STATEMENT OF JOHN J. PARK JR. IN CONNECTION WITH BRIEFING ON SECTION 5 ISSUES BEFORE THE UNITED STATES CIVIL RIGHTS COMMISSION

January 24, 2012

Introduction

Thank you for the opportunity to participate in this briefing on Section 5 of the Voting Rights Act and related issues. This is a very important issue for the United States and for the covered jurisdictions, and I hope that my contribution will be helpful to the Commission.

In participating in this briefing, I will draw on, among other things, my work in the Alabama Attorney General's Office between 1997 and 2006. During that time, my work included the representation of the State and its officials in redistricting, election law, and voting rights cases, including cases involving Section 5. In addition, I participated in the preparation of administrative preclearance submissions and the defense of the precleared plans against constitutional attacks.

I will also draw on my work as outside counsel for the Alabama Attorney General's Office in the current round of statewide redistricting. I have been performing that work pursuant to my appointment as "a Deputy Attorney General to represent the State of Alabama in litigation involving redistricting issues" from the Attorney General of Alabama, Luther Strange. To date, I have participated in the preparation of administrative and judicial preclearance submissions for the state's congressional and State Board of Education plans.

Please note that, while I believe my comments are consistent with Alabama's long-term views on the matters before the Commission, I am also drawing on my personal views and experience.

In this Statement, I will first briefly discuss implications of the fact that the constitutionality of Section 5 has been and is being challenged. Although I am aware that the Commission does not intend to explore the merits of the constitutional issue and I will not express a view of the merits either, I will explain why the existence of those challenges has a direct bearing on some state decisions

in the preclearance process and the likely responses of USDOJ and the courts. Next, I will address the effect of one of the 2006 changes to Section 5, the statutory reversal of *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier Parish II*). In the Fannie Lou Hamer, Rosa Parks, Coretta Scott King , César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (VRARA), Congress provided that the purpose inquiry under Section 5 extends to "any discriminatory purpose," not just the purpose to retrogress. VRA § 5(c), 42 U.S.C. § 1973c(c) (2006). If the proceedings involving Texas in the current round of redistricting are a harbinger, the future is not pretty for the covered jurisdictions, and unfairly so. The implementation of that change, and other factors, might understandably give rise to uncertainty about USDOJ on the part of covered jurisdictions that might lead them to file judicial preclearance actions.

The Current Litigation Background and its Impact

Although none of the previous challenges to the constitutionality of Section 5 has been successful, the current challenges raise new issues that relate to the 2006 reauthorization and the passage of time that has changed the litigation landscape. For example, the coverage formula which was readopted in 2006 made more sense in earlier decades, but was widely acknowledged by both academic supporters and skeptics to raise new constitutional questions in 2006. For this and other reasons, the doubts about the constitutionality of Section 5 that the Supreme Court expressed in 2009 remain pertinent. See *Northwest Austin Municipal Utility District No, 1 v. Holder*, 129 S. Ct. 2504 (2009) (*Northwest Austin MUD*). For reasons that I will elaborate on below, I believe we are in a constitutional "waiting period" while the challenges work their way through the lower courts, and that, during this window of time, current preclearance applications and rulings are likely to be affected in at least two important ways:

(1) More jurisdictions are likely to seek judicial preclearance of non-trivial changes to state laws or practices because that will give them the right to an appeal to the Supreme Court, and the courts should be more willing to follow the canon of construction that avoids constitutional decisions when reasonably possible; and

(2) More jurisdictions may seek bailout, like the MUD did, and their requests may have a greater likelihood of being granted by USDOJ and the courts when necessary to avoid reaching the constitutional question.

