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Testimony of
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Before the
United States Commission on Civil Rights

Redistricting and the 2010 Census:
Enforcing Section 5 of the VRA

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Chair Castro, Vice Chair Thernstrom, and distinguished Commissioners, thank you for inviting me to testify before you.

My name is Justin Levitt; I teach constitutional law and election law at Loyola Law School, in Los Angeles.¹ I have had the privilege to practice election law as well, including work with civil rights institutions and with voter mobilization organizations, ensuring that those who are eligible to vote and wish to vote are readily able to vote, and to have their votes counted. My work has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel jurisdictions to comply with their obligations under federal law and the Constitution.

I now focus on research and scholarship, confronting and reflecting on the structure of the election process while closely observing and rigorously documenting the factual predicates of that structure. I have paid particular attention in recent years to the redistricting process, focusing on the procedures by which bodies draw legislative district lines, especially for state legislative and federal office. In this context, I have analyzed in detail the structures and rules by which each of our 50 states conducts state and federal redistricting, and I have painstakingly followed the litigation that so often results. Much of that work is presented on a website, All About Redistricting, generously hosted by Loyola Law School at <http://redistricting.lls.edu>. I have also written in more traditional fora about the redistricting process: in addition to scholarship in law reviews and the like, with the support of the Brennan Center for Justice at NYU School of Law, I have published a monograph entitled *A Citizen's Guide to Redistricting*; the *Guide* attempts to translate the diversity of the redistricting process for an engaged lay audience. It is in this role as researcher and scholar that I appear before you today.

¹ My comments represent my personal views and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

Overview

I thank you for holding this hearing, focusing on the procedures for enforcing section 5 of the Voting Rights Act in the redistricting context. I hope to present something of an overview of the landscape, to assist your discussion and deliberation. Redistricting is the process of redrawing electoral district lines. While required by many local, state, and federal acts of legislation, it is a practice that also has constitutional imprimatur. In a line of cases following *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court determined that in order to foster equality of representation, the Constitution requires that districts by which general representative bodies are elected contain approximately equal populations.² As our population grows, shifts, and moves, our representative districts must keep pace. And so, after each national Census provides an updated snapshot of how many people live where, jurisdictions at every level of government must ensure that their electoral districts are redrawn.

In so doing, some jurisdictions must also ensure that their redistricting plans pass muster under section 5 of the Voting Rights Act, which prevents voting-related changes that are discriminatory in either purpose or effect. Section 5 of the Act precludes certain jurisdictions — those meeting a statutory formula based on exceedingly low historical levels of voter registration or participation³ — from implementing any new prerequisite to voting, or standard, practice or procedure with respect to voting, that has not been “precleared” either by the U.S. Department of Justice or a three-judge court of the U.S. District Court for the District of Columbia.⁴ Specifically, a jurisdiction may petition the court for a declaratory judgment of preclearance (“judicial preclearance”) or may secure preclearance if, after submitting a voting-related change to the Department of Justice, the Department fails to object to preclearance within sixty days (“administrative preclearance”).⁵ Redistricting plans are included among the voting-related changes that must be precleared;⁶ any jurisdiction covered under section 5, in whole or in part, must therefore submit redistricting plans for preclearance.⁷

² The Supreme Court applied an equal population standard to congressional districts in *Wesberry v. Sanders*, 376 U.S. 1 (1964), to state legislative districts in *Reynolds v. Sims*, 377 U.S. 533 (1964), and to local government districts in *Avery v. Midland County, Tex.*, 390 U.S. 474 (1968).

³ 42 U.S.C. § 1974b(b). The formula applies to any jurisdiction which 1) maintained a “test or device” as a prerequisite for voting on November 1, 1964, November 1, 1968, or November 1, 1972, and where 2) less than half of the voting-age population was registered to vote or voted in the presidential elections of 1964, 1968, or 1972. *Id.* That is, the formula applies where a majority of the electorate, more or less, was not participating in the democratic process.

⁴ The provisions governing the convening of a three-judge court are found in 42 U.S.C. § 1973c(a) and 28 U.S.C. § 2284.

⁵ 42 U.S.C. § 1973c(a). The Department may expedite consideration of a section 5 submission, and indicate its intention not to object to preclearance before the 60-day period has run. By the same token, if a submission does not contain information that the Department considers necessary to adequately evaluate the proposed change, the Department may request additional information; the 60-day clock is restarted from the date that the supplemental information is received. 28 C.F.R. § 51.37; *Branch v. Smith*, 538 U.S. 254, 263 (2003); *Georgia v. United States*, 411 U.S. 526, 541 (1973).

