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Before the House Judiciary Committee's Subcommittee on the Constitution

**Legislative Hearing on H.R. 9, "A Bill to Reauthorize and Amend
the Voting Rights Act of 1965" (Part I)**

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Good morning Chairman Chabot, Ranking Member Nadler, and Representatives Conyers, Watt and Scott, and other distinguished members of this Committee. I am the Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., and I welcome the opportunity to testify on the subject of H.R. 9, “A Bill to Reauthorize and Amend the Voting Rights Act of 1965”(Part I). My testimony will address three topics that are central to the renewal bill. The topics are: (1) and (2) the proposed restorative statutory clarifications of two recent Supreme Court cases that narrowed the effectiveness of the Section 5 preclearance provision, *Reno v. Bossier Parish School Bd. II*, 528 U.S. 320 (2000), and *Georgia v. Ashcroft*, 539 U.S. 461 (2002); and (3) the broad reach of Congressional remedial and prophylactic powers under the enforcement provisions of the Fourteenth and Fifteenth Amendments.

Bossier Parish II

Although the standard for Section 5 review set forth in the Voting Rights Act (“VRA”) in 1982 allows preclearance only if a proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group],” 42 U.S.C. 1973c, judicial interpretations of Section 5 have helped to shape its interpretation.

Prior to the Supreme Court’s decision in *Reno v. Bossier Parish School Bd. II*, and consistent with the origin and statutory purpose of both the VRA generally, and Section 5 in particular, a jurisdiction could not win preclearance for any Section 5 change that was intentionally racially discriminatory. The “discriminatory purpose” prong of Section 5 was grounded in the text of the statute itself, which barred voting changes with the “purpose” or “effect” of “abridging the right to

vote on account of race or color.” The statutory language describing the scope of the purpose inquiry was straightforward; however, the VRA’s unique history provided important context. After nearly one hundred years of blatant disregard of the constitutional commands of the Civil War Amendments and earlier unsuccessful attempts to correct that situation with earlier enactments, Congress in the VRA employed its considerable power to the extent necessary to begin the work of eradicating discrimination in voting. The Supreme Court so recognized in *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

Throughout the history of its Section 5 administration, the United States Department of Justice (“DOJ”) has consistently applied well-settled legal principles in determining whether a submitting jurisdiction had established that a proposed change was not the product of discriminatory intent. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). In the 5-4 decision in *Bossier Parish Sch. Bd. II*, however, the Supreme Court reinterpreted the statutory language and re-conceptualized the nature of the discriminatory purpose that renders a voting change ineligible for preclearance under Section 5 — limiting it to retrogressive purpose only. Since that ruling, non-retrogressive voting changes motivated by racial *animus*, no matter how clearly demonstrated, and thus regardless of how strong the indications are of unconstitutionality, are insulated from Section 5 objection under the purpose prong. The narrow decision elevates a strained interpretation of Section 5 over long-standing precedent (*see, e.g., City of Richmond v. U.S.*, 422 U.S. 358, 378 (1975)) (recognizing the harm inherent in discrimination motivated by racial *animus*) and Congressional intent, *see* H. R. Rep. No. 89-439, at 10 (1962) (observing that “[b]arring one contrivance has too often caused no change in result, only methods”). By limiting the new inquiry to the more narrow category of retrogressive intent — a specific intent

to worsen the position of minority voters vis-a-vis existing circumstances — while excluding from the reach of the statute non-retrogressive measures motivated by unlawful racial intent to disadvantage and harm minority voters because of their race, the Court, in effect, judicially overrode Congress’s purpose rather than effectuating it .

In this situation, a statutory amendment to clarify and restore the original Congressional intent regarding the proper scope and interpretation of Section 5’s purpose prong is desirable and appropriate for several reasons. Common sense and the plain objectives of the VRA strongly counsel against any interpretation of Section 5 that requires preclearance of intentionally discriminatory acts affecting the political process. The Fifteenth Amendment and the VRA each have, as one of their principal purposes, the eradication of historic and long-maintained voting discrimination. *See South Carolina v. Katzenbach*, 383 U.S. at 308 (noting that the VRA was “designed to banish the blight of discrimination in voting.”) Even if the preclearance determination does not insulate voting changes from all judicial challenge, *see Bossier II*, 528 U.S. at 335, it is 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 *Bossier II* rule actually rewards the most intransigent perpetrators of discrimination, who after decades of excluding minority voters and candidates completely, may now be able to keep the political process closed even though they have not abandoned their discriminatory ways. Under the reasoning of *Bossier II*, in these circumstances, would-be violators are not diminishing political power or access but merely maintaining an exclusionary *status quo*. This scenario may aptly be characterized as perversely paying dividends for past discrimination. *See City of Pleasant Grove*

