No. 12-96

In The Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC J. HOLDER, JR., Attorney General, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF MERCED COUNTY, CALIFORNIA, AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

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STATEMENT OF INTERESTS OF *AMICUS CURIAE* MERCED COUNTY[1]

A central argument of those supporting the constitutionality of the continued application of Section 5, under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act ("Act" sometimes herein), is that any over-inclusiveness can be addressed through the so-called "bailout" mechanism contained in Section 4(a). As Respondent Holder states:

> The constitutionality of the VRA's determination of covered jurisdictions can only be fairly judged in the context of the statute as a whole, including the statute's built-in mechanism for a jurisdiction to earn a change in its status from covered to non-covered (or vice-versa). Covered jurisdictions that can demonstrate they have complied with specific nondiscrimination requirements for a ten-year period can seek bailout. See 42 U.S.C. 1973a(c), 1973b(a); Supplemental Apps. A & B, *infra* (listing jurisdictions that have been subject to preclearance under section 3(c) or have terminated coverage under section 4(a)). This Court has consistently described bailout as a critical limiting feature contributing to Section 5's constitutionality. . . .

Brief for the Respondents in Opposition to Petition for Certiorari, at 24.

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[1] Merced County does not require the consent of the parties to file this brief. *See* Sup. Ct. R. 37.4.

Among the "bailed-out" jurisdictions listed in Supplemental Appendix B of that opposition is this *amicus curiae*, **Merced County, California**. *See* Supplemental App. B, p. 10a.

In 1975, the U.S. Attorney General determined that Merced County, was "covered" by the preclearance obligations of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, based on the 1972 renewal of the Act and the corresponding update to the Section 5 coverage formula in that year. *See* 40 Fed. Reg. 43746 (Sept. 23, 1975); 28 C.F.R., Appendix to Pt. 51. Coverage resulted primarily because, in 1972, Merced County hosted a large military population at Castle Air Force Base during the height of the Vietnam War. That transient population caused the County's voter participation rate to fall just below 50 percent of eligible voters in 1972 (49.6 percent), thereby failing the Section 4(b) coverage test, as described below.

Castle AFB has since been closed and converted to civilian uses;[2] however, because the 2006 reauthorization of Section 5 relied on the pre-existing coverage formula, the County remained subject to Section 5.

Earlier this year, the County obtained the consent of Respondent Holder and a decree of the United States District Court for the District of Columbia for

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[2] *See* United States Gen' Accounting Office, *Military Bases: Status of Prior Base Realignment and Closure Rounds* 86 (Dec. 1998), *available online at* http://www.defense.gov/brac/docs/gaostatus98-2.pdf (last visited Dec. 12, 2012).

bailout. *Merced County, Cal. v. Holder*, Case No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C.) (three-judge § 5 court) (judgment entered Aug. 31, 2012). This welcome result ensued after the County's 40-year record of diligent Section 5 compliance, and over two years of study and evaluation by the Voting Section of the United States Department of Justice.

Recently, however, Merced County's bailout has come under unjustified attack in the press and in a court filing opposing the bailout of several townships in New Hampshire.[3] Based on comments contained in some of the press attacks, Merced County anticipates one or more *amicus* briefs containing similar assertions may be filed in this Court by supporters of Petitioner Shelby County.[4]

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[3] *See* Peter Heilemann's Motion to Intervene, *The State of New Hampshire v. Holder*, Case No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. filed Dec. 5, 2012) (Dkt. #6), pp. 8-9; Hans A. von Spakovsky, *Crooked Justice*, NAT'L REV. ONLINE (Dec. 4, 2012), *online at* http://www.nationalreview.com/articles/334688/ crooked-justice-hans-von-spakovsky# (last visited Dec. 10, 2012); J. Christian Adams, *Eric Holder Cons the Courts to Save Voting Rights Act*, P.J. MEDIA (Dec. 3, 2012), *online at* http://pjmedia.com/jchristianadams/2012/12/03/eric-holder-cons-the-courts-to-save-the-voting-rights-act/ (last visited Dec. 18, 2012). J. Christian Adams, *Holder Con on Voting Extends to New Hampshire*, P.J. MEDIA (Dec. 4, 2012), *online at* http://pjmedia.com/tatler/2012/12/04/holder-con-on-voting-extends-to-new-hampshire/ (last visited Dec. 18, 2012).

[4] *See, e.g.*, Adams, *Eric Holder Cons the Courts, supra*, note 3 ("*But when the justices learn that the bailouts are being mass-produced with collusion and deception,* perhaps [they] will find a new reason to strike down the law." (emphasis added)). This

(Continued on following page)

Those attacks so far have asserted that Merced County was ineligible to bail out, and that it was only permitted to do so because the Attorney General has adopted a policy of ignoring the bailout requirements so that a large number of covered jurisdictions could bail out in advance of this case. Improper bailouts, the attack continues, cannot support an argument that the continuing application of Section 5 under the 1975 coverage formula is constitutional. Merced County does not purport to speak for the Attorney General, nor does it have any view on the merits of bailout efforts by any other jurisdiction. The success of those efforts will necessarily turn on the unique facts of each covered jurisdiction, about which the County has no direct knowledge.

However, the County does have knowledge about the circumstances of its own history under Section 5 and its bailout, which the County believes may be of interest and assistance to the Court in the determinations that it must make in this case.

SUMMARY OF ARGUMENT

Assertions that Merced County was not eligible for bailout are incorrect.

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brief *amicus curiae* must be filed in anticipation of these arguments being made because of the timing for the filing of *amicus curiae* briefs in support of neither party set forth in Rule 37.3(a).

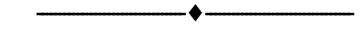
In 2009 the County approached the Attorney General to present its case, based on extensive evidentiary materials, that the County was eligible for bailout under the criteria set forth in section 4(a) of the Act. The County was also aware that, in order to qualify, it would be required to demonstrate that not only it, but 84 independent cities and state agencies within its boundaries, also met the bailout criteria.

