

**Testimony of Debo P. Adegbile  
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**Reauthorization of the Voting Rights Act: Policy Perspectives and  
Views from the Field**

**United States Senate Judiciary Subcommittee on the Constitution**

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## **Introduction**

As Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I welcome the opportunity to testify before the Senate Judiciary Subcommittee on the Constitution regarding the renewal of and continuing need for the expiring provisions of the Voting Rights Act (VRA). Today, my testimony is divided into two parts. Initially, I offer observations about LDF's practical experience with enforcement of the expiring provisions of the Act. My observations are informed by LDF's long experience with and work on these issues in the field. In light of that experience, I offer an analysis of some of the central policy issues that are presented in the current renewal debate. Renewal of the expiring provisions of the VRA is of critical importance to LDF as our work has long been, and continues to be, focused on ensuring that African Americans and other minority groups have equal and unfettered access to the political process.

## I.

### VRA Enforcement: A View from the Field -- Evidence of Continuing and Persistent Voting Discrimination

#### *Louisiana*

The recent history of Voting Rights Act enforcement in Louisiana provides strong evidence of the success of the VRA in preventing ongoing and pervasive state and local attempts to discriminate against minority voters, as well as the continuing need for the Section 5 preclearance requirement. Louisiana has the fifth largest African-American population in the United States, and the second highest percentage of African-American population of any state following Mississippi. Significant racially polarized voting and voting changes adopted with retrogressive purpose and/or effect continue to be commonplace in Louisiana.

LDF's substantial experience enforcing voting rights protections in Louisiana since the 1982 reauthorization indicates that, although the VRA has facilitated some progress toward the goal of equality in voting, discrimination against African-American voters has not been eradicated. The continuing need for Section 5 preclearance in the future is highlighted by the fact that some jurisdictions – including the State of Louisiana itself – have been repeat offenders that have drawn multiple objections during this time period.

Here, I describe some of the forms of discrimination that the preclearance provision has blocked through the present day, and then discuss the experience in Orleans Parish and other jurisdictions within the state in which Section 5 has effectively protected minority voting rights from repeated threats.<sup>1</sup>

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<sup>1</sup> A report that more fully details the voting experience in Louisiana since 1982 is part of the Congressional record. See DEBO P. ADEGBILE, VOTING RIGHTS IN LOUISIANA 1982-2006.

## Multiple Forms of Persistent Discrimination

The success of Section 5 is measured, in part, by the number of objections to proposed voting changes issued by the Department of Justice (“DOJ”). Indeed, Section 5 has been used more frequently in the years since 1982 than beforehand as the Department of Justice has interposed 96 objections to proposed voting changes in Louisiana since the last renewal.<sup>2</sup> Put another way, nearly two-thirds of the DOJ objections interposed against Louisiana have been made since the last Congressional reauthorization of Section 5.

Formal objections, however, do not include other indicia of Section 5’s effectiveness – including its deterrent effect on those jurisdictions that may be considering potentially discriminatory changes. In particular, DOJ’s “more information requests” (MIRs) often lead jurisdictions to withdraw or supercede potentially retrogressive voting changes.<sup>3</sup> Overall, jurisdictions within Louisiana have withdrawn 45 changes after receiving an MIR since the last renewal.<sup>4</sup> Both objection statistics and MIRs, among other things, help illustrate the full deterrent effect of Section 5.

## Repeat Offenders

The continued need for Section 5 preclearance is illustrated, in part, by the fact that several jurisdictions within Louisiana have received multiple objections to proposed voting changes since the 1982 renewal. Indeed, one of the worst repeat offenders is the State of

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<sup>2</sup> Compare to period from 1968 to 1982 during which DOJ objected to 50 attempts by state and local authorities to implement voting changes that would have retrogressed African-American voting strength, or 3.5 objections on average per year.

<sup>3</sup> Luis Fraga and Maria Lizet Ocampo note that because More Information Request (MIR) letters “are issued at far higher rates than letters of objection . . . they have the potential to impact a wider range and larger number of electoral changes” and have “prevented implementation of 1,162 additional voting changes from 1982 to 2005[.]” Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act 10-11* (June 7, 2006).

<sup>4</sup> *Id.* at 14 (Table 3: Changes, Objections, and MIR Outcomes, 1982-2005).

Louisiana itself. The DOJ has interposed an objection to every initial reapportionment plan adopted for the State House of Representatives since the VRA was passed in 1965. The record underlying these objections, described more fully below, provides substantial evidence of both retrogressive effect and purpose underlying the adoption of the plans.

### Objections to Louisiana State Legislative Reapportionment Plans, 1971-2001

In 1971, the DOJ objected to the state's first legislative reapportionment plan after the VRA went into effect, noting the "apparent racially discriminatory effects in both houses of the legislature in widely disparate parts of the state" including "an extraordinarily shaped 19-sided figure . . . [that] suggests a design to consolidate in one district as many black residents as possible."<sup>5</sup> The DOJ also interposed an objection to the post-1980 decennial redistricting plan finding that the plan had the "net effect of *reducing* the number of House districts with black majorities."<sup>6</sup> Similarly, in 1991, the Louisiana legislature once again proposed a plan that retrogressed African-American voting strength. DOJ objected to the proposed configuration of district boundaries in seven areas across the state finding that "the state has not consistently applied its own criteria" and the inconsistent application "in each instance" negatively impacted black voters' ability to elect a candidate of their choice.<sup>7</sup>

In 2001, the state filed a declaratory judgment action in *Louisiana House of Representatives v. Ashcroft* (Civ. No. 02-62 D.D.C.) seeking judicial preclearance process of its state house redistricting plan. In that case, the legislature argued that its proposed elimination of

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<sup>5</sup> Letter from David L. Norman, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Jack P.F. Gramillion, Attorney General, State of Louisiana (Section 5 Objection Letter) (Aug. 20, 1971), at 6.

