

**RENEWING THE TEMPORARY PROVISIONS OF THE  
VOTING RIGHTS ACT: LEGISLATIVE OPTIONS  
AFTER LULAC V. PERRY**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,  
CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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JULY 13, 2006

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**Serial No. J-109-98**

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Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

33-836 PDF

WASHINGTON : 2007

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~~ers tend to be conservative. Of course, conversely, Democrats in Perry argued that reapportionment aimed at helping Republicans was racially discriminatory. Well, what is to be done? The obvious answer is don't renew Section 5.~~

~~If Congress insists that it cannot go cold turkey, then at least it should not make Section 5 worse. The two *Bossier Parish* decisions have modestly limited its scope and its potential abuses. They should not be overturned. I would also put *Georgia v. Ashcroft* in this category. The current House bill not only overturns *Georgia v. Ashcroft* but replaces it with a provision that is muddy at best, will lead to years of more litigation, and will have results that its drafters never intended. I would add that the more this provision's meaning is clarified to ensure that it requires the creation of majority-minority districts, the more clearly unconstitutional it will be as well.~~

~~The case law that has grown up around Section 5 makes its meaning nearly incomprehensible already. Congress should not make matters worse by adding language, the meaning of which its own members cannot agree on.~~

~~I would also not extend Section 5 or Section 203 for another 25 years. The shorter the extension, the better, especially if Congress changes the statute in ways that might have unintended consequences. I would also try to put in place a better, more objective review mechanism, probably in the statute itself. Congress must undertake a serious, systematic comparison of voter registration and participation rates by race in covered versus non-covered jurisdictions, with an effort to determine the actual causes of any disparities and specifically whether those causes are discrimination, and if there are more limited and effective remedies for any discrimination than the preemption mechanism and an effects test. Above all, Senator Cornyn, Congress should not extend the law and then forget about it and its effects for another 25 years and then scramble and try to figure out what to do about it in the heat of another election year.~~

~~Thank you very much.~~

~~[The prepared statement of Mr. Clegg appears as a submission for the record.]~~

~~Senator CORNYN. Thank you, Mr. Clegg.~~

~~Professor Ifill?~~

**STATEMENT OF SHERRILYN A. IFILL, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MARYLAND SCHOOL OF LAW, BALTIMORE, MARYLAND**

Ms. IFILL. Thank you for giving me the opportunity to testify in support of the passage of this bill reauthorizing the Voting Rights Act.

I followed the deliberations on this matter in the House and in the Senate with some interest, and I commend both Houses for the deliberate and thorough way in which you have considered reauthorization of the Act.

As a former voting rights attorney and now an academic, I have tried to follow the arguments advanced by those who disagree with the continued need for the Act, like Mr. Clegg—arguments that I believe have been most capably countered by supporters of the Act

in the civil rights and academic communities who have appeared before you.

But I was particularly interested in appearing at this hearing because I confess to being somewhat intrigued by the name of the hearing: “Legislative Options after *LULAC v. Perry*.” I was intrigued because my reading of the Supreme Court’s decision in that case finds nothing that supports altering the existing framework of the draft bill for reauthorization of the Voting Rights Act. To the contrary, the Court’s analysis in *LULAC*, to my mind, strongly supports the bill. I say this for three reasons.

First, the Court upheld the district court’s finding that voting was racially polarized throughout the State of Texas. This finding and the Supreme Court’s recognition of it is significant. It reflects the reality that although this country has come a long way since the Act was passed in 1965, we still, as Congressman John Lewis stated to this Committee, have a great distance to go.

When I litigated voting rights cases in the 1980’s and early 1990’s in Texas, voting was racially polarized. Fifteen years later, this political reality continues to shape and to undermine the ability of minority voters to elect candidates of their choice.

Second, the Court in *LULAC*, in its detailed and local specific analysis of the way in which the dismantling of District 23 violated Section 2 of the Act, demonstrates why the protections of the Voting Rights Act are not limited merely to access to the ballot box, as some would have us believe. In 1965 and again in 1982, Congress explicitly designed the Act to address any means by which a jurisdiction might interfere with the ability of minority voters to participate in the political process and elect candidates of their choice. Rather than anticipate what those methods might be, Congress, and later the courts in furtherance of Congress’ goals, encouraged—and I am quoting—“a searching, practical evaluation of the local political reality and a functional view of the political process”—I am quoting from the Senate report accompanying the 1982 amendments of the Act—to determine whether a violation of Section 2 has occurred.

