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"Things Have Changed in the South": How Preclearance of South Carolina's Voter Photo ID Law Demonstrates that Section 5 of the Voting Rights Act is No Longer a Constitutional Remedy

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"THINGS HAVE CHANGED IN THE SOUTH": HOW PRECLEARANCE OF SOUTH CAROLINA'S VOTER PHOTO ID LAW DEMONSTRATES THAT SECTION 5 OF THE VOTING RIGHTS ACT IS NO LONGER A CONSTITUTIONAL REMEDY

I. INTRODUCTION

In 2012, the State of South Carolina filed a declaratory judgment action in the United States District Court for the District of Columbia seeking preclearance of proposed changes to state election law. Although a federal three-judge panel precleared South Carolina's voter photo ID law (the Act)[1] under

1. 2011 S.C. Acts 93.

section 5 of the Voting Rights Act of 1965 (VRA)[2] in *South Carolina v. United States*,[3] the decision highlighted several key issues with the continued constitutionality of section 5 of the VRA. The three-judge panel held that South Carolina's law, as interpreted, did not have a discriminatory effect on minorities nor was it enacted for a discriminatory purpose.[4] The court relied, almost exclusively, on an expansive interpretation of two ameliorative provisions contained in the law.[5] However, because of time constraints due to the nature of legal action and the timeframe of the decision, the court refused to allow South Carolina's law to go into effect in time for the 2012 election.[6]

In its decision, the court conducted a side-by-side comparison of voter photo ID laws that have faced legal challenges in other states and, in doing so, highlighted a major concern with section 5 of the VRA—the unequal treatment of states and the substantial federalism costs that the provision imposes.[7] The court's rationale to preclear the voter photo ID law, coupled with its inability to allow South Carolina to implement the law for the upcoming election, should be cast against the backdrop of concerns expressed by the United States Supreme Court in *Northwest Austin Municipal Utility District No. One v. Holder* (*NAMUDNO*)[8] that the current statutory structure of section 5 of the VRA may no longer be viable under the Constitution.[9]

This Note will analyze the district court's decision and compare it to recently enacted voter ID laws in other states. The analysis will then turn to what this decision means for the future of the VRA. Contrary to assertions made in the district court's opinion, the analysis of the decision will cast doubt on the continued viability of section 5 of the VRA.[10] This Note will also discuss the major federalism concerns with the VRA, as expressed by several members of the United States Supreme Court, and address the distinct possibility that section 5 of the VRA as it stands today is no longer a "congruent" remedial measure imposed on a select number of jurisdictions to remedy the harms presented.[11] This Note will assert that section 5 of the VRA, as amended, has lost its validity

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2. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (2006)).

3. No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094 (D.D.C. Oct. 10, 2012). The three-judge panel consisted of Judge Brett M. Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit and Judges Colleen Kollar-Kotelly and John D. Bates of the United States District Court for the District of Columbia.

4. *Id.* at *17.

5. *See id.* at *15–17 (citations omitted).

6. *See id.* at *17–19 (citing 2011 S.C. Acts 97).

7. *See id.* at *15–17 (citations omitted).

8. 557 U.S. 193 (2009).

9. *See id.* at 204.

10. *But see South Carolina*, 2012 WL 4814094, at *21–22 (Bates, J., concurring) (asserting that the district court's review of South Carolina's law pursuant to section 5 of the VRA served a "vital function" to ensure that South Carolina's law was not unduly restrictive and that the VRA's procedures "did not force South Carolina to jump through unnecessary hoops").

11. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

as race relations have changed in America and, thus, section 5 now needlessly violates the principles of federalism and of the individual states' dignitary interests in crafting legislation to provide its citizens fair and accurate voting mechanisms. As it currently stands, the recently amended VRA may no longer be a constitutional exercise of Congress's powers under Section Two of the Fifteenth Amendment. Part II of this Note outlines past and current efforts by states to enact voter photo ID laws and also provides background on section 5 of the VRA and its impact on the ability of covered jurisdictions to enact new voting laws. Part II also discusses, in detail, the key provisions of the South Carolina voter ID law and the Department of Justice's main objections to the Act. Part III conducts an in-depth review of the district court's opinion, describes the rationale the court provided for preclearing the Act, and outlines concerns about the court's analysis. Part IV analyzes the 2009 Supreme Court decision, in which the Court asserted that section 5 of the VRA may be inconsistent with the concept of federalism and may disturb the tradition of the states' equal sovereignty.[12] Part V describes how the Supreme Court's concerns regarding the continued validity of section 5 of the VRA manifested themselves in South Carolina's voter ID preclearance process. Part VI concludes the Note by asserting that circumstances have changed in such a way that the drastic remedial measures that section 5 of the VRA imposes are no longer a constitutional exercise of Congress's authority under the Fifteenth Amendment.

II. BACKGROUND

On December 23, 2011, the United States Department of Justice (DOJ) blocked a South Carolina law that would require voters to provide photo ID at the polls to vote.[13] The DOJ objected to the law pursuant to its authority under section 5 of the VRA, which gives it the power to block the implementation of such a law.[14] As a "covered jurisdiction," based on the formula provided in section 4 of the VRA,[15] South Carolina must receive preclearance under section 5 from the DOJ or a declaratory judgment by a federal three-judge panel from the United States District Court for the District of Columbia before changing *any* of its election laws.[16] The DOJ asserted, in its objection letter provided to the Assistant Attorney General of South Carolina, that the photo ID requirement would "significantly" burden nonwhite voters attempting to exercise their right to vote and that the state failed to prove that the proposed change would not have

12. *See NAMUDNO*, 557 U.S. at 202–04 (2009) (citations omitted).

13. Charlie Savage, *U.S. Cites Race in Halting Law over Voter ID*, N.Y. TIMES, Dec. 24, 2011, at A1, *available at* http://www.nytimes.com/2011/12/24/us/justice-department-rejects-voter-id-law-in-south-carolina.html.

14. *Id.*

15. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973b (2006 & Supp. V 2012)).

16. *Id.* § 5 (codified as amended at 42 U.S.C. § 1973c (2006)).

a "retrogressive effect" on the ability of minorities to vote in the state.[17] This marked the first time since 1994 that the DOJ had exercised its power under the Voting Rights Act to block a state's voter identification law.[18] The DOJ's decision to reject the South Carolina law was cast against the backdrop of eight other states that have passed laws implementing statutes that require photo IDs to vote in the 2012 election.[19]

Following the DOJ's decision to exercise its authority under section 5 of the VRA, South Carolina filed an action in the United States District Court for the District of Columbia seeking a declaratory judgment.[20] On October 10, 2012, the federal three-judge panel unanimously overturned the DOJ's decision and precleared South Carolina's law for any election starting in 2013.[21] In its decision, the court relied heavily on a broad interpretation of the law's "reasonable impediment" provision that would allow virtually any voter without a photo ID card to vote if they asserted in a sworn statement that they had a reasonable impediment to procuring the required identification.[22] The court also compared South Carolina's law with recently enacted voter ID laws across the United States and highlighted the fact that South Carolina's law, as interpreted, represented one of the more lenient voter ID laws in the country.[23]

A. State Voter Photo ID Laws—A Snapshot

Voter ID laws, like the one passed in South Carolina, have become a hot topic during the recent election cycle.[24] In 2011, thirty-four states introduced

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17. Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to C. Havird Jones, Jr., Assistant Deputy Attorney Gen., S.C. Attorney Gen.'s Office (Dec. 23, 2011), *available at* http://www.documentcloud.org/documents/279907-doj-south-carolina-voting.html.

18. Savage, *supra* note 13, at A1.

19. *Id.* at A3. Of the eight states recently passing laws implementing photo ID provisions, four of them (South Carolina, Alabama, Mississippi, and Texas) are covered jurisdictions under the VRA. *See Voter Identification Requirements*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (last updated Mar. 7, 2013).

20. *See* Complaint for Declaratory Judgment at 1, South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094 (D.C.C. Oct. 10, 2012) (No. 12-203 (CKK)).

21. *See South Carolina*, 2012 WL 4814094, at *19.

22. *See id.* at *4–7.

23. *See id.* at *15–17 (citations omitted).

24. *See, e.g.*, Ian Lovett, *Easier Access to Ballot Is Pushed by Democrats*, N.Y. TIMES, Oct. 6, 2012, at A11, *available at* http://www.nytimes.com/2012/10/06/us/politics/in-face-of-voter-id-laws-democrats-push-to-expand-ballot-access.html (discussing how Republicans and Democrats are pushing voter registration laws in opposite directions). Proponents of these more stringent laws assert that stronger provisions are being put in place to guard against fraud at the polls and increase public confidence in elections. *See* Kris W. Kobach, *Why Opponents Are Destined to Lose the Debate on Photo ID and Proof of Citizenship Laws: Simply Put—People Want Secure and Fair Elections*, 62 SYRACUSE L. REV. 1, 14 (2012); Hans A. von Spakovsky, *Protecting the Integrity of the Election Process*, 11 ELECTION L.J. 90, 90–91 (2012). On the other hand, opponents have openly criticized these laws by arguing that they will disenfranchise minority voters and those on the lower end of the socioeconomic spectrum. *See NAACP Applauds the DOJ's Ruling on*

voter identification legislation, and in 2012, thirty-two states introduced similar legislation.[25] In 2012 alone, fourteen states sought to enact voter ID requirements where none had existed before, and ten states sought to strengthen laws already in place.[26] States that require voters to present photo ID at the polls have been lumped into two groups: (1) "strict" states and (2) "non-strict" states.[27] "Strict" voter ID law states are those in which "a voter cannot cast a valid ballot without first presenting ID."[28] In these states, voters who are unable to present the proper photo ID are allowed to cast a "provisional ballot," which will not be counted until the voter returns to the polling place and provides proper identification to designated election officials, and in the event the voter does not return to the polling location, the vote will not be counted.[29] States identified as "non-strict" states provide voters with other means of casting a ballot without approved photo ID.[30] For example, these laws allow voters to "sign an affidavit of identity" or have an election official vouch for the voter's identity.[31] Under this framework, South Carolina appears to be a "strict" voter ID state; however, as this Note will discuss, the three-judge panel of the United States District Court for the District of Columbia cast this assessment aside.[32]

As of 2012, according to the National Conference of State Legislatures, a total of thirty-three states have passed voter ID laws.[33] Seventeen of those states have enacted legislation that requires a form of photo ID to be presented at the polls in order to vote; however, six of those states were not able to implement their laws in time for the November 2012 election.[34] Those states included: South Carolina, Texas, Mississippi, Alabama, Wisconsin, and Pennsylvania.[35] Of those six states, South Carolina, Texas, Mississippi, and Alabama are

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Restrictive Voter ID Law, NAACP (Aug. 30, 2012), http://www.naacp.org/press/entry/naacp-applauds-the-justice-departments-ruling-on-restrictive-voter-id-law (quoting Texas v. Holder, No. 12-cv-128 (DST, RMC, RLW), 2012 WL 3743676, at *32 (D.D.C Aug. 30, 2012)).

