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 *AMICI CURIAE* FORMER REPUBLICAN OFFICEHOLDERS IN SUPPORT OF APPELLEES

TREVOR POTTER
Counsel of Record
TARA MALLOY
PAUL S. RYAN
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., N.W.
Suite 650
Washington, DC 20036
(202) 736-2200

Counsel for Amici Curiae

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are Republican legislators and executive officials who formerly served at the highest levels of federal and state government. *Amici* include William S. Cohen, former Secretary of Defense and Member of the U.S. Congress; Robert "Bob" Dole, former Senate Majority Leader and 1996 Republican Presidential Nominee; former U.S. Representative Amory "Amo" Houghton, Jr.; Richard Lewis "Dick" Thornburgh, former Governor of Pennsylvania and U.S. Attorney General; and former Governor of Massachusetts, William F. Weld.[2]

Amici support Congress's decision in 2006 to reauthorize Section 5 of Voting Rights Act of 1965 ("VRA"), Pub. L. No. 89-110, 79 Stat. 439 (1965), through the enactment of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) ("VRARA"). *Amici* would also stress that even after reauthorization, the VRA remains flexible, allowing political

---

[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief. J. Gerald Hebert, counsel for *amici curiae* Bailed Out Jurisdictions, serves as Executive Director of the Campaign Legal Center. He took no part in authoring any part of this brief. Correspondence from counsel of record for Appellees and Appellant consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Additional information and biographies of the *amici curiae* can be found in Appendix A to this brief.

subdivisions still covered by Section 5 to "bail out" if they can reasonably demonstrate that they have fully complied with the VRA, and that all aspects of their voting and election processes over the last decade were non-discriminatory.

Amici submit this brief for two principal purposes. First, *amici* wish to highlight the bipartisan nature of the support for the 2006 renewal of the Act, and for all reauthorizations of the Act in the past. Second, *amici* argue that the reason behind the bipartisan support for the VRARA – as well as for past reauthorizations – was the extensive legislative record compiled by Congress that demonstrated both the efficacy of the Act and the remaining discrimination in voting that necessitated its renewal.

SUMMARY OF ARGUMENT

Support for the Voting Rights Act has always transcended political party and ideology. The 1965 Act had been championed not only by Democratic President Lyndon B. Johnson, but also by Republican legislators in the U.S. House of Representatives and Senate. Indeed, as noted by former Senate Majority Leader and 1996 Republican Presidential nominee Bob Dole:

> [I]t's a little-remembered fact that a greater percentage of Republicans voted for the Voting Rights Act of 1965 than did Democrats. In the Senate, all but two Republicans

> supported the act on final passage – 93 percent of the Republican caucus, compared with 73 percent of Senate Democrats. On the House side, 82 percent of Republicans supported the Act's passage, as did 78 percent of Democrats.

Bob Dole, *Grand Old Legacy*, WASH. POST, August 6, 2005, at A19.

The significant bipartisan support that was evident in the original enactment of the VRA carried over to the subsequent reauthorizations of its temporary provisions. The temporary provisions have been reauthorized four times by bipartisan majorities in the House and Senate, and these reauthorizations signed into law by four Republican presidents. James Thomas Tucker, *The Politics of Persuasion: Passage of The Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 206 (2007).

One of the crucial temporary provisions of the VRA is Section 5, *codified at* 42 U.S.C. § 1973c, which requires certain jurisdictions to "preclear" any proposed change affecting voting with either the U.S. Attorney General or the U.S. District Court for the District of Columbia before implementing the change. Initially, Section 5 covered only seven states in full that had met certain "triggers" under Section 4 of the VRA, *codified as amended at* 42 U.S.C. § 1973b(b), relating to their voting practices and registration rates in 1964. Section 5 has been extended in each of the four reauthorizations of the VRA, and its coverage expanded to include additional jurisdictions.

It is the most recent extension of Section 5 that is the focus of the challenge before this Court. Even as compared to the prior bipartisan extensions of Section 5, the VRARA enjoyed unprecedented, almost unanimous political support.

The bipartisan legislative support for the 2006 reauthorization was founded in the recognition that Section 5 has been crucial to eliminating barriers to the full enfranchisement of minority voters, and remains essential to eradicating the remaining vestiges of discrimination in voting. In the 2006 reauthorization, the House and Senate, led by Republican legislators, painstakingly amassed an extensive record detailing both the progress achieved due to the temporary provisions of the VRA, as well as the disparities in political participation across different races that persist today. The near-unanimous bipartisan vote for the VRARA can be ascribed to the powerful record compiled by the 2006 Congress.