In *LULAC*, the Court rejected a simplistic numbers game whereby one Latino district, District 23, could simply be swapped for another, District 25. The Court recognized instead that District 23 was dismantled precisely to keep Latinos there from exercising their increasing power in that district. The Court described this action by the State of Texas as “bearing the mark of intentional discrimination.”

Third, with regard to Section 5, as you know, *LULAC v. Perry* was not a Section 5 case; thus, the Court’s opinion in *LULAC* offers this Committee no new analysis or insight into the appropriate standard for preclearance under Section 5, the scope of jurisdictions to be covered under Section 5, or the trigger formula for Section 5. In fact, the only pronouncements about Section 5 that I think are of importance for this Committee’s work on the reauthorization bill appear in the opinion of Justice Scalia, concurring in part and dissenting in part.

In that opinion, the three most conservative Justices on the Court joined with Justice Scalia in reaffirming the constitutionality of Section 5 as a proper exercise of Congress’s authority under Sec-

tion 2 of the 15th Amendment, a power that remains undiminished after *City of Boerne v. Flores*.

Finally, to the charge that the Voting Rights Act fosters segregation, there are myriad factors that have contributed to residential segregation in the United States. Some of them include a history of violence, socioeconomic disparities between blacks and whites, red-lining, and even choice. None of these phenomena were created by the Voting Rights Act, and I would commend certainly a number of studies, including Jim Loewen's "Sundown Towns," Sheryll Cashin's "The Failure of Integration," if one wants to look at the purposes and the causes of residential segregation.

The Voting Rights Act instead has encouraged some of the most integrated districts, election districts, that this country has seen in the South.

In conclusion, the Supreme Court's decision in *LULAC v. Perry*, to the extent that it bears on the deliberations of this Committee, reaffirms the importance of reauthorizing the Act, and I would be happy to take any further questions about the decision.

Thank you.

[The prepared statement of Ms. Ifill appears as a submission for the record.]

Senator CORNYN. Thank you very much.

Ms. Perales?

~~STATEMENT OF NINA PERALES, SOUTHWEST REGIONAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, SAN ANTONIO, TEXAS~~

~~Ms. PERALES. Thank you, Chairman Cornyn. Thank you for the opportunity to testify today regarding the Supreme Court decision in the Texas redistricting case and its implications for the reauthorization of the Voting Rights Act.~~

~~My name is Nina Perales. I am Southwest Regional Counsel for MALDEF, the Mexican American Legal Defense Fund. MALDEF successfully litigated the Voting Rights Act claim before the Court. I argued the appeal on behalf of the GI Forum before the Supreme Court on March 1, 2006.~~

~~The *LULAC v. Perry* decision is a resounding affirmation of the Voting Rights Act and its continued importance in protecting minority voting rights. The Supreme Court decision also helps us understand why we need the protections of the temporary provisions in the face of ongoing discrimination in Texas.~~

~~The Court found that Texas had violated the Voting Rights Act by diluting Latino voting strength in District 23. As mentioned by Professor Ifill, the Court found racially polarized voting throughout the State and characterized the racially polarized voting in District 23 as "severe."~~

~~For Texas, the State containing the second largest number of Latinos in the United States, this is the second time a State redistricting plan has been invalidated in this decade for violating Latino voting rights.~~

~~This decision, although characterized by many as having to do with partisanship, is not about Democrats and it is not about Republicans. Importantly, the record in this case demonstrated that Latinos in District 23 were flexible in their partisan affiliation and~~

**Sherrilyn Ifill, Associate Professor of Law  
University of Maryland Law School  
Written Responses to Senator Cornyn's Questions**

