No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE HONORABLE CONGRESSMAN JOHN LEWIS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND INTERVENOR-RESPONDENTS

Aderson B. Francois
HOWARD UNIVERSITY
SCHOOL OF LAW
Civil Rights Clinic
2900 Van Ness Street NW
Washington, D.C. 20008
(202) 806-8065

Deborah N. Archer
Counsel of Record
Tamara C. Belinfanti
Erika L. Wood
NEW YORK LAW SCHOOL
RACIAL JUSTICE PROJECT
185 West Broadway
New York, NY 10013
(212) 431-2138
Deborah.Archer@nyls.edu

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Congressman John Lewis, is the United States Representative of Georgia's Fifth Congressional District, which includes the entire city of Atlanta, Georgia and parts of Fulton, DeKalb and Clayton counties.[1] He has served in this capacity since January 1987. Congressman Lewis has a continued interest in the development and protection of laws that guard against racial discrimination and promote social and political equality for all Americans.

Today, political historians and constitutional scholars acknowledge that the main impetus for President Lyndon Johnson submitting the Voting Rights Act of 1965 to Congress on March 15, 1965, and its passage by both Houses of Congress a mere five months later, was the brutal attacks on nonviolent civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama. Congressman Lewis was one of the marchers on that day and, like many of his fellow nonviolent civil rights demonstrators, was beaten with bullwhips, choked with toxic tear gas, and nearly trampled by horses simply because he wished to exercise his constitutional right to vote. In submitting this brief, Congressman Lewis hopes to attest personally to the

---

[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

high price many paid for the enactment of the Voting Rights Act and the still higher cost we might yet bear if we prematurely discard one of the most vital tools of our democracy.

SUMMARY OF ARGUMENT

Fifty years ago, "at the height of the civil rights movement, when America itself felt as if it might burst at the seams," Congressman John Lewis and young men and women of his generation put their bodies in the path of armed troopers mounted on horses and club-wielding mobs yelling for murder, in order to secure the right to vote for all Americans. John Lewis, *Walking with the Wind: A Memoir of the Movement* xvii (1998). Years and months of protests culminated in a bloody Sunday afternoon in March 1965 when Alabama state troopers charged through a line of peaceful marchers led by Congressman Lewis and fractured his skull with a club. The Voting Rights Act of 1965 was the result of, and remains a testament to, their sacrifice. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified at 42 U.S.C. § 1973 *et seq.*) (VRA or "the Act").

No statutory enactment has been more important in combating minority disenfranchisement and advancing voting rights for all Americans than the VRA. If, as the late President Ronald Reagan once declared, the right to vote is "the crown jewel of American liberties," President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), the VRA made this crown jewel not just the prized

possession of a fortunate few but the birthright of all Americans. The VRA in general, and the preclearance provisions of Section 5 in particular, helped break the back of Jim Crow segregation, made a place at the table of civic and political life for millions of Americans, and moved us closer to the goal of a "more perfect union." U.S. Const. pmbl.

And yet, as vital to American democracy as the VRA is, it has always endured intense criticism. Through the years, covered jurisdictions insisted with great sincerity, as Shelby County does today, that the Act's preclearance provisions were no longer needed, maintaining paradoxically on the one hand that the Act is an unwarranted abrogation of state authority by the federal government, and on the other hand that the Act has succeeded in doing so much good that covered jurisdictions should be relieved from the "burdens" of preclearance. Brief for Petitioner at 23-28.

At the heart of the argument against Section 5 of the VRA lies the unfounded belief that our history of voting rights has been one of consistent progress, that we have now reached the point where equal voting rights are guaranteed to all Americans, and that eliminating Section 5 as a tool of federal enforcement will not cause us to slide back. *Id.* at 19. But the fact is, a century before Congressman Lewis was nearly murdered on the Edmund Pettus Bridge for claiming the right to vote, his great-great-grandfather was among the first generation of former slaves to vote in Alabama. *See generally Finding Your Roots: John Lewis and Cory Booker* (PBS 2012). The fact that the Congressman

had to fight to regain a right his former slave ancestors had exercised is living proof of the danger of this claim of ever-forward progress.

Today, our electoral portrait remains stained with the blight of racial discrimination. In 2006, after careful review of a record in excess of 15,000 pages, Congress acted on the continuing need for the VRA. Congress observed that mechanisms of minority voter suppression continue to be utilized in covered jurisdictions. H. Rep. No. 109-478, at 2 (2006). Unlike the blatant voter suppression mechanisms employed in the past, today's mechanisms manifest themselves more subtly and consist of a hazardous mix of old and new tactics. *Id.* at 21. What is clear, however, is that these mechanisms continue to suppress, dilute, and infringe upon minorities' constitutional right to vote. *Id.* Petitioner's misguided attempt to cast doubt on the constitutionality of Section 5 is simply not supported by the extensive record of electoral discrimination in covered jurisdictions before Congress in 2006, nor that which the country saw leading up to the 2012 election.

ARGUMENT

I. The History of Voting Rights In America Has Been One of Recurring Retrenchment and Reconstruction Rather than Uninterrupted and Continuous Progress.

A. Young Men and Women Risked and Sometimes Gave Their Lives During The Civil Rights Movement to Secure the Right to Vote for All Americans.

Though often neglected in the usual narrative of judicial opinions, the story of the VRA is the story of young men and women of all races, economic circumstances, and religious backgrounds who risked their lives to create a non-violent social movement to overturn segregation in the Jim Crow South, and to ensure political participation for all throughout the United States. The years, days, and moments of the movement were made of boycotts, sit-ins, freedom rides, jail marches, fire hoses, literacy tests, billy clubs, poll taxes, tear gas, burning crosses, lynchings in the night, church bombings, and drive-by murders. Lewis, at 239-47.

