

Testimony of
Mr. Roger Clegg

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TESTIMONY OF
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BEFORE THE
SENATE JUDICIARY COMMITTEE
REGARDING THE

REAUTHORIZATION OF THE VOTING RIGHTS ACT

July 13, 2006

Introduction

Thank you, Mr. Chairman, for the opportunity to testify this afternoon before the Committee.

My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Sterling, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991.

The House bill about which I have been asked to testify this afternoon--which, among other things, reauthorizes the Section 5 and Section 203 provisions of the Voting Rights Act-- is bad policy from beginning to end, and unconstitutional in many different ways to boot. The provisions to which I object are: (1) the reauthorization of Section 5; (2) the overruling of the Supreme Court's Bossier Parish decisions; (3) the overruling of the Supreme Court's Georgia v. Ashcroft decision; and (4) the reauthorization of Section 203. (I would also note that, in the bill's section 3, there is a racial classification--page 8, line 24--that will have to withstand strict scrutiny if it is to be upheld as constitutional.)

Let me begin by quoting something to you:

And today, in the American South, in--in 1965, there was less than a hundred elected black officials. Today, there are several thousand. The Voting Rights Act of 1965 has literally transformed not just southern politics, but American politics. ...

Well, I think during the past 25 years, you have seen a maturity on the part of the electorate and on the part of many candidates. I think many voters, white and black voters, in metro Atlanta and elsewhere in Georgia, have been able to see black candidates get out and campaign and work

hard for all voters. ...

So there has been a transformation. It's a different state, it's a different political climate, it's a different political environment. It's a different world that we live in, really. ...

The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance. ... [I]t's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.

That's not me. That's John Lewis, in a sworn deposition in the Georgia v. Ashcroft litigation.

Justice O'Connor found that testimony credible. Let me read you how she concluded her opinion for the Supreme Court in that case:

The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. ... As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." ... While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.

But the bill that you are considering today will ignore what John Lewis said about the changes in the South, and it would explicitly overturn Justice O'Connor's decision in Georgia v. Ashcroft.

It would also ignore the warning that Justice Scalia gave in Bossier Parish, about the limits of Congress's authority.

And, at a time when we are struggling with the issue of immigration, and where the one thing that everyone ought to be able to agree on is that we need to focus more attention on how to make sure that those coming to our country can become integrated into our society, that we strengthen the social glue holding that society together, and that all of us be able at least to communicate with one another, this bill would tell immigrants

--hey, if you can't speak English, no problem, Congress will even force local governments to print ballots in foreign languages.

This bill is bad for those immigrants, because it says that you can be a full participant in American democracy without knowing English, which is a lie. This bill is bad for everyone, because it perpetuates the racial gerrymandering and racial segregation that is now an inextricable by-product of the Section 5 preclearance process. In fact, it makes that process worse by overturning the Bossier Parish and Georgia v. Ashcroft decisions.

All of this is bad policy, and it is also unconstitutional. Sometimes the bill exceeds Congress's

authority because it has no plausible record basis in enforcing the law against racial discrimination in voting, and sometimes it violates principles of federalism, and sometimes it actually turns the Constitution on its head and tries to guarantee racial gerrymandering and racial segregation.

I am not happy to say this, Mr. Chairman, but I believe I must: What I am afraid has happened is that Democratic Representatives are afraid in this area to do anything that might offend some minority incumbents and some of their minority constituents; their Republican counterparts are afraid to be called racist by various demagogues and interest groups; and both parties, especially Republicans, are politically happy with segregated districts and uncompetitive contests.

I hope that there will be enough Representatives and Senators, or a President, out there who take seriously enough their oaths to the Constitution; who are willing to stand up to those who will call anyone a racist who stands in the way of their liberal agenda; and who will not let short-sighted political calculations tempt them from constitutional principle and the principle of nondiscrimination and nonsegregation.

The Reauthorization of Section 5

The Two Basic Issues Raised by Section 5

Section 5 requires certain jurisdictions--called "covered jurisdictions"--to "preclear" changes in, to quote the statute itself, "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" with the U.S. Department of Justice or the U.S. District Court for the District of Columbia. This includes anything from a relatively minor change (like moving a voting booth from an elementary school to the high school across the street) to an undoubtedly major change (like redrawing a state's congressional districts). The change cannot be precleared unless it is determined that it--to quote the new bill's language--"neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."

Section 5 raises constitutional issues for two reasons, and I think that these two reasons together are likely to create judicial concerns greater than their sum alone. First, there are federalism concerns insofar as it requires states (and state instrumentalities, like cities and counties) to get advance federal approval in areas traditionally--and, often, textually, by the language of the Constitution itself--committed to state discretion. These federalism concerns are potentially heightened by the fact that some states are covered and others are not, especially if there is no compelling factual justification for the distinction. Second, since the federal government can bar a proposed change that has a racially disproportionate "effect" but not a racially discriminatory "purpose," Congress potentially exceeds its enforcement authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, since those two amendments ban state disparate treatment on the basis of race but not mere disparate impact on that basis.

Congress may have been confident that it was acting within its authority when it first passed the Voting Rights Act in 1965, but both the facts and the law have changed over the past 40 years.

