ORAL ARGUMENT SCHEDULED FOR JANUARY 19, 2012

11-5256

United States Court of Appeals for the District of Columbia Circuit

SHELBY COUNTY, ALABAMA,

Plaintiff-Appellant,

v.

ERIC H. HOLDER, JR.,
in his official capacity as Attorney General of the United States,,

Defendant-Appellee,

EARL CUNNINGHAM; HARRY JONES; ALBERT JONES; ERNEST MONTGOMERY; ANTHONY VINES; WILLIAM WALKER; BOBBY PIERSON; WILLIE GOLDSMITH, SR.; MARY PAXTON-LEE; KENNETH DUKES; ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC.; BOBBY LEE HARRIS,

Intervenors for Defendant – Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR AMICI CURIAE NEW YORK, MISSISSIPPI, AND CALIFORNIA

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Dated: December 8, 2011

CERTIFICATE OF INTERESTED PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici States of New York, Mississippi, and California in Support of Appellees certify that, to the best of the udnersigned counsel's knowledge, the list of interested persons and entities, the identified ruling under review, and list of related cases in the Brief for the Attorney General as Appellee are correct.

/s/ Barbara D. Underwood
Barbara D. Underwood
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INTEREST OF AMICI STATES

Shelby County, Alabama, challenges the preclearance requirement contained in Section 5 of the Voting Rights Act in part on the ground that the extraordinary problems of discrimination that led to its enactment in 1965 no longer exist, and that the burdens it imposes on States and localities are no longer justifiable. Amici States Mississippi, New York, and California are, for several reasons, particularly well qualified to provide the Court with a perspective that should inform any effort to resolve that claim.

First, Mississippi, New York, and California are among the 16 States covered in whole or in part by the Section 5 preclearance provision, and thus have extensive first-hand experience with the costs and benefits of its operation. Moreover, these Amici States contain a substantial number of minority voters affected by the enforcement of Section 5: Mississippi has the largest proportion of African-American voters of any state in the country, and New York and California contain some of the largest and most diverse counties within the covered jurisdictions.

Second, Mississippi, New York, and California share the commitment to eliminating racial discrimination in voting rights which animates the federal Voting Rights Act and, despite their own extensive efforts to address this problem, recognize the continuing need for this federal statute to address and remedy barriers to minority voter participation in the political process. The record assembled by Congress to support reauthorization of Section 5 in 2006 shows what Amici States know to be true: that Section 5 continues to play an important role in Mississippi, New York, and California—as well as in the other covered jurisdictions—in remedying and deterring unconstitutional conduct.

Third, in the experience of Amici States, claims that the preclearance obligations impose substantial burdens on the covered jurisdictions or unreasonably intrude on state sovereignty are mistaken. Moreover, those claims wrongly minimize the significant and measurable benefits Section 5 has produced in helping Amici States move towards their goal of eliminating racial discrimination and inequities in voting. The Section 5 preclearance provision has helped bring about tremendous progress in the covered States and has blocked discriminatory voting-related changes at all levels of state and local

government. This progress, while significant, remains fragile and incomplete, and Section 5 continues to be a vital mechanism that assists Amici States in working to achieve the equality in opportunities for political participation that is a foundational principle of our democracy.

SUMMARY OF ARGUMENT

With tremendous bipartisan support, Congress reauthorized the Section 5 preclearance provision of the Voting Rights Act in 2006. The record assembled by Congress showed that considerable progress has been made in Amici States and other covered jurisdictions, but it also contained ample evidence of ongoing conduct that hampers full and equal political participation by minorities. Congress's careful examination of conditions in the covered jurisdictions confirmed the important role that Section 5 has occupied in American democracy in helping to overturn barriers to participation and block discriminatory voting laws that would otherwise have been put into effect.

Amici States share the view of the United States and its supporting intervenors that the 2006 Reauthorization of Section 5 is an

appropriate exercise of Congress's power to enforce the Fourteenth and Fifteenth Amendments, and that substantial deference is owed to Congress's considered judgment about how best to give force and effect to the guarantees enshrined in those amendments in the face of the substantial evidence of ongoing and intentional discrimination.

