendments, there is nothing in the decision that suggests that a new constitutional test exists that requires a state-by-state comparative analysis. Indeed, in the context of this VRA renewal, which

¹ 42 U.S.C. § 1973b

² 383 U.S. 301 (1966).

³ *Id.* at 331.

⁴ *City of Rome*, 446 U.S. 156 at 174, 183(1980) (quoting *Katzenbach*, 383 U.S. at 309, 315).

presents a detailed historical record that begins with the Congressional findings from 1965, and continues through the record presently being developed regarding the experience since 1982, *Boerne*'s "congruence and proportionality" inquiry focuses on whether Sections 4 and 5 continue to be an appropriate invocation of Congressional enforcement powers. While Congress is free to make a policy determination to alter coverage, the constitutional inquiry requires that Congress establish an adequate record for the policy decision that it makes. It is entirely appropriate for Congress, having previously determined that the serious problems of constitutional magnitude exist in certain parts of the country, to focus its attention on those jurisdictions to determine (1) whether or not those problems have been eradicated, and, (2) to the extent progress has been made, what role Section 5's prophylactic protections have played in it. At this point Congress has been engaged in this process for many months and, in LDF's view, appropriately focused on the history of discrimination that gave rise to the coverage formula, and the evidence of persisting forms of discrimination to evaluate which jurisdictions remain subject to the special requirements of Section 5 of the VRA.

Although one of the major flaws of the *Boerne* line of cases is the resulting lack of very clearly discernible decisional rules, at least three considerations support the interpretation that Congress continues to have the power to renew Section 5 for covered jurisdictions: (1) *Boerne* and its progeny consistently point to the VRA as the exemplar of appropriate use of congressional Civil War Amendment enforcement powers; (2) recent *Boerne*-line decisions make it clear that Congress is at the height of its power when it acts to protect a fundamental right such as the right to vote from continuing threats of invidious discrimination; and (3) the only post-*Boerne* constitutional challenge to Section 5 of the VRA to reach the Supreme Court cited *Boerne*, and then swiftly reaffirmed the reasoning of *Katzenbach* and *City of Rome*, and upheld preclearance for "jurisdictions properly designated for coverage".⁵ Nothing in *Lopez* suggests that the constitutional inquiry following *Boerne* requires a comprehensive state-by-state comparative analysis. Because Congressional power to renew Section 5 is not tied to a comparison of voting discrimination between the covered and non-covered jurisdictions, LDF has not undertaken such an analysis, nor are we aware of any comprehensive study that makes this comparison at the level of detail that would make it particularly probative.⁶

Of course, the effect of Section 5 cannot be assessed in jurisdictions outside of coverage but it is my strong sense that even when one looks at the intensity and

⁵ *Lopez v. Monterey County*, 525 U.S. 226 (1999).

⁶ It is worthy of mention that Section 5 coverage is not fixed under the existing statute but rather contains a way out and a way in. Under the bailout provision in Section 4(a), jurisdictions that can establish a clean record of compliance with the VRA and statutory principles of equality in voting can bailout from the preclearance obligations. In addition, where a court finds intentional discrimination in voting it has the authority under Section 3(c) to order that the jurisdiction submit future voting changes for preclearance. Both of the mechanisms have been used since the time of the 1982 renewal. See *The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 20, 2005) (statement of Gerald Hebert, Esq.) [hereinafter Hebert testimony]; *Jeffers v. Clinton*, 740 F.Supp. 585, 586 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991). See response to the next question for a more detailed discussion of these provisions.

pervasiveness of polarized voting patterns, and as importantly, jurisdictions' efforts to structure electoral competition with an awareness of the polarized voting patterns,⁷ there are differences that continue as modern effects of the history that justified the coverage formula in 1965. In addition, while the data and analyses in this area would be, at best, an imperfect indicator, by examining litigation patterns outside the context of Section 5 some inferences can be drawn.

Some witnesses who have testified during hearings have suggested that the coverage formula is no longer viable because of an unfounded belief that the extent of evidence of discrimination in covered jurisdictions as a whole is comparable to that in non-covered jurisdictions. These witnesses or studies tend to offer a comparison by analyzing the raw number of successful Section 2 lawsuits that result in published opinions in covered versus non-covered states. However, this type of analysis, which for very practical reasons of data availability examines only readily available opinions, does not account for the vast number of Section 2 lawsuits that are resolved through pre-trial settlement or those suits that are dismissed because the jurisdiction adopted a remedial plan. For instance, the University of Michigan recently completed a survey of formal judicial findings in Section 2 litigation resulting in published decisions.⁸ Because of the limited data pool, the report identifies only three successful Section 2 suits in Georgia since 1982. A closer examination reveals that there have been a total of 69 successful Section 2 suits in Georgia, with most victories resulting from settlements or other pre-trial resolution of the claims.⁹ This evidence is in the congressional record.¹⁰ Because of the data limitation, the Michigan Report identifies only 66 successful suits resulting in published opinions in the nine fully covered states since 1982. In fact, there have been 653 successful claims overall that provided relief to plaintiffs in various forms. In light of this data, one could posit that plaintiffs in covered jurisdiction have been 13 times more successful with Section 2 claims than those in non-covered jurisdictions.¹¹ Indeed, evidence of this high success rate in Section 2 suits in the covered jurisdictions bolsters

⁷ For examples of such efforts in Texas and elsewhere, see *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4-5 (2006) (post-hearing written responses by Theodore S. Arrington, Ph.D., Professor and Chair of the Political Science Department at the University of North Carolina at Charlotte) (describing the distinction between racial polarization in covered and non-covered jurisdictions and finding that it is more intense in covered jurisdictions and is also exploited to a greater degree in those jurisdictions); Letter from US Department of Justice, Civil Rights Division, Voting Section to Galveston County (Section 5 Objection Letter) (Mar. 17, 1992) (objecting to a redistricting plan in Galveston County, TX that fractured African-American and Latino voters and provided no opportunity districts among the eight districts in the plan, even though African Americans and Latinos comprised 31% of the county's population).

⁸ ELLEN KATZ ET AL., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982 (Dec. 2005) [hereinafter, "The Michigan Report"]. The Michigan study itself notes the limitation of its dataset. See *id.* at 8 ("This study identified 322 lawsuits, encompassing 750 decisions that addressed Section 2 claims since 1982. These lawsuits, of course, represent only a portion of the Section 2 claims filed or decided since 1982.")

⁹ Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005, National Commission on the Voting Rights Act (February 2006) at Table 5.

¹⁰ *Id.* (Submitted to the House Subcommittee on the Constitution on March 8, 2006).

¹¹ Of course, this number does not account for the unpublished successful resolutions in non-covered jurisdictions but that information, to our knowledge, is not in the Congressional record, and we have reason to believe, is not comparable to the number of settlements in covered jurisdictions.

the record that has been developed around the continuing need for special oversight in these particular areas.

In this way, the record of Section 2 cases can be compared to Section 5 submission withdrawals following more information requests: these suits have a similar impact of preventing discriminatory practices from taking effect (or, in this case, persisting), but they are often overlooked. Section 2 prohibits jurisdictions from enacting laws, practices, or procedures that have the purpose or effect of “deny or abridging the right to vote.” Although the functional analysis used to determine whether a Section 2 violation has occurred differs from that used to make a preclearance determination under Section 5, Section 2 cases can be instructive nonetheless, as successful cases indicate when and where minority voter’s experience impairment of the opportunity to participate equally in the political process.

Even the evidence outlined in this report, subject to the limitations I described above, demonstrates that, since 1982, plaintiffs brought more successful Section 2 claims in covered jurisdictions than in non-covered jurisdictions. These figures, however, do not tell the whole story because this study was limited to reported decisions, and a great many Section 2 cases, and in some covered jurisdictions the majority, are resolved without any decision being reported. Moreover, the statistics do not account for the fact that the existence of Section 5 itself functions as a deterrent to both retrogression and broader forms of voting discrimination in the covered jurisdictions. Although the analysis of Section 2 cases nationwide is not the central inquiry for the reasons I have described above, data regarding Section 2 litigation inside covered jurisdictions suggests that the preclearance requirement of Section 5 and its accompanying role of federal oversight, have helped to chill some voting discrimination in the covered jurisdictions but also supports the need to continue Section 5’s protections in the covered jurisdictions.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the Presidential elections of 1964, 1968, and 1972. Reauthorization of the Act in its current form would preserve those dates as the “triggers”.*
 - a) *Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?*
 - b) *Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

Initially, the Section 5 trigger was a legislative proxy designed to reach many but not all of the jurisdictions with serious violations of the fundamental right to vote. In three previous renewals, as in the present renewal process, Congress has found that the eradication of discrimination in voting which is the purpose of the VRA, is a gradual process that requires vigilance, and is aided dramatically by the VRA’s protections.

Although the trigger is an important aspect of the overall VRA structure, the constitutional inquiry, as I have set out in a slightly different context in my response to your first question, is whether the record of voting discrimination within the covered jurisdictions justifies continuing federal oversight. LDF's assessment of the record that has already been established, even as it continues to be augmented, is that the record justifies renewal because: (1) it sets out a level of continuing voting discrimination in covered jurisdictions that continues the historical pattern, and (2) it shows that § 5 deterrence and prophylactic oversight has been the engine of improvements that are fairly recent and, in many instances, tenuous.

In addition, the current structure of the VRA contemplates that change may be necessary with respect to those jurisdictions subject to the requirements of Section 5. These statutory safeguards allow for change and revision making it unnecessary to use turnout data from recent presidential elections or data gleaned from jurisdictions that have been subject to Section 2 litigation¹² to determine which jurisdictions should be picked up or dropped from the preclearance requirements of Section 5.

The bail-in mechanism outlined in Section 3(c) and the bailout mechanism outlined in Section 4(a) of the Act work to ensure that the scope of Section 5 is appropriately expanded or contracted. These provisions were successfully modified and liberalized during the 1982 reauthorization of the Act. Section 4(a) establishes a bailout process that is both reasonable and achievable for those jurisdictions that enjoy full minority participation in the electoral process.¹³ The evidence demonstrates that all jurisdictions that have attempted to bail-out from coverage under § 5 have been able to do so. Section 3(c) of the Act, the "bail-in" mechanism or so-called "pocket trigger," allows a court to order a jurisdiction that is not covered by the trigger formula, to submit its voting changes in accordance within the requirements of Section 5.¹⁴ This provision would thus apply to those political subdivisions subject to Section 2 litigation should a court make the appropriate judicial findings. Together, these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach

¹² We note that reliance on data from jurisdictions that have been "subject to Section 2 litigation" may not be particularly instructive. Indeed, some of the litigation that falls into this category may include matters that were dismissed, withdrawn or determined to be without merit. In that regard, some of these matters may not reveal anything about continuing forms of vote discrimination in non-covered jurisdictions.

¹³ Hebert testimony, *supra* note 6 (describing "several advantages that [local jurisdictions] derive from the current bailout formula" including being "afforded a public opportunity to prove it has fair, non-discriminatory practices[,] . . . [being] less costly than making §5 preclearance submissions indefinitely[,] . . . [and] once bailout is achieved . . . [being] afforded more flexibility and efficiency in making routine changes, such as moving a polling place.)

¹⁴ For example, where a court held "that the State of Arkansas has committed a number of constitutional violations of the voting rights of black citizens," and in particular had "systematically and deliberately enacted new majority-vote requirements for municipal offices, in an effort to frustrate black political success in elections traditionally requiring only a plurality to win," the court imposed the preclearance requirement on the state. *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990), *aff'd*, U.S. 1019 (1991). See also *Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel authorizing preclearance of redistricting plans over a ten year period); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary* (May 16, 2006) (written testimony of Pamela Karlan, Professor, Stanford Law School),

of Section 5. In addition, these provisions demonstrate that there are sound statutory mechanisms in place to ensure that the list of covered jurisdictions is appropriately revised and updated.

Turnout data for presidential elections in the 1960s and 1970s were not used alone to determine which jurisdictions had high levels of discrimination in voting. In determining which jurisdiction would be covered under Section 5 of the Act, Congress also looked to those jurisdictions that simultaneously “engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the rights to vote on account of race or color.” These data point to jurisdictions that have long histories of discrimination and are relevant to developing a record that illustrates what gave rise to the designation of covered jurisdictions. In 1982, Congress did not deem it necessary to update the coverage formula as many forms of recent and contemporary discrimination persisted in the covered jurisdictions. That assessment was vindicated when the Supreme Court rejected a constitutional challenge to Section 5 as recently as 1999.¹⁵ Likewise, Congress today possesses the same authority to identify persisting discrimination in the covered jurisdictions.