The bipartisan support can also be attributed to the flexibility built into the preclearance mechanism. Congress recognized that some jurisdictions that remain subject to Section 5 under the 2006 reauthorization may be able to show a clean record of nondiscrimination in their voting processes; for this reason, the VRARA retained the "bail out" option to allow such jurisdictions to terminate coverage. *Amici* would also emphasize that the 2006 extension of Section 5 is not permanent. Congress will have the opportunity in the future to reassess the need for Section 5 and to take into account any changes in

voting patterns and practices that ensue in the coming years.

Petitioner Northwest Austin Municipal Utility District Number One now demands that this Court disturb the consensus of both major parties that Section 5 remains necessary to realize equal voting rights, and declare the 2006 extension of the preclearance requirement unconstitutional. *Amici* respectfully urge this Court to reject Petitioner's challenge to the 2006 reauthorization and to affirm the decision of the district court below upholding the VRARA. *See Northwest Austin Mun. Utility Dist. Number One v. Mukasey (NAMUDNO)*, 573 F. Supp. 2d 221 (D.D.C. 2008). The legislative record contains more than sufficient evidence of contemporary voting discrimination to justify Congress's decision to reauthorize Section 5 for an additional 25 years. Furthermore, the 2006 legislative record is at least as extensive as the records compiled by Congress in its earlier reauthorizations of Section 5 of Act, and these records have been deemed adequate to support the earlier renewals by this Court. *See City of Rome v. U.S.*, 446 U.S. 156 (1980) (upholding 1975 reauthorization of Section 5); *see also South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. U.S.*, 411 U.S. 526 (1973); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

Several decades after President Lyndon B. Johnson signed the 1965 VRA in law, President Ronald Reagan paid tribute to the Act upon signing the 1982 reauthorization of the Act, stating: "[T]he right to

vote is the crown jewel of American liberties, and we will not see its luster diminished. The legislation that I'm signing demonstrates America's commitment to preserving this essential right." President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), *available at* http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm. *Amici* submit that his statement holds true today, and applies equally well to the most recent authorization of the Act. The overwhelming bipartisan support for the VRARA, as well as for prior reauthorizations of the Act, is a testament to the continuing importance of Section 5 to this nation's efforts to achieve full and equal participation by all its citizens in the electoral process.

ARGUMENT

I. From Its Enactment to the Present Day, the VRA Has Won Enduring Bipartisan Support.

The reauthorization of Section 5 in 2006 was characterized by bipartisan leadership and almost unanimous approval. This cooperation in 2006 continued the pattern of bipartisan support that was established in the reauthorizations of the Act in 1970, 1975 and 1982. As stated by Senator Mitch McConnell (R-KY), then Senate Majority Whip, "We have, of course, renewed the Voting Rights Act periodically since [its enactment], overwhelmingly, and on a bipartisan basis, year after year after year because

Members of Congress realize this is a piece of legislation which has worked." 152 CONG. REC. S7975 (July 20, 2006) (statement of Sen. McConnell).

A. 1970 Reauthorization.

In the 1970 renewal of the VRA, Congress reauthorized Section 5 for an additional five years, and expanded Section 5 to cover jurisdictions that failed to meet certain voting benchmarks in 1968. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970). The reauthorization followed Congress's review of the progress made since the enactment of the VRA, which included 14 days of hearings conducted by the House and Senate. S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 184. The decision to reauthorize was based on Congress's conclusion that a five-year extension was "both reasonable and necessary to permit the dissipation of the long established political atmosphere and tradition of discrimination in voting because of color in those States and subdivisions in which literacy tests and low registration have gone hand in hand." H.R. REP. NO. 109-478, at 9 (2006).

Based on this legislative record, large bipartisan majorities voted in favor of reauthorizing Section 5. The Senate approved the reauthorization by a 64-12 vote, and the House approved it by a 272-132 vote. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act*, 86 TEX. L. REV. 667, 686-87 (2008), *citing Congress Lowers Voting Age,*

Extends Voting Rights Act, 26 CONG. Q. ALMANAC 192, 194-98 (1970).