The Shifting Factual and Legal Landscapes

As to the facts, few would dispute that a great deal of progress has been made over the last 40 years in eliminating the scourge of state-sponsored racial discrimination, particularly in the South (which is where most of the covered jurisdictions are). No one would deny that there is still additional progress to be made against racial discrimination generally, and in voting, too, but the facts are not there to justify singling out the jurisdictions delineated under Section 5 for the extraordinarily intrusive requirements of that section. (Worse, as I read the bill, it makes Section 5 permanent--there is no longer even a 25-year expiration date.)

Congress has heard testimony from Professor Ronald Keith Gaddie and from my colleague Edward Blum. And it has before it the exhaustive, and unrebutted, studies published by the American Enterprise Institute. All this makes quite clear that (a) there is no crisis in voting rights in 2006 compared to what there was in 1965, and (b) there is no appreciable difference in the voting rights enjoyed in covered jurisdictions versus noncovered jurisdictions. Why are Texas and Arizona covered, and not New Mexico, Oklahoma, and Arkansas? Why some counties in Florida and North Carolina, and not others? Why some boroughs in New York City, and not others?

I have gone through the House record, and thought I would share with you some of my thoughts about it. Regarding it, I would make four points.

First, I am struck by how one-sided it is. For instance, in the 170 pages of hearings on Georgia v. Ashcroft, I don't think that there is a single submission that defends Justice O'Connor's opinion. I don't think there was a single panel where more than one of the witnesses opposed reauthorization. I don't recall a single government official who testified or submitted a statement against reauthorization of Section 5.

Second, it seems to me that the evidence that the House did produce is almost all scattered and anecdotal rather than systematic and statistical. What's more, much of it is not even about purposeful discrimination, which is what you need to be able to cite. A Justice Department preclearance denial based on effect--even of a proposed at-large system, which seems almost as reviled now as literacy tests--does not help the bill, nor does a study of post-1982 Section 2 litigation (since such litigation typically asserts only a disproportionate "result").

Third, very little if any of the evidence compares covered jurisdictions to noncovered jurisdictions, and what comparisons there are undermine the bill. For example, one of the few discussions that compares, even implicitly, covered and noncovered jurisdictions--the statement by Charles D. Walton of the National Commission on the Voting Rights Act--concludes that "discrimination in voting and in election processes in the northeastern states is a significant problem" and that there would be "a great benefit to having more of the country covered by the pre-clearance provisions of Section 5"; likewise, a law review article by Laughlin McDonald of the ACLU's Voting Rights Project is entitled "The Need to Expand the Coverage of Section 5 of the Voting Rights Act in Indian Country," and would do so "throughout the West"; the July 20, 2005, letter that Rep. William Lacy Clay submitted to the National Commission on the Voting Rights Act complained mostly about Florida and Missouri (as did Jonah Goldman); the statement

of attorney Stephen Laudig complained about Indiana; Rep. Gwen Moore complained about Milwaukee; Alice Tregay complained about Chicago; Ihsan Ali Alkhatib complained about Detroit; Marlon Primes complained about Ohio; in general, the National Commission on the Voting Rights Act held hearings all over the country, and all over the country it found problems--sometimes in covered jurisdictions, but often not.

Fourth, there is very little if any discussion of why the extraordinary preclearance mechanism--and the use of an effects test--is the only, let alone the best, means to address the intentional discrimination that does arise.

In sum, the record reads like an attempt--and not a particularly skillful one--to justify after the fact a decision that had already been made.

Let's just go through each of the nine "Findings" of the House bill: "(1)" admits the "[s]ignificant progress" that has been made; "(2)" asserts that "vestiges of discrimination ... demonstrated by second generation barriers" still exist, but if these undefined "vestiges" and "barriers" are not purposeful, then they do not help the bill; "(3)" cites "racially polarized voting," but this alone is no evidence of a denial of voting rights, and certainly not unless the reason for the polarization is race rather than simply legitimate differences of political opinion, and is belied by the AEI studies anyway; "(4)" cites enforcement activities of the Department of Justice, but fails to mention that--based on the House's own record (see June 14, 2005, Statement of Joseph D. Rich before the National Commission on the Voting Rights Act)--more than 99 percent of proposed changes are precleared (the percentage of objections since 1995 is less than 0.2 percent, according to the Justice Department, see Serial No. 109-79, p. 2596); and, of course, this finding tells us nothing about the critical questions of whether the actions at issue were purposefully discriminatory and whether covered jurisdictions have more voting rights violations than noncovered ones; "(5)" cites evidence on the continued need for observer coverage in covered jurisdictions (but, again, no comparison is made with noncovered jurisdictions, and this observer provision in uncontroversial anyway); "(6)" criticizes the Supreme Court's *Bossier Parish II* and *Georgia v. Ashcroft* decisions, but without giving any legal or factual specifics (indeed, the Court's decisions were consistent with the intent of Section 5, and overturning them, in any event, would raise constitutional problems; I've also noted the failure of the record to include any pro-*Georgia v. Ashcroft* views); "(7)" again asserts, but again without defining, the existence of "vestiges of discrimination"; "(8)" is essentially the same as Finding (4); and "(9)" is a broad and, as we have now seen, unsubstantiated conclusion.

