Senate Judiciary Committee
Testimony of Michael A. Carvin
Jones Day
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Mr. Chairman and distinguished members, I appreciate this opportunity to testify concerning the ongoing protections of the Voting Rights Act in the wake of the *Shelby County* decision.

A. SHELBY COUNTY OPINION

The Supreme Court's recent landmark decision in *Shelby County v. Holder* (June 25, 2013) is a very important step in protecting the individual liberty safeguarded by the Constitution's structural limitations, in restoring the rule of law, in reducing politically motivated racial gerrymandering and in confirming the Nation's tremendous strides in ensuring equal opportunity for minority voters. Simply put, the Supreme Court correctly found that the 2006 Congress had not even attempted to identify those jurisdictions where Section 5's extraordinary preclearance obligations were needed because Section 2's protections were somehow inadequate.

A few threshold points about the constitutional basis for enacting Section 5 will help explain both why the *Shelby County* decision was entirely correct, and why the demise of Section 5 will not adversely affect equal minority voting opportunities. First, as *Shelby County* noted, it is axiomatic that the federal government does not possess some general or plenary power to regulate states in conducting elections. Slip. Op. at 10-11. Rather, as the Court has repeatedly noted, "the Framers of the Constitution intended the states to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 10, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991). Nor, of course, does Congress have a "general right to review and veto state enactments before they go into effect." *Id.* at 9. In light of this, it has always been recognized that any potential congressional power to impose preclearance must be found in the

enforcement clauses of the Fourteenth and Fifteenth Amendments, which authorize Congress to "enforce" the Fourteenth and Fifteenth Amendment's prohibitions against abridging voting rights on account of race. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308-310 (1966); *Shelby County*, Slip. Op. at 20. These Amendments, however, prohibit only *intentional* discrimination in voting; *i.e.*, disparate treatment of voters based on their race. *Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, while Congress has very broad power to "enforce" these nondiscrimination commands, it can only enact laws with some nexus to eradicating or remedying such purposeful discrimination—it cannot enact laws not fairly described as enforcing purposeful discrimination prohibitions, simply because the laws "help" minorities. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

The dispositive constitutional question, then, is whether Section 5 is needed to enforce the Civil War Amendments' prohibitions against purposeful discrimination, even though Section 2 of the VRA already prophylactically prevents any such potential discrimination, by prohibiting even *neutral* actions that have disproportionate "*results*" for minority voters. 42 U.S.C. § 1973(a). In prior cases, the Court found that Section 5 served a permissible enforcement role precisely and only because its extraordinary preclearance regime was necessary to supplement Section 2, by effectively curing problems that were difficult to resolve through Section 2's "case-by-case litigation." *See Katzenbach*, 383 U.S. at 328; *City of Rome v. United States*, 446 U.S. 156 (1980). The inference that Section 5 played a valuable supplementary role was quite reasonable in the 1960s and 1970s, given the level of entrenched Southern intransigence and the limited scope of Section 2, which in those decades only prohibited *purposeful* discrimination. *See Mobile* at 66. But, given the dramatic improvements in the covered jurisdictions since the 1960's and the fact that Section 2 has been

greatly expanded to now prohibit discriminatory "results," it is quite difficult to infer that Section 5's extraordinary and extra-constitutional regime is needed *on top of* Section 2's very effective remedies. And if Section 2 is effective at preventing and remedying unconstitutional discrimination in the covered jurisdictions, then Section 5's burdens are, by definition, gratuitous and unnecessary to vindicate the Constitution's guarantees.

Notwithstanding this obvious requirement, Congress in 2006 failed to provide any basis for concluding that ordinary litigation under Section 2 of the Voting Rights Act continues to be ineffective. Neither the statutory findings nor the House or Senate Reports contain any such conclusions regarding covered jurisdictions' conduct when Section 2 cases are being litigated or enforced. Instead, the congressional record shows that "[b]latantly discriminatory evasions of federal decrees are rare." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009).

