No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER JR., Attorney General of the United States of America, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF JULIUS CHAMBERS, ARMAND DERFNER, JAMES U. BLACKSHER, ANITA EARLS, ROBERT McDUFF, EDWARD STILL, ELLIS TURNAGE, CYNTHIA McCOTTRY SMITH, BERNARD R. FIELDING, MARJORIE AMOS-FRAZIER, LEE H. MOULTRIE, SOUTHERN ECHO, AND DEMOCRACY NORTH CAROLINA AS AMICI CURIAE IN SUPPORT OF APPELLEES

WILLIAM D. KISSINGER
Counsel of Record
SUJAL J. SHAH
ERIN SHANNON-CONROY
PERRY M. GROSSMAN
SARAH L. BISHOP
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
(415) 393-2000
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI CURIAE[1]

Amici curiae are individuals and organizations that work to protect minority voting rights in covered and non-covered jurisdictions across the South.

Attorney amici are members of the private voting rights bar, and collectively have spent over 200 years working on voting rights cases. Together, they have testified in every congressional reauthorization hearing regarding Section 5 since 1971, and have extensive knowledge of the expense, time, and endless rounds of litigation required to effectively prosecute cases under Section 2 of the Voting Rights Act. Amici curiae are acutely aware that in the absence of the preclearance requirement, the resources available to enforce the Voting Rights Act through private litigation are completely insufficient to protect the rights guaranteed to minority voters under the Fifteenth Amendment.

James U. Blacksher is an attorney in Birmingham, Alabama. He argued *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and has briefed several other voting rights cases before this Court, including *Sinkfield v. Kelley*, 531 U.S. 28 (2000).

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[1] This brief of amici curiae is filed with the consent of the parties. Written consent of all parties is being filed with the Clerk of Court together with this brief, in accordance with this Court's Rule 37.3(a). No counsel for any party authored this brief in whole or in part, nor did any person other than amici and their counsel make a monetary contribution to the preparation or submission of this brief.

Julius Chambers is an attorney in Charlotte, North Carolina. A former director-counsel of the NAACP Legal Defense Fund, he has argued numerous cases before this Court, including *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Shaw v. Hunt*, 517 U.S. 899 (1996).

Armand Derfner is an attorney in Charleston, South Carolina, He has argued numerous Voting Rights Act cases before this Court, including *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985).

Anita Earls is an attorney in Durham, North Carolina. She is a former Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice, and the current executive director of the Southern Coalition for Social Justice.

Robert McDuff is an attorney in Jackson, Mississippi. He has argued several cases before this Court, including the Voting Rights Act cases of *Clark v. Roemer*, 500 U.S. 646 (1991) and *Branch v. Smith*, 538 U.S. 254 (2003).

Edward Still is an attorney in Birmingham, Alabama. He has tried and briefed Voting Rights Act cases in five states spanning the period from *Bolden*, 446 U.S. 55, to *Riley v. Kennedy*, 128 S. Ct. 1970 (2008).

Ellis Turnage is an attorney in Cleveland, Mississippi. He has been litigating cases under Sections 2 and 5 of the Voting Rights Act since 1983.

Cynthia McCottry Smith, Bernard R. Fielding, Marjorie Amos-Frazier, and Lee H. Moultrie are African-American citizens and registered voters from South Carolina who are active in voter education and organization in Charleston, and were plaintiffs or witnesses in the case of *Moultrie v. Charleston County*, the companion case to *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir.), *cert. denied*, 543 U.S. 999 (2004). Southern Echo and Democracy North Carolina are nonprofit organizations that work to protect voting rights in jurisdictions covered under Section 5 through voter registration, education, and organization. In the absence of Section 5 enforcement, these individuals and organizations would not be able to work effectively to ensure equal voting rights.

Amici therefore file this brief to explain why, if the goals of the Voting Rights Act are ever to be realized, the judgment below must be affirmed.

SUMMARY OF ARGUMENT

Appellant, a municipal utility district with "virtually no familiarity of its own with the election process" and an existence of less than two decades (Appellee's Br. 13), asserts that: (1) a "small number of objections" and a supposedly high number of

Section 2 lawsuits in two covered jurisdictions (Texas and Alabama) mean that Section 5 is redundant or ineffectual; and (2) Section 2 adequately addresses all voting discrimination that remains in covered jurisdictions (Appellant's Br. 44-48, 52.). Both premises are demonstrably false.

In comparison to Appellant's limited familiarity with elections, attorney amici collectively have more than 200 years of experience litigating voting rights cases in covered and non-covered jurisdictions throughout the country. This experience has led amici to recognize the persistent need for timely enforcement capable of deterring illegal voting schemes before they are implemented—a task for which case-by-case litigation under Section 2 is ill-suited, but for which Section 5 was designed.

Were Section 5 unavailable, there would be a significant increase in the number of discriminatory voting changes that voters and jurisdictions would be forced to address through litigation. But Section 2 cannot substitute for the prophylactic function of Section 5. In practice, amici have seen Section 2 and Section 5 operate in the complementary fashion that Congress intended. Where minority voters in covered jurisdictions cannot find a lawyer or afford to pay one, Section 5 provides the means to redress new violations of their rights. And where minority voters are able to get their day in court, Section 5 provides the assurance that their hard-won and expensive battles will not have been fought in vain if a jurisdiction repeats similar violations.

Too many discriminatory voting changes would remain unchallenged if Section 5 were invalidated. For individual minority voters, the cost and effort required to pursue Section 2 cases are great barriers to private enforcement, a problem made more acute by the small number of practitioners in covered jurisdictions who are willing and able to take such cases. This creates a perverse incentive—all too often realized—for officials to continue suspect practices because they know most voters cannot challenge them. In contrast, Section 5 serves as a deterrent to such practices.

