

No. 11-5256

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SHELBY COUNTY, ALABAMA,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA (No. 10-651 (JDB))

**APPELLANT'S UNOPPOSED MOTION
TO EXPEDITE THE APPEAL**

FRANK C. ELLIS, JR.
WALLACE, ELLIS, FOWLER & HEAD
113 North Main Street
Columbiana, AL 35051
Telephone: (205) 669-6783

BERT W. REIN
Lead Counsel
WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
BRENDAN J. MORRISSEY
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7000
Email: brein@wileyrein.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 6

I. THE PUBLIC HAS AN UNUSUALLY COMPELLING INTEREST IN PROMPT DISPOSITION OF THIS APPEAL..... 6

II. THE DECISION BELOW IS SUBJECT TO SUBSTANTIAL CHALLENGE AND DELAY WILL CAUSE IRREPARABLE INJURY TO SHELBY COUNTY. 8

 A. The District Court’s Decision to Uphold Sections 4(b) and 5 of the VRA As Constitutional Is Subject To Substantial Challenge..... 8

 B. Shelby County Will Suffer Irreparable Injury Absent Expedited Review. 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

FEDERAL CASES

Allen v. State Board of Elections,
393 U.S. 544 (1969).....2

Board of Trustees of University of Ala. v. Garrett,
531 U.S. 356 (2001)..... 12

City of Boerne v. Flores,
521 U.S. 507 (1997).....9

City of Mobile v. Bolden,
446 U.S. 55 (1980)..... 11

City of Rome v. United States,
446 U.S. 156 (1980).....4

Georgia v. Ashcroft,
539 U.S. 461 (2003).....7

**Northwest Austin Municipal Utility District Number One v. Holder*,
129 S. Ct. 2504 (2009).....1, 3, 8, 9, 12, 13, 14, 15, 16

Presley v. Etowah County Commission,
502 U.S. 491 (1992).....3

Reno v. Bossier Parrish School Board,
528 U.S. 320 (2000)..... 11

Shelby County v. Holder,
270 F.R.D. 16 (D.D.C. 2010)5

South Carolina v. Katzenbach,
383 U.S. 301 (1966).....5, 9, 11, 12, 13, 15

* Authorities upon which we chiefly rely are marked with asterisks

DOCKETED CASES

Alabama v. Holder,
No. 11-cv-1628 (D.D.C.).....6

Florida v. United States,
No. 11-cv-1428 (D.D.C.).....7

Harrell v. United States,
No. 11-cv-1454 (D.D.C.).....6

LaRoque v. Holder,
No. 10-5433 (D.C. Cir.).....1

North Carolina v. Holder,
No. 11-cv-1592 (D.D.C.).....6

Texas v. United States,
No. 11-cv-1303 (D.D.C.).....7

FEDERAL STATUTES AND RULES

28 C.F.R. Pt. 51 App.....6

28 U.S.C. § 1657.....1

42 U.S.C. § 1973b(b).....2

42 U.S.C. § 1973c(a)2

LEGISLATIVE MATERIALS

H.R. Rep. No. 109-478 (2006) 10

S. Rep. No. 109-295 (2006)..... 10, 11

Hearing Before the Subcomm. on the Constitution of the House
Comm. on the Judiciary, 109th Cong., 1st Sess. (Oct. 18, 2005) 16, 17

MISCELLANEOUS

D.C. Cir. Handbook of Practice & Internal Procedures 1

Submission of the State of South Carolina for Preclearance, No. 2011-
2495 (June 30, 2011) 7

Submission of the State of Mississippi for Preclearance, No. 2011-
3689 (Sept. 7, 2011)..... 7

Voting Rights Act Reauthorization and Amendments Act of 2006,
Pub. L. No. 109-246, 120 Stat. 577 (2006)2, 10

INTRODUCTION

Pursuant to Fed. R. App. P. 2, Circuit Rule 2, and 28 U.S.C. § 1657, Appellant Shelby County, Alabama respectfully requests that the Court grant this Unopposed Motion to Expedite the Appeal. This appeal presents a facial challenge to the preclearance mechanism of Section 5 of the Voting Rights Act of 1965 (“VRA”), which uniquely interferes with the self-government of certain States and political subdivisions “by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, DC.” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511 (2009) (“*Nw. Austin*”). Shelby County also challenges Section 4(b)’s coverage formula, which determines the jurisdictions subject to Section 5 preclearance. Expedited review is warranted because: (1) the public has an “unusual interest in prompt disposition” that is “strongly compelling”; and (2) “the decision under review is subject to substantial challenge” and “delay will cause irreparable injury.” D.C. Cir. Handbook of Practice & Internal Procedures at 33. In *LaRoque v. Holder*, No. 10-5433 (Doc. No. 1288147), expedited review was granted for reasons equally applicable to this appeal.