<sup>6</sup> Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Charles Emile Bruneau, Jr., Member, Louisiana House of Representatives and David R. Poynter, Clerk, Louisiana House of Representatives (Section 5 Objection Letter) (June 1, 1982), at 2. (*Emphasis added.*)

<sup>7</sup> Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Jimmy N. Dimos, Speaker, Louisiana House of Representatives (Section 5 Objection Letter) (July 15, 1991).

a viable majority African-American district in Orleans Parish was justified by arguing that white voters in this part of the state were entitled to “proportional representation,” an unrecognized Section 5 defense, while ignoring long-standing Section 5 principles and disregarding significant growth of the African-American population in the Parish. The fate of Louisiana’s 2001 redistricting plan was the same as that of its predecessors. The 2001 redistricting plan for the Louisiana House of Representatives is a telling statewide example that emerged during the last decennial redistricting cycle in that the evidence suggested that the pre-settlement plan was enacted with both retrogressive purpose and effect.

The Louisiana legislature’s repeated attempts to violate the VRA over the course of four decades, which were arguably more blatant in 2001 than before, shows the importance and effectiveness of Section 5 in protecting African-American voters. The experience with Section 5 in Louisiana illustrates that without preclearance, we risk actual implementation of plans adopted with retrogressive effect and/or discriminatory purpose.

### Other Repeat Offenders

Numerous jurisdictions in Louisiana have repeatedly proposed retrogressive voting changes that were blocked by the DOJ during the Section 5 preclearance process. Between 1982 and 2003, 11 parishes were “repeat offenders” as they submitted multiple numbers of voting changes that drew objections.<sup>8</sup> An example of a particularly resistant jurisdiction is Pointe Coupee Parish, in which DOJ interposed objections to the school board and police jury district redistricting plans three decades in a row. Most recently, DOJ interposed an objection to a 2002

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<sup>8</sup> DEBO P. ADEGBILE, VOTING RIGHTS IN LOUISIANA 1982-2006: A REPORT OF RENEWTHEVRA.ORG 27 (Mar. 2006).

plan that would have eliminated a majority-black district.<sup>9</sup> The persistence of these repeat offenders along with the state's long history of Section 5 objections and changes withdrawn in response to MIRs together illustrate the grave potential for retrogression to emerge in the political process in the absence of the Section 5 safeguard.

### *Mississippi and South Carolina*

Much like Louisiana, the recent experience in the States of South Carolina and Mississippi also provides strong evidence of the continuing need for the broad application of Section 5. Although the record contains numerous examples of persistent voting discrimination, as reflected in various reports, and extensive witness testimony that has been submitted and offered, I highlight a few examples here. Indeed, in both of these covered states, DOJ has interposed a series of recent objections that reach a wide range of voting changes, many of which illustrate both retrogressive effect and purpose. For example, in 2001, the Town of Kilmichael, Mississippi, cancelled its general election for alderman and mayor, after the all-White Board of Aldermen realized that, given 2000 census data, African Americans comprised a majority of both the town's total population and registered voters. The cancellation prompted a 2001 objection from the DOJ on the grounds that the voting change prevented African Americans from electing candidates of their choice (since several African Americans had already qualified for the town's elections).<sup>10</sup> This continued voting discrimination has been accompanied by the reality of racially polarized voting, which has been documented through a long litany of Mississippi court

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<sup>9</sup> Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to E. Kenneth Selle, President, Tri-S Associates, Inc. (Aug. 22, 1983); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Clement Guidroz, President, Pointe Coupee Parish Police Jury (Feb. 7, 1992); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Gregory B. Grimes, Superintendent, Pointe Coupee Parish School District (Oct. 4, 2002).

<sup>10</sup> Letter from Ralph Boyd, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, Esq., December 11, 2001.

decisions. In *Jordan v. Winter*, a congressional redistricting case, the three-judge district court stated “[f]rom all the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race.”<sup>11</sup> In *Martin v. Allain*<sup>12</sup>, which involved a statewide challenge to the election of state trial court judges from multi-member districts, the federal district court noted that “racial polarization exists throughout the State of Mississippi . . . and that blacks overwhelmingly tend to vote for blacks and whites almost unanimously vote for whites in most black versus white elections.”<sup>13</sup> This same pattern has been confirmed in a number of decisions throughout the state dealing with local redistricting.<sup>14</sup>

Likewise, in 2003, the DOJ interposed an objection to a proposed annexation in the Town of North, South Carolina. The DOJ determined that the town had “been racially selective in its response to both formal and informal annexation requests” and found that “white petitioners have no difficulty in annexing their property to the town” while “town officials provide little, if any, information or assistance to black petitioners and often fail to respond to their requests, whether formal or informal, with the result that the annexation efforts of black persons fail.”<sup>15</sup> In the view of the DOJ the town’s deliberate non-responsiveness to African Americans revealed that race was “an overriding factor in how the town responds to annexation requests.”<sup>16</sup> More recently, in 2004, the DOJ interposed an objection to the state’s proposed change to Charleston County School Board’s method of election because the change from non-partisan to partisan

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<sup>11</sup> 604 F. Supp. 807, 812-813 (N.D. Miss. 1984) (three-judge court), aff’d 469 U.S. 1002 (1984).