25. *Voter Identification Requirements*, *supra* note 19.

26. *Voter ID: 2012 Legislation*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/voter-id-2012-legislation.aspx (last update Jan. 10, 2013).

27. *See Voter Identification Requirements*, *supra* note 19. The National Conference of State Legislatures (NCSL) has come up with the criteria for determining what constitutes "strict" and "non-strict" states. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*; *see also* South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094, at *4 (D.D.C. Oct. 10, 2012) ("At first blush, one might have thought South Carolina had enacted a very strict photo ID law. . . . But that rhetoric was based on a misunderstanding of how the law would work.").

33. *Voter Identification Requirements*, *supra* note 19.

34. *Id.*

35. *Id.*

considered covered jurisdictions under the VRA and are required to obtain preclearance from the DOJ before they could go into effect.[36]

B. The Voting Rights Act

Congress designed the VRA, pursuant to its power under Section Two of the Fifteenth Amendment, "to banish the blight of racial discrimination in voting" and create "stringent new remedies" to eradicate the rampant voting discrimination that had "infected" the country.[37] The Act was a direct response to certain states, predominantly in the South, that had established a pattern of disenfranchising African-American voters from exercising their right to vote through the use of discriminatory devices such as literacy and character tests.[38] The Supreme Court first upheld the VRA as an appropriate exercise of congressional power under the Fifteenth Amendment in *South Carolina v. Katzenbach*.[39] In its decision, the Court stated that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting,"[40] and even though the VRA "may have been an uncommon exercise of congressional power, . . . exceptional conditions can justify legislative measures not otherwise appropriate."[41]

The VRA establishes an effective federal systematic response to proactively prevent the disenfranchisement of minorities.[42] First, section 2 of the VRA, as currently codified at 42 U.S.C. § 1973(a), provides a national prohibition on any

> voting qualification or prerequisite to voting or standard, practice, or procedure [to] be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.[43]

To enforce this prohibition and also to avoid the burden of "case-by-case" litigation, section 4 of the VRA expressly abolishes "literacy tests and similar voting qualifications" that were considered "the most powerful tools of black

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36. *See* Civil Rights Div., *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Mar. 28, 2013).

37. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

38. *See id.* at 310–11 (citing V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 537–39 (1949)).

39. *Id.* at 337.

40. *Id.* at 326.

41. *Id.* at 334.

42. Enbar Toledano, Comment, *Section 5 of the Voting Rights Act and Its Place in "Post-Racial" America*, 61 EMORY L.J. 389, 393 (2011) (citing Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973aa-6 (2006))).

43. 42 U.S.C. § 1973(a) (2006).

disenfranchisement" in the South.[44] The VRA also allows federal examiners to override state election officials' determinations of voter eligibility.[45]

Most importantly in the context of covered jurisdictions and changes to individual state voting laws, section 4 of the VRA sets forth a formula to identify states or political subdivisions that will be subject to the remedial requirements of section 5.[46] The current formula for the VRA, as amended in 2006, provides that all states or political subdivisions that used literacy tests or qualifications in the November 1972 election and had less than 50% of its citizens of voting age registered to vote or had less than 50% of eligible voters turn out to vote in the 1972 presidential election are considered covered jurisdictions.[47] These covered jurisdictions are subject to section 5's remedial apparatus.[48]

Section 5 of the VRA effectively suspends all attempts to change voting laws in covered jurisdictions until the DOJ or a three-judge panel of the United States District Court for the District of Columbia approves the proposed changes.[49] The Supreme Court has held that the restrictions and requirements that section 5 imposes on certain covered jurisdictions apply to both ballot-access (e.g., voter ID qualifications) laws and political line redistricting.[50]

Since its enactment in 1965, Congress has reauthorized the VRA in 1970 for five years, in 1975 for seven years, and in 1982 for twenty-five years.[51] The Supreme Court upheld each of these reauthorizations, finding that current circumstances still justified the remedial provisions of the VRA.[52] Most recently, Congress reauthorized the VRA in 2006 for another period of twenty-five years.[53] Currently, South Carolina is one of nine states that are completely covered under section 5 of the VRA and thus require DOJ approval or a

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44. *NAMUDNO*, 557 U.S. 193, 198 (2009) (citing Voting Rights Act § 4(a)–(d)).

45. *Id.* (citing Voting Rights Act §§ 6, 7, 9, 13).

46. *See* Voting Rights Act § 4 (codified as amended at 42 U.S.C. § 1973b (2006 & Supp. V 2012)).

47. 42 U.S.C. § 1973b(b). Subsequent amendments to the VRA have left the coverage formula intact but changed the date for assessing the criteria from 1964 when the VRA was first enacted to the current law where it remains based on statistics from the 1972 Presidential elections. *See NAMUDNO*, 557 U.S. at 200.

48. *See* Voting Rights Act § 5 (codified as amended at 42 U.S.C. § 1973c (2006)).

49. *NAMUDNO*, 557 U.S. at 198 (citing Voting Rights Act § 5 (codified at 42 U.S.C. § 1973c(a))).

50. *Id.* (citing Allen v. State Bd. of Elections, 393 U.S. 544, 563–64 (1969)).

51. *Id.* at 200.

52. *Id.* (citing Lopez v. Monterey Cnty., 525 U.S. 266, 287 (1999); City of Rome v. United States, 446 U.S. 156, 182 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in NAMUDNO*, 557 U.S. 193 (2009); Georgia v. United States, 411 U.S. 526, 541 (1973)).

53. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended 42 U.S.C. §§ 1973a–1973c, 1973f, 1973j, 1973k, 1973l, and 1973aa-1a (2006 & Supp. V 2012)).

declaratory judgment from a federal three-judge panel before implementing *any* changes to existing voting laws.[54]

C. *South Carolina's Voter ID Law*

During the 2011 session, the South Carolina General Assembly enacted South Carolina's voter ID law that proposed several changes to the state's voter ID requirements.[55] South Carolina's Governor Nikki Haley signed the Act into law on May 18, 2011.[56] Prior to the Act, South Carolina law allowed voters to cast a regular ballot, in both federal and state elections, without presenting photo ID.[57] Voters were required only to provide a state-issued voter registration card and affix their signature on a poll list.[58] Presentation of a valid South Carolina Department of Motor Vehicle (DMV)-issued photo ID card or a driver's license also satisfied the requirements of the former law.[59] The former law received federal preclearance pursuant to section 5 of the VRA by approval of the DOJ and had been in effect in South Carolina since 1988.[60]

Section 1 of the Act lists factors to consider when determining a person's intent to make their current place of residence their home and "domicile" for purposes of voting.[61] Section 3 of the Act deals with the process and considerations for challenges to a voter's qualifications.[62] Sections 2 and 6 are concerned with issuing duplicate voter registration notification cards and an

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54. *See* Civil Rights Div., *supra* note 36. Alabama, Georgia, Louisiana, Mississippi, and Virginia join South Carolina as the original six states covered by section 5 of the VRA when it was first enacted in 1965. *Id.* Alaska, Arizona, and Texas were identified as covered jurisdictions after the 1975 amendment. *Id.* Several individual counties and townships in California, Florida, New York, North Carolina, South Dakota, Michigan, and New Hampshire are also subject to remedial provisions contained within section 5 of the VRA. *Id.* Critics of Congress's attempts to amend the VRA to keep it viable by updating the pertinent date for assessing the criteria under section 4 and redefining the term "literacy tests" to include English-only ballots point to the inclusion of these smaller political subdivisions under section 5 as evidence that the VRA may no longer be focused on those jurisdictions that are actually engaging in the disenfranchisement of minority voters. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL'Y 41, 50–51, 76 (2007). For example, after low voter turnout nationally in the 1968 presidential election, three of the five boroughs of New York became subject to section 5 of the VRA even though there was no evidence of New York elections officials attempting to deliberately disenfranchise minority voters—protected by the Fifteenth Amendment—from voting. *Id.* (citing Abigail Thernstrom, Op-Ed., *Emergency Exit*, N.Y. SUN (July 29, 2005), http://www.nysun.com/opinion/emergency-exit/17784/).

55. Complaint for Declaratory Judgment, *supra* note 20, at 3.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See* 2011 S.C. Acts 92 (codified as amended at S.C. CODE ANN. § 7-1-25(D) (Supp. 2011)).

62. *See id.* at 93 (codified as amended at S.C. CODE ANN. § 7-5-230(A)–(B)).

amendment to the procedures in place for "special identification cards" that the DMV issues.[63]

Section 4 of the Act requires the South Carolina State Election Commission to develop a system to issue free photo voter registration cards that can be used for voting purposes only.[64] Section 7 of the Act authorizes the election commission to conduct an "aggressive voter education program" to inform the general public about the Act's new photo ID requirements.[65] Section 8 of the Act requires the election commission to create a list of all registered voters who are "otherwise qualified to vote but do not have a South Carolina driver's license or other form of identification containing a photograph issued by the Department of Motor Vehicles," and that list is to be made available to any voter upon request.[66]

The most hotly contested part of the Act was section 5, which requires a South Carolina voter to present one of the following five "valid and current" photo ID documents: (1) a South Carolina driver's license, (2) a nondriver DMV issued identification card that contains a photograph, (3) a United States passport that contains a photograph, (4) a United States military identification card that contains a photograph, or (5) a South Carolina voter registration card that contains a photograph of the voter.[67] The Act also includes three possible exemptions to this photo ID requirement. First, if the voter simply cannot provide one of the acceptable forms of identification at the polling location, then they may cast a provisional ballot that will be counted after the voter brings a valid photo ID to the county board of registrations and elections before the election has been certified.[68] A second exemption is allowed in the event that the voter refuses to produce a valid photo ID due to a "religious objection to being photographed."[69] In that case, the voter may file an affidavit, under penalty of perjury, affirming that the voter is the person that they purport to be; that they had cast a provisional ballot on the day of the election; and that they do, in fact, have a "religious objection to being photographed."[70] After completing the affidavit, the voter may cast a provisional ballot, and the ballot and the affidavit will then be submitted to the county board of registration and elections for certification.[71]

Finally, the Act provides a third exemption for voters who "suffer[] from a reasonable impediment that prevents the elector from obtaining photograph[ic]

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63. Letter from Thomas E. Perez, *supra* note 17; *see* 2011 S.C. Acts 93, 96 (codified as amended at S.C. CODE ANN. § 7-5-125 (Supp. 2011) and S.C. CODE ANN. § 56-1-3350 (2006 & Supp. 2012)).