In *Northwest Austin MUD*, an 8-1 decision with Justice Thomas concurring in the judgment in part and dissenting in part, Chief Justice Roberts cited opinions by Justices Black, Harlan, Powell, Rehnquist, Kennedy, and Thomas in which members of the Court "expressed serious misgivings about the constitutionality of § 5." 129 S. Ct. at 2511. In his *Northwest Austin MUD* opinion, Justice Thomas wrote that he would "hold that § 5 exceeds Congress' power to enforce the Fifteenth Amendment." *Id*., at 2517 (Thomas, J., concurring in the judgment in part and dissenting in part); see also Perry v. Perez, No. 11-713 (Jan. 20, 2012), slip op. at 12 (Thomas, J., concurring in the judgment). Moreover, since that decision, a number of constitutional challenges to parts or all of Section 5 have been filed and are working their way through the lower courts.

Chief Justice Roberts also noted that conditions in the covered states have improved dramatically since 1965. The average registration and turnout rates for minority voters in 2000 for the six covered Southern states were not just over 50%, which is the Section 5 standard; they exceeded the national average. The number of minority elected officials has increased dramatically. And, the problem that led to the enactment of Section 5, covered jurisdictions changing their laws and practices to stay ahead of the courts and USDOJ, is gone. To the extent that practice ended because of Section 5, the covered jurisdictions know what got them in trouble and, if Section 5 expired, those jurisdictions would be unlikely to give Congress a reason to bring them back under it again.

Chief Justice Roberts also reiterated that Section 5 "intru[des] into sensitive areas of state and local policymaking and imposes substantial 'federalism costs.'" 129 S. Ct. at 2511 (quoting *Lopez v. Monterrey County*, 525 U.S. 266, 282 (1999)). It treats states differently, and, even if that was appropriate in 1965, "the Act imposes current burdens and must be justified by current needs." *Id*., at 2512. In that regard, it may prevent covered jurisdictions from doing things that non-covered jurisdictions can do, cf. *Boxx v. Bennett*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999)(three-judge court)(blocking Alabama from conducting a recount in a tight election due to deficiencies in a preclearance submission, while the margin was

within the statutory recount provision in neighboring non-covered jurisdictions), and may require them to do things that non-covered jurisdictions cannot be required to do.

Significantly, the Court declined to decide which legal standard applies to consideration of the constitutionality of Section 5, the rational basis test advanced by the Government or the congruence and proportionality test from *City of Boerne v. Flores*, 521 U.S. 507 (1997), advanced by Northwest Austin MUD. The Court explained, "The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test." *Northwest Austin MUD*, 129 S. Ct. at 2513.

In *Northwest Austin MUD*, the Court construed the bailout provisions of the Act in a way that avoided the constitutional issue. Doing so has not put the constitutional question to bed. Several challenges are now working their way through the lower courts, including one directed at the constitutionality of the coverage formula, which remains focused on forty-year old elections. Another challenge, filed by the State of Arizona, points to mismatches in the application of the language coverage formula.

I conclude by noting that, since Congress reauthorized Section 5 in 2006, the Supreme Court has limited the application of the Voting Rights Act in three cases. In *Riley v. Kennedy*, 553 U.S. 406 (2008), the Court held that a precleared Alabama local law that was implemented only once – and that because of an erroneous trial court ruling rejecting a constitutional challenge – was not "in force or effect" such that a return to the prior law – after the Alabama Supreme Court reversed the trial court's decision and invalidated the local law on generally-applicable, racially-neutral grounds – would have to be precleared, something that USDOJ refused to do. The effect of USDOJ's objection would have been to preserve the erroneous trial court's decision in amber, immunizing it from the application of even generally-applicable, racially-neutral rules of law. In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court held that Section 2 of the Act does not require the creation of crossover districts. In a crossover district, the minority population does not constitute a majority but is "at least potentially, …large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."

Id., 129 S. Ct. at 1242. Finally, there was *Northwest Austin MUD*, in which the Court held that a covered jurisdiction did not have to register voters in order to be eligible to apply for bailout.

The Court's *Northwest Austin MUD* decision makes bailout more accessible to smaller jurisdictions and has led to a number of successful bailouts, including that of Northwest Austin Municipal Utility District No. 1. The effect is to further limit the reach of Section 5. Nonetheless, bailout remains unrealistic for larger jurisdictions.