In June 1964, the Student Non-Violent Coordinating Committee (SNCC) began a voting campaign in Mississippi, where due to the state's Jim Crow voting practices only 5% of eligible African Americans were registered to vote. *Id.* at 241-62. The aim of what came to be known as "Freedom Summer" was to integrate the Mississippi Delegation of the 1964 Democratic National Convention by educating and organizing African-

American voters across the state, and to solicit their support for the Mississippi Freedom Democratic Party. *Id.*

As chairman of SNCC, Congressman Lewis helped plan and mobilize Freedom Summer. Years prior, he worked to register voters in Selma, Alabama. At that time in Alabama, only 1% of voting-age African Americans was registered to vote, state troopers used cattle prods to corral protestors, and crosses were burned in sixty-four of the state's eighty-two counties. *Id.* at 229-31, 233-37. In Mississippi, by the end of Freedom Summer, activists had endured more than a thousand arrests, thirty-five shootings, more than thirty church burnings, and just as many bombings. *Id.* at 274.

On March 7, 1965, nearly 600 people, including women and children wearing their Sunday church outfits, gathered at Brown's Chapel African Methodist Episcopal Church to march fifty-four miles from Selma to Montgomery to protest the killing of one of their own: Jimmy Lee Jackson, a twenty-six year old Army veteran and voting rights worker shot by an Alabama state trooper as he tried to protect his mother during a voting rights protest. *Id.* at 327-28. With Congressman Lewis leading the way, they marched "two abreast, in a pair of lines that stretched for several blocks . . . . At the far end, bringing up the rear, rolled four slow-moving ambulances." *Id.* at 337. The march was peaceful, "somber and subdued, almost like a funereal procession." *Id.* at 338. "There were no big names up front, no celebrities. This was just plain folks moving through the streets of Selma." *Id.*

And then, the marchers reached the Edmund Pettus Bridge, carrying U.S. Highway 80 across the Alabama River, where on the other side waited for them "a sea of blue-helmeted, blue-uniformed Alabama state troopers" backed by "several dozen more armed men . . . some on horseback . . . many carrying clubs the size of baseball bats." *Id.* at 338-39. As the marchers crested the top of the bridge, the trooper in charge ordered them to disperse. *Id.* at 339. When they knelt to pray, troopers and deputized citizens charged and, with the cries of rebel yells and "*Get 'em! Get the niggers*!", swept forward "like a human wave, a blur of shirts and billy clubs and bullwhips" *Id.* at 340.

Without a word, one trooper swung his club against the left side of Congressman Lewis' head, fracturing his skull. *Id.* A cloud of tear-gas enveloped the marchers. Bleeding badly and barely hanging onto consciousness, Congressman Lewis tried to stand up from the pavement only to find himself surrounded by women and children weeping, vomiting while "men on horses [moved] in all directions, purposely riding over the top of fallen people, bringing the animals' hooves down on shoulders, stomachs, and legs." *Id.* at 341.

In the late afternoon, hours after the attack had begun, "troopers, possemen, and sheriff's deputies pursued the marchers over the mile back to the neighborhood around Brown Chapel, where they attacked stragglers in a frenzy," taunting those who had taken refuge in the church "for the negroes to come out." Taylor Branch, *At Canaan's Edge: America in the King Years 1965-1968* 53 (2006).

That evening, just past 9:30 p.m., ABC Television cut into its Sunday night movie – a premiere broadcast of Stanley Kramer's *Judgment at Nuremberg*, a film about Nazi racism – with "a special bulletin," showing to the entire country fifteen minutes of film footage of the attack on the Edmund Pettus Bridge. *Id.* at 55.

Eight days later, President Johnson addressed the American people: "I speak tonight for the dignity of man and for the destiny of democracy. At times, history and fate meet at a single time, in a single place to shape a turning point in man's unending search for freedom . . . . So it was last week in Selma." President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965). The President ended by calling on Congress to enact the Voting Rights Act, which it did on August 6, 1965.

B. A Century Before the Congressman Was Nearly Murdered for Trying to Exercise The Right to Vote, His Great-Great-Grandfather Freely Voted During Reconstruction.

In 2009, Congressman Lewis participated as *amicus curiae* when this Court again considered the constitutionality of Section 5 in *Northwest Austin Municipal Utility District Number One v. Holder*. Brief for the Hon. Congressman John Lewis as Amicus Curiae Supporting Appellant, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). He explained that "the danger of accepting the argument that we have made so much progress

that we no longer need the very tool that made all that progress possible is that we will forget one of the most important lessons history has to teach us, namely: that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward . . . ." *Id.* at 10-11. At the time, unbeknownst to Congressman Lewis, his family history was proof "that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made." *Id.* at 11.

At the conclusion of the Civil War, a century prior to Bloody Sunday and the Edmund Pettus Bridge attack, Tobias and Elizabeth Carter, Congressman Lewis' great-great-grandparents, exercised the full rights and privileges of citizenship. Both former slaves, they married soon after the Emancipation Proclamation, bought land and settled in rural Alabama. Congressman Lewis' great-great-grandfather was part of the first generation of former slaves to register and vote in Alabama. *See generally Finding Your Roots: John Lewis and Cory Booker*.

In many ways, the life of full citizenship Congressman Lewis' great-great-grandfather led during Reconstruction was unique. For a short while immediately following their emancipation, African Americans in large numbers throughout the South were able to participate in the American political system.