Over the next two years, the County worked with the Voting Section attorneys to persuade them of the County's eligibility, and to obtain the Attorney General's consent to the County's bailout. The evaluation process undertaken by the Voting Section of the United States Department of Justice ("USDOJ") was diligent and painstaking. The County provided the Voting Section with tens of thousands of pages of public records. It twice sent County officials and special counsel to Washington, D.C., to meet with Voting Section attorneys to present its case. Where there were legal disputes about whether particular unprecleared actions were subject to preclearance, the County presented legal briefings supporting its position that preclearance was not required, but to ensure that there was no impediment to bailout, the County made precautionary preclearance submissions of every action without waiving its legal arguments to the contrary. *See* Consent Decree, *Merced County v. Holder, supra*, ¶ 29. Voting Section attorneys traveled to Merced County to meet with staff from numerous special districts within the County and to review their records for the preceding ten years. These attorneys also interviewed numerous members of

local communities. *Id*. at ¶ 8. The County also extensively publicized its efforts to secure the Attorney General's consent to bailout and secured the support of groups representing minority voters and of numerous public entities. Finally, after two years, the Attorney General consented to the County's bailout.

A consent decree and final judgment granting that request was entered by a three-judge panel of the United States District Court for the District of Columbia on August 31, 2012. That judgment recites the particulars in which Merced County satisfied the criteria for bailout, and was fully warranted. No person or entity intervened in the bailout action to oppose the County's exit from Section 5 coverage.

Allegations that Merced County's bailout was not in compliance with law, but was instead the result of the Attorney General's disregard of the bailout criteria, are incorrect and are based on insufficient knowledge of the facts, and an incorrect interpretation of the relevant law. The Attorney General's review was thorough and comprehensive, and Merced County's bailout was fully warranted under the law.



ARGUMENT

I. BACKGROUND OF THE COUNTY'S INITIAL COVERAGE UNDER SECTION 5.

When Congress enacted the Voting Rights Act of 1965, it determined that racial discrimination in voting had been especially prevalent in certain areas

of the country. Section 4(a) of the Act (42 U.S.C. § 1973b) therefore established a formula that was "reverse-engineered" to target those areas and to subject them to more stringent remedies. Pet. App. 56a. Nothing in the legislative record indicates that Merced County, or anywhere in California, for that matter, was a target of these provisions.[5]

The jurisdictions identified by the formula were then subjected to a two-part remedy: the first part was a five-year suspension of the use of any "test or device" (such as a literacy test), as a prerequisite to register to vote. The second was the requirement for review ("preclearance") under Section 5 of any change affecting voting made by a covered area either by the United States District Court for the District of Columbia or by the Attorney General.

A. Initial Coverage.

The coverage formula as enacted in 1965, and as subsequently amended in 1970 and 1975, contained

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[5] One treatise on election law – co-written by prominent voting rights experts Samuel Issacharoff, Pamela Karlan, and Richard Pildes – states that the 1975 amendment that resulted in Merced County's coverage "was designed largely to bring" Texas – the only former Confederate state to have evaded Section 5 coverage to that point – "under the preclearance obligation." *See* Issacharoff, Karlan & Pildes, *The Law of Democracy: Legal Structures of the Political Process* (Foundation 2d ed. 2001), p. 557; *see also Briscoe v. Bell,* 432 U.S. 404, 406 (1977).

two prongs, both of which had to be met to subject a jurisdiction to the preclearance requirement.

The first prong in the preclearance coverage formula was whether, at the presidential election immediately preceding the enactment/amendment of the Act, the state or a political subdivision of the state maintained a "test or device" restricting the opportunity to register and vote.

This prong was met in Merced County through no fault of the County. Merced County never had any such test or device of its own. The State of California, however, had a literacy test that had been on the books since 1894.[6] The California Supreme Court struck down that literacy test as unconstitutional in 1970, and it was not thereafter enforced.[7] It was not formally repealed by the voters, however, until November 7, 1972 – six days after the trigger date for Merced County's coverage.[8]

In 1975, the phrase "test or device" was broadened to include the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a

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[6] *See Castro v. State of Cal.,* 2 Cal. 3d 223 (1970).

[7] *Id*.

[8] *See* Cal. Stats. 1972, ch. 920 & Res. ch. 98 (submitting Senate Const. Amend. 32, repealing the constitutional provision containing the literacy test, to the voters on Nov. 7, 1972); *Ramirez v. Brown*, 9 Cal. 3d 199, 204 & 210 (1973) (noting passage of SCA 32 (Proposition 7)).

single language minority constituted more than five percent of the citizens of voting age. Merced County met this prong too, again through no fault of its own. Registration and voting was then – as now – governed by state law, which contained no provision for election materials to be in languages other than English. In addition, Merced County's "language minority" population constituted more than five percent of the citizens of voting age.[9] (Though California law governed the languages in which voting materials were provided, the State was not covered. *See Lopez v. Monterey County*, 525 U.S. 266, 268 (1995).)

The second prong of the preclearance coverage formula was met if the Director of the Census determined that less than 50 percent of persons of voting age were registered to vote, or actually cast votes for the office of President, at the presidential election immediately preceding the Act's enactment in 1965 (Johnson v. Goldwater) or amendment in 1970 (Nixon v. Humphrey), or if less than 50 percent of citizens of voting age were registered to vote, or actually cast votes for the office of President, at the presidential

[9] U.S. Census Bureau, *Current Population Reports*, Series P-25, No. 627, "Language Minority, Illiteracy and Voting Data Used in Making Determinations for the Voting Rights Act Amendments of 1975 (Public Law 94-73)," U.S. Government Printing Office, Washington, D.C., June 1976, p. 13, *available online at* http://www.census.gov/hhes/www/socdemo/voting/publications/p25/1975/index.html (last visited Dec. 10, 2012) (hereafter "1975 Amendments Report").

election immediately preceding the Act's amendment in 1975 (Nixon v. McGovern). 42 U.S.C. § 1973b(b). Applying this second prong of the formula did not result in coverage for Merced County in 1965 or in 1970.