The absence of findings concerning Section 2's inadequacies shows that there is no cognizable need—and therefore no adequate constitutional justification—for extending Section 5. If Section 2 broadly and effectively precludes all actions with a discriminatory "result"—as it does—there is simply no need to supplement this effective antidiscrimination law with the burdensome preclearance requirement, just as it would be unconstitutional to supplement Title VII's "effects test" with a law requiring employers to preclear all hiring decisions with the Justice Department by proving the absence of such effect.

In fact, the legislative record clearly demonstrates that Section 5 no longer targets the states where discrimination is most pervasive. As the Supreme Court emphasized in *Northwest Austin*, even "supporters of extending § 5" acknowledged that "the evidence in the record" fails to identify "systematic differences between the covered and the non-

covered areas" and "in fact … suggests that there is more similarity than difference." 557 U.S. at 204 (quoting Professor Richard Pildes). For example, as *Shelby County* noted, the evidence before the 2006 Congress showed virtually equal black-white turnout rates in the covered jurisdictions (with minority turnout steadily improving through 2012); a minority participation rate that is *better* than the general pattern seen in non-covered jurisdictions. *Shelby County*, Slip. Op. at 15. Indeed, *every* Justice in *Northwest Austin* directly warned Congress in 2009 about the inadequacies of an out-dated formula which fails to show that Section 5 problems are still "concentrated in the jurisdictions singled out for preclearance," and confirmed that Section 5 "*must* be justified by *current* needs." *Nw. Austin*, 557 U.S. at 2003; *accord id.* at 226 (opinion of Thomas, J.). Nonetheless, Congress took no steps after 2009 to update the coverage formula or identify "current[ly]" problematic jurisdictions.

More important, Congress in *2006* consciously *avoided* examining whether there was a "current need" for Section 5 (with or without Section 2), by refusing to tailor the preclearance burden to those jurisdictions which had the worst voting discrimination in 2006. Instead, Congress continued to rely on election data that was 34 to 42 years old to determine which jurisdictions would be covered. *See id.* at 199-200; *see also* 42 U.S.C. §§ 1973b(b), 1973c(a). Such reliance on outdated election data does not make sense, just as it would not have made sense for the Congress in 1965 to rely on data from the election of Calvin Coolidge to determine which states should be covered by Section 5.

Supporters of Section 5 argue that the 2006 Congress did make valid findings of "second generation" discrimination—*i.e.*, "racial gerrymandering" and "at-large voting" systems that "dilute" minority groups' aggregate "voting strength," as opposed to "first generation" barriers to an individual's right to vote—because there are allegedly more successful Section 2 suits in

covered jurisdictions than there are outside. *Shelby County*, Slip. Op. at 5, 19-21 (Ginsburg, J. dissenting). But this Section 2 evidence cannot justify the perpetuation of Section 5 for a number of reasons.

First, and most obviously, the 2006 Congress did not *use* the Section 2 evidence to identify the jurisdictions where preclearance is needed. It did not tie the coverage formula to the Section 2 evidence concerning "second generation" discrimination, but to the 40-year-old data which reflects "first generation" ballot access discrimination. Obviously, any congressional effort to arbitrarily extend preclearance to, say, all states east of the Mississippi River, would not be permissible just because statistical evidence showed higher concentrations of Section 2 suits east of the River. Congress' *selection methodology* itself must be justified. If Congress thinks that the level of Section 2 lawsuits is a proper basis for identifying jurisdictions which need Justice Department oversight under Section 5 preclearance, then it needs to tie the coverage formula to these Section 2 suits—not 40-year-old information concerning ballot access.

Second, any evidence that Section 2 suits are generally more prevalent in covered jurisdictions undermines, rather than supports, the notion that perpetuating Section 5 in those jurisdictions is needed. Again, the question is not whether discrimination persists in the covered jurisdictions or exceeds that in the non-covered jurisdictions, but, rather, whether the discrimination in those jurisdictions can be effectively remedied by Section 2 without burdensome Section 5 preclearance. If the 2006 Congressional record does actually show successful results in Section 2 proceedings in covered jurisdictions, this further confirms that Section 5 has outlived any useful role, since "case-by-case litigation" under Section 2 is now quite adequate to remedy discrimination in those jurisdictions. *See Katzenbach*, 383 U.S. at 328.

