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On the Reauthorization of Section 5 of the Voting Rights Act

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For forty years, the Voting Rights Act has served as the exemplar of this Nation's commitment to redressing injustices visited upon racial and ethnic minorities. The fact that such a statute was necessary nearly a century after the passage of the Fifteenth Amendment is a painful reminder of a shameful legacy.

The reauthorization of key provisions of the Voting Rights Act is an occasion to reassess the state of minority voting rights. This reassessment must be done with caution and a degree of rigor for two quite distinct reasons.

First, the state of minority voting rights and the need for Section 5 today reflects the impact of the Voting Rights Act itself, the most successful of any civil rights statute ever passed by this Congress. The Act targeted the exclusion of black citizens from the franchise, and its dramatic effectiveness is hard to overstate. Take, for example, the coverage formula of Section 5 of the Act, which used voter turnout levels to determine which jurisdictions were subject to its preclearance requirements. Had the coverage formula been applied to the 1968 presidential election rather than the 1964 presidential election, not one of the originally covered states would have fallen under the preclearance regime. The combination of the Act's ban on voter disqualification mechanisms and the federal commitment to the registration and protection of African American voters broke the lockhold of intransigent racial exclusion in the covered states. Forty years hence, the legions of black voters and the established presence of minority elected officials is the historic legacy of the Act. While the number of objections to proposed changes from covered jurisdictions has declined to the single digits in any given year, this Congress should be hesitant in altering such a dramatically successful civil rights statute. Even in the absence of significant numbers of objections, Section 5 in all likelihood continues to serve as a reminder in covered jurisdictions that any untoward conduct will be subject to review. One should tread cautiously with this heroic legacy.

But there is a second reason for caution and rigor. In cases such as *City of Boerne v. Flores*,¹ the Supreme Court confined the reach of Congress' remedial authority under the Fourteenth and Fifteenth Amendments – its ability to reach beyond the direct commands of those Amendments – by demanding from Congress some evidence of “congruence and proportionality” between its remedial legislation and the constitutional aims that Congress seeks to advance. The Court has given Congress wide berth in addressing manifest injustices in the core areas of the Fourteenth and Fifteenth Amendments.² But it is far from clear that the injustices that justified Section 5 in 1965 can justify its unqualified reenactment today. The very effectiveness of the Voting Rights Act, and the

¹ 521 U.S. 507 (1997).

² See generally *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

immediacy of its impact in 1965, is a source of constitutional vulnerability today. The bulk of the coverage under Section 5 is triggered by voter turnout figures from 1964, a date that seems remote in 2007, and risks appearing constitutionally antiquated by the proposed next expiration date of 2032. By 2032, the youngest eligible voter from 1964 will be 86 years old.

Potential constitutional scrutiny is not the sole source of concern over the continued operation of Section 5. The Act has four key features that reflect the historic understanding of the source of minority exclusion from the franchise, and that raise serious questions about its reach and efficacy today.

1. *The Act is geographically specific.* The original coverage formula was designed to pick up the core Southern states that had been bastions of Jim Crow. Subsequent coverage was extended to finding areas of language-minority concentrations that might replicate the voter exclusion practices of the original Southern jurisdictions. A key assumption, well understood and documented in 1965, was that the areas to which the Act's preclearance requirements would apply were outliers on the national stage. When the Court confronted the constitutionality of Section 5 for the first time, it could readily accept that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."³ Faced with what were clearly understood to be "flagrant" practices, the Court accepted the Act's geographic markers. The clear record of geographic demarcation no longer exists. As the Court has recognized from its initial encounter with the Act, "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects."⁴
2. *The Act targets change.* The structure of the Voting Rights Act was centered on the suspension of antivoter devices through Section 4 (most notably literacy tests), and then a prohibition under Section 5 from bringing back the disfavored practices. Section 5 does not carry its own prohibitions but instead serves as a ratchet preventing backsliding toward retrograde practices. Many of the practices that have garnered most attention recently, such as felon disenfranchisement or voter intimidation at the polls, are not subject to the Section 4 suspension clause and, so long as they are pursuant to formal practices already in place, do not trigger Section 5 scrutiny. The unrivaled effectiveness of Section 5 in its initial stages resulted from the congruence between its administrative structures and the perceived harms. A prohibition on change well fit the Act's central aim of removing the manifest barriers to the minority franchise. It is not clear that the prohibition on change affecting access to the ballot well captures the Act's purposes today. For example, one study by a former Department of Justice attorney found that in the six-year period beginning in 1997, only six of the forty-