In November 1972, however, the voter participation figure for Merced fell barely under 50 percent, with 49.6 percent of the County's eligible voters voting in the 1972 presidential election.[10] The result was coverage under Section 5. Coverage was not appealable. 42 U.S.C. § 1973b(b). The only other jurisdiction with a voter participation rate between 49 and 50 percent that was covered in 1975 was Coconino County, Arizona, which would have been covered anyway as a result of the State of Arizona being covered.[11]

B. Demographic Circumstances Leading to Coverage under Section 5.

This low voter turnout in Merced County (just barely under 50 percent) was not an indication of racial vote suppression. Rather, as detailed in the report of respected demographer Dr. Jeanne Gobalet of Lapkoff & Gobalet Demographic Research, which was submitted to the Voting Section of the United States Department of Justice in connection with the County's quest to seek the Attorney General's consent

[10] *Id.*

[11] *Id.*

to bailout, Merced County fell below the 50 percent voter participation threshold in 1972 for three reasons wholly unrelated to race. *See* Rule 32.3 Letter Proposing to Lodge Non-Record Materials, submitted herewith ("Rule 32.3 Letter"), Item #2b.[12]

As documented in the Gobalet Report, the main reason that Merced County met the second prong of the preclearance formula was that the County had a large transitory population in 1972 who were counted as part of the County's voting population in the 1970 Census: military personnel living in Castle Air Force Base. In making its determination under Section 4, the Census Bureau treated those military personnel as eligible voters in Merced County, even though the U.S. Department of Defense encouraged them to vote in their legal places of residence (outside Merced County, in most cases). Not surprisingly, voter turnout in the two precincts covering Castle Air Force Base fell well below the 50 percent threshold, dragging down the County's overall voter turnout percentage to 49.6 percent. The Bureau's calculation of voter turnout made no adjustment for temporary military personnel. Outside the two precincts covering Castle Air Force Base, more than 50 percent of eligible voters in Merced County voted in the November

[12] A similar analysis was presented to Congress in 2006, in connection with the reauthorization of the Voting Rights Act. *See* discussion, *infra*, at 22. Nobody has ever disputed the accuracy of that analysis.

1972 presidential election.[13] Had this adjustment been made, Merced County would not have been covered under Section 5. *See* Rule 32.3 Letter, Item #2b.[14] It is perhaps noteworthy that each of the other three California counties covered by Section 5 were also rural counties with large military installations and comparatively small civilian populations.[15]

This issue of military presence was one which Congress was fully aware could skew the results of the coverage test when the Voting Rights Act was enacted in 1965. In fact, the initial language of Section 4 of the Act as introduced in the Senate would

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[13] The population of Castle AFB was even more transitory than most military bases, because it was a training base.

[14] Dr. Gobalet also notes two additional nondiscriminatory factors leading to Merced County's coverage. First, the Census Bureau's estimate of the citizen voting age population in Merced County was too large because it assumed, erroneously, that the estimated growth in Merced County's voting age population from 1970 through November 1972 contained no non-citizens. This means that in the formula used to calculate voter participation (votes cast ÷ eligible voters) the number in the denominator was too large, artificially lowering the participation rate. Also, the Bureau's measure of Merced County voter participation in the November 7, 1972, general election took account only of persons casting a vote for the office of President of the United States. The measure did not take into account the people who voted in the election but chose not to cast a vote for a presidential candidate.

[15] At the time of their coverage, Kings County hosted Lemoore Naval Air Station; Yuba County hosted Beale Air Force Base; and Monterey County hosted Fort Ord Army Base and Camp Roberts Army Base.

have triggered coverage under Section 5 if 50 percent of the voting age population "other than aliens and persons in active military service and their dependents" did not register and vote.

This exception was removed in the Senate, however, because – as explained by the amendment's sponsor, Senator Tydings of Maryland – "When these words were included in the original bill, it was not realized that the Census Bureau would be confronted with the troublesome question of determining the facts in regard to these figures." 111 Cong. Rec. 11714 (May 26, 1965) (statement of Sen. Tydings). Senator Tydings proceeded to explain that the Census Bureau did not have the figures required, and that insisting on including them would delay the Act's implementation. *Id*.

In other words, the inclusion of military personnel in the voting age population was a matter of expediency, rather than a determination that jurisdictions containing military populations were likely to be the seat of endemic racism.

Moreover, bailout was explicitly regarded as the solution for a jurisdiction caught in the Section 5 net due to a large military population. When challenged on whether it made sense to include military personnel in calculating the coverage formula, Attorney General Katzenbach responded that "My answer, again, would be if, because of that kind of fluke such as you suggest, sufficient difference was made to move you just over 49, just under 50, that, after all,

you could get out from under it completely" by seeking to bail out. *Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary*, 89th Cong., 1st Sess. 82 (1965).

II. MERCED COUNTY'S RECORD OF COMPLIANCE UNDER SECTION 5.

A. Compliance History.

Following the County's coverage determination in 1975, the County immediately began complying with the Act, submitting hundreds of voting changes, including frequent submissions for its polling place changes, voting precinct changes, voting machine changes, bilingual procedures, special elections, etc. *See, e.g.,* Rule 32.3 Letter, Item #2 (Preclearance Submission Nos. X7007 (1976), X7080 (1976), X7081 (1976), X7082 (1976), X7083 (1976), X7084 (1976), X7085 (1976), X7086 (1976), X8077 (1976), X8644 (1976), X8645 (1976), A0149 (1977), A4889 (1978), A8480 (1978)).

As a result of that diligence, when Merced County requested the Attorney General's consent to bailout, the Voting Section identified only thirteen possible "voting changes" that had not been precleared in the preceeding ten years. *See* Rule 32.3 Letter, Item #11. The County disputed whether most of these items required preclearance.

Two of the changes involved landowner assessment proceedings under California's Proposition 218.

The County disputed that those actions even required preclearance, and provided the Voting Section with extensive legal analysis to that effect. The County nevertheless submitted them as a precautionary matter. *See* Rule 32.3 Letter, Item #13.

