

**Answers by Juan Cartagena,
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To Written Questions From Senator Schumer
Of The Senate Judiciary Committee
23 June 2006**

1. The proposed reauthorization bill, S.2703, addresses the Supreme Court's decision in *Reno v. Bossier Parish Scholl Board*, 528 U.S.320(2000) (*Bossier Parish II*) by clarifying that a voting rule change motivated by any discriminatory purpose cannot be precleared under Section 5 of the Voting Rights Act.
 - a. Do you support this change? Why or Why not?
 - b. In your views, is the Supreme Court's decision in *Bossier II* consistent with Congress's original intent in enacting Section 5?
 - c. Please provide two or three examples of voting changes that could not have been precleared before *Bossier II* but were required to be precleared after *Bossier II*.
 - d. What impact has *Bossier II* had on minority voting rights and the ability of the Department of Justice to object to discriminatory voting changes under Section 5?
 - e. Would restoring the pre-*Bossier II* standard to Section 5 be constitutional?

Answer: I make only a few points with regard to the proposed changes addressing the decision in Reno v. Bossier Parish School Board because other witnesses in these hearings have provided excellent analysis which I fully support. See, Testimony of Brenda Wright before the House Subcommittee on the Constitution, November 1, 2005; Testimony of Professor Pamela Karlan before the Senate Judiciary Committee, May 16, 2006. In New York the difficulties created by the narrow Supreme Court interpretation in Reno have not been realized as far as I know. I say that without the benefit of any Section 5 conclusions made since the decision in 2000 – that is, without the benefit of any information that would inform the Committee of decisions not to interpose an objection because of the narrow interpretation of discriminatory intent embodied in the Reno decision. However, it is difficult to understand how purposeful discrimination against racial and language minorities cannot violate Section 5, only retrogressive intent can violate that section of the VRA under Reno. Where jurisdictions have purposefully taken actions to lock out racial and language minorities from political power those acts – no matter where they occur in the U.S. – are an affront to the very goals of the VRA – irrespective of whether there was “retrogressive intent.” Moreover, there can be no constitutional difficulties in prohibiting under Section 5 all unconstitutional discrimination touching upon the right to vote –

discrimination which would also violate the 14th and 15th Amendments to the Constitution. Restoring Section 5 preclearance review to a pre-Reno standard would make Section 5 consistent with the prohibitions in these Constitutional amendments.

2. The proposed bill also addresses the Supreme Court's decision *Georgia v. Ashcroft*, 539 U.S. 461 (2003), by clarifying that the purpose of Section 5 of the Voting Rights Act is to protect the ability of minority citizens to elect their preferred candidates of choice.
 - a. Do you support this change? Why or Why not?
 - b. In your view, is the Supreme Court's decision in *Georgia v. Ashcroft*, consistent with Congress's original intent in enacting Section 5?
 - c. Does the bill, as drafted, adequately restore the pre-*Georgia v. Ashcroft* standard?
 - d. What are the problems both substantively and logistically, with allowing covered jurisdictions to substitute "influence districts" for districts which preserve minority voters' ability to elect their preferred candidates of choice?
 - e. What would be the consequences for minority voters in covered jurisdiction if the bill did not address *Georgia v. Ashcroft* in the way that it currently does?
 - f. Some law professors argue that restoring Section 5 to its pre-*Georgia v. Ashcroft* standard would make it harder for the bill to pass constitutional muster under the *City of Boerne v. Flores* lines of cases. Do you agree? What are the best arguments in defense of this change?
 - g. Others have suggested that the pre-*Georgia v. Ashcroft* standard requires covered jurisdictions to pack minority voters into fewer districts. Do you agree that the bill, as drafted, requires packing? Under the current bill, could districts that are not majority-minority still be considered districts in which minority voters have the ability to elect their preferred candidates of choice? If so, please give an example.

Answer: We support the proposed change to restore Section 5 review in redistricting matters to its pre-Georgia v. Ashcroft standard for essentially two reasons: The "ability to elect" standard in place before the opinion was rendered is administrable and workable in both the courts and in the administrative preclearance review. Secondly, for Latino voters in particular, the nebulous "influence" standard poses more substantial risks that endanger their ability to elect candidates of choice.

Specifically, trading the straightforward, “ability to elect” non-retrogressive test for an “influence” standard that requires under Georgia v. Ashcroft, an assessment of what “influence” means in post-election governance, results in trading a bright-line test for an as yet undefined test. The “ability to elect” standard, as well as the existence of racially polarized voting, already requires case-specific analysis. An “influence” standard equally requires a case-specific inquiry but it may also be used to disguise purposefully discriminatory or retrogressive actions by the submitting authority. Ultimately, as the Supreme Court noted, the new “influence” standard responds to a need to provide flexibility to the States to choose among theories of effective representation. Georgia v. Ashcroft, 539 U.S. 461, 482 (2003). In this regard, I urge the Committee to follow the conclusions reached by Professor Pamela Karlan in her testimony before this Committee on May 16, 2006, in which she noted that if the choice is among theories of effective representation, Congress clearly has the constitutional power to make the choice, citing previous examples in the past of how Congress made similar choices. That choice should be in favor of an “ability to elect” standard, rather than the unformed “influence” standard.