Immediately after Emancipation, African Americans in Alabama "began acting like

independent men and women." Howard Zinn, *A People's History of the United States* 195 (5th ed. 2003). Former slaves, who had lived for generations under the control of white slave masters, who were not permitted to learn to read, who could not control the destiny of their own families and who certainly could not vote, were beginning to participate in civic life in unprecedented ways. In 1868, 700,000 African Americans, mostly freed slaves, voted for the first time in Ulysses Grant's presidential election. *Id.* at 194. Newly freed African-American men were elected to state legislatures in former Confederate States. In South Carolina, African Americans were the majority in the lower house. *Id.* at 195. By 1880, "African-Americans were an absolute majority in Louisiana, Mississippi, and South Carolina, and were over 40% of the population in Alabama, Florida, Georgia and Virginia." Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 Harv. C.R.-C.L. L. Rev. 65, 66 (2008). By 1898, Mississippi had 190,000 African-American voters and only 69,000 white voters. *Williams v. Mississippi*, 170 U.S. 213, 215 (1898). At the federal level, in 1869, Hiram Rhoades Revels and Blanche Bruce, two African Americans, one a former slave, were elected to the United States Senate, along with twenty African-American Congressmen. Zinn, at 195.

Congress passed the Fifteenth Amendment on February 26, 1869, enfranchising more than a million African-American men who had been slaves only a decade earlier. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the*

United States 80, 82 (2d ed. 2009). With the ratification of the Fifteenth Amendment, the words "right to vote" were written into the U.S. Constitution for the first time, "announcing a new, active role for the federal government in defining democracy." *Id.* at 82-83.

This progress was not the natural trajectory of emancipation, nor was it coincidental; it was the direct result of the federal government's presence throughout the southern United States. Once that federal presence was removed, the enormous political, social and economic progress was wiped away and would not be regained for almost a century.

By late 1870, all the former Confederate states had been readmitted to the Union and most were controlled by the Republican Party, due primarily to the support of African-American voters. The heavily disputed presidential election of 1876 ended in a compromise that resulted in troops being withdrawn from the South in 1877, signifying the formal end of Reconstruction. During floor debates on the Civil Rights Act of 1871, African-American representative Robert B. Elliot reminded his fellow legislators that, "the declared purpose [of the Democratic party of the South is] to defeat the ballot with the bullet and other coercive means . . . ." Cong. Globe, 42nd Cong. 1st Sess. 389-92 (1871). His prediction came to pass. Democrats in the South convened state constitutional conventions with the explicit purpose to disenfranchise African Americans. Keyssar at 84-85. In the period after 1878, in a deliberate effort to disenfranchise the

potentially powerful voting bloc of former slaves, southern states like Alabama, Georgia, Mississippi and Louisiana enacted literacy tests, grandfather clauses, poll taxes and other unfair voter registration practices. *Id.* at 89-91. By 1880, white Democrats in the South had regained control over state and local governments and the number of southern African-American legislators fell dramatically. *Id.* at 86.

Thus, it is inaccurate to say, as has sometimes been suggested when recounting the history of voting rights in this country, that after a century of congressional inaction and failure, the VRA served as the starting point of effective federal participation to enforce the Fifteenth Amendment. Rather, the narrative of voting rights, as evidenced by the story of Congressman Lewis' own ancestors, is one of a cycle of retrenchment and reconstruction. The approximately twenty-year period between 1866 and 1880 was a brief moment of reform. Among other things, the Civil Rights Act of 1866, 14 Stat. 27 (1866), the Civil Rights Act of 1870 (The Enforcement Act), 16 Stat. 140 (1870), and Civil Rights Act of 1871, 17 Stat. 13 (1871), established robust federal enforcement of constitutional rights for all Americans by establishing civil and criminal penalties for denying African Americans the right to vote and providing for federal troops to patrol polls in the South.

If, by 1880, federal enforcement of voting rights began a period of relative retrenchment, with all due respect, it must be acknowledged that, even while striking down some of the most blatant forms

of voter disenfranchisement,[2] this Court's expansive reading of state sovereignty also contributed to a weakening of federal involvement in voting rights enforcement, the end of Reconstruction, and the political disempowerment of African Americans. *See Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1889); *United States v. Cruikshank*, 92 U.S. 542 (1876); and *United States v. Reese*, 92 U.S. 214 (1875).

C. Congressman Lewis' Public Service Career Has Been Devoted to the Proposition that Democracy Is Not a State but an Act that Requires Continued Vigilance to Ensure a Fair and Free Democracy.

This brief history is not to simply revisit a past we all know too well, but to illustrate that "[d]emocracy is not a state. It is an act. It requires the continued vigilance of us all to ensure that we continue to create an ever more fair, more free democracy." Press Release, John Lewis, On Anniversary of Bloody Sunday, Rep. John Lewis Cites Current Voting Rights Struggle (Mar. 8, 2012). Since first being elected to the House of Representatives in 1986, Congressman Lewis has

---

[2] *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915); *Guinn v. United States*, 238 U.S. 347 (1915); *Neal v. Delaware*, 103 U.S. 370 (1880).

dedicated much of his twenty-seven-year political career to the preservation of voting rights for all Americans. Among other things, he has introduced bills designed to expand access to the polls, such as the Voter Empowerment Act of 2013, H.R. 12, 113th Cong. (2013) and the Voting Rights of Homeless Citizens Act of 1997, H.R. 74, 105th Cong. (1997). He has also introduced and co-sponsored many House resolutions to commemorate the events and figures of the Civil Rights movement and to draw attention to threats against voting rights. He has done this because he believes that "[t]he vote is the most powerful, nonviolent tool that our citizens have in a democratic society, and [that] nothing . . . should interfere with the right of every citizen to vote and have their vote count." Congressman John Lewis, 40th Anniversary of the Voting Rights Act (July 28, 2005).