Four of the actions concerned special elections to fill vacancies on a city council or school board under precleared state law.[16] *See* Rule 32.3 Letter, Item #3 (Preclearance Submission Nos. 1994-0046 & 1994-0958). The County maintained that further preclearances were not legally required. However, to resolve any dispute, these too were submitted for preclearance, and preclearance was granted. *See id*. (Preclearance Submission Nos. 2011-2329, 2011-2330 & 2011-2331).

The other seven actions concerned special elections on tax and bond measures, placed on the ballot pursuant to precleared state law by one of the State's 22 school districts within the County. *See id.* (Preclearance Submission No. 2001-0158). The County is required by state law to conduct these elections for the school districts.

The County also had a practice of actively scouring its available historical records to identify "voting changes" and confirm preclearance. When unable to locate evidence of preclearance, the County sought

[16] In the course of its compliance review, the County, on its own, located one other special election to fill a vacancy on a city council that had not been precleared.

preclearance of historical changes going back decades. For example, in 2002 – in connection with its decennial, post-redistricting re-precincting, the County made a comprehensive submission seeking preclearance of all changes to its voting precincts going back to 1972, because it was unable to definitively establish, based on its own documentation, that preclearance had been received. *See* Rule 32.3 Letter, Item #9. Upon being informed by the USDOJ that these precinct changes had been precleared, the submission was withdrawn, and only the 2002 precinct changes were precleared. *Id*.

The County received only one objection to a voting change that it enacted, despite a long history of preclearance submissions. The one objection was in 1992, and was directed to the redistricting plan for its supervisorial districts. The objection was not based on a conclusion that the redistricting plan was "retrogressive," but rather on the plan's failure to gerrymander the supervisorial district lines to link Hispanic population concentrations in different cities in a manner to create a majority-minority district. *See* Rule 32.3 Letter, Item #10. The objection was interposed during a period when the Voting Section of the United States Department of Justice was enforcing a policy requiring the "maximization" of minority voting strength in redistricting plans. This Court subsequently declared that policy violated Section 5 and was unconstitutional. *See Miller v. Johnson,* 515 U.S. 900, 924-26 (1995); *Abrams v. Johnson,* 521 U.S. 74, 90 (1997). However, as a small rural county of

limited resources, Merced County chose not to challenge the objection. Instead, the County rescinded its redistricting plan and redrew its supervisory district lines to link the Hispanic population in the southern part of the City of Merced, the county seat, with the Hispanic population in the City of Livingston, 15 miles away, skirting around the intervening City of Atwater along State Highway 99, thereby creating a "U"-shaped majority-Hispanic district. The new map received preclearance. *See* Rule 32.3 Letter, Item #3.

There has never been a Section 2 or constitutional lawsuit filed in the County alleging discrimination in voting.

B. Successful Defense of Section 5 Enforcement Actions.

There were three enforcement actions alleging Section 5 violations in the County, but they were resolved in the County's favor.

In 2003, a pair of related cases was filed concerning California's 2003 gubernatorial recall election. *Hernandez v. Merced County, California*, 03-cv-06147-OWW-DLB (E.D. Cal. filed Aug. 25, 2003); *Gallegos v. State of California*, 03-cv-06157-REC-LIO (E.D. Cal. filed Aug. 25, 2003). Those suits alleged – incorrectly – that Merced County was seeking to implement voting changes at the recall election without preclearance. In fact, a preclearance submission had

been made by the County before the litigation was filed, and preclearance was received approximately two weeks later. *See* Rule 32.3 Letter, Item #3 (Preclearance Submission No. 2003-3023). Given that Merced County was in full compliance with Section 5, the plaintiffs voluntarily dismissed the actions. *See* Rule 32.3 Letter, Item #12.

The third action was filed just days before the November 2006 statewide election, and this action did not allege any violations by the County itself. Instead the action sought to enjoin the conduct of that election based upon the alleged failure to obtain preclearance of annexations, de-annexations, and other boundary changes to numerous independent cities and special districts within the County, which had been approved by a state agency called the Local Agency Formation Commission ("LAFCO"). *Lopez v. Merced County*, Case No. 06-cv-01526-OWW-DLB (E.D. Cal. filed Oct. 27, 2006). (This aspect of the case is discussed in more detail below.)

The County, cities, and special districts vigorously defended this litigation, and ultimately the original complaint and the first amended complaint were dismissed.[17] The plaintiffs then abandoned their

[17] *See Lopez v. Merced County*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007) (three-judge § 5 court); *Lopez v. Merced County*, 2007 U.S. Dist. LEXIS 44426, *10 (E.D. Cal. June 8, 2007) (three-judge § 5 court). Many of these changes either had been precleared, were included in preclearance submissions pending with the Attorney General at the time the complaint was filed,

(Continued on following page)

challenges to the boundary changes and instead filed a second amended complaint challenging historical polling place changes by the County. All of the challenged changes were made in or before 1976.

The County vigorously defended against this new complaint as well, demonstrating that each of these ancient polling place changes either had been precleared, or did not require preclearance. Ultimately, however, the Court did not reach the merits. Instead, judgment was granted in the County's favor due to plaintiffs' lack of standing to bring the action. *Lopez v. Merced County*, 2008 U.S. Dist. LEXIS 3941 (Jan. 16, 2008).

Nevertheless, in an abundance of caution because its defenses on the merits were not resolved, the County submitted the historical polling place changes and received preclearance thereof. *See* Rule 32.3 Letter, Item #3 (Preclearance Submission No. 2007-3449).

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had not yet been administered in any election, or did not require preclearance for a variety of reasons. *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462, 467-68 & n.8 (1987) (noting Attorney General's position that annexation of land for a public park not subject to preclearance requirement). The remaining boundary changes were submitted for preclearance immediately, and received preclearance.

C. The Issue of Independent Agencies within the County.

The presence of independent cities and state agencies within the boundaries of Merced County, over which the County has no legislative or regulatory control, has always presented a Section 5 compliance challenge.

