

Testimony of

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Before the United States Senate Judiciary Committee

Legislative Hearing on "An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization"

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Section 5 Was Designed to Address Deeply Entrenched Racial Discrimination in Voting

This country's long and difficult struggle to eliminate persistent racial discrimination in voting is well documented. See e.g. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-314 (1966). Despite the enactment of the Fifteenth Amendment and the Enforcement Act of 1870, actions with an "unremitting and ingenious defiance of the constitution" denied the right to vote to African Americans. *Id.* at 309, 311. In fact, despite efforts from all branches of the federal government to eradicate the persistent problem, many states continued this pattern of racial discrimination in voting in the face of the Fifteenth Amendment for over one hundred years. Traditional legal remedies that provided a case-by-case assessment of racial discrimination did not effectively block or deter continued discrimination among states with a persistent history of vote denial because of race. *Id.* at 314. Recognizing the persistent and undeterred circumvention of the Civil War Amendments by some states, Congress reacted decisively in 1965 and committed itself irreversibly to what the Supreme Court has recognized as the "firm intention to rid the country of racial discrimination in voting" by enacting the Voting Rights Act ("VRA"). *Id.* at 315 (emphasis added). The expiring enforcement provisions of the VRA have allowed millions of Americans to realize their constitutional right to vote free from racial discrimination. We have not yet eliminated the entrenched discrimination in voting that gave rise to the VRA, and should therefore renew the expiring provisions.

The Voting Rights Act is the Exemplar of Congress's Civil War Amendment Enforcement Power
Congress has the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude today as it did in 1965. See U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2. It is well settled that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).
Arguments by covered jurisdictions inviting the Supreme Court to restrict the power granted to Congress through the Civil War Amendments and circumvent the application of laws designed to remedy racial discrimination in states with a history of discrimination are not new to the Voting Rights Act. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding several provisions of the VRA against constitutional attack); *City of Rome v. U.S.*, 446 U.S. 156 (1980) (rejecting a § 5 constitutional challenge); and *Lopez v. Monterey*, 525 U.S. 266 (1999) (same). Indeed, these efforts have followed the persistent voting discrimination to which the VRA addresses itself.

This Congress should not retreat from reauthorizing the expiring provisions of the VRA because of what some have

called a "New Federalism Revolution." On several occasions, the Supreme Court has addressed concerns of federalism and the application of the VRA and found that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, ...Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act." *City of Rome*, 446 U.S. at 180 (emphasis added). The VRA is "appropriate legislation." It is a carefully considered Act drafted to remedy a constitutionally grave harm to citizens who live in states with a history and continued evidence of persistent racial discrimination. In providing this protection in covered jurisdictions, Congress has consistently been acutely aware of the balance of federal power in intruding on state sovereignty. The Voting Rights Act always embodied respect for federalism principles even as it imposed its substantial remedies. Indeed, § 5 has always been limited as to scope, duration, and geographic reach. Section 4 incorporates the ability to bail-out from coverage as part of a system of incentives for compliance that is serious but achievable. The built-in periodic reassessments of progress and evaluation of further necessity is unique and well suited to the goal: of eradicating racial discrimination in voting, while also recognizing that its federalism costs require periodic review. See *South Carolina v. Katzenbach*, 383 U.S. at 315. "Limitations of this kind tend to ensure Congress' means are appropriate to ends legitimate under [the Fourteenth and Fifteenth Amendment]." See *City of Boerne*, 521 U.S. at 533.

Congruence and Proportionality

The "congruence and proportionality" judicial standard enunciated in *City of Boerne*, analyzes whether the "means" are appropriate to "legitimate ends." See *Id.* at 520. *Boerne* and its progeny began to place greater limitations on the enforcement powers of Congress under § 5 of the Fourteenth Amendment, and likely §2 of the Fifteenth Amendment, see *Lopez v. Monterey*, 525 U.S. at 282-283 (citing *City of Boerne*, 521 U.S. at 518) by requiring that Congress act only after careful assessment and documentation of a problem of constitutional magnitude. *Id.* at 530-532; *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). As recent Supreme Court precedents suggest, however, *Boerne* does not condemn all remedial legislation, especially when a Congressional enactment is related to fundamental constitutional rights. See *Lopez v. Monterey*, 525 U.S. 266 (1999) (upholding § 5 of the Voting Rights Act against federalism challenge in factual circumstances presenting clear federalism costs); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (upholding the FMLA against a *Boerne* challenge); *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Title II of the ADA against a *Boerne* challenge).