When Congress reauthorized Section 5 in 1970, 1975 and 1982, Congressman Lewis was not yet elected to federal office. But during the 2006 reauthorization hearings, he defended the landmark legislation. During the House debate, Congressman Lewis implored his colleagues to reject all four proposed amendments to Section 5, saying, in part:

> Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting

> Rights Act. And we must not go back to the dark [past].
>
> We cannot separate the debate today from our history and the past we have traveled. When we marched from Selma to Montgomery in 1965, it was dangerous. It was a matter of life and death. I was beaten, I had a concussion at the bridge. I almost died. I gave a little blood, but some of my colleagues gave their very lives.

152 Cong. Rec. H5164 (daily ed. July 13, 2006) (statement of Rep. Lewis).

Today, 150 years after his great-great-grandfather cast one of the first African-American votes in our country, and nearly fifty years after his march across the Edmund Pettus Bridge, Congressman Lewis continues his life-long fight to ensure that all American citizens are able to exercise their right to vote, regardless of their race. The Voting Rights Act is as relevant and necessary today as it was upon its passage nearly fifty years ago.

II. Section 5 of the Voting Rights Act Remains Crucial to Protect the Rights of All Americans to Participate in Our Electoral System Free from Racial Discrimination.

Petitioner and its *amici* contend that Congress erred in its determination that Section 5 of the VRA is still necessary in light of the progress that has been made. The crux of their contention rests on the following conclusion: Section 5 of the VRA works.

However, the VRA's achievements do not render it irrelevant; to the contrary, the Act's recent achievements illustrate its continuing relevance in a society where voting discrimination remains very much a reality.

The VRA's success is remarkable and undeniable. Indeed, its enactment was a turning point in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). In the nearly five decades since the Act's passage, minority voters have garnered increasing political power. While considerable progress has been made, the VRA's goal of bringing to life the promise of the Fifteenth Amendment has not been fully realized. Barriers to equal political participation persist; minority citizens are still denied access to the polls and have had to struggle through increasingly ingenious discriminatory roadblocks. That the Act has begun to cure the malaise of voting discrimination does not render its most powerful tonic superfluous. The acknowledged success of the VRA is not proof that Section 5's usefulness has expired. In fact, it is evidence that Section 5's powerful medicine is working and needs to continue.

A. The Substantial and Persistent Electoral Discrimination in Georgia is Indicative of the Continuing Need for Section 5.

Although there are no more literacy tests and grandfather clauses, today we see a new generation of tools being employed across the country: discriminatory redistricting and annexation plans, voter identification and verification laws, at-large election schemes, unexpected re-registration requirements, sudden polling place changes, and the last minute addition of new rules for candidate qualification. All of these methods are used to discriminate against minorities and have led to over 700 Section 5 preclearance objections by the United States Department of Justice (DOJ) between 1982 and 2006. H.R. Rep. No. 109-478, at 22 (2006).

Since Section 5's reauthorization in 1982, Congressman Lewis' state of Georgia has received an alarming ninety-one preclearance objection letters from the DOJ, *id.* at 37, even though the state's Governor insists that Georgia should be relieved of Section 5's preclearance provisions, Brief for Georgia Governor Sonny Perdue as Amicus Curiae Supporting Appellants, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009). Here are a few examples:

In 2002, a state court judge sitting by designation as Superintendent of Elections of Randolph County, Georgia, issued an opinion that Henry Cook, an African-American member of the Randolph County Board of Education was a resident of District 5, the majority African-American district from which he had been elected. Letter from Wan J. Kim, Assistant Attorney Gen., U.S. Dep't of Justice, to Tommy Coleman, Esq. (Sept. 12, 2006). In 2006, however, the County Board of Registrars, all of

whose members were white, removed Cook from District 5 and reassigned him to District 4, a majority white district. *Id.* Given the history of racial bloc voting in Randolph County, Cook would certainly have been defeated had he run for reelection in District 4. *Id.* Randolph County refused to submit Cook's reassignment for preclearance under Section 5, even though it constituted a change in voting. *Id.* The Board of Registrars then submitted the change for preclearance, and the DOJ objected. *Id.* The DOJ cited the absence of any intervening change in fact or law since the 2002 decision of the state court judge, and ruled that in light of the history of discrimination in voting in Randolph County, the County failed to sustain its burden of showing that the submitted change lacked a discriminatory purpose. *Id.*

In March 2007, Georgia instituted a data verification system for its voter registration database that sought to match information provided by a voter registration applicant with the information maintained by the state's Department of Driver Services and the Social Security Administration. Letter from Loretta King, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to the Hon. Thurbert E. Baker, Attorney Gen. of Ga. (May 29, 2009) ("King Letter"). If the applicant's information did not match, the applicant would be "flagged" and would not be registered to vote unless and until the applicant provided additional documentation to prove his citizenship status. *Id.* Under the previous system, applicants seeking to register to vote only had to swear or affirm on the voter registration form

that the information provided, including their citizenship status, was true. *Id.* Georgia claimed that the new verification system was part of its efforts to implement the requirements of the Help America Vote Act, 42 U.S.C. § 15301 *et seq.* *Id.* Although Georgia is a covered jurisdiction under Section 5, it did not seek preclearance before implementing this new system. *Morales v. Handel*, No. 1:08-CV-3172, at 22 (N.D. Ga. Oct. 27, 2008).