⁶ *Allen v. State Board of Elections*, 393 U.S. 544, 565-66, 569 (1969); *Georgia v. United States*, 411 U.S. 526, 531-34 (1973).

⁷ *Lopez v. Monterey County*, 525 U.S. 266 (1999).

Like other voting-related changes subject to preclearance, a redistricting plan will be precleared if the jurisdiction can demonstrate that the plan “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a defined language minority group.⁸

Substantive preclearance standard (including recent changes)

As is clear from the statutory text, there are two prongs to this inquiry. The “effect” portion of section 5 focuses on “retrogression”: whether a change diminishes the effective exercise of the electoral franchise for covered minorities within the jurisdiction, as compared to the ability that such minorities possessed before the implementation of the proposed change.⁹ In 2003, in *Georgia v. Ashcroft*,¹⁰ the Supreme Court interpreted the Voting Rights Act’s retrogression standard to be quite flexible: in assessing whether new electoral arrangements diminished minority voters’ effective exercise of the franchise, the Court allowed jurisdictions to balance minority voters’ ability to elect candidates of choice with their ability to influence (but not decide) the election of potentially responsive legislators, and even to assess the comparative legislative influence that representatives of minority communities would be able to achieve.¹¹

Congress reacted, in particular, to the Court’s assertion that under section 5, even when a minority group was deprived of its ability to elect a candidate of choice, “a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice.”¹² In 2006, it amended section 5 of the Voting Rights Act,¹³ stating expressly that *Georgia v. Ashcroft*, inter alia, “misconstrued Congress’ original intent” in enacting the statute.¹⁴ The 2006

⁸ 42 U.S.C. § 1973c(a); *id.* §§ 1973b(f)(2), 1973l(c)(3).

⁹ *Beer v. United States*, 425 U.S. 130, 141 (1976).

¹⁰ 539 U.S. 461 (2003).

¹¹ *Id.* at 479-84.

¹² *Id.* at 480.

¹³ Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 (2006) [hereinafter “VRARA”]. The amendments passed by a vote of 98-0 in the Senate and 390-33 in the House. Of states covered in whole or in part for purposes of section 5, the bill was supported by a unanimous vote of the Alaska, Florida, Michigan, Mississippi, New Hampshire, New York (with two nonvoting Representatives), South Dakota, and Virginia (with one nonvoting Representative) House delegations; 89% of the California delegation; 86% of the Louisiana delegation; 85% of the North Carolina delegation; 83% of the South Carolina delegation; 80% of the Texas delegation (with one nonvoting Representative); 75% of the Arizona delegation; 71% of the Alabama delegation; and 54% of the Georgia delegation. There was no state in which a majority of the delegation opposed passage. See Clerk of the House of Representatives, Final Vote Results for Roll Call 374 (H.R. 9) (July 13, 2006), <http://clerk.house.gov/evs/2006/roll374.xml>.

¹⁴ VRARA § 2(b)(6). See also H.R. REP. NO. 109-478, at 65, 68-72, 94 (2006). Because the Senate Judiciary Committee’s Report was not released until July 26 — six days after the full Senate had passed the bill reauthorizing and amending the Voting Rights Act, and one day before the bill was signed — its reliability as legislative history has been questioned. See, e.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 185-92 (2007); *Texas v. United States*, No. 11-1303, 2011 WL 6440006, at *18 n.30 (D.D.C. Dec. 22, 2011) (three-judge court) (“[T]he Senate Report [to the 2006 Amendments] carries little weight as a piece of legislative history or evidence of legislative intent.”).

amendments clarified that a procedure (including a redistricting plan) that “will have the effect of diminishing the ability of citizens of the United States on account of race or color, or [membership in a language minority group,] to elect their preferred candidates of choice denies or abridges the right to vote” and may not be precleared.¹⁵ It further announced that the purpose of the clarification “is to protect the ability of such citizens to elect their preferred candidates of choice.”¹⁶ Thus, for any redistricting change subject to section 5, decisionmakers must at least prevent a decrease in minority citizens’ ability to elect preferred candidates in covered jurisdictions — or, put differently, that they must at least protect the tangible gains realized by minority voters in acquiring the ability to elect candidates within covered areas.¹⁷

