

No. 12-96

IN THE
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., in his official capacity
as Attorney General of the United States, *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR *AMICI CURIAE*, THE CITY OF NEW
YORK, THE COUNCIL OF THE CITY OF NEW
YORK, MICHAEL R. BLOOMBERG, IN HIS
CAPACITY AS MAYOR OF THE CITY OF NEW
YORK, AND CHRISTINE C. QUINN, IN HER
OFFICIAL CAPACITY AS THE SPEAKER OF THE
CITY COUNCIL OF THE CITY OF NEW YORK,
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*

Amici are the City of New York, the Council of the City of New York, Michael R. Bloomberg, in his official capacity as Mayor of the City of New York, and Christine C. Quinn, in her official capacity as Speaker of the Council of the City of New York (hereinafter collectively referred to as “the City”). Three of the City’s five counties are covered jurisdictions under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b. Bronx, Kings, and New York counties were declared covered jurisdictions under Section 5 in 1971 and have remained covered since.¹ 36 Fed. Reg. 5809 (Mar. 27, 1971).

New York City’s five counties are home to over 8.2 million residents. U.S. CENSUS BUREAU. STATE AND COUNTY QUICKFACTS. Updated Jan. 10, 2013, *available at* <http://quickfacts.census.gov/qfd/states/36/3651000.html>. The City’s residents come from all fifty states and from countries around the world. They are diverse in a myriad of ways, including race, color, creed, age, national origin, gender, sexual orientation, disability, and marital status. The City embraces this diversity with strong anti-discrimination laws and policies promoting the equal rights of its residents. *See, e.g.*, N.Y.C. Admin. Code § 8-101 (2012).

In the intervening 41 years since the City became a covered jurisdiction, the City has pre-cleared over two

1. Kings and Bronx counties are also covered under Section 4(f) (4), which relates to language minority voters. 42 U.S.C. § 1973b(f); 40 Fed. Reg. 43746 (Sept. 23, 1975). Section 5 preclearance for the three covered counties started in 1974 following litigation that temporarily exempted the City from coverage, and then reopened the City to Section 5 review. *See N.Y. State on behalf of N.Y., Bronx & Kings Co. v. U.S.*, 65 F.R.D. 10 (D.D.C. 1974).

thousand voting changes with the Justice Department. *See 2 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1840 (2006) (Appendix to the statement of Wade Henderson, report of RenewTheVRA.Org, “Voting Rights in New York, 1982–2006”); Juan Cartagena, *Report: Voting Rights in New York City: 1982-2006*, 17 S. Cal. Rev. L. & Social Justice 501, 505. Changes have ranged from altering the location of polling places to the inclusion of additional languages, like Bengali, on election materials for language minority groups. In the course of the City’s long history with Section 5 procedures, New York City officials have regularly engaged with Justice Department officials, who serve as valuable resources for local election officials in developing voting-related plans. The Justice Department’s feedback both before and after preclearance assists the City in perfecting its electoral processes.

SUMMARY OF THE ARGUMENT

The Section 5 preclearance requirements do not impose an undue burden on or interfere with governmental function in covered jurisdictions like New York City. In fact, preclearance has, and continues to, provide substantial benefits to New York City and the nation in eliminating voting discrimination.

ARGUMENT

We agree with the Justice Department and Intervenors-Respondents that Congress’s 2006 reauthorization of the Voting Rights Act and Section 5 was a Constitutional exercise of legislative power granted under Article IV and the Fifteenth Amendment. Congress’s judgment is due substantial deference. This brief does not repeat the

arguments of the parties in explaining why Section 5 satisfies Constitutional requirements. Instead, this brief relates the experience of the City as a covered jurisdiction, demonstrating that Section 5 imposes no undue burden on covered jurisdictions and that it provides substantial benefits to the nation in eliminating voting discrimination.

I. THE ADMINISTRATIVE REQUIREMENTS IMPOSED BY SECTION 5 OF THE VOTING RIGHTS ACT ARE NOMINAL AND NON-OBTRUSIVE

a. The Process Of Generating and Transmitting A Submission For Preclearance Does Not Require Significant Additional Time or Cost.

The procedures for submitting voting changes are clear, unambiguous, and effectively routine. *See, e.g., Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. On Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 13 (2006) (testimony of Donald Wright)*. Indeed, the Justice Department has gone to great lengths to ease and streamline the preclearance process. Regular guidance as to the standards of review and essential components for submission is published in the Federal Register. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011); Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239 (Apr. 15, 2011). Officials are also available to field questions in advance of submissions. Moreover, technological advancements have enabled online submission, in many cases, saving time and money in printing and mailing costs. *See* How to File An Electronic Submission, http://www.justice.gov/crt/voting/sec_5/evs (last visited Jan. 17,

2013). Currently, submitting routine voting changes need not consume significant additional administrative time than documenting and implementing the voting change itself.