- There are currently six incorporated cities within the boundaries of Merced County. Cities are not subject to the County's control, but are given independent authority by the California Constitution, subject only to the general law of the state. *See* CAL. CONST. art. XI, §§ 2, 5 & 7.
- The County also has 22 school districts partially or wholly within its boundaries. These districts are agencies of the State of California and are governed by state law, not by county ordinances. *See* CAL. CONST. art. X, § 14; Cal. Educ. Code, generally.[18]

[18] The school districts in Merced County have a long history of compliance with the preclearance requirement, including numerous boundary changes, special elections, etc. *See, e.g.,* Rule 32.3 Letter, Item #3 (Preclearance Submission Nos. A3239 (1977), A3240 (1977), 1992-3584, 1992-3585, 1992-3387, 1993-0254, 1993-0255, 1993-1114, 1993-2244, 1993-2326, 1993-2327, 1993-2328, 1993-3911, 1994-3511, 1994-3512, 1994-4525, 1994-4526, 1995-3933, 1996-0350, 1996-0351, 2002-2950, 2002-2951, 2002-4773, 2004-0518, 2004-2641, 2006-1081, 2006-6824, 2006-6825,

(Continued on following page)

- And there are 56 special districts in the County with elective governing boards (primarily water districts, irrigation districts, community service districts, healthcare districts, drainage districts, and resource conservation districts). Each of these entities is a creature of state law and operates thereunder.[19] Several of them cover more than one county, such

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2007-6212, 2009-0212, 2009-1033, 2009-1598, 2009-1599, 2009-2002, 2009-1722).

[19] *See, e.g.,* Cal. Govt. Code § 61000 *et seq*. (community service districts); *Edgemont Cmty. Servs. Dist. v. City of Moreno Valley*, 36 Cal. App. 4th 1157, 1160 (1995) (a community service district is "a political subdivision and public agency of the State of California."); Cal. Water Code § 30000 *et seq*. (water districts); *County of Fresno v. Malaga County Wat. Dist.*, 100 Cal. App. 4th 937, 942 (2002) (water districts "are districts of 'limited powers' and are 'agenc[ies] of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.' "); Cal. Water Code § 20570 ("It is reaffirmed that [irrigation] districts are state agencies formed and existing for governmental purposes."); *Cooper v. Leslie Salt Co.,* 70 Cal. 2d 627, 632-33 (1969) (irrigation districts are "delegated agencies of the state government"); Cal. Pub. Res. Code § 9001 (resource conservation districts are organized and operated to fulfill state's leadership role in natural resource conservation); 64 Ops. Cal. Att'y Gen. 105 (1981) (same); Cal. Health & Saf. Code § 32000 *et seq*. (healthcare districts); *Marin Healthcare Dist. v. Sutter Health*, 103 Cal. App. 4th 861, 866 (2002) (healthcare districts are "political subdivision[s] of the state"); *Knights Landing Ridge Drainage Dist. v. Reclamation Dist. No. 730*, 1 Cal. 2d 350, 352 (1934) (drainage district "was 'a public mandatory or governmental agency of the state – indeed, the state itself' " (quoting *W. Assurance Co. v. Sacramento & San Joaquin Drainage Dist*., 72 Cal. App. 68 (1925))).

as Central California Irrigation District and San Luis Water District.[20]

These entities can make "voting changes" on their own under State law and without the approval of the County. For example, these entities can and do change their boundaries through the state agency called LAFCO (*see* note 20, *supra*). The County could object, but its objection does not carry the force of law; it cannot stop LAFCO approval.

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[20] One example of the difficulties the County faced with ensuring Section 5 compliance by these independent agencies is demonstrated by the consolidation of 11 local water districts – including four in Merced County – into one new district, the (New) Del Puerto Water District. In 1994, the Local Agency Formation Commission ("LAFCO"), a state agency in neighboring Stanislaus County, which is not covered under Section 5, approved the consolidation of these neighboring districts into a single regional district to streamline the efficient use of their water resources. The great majority of the new district's territory and population are in Stanislaus County. The District also incorporates territory in San Joaquin County, which does not even share a common boundary with Merced.

Merced County had no role in this consolidation. However, in 2010, upon learning of this consolidation, conducted in another county but which affected special districts in Merced County, the County of Merced submitted the change for preclearance, which it received. *See* Preclearance Submission No. 2010-0748. No election was ever held within the new District prior to that preclearance submission, so no violation of Section 5 occurred, but this case highlights the difficulties that Merced County faced in its effort to ensure Section 5 compliance by independent, self-governing entities that contain territory within its borders. *See* Rule 32.3 Letter, Item #2a.

There is an unresolved legal question – which the County raised in the *Lopez* litigation – as to whether these independent and state entities are even subject to the preclearance requirement. *United States v. Bd. of Comm'rs of Sheffield, Alabama*, 435 U.S. 110 (1978), held that cities and other "state actors" within a wholly covered State are subject to the preclearance requirement. *Id*. at 127. But no case has resolved whether independent cities and state agencies, which are not "county actors" but which have territory in a covered county, are subject to the preclearance requirement when the state in which that county is located is not covered.

While disputing its preclearance responsibility for these agencies, Merced County has historically made affirmative efforts at its own expense to ensure their compliance. For example, the County undertook a comprehensive audit of boundary change activity authorized by the LAFCO in Merced County. As part of that audit, the County made preclearance submissions on behalf of five of the six incorporated cities within its boundaries (the 6th – the City of Merced – made its own submission) and dozens of special districts, seeking preclearance of their historical annexations, de-annexations, consolidations, formations, etc.[21] The County also worked cooperatively

[21] This task fell to the County – though it was not responsible for these boundary changes – because the federal court held that the LAFCO that approved these changes has no preclearance responsibility. *See Lopez v. Merced County*, 2007 U.S. Dist.

