Testimony of

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Mr. Chairman and distinguished Committee members, thank you for the opportunity to testify this morning.

My name is Abigail Thernstrom. I am a senior fellow at the Manhattan Institute, a public policy think tank, and the vice chair of the U.S. Commission on Civil Rights. By training I am a political scientist, having received my Ph.D. from the Department of Government, Harvard University, in 1975. I have been writing on race-related issues my entire professional career. My first book, Whose Votes Count? Affirmative Action and Minority Voting Rights, published by Harvard University Press in 1987, won four awards, including one of the American Bar Association's two book prizes. After an absence of two decades, I have returned to the topic of voting rights with a book in progress tentatively titled Voting Rights--and Wrongs: The Elusive Quest for Racially Fair Elections.

I have been asked to speak to the implications of the Supreme Court's recent decision in LULAC v. Perry (June 28, 2006) for the shape of the reauthorization legislation now under consideration. And indeed the decision does contain important messages pertinent to the current debate. Moreover, it reinforces a conviction I have had for some months: the House bill as it currently stands will have unintended and unwelcome consequences.

The LULAC decision makes several points clear.
The Voting Rights Act, which in theory protects minority voters from disfranchisement, has become an instrument for partisan gerrymandering. And while the Republicans have found that distortion of the law very much to their liking in the past, that era is over. On the other hand, Democrats too have already learned the cost of murky legal standards that allow preclearance judgments with which they profoundly disagree.

The House bill explicitly protects "the ability of [minority] citizens to elect their preferred candidates of choice." But who qualifies as a "candidate of choice"? And what does an "opportunity" district look like? Neither the Supreme Court not anyone else has a good answer to these questions, which are at the center of the proposed statutory amendments.

For instance, Martin Frost's old District 24 was drawn by whites to elect a white Democrat, as Rep. Eddie Bernice Johnson testified at the trial. Nevertheless, appellants in LULAC argued that this was a district in which black voters could predictably elect the "candidate of their choice," which is how they described Mr. Frost. It was, they said, a black "opportunity-to-elect" district, protected by the Voting Rights Act, even though it was only 25 percent black and had elected a white congressman. Justice Kennedy, writing for the Court in LULAC, didn't buy the argument. The district "was formed for partisan reasons," he wrote. "The fact that African Americans preferred Frost to some others does not . . . make him their candidate of choice."
But only the Chief Justice and Justice Alito joined Justice Kennedy's reasoning. (Justices Scalia and Thomas were silent on the issue.) And suppose District 24 was not 25 percent but 35 percent black--still majority white, but not to the same degree. Would that have made it a clear black "opportunity to elect" district if a white Democrat were elected with the aid of black voters? Is there a magic number that defines a district to which minority (and Democratic) voters are entitled under the Voting Rights Act--a district that contains enough black and Hispanic voters to ensure they can elect "their preferred candidates of choice"? Is there a rational process we can use to determine what that number would be? The answer is clearly no.

Justice Department staff attorneys had hoped the 2003 Texas redistricting plan would not be precleared, and when their views were overridden, they leaked the memo making their case. They argued that Gene Green, the white incumbent in the majority-Hispanic District 29, had been called "basically Hispanic himself," and thus that Democratic district could not be altered. It was protected by the Voting Rights Act as a district that had "performed" for Hispanic voters. District 25 was also represented by a white Democrat deemed "responsive" to minority interests, and was thus regarded as untouchable by the staff attorneys. But redrawn, the state predicted, the district would elect a black to Congress--as indeed turned out to be the case.
In the LULAC decision, as well, it was not only the discussion of Martin Frost's district that raises unanswered questions about the sanctity of particular lines drawn for partisan reasons (even though the Court, in theory, is staying away from partisan gerrymandering issues). Civil

rights groups had argued that while Mr. Frost counted as a "black" representative, the Republican incumbent, Henry Bonilla, could not speak for Hispanic interests because his party label was "R." And this, in fact, was an argument to which Justice Kennedy in LULAC was sympathetic. "Latinos could have had an opportunity district in District 23 had its lines not been altered and . . . they do not have one now." In other words, the state took too many Democrats out of the district (which remained majority-Hispanic), and thus deprived minority (Democratic) voters of their electoral "opportunity."

Here again, is the question of what these "opportunity" districts--protected by the Voting Rights Act--look like. At the oral argument, the Chief Justice asked Nina Perales (representing the Mexican American Legal Defense and Educational Fund) seven times, in several different ways: What number of minority voters is enough to make a district qualify as "Hispanic-opportunity," rather than one masquerading as such? Her unhelpful answer: an "Hispanic-opportunity" district is one in which Hispanics have electoral opportunity. By which she clearly meant Hispanics and Democrats, the two being one and the same in her view.