v. U.S., 479 U.S. 462 (1987) (sustaining objection under Section 5 to proposed annexation based upon discriminatory purpose because otherwise, the City’s “extraordinary success in resisting integration thus far [would be made] a shield for further resistance.”); *see also Bossier II*, 528 U.S. at 342 (Souter, J., *dissenting*) (noting Bossier Parish School Board’s decades of resistance to a desegregation order).

As originally enacted, Section 5 was intended to provide a mechanism to eradicate such purposeful voting discrimination and its continuing effects as quickly as practicable. Under the rule of *Bossier II*, however, for one category of voting rights violations, individual litigation brought either by an overburdened DOJ or at great expense by minority voters themselves is the only avenue for achieving that purpose.

For a quarter century, nothing in the text of Section 5 or the Constitution was understood to require the rule of *Bossier II*. *See City of Richmond*, 422 U.S. at 378 (1975) (“An official action . . . taken for the purpose of discriminating against Negroes on account of race has no legitimacy at all under our constitution or under [Section 5].”); *Beer v. U.S.*, 425 U.S. 130, 141 (1976) (“an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution”); *Pleasant Grove v. U.S.*, 479 U.S. at 472 (upholding denial of preclearance for a proposed annexation in an all-white city where the City had not dealt fairly with annexation requests from local African-American communities, and specifically affirming district court’s findings of discriminatory purpose and pretextual nature of justifications advanced by City for annexation).

As testimony and analysis presented to this Committee illustrates, the *Bossier II* rule has significantly narrowed Section 5’s implementation by the DOJ. *See generally* Testimony of Brenda

Wright, November 1, 2005; *See also* Peyton McCrary *et al.*, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act* at 38 (Nov. 1, 2005) (unpublished manuscript submitted); H.R. Rep. No. 109-69 (2005), reprinted in *Voting Rights Act: Section 5 – Preclearance and Standards* (noting that 43% of the DOJ objections in the 1990s were based exclusively on the discriminatory purpose prong). Accordingly, the *Bossier II* decision was not simply a minor shift without consequences.

The proposed clarification to Section 5 in H.R. 9, in pertinent part, restores the pre-*Bossier II* discriminatory purpose standard. 42 U.S.C. 1973c(c) would be amended to read as follows: “(c) The term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.” This modification would allow the DOJ, or the reviewing three-judge panel, to interpose objections or to deny declaratory judgments in situations where sufficient evidence of discriminatory intent exists such that the submitting jurisdiction cannot meet its Section 5 burden.

Significantly, *Bossier II* rests primarily on the Court’s interpretation of the statutory language, *see Bossier II*, 528 U.S. at 336. In *Bossier I*, the Court had also given weight to the Congress’s failure to clarify Section 5’s statutory language in reaching its conclusion that Section 5’s “effects” prong was limited to retrogressive effects. *See Bossier I*, 520 U.S. at 483 (noting Congress’s failure to alter the language of Section 5 following *Beer v. U.S.*). The proposed modification to Section 5 in H.R. 9 is intended to avoid any implication that Congress ratifies the *Bossier II* ruling by aligning the purpose prong with Constitutional standards.

Restoring the original aim and scope of the “purpose” prong of Section 5 is fully within Congress’s powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments, which themselves were part of “the basic alteration in our federal system wrought in the

Reconstruction era through federal legislation and constitutional amendment . . . [establishing] the role of the Federal Government as a guarantor of basic federal rights against state power,” *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). As the Supreme Court, through Justice O’Connor, recognized and reaffirmed in *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999), “Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions . . .,” citing *City of Rome v. U.S.*, 446 U.S. 156, 175, 178-80 (1980). The “effects” prong of Section 5 thus goes beyond the Constitutional standard; the Fourteenth and Fifteenth Amendments are violated only by intentional discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); *Bolden v. City of Mobile*, 446 U.S. 55 (1980). Nevertheless, as Justice O’Connor noted, the Court in *City of Boerne v. Flores*, recognized that Congress’s power to legislate under the Fourteenth Amendment extends to “[l]egislation which deters or remedies constitutional violations . . . 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.’” 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer* 427 U.S. at 445, 455). On the other hand, the “purpose” prong as it would be restored under H.R. 9 is congruent with the Constitutional requirement and thus necessarily imposes lesser federalism costs, supporting the conclusion that there is no serious basis for doubting its constitutionality.¹