64. *See* 2011 S.C. Acts 94 (codified as amended at S.C. CODE ANN. § 7-5-675).

65. *Id.* at 97.

66. *Id.* at 98.

67. *Id.* at 94 (codified as amended at S.C. CODE ANN. § 7-13-710(A)).

68. *Id.* at 95 (codified as amended at S.C. CODE ANN. § 7-13-710(C)(1)).

69. *Id.* (codified as amended at S.C. CODE ANN. § 7-13-710(D)(1)(a)).

70. *Id.*

71. *Id.*

identification."[72] As was the case with the "religious objection" exemption, the voter may also complete an affidavit, under penalty of perjury, and affirm that the voter is the person that they purport to be, that they had cast a provisional ballot on the day of the election; and that they do, in fact, suffer from a "reasonable impediment" that prevents them from obtaining one of the required photo ID cards.[73] After completing the affidavit, the voter will be able to cast a provisional ballot that will be sent, along with the affidavit, to the county board or registration and elections.[74]

Under both the "religious objection" and "reasonable impediment" exemptions to the Act's photo ID requirement, if the county board of registration and elections "determines that the voter was challenged *only* for the inability to provide proof of identification and the required affidavit is submitted," then "the county board of registration and elections *shall* find that the provisional ballot is *valid* unless the board has grounds to believe the affidavit is false."[75] A straightforward reading of this provision would indicate that, unless the board has information that the reasonable impediment or religious objection provided by the voter is false, then the vote will be counted if a proper affidavit has been filed; however, the DOJ apparently saw it differently.

D. The DOJ's Letter Objecting to the South Carolina Voter ID Law

Unlike South Carolina's current voter ID law passed in 1988, the DOJ refused to preclear the Act, and South Carolina was forced to file an action seeking a declaratory judgment in order to receive preclearance from a federal three-judge panel sitting in the United States District Court for the District of Columbia.[76] The DOJ primarily objected to provisions contained in section 5 of the Act in a letter dated December 23, 2011.[77] In its complaint, South Carolina asserted that the DOJ failed to take into account the ameliorative provisions contained within the law that would "mitigate or eliminate any purported discriminatory effects" that the DOJ identified with section 5 of South Carolina's voter ID law.[78]

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72. *Id.* (codified as amended at S.C. CODE ANN. § 7-13-710(D)(1)(b)).

73. *Id.*

74. *Id.*

75. *Id.* at 95–96 (emphasis added) (codified as amended at S.C. CODE ANN. § 7-13-710(D)(2)).

76. *See generally* Letter from Thomas E. Perez, *supra* note 17 (outlining the DOJ's objections to South Carolina's 2011 voter photo ID law).

77. *See id.* Initially, the DOJ did not object to sections 1 and 3 of the Act. *Id.* After receiving further information on sections 2 and 6, the DOJ also decided not to object to those provisions. *Id.* Finally, the DOJ chose to make "no determination" on sections 4, 7, and 8 of the Act because, according to its letter, the procedures to implement those provisions were dependent upon approval of section 5. *Id.*

78. Complaint for Declaratory Judgment, *supra* note 20, at 6.

III. *SOUTH CAROLINA V. UNITED STATES*

As stated previously, a three-judge panel of the United States District Court for the District of Columbia precleared the Act; however, the panel declined to allow South Carolina to implement the Act for the 2012 presidential election.[79] The court anchored its decision in an expansive interpretation of the Act's reasonable impediment exemption.[80] The court began its opinion by asserting that the VRA "is among the most significant and effective pieces of legislation in American history."[81] Thereafter, the court explained that the VRA's section 5 provision "seeks to ensure that the proposed changes [to state voting laws] 'neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race or color' or membership in a language minority group."[82] In its analysis, the court examined the likely effects of the new law on minority voters in comparison to the current South Carolina voter identification law, which had been in place since 1988.[83]

A. The Court's Explanation of the Key Provisions in South Carolina's New Voter ID Law

The court first analyzed the provisions of the Act and provided a brief discussion on what constituted a valid form of identification and how a voter could obtain a photo ID under the Act.[84] The district court highlighted the fact that the Act actually *added* three forms of valid photo IDs that were not accepted under the preexisting law: "[(1)] a passport, [(2)] a federal military photo ID, and [(3)] a new free photo voter registration card."[85] Moreover, the court noted that a voter could obtain one of the free photo voter registration cards by presenting a current non-photo voter registration card to one of the election offices that exist in all of South Carolina's forty-six counties or for those citizens already registered to vote, by confirming their date of birth and last four digits of their Social Security number.[86] The court noted that the Act also expressly authorizes, in accord with the federal Help America Vote Act, that a citizen can obtain one of these cards by presenting a "photo ID, utility bill, bank statement, government

79. *See supra* text accompanying note 21.

80. *See supra* text accompanying note 22.

81. South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094, at *2 (D.D.C. Oct. 10, 2012).

82. *Id.* (quoting 42 U.S.C. § 1973c(a) (2006)).

83. *See id.* at *2–3 (citing 2011 S.C. Acts 90). "By prohibiting the enforcement of a voting-procedure change until it has been demonstrated . . . that the change does not have a discriminatory effect, Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes." Beer v. United States, 425 U.S. 130, 140 (1976) (alterations in the original) (citing H.R. REP. NO. 91-397, at 8 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3284).

84. *See South Carolina*, 2012 WL 4814094, at *2.

85. *Id.*

86. *Id.*

check, paycheck, or other government document" that displays the voter's name and address.[87] Additionally, the court highlighted section 6 of the Act, which provides free DMV photo ID cards from county DMV offices in South Carolina, and noted that the previous voting law in South Carolina charged a five-dollar fee for such cards.[88] To obtain one of the free DMV photo ID cards, a citizen can go to a DMV office—of which there is at least one in each of South Carolina's forty-six counties—and provide proof of their "South Carolina residency, U.S. citizenship, and Social Security number."[89] The court also mentioned the fact that documents required to obtain these DMV cards are not different from the preexisting law.[90] Lastly, the court noted that the Act requires that the photo ID must be both "valid and current," whereas the preexisting law stated that the photo ID must only be "valid."[91]

The court then turned its attention to a brief factual discussion of the reasonable impediment exemption.[92] Following this discussion, the court plainly and emphatically asserted that the Act would still allow citizens to provide their *non-photo* voter registration card to vote as they could in previous elections under South Carolina law.[93] The court also briefly discussed section 7 of the Act that requires the South Carolina State Election Commission to develop an "aggressive voter education program."[94] The Act requires that the commission provide information at local county election offices, train poll managers and workers, coordinate with service organizations, place advertisements in state newspapers, and provide information about the new laws to local media outlets.[95] Similarly, the Act also requires that information identifying the changes to South Carolina's voting laws be disseminated to voters at polling locations on the day of the election.[96] Before the elections, the commission will also be required to notify registered voters who do not have photo ID cards of the availability of the free ID cards.[97]

Lastly, the district court identified the provisions of section 8 of the Act that require the commission to provide the list of registered voters who do not have a photo ID to third parties who have requested the lists.[98] The court explained that

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87. *Id.* (citing Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1712 (codified at 42 U.S.C. § 15483 (2006))).

88. *See id.* at *3 (citing 2011 S.C. Acts 96).

89. *Id.*

90. *Id.* Under the preexisting law, a voter had to present proof of South Carolina residency, U.S. citizenship, and a Social Security number, which was typically done by presenting either a birth certificate or passport, among other things. *Id.* These same documents would suffice for a voter to acquire a free DMV photo ID to vote. *Id.*

91. *Id.* at *2 n.2.

92. *See id.* at *3.

93. *Id.*

94. *Id.* (quoting 2011 S.C. Acts 97).

95. *Id.*

96. *Id.* (citing 2011 S.C. Acts 97).

97. *Id.*

98. *Id.* at *4 (citing 2011 S.C. Acts 98).

section 8 was put in place to provide assistance to organizations that want to help educate voters about the new law and provide another avenue for voters to get the proper photo ID.[99]

B. *Detailed Analysis of the Act's Reasonable Impediment Provision and the Affidavit Process*

The district court focused the majority of its opinion on a detailed analysis of the Act's reasonable impediment provision and explained that the provision should dispel criticism that the law was too strict.[100] Pursuant to the language of the Act, if a voter provided that they had a reasonable impediment that prevented them from obtaining a photo ID, the voter would be allowed to complete an affidavit at the polling location and attest to their identity.[101] To confirm their identity to a notary or, if a notary is unavailable, a poll manager who must witness the affidavit, the voter may provide their non-photo voter registration card.[102] Additionally, the voter must also list on the affidavit their reasons for not obtaining an approved photo ID.[103] The voter then could cast a provisional ballot, and the county board of elections *must* treat the ballot as valid, unless the board has reason to believe that the voter's claim of a reasonable impediment was false.[104] The court provided that as long as a voter "does not lie about his or her identity or . . . about the reason he or she has not obtained a photo ID, the reason that the voter gives *must* be accepted by the county board, and the ballot *must* be counted."[105] The court concluded that all voters "who previously voted with (or want to vote with) the non-photo voter registration card may still do so, as long as they state the reason that they have not obtained a photo ID."[106] The court conducted a more in-depth analysis of the reasonable impediment provision later in the opinion.[107]

According to the court, the most concerning question presented by the Act, as expressed by its critics, was how the State would implement the reasonable impediment provision.[108] The crux of this issue was whether the provision would be interpreted broadly, so as to allow voters without proper photo IDs to vote, or more restrictively with the result of disadvantaging poorer citizens that may lack the necessary transportation or other means to obtain new photo IDs.[109] Therefore, the court opined that the "initial rhetoric" arguing that the Act

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99. *Id.*
100. *See id.*
101. *Id.* at *3 (quoting 2011 S.C. Acts 95).
102. *Id.*
103. *Id.*
104. *Id.* (quoting 2011 S.C. Acts 95–96).
105. *Id.* (emphasis added).
106. *Id.*
107. *See id.* at *4–7 (citations omitted).
108. *See id.* at *4.
109. *Id.*

constituted a "very strict photo ID law" was rooted in a fundamental misunderstanding of how the law would be implemented.[110] The court asserted that the Act, as interpreted by South Carolina officials, "does not have the effects that some expected and some feared."[111]