Put simply, those seeking to extend the Act's reach, including USDOJ, have not done well in the Court lately. That record might counsel in favor of a restrained approach on the part of USDOJ, particularly given the constitutional challenges now working their way through the lower courts, but DOJ has objected to the South Carolina's Voter-ID law. And, regardless of how those challenges are ultimately resolved, the desire to avoid those "serious constitutional questions" is likely to affect that resolution. *Northwest Austin MUD*, 129 S. Ct. at 2513.

The Effect of the 2006 Amendments to Section 5

The Statutory Change

When Congress reauthorized Section 5 in 2006, it chose to tighten the Act's coverage, reversing two Supreme Court decisions, and rejected suggestions that coverage be updated to reflect substantial changes in the practices and performance of the covered jurisdictions. In particular, Congress rejected the Supreme Court's decision in *Bossier Parish II*, in which the Court held that the Act did not bar the preclearance of a redistricting plan that did not retrogress but was (allegedly) enacted with a discriminatory purpose. Congress responded by defining "purpose" to include "any discriminatory purpose."

As a result, USDOJ's Guidance now states that purpose includes "'any discriminatory purpose,' and is not limited to a purpose to retrogress." 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011). USDOJ explains that a discriminatory purpose can be shown with either direct or circumstantial evidence, and that, with respect to circumstantial evidence, it will be "guided by the Supreme Court's illustrative, but not exhaustive list of subjects…." *Id*. (internal quotation omitted).

The Texas Proceedings

To my knowledge, the first application of this new definition of "purpose" came in the review of judicial preclearance submissions by Texas. I understand that Texas submitted four statewide plans for judicial preclearance, and that the contested proceedings involve the Texas congressional, state senate, and state house of representatives redistricting plans.

The review of redistricting plans for Texas is more complex than it would be for Alabama because Texas has more than one large minority population to deal with. Moreover, with respect to the Texas congressional plan, Texas received four new districts as the result of the 2010 Census. These factors make the current Texas submissions more complex than the 7- and 8-member Alabama plans that were recently administratively precleared.

Texas sought judicial preclearance, and a number of parties intervened. Both USDOJ and the intervenors put the new "any discriminatory purpose" authority to use. For its part, USDOJ advanced objections to the congressional and state house of representatives plans, but not to the senate plan. Some of the objections from USDOJ were to specific districts. In addition, USDOJ argued that there was circumstantial evidence of discriminatory intent with respect to the congressional and state house of representatives plans.

Significantly, the intervenors' objections go farther than those of USDOJ. Where USDOJ did not object to the state senate plan, the intervenors did. The intervenors also challenged different districts, and they contended that all three plans were the product of a discriminatory purpose.

Texas moved for summary judgment, and, on December 22, 2011, a three-judge court sitting in the District of Columbia denied the Texas motion. *Texas v. United States*, 2011 WL 6440006(D.D.C. Dec. 22, 2011). By the time of this briefing, the trial proceedings to determine whether the Texas plans should be precleared should be almost complete.

The denial of Texas's summary judgment motion and the pending trial gave the intervenors and their lawyers an opening. While Texas was hung up in Washington, DC, a three-judge federal district court sitting in the Western District

of Texas acted. The intervenors and their lawyers had filed suit seeking to enjoin Texas from using its old redistricting plans and asked the court to draw remedial plans to use in the upcoming elections. Lawsuits seeking such relief have been filed before, when a legislature has been unable to agree on a plan as well as when a covered jurisdiction's plan is not precleared, and the Supreme Court has provided guidance. See, e.g., *Upham v. Seamon*, 456 U.S. 37 (1982).