Consequently, while it is important for this Congress to take the *Boerne* cases into account in its deliberations and decision making, the limits of the *Boerne* doctrine must also be recognized: (1) the metes and bounds of the doctrine developed from *Boerne* through *Lane* and *U.S. v. Georgia*, do not provide crystal-clear legislative and decisional rules for Congress to follow; (2) Congress should not lightly assume that *Boerne* will be extended to reverse rulings from *Katzenbach* to *Lopez*, since in those decisions and in *Boerne* itself the Court recognized that when it enacted the VRA to protect the right to vote against racial discrimination, Congress's powers were at their "zenith"; and (3) when enacting remedial legislation that reaches individuals in classes afforded a heightened level of constitutional scrutiny, such as those defined by race or gender, "it is easier" for Congress to develop an adequate supportive record. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. at 735; see also *Tennessee v. Lane*, 541 U.S. at 529. This is consistent with the Court's recognition of the permitted intrusion into state sovereignty intended under the Fifteenth Amendment. *Lopez v. Monterey* at 285. Even under the *Boerne* decision it remains the case that the "appropriateness of the remedial measures must be considered in light of the evil presented" *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 308).

In the face of some uncertainty, it stands to reason that *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5 is the most instructive case on the appropriate analysis of § 5 of the Voting Rights Act under *Boerne* and its progeny. 525 U.S. 266 (1999). In *Lopez*, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance. *Id.* at 269. The Court again noted that *Boerne* recognized Congress's considerable enforcement power even if, in the process, Congress prohibits conduct that "is not itself constitutional and intrudes into legislative spheres of autonomy previously reserved to the states." *Id.* at 282-283; see also *Tennessee v. Lane*, 541 U.S. at 520. This prophylactic dimension of Congress's enforcement powers was previously explained by Congress in the 1982 renewal of the Voting Rights Act. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).

Boerne's Evidentiary Standard

"As a general matter, it is for Congress to determine the method by which it will reach a decision" to enact remedial legislation. *City of Boerne*, 521 U.S. at 532. The method Congress ultimately uses to reach a decision is granted broader latitude when Congress acts pursuant to the enforcement power provisions to remedy racial discrimination. See *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. 721, 735 (2003). The Supreme Court has focused on the detail of evidence in the record in some cases. *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000); *Bd of Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). However, in the case of protected categories subject to heightened scrutiny (i.e., race and gender), the Court has upheld legislation based upon a record sufficient to identify the existence of discriminatory practices without requiring a threshold quantum of evidence from different jurisdictions. *Hibbs*, 58 U.S. at 735 (noting "important shortcomings of some state policies") (emphasis added). Although the Supreme Court has not clearly established the requisite quantum of evidence, or exactly what form such evidence must take, compare *Treasurers of the Univ. of Alabama v. Garrett*, 531 U.S. 356 with *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. 721, recent precedents show that the body of evidence before Congress is appropriate in quantity, relevance, and focus. See e.g. *Tennessee v. Lane*, 541 U.S. at 558, *Nevada Dep't of Human Resources v. Hibbs*, 38 U.S. at 730. "Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionality appointed to decide.'" *Boerne* at 531-532. Here, the purpose of the Voting Rights Act is to eradicate racial discrimination in voting under the Fifteenth Amendment to the Constitution. This body is well within the scope of its power in deciding the appropriate means to remedy past violations and prevent future violations of the Fifteenth Amendment. Indeed, a fair reading of the Constitution supports the proposition that Congress's unique fact-finding expertise make it not only better situated to study a problem as fact finder but also better situated to assess what evidence most fully illuminates the dimensions of a constitutional problem.

After Boerne the Principal Constitutional Question Attending the VRA Renewal Is Whether Evidence of Continuing Discrimination Exists In Covered Jurisdictions

There is great deal of attention on the § 4 trigger which causes some to focus solely upon the legislative formula (use of a test or device plus turnout or registration below 50%) that was employed to determine the geographic scope of § 5 preclearance. The triggering formula, however, was a legislative proxy employed by Congress to reach many but by no means all of the jurisdictions that had serious histories of voting discrimination. The trigger has been upheld against constitutional challenge by the Supreme Court, see *Katzenbach*, and subsequent cases have not disturbed the ruling. See *Lopez*, 525 U.S. 266 (1999). The question that Congress must answer to its satisfaction is not what the trigger is or has been, but rather whether the record of discrimination compiled demonstrates that the problems of unlawful discrimination in voting persist in the covered jurisdictions. Although *Katzenbach*, and the authorities relied upon therein, stand for the proposition that Congress-in its discretion-need not address all facets of a problem at once or in precisely the same way, it must show the persistence of a pattern of discrimination sufficient to justify the continued use of its enforcement powers under the Civil War Amendments.