<sup>12</sup> 658 F. Supp. 1183 (S.D. Miss. 1987).

<sup>13</sup> *Id.* at 1194.

<sup>14</sup> *See, generally, Houston v. Lafayette County*, 20 F.Supp.2d 996 (N.D. Miss. 1998); *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Jordan v. City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984).

<sup>15</sup> Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to H. Bruce Buckheister, Mayor, North, SC (September 16, 2003)

<sup>16</sup> *Id.*

elections would “make it extremely difficult for minority-preferred candidates to win.”<sup>17</sup> While the non-partisan election system was credited by a federal judge in *United States v. Charleston County* (D.S.C. 2003) for its creation of opportunities for single-shot voting and plurality victory by minority-preferred candidates, the proposed system imposed a *de facto* majority requirement, which, when combined with an at-large system, would likely result in the defeat of minority voters’ candidates of choice. The DOJ also noted that this plan was proposed in the face of opposition from a majority of minority elected officials opposed and despite the availability of non-retrogressive alternative plans that had been made available.

Indeed, this evidence illustrates the persisting nature of voting discrimination in the covered jurisdictions and the ability of the Section 5 preclearance process to ferret out voting discrimination that often manifests itself in multiple forms. This evidence must also be viewed in the context of high levels of racial polarization<sup>18</sup> and other barriers that persist within the political process. For example, federal observers have been deployed to monitor elections in Mississippi no less than 250 times covering 48 of the state’s 82 counties since the 1982 renewal. A number of these counties were covered on multiple occasions illustrating the intransigence and resistance of local officials in these areas. Moreover, courts have highlighted the steep levels of racially polarized voting in these covered jurisdictions making the role of the Section 5 preclearance process necessary to prevent impairment of minority voting strength.

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<sup>17</sup> Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to C. Havird Jones, Jr., Esq., Senior Assistant Attorney General (February 26, 2004).

<sup>18</sup> See also *United States v. Charleston County* and *Moultrie v. County Council*, 316 F.Supp.2d 268 (D.S.C. 2003)(suit challenging the at-large method of electing the nine member Charleston County Council under Section 2 of the Voting Rights Act. In particular, the court found evidence of white bloc voting and concluded that in 10 general election involving Black candidates, “white and minority voters were polarized 100% of the time.”). *Id.* at 278.

## II.

### Policy Perspectives

#### ***1. Why is Section 5 preclearance still necessary?***

The Section 5 coverage formula was put into place after Congress thoroughly reviewed the record before it in 1965, and subsequently renewed in 1970, 1975 and 1982. During each of these deliberations Congress documented widespread evidence of persistent violations of minority voting rights in covered jurisdictions. The record before this Congress presents continued evidence of such violations, and highlights the necessity for continued review of voting changes to protect minority voters in covered jurisdictions. For example, since the VRA's 1982 renewal, violations of minority voting rights have taken the form of last minute election date or polling place changes, discrimination at the polls, and familiar dilutive tactics of "cracking" and "packing" minority voting districts.<sup>19</sup> Additionally, as noted in the first part of my testimony, contemporary reports from the field illustrate that voting discrimination in covered jurisdictions is alive and well, and significantly continues to be checked by the prophylactic protection.

Section 5 preclearance also plays an important role in deterring covered jurisdictions from enacting discriminatory voting changes. Although many VRA opponents and

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<sup>19</sup> See e.g. Laughlin McDonald, Janine Pease and Richard Guest, *Voting Rights in South Dakota 1982-2006*, 15-21 LEADERSHIP CONFERENCE ON CIVIL RIGHTS (March 2006); *Asian-Americans and the Voting Rights Act: The Case for Reauthorization*, 21-22 ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND (May 2006) (documenting numerous examples of racist behavior by poll workers in elections between 1988 and 2006); Robert McDuff, *Voting Rights in Mississippi, 1982-2006*, LEADERSHIP CONFERENCE ON CIVIL RIGHTS (May 2006) (discussing recent examples of the use of racial campaign appeals); *Kilmichael Mississippi*, Protect Voting Rights: Renew the VRA, <http://renewthevra.civilrights.org/resources/detail.cfm?id=190> (last visited June 13, 2006) (discussing an incident in 2001 when three weeks before election day in Kilmichael, Mississippi, the all-White town council decided to cancel the municipal election); Debo P. Adegbile, *Voting Rights in Louisiana 1982-2006*, 27-29 LEADERSHIP CONFERENCE ON CIVIL RIGHTS (March 2006) (noting that at least 11 Parishes in Louisiana were "repeat offenders," and that on 13 instances the DOJ caught jurisdictions resubmitting objected-to proposals with cosmetic or no changes).

commentators point to a recent reduction in DOJ objections as evidence of the decreasing need for Section 5 -- this analysis oversimplifies the many ways in which the law serves to protect minority voters. Excluded from the category of objection statistics are other categories of deterred and rejected voting changes. These include matters that were denied preclearance by the Washington D.C. District Court; matters that were settled while pending before that court; voting changes that were withdrawn, altered or abandoned after the DOJ made formal More Information Requests (MIRs)<sup>20</sup>; as well as any recognition that the very existence of preclearance deters discriminatory voting changes in the first place. Taken together, these categories provide a more holistic view of the sizeable impact, deterrent effect, and continued need for Section 5's provisions. Moreover, without the Section 5 preclearance provisions many jurisdictions that have experienced a long history of exclusionary practices in voting would have lacked the incentive to tailor their electoral changes in a non-discriminatory fashion. Even with Section 5 in place, many covered jurisdictions made voting changes that disadvantaged minority voters without preclearing them with the DOJ. Despite vigorous enforcement efforts, the DOJ -- with its limited resources -- is unable to ensure that jurisdictions have submitted every voting change for preclearance. Without Section 5, the DOJ's ability to monitor discrimination against minority voters would be severely handicapped, and the VRA's deterrent effect on covered jurisdictions would be lost. The hearings on the current House and Senate renewal bills -- like those in previous decades -- contain evidence that the burdens that would be placed upon voters to vindicate their rights in the absence of preclearance would be substantial.