In this case, the Texas court declared that it "was not required to give any deference to the Legislature's enacted plan" and, instead, imposed remedial plans that, in its view, "place[d] the interests of the citizens of Texas first." Those remedial plans favored the interests of Democrats, while the Legislature's plans favored the interest of the Republican majority and the voters who elected it. Texas sought Supreme Court review after the Texas court declined, in a 2-1 decision, to stay its ruling imposing new plans, reasoning that to adopt the legislatively-enacted, but unprecleared Texas plans or to defer to them "would make the preclearance process meaningless and constitute a de facto ruling on the merits of the various challenges to the State's plan." *Perez v. Perry*, 2011 WL 5904716 at *1(W.D. Tex. Nov. 25, 2011).

The Supreme Court unanimously reversed, with Justice Thomas concurring in the judgment. It held that, even though the legislatively-enacted Texas plans were not yet precleared, Section 5 "does not mean that the [unprecleared] plan is of no account or that the policy judgments it reflects can be disregarded by a district court drawing an interim plan." *Perry v. Perez*, slip op. at 5. It instructed the lower courts to be guided by the unprecleared plan unless some aspect of it stands a "reasonable probability" of failing to gain preclearance. *Id*., slip op. at 6. The Court explained that the "reasonable probability" standard means that the Section 5 challenge is "not insubstantial," and that applying that standard "ensures that a district court is not deprived of important guidance provided by a state plan due to § 5 challenges that have no reasonable probability of success but still respects the jurisdiction and prerogative of those responsible for the preclearance determination." *Id*.

One example of the importance of looking to the legislature's plan for guidance which the Court offered relates to adding four new congressional districts. The court could not look to the old plan because it did not include those

districts. The new, unprecleared plan "reflects the State's policy judgments on where to place the new districts and how to shift existing ones in response to massive population growth." *Id*., slip op. at 4. In locating the new districts, the Texas legislature "exercise[d] its political judgment" and "weighed and evaluated" the applicable "criteria and standards." *Id*. The courts are "at best, ill suited" for the making of those kinds of policy judgments. *Id*.

Had the Supreme Court ruled the other way, delays in the resolution of judicial preclearance proceedings would have been to the benefit of those opposing the plan. In *Perry v. Perez*, those parties did not just object to preclearance, making the trial necessary, they actively encouraged the Texas court to adopt plans that favored their interests. Now, the courts will have to treat plans that are pending preclearance much like plans to which objections have been made.

As I noted before, the preclearance proceedings are on-going. The Washington DC three-judge court denied summary judgment on the purpose claims observing, "Such an intensely fact-driven inquiry is typically difficult to resolve at the summary judgment stage." *Texas v. United States*, 2011 WL 6440006 at *21. If the claims and the court's treatment of them are typical of what we can expect, the preclearance lawsuit will turn into a trial of discriminatory purpose claims. In my judgment, the statutory change makes it much more likely that judicial preclearance proceedings will involve a trial.

Given that USDOJ and the DC courts will consider the same question of discriminatory purpose, a covered jurisdiction might still prefer to be in front of a three-judge court to proceeding administratively. Even if the covered jurisdiction will have to disprove the discriminatory purpose claim, USDOJ and any intervenors will have to offer admissible, relevant evidence from witnesses who will be subject to cross examination to support their position. The administrative process does not provide for such fact-finding. In addition, more covered jurisdictions are likely to conclude that the independent federal judiciary is a more neutral arbiter to make the decision as opposed to the permanent bureaucracy and the political leaders of the Civil Rights Division, whose power and budget are enhanced by a broader reading of Section 5 that covers more and more state decisions.

The "Any Discriminatory Purpose" Inquiry

In essence, we know more about what "any discriminatory purpose" should not be in this context than we do about what it will be. In the Texas preclearance proceedings, we did not learn a great deal from the court's denial of summary judgment. The court did observe that, even if Texas did not have to account for the growth of the Hispanic population to avoid retrogression, its alleged failure to do so was relevant in the discriminatory purpose inquiry. *Texas v. United States*, 2011 WL 6440006 at *20. Otherwise, the court deemed the issue to be generally unsuited to resolution on summary judgment and declared that Texas had not said enough to get summary judgment in its favor.

