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GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
FAX (212) 487-5349
www.vote.nyc.ny.us

AGENDA COMMISSIONER'S AGENDA TUESDAY, JUNE 23, 2009 AT 1:30 P.M.

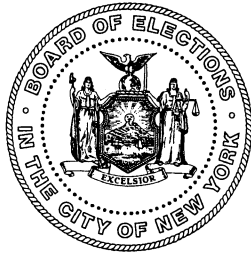
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1. Minutes
 - a) 5/19/09
 - b) 5/26/09
 - c) 6/02/09
 - d) 6/09/09
 2. Marcus Cederqvist
 - a) HAVA Update
 3. John Ward
 - a) Vacancy Report
 4. Executive Session
 - a) Personnel

For Your Information

- Candidates' Briefing Session
- Comments on the Proposed Amendments to the Rules and Regulations of the State Board of Elections
- NYS Board of Elections Weekly Status Report for the Week of June 12, 2009 through June 18, 2009
- NYS Board of Elections Weekly Status Report for the Week of June 5, 2009 through June 11, 2009
- NYS Board of Elections Weekly Status Report for the Week of June 29, 2009 through June 4, 2009
- Resolution No. 260 – Resolution Urging Continued Use of Lever Voting Machines in New York State
- Supreme Court of the United States Syllabus, October Term 2008
- Off the Floor – Election Law (Millman)
- Statewide Voter Registration List Regulations Matter

News Items of Interest

- *The Washington Post*: Firm to Give D.C. Information About Its Voting Devices



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JOHN J. WARD
FINANCE OFFICER

DATE: June 23, 2009
TO: Commissioners

FROM: John Ward
Finance Officer.

RE: Vacancies

					Inc.	New.
1	Assistant General Counsel					\$75,000
2	Valerie Marshall	Adm. Asst.	N.Y.	Dem.	\$39,440	\$37,562
3	Robert Helenius	VMT	Bklyn	Rep.	\$27,818	\$26,493
4	Lisa Sattie	Adm. Asst.	S.I.	Dem.	\$39,440	\$37,562
5	Steve Morena	Clerk.	Qns	Rep.	\$27,111	\$25,820
6	Roselie DeDomenico	Clerk.	Qns	Dem.	\$27,111	\$25,820

*Comments
Pg 1*

BOARD OF ELECTIONS

in the

CITY OF NEW YORK

CANDIDATES'

BRIEFING

SESSION

Thursday, June 18, 2009

DCAS Training Center, New York City

Remarks of

STEVEN H. RICHMAN

GENERAL COUNSEL

Good Morning.

I am Steven H. Richman, the General Counsel for the Board of Elections. I am the Board's Chief Legal Officer and Advisor.

The Board of Elections in the City of New York is charged with conducting fair and honest elections throughout the five boroughs. The permanent and temporary staff of the Board is dedicated to fulfilling that mandate and providing efficient, courteous service to all the candidates and voters in our great city.

I want to spend a few minutes to share some important information about this year's elections, including the petition process, voter registration matters as well as some reminders about what to do on Election Day.

All candidates should read and understand the applicable provisions of the New York State Election Law as well as the Rules and Regulations adopted both by the Board of Elections in the City of New York and the State Board of Elections.

Candidates may wish to consult with an attorney with experience and competence in Election Law matters in order to protect their rights.

The Board does not provide legal advice to candidates or recommend attorneys.

All candidates are required to comply with each and every provision of the Election Law and the Rules adopted by both the State Board of Elections and the Board of Elections in the City Of New York.

GENERAL INFORMATION - 2009 ELECTIONS

In 2009, the Primary Election is scheduled for TUESDAY, SEPTEMBER 15, 2009. Polls will be open from 6 AM to 9 PM.

If no candidate for Citywide Office, Mayor, Public Advocate or Comptroller receives 40% of the votes cast in a party's primary election on September 15th, the two candidates receiving the most votes in the Primary will face each other in a RUN-OFF Primary, which

will be held two weeks later, on **TUESDAY, SEPTEMBER 29, 2009**.
Once again the polls will be open from 6 AM to 9 PM.

The 2009 General Election will be held on **TUESDAY, NOVEMBER 3, 2009**. The polls will be open from 6 AM to 9 PM.

In 2009, all voters within the City of New York will nominate in the primary and elect in the General Election: the Mayor, Public Advocate and Comptroller of the City of New York, a Borough President in each borough of the City, all the members of the New York City Council, Districts Attorneys in New York and Kings Counties, and Civil Court Judges in all boroughs. In November, the voters will also elect Justices of the New York State Supreme Court in every borough except Brooklyn. In the September party primaries, in addition to choosing nominees for public office, some political parties in some or all of the boroughs will elect State Committee Members, District Leaders, County Committee Members along with Delegates and Alternates to the Judicial Conventions which nominate candidates for election to the New York State Supreme Court.

THE PETITION PROCESS

There are 2 distinct petition processes that will occur during this year.