In September 2008, Jose Morales, a naturalized U.S. citizen and a Georgia resident, applied to register to vote. *Id.* at 2-3. Soon after, Morales received a letter from the county registrar informing him that he was required to provide documentation verifying his citizenship before being registered to vote. *Id.* at 3. That October, Morales filed suit in the U.S. District Court for the Northern District of Georgia seeking a temporary restraining order and a preliminary injunction against the Georgia Secretary of State under Section 5 of the VRA. *Id.* at 3-4. A three-judge panel found that Georgia violated Section 5 by not seeking preclearance for the new verification procedure. *Id.* at 22. Because there was an "imminent" general federal election, the court issued a preliminary injunction enjoining the secretary of state to undertake remedial action "unless and until preclearance is obtained under Section 5." *Id.* at 23. The court explained that the injunction addressed the state's "compelling interest in complying with Section 5's mandate to ensure that no eligible voter is denied the right to vote for failure to comply with an unprecleared voting practice." *Id.* at 26.

In October 2008, prompted by the lawsuit, Georgia finally submitted the new verification process to the DOJ for preclearance. The DOJ objected to the submission, finding that the system was "seriously flawed" and subjected a disproportionate number of African-American, Asian, and Hispanic voters to additional and erroneous burdens on the right to register to vote. King Letter at 4. The DOJ noted that because Georgia had implemented the new changes in violation of Section 5, there was data reflecting the actual results of the state's verification process. This data revealed that the system was inaccurate, resulting in "thousands of citizens who are, in fact, eligible to vote under Georgia law" being improperly flagged. *Id.* at 3. Moreover, the impact of these errors fell disproportionately on minority voters. More than 60% more African-American applicants were flagged than whites; Hispanic and Asian applicants were more than twice as likely to be flagged as white applicants. *Id.* at 4.

The long journey of Georgia's discriminatory citizenship verification system demonstrates Section 5's continued necessity in two important ways. First, Georgia implemented its new system ignoring Section 5's preclearance requirement, providing clear data that illustrate the policy's actual discriminatory impact. Second, the case demonstrates how Section 5 provides swift legal recourse even when a state tries to avoid the preclearance process, giving courts the authority to quickly enjoin the state from implementing the law and to continue that enjoinder until the state complies with Section 5. Without Section 5, Georgia's flawed system would have

continued to wrongly flag minority voter registration applications just weeks before an election.

B. Recent Increases in Minority Voting Strength and the Election of Minority Candidates Engendered Discriminatory Reponses in Covered Jurisdictions.

The Voting Rights Act played a direct and pivotal role in the election and reelection of our country's first African-American President. The election of Barack Obama in 2008, and his recent reelection in 2012, showcased both the progress the VRA helped to usher in, as well as the continuing animosity towards minority participation in our electoral process, especially in jurisdictions covered under Section 5. Amici in support of Petitioner argue that President Obama's election proves that Section 5 is no longer necessary. Brief for Cato Institute as Amicus Curiae Supporting Petitioner at 10. While there is no doubt that the gains in minority political participation can be largely attributed to the VRA, the legislative response in many covered jurisdictions to the 2008 election only lend further support to Congress' conclusion in 2006 that Section 5 remains vital.

In response to more minority voters participating in the political process, seven of the eight states fully covered under Section 5 have passed legislation in the last two years designed to restrict voting rights and access to the polls. These laws harken back to the days of Jim Crow, and remind us all that we have not left the past behind.

When assessing electoral changes, the court must consider the "totality of the circumstances." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 401 (2006). This includes a state's history of voting-related discrimination, the extent to which voting is racially polarized, and the extent to which the state has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group. *Id.* We cannot ignore that the recent changes to voting practices and procedures were enacted against a backdrop of increasing racial animosity brought about by the election of the first African-American President. Following President Obama's election, covered jurisdictions were littered with billboards, signs, t-shirts, and bumpers stickers with messages such as "I do not support the nigger in the white house" and "don't renig [sic] in 2012." Two individuals were removed from the Republican National Convention after throwing nuts at an African American camerawoman and shouting, "[T]his is how we feed the animals." Empty chairs, symbolizing President Obama, were "lynched" in Texas and Virginia.

Candidates and pundits alike invoked the image of poor African Americans and Hispanics as inhibiting America's economic recovery, including Newt Gingrich branding President Obama as "the greatest food stamp president in history." This racially-charged, political rhetoric appeals to those white voters who are primed and listening for subtle racial calls to action. This is "dog whistle" politics, plain and simple.

The country has seen this interplay before. As racial animosity rises, some elected officials respond by appealing to racist sentiment. When overt racism permeated society, George Wallace and Barry Goldwater resurrected the double entendre of "states' rights" to oppose the integration of Alabama's schools and the Civil Rights Act of 1964, disguising their racism as federalism. *See* Juan Williams, *The 1964 Civil Rights Act—Then and Now*, 31 Human Rights 6 (2004). President Nixon appealed to white racists and anti-civil rights voters by referencing "busing" and "states' rights." *See* President Richard Nixon, Address to the Nation on Equal Educational Opportunities and School Busing (Mar. 16, 1972).

The continued use of racial appeals in political campaigns is just one additional piece of evidence that race impacts our political process, making it more difficult for minority candidates to be elected and for minority voters to have their votes count.

C. Section 5 of the Voting Rights Act Prevented Electoral Discrimination Against Racial and Ethnic Minorities in the 2012 Election.