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with the larger entities – such as the multi-county Central California Irrigation District, Merced Irrigation District, and the City of Merced – to aid those entities in making their own submissions. *See, e.g.,* Rule 32.3 Letter, Item #3 (Preclearance Submission Nos. 2005-3948, 2005-4372 and 2007-5916).[22]

III. MERCED COUNTY'S PRIOR EFFORTS TO EXIT SECTION 5 COVERAGE.

A. 1992 Objection Removes Opportunity for Bailout.

The County of Merced's interest in seeking bailout has a long history. While the County's records cannot be located, former County officials recall that the County first explored exiting from Section 5 coverage in 1986, when Merced County Counsel Bill Gnass and County Supervisor Jerry O'Banion met with Voting Section personnel at USDOJ headquarters in Washington, D.C. They recall that the County was not encouraged to pursue bailout.

LEXIS 44426, *10 (E.D. Cal. June 8, 2007) (three-judge § 5 court).

[22] The *Lopez* action, discussed above, was filed after the County's audit of independent agency compliance was well-underway and preclearance submissions already made.

After the 1986 interview, and as noted above, the Attorney General objected to the County's 1992 supervisorial redistricting plan. Consequently, the County was ineligible to seek bailout for ten years. 42 U.S.C. § 1973b(a)(1)(E).

Upon the close of that period, however, the County began its systematic assessment of its own compliance status, as well as that of the independent cities and state agencies within its borders with the goal of availing itself of the bailout remedy.

B. Unsuccessful Efforts to Obtain Congressional Relief in 2005-2006.

Another opportunity to exit Section 5 coverage presented itself when Congress was considering The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA"). The County of Merced participated in those proceedings, sending an extensive letter to the House Judiciary Committee, explaining the circumstances leading to the County's coverage in 1972, and requesting that the Voting Rights Act be amended to enable jurisdictions that could prove they were only covered due to the inclusion of military voters in the eligible voter base, and who had not received an objection under Section 5 in the prior ten years, to bailout. *See Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act, Hearing*

before the Subcommittee of the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess. 171-237 (Oct. 20, 2005) ("Presentation on Behalf of Merced County, California, Concerning Reauthorizations of Sections 4 and 5 of the Voting Rights Act"). *See* Rule 32.3 Letter, Item #4.

The explicit rationale for the proposed amendment to the bailout provision was to "further tailor[ ] the provisions to the evils sought to be remedied," and thereby to "make[ ] it more congruent and proportional to the harms to be addressed." *See* H.R. REPT. NO. 109-478, 156 (May 22, 2006) (statement of Rep. Lungren, proposing above amendment to VRARA).

Though the congressional record contained no evidence whatsoever of racial discrimination in Merced County, the County's legislative efforts were ultimately unsuccessful. Congress did not make any changes to the bailout provisions of the Act in 2006.[23]

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[23] The only reference to Merced County in the legislative record – other than Congressman Lungren's unsuccessful effort to amend the bailout provisions at the County's request – is in the testimony of Joaquin G. Avila, the lawyer who subsequently filed the *Lopez* suit against the County. He suggested that Merced County would be unable to bail out for two reasons: (1) Mr. Avila alleged that the City of Los Banos, one of the cities in Merced County, conducted at-large elections, and it had no Latinos elected to its City Council; and (2) he alleged that a number of special districts had failed to preclear boundary changes. *See Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after* LULAC v. Perry*, Hearing before the*

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C. The Bailout Window Closes from 2006-2008, During the Pendency of *Lopez v. Merced County*.

In October 2006, very shortly after its unsuccessful legislative efforts leading up to the enactment of the VRARA, the *Lopez* action was filed against the County, again temporarily postponing any effort to bail out. Section 4 prohibits the district court from approving a bailout while a Section 5 enforcement action is pending. 42 U.S.C. § 1973b(a)(1)(B).

Subcommittee of the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess. 113 (July 13, 2006) (S. Hrg. 109-823) ("Avila, Joaquin G., Assistant Professor of Law, Seattle University School of Law, Seattle, Washington, statement and attachment").

Regarding the first of these contentions, this Court has held that at-large electoral systems are not *per se* illegal. *See Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). Moreover, Mr. Avila also failed to mention the success of other minority candidates in Los Banos elections, such as Tommy Jones, an African American candidate elected to the city council in 2004 and elected Mayor in 2006, and Latinos – such as Jack Vasquez and Mario Gonzalez, who had been elected to, and were serving on the overlapping Los Banos Unified School District governing board at the time Mr. Avila was giving his testimony. *See Election Results*, FRESNO BEE (Nov. 4, 2004), p. A8 (available on Lexis-Nexis); *Election Results*, FRESNO BEE (Nov. 9, 2006), p. B6 (available on Lexis-Nexis).

Regarding the second point, Mr. Avila subsequently filed the *Lopez* lawsuit challenging the alleged failure to preclear these boundary changes, and was unsuccessful, as noted above.

After judgment was entered in Merced County's favor in 2008, however, the County accelerated its preparations for contacting the Attorney General to seek his consent to the bailout, and finally made the initial contact in 2009, discussed below.

IV. MERCED COUNTY'S REASONS FOR SEEKING BAILOUT.

The County sought bailout because it never was a target for coverage and coverage was not a reflection of racial discrimination in voting, but rather of the military base in the County; the County had nevertheless worked very hard to comply with Section 5 and to satisfy the statutory criteria for bailout. The County believed that it was entitled to bail out under the law, as discussed below. In addition, as stated in Resolution No. 2010-142 (July 27, 2010) of the Merced County Board of Supervisors, the County determined to pursue a bailout action for the following additional reasons:

1. *To Remove the Stigma of Section 5 Coverage:* Section 5 is correctly regarded as a remedy aimed at historical bad actors – primarily states with a history of intransigent violations against the voting rights of minority voters. As discussed above, however, that does not accurately describe Merced County, which was covered under Section 5 due to the large temporary military population

in the County, and which had never been the target of a claim of intentional discrimination affecting voting rights or a violation of Section 2.

2. *To Mitigate the High Costs of Compliance:* Merced County spent close to $1 million in the last decade, primarily for legal fees, attributable solely to its coverage under Section 5 – for compliance by itself and other independent governmental agencies, and for the (successful) defense of Section 5 litigation. (This is in addition to the approximately $350,000 that the County spent in connection with the actual bailout effort itself.)