Amici's lengthy experience in the voting rights arena shows the importance of Congress's considered decision to reauthorize Section 5. Without it, minority voters will fail to realize the full promise of the Voting Rights Act.

ARGUMENT

I. Amici's Experience Confirms That Section 2 Cannot Replace The Prophylactic Function Of Section 5; The Two Enforcement Mechanisms Are Complementary

Although Appellant contends that the amount of Section 2 litigation brought in nine wholly or partially covered states proves that such litigation alone is sufficient to prevent discriminatory voting practices (Appellant's Br. 48), its argument ignores that

Section 2 and Section 5 provide different protections and operate in very different ways.

A. As Designed By Congress, Section 2 And Section 5 Are Mutually Reinforcing

Section 2 and Section 5 provide separate but complementary and mutually reinforcing mechanisms to combat and remedy disfranchisement of minority voters. *See South Carolina v. Katzenbach*, 383 U.S. 301, 315-16 (1966). Section 2 provides citizens nationwide the right to sue to end any voting practice—whether new or old—that discriminatorily denies or abridges voting. *See* 42 U.S.C. § 1973. Under Section 2, the burden of proving the denial is on the voter and the litigation is highly complex, lengthy, and expensive. Section 5 applies prospectively to prevent jurisdictions with the worst records of discrimination from enacting retrogressive practices or reimposing a system that courts have found violates voters' rights. *See* 42 U.S.C. § 1973c. Under Section 5, the pre-approval requirement helps block and deter discriminatory voting changes at the outset and the cost to voters is comparatively tiny. Both Sections are necessary to ensure that minorities' rights are meaningfully protected.

Without Section 2, old voting practices could carry forward far into the future in all jurisdictions, regardless of Section 5's protections. Without Section 5 preclearance, many new discriminatory measures would go unchallenged because of the

absence of resources and sufficient lawyers to litigate them all under Section 2. Even if such practices are challenged, they could nevertheless infect multiple elections before voters obtain relief. (*See* NAACP Br. 42 (noting that Congress enacted Section 5 "to protect minority citizens from even a temporary impairment of this most fundamental of civil rights during the sometimes prolonged period needed to bring and ultimately prevail in Section 2 litigation.")) Moreover, "[w]hen a jurisdiction changes its election system in response to a Section 2 court order or to avoid Section 2 liability, Section 5 helps ensure that [later actors] will not water down the remedy." Robert Kengle, Voting Rights In Georgia, 1982-2006, at 26 (March 2006), referenced at *Renewing the Temporary Provisions of the Voting Rights Act: An Introduction to the Evidence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 30 (2006) (list of voting rights reports).[2] Eliminating Section 5 would require minority voters to undertake the enormous time and expense of litigation every time a covered state or local government instituted a measure to dilute minority voting strength. (*See* NAACP Br. 43 ("Section 5 complements Section 2 by prescreening voting changes, and it thereby often spares minority groups the substantial costs of pursuing after the fact litigation.").)

[2] All of the state reports referred to in the Senate hearing are available at http://www.civilrights.org/voting-rights/vra/states.html.

The experience of amici curiae in litigating voting rights cases confirms that Section 2 is not an adequate substitute for Section 5. First, the delay endemic to Section 2 litigation allows voting rights violations to persist over multiple elections, whereas Section 5 preclearance offers a timely remedy. Second, even after courts find Section 2 violations, jurisdictions often persist in enacting discriminatory laws and engaging in discriminatory practices.

B. Case Studies

Three recent case studies involving amici demonstrate these points. In *United States v. Charleston County*, amicus curiae Armand Derfner was an attorney for the private plaintiffs (who are also amicus curiae). In the *Dillard* cases, amici curiae Ed Still and James Blacksher were plaintiffs' counsel in *Dillard v. Chilton County* and *Dillard v. Crenshaw County*. In *Moore v. Beaufort County*, amicus curiae Anita Earls was plaintiffs' counsel.

Although the tactics of the defendants in these cases may appear to be relics of the 1960s and 1970s, they are typical responses by contemporary jurisdictions to Section 2 litigation. *Compare* S. Rep. No. 94-295, at 16-17 (1975) ("Measures [to dilute minority voting strength] may include switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans.") *with* H.R. Rep. No. 109-478, at 36 (2006) (noting the

persistent use of vote dilution schemes such as "enacting discriminatory redistricting plans; . . . enacting discriminatory annexations and deannexations . . . and changing . . . single member districts to at-large voting and implementing majority vote requirements"). These cases reveal why the course of voting rights litigation under Section 2 is too pockmarked with pitfalls and detours to provide the only road to vindication for disenfranchised minority voters.

A fourth case, *Tangipahoa Citizens for Better Government v. Parish of Tangipahoa*, demonstrates how Section 5 and Section 2 can work in concert to prevent abuses in their infancy.

1. *Charleston County*

Prior to 2004, Charleston County, South Carolina's nine-member County Council was elected under an at-large, partisan voting system. *Charleston County*, 316 F. Supp. 2d at 274. Because Section 5 did not apply to this voting system, Section 2 was the only recourse for minority voters seeking to challenge it. In 2004, that at-large system was dismantled by a judgment that the system resulted in racial discrimination in violation of Section 2 of the Voting Rights Act. The successful Section 2 suit was prosecuted over three years, but voters had been fighting the practice, unsuccessfully, for over a decade longer.