Leading up to the 2012 election, several Section 5 covered jurisdictions attempted to implement new policies and practices that had discriminatory effects on minority voters, impeding their ability to register, vote, and elect representatives of their choice. In several states,

Section 5 and its preclearance process served their purpose: to prevent the illegal disenfranchisement of hundreds of thousands of minority voters.

The unprecedented number of minority voters who participated in the 2012 election has garnered much attention in the media. It is a landmark our country should celebrate. But we must also recognize that this phenomenon is an accomplishment of the VRA, with Section 5 playing an important role. An examination of the voting rights cases leading up to the 2012 election reveals that this historical participation in our democratic process was in part the direct result of Section 5's protections. Indeed, without Section 5, minority voters in several states would have been denied their right to vote in 2012.

1. Section 5 Prevented Discriminatory Voter Identification Laws from Disenfranchising Minority Voters in the 2012 Election.

The most widespread legislative effort to curtail the right to vote leading up to the 2012 election was the imposition of stricter documentary identification requirements on voters. Section 5's preclearance requirement prevented the implementation of discriminatory voter identification laws in the 2012 general election by shifting the burden from the many voters who may have been disenfranchised by these laws, to the states seeking to implement them. Two covered jurisdictions—Texas and South Carolina—failed to

persuade the DOJ and the U.S. District Court for the District of Columbia that they could implement their new voter identification laws prior to the 2012 election without discriminating against minority voters.

In May 2011, Texas passed Senate Bill 14, S. 14, 2011 Leg., 79th Sess. (Tex. 2011) ("SB 14"), amending its voter identification law to eliminate a number of acceptable forms of identification allowed under the existing law and instead requiring voters to present a Texas driver's license, military identification, citizenship certificate or passport before being allowed to vote. *Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676, *1 (D.D.C. Aug. 30, 2012). As a covered jurisdiction under Section 5, Texas was required to submit SB 14 for preclearance, which it did on July 25, 2011 by submission to the Department of Justice. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012).

On March 12, 2012, the Attorney General objected to Texas' preclearance submission finding that the state had failed to meets its burden that the new law would not have a retrogressive effect on the state's minority population. *Id.* Specifically, data submitted by Texas in support of its submission showed that over 600,000 registered voters in the state did not have the identification required by the new law, a disproportionate share of whom were Hispanic. *Id.* The data indicated that a Hispanic voter in Texas was 46.5% more likely than a non-

Hispanic voter to lack the new forms of identification. *Id.*

In January 2012, after being denied preclearance by the DOJ, Texas sought preclearance for its new voter identification law from the U.S. District Court for the District of Columbia. *Texas*, 2012 WL 3743676, at *1. After an expedited trial, the district court concluded, "record evidence suggests that SB 14, if implemented, would . . . likely 'lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at *26 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Consequently, the court held that Texas' voter identification law violated Section 5 and could not be enforced for the 2012 election. *Id.* at *26, 32.

The swift rejection of Texas' voter identification law by both the DOJ and the district court prevented one of the most restrictive voter identification laws in the country from being implemented in a way that would have blocked a disproportionate number of minority voters from the polls on Election Day 2012. Section 5's preclearance process served its purpose—providing an efficient and effective means to prevent the rollback of minority voting rights.

In May 2011, South Carolina, also a covered jurisdiction, passed Act R54 which amended South Carolina's voter identification law to narrow the forms of permitted voter identification. R54, 119th Gen. Assemb., Reg. Sess. (S.C. 2011-2012). Similar

to Texas, the South Carolina law required voters to present a South Carolina driver's license, motor vehicle photo identification, passport, military identification card or a photo voter registration card. S.C. Code Ann. § 7-13-710(A) (2011). The prior law did not require photo identification to vote, allowing voters to present a non-photo voter identification card. *Id.* But the South Carolina amendment differed from Texas' law in that it allowed voters with a "reasonable impediment" that prevents them from having one of the required forms of voter identification to sign an affidavit confirming their identity and explaining why they do not have one of the required forms of identification. S.C. Code Ann. § 7-13-710 (D)(1)(b) (2011).

On December 23, 2011, the DOJ denied preclearance for South Carolina's new voter identification law, finding that the new law would adversely affect minority voters. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to C. Havird Jones, Jr., Assistant Deputy Attorney Gen. of S.C. (Dec. 23, 2011). Data presented by the state demonstrated that minority voters were nearly 20% more likely to lack motor vehicle photo identification than white registered voters. *Id.* at 2. The DOJ also determined that the "reasonable impediment" exemption would not mitigate the law's discriminatory effects because it was ambiguous and could be applied in a discriminatory way. *Id.* at 3.

South Carolina then filed for preclearance in the U.S. District Court for the District of Columbia. *South Carolina v. United States*, No. 12-203, 2012

WL 4814094 (D.D.C. Oct. 10, 2012). The court decided the case on October 10, 2012, less than one month before the general election. Like the DOJ, the court concluded that non-white voters were more likely than white voters to not have one of the required forms of voter identification, but found that the law's "sweeping reasonable impediment exemption eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused." *Id.* at *9. In reaching its conclusion, the court was careful to explain that a broad interpretation and application of the exemption was critical to assuring the law's legality. *Id.* at *19 (stating, "this law, without the reasonable impediment provision, could have discriminatory effects and impose material burdens on African-American voters . . . .").