B. 1975 Reauthorization.

In 1975, Congress extended Section 5 for an additional seven years, and expanded its coverage to jurisdictions that used a test or device in 1972 and had registration rates of less that 50 percent. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). Congress also extended the protections of the Act to "language minorities" to ensure that the rights of citizens with limited English abilities were not abridged or diminished. *See* 42 U.S.C. §§ 1973b(f), 1973aa-1a, 1973*l*.

The 1975 reauthorization was grounded in the substantial record compiled by Congress of both widespread voting discrimination in the covered jurisdictions and non-compliance with the Act. S. REP. NO. 97-417, 1982 U.S.C.C.A.N. 177, 185-86. After 13 days of hearings in the House and seven days of hearings in the Senate, Congress concluded that the preclearance requirement remained necessary because "there are continuing and significant deficiencies yet existing in minority registration and political participation." H.R. REP. NO. 109-478, at 9 (2006), *citing* H.R. REP. NO. 94-196, at 7 (1975).

Again, the strong record translated into strong support from both Republicans and Democrats for the reauthorization. The Senate passed the final bill 77-12, and the House agreed to the Senate version

without convening a conference in a vote of 346-56. Kousser, *supra*, at 706, *citing Congress Clears Voting Rights Act Extension*, 31 CONG. Q. ALMANAC 521, 529-33 (1975).

C. 1982 Reauthorization.

In 1982, Congress extended Section 5 of the VRA for an additional 25 years. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

Again the reauthorization was preceded by a detailed and thorough examination by both the House and Senate of developments in voting practices since the 1975 reauthorization. The testimony received during the 27 days of hearings conducted by the House and Senate highlighted that the direct barriers to minority political participation had been replaced by more "sophisticated" forms of discrimination that "dilute minority voting strength." S. REP. NO. 97-417, 1982 U.S.C.C.A.N. 177, 187. Congress nevertheless concluded that "continued manipulation of registration procedures and the electoral process . . . effectively exclude minority participation from all stages of the political process," and that reauthorization of Section 5 was consequently warranted. H.R. REP. NO. 109-478, at 10, *citing* H.R. REP. NO. 97-227, at 14 (1982).

In light of the extensive record, reauthorization again garnered the support of substantial majorities

of the Members of both parties in the House and Senate.

Indeed, the principal resistance to the 1982 amendments related to proposed amendments to Section 2 of the Act, *codified at* 42 U.S.C. § 1973, not to the extension of Section 5. In its reauthorization bill, the House had amended Section 2 to clarify that a claim under this section could rest solely on a showing that a practice is applied "in a manner which results in a denial or abridgment" of the right to vote based on race, and need not allege discriminatory intent. *See* H.R. 3112, 97th Cong. (as passed by the House, Oct. 5, 1981). The amendment to Section 2 in the House bill drew opposition in the Senate, which threatened to derail the extension of Section 5. It was former Senator Bob Dole (R-KS) who took the lead in formulating a compromise amendment to Section 2. S. REP. NO. 97-417, 1982 U.S.C.C.A.N. 177, 180; Thomas M. Boyd, Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1414-16 (1983). The "Dole Compromise," as it came to be known, was widely credited as rescuing the reauthorization from the dissension over Section 2. *See, e.g.*, Benjamin Taylor, *Voting Rights Act Endorsed; Reagan Backs Compromise*, BOSTON GLOBE, May 4, 1982; Hedrick Smith, *Dole Finding Role of the Moderate Suits Him*, N.Y. TIMES, May 14, 1982. Former Senator Dole would later recall his role with pride, stating that "[w]hen the Voting Rights Act came up for reauthorization in 1982, I was pleased to craft the

compromise extending its 'pre-clearance' enforcement provision for 25 years and ensuring that voting rights violations could be challenged in federal court." Dole, *supra*, A25.

The Senate ultimately voted overwhelming 85-8 in favor of the final bill, and extended Section 5 for an additional 25 years. Kousser, *supra*, at 707, *citing Voting Rights Act Extended, Strengthened*, 38 CONG. Q. ALMANAC 373, 376 (1982).

D. 2006 Reauthorization.

In 2006, Congress reauthorized Section 5 for an additional 25 years. VRARA, § 4. Mirroring the earlier renewals of Section 5, the 2006 reauthorization was based on an extensive legislative record, as discussed in *infra* Section II, and enjoyed broad bipartisan support.