The first is the *Designating Petition Process*. This is the method by which candidates qualify for the primary ballot of one of the five political parties with official ballot status — Democratic – Republican – Independence – Conservative – Working Families.

The second is the *Independent Nominating Petition Process*. This is the method by which candidates qualify for the November general election ballot as an independent candidate for a public office.

The basic process for both types of petitions is similar. You should always consult the appropriate set of BOE Rules as well as the Election Law.

DESIGNATING PETITIONS

I will briefly summarize the provisions of the Election Law and the Board's Rules relating to Designating Petitions. References to sections relate to parts of the Board's Rules which is available on the Board's website and at all Board offices.

Under the Election Law, the first day to circulate designating petitions was Tuesday, June 9, 2009. Designating petitions must be filed in person at the Board's Executive Offices on: Monday, July 13th -- Tuesday, July 14th and Wednesday, July 15th --- from 9 AM until 5 PM, and on Thursday, July 16th from 9 AM to Midnight.

All petitions, cover sheets, acceptances, declinations, and certificates of authorization must be submitted by the deadlines established by the Election Law and set forth on the Calendar by the candidate in proper and correct form which complies with the requirements of the Election Law and the Board's Rules. This calendar is including in our booklet which is available here for distribution as well as posted on the Board's website and available at each of our offices.

A petition is the term used to describe all the volumes of duly signed petition pages which the candidate claims on his or her cover sheet and provides the candidate with a sufficient number of signatures to qualify for the ballot.

For a petition consisting of a single volume of more than 10 pages or multiple volumes to be valid, the candidate must also timely file a cover sheet, which is really a summary sheet to be valid. This cover sheet is to be filed separately from the petition volumes; it is not to be attached to any petition volume! Please note that this is a relatively new requirement. See Part C of the Board's Rules.

Each petition volume must have a Board issued ID number on it. You can and should apply for these ID numbers before you submit your petitions. They can be obtained from the Candidate Records Unit at the Board's Executive Office. See Part B of the Board's Rules.

All petition sheets within a volume must be securely bound together. See Part A of the Board's Rules.

For designating petitions, the subscribing witness must be an enrolled member of that party residing anywhere in New York State.

For independent nominating petitions, the subscribing witness can be a registered voter residing anywhere in the State of New York.

Notary Publics of the State of New York and Commissioners of Deeds within the City of New York can also serve as subscribing witnesses for both Designating and Independent Nominating Petitions.

PETITION & COVER SHEET REVIEW PROCESS

When a petition and the candidate's cover sheet is filed, the staff of the Board has 2 business days to review those materials and determine if the petition and the cover sheet meet the statutory requirements. If the staff finds that one or more of the required elements is not present, we make a report of our findings to the Commissioners, who then determine if the petition and/or cover sheet is defective. Many defects are curable; some are not and are fatal defects.

If the Commissioners determine that a petition or cover sheet fails to meet the statutory requirements, the petition is ruled INVALID at that time. However, if the defect is curable, the Board will send the candidate or his designated contact person a Notice of Non-Compliance (often referred to as an "NCN Notice;) which then gives the candidate three (3) business days from the date of that Notice to attempt to cure the defect.

It is essential that you provide the Board with a working fax number that can receive such notices even after 5 PM. If you don't provide such a number and authorization, the Non-Compliance Notice will be sent by overnight mail, eating into your time to correct the defect.

Some petitions are defective on their face. The Board calls these Prima Facie Defects. They are not curable through the Board's administrative process. In the event that the Board finds a Prima Facie Defect, a notice will be sent to the candidate advising of that fact and the candidate's right to be heard and challenge that preliminary determination at the start of the petition hearings for that

borough. For example, a person who is a candidate for Democratic District Leader is an enrolled Conservative. That petition is Prima Facie Defective. I refer you to Part E of the Board's Rules.

If the defect is one that is curable, the candidate has three days to file the cure. That usually takes the form of an Amended Cover Sheet. Be sure to fill it out completely including the authorization statement at the bottom of the sample form. Also, be sure to attach a copy of the defective cover sheet is seeks to cure. See Part D of the Board's Rules for more information.

GENERAL AND SPECIFIC OBJECTIONS

An enrolled party member living in the district for a party position petition or any registered voter eligible to vote for the public office may challenge the validity of a petition.

General objections must be filed within 3 days of the filing of the last part of the petition. Specific objections must be filed with 6 days thereafter. See Parts G and H of the Board's Rules.

Those specific objections (if properly filed) are reviewed by the Board's staff and they make preliminary rulings on each objection. The appropriate Borough staff of the BOE prepares a Clerk's report which informs the Commissioners of their findings during the review of the petition. It sets forth the number of signatures submitted, the number found by the staff to be valid as well as those found to be invalid and the number required to qualify for the ballot.

If legal challenges are presented, a Counsel's Report in lieu or in addition to a Clerk's Report will be given to the Commissioners. A candidate or his or her duly authorized representative shall receive a copy of such report at least 24 hours prior to the Commissioners of Elections hearings on that matter. See Part I of the Rules for more information.