Shelby County thus requests that the Court expedite this appeal as follows: Opening Brief for Appellant and Joint Appendix – November 1, 2011; Amicus Briefs in Support of Appellant – November 8, 2011; Brief for Appellee –

December 1, 2011; Briefs for Appellee Intervenors/Amicus – December 8, 2011; Reply Brief for Appellant – December 15, 2011; Oral Argument – as soon thereafter as practicable. The Attorney General and the Defendant-Intervenors neither oppose this motion nor this briefing schedule.

BACKGROUND

In 2006, Congress reauthorized Section 5 for an additional twenty-five years. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (“VRARAA”). Section 5 forbids certain “covered” States and political subdivisions from implementing “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964,” unless the change has been “precleared” by the Department of Justice (“DOJ”) or the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973c(a). Section 4(b) of the VRA subjects Shelby County to “preclearance” because the State of Alabama was using a prohibited voting test in 1965 and less than 50% of the persons of voting age residing in Alabama voted in the Presidential election of 1964. *See id.* § 1973b(b). Shelby County thus must preclear *all* voting changes—including decennial changes to voting districts, *see Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)—based on voting data more than four decades old.

The constitutionality of the 2006 reauthorization of Section 5 and Section 4(b) was immediately tested in the *Northwest Austin* litigation. Although that case ultimately was resolved on statutory grounds, the Supreme Court emphasized that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of the dramatic changes in the covered jurisdictions since 1965. *Nw. Austin*, 129 S. Ct. at 2513. As the Court explained, Section 5 "imposes current burdens and must be justified by current needs" and Section 4(b)'s "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 2512. The Supreme Court warned that "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.*

On April 27, 2010, Shelby County facially challenged the constitutionality of Sections 5 and 4(b) in order to have these serious constitutional questions finally decided. Shelby County has a compelling interest in having these questions expeditiously resolved. The preclearance obligation is "an extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 500-01 (1992), as

it “both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act,” *City of Rome v. United States*, 446 U.S. 156, 200 (1980) (Powell, J., dissenting). Section 5 also imposes a significant financial and administrative burden on covered jurisdictions. “In the last ten years, Shelby County has sought preclearance numerous times, expended significant taxpayer dollars, time, and energy to meet its obligations under Section 5 of the VRA, and has had at least one election delayed in order to ensure compliance with the preclearance obligation of Section 5.” Decl. of Frank Ellis ¶ 7 (Doc. No. 5) (Exhibit A). Shelby County also informed the District Court that “the districting changes triggered by the decennial census, as well as routine voting changes related to local elections and zoning, will require it to seek preclearance in the near future.” *Id.* ¶ 8.

These concerns have been borne out. Over the course of this litigation, Shelby County has expended significant time, energy, and resources in having voting changes precleared. It also will have to do the same in the near future; indeed, Shelby County will soon need to seek preclearance for changes to polling locations in the absence of a determination by this Court that the preclearance obligation is unconstitutional.

Shortly after filing its complaint, Shelby County sought summary judgment on the grounds that the 2006 reauthorization of Section 5 and Section 4(b) exceeds

Congress's authority to enforce the Fourteenth and Fifteenth Amendments, as well as violates the Tenth Amendment and Article IV of the Constitution. After denying the motion of the Attorney General and private intervenors seeking discovery, *Shelby Cnty. v. Holder*, 270 F.R.D. 16 (D.D.C. 2010), the District Court set a briefing schedule "for the filing of dispositive motions, which generated over 1,000 pages of briefs and exhibits and culminated in a lengthy motions hearing on February 2, 2011." Memorandum Opinion ("Mem. Op.") at 34. Two days after oral argument, the Court ordered the parties "to submit additional briefing" on "the following question: in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it 'rational in both practice and theory,' *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), for Congress to preserve the existing coverage formula in Section 4(b) of the Act?" Minute Order (Feb. 4, 2011).

In a 151-page opinion, the District Court granted cross-motions for summary judgment filed by the Attorney General and Defendant-Intervenors. The court ruled that, under "the standard of review articulated by the Supreme Court in *City of Boerne v. Flores*, ... Section 5 remains a 'congruent and proportional remedy' to the 21st century problem of voting rights discrimination in covered jurisdictions." Mem. Op. at 3-4. The court also held "that Section 4(b)'s disparate geographic coverage remains 'sufficiently related' to the problem that it targets" principally because it subjects to preclearance "those jurisdictions with the worst *historical*

records of voting discrimination” and because “although the legislative record is primarily focused on the persistence of voting discrimination in covered jurisdictions—rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions—the record does contain several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement.” *Id.* at 146-47, 149. Shelby County timely appealed.