The court related that as the litigation progressed, "South Carolina officials determined, often in real time, how they would apply the broadly worded . . . provision."[112] Specifically, the South Carolina Attorney General and the Executive Director of the South Carolina State Election Commission provided testimony and, in an additional memorandum, submitted to the court at the close of trial that the official interpretation of the provision "emphasized . . . a driving principle both at the polling place and in South Carolina state law more generally . . . erring in favor of the voter."[113] The court highlighted the fact that South Carolina's official interpretation would allow registered voters to continue to use their non-photo voter registration card as long as they could state a truthful reason for not obtaining a photo ID.[114] The court found that as a result of this interpretation, the Act would not deny any citizen their right to vote as long as the voter provided the same non-photo voter registration card that they could use under the preexisting South Carolina law.[115] Likewise, the court also noted that "*any* reason offered by a voter in an affidavit pursuant to the reasonable impediment provision "*must* be accepted—and his or her provisional ballot counted unless the affidavit is 'false.'"[116] As a result, the court concluded that whether the impediment that the voter described was reasonable is totally up to the voter and not the county election board.[117] The court further explained that the reasonable impediment affidavit was in place only to ensure that voters were who they said they were.[118] The plain text of the provision was intended "*not* to second-guess the reasons that those voters have not yet obtained photo IDs" but to ensure that the voter was not lying about their impediment.[119]

The court cited testimony and statements that the South Carolina Attorney General made during the litigation that a voter could assert several reasons why they have not obtained a photo ID.[120] For example, a voter could assert that they

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at *4–5.
114. *Id.* at *5.
115. *Id.*
116. *Id.* (emphasis added).
117. *Id.*
118. *Id.*
119. *Id.*
120. *See id.*

did not have a birth certificate, were disabled, or did not have a car.[121] The court also listed a host of other reasons a voter could offer for not obtaining a photo ID[122] and provided that "[a]ny reason that the voter *subjectively* deems reasonable will suffice, so long as it is not false."[123]

The court explained that as a result of the broad interpretation of the reasonable impediment provision, the Act would not, in fact, make it more difficult for those without a photo ID to vote in South Carolina's elections.[124] The court found it unusual that the DOJ and intervenors in the case "resisted" the broad interpretation of the Act.[125] The DOJ argued that the broad interpretation of the Act's reasonable impediment provision disregards the statutory language.[126] The court rejected these concerns and held that allowing the individual voter's subjective belief to determine what constituted a reasonable impediment was "perfectly consistent" with the plain language of the Act.[127] As a result, the court accepted the broad interpretation of the reasonable impediment provision as a preclearance condition.[128] The court determined that the only additional requirements that the Act would impose on voters, which did not exist under the preexisting law, would be that those voters who do not have a valid and current photo ID would have to complete an affidavit confirming their identity and providing a reason for not having a photo ID.[129] However, according to the court, this requirement would not negate the validity of the reasonable impediment provision nor would it place an undue burden on the right to vote.[130]

Moreover, the court rejected the DOJ's contention that the Act's affidavit requirement would "negate the efficacy of the reasonable impediment provision."[131] The court stated that the Act permits voters who list a reasonable impediment to vote if they complete an affidavit, which a notary can witness at the polling location.[132] Because the affidavit requirement, as it will be implemented, provides for notaries to be present at polling places to witness these affidavits and because those notaries "will *not* be able to require photo ID

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121. *Id.* The court specifically noted that the example for not obtaining a photo ID because the voter did not have a car was "especially important because one of the main concerns during the legislative debates was whether citizens without cars would be required to obtain photo IDs." *Id.*

122. *Id.* The court provided a list of possibilities that could be considered reasonable impediments, to include: the voter had to work, was unemployed, could not obtain transportation to one of the county offices, did not have enough money to travel, had to take care of their children, was helping family members, was busy with charitable work, or any other possible reason. *Id.*

123. *Id.*

124. *Id.* at *6.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

in order to notarize the affidavit," the affidavit requirement would not have the effect of burdening the right to vote.[133] Furthermore, in the event that a notary was not available at a polling location, the South Carolina Attorney General had authorized poll managers to witness the affidavits in lieu of notarization, which would suffice to allow those ballots to be counted.[134] In conclusion, the court accepted and required, as a condition of preclearance, that the Act does not require notaries to witness the affidavits if they are not available.[135]

C. Analysis of the Act Under Section 5 of the VRA

After its lengthy discussion concerning the interpretation of the reasonable impediment provision and the affidavit process in the Act, the district court then turned its focus to applying the two-prong statutory test to determine whether the Act, as interpreted, satisfied section 5 of the VRA.[136] Under section 5 of the VRA, South Carolina had the burden of showing that the new law did not have "the purpose nor will [it] have the effect of denying or abridging the right to vote on account of race or color."[137] The court first examined whether the Act would have a "discriminatory effect" on minorities' right to vote in South Carolina.[138]

1. Analysis of the Effects Test of Section 5 of the VRA

According to the district court, to satisfy the "effects prong" under section 5 of the VRA, South Carolina had to show that implementation of the Act would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[139] In other words, the Act could not "disproportionately and materially burden" minorities from voting as compared to the current state law.[140]

The court began its analysis of this prong by reviewing its previous interpretation of "the expansive reasonable impediment provision" that would allow South Carolina citizens to continue to use their non-photo voter registration cards to vote.[141] In addressing the concerns of one particular South Carolina voter, the court opined that the intervenor could still vote at their usual polling place with their current non-photo voter registration card and could assert any one of a number of reasons why they had not obtained the appropriate photo

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133. *Id.* at *6–7.
134. *Id.* at *7.
135. *Id.*
136. *See id.*
137. *Id.* (quoting 42 U.S.C. § 1973c(a) (2006)) (internal quotation mark omitted).
138. *Id.*
139. *Id.* (quoting Beer v. United States, 425 U.S. 130, 141 (1976)) (internal quotation marks omitted).
140. *Id.*
141. *Id.*

ID.[142] The court also explained that the Act would actually "*expand*[]" the forms of photo IDs that will be accepted at polling locations to include military ID cards, passports, and new free photo ID cards provided by the state.[143] Accordingly, the court dismissed the voter's assertion that they would be forced to acquire a new photo ID card to vote in South Carolina's future elections.[144]

Likewise, the court asserted that the Act would make it easier to obtain an appropriate photo ID and cited the Act's provision that would allow for a new free photo voter registration card and free DMV photo ID cards to support its contention.[145] These new cards would be available at every county election office and DMV location; therefore, such availability would also make acquiring these photo ID cards much easier.[146] Additionally, the court cited the Act's implementation of section 8's education and outreach provisions that would "encourage and make it easier" for voters without an approved photo ID to obtain one.[147] Lastly, the court stated that the Act's provisions requiring the commission to provide a list of registered voters without the required photo ID to third-party organizations would "encourage those organizations to engage in their own mobilization efforts" to protect minority and disadvantaged voters.[148]

The court then confronted the statistics of registered voters in South Carolina who possess one of the Act's valid photo IDs.[149] In South Carolina, 95% of all registered voters possess one of the required photo IDs.[150] However, the court noted there was an "undisputed" disparity between whites (96%) and blacks (approximately 92%–94%) that currently have a valid photo ID.[151] The court opined that this disparity, coupled with the burden of time and transportation in obtaining a photo ID, could present a problem for the Act under "the strict effects test of [s]ection 5 of the [VRA]."[152] However, the court reasoned that even though the Act may have had problems satisfying the test under section 5 of the VRA, the broadly interpreted reasonable impediment provision in the Act

142. *Id.*
143. *Id.* at *8.
144. *See id.* at *7.
145. *Id.* at *8.
146. *Id.*
147. *Id.*
148. *Id.*
149. *See id.*
150. *Id.*
151. *Id.* However, this "undisputed racial disparity" asserted by the court was pointed out by the State in its trial brief. *See* South Carolina's Trial Brief at 34, *South Carolina*, 2012 WL 4814094 (No. 1:12-cv-203 (CKK-BMK-JDB)). South Carolina's statistical research provided that "[l]ess than 5.5% of South Carolina registered voters—149,021 of over 2.7 million registered voters"—lacked the appropriate photo ID. *Id.* Broken down by race, "4.71% (91,119) of white registered voters and 6.76% (56,770) of minority registered voters" did not have the required photo ID. *Id.* (citing Supplemental Declaration of M.V. Hood III at 10 tbl.6, *South Carolina*, 2012 WL 4814094 (No. 12-203 (CKK-BMK-JDB))). This analysis would indicate that the Act would have a greater disparate impact, by sheer numbers, on *white* voters than on minority voters.
152. *South Carolina*, 2012 WL 4814094, at *8.

"eliminat[ed] any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused."[153]

Next, the court discussed concerns that the voter would be casting a "provisional" ballot and not a "regular" ballot.[154] The court concluded that the word "provisional" was a "misnomer" as the ballots *must* be counted so long as the voter did not lie when completing their reasonable impediment affidavit.[155] Relying on a previous decision, the court held that requiring a voter to cast a provisional ballot "does not burden the right to vote."[156] The court also stressed that for the reasonable impediment provision to be implemented as interpreted and to ensure that the affidavit process does not become a "trap for the unwary, or a tool for intimidation or disenfranchisement of qualified voters," the court would require that a form affidavit be provided for voters and that it include separate boxes that a voter could check to indicate their reasonable impediment for not obtaining a photo ID.[157] At a minimum, the form must include boxes to "check for 'religious objection'; 'lack of transportation'; 'disability or illness'; 'lack of birth certificate'; 'work schedule'; 'family responsibilities'; and 'other reasonable impediment.'"[158]

Moreover, the court provided that its interpretation of the Act would indicate that a voter who does not provide a photo ID to vote and casts a provisional ballot pursuant to the reasonable impediment provision would not be required to "attend the canvassing at the county office when the provisional ballots are counted" because the ballots were to be presumed valid unless the country board of elections could show that the reasons provided on the affidavit were false.[159] Finally, the district court strengthened its assessment of the provisional ballot process as "ameliorative" by relying on the United States Supreme Court's holding in *Crawford v. Marion County Election Board*,[160] in which the Court upheld a similar provisional ballot process.[161] The district court characterized the Supreme Court's decision as holding that provisional voting ballots have the effect of "curing problems and alleviating burdens, not . . . creating problems and imposing burdens."[162] Therefore, the court concluded that the Act, as interpreted, would not have "any discriminatory retrogressive effect on racial