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<sup>20</sup> 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 Jun 9, 2006) (assessing the deterrent effect of Section 5 through an examination of the issuance of MIRs by the DOJ).

Given an extensive and carefully assembled record of continued voter discrimination in covered jurisdictions, and the evidence that Section 5 has operated to correctly identify the jurisdictions where preclearance is most necessary given past and current patterns of voter discrimination, I believe that maintaining Section 5 preclearance is not only appropriate, but is critical to the continued success of the VRA.

## ***2. Does Congress still have the power to renew Section 5?***

Yes, in light of the strong, record of both historical and current voting discrimination before Congress, it continues to have the power to renew Section 5 of the VRA. Several factors support this conclusion. First, the VRA's renewal is consistent with recent Supreme Court precedent. The *Boerne* decision and its progeny, while requiring that Congress be deliberate in the exercise of its Fourteenth and Fifteenth Amendment enforcement powers, do not place a substantial limitation on Congressional power to enact remedial or prophylactic legislation in the area of race.<sup>21</sup> In fact, *Boerne* and the subsequent case law in this area suggest that Congressional power is at its height when it enacts remedial or prophylactic legislation to protect the fundamental rights of individuals in classes afforded heightened levels of constitutional scrutiny.<sup>22</sup> These are the precise circumstances at play here. Congress has before it an extensive record of both historical and current instances of voting discrimination that persuasively illustrates a measurable degree of progress but also the intractability of this problem in covered jurisdictions, necessitating continued Congressional protection of those jurisdictions. This record at issue here is distinguishable from the record under review in *Boerne*. Moreover,

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<sup>21</sup> See, e.g. the post-*Boerne* cases *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004) (suggesting that where Congress acts to remedy problems in areas traditionally subject to higher judicial scrutiny, the sweep of its power is greater).

<sup>22</sup> See *Hibbs*, 538 U.S. at 735, in which the Court upheld Congress's abrogation of state's sovereign immunity under the Family Medical Leave Act (FMLA) because the act was intended to prevent sex discrimination; and *Lane*, 541 U.S. at 529, in which the Court upheld Congress's abrogation of state's sovereign immunity under Title II of the Americans with Disabilities Act because it protected citizens' fundamental right of access to the courts as applied.

*Boerne* and the cases that followed the Court cited the VRA as the exemplar of Congress's enforcement power under the Fourteenth and Fifteenth Amendments.

Additionally, the Court recently reaffirmed its support of Congressional action on the issue of minority voting rights in the 1999 case *Lopez v. Monterey County*.<sup>23</sup> In this post-*Boerne* decision, the court cited both *Katzenbach* and *City of Rome* favorably, and upheld the validity of preclearance in "jurisdictions properly designated for coverage."<sup>24</sup> The *Lopez* decision was decided just weeks after another Supreme Court case in which *Boerne* was invoked to invalidate a congressional enactment.<sup>25</sup> In light of this recent decision, there is nothing to suggest that Congress now lacks the authority to renew Section 5 of the VRA under the record before it.

Finally, this VRA renewal process does not stand alone. It is worth noting that a different constitutional moment occurs when Congress legislates under the Civil War Amendments *de novo*, as in *Boerne*, in contrast to when Congress is extending an existing piece of successful civil rights litigation. The Court has explicitly recognized that Congress acts as a continuing body when reviewing evidence, and that previous legislative findings and experience are properly part of the current record.<sup>26</sup> In light of the strong record currently before Congress, which is supported by the records from 1965, 1970, 1975, 1982 and 1992, it seems readily

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<sup>23</sup> *Lopez v. Monterey Cty.*, 525 U.S. 266, 285 (1999) (holding that "In short, 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 burden the Act imposes.").

<sup>24</sup> *Lopez v. Monterey County*, 525 U.S. 266 (1999).

<sup>25</sup> *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999)(distinguishing remedial and prophylactic voting legislation).

<sup>26</sup> See *Fullilove v. Klutznick*, 448 U.S. 448, 502-502 (1980), noting that:

Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attributes as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

apparent that Congress has satisfied its burden under the *Boerne* doctrine and has the power to renew Section 5.

### ***3. Do the benefits of preclearance outweigh the costs?***

Yes – Section 5 preclearance has led to widespread and well-documented benefits for minority voters with relatively low administrative or economic costs. From an economic and public policy standpoint, Section 5 is a cost-effective means to prevent discrimination. Every DOJ objection, or withdrawn, altered or abandoned voting change in response to a DOJ more information request (MIR), represents a potential lawsuit – and more importantly a deprivation of the right known to be “preservative” of all other. Blocking and deterring changes is undoubtedly better and more cost-effective than having to litigate them; Section 5 thus removes the need for private parties to spend their own and usually judicial resources to stop discriminatory changes.