The amendment’s language is written in one direction: it unequivocally explains that a procedure diminishing the ability to elect will “abridge the right to vote” in violation of section 5.¹⁸ This makes sense as a correction of the interpretation advanced by *Georgia v. Ashcroft*. Yet what the 2006 amendment does not say may also be important. The statute does not state that the *only* conduct deemed retrogressive is conduct that diminishes the ability to elect candidates of choice.¹⁹ For example, in a covered area where minority voters have the ability to elect candidates of choice, it is clear that that ability may not be diminished under section 5. But in a covered area where minority voters do not have the ability to elect candidates of choice, it may also constitute impermissible retrogression under section 5 for a redistricting plan to dilute the influence of the minority group, thereby abridging their effective exercise of the electoral franchise.²⁰

The “purpose” prong of section 5 was also amended in 2006. In 2000, the Supreme Court, in *Reno v. Bossier Parish School Board (Bossier Parish II)*,²¹ held that section 5 “does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.”²² That is, the Court found that section 5 prohibits preclearance based on the purpose of a redistricting plan only of plans designed to reduce minorities’ ability to elect candidates of choice, but not — for example — plans intentionally designed to limit the effective

¹⁵ 42 U.S.C. § 1973c(b).

¹⁶ *Id.* § 1973c(d).

¹⁷ *Texas v. United States*, No. 11-1303, 2011 WL 6440006, at *15 (D.D.C. Dec. 22, 2011) (three-judge court).

¹⁸ 42 U.S.C. § 1973c(b).

¹⁹ Similarly, § 1973c(d) explains that the amendment “protect[s] the ability of . . . citizens to elect their preferred candidates of choice,” but does not say that it *only* protects an ability to elect.

²⁰ The relevant legislative history does little to resolve the ambiguity. Most pertinent discussion was focused on correcting the construction advanced by *Georgia v. Ashcroft*, for districts where minorities do have the ability to elect, leaving some question about other areas. Statements in the record might each be seen to advance a different conclusion with respect to this question. *Compare, e.g.*, H.R. REP. NO. 109-478, at 65 (2006) (explaining the need to amend the “effect” prong to “clarify the types of conduct that Section 5 was intended to prevent, including those techniques that diminish the ability of the minority group to elect their preferred candidates of choice”) (emphasis added), *with id.* at 70-71 (“in making preclearance determinations under Section 5, the comparative ‘ability [of the minority community] to elect preferred candidates of choice’ is the relevant factor to be evaluated when determining whether a voting change has a retrogressive effect”) (emphasis added).

²¹ 528 U.S. 320 (2000).

²² *Id.* at 341.

political power of minorities who had not previously had the ability to elect candidates of choice.²³

Bossier Parish II drew critique from Congress as well; it, too, “misconstrued Congress’ original intent.”²⁴ The 2006 amendments clarified that the term “purpose” in section 5 “shall include any discriminatory purpose,” retrogressive or not.²⁵ And Congress made clear its intent that this discriminatory purpose be susceptible to proof via a broad range of evidence — circumstantial and direct.²⁶

There has been one other particularly notable change to the preclearance regime since the last redistricting cycle, concerning the scope of the Act’s coverage. Jurisdictions covered for section 5 purposes are not eternally covered: the Act itself requires Congress to “reconsider” the coverage formula in 2021, and in 2031, the coverage formula expires unless reauthorized before that date.²⁷ Moreover, covered jurisdictions are eligible to petition for “bailout” — a declaratory judgment issued by the U.S. District Court for the District of Columbia to jurisdictions that, within the prior ten years, have demonstrated compliance, including a lack of cognizable liability under the Voting Rights Act, successful preclearance of all changes in voting practices without objection, and “constructive efforts” to promote access to the political process.²⁸ Such a judgment removes a jurisdiction from coverage for section 5 purposes. At least 146 counties and cities once covered for section 5 purposes are no longer covered.²⁹ (At least one additional bailout application is currently pending).³⁰

²³ Consider, in this context, Georgia’s 1981 congressional redistricting plan, which retained nine of ten majority-white districts. In the remaining district, to avoid retrogressive effect, the plan architects mildly increased the percentage of African-American voting-age population to 52%, while retaining a substantial Anglo majority of registered voters. *Busbee v. Smith*, 549 F.Supp. 495, 498-99 (D.D.C. 1982). The chair of Georgia’s House redistricting committee (and reputed architect of the plan) was quoted as explaining, “I don’t want to draw nigger districts.” *Id.* at 501.