Please note that the summary of the Clerk's or Counsel's report must be made available to the candidate and the objector at least 24 hours before the Commissioners hearings. If you do not provide a fax number, it is your responsibility as a candidate to check with the

appropriate Board of Elections' office at least the day before the start of petition hearings for your borough.

BOE PUBLIC HEARINGS ON PETITION CHALLENGES

The Board will begin its hearings on challenges to designating petitions on Monday, August 3, 2009 at 10:00 AM in the Commissioners' Hearing Room on the 6th Floor of 42 Broadway in Manhattan and continuing on Tuesday and Wednesday of that week as required. A detailed schedule by Borough will be made available late on the afternoon of Tuesday, July 28, 2009. The first item for each borough will be a call of the Prima Facie matters.

These hearings are quasi-judicial hearings. All persons appearing must file a notice of appearance; those non-lawyers representing candidates must have a signed written statement of authorization to appear on their behalf.

At these hearings, both the objector and the candidate have the right to appear, be heard and offer evidence and information.

If you are challenging a finding of the Board's staff in a Clerk's or Counsel's report, you must present detailed specifics to rebut the Board's staff findings. Be prepared to identify specific signatures where errors were made (citing the volume, page and line number for each).

Usually, after hearing from both sides, the Commissioners either send the matter back for additional staff work, or more likely decided the matter on its merits right in front of the candidate and objector.

JUDICIAL PROCEEDINGS

The Board's determinations in petition matters may not be last word. Candidates in the Primary Election have until July 30, 2009 to institute judicial proceedings relating to designating petitions, or three (3) days after the Board removes a candidate from the ballot.

Election Law proceedings are given preference on the Court system's calendar and usually move at a very fast pace.

Please note that the Board of Elections must be named in every election law proceedings as well as served with a copy of the duly executed papers, usually in the form of an Order to Show Cause. These should be served on the Board at our Executive Offices at 32 Broadway, 7th Floor here in Manhattan.

Any attempt to restrain or enjoin the Board from printing absentee ballots will be strongly resisted by the Board in Court, including automatic stays through the appellate process.

At the end of each Court proceeding, each of the candidate's involved is required to immediately file a copy of the determination by the Court with the Board. This is particularly important when a Court either places a candidate on or takes a candidate off the ballot.

Of course, appellate review, to the Appellate Divisions, the NYS Court of Appeals and the federal Courts are possible, but the time track is most rapid and expensive.

THE FORM OF THE PRIMARY BALLOT

At this time, it is unclear which political parties will be conducting Primary Elections on September 15th. This year, we will still be using the lever voting machines, which may not be able to provide all parties with the ability to conduct their primaries on the voting machines. Some of the smaller party primaries may be conducted using paper ballots. The Board will ensure that the secrecy of the vote is preserved even if an all paper ballot primary is required. This may involve canvassing the votes on a unit basis larger than each Election District.

Also, we expect that legislation will be enacted shortly continuing the past practice that write-in voting for party positions will occur only when an Opportunity to Ballot or OTB position is filed. Also, write-in votes on the voting machine will not be counted at the poll site on Election Day; they will be canvassed when the voting machines are returned to the Voting Machine Facility during the required recanvass.

For both the September Primary Election and the November General Election, the Board of Elections, in compliance with a Federal Court

order will deploy at least one ballot marking device (BMD) at each poll site to assist those voters with disabilities in participating in the voting process. The BMD will allow a person with special needs to independently mark a paper ballot with their choices and then deposit that secret ballot into a ballot box to be counted when the polls close after 9 PM.

All candidates have a right to inspect the voting machines and paper ballots before the machines and BMDs are sealed and delivered to the poll sites. Each candidate will receive a written notice from the Board setting forth the dates and times for each opportunity to inspect and observe the key elements in this year's electoral process.

ELECTION DAY OPERATIONS

Each candidate has the right to designate poll watchers to view activities at poll sites on Election Day as well as observe the canvass and recanvass of votes. The Board has issued a special poll watchers guide which summarizes the duties and responsibilities of poll watchers as well as what limits are on their activities. Specifically, no poll watcher may interfere in the ability of the Inspectors or a voter from exercising the right to vote. A poll watcher may challenge a person's right to vote under the Election Law, but then the Inspectors carry out the process to determine if the person is eligible to vote.

Also, electioneering – the advocacy for or against a candidate – is prohibited within 100 feet of every entrance where a voter may enter a poll site. This includes both the main public entry way as well as the entry point for persons with disabilities. The poll workers together with the New York City Police Department enforce this rule.

PLEASE REMEMBER – THE POLL WORKERS – the Coordinator, the Inspectors, the Interpreters, the Door Clerks and the Information Clerks all have important jobs to do on Election Day and perform certain tasks mandated by law. Cooperate with them – work with them – don't interfere.

If you have a problem on Primary or Election Day: with a poll worker; with a broken machine; electioneering or any other election related

problem CALL THE BOARD at our toll free number 1- 866 – VOTE – NYC. Give our operators all the information you can. Specifically, the ED/AD involved, the poll site name and address, the name of the poll worker (if available) and a brief description of the problem. We will move swiftly to correct the situation or resolve the problem.