We will, no doubt, learn more from the court's decision after the trial. Even so, we should be able to make some predictions.

As Texas explained in its summary judgment motion, there are several things that "any discriminatory purpose" should not be. It should not mean:

(1) the proposed change may have a disparate effect on minority voters because disparate effect is not the same thing as disparate treatment, see, e.g., *Vill. of Arlington Heights v. Metro. Housing Dev. Corp*., 429 U.S. 252, 264-65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.");

(2) the drafters of the plans took race into account without letting racial considerations predominate because, after all, the Voting Rights Act requires that race be considered;

(3) the jurisdiction's plan does not seek to create the maximum number of minority-majority districts possible because the United States Supreme Court rejected this reading of the Voting Rights Act in *Miller v. Johnson*, 515 U.S 900 (1995); see also 51 C. F.R. § 51.59(b) (2011)("A jurisdiction's failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.");

(4) the change is allegedly dilutive in violation of Section 2, see e.g., *Shaw v. Hunt*, 517 U.S. 899, 913 n. 6 (1996)("[W]e doubt that a discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5.");

(5) the jurisdiction's plan does not provide proportional representation because Section 2, by its terms, does not create such a right; and

(6) the voting change seeks to maintain or increase partisan advantage, see e.g., *Easley v. Cromartie*, 532 U.S. 234 (2000).

We also know that Section 2 does not require the creation of crossover districts. See *Bartlett v. Strickland*. Accordingly, it cannot be the case that a covered jurisdiction's refusal to create a crossover district that a minority representative asks for represents purposeful discrimination. Otherwise, a covered jurisdiction would have to do something that it cannot be legally required to do, and *Bartlett v. Strickland* would be turned on its head.

That said, the Florence Times Daily reported that, in the debate in the Alabama House of Representatives regarding the proposed congressional plan, James Buskey, an African-American legislator from Mobile, wanted to establish a "minority impact district." He was quoted as saying, "If we can demonstrate we can create a minority impact district under the Voting Rights Act, we have an obligation to do so." "Redistricting plan passes with protests from House," Florence Times Daily, June 3, 2011.

In my judgment, Representative Buskey's argument lacks merit. I note further that the Alabama congressional plan was administratively precleared even though it did not include the "minority impact district" that he wanted.

Another Reason for Uncertainty

Recently, in an interview, Thomas Perez, Assistant Attorney General for Civil Rights, and the political appointee who oversees the Voting Section, said, "We're trying to demystify the [preclearance] process." It didn't help when he explained, "There's no magical numerical formula." Instead, Perez said that the process is "a very holistic process that involves looking at prior elections, voting age data, things of that matter."

To a covered jurisdiction, that description of the process sounds like "we at USDOJ know preclearance when we see it." As a participant in an election law blog put it, the law should set clear standards and provide guidance to the covered jurisdictions, not rely on a squishy "holistic" analysis.

Conclusion

In my judgment, Section 5 should be a process with defined standards that covered jurisdictions can be confident of meeting. In this judgment, I agree with *Bossier Parish II*, in which Justice Scalia explained, preclearance "does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action." *Bossier Parish II*, 528 U.S. at 335 (emphasis in original). This understanding reflects the Court's view that Sections 2 and 5 "combat different evils and…impose very different duties upon the states." *Bossier Parish I*, 520 U.S. at 477. In my judgment, things work best when those very different inquiries are undertaken in two stages: in the United States District Court for the District of Columbia for the §5 retrogression inquiry, and in a local court for any § 2 issues after the proposed change has been precleared.

The statutory change to allow for an inquiry into "any discriminatory purpose" takes the preclearance inquiry farther away from a straightforward analysis of retrogression. It also makes it more likely that judicial preclearance actions will result in a trial. The net effect will be to make preclearance harder and more expensive to obtain, thereby increasing the already substantial federalism costs imposed by the statute.