Finally, the history of the revisions to the trigger has been that new trigger dates have at times been added to cover jurisdictions with significant voting discrimination. For example, widespread documented voting discrimination against persons of Spanish Heritage in Arizona and Texas led to the addition of those states to Section 5 coverage in 1975. As a policy matter Congress has the power to revisit the trigger but LDF supports the presently pending bill in its existing form for the reasons described above, and additionally, because as far as LDF is aware, while the record as to covered jurisdictions is nearly complete, the record has not been similarly developed for non-covered jurisdictions in a way that would justify Section 5 expansion..

3. *In City of Boerne v. Flores, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the 14th and 15th amendments. In striking down the Religious Freedom Restoration Act, the Court observed, “RFRA’s legislative record lacks examples of modern instance of generally applicable laws passed because of religious bigotry.”*

Given this statement, would you support removing- at a minimum- the year 1964 from the coverage formula?

To the extent that the above question fairly characterizes the “rules” that *Boerne* and its progeny have set out¹⁶ the query about removing the 1964 aspect of the trigger

¹⁵ *Lopez v. Monterey County*, 525 U.S. 226 (1999).

¹⁶ While historical evidence, standing on its own, may not be adequate to warrant prophylactic Congressional activity, it can be part of a larger body of evidence to support Congressional action in reference to the Civil War Amendments. *See Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 730-735 (2003) (reviewing both “the long and extensive history of sex discrimination . . . [and] the persistence of such unconstitutional discrimination by the States” in concluding that this record “is weighty enough to justify the enactment of prophylactic § 5 legislation” by Congress); *Tenn. v. Lane*, 541 U.S. 509, 528 (2004) (upholding Title II of the ADA as a congruent and proportional response to a “long history” of

still does not follow. As I have described, *Boerne* and its progeny look to a historical pattern of discrimination to justify the use of Congressional enforcement powers. The proposed revision of Section 5 is unnecessary given Congress's sweeping power and authority under the Fourteenth and Fifteenth Amendments to pass "firm [legislation] to rid the country of racial discrimination in voting."¹⁷ Indeed, the Supreme Court has recognized that the Voting Rights Act, in its present form, is the exemplar of Congress's enforcement power under the Civil War Amendments. Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude today as it did in 1965.¹⁸

The legislation at issue in *Boerne* was deemed problematic because the legislative record lacked any recent and contemporary examples of modern instances of discrimination and also because the history of persecution described in the hearings all occurred more than 40 years ago.¹⁹ Thus, the *Boerne* ruling does not call for outright exclusion of historical data, such as the 1964 presidential election turn-out figures that help develop the coverage formula, so long as this data is sufficiently complimented by recent and contemporary evidence of continued voting discrimination.²⁰ For example, the experience in Louisiana since the time of the 1982 renewal is set out in detail in report regarding recent and persisting voting discrimination in the State of Louisiana.²¹ Although Louisiana, alone, does not make the case for renewal of the expiring provisions, the evidence is fairly stark.²² Indeed, the Department of Justice has interposed 96 objections to proposed voting changes in Louisiana since 1982. Although the vast majority of these objections were to redistricting plans, they also include objections to proposed changes to voter registration requirements, election schedules, voting procedures, polling places, method of election, and structures of elected bodies. Most recently, in 2001, the Louisiana State Legislature unsuccessfully sought judicial preclearance of its statewide redistricting plan for the Louisiana House of Representatives from a three-judge panel in the District Court for the District of Columbia. The proposed plan eliminated a majority Black district in Orleans Parish that provided African-American voters the opportunity to elect candidates of their choice. Ultimately, the litigation resulted in an eve of trial settlement that restored the opportunity district in Orleans Parish. The 2001 redistricting plan for the Louisiana House of Representatives is

discrimination, and citing the "sheer volume of evidence" of both that "long history" and the fact that discrimination "has persisted despite several legislative efforts to remedy the problem.")

¹⁷ *Katzenbach* at 315 (emphasis added).

¹⁸ See U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

¹⁹ *Boerne* 521 U.S. 507 (1997).

²⁰ Moreover, in *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance. 525 U.S. 266, at 269.

²¹ Debo P. Adebile, Voting Rights in Louisiana, 1982-2006 (report submitted to the H. Comm. on the Judiciary on Mar. 8, 2006).

²² The Leadership Conference on Civil Rights has carefully set out the experience in most of the covered jurisdictions since 1982 in the House record. The ACLU has submitted into the record a report of over 800 cases since 1982, The National Committee on the Voting Rights Act has submitted a detailed report, and several reports on the impact of Section 203 have been made a part of the record. In addition to these reports, detailed testimony from citizens, practitioners, academics, supporters, and detractors is in the record.

perhaps one of the most egregious statewide redistricting plans to emerge from the last decennial redistricting cycle in that the pre-settlement plan presented compelling evidence that initial plan was enacted with both retrogressive purpose and effect.

Moreover, there is a difference of constitutional moment when Congress legislates under the 14th and 15th Amendments *de novo*, as was the case in *Boerne*, in contrast to extending, for a limited period, the most successful civil rights legislation ever enacted at the nexus of fundamental rights and protection against racial and language minorities. In *Boerne*, the Court recognized that the VRA was enacted to protect the right to vote against racial discrimination and noted that Congressional power was at its “zenith” when enacting remedial legislation that reaches individuals in classes afforded a heightened level of constitutional scrutiny, such as those defined by race or gender, “it is easier”.²³ Given the fact that *Boerne* calls for historical evidence that is appropriately complimented by recent examples of discrimination and given that the Court touted Section 5 as model legislation exemplifying Congressional power under the Civil War Amendments, the removal of the 1964 presidential election from the coverage formula is both unnecessary and unwarranted.

4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions- yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or .153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only one objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?*

Objection rates alone neither address the efficacy nor continued utility of Section 5. Excluded from those statistics noted above are Section 5 matters that were denied preclearance in the District Court for the District of Columbia (D.C.); those matters that were settled while pending before the D.C. District Court²⁴; and voting changes that were

²³ *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. at 735; see also *Tennessee v. Lane*, 541 U.S. at 529.

²⁴ In *Louisiana House of Reps. v. Ashcroft*, the Department of Justice, under former Assistant Attorney General John Ashcroft, along with individual African American voters in Louisiana who were represented by the NAACP Legal Defense and Educational Fund, and the Louisiana Legislative Black Caucus, opposed Louisiana’s suit seeking a judicial preclearance determination from the District Court of the District of Columbia. The suit, which concerned the statewide redistricting plan for the Louisiana House of Representatives, sought to eliminate a majority Black district in Orleans Parish that provided minority voters an opportunity to elect candidates of choice. Ultimately, the litigation resulted in an eve of trial settlement that restored the opportunity district after the D.C. District Court issued a strong ruling condemning the Louisiana House of Representatives for a mid-course revision in its litigation theory and tactics. In my view, this is one of the most egregious statewide redistricting plans to emerge from the last decennial redistricting cycle in the pre-settlement was enacted with both retrogressive purpose and effect.

This case illustrates the limited utility of focusing solely on objection statistics in gauging the effectiveness of Section 5. Because this case was settled on the eve of trial, there is no firm objection statistic or declaratory judgment ruling to which can be referred. However, this matter illustrates one of the

withdrawn, altered or abandoned after the Department of Justice made formal requests for more information by mail²⁵ or informal requests for more information by telephonic inquiry. This activity provides a more comprehensive understanding of the overall impact and deterrent effect of Section 5.

In addition, this question focuses on the time frame between 1996 and 2005. Indeed, there is a notable decrease in the number of objections during the latter part of this time period. However, this decrease may be explained by several phenomena: (1) the *Bossier II* ruling that restricted the Justice Department from objecting to voting changes enacted with discriminatory purpose; (2) the natural reduction in voting changes submitted in the middle of a decade following the decennial redistricting cycle that generally occurs during the first 2 years of the decade; (3) the consistent deterrent effect of Section 5, among other things. I will explain each of these phenomena separately.

First, prior to the *Bossier II* ruling²⁶, in over 30 years of enforcement of the Voting Rights Act the United States Department of Justice (“DOJ”) had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose.²⁷ The DOJ had never limited its purpose analysis to a search for “retrogressive intent.” Instead, guidelines indicated that “the Attorney General [] consider[s] whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution.”²⁸ A recent empirical study revealed that discriminatory purpose served as the basis for 43 percent of all objections made in the administrative preclearance process prior to the *Bossier II* ruling.²⁹ The proposed legislation would restore § 5 to the pre-*Bossier II* standard and allow the DOJ to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the VRA. Once that standard is restored, both judicial and administrative preclearance determinations will increase markedly.

most egregious attempts on the part of a state to adopt a retrogressive plan that would have worsened the position of minority voters.

²⁵ See generally Luis Ricardo Fraga & Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act (June 7, 2006) (unpublished essay, submitted to Senate Judiciary Committee on June 9, 2006) (assessing the deterrent effect of Section 5 through an examination of the issuance of more information requests (MIRs) from the Justice Department).

²⁶ *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*).

²⁷ See *Katzenbach*, 383 U.S. at 328 (1966) (Section 5 was intended to prevent covered jurisdictions from “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination”; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself).

²⁸ 28 C.F.R. § 51.55(a).

²⁹ See Peyton McCrary, Christopher Seaman, and Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court transformed Section 5 of the Voting Rights Act* (unpublished manuscript) (2005).

Second, following the release of the Census at the beginning of the decade, jurisdictions tend to adopt new redistricting plans and entertain other voting changes to accompany those plans. During the mid-1990s, prior to the *Georgia* and *Bossier* rulings, there was also a documented reduction in the number of objections issued by the Justice Department.³⁰ Thus, a reduction in the number of objections should be expected during the periods in the middle of the decade during which there is less voting change activity, and should have little impact on any assessment of the merits of and continued need for Section 5.

Finally, the low number of objections does not account for the general deterrent effect of Section 5 in the covered jurisdictions. Although the phenomena described above explain the recent decrease in the overall number of submissions and resulting objections, Section 5 has always had a deterrent effect on retrogressive and discriminatory voting practices in covered jurisdictions. Professors Luis Ricardo Fraga and Maria Lizet Ocampo recently completed an extensive study of the letters issued by the Justice Department requesting more information (MIRs) about pending Section 5 submissions. Requests for more information provide an objective way to measure the deterrent effect of the Section 5 review process. Although MIRs are among the mechanisms used by the DOJ to facilitate the administrative review process and develop greater understanding of a pending change, these letters can also signal to a submitting jurisdiction that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. Indeed, in many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response, which effectively terminates a pending submission. Fraga and Ocampo conclude that MIRS enhanced the deterrent effect of Section 5 by 51%.³¹ In addition, there are presumably many discriminatory voting changes that were never proposed in the first place because of Section 5 preclearance.

Congress should not measure the utility and need for Section 5 through objection rates alone as these rates have decreased in recent years given the impact of two major Supreme Court rulings and the natural reduction in the number of submitted changes in the middle of a decade. In addition, Section 5 has had a well-documented deterrent effect within covered jurisdictions that is not reflected in these statistics. Moreover, objection statistics also do not account for those jurisdictions that unsuccessfully seek judicial preclearance in the D.C. District Court or those jurisdictions that alter a particular voting change as a result of a pre-litigation settlement or in response to a request for more information issued by the Justice Department.

³⁰ See Fraga & Ocampo, *supra* note 25, at 15, Figure 1 (Objections and MIR Outcomes by Year).

³¹ *Id.* at 3. Specifically, this study “reveal[ed] that 13,697 MIRs and 3,120 follow up requests were sent to jurisdictions from 1982 to 2005. A total of 1,162 changes that received an MIR led to withdrawals, superseding changes, or no responses. This is separate from and in addition to the 2,282 changes that were objected to by the DOJ during the same 23-year period.” *Id.*

5. *In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?*

In 1965, Congress enacted the Voting Rights Act to help protect the constitutional rights of Americans to vote free from racial discrimination. Although civil rights groups, advocates and citizens have all hoped that we would quickly resolve and eliminate the issues and problems that impede access to the ballot box, the evidence shows that voting discrimination persists. Indeed, we have not yet eliminated the entrenched discrimination in voting that gave rise to the VRA. Indeed, Congress's own experience with the renewal of Section 5 reflects a pattern of lengthening the period of coverage as experienced revealed the level of entrenchment and intractability of voting discrimination. Congress should therefore renew the expiring provisions for 25 years. Although Congress is granted broad latitude when acting pursuant to its sweeping enforcement powers to remedy racial discrimination,³² recent precedents show that Congress must conduct hearings and gather evidence that is appropriate in quantity, relevance, and focus.³³ Indeed, no other civil right has commanded more attention, resources, hearing and oversight from Congress than the right to vote. Given this extensive expenditure of Congressional resources, as evidenced by multiple hearings and voluminous record, and Congress's own experience drawn from previous renewals, a 25-year term allows for meaningful change to be measured and makes the possibility for real eradication of voting discrimination an achievable possibility when Congress revisits these issues again.