Finally, this Section 2 evidence does not, in fact, reflect any cognizable differences between the covered jurisdictions and the noncovered jurisdictions. For example, five of the ten states with the greatest number of successful Section 2 lawsuits are noncovered jurisdictions (and six of the top ten states where racially polarized voting has been most often found). *See* "Katz Report," *Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong. at 974, 1019-20 (October 18, 2005). Any statistical disparity concerning the covered jurisdictions simply reflects that the South disproportionately had or has more at-large systems and many more jurisdictions where minorities can constitute a majority in a single-member district—a necessary prerequisite to making a Section 2 challenge. (At-large electoral systems were the principal focus of the amended Section 2 and the lawsuits brought under it, because those systems were viewed as the "most significant" cause of minority vote dilution. *See* S. Rep. No. 417, S. Rep. 97-417, 97 (1982); *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986).)

Thus, the Court had ample reason to strike down the amended Section 5's coverage forumla.

B. MINORITY VOTING RIGHTS UNDER SECTION 2, WITHOUT SECTION 5.

In response to all this, Section 5's proponents nonetheless contend that Section 2 is somehow inadequate to protect minority voting equality. Relatedly, they argue that these alleged inadequacies will lead to inequities in minority voting now that Section 5's coverage formula has been invalidated. But this assertion rests on gross distortions concerning both Section 2's ineffectiveness and Section 5's relative importance in ending voting discrimination.

1. The most obvious falsehood is that Section 2 litigation focuses on voting problems "only after the fact," requiring tolerance of illegal voting schemes "for several electoral cycles" so that a "§ 2 plaintiff can gather sufficient evidence to challenge" the system. *Shelby*

County, Slip Op. at 14 (Ginsburg, J., dissenting.) This is demonstrably untrue. It is quite clear that Section 2 vote dilution challenges to redistricting schemes occur in the same time-frame and are based on the same evidence as any Section 5 redistricting dispute. Virtually all Section 2 challenges are brought before the first election under a new redistricting scheme and all of them rely on precisely the same analysis of racially polarized voting and potential minority success as is analyzed in Section 5 cases. That is, both Section 2 and Section 5 courts project future minority electoral success and racially polarized voting based on past electoral returns. There is no reason to believe, and no evidence to suggest, that courts adjudicating Section 2 challenges are somewhat slower than the D.C. courts resolving Section 5 challenges. If anything, experience proves otherwise. In the highly published challenge to Texas' statewide redistricting, for example, the Texas three-judge-court adjudicating the Section 2 challenges resolved the case and entered a remedial plan in November of 2011, while the D.C. three-judge-court waited until late August of 2012 to resolve the Section 5 challenge, well past the time needed for relief that could effectively cure any problems prior to the upcoming elections. *See Perez v. Perry*, 835 F. Supp.2d. 209 (W.D. Tex. 2011); *Texas v. United States*, 2012 WL 3671924 (D.D.C. Aug. 28, 2012).

Thus, Section 2 is just as effective in addressing single-member redistricting schemes as is Section 5. Moreover, with respect to minority vote dilution caused by *at-large* schemes, Section 2 is markedly *more* effective than Section 5. Section 5 is inherently incapable of dismantling the dilutive at-large election schemes that were prevalent in the South because it only reviews voting *changes*, and no jurisdiction desiring to dilute minority voting strength would *change* its at-large system to a single-member scheme. Thus, Section 2, not Section 5,

was virtually the exclusive voting rights vehicle for eliminating racially dilutive at-large systems. *See, e.g., Gingles* at 79-80.

2. In short, Section 2 clearly addresses the "second generation" vote dilution issues referenced by the 2006 Congress at least as well as Section 5. Apparently recognizing this, some Section 5 proponents now switch gears and contend that Section 2 somehow does not adequately respond to "*first generation*" discriminatory denials of ballot access. Again, this is obviously untrue. The 2006 Congress unequivocally found that "first generation" ballot access discrimination—such as moving polling places or unreasonable voter qualification requirements—was not a special problem in covered jurisdictions, especially given that minority registration and turnout in those areas equaled or exceeded the rate in noncovered jurisdictions. *See Shelby County*, Slip Op. at 14-15. Since all agree that Section 2 is adequate to ensure nondiscriminatory minority voting participation in noncovered jurisdictions, and since such participation is *higher* in the covered jurisdictions, it necessarily follows that Section 2 is adequate in the covered jurisdictions—eliminating the need for additional Section 5 burdens.