As to the law, during the time since the Voting Rights Act was first enacted in 1965, the Supreme Court has made clear that the Fourteenth Amendment bans only disparate treatment, not state actions that have only a disparate impact and were undertaken without regard to race. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977) ("Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."). A plurality of the Court has drawn the same distinction for the Fifteenth Amendment. *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality opinion) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of freedom to vote 'on account of race, color, or previous condition of servitude.'" (quoting the Fifteenth Amendment)).

The Supreme Court has also ruled even more recently that Congress can use its enforcement authority under the Fourteenth Amendment to ban actions with only a disparate impact only if those bans have a "congruence and proportionality" to the end of ensuring no disparate treatment. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). It is likely that this limitation applies also to the Fifteenth Amendment; there is no reason to think that Congress's enforcement authority would be different under the Fourteenth Amendment than under the Fifteenth, when the two were ratified within 19 months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed have both been used to ensure our citizens' voting rights.

Finally, the Supreme Court has, in any number of recent decisions, stressed its commitment to principles of federalism and to ensuring the division of powers between the federal government and state governments. See, e.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). It has also stressed what is obvious from the text of the Constitution: "The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995).

The Unconstitutionality of Reauthorizing Section 5

Putting all this together, it is very likely that the courts will look hard at a law that requires states and state instrumentalities to ask permission of the federal government before taking action in areas that are traditionally, even textually, committed to state discretion under the Constitution, and to meet a much more difficult standard for legality than is found in the Constitution itself.

It is true that in the leading case *City of Boerne v. Flores*, the Court explicitly distinguished the actions Congress had taken under the Voting Rights Act. On the other hand, however, in doing so it stressed Congress's careful findings and rifle-shot provisions. 521 U.S. at 532-33. If Congress were to reauthorize Section 5 without ensuring its congruence and proportionality to the end of banning disparate treatment on the basis of race in voting--which is exactly what the bill we are discussing today would do--the language in *Flores* could as easily be cited against the new statute's constitutionality as in its favor. Likewise, the Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)--upholding Congress's abrogation of state immunity under the federal Family and Medical Leave Act--also stressed Congress's factual findings and the challenged statute's limited scope.

One frequently noted byproduct of the use of the effects test--under both Section 5 and Section 2--has been racial gerrymandering. It is ironic that the Voting Rights Act should be used to encourage the segregation of voting, but it has. In the closing pages of his opinion for the Court in *Miller v. Johnson*, 515 U.S. 900 (1995), Justice Kennedy noted the constitutional problems raised for the statute if it is interpreted to require such gerrymandering. (The Supreme Court has likewise, in the employment context, noted the danger of effects tests leading to more, rather than less, disparate treatment. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 992-94 & n.2 (1988) (plurality opinion); *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J. concurring in judgment).) This byproduct of racial gerrymandering obviously raises a policy problem of the Voting Rights Act, in addition to the constitutional one.

Congress does not have before it evidence on which it can base a conclusion that the preclearance approach and the "effects" test are necessary to ensure that the right to vote is not "denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," to quote the Fifteenth Amendment. To the contrary, the evidence--especially the AEI studies, cited above--points in the opposite direction. Without these findings, a reauthorized Section 5 does not pass the tests of constitutionality the Supreme Court has set out. The problems that remain are national in scope, and to focus on only particular jurisdictions makes no policy sense and aggravates federalism concerns. If the problems remain regional or remain only in even more widely scattered jurisdictions, then applying the statute's preclearance provisions where they are no longer justified also aggravates federalism concerns. The test in the statute that determines whether a statute is covered or not is, after all, based on data that are three decades old.

Section 5 has had other bad side effects. The segregated districts it has created have contributed to a lack of competitiveness in elections; more extreme and fewer swing districts; the insulation of Republican officeholders from minority voters and issues of particular interest to their communities (to the detriment of both the officeholders and the communities); and, conversely, the insulation of minority officeholders from white voters, making it harder for those officeholders to run for statewide or other larger-jurisdiction positions.

Section 5 of the Voting Rights Act is no longer fashioned to do the best job it can to guarantee the right to vote, and no longer does so in a way that consistent with the principle of federalism--which, after all, is also a bulwark against government abridgment of our rights as citizens.

Overturning the Bossier Parish Decisions

The Voting Rights Act's two most prominent provisions are Section 2, 42 U.S.C. 1973, and Section 5, 42 U.S.C. 1973c. Section 2 applies nationwide, and bans any racially discriminatory "voting qualification or prerequisite to voting or standard, practice, or procedure." Discrimination is defined in terms of a controversial "results" test. It is controversial because it defines discrimination differently than it is defined in the Constitution itself, and because it inevitably drives jurisdictions to do exactly what the Constitution itself proscribes, namely act with an eye on race and ethnicity.

Section 5, on the other hand--and as I've already discussed--is not nationwide in scope. Rather, it requires certain jurisdictions--called "covered jurisdictions"--to "preclear" voting changes.