ARGUMENT

I. THE PUBLIC HAS AN UNUSUALLY COMPELLING INTEREST IN PROMPT DISPOSITION OF THIS APPEAL.

In response to the 2010 census, states and localities throughout the country are currently engaged in the redistricting process. The redrawn districts in sixteen of these states are subject to preclearance under Section 5. *See* 28 C.F.R. Pt. 51 App. There can be no question, then, that Section 5 will have an immediate and significant impact on the implementation of the redrawn legislative districts within those jurisdictions. In fact, Section 5’s preclearance obligation already has spawned significant redistricting litigation even though many covered states remain engaged in that process. *See, e.g., Alabama v. Holder*, No. 11-cv-1628 (D.D.C. filed Sept. 9, 2011); *North Carolina v. Holder*, No. 11-cv-1592 (D.D.C. filed Sept. 2, 2011); *Harrell v. United States*, No. 11-cv-1454 (D.D.C. filed Aug. 9,

2011) (South Carolina); *Texas v. United States*, No. 11-cv-1303 (D.D.C. filed July 19, 2011). Moreover, the redistricting process in the covered jurisdictions may bear on the partisan makeup (and perhaps even control) of the U.S. Congress. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 466-75 (2003).

Section 5 also impacts a multitude of other voting changes related to the Spring 2012 primaries and November 2012 general election. Covered jurisdictions are required, for example, to preclear the dates for their upcoming primaries, early-voting hours, voter identification laws, and polling place locations. *See, e.g., Submission of the State of Mississippi for Preclearance*, No. 2011-3689 (Sept. 7, 2011), *available at* <http://www.justice.gov/crt/about/vot/notices/vnote091911.php> (Presidential primary date); *Florida v. United States*, No. 11-cv-1428 (D.D.C. filed Aug. 1, 2011) (early voting hours, third-party registration rules, provisional voting, and petition-signature expiration dates); *Submission of the State of South Carolina for Preclearance*, No. 2011-2495 (June 30, 2011), *available at* <http://www.justice.gov/crt/about/vot/notices/vnote070511.php> (voter ID law).

In light of Section 5's pervasive impact on decennial redistricting and the 2012 election cycle in the covered jurisdictions, prompt judicial resolution of its constitutionality is essential. The voters in the covered jurisdictions are entitled to know that the changes to the district in which they will vote, as well as the many election laws their chosen representatives have enacted, have not been unlawfully

restrained by a preclearance process that has no constitutional warrant. Yet that result can be achieved only if the constitutionality of Section 5 and Section 4(b) is decided by the Spring of 2012 given the potential for subsequent appeal. Reviewing and invalidating Section 5 after that juncture risks disrupting the November 2012 general election and could cause districts to be redrawn in the middle of the decade. Expediting this appeal ensures to the extent possible that these troubling problems are averted.

II. THE DECISION BELOW IS SUBJECT TO SUBSTANTIAL CHALLENGE AND DELAY WILL CAUSE IRREPARABLE INJURY TO SHELBY COUNTY.

A. The District Court's Decision to Uphold Sections 4(b) and 5 of the VRA As Constitutional Is Subject To Substantial Challenge.

1. The district court's decision is clearly subject to substantial challenge in light of the Supreme Court's declaration that Section 5 and Section 4(b) raise "serious constitutional questions." *Nw. Austin*, 129 S. Ct. at 2513. Indeed, the only Justice not to join that pronouncement went one step farther and concluded that Section 5's preclearance obligation is no longer constitutionally justified. *See id.* at 2517-27 (Thomas, J., concurring in the judgment in part, dissenting in part); *see also* Mem. Op. at 34 ("To date, one Supreme Court Justice has declared that he would strike down Section 5 as an unconstitutional exercise of Congress's Fifteenth Amendment enforcement power, while several other Justices have voiced concerns about the continued vitality of the Act's coverage formula, and about the

apparent never-ending nature of the preclearance obligation, which was originally intended to last through 1970, but which is now scheduled to last through 2032.”) (internal citations omitted)). The district court’s 151-page opinion underscores the seriousness of this constitutional challenge.