Any burden in developing a submission for preclearance is *de minimis* relative to the work already required for any voting change under New York State and local law. Irrespective of Section 5's requirements, the type of government action subject to preclearance will always involve substantiation. N.Y. ELEC. LAW §§ 1-102 & 3-200 *et seq.* (2012). For example, under State law, a change in polling place must be reflected in an official record, implemented according to law, and supported by a articulable rationale -- even if that reason is merely a political judgment. N.Y. ELEC. LAW § 3-212 (2012). As Section 5 requires just such straightforward information, this record serves as the basis for the submission. 28 C.F.R. § 51.27 (2011). Preclearance requires that all changes with an effect on voting be supported by basic descriptive factual information about the proposed change and affected jurisdiction. *Id.* If the action only has a negligible impact on voting rights, the submission will be brief. If the action is more significant, such as redistricting, maps and census data are also required.² 28 C.F.R. § 51.28 (2011). But, as noted, much of the necessary submission material will already have been generated during the redistricting process, in which maps are drawn, census data is analyzed, and past election results are documented. N.Y.C. Charter § 51 (2009).

Under local law, the City redraws its City Council districts every ten years, utilizing the most recent

2. This type of record is generated in all states and their political subdivisions at least every 10 years when they must redraw districts. *Baker v. Carr*, 369 U.S. 186 (1962).

decennial-Census data -- a process that takes several months to conduct. N.Y.C. Charter ch. 2-A (2009). With or without the Section 5 requirements, the City would be obligated by law to undertake the same redistricting process in a manner consistent with the goals of the Voting Rights Act. As evidenced by the language of the Charter, compliance with the whole of the Voting Rights Act is paramount, both because of preclearance and the value of good electoral processes. *See Id.* The City Charter mandates that the appointed Districting Commission draw new Council districts with careful attention to Constitutional parameters. Specifically,

- a. The difference in population between the least populous and the most populous districts shall not exceed ten percentum (10%) of the average population for all districts, according to figures available from the most recent decennial census. Any such differences in population must be justified by the other criteria set forth in this section.
- b. Such districting plan shall be established in a manner that ensures the fair and effective representation of the racial and language minority groups in New York city which are protected by the United States voting rights act of nineteen hundred sixty-five, as amended.
- c. District lines shall keep intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious or other.

Id. at § 52.

Redrawing lines is a comprehensive and measured process, wherein the Districting Commission holds open meetings and hearings. *Id.* at § 51. A variety of stakeholders, including citizens, minority interest groups, political groups, and academics attend hearings, provide testimony, and engage with the Districting Commission. *See, e.g.*, N.Y.C. Districting Comm'n, *The Final Districting Plan For The Council Of The City Of New York* (Mar. 31, 2003) (Submission No. 2003-1147), 10-16. The new district lines drawn by the Districting Commission are then subject to public comment and review, and possible revision if necessary. N.Y.C. Charter § 51. The resultant record of this process must be maintained as a part of City records. N.Y.C. Charter §§ 1133 & 3003 (2009). It is no hardship to submit those same materials to the Justice Department for preclearance review.

b. Section 5 Preclearance Requirements Do Not Impede or Interfere With Lawful Local Decision Making.

Nowhere does the Voting Rights Act prohibit lawful local governance. Moreover, the preclearance process does not remove local authority to make decisions, as others have argued. *Br. for Arizona et al. as Amici Curiae Supporting Pet'r, Shelby County, AL v. Holder et al.*, 25, No. 12-96 (Jan. 2, 2013). Preclearance only provides a review of decisions to ensure they comply with the Constitution when they potentially affect voting rights.

New York City has not been meaningfully limited in its governance decisions as a result of preclearance. The Districting Commission and City officials may make all necessary legal changes for effective New York City

elections. N.Y. ELEC. LAW § 1-102 (2012); N.Y.C. Charter § 51 (2009). On the rare occasions the Justice Department has raised objections to City voting changes, the City was able to fix the identified problems in ways that did not interfere with the concept of self-governance.³ *See, e.g.*, Letter from Wm. Bradford Reynolds, Asst. Att’y Gen., Civil Rights Div., Dep’t of Justice, to Fabian Palomino, N.Y.C. Districting Comm’n, regarding Submission No. 81-1981 (Oct. 27, 1981) (on file with author) (objecting to possible retrogressive effects in new redistricting plans). Rather, these objections simply sharpened the City’s focus on potential voting rights issues.