A 25 year extension of Section 5 ensures that we will have no less than two decennial redistricting cycles to help make an informed assessment about the need to renew Section 5 when this provision come before Congress again. As described above, jurisdictions tend not to adopt a significant number of voting changes during the middle of a decade. For that reason, the decennial redistricting cycles have historically been tremendously active periods for jurisdictions. The number of submitted voting changes spikes during these periods as do the corresponding number of objections issued by DOJ.³⁴

Moreover, the 25-year time period also allows for no less than four senatorial election cycles. These unique moments in the political calendar tend to be marked by heightened levels of racially polarized voting. Further, experience dictates that jurisdictions will sometimes adopt eleventh-hour voting changes during these highly contentious moments in the electoral process, whether they be for political advantage or racial disadvantage. For these reasons, a 25-year extension is reasonable and will ensure that we capture a sufficient variation in the type of voting changes made following the release of the Census, and following key federal election cycles.

³² See *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. 721, 735 (2003).

³³ See also *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000). Although the Supreme Court has not clearly established the requisite quantum of evidence, or exactly what form such evidence must take, compare *Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 with *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. 721 at 730; *Tennessee v. Lane*, 541 U.S. at 558.

³⁴ See Fraga & Ocampo, *supra* note 25 at 12, Table 1 and 15, Figure 1.

Additionally, the proposed legislation will restore Section 5 to its former vitality by addressing the impact of the Supreme Court’s rulings in *Bossier II* and more recently in *Georgia v. Ashcroft*. Thus, a 25 year time period will allow a meaningful opportunity for a restored Section 5 to ferret out the impermissible backsliding and discrimination that resurfaced in the political process following these rulings.

Finally, it is worth noting that both Congress and the Supreme Court played an important role in the struggle to desegregate our nation’s public schools. The NAACP Legal Defense and Educational Fund also played a central role in this effort litigating some of the seminal cases in this area. Over the last few decades, many schools have been successfully desegregated while remaining under the watchful eye of federal courts. Unfortunately, our federal system has turned its back on integrated education and we are now witnessing the resegregation of public schools throughout the country. Numerous public schools are pushing for a declaration that they have achieved unitary status and are seeking to end the very consent decrees that helped them integrate. Indeed, when the federal government steps out of the process, our civil rights are placed in a vulnerable position. History dictates that no civil right is more important than the right to vote. For these reasons, a 25 year extension of Section 5 is both reasonable and necessary to ensure protection of the most fundamental civil right: the right to vote.

6. *Putting aside the constitutional question with regard to overturning Georgia v. Ashcroft, would it be your view that even districts that are “influence districts”, with relatively low number of minority voters, should be protected by the plan? Why or why not?*

The *Georgia* Court offers an extremely intangible definition of an influence district. The Court identified an “influence district” as one “where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.”³⁵ In the view of LDF, and that of many others who have testified during these hearings, it is difficult to identify when the number of “influence districts” would suffice to replace a viable opportunity district. The proposed legislation appropriately restores the key feature of § 5 retrogression analysis which has long looked to ensure that voting changes do not eliminate or reduce those districts that provide minority voters a tangible opportunity to elect candidates of their choice.

The retrogressive effect of a proposed voting change has historically been measured by examining the minority community’s ability to elect candidates of choice under the benchmark and proposed plans. For example, an examination of the retrogressive effect of a proposed redistricting plan would require identification of the number of viable opportunity districts in the benchmark plan to ensure that this number is not reduced under the proposed plan. The proposed legislation appropriately restores the tangible “opportunity to elect” standard and does not allow jurisdictions to cloak

³⁵ *Georgia v. Ashcroft*, 539 U.S. 461, at 482 (2003).

intentional discrimination under the intangible framework set forth by *Georgia v. Ashcroft*.³⁶

Indeed, there are instances in which opportunity or coalition districts with relatively low numbers of minority voters, close to or below 50 percent, may provide an opportunity to elect. Changes that have eliminated the opportunity in such districts have drawn objections and should continue to do so even should the *Georgia* ruling be revised by the proposed legislation. For example, in April 2005, the Justice Department determined that the redistricting plan for the Town of Delhi, Louisiana, was not entitled to preclearance.³⁷ According to the 2000 Census, the Town of Delhi has 2,247 persons of voting age, of whom 1,153 (51.3%) are black. Under the benchmark plan, African Americans had the ability to elect candidates of choice in four of the town's five wards. However, the proposed plan eliminated that ability in one ward where the town sought to reduce the black voting age population from 48.4 to 37.9 percent. The Department's careful analysis revealed that this reduction eliminated the ability of African American voters to elect candidates of choice and objected to the change. I highlight this as a contemporary example of a district that has a Black voting age population below 50 percent that yet provides minority voters an opportunity to elect. The proposed legislation will appropriately bar covered jurisdictions from undermining the benchmark while protecting minority voters from unconstitutional retrenchment in political gains. Further, the bill will make it more practical for the D.C. District Court to adjudicate, and the DOJ to administer, the retrogression provisions of § 5.

With respect to the putative constitutional question, the proposed modification is statutory and not constitutional in nature. The change would return the standard to what it had been for over 25 years. It is my view that the proposed legislation does not overturn the *Georgia v. Ashcroft* ruling in its entirety. Rather, the legislation would restore, as a minimum standard, the more readily verifiable and tangible "ability to elect" principle that has long been the fundamental feature of § 5 analysis, while leaving open, for further consideration, the additional aspects of participation in the political process catalogued in the *Georgia v. Ashcroft* opinion and invited by your question.

³⁶ *Id.*

³⁷ See Letter from US Department of Justice, Civil Rights Division, Voting Section to Town of Delhi, Richland Parish, Louisiana (Section 5 Objection Letter) (April 25, 2005).

**Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and
Educational Fund, Inc. to Written Questions of Senator Patrick Leahy
June 9, 2006**

1. *Mr. Shaw, the extensive record established in 11 hearings in the House of Representatives includes the testimony of over 50 practitioners, elected officials, advocates, and academics, state by state reports detailing discrimination in Section 5 and 203 covered jurisdictions since 1982, the Voting Rights Project's 800 page report, and the National Commission reports. The hearings in the Senate Judiciary Committee will include the testimony of more than 30 additional witnesses and the balance of the state reports which will provide additional evidence of recurring discrimination in covered jurisdiction and evidence of the deterrent effect of Section 5. Based on this record, do you believe Congress has the power under the 14th and 15th Amendments to reauthorize the expiring provisions of the VRA. Please explain.*

The expiring provisions of the Voting Rights Act ("VRA") aim to remedy a constitutionally grave harm to citizens who live in states that are characterized by both historical and contemporary evidence of persistent racial discrimination. It is well settled that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"¹ Further, in *City of Boerne v. Flores*, the Supreme Court observed that when Congress enacted the Voting Rights Act to protect the right to vote against racial discrimination, Congressional powers were at their "zenith." Moreover, the Court has recognized that Congress must be given "wide latitude" with respect to prophylactic legislation designed to remedy or prevent unconstitutional actions.² Given these broad powers where fundamental rights are at issue, I believe that both Supreme Court precedent and the extensive record that has been built support Congress's authority to renew the expiring provisions of the VRA as these provisions aim to prevent the denial or abridgement of the right to vote on account of race or color.³

Although the Supreme Court has not identified a clear threshold of evidence that must be developed to support federal legislation⁴, recent precedents suggest that the extensive body of evidence that has been compiled in Congress is appropriate in quantity, relevance, and focus.⁵ In some *Boerne* cases, the Court has focused on the detail of evidence in the record.⁶ However, in the case of protected categories subject to

¹ *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

² *Id.* at 519.

³ See U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

⁴ Compare *Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 with *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. 721

⁵ See e.g. *Tennessee v. Lane*, 541 U.S. at 558, *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. at 730.

⁶ *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000); *Bd of Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

heightened scrutiny (*i.e.*, race and gender), the Court has upheld legislation based upon a record that was deemed sufficient to identify the existence of discriminatory practices without clearly identifying a particular threshold or quantum of evidence.⁷

Here, Congress is faced with a renewal of a statute that has the purpose of eradicating racial discrimination in voting under the Fourteenth and Fifteenth Amendments to the Constitution. Congress is granted broad latitude in deciding the appropriate means to remedy past violations and prevent future violations pursuant to its enforcement authority under the Fifteenth Amendment.⁸ Further, Congress's unique fact-finding ability makes it well-situated to compile evidence about a constitutional problem and identify the appropriate legislative solution. Moreover, because the issue of voting discrimination relates to issues of political fairness and access, and has been weighed by Congress on five other occasions in as many decades it is very well-positioned to understand the complexity of these issues and implement an effective prophylactic remedy. Congress did not begin this renewal process with a clean slate but rather with an awareness of a historical pattern of voting discrimination that nevertheless had to reassessed.

Indeed, the only post-*Boerne* constitutional challenge to Section 5 of the VRA to reach the Supreme Court cited *Boerne*, reaffirmed the reasoning of *Katzenbach* and *City of Rome*, and upheld preclearance for "jurisdictions properly designated for coverage".⁹ Nothing in the *Lopez v. Monterey* ruling suggests that the constitutional inquiry following *Boerne* requires a comprehensive state-by-state comparative analysis. Moreover, Congress has developed an extensive and comprehensive record which details evidence of continuing voting discrimination in covered jurisdictions and supports the continuing need for Section 5. This record enables Congress to renew the expiring provisions of the Act pursuant to its broad enforcement powers under the 14th and 15th Amendment.

2. *You have testified that in light of evidence of continued discrimination in the covered jurisdiction, the deterrent effect of Section 5 justifies its renewal. Yet, others have argued that Section 5 has been so successful that it is no longer needed. Can a successful deterrent still be a success if it is no longer operational? Won't softening or removing this successful deterrent risk the emergence of new abuses?*

The Section 5 review process has proven to be an effective deterrent on retrogressive and discriminatory voting practices in the covered jurisdictions.¹⁰

⁷ *Hibbs*, 38 U.S. at 735 (noting "important shortcomings of *some* state policies") (emphasis added).

⁸ *Id.* at 735 (2003).

⁹ *Lopez v. Monterey County*, 525 U.S. 226 (1999).

¹⁰ *See, e.g.*, RICHARD L. ENGSTROM ET AL., LOUISIANA, IN QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 103, 110 (Chandler Davidson & Bernard Grofman eds., 1994) (discussing the deterrent effect of Section 5 and providing an analysis of how Section 5 was designed to "bring the force of the federal government to bear" on voting discrimination).

Numerous witnesses have testified about this clear deterrent effect.¹¹ Eliminating Section 5 would lead to reemergence of more widespread retrogression within the covered jurisdictions.

Professors Luis Ricardo Fraga and Maria Lizet Ocampo recently completed an extensive study of the letters issued by the Justice Department requesting more information (MIRs) about pending Section 5 submissions. MIRs provide an objective way to measure the deterrent effect of the Section 5 review process. Although MIRs are among the mechanisms used by the DOJ to facilitate the administrative review process and develop greater understanding of a pending change, these letters can also signal to a submitting jurisdiction that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. Indeed, in many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response, which effectively terminates a pending submission. Fraga and Ocampo conclude that MIRS enhanced the deterrent effect of Section 5 by 51%.¹²

If Section 5 were allowed to expire, there is little doubt that advances made in covered jurisdictions would be undermined. Some have offered the phrase, “Bull Connor is dead,” to suggest that the political process has been rid of individuals determined to bar African Americans and other minorities from exercising the right to vote. I would take a different view. Indeed, the record is replete with examples of continued discrimination in the covered jurisdictions, and in some cases evidence that indicates that jurisdictions have tried to reimpose previously discredited practices. For example, since 1982, the Department of Justice has interposed 96 objections to proposed voting changes in Louisiana. Although the vast majority of these objections were to redistricting plans, they also include objections to proposed changes to voter registration requirements, election schedules, voting procedures, polling places, method of election, and structure of elected bodies. Some of these objections, including those interposed to Point Coupee Parish redistricting plans during each of the last three decades, make clear the continued intransigence and resistance among elected officials throughout the state. Most recently, Louisiana unsuccessfully sought judicial preclearance of its statewide redistricting plan for the State House of Representatives. All of these proposed voting changes would likely have gone into effect and placed minority voters in a worse position but for the deterrent effect of the Section 5 review process.

¹¹ See e.g. *The Voting Rights Act: The Continuing Need for Section 5, Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 25, 2005) (statement of Laughlin McDonald)(noting that in 2005, the Georgia legislature redrew its congressional districts, but before doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5); . *The Voting Rights Act: The Continuing Need for Section 5, Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 25, 2005) (statement of Nina Perales)(noting that the deterrent effect of Section 5 stops many discriminatory election changes before they are enacted by covered jurisdictions).

¹² *Id.* at 4. Specifically, this study revealed that 13,697 MIRs and 3,120 follow up requests were sent to jurisdictions from 1982 to 2005. A total of 1,162 changes that received an MIR led to withdrawals, superseding changes, or no responses. This is separate from and in addition to the 2,282 changes that were objected to by the DOJ during the same 23 year period.