153. *Id.* at *9.
154. *See id.* at *10.
155. *Id.*
156. *Id.* (citing Florida v. United States, No. 11-1428, 2012 WL 3538298, at *33–38 (D.D.C. Aug. 16, 2012)).
157. *Id.* at *9.
158. *Id.*
159. *Id.* at *11.
160. 553 U.S. 181 (2008).
161. *See South Carolina*, 2012 WL 4814094, at *11 (citing *Crawford*, 553 U.S. at 199–200).
162. *Id.* (citing *Crawford*, 553 U.S. at 199–200).

minorities."[163] Thus, the court held that the Act satisfied the effects prong under section 5 of the VRA.[164]

2. Analysis Under the Purpose Test of Section 5 of the VRA

The district court then directed its analysis to the purpose test of section 5 of the VRA.[165] Under this test, South Carolina was required to "demonstrate that [the Act] was not passed for 'any discriminatory purpose.'"[166] The court stated that in evaluating the legislative purpose, the court was required to look to the factors espoused in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[167] for guidance.[168] According to the court, the first step under *Arlington Heights* was to examine whether the new law "has discriminatory retrogressive effects under the effects prong of [s]ection 5."[169] Having already decided that issue, the court identified other sources of evidence to "include the historical background of the legislative decision, the specific sequence of events leading up to the law's passage, departures from the normal legislative procedure, and legislative history, especially contemporaneous statements by legislators."[170] The court stated that to constitute a discriminatory purpose, the legislature must have chosen "a particular course of action at least in part because of, not merely in spite of, its adverse effects on a minority group."[171]

Analyzing the Act under the purpose-test framework, the court first looked to the stated purpose of the Act.[172] Under section 5 of the Act, the stated purpose of the voter ID provisions was "to confirm the person presenting himself to vote is the elector on the poll list."[173] The court stated that South Carolina legislators continually asserted that the purpose of the Act was to "deter voter fraud and enhance public confidence in the electoral system."[174] The court noted that in *Crawford* the Supreme Court stated that there was no questioning "the legitimacy or importance" of the states enacting legislation aimed at deterring voter fraud and that "there is 'independent significance' in enhancing public

163. *Id.* at *8.
164. *Id.* at *12.
165. *Id.*
166. *Id.* (quoting 42 U.S.C. § 1973c(c) (2006)).
167. 429 U.S. 252 (1977).
168. *South Carolina*, 2012 WL 4814094, at *12 (quoting Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 488 (1997)).
169. *Id.* (quoting *Arlington Heights*, 429 U.S. at 266).
170. *Id.* (citing *Arlington Heights*, 429 U.S. at 267–68).
171. *Id.* (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)) (internal quotation marks omitted).
172. *See id.*
173. 2011 S.C. Acts 96 (codified as amended at S.C. CODE ANN. § 7-13-710(E) (Supp. 2011)).
174. *South Carolina*, 2012 WL 4814094, at *12.

confidence in the electoral system."[175] Moreover, the court highlighted the fact that the Supreme Court declared that those interests were still justified, even if there was *no evidence* of voter fraud in the state.[176] The district court had also affirmed this assertion in previous preclearance voter ID cases involving other covered jurisdictions.[177] Therefore, the court concluded that South Carolina's goal of preventing voter fraud and bolstering confidence in its election system was valid and should not be deemed pretext simply because the State could not show actual situations of voter fraud.[178]

The court next addressed the record, which indicated that statistics of citizens who possessed photo IDs varied from race to race.[179] Under the *Arlington Heights* analysis, "ongoing legislative action with the knowledge of such an impact might be some evidence of discriminatory purpose" in light of the circumstances.[180] However, the district court declined to "thread that analytical needle" because South Carolina legislators had made several bipartisan changes to the bill—including the all-important reasonable impediment provision and the addition of three new forms of photo ID—that would ensure that all voters, with or without photo ID cards, would be able to cast a ballot as they did under the preexisting law.[181]

The court discarded the DOJ's argument that the Act's passage in such close proximity to the election of the country's first African-American President and evidence of a contentious legislative history were proof of a discriminatory purpose.[182] The court stated that such evidence was largely "circumstantial" and did not "overcome" the facts described, which indicated the Act had not been "enacted for a discriminatory purpose."[183] However, the court did relate that it was "troubled" by evidence presented in the record of an email exchange between a member of the South Carolina House of Representatives and a constituent, "in which the constituent referred disparagingly to [African-American] voters who [did] not have photo IDs" and was not admonished by the

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175. *Id.* (quoting Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196–97 (2008)) (internal quotation mark omitted).

176. *Id.* (quoting *Crawford*, 553 U.S. at 194).

177. *See id.* (quoting Texas v. Holder, No. 12-cv-128 (DST, RMC, RLW), 2012 WL 3743676, at *12 (D.D.C. Aug. 30, 2012) ("[W]e reject the argument, urged by the United States at trial, that the absence of documented voter fraud in Texas somehow suggests that Texas's interests in protecting its ballot box and safeguarding voter confidence were 'pretext.' A state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well."); Florida v. United States, No. 11–1428, 2012 WL 3538298, at *45 (D.D.C. Aug. 16, 2012) ("[T]he fact that a state has acted proactively to close a loophole in its election laws . . . does not *by itself* raise an inference of discriminatory intent.")).

178. *Id.* at *13.

179. *See id.*

180. *Id.* (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

181. *Id.*

182. *Id.* at *14.

183. *Id.*

representative.[184] Nevertheless, the court concluded that the conduct of one legislator and one constituent did not overcome the vast amount of evidence nor did it affect the court's final holding that the Act was "race-neutral," did not have a discriminatory effect, and was not enacted for a discriminatory purpose.[185] However, the court did not end its analysis there and, instead, the court proceeded to highlight a major concern with section 5 of the VRA—the inconsistent treatment of states under the VRA.[186]

D. Comparison of South Carolina's Law to Other States' Laws

The court attempted to bolster its holding that the Act lacked a "discriminatory retrogressive effect or discriminatory purpose" by comparing it with other voter ID laws proposed or enacted in Indiana, Georgia, New Hampshire, and Texas that had faced legal challenges.[187] The court concluded that if South Carolina's law had been placed on a "spectrum of stringency," it would have "clearly" fallen on the "less stringent end."[188] According to the court, some states that have enacted voter ID laws in hopes of deterring fraud and increasing confidence in elections have minority populations that "disproportionately lack photo IDs."[189] As a result, to address those concerns, the states have adopted "[t]wo broad kinds of ameliorative provisions" to reduce the burden on minority voters.[190] First, states have made photo IDs more readily available to voters by making IDs free, have expanded the documentation that can be used to get an ID, or have made the IDs available at convenient locations.[191] Second, states have created a method—similar to South Carolina's reasonable impediment provision—that allows voters without a photo ID, through no fault of their own, to still vote.[192] In view of these provisions used in other states, the court highlighted the fact that South Carolina's law contained both types of "ameliorative provisions" and, as a result, that the Act was "significantly" more lenient than the voter ID laws in Indiana, Georgia, New Hampshire, and Texas.[193] To prove its assertion, the court conducted a side-by-side comparison of the Act with similar laws that have recently undergone legal challenges.[194]

184. *Id.*
185. *Id.* at *14–15.
186. *Id.* at *15.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at *15–17 (citations omitted).

First, the district court analyzed the voter ID law in Indiana that the Supreme Court upheld in *Crawford*.[195] Indiana is not a covered jurisdiction under section 5 of the VRA; however, the court still found that the Supreme Court's decision on voter ID laws was "instructive."[196] Most notably, the court highlighted the fact that Indiana's law was upheld even though it did not have either kind of the "ameliorative provisions."[197] According to the court, the Indiana law required citizens to present a birth certificate (which included a fee) to acquire a photo ID[198] and did not include any provision like South Carolina's reasonable impediment provision.[199] Moreover, the court noted that voters could cast a provisional ballot only if they claimed indigence, and the vote would not be counted until the voter "made *a separate trip* to the county seat" after the election.[200]

Next, the court looked at recent voter ID laws that were passed in Georgia and New Hampshire.[201] Both states are "covered jurisdictions" and must obtain preclearance under section 5 of the VRA.[202] Both states' voter ID laws were precleared by the DOJ, even though those laws only had one of the two types of ameliorative provisions that the South Carolina law contains.[203] Georgia's law, according to the court, simply does not allow voters to cast ballots without a valid photo ID.[204] The court noted that there was no comparable "affidavit or reasonable impediment provision" like in South Carolina and, thus, the Georgia law was "significantly more stringent than South Carolina's law."[205] However, the DOJ precleared the law anyway.[206] The Eleventh Circuit upheld the law as constitutional,[207] and as the district court noted in a previous decision, it was precleared "probably for good reason."[208]

The court then looked at the New Hampshire voter ID law that the DOJ also precleared.[209] Similar to the South Carolina law, New Hampshire does allow voters without a valid photo ID to cast a ballot after signing an affidavit

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195. *See id.* at *15 (citing Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–04 (2008)).

196. *Id.*

197. *Id.*

198. *Id.* (citing *Crawford*, 553 U.S. at 198 n.17).

199. *Id.*

200. *Id.*

201. *Id.* at *16.

202. *See id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *See* Common Cause/Georgia v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) (holding that the burden imposed by requiring voters to have photo ID "is outweighed by the interests of Georgia in safeguarding the right to vote").

208. *South Carolina*, 2012 WL 4814094, at *16 (quoting Texas v. Holder, No. 12-cv-128 (DST, RMC, RLW), 2012 WL 3743676, at *32 (D.D.C Aug. 30, 2012)) (internal quotation marks omitted).

209. *See id.*

confirming their identity.[210] However, unlike in South Carolina, the New Hampshire law requires officials to follow up with every voter who submitted an affidavit after the election.[211] Moreover, the New Hampshire law does not make free photo ID cards available unless the voter has a voucher exempting them from paying the required fee.[212]

Lastly, the court analyzed the new Texas voter ID law that both the DOJ and a three-judge panel denied for preclearance.[213] The court opined that had the Texas law been precleared, it would have represented the "most stringent [voter ID law] in the Nation."[214] The court explained that the Texas law, unlike South Carolina's, would have required many citizens to present a birth certificate to obtain an appropriate ID, and some citizens would incur a fee to obtain a birth certificate.[215] In addition, Texas has counties that do not have a place where voters can obtain a required photo ID, which, unlike in South Carolina, would require voters in those counties to travel to other counties.[216] Most importantly, the Texas law did not have a provision like South Carolina's reasonable impediment clause or its affidavit process.[217]

In summarizing its state-by-state comparison, the court asserted that Indiana and Texas did not have any of the "ameliorative provisions" that the South Carolina law contains and that Georgia's and New Hampshire's laws had only one such provision.[218] As a result, the court opined that South Carolina's law would impose less of a burden on voters without proper photo ID than the laws of those states.[219] It must be noted, however, that even though Indiana, New Hampshire, and Georgia all lacked at least one kind of the "ameliorative provisions" contained in South Carolina's law, all three were upheld against legal challenges, and two of those challenges were upheld under the VRA.[220]

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210. *Id.* (citing N.H. REV. STAT. ANN. § 659:13(I)(c) (LexisNexis 2012)).