1. What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.

I did not receive the questions provided in your July 23, 2006 letter until July 31, 2006 -- four days after the Voting Rights Act renewal bill was signed by President Bush. Several of the questions are framed in terms that suggest that they were designed to explore some of the issues that would inform the Senate vote. As I understand it, your questions 1-6, and 8 were put to and answered by several witnesses prior to the Senate's 98-0 vote in favor of the renewal bill and thus prior to the President's signing. I have had the opportunity to review the responses of Drew Days, Pam Karlan, and Ted Shaw, among others, and believe that I agree with the substance of their responses to your questions and that no meaningful contribution to the relevant legislative record can be made at this post-enactment stage. Indeed, I presume that your satisfaction with the thorough testimony offered by witnesses and to the written responses provided in response to your queries, as well as to those of the other Senators, was manifested in your vote in favor of the bill. Accordingly, in lieu of providing written responses to questions 1-6, 8 here, I rest on those written responses that were provided prior to the Senate vote by the witnesses that I identified above. In addition, I believe that the answers I furnished at the hearing with regard to the significance of the number of Department of Justice objections under Section 5, are responsive to question 4.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the Presidential elections of 1964, 1968, and



1972. Reauthorization of the Act in its current form would preserve those dates as the “triggers”.

- a) Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?
- b) Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

Please see my response to Question 1.

3. In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the 14th and 15th amendments. In striking down the Religious Freedom Restoration Act, the Court observed, “RFRA’s legislative record lacks examples of modern instance of generally applicable laws passed because of religious bigotry.”

Given this statement, would you support removing- at a minimum- the year 1964 from the coverage formula?

Please see my response to Question 1.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions- yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or .153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only one objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Please see my response to Question 1, and also my live testimony at the hearing on July 13, 2006.

5. In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?

Please see my response to Question 1.

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

Please see my response to Question 1.

7. What do the changes to the Voting Rights Act proffered in the current re-written version mean? Specifically, Section 5 of the currently proposed re-write of the Act says the following:

(b) Any voting qualification, or prerequisite to voting, or standard, practice, or procedure, with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) the term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.

Please tell the committee, in a few sentences, what you believe these phrases to mean.

Although many of the issues raised in my response to Question 1 apply equally here in that post-enactment legislative history cannot have informed the vote, I provide the following brief written response because I am not aware that this specific question has been addressed by numerous witnesses. The “preferred candidate of choice” language was designed to clarify Congressional intent in light of the Supreme Court’s recent ruling in *Georgia v. Ashcroft*, which held that the presence of influence districts may factor into whether or not a redistricting plan can be deemed retrogressive. This new language in the bill will help ensure that under Section 5 jurisdictions are not permitted to dismantle districts that provide minority voters an opportunity to elect candidates of choice in favor

of districts in which minority voters “can play a substantial, if not decisive, role in the electoral process” -- more commonly referred to as influence districts.<sup>1</sup>

In addition, the “any discriminatory purpose” language contained in the bill further clarifies Congressional intent in light of the *Reno v. Bossier Parish School Board II* ruling which held that evidence of discriminatory purpose was not sufficient to sustain a Section 5 objection. In *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 framework for determining whether there was sufficient circumstantial evidence or direct evidence of invidious discriminatory purpose infecting the adoption of a particular voting change. The *Arlington Heights* framework requires the Justice Department and courts to determine 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.<sup>2</sup> The newly enacted bill will help ensure that Section 5 appropriately filters out changes enacted with discriminatory intent and not only those manifesting the more narrow retrogressive intent.

8. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* and/or *Bossier Parrish II* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under a plan?

<sup>1</sup> *Georgia v. Ashcroft*, 539 U.S. 461, at 482 (2003).

<sup>2</sup> *Arlington Heights*, 429 U.S. at 266-68.

Please see my response to Question 1.

9. The Court in *LULAC v. Perry* indicates that for purposes of Section 2, the analysis should focus on a district in isolation. In other words, the Court said that Texas could not remedy a possible Section 2 violation of “dilution” by creating a new offsetting opportunity district because the analysis must be performed in “isolation.” This seems troubling. As Chief Justice Roberts pointed out:

*When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a [ ] violation can be made out in any one district “in isolation.” In these circumstances, it is always possible to look at one area of minority population “in isolation” and see a “violation” of §2...*

*For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.*

If the analysis for Section 5 determination of “candidate of choice” are similarly decided on a district-by-district basis, how can it possibly work?