Section 5 also plays an important educative function in covered jurisdictions. Through the MIR process, and as part of the submission process in general, there is extensive communication between the DOJ and the submitting jurisdiction. This communication thus facilitates public awareness and compliance with the law even short of the provisions affirmative deterrence effects.

The DOJ also applies the preclearance standard with a degree of flexibility that takes into account the nature of the electoral change being reviewed, and the time before the proposed change would take effect. For example, last minute polling place changes will be reviewed quickly before elections, whereas for more complex changes, the DOJ will be more likely to use its statutorily given 60-day review period. The DOJ’s actions following Hurricanes Katrina and

Rita further illustrate the flexible nature of preclearance review. After the hurricanes, the DOJ immediately sent a letter to the Secretaries of State in Mississippi and Louisiana acknowledging that they would be ready to expedite voting changes.<sup>27</sup>

Although Section 5 does require jurisdictions to take steps to comply and carefully consider the impact of voting changes, many of the costs and inconvenience arguments are overstated. More significantly, the cases from *Katzenbach* forward the Supreme Court has recognized that the imposition of costs must be weighed against the gravity of the harm being prevented – viewed in this light, on the record before Congress, the balance falls on the side of Section 5 to continue to protect the fundamental right to vote.

#### ***4. Is there a need to change the Section 4 coverage formula?***

The evidence in the record does not indicate that the existing Section 4 coverage formula, or “trigger,” needs to be revised or updated. The evidence in the record indicates that the existing coverage formula has proven extremely effective in addressing voter discrimination in the jurisdictions where voters most need protection, and has allowed for tailored responses in both covered and non-covered jurisdictions, where circumstances warrant, through administration of the bail-in and bailout provisions.

With respect to the existing coverage formula, the unique history and deeply entrenched nature of voting discrimination in covered jurisdictions strongly support the use of prophylactic measures to protect minority voters in these particular areas. In several covered states, for over a century before the passage of the VRA – and in many states up until the 1980’s or early 1990’s – not a single black was elected to Congress. Local circumstances in many places were not much better. Section 5, through “triggering” covered jurisdictions, has thus performed the important

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<sup>27</sup> See e.g. Letter from Bradley J. Schlozman to Honorable Al Ater, September 7<sup>th</sup> 2005 available at [http://www.usdoj.gov/crt/voting/la\\_katrina.htm](http://www.usdoj.gov/crt/voting/la_katrina.htm) (visited on June 20, 2006).

function of protecting the rights of minority voters in the places they are most at risk, and in which they have the most to gain.

Additionally, as set out above, because the Supreme Court considers both the history and ongoing nature of discrimination when weighing Congress's legislative power to enforce the Fourteenth and Fifteenth amendments, the years 1964, 1968 and 1972, which are referred to in the current trigger formula, remain relevant to assessing the jurisdictions in which minority voters are most in need of protection.

It bears emphasis that the registration and turnout levels that, in combination with the history of tests or devices, determine coverage were not the only evil that the VRA sought to eradicate. Depressed registration and turnout was a symptom of a much larger problem of discrimination in voting and Congress and courts have both recognized that mandate of the VRA does not end there.<sup>28</sup> The registration and turnout data were used as a proxy for discrimination – a proxy that informed but did not exclusively determine the inquiry. As in 1982, Congress can appropriately look to the experience in covered jurisdictions to assess if preclearance is still effective in light of the dangers that continue to exist.

Moreover, the existing bailout and bail-in provisions – Sections 4(a) and 3(c) of the act – operate in tandem with the Section 5 Coverage formula to ensure that the scope of Section 5 is appropriately contracted or expanded.<sup>29</sup> To date, every jurisdiction that has tried to bail out has

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<sup>28</sup> See e.g. *Sumter County, S.C. v. U.S.*, 555 F. Supp. 694, 707 (D.D.C. 1983) ("Obviously, the preclearance requirements of the original act and its 1982 amendment had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent.").

<sup>29</sup> To "bail out" of coverage under the VRA under section 4(a)(1), a covered jurisdiction must demonstrate compliance with the VRA for a ten-year period immediately preceding the filing of a bailout action. This compliance requires that the jurisdiction took "positive steps," including: (i) eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this act; and (iii) 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 elected officials throughout the jurisdiction and at all stages of the voting process. Under section 3(c) of the act, a court may order an uncovered jurisdiction to submit its voting

been successful, and those jurisdictions have expressed satisfaction with both the existing bailout formulation as well as the results they have achieved.<sup>30</sup> Additionally, courts have imposed Section 5 preclearance on jurisdictions where violations of the voting rights of their minority citizens justify future oversight.<sup>31</sup>

There is no evidence in the record, of which I am aware, indicating that the existing bailout provisions are particularly onerous or difficult to administer. According to J. Gerald Hebert, who served as legal counsel to all of the jurisdictions who have bailed out since the 1982 amendments, the issue is not that the bailout provisions are difficult or that jurisdictions are applying and being denied, but simply that “jurisdictions are just not applying.”<sup>32</sup> While this commentary perhaps suggests the need for increased awareness of the availability of bailout by covered jurisdictions, it does not suggest that the existing provisions are not working. Given this evidence, it stands to reason that the existing coverage formula and bailout provisions have provided, and will continue to provide, an important incentive for covered jurisdictions to comply with Section 5 as was intended at their enactment.

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changes in accordance with the requirements of Section 5 if appropriate judicial findings are made, usually with respect to Section 2 litigation.

<sup>30</sup> 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] (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.)