This amicus brief does not repeat the arguments of the parties explaining in detail why and how Section 5 satisfies constitutional requirements. Instead, this brief focuses on showing, from the experience of three covered jurisdictions, that Section 5 imposes no undue burden on covered jurisdictions and that it provides substantial benefits to covered States and localities committed to ending racial discrimination and its vestiges in voting. Contrary to Appellant's claims that Section 5 constitutes an "intrusion" on States, App. Br. at 47, compliance with Section 5 has not imposed, and does not impose, undue compliance burdens on the covered jurisdictions. Section 5 assists States rather than burdening them, because it serves as a prophylactic mechanism that identifies and blocks discriminatory voting-related changes before they take effect, and reduces the need for burdensome litigation over these changes after the fact. Because

voting-related changes may be implemented by a wide array of actors at both the state and local level, the task of preventing unconstitutional changes can be difficult. Amici States welcome the assistance provided by the statutory preclearance requirement and the experienced staff of attorneys who perform the preclearance function. In the experience of Amici States, compliance with the preclearance requirement produces significant benefits for Amici States and poses no undue costs or burdens on covered jurisdictions.

ARGUMENT

POINT I

COMPLIANCE WITH SECTION 5 DOES NOT IMPOSE UNDUE BURDENS ON COVERED STATES

The Section 5 preclearance mechanism is a streamlined process that does not impose significant compliance burdens on States. Indeed, the United States Department of Justice has undertaken extraordinary steps to facilitate the Section 5 review process through the creation of an online submission system and the issuance of new guidance and regulations. *See* How To File An Electronic Submission, http://www.justice.gov/crt/voting/sec_5/evs/ (last visited Dec. 7, 2011). Moreover,

DOJ staff and personnel are readily available to answer questions and field inquiries regarding the Section 5 review process. During its 2006 Reauthorization of Section 5, Congress received considerable testimony regarding the costs and benefits associated with Section 5. The weight of that evidence makes plain that Section 5 imposes no undue burden on covered jurisdictions.

Both the practical experience of Amici States[1] and the evidence in the Congressional record confirm that the administrative burdens associated with Section 5 compliance are minimal. While legislators may engage in extensive deliberations preceding the adoption of a voting change, the materials necessary for DOJ's limited Section 5 review of those changes are generally both readily accessible and easy to assemble. In general, covered jurisdictions need only assemble enough information to help the Justice Department determine whether a voting-related change was adopted with a discriminatory purpose or will have the effect of worsening the position of minority voters. The information and material relevant to DOJ's analysis is often part of the

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[1] *See, e.g.*, *Lopez v. Monterey County*, 525 U.S. 266 (1999); *United Jewish Org. of Williamsburgh, Inc. v. Carey,* 430 U.S. 144 (1977).

more expansive legislative record compiled in the period preceding adoption of the new law or change. Congress heard testimony that preparing Section 5 preclearance submissions is "a task that is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the [election] change to begin with." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 10-11 (2006) ("*Benefits and Costs"*) (testimony of Armand Derfner). Moreover, according to one state elections official, "preclearance requirements are routine and do not occupy an exorbitant amount of time, energy or resources." *Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 12-13 (2006) ("*Policy Perspectives*") (testimony of Donald Wright).

Nor is the actual submission of the Section 5 preclearance materials a costly undertaking. Today, covered jurisdictions are able to make an administrative submission to DOJ online, thus eliminating the need to prepare hard copies of materials for mailing and the costs

associated with courier mail. *See* How To File An Electronic Submission, *supra*. With more and more governing bodies promoting transparency and making legislative records and other related materials publicly accessible and available online (*see e.g.*, Miss. Standing Joint Reapportionment Comm., http://www.msjrc.state.ms.us/ (last visited Dec. 5, 2011); N.Y. State Legis. Task Force on Demographic Research & Reapportionment, http://www.latfor.state. ny.us/ (last visited Dec. 5, 2011); and Cal. Citizens Redistricting Comm'n, http://wedrawthelines.ca.gov/) (last visited Dec. 5, 2011)), often Section 5 submissions can be completed with tremendous ease. Congress received testimony from a former DOJ official, who indicated that during her tenure, the government "went to great lengths to make sure that the technology and internal operating procedures in place would facilitate electronic submission of much of the required information. [DOJ] conferred with state and local officials so [the Department] could take their concerns into account as we structured our processing of submissions." *The Continuing Need for Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 64 (2006) (*"Continuing Need for Section 5"*) (response of Anita Earls). State and