The House bill was introduced by then-Chairman of the House Judiciary Committee Jim Sensenbrenner (R-WI), who had announced as early as July 2005 his plan to advocate for early reauthorization. *See* H.R. 9, 109th Cong. (2006); *see also* Tucker, *supra*, at 217, *citing* Rep. Sensenbrenner to Introduce 25-Year Voting Rights Extension Legislation, Calls for Bipartisan Approach to Civil Rights Issues, U.S. FED. NEWS, July 10, 2005. He led the reauthorization effort with Ranking Member John Conyers (D-MI), Representative Steve Chabot (R-OH), Chairman of the House Judiciary Subcommittee on the Constitution, and Representative Mel Watt (D-NC), Chairman of

the Congressional Black Caucus. Tucker, *supra*, at 213-17. The bill was co-sponsored by a total of 152 Members, including the House leadership at that time, Speaker Dennis Hastert (R-IL) and House Minority Leader Nancy Pelosi (D-CA).

The Senate bill was sponsored by Senator Arlen Specter (R-PA), then-Chairman of the Senate Judiciary, and enjoyed the support of 57 co-sponsors. S. 2703, 109th Cong. (2006) (enacting H.R. 9, as amended). Among the co-sponsors was the leadership of both parties at that time, including Senate Majority Leader Bill Frist (R-TN) and Senate Minority Leader Harry Reid (D-NV).

President George W. Bush was also an early supporter of the renewal of the VRA, stating publicly in December 2005 while signing a bill honoring Rosa Parks that "Congress should renew the Voting Rights Act."[3] Further, on the morning of the House floor vote on the reauthorization, the White House offered crucial support, issuing a statement that "The Administration is strongly committed to renewing the Voting Rights Act, and therefore supports passage of H.R. 9."[4]

---

[3] *See* Tucker, *supra*, at 211, *citing* The White House, President Signs H.R. 4145 to Place Statue of Rosa Parks in U.S. Capitol, Dec. 1, 2005.

[4] The Statement of Administration Policy: H.R. 9 – Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (July 13, 2006) is available at http://www.whitehouse.gov/omb/legislative/sap/109-2/hr9sap-h.pdf (last visited Mar. 20, 2009).

In the House, the reauthorization legislation passed by a recorded vote of 390-33; in the Senate, the legislation passed by a unanimous vote of 98-0.

Members of both political parties hailed the unity of the parties and recognized that the cooperation related to the continued importance of the VRA to the health of American democracy. Then-Senator Barack Obama (D-IL) stated that "at a time when Americans are frustrated with the partisan bickering that too often stalls our work, the refreshing display of bipartisanship we are seeing today reflects our collective belief in the success of the act." 152 CONG. REC. S7984 (July 20, 2006) (statement of Sen. Obama). Then-Senate Majority Leader Bill Frist (R-TN) noted that: "Today the Senate is standing together to protect the right to vote for all Americans. We stand together, putting aside partisan differences, to ensure discrimination at the voting booth remains a relic of the past." 152 CONG. REC. S7965 (July 20, 2006) (statement of Sen. Frist).

President Bush signed VRARA into law on July 27, 2006, noting that "we've made progress toward equality," but recognizing that "the work for a more perfect union is never ending."[5]

---

[5] President's Remarks on Signing The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 42 WKLY. COMP. PRES. DOC. 1392 (July 27, 2006).

II. The Bipartisan Support for the 2006 Reauthorization Was Grounded in Congress's Recognition that Section 5 Is Still Needed to Eliminate the Barriers to Minority Voting that Persist Today.

In each of the reauthorizations of the VRA, the strong bipartisan support for extending Section 5 has reflected Congress's conviction that the preclearance mechanism remained necessary to deter voting discrimination and to ensure the full enfranchisement of all citizens regardless of race. Further, in each of the reauthorizations, this conviction was grounded in an extensive legislative record that both demonstrated the progress made under the Act and the remaining problems of discrimination in voting.

Amici, some of whom were personally involved in past reauthorizations of the Act, can attest to the effort and deliberation underlying earlier extensions of Section 5. *Amici* also submit that the reauthorization in 2006 was no exception to this tradition. The bipartisan consensus in favor of the VRARA is attributable to the comprehensive record compiled by the House and Senate in their review of the temporary provisions of the Act. This record is at least as extensive as the records that supported earlier reauthorizations of the Act, and thus is more than sufficient to demonstrate that Congress again acted reasonably in extending Section 5 in 2006.