The lawsuit that ended the discriminatory at-large system was not the first one brought by minority voters. Two earlier federal court challenges were

brought in the 15 years prior to *Charleston County*. *NAACP v. Charleston County*, Civ. No. 2:89cv00293 (D.S.C. 1989); *Gadson v. Howard*, Civ. No. 2:94cv01164 (D.S.C. Aug. 15, 1995). Finally, the ultimately successful suits—one filed by the United States and one by private plaintiffs—were brought at the beginning of 2001, and continued until this Court denied certiorari nearly four years later, in November 2004. 543 U.S. 999 (2004). In the interim, the 2002 elections took place under the system later adjudged to be illegal. Because the County insisted on moving for a stay (which was denied), the 2004 elections came within a hair of being held under a discriminatory system as well. *See* Order at 2, *Charleston County*, C.A. No. 2:01-562-23 (D.S.C. March 4, 2004) (denying defendants' motion for stay). Of course, there were many more elections held under this illegal system between the 1989 challenge and the 2004 decision. Each of these elections carries a pall of discrimination that could have been remedied, but for the pains and costs of lengthy Section 2 litigation.

Remarkably, the *Charleston County* story did not end with the district court's invalidation of the County Council's at-large election format in 2003. In defiance of the Court's decision, the South Carolina General Assembly enacted a law adopting an identical partisan at-large election format for the Charleston County School Board. *See* Letter from R. Alexander Acosta, Assistant Attorney Gen., U.S. Dep't of Justice to C. Havird Jones, Jr., Senior Assistant

Attorney Gen., S.C. Attorney Gen. (Feb. 26, 2004) ("Acosta Ltr.").[3]

Prior to the *Charleston County* decision, the school district used a non-partisan, at-large system with no majority requirement, which had allowed several minority candidates to win board seats. *See id.* By contrast, the partisan, at-large format that the court in *Charleston County* had invalidated, and which the South Carolina General Assembly sought to adopt for the school board, created "a de facto majority vote requirement [that] makes it more difficult for the African-American community to employ a traditional strategy of bullet voting in order to improve their chances of electing candidates of their choosing." *Charleston County*, 316 F. Supp. 2d at 294.

Fortunately, the new school board law was subject to preclearance. Without Section 5, minority voters would have had to pursue yet another lengthy and costly Section 2 suit. The school district would have been free to delay the vindication of plaintiffs' rights and stave off a judgment by spending taxpayer dollars to manufacture arguments to distinguish this case from the County Council case. The Attorney General interposed an objection to this clear violation, thereby stopping the General Assembly's attempt at imposing a discriminatory system before it had any effect. *See* Acosta Ltr., *supra*.

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[3] *Available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_022604.php.

2. The *Dillard* Cases

In the 1986 case of *Dillard v. Crenshaw County,* 640 F. Supp. 1347 (M.D. Ala. 1986), a federal court found that, for a century, the Alabama State Legislature had purposefully switched from single-member to at-large election of local governments and enacted "numbered place" and "anti-bullet voting laws" in the 1950s and 1960s to prevent black voters from electing their candidates of choice. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988). Based on that finding, the District Court expanded the case to include a defendant class of 183 cities, counties, and county school boards that were using such systems. *Id.*

In 1988, in one spinoff case, the Chilton County Commission admitted that its at-large voting system violated Section 2, and entered into a court-approved settlement that temporarily increased the number of commissioners from four to seven and incorporated "cumulative voting" into the Commission's at-large format. *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989). According to the consent decree, this temporary system was to remain in place until the state legislature passed a system, recommended to it by the Chilton County Commission, that could be precleared under Section 5. *See* Consent Decree at 1, *Dillard v. Chilton County Comm'n*, CA No. 2:87-1179-T (M.D. Ala. June 23, 1988).

The new cumulative voting system that plaintiffs obtained through hard-fought and costly Section 2 litigation remained in place for fifteen years; however, the Commission neglected its promise to pass a resolution proposing a new, valid election system. In 2002, another *Dillard* jurisdiction successfully challenged a court-ordered expansion of its county commission to which the County had not consented. *Dillard v. Chilton County Comm'n*, 447 F. Supp. 2d 1273, 1275 (M.D. Ala. 2006) (citing *Dillard v. Baldwin County Comm'n*, 222 F. Supp. 2d 1283 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004)). Seizing on the *Baldwin County Commission* decision, an all-white group sought to intervene in the *Chilton County* case. It asked the court to invalidate the 1988 settlement, contending that in spite of the County's explicit agreement to the consent decree, it could not be enforced if "a remedy to which the state agreed exceeded what a federal court could have imposed had the case gone to trial." James Blacksher, et al., *Voting Rights in Alabama: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 249, 263 (2008); *see Dillard v. Chilton County Comm'n*, 447 F. Supp. 2d at 1275; *Dillard v. Chilton County Comm'n*, 452 F. Supp. 2d 1193, 1196 (M.D. Ala. 2006).

Although the intervenors' position was "contrary to Supreme Court precedent . . . the district court kept the issue under submission for over a year, [and t]he Alabama Attorney General, instead of urging the district court to uphold the state's 1988 agreement, first sided with the white intervenors, and then

withdrew from any participation in the matter." Blacksher, et al., *supra*, at 263. In 2003, the intervenors pressured the County Commissioners into adopting a resolution urging the passage of a local act restoring the discriminatory election format that the Commissioners, the plaintiffs, and the district court had all agreed violated Section 2 *fifteen years earlier*. *Id.* Indeed, "without the protections of Section 5 of the Voting Rights Act, some white-majority state and local governments in Alabama will bow to pressure from their white constituents and return to the racially discriminatory election practices of the past." *Id.* at 263-64.

Wielding its preclearance authority under Section 5, the Attorney General's office was able to thwart the Chilton County Commission's attempt to return to the at-large system that the court had found was born of racial animus. *See id.* at 263; Letter from Joseph D. Rich, Chief, Voting Section, Civil Rights Div., Dep't of Justice, to John Hollis Jackson & Dorman Walker (Oct. 29, 2003). As Bobby Agee, Chilton County's first black commissioner since reconstruction,[4] noted in the aftermath of the case, "[w]e would be having a totally different conversation if [Section 5] didn't exist. . . . [It's a] very important protection. We would have been at ground zero without

[4] David T. Canon, *Race, Redistricting, and Representation* 260 (1999).