Blacks may be reliable Democrats, and thus white Democrats arguably represent their interests, as Justice Sandra Day O'Connor suggested in Georgia v. Ashcroft, the Court's 2003 decision that revisited the section 5 standards. "No party," she said, "contests that a substantial majority of black voters in Georgia vote Democratic" and thus any increase in the number of Democratic state senators, even if they were white, would boost minority representation. So, in reviewing districting maps for preclearance, the Justice Department can assume that what's good for Democrats is good for blacks, the Court found, in effect. But will the same point hold into the indefinite future for Hispanics? And when even a slight majority of Hispanics in a district vote Republican, will that now be a Hispanic- and Republican-opportunity district that will remain protected by the Voting Rights Act? Down the road, both parties can play definitional games that further partisan interests, and the Sensenbrenner bill encourages such gamesmanship.
Such games have long been integral to the Department of Justice enforcement process. The administrations of Presidents George H.W. Bush and Bill Clinton, for different political reasons, worked with the same assumptions in interpreting the preclearance provision. But the current Justice Department has broken ranks with the career attorneys in the voting section, as noted above. In the wake of the Attorney General's decision to approve the Texas redistricting plan, Democrats, civil rights spokesmen, and their allies in the scholarly community and in the media were outraged by the "bias" that had allegedly crept into the preclearance process. The charge (leaving the question of its validity aside) is quite amusing. In the 1980s and 1990s, the Justice Department used the Voting Rights Act to pursue an ideologically driven agenda in direct conflict with the Supreme Court's interpretation of the statutory language.

Thus, throughout the 1980s, the department all but ignored the Court's 1976 holding in Beer v. United States, which established the retrogression (backsliding) test to measure the discriminatory "effect" of a districting plan or other electoral change. Plans that were not "fairly drawn" were called "retrogressive." And "fairly drawn" meant safe black seats in proportion to the minority population. Districting maps were expected to "fairly reflect" black voting strength. Jurisdictions that resisted this amendment of the law through the process of enforcement were said to be engaged in intentional discrimination.

In the 1990s, the charge of intentional discrimination became the chief means by which the Justice Department forced jurisdictions to draw the maximum number of possible majority-minority districts. Voting section attorneys worked hand in glove with the ACLU, the NAACP, and other advocacy groups, frequently insisting that jurisdictions adopt the plans drawn by them even when black elected officials in state legislatures had different priorities and objected. A good peek at that story is provided in the Supreme Court's 1995 decision in Miller v. Johnson (and in the district court decision that preceded it).

This history is relevant to the Sensenbrenner bill. The proposed amendments to the statute would allow objections to electoral changes on suspicion of "any discriminatory purpose," thus overturning Bossier Parish II, which held that preclearance could only be denied when there was suspicion of retrogressive purpose. In overturning the Court's 2000 decision, the proposed statutory change would reinstate the power of the Justice Department to play with charges of illegal purpose (an undefined term) in order to reject districting plans that are not to its liking for partisan or other unstated reasons. And it would allow the department to ignore the retrogression test entirely, since that more confining test insists that the legitimacy of new districting lines be measured against the political power afforded minority voters under the previously precleared plan.

To turn the retrogression test into an irrelevancy is to ignore the core purpose of the preclearance provision, which was to make sure the effect of the other enfranchising provisions of the Voting Rights Act was not undermined by inventive new devices that robbed black voters of the gains they had made. Section 5 was designed as a prophylactic measure--a means of guarding against renewed disfranchisement. And its design relegated to Justice Department attorneys a limited, and thus manageable, task--assessing blacksliding.

Had the original 1965 Voting Rights Act included a broader definition of either discriminatory effect or purpose in section 5, it would have asked Justice Department attorneys to settle broad questions of electoral equality that are inappropriate in a process of swift administrative review. The resolution of such questions requires the specific, detailed, idiosyncratic knowledge of race and politics in local jurisdictions that only a local federal district court can obtain in the course of a trial. Such expansive definitions would have invited, in short, precisely that ideologically driven, creative disregard of the statute that has characterized the enforcement of section 5, but which Bossier Parish II partially stopped. If the old, open-ended definition of "purpose" is resurrected, as the House bill proposes, then the term can be used for whatever partisan goals the Department of Justice (today and in the future) wishes to set. Moreover, that resurrection is unnecessary: Plaintiffs who suspect intentional discrimination can always bring suit on Fourteenth Amendment grounds.

The LULAC decision left many questions unanswered and left open the door to continuing subjectivity in assessing black and Hispanic electoral opportunity and who counts as a minority "representative." But at least it did adhere to the tighter definition of purpose contained in Bossier Parish II--a definition that squares with the backsliding principle that informs the entire structure of section 5.

The proposed language for section 5 cannot be administered like a highway bill. Enforcement depends on unacknowledged normative assumptions. The murky language of section 2 already

has courts immersed in what Justice Thomas (echoing Justice Frankfurter) has called "a hopeless project of weighing questions of political theory." But at least the project is one in which judges, disciplined by the structure of trials and appeals, are engaged. Not so with section 5. The opaque language of the proposed House bill would further empower Justice Department attorneys--which in practice most often means those in career positions, along with equal opportunity specialists and paralegals. In preclearance decisions, Justice has pretty much the last word, and that word will almost inevitably be driven by normative and partisan convictions, which may vary from one administration to the next.

The core provisions of the Voting Rights Act are permanent. Basic Fifteenth Amendment rights are secure. The issue today is the reauthorization of the emergency provisions that were constitutionally radical and thus initially expected to last only five years. What, precisely, is needed forty-one years later? Congress has time to take great care in answering that question.