2. The decision to uphold Section 5 is unsustainable. Section 5 is “an uncommon exercise of congressional power” previously upheld as a valid use of Congress’s Fifteenth Amendment enforcement authority because “legislative measures not otherwise appropriate” were necessary to combat “exceptional conditions” and “unique circumstances.” *Katzenbach*, 383 U.S. at 334. Given the substantial federalism costs of preclearance, allowing the federal government to prophylactically restrain all voting changes pending preclearance necessarily requires evidence of “unremitting and ingenious defiance” of the Fifteenth Amendment by covered jurisdictions. *Id.* at 309. As the Supreme Court recently suggested, *see Nw. Austin*, 129 S. Ct. at 2511-13, and as Justice Thomas concluded, *see id.* at 2525-27 (Thomas, J.), the 2006 legislative record lacked such evidence. In short, the “exceptional conditions” that justified preclearance in the first instance are no longer present. *Katzenbach*, 383 U.S. at 334.

To conclude otherwise, the district court relied on evidence in the legislative record that could not possibly show the “widespread and persisting deprivation of constitutional rights,” *City of Boerne*, 521 U.S. at 526, needed to justify

reauthorization. First, the court relied on evidence of “first generation barriers” to voting—(1) voter registration and turnout; (2) minority elected officials; and (3) Section 5 objections, *see* Mem. Op. at 72-91—but all three of these metrics fatally undermine any basis for reauthorizing Section 5. In fact, Congress acknowledged that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” VRARAA, § 2(b)(1), 120 Stat. at 577. By 2006, a 50% disparity in voter registration between whites and African-Americans had been virtually eliminated. *See* S. Rep. No. 109-295, at 11 (2006). African-American voter turnout in the 2004 presidential election was actually higher than white turnout in three fully-covered states and was within 5% in two others. *See id.* Congress also found that “the number of African-American elected officials serving in the original six [covered] States ... increased by approximately 1000 percent since 1965, increasing from 345 to 3700.” H.R. Rep. No. 109-478, at 18 (2006). And Congress acknowledged that between 1982 and 2005, the Section 5 objection rate dropped to .071%; and in 2005, DOJ objected to only one of 3,811 preclearance submissions. *See id.* at 22.

Second, the district court relied on so-called “second generation barriers” to voting. Mem. Op. at 91-118; *see also* VRARAA, § 2(b)(2), 120 Stat. at 577. But

these barriers, such as racially polarized voting and Section 2 litigation, *see id.* § 2(b)(3), do not even interfere with the exercise of the franchise—let alone resemble the unrelenting campaign of discrimination needed to “justify legislative measures not otherwise appropriate.” *Katzenbach*, 383 U.S. at 334. Racially polarized voting is not “reliable evidence of actual voting discrimination,” *id.* at 329; indeed, it is not evidence of voting discrimination at all (much less intentional discrimination), *City of Mobile v. Bolden*, 446 U.S. 55, 64-65 (1980). And the legislative record identified only twelve published decisions between 1982 and 2006 finding intentional voting discrimination under Section 2 by any covered jurisdiction, *half of which involved discrimination against white voters*, *see* S. Rep. No. 109-295, at 13. The district court also relied heavily on vote dilution evidence even though the Supreme Court has never held that vote dilution violates the Fifteenth Amendment. *Reno v. Bossier Parrish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). This kind of secondary evidence is insufficient to justify a measure as constitutionally intrusive as Section 5. If preclearance were constitutionally justified on the basis of such evidence, Congress’s ability to interfere with state and local administration of elections would be limitless.

Third, the district court relied on isolated instances of intentional voting discrimination throughout the covered jurisdictions since 1982. *See, e.g.*, Mem. Op. at 69-70, 128. But documenting isolated instances of voting discrimination is

insufficient to justify the extreme preclearance obligation. A prophylactic remedy this sweeping could never be sustained on the ground that *some* intentional discrimination remains in the covered jurisdictions. *See Katzenbach*, 383 U.S. at 334; *Nw. Austin*, 129 S. Ct. at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part). Congress was instead required to document an ongoing, pervasive, and systematic campaign of voting discrimination in the covered jurisdictions. *See Katzenbach*, 383 U.S. at 328, 335. The isolated instances of discrimination catalogued by the district court fall far short of “abundant evidence of States’ systematic denial of” the right to vote needed to sustain Section 5. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001).