Section 5." Blacksher, et al., *supra*, at 264.[5] If not for Section 5, black voters today would be shut out of county commission office in Chilton County, *twenty years* after their successful Section 2 suit, 40 years after the 1965 Voting Rights Act, and 135 years after the passage of the Fifteenth Amendment.

3. *Beaufort County*

In 1988, no black candidate had been elected to the Beaufort County Board of County Commissioners for over thirty years, despite the county's black voting age population of approximately thirty percent. *Moore v. Beaufort County*, 936 F.2d 159, 160 (4th Cir. 1991). In April 1988, black voters filed a complaint in federal court seeking to change the Board's at-large, residency district-based election format. *Id*. After obtaining a preliminary injunction, the plaintiffs were able to engage in negotiations and ultimately, in 1989, reach a settlement agreement changing the method of election to one providing an opportunity to elect candidates of choice to two out of seven seats on the board. *Id.* at 160-61. Shortly after finalizing this

[5] The *Dillard* cases are a perfect example of the need for Section 5 preclearance to ensure that court-ordered remedies from Section 2 cases are not watered-down or ignored. The court's order—to replace 189 unlawful at-large election systems—could not conceivably have been enforced through case-by-case litigation alone. The court's remedy, to have new systems precleared under Section 5, was the only workable solution. Blacksher et al., *supra*, at 264.

agreement, however, the defendant county commissioners reneged on the agreement. *See id.* at 161. The plaintiffs had no choice but to sue. Two years later, in June 1991, the Fourth Circuit Court of Appeals enforced the original settlement agreement. *Id.* at 161-62, 164.

As in *Charleston County* and *Dillard v. Chilton County*, the threat of discrimination in *Moore* did not end with a court's ruling in a Section 2 case. Ever since the settlement was enforced, African-Americans have elected candidates of choice to the Board of County Commissioners.[6] However, some members of the Board have repeatedly sought to eliminate the use of limited voting, which, combined with staggered terms and a seven-member board, provides black voters the opportunity to elect their candidates of choice.[7] Fortunately, because Beaufort County is covered under Section 5, any proposed change is subject to the non-retrogression requirement and no such proposals have been successful. *See* note 7, *supra.* In Beaufort County, Section 2 put a fair method of election in place (albeit allowing the defendants to continue the unlawful practice for three years after they reneged on the agreement), and

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[6] *See* Jonathan Clayborne, *Closed Session Acts May Have Lasting Impacts*, Wash. Daily News, March 16, 2005, *available at* http://www.wdnweb.com/articles/2005/03/16/news/news03.txt.

[7] *See* Jonathan Clayborne, *Board Tackles Limited Voting*, Wash. Daily News, Feb. 10, 2006, *available at* http://www.wdnweb.com/articles/2006/02/10/news/news03.txt.

Section 5 ensured that no hard-fought progress is lost.

4. *Parish of Tangipahoa*

The Tangipahoa Parish redistricting case shows how Section 2 and Section 5 enforcement work together to produce timely results for jurisdictions and voters alike. *See Tangipahoa Citizens for Better Government v. Parish of Tangipahoa*, No. Civ.A.03-2710, 2004 WL 1638106 (E.D. La. July 19, 2004). In September 2003, a group of Tangipahoa Parish citizens filed a Section 2 suit challenging that year's redistricting plan on the grounds that it failed to provide appropriate representation to its African-American residents. *Id.* at *1. By November 2003, the Parish had submitted and been denied preclearance for both its original map, and a subsequent revised map. *Id.* Upon receiving two objection letters, the Parish designed an amended plan to address the Attorney General's concerns and held three public hearings on the new plan, which was precleared in January 2004. *Id.* The district held special elections under the precleared plan in March, a mere seven months after the filing of plaintiffs' Section 2 complaint. *Id.* at *2. Section 5 protected minority voters before any election took place under the discriminatory system.

Compare this experience to that of voters in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), a case that arose in a jurisdiction not covered by Section 5.

There, the shortcomings of Section 2 litigation are pronounced. The District Court found that the County

> had engaged in intentional discrimination in redistrictings that it undertook in 1959, 1965 and 1971 . . . [and] that the 1981 redistricting was calculated at least in part to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future.

Id. at 767. The plaintiffs suffered eight years of illegitimate elections until they were able to litigate the case in federal court under Section 2.

II. Few Plaintiffs Have The Capacity To Bring Section 2 Cases Because They Are Complex And Expensive, And Few Private Practitioners Are Willing To Take Them

Without the bulwark of Section 5, the burden of challenging discriminatory voting changes will fall upon economically disadvantaged minority voters and already overburdened voting rights lawyers. The types of cases generally pursued under Section 2—challenges to discriminatory redistricting plans and methods of election—are extraordinarily complex and take significant resources to pursue. Moreover, most of the voting changes will not be spread out over time, but will be concentrated in the immediate aftermath of the post-census redistricting in every state, county, and city in the covered jurisdictions, thus straining

the resources of the few lawyers who represent plaintiffs in Section 2 cases. Consequently, voters will only be able to obtain counsel and secure the necessary funding to challenge a tiny percentage of the new flood of discriminatory practices that would result from the elimination of Section 5.