3. *To Protect the County from Being A Pawn in Larger Political Disputes:* Part of the reason Merced County's litigation costs were so high is that the County served as a political pawn in larger statewide policy disputes. The quintessential example of this dynamic was the 2003 recall of California Governor Gray Davis. Shortly before the recall election, Merced County was sued for allegedly failing to comply with Section 5 in its conduct of that election and two related ballot measure elections. These allegations were untrue, as discussed above – the County had complied. The ultimate target of the suit, however, was the statewide election, not Merced County itself. Thus, the plaintiffs also named

> the State as a defendant, and asked the district court to postpone the statewide recall and ballot measure elections until March 2004.[24]

See Rule 32.3 Letter, Items #2a & 7.

V. MERCED COUNTY'S EFFORTS TO OBTAIN THE ATTORNEY GENERAL'S CONSENT TO BAILOUT (2009-2012).

In 2009, after spending approximately ten years to make sure it qualified for bailout and successfully opposing Section 5 litigation, the County of Merced contacted the Department of Justice to inquire about the prospect of bailing out of Section 5 coverage.

County officials met with senior staff in the Voting Section on December 16, 2009, to present the County's history under Section 5, and its views of its eligibility for bailout. *See* Rule 32.3 Letter, Items #2a-2b.

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[24] As was widely reported at the time, opponents of the recall hoped to postpone the conduct of that election from October 2003 to March 2004, which was regarded as a more favorable time for the incumbent Governor because "[m]ore Democrats [we]re expected to vote because of the contested Democratic presidential primary, while some of the anger against Davis may [have] cool[ed] by then." *See* Harrison Sheppard, *Davis to Sue Again for Delay: Governor to Ask Court for March Recall Vote*, L.A. DAILY NEWS (Aug. 4, 2003), p. N3 (available on Lexis-Nexis).

On April 27, 2010, the Merced County Board of supervisors conducted a widely-publicized public hearing at a regular Board meeting to obtain public input regarding whether to pursue bailout. No opposition was expressed by any person at that public hearing. *See* Rule 32.3 Letter, Item #5.

On July 27, 2010, the County Board of Supervisors held another public meeting at which bailout was considered. Again, no member of the public spoke in opposition, and public comment – including from members of the Latino community – was favorable. The Board then adopted a resolution authorizing County Counsel and the County's special voting rights counsel to pursue bailout. *See* Rule 32.3 Letter, Items #6-7. At no time did the County ever receive an objection to its plan to seek to bail out from Section 5 coverage.

The County then worked with USDOJ for more than two years on its evaluation of the County's eligibility for bailout.

From August to December of 2010, the County widely publicized the bailout effort, and worked to obtain support from key groups within the County. Letters of support were ultimately sent to USDOJ by numerous organizations, including the West Merced and East Merced Chapters of the NAACP, the Merced County Hispanic Chamber of Commerce, and the Merced Lao Family Community. *See* Rule 32.3 Letter, Items #8a-8s.

The Voting Section was assiduous and thorough in its review of the County's bailout qualifications. The County worked diligently to assemble extensive background information, and to collect and forward thousands of pages of documents at USDOJ's request, including 10 years' worth of agendas and minutes for the County, and for virtually every city, school district and special district with territory in the County. The County also continued to make routine preclearance submissions in connection with each election it conducted during this period of time. *See* Rule 32.3 Letter, Item #3.

In February 2011, the Voting Section sent a team of investigators to Merced County to meet with representatives of dozens of special districts. This was followed by an additional in-person meeting between County representatives and Voting Section personnel in Washington, D.C., in March of 2011. *See* Rule 32.3 Letter, Item #16.

On March 16, 2011, USDOJ provided the County with a spreadsheet of 128 items, collected from its review of County, city and special district minutes, that it believed *might* have required preclearance. As discussed above, only about thirteen items on this list involved County action, and the County disputed the need to preclear most of them. The County nevertheless made preclearance submissions for these changes, while at the same time preserving its legal arguments.

The vast majority of the items on the March 16, 2011, list involved actions by the independent cities and state special districts within the County's borders. The Voting Section attorneys apparently believed that, despite their independence from the County, compliance by these entities as well was required as a prerequisite to bailout. The County worked with the Voting Section and the involved entities to assess the status of each one of the 128 items. Many had already been precleared, were already pending for preclearance, or did not require preclearance. *See, e.g.,* Rule 32.3 Letter, Item #15. The County argued that a substantial majority of the items (*e.g.,* landowner-voting assessment and tax district proceedings, appointment proceedings under precleared state law, etc.) simply were not subject to preclearance. But the County made precautionary preclearance submissions nonetheless, to ensure that the issue was resolved. *Id*., Items #13-15. Many of the items on the March 16 list, although unprecleared, had never been implemented in violation of Section 5. *Id*., Item #15. Submissions were made for these items as well.

In January 2012, the County received a letter from the Voting Section requesting that the County provide minutes for meetings conducted in 2011 by twenty (20) of the cities and special districts. The County coordinated the delivery of these additional minutes as well. Based on the contents of those minutes, the County made four more precautionary preclearance submissions for four special districts,

covering four appointments (which the County did not believe required preclearance), one change of election cycle (*i.e.*, consolidation with the statewide election) that had not yet been implemented,[25] and two landowner improvement-district inclusion proceedings (which the County also did not believe required preclearance). *See* Section II.A, *supra*.

Finally, on March 6, 2012, the County filed its complaint seeking bailout in the District Court for the District of Columbia. Nobody intervened to oppose the County's bailout, despite extensive publicity of the County's quest for bailout and eventual filing of the complaint.[26]

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[25] This matter involved an independent school district that had just recently consolidated its board member election with the statewide election. It was the last in a series of actions under State law adopted by independent school districts, seeking to move the districts' odd-year elections to even years, so that they could be consolidated with the statewide general elections. All of the other consolidations (approximately 33) had previously been submitted for preclearance, *see* U.S. Dept. of Justice, Voting Section, *Notice of Preclearance Activity Under the Voting Rights Act of 1965, As Amended* (June 27, 2011), *available online at* http://www.justice.gov/crt/about/vot/notices/vnote062711.php (last visited Dec. 17, 2012), but the one in question was not yet finalized when that initial submission was made. It was precleared prior to implementation, so there was no violation of Section 5.