<sup>31</sup> See *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990), *aff’d*, U.S. 1019 (1991) (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); 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).

<sup>32</sup> Hebert testimony, *supra* note 30.

## **5. Should Section 5 be extended nationwide?**

Proposals to extend Section 5 nationwide are designed to end the application of the statute for both legal and practical reasons. While applying Section 5 nationwide may seem attractive upon first blush, doing so would extend the VRA beyond the targeted jurisdictions that have an established history of discrimination and make it vulnerable to a constitutional challenge. The existing record does not support nationwide expansion to places where, among other things there are no minority voters. Indeed, no serious argument can be advanced that nationwide coverage of Section 5 would be "congruent and proportional" to address the harms it is designed to cure -- namely a history of significant discrimination against minority voters -- as required by the Supreme Court's recent precedents. Accordingly, it would be disingenuous for those who seek to conform to the contours of the *Boerne* decisions to support nationwide extension. Congress has appropriately focused on the history of discrimination that gave rise to the coverage formula, and the evidence of persisting forms of discrimination when evaluating which jurisdictions remain subject to the preclearance requirements.

On the practical side, nationwide application of Section 5 would be extremely difficult, if not impossible, for the DOJ to administer, given the volume of voting changes that would have to be reviewed. This expansion of coverage would dilute the DOJ's ability to appropriately focus their work on those jurisdictions where discrimination has been and continues to be a problem.

## **6. *Are the proposed modifications to the statute appropriate?***

The proposed modifications to the statute realign the standards for Section 5 with long-standing judicial interpretations of and Congressional intent regarding Section 5. First, the proposed bill amends Section 5 of the Act to prohibit *all* unconstitutional discrimination with regards to the right to vote, not just discrimination that is also retrogressive. This modification

responds to the holding of *Reno v. Bossier Parrish II (Bossier II)*, which established a preclearance standard under which intentionally discriminatory voting changes (i.e. those motivated by racial animus) must be precleared where minority voters are not made worse off. This decision makes little sense, and ultimately allows for discrimination that not only violates the purpose of the VRA, but also is itself unconstitutional. The Fifteenth Amendment and the VRA each have, as one of their principal purposes, the eradication of historic and long-maintained voting discrimination. It is both unnecessary and inefficient for the federal government to turn a blind eye to purposefully discriminatory acts while covered jurisdictions persist in, renew, or develop invidious voting schemes. The modification to Section 5 will prevent this from occurring.

The proposed bill also restores the original “ability to elect” test for measuring minority voting strength. In *Georgia v. Ashcroft*, the Supreme Court abandoned this straightforward non-retrogression test in favor of a confusing, amorphous, and difficult to administer “influence” standard.<sup>33</sup> This new standard permits electoral changes where the DOJ can identify that proposed plans trade “influence district” for “ability to elect” districts<sup>34</sup> Although there may be situations where minority “influence” is measurable and important, in reality discerning such instances seems not only unrealistic, but administratively unworkable. For instance, in the absence of any clear metric for “influence,” which was not provided by the Court in *Georgia v. Ashcroft*, it would be difficult to evaluate the tradeoffs that this case injected into the Section 5 analysis. Additionally, an influence trade-off theory could be used to cloak purposefully retrogressive or discriminatory acts from meaningful Section 5 review. The “ability to elect” standard proposed by the current bill has withstood the test of time, and proven workable both

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<sup>33</sup> *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

<sup>34</sup> *Id.* at 482 (the court defined 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.”).

judicially and administratively as a means of protecting minority communities' ability to elect the candidates of their choice.

Finally, the proposed bill would amend Section 14 of the VRA to allow prevailing parties to recover reasonable litigation expenses in addition to attorney's fees. Given the complex nature of VRA litigation, litigants currently bear significant expense furnishing witnesses, experts and other trial necessities. The proposed amendment will assist the efforts of all parties seeking to enforce the provisions of the VRA, and prevent worthwhile cases from going untried due to lack of funds.

***7. Does the record suggest that renewal of the language assistance provisions is necessary?***

S 2703 also provides a straight reauthorization of Sections 4(f)(4) and 203 for twenty-five years, based upon a well-documented need for language assistance among language minority citizens whose access to the political process has been barred by discrimination in voting and education.

Congress plainly has the authority to remove barriers to political participation by language minority U.S. citizens. In *Katzenbach v. Morgan*, the United States Supreme Court upheld the language assistance provisions in Section 4(e) as a valid exercise of congressional enforcement powers under the Fourteenth and Fifteenth Amendments.<sup>35</sup> The Court reasoned that Congress may have “questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.”<sup>36</sup> *Katzenbach* is consistent with

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<sup>35</sup> 384 U.S. 641, 650 (1966).

<sup>36</sup> 384 U.S. at 658.

the Supreme Court’s 1923 decision in *Meyer v. Nebraska*, which held that “the protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue.”<sup>37</sup> As a result, Congress has broad remedial powers to reauthorize Sections 4(f)(4) and 203.

The record supports the exercise of those powers, as the bill recognizes in reaffirming the findings in Section 203(a).<sup>38</sup> The Judiciary Committee and this Subcommittee have received substantial evidence documenting discrimination in voting and education that supports maintaining the protections in Sections 4(f)(4) and 203 of the Voting Rights Act for the four covered language groups.<sup>39</sup> I will briefly summarize some of that evidence, first focusing on voting discrimination, and second turning to the lack of equal educational opportunities in the three states that became subject to the preclearance and minority language assistance provisions in 1975: Alaska, Arizona and Texas.