Finally, the district court relied on Section 5’s so-called “deterrent effect” in order to explain away the absence of pervasive evidence of voting discrimination. Deterrence postulates that the presence of Section 5 alone restrains jurisdictions with a history of voting discrimination from reverting to their historic malpractices. *See, e.g.*, Mem. Op. at 131. Thus, instead of neutrally deciding whether the 2006 legislative record included sufficient evidence of actual ongoing discrimination, the district court inferred that any evidence in the legislative record—however meager—signaled a deeper desire to discriminate. *See id.* at 71. The Supreme Court made clear, however, that “[p]ast success alone ... is not adequate justification to retain the preclearance requirements [T]he [VRA] imposes

current burdens and must be justified by current needs.” *Nw. Austin*, 129 S. Ct. at 2511-12; *see also id.* at 2525 (Thomas, J.) (“Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose.”). The 2006 legislative record does not verify the assumption that the covered jurisdictions have a unique latent desire to discriminate against minority voters. Congress was not entitled to reauthorize—and the district court was not entitled to uphold—Section 5 based “on outdated assumptions about racial attitudes in the covered jurisdictions.” *Id.* at 2525.

3. The decision to uphold Section 4(b) also is subject to substantial challenge. Even if a prophylactic remedy like preclearance remains appropriate for *some* jurisdictions, retention of the statute’s outdated coverage formula is indefensible. As both the Supreme Court in *Northwest Austin* and the district court’s supplemental briefing order indicated, the constitutionality of the coverage formula is a significant issue. Yet the opinion under review devoted a mere 9 of its 151 pages to this important question. The court did not seriously confront whether “a statute’s disparate geographic coverage formula is sufficiently related to the problem that it targets.” *Nw. Austin*, 129 S. Ct. at 2512.

To withstand review, the coverage formula must be constitutionally sound “in both practice *and* theory.” *Katzenbach*, 383 U.S. at 330 (emphasis added). It is irrational in practice because the evidence of discrimination in the legislative

record is no longer concentrated in the covered jurisdictions. It is irrational in theory because it not only relies on decades-old voting data, but that data is predicated on registration and turnout statistics responsive to “first generation” interference with an individual’s ability to register and cast a vote—not “second generation” barriers that allegedly dilute the weight of that vote. In short, “[t]he statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.” *Nw. Austin*, 129 S. Ct. at 2512.

Despite the Supreme Court’s warnings about the coverage formula, the district court essentially dodged the question whether the formula is rational in theory, even after asking for supplemental briefing on this precise issue. Minute Order (Feb. 4, 2011) (ordering supplemental briefing and “encouraging” the parties “to address each aspect of the question separately—that is, to explain both why Section 4(b) is or is not rational ‘in practice’ and why Section 4(b) is or is not rational ‘in theory’”). Though conceding that “the continued reliance on arguably outdated data is a fair cause for concern,” the court declined to address Shelby County’s argument that there is a mismatch between Section 4(b)’s inputs and the kind of voting-discrimination evidence that Congress relied on to reauthorize Section 5. Mem. Op. at 145. Worse still, the court failed to appreciate the significance of its implicit concession that Section 4(b)’s coverage formula is not

rational in theory. Because the formula must be rational “in both practice *and* theory,” *Katzenbach*, 383 U.S. at 330, a failure on either score is fatal.

Instead of squarely confronting the formula’s theoretical flaws, the district court defended Section 4(b) as constitutional in practice. According to the district court, the formula is not really a formula at all; it is a reverse-engineered list designed to capture “those jurisdictions with the worst *historical* records of voting discrimination.” Mem. Op. at 146-47 (emphasis in original). By endorsing this mode of analysis, the district court once again inappropriately relied on misconduct from half a century ago to justify continuing the disparate treatment of certain sovereigns. The district court claimed that it was not punishing these jurisdictions “for long past sins,” *id.* at 147 (quoting *Nw. Austin*, 129 S. Ct. at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part), because the 2006 legislative record does contain evidence of “contemporary voting discrimination” in the “same jurisdictions that had histories of unconstitutional conduct,” *id.* But that is not the pertinent question. The relevant inquiry is whether the *current* evidence shows voting discrimination to be meaningfully greater in the covered jurisdiction than elsewhere in the country such that Section 4(b)’s departure from equal sovereignty is constitutionally justified. *See Nw. Austin*, 129 S. Ct. at 2512. The district court offered very little in response to this question; rather, it suggested that “an additional showing of a meaningful difference in voting discrimination

between covered and non-covered jurisdictions” may not even be constitutionally required at all. Mem. Op. at 147.