local officials are generally able to prepare Section 5 submissions easily using templates prepared for previous submissions. Congress heard evidence from one official that "[t]he ease and cost of such submissions also improves with the use of previous submissions in an electronic format to prepare new submissions. In my experience, most submissions are routine matters that take only a few minutes to prepare using electronic submission formats readily available to me." *Policy Perspectives*, *supra*, at 313 (testimony of Donald Wright).

Redistricting, now underway in jurisdictions across the country, represents perhaps the busiest moment in each decade for Section 5 covered jurisdictions. DOJ has taken specific measures to minimize the compliance burden of Section 5 in redistricting by issuing important Guidance at the outset of the decennial redistricting cycle to help jurisdictions understand both changes in the law over the course of the preceding decade and the standards utilized during its review of Section 5 submissions. The Guidance also provides practical information regarding the materials that jurisdictions must compile as part of a Section 5 submission. DOJ issued its most recent Guidance on February 9, 2011, and this document, written in layman's terms,

provides clear instructions to walk jurisdictions through the Section 5 administrative review process and its components. *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7,470 (Feb. 9, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/sec5guidance2011.pdf. This Guidance has been particularly helpful for covered States and their respective political subdivisions—some of which have already adopted, or may soon adopt, redistricting plans that will be submitted for review. In some instances, local officials may be contending with the preclearance process for the first time or be otherwise untutored in the specific requirements of the Voting Rights Act.

In addition, on April 15, 2011, DOJ issued federal regulations, which further elaborate the legal standards governing the Section 5 review process. *See* Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239 (Apr. 15, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/sec5proc_2011.pdf. DOJ's efforts to facilitate Section 5 compliance through Guidance and regulations were considered by and documented before Congress during the 2006 Reauthorization of Section 5. Congress received testimony that DOJ "modified the Section 5

regulations to make the process technically easier for jurisdictions." *Continuing Need for Section 5*, *supra*, at 64 (response of Anita Earls). Congress also received testimony confirming that DOJ's Guidelines "identify specific information that jurisdictions must provide in order for their submission to be deemed complete and reviewable" and "the Guidelines are written in easy to understand language that generally avoids 'legalese.'" *Benefits and Costs*, *supra*, at 100 (testimony of Fred Gray).

For Amici States, the Section 5 submissions of Congressional, state legislative and local redistricting plans have historically proven to be the most complex and time-consuming kind of voting-related change presented for preclearance. However, because much of the demographic data and other information relevant to DOJ's analysis is naturally included in and considered during the legislative process, even these submissions have not proven significantly burdensome. Moreover, because jurisdictions do not redraw their district boundaries often, any arguable burden associated with preclearance of a redistricting plan is generally only incurred once a decade. These views are consistent with evidence before Congress which indicated that "[t]he costs of

preclearance submissions are insignificant, except for redistricting submissions, which entail a large amount of detailed demographic information and election data. These redistrictings generally occur on a state, county, or municipal level once every ten years since they follow the release of the new census data. So even if they are large submissions, they are very infrequent." *Policy Perspectives*, *supra*, at 313 (testimony of Donald Wright).

The Section 5 review of other voting-related changes has not proven significantly burdensome or intrusive on the time of those officials who prepare materials for submission to DOJ. Generally, counsel and staff personnel familiar with the Section 5 preclearance process prepare administrative submissions. Thus, the Section 5 preclearance process is often both routine and familiar to the relevant submitting officials in Amici States. 152 Cong. Rec. H5054 (July 12, 2006) (Rep. Price) ("'Preclearance requirements are routine, and do not occupy exorbitant amounts of time, energy or resources.'"). These officials, given their familiarity and experience with the process, help ensure that the initial submission is complete and contains all of the relevant information that DOJ needs to make its preclearance

determination. This perspective is consistent with the evidence before Congress that showed that covered jurisdictions often "have staff counsel that prepare submissions as part of their ongoing duties, so additional costs are not incurred in those situations. The costs of submissions are significantly reduced by ensuring that they are promptly and correctly submitted the first time." *Policy Perspectives*, *supra*, at 313. Moreover, Congress also received evidence confirming that election officials in covered jurisdictions "viewed Section 5 as a manageable burden providing benefits in excess of costs and time needed for submissions." *Id.*