³ South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

⁴ *Id.* at 308.

two DOJ objections lodged during that time concerned minority voters' access to the ballot, an average of one per year.⁵

3. *The sole method of redress is administrative with preclearance authority held by the Department of Justice.* The preclearance provision is unique in the amount of authority placed in the Department of Justice, whose internal decisionmaking is essentially unreviewable.⁶ The assumption was that DOJ was the only actor with sufficient disinterest from local pressures to act fully in conformity with the aims of enhancing minority voting rights. The targeted jurisdictions, by contrast, were characterized by local politics organized around minority exclusion and holding no prospect for redress. Typically, the covered jurisdictions were under exclusive one-party control, had few if any minority elected officials, and had isolated and impoverished minority communities that were without access to legal resources and subject to forms of legal and extralegal exclusion and intimidation. The result was a political lock-up without avenues of change. It was also a world in which there were unlikely to be significant untoward or partisan pressures on DOJ. The lack of bipartisan competition in most of the covered jurisdictions meant that there was little capacity to affect national political balances through misuse of Section 5 preclearance authority. Unfortunately, the emergence of real bipartisan competition in covered jurisdictions has brought with it concerns of preclearance objections motivated by political gain, particularly in the highly contested area of redistricting.
4. *The Act targeted exclusion and did not directly address the issue of minority vote dilution.* Section 4 and Section 5 of the Act were mainly directed in 1965 to the elimination of outright obstacles to the exercise of the franchise. The scope of Section 5 was extended without much difficulty to the question of municipal annexations and other boundary issues that defined who could and could not vote, actions that readily mapped onto the Supreme Court's landmark decision in *Gomillion v. Lightfoot*.⁷ Almost immediately, however, and largely as a result of the dramatic effectiveness of the Act, Section 5 attention was drawn to practices bearing not on the *exercise* of the franchise but on the *effectiveness* of the minority franchise. With *Allen v. Board of Elections*,⁸ Section 5 was applied to the question whether at-large versus districted elections offered minority voters a meaningful opportunity to elect candidates of their choice. But the retrogression standard of review under Section 5 has proven difficult to apply to these sorts of challenges. Particularly after the 1982 Amendments to Section 2, at-large and multimember districts were largely disbanded as dilutive of minority voting strength. Once the contested issue became not whether there would be districted elections, but the precise contours of district lines, the nonretrogression standard of Section 5 fit poorly. The attempt of DOJ to enforce a contested view of maximization of minority voting strength through concentrated majority-minority

⁵ Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 Denver U. L. Rev. 225, 253 (2003).

⁶ See *Morris v. Gressette*, 432 U.S. 491, 507 (1977).

⁷ 364 U.S. 339 (1960).

⁸ 393 U.S. 544 (1969).

districts prompted constitutional concern during the 1990s⁹ and gave rise to the Court's divided reassessment of the objectives of the Act in *Georgia v. Ashcroft*.¹⁰

The differences between the initial concerns and regulatory framework of Section 5 and the key voting rights issues of today place great pressure on the constitutionality of the Act as well as its effectiveness. In an earlier academic article, which I append to this testimony, I raised the question whether Section 5 of the Voting Rights Act had, in effect, largely called into question the reason for its own existence as a result of its record of success.¹¹ I will not repeat the main arguments here.

Instead, I wish to address five separate suggestions for tailoring the Act to the world of 2006 rather than 1965. The hope is not only that the Act may be more effective in addressing the voting issues that are within its scope, but also that it will be more likely to withstand constitutional challenge.

The proposed areas of change would be:

1. *Move the unit of coverage from the states to political subdivisions.* Under this proposal, all political subdivisions currently covered as part of a covered state would continue to be covered, subject to bailout provisions discussed below. This corresponds to the focus of enforcement actions of DOJ. For example, between 2000 and 2005 there were a total of only 40 objections total under DOJ preclearance; 37 of them were directed to political subdivisions of the states and only three to the states as such. It is also at the local level that the conditions of lack of political competition and isolation of minority communities are most likely still to obtain. By contrast, the states currently covered by Section 5 typically have sizeable delegations of minority elected officials who are well positioned to ensure that voting measures antithetical to minority voter interests are not passed through inadvertence or malevolence, and are certainly well positioned to ensure that such measures are not the product of stealth legislation. Any legislation at the statewide level deemed antithetical to minority voting interests will be met not only with certain political objections, but nearly as certainly with substantive litigation under either Section 2 of the Act or under the Constitution.
2. *Liberalize the bailout provisions.* Currently only a handful of counties in Virginia have been able to remove themselves from Section 5 coverage. Part of this results from the fact that Virginia as a whole is not a covered jurisdiction so that counties are responsible for their own conduct. A liberalized bailout provision – one that allowed counties or municipalities that have not engaged in objectionable conduct for some fixed number of years to escape the administrative burden and the costs associated with Section 5 preclearance – would alleviate some of the constitutional pressure on the most suspect of the Act's current features: the