In two decisions over the past decade, the Supreme Court explained how Section 2 and Section 5 fit together. In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) (Bossier Parish I), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (Bossier Parish II), the Supreme Court held that, because Section 5 is aimed at changes in voting practices undertaken in order to evade the Fifteenth Amendment, it is violated only if the changes at issue are retrogressive in "purpose" or "effect." Thus, it is not permissible to refuse to preclear a changed practice or procedure simply because it may contain a violation of Section 2 (Bossier Parish I) or may reflect a discriminatory purpose (Bossier Parish II); the change must also be retrogressive.

The Bossier Parish decisions were rightly decided. As Justice O'Connor wrote for the Court in Bossier Parish I, "we have consistently understood these sections [i.e., Sections 2 and 5] to combat different evils and, accordingly, to impose very different duties upon the States." As I read it, however, Section 5 of the new bill would overturn both decisions; Section 5's new subsection (b) takes care of Bossier Parish I, and its new subsection (c) takes care of Bossier Parish II. (I see in Finding (6) that only Bossier Parish II is criticized, but even if you intend to overrule only it, in doing so you are also in effect overruling Bossier Parish I, because the bureaucrats at the Justice Department will be able to say that the failure to correct a Section 2 problem--and to maximize the political advantage of a protected racial group--is evidence of discriminatory purpose.)

In my view, this is bad policy and unconstitutional. I'm sure that some will argue, for instance, What's wrong with the Justice Department holding up a change if it contains a potential Section 2 violation? But the problem is that, in truth, we don't know whether there is a Section 2 violation or not. Generally, we would have just one side's opinion about that, without a trial or a formal hearing or anything of the sort. As the Supreme Court recognized in Bossier Parish II, Section 5 contains "extraordinary burden-shifting procedures." And, while Section 5 is normally aimed at a simple determination of backsliding *vel non*, determining a Section 2 or purpose violation requires a difficult legal appraisal and, factually, weighing the "totality of the circumstances"--something much better left to conventional litigation. See generally Abigail M. Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987).

Indeed, as a practical matter, the government's opinion is likely to be that of a low-level bureaucrat. And it is one thing to give that person, whoever he or she is, the authority to hold up a change; it is something else to give that person the effective authority to order changes where none were being made. It can no longer be claimed that all the Department is trying to do is thwart changes designed to keep one step ahead of the enforcement of the law. Now, moreover, all that person at the Department will have to point to is some statement in a voluminous record that, taken out of context, shows bad purpose; indeed, not even that is necessary if the preclearance involves a practice (like voter ID) that someone at the Department believes has inherently a bad purpose.

This shift further jeopardizes the statute's constitutionality. In his opinion for the Court in Bossier Parish II, Justice Scalia wrote: "Such a reading would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), perhaps to the extent of raising concerns about Section 5's constitutionality, see *Miller [v. Johnson]*, 515 U.S. 900, [926-927] [(1995)]."

These problems are further exacerbated by the fact that, because Section 2 uses a constitutionally problematic "results" test, the Justice Department would be able to refuse to preclear, for instance, a redistricting plan that it felt had not been redrawn to contain "enough" minority-majority districts--even though the submitted plan contained no fewer such districts than it had in the past. The Department could likewise claim that the failure to "improve" voting lines demonstrates discriminatory "purpose"--and, once again, gerrymandered districts (of either the majority-minority or influence/coalition variety) would be ordered even though there had been no retrogression. This fear is hardly an unfounded one, since the Court itself has noted the

Department's record in the past of coercing this sort of gerrymandering. *Miller v. Johnson*, 515 U.S. 900 (1995).

Finally, let me note another unhappy side-effect of overturning the Bossier Parish decisions. If the Justice Department refused to preclear a change that actually diminished discrimination but not by enough to make the Department happy--because it didn't diminish it enough--the result would be to leave in place the more discriminatory status quo. It would be better and fairer to everyone to approve the change (improving matters) and then also bring a separate lawsuit under Section 2 (which, if successful, might improve matters still further). See *Bossier Parish II*, 528 U.S. at 335-336.

Overturning *Georgia v. Ashcroft*

The bill we are discussing today also adds a final subsection to Section 5, stating that the focus of the law now would be just on whether a new provision protects citizens' ability "to elect their preferred candidates of choice." The purpose of this new subsection is to overturn Justice O'Connor's opinion in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Justice O'Connor wrote in that opinion that compliance with Section 5 had to be based on "the totality of the circumstances," not just on "the comparative ability of a minority group to elect a candidate of its choice." She relied in part on the testimony of Rep. John Lewis (D-Ga.).

The new bill rejects that broad approach, because it insufficiently guarantees the creation of majority-minority districts. The purpose of the provision is to demand the use of racial classifications that the Supreme Court has ruled will always trigger strict scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). Worse, the bill demands the segregation of voting districts *uber alles*, as the *sine qua non* for Section 5 preclearance of redistricting. In doing so, as I noted above, it also rejects the penultimate paragraph in Justice O'Connor's opinion for the Supreme Court in *Georgia v. Ashcroft*: The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. Cf. *Johnson v. De Grandy*, 512 U. S., at 1020; *Shaw v. Reno*, 509 U. S., at 657. As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." Pl. Exh. 21, at 14. While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life. See *Shaw v. Reno*, *supra*, at 657.