Although many of the issues raised in my response to Question 1 apply equally here in that post-enactment legislative history cannot have informed the vote, I provide the following brief written response because I am not aware that this specific question has been addressed by numerous witnesses. The Court’s recent ruling in *LULAC* helps clarify the governing standards for both proving and for remedying a violation of Section 2 of the Voting Rights Act, including the Section 2 prerequisite of compactness, the requirement which requires a showing, in the context of a redistricting challenge, that

minority voters are sufficiently compact and numerous such that a district can be created that would provide those voters with an opportunity to elect candidates of their choice. 126 S.Ct. 2594; *see also Johnson v. DeGrandy*, 512 U.S. 997 at 1008 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). As outlined in Justice Kennedy’s controlling opinion, the three “*Gingles*” prerequisites must initially be met “[c]onsidering the district in isolation.” 126 S.Ct. 2594, 2616. Thereafter, however, Justice Kennedy recognized that a broader examination might lead to the conclusion that there could be no Section 2 violation under the circumstances.

The State of Texas argued that even though the *Gingles* prerequisites were met with respect to the challenged District 23 (because the District could have been drawn in an equally compact manner so as to including a sufficient numbers of Latinos of voting age to permit those voters to elect a candidate whom they preferred) there was no Section 2 violation because “it met its §2 obligations by creating new District 25 as an offsetting [Latino] opportunity district,” *id.* The Court rejected this argument because it found that District 25 under the State’s plan was not “compact” in the sense that had it not been drawn by the State, individuals in the area could have succeeded, in a different Section 2 case, in meeting the *Gingles* compactness prerequisite by proposing it. *Id.* at 23-29. Justice Kennedy’s opinion clarified that a “State [may] use one majority-minority district to compensate for the absence of another only when the racial group in each area had a §2 right and both could not be accommodated,” *id.* at 23.

It is evident from this approach that the Court did not limit the Section 2 analysis to a single district “in isolation.” Justice Kennedy’s opinion confirms this by stating that “the first *Gingles* condition requires the possibility of creating more than the existing

number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.” *Id.* at 23, quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994). Further clarifying the compactness requirement, the *LULAC* Court also noted that this “inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’” *LULAC* (quoting *Vera*, 517 U.S. at 977, (plurality opinion)). Most importantly, the Court held that states cannot use one majority-minority district to compensate for the absence of another except in those instances when the racial group in each area had a Section 2 right and both could not be accommodated.

It is important, in interpreting the Court’s language, to bear in mind the well-established principle statement regarding the need to review Section 2 claims in isolation to mean that Section 2 addresses a different harm than that addressed in the Section 5 context. Section 2 goes beyond the bare protections provided in the Section 5 context by looking to see whether the voting strength of minority voters in a particular jurisdiction has been diluted. In that sense, the protections afforded by Section 2 are broader in scope. Section 2 violations do not require the kind of comparative analysis conducted in the Section 5 context by looking at electoral opportunities provided under an old and new plan. Rather, Section 2 violations are largely jurisdiction geographic area-specific and require an intensely localized examination of the factors outlined constituting in the *Gingles* preconditions, including the compactness requirement, in order to determine whether a meritorious claim has been presented. It also is clear, however, that the Court’s precedents have recognized that considerations of “substantial proportionality”

on a jurisdiction-wide basis may serve as a limitation on Section 2 claims. *See DeGrandy*, 512 U.S. 997, 1015-16 (1994).

The analysis conducted in the Section 5 context is entirely distinct from that conducted in the Section 2 context, although it. However, the analysis is comparable in that preclearance determinations also turn on require a very localized and focused analysis. However, unlike the Section 2 context, this analysis aims to determine the number of truly viable districts under the benchmark and proposed plans. Indeed, determining whether a particular district is viable as a minority-opportunity district calls on for an careful regression analysis of voting patterns to that help determine whether minority voters are able to elect their “candidates of choice.”

Thus, for the reasons outlined above, I believe that Section 2 and 5 are workable provisions that address different harms utilizing distinct forms of analysis.

10. The Supreme Court said that Henry Bonilla, a Hispanic Republican – a man that grew up in the barrios, a man who was the first in his family to attend college – could not represent Hispanics in his district – seemingly, simply because he is not a Democrat.

Similarly, you wrote the following in a July, 12 2005 editorial piece in the Baltimore Sun:

*“The nomination of Justice Thomas to the seat vacated by Justice Marshall reduced the idea of diversity to its most simplistic and cosmetic terms. One need not question Justice Thomas' race or his authenticity as a black justice to recognize that describing him as "representative" of blacks, when his views reflect those of only 10 percent of the black population, is cynical and crude.”*

What support by the minority population in an elected official’s district should be sufficient to indicate who can represent them?