In addition, DOJ has administered the Section 5 review process with a significant degree of flexibility and latitude, taking into account the unique circumstances and crises that sometimes emerge within the covered jurisdictions. In Amici's experience, DOJ has expedited its review of voting-related changes, where possible, to accommodate the challenges that can confront the covered States on occasion. For example, after Hurricane Katrina, DOJ issued a letter to Mississippi acknowledging that they would be ready to expedite their review of any last-minute voting-related changes that may have resulted from the

hurricane. *Id.* at 141-42. In other instances, DOJ has made swift preclearance determinations—well before the end of its statutorily required 60-day review period. *Benefits and Costs*, *supra*, at 10-11 (noting "if there is a sudden need for a new polling place, that can be precleared very swiftly if there is an election coming up") (testimony of Armand Derfner); *Policy Perspectives*, *supra*, at 312 (official noting that he "never had a situation where the USDOJ has failed to cooperate with our agency or local government to ensure that a preclearance issue did not delay an election") (testimony of Donald Wright). In no way, has DOJ administered Section 5 in a manner that unduly obstructs or infringes upon the dignity and sovereignty of Amici States.

POINT II

SECTION 5 CONTINUES TO PROVIDE SUBSTANTIAL BENEFITS TO COVERED JURISDICTIONS COMMITTED TO ELIMINATING BARRIERS TO MINORITY POLITICAL PARTICIPATION

A. Section 5 Has Produced Historic Progress and Measurable Benefits in Mississippi.

The Voting Rights Act is directly responsible for significant progress in Mississippi. According to the 2010 Census, Mississippi has a total population of almost 3 million persons, of whom 37 percent are

African American—the highest proportion of any State in the country. At the time of Congress's 2006 Reauthorization, Mississippi had one of the highest number of black elected officials of any of the covered States: one of its four members in the U.S. House of Representatives was African American, elected from a majority-minority district; and approximately 27 percent of the members of the state legislature were Black. *See Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 142 (2006) *("Modern Enforcement")*; Robert McDuff, *Voting Rights Act and Mississippi: 1965-2006*, 17 Rev. of L. & Soc. Justice 475, 475 (2008). This progress, which endures today, reflects the fruits of effective Voting Rights Act enforcement.

Congress received evidence concerning 112 objections that had been interposed as to voting-related changes adopted or proposed throughout Mississippi between the 1982 and 2006 Reauthorizations. Objections were interposed because of changes involving redistricting plans, at-large elections, annexations of territory, numbered post requirements, majority vote requirements, candidate qualification requirements, changes from election to appointment of certain public

officials, polling place relocations, open primary laws, and a variety of other measures. *Modern Enforcement*, *supra*, at 136. Congress received testimony that of the 169 objections in Mississippi since enforcement of the Act began, 99 objections related to changes involving the State's counties. And, of these 99 objections, 79 were interposed between 1982 and 2006, covering more than half of the State's 82 counties. 2 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1712-13 (2006) *("Evidence of Continued Need").* For Mississippi, Section 5 has been a helpful and necessary complement to the State's efforts to ensure that all voters have unfettered access to the ballot box.

Moreover, it is axiomatic that the number of objections alone does not tell the whole story about the vital role that Section 5 plays in helping covered jurisdictions like Mississippi ensure fair and equal political participation by minorities. Because Section 5 is in place, officials within Amici States are more mindful of the potential impact that proposed voting-related changes will have on minority voters. Officials exercise a greater degree of due diligence in considering whether new voting laws might hurt minority voters, recognizing that

these laws will eventually be subject to Section 5 review. As Congress found, "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 57 (2006); *Continuing Need for Section 5*, *supra*, at 6 (testimony of Pamela Karlan) ("I know from my own experience doing compliance in California, dealing with covered jurisdictions there, that the Voting Rights Act has a huge deterrent effect, and it has a huge effect in telling jurisdictions that the concerns of racial minorities should not be at the bottom of the list.").