In addition, I would note that there is a good chance that the courts will interpret what the bill actually says as freezing into place not only majority-minority districts, but also influence or coalition districts. The latter will include districts, that is, in which a racial minority may make up a very small percentage of the voting population (for instance, Rep. Martin Frost's district that was at issue in the Texas redistricting case just decided by the Supreme Court). After all, an

influence or coalition district can be said to ensure that the voters in question are able "to elect their preferred candidates of choice," and parts of Justice O'Connor's opinion in *Georgia v. Ashcroft* supports that interpretation (see, e.g., 539 U.S. at 480: "In order to maximize the electoral success of a minority group, a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely--although perhaps not quite as likely as under the benchmark plan--that minority voters will be able to elect candidates of their choice.") (citations omitted); see also her quotation from *Johnson v. De Grandy*, two paragraphs later).

Reauthorizing Section 203

Finally, let me turn to the reauthorization for 25 years of the foreign-language ballot provisions of the Voting Rights Act, 42 U.S.C. 1973aa-1a, commonly referred to as Section 203, which is accomplished by Section 7 of the new bill. My discussion below is drawn from Linda Chavez's testimony before this subcommittee last fall; she is the chairman of the Center for Equal Opportunity. Similar points were also made for the subcommittee's record by K.C. McAlpin of ProEnglish and Jim Boulet, Jr., of English First.

Section 203 requires certain jurisdictions to provide all election-related materials, as well as the ballots themselves, in foreign languages. The jurisdictions are those where more than 5 percent of the voting-age citizens are members of a particular language minority, and where the illiteracy rate of such persons is higher than the national illiteracy rate. The language minority groups are limited to American Indians, Asian Americans, Alaskan Natives, and those "of Spanish heritage." Where the language of the minority group is oral or unwritten, then oral voting assistance is required in that language.

There are basically three policy problems with Section 203 that I would like to discuss today. First, it encourages the balkanization of our country. Second, it facilitates voter fraud. And, third, it wastes the taxpayers' money. In addition to these policy problems, in my view Section 203 is unconstitutional because, although Congress asserts it has enacted this law pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments, in fact this statute actually exceeds that authority.

Section 203 Balkanizes Our Country

America is a multiethnic, multiracial nation. It always has been, and this is a source of national pride and strength. But our motto is *E pluribus unum*--out of many, one--and this means that, while we come from all over the globe, we are also united as Americans.

This unity means that we hold certain things in common. We celebrate the same democratic values, for instance, share the American dream of success through hard work, cherish our many freedoms, and champion political equality. Our common bonds must also include an ability to communicate with one another. Our political order and our economic health demand it.

Accordingly, the government should be encouraging our citizens to be fluent in English, which,

as a practical matter, is our national language. And, in any event, the government certainly should not discourage people from mastering English, and should not send any signals that mastering English is unimportant. Doing so does recent immigrants no favor, since true participation in American democracy requires knowing English. See Jose Enrique Idler, *En Ingles, Por Favor*, National Review Online, March 8, 2006, available at <http://www.nationalreview.com/comment/idler200603080757.asp>.

Inevitably, however, that is what the federal government does when it demands that ballots be printed in foreign languages. It also devalues citizenship for those who have mastered English as part of the naturalization process. As Boston University president John Silber noted in his 1996 congressional testimony, bilingual ballots "impose an unacceptable cost by degrading the very concept of the citizen to that of someone lost in a country whose public discourse is incomprehensible to him." Quoted in John J. Miller, *The Unmaking of Americans: How Multiculturalism Has Undermined America's Assimilation Ethic* (1998), page 133.

Section 203 Facilitates Voter Fraud

Most Americans are baffled by the foreign-language ballot law. They know that, with few exceptions, only citizens can vote. And they know that, again with only few exceptions, only those who speak English can become citizens. So why is it necessary to have ballots printed in foreign languages?

It's a good question, and there really is no persuasive answer to it. As a practical matter, there are very few citizens who need non-English ballots.

There are, however, a great many noncitizens who can use non-English ballots. And the problem of noncitizens voting is a real one. The Justice Department has brought numerous criminal prosecutions regarding noncitizen voting in Florida, as documented in a recent official report. Criminal Division, Public Integrity Section, U.S. Department of Justice, *Election Fraud Prosecution and Convictions, Ballot Access & Voting Integrity Initiative*, October 2002 - September 2005. This problem was mentioned years ago by Linda Chavez (*Out of the Barrio*, page 133), and has been extensively reported on in the press. See Ishikawa Scott, "Illegal Voters," *Honolulu Advertiser*, Sept. 9, 2000; Dayton Kevin, "City Steps Up Search for Illegal Voters," *Honolulu Advertiser*, Sept. 9, 2000; Audrey Hudson, "Ineligible Voters May Have Cast a Number of Florida Ballots," *Washington Times*, Nov. 29, 2000 ("A sizable number of Florida votes may have been cast by ineligible felons, illegal immigrants and noncitizens, according to election observers. ...This would not be the first time votes by illegal immigrants became an issue after Election Day. Former Republican Rep. Robert K. Dornan of California was defeated by Democrat Loretta Sanchez by 984 votes in the 1996 election. State officials found that at least 300 votes were cast illegally by noncitizens."); "14 Illegal Aliens Reportedly Voted," *KSL NewsRadio 1160*, Aug. 8, 2005; Associated Press, *Untitled* (first sentence: "Maricopa County Attorney Andrew Thomas has charged 10 legal residents who are not U.S. citizens with fraudulently registering to vote, and more residents are being investigated, he said."), Aug. 12, 2005; Joe Stinebaker, "Loophole Lets Foreigners Illegally Vote," *Houston Chronicle*, Jan. 17, 2005; Lisa Riley Roche & Deborah Bulkeley, "Senators Target License Abuses," *Desert Morning News*, Feb. 10, 2005; Teresa Borden, "Scheme To Get Noncitizens on Rolls Alleged," *Atlanta*