INDEPENDENT NOMINATING PETITIONS

I will briefly summarize the provisions of the Calendar relating to this year’s independent nominating petition process.

This year, the first day to circulate independent nominating petitions for November’s General Election is Tuesday, July 7, 2009.

Independent Nominating Petitions are to be filed at the Board’s Executive Offices beginning on Tuesday, August 11th and continuing on August 12th, 13th, 14th, and 17th from 9 AM until 5 PM. Tuesday, August 18th, 2009 is the last day to file independent nominating petitions and the Board will be open from 9 AM until Midnight.

With respect to independent nominating petitions, Candidates have until September 1, 2009 to institute judicial proceedings, or three (3) days after the Board removes a candidate from the ballot.

The Commissioners adopted the Independent Nominating Rules for 2009 on May 12, 2009 and they are currently awaiting pre-clearance by the Attorney General of the United States under the Voting Rights Act of 1965, as amended. When the Rules are pre-cleared they will be available at all Board offices and on the website along with a detailed calendar.

We hope that these materials will be available by the time the petitioning period begins. Traditionally, the Commissioners schedule hearings on challenges to independent nominating petitions for late in the first full week of SEPTEMBER.

VOTER REGISTRATION

The last area I want to cover for you today are the deadlines relating to voter registration:

The last day for a new voter to register for the September Primary is AUGUST 21st, 2009; The last day for a new voter to register for the November General Election is OCTOBER 9, 2009; On both of the last days to register the Board's Executive Office will be open until Midnight to receive any last minute registration forms.

If you are already enrolled in a political party, the last day to change your enrollment for the following year, 2010 is October 9, 2009. For a change of enrollment to be effective for this year, it had to be filed with the Board by October 10, 2008.

If you qualify for an absentee ballot, you must apply by specific dates:

For the Primary Election, a mailed application must be postmarked by September 8th or personally delivered to a Board office by September 14th, the day before the Primary election;

For the General Election, a mailed application must be postmarked by October 27, 2009 or personally delivered to a Board office by November 2, 2009.

Once again, more detailed information on absentee ballots is available on the Board's website.

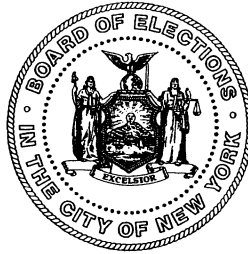
CONCLUSION

The 351 permanent staff members of the Board of Elections in the City of New York are dedicated to serving all of our voters. Please note that the Board cannot give specific legal advice or guidance to individual candidates or provide answers to relating to specific petitions, candidates, etc.

Please know that all of our materials that can assist you are available on the Board's website: www.vote.nyc.ny.us or available for distribution or sale at our Executive Offices.

Thank you for your attention this morning.

Revised: 6/15/09



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srichman@boe.nyc.ny.us

June 18, 2009

New York State Board of Elections
40 Steuben Street
Albany, NY 12207-2108
Attn: Robert Brehm
Deputy Director of Public Information

Re: Comments on the Proposed Amendments to the Rules and
Regulations of the State Board of Elections, N.Y. Comp.
Codes Rules & Regs. tit. 9, § 6217.5(3) (a)

To the New York State Board of Elections:

On behalf of the Commissioners of Elections in the City of New York (the "Commissioners"), I write to provide comments on the proposed amendments to the Rules and Regulations of the State Board of Elections, § 6217.5(3) (a) of Title 9 of the Official Compilation of Codes, Rules, and Regulations of the State of New York. The proposed amendments were published in the State Register on June 10, 2009 in Volume XXXI, Issue 23. In accordance with the New York State Administrative Procedure Act (SAPA), the State Board is required to receive and accept comments on these proposed amendments through July 28, 2009.

Comments of the Commissioners of Elections in the City of New York on the Proposed Amendments to the Rules and Regulations of the State Board of Elections, N.Y. Comp. Codes Rules & Regs. tit. 9, § 6217.5(3) (a)

The Commissioners oppose the proposed amendments: by removing the requirement that county boards of elections electronically document their compliance with the bipartisanship provisions of § 6217.5(3) (a) and the Election Law, the amendments decrease accountability and transparency. Bipartisanship is a basic tenant of New York's election law and procedure, and is a principle that is especially crucial to voter registration and qualification.

The State Constitution Article II, § 8 requires that “[a]ll laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters . . . shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes.” Under the Election Law, each application for registration must be “received by two members of the local board of inspectors, representing respectively the two political parties as provided herein for the appointment of inspectors.” Election L. § 5-202(2). Cancellation of a voter's registration must be approved by two members of the county board of elections or two employees of the board representing different political parties. Election L. § 5-404(1). Whenever a voter's registration is challenged, a bipartisan team of workers must investigate the voter's status. Election L. § 5-702(1).