A. The Complex And Expert-Intensive Nature Of Section 2 Lawsuits Mean They Are Costly For Parties And The Courts

"Voting suits are unusually onerous to prepare." *Katzenbach*, 383 U.S. at 314. Section 2 lawsuits are widely recognized as among the most complex, fact-intensive, time-consuming, and expensive federal cases to bring and to litigate. As this Court explained in 1966, one reason that Section 2 litigation is ineffective is because such suits "sometimes requir[e] as many as 6,000 man-hours [and are] exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings." *Id.*; *see also id.* at 315 (Section 5 justified because "[f]our years [of litigation] is too long. The burden is too heavy—the wrong to our citizens is too serious" to rely solely on litigation) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess., at 11 (1965)); *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997) (Section 5 necessary because of "the slow, costly character of case-by-case litigation"); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right To Vote*, 49 How. L.J. 741, 747 (2006). This level of complexity frequently requires thousands of hours of

attorney time, the extensive use of expert testimony, and considerable judicial resources.

Since 1993, the Federal Judicial Center has compiled statistics on the amount of time and effort required by 63 types of cases in the federal courts. *See* Fed. Judicial Ctr., *2003-2004 District Court Case Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States* 9 (2005). The Federal Judicial Center study identifies voting rights cases as the sixth most time consuming, just ahead of civil antitrust cases. *Id*. at 60 fig. 4. According to the study, voting rights cases require nearly four times the judicial resources of the median district court case. *Id*.

Section 2 suits are no less resource intensive for the parties and their counsel, as *Charleston County* illustrates. That case resulted in a six-week trial (excluding post-trial briefing), conducted only after proceedings before a magistrate judge and an unsuccessful mediation by a senior district court judge. *See* U.S. Dist. Ct. D.S.C. (Charleston), Civil Docket for Case No. 2:01-cv-00562-PMD. After the district court's 75-page opinion finding a Section 2 violation, there were further, lengthy proceedings to establish a remedy, followed by costly proceedings necessitated by the County's insistent and repeated efforts to gain a stay or modify the judgment. *Id.* In this single case, defendants spent approximately $2,000,000 in fees and costs, including more than $100,000 in expert witness fees. *Voting Rights Act: An Examination of*

the Scope and Criteria for Coverage Under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 85 (2005) (statement of Armand Derfner, Voting Rights Attorney). Lawyers at a limited-budget nonprofit organization and a private practitioner in a two-person law firm collectively spent nearly 1800 hours representing private plaintiffs. Order at 12, *Charleston County*, No. 2:01-cv-00562 PMD (D.S.C. Aug. 8, 2005). Furthermore, the Plaintiffs also had the benefit of the Justice Department's involvement, and the resources of the federal government to help shoulder the burden of prosecuting the case.

The fees and hours demanded by *Charleston County* are hardly unique among Section 2 cases. To illustrate the point, each of the following awards is adjusted for inflation.[8] In *Major v. Treen*, 700 F. Supp. 1422, 1428 (E.D. La. 1988), plaintiffs' attorneys worked on a contingent-fee basis, and devoted over 2,500 hours to representing disadvantaged black residents of New Orleans in a successful challenge to Louisiana's congressional redistricting. *See id*. at 1428, 1435. The District Court noted that the state's attorneys likely spent as much time on the case as plaintiffs' counsel. *Id*. at 1430 n.5. Although plaintiffs were ultimately awarded attorneys' fees in the amount of $335,864.15 and costs of $50,740, the

[8] All figures adjusted for inflation using the Bureau of Labor Statistics inflation calculator, *available at* http://data.bls.gov/cgi-bin/cpicalc.pl.

dispute over fees continued for five years after the case was decided on the merits. *Id*. at 1453. In *Harper v. City of Chicago Heights*, Nos. 87 C 5112 88 C 9800, 2002 WL 31010819 (N.D. Ill. Sept. 6, 2002), the district court, in an opinion awarding plaintiffs' attorneys $385,661.84, noted that the case had "spanned over a decade and, as the 600 plus entries on the docket sheet reflects [sic], was hard fought on both sides." *Id*. at *3. Further examples are legion. *See, e.g.*, *Bone Shirt v. Hazeltine*, 524 F.3d 863, 864 (8th Cir. 2008) (denying plaintiffs recovery of expert witness fees, but noting that parties stipulated that the amount of requested expert fees ($59,391.33) was reasonable); *Graves v. Barnes*, 700 F.2d 220, 224 (5th Cir. 1983) (awarding $1,662,313.14 in attorneys' fees); *Cottier v. City of Martin*, No. CIV 02-5021, 2008 WL 2696917 (D.S.D. March 25, 2008) at *5-6 (awarding plaintiffs $541,479 in attorneys' fees for 2,446.61 hours of work, and $56,331 in costs after deducting $45,265.54 in expert witness fees).

B. The Costs Of Section 2 Litigation Are A Serious Bar To Relief From Violations

With the addition of possibly hundreds of Section 2 cases if Section 5 were unavailable, and "[g]iven the miniscule size of the voting rights bar, requiring plaintiffs," and their attorneys to take on such substantial fees and out-of-pocket costs "would quite plausibly leave literally thousands of unconstitutional systems in place." Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights*

and Remedies After Flores, 39 Wm. & Mary L. Rev. 725, 736 (1998). Although attorneys may be paid on a contingency-basis, ethical rules require plaintiffs to pay out-of-pocket for any fees and costs associated with expert witnesses. *See* Model Rules of Prof'l Conduct R. 3.4 cmt. (2004) ("The common law rule in most jurisdictions is that . . . it is improper to pay an expert witness a contingent fee."). As a result, plaintiffs without the means to pay for expert testimony are all but barred from pursuing Section 2 litigation. *See, e.g.*, Karlan, *Two Section Twos*, *supra*, at 736 ("The cost of proving what turned out to be a blatant series of constitutional violations [in *Mobile v. Bolden*] was staggering: The black plaintiffs' lawyers logged 5,525 hours and spent $96,000 in out-of-pocket expenses, which were exclusive of expenses incurred by Justice Department lawyers after the department intervened in support of the Plaintiffs and the costs of expert witnesses and paralegals.") (citation omitted).