²⁴ VRARA § 2(b)(6). *See also* H.R. REP. NO. 109-478, at 65, 66-68 (2006).

²⁵ 42 U.S.C. § 1973c(c).

²⁶ H.R. REP. NO. 109-478, at 68 (2006) (citing “the factors set out in *Village of Arlington Heights et al. v. Metropolitan Housing Development Corporation et al.*”, 429 U.S. 252 (1977), as useful in determining the existence of discriminatory intent).

²⁷ *Id.* § 1973b(a)(7), (8).

²⁸ *Id.* § 1973b(a)(1). Jurisdictions are not eligible for bailout if governmental units within their territory have not abided by the same standards, though the Department of Justice has been willing to grant retroactive preclearance for smaller jurisdictions’ isolated failures to timely submit changes for preclearance. *Id.*; Brief of *Amici Curiae* Jurisdictions That Have Bailed Out Under the Voting Rights Act in Support of Appellees at 15-20, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder* (“NAMUDNO”), 557 U.S. 193 (2009) (No. 08-322).

²⁹ U.S. Dep’t of Justice, *Jurisdictions Currently Bailed Out*, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout (last visited Jan. 7, 2012); Dept. of Commerce, Bureau of Census, *2002 Census of Governments*, Vol. 1, No. 1, pp. 1, 22–60. There are 423 total governmental units within these covered jurisdictions, including 208 special districts, which may or may not have elected governments, and therefore may or may not be required to submit changes for preclearance.

In the Supreme Court’s 2009 *NAMUDNO* case concerning bailout, the Court stated, “Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act.” *NAMUDNO*, 129 S. Ct. at 2516. This figure appears to be partially misleading and partially incorrect. First, the Court appears to be tallying jurisdictions seeking bailout since August 5, 1984, when the expanded bailout

The Act's coverage formula (and its provisions for bailout) generally speak in terms of states and "political subdivisions" — defined as counties, parishes, or other jurisdictions that conduct voter registration³¹ — though section 5 compliance requirements extend to "all governmental units within [the] territory" of such subdivisions.³² It was therefore unclear whether covered governmental units that did not register voters could bail out of coverage. In 2009, the Supreme Court determined that all governmental units, whether actively engaged in registering voters or not, were eligible to file bailout actions.³³ Since the decision, thirteen jurisdictions (representing twenty-three governmental units) have sought bailout.

Preclearance in the 2011 cycle

In 2011, according to DOJ records, jurisdictions submitted for preclearance changes in at least 1139 redistricting plans and changes in five redistricting procedures.³⁴ More submissions are to be expected as jurisdictions continue redistricting over the next few years: from 1990-99, 3456 changes were submitted, and from 2000-09, 3141 changes were submitted.³⁵

Already, however, one element of the preclearance process appears notable. In 2011, jurisdictions sought preclearance for 24 redistricting plans through the U.S. District Court for the District of Columbia.³⁶ Seventeen of these plans were submitted to the court at approximately

provisions of the 1982 amendments to the Voting Rights Act — permitting bailout by subjurisdictions of covered states — became effective. Voting Rights Amendments of 1982, Pub. L. No. 97-205, § 2(b) (1982). Second, the source cited by the Court — the Census Bureau's 2002 Census of Governments — lists 11,774 local governments within covered jurisdictions, including 5,110 special districts. Third, it is not clear how many of these governments are elected, and thereby required to submit changes for preclearance. Fourth, the sentence seems to be comparing apples to oranges: within the "17" (actually 18) jurisdictions seeking preclearance between August 5, 1984, and the decision in *NAMUDNO*, the 2002 Census of Governments lists 86 covered political subdivisions. Cf. Declaration of Robert S. Berman, *Laroque v. Holder*, No. 10-0561, 2011 WL 6413850 (D.D.C. Aug. 1, 2011) (Doc. No. 55-6).

³⁰ *King George County v. Holder*, No. 11-02164 (D.D.C.) (complaint filed Dec. 7, 2011).

³¹ *Id.* § 1973l(c)(2).

³² *Id.* § 1973b(a)(1)(D)-(F); *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 129, 135 (1978).

³³ *NAMUDNO*, 129 S. Ct. at 2516.