Part 6217 of the Rules and Regulations of the State Board of Elections was enacted pursuant to § 5-614 of the Election Law, which created the Statewide Voter Registration List, a computerized list of registered voters known as NYSVoter. Part 6217 is comprised of “regulations in relation to the operation of . . . NYSVoter,” including the creation and maintenance of the computerized list. N.Y. Comp. Codes Rules & Regs. tit. 9, § 6217.1(1). Reflecting the importance of bipartisanship to voter registration, the regulation requires that “[a]ll voter registration activity must be done by a bipartisan team of workers to ensure

Comments of the Commissioners of Elections in the City of New York on the Proposed Amendments to the Rules and Regulations of the State Board of Elections, N.Y. Comp. Codes Rules & Regs. tit. 9, § 6217.5(3) (a)

fairness and uniformity in the process.” N.Y. Comp. Codes Rules & Regs. tit. 9, § 6217.5(3).

Under the existing version of § 6217.5(3)(a), before the information in an application for voter registration is sent to NYSVoter, the application must be reviewed by a member of each of the two major political parties, each of whom must electronically sign his or her work. Contrary to principles of bipartisanship, the proposed amendments to § 6217.5(3) (a) remove the electronic signing obligation and provide no alternative method for documenting compliance with the bipartisanship requirements of the regulation. The State Board of Elections, county boards, and voters will be left with absolutely no means of verifying compliance with the bipartisanship requirements of Election Law § 5-202(2) and the Rules and Regulations of the State Board of Elections.

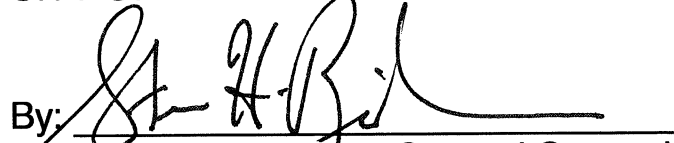
The Commissioners consider the proposed amendments a move in the wrong direction. Indeed, rather than *removing* the electronic verification requirements from § 6217.5(3) (a), the State Boards *should add* electronic verification requirements throughout § 6217, to ensure adherence to the Election Law’s bipartisanship requirements in all aspects of NYSVoter’s creation and maintenance. *See e.g.*, N.Y. Comp. Codes Rules & Regs. tit. 9, §§ 6217.7 (processing of voters who move between counties, including cancellation of registration); 6217.9 (determining voter registration status, including purged status); 6217.10 (voter registration list changes and list maintenance, including cancellation of registration).

Comments of the Commissioners of Elections in the City of New York on the Proposed Amendments to the Rules and Regulations of the State Board of Elections, N.Y. Comp. Codes Rules & Regs. tit. 9, § 6217.5(3) (a)

For the foregoing reasons, the Commissioners of Elections in the City of New York urge the Commissioners of the New York State Board of Elections to reject the proposed amendments to § 6217.5(3)(a).

Very truly yours,

THE BOARD OF ELECTIONS IN THE
CITY OF NEW YORK

By: 
Steven H. Richman, General Counsel

Copy: Peter J. Kiernan, Counsel to the Governor
Kathleen O'Keefe, Team Leader- Program and Counsel Staff,
New York State Assembly
Christopher Higgins, Assistant Counsel to the Majority, New
York State Senate
Peter Kosinski, Counsel, New York State Senate

NEW YORK STATE BOARD OF ELECTIONS

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James A. Walsh, Co-Chair
Evelyn J. Aquila, Commissioner
Gregory O. Peterson, Commissioner
Stanley L. Zalen, Co-Executive Director
Todd D. Valentine, Co-Executive Director

Comments of the Commissioners of Elections in the City of New York on the Proposed Amendments to the Rules and Regulations of the State Board of Elections, N.Y. Comp. Codes Rules & Regs. tit. 9, § 6217.5(3) (a)

BOARD OF ELECTIONS IN THE CITY OF NEW YORK

The Commissioners of Elections

Marcus Cederqvist, Executive Director

George Gonzalez, Deputy Executive Director

Pamela Perkins, Administrative Manager

Steve Ferguson, Director, Management Information Systems

Charles Webb, III, Esq., Counsel to the Commissioners

Steven Denkberg, Esq., Counsel to the Commissioners

John Owens, Esq., Director of Campaign Finance

Reporting Enforcement

NEW YORK CITY LAW DEPARTMENT

Michael A. Cardozo, Corporation Counsel

Eric Proshansky, Deputy Chief, Affirmative Litigation Division

Doris Bernhardt, Assistant Corporation Counsel

Michael Pastor, Assistant Corporation Counsel



State of New York
STATE BOARD OF ELECTIONS

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Todd D. Valentine
Executive Director
Stanley L. Zalen
Executive Director
Kimberly A. Galvin
Special Counsel
Paul M. Collins
Deputy Counsel

June 18, 2009

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending June 18, 2009.

Respectfully submitted,

s/ _____
Kimberly A. Galvin (505011)
Special Counsel

s/ _____
Paul M. Collins (101384)
Deputy Special Counsel

HAVA COMPLIANCE UPDATE
Activities & Progress for the Week of 6/12/09-6/18/09

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders.