Importantly, the district court did *not* preclear the law for the 2012 election, finding that implementing the law so close to the election created too much of a risk to African-American voters. *Id.* The court explained, "[b]ecause the voters who currently lack qualifying photo ID are disproportionately African-American, proper and smooth functioning of the reasonable impediment provision would be vital to avoid unlawful racially discriminatory effect on African-American voters in South Carolina in the 2012 election." *Id.*

The preclearance of South Carolina's voter identification law provides an important example of the critical role Section 5 continues to play in protecting voting rights. First, the data shared during the preclearance process clearly

demonstrated how a facially neutral law could have a dramatic discriminatory effect on minority voters. Second, the preclearance process provided an opportunity for the federal court to instruct the state that the reasonable impediment exemption must be expansively implemented in order to prevent the law's potentially discriminatory impact. Third, the court put South Carolina on notice, explaining in no uncertain terms that Section 5 would prohibit any ad hoc alteration to the implementation of the exemption. And finally, Section 5 prevented the law from going into effect too soon before the 2012 election, averting the serious risk of disenfranchising African American voters.

2. Section 5 Prevented the Reduction of Voting Hours in the 2012 Election, Assuring Minority Voters Access to the Polls.

Early voting, or the opportunity for voters to cast their ballots in-person before Election Day, was widely utilized in a number of states in the 2012 election. Florida implemented early, in-person voting in 2004, as part of its post-2000 election reform. Minority voters, who often have greater transportation and occupational challenges getting to the polls, have participated in early voting in large numbers. *Florida v. United States*, No. 11-1428, 2012 WL 3538298, at *29 (D.D.C. Aug. 16, 2012); Michael C. Herron & Daniel E. Smith, *Early Voting in Florida in the Aftermath of House Bill 1355* 10 (Working Paper, Jan. 10, 2013). In 2012, Section 5 prevented an attempt to cut nearly half the number of days allowed for early voting in Florida.

In 2011, the Florida legislature passed an omnibus election administration bill making some eighty changes to the state election law, including one that decreased the number of days allowed for early in-person voting. *Florida*, 2012 WL 3538298, at *3. Because five counties in Florida are covered jurisdictions under Section 5, Florida submitted the change to the early voting law to United States District Court for the District of Columbia for preclearance. *Id.* at *2.

Under its prior law, Florida permitted early, in-person voting for twelve days over a fourteen-day period beginning on the fifteenth day before an election and ending on the second day before the election. Fla. Stat. § 101.657(d) (2010). The new law amended the number of days, the number of hours and the weekend times that early voting was offered in the state, decreasing the period from twelve days to eight, and eliminating the last Sunday before the election. Fla. Stat. § 101.657(d) (2011); *Florida*, 2012 WL 3538298, at *5-6.

The district court denied preclearance, concluding that minority voters would be disproportionately affected by the decrease in early voting days. *Florida*, 2012 WL 3538298, at *23. The evidence presented at trial showed that in the 2008 general election, more than half of African-American voters in Florida used early in-person voting—twice the rate of white voters. *Id.* at *17. This trend has continued since 2008; African Americans have consistently used early in-person voting in Florida at rates that exceed those of white voters. *Id.* at *21-22.

Consequently, the court determined that the decrease in early voting days had a "retrogressive effect with respect to African-American voters' effective exercise of the electoral franchise" and could not be precleared under Section 5. *Id.* at *23.

For the 2012 general election, only thirty-two of Florida's sixty-seven counties, including the five counties covered by Section 5, offered the maximum ninety-six hours of early voting hours permitted under the new law. Minority voters again took advantage of the extra time to cast their votes. While African Americans made up less than 14% of Florida's registered voters in 2012, they made up more than 22% of the early voter electorate on each day of the 2012 early voting period. Herron & Smith, at 11. However, because there was a reduction in the total number of early voting hours and days in 2012, including the elimination of the Sunday immediately before Election Day, there were fewer opportunities for minorities to vote early. In Miami-Dade and Palm Beach counties, voters stood in line to cast early votes for more than five hours during the weekend before Election Day. *Id.* at 20. In those two counties, African Americans made up only 16.7% of registered voters, but accounted for 43.8% of the early voters on Sunday, November 4, 2012. *Id.* at 21. The data tell the story. There is simply no question that without Section 5, a disproportionate number of minority voters in Florida would have been deterred from exercising their right to vote in 2012.

3. Section 5 Prevented the Discriminatory Dilution of

Minority Voting Strength in the 2012 Election.

In addition to preventing discriminatory voting laws from taking effect, Section 5 also prevented discriminatory legislative districts from diluting the voting strength of minority communities in 2012. After redrawing it legislative districts following the 2010 Census, Texas sought preclearance from the United States District Court for the District of Columbia. Texas has a long history of attempting to use the redistricting process to weaken the voting strength of minorities. In its opinion denying preclearance, the district court noted, "[i]n the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Texas v. United States*, No. 11-1303, 2012 WL 3671924, at *20 (D.D.C. 2012), *petition for cert. filed*, 81 USLW 3233 (U.S. Oct 19, 2012)(No. 12-496).

According to the 2010 Census, Texas' population grew by approximately 4.3 million in the past decade, an increase of more than 20%. *Id.* at *17. Approximately 89% of this growth was from non-white minorities: Hispanics comprised 65% of the increase, African Americans 13.4%, and Asian Americans 10.1%. *Id.* As a result of this increase, the Texas Congressional delegation grew from thirty-two to thirty-six members, the largest growth ever in a jurisdiction fully covered by Section 5. *Id.* Prompted by this population growth, the Texas State Legislature drew and enacted new legislative districts. Despite the substantial increase in the minority population, the enacted Congressional

districts did not include a single new minority district. *Id.*

After an expedited trial in the summer of 2012, the District Court denied preclearance, finding sufficient evidence that the proposed U.S. Congressional and State House plans would have a retrogressive effect on minority voters, and that the U.S. Congressional and State Senate plans were enacted with a discriminatory purpose. *Id.* at *37. The court found that under the enacted plan, proportional representation would yield fourteen new minority ability districts, but that there continued to be only the ten ability districts that had existed under the former plan prior to the new Census figures, creating a "representation gap" in the proposed plan of four districts. *Id.* at *18.