¹In *Bossier II*, Justice Scalia’s opinion for the Court suggests that interpreting Section 5 to extend to “discriminatory but non-retrogressive vote-dilutive purposes . . . [would] exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts, [citation omitted], perhaps to the extent of raising concerns about § 5’s constitutionality,” 528 U.S. at 336, citing *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). This is far from overruling *Katzenbach*, *City of Rome*, and *Lopez*. It is important to note, first, that *Miller* suggested only that if Congress had intended to incorporate a policy of maximizing majority-black districts into Section 5 (and the Court found “no indication Congress intended such a far-reaching application of § 5,” 515 U.S. at 927), that might raise constitutional questions. *Id.* at 926-27; and second, that

Georgia v. Ashcroft

In 1976, in *Beer v. U.S.*, 425 U.S. 130 (1976), the Supreme Court interpreted “discriminatory effect” to mean retrogression — an analysis that calls for a determination of whether the minority community is worse off after the change, measured against the *status quo* or benchmark. *Beer* went further to require a denial of preclearance of voting changes if “the ability of minority groups . . . to elect their choices to office is . . . diminished.” *Id.* at 141 (quoting the House Report on the extension of the Voting Rights Act in 1975). This ability-to-elect standard was ratified when Congress extended Section 5 in 1982, and has been consistently applied by courts and the DOJ for more than a quarter century.

However, in a recently decided Section 5 redistricting case, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), a bare 5-4 majority of the Supreme Court suddenly abandoned the straightforward approach adopted in *Beer* and replaced it with a new analysis that undermines the focus on voting changes that diminish the minority community’s ability to elect candidates of choice, where it exists, in favor of far more nebulous considerations.

The Court held that plans that reduce the ability of minority voters to elect candidates of choice could still be approved under Section 5 as long as the Attorney General or a court believes that other factors somehow balance out the loss in tangible minority voting power. Although all nine

immediately after the “perhaps” phrase quoted above, Justice Scalia continued by saying that, “Most importantly, [coverage of discriminatory but nonretrogressive vote-dilutive purposes under Section 5] finds no support in the language” of the statute, in the Court’s view. In light of these observations, the “perhaps to the extent of raising concerns about § 5’s constitutionality” phrase is simply an inadequate basis for predicting that restoration of the original intent of the “purpose” prong will be subject to serious constitutional attack.

Justices appeared to agree that, in the Section 5 context, a numerical majority of minority voters in a district was not a hard and fast requirement to establish ability to elect, one factor to which the Court points is whether the new plan results in the election of representatives who, while not the candidates of choice of minority voters, “would be willing to take the minority’s interests into account.” The Court characterized these districts as “influence” districts.

The facts and circumstances of *Georgia v. Ashcroft* have been recounted in detail during previous hearings and through written testimony; thus, I will not revisit them here. Instead, I will only note briefly that there are some fairly obvious redistricting realities that often get lost in many discussions, even among those who are very knowledgeable about the subject. The preference for single-member districts, the decennial Census enumeration, and the constitutional requirements under the doctrine of “one-person, one-vote,” place substantial temporal, geographic, and demographic limitations on line-drawing. In addition, historical patterns of racial segregation continue to shape too many communities and, as Drs. Richard Engstrom and Theodore Arrington have testified before this Committee, racial bloc voting patterns persist in many covered jurisdictions. In many, but by no means all situations, minority voters do not have the ability to elect candidates of their choosing if they are dispersed intentionally or in service of some other aim. And, the record of DOJ objections and letters requesting more information is replete with evidence of intentional efforts to dilute, and of dilutive effects, in a variety of contexts and jurisdictions at all levels of government.

Against the backdrop of gradually achieved and potentially fragile gains (documented in part in voluminous and thorough DOJ objection and “more information” letters, observer deployments and reports, as well as detailed and thorough reports prepared by the nation’s leading voting rights

organizations and voting rights experts), the Supreme Court announced its radical departure from the *Beer* standard that had for so long protected minority voters' equal voting rights in tangible ways.