As a result, in most covered jurisdictions, Section 5 objections have more significantly promoted progress in fair voting practices than Section 2 litigation. For example, only two of Mississippi counties' redistricting plans changed as a result of reported Section 2 lawsuits without any Section 5 objections. Robert McDuff, *Voting Rights in Mississippi, 1982-2006*, at 17 (2006) reprinted in *Modern Enforcement of the Voting Rights Act, Hearing Before S. Comm. on the Judiciary*, 109th Cong. 149 (2006) ("*Modern Enforcement*: *S. Comm. Hearing*.") Without Section 5, the discriminatory redistricting plans initially passed

by the other counties would have prevented the election of most of the 127 African-Americans elected to county boards of supervisors (who come from sixty-seven different counties, forty-three of which incurred one or more Section 5 objections to redistricting plans for supervisors districts). *Id*. "The legal resources did not exist in Mississippi in the past forty years to bring a lawsuit in lieu of every one of the 169 objections that have been issued, and they will not exist in the future." *Id*.

The theoretical availability of court-awarded attorneys' fees is often cited as a mitigating factor in the burden on plaintiffs; however such recovery has often been seriously incomplete and tenuous.[9] While the defendant could freely use taxpayer funds to retain the best counsel it can find anywhere in the country, at any expense, plaintiffs' counsel who prevail may be denied adequate payment. *See, e.g.*, *Arbor Hills Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 193-94 (2d Cir. 2007) (holding that plaintiffs' New York City counsel could

[9] For example, until the 2006 Amendment to the Voting Rights Act, prevailing plaintiffs could not recover for the expenses of their expert witness. *W. Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 97 (1991). This was quite serious as expert testimony has increasingly become the focus of voting cases. *See* Wendy K. Tam Cho & Albert H. Yoon, *Strange Bedfellows; Politics, Courts, and Statistics: Statistical Expert Testimony in Voting Rights Cases*, 10 Cornell J. L. & Pub. Pol'y 237, 252 (2001) (noting that voting rights cases require particularly complex statistical analysis due to the *Gingles* framework).

only recover at far-lower Albany rates). Moreover, a plaintiff whose goals are achieved without a court order is not a prevailing party entitled to attorneys' fees under 42 U.S.C. § 1988. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-07 (2001). Thus, if a defendant realizes during the midst of litigation or on the eve of trial that it is facing likely defeat, it may be able to avoid paying attorneys' fees by unilaterally withdrawing the challenged practice. *See generally* Brian J. Sutherland, *Voting Rights Rollback: The Effect of* Buckhannon *on the Private Enforcement of Voting Rights*, 30 N.C. Cent. L.J. 267, 277-88 (2008) (arguing that defendants in voting rights cases may strategically render plaintiffs' claims moot so as to deny them an award of attorneys' fees). By that time, the bulk of plaintiffs' effort and expense has already been incurred. Thus, a unilateral withdrawal may simply (and may be intended to) deprive plaintiffs' attorneys of fees.

C. The Lack Of Available Attorneys To Litigate Cases Is A Barrier To Additional Section 2 Litigation

Even if most minority voters could afford to sue, many voting rights abuses might not be prosecuted at all due to the severe dearth of voting rights practitioners in the private bar. "It is well-settled that civil rights cases, particularly those that are controversial and those that are based on contingent fees, are often not desirable to attorneys." Order at 11, *Moultrie v.*

Charleston County, No. 2:01-cv-00562-PMD (Aug. 8, 2005); *see e.g.*, *Cottier*, 2008 WL 2696917, at *5 ("Plaintiffs have produced evidence that they were unable to find members of the local bar who would represent them. In addition, [plaintiffs' lead attorney] said in his affidavit that he would not have been willing to represent Plaintiffs without the resources and assistance of the ACLU. The cost, complexity and undesirability of this voting rights case forced Plaintiffs to look beyond the South Dakota bar for their attorneys.").

The experience of amici, litigating in their home states, reflects the lack of available attorneys to litigate potential Section 2 cases.[10] Amici know first-hand that

[10] Although the NAACP Legal Defense Fund, NAACP Special Contribution Fund, the Lawyers Committee for Civil Rights Under Law, the ACLU Southern Regional Office, and MALDEF are able to help on occasional cases, these groups likely have fewer than twenty lawyers combined in their voting rights sections, and have obligations throughout the country that they must meet with finite resources. Their dockets would be overwhelmed far beyond their capacity if Section 5 were abandoned. Amici curiae know of no organizations that have more than five lawyers dedicated primarily to voting rights cases. Given the intense work required by Section 2 cases and deadlines imposed by election dates, these organizations can handle only a small number of cases at any one time. They do not have enough resources to litigate every voting rights abuse in the country. Therefore, Section 2 litigation falls to a few courageous plaintiffs willing to expend the precious time, energy, and resources to back multi-year complex litigation, and the few members of the private bar willing to expend the necessary time and resources on these cases despite the contingent nature of the fees, the unavailability of an enhancement, and the potential

(Continued on following page)

there are not enough attorneys to address the current demand for Section 2 cases, much less the increase in demand which would result if Section 5 were eliminated.

For example, in North Carolina, while there were between eight and ten attorneys in private practice experienced in voting rights litigation and willing to file such cases during the period between roughly 1986 and 2002, since that time amici's experience shows that the number has dwindled to only one or two. Indeed, institutional plaintiffs brought 45 percent (26 of the 58) of Section 2 cases in North Carolina between 1982 and 2005.[11] *See* Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters*: *The Voting Rights Act At Work, 1982-2005* (2006) ("*Protecting Minority Voters*"). These resources are hardly unlimited, however, and the more than 50% of cases remaining must be handled by members of the "miniscule" private voting rights bar. Karlan, *Two Section Twos*, *supra*, at 736.