211. *Id.*

212. *Id.* (citing N.H. REV. STAT. ANN. § 260:21(V)(a)).

213. *See id.*

214. *Id.* (citing Texas v. Holder, No. 12-cv-128 (DST, RMC, RLW), 2012 WL 3743676, at *33 (D.D.C. Aug. 30, 2012)).

215. *Id.* (citing *Texas*, 2012 WL 3743676, at *1–2).

216. *Id.* (citing *Texas*, 2012 WL 3743676, at *16).

217. *Id.*

218. *Id.*

219. *Id.*

220. *See generally* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196–204 (2008) (citations omitted) (upholding Indiana voter ID law against a facial challenge and holding that the statute does not impose excessive burdens on any class of voters and that "[t]here is no question about the legitimacy or importance of the State's interest" in preventing fraud and promoting "public confidence in the integrity of the electoral process"); Common Cause/Georgia v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) (holding that the burden imposed by requiring voters to have photo ID "is outweighed by the interests of Georgia in safeguarding the right to vote"); Letter from T. Christian Herren, Jr., Voting Section Chief, U.S. Dep't of Justice Civil Rights Div., to J. Gerald Hebert and Stephen B. Pershing (Sept. 4, 2012), *available at* http://doj.nh.gov/election-law/documents/20120710-preclearance-voter-affidavit.pdf (precleaning the New Hampshire voter ID law).

E. South Carolina's Law and the Carter–Baker Report

The court also measured the Act against proposed voter ID reforms championed by the bipartisan Commission on Federal Election Reform (the Carter–Baker Report).[221] The Carter–Baker Report recommended that states adopt voter ID laws and actually "proposed *less* accommodation for voters without photo IDs than [the Act] provides."[222] The report recommended that photo IDs should be free of charge and readily available, but contrary to the South Carolina law, it would require voters to present a birth certificate to obtain an ID.[223] The court also noted that the Carter–Baker Report would allow voters without a proper photo ID to cast a provisional ballot in the first two elections after a law was passed; however, subsequent elections would require voters who cast a provisional ballot to return to the appropriate election office within forty-eight hours and present a valid form of identification to have their votes counted.[224]

F. The District Court's Conclusion

The court concluded its opinion by contending that its comparisons of the Act with the Carter–Baker Report and the other states' laws firmly supported its ultimate conclusion that South Carolina's law does not have a discriminatory effect or purpose and should be precleared for future elections.[225] However, the court refused to preclear the Act for the 2012 elections.[226] The court stated that because South Carolina would have to take "a large number of difficult steps" to properly implement the reasonable impediment provision by the 2012 elections, the Act should only be implemented after the elections.[227] The court emphasized in its rationale that because the South Carolina General Assembly had set forth several deadlines for conducting appropriate education and training that would take place over the course of approximately eleven months and because the final preclearance had not been completed until October 2012, there would not be enough time to complete those steps before the 2012 elections, and if South

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221. *South Carolina*, 2012 WL 4814094, at *17. Former President Carter and former Secretary of State James Baker issued the report. *See* COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS, at ii (2005).

222. *South Carolina*, 2012 WL 4814094, at *17; *see also* COMM'N ON FED. ELECTION REFORM, *supra* note 221, at 18–21 (recommending provisions for the implementation of photo IDs for voting and highlighting the fact that photo IDs are required to board planes, enter federal buildings, and cashing a check, and so should also be required to vote).

223. *South Carolina*, 2012 WL 4814094, at *17; *see also* COMM'N ON FED. ELECTION REFORM, *supra* note 221, at 19 (requiring proof of citizenship).

224. *South Carolina*, 2012 WL 4814094, at *17; COMM'N ON FED. ELECTION REFORM, *supra* note 221, at 19.

225. *South Carolina*, 2012 WL 4814094, at *17.

226. *Id.*

227. *See id.* at *17–18.

Carolina tried to rush these steps, there was a high "potential for chaos."[228] The court was convinced that South Carolina would be unable to "ensure proper implementation of the multi-step training and educational process" and the even more "critical reasonable impediment provision" in the four weeks prior to the election; therefore, the district court decided to not preclear the Act until after the 2012 election.[229] However, the court did not stop there.

IV. CONSTITUTIONAL CONCERNS WITH SECTION 5 OF THE VRA

In a separate concurrence to the district court's decision, Judge Bates opined that no one could doubt "the vital function that [s]ection 5 of the [VRA]" played and that had the DOJ and the court not reviewed the Act before its implementation, it "certainly would have been more restrictive."[230] The concurrence noted that several South Carolina legislators admitted that they wanted to structure the Act in a way that would ensure it would be precleared, and that the ameliorative provisions contained in the Act were adopted and "shaped by the need for [preclearance]."[231] The concurrence noted that Congress recognized the importance of such a "deterrent effect" that section 5 of the VRA embodied, and that the "[s]ection 5 process . . . did not force South Carolina to jump through unnecessary hoops," but rather "demonstrates the continuing utility of [s]ection 5 of the [VRA] in deterring problematic . . . changes in state and local voting laws."[232] However, as highlighted by the Supreme Court in *NAMUDNO*[233] and as evidenced by the district court's own decision, there are serious concerns as to whether section 5 of the VRA remains a constitutionally appropriate exercise of Congress's remedial powers under the Reconstruction Amendments.

The VRA has been, by all accounts, largely successful.[234] Following the VRA's initial enactment in 1965, the number of African-Americans who have registered to vote and actually voted has increased dramatically.[235] Notably, in some of the covered jurisdictions, minorities now register and vote at higher levels than those of white voters.[236] Moreover, these successes have resulted in a "significant increase" in the number of African-Americans serving in elected

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228. *Id.* at *18.

229. *Id.*

230. *Id.* at *21 (Bates, J., concurring).

231. *Id.*

232. *Id.*

233. *See generally NAMUDNO*, 557 U.S. 193, 201–06 (2009) (citations omitted) (expressing concerns that section 5 of the VRA may no longer be a constitutional exercise of Congress's power under the Fifteenth Amendment; however, the Court chose to decide the case on other grounds).

234. *See id.* at 201.

235. *See id.* (citing H.R. REP. NO. 109-478, at 12–13 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 626–27).

236. *Id.* (citing H.R. REP. NO. 109-478, at 12–13, 18–20, *reprinted in* 2006 U.S.C.C.A.N. at 626–30).

positions.[237] However, these achievements have critics questioning whether the VRA remains a constitutional exercise of congressional power or whether the remedy provided by section 5 has become disproportionate to the injury to be prevented such that the VRA has become a "victim of its own success?"[238]

In *NAMUDNO*, the Supreme Court narrowly passed on ruling directly on the continued constitutionality of section 5 of the VRA.[239] Chief Justice Roberts, writing for the majority, asserted that section 5 of the VRA imposes "substantial 'federalism costs.'"[240] These costs have, over the history of the VRA, caused consternation with several members of the Court.[241] Moreover, the Court explained that racially discriminatory conditions that were relied upon when the VRA was first enacted and upheld by the Court have "unquestionably improved."[242] For example, the Court explained that "[v]oter turnout and registration rates now approach parity" and that "[b]latantly discriminatory evasions of federal decrees are [now] rare."[243] In addition, "minority candidates currently hold office at unprecedented levels."[244] As the Court so succinctly put it, "*[t]hings have changed in the South*," and the Court hinted that it may be time to take a closer look at the continued constitutional validity of section 5 of the VRA.[245]

The Court first expressed concern with the fact that the VRA "differentiates between the [s]tates, despite our historic tradition that all the [s]tates enjoy 'equal sovereignty.'"[246] Though the Court agreed with the reasoning in

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237. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 198 (2007).

238. *See generally* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004) (questioning whether the success of the VRA has compromised its mission and developed a section 5 remedy that is now disproportionate to the injury it aims to prevent); Glenn Kunkes, Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & POL. 357 (2012) (asserting that the VRA is no longer a constitutional exercise of congressional power); Thernstrom, *Section 5 of the Voting Rights Act*, *supra* note 54 (considering the constitutional legitimacy of the VRA in light of its rewritten form that no longer focuses on jurisdictions that are disenfranchising minority voters).

239. *See NAMUDNO*, 557 U.S. at 201–06 (citations omitted). The Court opted to decide a bailout provision on statutory grounds, holding that all political subdivisions are able to file a bailout suit under the VRA. *Id.* at 211.

240. *Id.* at 202 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

241. *Id.* (citing *Lopez*, 525 U.S. at 293–98 (Thomas, J., dissenting); *id.* at 288 (Kennedy, J., concurring in judgment); City of Rome v. United States, 446 U.S. 156, 209–221 (1980) (Rehnquist, J., dissenting), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in NAMUDNO*, 557 U.S. 193 (2009); *id.* at 200–206 (Powell, J., dissenting); Georgia v. United States, 411 U.S. 526, 545 (1973) (Powell, J., dissenting); Allen v. State Bd. of Elections, 393 U.S. 544, 586 n.4 (1969) (Harlan, J., concurring in part and dissenting in part); South Carolina v. Katzenbach, 383 U.S. 301, 358–62 (1966) (Black, J., concurring and dissenting)).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* (emphasis added).

246. *Id.* at 203 (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960)).

Katzenbach that the principle of equality of states "does not bar . . . remedies for *local* evils which have subsequently appeared,"[247] it expressed caution that such a "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[248] The Court also directly questioned whether the "evil" that section 5 of the VRA was intended to remedy still exists in the traditional covered jurisdictions, because the VRA's current "coverage formula is based on data that is now more than [thirty-five] years old, and there is considerable evidence that it fails to account for current political conditions."[249] To support this assertion, the Court provided the example that the racial gap between voter registration and turnout is actually *lower* in states originally covered by section 5.[250] Additionally, the Court explained that during hearings for the 2006 extension of the VRA, Congress was warned that evidence presented did not discuss "systematic differences between the covered and the [noncovered] areas of the United States" and, as a matter of fact, there was evidence that indicated there was actually more "similarity than difference" between covered and noncovered jurisdictions.[251] Indeed, other commentators have conceded that the most someone could argue in defense of the VRA's section 5 continued coverage "formula is that it is the best of the politically feasible alternatives or that changing the formula would . . . disrupt settled expectations."[252]

Ultimately, the Court asserted that "the [VRA's] preclearance requirements and its coverage formula raise *serious* constitutional questions."[253] It appears that the Court based this determination on two main concerns with section 5's preclearance requirement, as it currently stands. First, the Court questioned the need for these rules in light of the fact that the circumstances with regard to voting in covered jurisdictions appear to have improved dramatically since the VRA was first enacted.[254] Second, the Court explained that these changes in voting demographics may no longer warrant such a significant "departure from the fundamental principle of equal sovereignty"[255] and the imposition of

247. *Id.* (alternation in original) (quoting *Katzenbach*, 383 U.S. at 328–29) (internal quotation mark omitted).