A. The House and Senate Compiled a Substantial Record to Support the Extension of Section 5 in 2006.

From October 18, 2005, through March 8, 2006, the Subcommittee on the Constitution of the House Judiciary Committee, under the leadership of Representative Steve Chabot, then-Chairman of the Subcommittee, held ten oversight hearings, gathering testimony from 39 witnesses. H.R. REP. NO. 109-478, at 5. After receiving additional written testimony from the Department of Justice, and other interested organizations and private citizens, the Committee's record encompassed over 12,000 pages of testimony and documentary evidence from over 60 witnesses. *Id*. The Subcommittee held an additional two legislative hearings and received testimony from another seven witnesses. *Id*.

Subcommittee Chairman Chabot stressed the size and depth of the congressional record, stating that "we have given this issue more time and more attention than any single issue since I became chairman of the Subcommittee on the Constitution of the Judiciary Committee 6 years ago." 152 CONG. REC. H5148 (July 13, 2006) (statement of Rep. Chabot). This sentiment was echoed by Committee Chairman Sensenbrenner, who noted that "based upon the committee's record . . . it is one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years that I have been honored to serve as a Member

of this body." 152 CONG. REC. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner).

The voluminous record developed by the House Judiciary Committee was submitted to the Senate Judiciary Committee on April 27, 2006. Although the Senate benefited from the record gathered by their colleagues in the House, the Senate Judiciary Committee and its Subcommittee on the Constitution also conducted an additional nine hearings. S. REP. NO. 109-295 (2006), at 10.

Importantly, the House and Senate also took into account a diverse array of viewpoints, hearing testimony both in favor and against reauthorization, as well as allowing and voting on various proposed amendments to the Act. *See, e.g.*, H.R. REP. NO. 109-478, at 123-73 (text and debate of various proposed amendments); Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?* 43 HARV. C.R.-C.L.L. REV. 385, 402 (2008) (discussing wide variety of viewpoints expressed on Section 5 in congressional hearings and debate). The breadth of the testimony compiled attests to the care with which Congress approached the 2006 reauthorization and the balance in the legislative deliberation of the VRARA.

Although dissenting opinions were offered and considered, the legislative record amassed in the House and Senate established the persistence of discrimination in voting and the continued need for

Section 5. The House Judiciary Committee stated unequivocally that "the temporary provisions of the VRA are still needed." H.R. REP. NO. 109-478, at 6. The Committee's report went on to explain:

> Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice.

Id. The Senate Judiciary Committee reached the same conclusion, stating that: "we recognize the great strides that have been made in the treatment of racial minorities over the last forty years, but extending the expiring provisions of the Voting Rights Act is still necessary to continue to fulfill its purpose." S. REP. NO. 109-295, at 2.

B. The 2006 Record Matches the Legislative Records Developed to Support Earlier Reauthorizations of Section 5.

In reaching the bipartisan conclusion that the reauthorization of Section 5 in 2006 was necessary to effectuate the purposes of the Act, the House and Senate gathered and considered the same types of evidence that Congress had gathered and considered in earlier renewals of the Act. As stated by the House Judiciary Committee, "[d]espite the substantial progress that has been made, the evidence before the Committee resembles the evidence before Congress in

1965 and the evidence that was present again in 1970, 1975, 1982, and 1992." H.R. REP. NO. 109-478, at 6.

The legislative records that supported the 1965 VRA and its later reauthorizations were deemed sufficient by the Supreme Court in *South Carolina* and *City of Rome* to justify Congress's enactment of those laws. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *City of Rome v. U.S.*, 446 U.S. 156 (1980); *see also Georgia v. U.S.*, 411 U.S. 526 (1973). As highlighted by the district court, Congress considered the same categories of evidence in the 2006 renewal as the Supreme Court examined and found significant in upholding the 1975 reauthorization in *City of Rome*, namely: racial differences in registration rates, the representation of minorities in office, and the prevalence of Section 5 objections by the Attorney General. *NAMUDNO*, 573 F. Supp. 2d at 247. Because the legislative record in 2006 thus parallels the earlier records supporting reauthorization, as the following section will review, it serves as ample justification for Congress's exercise of its constitutional authority to extend Section 5.

1. Differences in registration rates

In the 1975 reauthorization, Congress both investigated the progress made in increasing minority registration rates, and documented the race-based disparities in political participation that remained in

at least several covered jurisdictions. *NAMUDNO*, 573 F. Supp. 2d at 265-66.