Similarly, forgetting for a moment that Justice Thomas is not an elected official – and thus, is not “representative” of any constituency in particular... if 10% support is not enough support for Justice Thomas to represent the views of African-Americans, what is enough? Would 20% be enough? 40%?

As I have articulated in my scholarship over the past 13 years, the term “representation” is a dynamic one, capable of multiple meanings depending on the context. Even appointed officials can serve in a “representative” capacity, although not in precisely the direct manner that elected representatives do. For example, on our federal circuit courts of appeal, judges are selected from the states that comprise each appellate district. In the 4<sup>th</sup> Circuit for example, judges are selected from North Carolina, South Carolina, Maryland, Virginia and West Virginia. Ideally, each of those states should be “represented” on the 4<sup>th</sup> Circuit. This does not mean that judges on the 4<sup>th</sup> Circuit are expected to advance the interests of their home states in deciding cases. But without question, the experience and familiarity of judges from particular states with the practice of law, the political reality, and governing structures in their home states should inform the work of the entire 4<sup>th</sup> Circuit.

Justices on the Supreme Court and other appointed courts can and do serve a representative function – albeit a quite different one than legislators. Judges must be impartial decision makers. But adherence to impartiality does not mean that a judge has no representative function. I have described the boundaries of judicial representation in my article, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee. L. Rev (2000) at pages 466-479, and I invite you to review that article for a more expansive articulation of my views in this regard.



With regard to the percentage of support needed to “represent” a community, it is an accepted pillar of our democracy that a candidate who receives the support of a majority (50% + 1) of the electorate becomes the representative of that jurisdiction. I know of no circumstance in which a leader who enjoys the support of only 10% of a relevant constituency has been regarded as the legitimate “representative” of that community. I use this same standard when thinking about whether an appointed official can be said to “represent” a particular constituency, recognizing of course that appointed officials – especially judges – are not pure or direct representatives in the same way as legislators or executives. In short, I ask, are the views and decisions of the “representative” reflective of those of the majority of the constituency to be represented?

I reject any notion that representation based on solely on shared racial background or characteristics is legitimate. Again, I elaborate on this in my article *Racial Diversity on the Bench*, cite above at pages 479-491. I fully acknowledge that shared racial background can be an important aspect of representation, but only if that shared background translates into common views, perspectives, values or goals between the putative representative and his constituents. For this reason, I argue that Justice Clarence Thomas is not “representative” of African Americans in the United States. He is African American, but his views as expressed in cases such as *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting), *M.L.B. v S.L.J.*, 519 U.S. 102, 129 (1996) (Thomas, J., dissenting), *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring), *Hudson v. McMillan*, 503 U.S. 1, 28 (1992) (Thomas J., dissenting), to name just a few, demonstrate that he does not share the opinion, perspectives or goals of the vast majority of African Americans. The views he advances may represent those of African American

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Testimony of

**SHERRILYN A. IFILL**

**Associate Professor of Law, University of Maryland School of Law**

**Before the Senate Committee on the Judiciary**

**Subcommittee on the Constitution, Civil Rights and Property Rights**

**“Renewing the Temporary Provisions of the Voting Rights Act: Legislative  
Options after *LULAC v. Perry*”**

**Hearing Regarding the Reauthorization of the Voting Rights Act**

**July 13, 2006**

**Background**

I am pleased to have the opportunity to offer my testimony in support of S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. My testimony is focused on the impact of the Supreme Court's recent ruling in *League of United Latin American Citizens, et al. v. Perry, et al.*, 548 U.S. \_\_\_(2006)(slip. op. no. 05-204)(LULAC), on Congress's efforts to renew the expiring provisions of the Voting Rights Act of 1965 (VRA). Although the Court's ruling arises in the context of several legal claims that did not touch upon Section 5 of the VRA, the ruling recognizes that voting discrimination persists throughout the State of Texas, which has the nation's 4th largest minority population,<sup>1</sup> and essentially reaffirms the importance of the expiring provisions of the Act. I strongly urge Chairman Arlen J. Specter and other Members of this Committee to pass S. 2703 to help ensure that African Americans, Latinos, Native Americans and other racial and language minority groups are able to participate meaningfully in the political process.