248. *Id.*

249. *Id.*

250. *Id.* at 203–04 (citing EDWARD BLUM & LAUREN CAMPBELL, AM. ENTER. INST., ASSESSMENT OF VOTING RIGHTS PROGRESS IN JURISDICTIONS COVERED UNDER SECTION FIVE OF THE VOTING RIGHTS ACT 4–5 (2006)).

251. *Id.* at 204 (quoting *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Richard H. Pildes)) (internal quotation marks omitted).

252. *Id.* (alteration in original) (citing Persily, *supra* note 237, at 208) (internal quotation mark omitted).

253. *Id.* (emphasis added).

254. *See id.* at 203.

255. *Id.*

"substantial 'federalism costs.'"[256] The United States District Court for the District of Columbia's decision to preclear South Carolina's voter ID law was a prime example of these concerns and should invite a deeper inquiry into the continued constitutionality of section 5 of the VRA.

V. PRECLEARANCE OF THE SOUTH CAROLINA VOTER ID LAW IN LIGHT OF *NAMUDNO*

In preclearing the South Carolina voter ID law, the three-judge panel of the United States District Court for the District of Columbia focused its analysis on two main issues to bolster its decision: (1) the expansive interpretation of the reasonable impediment provision as interpreted by South Carolina's officials[257] and (2) a comparison of the South Carolina law with other states' similar laws that faced legal challenges.[258] When viewed in light of the Supreme Court's decision in *NAMUDNO*, the district court's decision highlights major concerns with the continued constitutionality of section 5 of the VRA.

A. "Things Have Changed in the South"

The Supreme Court, in its decision in *NAMUDNO*, expressly stated that circumstances and conditions that were a prerequisite in upholding the "statutory scheme" of the VRA have "unquestionably improved."[259] As a result, the Court provided that though these improvements *may* be "insufficient and that conditions continue to warrant preclearance under the [VRA]," the burdens imposed by the VRA "must be justified by current needs."[260] The Court expressed concern that the "evil" that section 5 of the VRA was enacted to remedy may no longer exist "in the jurisdictions singled out for preclearance."[261] The Court highlighted the fact that the current coverage formula, under the VRA, is based on data from 1972 and that current conditions in these jurisdictions may not warrant continued coverage under the VRA.[262]

Indeed, the congressional record indicates that in some covered jurisdictions, "[African-American] turnout *exceeded* that of whites."[263] Even more importantly, as evidence of those covered jurisdictions' new understanding, the rates of DOJ denials to preclearance submissions have declined over the years.[264]

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256. *Id.* at 202 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).
257. *See supra* Part III.B.
258. *See supra* Part III.D.
259. *NAMUDNO*, 557 U.S. at 202.
260. *Id.* at 203.
261. *Id.*
262. *See id.*
263. Persily, *supra* note 237, at 196–97 (citing S. REP. NO. 109-295, at 11 (2006)) (emphasis added).
264. *Id.* at 199–200.

Even though there has been an increase in the number of preclearance requests, the "rate and absolute number" of DOJ preclearance denials has declined.[265]

As evidence of this change in circumstances since the VRA was first enacted, one need look no further than the state of South Carolina. In South Carolina, an estimated 37.3% of African-Americans were registered to vote as of March 1965, before the VRA was enacted; however, that figure rose dramatically, to 51.2%, by September 1967.[266] The percentage gap between African-American and white registered voters shrunk during that same time period from 38.4% to 30.5%.[267] Today, it can be argued that these numbers are an even more astounding and shining example of the immense success of the VRA and a resounding indication that it is time to reexamine the "substantial federalism costs" imposed by section 5 of the VRA. In the 2008 presidential election, an estimated 76.1% of African-Americans in South Carolina were registered to vote, and 72.6% of African-Americans registered actually voted in the election.[268] The estimated percentage gap between African-American and white registered voters actually *favored* African-American voters by 2.7% (estimated 76.1% of African-American citizens registered to vote versus 73.4% of white, non-Hispanic citizens), and only 63.5% of those registered white, non-Hispanic voters actually voted in the election.[269] It appears that things have drastically changed in the South.

In its decision to preclear the Act, the district court relied heavily on the "extremely broad interpretation of the reasonable impediment provision" that would make it less difficult for those "voters with a non-photo voter registration card (and without photo ID) to vote as they could under [preexisting] law."[270] The court lauded South Carolina officials' focus on interpreting the reasonable impediment provision so as to "err[] in favor of the voter."[271] Indeed, the reasonable impediment provision, as interpreted, did not make it more difficult for citizens to cast a vote at the polls, as some critics feared, but was rather geared toward ensuring that those casting a vote were who they purported to be.[272] This interpretation is further evidence of a greater understanding by covered jurisdictions of what is required in drafting legislation to ensure that

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265. *Id.* at 199.

266. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 43 (1975) (citing U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 222 (1968)), *available at* http://www.law.umaryland.edu/Marshall/usccr/documents/cr12v943a.pdf.

267. *Id.*

268. *See* U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008—DETAILED TABLES, at tbl.4 (2012), *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html.

269. *See id.*

270. South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094, at *6 (D.D.C. Oct. 10, 2012); *see also supra* note 122 and accompanying text (providing a range of possibilities that could be listed as a reasonable impediment).

271. *See South Carolina*, 2012 WL 4814094, at *5.

272. *See supra* notes 114–30 and accompanying text.

voters are not disenfranchised from engaging in the electoral process by enacting expansive provisions that would mitigate any burden on the right to vote.[273] Moreover, it is proof that South Carolina is enacting laws that are less stringent than their noncovered counterparts,[274] and it can be argued that these states are now setting the standard for future effective legislation to protect voters who exercise their voting rights while, at the same time, ensuring public confidence in the electoral process and deterring fraud at the polls. This by-product of section 5's deterrent effect has come at a significant and protracted price,[275] and it warrants a serious analysis of whether the VRA's benefits still continue to outweigh such massive costs.

B. A Continuing Departure from "Equal Sovereignty" and the Principles of Federalism

The concept of "equal sovereignty" rests on the principle that when a new state is admitted into the Union, it is provided all the powers that were afforded to the original states, and those powers may not be "diminished or impaired" by conditions under which the new state entered the Union.[276] As a result, no state can be "deprived of any of the power constitutionally possessed by other [s]tates" so as to place them on unequal footing.[277] This doctrine does not prevent Congress from enacting remedial measures for specific geographic locations to remedy "local evils which have subsequently appeared."[278] However, as Chief Justice Roberts noted in his majority opinion in *NAMUDNO*, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[279] Indeed, in 1966, when the Court first upheld the VRA, it conceded that such legislation was "an uncommon exercise of congressional power" that was justified under the "exceptional conditions" that existed at the time.[280] This point is an especially relevant one to consider when dealing with state voting requirements and qualifications, where "[n]o function is

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273. *See supra* Part III.D and text accompanying note 264.

274. *See supra* text accompanying notes 195–200 (comparing the reasonable impediment provision and provisional ballot procedures in South Carolina with the voter ID law in Indiana, which the United States Supreme Court upheld even though it had neither kind of ameliorative provision).

275. *See NAMUDNO*, 557 U.S. 193, 202 (2009) (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

276. 72 AM. JUR. 2D *States, Etc.* § 17 (2012) (citing Virginia v. West Virginia, 246 U.S. 565, 593 (1918); Potter v. Murray City, 760 F.2d 1065, 1067 (10th Cir. 1985)).

277. *E.g.*, Coyle v. Smith, 221 U.S. 559, 570 (1911) (holding that a condition in the enabling act admitting Oklahoma to the Union stating that the state could not change the location of its capital city until a specified time after admission was not enforceable under the constitutional doctrine of equality of the states).

278. South Carolina v. Katzenbach, 338 U.S. 301, 328–29 (1966).

279. *NAMUDNO*, 557 U.S. at 203.

280. *Katzenbach*, 383 U.S. at 334.

more essential to the separate and independent existence of the States . . . than the power [for the States] to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices."[281]

There is no doubt that initially the VRA was a proper exercise of Congress's power under the Fifteenth Amendment.[282] It was enacted against a "backdrop of 'historical experience'" with states that had a history of disenfranchising African-American voters and were constantly attempting to circumvent federal laws and the constitutional ban on voting discrimination.[283] However, section 5 of the VRA is the "quintessential prophylaxis"[284] statute created to enforce the Reconstruction Amendments by suspending all changes to state election laws, and to remain valid under the Constitution, it must identify the harm it is designed to remedy and remain tailored to specifically preventing that harm.[285] Simply stated, "Congress must establish a 'history and pattern' of constitutional violations to establish the need for [section] 5 by justifying a remedy that pushes the limits of its constitutional authority."[286]

Indeed, the United States Supreme Court has acknowledged that section 5 of the VRA is preventative in nature and affords Congress greater flexibility to remedy and deter violations of voting rights protected under the Fifteenth Amendment.[287] However, there must be a "connection between the 'remedial measures' chosen and the 'evil presented' in the record made by Congress" for Congress to continue to strip individual states of a fundamental power that belongs distinctly to the states.[288]

As discussed above,[289] the record before Congress when it most recently reauthorized section 5 of the VRA did not indicate that covered jurisdictions were still "engaged in a systematic campaign to deny black citizens access to the ballot through intimidation and violence," as they were when Congress first enacted the VRA.[290] As a matter of fact, the district court lauded South Carolina's new law as compared to the law in Indiana—a noncovered jurisdiction with a law containing *none* of the ameliorative provisions set forth in

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281. *NAMUDNO*, 557 U.S. at 216 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (opinion of Black, J.), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI) (internal quotation mark omitted).

282. *Id.* at 217 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

283. *Id.* at 221 (citing *Katzenbach*, 383 U.S. at 308–09).

284. *Id.* at 223.

285. *Id.* at 225 (quoting Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999)).