PLAN A

Overall Compliance Status Summary

Overall, activities and progress toward HAVA compliance are on schedule as outlined in the most recent time line.

Contracting with Voting System Vendors

Status of tasks in this category: on schedule

- Contract extensions for both NYSTEC contracts were approved by the SBOE on June 15, 2009.

Testing, Certification, and Selection of Voting Systems & Devices

Status of tasks in this category: in jeopardy but on schedule with the most recent time line.

- Overall progress of testing :
 - SysTest is continuing on the Test. While some testing is taking more time than anticipated, SysTest is making adjustments to keep the testing on track and in compliance with the timeline.
 - NYSTEC has reviewed revisions to the Procedural Controls section of the GenSec test case draft from SysTest and provided feedback.
 - A conference call is scheduled for next week between NYSTEC, SysTest and Cigital to discuss the source code testing procedures and project status.

NEW YORK STATE BOARD OF ELECTIONS

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: on schedule.

- The centralized acceptance testing process has started at the warehouse location in Albany. It is anticipated that voting system units will be delivered for testing on Monday, June 22, 2009.

HAVA COMPLAINT PROCESS

NYC HAVA Complaint

The SBOE staff has had internal discussions and will be seeking guidance from the Board.



State of New York
STATE BOARD OF ELECTIONS

James A. Walsh
Chair
Douglas A. Kellner
Chair
Gregory P. Peterson
Commissioner
Evelyn J. Aquila
Commissioner

40 STEUBEN STREET
ALBANY, N.Y. 12207
Phone: 518/474-6367 Fax: 518/486-4546
website: www.elections.state.ny.us

Todd D. Valentine
Executive Director
Stanley L. Zalen
Executive Director
Kimberly A. Galvin
Special Counsel
Paul M. Collins
Deputy Counsel

June 12, 2009

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending June 11, 2009.

Respectfully submitted,

s/ _____
Kimberly A. Galvin (505011)
Special Counsel

s/ _____
Paul M. Collins (101384)
Deputy Special Counsel

HAVA COMPLIANCE UPDATE
Activities & Progress for the Week of 6/5/09 – 6/11/09

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders as Amended.

PLAN A

Overall Compliance Status Summary

Overall, activities and progress toward HAVA compliance are on schedule with the recent Amended Time Line.

Contracting with Voting System Vendors

Status of tasks in this category: *on schedule*

- SBOE agreed to the regular add requests made by ES&S and Sequoia's and they are at OSC for approval. All questions asked by OSC to date have been answered and they are working through their approval process.

Testing, Certification, and Selection of Voting Systems & Devices

Status of tasks in this category: *on schedule* with the recent Amended Time Line.

- Overall progress of testing :
 - The County receipt process is close to being finalized. Revisions have been made and sent to SBOE on June 9, 2009 for further review and approval. The process will be finalized by next week.
 - The draft Security Policy has been reviewed by SBOE and edits have been provided to NYSTEC .. Once the edits are completed NYSTEC will draft the security templates that will constitute an appendix to the security policy to provide starting points for county use in developing their unique procedures.
 - SysTest reports that testing is going well and that all deadlines are being met.

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: *on schedule*

- Since last week one county has indicated that it would like to participate in the pilot program to a significant degree and another has indicated that it would like to expand its participation beyond that previously approved by SBOE. Such requests will be discussed and the Board meeting on Monday, June 15th.
- Acceptance testing on new voting systems to be used in the pilot will begin next week in Albany.

HAVA COMPLAINT PROCESS

NYC HAVA Complaint

SBOE staff has discussed the issue at length and it will advise the Board as to their recommendation at the Board meeting on Monday, June 15th.



State of New York
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June 4, 2009

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending June 4, 2009.

Respectfully submitted,

s/ _____
Kimberly A. Galvin (505011)
Special Counsel

s/ _____
Paul M. Collins (101384)
Deputy Special Counsel

HAVA COMPLIANCE UPDATE
Activities & Progress for the Week 5/29/09-6/04/09

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders.

PLAN A

Overall Compliance Status Summary

Overall, activities and progress toward HAVA compliance are in jeopardy and behind schedule.

Contracting with Voting System Vendors

Status of tasks in this category: on schedule

- The vendor contract amendments were approved by OSC on May 29, 2009. The approved amendments were sent to SBOE and the vendors.
- OGS has issued purchase orders to the vendors for additional machines.

Testing, Certification, and Selection of Voting Systems & Devices

Status of tasks in this category: in jeopardy and behind schedule

- Overall progress of testing :
 - NYSTEC continues to assist in the testing effort by participating in conference calls with SysTest, SBOE and the vendors to clarify and resolve testing issues. Daily conference calls have started for security related discussions.
 - SBOE and NYSTEC are currently working on policies and procedures for the Lot 1 acceptance testing process, county receipt process, the auditing function and others in anticipation of presenting these at the June 23rd conference.