Similarly, in 2006, Congress highlighted both the progress and the remaining deficits in minority registration and turnout. It noted, for instance, that "the disparities between African-American and white citizens who are registered to vote have narrowed considerably in six southern States covered by the temporary provisions (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) and in the 40 counties covered in the State of North Carolina." H.R. REP. NO. 109-478, at 12. However, it also found that certain covered jurisdictions lagged in their equalization of participation rates. In Virginia, in the 2004 election, "black registration was 7 percentage points lower than the national average, black registration was 11 percentage points lower than white registration, and black turnout was 13 percentage points lower than white turnout." S. REP. NO. 109-295 at 11.

The disparities found by Congress in the participation rates of language minorities were yet starker. In the 2004 elections, Latinos registered and turned out at rates roughly 30 percentage points lower nationwide than white voters. *Id*. For instance, in Florida, only 36.7 percent of Hispanic citizens were registered to vote in 1996, compared to 67.8 percent of white citizens. H.R. REP. NO. 109-478, at 29. In Texas, only 41.5 percent of Hispanic citizens were registered in 2004, compared to 61.5 percent of white citizens. *Id*.

2. Representation of minorities in federal, state and local office

In compiling the record to support the 1975 reauthorization, Congress considered both the increase in minority elected officials, and the shortfalls in minority representation, particularly at the statewide level. *NAMUDNO*, 573 F. Supp. 2d at 265-66.

In 2006, Congress acknowledged the great strides made in minority representation, noting that in 1964, there were only 300 African-Americans in public office, whereas "today there are more than 9,100 black elected officials, including 43 members of the United States Congress, the largest number ever." S. REP. NO. 109-295, at 12.

Again, however, Congress found that as in 1975, the number of African-American representatives in State legislatures did not reflect the number of African Americans in the general population. H.R. REP. NO. 109-478, at 33. "For example, in southern states such as Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, where African Americans constitute 35 percent of the population, African Americans made up only 20.7 percent of the total number of State legislators." *Id*. Moreover, the House Judiciary Committee found that in Mississippi, Louisiana, and South Carolina, African Americans have yet to be elected to any statewide office. *Id*. at 34.

The Committee also found that the number of language minority officials elected to office was not in

proportion to the size of their populations. Although more than 15 million citizens of Hispanic origin reside in the United States, Latinos constitute only 0.9 percent of the total number of elected offices in the country. *Id*. at 33-34. The Committee also noted that the number of Asian-American elected officials did not match the growth of the Asian-American population. It documented, for instance, that the number of Asian Americans residing in the United States rose from 1.2 million in 1970 to 12 million in 2004, but that the number of Asian American elected officials had only increased from 120 in 1978 to 346 in 2004. *Id*.[6]

---

[6] In response to critics who argue that the election of President Barack Obama in 2008 undercuts Congress's findings regarding race-based voting patterns, *amici* would highlight the analysis of the 2008 election in the friend-of-the-court brief filed by Nathaniel Persily, Stephen Ansolabehere and Charles Stewart III. *See* Brief for Nathaniel Persily, Stephen Ansolabehere, and Charles Stewart III as *Amici Curiae* on Behalf of Neither Party (Feb. 26, 2009) ("Persily Br."). In their review of the results of the 2008 Presidential election, these professors of law and political science found no decline in racially polarized voting in covered states, nor a "disruption in the well-known correlations between race and vote choice." Persily Br. at 3.

They noted that Obama's victory was due to gains he made relative to the performance of the 2004 Democratic presidential nominee among racial minorities nationwide and whites in *noncovered* jurisdictions. *Id*. In *covered* states, however, Obama received only 26 percent of the white vote. Indeed, the six states with the lowest percentage of whites who reportedly voted for Obama are covered states, and three of those states (Alabama, Mississippi, and Louisiana) reported a drop in the white vote for the Democratic nominee since 2004. *Id*. at 10. Thus, far from

(Continued on following page)

3. Section 5 objections interposed

As in the 1975 reauthorization, Congress also reviewed the number and nature of the objections interposed by the Attorney General to submitted voting changes in its deliberation on the VRARA.