³⁴ Submissions compiled from data available at U.S. Dep't of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, at <http://www.justice.gov/crt/about/vot/notices/noticepg.php> and U.S. Dep't of Justice, Archive of Notices of Preclearance Activity Under the Voting Rights Act of 1965, As Amended, at <http://www.justice.gov/crt/about/vot/notices/votarch.php>. Raw data available upon request. The tally in the text reflects separate counts for individual plans, even when submitted as part of the same preclearance request, where such separate plans were identified in the Department of Justice notices. This tally may moderately overcount the number of plans affected, if plans for different entities (e.g., a Board of Supervisors and a Commissioners Court) are coextensive; this tally may also undercount the number of plans affected, if plans for different entities were submitted under one preclearance request, without an indication by the DOJ as to the type of plan submitted.

³⁵ U.S. Dep't of Justice, Section 5 Changes By Type and Year, at http://www.justice.gov/crt/about/vot/sec_5/changes.php. It is not clear whether this tally represents the total number of submissions, or whether it represents the total number of plans affected, including changes to multiple plans within the same submission.

³⁶ The totals were compiled by searching the dockets of the U.S. District Court for the District of Columbia, from records maintained at All About Redistricting, Litigation in the 2010 Cycle, <http://redistricting.ils.edu/cases.php>, and

the same time as they were submitted for administrative preclearance to the Department of Justice; seven plans (from Michigan and Texas) were submitted exclusively to the court. This appears to be a strategy weighted heavily toward statewide plans: of the 33 statewide plans submitted last year,³⁷ 21 were submitted either exclusively or concurrently to the court. In contrast, of the 1106 local redistricting plans submitted last year, only three were submitted to the court (all from Texas jurisdictions, and all concurrently).

The court filings may also be contrasted with past redistricting cycles: by the end of 2001, only Georgia, with its congressional and two state legislative plans, had filed for preclearance in court. Indeed, over the entire cycle, only four additional redistricting plans were submitted for court preclearance (one from Louisiana, one from Florida, and two from North Carolina).³⁸ By the end of 1991, two jurisdictions (Bolivar County, Mississippi, and Texas) had sought court preclearance for five plans; in the remainder of the cycle, six other plans were submitted to the court (five of which were submitted after administrative objections had been filed). The rate of court submissions, and particularly the rate of submissions either exclusively to the courts or before administrative decisions have been rendered, is unprecedented.³⁹

The change does not seem to be driven by an increased rate of DOJ opposition to submitted plans.⁴⁰ Thus far, the Department of Justice has not objected to any statewide plan in the administrative process, despite strong statements from civil rights groups urging objections to some submissions.⁴¹ In court, it has objected to only Texas' congressional and state House plans in court. And it has objected to only three other local redistricting plans — a board of supervisors plan and election commission plan from Amite County, Mississippi, and a police

from data available at U.S. Dep't of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, at <http://www.justice.gov/crt/about/vot/notices/noticepg.php>. Eleven jurisdictions — eight states and three counties — filed thirteen preclearance lawsuits.

³⁷ In South Dakota, although two state Representatives are elected from most state Senate districts, the redistricting bill submitted for preclearance in 2011 split a state Senate district into two Representative districts in an area covered by section 5, and must therefore be analyzed separately for each chamber. *See* H.B. 1001, 86th Leg., Spec. Sess. § 7 (S.D. 2011). Therefore, South Dakota's submission is treated as two plans for preclearance purposes.

³⁸ U.S. Dep't of Justice, Section 5 Declaratory Judgment Actions (U.S. District Court for the District of Columbia), http://www.justice.gov/crt/about/vot/sec_5/caselist_ddc.pdf; tally confirmed by searching the dockets of the U.S. District Court for the District of Columbia.

³⁹ In 1981, only California had filed for court preclearance (1 plan); by the end of the decade, 4 other jurisdictions had filed (6 plans) in court. In 1971, no jurisdiction filed for court preclearance; by the end of the decade, 8 jurisdictions had filed (12 plans) in court. U.S. Dep't of Justice, Section 5 Declaratory Judgment Actions (U.S. District Court for the District of Columbia), http://www.justice.gov/crt/about/vot/sec_5/caselist_ddc.pdf.