Moreover, evidence revealed that "substantial surgery" was performed on the Congressional districts of four African-American and one Hispanic members of Congress, removing each incumbent member's district office from the district. *Id.* at *19. Although Texas argued that this was the result of partisan politics and not racial discrimination, the court noted that, "[n]o such surgery was performed on the districts of Anglo incumbents. In fact, *every* Anglo member of Congress retained his or her district office." *Id.* at *20.

Due to the delayed resolution of preclearance, a Texas district court drew interim maps for the 2012 election. *Perez v. Perry*, 835 F. Supp.2d 209 (W.D. Tex. 2011), *vacated and remanded*, 132 S.Ct. 934 (2012). After an appeal to United States

Supreme Court, the Texas federal court redrew the maps in February 2012, putting in place the districts for the 2012 election. *Perez v. Texas*, No. 11–CA–360, 2012 WL 4094933, at *1-2 (W.D. Tex. Feb. 28, 2012). Texas voters elected nine new members of Congress in 2012; four Hispanic and one African-American.

The Section 5 preclearance process prevented districts that had both the purpose and effect of discriminating against minority voters from going in to effect in Texas, and created the opportunity for more equitable districts to be put in place in time for the 2012 election. As a result, minority voters in Texas were able to elect representatives of their choice.

4. Section 2 of the Voting Rights Act Would Not Have Been as Effective as Section 5 in Preventing Disenfranchisement of Minority Voters During the 2012 Presidential Election.

The efficacy of the VRA's strong medicine is largely attributable to Section 5. Unlike Section 2, which is reactive and places the burden on individual plaintiffs to prove that a practice has a discriminatory effect, *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966), Section 5 is preemptive and acts as a barricade to ensure that discriminatory changes are not put into effect. In so doing, Section

5 shifts the burden onto covered jurisdictions to establish prior to implementation that a proposed voting change has neither a discriminatory effect nor purpose. By addressing the issue at the earliest possible stage, Section 5 decreases the cost and time associated with litigation. This anticipatory approach ensures that voting rights are not infringed upon in the first instance. Accordingly, Section 5 has played a significant role in deterring voting discrimination and remains vital to the protection of equal political participation. Indeed, the 2012 national election provides clear evidence that Section 5 remains an essential tool for protecting the right to vote in our country.

Without Section 5, voters' only recourse to pursue voting rights violations would be Section 2 of the VRA. Section 2's protections are insufficient to ensure minority access to the franchise. Section 2 litigation is time consuming and expensive, and the discriminatory impact of the challenged policy or practice remains in effect while the litigation proceeds. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R.*, 109th Cong. 58 (2005) ("VRA Hearing"). Voters seeking to challenge election laws under Section 2 must hire an attorney, engage in extensive fact-gathering, hire experts, and pay costs associated with filing a lawsuit, which can cost millions of dollars and take years to achieve. *Id.* at 78. Furthermore, state actors are entitled to an additional benefit under Section 2 because the burden of proving discrimination lies with the private plaintiff. *Id.* at 79-80. As this Court has

explained, in designing Section 5, Congress "found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *Katzenbach*, 383 U.S. at 328.

Significantly, discriminatory laws remain in effect throughout the Section 2 litigation, giving the state actor all the benefits of elected office even if the discriminatory practice is ruled unconstitutional. VRA Hearing at 43. Section 5 prohibits the discriminator from benefiting from discriminatory practices, and also prevents the election of representatives based on discriminatory practices.

All of these concerns would have come to bear in challenging the discriminatory practices in Texas, South Carolina, Florida, and Georgia. The voters would have borne the burden of finding lawyers, marshaling evidence, hiring experts, and all the other expensive and time consuming complications of litigation. Election Day 2012 would be long passed, and untold hundreds of thousands of voters would have been wrongly denied their right to vote, officials elected under discriminatory practices would be comfortably settled in their offices and enacting new policies before the court could rule on the challenged practices.

Without Section 5, Hispanic and African-American voters in Texas would have been turned away from the polls on Election Day because they could not afford one of the few acceptable forms of

photo identification required by SB 14. Without Section 5, African-American and Hispanic voters in South Carolina would have been confronted at the polls with new and complex identification requirements, resulting in confusion, confrontation, and frustration. Without Section 5, African-American and Hispanic voters in Florida would have arrived at the polls on their day off to exercise their most precious right only to find the polls closed and the doors locked. Without Section 5, Jose Morales and countless other United States citizens whether Hispanic, Asian, or African-American would have had their voter registration forms wrongly rejected by Georgia election officials who questioned their citizenship simply because of their last name, or a computer glitch.

Simply put, Section 2 alone cannot secure minority voting rights in covered jurisdictions because pervasive and consistent racial discrimination continues to exist. Section 5 remains a necessary tool to protect the right to vote in our country. "The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great . . . ." *Katzenbach*, 383 U.S. at 315.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully Submitted,

Aderson B. Francois
HOWARD UNIVERSITY
SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 Van Ness Street NW
Washington, D.C. 20008
(202) 806-8065

Deborah N. Archer
Counsel of Record
Tamara C. Belinfanti
Erika L. Wood
NEW YORK LAW SCHOOL
RACIAL JUSTICE PROJECT
185 West Broadway
New York, NY 10013
(212) 431-2138
Deborah.Archer@nyls.edu

JANUARY 2013