The House Judiciary Committee Report noted that since 1982, the Department of Justice objected to more than 700 voting changes because they were determined to be discriminatory. H.R. REP. NO. 109-478, at 36. In nine of the sixteen states covered by Section 5, more objections were interposed after 1982 than before that year. H.R. REP. NO. 109-478, at 36, *citing Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, NATIONAL COMMISSION ON THE VRA 54 (Feb. 2006).

Congress also found that the types of voting changes submitted by covered jurisdictions – many of which had been deemed discriminatory by the Attorney General – resembled the types of changes submitted in earlier periods. The House Judiciary Committee noted that "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory

---

marking a watershed in electoral participation, the 2008 election demonstrates the "intransigence of racial differences in voting patterns." *Id*. at 3.

annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements." *Id*. at 36.

The evidence reviewed in the foregoing subsections represents but a fraction of the record amassed by Congress in the 2006 reauthorization. As noted by the district court, Congress also reviewed additional categories of evidence that demonstrated the continuing need for the preclearance mechanism, including "more information request" letters, judicial preclearance suits, Section 5 enforcement actions, Section 2 litigation, appointment of federal election observers, and statistics on racially polarized voting. 573 F. Supp. 2d at 247.

However, even a sampling of the massive record reveals the similarity of the evidence gathered in the 2006 reauthorization and the evidence underlying previous reauthorizations, and demonstrates that widespread discrimination against minority voters persists to this day. As summarized pithily by Chairman Sensenbrenner: "We need the Voting Rights Act, and we need the Voting Rights Act because in the last 25 years the covered jurisdictions have not come clean." 152 CONG. REC. H5164 (July 13, 2006) (statement of Rep. Sensenbrenner).

The bipartisan consensus that the VRA remains necessary to achieve the full enfranchisement of

minority voters rests on a substantial legislative record that resembles the record supporting the 1975 reauthorization, upheld in *City of Rome*, as well as the records supporting the other reauthorizations of the Act. *Amici* thus respectfully urge the Court to find that the 2006 reauthorization of Section 5 represents a valid exercise of Congress's authority under the Constitution to remedy the continuing problem of racial discrimination in voting.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 2009

Respectfully submitted,

TREVOR POTTER
Counsel of Record
TARA MALLOY
PAUL S. RYAN
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., N.W.
Suite 650
Washington, DC 20036
(202) 736-2200

Counsel for Amici Curiae

Appendix A

The following Republican officeholders constitute the *amici curiae* who submit the foregoing brief:

- William S. Cohen. Mr. Cohen served as a U.S. Representative for Maine's Second Congressional District from 1973 to 1979, and as a U.S. Senator for Maine from 1979 to 1997. Mr. Cohen also served as Secretary of Defense under President Bill Clinton from 1997 to 2001. He is currently the Chairman and CEO of The Cohen Group, a business consulting firm based in Washington, D.C.

- Robert "Bob" Dole. Mr. Dole served as a U.S. Representative from Kansas from 1961 to 1969, and as a U.S. Senator for Kansas for almost three decades, from 1969 to 1996. He served as Chairman of the Senate Finance Committee from 1981 to 1985. Mr. Dole was elected Senate Majority Leader in 1984, and served as the leader of the Senate Republicans until he resigned from the Senate in 1996 to pursue his campaign for President of the United States. He is currently special counsel at Alston & Bird, LLP.

- Amory "Amo" Houghton, Jr. Mr. Houghton served as a U.S. Representative from New York, 29th Congressional District. Mr. Houghton is the only former Fortune 500 CEO to have served in the House. There, Mr. Houghton was a member of the House Ways and Means Committee, chaired the

Oversight Subcommittee and was a member of the Trade Subcommittee. Houghton is also a founding member of the Republican Main Street Partnership, which seeks to strengthen the political center, where he now serves as a Board Member.

- Richard Lewis "Dick" Thornburgh. Mr. Thornburgh served as the Governor of Pennsylvania from 1979 to 1987. Thereafter, he served as the U.S. Attorney General under Presidents Ronald Reagan and George H. W. Bush from 1988 to 1991. Prior to his Governorship, Mr. Thornburgh was the U.S. Attorney for the Western District of Pennsylvania, and the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice. He currently is counsel at K&L Gates, LLP.
- William F. Weld. Mr. Weld served as Governor of Massachusetts from 1991 to 1997. Prior to serving as Governor, Mr. Weld served as the U.S. Attorney for Massachusetts and as the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice. Mr. Weld is currently a partner in the law firm of McDermott Will & Emery, LLP.