⁴⁰ This observation, of course, is purely quantitative. I am not aware of novel Justice Department positions with respect to redistricting that may be encouraging the increased rate of court filings in this cycle — or jurisdictions' informed perceptions of such positions — but if they existed, they would not necessarily be reflected in the numerical analysis.

⁴¹ *See, e.g.*, ACLU Voting Rights Project & ACLU of South Carolina, Comment Under Section 5 of the Voting Rights Act, Re: Submission No. 2011-3370 (Oct. 11, 2011) (South Carolina Congressional plan), *available at* www.aclu.org/files/assets/comment_letter_on_congressional_plan.pdf; Comment Under Section 5 of the Voting Rights Act, Re: Section 5 Submission No. 2011-1633 (May 13, 2011) (Louisiana state House of Representatives plan), *available at* http://naacpldf.org/files/case_issue/DOJ%20Comment%20Letter--State%20House%20Map.pdf.

jury plan from East Feliciana Parish, Louisiana.⁴² Indeed, the Department of Justice has requested more information — signaling that an initial application did not contain enough information to show an absence of discriminatory purpose and effect, which can (though does not necessarily) indicate reason for concern⁴³ — with respect to only 28 of the 1139 submitted plans thus far, including two submissions subsequently withdrawn, and the three plans to which the Department objected.⁴⁴

At least with respect to objections, this is not a marked increase from cycles past. By the end of 2001, the Justice Department had objected to four redistricting plans (the remainder of the cycle brought objections to 29 other plans).⁴⁵ By the end of 1991, the Justice Department had objected to 56 redistricting plans submitted that year (the remainder of the cycle brought objections to 131 other plans). There is little evidence that the 2011 Department of Justice has been objecting to plans at an anomalously extensive rate and thereby driving jurisdictions into court.⁴⁶

Of course, the number of objections does not itself indicate the merit of any individual objection (or lack of objection), and does not indicate the nature of jurisdictions' deliberations concerning the plans they wish to enact and submit for preclearance. (Indeed, as legal standards and covered geographies have changed, one should expect the objection rate to change.) It is also certainly true that section 5 permits both administrative preclearance and judicial preclearance, as either alternative or sequential proceedings⁴⁷ — jurisdictions that choose to proceed through the court are entitled to proceed through the court if they so choose.

Still, the markedly increased rate of concurrent submissions to both the court and to the Department of Justice is a notable development. In particular, if the rate continues to grow, it may eventually raise concerns about resource deployment, since the Department of Justice must

⁴² Letter from Thomas E. Perez, Asst. Att'y Gen., U.S. Dep't of Justice, Civil Rights Div. to Tommie S. Cardin, Esq. (Oct. 4, 2011) (Amite), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_100411.pdf; Letter from Thomas E. Perez, Asst. Att'y Gen., U.S. Dep't of Justice, Civil Rights Div. to Ms. Nancy P. Jensen (Oct. 3, 2011) (East Feliciana), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_100311.pdf.

⁴³ *See supra* note 5.

⁴⁴ Figures compiled from data available at U.S. Dep't of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, <http://www.justice.gov/crt/about/vot/notices/noticepg.php> and U.S. Dep't of Justice, Archive of Notices of Preclearance Activity Under the Voting Rights Act of 1965, As Amended, <http://www.justice.gov/crt/about/vot/notices/votarch.php>.

⁴⁵ Data compiled from Lawyers' Committee for Civil Rights Under Law, Voting Rights Act: Objections and Observers, http://www.lawyerscommittee.org/projects/section_5/. The tallies in the text represent all objections coded in this comprehensive database as "Redistricting / Reapportionment" objections.

⁴⁶ By the end of 1981, the Justice Department had objected to 10 redistricting plans submitted that year (the remainder of the cycle brought objections to 148 other plans). By the end of 1971, the Justice Department had objected to 22 redistricting plans submitted after decennial census figures had been delivered (the remainder of the cycle brought objections to 68 other plans).

⁴⁷ For example, even if the Department of Justice objects to preclearance, a plan may still be precleared under the statute if the jurisdiction in question secures a declaratory judgment from the U.S. District Court for the District of Columbia.

simultaneously process the administrative submission and respond to the declaratory judgment litigation.