To correct this unwarranted shift in statutory interpretation, the proposed modification to Section 5 in H.R. 9 is found in §§ 1973c(b) and (d) and reads as follows:

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

(d) the purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

These provisions are intended to restore the primacy of the ability-to-elect standard that protects hard-won gains from disappearing, and in so doing avoids several of the dangers that *Georgia v. Ashcroft* has invited. I will describe a few.

- In the absence of a clear metric for influence², it is exceedingly difficult to evaluate the trade-offs that *Georgia v. Ashcroft* introduced into the Section 5 analysis;
- The pursuit of an influence theory will likely be used to cloak and protect intentionally discriminatory or retrogressive acts from meaningful Section 5 review;
- The influence theory eradicates any meaningful benchmark analysis because it invites wholly incongruous comparisons.

In contrast, the DOJ and the Court are familiar with the ability-to-elect standard that has been applied effectively, both before and after the limitations on Section 5 established by *Shaw v. Reno*

²Strict numerical cut-offs, such as 20%, 25% or 30%, ignore local conditions which are important.

and its progeny. The “opportunity to elect” standard can provide flexibility by adjusting to changes in levels of polarized voting.

Prior to *Georgia v. Ashcroft*, DOJ’s assessment of the minority community’s ability to elect was conducted utilizing a functional approach that was intensely jurisdiction-specific. The DOJ performed an intimately localized review of election results, demographic data, maps and other information in order to assess the relative ability to elect under the benchmark and proposed plans. The “Procedures for the Administration of Section 5 of the Voting Rights Act,” 28 C.F.R. Part 51, provide detailed information about the pre-*Georgia v. Ashcroft* Section 5 review process. For example, 28 C.F.R. § 51.28 identifies supplemental information that the DOJ has utilized to assess the minority community’s ability to elect, including: (1) demographic information; (2) maps; (3) election returns; (4) evidence that the change was adequately publicized and that there was sufficient opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place; and (5) a list of minority contacts in the covered jurisdiction.

The ability-to-elect standard is restorative and strictly statutory in dimension. The standard has withstood the test of time as an effective and workable judicial and administrative test, and continues to be vital in light of the ongoing efforts to weaken the position of minority voters. A Section 5 declaratory judgment case from Louisiana in the post-2000 round redistricting that was settled before the Supreme Court decision in *Georgia v. Ashcroft* provides some indication of the dangers posed by the decision.

In *Louisiana House, et al. v. Ashcroft*,³ the DOJ, individual African-American Louisiana voters represented by the NAACP Legal Defense and Educational Fund, Inc., and the Louisiana Legislative Black Caucus (as intervenors) opposed the Louisiana House of Representatives’s plan to eliminate an African-American ability-to-elect district in New Orleans, despite the fact that the district had experienced an increase in the African-American population during the preceding decade. After the disposition of preliminary motions, the Louisiana House did not mount a defense based upon any recognized theory under Section 5, but instead sought to uphold a plan intended to protect the seats of two powerful white politicians, one Republican and one Democrat — even though incumbency protection is not accepted as a defense in vote dilution cases. The litigation was settled, and the ability-to-elect district was restored after a strong ruling from the Court that criticized the Louisiana House for its litigation tactics. LDF spent over \$33,000.00⁴ on just one of its experts. Most significantly, had *Georgia v. Ashcroft* governed, the Louisiana House could have mounted a defense based upon a theory that the plan eliminated an “opportunity to elect” district but still provided “influence” for African-American voters. In this case, the ability-to-elect standard protected against elimination of minority voting strength, the core of Section 5’s aims as they have always been understood, in New Orleans.

³This case and other evidence of the continuing need for the expiring provisions of the VRA is described more fully in the Leadership Conference for Civil Rights’s Louisiana Report, which has been submitted into the House record.

⁴These expenditures were not recoverable under then-existing law.

Congressional Power to Renew Section 5

Section 5 of the VRA has been constitutionally challenged in three major cases, over the course of four decades. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *City of Rome v. U.S.*, 446 U.S. 156 (1980); and *Lopez v. Monterey*, 525 U.S. 266 (1999). Over that forty-year span, Congress's power to enact and renew Section 5 preclearance has been upheld in each case in opinions that have consistently recognized the federalism costs that the provision imposes. There is no doubt that the Civil War Amendments, and Congress through its broad enforcement powers, have reordered the federal balance, because, as the Court has observed in a variety of contexts, that was the very purpose of those Amendments to the Constitution. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) (“[t]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment.”), 427 U.S. 445, 455 (1976); *Mitchum v. Foster*, *supra*.