Moreover, in contrast to some of the statutes that have fallen under *Boerne* and its progeny, Congress is not now faced with new legislation designed to remedy a problem without established historical and jurisprudential precedent. The history and pattern of discrimination that Congress has examined in previous renewals is itself relevant to its decision as are the successes that § 5 has yielded where earlier legislative efforts failed.

The Efficacy of § 5 Justifies Renewal

The VRA was drafted to rid the country of racial discrimination - not simply to reduce racial discrimination in voting to what some view as a tolerable level. See *South Carolina v. Katzenbach*, 383 U.S. at 315 (emphasis added). This Congress need not draw the conclusion that improvements in the area of racial discrimination in voting, facilitated by § 5 and other VRA provisions provide the basis for weakening the effect of the Act in the face of continuing discrimination in voting. (See e.g. *LCCR Voting Rights in Louisiana: 1982-2006*, submitted to the House Judiciary Subcommittee on the Constitution, describing the State's modern experience with discrimination under the VRA, prepared by NAACP LDF).

Congress's retreat from enforcement of the Fifteenth Amendment in the 1870s led to a century of persistent discrimination that was not addressed in any meaningful sense until 1965. As we evaluate the improvements in political access enabled by the VRA, we cannot justify a retreat from the remedial and prophylactic VRA when there is still demonstrable evidence of racial discrimination. The record before Congress evidences continued discrimination in voting in the covered jurisdictions. The above-cited report is but one example of that evidence. The

record made in the House of Representatives includes substantial documentation of the persistence of intentional discrimination by state and local officials in § 5-covered jurisdictions. In the various State reports, in testimony at Subcommittee hearings, in the report of the National Commission on the Voting Rights Act, and in other materials that are a part of the record there are descriptions of both court rulings and § 5 objection letters that find discriminatory "purpose" as well as "effect" in voting changes under review.

There is also evidence of dilutive redistricting plans. As the Supreme Court has recognized, the redistricting process has, since the mid-1980s and unquestionably since the 1990 Census, been permeated with information about racial composition of census divisions and election districts that are the standard building blocks for districting plans, so that legislative bodies are always aware of the racial impact of the plans they are drawing. Retrogressive and dilutive results of modern redistrictings are evidence of purposeful discrimination, just as in an earlier era -- when such detailed, easily manipulable, information was less common -- the "uncouth twenty-eight-sided figure" defining the redrawn boundaries of Tuskegee, Alabama so as "to remove from the city all save only four or five of its 400 [previous] Negro voters while not removing a single white voter or resident" was conclusive evidence of unconstitutional discrimination. *Gomillion v. Lightfoot*, 364 U.S. 339 (1961).

Therefore, the suggestion that intentionally discriminatory conduct has disappeared from the voting arena in covered jurisdictions to such an extent that § 5 protections are no longer necessary, rests upon some unrealistically narrow definition of what constitutes "intentional discrimination." As Professor Hasen puts it: "Bull Connor is dead." But make no mistake about whether future generations have learned to act intentionally to achieve discriminatory and retrogressive results without openly admitting their purposes -- because, in the words of the late Justice Harry Blackmun, "it is no longer fashionable to be a racist."

The Attorney General's Pre-Bossier II Standards for Detecting Discriminatory Purpose

Under well-established Supreme Court precedent, the discriminatory effect of a voting change sheds light on the purpose for which it is enacted. *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) [hereinafter *Bossier II*]. Moreover, in the circumstances presented by the current renewal, where Congress is evaluating the necessity for continued and remedial prophylactic legislation, its long experience with the persistence and adaptability of voting discrimination places discriminatory voting effects relevant to Congress's inquiry. As the Senate Report accompanying the 1982 reenactment of the VRA explained, Congress intended the Act "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally." S. Rep. No. 417 at 5.

From the time of the 1982 reenactment of § 5 until the Supreme Court's decision in *Bossier II*, the Supreme Court consistently held that § 5 should be interpreted so as to enforce the constitutional prohibitions against voting changes enacted with racially discriminatory purpose. /

Similarly, prior to *Bossier II*, in over 30 years of enforcement of the Voting Rights Act the United States Department of Justice ("DOJ") had consistently read § 5 to require covered jurisdictions to show that their voting changes were enacted without an unconstitutionally discriminatory purpose. / The DOJ had never limited its purpose analysis to a search for "retrogressive intent." Instead, guidelines indicated that "the Attorney General [] consider[s] whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution." 28 C.F.R. § 51.55(a).