The court nevertheless found that some evidence in the legislative record suggested that voting discrimination is more prevalent in the covered jurisdictions. *See* Mem. Op. at 147-49. But none of this evidence demonstrates that voting discrimination is “concentrated in the jurisdictions singled out for preclearance.” *Nw. Austin*, 129 S. Ct. at 2512. As an initial matter, Congress did not even devote serious attention to comparative analysis. Mem. Op. at 149 (conceding that “the legislative record is primarily focused on the persistence of voting discrimination in covered jurisdictions”). And the statistical evidence in the legislative record does not even remotely support upholding Section 4(b). The district court primarily relied on Section 2 litigation, but there were more Section 2 lawsuits filed, as well as more Section 2 suits that resulted in findings of intentional discrimination, in non-covered jurisdictions than in covered jurisdictions. *See* Ellen Katz & The Voting Rights Initiative, VRI Database Master List (cited in *To Examine the Impact & Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong., 1st Sess.*, at 974, 1019-20 (Oct. 18, 2005)).

A state-by-state comparison of Section 2 litigation only makes matter worse. Of the States with the highest number of Section 2 lawsuits filed since 1982, the

nine covered States make up only 5 of the top 10, 6 of the top 14, and 7 of the top 26. *See id.* In fact, New York had more Section 2 lawsuits filed since 1982 than all but two covered States. *See id.* Notably, one covered State (Alaska) did not have a single reported Section 2 suit filed during the entire period covered by the legislative record. *See id.* Similarly, of the States with adjudicated Section 2 violations, covered States make up only 5 of the top 10, 6 of the top 18, and 7 of all 25. *See id.* In particular, Illinois had more Section 2 violations than five of the covered States. *See id.* Moreover, only 4 of the 20 States with Section 2 lawsuits that resulted in findings of intentional discrimination were covered States. *See id.* And, of the 6 States with more than one finding of intentional discrimination, only 2 were covered States. *See id.* In fact, Illinois and Tennessee each had more Section 2 lawsuits that resulted in findings of intentional discrimination than all but two covered States. *See id.*

In sum, many (if not most) of the nine covered States would not have been covered had Congress chosen to individually identify those States with the highest incidence of “second generation barriers.” But States like New York, Illinois, and Tennessee clearly would have been on that hypothetical coverage list. If Congress genuinely considered Section 2 litigation and other “second generation barriers” legitimate barometers for whether a State should be subject to preclearance until 2031, it would not have retained this defective formula, and it certainly would not

have targeted these nine States alone for coverage. It simply was not constitutional in theory or practice to impose preclearance on the covered jurisdictions through 2031 based on voting statistics from 1964, 1968, and 1972.

B. Shelby County Will Suffer Irreparable Injury Absent Expedited Review.

As a covered jurisdiction, Shelby County is forced to expend significant taxpayer funds, time, and resources to have all of its voting changes precleared. Indeed, Shelby County has done so during the course of this litigation. For example, after re-drawing its County Commission Districts to comply with the Fourteenth Amendment's "one man, one vote" mandate and, following public hearings, having those districts approved by the Shelby County Commission, the County sought administrative preclearance from the DOJ. In a letter dated September 15, 2011, the DOJ informed Shelby County that "[t]he Attorney General does not interpose any objection to the specified change," but would be reserving the right to re-open the issue if any "additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period" and also cautioning that "the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change." Letter from T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, DOJ, to Dorman Walker, Sept. 15, 2011. (Exhibit B).

In the absence of a ruling by this Court that either Section 5 or Section 4(b) is unconstitutional, Shelby County will be required to expend additional taxpayer funds, time, and resources to preclear voting changes in the near future. The most immediate voting changes relate to the location of various polling places. In less than one week, October 10, 2011, the County Commission will consider and make three polling place changes, all of which are necessary to facilitate the efficient administration of elections. The voting location for Precinct 7 will move from Chelsea City Hall to the Chelsea Church of God because City Hall is too small to accommodate the growing local population. The voting location for Precinct 32 will move from the Wilton Municipal Annex to Wilton Baptist Church because its current location is in a state of disrepair and the municipality lacks the funds to repair the facility. Finally, the voting location for Precinct 46 will move from Covenant Life Church to the First Baptist Church Pelham Annex to accommodate a growing local population and because communications problems between county poll workers and Covenant Life Church interfered with the efficient operation of elections in the past.

Before implementing these routine changes, however, Shelby County will have to seek preclearance. It will be forced to use taxpayer funds to prepare preclearance submissions to the DOJ or litigation in the district court; either path will require continued expenditures of an untold amount of both taxpayer funds

and limited County resources. Preclearance litigation is very costly; and seeking administrative preclearance provides no guarantee of cost-savings to the County, especially given the fact that the Attorney General's failure to object to a voting change does not preclude future litigation. *See* Exhibit B. Moreover, there is no assurance that these (and any other) voting changes will be precleared. If these particular voting changes are not precleared, numerous Shelby County voters will be left in polling locations that cannot accommodate the local population or otherwise are not conducive to the efficient administration of voting.