Finally, it is worth noting that both Congress and the Supreme Court played an important role in the struggle to desegregate our nation's public schools. The NAACP Legal Defense and Educational Fund, Inc. also played a central role in this effort litigating some of the seminal cases in this area. Over the last few decades, many schools have been successfully desegregated while remaining under the watchful eye of federal courts. Unfortunately, our federal system has largely turned its back on integrated education and we are now witnessing the resegregation of public schools throughout the country. Numerous public schools are pushing for a declaration that they have achieved unitary status and are seeking to end the very consent decrees that helped them integrate. In recent years, many school districts have returned to federal court seeking a declaration that they have achieved unitary status. The result, more often than not, has been that once a decree is lifted, the system is likely to resegregate itself. History and experience dictate that when there is no federal oversight, civil rights crises reemerge. It would make no sense to deny that substantial improvements in voter access, participation and effectiveness have been made, just as it would be equally misguided to ignore the role that Section 5 has played in the process. For these reasons, a 25 year extension of Section 5 is both reasonable and necessary to ensure protection of the most fundamental civil right: the right to vote.

3. *The bill introduced in the House and the Senate includes a correction to the Supreme Court's decision in Reno v. Bossier Parish School Bd. ("Bossier II") by making clear that a voting rule change motivated by any discriminatory purpose violates Section 5. Without this fix, is it possible for jurisdictions covered by Section 5 to pass changes to voting rules with the clear intent to discriminate against minorities? Isn't such a result inconsistent with the purposes of the Voting Rights Act to eliminate discriminatory tactics that undermine the guarantees of the 15th Amendment?*

The Senate Report accompanying the 1982 reenactment of the VRA indicate that Congress intended the Act "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally."¹³ From the time of the 1982 reenactment of § 5 until the Supreme Court's decision in *Bossier II*, the Supreme Court consistently held that § 5 should be interpreted so as to enforce the constitutional prohibitions against voting changes enacted with racially discriminatory purpose.¹⁴ Similarly, prior to *Bossier II*, in over 30 years of enforcement of the Voting

¹³ S. Rep. No. 417 at 5.

¹⁴ See, e.g., *City of Pleasant Grove*, 479 U.S. 463; (reiterating that a covered jurisdiction has the burden to prove "the absence of discriminatory purpose" on its part); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 159 (1983)(a reapportionment plan is unconstitutional if it is adopted with an invidious discriminatory purpose constituting a denial of equal protection, and if racial purpose has been a motivating factor in the decision, the state has unconstitutionally denied black citizens equal protection); *City of Rome v. United States*, 446 U.S. 169, 176-179 (1980)(by describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent.); *City of Richmond v. United States*,

Rights Act the United States Department of Justice (“DOJ”) had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose.¹⁵ As a result of *Bossier II*, both courts and the DOJ are required to preclear changes enacted with discriminatory intent so long as the changes lack retrogressive purpose or effect. This result is inconsistent with both Congressional intent and the guarantees of the Fifteenth Amendment

Once that standard is restored, both the judicial and administrative preclearance processes will appropriately bar discriminatory voting changes and return to long-standing Supreme Court guideposts for evaluating discrimination. Indeed, in the earlier *Bossier Parish* case, *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), outlines the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. Numerous cases arising under § 5 have approved of or adapted this standard to help ferret out discriminatory intent in the § 5 process.¹⁶ The DOJ, adopting an analytical approach that mirrors that of the courts in this context, had successfully employed the *Arlington Heights* test to ferret out those voting changes infected with discriminatory purpose. The DOJ’s past and present use of the *Arlington Heights* framework to identify those instances in which discriminatory purpose infects a proposed voting change makes clear that there is an objective and workable standard, sanctioned by the Supreme Court, to ferret out those changes enacted with an unconstitutional discriminatory purpose.

The proposed legislation will restore an important safeguard of § 5 which has long stood as one of the federal government's principal weapons in its arsenal against unconstitutional racial discrimination in voting. The *Arlington Heights* framework has provided, and would continue to provide under the pending bill, the contours around which both courts and the DOJ can effectively analyze and detect unconstitutional discriminatory purpose consistent with the guarantees of the Fifteenth Amendment. Indeed, a law that permits intentional discrimination to receive the approval of the Civil Rights Division of DOJ is calling out for clarification.

422 U.S. 358, 378-79 (1975) (annexations animated by discriminatory purpose have no credentials whatsoever for actions generally lawful may become unlawful when done to accomplish an unlawful end).

¹⁵ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination"; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.).

¹⁶ *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); *U.J.O. of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

**Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and
Educational Fund, Inc. to Written Questions of Senator Edward M. Kennedy
June 9, 2006**

1. *When Section 5 was reauthorized in 1982, Congress amended the bailout provision to make it easier to end coverage of jurisdictions that can show they no longer discriminated. In fact, the Senate committee report on the 1982 Act stated that the bailout criteria were changed to “recognize[e] and reward[] their good conduct, rather than require them to await an expiration date which is fixed regardless of the actual record.” The report also stated that “the goal of the bailout ... is to give covered jurisdictions an incentive to eliminate practices denying or abridging opportunities for minorities to participate in the political process.” In your view, do the bailout provisions adequately prevent Section 5 from applying too broadly, so that it applies only where it is truly needed?*

Section 4(a) of the Voting Rights Act establishes a reasonable and achievable bailout process⁵ that allows those jurisdictions that enjoy full minority participation in the electoral process to terminate their covered status under the Act. The evidence demonstrates that, since 1982, all of the jurisdictions that have applied to bailout from coverage under Section 5 have been able to do so. All of these jurisdictions received substantial assistance during the initial phases of the process and consent of the Justice Department.⁶ Unlike the time period leading up to the 1982 reauthorization that resulted in liberalization of the bailout process, there is no evidence in the record that demonstrates that jurisdictions have encountered difficulty with the bailout process or that indicates that jurisdictions have tried, without success, to bail out from coverage under the Act.⁷

¹ *Katzenbach* at 315 (emphasis added).

² *See* U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

³ 521 U.S. 507, at 518 (1997).

⁴ *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. at 735; *see also Tennessee v. Lane*, 541 U.S. at 529.

⁵ To demonstrate compliance with the Voting Rights Act for the ten-year period immediately preceding the filing of the bailout action, section 4(a)(1) outlines the “positive steps” requirements that a State or political subdivision must demonstrate including: (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

⁶ As a check on continued compliance, the current version of the bailout provision grants the District Court of the District of Columbia jurisdiction over a voting rights case for a specified period of time once the declaratory judgment has been entered. During this ten year probationary period, the Attorney General can move to reopen the case because of alleged voting rights infractions.

⁷ On May 9, 2006, Professor Samuel Issacharoff indicated in his submitted written testimony that the “current bailout provision appears unduly onerous and not sufficiently geared to actual legal violations.” However, Prof. Issacharoff did not offer any evidence that would support this claim. My review of the

To date, eleven jurisdictions in the State of Virginia have successfully availed themselves of the bailout process. Gerald Hebert, legal counsel for all jurisdictions that have bailed out since the 1982 Amendments, characterizes the process as both “straightforward and easy.”⁸ Despite clear evidence that the bailout process provides an adequate mechanism for jurisdictions to remove themselves from the requirements of Section 5, there are some administrative steps that the Justice Department might take to educate jurisdictions about the eligibility requirements and criteria. For example, Principal Deputy Assistant Attorney General Rena J. Comisac testified on May 4, 2006, about the extensive steps taken by the Justice Department to inform certain covered jurisdiction about the requirements of Section 203 of the Act. Specifically, the Justice Department mailed formal notice and detailed information about Section 203 to hundreds of jurisdictions across the United States and initiated face-to-face meetings with State and local election officials to explain the law and answer questions.⁹ For example, if the DOJ were to include guidance about the bailout process and requirements with preclearance letters, where appropriate, to educate jurisdictions and make similar information clearly available under an appropriate heading on its website for those jurisdictions unfamiliar with the bailout statute and rules, there would likely be an increase in the number of jurisdictions that seek bailout over the course of the next 25 years as compliance improves.

The evidence in the record demonstrates that the bailout process is reasonable and that the 1982 Amendments sufficiently readjusted the requirements of the bailout mechanism. Moreover, the evidence shows that the Justice Department has generally provided assistance to those jurisdictions that have sought bail out and routinely offered joint consent to an entry of judgment granting bailout as permitted under the Act. Given these facts, I believe that the bailout provisions adequately prevent Section 5 from applying too broadly by providing eligible jurisdictions an effective and accessible tool to terminate their covered status.

record indicates that there is virtually no evidence in the record that jurisdictions have encountered difficulty satisfying the bailout requirements. *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Related to Reauthorization, Sen. Jud. Comm.* (statement of Samuel Issacharoff) (May 9, 2006).

⁸ *See The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (Oct. 20, 2005) (statement of Gerald Hebert, Esq.)

⁹ *See The Voting Rights Act Reauthorization and Amendments Act of 2006, Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary* (statement of Principal Deputy Assistant Attorney General Rena J. Comisac) (May 4, 2006) at 2.

**Response of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. to Written Questions of Senator Charles D. Schumer
June 9, 2006**

1. *The proposed reauthorization bill, S. 2703, addresses the Supreme Court's decision in Reno v. Bossier Parish School Board, 528 U.S. 320 (2000) (Bossier Parish II) by clarifying that a voting rule change motivated by any discriminatory purpose cannot be precleared under Section 5 of the Voting Rights Act.*

- a. *Do you support this change? Why or why not?*
- b. *In your view, is the Supreme Court's decision in Bossier II consistent with Congress's original intent in enacting Section 5?*

From the time of the 1982 reenactment of § 5 until the Supreme Court's decision in *Bossier II*, the Supreme Court consistently held that § 5 should be interpreted so as to enforce the constitutional prohibitions against voting changes enacted with racially discriminatory purpose.¹ I support the language in the proposed bill that restores Section 5 to its prior force while returning it to a status consistent with long-standing Supreme Court precedent. The drafted bill will help ensure that the preclearance process ferrets out not only those voting changes that are retrogressive in effect or purpose, but all changes enacted with a constitutionally prohibited purpose.

The Senate Report accompanying the 1982 reenactment of the VRA indicates that Congress' intent in creating the Act was "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally."² In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because "it had reason to suppose that these states [which are subject to Section 5] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself."³ To the extent that the *Bossier II* decision eliminated the ability to detect, ferret out, and block discriminatory purpose during the Section 5 review process, the ruling is inconsistent both with Congress' original intent and with common sense. For example, it

¹ See, e.g., *City of Pleasant Grove*, 479 U.S. 463; (reiterating that a covered jurisdiction has the burden to prove "the absence of discriminatory purpose" on its part); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 159 (1983)(a reapportionment plan is unconstitutional if it is adopted with an invidious discriminatory purpose constituting a denial of equal protection, and if racial purpose has been a motivating factor in the decision, the state has unconstitutionally denied black citizens equal protection); *City of Rome v. United States*, 446 U.S. 169, 176-179 (1980)(by describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless both discriminatory purpose and effect are absent.); *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975) (annexations animated by discriminatory purpose have no credentials whatsoever for actions generally lawful may become unlawful when done to accomplish an unlawful end).

² S. Rep. No. 417 at 5.

³ 383 U.S. at 335 (emphasis added). Before it enacted Section 5, Congress found that certain jurisdictions, whose laws had been invalidated in court, would simply switch to another discriminatory statute or device. H. Rep. No. 439, 89th Cong. 1st Sess. (1965), *reprinted in* 1969 U.S.C.C.A.N. 2441.

creates a situation where jurisdictions that have more successfully resisted racial equality may, in certain circumstances have greater latitude to persist in illegal exclusionary tactics. *Bossier II* must be addressed in the way the pending bill contemplates to restore rationality to the statutory framework.

c. Please provide two or three examples of voting changes that could not have been precleared before Bossier II but were required to be precleared after Bossier II.

Given the clear effect of the *Bossier II* ruling on the Section 5 statutory framework, little attention has been paid to evidence of discriminatory purpose in the Section 5 review process. Moreover, the DOJ is in the best position to know what evidence has been presented to support preclearance of the many submissions that it receives. Indeed, the underlying submissions are not readily available, and are not published on any website of similar public database. As a result, it is difficult to specifically ascertain how many voting changes likely would have drawn objections were Section 5 not significantly restricted in scope as a result of the *Bossier II* ruling. I will describe, however, a recent voting change that was precleared by the Department of Justice on May 1, 2006, that was accompanied by strong evidence of discriminatory purpose underlying the change.