It is not new that some opponents of the VRA and others are raising questions about Congress's power to reauthorize the expiring provisions, because the statute initially was passed in the face of similar questions; voices articulating those sentiments have persisted as have the problems that justify the preclearance remedy. *See, e.g., ACLU Report of Voting Rights Litigation Since 1982* (documenting judicial findings of voting discrimination from courts across the country, submitted into the House Record); *see also The Report of the National Commission on the Voting Rights Act* (summarizing testimony about voting abuses and trends, and collecting data). Nor is it new that the record assembled by the House of Representatives as of this point, with more hearings scheduled for the Senate, has documented numerous Section 5 violations, including examples of intentional voting discrimination, examples of retrogressive effects

intercepted by the existing preclearance protections, and including both local and statewide voting violations. These sources document both violations that touch many citizens, as well as those that have harmed (or would have harmed) only a few, but each may have remained in place for years or decades but for the VRA's Section 5 preclearance requirement.

The Louisiana State Report of the Leadership Conference on Civil Rights documents the fact that every statewide redistricting for the Louisiana House of Representatives since the VRA was passed has initially been met with an objection; this is but one illustration of the level of entrenchment of voting discrimination in that State, where more than half of the State's parishes have received objection letters. However, objections are not the only measure of the effect of Section 5 in achieving its purposes. Whether classified as deterrence or part of the VRA's educative function in enhancing compliance with federal law, tracing the line of "more information" letters from the DOJ reveals that many additional and very likely harmful changes were withdrawn in response to these letters. Intense and sustained discrimination against Native Americans has been documented, as has widespread non-compliance with Section 5 in certain covered jurisdictions, such as South Dakota. This is not a full summary but rather provides some general sense of what this Committee has assembled during the ten renewal hearings to date.

The present formulation of the threat of constitutional invalidation, however, is largely founded on the Supreme Court's decision in *Boerne v. Flores*, 521 U.S. 507 (1997) and its progeny, which have re-examined both the balance of power between the state and federal governments and also the relationship of the co-equal branches of Congress and the Supreme Court. In *Boerne*, the Court announced the new doctrine of "congruence and proportionality" to place some limit on Congressional power under broadly framed Constitutional grants of authority. There are few who

doubt that the cases clearly call for Congress to be more deliberate in its exercise of its enforcement powers under the Civil War Amendments. Indeed, the Court in *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), very carefully reviewed the Congressional record relied upon to justify its passage of Title I of the Americans with Disabilities Act pursuant to the enforcement powers and ultimately found it wanting. But even these cases fail to carve out clearly discernible limits on Congressional power to enact remedies and prophylactic legislation in the area of race. 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).

At best, *Boerne* is an evolving doctrine and its ultimate contours are presently unknown; at worst, too muscular a *Boerne* doctrine could trample Congressional power creating constitutional problems of a different variety. The *Boerne* cases do not provide clear rules for Congressional guidance. The best that can be said in light of those cases is that:

- even as the Court announced the *Boerne* doctrine, it recognized that the VRA was the exemplar of the appropriate exercise of Congressional power;
- two years after announcing its decision in *Boerne*, the Court reaffirmed Section 5's constitutionality in *Lopez v. Monterey*, 525 U.S. 266 (1999), a case that recognized federalism costs in strong terms: "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 burdens the Act imposes," *id.* at 285;

- Congress has compiled a strong record, one that compares favorably with 1982, and it continues to do so;
- Congress acts at the height of its enforcement powers when it renews the VRA, which is a remedy and prophylactic measure for discrimination against race and language minorities from which the entire nation has benefitted; and finally
- it would implicate serious separation of powers, and *stare decisis* concerns for the Court to curtail a renewed Congressional vindication of the right “that is preservative of all other rights,” in the face of the nation’s ongoing efforts to vindicate the full promise of the Constitution that has yet to be fully achieved.

We urge renewal of all of the expiring provisions as set forth in H.R. 9, and specifically recognize the centrality of the Language Access provisions in Section 203 that have aided in extending a full measure of citizenship to all Americans.