⁹ See, e.g., *Miller v. Johnson*, 515 U.S. 900 (1995).

¹⁰ 539 U.S. 461 (2003).

¹¹ See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success*, 104 Colum. L. Rev. 1710 (2004).

extension of the original coverage formula. Bailout need not entail fullscale deregulation, however, as the next proposal suggests. But the current bailout provision appears unduly onerous and not sufficiently geared to actual legal violations.

3. *Create an intermediate regulatory status less onerous than preclearance.* Preclearance operates on a model of regulation analogous to that of the Food and Drug Administration, which requires anticipatory regulatory approval on the assumption that the consequences of error are too costly to bear. That is in contrast to the more typical regulatory mechanism administered by the Securities and Exchange Commission, which requires disclosure of critical information prior to the issuance of securities, but leaves enforcement to subsequent processes, public and private. The law might be revised to allow jurisdictions that had not had a Section 5 objection or a successful Section 2 lawsuit in a defined period of time, say 5 years, to be removed from preclearance requirements, yet still required to disclose on a DOJ-maintained website all changes that would have been covered under Section 5 and the reasons for their having been taken. That would allow for a suit by DOJ or by private parties claiming either that the changes violated Section 2 or that the disclosures were false. Violation of either the substantive protections of Section 2 or the truth-in-reporting provisions of the administrative disclosure requirements would both invalidate the proposed change and potentially reinstate plenary Section 5 coverage.
4. *Expand the jurisdictional reach of this Section 5 disclosure regime.* An administrative disclosure regime modeled on the SEC would render the administrative burdens of Section 5 coverage far less onerous. The reach of this administrative review could be expanded to any jurisdiction that has lost a Section 2 lawsuit in the past five years or to any jurisdiction found to have engaged in harassment of minority voters. This new “coverage formula,” which turns on factors that are both more current and more functionally relevant than 1964 voter turnout, would take further constitutional pressure off of the anachronistic coverage formula of the current Act. It would also bring the geographic scope of Section 5 into conformity with the nationwide scope of Section 2.
5. *Remove statewide redistricting from Section 5 overview.* The current bill expresses a congressional repudiation of *Georgia v. Ashcroft*, and calls for more rigorous Section 5 review of redistricting, but gives no clear indication of how that is to be done. There are two key problems with the use of standard Section 5 analysis to statewide redistricting.
 - a. First, it is noteworthy that no Justice of the Supreme Court in *Ashcroft* was willing to endorse the fixed non-retrogression standard associated with *Beer v. United States*.¹² That is because the mechanical application of the *Beer* standard operates as a one-way ratchet, and results in majority-minority districts of increasing concentration over time. It is far from clear that minority voters are well served by being packed in increasingly concentrated minority districts. It would be a terrible irony if the

¹² 425 U.S. 130 (1976).

mechanical enforcement of the Voting Rights Act were to become an obstacle to political integration and the expansion of minority voter influence through coalitional districts in which candidates supported by minority voters had a meaningful opportunity to elect candidates of choice to office in collaboration with white voters. The prospect of interracial politics was not even a gleam in the eye of the founding generation of the Voting Rights Act in 1965. It is unimaginable that their legacy would emerge as a barrier to political integration.

- b. Second, because statewide redistricting has become a major partisan battleground in many of the Section 5 covered jurisdictions, the intervention of the DOJ in this particular context has been rife with accusations of partisan motivation. The visibility of redistricting and the clear partisan temptations for DOJ oversight (now that there is vigorous partisan competition in the covered jurisdictions) make this an area that can be more wisely entrusted to enforcement through Section 2 of the Act or under the various constitutional provisions implicated in the redistricting process.

In sum, I believe that Section 5 of the Voting Rights Act can be extended in a way that more closely addresses the concerns of minority voters today. In so doing, this Congress may not only make the Act more effective, it may also better protect it from constitutional scrutiny.