In the past, when the Justice Department has objected, the City has benefited from its review and consideration. In 1981, the Justice Department rejected the City’s redrawn Council districts because of the retrogressive effects of certain district lines. *Id.* In 1991, the Justice Department again objected to the City’s redistricting plans. However, these plans were the first submitted for preclearance since this Court had ruled that the City’s Board of Estimate violated the “one person, one vote” requirements in 1989. *Board of Estimate v. Morris*, 489 U.S. 688 (1989). The City was then confronted with the formidable task of expanding its 35 City Council districts to 51. N.Y.C. Charter Revision Comm’n, Final Report of the New York City Charter Revision: Jan. 1989–Nov. 1989 (1990), 9-11. The Justice Department objected to the City’s initial plans, noting potential problems with new districts

3. Only nine objections have been raised in response to the City’s submissions, the last of which was in 1999. *See* Section 5 Objection Determinations: New York, http://www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last visited Jan. 24, 2013).

in Brooklyn and the Bronx, and the difficulties the City faced with such dramatic district changes. Letter from John R. Dunne, Asst. Att’y Gen., Civil Rights Div., Dep’t of Justice, to Judith Reed, N.Y.C. Districting Comm’n, regarding Submission No. 91-1902 (July 19, 1991) (on file with author) (“[It is] a job of staggering proportions, namely to divide a city of over 7 million people into 51 new council districts while addressing the historical inability of the many minority communities in the city to elect candidates of their choice”). The letter went on to clarify Justice Department policies with regard to incumbents and offered further assistance if needed. *Id.* Following the suggestions set forth in the Justice Department letter, the City was able to swiftly redraw district lines so all citizens had the opportunity to elect the candidates of their choice. Robert Pear, *New York’s Plan Wins U.S. Backing*, N.Y. TIMES, Jul. 27, 1991, available at <http://www.nytimes.com/1991/07/27/nyregion/new-york-s-plan-wins-us-backing.html>. The next redistricting plan was submitted by the City in 2003, and was accepted by the Justice Department without objection. The City is currently preparing new Council district lines for the 2013 elections, and will be soon be submitting those changes to the Justice Department.

II. THE RELATIVE COSTS IMPOSED BY SECTION 5 PRECLEARANCE ARE FAR OUTWEIGHED BY THE BENEFITS GENERATED FOR CITIZENS AND COUNTRY OVERALL

As a covered jurisdiction, the City supports affirmation of the Circuit Court’s decision upholding the constitutionality of the Voting Rights Act. As discussed above, the actual “burden” imposed by Section 5 is minor.

Further, any such burden pales in comparison to the broad benefits of Section 5.

Voting rights are an important and vital issue, especially in a period where national demographics are dramatically shifting. Both the City's and country's populations are more diverse than ever. U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS, C2010BR-02, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, 3 (Mar. 2011); N.Y.C. Department of City Planning, *Total Population by Mutually Exclusive Race and Hispanic Origin: New York City and Boroughs, 1990 to 2010*, Table PL-P2A NYC (May 2011) (hereinafter, "*City Planning Table: N.Y.C. 1990-2010*"). Continued vigilance is needed to protect the most fundamental right in a representative democracy -- the right to vote -- for all citizens. Since 1965, Section 5 has played a critical role in advancing the Constitutional voting rights of minorities across the United States. Data show increased participation by minority-citizens nationwide. DOUGLAS R. HESS, PROJECT VOTE, REPRESENTATIONAL BIAS IN THE 2008 ELECTORATE 12, tbl. 5 (2009), *available at* <http://www.projectvote.org/reports-on-the-electorate-/440.html>. Despite these laudable gains, voting discrimination still exists and pernicious problems remain. *Id.* at 21; Cartagena, *supra*, at 537-39. There is still room for improvement.

During its time as a covered jurisdiction, the City has achieved increased participation by racial and language minorities. For example, voting-related materials have been translated into Spanish, Chinese, Korean, Bengali and Russian. N.Y.C. Board of Elections, For Voters, <http://vote.nyc.ny.us/html/voters/voters.shtml> (last visited Jan.

18, 2013). Elections in the City are more inclusive because more citizens can meaningfully engage in the electoral process. Further, 53% of the New York City Council seats are now held by members of racial minorities, compared to 45% ten years ago. Frank Lombardi, *White City Council Members the Minority for First Time Ever After Tuesday Elections*, N.Y. DAILY NEWS, Nov. 3, 2009. The representation of racial minorities on the Council is now approaching parity with the demographic makeup of the City, where the population is 67% minority or non-white. *City Planning Table: N.Y.C. 1990-2010*.

The City continually strives to ensure that the Fifteenth Amendment rights of all its citizens are protected. Its voting-rights record improves year after year, and preclearance aids in this process by providing an additional external check on the process. The City engages in transparent redistricting and elections processes that are varied and complex. It is with the help of Section 5 that state and local governments with imperfect histories on voting issues have improved, and continue to improve, their electoral processes.

CONCLUSION

For all the above reasons, and those stated in the Justice Department and Intervenors-Respondent's briefs, Section 5 of the Voting Rights Act should be upheld. This is especially important in ensuring fundamental rights are protected and in advancing democracy in this country. Congress did not exceed its enumerated powers in reauthorizing the Voting Rights Act in 2006. Accordingly, the City of New York urges affirmance of the D.C. Circuit Court's judgment.

Respectfully submitted,

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