In Mississippi, the attorneys with significant experience handling Section 2 claims who are willing

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that a jurisdiction will evade payment by abandoning the challenged practice at the last minute.

[11] Of those 58 cases, several were filed by attorneys appearing in their capacities as attorneys employed by legal services programs. *Id*. Those attorneys, since 1996, have been barred from "participating in any . . . way in litigation related to redistricting." 45 C.F.R. § 1632.3 (2009); *see* 61 Fed. Reg. 63756 (Dec. 2, 1996).

and able to take cases for minority plaintiffs probably number between two and five. Since the last renewal of Section 5, at least 155 potentially discriminatory voting changes in Mississippi were blocked because of Section 5. J.S. App. 70, Map 9.[12] Mississippi's lawyers could have handled no more than a small percentage of those potential cases if Section 2 had been the only recourse. *See* McDuff, *supra*, at 17.

Mississippi lawyers and organizations are able to handle, at most, a handful of cases in any post-census redistricting cycle.[13] Given the deluge of redistrictings not only at the state level, but for county governing boards, school boards, and justice courts in each of Mississippi's 82 counties, as well as city councils in its 274 municipalities,[14] these lawyers could not come

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[12] The opinion of the three judge district court (J.S. App. 1-183) is reported at 573 F. Supp. 2d 221.

[13] One amicus curiae, Southern Echo, works with community groups to use the Section 5 comment process as a means of alerting the United States Department of Justice to discriminatory redistricting plans. Southern Echo: Census and Redistricting, http://southernecho.org/s/?page_id=256. But Southern Echo has no practicing attorneys on staff. Southern Echo: Staff, http://southernecho.org/s/?page_id=55. Other public interest organizations in Mississippi are occupied with other priorities and, like Southern Echo, will not be able to devote much time or money to Section 2 litigation. *See Modern Enforcement*: *S. Comm. Hearing*, *supra*, at 96 (written responses of Robert B. McDuff, Attorney).

[14] *See Municipal Government in Mississippi* 393 (P.C. McLaurin Jr. & Michael T. Allen eds., 2d ed. 2001), *available at* http://www.mslocalgovernment.org/publications/city/books/2001/index.htm.

close to handling the workload if Section 5 disappeared. It would be impossible for the few available Mississippi lawyers to review more than a handful of cases and bring Section 2 cases challenging discriminatory redistrictings in time to stop those plans from being implemented. This is equally true in other covered states.

In Alabama, James U. Blacksher and Edward Still were two of the three lawyers that represented the plaintiffs in the *Dillard* cases. Each has also represented minority plaintiffs in state-level redistricting cases following the 1980, 1990, and 2000 Censuses. Other than their *Dillard* co-counsel, Larry Menefee (who no longer takes voting cases), there are no lawyers who have represented black plaintiffs or intervenors in any Alabama Section 2 cases since 1995.

D. Due To Their Access To Taxpayer Funds, Jurisdictions Violating Section 2 Do Not Face Similar Burdens, And In Fact Have An Incentive To Stall

In the absence of Section 5, the prospect that official action will be subject to scrutiny is severely diminished. Under a regime where Section 2 litigation is the only enforcement mechanism, officials sometimes have little incentive for voluntary compliance where plaintiffs may lack the resources to fund complex multiyear litigation or no lawyers may be willing to take the case. As Virginia Congressional

Representative Robert Scott noted in the 2005 reauthorization hearings:

> Bringing a section 2 action is very expensive, more than what most voters or small groups may be willing to afford to vindicate their rights. And even if they were able to make a case and be successful, this would be years down the road by the time you take into account the time frame for litigation, including appeals. By then, the winner of the illegal election is an incumbent, and we all know . . . that incumbency is a huge and, more often than not, dispositive advantage in an election. So it is clear that if we do not renew this section, we would essentially create a perverse incentive to pass illegal plans with no immediate recourse.

Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 4 (2005) (statement of Rep. Scott).

Even if a jurisdiction does face a Section 2 suit, officials have all the taxpayers' resources available to defend the challenge. The *Edgefield County School District* case provides an example of the incentives for official intransigence in the face of Section 2 litigation. Edgefield County's County Council at-large electoral scheme was a subject of a 1974 litigation that resulted in this Court's decision in *McCain v. Lybrand*, 465 U.S. 236 (1984), and was "ultimately disposed of 11 years later upon the implementation of a five single-member districts election plan in place of

the at-large system for County Council election." *Jackson v. Edgefield County Sch. Dist.*, 650 F. Supp. 1176, 1189-90 (D.S.C. 1986). But Edgefield County continued to conduct its elections for school board using an at-large method, forcing minority voters to file *another* lawsuit to challenge the same type of election system that was invalidated by this Court. *Id*. Rather than accepting precedent and the rule of law just established in *McCain*, the Edgefield County School District fought the case tenaciously, at great length and cost, before a trial resulted in the election system's invalidation. *Id*. at 1203-04. The judgment required the school board to submit a new election plan and "seek preclearance of such plan and schedule pursuant to Section 5 of the Voting Rights Act." *Id*. at 1204.

The ability to stay in office under an illegal election system, and defend that system at taxpayer expense, creates a further incentive for officials in offending jurisdictions to use all the resources at their disposal to fight these suits to judgment and beyond.

III. Appellant Ignores The Deterrent Effect Of Section 5

In contrast to the perverse incentives created by the cost of Section 2 litigation, Section 5 has an opposite deterrent effect. Appellant attempts to make much of a so-called "vanishingly small number of objections." (Appellant's Br. 52.) However, this mischaracterizes the evidence. The Department of Justice

("DOJ") actually made more objections between 1982 and 2004 than between 1965 and 1982. (*See* NAACP Br. 35.) *See* H.R. Rep. No. 109-478, at 21. And since Section 5 was last renewed in 1982, over 750 Section 5 objections have prevented the implementation of at least 2400 potentially discriminatory voting changes by state and local governments. (Fed. Appellee's Br. 43.) *See also* J.S. App. 70, Map 9. Furthermore, regardless of how Appellant characterizes the absolute number of objection letters, each objection affects thousands, if not hundreds of thousands, of minority voters in covered jurisdictions. Between 2000 and 2006, "Section 5 objections have functioned to aid small as well as large scale elections, shielding as few as 208 and as many as 215,406 voters with a single objection." *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 58-59 (2006) (written responses of Anita S. Earls).