I am a civil rights lawyer and an Associate Professor of Law at the University of Maryland School of Law in Baltimore, Maryland. My coursework includes Civil Procedure, Constitutional Law and Voting Rights Law, among others. I have extensive experience litigating voting rights matters including challenges to discriminatory election schemes under the Voting Rights Act of 1965 and cases, on behalf of black voters, challenging the method of electing

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<sup>1</sup> According to 2005 U.S. Census Bureau estimates, Texas ranks 4th in the nation as a minority-majority state (after Hawaii, New Mexico, and California). The Texas State Data Center estimates that Hispanics could become a majority in the State by 2030.

judicial officers in Texas, Louisiana, and Oklahoma. I have also served as counsel for the petitioners in *Houston Lawyers' Ass'n. v. Atty. Gen'l. of Texas*, 501 U.S. 419 (1991), in which the U.S. Supreme Court held that Section 2 of the Voting Rights Act applies to judicial elections. Given my experience litigating voting rights matters in the State of Texas, I am struck by the Supreme Court's analysis of the Section 2 claim in *LULAC* and the similarities between circumstances currently affecting minority voters in the state, and the voting conditions that I encountered while litigating in Texas and other covered jurisdictions around the country during the 1980s and 1990s. In light of those similarities, I am alarmed by the claim advanced by some that the Court's decision in *LULAC v. Perry* in some way weakens the case for reauthorizing the key provisions of the Voting Rights Act contained in the draft bill before this Committee. To the contrary, the Court's decision in *LULAC v. Perry* affirms the continuing need for the preclearance provisions of Section 5 of the Act and reaffirms the principles by which courts have analyzed claims brought under section 2 since the 1982 amendments to the Act.

#### **Introduction**

In *LULAC*, the Supreme Court considered the legality of a redistricting plan that presented substantial issues of minority vote dilution occurring in the context of a contested, partisan-driven legislative session in the State of Texas. In its ruling, the Court determined that there was no "manageable" standard that could be employed to police partisan gerrymandering, and thus refused to

invalidate the redistricting plan on the basis of proposed legal theories that would limit partisan redistricting. The Court also rejected a Section 2 challenge to District 24, which incorporates significant parts of the Dallas-Forth Worth metropolitan area, in which African-American voters argued that they had effective electoral control of a Congressional district even though they constituted under 30 percent of the voting population in that district. Significantly, and most relevant for purposes of this hearing, the Court held that District 23 had to be redrawn because it results in impermissible vote dilution in violation of Section 2 of the Voting Rights Act (VRA).

In large part, the Court's ruling addresses the various legal claims raised to challenge the practice of one political party drawing legislative district lines to maximize its electoral advantage. However, to the extent that the Court's ruling bears on Congress's consideration of the expiring provisions of the VRA, it lies in the fact that the successful Section 2 vote dilution claim shows that voting discrimination persists today in covered jurisdictions, contrary to the views of those who attempt to deny this well supported fact. The VRA's protections remain important checks on voting discrimination which continues to have the tendency to "shape shift;" Congress has used evidence that jurisdictions have moved to adopt new and more sophisticated forms of discrimination to justify the necessity of Section 5 from the outset. My testimony will highlight a few points made by the Court that lend support to the current renewal bill. First, the Court recognized that discrimination persists on a statewide basis in Texas and is reflected, in part, by significant levels of racially polarized voting in state

elections. Second, the Court also suggested that intentional discrimination continues to stand as a threat within the political process. Third, the Court recognized that Section 5 is a compelling state interest, suggesting that any future challenge to the constitutionality of Section 5 would likely fail as similar challenges have in the past.<sup>2</sup> And finally, the Supreme Court's ruling supports the need for Congress to restore the "ability to elect" standard within the Section 5 context, thus bringing imperative uniformity and clarity to the way that minority electoral opportunities are measured within the judicial and administrative contexts.

#### **Supreme Court Recognition of Continued Racially Polarized Voting**

The *LULAC* Court recognized that significant levels of racially polarized voting continue to hamper minority electoral opportunities. This political reality highlights the continued need for the expiring provisions of the Act. Indeed, the Court recognized that polarization within challenged District 23 was "particularly severe," finding that the "Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district."<sup>3</sup> The *LULAC* case illustrates not only the existence of racially polarized voting, but more significantly, how knowledge of those voting patterns – which are vestiges of state-sponsored discrimination – can be used by governmental actors to structure electoral arrangements in ways that disadvantage minority voters. To

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<sup>2</sup> See e.g., *Lopez v. Monterey Cty.*, (involving a post-*Boerne* challenge to § 5. Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance) 525 U.S. 266, 269 (1999).