Most recently, the NAACP Legal Defense & Educational Fund, Inc. (LDF) submitted a Comment Letter to the Attorney General urging that the Department of Justice (DOJ) interpose an objection to a proposed change to the method of electing and configuration of the Rockingham County Board of Education in North Carolina.⁴ LDF's investigation into this matter yielded evidence that suggested the proposed change was adopted with discriminatory purpose. Specifically, we learned that the proposed change was enacted despite strong opposition from a majority of the school board members and protest from a significant number of minority residents in the county. We also learned that the proposed change was advanced by a group of white residents in the county, Citizens About School Elections (CASE), who are fundamentally opposed to the desegregation of certain schools within the county. Community contacts in the county indicated that CASE members fought to change the school board's configuration and method of election in order to diminish minority voting strength.⁵ Despite significant

⁴ See attached Comment Letter from Theodore Shaw to John Tanner, Chief Voting Section (April 2005).

⁵ Under the current statutory framework, Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341 (2000). Thus, the Court's reconception of the Section 5 standard permits preclearance of proposed changes "no matter how unconstitutional [they] may be" so long as they are deemed non-retrogressive. *Id.* at 336. Although discriminatory purpose alone is insufficient evidence to deny preclearance under the current statutory framework, we highlighted this evidence in our Comment Letter because it suggested that the justification proffered by the state for the proposed change, as well as the state's description of the anticipated effect that the change will have on minority voters, are unreliable and thus, did not help the state satisfy its burden of showing that the change was not retrogressive in purpose or effect.

evidence of discriminatory purpose underlying the change, the DOJ precleared the change on May 1, 2006.

Utilizing the framework set forth in *Arlington Heights* for discerning discriminatory motive, LDF examined the motivation behind the proposed voting change by conducting a sensitive “inquiry into such circumstantial and direct evidence as may be available.”⁶ In *Arlington Heights*, the Supreme Court indicated that the “important starting point” for assessing discriminatory intent ... is “the impact of the official action whether it ‘bears more heavily on one race than another.’”⁷ Other considerations relevant to the purpose inquiry include, among other things, “the historical background of the [jurisdiction’s] decision”; “[t]he specific sequence of events leading up to the challenged decision”; “[d]epartures from the normal procedural sequence”; and “[t]he legislative or administrative history, especially. . . [any] contemporary statements by members of the decision-making body.”⁸

The sequence of events leading up to the adoption of the proposed change illustrated, in part, the discriminatory intent underlying H.B. 1034. Members of CASE who were incensed regarding the school board’s 2002 school attendance area redistricting efforts pushed the proposed change. Specifically, CASE members were bitterly opposed to the board’s last redistricting plan that resulted in an increase in the number of African-American students at certain predominantly white schools in the county. Moreover, CASE members were upset that African Americans from a housing complex in Reidsville were drawn into the predominantly white school districts of Wentworth and Huntsville. CASE members sought to change both the configuration of the districts and method of election to reduce minority electoral opportunity and wrestle control from sitting school board members. At a public hearing regarding the school board’s redistricting plan, CASE members openly shared their racially driven concerns about the impact that these Black students would have on test scores and the overall quality of the school. More importantly, CASE members expressed their hostility towards the idea of racial mixing.

School Board Chairman Wayne Kirkman indicated that CASE members in Rockingham County openly discussed strategies to reduce minority voting strength and eliminate minority school board members. CASE members first proposed the idea of changing the method of election by reducing the number of single-member districts and

⁶ *Village of Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252 at 266 (1977). In determining “whether invidious discriminatory purpose was a motivating factor,” courts have looked to the Arlington Heights framework, at least in part, to evaluate purpose in the § 5 context. See *Pleasant Grove v. United States*, 479 U.S. 462, 469-470 (1987) (considering city’s history in rejecting annexation of black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); *Busbee v. Smith*, 549 F. Supp. 494, 516-517 (D.C. 1982), *aff’d mem.*, 459 U.S. 1166 (1983) (referring to *Arlington Heights* test); *Port Arthur v. United States*, 517 F. Supp. 987, 1019, *aff’d*, 459 U.S. 159 (1982) (same).

⁷ *Arlington Heights*, 429 U.S., at 266 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

⁸ *Id.* at 268.

replacing them with at-large seats in 2002. At a public hearing on the issue, a number of Black voters expressed concern about the likely impact that the change would have on minority voting strength. The school board unanimously rejected the idea following that hearing. Subsequently, CASE members sought to throw support and resources behind selected African-American candidates in order to help develop the record necessary for the proposed change to survive scrutiny under Section 5. Realizing that the school board was opposed to the change, CASE members turned to the Rockingham County Commission for assistance. A local news article described the Commission's meeting leading up to the adoption of a resolution supporting the CASE proposal as an "ambush" and noted that the resolution was passed with "no-comment, no-discussion [and] no-question."⁹

There are noteworthy departures from normal procedure in the process leading up to the adoption of the proposed change. For example, the state legislature adopted the change despite an April 25, 2005 resolution from the Rockingham County Board of Education memorializing its opposition to "any alteration to its electoral districts" and stating that "such efforts will dilute the minority representation and fail to adequately assure fair representation for each citizen of Rockingham County."¹⁰ Further, the state legislature adopted the proposed change despite the fact that North Carolina General Statute 115C-37(i) contemplates that school districts shall only be revised following the federal census of population each 10 years. The school board adopted its decennial redistricting plan shortly after the release of the 2000 census and this plan was precleared by the Justice Department on June 25, 2002.

Finally, the legislative history leading up to adoption of the change also provides evidence of the discriminatory purpose underlying the proposed change. Here, Session Law 2005-307 was initially introduced and failed to obtain a sufficient number of votes to pass. However, the bill was reintroduced as part of a different bill that concerned a study regarding the implementation of success centers in New Hanover County school system. Ultimately, all African-American Senators in the General Assembly voted against the bill.

For these reasons, we believe that this particular voting change would have drawn and should have an objection had the change been evaluated under the pre-*Bossier II* statutory framework. The circumstantial evidence of discriminatory purpose underlying this change was readily apparent. We believe that the under the circumstances described above, the Attorney General could have interposed an objection to this voting change had it been made prior to *Bossier II*.

⁹ See Attachment to Letter from Theodore Shaw.

¹⁰ *Id.*

d. *What impact has Bossier II had on minority voting rights and the ability of the Department of Justice to object to discriminatory voting changes under Section 5?*

Prior to *Bossier II*, in over 30 years of enforcement of the Voting Rights Act the United States Department of Justice (“DOJ”) had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose.¹¹ During the pre-*Bossier II* era, DOJ conducted its purpose analysis in accordance with its guidelines which state that “the Attorney General [] consider[s] whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution.”¹² However, the *Bossier II* ruling has had a significant impact on the effectiveness of the Section 5 preclearance process resulting in fewer objections. Since the *Bossier II* ruling, there has been a substantial decline in the number of objections issued by DOJ. A recent empirical study determined that between 2000 and 2004, the DOJ interposed a mere 41 objections compared with 250 objections during a comparable period one decade earlier.¹³

The proposed bill would restore § 5 to the pre-*Bossier II* standard and allow the DOJ to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the VRA. Once that standard is restored, the administrative preclearance process will appropriately turn to, and rely upon, the Supreme Court guideposts for evaluating discrimination. Indeed, in the earlier *Bossier Parish* case, *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), provides the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. The *Arlington Heights* framework requires careful consideration of whether the “the impact of the official action” “bears more heavily on one race than another,” the historical background of the jurisdiction’s decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements

¹¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination”; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.).

¹² 28 C.F.R. § 51.55(a).

¹³ See Peyton McCrary, et al. Peyton McCrary. See also *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act* (Nov. 1, 2005) (unpublished manuscript), reprinted in *Voting Rights Act: Section 5-Preclearance and Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 96-181 (2005)(Serial No. 109-69).

by members of the decision making body.¹⁴ Numerous cases arising under § 5 have approved of or adapted this standard to detect discriminatory intent in the § 5 process.¹⁵

e. Would restoring the pre-Bossier II standard to Section 5 be constitutional?

Restoring the pre-*Bossier II* standard as contemplated would be constitutional. The Supreme Court's precedent interpreting Congress's purpose for enacting Section 5 reveals that the overarching goal of the law was to prevent covered jurisdictions from switching from overt prohibitions on the right to vote to more subtle methods that impair minority voting strength.¹⁶ Restoration of the standard is statutory and not constitutional in nature.

The similarity of the terms in Section 5 of the Voting Rights Act with Section 1 of the Fifteenth Amendment also is evidence of its inherent pre-*Bossier II* constitutionality.¹⁷ Section 5 expressly prohibits enactment of voting changes unless the jurisdiction shows that the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”¹⁸ Section 1 of the Fifteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” “This use of constitutional language indicates that one purpose forbidden by the statute is a purpose to act unconstitutionally.”¹⁹ Indeed, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court explained that Section 5 “suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment.”²⁰

Moreover, in a number of cases that pre-date the *Bossier II* ruling, the Supreme Court specifically held that a jurisdiction seeking preclearance for a voting change must prove a lack of discriminatory purpose, even if the change has no retrogressive effect. For example, in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1986), the Court rejected the argument that a city's annexation of land with white voters that was not

¹⁴ *Arlington Heights*, 429 U.S. at 266-68.

¹⁵ See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); *U.J.O. of Williamsburgh v. Carey*, 430 U.S. 144 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

¹⁶ See, e.g., *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969); *Georgia v. United States*, 411 U.S. 526, 534 (1973) (same); and *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination”).

¹⁷ 117 S. Ct. at 1505.

¹⁸ 42 U.S.C. 1973c

¹⁹ 117 S. Ct. at 1505.

²⁰ *Katzenbach*, at 334 (emphasis added).

accompanied by an annexation of land with blacks is entitled to preclearance under Section 5 since the city had no blacks and, therefore, the annexation did not have any retrogressive effect on black voting strength.²¹ The majority explained that Section 5 forbids a voting change with a discriminatory purpose even if it does not worsen the voting strength of blacks. “[I]t may be asked how it could be forbidden by Section 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under [Section 5].... An annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by Section 5, whatever its actual effect may have been or may be.”²²

2. *The proposed bill also addresses the Supreme Court’s decision Georgia v. Ashcroft, 539 U.S. 461 (2003), by clarifying that the purpose of Section 5 of the Voting Rights Act is to protect the ability of minority citizens to elect their preferred candidates of choice.*

a. *Do you support this change? Why or why not?*

The proposed bill appropriately restores, as a minimum standard, the more easily verifiable and tangible “ability to elect” principle that has long been the fundamental feature of § 5 analysis. This restorative standard will be one that is administrable by both courts and the Department of Justice, and will help bar covered jurisdictions from enacting changes that have the purpose or effect of minimizing minority voting strength thus eroding the status of minority electoral opportunity.

b. *In your view, is the Supreme Court’s decision in Georgia v. Ashcroft consistent with Congress’s original intent in enacting Section 5?*

Recognizing the persistent and undeterred circumvention of the Civil War Amendments by some states, Congress reacted decisively in 1965 and committed itself irreversibly to what the Supreme Court has recognized as the “firm intention to *rid* the country of racial discrimination in voting” by enacting the Voting Rights Act (“VRA”).²³ A decision that permits, even if it does not require, a jurisdiction to hide behind a novel theory to achieve an old discriminatory goal of vote dilution is inconsistent with Congress’s intention when the VRA was enacted and renewed.

²¹ *City of Pleasant Grove*, at 471.

²² *Id.* at 471 n. 11, quoting *City of Richmond v. United States*, 422 U.S. 358, 378-379 (1975).

²³ *Katzenbach*, at 315 (emphasis added).

c. *Does the bill, as drafted, adequately restore the pre-Georgia v. Ashcroft standard?*

The proposed legislation would appropriately and adequately restore the pre-Georgia v. Ashcroft standard by putting back in place the cornerstone of § 5 retrogression analysis which has long looked to ensure that voting changes do not disturb pre-existing levels of minority voting strength. The level of the minority community's voting strength under benchmark and proposed plans has historically been measured by objectively examining and quantifying the minority community's ability to elect candidates of choice. Thus, the proposed legislation restores the tangible "ability to elect" standard and does not allow jurisdictions to cloak intentional discrimination under the intangible framework set forth by *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

d. *What are the problems, both substantively and logistically, with allowing covered jurisdictions to substitute "influence districts" for districts which preserve minority voters' ability to elect their preferred candidates of choice?*

In stark contrast to the "ability to elect" standard that has long been the cornerstone of Section 5 retrogression determinations in both the administrative and judicial preclearance processes, measuring "influence" is inherently amorphous. The "influence" standard is both difficult to define and measure as made clear during the recent testimony of Assistant Attorney General Wan Kim. Even assuming that one could meaningfully measure influence, it is unclear how courts or the Department of Justice would determine how much influence must be gained in order to justify the elimination of a district that provides minority voters a clear opportunity to elect. This level of indeterminacy would undermine the effectiveness of Section 5 enforcement.