Substantive questions in the 2011 cycle

Finally, the cases proceeding exclusively through the courts (or those that may turn to the courts in the event of an administrative objection) present the prospect of judicial interpretation of substantive provisions of the Voting Rights Act, including the 2006 amendments, as applied to redistricting.⁴⁸ Such interpretation is comparatively rare. Though section 5 of the Act has existed since 1965, it has been amended several times. Redistricting plans — arriving largely (though not exclusively) on a decennial cycle, while other election-related changes can and do occur at any time — have historically comprised just 2% of submissions. The vast majority of these redistricting plans have proceeded through administrative preclearance, and 96% of those submissions have been precleared without objection;⁴⁹ such a disposition is not judicially reviewable.⁵⁰ The combination of these factors leaves comparatively little opportunity for courts to construe the substance of section 5 as applied to redistricting.

Already this cycle, Texas’s requests for judicial preclearance of its statewide redistricting plans have presented several contested interpretations of section 5’s substantive standards.⁵¹ Among those issues are:

- whether minority citizens’ “ability . . . to elect their preferred candidates of choice”⁵² is determined purely by the percentage of voting-age minority residents or citizens within a district, or whether (as the Justice Department argued) the ability to elect candidates of choice depends on a more robust contextual analysis of electoral behavior in the area in question, including voter registration, turnout, and levels of polarization;⁵³
- whether minority citizens’ “ability ... to elect their preferred candidates of choice” must be assessed by reference only to populations of discrete minorities, or whether (as the Justice Department argued) the ability to elect candidates of choice may also be assessed where “one group of minority voters joins together with voters of a different racial or language background to elect

⁴⁸ Litigation challenging the constitutionality of sections 4 and/or 5 of the Voting Rights Act, including litigation focusing on the 2006 amendments, may also provide judicial interpretations of the Act’s substantive provisions. *See, e.g.*, *Laroque v. Holder*, No. 10-0561, 2011 WL 6413850 (D.D.C. Dec. 22, 2011).

⁴⁹ U.S. Dep’t of Justice, Section 5 Changes By Type and Year, http://www.justice.gov/crt/about/vot/sec_5/changes.php, as supplemented by 2010-11 submissions and objections.

⁵⁰ *Morris v. Gressette*, 432 U.S. 491, 504-05 (1977).

⁵¹ Michigan’s preclearance action was filed on November 3, 2011, and is still relatively close to at the beginning of the process; few contested interpretive issues appear to be raised in the state’s Complaint. Complaint, *Michigan v. United States*, No. 11-01938 (D.D.C. Nov. 3, 2011) (Doc. No. 1), *available at* <http://www.scribd.com/doc/72169757/Michigan-VRA-Section-5-Action-11-3-2011>.

⁵² 42 U.S.C. § 1973c(d).

⁵³ *Texas v. United States*, No. 11-1303, 2011 WL 6440006, at *6-8 (D.D.C. Dec. 22, 2011) (three-judge court).

the minority voters' candidate of choice";⁵⁴

- whether, in the context of an increased number of seats driven overwhelmingly by the growth of a minority population, retrogression is to be measured by the number of districts in which minority citizens have an ability to elect candidates of choice, or whether (as the Justice Department argued) the proportion of districts in which minority citizens have an ability to elect candidates of choice may also be relevant;⁵⁵ and
- whether retrogression protects against only the diminishment of an existing ability to elect, or whether it also protects against the diminishment of an emerging (but not yet extant) ability to elect.⁵⁶

Court battles elsewhere, beyond covered jurisdictions, may also affect the preclearance process; for example, battles over claims of legislative privilege and litigation work-product in assessing legislative intent for partisan gerrymandering and other purposes may also prove relevant in determining the scope of evidence available to assess discriminatory motive under section 5.⁵⁷

In the Texas preclearance case, the three-judge court thus far appears to have agreed in several respects with the legal position advanced by the Department of Justice.⁵⁸ Notably, it has not apparently done so out of a (required) sense of deference to the Department's resolution of statutory ambiguity; though Department of Justice interpretations of section 5, particularly those embodied in promulgated regulations, are traditionally afforded "substantial deference" by the courts,⁵⁹ the three-judge court evaluating legal standards in the context of Texas's recent motion

⁵⁴ *Id.* at 8.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 8. The three-judge court did not indicate that the Department of Justice advanced a particular position with respect to this issue, which was raised primarily by Intervenor.