Journal-Constitution, Oct. 28, 2004; Associated Press, "Harris County Cracking Down on Voting by Non-U.S. Citizens," Houston Chronicle, Jan. 16, 2005; John Fund's Political Diary, Wall Street Journal, Oct. 23, 2000 (voter fraud a growing problem since "47 states don't require any proof of U.S. residence for enrollment"); Doug Bandow, "Lopez Losing," American Spectator, Oct. 28, 2005 (Nativo Lopez's Hermandad Mexicana Nacional "registered 364 non-citizens to vote in the 1996 congressional race in which Democrat Loretta Sanchez defeated incumbent Republican Bob Dornan").

Section 203 Wastes Government Resources

As I just noted, there are few citizens who need ballots and other election materials printed for them in languages other than English. The requirement that, nonetheless, such materials must be printed is therefore wasteful.

On the one hand, the cost of printing the additional materials is high. It is a classic, and substantial, unfunded mandate. For example, Los Angeles County had to spend over \$1.1 million in 1996 to provide Spanish, Chinese, Vietnamese, Japanese, and Filipino assistance. General Accounting Office, Bilingual Voting Assistance: Assistance Provided and Costs (May 1997), pages 20-21. Six years later, in 2002, it had to spend \$3.3 million. Associated Press, "30 States Have Bilingual Ballots," Sept. 25, 2002. There are 296 counties in 30 states now that are required to have such materials, and the number is growing rapidly. See "English Is Broken Here," Policy Review, Sept-Oct. 1996. Frequently the cost of multilingual voter assistance is more than half of a jurisdiction's total election costs. GAO May 1997, pages 20-21. If corners are cut, the likelihood of translation errors increases. (Indeed, the inevitability of some translation errors, no matter how much is spent, is another argument for why all voters need to master English. See *The Unmaking of Americans*, page 133; Amy Taxin, "O.C.'s Foreign-Language Ballots Might Be Lost in Translation: Phrasing Is Found To Differ by County, Leading to Multiple Interpretations and Possibly Confusion for Some Voters," Orange County Register, Nov. 3, 2005; "Sample S.J. Ballot Contains Error: Spanish Translation Doesn't Make Sense," Stockton Record, Feb. 27, 2003; Jim Boulet, "Bilingual Chaos," National Review Online, Dec. 19, 2000; English First Foundation Issue Brief, Bilingual Ballots: Election Fairness or Fraud? (1997), available at <http://www.englishfirst.org/ballots/efbb.htm>.)

On the other hand, the use made of the additional materials is low. According to a 1986 General Accounting Office study, nearly half of the jurisdictions that provided estimates said no one--not a single person--used oral minority-language assistance, and more than half likewise said no one used their written minority-language assistance. Covered jurisdictions said that generally language assistance "was not needed" by a 10-1 margin, and an even larger majority said that providing assistance was either "very costly or a waste of money." General Accounting Office, Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election, Sept. 1986, pages 25, 32, 39. According to Yuba County, California's registrar of voters: "In my 16 years on this job, I have received only one request for Spanish literature from any of my constituents." Yet in 1996 the county had to spend \$30,000 on such materials for primary and general elections. *The Unmaking of Americans*, page 134.

What's more, to quote again from John J. Miller's excellent book, *The Unmaking of Americans: How Multiculturalism Has Undermined America's Assimilation Ethic* (1998), pages 242-243:

Getting rid of foreign-language ballots "does not mean that immigrant voters who still have difficulty communicating in English would not be without recourse. There is a long tradition in the United States of ethnic newspapers--often printed in languages other than English--providing political guidance to readers in the form of sample ballots and visual aids that explain how to vote. It would surely continue." I should add that Mr. Miller concluded that "Congress should amend the Voting Rights Act to stop the Department of Justice from coercing local communities to print election materials in foreign languages."

In sum, as a simple matter of dollars and cents, foreign-language ballots are just not worth it. The money would be much better spent on improving election equipment and combating voter fraud.

Section 203 Is Unconstitutional

Finally, Mr. Chairman, I would suggest that Section 203 raises serious constitutional problems, and, if it is reenacted, should be struck down as unconstitutional.