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: on schedule

- The SBOE, DOJ and AG's office have submitted a joint proposal to the Court outlining SBOE's Pilot Program Proposal and requesting that the Court review and order the same for the Fall elections and revise the timelines in the January 16, 2008 Remedial Order. Copies of these documents will be posted to the SBOE web site by the end of the week.

HAVA COMPLAINT PROCESS

NYC HAVA Complaint

On May 19, 2009 the NYC BOE responded to the State Board's Steering Committee's request for information. The SBOE staff is currently discussing the points made by NYC in an effort to determine how next to proceed.

FYI

Resolution No. 260

Supervisor JAMES CALLERY offered the following Resolution and moved its adoption:

**RESOLUTION URGING CONTINUED USE OF
LEVER VOTING MACHINES IN NEW YORK STATE**

WHEREAS, for decades, mechanical lever-style voting machines have been used throughout New York State with very few problems; and

WHEREAS, pursuant to the Help America Vote Act (HAVA), the NYS Board of Elections has mandated counties to purchase electronic voting machines; and

WHEREAS, the County has already augmented the lever voting machine with handicap accessible ballot marking devices, which satisfies HAVA requirements; and

WHEREAS, the State mandate to convert entirely to an optical scanner system will be extremely expensive to maintain, at County cost; and

WHEREAS, converting to a system whereby a large majority of voters will vote on electronic-type voting machines rather than time-tested lever voting machines has the potential to harm the integrity of the voting process in New York State; now, therefore be it

RESOLVED, That the Board of Supervisors hereby urges the State Legislature and NYS Board of Elections to authorize continued use of lever voting machines in New York State, supplemented by electronic ballot marking devices (BMD); and, be it further

RESOLVED, That certified copies of this Resolution be forwarded to the County Treasurer, Board of Elections, Governor David Paterson, Senate Majority Leader Malcolm Smith, Senator Hugh Farley, Assembly Speaker Sheldon Silver, Assemblyman Marc Butler, NYS Board of Elections, NYS Association of Towns, Administrative Officer/Clerk of the Board and to each and every other person, institution or agency who will further the purport of this Resolution.


Seconded by Supervisor FAGAN and adopted by the following vote:

TOTAL: Ayes: 20 Nays: 0

STATE OF NEW YORK }
COUNTY OF FULTON } "

I, Jon R. Stead, Clerk of the Board of Supervisors of Fulton County hereby certify that I have compared the foregoing resolution with the original resolution, adopted by the Board of Supervisors of said County, at a duly called and held meeting of said Board on the 8th day of JUNE 2009, and the same is a true and correct transcript therefrom and the whole thereof.

Witness my hand and official seal
this 8th day of JUNE 2009.


Clerk of the Board of Supervisors of Fulton County

County
1247

(Slip Opinion)

OCTOBER TERM, 2008

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**NORTHWEST AUSTIN MUNICIPAL UTILITY
DISTRICT NUMBER ONE v. HOLDER,
ATTORNEY GENERAL, ET AL.**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

No. 08–322. Argued April 29, 2009—Decided June 22, 2009

The appellant is a small utility district with an elected board. Because it is located in Texas, it is required by §5 of the Voting Rights Act of 1965 (Act) to seek federal preclearance before it can change anything about its elections, even though there is no evidence it has ever discriminated on the basis of race in those elections. The district filed suit seeking relief under the “bailout” provision in §4(a) of the Act, which allows a “political subdivision” to be released from the preclearance requirements if certain conditions are met. The district argued in the alternative that, if §5 were interpreted to render it ineligible for bailout, §5 was unconstitutional. The Federal District Court rejected both claims. It concluded that bailout under §4(a) is available only to counties, parishes, and subunits that register voters, not to an entity like the district that does not register its own voters. It also concluded that a 2006 amendment extending §5 for 25 years was constitutional.

Held:

1. The historic accomplishments of the Voting Rights Act are undeniable, but the Act now raises serious constitutional concerns. The preclearance requirement represents an intrusion into areas of state and local responsibility that is otherwise unfamiliar to our federal system. Some of the conditions that the Court relied upon in upholding this statutory scheme in *South Carolina v. Katzenbach*, 383 U. S. 301, and *City of Rome v. United States*, 446 U. S. 156, have unquestionably improved. Those improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to

NORTHWEST AUSTIN MUNICIPAL UTIL. DIST.
NO. ONE v. HOLDER

Syllabus

its success, but the Act imposes current burdens and must be justified by current needs. The Act also differentiates between the States in ways that may no longer be justified.

At the same time, the Court recognizes that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called upon to perform.” *Blodgett v. Holden*, 275 U. S. 142, 147–148 (Holmes, J., concurring). Here the District Court found that the sizable record compiled by Congress to support extension of §5 documented continuing racial discrimination and that §5 deterred discriminatory changes.