The need for language assistance in Alaska remains high, but is largely unmet.<sup>40</sup> There is substantial non-compliance with Section 203, including lack of oral language assistance, no voter

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<sup>37</sup> 262 U.S. 390, 401 (1923).

<sup>38</sup> 42 U.S.C. § 1973aa-1a(a).

<sup>39</sup> For example, in Arizona, the Department of Justice has objected to four statewide redistricting plans since 1982 because of their discriminatory impact on language minority citizens, including one in the 1980s, two in the 1990s, and one in 2002. DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO ET AL., VOTING RIGHTS IN ARIZONA 1982-2006, at 4, 17, 54, 56-57 (2006). In 1989 and 1994, the Department of Justice brought successful cases against the State of Arizona and Apache, Coconino, and Navajo Counties for denying American Indian voters access to the political process, which continued to be a problem as recently as 2002. *United States v. Arizona*, No. CIV.-94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994); *United States v. Arizona*, No. CIV-88-1989-PHX-EHC (D. Ariz. 1989) (consent decree amended Sept. 27, 1993).

<sup>40</sup> NATALIE LANDRETH & MOIRA SMITH, VOTING RIGHTS IN ALASKA 1982-2006, at 3, 8, 12, 23 (2006). For example, 80.5 percent of Alaska Native graduating seniors are not proficient in reading comprehension, they have failure rates on standardized tests that are more than 20 percent higher than non-Native students, and their graduation rates lag more than 15 percent behind the statewide average. *Ibid.* at 27-28.

outreach, and the absence of language assistance by telephone.<sup>41</sup> Voter turnout in these isolated Native communities trails statewide turnout by nearly seventeen percent.<sup>42</sup>

In Arizona, the Department of Justice has objected to four statewide redistricting plans since 1982 because of their discriminatory impact on language minority citizens, including one in the 1980s, two in the 1990s, and one in 2002.<sup>43</sup> Since 1982, more than 1200 federal observers have been deployed to Apache, Navajo, and Yuma Counties, identifying substantial non-compliance in the availability and quality of language assistance to American Indian and Latino voting-age citizens.<sup>44</sup> In 1989 and 1994, the Department of Justice brought successful cases against the State of Arizona and Apache, Coconino, and Navajo Counties for denying American Indian voters access to the political process, which continued to be a problem as recently as 2002.<sup>45</sup> Indeed, just last week the DOJ brought a Section 203 case in Cochise County, Arizona where a consent decree is currently before the court.

The record also contains evidence about the importance of the language assistance provisions and oversight under Section 5 in Texas, where 22.4 percent of voting age citizens are Latino and 12.3 percent are African-American.<sup>46</sup> Since 1982, Texas has the second highest number of Section 5 objections interposed by the DOJ, including at least 107 objections, 10 of which were for statewide voting changes.<sup>47</sup> A majority of all Section 5 objections to

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<sup>41</sup> *Id.* at 32-36.

<sup>42</sup> *Id.* at 25.

<sup>43</sup> DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO ET AL., VOTING RIGHTS IN ARIZONA 1982-2006, at 4, 17, 54, 56-57 (2006).

<sup>44</sup> *Id.* at 5, 17, 50-54.

<sup>45</sup> *United States v. Arizona*, No. CIV.-94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994); *United States v. Arizona*, No. CIV-88-1989-PHX-EHC (D. Ariz. 1989) (consent decree amended Sept. 27, 1993).

<sup>46</sup> Census 2000, STF-3 and STF-4 data.

<sup>47</sup> NINA PERALES, LUIS FIGUEROA & CRISelda RIVAS, THE MINORITY VOTING EXPERIENCE IN TEXAS SINCE 1982: DEMONSTRATING THE IMPORTANCE OF REAUTHORIZATION OF THE VOTING RIGHTS ACT 3, 15-16 (2006).

discriminatory voting changes in Texas have been since 1982, which have affected nearly 30 percent of Texas's 254 counties, where 71.8 percent of the State's non-white voting age population resides.<sup>48</sup> Texas also leads the nation in several categories of voting discrimination, including recent Section 5 violations and Section 2 challenges.<sup>49</sup> For example, in 2004, Waller County was stopped from disenfranchising African American students at Prairie View A&M who were trying to vote for two African American students running for County office. In 2002, Section 5 prevented the City of Seguin from dismantling a Latino city council district and then from canceling the candidate-filing period to prevent Latino candidates from running in the district and winning a majority of seats. In 2002, DOJ used Section 5 to prevent the City of Freeport from restoring at-large elections that had been eliminated after a successful voting rights lawsuit brought by Latino and African American voters who comprised a majority of the City's population.

The need for language assistance in jurisdictions across the nation is extreme in many places.<sup>50</sup> Among all covered jurisdictions, an average of 13.1 percent of citizens of voting age are limited-English proficient (LEP) in the languages triggering coverage.<sup>51</sup> These LEP U.S. voting age citizens also experience high illiteracy rates. According to the 2000 Census, covered

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<sup>48</sup> *Id.* at 3, 15.

<sup>49</sup> *Id.*

<sup>50</sup> For example, the need for language assistance in Alaska remains high, but is largely unmet. The Full Committee heard testimony from Natalie Landreth that residents of nearly 200 Native villages accessible only by plane live in abject poverty, have high unemployment rates, the lowest levels of education, and a high level of limited-English proficiency that impair their ability to participate in elections. For example, 80.5 percent of Alaska Native graduating seniors are not proficient in reading comprehension, they have failure rates on standardized tests that are more than 20 percent higher than non-Native students, and their graduation rates lag more than 15 percent behind the statewide average. There is substantial non-compliance with Section 203, including lack of oral language assistance, no voter outreach, and the absence of language assistance by telephone. NATALIE LANDRETH & MOIRA SMITH, *VOTING RIGHTS IN ALASKA 1982-2006* (2006).