Senate Bill 2703 would restore § 5 to the pre-*Bossier II* standard and allow the DOJ to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the VRA. Once that standard is restored, both judicial and administrative preclearance determinations will appropriately turn to, and rely upon, the Supreme Court guideposts for evaluating discrimination. Indeed, in the earlier *Bossier Parish* case, *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), provides the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. The *Arlington Heights* framework requires careful consideration of whether the "the impact of the official action" "bears more heavily on one race than another," the historical background of the jurisdiction's decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements by members of the decision making body. *Arlington Heights*, 429 U.S. at 266-68. Numerous cases arising under § 5 have approved of or adapted this standard to help ferret out discriminatory intent in the § 5 process. /

The DOJ, adopting an analytical approach that mirrors that of the courts in this context, has successfully employed the Arlington Heights test to ferret out those voting changes infected with discriminatory purpose. With respect to redistricting submissions, in conducting an analysis under Arlington Heights factors, the DOJ has traditionally analyzed the following factors (28 C.F.R. § 51.59):

- (a) the extent to which malapportioned districts deny or abridge the right to vote of minority citizens;
- (b) the extent to which minority voting strength is diminished or reduced by the proposed redistricting;
- (c) the extent to which groups of concentrated minority voters are fragmented among different districts;
- (d) the extent to which minority voters are packed or over-concentrated into one or more districts;
- (e) whether or not alternative plans were considered that satisfy the jurisdiction's legitimate redistricting goals and governmental interests;
- (f) the extent to which the redistricting plan departs from objective redistricting criteria, and ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards natural or artificial boundaries; and
- (g) the extent to which the plan is inconsistent with the redistricting goals defined by the jurisdiction. (28 C.F.R. § 51.60).

Most recently, in April 2005, the DOJ utilized the Arlington Heights framework in determining that the redistricting plan for the Town of Delhi, Louisiana, was not entitled to preclearance. Employing the analytical framework of Arlington Heights, the DOJ denied preclearance after determining that the plan was motivated by an intent to regress. The DOJ determined that town officials sought to worsen the position of minority voters by looking first to the historical background of the City's decision, which revealed that the plan was adopted despite steadily increasing growth in the Town's Black population. In addition, the DOJ noted that: the redistricting was not driven by any constitutional or statistical necessity; that the board rejected a less regressive alternative plan that complied with traditional redistricting principles; that the resulting regression was avoidable; and that the plan was adopted despite the counsel of the Town's demographer who noted the regressive effect of the plan.

The DOJ's past and present use of the Arlington Heights framework to identify those instances in which discriminatory purpose infects a proposed voting change makes clear that there is an objective and workable standard, sanctioned by the Supreme Court, to ferret out those changes enacted with an unconstitutional discriminatory purpose. The proposed legislation will restore the muscle of § 5 which has long stood as one of the federal government's principal weapons in its arsenal against unconstitutional racial discrimination in voting. The Arlington Heights framework has provided, and would continue to provide under the pending bill, the contours around which both courts and the DOJ can analyze and detect unconstitutional discriminatory purpose.

The Necessity of Restoring the "Ability to Elect" Standard in Response to Georgia v. Ashcroft

Moreover, the proposed legislation would appropriately restore the cornerstone of § 5 regression analysis which has long looked to ensure that voting changes do not disturb pre-existing levels of minority voting strength. The level of the minority community's voting strength under benchmark and proposed plans has historically been measured by objectively examining and quantifying the minority community's ability to elect candidates of choice. Thus, the proposed legislation restores the tangible "opportunity to elect" standard and does not allow jurisdictions to cloak intentional discrimination under the intangible framework set forth by Georgia v. Ashcroft, 539 U.S. 461 (2003). This particular aspect of the bill will prevent jurisdictions from undermining the benchmark while protecting minority voters from unconstitutional retrenchment in political gains. Further, the bill will make it more practical for D.C. District Court to adjudicate, and the DOJ to administer, the regression provisions of § 5. Finally, the proposed legislation should not be viewed as overturning the Georgia v. Ashcroft ruling in its entirety. It would restore, as a minimum standard, the objectively-verifiable and tangible "ability to elect" principle that has long been the fundamental feature of § 5 analysis, while leaving open, to further consideration, the additional aspects of participation in the political process catalogued in the Georgia v. Ashcroft opinion.

Congress has the constitutionally derived power to renew the expiring provisions of the VRA, and the record

illustrates that is the wisest course. The NAACP Legal Defense and Educational Fund, Inc. supports renewal and restoration of the expiring provisions of the Voting Rights Act and urges passage of the pending bill in the present form.