As I noted above, the Supreme Court has made clear that only purposeful discrimination--actually treating people differently on the basis of race or ethnicity--violates the Fourteenth and Fifteenth Amendments. See *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1976); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Court has ruled even more recently that Congress can use its enforcement authority to ban actions that have only a disparate impact only if those bans have a "congruence and proportionality" to the end of ensuring no disparate treatment. *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also *United States v. Lopez*, 514 U.S. 549 (1995). This limitation is likely to be even stricter when the federal statute in question involves areas usually considered a matter of state authority. See, e.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

Now, it seems to me very unlikely that the practice of printing ballots in English and not in foreign languages would be a violation of the Fourteenth or Fifteenth Amendments--that is, it is very unlikely that this practice could be shown to be rooted in a desire to deny people the right to vote because of race or ethnicity. See *Out of the Barrio*, page 46; see also Abigail Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987), pages 40, 57. Rather, it has perfectly legitimate roots: To avoid facilitating fraud, to discourage balkanization, and to conserve scarce state and local resources. Accordingly, Congress cannot assert that, in order to prevent discrimination in voting, it has authority to tell state and local officials that they must print ballots in foreign languages.

The rather garbled text of Section 203, however, apparently says that Congress was concerned not with discrimination in voting per se, but with educational disparities. That is, the poorer education that, say, Latinos receive is what makes foreign-language ballots necessary. Of course, if these disparities are not rooted in discrimination, then there remains a problem with Congress asserting its power under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment to require bilingual ballots. But let us assume that Congress did have in mind unequal educational opportunities rooted in educational discrimination, presumably by the states.

Even here, I think there are insurmountable problems. There is, in short, a lack of congruence and proportionality between the asserted discrimination in education and the foreign-language ballot mandate in Section 203. Are all the language minorities covered by Section 203 subjected

to government discrimination in education--and, if not, then why are all of them covered? Are there language minorities that are subject to government discrimination that are not covered by Section 203--and, if so, then why aren't they covered? How often does education discrimination result in an individual not becoming fluent enough in English to cast a ballot? Isn't it much more likely that this lack of fluency has some other cause (like recent immigration, most obviously, or growing up in an environment where English is not spoken enough)? Finally, is it a congruent and proportional response to education discrimination to force states to make ballots available in foreign languages? How likely is Section 203 to result in the elimination of education discrimination? Does this "remedy" justify Congress's overruling of the legitimate reasons that states have for printing ballots in English and not in foreign languages?

Congress has not and cannot answer these questions satisfactorily.

Does anyone really believe that the reason for Section 203 has anything to do with remedying state discrimination in education? Of course not. As Linda Chavez discussed in *Out of the Barrio*, the Voting Rights Act of 1965 was motivated by a desire to stop discrimination; the later expansion of the Voting Rights Act at the behest of Latino special interest groups was simply about identity politics. There was little factual record established even to show that Hispanics were being systematically denied the right to vote. This disenfranchisement would have been particularly difficult to demonstrate in light of the number of Hispanics who had previously been elected to office, which included Governors, U.S. Senators, Members of the House of Representatives, as well as numerous state legislators and local officials, many of these officials serving in jurisdictions that would soon be subject to the special provisions of the Voting Rights Act. See also Thernstrom, chapter 3. There is no credible way to equate the discrimination that African Americans in the South suffered to the situation of Latinos, who had voted--and been elected to office--in great numbers for decades. That was true when Section 203 was first enacted, and it is even more true now, which is what matters for purposes of reauthorization. The reason for the bilingual ballot provision is not and never has been about discrimination--it is about identity politics.

Conclusion and Discussion of *LULAC v. Perry*

In my conclusion, I would like to focus specifically on the divergence between what the Voting Rights Act was supposed to be and what it has become. That divergence is in many ways dramatized by the Supreme Court's recent decision in *LULAC v. Perry* (June 28, 2006).

The purpose of the VRA was to stop racial discrimination in voting. In some jurisdictions prior to 1965, specifically in the Deep South, there was no question that African Americans, in particular, were disenfranchised. So Section 2 of the VRA prohibited that, and Section 5 of the VRA fashioned an ingenious and effective mechanism to stop this discrimination. Many states had been quite devious in avoiding federal law enforcement by constantly changing the methods through which disenfranchisement was accomplished, and so Section 5 said that any change related to voting procedures had to be precleared by the federal government. This was intended to catch, among other things, racial gerrymandering that was designed to prevent African Americans from electing their candidates of choice.

The VRA has diverged from this original purpose in two ways. The first way is that there really is no longer any rhyme or reason in which jurisdictions are covered and which ones aren't. Let's face it: We all know that. After several decades, we would expect to need to update the trigger mechanism--looking at more recent elections or more recent records of voting violations. But we all also know that this would result in many jurisdictions no longer being covered, and perhaps adding to the VRA's coverage mechanism a number of new jurisdictions, and it is hard to say which would be more politically unpopular.

The other way the VRA has diverged from its original stated purpose is even more disturbing. It is not being used to stop racial gerrymandering; it is being used to require it.