Moreover, aspects of the Court's opinion in Georgia that make the existence of leadership positions held by minority incumbents a part of the retrogression analysis add to the indeterminacy of the influence standard. Indeed, reductions in the percentage of minority voters in those benchmark districts held by minority legislators who may have attained positions of "legislative leadership, influence and power" put those very legislators and their potential successors at risk of not being reelected. Moreover, the Court does not explain how to enforce the expectation that those minority legislators occupying positions of powers will continue to hold on to those leadership positions moving forward.

Finally, the evidence presented during these hearings confirms that historical patterns of racial segregation continue to shape many communities and racial bloc voting persists. As a result, in many communities within covered jurisdictions, minority voters would be unable to elect candidates of their choice if Section 5 did not act as a check to bar jurisdictions from intentionally dispersing and fragmenting districts. The proposed bill will address the dangers resulting from the *Georgia v. Ashcroft* ruling and restore the primacy of the ability to elect standard that protects hard-won gains from disappearing.

e. *What would be the consequences for minority voters in covered jurisdictions if the bill did not address Georgia v. Ashcroft in the way that it currently does?*

If the drafted bill did not address the impact of *Georgia v. Ashcroft*, the statutory framework would allow jurisdictions to eliminate or fracture majority minority districts that provide minority voters an opportunity to elect candidates of their choice where the jurisdiction is able to point to the creation of new “influence districts.” Indeed, Assistant Attorney General Wan Kim testified that the standard for determining what constitutes an “influence district” and for measuring retrogression following *Georgia v. Ashcroft* was difficult to determine in the administrative context.²⁴ The proposed legislation appropriately restores the cornerstone of Section 5 retrogression analysis, which has long looked to ensure that voting changes do not disturb pre-existing levels of minority voting strength in viable opportunity districts.

f. *Some law professors argue that restoring Section 5 to its pre-Georgia v. Ashcroft standard would make it harder for the bill to pass constitutional muster under the City of Boerne v. Flores line of cases. Do you agree? What are the best arguments in defense of this change?*

Most of the concerns within academic circles have been driven by interpretive readings of the Supreme Court’s recent ruling in *City of Boerne* and its progeny which places greater limitations on the enforcement powers of Congress under § 5 of the Fourteenth Amendment, and likely §2 of the Fifteenth Amendment, and announced the new doctrine of “congruence and proportionality” which appears to place some limits on Congressional power under these Amendments by requiring careful legislative record development.²⁵ Although the *Boerne* ruling and its progeny appear to emphasize the need for Congress to be more deliberate in its exercise of authority under the Reconstruction Amendments, these cases do not establish any clear limitations on Congressional power to enact prophylactic legislation in the context of race.²⁶

In *Boerne*, the Court recognized that the VRA was enacted to protect the right to vote against racial discrimination and noted that Congressional power was at its “zenith” when enacting remedial legislation that reaches individuals in classes afforded a heightened level of constitutional scrutiny, such as those defined by race or gender, “it is

²⁴ See *Modern Enforcement of the Voting Rights Act*, Sen. Comm. on the Judiciary, 109 Cong. (May 10, 2006) (statement of Assistant Attorney General Wan Kim, U.S. Department of Justice, Civil Rights Division).

²⁵ See *Lopez v. Monterey*, 525 U.S. at 282-283 (citing *City of Boerne*, 521 U.S. at 518).

²⁶ See *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 124 S.Ct. 1978 (2004)(suggesting that where Congress acts to remedy problems in areas traditionally subject to higher judicial scrutiny, the sweep of its power is greater).

easier”.²⁷ Moreover, the Supreme Court has recognized that the Voting Rights Act, in its present form, is the exemplar of Congress’s enforcement power under the Civil War Amendments. Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude today as it did in 1965.²⁸ Finally, in *Lopez v. Monterey*, 525 U.S. 266 (1999), the post-*Boerne* Court recognized that the “Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens the Act imposes.”

Others have expressed concern regarding the inclusion of the 1964 and 1968 presidential turnout figures that are currently incorporated into the coverage formula and suggest that reliance on such data makes Section 5 vulnerable to a legal challenge given the *Boerne* ruling.²⁹ However, the legislation at issue in *Boerne* was deemed problematic because the legislative record lacked any recent and contemporary examples of modern instances of discrimination and also because the history of persecution described in the hearings all occurred more than 40 years ago.³⁰ Thus, the *Boerne* ruling does not call for outright exclusion of historical data, such as the 1964 presidential election turn-out figures that help develop the coverage formula, so long as this data is sufficiently complimented by recent and contemporary evidence of continued voting discrimination.³¹

The current structure of the VRA contemplates that change may be necessary with respect to those jurisdictions subject to the requirements of Section 5. These statutory safeguards allow for change and revision to determine which jurisdictions should be picked up or dropped from the preclearance requirements of Section 5. The bailout mechanism outlined in Section 4(a) and the bail-in mechanism outlined in Section 3(c) of the Act work to ensure that the scope of Section 5 is appropriately expanded or restricted. These provisions were successfully modified and liberalized during the 1982 reauthorization of the Act. Section 4(a) establishes a bailout process that is both

²⁷ *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. at 735; see also *Tennessee v. Lane*, 541 U.S. at 529.

²⁸ See U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

²⁹ Also, it is important to note that turnout data for presidential elections in the 1960s and 1970s were not used alone to determine which jurisdictions had high levels of discrimination in voting. In determining which jurisdiction would be covered under Section 5 of the Act, Congress also looked to those jurisdictions that simultaneously “engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the rights to vote on account of race or color.” These data point to jurisdictions that have long histories of discrimination and are relevant to developing a record that illustrates what gave rise to the designation of covered jurisdictions.

³⁰ *Boerne*, 521 U.S. 507 (1997).

³¹ Moreover, in *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial “federalism costs” of preclearance. 525 U.S. 266, at 269.

reasonable and achievable for those jurisdictions that enjoy full minority participation in the electoral process. The evidence demonstrates that virtually all jurisdictions that have sought to opt out from coverage under Section 5 have been able to do so. Section 3(c) of the Act, the “bail-in” mechanism, allows a court to order a jurisdiction, that is not covered by the trigger formula, to submit its voting changes in accordance within the requirements of Section 5.³² Together, these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach of Section 5. In addition, these provisions demonstrate that there are sound statutory mechanisms in place to ensure that the list of covered jurisdictions is appropriately revised and updated.

Finally, nothing in the bill purports to disturb the *Shaw v. Reno* line of cases nor is the ability to elect a command to pack districts. Indeed, one of the advantages of the ability to elect standard is that it inherently takes account of changing levels of polarized voting and can thus take account of changing circumstances.

g. Others have suggested that the pre-Georgia v. Ashcroft standard requires covered jurisdictions to pack minority voters into fewer districts. Do you agree that the bill, as drafted, requires packing? Under the current bill, could districts that are not majority-minority still be considered districts in which minority voters have the ability to elect their preferred candidates of choice? If so, please give an example.

The pre-*Georgia v. Ashcroft* standard does not require jurisdictions to pack minority voters into fewer districts. Packing is the practice referred to when jurisdictions devise redistricting plans that concentrate minority voters "into districts where they constitute an excessive majority."³³ This practice has historically been used as a tool to dilute African American voting strength and undermine the overall effectiveness of minority votes. It is also a practice that has been challenged under both Sections 2 and 5.³⁴ The existence of these statutory safeguards illustrates that there is a mechanism in place to challenge jurisdictions that choose to impermissibly pack minority voters. Moreover, the Department of Justice has long looked to “the extent to which minorities are overconcentrated in one or more districts” in determining whether a plan should be denied preclearance.³⁵ The drafted bill will prevent jurisdictions from undermining the benchmark by barring covered jurisdictions from eliminating those districts that provide minority voters an opportunity to elect candidates of choice. Should a jurisdiction devise

³² See *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991); *Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel authorizing preclearance of redistricting plans over a ten year period); Written Testimony of Pamela Karlan, Senate Committee on the Judiciary (May 16, 2006)

³³ See *Voinovich v. Quilter*, 507 U.S. 146, (1993) quoting *Gingles*, 478 U.S. 30, 46 n. 11, (1986). But also, note that redistricting plans that crack, fragment or fracture minority voters may results in dilution of minority voting strength by “[d]ividing the minority group among various districts so that it is a majority in none[.]”

³⁴ *Id.*

³⁵ See 28 C.F.R. 51.59; *see also* 28 C.F.R. 51.56-58.

a plan that lacks retrogressive effect but nonetheless packs minority voters into fewer districts, such plans could still be denied preclearance if there is evidence of a retrogressive purpose underlying the change. Moreover, plans that pack voters have always been and will continue to be vulnerable under Section 2 of the Act.

Indeed, there are instances in which opportunity or coalition districts that are not majority minority may provide an opportunity to elect. Changes that have eliminated the opportunity in such districts have drawn objections and should continue to do so even should the *Georgia* ruling be revised by the drafted legislation. For example, in April 2005, the Justice Department determined that the redistricting plan for the Town of Delhi, Louisiana, was not entitled to preclearance.³⁶ According to the 2000 Census, the Town of Delhi has 2,247 persons of voting age, of whom 1,153 (51.3%) are black. Under the benchmark plan, African Americans had the ability to elect candidates of choice in four of the town's five wards. However, the proposed plan eliminated that ability in one ward where the town sought to reduce the black voting age population from 48.4 to 37.9 percent. The Department's careful analysis revealed that this reduction eliminated the ability of African American voters to elect candidates of choice and objected to the change. I highlight this as a recent example of a district that has a Black voting age population below 50 percent in which minority voters have the ability to elect. The proposed legislation will appropriately bar covered jurisdictions from undermining the benchmark while protecting minority voters from unconstitutional retrenchment in political gains. Further, the bill will make it more practical for the D.C. District Court to adjudicate, and the DOJ to administer, the retrogression provisions of § 5.

3. *The proposed bill would amend Section 14 of the Voting Rights Act to allow prevailing parties to recover "reasonable expert fees" and "other reasonable litigation expenses" in addition to reasonable attorneys' fees.*

a. *Do you support this change? Why or why not?*

I stand in strong support of the proposed amendment to Section 14 of the VRA as this will help facilitate the efforts of private litigants, non-profit organizations and other entities seeking to enforce the provisions of the VRA. Given the unique and complex nature of litigation brought under the Act, litigants must bear significant expense associated with the retention of a wide array of experts including historians, statisticians, social scientists, and demographers, among others. Indeed, "it is virtually impossible to prove a Voting Rights Act violation without expending thousands of dollars for expert witness testimony."³⁷

In his recent testimony before the House Judiciary Committee's Subcommittee on the Constitution, Debo P. Adegbile, Associate Director of Litigation for the NAACP

³⁶ See *Department of Justice Objection Letter*, Town of Delhi, Richland Parish, Louisiana (April 25, 2005).

³⁷ Joaquin R. Avila & Brenda Wright, "The Necessity for Reimbursement of Expert Witness Fees and Expenses in Voting Rights Cases" (Excerpt included in materials provided by the American Civil Liberties Union and the Center of American at a Voting Rights Briefing on Oct. 14, 2005).

Legal Defense and Education Fund, testified that during a recent Section 5 declaratory judgment matter concerning the 2001 redistricting plan for the Louisiana House of Representatives, (*Louisiana House, et al. v. Ashcroft*), over \$33,000.00 were spent on just one of its experts.³⁸ Further, in 1990, the Mexican American Legal Defense Fund's application for recovery of \$152,942.45 spent on experts in the case of *Garza v. Los Angeles County Board of Supervisors* was denied.³⁹ "Because MALDEF was forced to absorb the costs for experts in Garza, it had fewer funds available for additional litigation and found it necessary to declare a moratorium on the filing of new litigation for the remaining quarter of its 1991-92 fiscal year."⁴⁰ Because prevailing parties are unable to recover reasonable expenses, many worthwhile cases go untried because of the excessive costs inherent in making the case. In the end, justice is what suffers. Worthwhile cases are not pursued because of past litigation that drained all available funds, or a reasonable fear that the potential costs incurred in pursuing future litigation would cripple the representative organization. It goes without saying that if non-profit organizations and private practice attorneys cannot bear to shoulder these costs, the affected individuals are not capable either.

b. *Please explain the importance of expert testimony in voting rights litigation.*

The very tough standards established by the Supreme Court for voting rights cases require that expert services be used, and judicial opinions often reflect the crucial role played by expert witnesses."⁴¹ Typically, suit brought under Sections 2, 5 or 203 of the Act require expert statistical analysis of election returns and precinct population data, often through several different statistical techniques that may require hundreds of hours of expert time. In addition, plaintiffs may also need additional experts to establish other factors relevant under the totality of the circumstances, an expert historian to document a history of racial discrimination in the jurisdiction and/or a social scientist to analyze Census data and testify on continuing socioeconomic disparities between whites and minorities."⁴² Often, the issues inherent in these cases only become clear once experts have been able to provide the appropriate historical and legal context necessary for a complete evaluation of the questions and proposals presented.