Therefore, Section 5 not only prevents the implementation of discriminatory voting-related changes that are adopted by state or local bodies, but also helps prevent many, although not all, discriminatory voting changes from being adopted in the first place. Accordingly, perhaps "[t]he most significant impact of section 5 . . . is not from its enforcement mechanism but from its deterrent effect." 152 Cong. Rec. S7969-S7970 (July 20, 2006) (testimony of Sen. Diane Feinstein); *Modern Enforcement*, *supra*, at 87 (noting that "[o]bjection rates only tell part of the story of Section 5's success" and does not account for the fact that the Section 5 "process often discourages jurisdictions from

adopting voting changes that may place minority voters in a worse position.") (testimony of Robert McDuff).

B. Section 5 Has Led to Progress in New York and Helped Secure the Rights of Racial and Language-Minority Voters in the State.

Section 5 of the Voting Rights Act has played an equally central role in helping to block and deter ongoing voting discrimination and eliminate the vestiges of such discrimination in New York. Between the 1982 and 2006 Reauthorizations, DOJ interposed fourteen Section 5 objections to voting-related changes related to New York's three covered counties (Bronx, Kings, and New York). 2 *Evidence of Continued Need*, *supra*, at 1840. Congress received evidence showing that "Section 5 objections have helped prevent minority vote dilution in three broad areas: redistricting, non-geographical election procedures (voting rules, election control, suspension of elected bodies, etc.), and barriers to political access for linguistic minorities. The scope of these categories is significant: their breadth touches virtually every aspect of the vote." 1 *Evidence of Continued Need*, *supra*, at 314. By providing this critical guidance to state and local political actors in New York, the Section 5

process has helped the State better fulfill its commitment to achieving fair and equal political participation.

Among the recent objections arising in the Section 5 preclearance process was a 1999 objection to a proposed change to adopt limited voting for New York City school board elections. Limited voting, a voting system in which a voter is permitted fewer votes than there are positions available, has been recognized as a measure that dilutes minority-voting strength by preventing minorities from casting their votes in blocs. Congress received evidence that the proposed 1999 change would have made it three times more difficult for minorities to elect candidates of their choice in New York City school board elections. 2 *Voting Rights Act: Section 5 of the Act–History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 3244 (2005).

Also among those voting-related changes blocked by Section 5 was a proposed set of changes to Chinese-language election procedures in Kings and New York Counties. The 1994 objection was based, in part, on the failure to provide for translation of candidates' names on machine ballots and the failure to translate operating instructions for

voting machines. As the evidence before Congress demonstrated, the translation of candidates' names was critical because "it would be extremely difficult, if not impossible, for these voters to understand names written in English." 2 *Evidence of Continued Need*, *supra*, at 1842-43.

During its 2006 Reauthorization, Congress received evidence that DOJ "has justified, in part, a number of its objections to preclearance under Section 5 in New York City on the basis of the existence of racially polarized voting." For example, 1990 and 1994 objections to proposed changes involving judicial elections were, in part, "based on the existence of racially polarized voting." *Id.* at 1857-58.

New York has an especially distinctive perspective regarding the central role that Section 5 plays in protecting the rights of its language-minority voters. These groups, including Latino, Asian American, and African-American voters, have historically faced discrimination based both on their race and language-minority status. New York, like a number of other Section 5 covered States including California, Texas, and Florida, has a significant number of language minorities. Congress received evidence "revealing that 63 percent of Asian Americans in New

York reside in limited English proficient homes. Hispanics are similarly situated, with more than 75 percent of Latinos nationwide reportedly speaking a language other than English in the home, and 23 percent of registered Latinos identifying Spanish as their primary language." *1 Evidence of Continued Need*, supra,. at 46. As further evidence of the ongoing barriers to equal political participation by minorities, Congress also "received testimony revealing that more than 800 Federal observers were assigned to covered counties in New York City from 1985 through 2004 to protect Asian American and Latino voters' full participation in the electoral process." H.R. Rep. No. 109-478, *supra*, at 44-45.