More specifically, there is nothing to the notion that Section 2 somehow cannot address discriminatory ballot access barriers. While they have been constantly mentioned in connection with the *Shelby County* case, moving polling places has never been a significant source of Section 5 objections or controversies, and were not cited by the 2006 Congress as a sufficient basis for requiring continued preclearance. In all events, the reality is that Section 2 is more than capable of dealing with the extremely rare instances of discriminatory polling place relocations just before an election. Any litigant would simply obtain a TRO or preliminary injunction to prevent the move, presenting precisely the same evidence of inconvenienced minority voters that would be relied on in a Section 5 challenge.

In this regard, I note that the most controversial "ballot access" issue of the day—voter ID requirements—are just as (if not more than) prevalent in noncovered jurisdictions as they are in covered. *See* http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (list of states with voter identification laws). Moreover, voter ID requirements in covered jurisdictions have almost uniformly been *upheld* against Section 5 challenges. The *only* exception was the ID law enacted in Texas and, even in that case, there was concededly no objective proof that minorities would be disproportionately harmed or affected by the law. *See Texas v. Holder*, 2012 WL 3743676 (D.D.C. Aug. 30, 2012). Among other things:

- Minority turnout *increased* after voter ID laws were enacted in Georgia and Indiana. *See* Proposed Findings of Fact & Conclusions of Law ¶ 25 (DE 202);
- It was undisputed that, after Indiana and Georgia enacted a voter identification law, "virtually no Georgia or Indiana voters reported being turned away from the polls because of a lack of photo ID." *Texas*, 2012 WL 3743676, at *15;
- It was undisputed that "this finding remained constant across racial lines." *Id.*;
- There was no "reliable evidence" showing that minorities disproportionately lacked photo identification in Texas. *Id.* at *26.

Despite the lack of evidence of any *disparate impact* on minority voters, the Section 5 court denied preclearance based on rank speculation that it will be more difficult for blacks and Hispanics who currently lack voter identification to obtain voter identification because minorities are disproportionately less wealthy. *Id.* at *27-29. But this speculation is misguided because the relevant comparison is between minorities and whites who *lacked voter identification*—and no evidence supports the counter-intuitive notion that, within the relatively poor group lacking ID, minorities are disproportionately unable to pay the modest fee to obtain

such ID. In sum, save for the illogical , flawed *Texas* decision, there is no evidence or finding that voter ID rules discriminatorily exclude minorities, nor any evidence that Section 5 typically invalidates such requirements.

3. It is also claimed that Section 5's demise will somehow lead to an increase in racial gerrymandering, but just the opposite is true. Far from being a deterrent to racial gerrymandering, Section 5 has been the moving force behind most of these gerrymandered districts. As has been extensively documented, the Justice Department in the 1990s used its Section 5 powers to impose a "black-max" districting policy on covered jurisdictions, requiring them to discard traditional districting principles to maximize the number of grotesque majority-minority districts. *See Miller v. Johnson*, 515 U.S. 900, 921 (1995). Indeed, every racially gerrymandered district invalidated under *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny is directly traceable to the Justice Department's requirement to mandate such districts, even though they were irreconcilable with traditional districting principles.

In addition to being a powerful engine for racial gerrymanders, Section 5 has also been extensively used to require political line-drawing to advance parochial partisan interests. In the 1990 and 2000 redistricting cycles, Republicans used Section 5 to create or maintain *majority-minority* districts, because those districts served their political interests. (Majority-minority districts typically benefit Republicans because it makes the adjacent, predominantly white districts more amenable to Republican success.) *See, e.g.*, Steven Hill, *How the Voting Rights Act Hurts Democrats and Minorities*, The Atlantic, June 17, 2013 ("The GOP has found the VRA to be a great ally . . . [because] as traditionally applied, it has helped the party win a great number of legislative races.").