<sup>3</sup> *Lulac*, 548 U.S. at 21.

state it more simply, racially polarized voting patterns plus governmental power can, and does, result in minority vote dilution in many covered jurisdictions.

#### **Discrimination as Shape Shifter**

Congress has compiled an extensive record that demonstrates that discrimination persists in the political process. This record illustrates the continuing need for Section 5 of the Voting Rights Act and provides a sufficient basis for Congress to reauthorize its expiring provisions. Although opponents have pointed to substantial progress made since the 1982 renewal, the evidence demonstrates that jurisdictions continue to find new ways to retrogress and dilute minority voting strength. Indeed, the *LULAC* Court recognized that the contested redistricting plan eliminated minority electoral opportunity in the face of growing numbers of politically cohesive Latino voters. This observation ties directly to well-established findings of Congress, in the context of previous renewal debates, showing that one of the periods of greatest danger for minority voting power occurs at the very time that minority communities are poised to exercise it. Consider, for example, that as early as the seminal Section 5 case of *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), the underlying discriminatory practices involved illustrated that once African Americans were able to register to vote, the rules of the game shifted resulting in restrictions that limited the effectiveness of their votes.

It is also noteworthy that the Court noted that the Texas redistricting plan “bears the mark of intentional discrimination that could give rise to an equal

protection violation.”<sup>4</sup> The Court also recognized that jurisdictions are often juggling various redistricting principles when it adopts a particular plan but noted that these principles, such as incumbency protection, “cannot justify the [negative] effect on minority voters.”<sup>5</sup> Similarly, in the Section 5 context, the preclearance process ensures that jurisdictions do not adopt retrogressive voting changes dressed up with justifications that bear the marks of apparent neutrality. Indeed, the Section 5 process is aimed at ferreting out those changes that place voters in a worse position and those changes may or may not have been adopted with any malice or apparent discriminatory intent. Nonetheless, the Court’s ruling in *LULAC* recognized that discriminatory intent may continue to surface within the political process. Experience shows that, more often than not, this discrimination may surface in different shapes and forms.<sup>6</sup> Indeed, the *LULAC* Court provides the most recent and compelling evidence of this fact. It bears emphasis that the Court’s opinion identifies many hallmarks of the voting discrimination in Texas that were so familiar to me when I litigated voting rights cases in that state much closer in time to the 1982 renewal.

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<sup>4</sup> *Id.* at 34. Moreover, this recognition on the part of the Court lends support to the language in proposed legislation that aims to restore § 5 to the pre-*Bossier II* standard by allowing the DOJ and courts 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 Voting Rights Act.

<sup>5</sup> *Id.* at 35.

<sup>6</sup> *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination”; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.).



**Partisanship Will Not Insulate Voting Changes from Review Regarding their Impact on Minority Voting Strength**

The *LULAC* ruling highlights the fact that intense partisan debates will not suffice to insulate those jurisdictions that adopt changes that either impair or retrogress minority voting strength. Some scholars have argued that, perhaps, statewide redistricting should be removed from the scope of Section 5 review because the high-stakes nature of those plans is almost always subject to litigation. While Section 5 itself did not block the voting discrimination in this case, a reality that perhaps illustrates, among other things, the difficulty of applying *Georgia v. Ashcroft*, there can be little doubt that the Voting Rights Act does play a vital role in protecting minorities in battles that are often characterized as solely partisan. If anything, *LULAC* illustrates that minorities cannot be used as fillers or as pawns for districts in a quest for a partisan power grab. Rather, protection of minority voting strength and compliance with the Voting Rights Act are a compelling state interest that must seriously be considered by line-drawers and politicians alike.

*LULAC* makes clear that it would be completely untenable to ask all minority voters facing continuing voting discrimination in covered jurisdictions to file and litigate complex Section 2 cases in order to vindicate their rights. Indeed, the time and resources involved would lead to too many communities bearing continued discrimination in the absence of funds and expertise to stop it.