Recently released Section 203 determinations pursuant to the Voting Rights Act reveal an increase in the number of counties throughout New York State now legally required to provide language assistance. *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_203/2011_notice.pdf. Some of these increases are attributable to recent and contemporary changes in the State's demographics—but these new demographic changes alone

would not be sufficient to warrant an expansion of Section 5's geographic scope. In the covered counties of New York, Kings, and Bronx, these language-minority groups have long been and continue to remain vulnerable to the kind of entrenched voting discrimination that Section 5 was specifically designed to redress.

Arizona and Georgia have submitted an amicus brief in support of the appellant in which they argue that the definition of language-minority groups is "arbitrary" and "not congruent." Br. of Amici Curiae the States of Arizona and Georgia at 23. While those claims have not been raised by the appellant and are thus not properly before this court, their argument, nonetheless, reflects a misunderstanding of the coverage provision contained within Section 4(b) of the Act. When Congress amended the coverage provision in 1975, its purpose was to remedy unconstitutional conduct in voting that had not been addressed by the original 1965 trigger. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400. Congress determined, based on twenty days of hearings between the two chambers, testimony from over 60 witnesses, and "overwhelming evidence" of discrimination, that language-minority groups, including those in New York, faced significant levels of

discrimination in States that had not been covered through the 1965 coverage provision. In response to this extensive body of evidence, Congress revised the coverage provision to reach formerly non-covered jurisdictions, including New York and others. *See* S. Rep. No. 94-295, at 24, 30, 32 (1975); H.R. Rep. No. 94-196, at 16, 22, 24 (1975). Contrary to Georgia and Arizona's claims, the determination about which groups are subject to coverage has not been left to the Census Bureau; the substantive factors used to identify covered jurisdictions were determined by Congress and were most recently affirmed by Congress during its 2006 Reauthorization, based on its findings that confirm the ongoing discrimination faced by language-minority groups in the covered jurisdictions.

C. Section 5 Is Responsible For Recent Progress in California.

California's recent experience under Section 5 similarly illustrates the vitality of the statute, and also demonstrates its carefully tailored nature. The statute has directly led to progress in California and continues to do so. For example, between 1990 and 2005, the number of Asian American elected officials in California increased from zero to

nine as a result of portions of the State being subject to the protections of the Voting Rights Act. *Voting Rights Act: Section 203–Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2006) (testimony of Margaret Fung).[2] Between the 1982 and 2006 Reauthorizations of Section 5, there were four objections to proposed voting-related changes in the covered counties of California. *See* DOJ Civ. Rts. Div., http://www.justice.gov/crt/about/vot/sec_5/ca_obj2.php (last visited Dec. 8, 2011).

The experience in California further shows that the bailout mechanism in Section 5, specifically retained by Congress in 2006, allows those Section 5 covered jurisdictions with no record of recent discrimination to terminate their preclearance responsibilities. 42 U.S.C. § 1973b(a). In April 2011, the Alta Irrigation District filed a petition before a three-judge panel of District Court for the District of

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[2] At least one researcher has found a positive statistical correlation between Section 5 and voter registration and turnout in California. *See* Jessica Lee, The Effects of Section 5 of the Voting Rights Act: A California Case Study (May 20, 2009) (unpublished honors thesis, Stanford University), *available at* http://publicpolicy.stanford.edu/node/349.

Columbia seeking to terminate its Section 5 responsibilities pursuant to Section 4(a) of the Act. The Irrigation District, which stretches across three California counties, included one county covered under Section 5. On July 15, 2011, the District entered into a consent judgment and decree permitting it to bailout. *See* Consent Judgment, *Alta Irrigation District v. Holder*, No. 11-cv-758) (D.D.C. 2011) (Dkt. No. 9), *available at* http://www.justice.gov/crt/about/vot/misc/alta_cd.pdf. Indeed, a number of cities, counties, and other special purpose districts around the country have successfully bailed out under the Voting Rights Act in recent months. Alta Irrigation District filed its bailout action in the U.S. District Court for the District of Columbia on April 20, 2011 and secured an order granting its request less than 90 days later—demonstrating that the timelines for achieving a bailout are speedy. Alta Irrigation District's recent bailout stands as evidence of the fact that the Section 5 preclearance provision has a workable mechanism that allows eligible jurisdictions a way to exempt themselves from the requirements of the preclearance provision, further minimizing any arguable federalism costs imposed on covered jurisdictions. *See* J. Gerald Hebert, Press Release: Local Governments Continue to Pursue