³⁸ *A Bill to Reauthorize and Amend the Voting Rights Act of 1965: Hearing on H.R. 9 Before the House Judiciary Committee Subcommittee on the Constitution*, 109 Cong. (2006) (statement of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund).

³⁹ 756 F.Supp. 1298 (C.D. Cal.) *aff'd* 918 F.2d 763 (9th Cir. 1990).

⁴⁰ T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc v. Casey, and *Due Process of Statutory Interpretation*, VAND. L. REV. 687, 711 (1992).

⁴¹ *Id.* at 707-708.

⁴² AVILA & WRIGHT, *supra* note 1. See generally, Wendy K. Tam Cho & Albert H. Yoon, *Strange Bedfellows: Politics, Courts, and Statistics: Statistical Expert Testimony in Voting Rights Cases*, 10 CORNELL J.L. & PUB. POL'Y 237 (2001)(discussing the shortcomings of judges in that their legal training and professional experience does not necessarily well-equip them to grasp the technical complexities of voting rights cases without the assistance of expert testimony.)

c. *What are the costs associated with expert testimony and what impact do they have on victims of voting discrimination?*

When retaining an expert to provide testimony, there are generally costs associated with commissioning necessary written reports, providing transportation and accommodations for the witness when appropriate, and an hourly rate to compensate the expert for their time when called to testify. In addition, many experts generally charge an hourly fee to compensate for time used to prepare work product, deliberate, produce reports and prepare for court appearances. These costs are fairly sizeable in most voting rights matters given the protracted nature of the litigation. In his dissent in *West Virginia University Hospitals, Inc. v. Casey*, Justice Thurgood Marshall asserted that refusing recovery for expert witness fees in civil rights cases serves “to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their cases to court.”⁴³

d. *Are you familiar with the provision of expert witness fees in other civil rights statutes and if so, are there any constitutional issues that we should be aware of?*

Other civil rights statutes that provide for expert witness fees include 42 U.S.C.A. § 1988 (Proceedings in vindication of civil rights). Section c of this statute provides that “[i]n any action or proceeding to enforce a provision of sections 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.”⁴⁴ At present we are unaware of any constitutional issues relating to these provisions.

4. *The proposed bill would amend Section 203 to reflect the fact that after 2010, the American Community Survey (ACS), which will be administered annually, will replace the long form census. The bill provides that, consistent with this change, coverage under Section 203 shall be determined based upon information compiled by the ACS on a rolling five-year average.*

a. *Do you support this change? Why or why not?*

b. *In your view, does this change bolster or weaken the constitutionality of Section 203?*

⁴³ *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 103 (Marshall, J., dissenting) (quoting *Hidle v. Geneva Cty. Bd. of Ed.* 681 F.Supp. 752, 758-59 (M.D.Ala. 1988).

⁴⁴ 42 U.S.C.A. § 1988 (1991). Section b of this statute (b) indicates that expenses may be recoverable in “any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.]”.

The NAACP Legal Defense and Educational Fund, Inc., strongly supports the proposed amendments to Section 203 as these provisions help ensure that citizens who are limited in their ability to speak English can receive the language assistance they need to participate equally and meaningfully in the political process. Section 203 plays an important role in removing barriers to voting for many new citizens and first-time voters. Further, this provision of the VRA has helped ensure that many minority language citizens are able to register to vote and cast their ballots.

With respect to the proposal to replace the long form census with the American Community Survey, I respectfully defer comment to the other witnesses who have offered written and verbal testimony about Section 203, and other experts in the area.



NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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COMMENT UNDER SECTION 5 OF THE VOTING RIGHTS ACT

John Tanner, Esq.
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Section 5 Submission No. 2006-3029 (Submission by the State of North Carolina Regarding Proposed Changes to the Size and Method of Election of the Rockingham County Board of Education)

Dear Mr. Tanner:

Introduction

The NAACP Legal Defense & Educational Fund, Inc. (LDF) urges the Attorney General to object to the pending Section 5 submission of the State of North Carolina's Session Law 2005-307 (H.B. 1034) which provides for a change in the method of election, creation of five at-large seats and reduction in the number of single-member districts for the Rockingham County Board of Education in North Carolina (Submission No. 2006-0329). The state has failed to meet its burden of showing that the proposed change will not have a retrogressive effect on minority voters.¹ Moreover, there is evidence that suggests that the proposed change was adopted with discriminatory purpose, and the Department should request further information from the state on that question before making a preclearance decision.

Our investigation into this matter indicates not only that the proposed change was enacted despite strong opposition from a majority of the school board members and protest from a significant number of minority residents in the county, but also that the proposed change was pushed by a group of white residents in the county, Citizens About School Elections (CASE), who are fundamentally opposed to the desegregation of certain schools within the county. It is our understanding that CASE members have fought to change the school board's configuration and method of election in order to diminish minority voting strength. Although discriminatory purpose alone is insufficient evidence to deny preclearance under the current statutory framework,² this evidence suggests that

¹ Georgia v. United States, 539 U.S. 461 (2003); Pleasant Grove v. United States, 47 U.S. 462 (1987) (submitting official bears the burden of proof).

² Under the current statutory framework, Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." Reno v. Bossier Parish School Bd., 528 U.S. 320, 341 (2000). Thus, the Court's reconception of the Section 5 standard permits preclearance of

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The NAACP Legal Defense and Educational Fund, Inc. (LDF) is not a part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. Since 1957, LDF has been a completely separate organization. Contributions are deductible for U.S. income tax purposes.

the justification proffered by the state for the proposed change, as well as the state's description of the anticipated effect that the change will have on minority voters, are unreliable and thus, do not help the state satisfy its burden of showing that the change will not have a retrogressive effect.

As you know, the Rockingham County Board of Education is currently comprised of eight single-member districts. Only one of these districts, District 1, contains a majority of African-American voters. This district is currently represented by long-term Board member Herman Hines. According to the state's submission, the Black population percentage of this district will be reduced from 53.43% in the current plan to 51.17% under the proposed plan. The state seeks to create a mixed system by enlarging the current size of the Board to include five at-large seats and reducing the number of single-member districts by two. The reduction in single-member districts places minority voters in a worse position as the Black population percentage of District 1 is reduced to a level that may well make it significantly more difficult for minority voters to elect candidates of their choice. Reductions of this magnitude from a higher starting benchmark than is involved here would perhaps be of less concern, but under the circumstances in Rockingham County, the state has the burden of presenting an appropriate analysis of voting patterns to demonstrate that the reduction proposed will not adversely affect the ability of minority voters to elect candidates of choice. The Department should require such a showing before making its preclearance decision.

The addition of five at-large seats makes the retrogressive effect clear. As we discuss below, there is little likelihood that minority voters will be able to elect candidates of their choice to these at-large seats in spite of some recent election results. Thus, the addition of at-large seats further reduces the overall level of minority voting strength on the Board.

History of Black Electoral Success

While there are a few examples of Black electoral success in at-large or majority white districts in Rockingham County, these examples do not alleviate concerns regarding the retrogressive effect of the proposed change. Many of the recent instances of Black electoral success are aberrational. For example, the recent electoral success of Tim Scales, elected from majority white school district 8, is atypical. Scales is an unusual Black candidate in that he has an extremely high level of name-recognition within the community that falls within his district. Scales himself notes that his recent electoral success is directly attributable to his work as manager of several local Winn Dixie supermarkets and as a former little league coach for a number of residents, who are now of voting age, within his district. Prior to Scales, no African American has ever won an election in this particular school district. Because Scales's district would be significantly altered and expanded under the proposed plan to include a number of new areas, there is no guarantee that he would continue to enjoy the unusual benefit of broad

320, 341 (2000). Thus, the Court's reconception of the Section 5 standard permits preclearance of proposed changes "no matter how unconstitutional [they] may be" so long as they are deemed non-retrogressive. *Id.* at 336.

name-recognition that helped him secure the seat. We highlight this specifically to show that neither Scales nor any candidate of choice within the African-American community would necessarily enjoy success in the enlarged district under the proposed plan and thus, the special circumstances surrounding Scales's election in the benchmark plan do not help the state satisfy its burden.

The state offers a selective description of Black electoral patterns over the last several years highlighting those instances where Blacks have held at-large positions or seats in majority white districts. Specifically, the state notes that one of the five current county commissioners, whom are elected at-large, is African American. In addition, the state points to the current District Attorney, Belinda Foster, as another example of an African American elected at-large. The state notes that Foster was elected in 1994, 1998 and 2002. However, Ms. Foster ran uncontested during 2 of those 3 elections. Thus, Ms. Foster's success in an at-large position is largely the result of special circumstances, and therefore less probative of black electoral success.³ Furthermore, Ms. Foster is currently embroiled in a hotly contested election with a white opponent. It is our understanding that this is a racially heated contest, that the election will likely be polarized along racial lines and that the results from this contest will likely produce evidence of the type of racial bloc voting that generally occurs in Rockingham County.

The state fails to mention the defeat of African-American candidates in elections held at-large and in majority white districts. For example, Elrethea Perkins Neal ran for District 5 of the school board in 1998 and was soundly defeated by a white opponent. In addition, Neal ran unsuccessfully for the County Commission in both 2002 and 2004. Neal's lack of success, despite strong support from the African-American community, illustrates usual racial bloc voting patterns and the difficulty that minority voters are likely to face in efforts to elect candidates of choice in the majority-white districts or at-large seats under the state's proposed plan.

Our investigation indicated, and independent inquiry by the Justice Department should confirm, that CASE members strategically backed and/or financed the candidacies of some African Americans, including current County Commissioner Harold Bass and current School Board member Bell, to help show that Blacks can be elected in majority-white areas. Thus, many of the examples of Black electoral success highlighted in the state's submission may be largely attributable to purposeful action of CASE members intended to develop a record that would support preclearance of proposed changes that would actually reduce Black voting strength. For example, current school board member Amanda Joann Bell lost the 2002 school board election in District 2 against the white incumbent. However, our understanding is that she won the seat after receiving unusual support from CASE members who strategically backed her candidacy in 2004. School Board Chairman Wayne Kirkman, who is white, indicates that CASE members backed Bell in order to defeat her predecessor, Reida Drum, who had vocally opposed changing the method of election and size of the board. Also, by backing Bell, CASE members

³ See *Thornburg v. Gingles* at 106 S. Ct. at 2772 n. 29; 590 F. Supp. at 369-70 (noting that the absence of an opponent might constitute a special circumstance that would explain apparent black electoral success).

sought to develop a record surrounding the proposed change that they believed would enable it to survive Section 5 scrutiny.

It is well-recognized that the elections of minority candidates during the pendency of litigation or other action under the Voting Rights Act have little probative value.⁴ In crafting this rule, courts have reasoned that “the possibility exists that the majority citizens might evade the requirements of the Voting Rights Act by manipulating the election of ‘safe’ minority candidates and that pending [or prospective] action under the Act “might” work “a one-time advantage for black candidates in the form of unusual organized political support by white leaders” seeking to evade the requirements of the Act.⁵ The circumstances surrounding the recent election of current County Board Chairman Harold Bass and school board member Amanda Bell appear to fit squarely within the rule's rationale. Thus, references to these particular successes do not help the state meet its burden under Section 5. At a minimum, the Department should request further information from the state with regard to CASE's role before reaching a preclearance decision.

Discriminatory Purpose

Assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a “sensitive inquiry into such circumstantial and direct evidence as may be available.”⁶ The “important starting point” for assessing discriminatory intent under Arlington Heights is “the impact of the official action whether it ‘bears more heavily on one race than another.’”⁷ Other considerations relevant to the purpose inquiry include, among other things, “the historical background of the [jurisdiction's] decision”; “[t]he specific sequence of events leading up to the challenged decision”; “[d]epartures from the normal procedural sequence”; and “[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body.”⁸

⁴ See *Davis v. Chiles*, 139 F.3d 1414, 1417 n.2 (11th Cir. 1998) (assigning “little probative value” to the post-trial appointment and reelection of a black judge in Florida's Second Judicial Circuit, which includes Liberty County, and the “recent” election of a black judge who faced a white opponent in Leon County, Florida).

⁵ *Thornburg v. Gingles*, 478 U.S. at 75-76 (quoting Sen. Report at 29 and *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc), *aff'd sub nom.*, *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam)). See also *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978, 983 (11th Cir. 1982) (“[P]oliticians might find it politically expedient to have a ‘token’ black school board member.”) (emphasis added).

⁶ *Village of Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252 at 266 (1977). In determining “whether invidious discriminatory purpose was a motivating factor,” courts have looked to the Arlington Heights framework, at least in part, to evaluate purpose in the § 5 context. See *Pleasant Grove v. United States*, 479 U.S. 462, 469-470 (1987) (considering city's history in rejecting annexation of black neighborhood and its departure from normal procedures when calculating costs of annexation alternatives); *Busbee v. Smith*, 549 F. Supp. 494, 516-517 (D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983) (referring to Arlington Heights test); *Port Arthur v. United States*, 517 F. Supp. 987, 1019, *aff'd*, 459 U.S. 159 (1982) (same).