286. *Id.* (quoting Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001)).

287. *See id.* at 223–24 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000)).

288. *See id.* at 225 (quoting City of Boerne v. Flores, 521 U.S. 507, 530 (1997)).

289. *See supra* Part IV.A.

290. *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

the Act[291]—and yet the United States Supreme Court still deemed Indiana's law a constitutional exercise of state power.[292] It can be argued that South Carolina, a southern state, has created a more voter-friendly law that is more effective in guarding against disenfranchising minority voters than a more northern state, Indiana, which is not a covered jurisdiction under the VRA. Perhaps it is true that "[t]hings have changed in the South"[293] and that southern states now lead the way in race-neutral legislation.[294] Accordingly, the question must be asked: is the DOJ making its decision to object to state voter ID laws and submitting them to the lengthy administrative process because of a concern for minority voters, or is it simply doing so for political reasons?[295]

Finally, contrary to Judge Bates's assertion, the section 5 process *did* force South Carolina to "jump through unnecessary hoops."[296] This delay imposed a "substantial federalism cost[]"[297] by refusing to allow South Carolina, a sovereign state, to enact a law pursuant to its authority under the Constitution to administer its elections.[298] Congress can no longer justify this "significant and undeniable" encroachment on state sovereignty that fundamentally restructures the nature of the relationship between *certain* states and the federal government.[299] Moreover, the lawsuit cost South Carolina taxpayers approximately $3.5 million, a figure three times what South Carolina's Attorney General had anticipated.[300] Though the federal government will have to pick up

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291. *See* South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094, at *15 (D.D.C. Oct. 10, 2012).

292. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–04 (2008) (citations omitted).

293. *NAMUDNO*, 557 U.S. at 202.

294. *See supra* text accompanying notes 271–75.

295. Indeed, individuals familiar with the inside workings of the DOJ Voting Right Section reported that President Obama's political appointees in the DOJ made the decision to object to preclearance of the South Carolina voter ID law over the recommendation of career DOJ lawyers and supervisors who believed the law should have been precleared. J. Christian Adams, *Internal DOJ Documents Argued for SC Voter ID Approval . . . but Obama Appointees Overruled*, PJ MEDIA (Sept. 11, 2012, 8:10 PM), http://pjmedia.com/jchristianadams/2012/09/11/doj-documents-argued-for-sc-voter-id-approval. It should be noted that such allegations are not new and were also leveled against the DOJ during President George W. Bush's Administration when it decided to preclear the Georgia voter ID law in 2005 over objections of career Voting Rights Section employees. *See* Dan Eggen, *Criticism of Voting Law Was Overruled*, WASH. POST, Nov. 17, 2005, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html.

296. *See supra* text accompanying note 232.

297. *NAMUDNO*, 557 U.S. at 202 (quoting Lopez v. Monterey Cnty., 252 U.S. 266, 282 (1999)) (internal quotation marks omitted).

298. *See* Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (opinion of Black, J.).

299. *See NAMUDNO*, 557 U.S. at 224 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting United States v. Bd. of Comm'rs of Sheffield, Ala., 435 U.S. 110, 141 (1978) (Stevens, J., dissenting)).

300. Adam Beam, *SC's Voter ID Suit Cost $3.5 Million*, THE STATE, Jan. 5, 2013, at B1, *available at* http://www.thestate.com/2013/01/05/2577507/lawmakers-approve-additional-2.html#.UOmqi44lZaE. A subsequent court order was issued by the same panel of federal judges that required the federal government to reimburse South Carolina for a portion of the legal fees the State

some of the tab as a result of their unsuccessful challenge, some of the "real" costs associated with this litigation will have to be borne by South Carolina taxpayers.[301]

VI. THE FUTURE OF SECTION 5 OF THE VRA AFTER *SOUTH CAROLINA V. UNITED STATES*

Recently, the United States Supreme Court granted a writ of certiorari to take up the specific question of whether Congress's decision to reauthorize section 5 of the VRA in 2006 exceeded its authority under the Fourteenth and Fifteenth Amendments.[302] Proponents of the continued constitutional viability of section 5 of the VRA point to examples of allegedly discriminatory voting practices[303] or evidence of "racially polarized voting" within certain covered jurisdictions.[304] But these concerns are a far cry from the political climate in the South when the VRA was first enacted,[305] when case-by-case litigation would have been "woefully inadequate" to combat the pervasiveness of the discrimination.[306] This is not to say that voter discrimination no longer occurs, but "isolated incidents" of interference with voting rights have "never been sufficient justification for the imposition of [section] 5's extraordinary requirements."[307] It can most assuredly be argued that in today's society of

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incurred. Order for Bill of Costs at 5, South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094 (D.D.C. Oct. 10, 2012) (No. 12-203). South Carolina had requested over $90,000 in reimbursement back in October, but the court ruled that it was not entitled to the entire amount. Ryan J. Reilly, *South Carolina Voter ID Legal Fees Must Be Paid Partly By Feds, Court Rules*, HUFFINGTON POST (Jan. 7, 2013, 1:49 PM), huffingtonpost.com/2013/01/07/south-carolina-voter-id_n_2425076.html.

301. *See id.*

302. Shelby Cnty., Ala. v. Holder, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted in part*, 133 S. Ct. 594 (2012).

303. *See NAMUDNO*, 557 U.S. at 228 (Thomas, J., concurring in the judgment in part and dissenting in part). *See generally* JOHN C. RUOFF & HERBERT E. BUHL III, VOTING RIGHTS IN SOUTH CAROLINA 1982–2006, at 16 (2006), *available at* http://www.protectcivilrights.org/pdf/voting/SouthCarolinaVRA.pdf (listing several objections to changes in South Carolina's voting laws since 1982 and other voter discrimination litigation occurring within the state during the same time period).

304. *See NAMUDNO*, 557 U.S. at 228 (Thomas, J., concurring in the judgment in part and dissenting in part); RUOFF & BUHL, *supra* note 303, at 46–47 (citations omitted).

305. *See, e.g.*, *NAMUDNO*, 557 U.S. at 218–22 (Thomas, J., concurring in the judgment in part and dissenting in part) (highlighting the pervasive and intentional nature of discrimination in covered jurisdictions at the time of the VRA's enactment attempting to disenfranchise minority voters, including by using violent threats against minorities trying to visit the polls, unfair literacy tests where more than two-thirds of African-Americans were illiterate, and other unfair voter qualifications such as property requirements, good character tests, and grandfather clauses).

306. *See id.* at 220–22 (citations omitted); *see also* Thernstrom, *Section 5 of the Voting Rights Act*, *supra* note 54, at 44 ("[I]t was perfectly reasonable to believe that *any* move affecting black enfranchisement in the Deep South was deeply suspect.").

307. *NAMUDNO*, 557 U.S. at 228 (Thomas, J., concurring in the judgment in part and dissenting in part).

twenty-four-hour media coverage, the ability of states to discriminate against minority voters on such a broad and pervasive scale, as was the case when the VRA was enacted, would simply not go unnoticed. Moreover, those who rest their arguments on evidence of "racially polarized voting" ignore the fact that such data is "not evidence of unconstitutional discrimination," is not orchestrated by state action, and "is not a problem unique to the South."[308]

When it was first enacted, the VRA was specifically designed to attack the "deliberate disfranchisement in the Jim Crow South."[309] This purpose was its singular aim, and the law contained a mechanism (section 4) to identify the states and jurisdictions that would be targeted by the federal government to eradicate minority voter disenfranchisement.[310] At the time, the statute was the appropriate remedy, even though it represented a "substantial departure" from the traditional relationship between the states and the federal government.[311] It effectively attacked those jurisdictions that were systematically targeting minority voters, and it was successful in addressing the emergency.[312] However, after its initial success, the powers of the statute did not subside as the exigency diminished but rather continued to grow.[313]

Today, the VRA has a "radically revised aim" with its main purpose to ensure "reserved seats for black and Hispanic candidates."[314] The amended VRA "rests on a racism-everywhere vision," one that was appropriate in the 1960s but cannot be reasonably argued as an accurate view of the United States today.[315] The recent battle over the South Carolina voter ID law is proof of the changes that have occurred in this country with respect to race relations and voting rights, and it reveals that section 5 has outlived its constitutionality. The three-judge panel noted in its decision that South Carolina's voter ID law was one of the most lenient in the nation,[316] and yet South Carolina still remains a covered jurisdiction and must submit *any* change to its voting laws to the federal government for approval.[317] This "mother-may-I" requirement remains in place in just a few states and no longer represents a response to an emergency situation

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308. *Id.*

309. Thernstrom, *Section 5 of the Voting Rights Act*, *supra* note 54, at 43.

310. *See id.*

311. *See NAMUDNO*, 557 U.S. at 224 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting United States v. Bd. of Comm'rs of Sheffield, Ala., 435 U.S. 110, 141 (1978) (Stevens, J., dissenting)) (internal quotation mark omitted).

312. *See* Thernstrom, *Section 5 of the Voting Rights Act*, *supra* note 54, at 44 (citing U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT, *supra* note 266, at 43).

313. *Id.* at 44–45.

314. *Id.* at 45.

315. *Id.* at 42.

316. *See* South Carolina v. United States, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094, at *15–17 (D.D.C. Oct. 10, 2012) (citations omitted).

317. *NAMUDNO*, 557 U.S. at 198 (citing Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c(a) (2006))).

where states are involved in an "unremitting and ingenious defiance of the Constitution."[318]

For South Carolina's voter ID law, the section 5 process imposed a serious burden on the State. South Carolina was not able to have its law in place for the 2012 election, even though it had been duly passed by the General Assembly and signed by the Governor more than a year earlier.[319] Moreover, the litigation resulted in a cost of approximately $3.5 million, some of which must be paid by the taxpayers of South Carolina.[320] Overall, the great weight of the evidence does not justify continuing this unequal treatment of states as if the Jim Crow South still existed.[321] As Justice Clarence Thomas noted in his concurrence in *NAMUDNO*, "Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose."[322] Rather, proponents of section 5 should be championing the fact that the provision is no longer justified or needed. Admitting that a prophylactic law is outmoded is an "acknowledgement of victory,"[323] and the decision in *South Carolina v. United States* is cause to celebrate real change in the South.

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318. *Id.* at 221–26 (Thomas, J., concurring in the judgment in part and dissenting in part) (citations omitted) (internal quotation mark omitted).

319. *See South Carolina*, 2012 WL 4814094, at *17–19.

320. *See supra* notes 300–01 and accompanying text.

321. *See supra* text accompanying notes 309–15.

322. *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

323. *Id.*

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