and Receive Voting Rights Act "Bailouts" (Aug. 17, 2001), *available at* http://voterlaw.com/ press08162011.htm (referencing numerous recently granted and pending bailout petitions in the D.C. District Court and describing bailout as easy, cost-effective, and affordable). Additionally, the statute's bailout provision also provides an incentive for compliance among the covered jurisdictions. *See* H.R. Rep. No. 109-478, *supra*, at 25 (noting that "covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so.")

D. The Advance Guidance Provided by Section 5 Helps States Avoid Potentially Costly and Burdensome Litigation Under Section 2.

One of the most significant benefits of the preclearance process to the States is that a Section 5 objection will prevent a problematic voting change from taking root in the covered jurisdictions, thus reducing the likelihood that Amici States will face costly and protracted Section 2 litigation. Experience has shown that Section 2 litigation, unlike the Section 5 administrative preclearance process, is time-consuming, costly, and burdensome. Congress heard testimony revealing that the

average costs associated with Section 2 litigation are around half a million dollars. Specifically, the evidence showed that "[b]ringing vote dilution cases . . . is a very, very costly enterprise. You need expert witnesses, you need skilled lawyers. . . . I would estimate that the cost of a vote dilution case, to bring a vote dilution case through trial and appeal, runs close to half a million dollars." *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Part I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary* 109th Cong. 65-66 (2006) (testimony of Gerald Hebert). These litigation costs are equally high for the States and jurisdictions that must defend themselves when affirmative litigation is brought by private litigants. *See Benefits and Costs*, *supra*, at 80 (noting that one county spent over $2,000,000 defending a Section 2 case, and that DOJ spent many hours too). While Section 5 and Section 2 reflect distinct legal standards, *Bartlett v. Strickland,* 556 U.S. 1, 20 (2009), a redistricting plan or voting-related change precleared under Section 5 is less likely to be subject to future challenge under Section 2 of the Voting Rights Act. The Section 5 review process helps to weed out those plans and voting-related changes

that may not withstand scrutiny under the anti-dilution prohibitions found with Section 2.

Beyond the higher costs attendant to Section 2 litigation, the political reality is that Section 5 of the Voting Rights Act has had a far more transformative impact than Section 2 in helping extend greater access to the franchise for minority voters in the covered jurisdictions. The benefits that Section 5 has had, for example, in Mississippi are appreciable. Evidence before Congress showed that "litigation under Section 2 of the Act has played a role in the changes that occurred in Mississippi. But, it has only been a small part of the story. Objections issued under Section 5 have made a far bigger difference." 2 *Evidence of Continued Need*, *supra*, at 1726.

For example, "127 black supervisors holding office [in Mississippi at the time of the 2006 reauthorization] c[a]me from 67 different counties," and 43 of those counties had "incurred one or more Section 5 objections of redistricting plans for supervisors." *Id.* Indeed, of the group of 67 Mississippi counties, "[t]here were only two counties whose redistricting plans were changed solely as a result of reported Section 2 lawsuits without any Section 5 objections." *Id.* This evidence

demonstrates that stripping away the protections of Section 5 that now sit alongside Section 2 would produce a more costly and burdensome statute that would not nearly achieve the same progress and good government benefits that the statute as enacted by Congress can achieve. H.R. Rep. No. 109-478, *supra*, at 57.

CONCLUSION

For the foregoing reasons, this Court should uphold the D.C. District Court's decision and find Sections 5 and 4(b) of the Voting Right Act constitutional.

Dated: New York, NY
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I hereby certify that on December 9, 2011, the foregoing BRIEF OF THE STATES OF NEW YORK , CALIFORNIA, AND MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF THE APPELLEES was filed electronically with the Clerk of the Court using the CM/ECF system, which will serve a copy of the foregoing on the following registered CM/ECF users:

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