⁵⁷ *See, e.g.*, Order, *Baldus v. Brennan*, No. 11-0562 (E.D. Wis. Jan. 3, 2012) (Doc. No. 104), *available at* <http://redistricting.ils.edu/files/WI%20baldus%2020120103%20leg%20privilege.pdf>; Opinion and Order, *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, No. 11-05065 (N.D. Ill. Oct. 12, 2011) (Doc. No. 77), *available at* <http://redistricting.ils.edu/files/IL%20cfbm%2020111012%20subpoena%20ruling.pdf>; Order, *Perez v. Texas*, No. 11-360 (W.D. Tex. Aug. 11, 2011) (Doc. No. 189), *available at* <http://tinyurl.com/3gvlqln>.

⁵⁸ *Texas v. United States*, No. 11-1303, 2011 WL 6440006, at *12-13, 18-19 (D.D.C. Dec. 22, 2011) (three-judge court). The three-judge court also noted that the Department of Justice's interpretation of section 5, particularly with respect to its contextual approach to retrogression, is consistent with Department of Justice guidance for the past two decades — as the court took pains to point out, "in different administrations and under different Attorneys General." *Id.* at *18 and n.26.

⁵⁹ *Lopez v. Monterey County*, 525 U.S. 266, 281-82 (1999); *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508-09 (1992); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 39 (1978). The Court has been less willing to defer to the DOJ's interpretation of section 5 when it believes that doing so would "raise serious constitutional questions." *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995); *cf. Nw. Austin Mun. Util. Dist. No. 1 v. Holder* ("NAMUDNO"), 557 U.S. 193, 129 S. Ct. 2504, 2515-16 (2009).

for summary judgment neither mentioned this deference nor cited any of the relevant cases.⁶⁰ Instead, the court appears to have confirmed most of the positions favored by the Department of Justice as a matter of *de novo* review.

The most significant exception concerned the application of a particular legal standard to the facts at hand in Texas. The Department of Justice argued that Texas's proposed congressional plan effected retrogression by failing to draw any new districts in which minority citizens had the ability to elect candidates of choice, given that the substantial growth of the Hispanic population had driven the substantial increase in the number of congressional districts Texas was apportioned. The DOJ did not argue that retrogression would be established by *any* decrease in proportional power, including the addition of a single incremental district without minorities' ability to elect candidates of choice;⁶¹ instead, it appeared to argue that the circumstances of Texas's remarkable growth indicated retrogression in the instant case. The three-judge court disagreed, but also not as a categorical matter; it declined to find retrogression on the instant facts, but did not foreclose the possibility that a state's failure to draw new "minority ability districts" in the face of increased apportionment could in different circumstances amount to retrogression.⁶² This finding is consistent with the Department's general identification of "[t]he extent to which [overall] minority strength is reduced by the proposed redistricting" as one factor among many to be considered in any individual instance of potential retrogression.⁶³

Trial in the Texas preclearance case has been scheduled for the latter weeks of January: after this statement has been submitted but before the date of my testimony before you. It may be that the three-judge court's decision — with or without further clarification of the appropriate legal standards for preclearance more generally, and with or without further clarification of the Department of Justice's approach to preclearance in this cycle — has been rendered by the time I appear before you; other cases, including potential appeals to intermediate appellate courts or to the Supreme Court, may have altered the legal landscape in other ways. This hearing arrives as the preclearance process is underway, and thereby necessarily as our understanding of section 5 is in a bit of flux. Nevertheless, I hope that my remarks today have assisted the Commission in its attempt to assess the manner in which preclearance is proceeding at the moment.

I thank you again for the opportunity to testify before you, and look forward to answering any questions that you may have.

⁶⁰ Texas v. United States, No. 11-1303, 2011 WL 6440006 (D.D.C. Dec. 22, 2011) (three-judge court).

⁶¹ Most (but not all) circumstances in which the number of seats grows and fewer of the new incremental districts allow minorities to elect candidates of choice would lead to a decrease in proportional power.

⁶² The court found that the fact that Texas did not draw incremental districts in which minorities had the ability to elect candidates of choice did not establish retrogression given the percentage growth at issue in the case. It did, however, find that fact to be evidence relevant to a discriminatory purpose claim. Texas v. United States, No. 11-1303, 2011 WL 6440006, at *21 (D.D.C. Dec. 22, 2011) (three-judge court).

⁶³ 28 C.F.R. § 51.59(a)(2). Of note with respect to a potential discriminatory purpose claim, *see supra* note 62, the Justice Department's regulations also state that "[a] jurisdiction's failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose." *Id.* § 51.59(b).