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that the Court grant this Unopposed Motion to Expedite the Appeal and order the appeal to proceed as follows: Opening Brief for Appellant and Joint Appendix – November 1, 2011; Amicus Briefs in Support of Appellant – November 8, 2011; Brief for Appellee – December 1, 2011; Briefs for Appellee Intervenors/Amicus – December 8, 2011; Reply Brief for Appellant – December 15, 2011; Oral Argument – as soon thereafter as practicable.

Dated: October 4, 2011

Respectfully submitted,

/s/ Bert W. Rein

Bert W. Rein

Lead Counsel

William S. Consovoy

Thomas R. McCarthy

Brendan J. Morrissey

WILEY REIN LLP

1776 K Street, NW

Washington, DC 20006

Tel.: (202) 719-7000

Fax: (202) 719-7049

Email: brein@wileyrein.com

Frank C. Ellis, Jr.

WALLACE, ELLIS, FOWLER & HEAD

113 North Main Street

Columbiana, AL 35051

Tel.: (205) 669-6783

Fax: (205) 669-4932

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2011, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

Robert Evans Kopp
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Email: robert.kopp@usdoj.gov

Linda Frances Thome
U.S. Department of Justice
(DOJ) Civil Rights Division, Appellate Section
PO Box 14403, Ben Franklin Station
Washington, DC 20044-4403
Email: linda.thome@usdoj.gov

Diana Katherine Flynn
U.S. Department of Justice
(DOJ) Civil Rights Division, Appellate Section
PO Box 14403, Ben Franklin Station
Washington, DC 20044-4403
Email: Diana.K.Flynn@usdoj.gov

Kristen Clarke
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
Email: kclarke@naacpldf.org

John Adolphus Payton
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street
16th Floor

New York, NY 10013
Email: jpayton@naacpldf.org

Arthur Barry Spitzer
American Civil Liberties Union of the National Capital Area
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920
Email: artspitzer@aol.com

Jon Marshall Greenbaum
Lawyers Committee for Civil Rights
1401 New York Avenue, NW
Suite 400
Washington, DC 20005-0000
Email: jgreenbaum@lawyerscommittee.org

I further certify that I sent the foregoing document via First Class U.S. Mail
to the following:

Mark A. Posner
Jon M. Greenbaum
Lawyers' Committee for Civil Rights
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

Arthur B. Spitzer
American Civil Liberties Union of the National Capital Area
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920

Laughlin McDonald
Nancy Abudu
American Civil Liberties Union Foundation, Inc.
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303

John Payton
Dale E. Ho
Debo P. Adegbile
Ryan P. Haywood
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013

Samuel Spital
Squire, Sanders & Dempsey, LLP
30 Rockefeller Plaza
23rd Floor
New York, NY 10112

Autumn C. Katz
Daniel T. Stabile
David Cooper
John M. Nonna
Dewey & LeBeouf LLP
1301 Avenue of the Americas
New York, NY 10019-6092

Dated: October 4, 2011

/s/ Bert W. Rein

Bert W. Rein

Lead Counsel

William S. Consovoy

Thomas R. McCarthy

Brendan J. Morrissey

WILEY REIN LLP

1776 K Street, NW

Washington, DC 20006

Tel.: (202) 719-7000

Fax: (202) 719-7049

Email: brein@wileyrein.com

Frank C. Ellis, Jr.

WALLACE, ELLIS, FOWLER & HEAD

113 North Main Street

Columbiana, AL 35051

Tel.: (205) 669-6783

Fax: (205) 669-4932

Counsel for Appellant

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SHELBY COUNTY, ALABAMA

Plaintiff,

Civil Action No. 1:10-cv-00651-JDB

v.

ERIC H. HOLDER, JR.,
in his official capacity as
ATTORNEY GENERAL OF THE
UNITED STATES,

Defendant.

DECLARATION OF FRANK C. ELLIS, JR.

Frank C. Ellis, Jr., pursuant to 28 U.S.C. § 1746, declares the following:

1. I am an individual over twenty-one years of age, and of sound mind, who has never been convicted of a felony, is capable of making this declaration, and am fully competent to declare as to the matters stated herein.
2. I am an attorney admitted to practice before all courts in the State of Alabama. I am a partner at the law firm of Wallace, Ellis, Fowler & Head, and maintain an office in Columbiana, Alabama.
3. Since 1964, I have been the County Attorney for Shelby County, Alabama.
4. I am personally acquainted with the facts herein stated by reason of performance of my service as County Attorney and based on my review of Shelby County records with respect to its compliance with Section 5 of the Voting Rights Act ("VRA").