Sometimes that motivation is overtly racial. There is no doubt in my mind that the Voting Rights Act is being used to foster segregation in voting districts, and is being used to try to ensure something like racial proportionality in legislatures. But at least four of the justices in *Perry* acknowledged that, while generally the reapportionment there was about politics, not race, what racial gerrymandering did take place was required by the VRA. It is disturbing to see a civil-rights statute twisted into a partisan-political device, and this abuse is committed by both parties.

For instance, in Texas, Republicans were not seeking to dilute anyone's voting power because of race; they were focused on people's voting power because of party--not always a particularly noble focus, but one that is as old as Elbridge Gerry, at least--but the Democrats wanted to stop them and so they tried, with some success, to use the Voting Rights Act to do it. Likewise, in *Georgia v. Ashcroft*, the Democrats weren't trying to hurt black voters or help them, per se; they just wanted to try to win more seats for Democrats. But their efforts were challenged under the Voting Rights Act because it was the tool at hand.

Incidentally, the same kind of abuse can also happen in ways that don't involve gerrymandering, but do involve other voting practices or procedures that are objected to, ostensibly because they are racially discriminatory, but really because for partisan purposes. For instance, I suspect that absentee-ballot procedures, limitations on felons voting, and voter-identification and other antifraud laws are all challenged sometimes, not because anyone really believes that they are intended to be racially discriminatory, but because one side thinks these rules will hurt their voter turnout, and their disparate racial impact allows the VRA to be invoked for, again, a partisan political end.

The good news is that, in 2006, neither party wants to stop anyone from voting because of race; all either party cares about is winning. There is no candidate in either party who would not be thrilled with 100 percent black registration and turnout, so long as the candidate was also confident that those voters would vote for him or her.

The "racial polarization" that is often the centerpiece of VRA litigation is an increasingly incoherent concept. Whites and blacks may frequently vote differently in some jurisdictions, but it is not about race or discrimination--it is just about differences in political opinion on issues like taxes and national defense.

But because African Americans vote so overwhelmingly Democratic, any effects test in the

voting area can be readily invoked for partisan purposes--sometimes by one party, sometimes by the other. For instance, for years Republicans have tried--sometimes successfully, although those days may be ending--to use an effects test to pack African Americans into a relatively few districts, thus bleaching all the other, surrounding districts white, with the end result that there are lots of Republican districts and just a few black ones, especially in jurisdictions (like the South) where the white voters tend to be conservative. Conversely, Democrats can argue that restrictions on felon voting (which disproportionately affects blacks) violates the Voting Rights Act; they are also likely to argue that "wasting" black votes by overpacking minority-majority districts violates the Voting Rights Act; in *Perry*, they argued that reapportionment aimed at helping Republicans was racially discriminatory. And even without an effects test in Section 5, the preemptory power that it gives the Executive Branch allows it to object if it thinks the discriminatory effect is good evidence of discriminatory intent.

As I have already discussed, the intrusiveness of Section 5 into traditionally state functions, its use of a constitutionally ultra-vires effects test, and its now-established track record in pushing jurisdictions toward racial segregation and gerrymandering in redistricting--all combine to make Section 5 unconstitutional.

Well, what is to be done? The obvious answer is, don't renew Section 5. The case law is too bad and the temptations to abuse it are too great. At the same time, there is overwhelming evidence that it has outlived its (originally noble) purpose.

If Congress insists that it cannot go cold turkey, then at least it should not make Section 5 worse. The two *Bossier Parish* decisions have modestly limited its scope and its potential abuses; they should not be overturned. *Georgia v. Ashcroft* also belongs in this category. The current House bill not only overturns *Georgia v. Ashcroft*, but replaces it with a provision that is muddy at best, will lead to years of more litigation, and probably will have results that its drafters never intended. I would add that, the more this provision's meaning is clarified to ensure that it requires the creation of majority-minority districts, the more clearly unconstitutional it will be as well. The case law that has grown up around Section 5 makes its meaning nearly incomprehensible already; Congress should not make matters worse by adding language, the meaning of which its own members cannot agree on.

I would also not extend Section 5--or Section 203--for another 25 years. The shorter the extension, the better--especially if Congress changes the statute in ways that might have unintended consequences. I would also try to put in place a better, more objective review mechanism, probably in the statute itself. Congress must undertake a serious, systematic comparison of voter registration and participation rates by race in covered versus noncovered jurisdictions, with an effort to determine the actual causes of any racial disparities, and specifically whether those causes are discrimination--and if there are more limited and effective remedies for any discrimination than the preemption mechanism and an effects test. It should undertake the same sort of covered-versus-noncovered comparison to see in which jurisdictions actual violations of the Fifteenth Amendment of any kind are occurring. Above all, Congress should not extend the law and then forget about it and its effects for another 25 years, and then scramble and try to figure out what to do about it in the heat of another election year.

But, really, by far the best course is to declare victory and let Section 5 and Section 203 lapse. Let me conclude, Mr. Chairman, by quoting Chief Justice Roberts in the Perry case: "It is a sordid business, this divvying us up by race." As a matter of public policy and constitutional law, Section 5 and Section 203 should not be reauthorized; in any event, the Supreme Court's *Bossier Parish* and *Georgia v. Ashcroft* decisions should not be overturned.

Thank you very much, Mr. Chairman, for the opportunity to present this testimony today.