**The Proposed Bill Will Bring Uniformity to the VRA Statutory Framework**

The proposed bill will bring needed uniformity and coherence to the Act's statutory framework by restoring the "ability to elect" standard in the Section 5 preclearance context. Currently, Section 2 of the VRA relies on the "ability to elect" standard in determining whether a particular voting practice or procedure dilutes minority voting strength. Specifically, in the redistricting context, Section 2 requires that courts look to see whether a redistricting plan impairs minority voting strength by eliminating the "opportunity to elect their candidate of choice." Section 2 courts perform this analysis by conducting a very thorough review that looks to the preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), while also considering the totality of the circumstances surrounding the challenged practice. Although the current Section 5 retrogression determination is different in that it looks only to whether a particular voting change places minority voters in a worse position, historically, the Justice Department and courts have made preclearance determinations by initially comparing minority electoral opportunities under the benchmark and proposed plans. It is this assessment of minority electoral opportunities that has long been consistent with Section 2 determinations about practices that provide minority voters an opportunity to elect candidates of choice.

The Court's recent ruling highlights the appropriate methodology for determining whether minority voters have an opportunity to elect candidates of choice. The proposed bill provides a needed coherence by restoring this methodology and standard in the Section 5 context and bringing a degree of

consistency between Sections 2 and 5 while continuing to recognize that they serve as distinct, but complimentary tools for attacking the same harm. The *LULAC* opinion demonstrates that the ability to elect standard is administrable, as both the Court and the Department of Justice (DOJ) had recognized for nearly 30 years prior to *Georgia v. Ashcroft*, 539 U.S. 461 (2003), *vacated and remanded*. Indeed, the Court determined that challenged District 23 was invalid under Section 2 because it no longer provided minority voters the opportunity to elect candidates of their choice. The Court recognized that the opportunity to elect candidates of choice in a Section 2 case requires more than the ability to influence the outcome between some candidates.<sup>7</sup>

Further, the Court emphasized the importance of making particularized determinations about minority electoral opportunity. Although the Court acknowledged that the challenged district was physically compact, the court noted that the *Gingles* compactness requirement refers to the compactness of the minority population, not the compactness of the contested district.<sup>8</sup> In reaching its holding, the Court noted that the old district fractured a politically cohesive population of minority voters who had forged an “efficacious political identity.”<sup>9</sup> This particularized determination is consistent with the approach used to measure electoral opportunities in the Section 5 context.

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<sup>7</sup> *Id.* at 40.

<sup>8</sup> See *Bush v. Vera*, 517 U.S. 952, 997 (1996).

<sup>9</sup> *LULAC*, 548 U.S. at 29.

### **Conclusion**

Although the recent *LULAC* ruling does not bear directly on the bill, to the extent that any relevant conclusions can be drawn from it, the Court affirms that the Voting Rights Act and the protections it affords are still a vital and necessary component of our nation's political life. Moreover, several Justices recognize that Section 5 is a compelling state interest and this strongly suggests that any future challenges to the constitutionality of the Act's retrogression provisions will likely be unsuccessful. *LULAC* does not require that Congress amend the language of the proposed bill. In fact, the ruling supports the importance of restoring the ability to elect standard in the Section 5 context to bring needed clarity, uniformity, and enhanced administrability to the Act's statutory framework.<sup>10</sup>

Most significantly, the *LULAC* Court recognized that racial discrimination against our nation's racial and language minorities persists to the present day -- at times in the context of statewide voting changes -- as does extreme levels of polarized voting such as the Court found on a statewide basis in Texas. This stark evidence of persisting discrimination not only bolsters Congress' authority to renew the expiring provisions but also highlights the continuing need for Section 5 to remain in effect in the covered jurisdictions.

Finally, the *LULAC* ruling highlights the fact that intense partisan struggles are not sufficient to insulate those jurisdictions that adopt changes that either impair or retrogress minority voting strength. Partisan battles, as illustrated by

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<sup>10</sup> It is worth noting that Assistant Attorney General Wan Kim of the Civil Rights Division, U.S. Department of Justice, offered testimony during these hearings that shows that the standards used for determining retrogression following *Georgia v. Ashcroft* are difficult to apply in the administrative context. This testimony lends strong support for restoring the ability to elect standard.

Texas's recent experience, may indeed pose a grave threat to minority voting rights.