In the latest round of redistricting, Democrats used Section 5 as a partisan tool to preclude any diminution of their potential electoral success. For example, last year's decision in *Texas v. United States*, No. 11–1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) squarely held that Section 5 prohibits diminishing the electoral fortunes of *white* Democrats solely because they receive the support of most minority voters in general elections, even though there is no indication that the district could elect a *minority* Democratic candidate or of racially polarized voting. *Id.* at *38-44. Specifically, the *Texas* court concluded that Section 5 protected the district of white Democratic Congressman Lloyd Doggett, even though whites constituted the vast majority of voters in his district. *Id.* at *39. Consequently, far from protecting minority voters against denials of *equal* opportunity "on account of *race*," Section 5 granted *preferential* partisan treatment of the nonminority candidate preferred by minorities in general elections (virtually always the Democratic candidate), in every district where there was a cognizable minority population. Needless to say, such a preference for one political party has nothing to do with protecting minorities against race-based discrimination and therefore has nothing to do with enforcing the Fourteenth and Fifteenth Amendments' guarantees of racial equality in voting.

In short, Section 5 adds nothing to Section 2's protection of equal racial opportunities, but grants preferential treatment and guaranteed success to certain political parties. The Supreme Court has frequently noted the constitutional concerns created by interpreting Section 5 in any such preferential manner, and it consistently interpreted the statute to avoid that result. *See e.g.*, *Northwest Austin*, 557 U.S. at 203; *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) ("considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under §

5"); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000) (*Bossier II*). Nonetheless, the 2006 Congress *overturned* the two decisions raising these constitutional warnings and reversed their interpretation of Section 5 to make it even more preferential. *See Shelby County*, Slip Op. at 16. Specifically, the 2006 Congress created a quota floor for minority electoral success, by prohibiting any diminution in minorities' "ability to elect" their preferred candidates, regardless of whether changing demographics and traditional districting principles compelled altering district lines in that manner. *See* 42 U.S.C. § 1973c(b), (d). *See also Shelby County v. Holder*, 679 F.3d 848, 886-87 (D.C. Cir. 2012) (Williams, Sr. Cir. J., dissenting). (This is the "racial entitlement" Justice Scalia referred to at the oral argument in *Shelby*.) The demise of Section 5 therefore will not threaten minorities' equal voting opportunities, but will simply help end use of the VRA as a partisan tool (by both major parties).

C. FUTURE LEGISLATION

Although I have not seen any specific proposals for amending Section 5, I can make a few general comments about any such potential efforts. First, it will be very difficult, if not impossible, to devise a coverage formula that accurately identifies jurisdictions where Section 5 is permissible "enforcement" legislation. Given the clear success of Section 2's "case-by-case litigation," Section 5 will rarely, if ever, be needed in any jurisdiction, much less a significant number of political subdivisions or states.

Similarly, it will be very difficult to devise or justify any kind of "national code" regarding ballot access. The enforcement clauses of the Fourteenth and Fifteenth Amendments provide no basis for such legislation because, as noted, there is no evidence or allegation that Section 5 is needed to combat discriminatory denials of *ballot access* (as opposed to "second generation" vote dilution). Moreover, it will be quite difficult to show that any state practice

preempted by the new national code is arguably unconstitutional discrimination, thus precluding the argument that the code is proper "enforcement" legislation directed at potentially purposeful discrimination. The Elections Clause also seemingly provides no basis for such a law, even in federal elections, because it is the *State's* responsibility to establish criteria and enforcement methods for determining "*who* may vote" in "federal elections." *See Arizona v. Inter Tribal Council of Arizona*, p. 13. (June 17, 2013).

At a minimum, since it is extremely doubtful that *Shelby County's* invalidation of Section 5 will somehow lead to increased denials of equal voting opportunities, it would be wise to wait and evaluate whether or not Section 5 actually is needed to supplement Section 2, or whether such case-by-case litigation is adequate, as it concededly is for *all* other federal laws prohibiting discrimination in employment, housing, etc..