Equally important, however, are the comments I made previously in response to Senator Cornyn’s written questions: that is, that Section 5’s “ability to elect” standard is critical for providing full and fair access for Latino voters to elect candidates of choice. I respectfully set forth a portion of that previous response:

“Ability-to-elect districts are critical to the Latino community at this time. Indeed, as I and other writers have noted, the bulk of the Georgia v. Ashcroft debate going on nationally fails to account for how the new Supreme Court interpretation affects Latino voting strength; indeed it appears to threaten the very gains that have been made over the years. See, Cartagena, J. “Latinos and Section 5 of the Voting Rights Act: Beyond Black and White,” 18 National Black Law Journal (No. 2) 201 (2005)(appended to my testimony before this Committee.); Alvaro Bedoya, “The Unforeseen Effects of Georgia v. Ashcroft on the Latino Community,” 115 Yale Law Journal 2112 (2006). Latinos are rarely elected outside Latino-majority districts (where they clearly have an ability to elect), such that these districts are critical to their ability to integrate the halls of legislative power, as opposed to the unsubstantiated and purported benefits to Latinos of coalitional or influence districts. Bedoya, A., *supra*, 115 Yale Law Journal at 2136. Moreover, Latinos residing in Section 5 covered jurisdictions, 11.2 million, are quickly approaching the number of African-Americans living in covered jurisdictions (12.7 million) signifying that Section 5 – its reauthorization and restoration – is not merely a black-white issue. *Id.* at 2121-2128, tbl. 1. This provides additional justification for the proposed section to restore Section 5 review to a pre-Georgia v. Ashcroft standard.”

3. The proposed bill would amend Section 14 of the Voting Rights Act allow prevailing parties to recover “reasonable expert fees” and “other reasonable litigation expenses” in addition to reasonable attorneys’ fees.
 - a. Do you support this change? Why or why not?

- b. Please explain the importance of expert testimony in voting rights litigation.
- c. What are the costs associated with expert testimony and what impact do they have on victims of voting discrimination?
- d. Are you familiar with provision of expert witness fees in other civil rights statutes and if so, are there any constitutional issues that we should be aware of?

*Answer: We support the change to allow the recovery of expert fees along with attorneys' fees in Voting Rights Act cases. The role of private attorneys general is a necessary element in the enforcement of the VRA – unfortunately few organizations (or law firms) are in the position to advance the funds necessary to litigate these cases. The Community Service Society, an independent, non-profit advocacy and research organization is one of the few that can do so and we have used the VRA to ensure fair and nondiscriminatory election practices in New York since 1989 as part of our mission to increase the opportunities for political participation of poor, marginalized communities. Recovery of attorneys' fees, and expert fees as proposed by this change, would allow nonprofit organizations like CSS to use the proceeds to continue to launch new cases where necessary. As part of our engagement in Section 2 litigation (e.g., United Parents Associations v. New York City Board of Elections challenging New York's nonvoting purge laws) and Section 5 preclearance review (e.g. CSS's comments urging denial of preclearance for the initial New York City Council redistricting plan of 1992), we have relied upon experts in a few general areas: Political Scientists (or equivalent social scientists) capable of conducting ecological regressions of voting data for the purposes of demonstrating the existence of racially polarized voting or demonstrating the racially discriminatory effects of institutional barriers to the vote; Historians capable of documenting New York State constitutional and legislative history touching upon the right to vote; Demographers capable of mapping out alternative redistricting scenarios; and Criminal Justice experts capable of addressing the intersection between race and the criminal justice system and its impact on voting eligibility. There is no question that expert testimony is an indispensable part of litigation in all challenges to redistricting plans, at-large election structures, or proportional representation schemes. Indeed, the seminal case of Thornberg v. Gingles, 478 U.S. 30 (1986) clearly indicates how courts must rely upon social science expert data to establish critical components of racially polarized voting for the purposes of proving Section 2 violations. Our experience in cases raising other challenges under Section 2 also evidences the need to use expert testimony in related areas as well given the broad scope of relevant Section 2 evidence. The Supreme Court in Thornberg v. Gingles identified this broad inquiry when it noted that "[T]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." (*Id.* at 47). In general, CSS will budget expert fees at \$15,000 per expert,*

depending on the circumstances of the case. I am unaware of any constitutional issues that would preclude the changes to the VRA proposed by this provision, since recouping litigation costs is part of Congress' overall goal to rely upon private attorneys general to enforce essential civil and constitutional rights in the U.S.

4. The proposed bill would amend Section 203 to reflect the fact that after 2010, the American Community Survey (ACS), which will be administered annually, will replace the long form census. The bill provides that, consistent with this change, coverage under Section 203 shall be determined based upon information compiled by the ACS on a rolling five-year average.

a. Do you support this change? Why or why not?

Answer: We would support the change to include more recent Census data to update the list of covered jurisdictions under Section 203. The right to vote is too important a right to delay impede or otherwise fail to make meaningfully available to American citizens who speak English as a second language. Using ACS data would allow jurisdictions to respond to changing demographics in a way to ensure full access to the voting booth for these American citizens.

b. In your view, does this change bolster or weaken the constitutionality of Section 203?

Answer: As I noted in my testimony before this Committee in May, Section 203 is already self-maintaining because it adjusts itself to changing demographic patterns. Using the ACS data only enhances this important feature of Section 203. In effect, conditioning coverage on the existence of objective data, which now will be available sooner, makes Section 203 more narrowly tailored to the harm it seeks to remedy, therefore, bolstering its constitutionality. Along with the current bailout provisions of Section 203 (see Section 203(d)), this provision is proportional and congruent with the need that Congress has identified. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court upheld the constitutionality of a similar provision requiring language assistance to American citizens for whom English is a second language by noting that it is a proper use of Congressional power under the Civil War Amendments. Shortening the time frame in which the Attorney General can either add or omit covered jurisdictions can only ease any federalism concerns that may exist, especially considering the Supreme Court's subsequent announcement that "the Voting Rights Act, by its nature, intrudes on state sovereignty." Lopez v. Monterey, 525 U.S. 266, 285 (1999).