⁷ *Arlington Heights*, 429 U.S., at 266 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

⁸ *Id.* at 268.

The sequence of events leading up to the adoption of the proposed change illustrates, in part, the discriminatory intent underlying H.B. 1034. We understand that the proposed change was pushed by members of CASE who were incensed regarding the school board's 2002 school attendance area redistricting efforts. Specifically, CASE members were bitterly opposed to the board's redistricting plan that resulted in an increase in the number of African-American students at certain predominantly white schools in the county. Moreover, CASE members were upset that African Americans from a housing complex in Reidsville were drawn into the predominantly white school districts of Wentworth and Huntsville. CASE members sought to change both the configuration of the districts and method of election to reduce minority electoral opportunity and wrestle control from school board members. At a public hearing regarding the school board's redistricting plan, CASE members openly shared their racially driven concerns about the impact that these Black students would have on test scores and the overall quality of the school. More importantly, CASE members expressed their hostility towards the idea of racial mixing.

CASE, whose members reside largely in the Town of Bethany, appear to have determined to push the proposed changes as a way to sustain greater power, control and influence over the school board at the expense of current levels of minority voting strength. School Board Chairman Wayne Kirkman indicates that CASE members in Rockingham County openly discussed strategies to reduce minority voting strength and eliminate minority school board members.

CASE members first proposed the idea of changing the method of election by reducing the number of single-member districts and replacing them with at-large seats in 2002. At a public hearing on the issue, a number of Black voters expressed concern about the likely impact that the change would have on minority voting strength. The school board unanimously rejected the idea following that hearing. Subsequently, CASE members sought to throw support and resources behind selected African-American candidates in order to help develop the record necessary for the proposed change to survive scrutiny under Section 5. Realizing that the school board was opposed to the change, CASE members turned to the Rockingham County Commission for assistance. A local news article described the Commission's meeting leading up to the adoption of a resolution supporting the CASE proposal as an "ambush" and noted that the resolution was passed with "no-comment, no-discussion [and] no-question." See Attachment B.

There are noteworthy departures from normal procedure in the process leading up to the adoption of the proposed change. For example, the state legislature adopted the change despite an April 25, 2005 resolution from the Rockingham County Board of Education memorializing its opposition to "any alteration to its electoral districts" and stating that "such efforts will dilute the minority representation and fail to adequately assure fair representation for each citizen of Rockingham County." See Attachment A. Further, the state legislature adopted the proposed change despite the fact that North Carolina General Statute 115C-37(i) contemplates that school districts shall only be revised following the federal census of population each 10 years. The school board

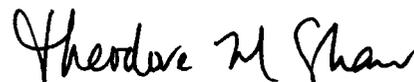
adopted its decennial redistricting plan shortly after the release of the 2000 census and this plan was precleared by the Justice Department on June 25, 2002.

Finally, the legislative history leading up to adoption of the change also provides evidence of the discriminatory purpose underlying the proposed change. Here, Session Law 2005-307 was initially introduced and failed to obtain a sufficient number of votes to pass. However, the bill was reintroduced as part of a different bill that concerned a study regarding the implementation of success centers in New Hanover County school system. Ultimately, all African-American Senators in the General Assembly voted against the bill.

Conclusion

For the reasons outlined above, we submit that the state has failed to meet its burden of showing that the proposed change will not have a retrogressive effect on minority voters. Further, evidence that the change was adopted with discriminatory purpose suggests that both the justification proffered for the proposed change and the state's description of the anticipated effect that the change will have on minority voters are unreliable. Thus, these statements do not help the state satisfy its burden of showing that the change will not have a retrogressive effect. Moreover, the proposed change will reduce the Black population percentage of District 1 to a level that may place minority voters in a worse position than at present in terms of their ability to elect candidates of choice; at a minimum, the state has failed to meet its burden of demonstrating that the change will not have this result. Finally, we note the prevailing view that at-large elections have historically had deleterious effects on black representation.⁹ Since passage of the Voting Rights Act in 1965, significant strides have been made in minority representation following litigation brought under the Act to challenge the discriminatory effect of at-large elections. Thus, we urge the Attorney General to interpose an objection to the proposed change or, alternatively, request additional relevant information, if any exists, that will help the state meet its burden of showing that the change lacks retrogressive effect.

Very truly yours,



Theodore M. Shaw
Director-Counsel and President
NAACP Legal Defense and
Educational Fund, Inc.

⁹ See Bernard Grofman & Chandler Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in *Quiet Revolution* at 319; Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigations, 24 *Harv. C.R.-C.L. L. Rev.* 173, 185 (1989) (indicating that at-large plans historically have been the favored method of diluting the black vote). See also *Dillard v. Crenshaw County*, 640 F.Supp. 1357, 1360 (discussing Alabama's intentional switching between district and at-large elections as a response to the perceived threat of Black voting strength).

NORTH CAROLINA
ROCKINGHAM COUNTY

RESOLUTION OF THE ROCKINGHAM COUNTY BOARD OF EDUCATION
REGARDING THE METHOD OF ELECTION OF THE BOARD OF EDUCATION

WHEREAS, the consolidate Rockingham County Board of Education was formed after a resolution of the Rockingham County Board of Commissioners on June 8th, 1992, following which electoral districts were established after review by the United States Department of Justice to assure compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c; and

WHEREAS, the districts created by the act of the Commissioners are the districts currently in place after adjustment following the 2000 United States Census; and

WHEREAS, N.C.G.S. 115C-37(i) provides that school board districts shall be revised only following the federal census of population each 10 years and the 2000 data was used to redraw the lines and was pre-cleared by the U.S. Department of Justice on June 25, 2002; and

WHEREAS, there is no current census data with which to accurately determine the demographic make-up of citizens of Rockingham County and the last census data showed significant shifts in the populations of several districts; and

WHEREAS, the Rockingham County Board of Education does not believe that the citizens of Rockingham County, and particularly the minority citizens of Rockingham County, will be fairly represented if the eight districts currently in place are altered so as to reduce the number of districts from which board members are elected; and

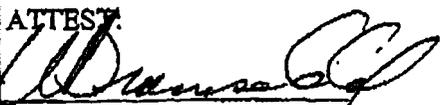
WHEREAS, the majority of Rockingham County Board of Education does not support efforts to alter the electoral districts at this time:

NOW, THEREFORE, IT IS HEREBY RESOLVED that the Rockingham County Board of Education does not support any alteration to its electoral districts and believes that such efforts will dilute the minority representation and fail to adequately assure fair representation for each citizen of Rockingham County.

This the 25th day of April 2005.


K. Wayne Kirkman, Chair

ATTEST:


Secretary

COMMISSIONERS APPROVE SCHOOL BOARD ELECTION REFORM



March 7 - Bethany Mayor Wayne Barham and his former arch-enemy Sandra Griffin gleefully fist-pump the air in celebration of a vote by the Neely County Commissioners. Barham and Griffin set aside their animosity towards each other to join in a common fight against the Neely County School Board. They achieved their first real taste of victory over an uncooperative and combative Board of Education when the Commissioners unanimously approved a resolution in support of changing the eight-district system of electing Neely County School Board members

In the years before they realized they had a common foe, Mayor Barham opposed moving Bethany students to Wentworth while Griffin feared Neely County Middle School would not be built if Bethany students were not bused to Wentworth to attend the school.

Neely County Middle School was eventually built and the charter Bethany Community Middle School was established by the Bethany community over the vehement objections of the School Board. The charter school allows Bethany middle grade students to attend school in their community rather than spending up to four hours per day on a bus traveling to Wentworth. Although it is publicly funded, the Bethany Community Middle School is operated by its own board and it does not answer to the school system bureaucracy at the Harrington Hilton in Eden.

Mayor Barham and Griffin, along with a small but determined cadre of Neely County citizens, organized themselves to lobby Commissioners and local representatives in the State Legislature. The group calls itself Citizens About School Elections, as in "get on their CASE."

CASE's mission is to change the Neely County School Board system so that all citizens can vote for a majority of the Board. Neely County School Board members are currently elected in eight separate districts. Each district elects its own member to the board. The eight-district system was established when the county's four school systems were merged in 1993.

CASE has suggested a system which elects three School Board members at-large with four members elected in districts. This would allow every voter to cast a ballot for four of seven board members. The 4-3 system would also eliminate the tie votes that can

occur on an eight-member board. CASE believes a combination of at-large and district members would cause the School Board members to be less "territorial" and more sensitive to needs of the Neely County School System as a whole.

Except in the case of School Board member Celeste DePriest, members are required to live in the districts in which they are elected. Due to her marital problems, the Neely County Elections Board granted DePriest a special exemption which allowed her to live in one district while serving as a School Board member for another district.

As of this report, Ms. DePriest is experiencing problems with paying her rent in a timely manner. DePriest recently lost her job as director of the non-profit Best Friends organization. No doubt this has contributed to her rent problems. Her landlord has filed court papers for a "summary ejection." If Celeste gets the boot, there is no telling where she might end up living and what kind of special exemption the Board of Elections might be called upon to grant. Editor's note: The Neely County court has ordered School Board member Celeste DePriest to vacate the residence at 637 Church St in Eden for failure to pay rent. DePriest has until March 19 to move. After that date the house will be padlocked by the Sheriff and DePriest and her belongings will be put out on the street.

Celeste currently has job feelers out as far as the Forsyth County School System where former Neely County School Superintendent George "The Puppetmaster" Fleetwood holds an executive position. Celeste was a staunch supporter of the mechanical Fleetwood during his tenure with the Neely County School System. We believe "The Puppetmaster" owes Ms. DePriest a favor or two.

With any luck, Fleetwood will find a suitable position for Ms. DePriest and whisk her away to Forsyth County. Although her meeting attendance record and her inability to work and play well with others on the Neely County School Board might be viewed negatively by some, we believe Celeste DePriest would be a wonderful asset to the Forsyth County School System, especially if it means she might move to Forsyth County.

During her service as a Neely County School Board member, Ms. DePriest has done her part to stop publication of the Neely Chronicle. It is only fair that we return the favor by noting she is suffering some of the problems that she so hoped to cause us. We're not proud of it, but we have to confess there's a little twinkle in our eyes and a small bounce in our step that wasn't there before.

Anyways, we digress. After many, many months of pressing the issue (someone said it was 7 years), CASE scored big when the Commissioners finally approved asking the state Legislature to change the way the Neely County School Board is elected. The question came before the Commissioners on at least

three occasions, but it was never put to an official vote. The School Board has fought it every step of the way, including making childish threats to pass a resolution asking the state Legislature to change the way Neely County Commissioners are elected.

School Board members Celeste DePriest and Tim Scales and former board member Reida Drum put up the strongest opposition to reforming the district system. They paid School Board Attorney Jill Wilson \$150 per hour to insist that the United States Department of Justice (DOJ) will never approve changing the way Neely County School Board members are elected.

The DOJ approved the eight-district system in part to ensure Herman Hines is always elected to the School Board no matter how poorly he represents his district or how much harm he causes the school system. Tim Scales has threatened to scream discrimination if any election reform is attempted. Scales insists he has an inside track with the DOJ and he can derail any reform with a simple phone call to Washington, D.C.

There is no explanation for Reida Drum's repeated flip-flops on the issue. According to Mayor Barham, Amanda Bell, who replaced Drum on the Board, supports School Board election reform. CASE members credit themselves with Drum's defeat.

Despite all their bluster over the years, not a single School Board member was present when the Commissioners passed their resolution of support for CASE's goal. Mayor Barham indicated the low-key, no-comment, no-discussion, no-questions passage of the resolution was preferable to having a mass of CASE supporters tangling with School Board members in front of the Commissioners. An ambush also prevented the NAACP from protesting the resolution's passage. During a public hearing last year, NAACP leaders expressed concerns about losing minority representation on the School Board if the eight-district system is eliminated.

To address the NAACP's concerns, the resolution asks the Legislature to be mindful of the need for some minority School Board members when a new election system is approved. The resolution is non-specific about what a new system might be, but it does indicate that there should be an odd number of board members and every voter should be able to cast ballots for the majority of the Board. The details of how to achieve the basics is left up to the Legislators to resolve.

The removal of Pappy Hoover and Barbie Eggleston from the Board of Commissioners was no doubt instrumental in the sudden passage of the resolution after so many months of delays. Before becoming County Commissioners, Pappy and Barbie were Neely County School Board members. Their allegiance was always to their former board rather than with the need for any type of School Board election reform.

When the Neely County School Board learns it has been bushwhacked by the new Board of

ATTACHMENT B

The Neely Chronicle, April 2006 at 16.
(local newspaper in Rockingham Cty, NC)