Faced with this data, Appellant claims that the number of objection letters issued as a percentage of total submissions "is more revealing." (Appellant's Br. 52.) However, the percentage of objection letters, or even the large number of letters themselves, fails to tell the whole story concerning the positive deterrent effect of Section 5.

Part of the prophylactic effect of Section 5 comes from what are called "more information request" letters, or MIRs, that are issued by the DOJ. *See Modern Enforcement*: *S. Comm. Hearing*, *supra*, at 76-77 (written responses of Natalie Landreth, Staff

Attorney, Native Am. Rights Fund, Anchorage, Alaska) ("[T]hese less formal measures give the jurisdiction notice that its activities are being monitored and thus deter that jurisdiction from proceeding in an inappropriate manner. The DOJ does not send objection letters as a knee-jerk reaction and therefore they cannot serve as the only indicator [of a problem]."); *id.* at 25 (statement of Juan Cartagena, Gen. Counsel, Cmty. Serv. Soc'y, N.Y., N.Y.) (state responses to MIRs "demonstrate[ ] the effectiveness . . . of Section 5 objections above and beyond the number of objections issued"). MIRs outnumber objection letters, increasing the number of changes that were not precleared by the DOJ. J.S. App. 65-67 (noting that "in terms of enforcing section 5, MIRs have become nearly as important as formal objection letters.")

Just as important are the changes that never make it to objections because they were made in compliance with the law or never even attempted. H.R. Rep. No. 109-478, at 24. As Congress found, "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." *Id.* It emphasized that Section 5's deterrent effect was "substantial":

> Once officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result.

Id. (quoting *Protecting Minority Voters*, *supra*, at 57). The submission requirement itself "prevents retrogression and prevents harming minority voting strength and prevents back-sliding, the very types of evils that Congress sought to prevent in passing Section 5." *Modern Enforcement*: *S. Comm. Hearing*, *supra*, at 8 (2006) (statement of Wan J. Kim, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice); (*see also* Appellee's Br. 11-14.)

Section 5 also provides an incentive for officials to include minority voters and their representatives in contemplated changes that may have an impact on minority voting strength. *See* Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 24 (2007) (noting that Section 5 "increases the minority communities' leverage in demanding accommodation of minority concerns"). For example, when the city of Rocky Mount, North Carolina annexed predominantly white neighborhoods nearby but refused to annex the traditionally African-American community of Battleboro, Battleboro residents were able to use the prospect of a Section 5 objection to preempt this discriminatory policy and gain the benefits of municipal services and the ability to vote in local elections. *See Testimony of Anita S. Earls Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary* (Oct. 25, 2005), 2005 WL 2800039 (F.D.C.H.) ("One of the key factors that led the city [of Rocky Mount] to finally agree to annex this [traditionally African-American] community was the fact

that community members were prepared to vigorously oppose any future annexations of white neighborhoods in the Section 5 preclearance process.")

Other jurisdictions show a desire to comply with Section 5 and appreciate its prospective benefits. Travis County, the covered jurisdiction Appellant contracted to run all of its elections, values its Section 5 coverage because "the County—not to mention its voters—receives benefits from the Section 5 preclearance process. [Section 5]'s valuable educational and deterrent effects aid the County and election officials in administering their multifaceted election duties." (Appellee's Br. 15.) Indeed, "[i]t would undoubtedly prove more costly to the County to litigate a Section 2 case to conclusion . . . than to consider and address in advance [the contemplated change] in the process of seeking and obtaining preclearance." *Id.* at 11 (likening Section 5 to "preventative maintenance" of the election system, and Section 2 to "major repairs," and noting that "[i]f ever there were a circumstance where an ounce of prevention is worth a pound of cure," it is in the conduct of free and nondiscriminatory elections).

Similarly, Professor Richard Engstrom, a consultant in redistricting process for State legislators, testified,

> as a consultant who has had a role in drawing maps and the process, that . . . section 5 looms seriously over political cartographers

> and decision makers when it comes to plans. And I can testify that I have seen districts changed in order to avoid retrogression and gain preclearance.

Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 31 (2005) (testimony of Richard Engstrom, Professor, Univ. of New Orleans). And in Alaska, DOJ's sole objection had a "dramatic impact" over a decade, and "demonstrates that even a single objection can have a significant impact on the political landscape [statewide] and that the mere prospect of another objection can ensure compliance with the law." *Modern Enforcement: S. Comm. Hearing*, *supra*, at 81 (written responses of Natalie Landreth).

* * *

Section 2 simply cannot replace the protections afforded by Section 5. It cannot stop violations before they happen. Minority voters do not have the resources to litigate every discriminatory practice currently captured by Section 5 preclearance, and there is a dearth of lawyers with the experience and wherewithal to litigate these complex, time-consuming cases. Even when cases are brought under Section 2, discriminatory election systems continue to taint the voting process as the cases wind their way through courts. The Court should not second-guess Congress'

finding that Section 5 is needed to fulfill the Fifteenth Amendment's promise in covered jurisdictions.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

WILLIAM D. KISSINGER
Counsel of Record
SUJAL J. SHAH
ERIN SHANNON-CONROY
PERRY M. GROSSMAN
SARAH L. BISHOP
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
(415) 393-2000
Counsel for Amici Curiae