[26] *See, e.g.,* Mike North, *Elections: County Seeks to Shed Rule; Minority Groups Back Effort to Escape Federal Voting Rights Act's Costly Section 5*, MERCED SUN-STAR (Mar. 24, 2011), p. A1 (available on Lexis-Nexis).

On April 24, 2012, the Voting Section identified six additional, possibly unprecleared, changes by cities and special districts. Three were determined not to require preclearance. One was premature, but would be submitted in 2013 if necessary. The County precleared – on a precautionary basis – another landowner-voting assessment proceeding and one appointment pursuant to precleared state law.

On July 10, 2012, the Attorney General filed a notice in the district court of his consent to the County's bailout, and a final consent decree and judgment granting bailout were entered by the court on August 31, 2012.

VI. MERCED COUNTY'S ELIGIBILITY FOR BAILOUT.

Section 4 of the Voting Rights Act details the extensive criteria that a jurisdiction must establish to be entitled to bail out from Section 5 coverage.

Merced County provided the Attorney General with a detailed analysis of its ability to meet these criteria at the December 2009 meeting. *See* Rule 32.3 Letter, Items #2a-2b. Ultimately, the Attorney General agreed with the County's analysis and the three-judge district court approved a consent decree and judgment that concluded the same. *See* Rule 32.3 Letter, Item #1.

It is clear that the County did satisfy all of the Section 4 criteria, as specified in the consent decree.

As noted above, nobody intervened to contend otherwise, though they could have done so as of right. *See* 42 U.S.C. § 1973b(a)(4).

The County did make preclearance submissions, precautionary and otherwise, during the two-year process of securing the Attorney General's consent and during the *Lopez* litigation (in addition to the submissions that it was required to make as a matter of course in connection with its routine, ongoing administration of elections). However, no objections were interposed, and the Attorney General was well within his discretion in this case to conclude that any Section 5 violations "were trivial, were promptly corrected, and were not repeated." 42 U.S.C. § 1973b(a)(3).

The Attorney General (both Respondent Holder and his predecessors) has *long* taken the position that retroactive preclearance is sufficient to meet this criterion. Indeed, of the jurisdictions to successfully bail out between 1982 (when the bailout criteria were last amended) and 2006 – all of them cities and counties in Virginia – a number of them did *not* have perfect compliance with this requirement, yet still were successful in their efforts to bail out. For example, Roanoke County, Warren County, Shenandoah County, and Augusta County all admitted – in their bailout action complaints filed with the D.C. District Court – having administered multiple voting changes without preclearance. While these changes were ultimately submitted by the jurisdictions in connection with their bailout suits, and each received

preclearance, not all the submissions were timely.[27] This Court "traditionally afford[s] substantial deference to the Attorney General's interpretation of § 5 in light of [his] 'central role . . . in formulating and implementing' that section." *Lopez v. Monterey County*, 525 U.S. at 281 (quoting *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 39 (1978)).[28]

The Attorney General's interpretation is also supported by extensive case law under Section 5. *See, e.g., East Flatbush Elec. Comm. v. Cuomo,* 643 F. Supp. 260, 264 (E.D.N.Y. 1986) (three-judge § 5 court) ("retroactive federal approval satisfies the preclearance requirements of § 5.") (citing *Berry v. Doles*, 438 U.S. 190, 192 (1978)). *See also Moore v. Caledonia Natural Gas Dist.*, 890 F. Supp. 547, 550 (N.D. Miss. 1995) (same, citing *East Flatbush*); *Waide v. Waller*, 402 F. Supp. 902, 925 (N.D. Miss. 1975) (three-judge § 5 court) ("The belated satisfaction of

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[27] The consent decrees entered in each of these cases are available on the USDOJ Voting Section website. *See* http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Dec. 12, 2012). The Augusta consent decree was cited in Merced County's own consent decree in support of this point.

[28] We note that the timing of these Virginia bailouts and others gives lie to the claim in press accounts (*see* note 3, *supra*) that this interpretation of the Act can be attributed to a desire by the present Attorney General to ease bailout to support the defense of this action. After all, these bailouts predated the 2006 VRARA renewal. They predated this Court's decision in *N.W. Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). And they predated the election of the present administration.

the Voting Rights Act requirements moots the first prong of plaintiff's attack on § 25-31-1, and we therefore certify that the challenged statute *is in full compliance* with the requirements of the Voting Rights Act." (emphasis added)); *Leyva v. Bexar County Republican Party*, 2002 U.S. Dist. LEXIS 25916, *8-*10 (W.D. Tex. Dec. 5, 2002) (three-judge § 5 court) (granting defendant summary judgment based on retroactive preclearance); *Velez v. Board of Elections*, 1990 U.S. Dist. LEXIS 11669 (S.D.N.Y. Sept. 5, 1990).

CONCLUSION

After unintended coverage, decades of compliance with Section 5, extensive work by the County to oversee compliance by independent cities and state agencies that it does not control, the expenditure of more than $1 million in legal fees, an unsuccessful congressional lobbying effort, and more than two years of investigations by the United States Department of Justice, the County of Merced finally achieved its goal of bailing out of Section 5 coverage.

That effort finally relieved the County of the stigma of being covered by a statute designed to target historic discriminators; freed the County from the ongoing expenditure of funds for compliance and litigation; and will hopefully free the County, as well, from the historic practice of others to leverage the

County's Section 5 coverage in an attempt to influence California state politics.

Contrary to recent allegations in the press, and in pleadings opposing the efforts of New Hampshire entities to bail out, Merced County, California, was eligible to bail out from coverage under Section 5, and its unopposed bailout action was properly granted by the three-judge court.

Respectfully submitted,

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