<sup>51</sup> DR. JAMES THOMAS TUCKER & RODOLFO ESPINO, *MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS EXECUTIVE SUMMARY 21* (Mar. 2006) (summarizing July 2002 Census determinations for Section 203 coverage).

language minority citizens have an average illiteracy rate of 18.8 percent, nearly fourteen times the national rate.<sup>52</sup>

High LEP and illiteracy rates are the product of past and present educational discrimination. Since 1975, at least twenty-four successful educational discrimination cases have been brought on behalf of ELL students in fifteen states, fourteen of which are presently covered in whole or in part by the language assistance provisions.<sup>53</sup> Cases brought on behalf of ELL students remain pending in Alaska, Illinois, and Texas.<sup>54</sup> Consent decrees or court orders remain in effect for ELL students statewide in Arizona and Florida, and in the cities of Boston, Denver, and Seattle, each of which is covered by the language assistance provisions.<sup>55</sup>

Educational discrimination is compounded by the absence of sufficient adult ESL programs in most of the covered jurisdictions. A majority of surveyed ESL providers in sixteen states covered by Section 203 reported that they have lengthy waiting lists, many ranging from one to three years.<sup>56</sup>

Unequal educational opportunities afforded to covered language minority groups continue to result “in high illiteracy and low voting participation.”<sup>57</sup> The barriers posed by educational discrimination, language and the absence of sufficient ESL classes, and high illiteracy result in extremely depressed voter participation. According to the Census Bureau, in the November 2004 Presidential Election, Hispanic voting-age U.S. citizens had a registration

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<sup>52</sup> *Id.*

<sup>53</sup> DR. JAMES THOMAS TUCKER, UNEQUAL EDUCATIONAL OPPORTUNITIES FOR ENGLISH LANGUAGE LEARNERS IN SECTION 203 COVERED JURISDICTIONS (June 2006).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> DR. JAMES THOMAS TUCKER, WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS 3, 18 (June 2006).

<sup>57</sup> 42 U.S.C. § 1973aa-1a(a).

rate of 57.9 percent and Asian voting-age U.S. citizens had a registration rate of only 52.5 percent, compared to 75.1 percent of all non-Hispanic white voting-age U.S. citizens.<sup>58</sup>

Therefore, Sections 4(f)(4) and 203 should be renewed, as provided by S. 2703.

***8. Do the expiring provisions serve to enhance political inclusion of race and language minorities, or further balkanize society?***

The expiring language assistance and Section 5 preclearance provisions, while taking race and language proficiency into account, are fundamentally aimed at including all citizens in the electoral process and ensuring that their votes will carry weight equal to that of all other citizens. Promoting minority citizens' right to exercise their right to vote is fundamental to including them in the American political system, and these provisions take these factors into account in order to protect voters from discrimination on the basis of race or language minority status. Given that racially polarized voting remains intense in many parts of covered jurisdictions, the VRA, as amended, was designed to both give minority voters a voice in the political process and provide the opportunity for minority candidates to hold office. The VRA's success in providing African American, Latino, Native American and Asian Americans a voice in the democratic process after substantial exclusion results in an inclusive political system, not an exclusive one. Even opponents of the VRA point to increases in minority representation as evidence of progress. Although nobody asserts that the provisions will be necessary in perpetuity, the record indicates that gains have been recent, attributable, in part, to the VRA, and that they are susceptible to being lost.

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<sup>58</sup> U.S. CENSUS BUREAU, Table 4a, Reported Voting and Registration of the Total Voting-Age Population by Sex, Race and Hispanic Origin: November 2004. Unfortunately, the Census Bureau does not report the registration and turnout data for American Indian or Alaska Native voters. What is known is that American Indian and Alaska Native voter registration and turnout is still below non- American Indian and Alaska Native averages in many parts of the country. For example, voter turnout in these isolated Native communities trails statewide turnout by nearly seventeen percent. NATALIE LANDRETH & MOIRA SMITH, VOTING RIGHTS IN ALASKA 1982-2006 (2006).

Nothing about the expiring provisions serves to “balkanize” society or, encourages “racial gerrymandering.” Residential racial segregation in the U.S. has a long history, and remains a reality today. Consequently, the preference for single-member districts will lead to many districts with high concentrations of geographically compact minority voters. The Supreme Court has limited the extent to which race can drive line-drawing after *Shaw v. Reno*, which ensures that there is no real prospect that any alleged distortions will occur in the future. It seems odd to assert that the bill that has done so much to move us away from exclusion would now implausibly be blamed for leading to it.

Furthermore, for language minorities, the expiring provisions certainly enhance political inclusion. English-only voting materials bar non-English speaking citizens from voting by effectively imposing a literacy test as a condition of exercising the franchise. In response, the expiring language access provisions allow non-proficient citizens to exercise their fundamental right to vote. Rather than excluding non-proficient citizens from voting, and thus from the political system, the language access provisions promote the inclusion of all citizens -- many of whom are the victims of voting discrimination and unequal educational opportunities. The right to vote outweighs the state interest in encouraging individuals to learn English, which can be accomplished in other, less burdensome ways.