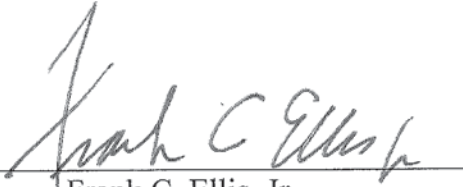
5. Shelby County has been subject to Section 5 of the VRA since August 7, 1965, when, pursuant to Section 4(b) of the VRA: (a) the Attorney General determined that, as of November 1, 1964, the State of Alabama was using one or more prohibited tests or devices; and (b) the Director of the Census determined that less than 50 percent of the persons of voting age residing in Alabama voted in the presidential election of November 1964. *See* 42 U.S.C. § 1973b(b)-(c); Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965); Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965 (Pub. L. No. 89-110), 30 Fed. Reg. 9897 (Aug. 7, 1965).
6. Under Section 4(b) of the VRA, Shelby County must seek preclearance under Section 5 of the VRA for all proposed voting changes.
7. In the last ten years, Shelby County has sought preclearance numerous times, expended significant taxpayer dollars, time, and energy to meet its obligations under Section 5 of the VRA, and has had at least one election delayed in order to ensure compliance with the preclearance obligations of Section 5 of the VRA.
8. Because Section 5 of the VRA requires that even the most minor voting changes must be precleared by the Department of Justice, Shelby County reasonably anticipates that it will have to seek preclearance in the near future. Shelby County anticipates that, among other reasons, the districting changes triggered by the decennial census, as well as routine voting changes related to local elections and zoning, will require it to seek preclearance in the near future.
9. A covered jurisdiction is ineligible for bailout under Section 4(a) of the VRA unless “[a]ll changes affecting voting have been reviewed under Section 5 prior to their

implementation.” United States Department of Justice, Civil Rights Division, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/voting/misc/sec_4.php (last visited June 1, 2010). On April 9, 2002, Shelby County held a referendum election under a law that had not been precleared. *See* Letter from Joseph D. Rich, Chief, Voting Section, U.S. Department of Justice Civil Rights Division, to Frank C. Ellis, Jr., Esq., and Dorman Walker, Esq. (Oct. 9, 2003) (Ex. A). The referendum election was later precleared by the Department of Justice. *See id.*

10. A “political subdivision” is ineligible for bailout under Section 4(a) of the VRA if the Attorney General has interposed an objection under Section 5 of the VRA during the past ten years to any change submitted for preclearance by “any governmental unit within its territory.” 42 U.S.C. § 1973b(a)(1)(E). On August 25, 2008, the Attorney General interposed an objection under Section 5 of the VRA to certain voting changes submitted for preclearance by the City of Calera, Alabama. *See* Consent Decree at 2-3, *United States v. City of Calera*, No. 08-1982 (N.D. Ala. Oct. 29, 2008) (Ex. B). The City of Calera is a “governmental unit” within the territory of Shelby County. 42 U.S.C. § 1973b(a)(1)(E).
11. According to data made publicly available by the U.S. Census Bureau, in 2000, the voting-age population of Shelby County was 105,673. In the November 2000 presidential election, 88,470 persons were registered to vote and 62,128 persons cast ballots in Shelby County. Thus, Shelby County had a registration rate of 83.7% and a voter turnout rate of 58.8%. According to data made publicly available by the U.S. Census Bureau, in 2004, the voting-age population of Shelby County was 120,886. In the November 2004 presidential election, 98,549 persons were registered to vote and 78,906

persons cast ballots in Shelby County. Thus, Shelby County had a registration rate of 81.5% and a voter turnout rate of 65.3%.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this day, June 7, 2010.



Frank C. Ellis, Jr.

EXHIBIT B



Civil Rights Division

TCH:RSB:JR:SMC:tst
DJ 166-012-3
2011-3070

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

September 15, 2011

Dorman Walker, Esq.
Balch & Bingham
P.O. Box 78
Montgomery, Alabama 36104-3515

Dear Mr. Walker:

This refers to the 2011 redistricting plan for Shelby County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on August 15, 2011.

The Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41 and 51.43.

Sincerely,

T. Christian Herren, Jr.
Chief, Voting Section

10/11/11

10/11/11 10:00 AM
10/11/11 10:00 AM
10/11/11 10:00 AM