The Court will not shrink from its duty “as the bulwark of a limited Constitution against legislative encroachments,” *The Federalist* No. 78, but “[i]t is . . . well established. . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case,” *Escambia County v. McMillan*, 466 U. S. 48, 51. Here, the district also raises a statutory claim that it is eligible to bail out under §§4 and 5, and that claim is sufficient to resolve the appeal. Pp. 6–11.

2. The Act must be interpreted to permit all political subdivisions, including the district, to seek to bail out from the preclearance requirements. It is undisputed that the district is a “political subdivision” in the ordinary sense, but the Act also provides a narrower definition in §14(c)(2): “[P]olitical subdivision’ shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” The court below concluded that the district did not qualify for §4(a) bailout under this definition, but specific precedent, the Act’s structure, and underlying constitutional concerns compel a broader reading.

This Court has already established that §14(c)(2)’s definition does not apply to the term “political subdivision” in §5’s preclearance provision. See, e.g., *United States v. Sheffield Bd. of Comm’rs*, 435 U. S. 110. Rather, the “definition was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under §4(b).” *Id.*, at 128–129. “[O]nce a State has been [so] designated . . . , [the] definition . . . has no operative significance in determining [§5’s] reach.” *Dougherty County Bd. of Ed. v. White*, 439 U. S. 32, 44. In light of these decisions, §14(c)(2)’s definition should not constrict the availability of bailout either.

The Government responds that any such argument is foreclosed by *City of Rome*. In 1982, however, Congress expressly repudiated *City of Rome*. Thus, *City of Rome*’s logic is no longer applicable. The Gov-

Syllabus

ernment’s contention that the district is subject to §5 under *Sheffield* not because it is a “political subdivision” but because it is a “State” is counterintuitive and similarly untenable after the 1982 amendments. The Government’s contrary interpretation has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act. It is unlikely that Congress intended the provision to have such limited effect. Pp. 11–17.

573 F. Supp. 2d 221, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08–322

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, APPELLANT *v.* ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[June 22, 2009]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The plaintiff in this case is a small utility district raising a big question—the constitutionality of §5 of the Voting Rights Act. The district has an elected board, and is required by §5 to seek preclearance from federal authorities in Washington, D. C., before it can change anything about those elections. This is required even though there has never been any evidence of racial discrimination in voting in the district.

The district filed suit seeking relief from these preclearance obligations under the “bailout” provision of the Voting Rights Act. That provision allows the release of a “political subdivision” from the preclearance requirements if certain rigorous conditions are met. The court below denied relief, concluding that bailout was unavailable to a political subdivision like the utility district that did not register its own voters. The district appealed, arguing that the Act imposes no such limitation on bailout, and that if it does, the preclearance requirements are unconstitutional.

That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of §5.

I

A

The Fifteenth Amendment promises that the “right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.” U. S. Const., Amdt. 15, §1. In addition to that self-executing right, the Amendment also gives Congress the “power to enforce this article by appropriate legislation.” §2. The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure. Early enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow. *South Carolina v. Katzenbach*, 383 U. S. 301, 310 (1966); A. Keyssar, *The Right to Vote* 105–111 (2000). Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were creative in “contriving new rules” to continue violating the Fifteenth Amendment “in the face of adverse federal court decrees.” *Katzenbach, supra*, at 335; *Riley v. Kennedy*, 553 U. S. ___, ___ (2008) (slip op., at 2).

Congress responded with the Voting Rights Act. Section 2 of the Act operates nationwide; as it exists today, that provision forbids any “standard, practice, or procedure” that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” 42 U. S. C. §1973(a). Section 2 is not at issue in

Opinion of the Court

this case.

The remainder of the Act constitutes a “scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant.” *Katzenbach, supra*, at 315. Rather than continuing to depend on case-by-case litigation, the Act directly pre-empted the most powerful tools of black disenfranchisement in the covered areas. All literacy tests and similar voting qualifications were abolished by §4 of the Act. Voting Rights Act of 1965, §§4(a)–(d), 79 Stat. 438–439. Although such tests may have been facially neutral, they were easily manipulated to keep blacks from voting. The Act also empowered federal examiners to override state determinations about who was eligible to vote. §§ 6, 7, 9, 13, *id.*, at 439–442, 444–445.

These two remedies were bolstered by §5, which suspended all changes in state election procedure until they were submitted to and approved by a three-judge Federal District Court in Washington, D. C., or the Attorney General. *Id.*, at 439, codified as amended at 42 U. S. C. §1973c(a). Such preclearance is granted only if the change neither “has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.” *Ibid.* We have interpreted the requirements of §5 to apply not only to the ballot-access rights guaranteed by §4, but to drawing district lines as well. *Allen v. State Bd. of Elections*, 393 U. S. 544, 564–565 (1969).

To confine these remedies to areas of flagrant disenfranchisement, the Act applied them only to States that had used a forbidden test or device in November 1964, and had less than 50% voter registration or turnout in the 1964 Presidential election. §4(b), 79 Stat. 438. Congress recognized that the coverage formula it had adopted “might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices.” *Briscoe v. Bell*, 432 U. S. 404, 411 (1977). It therefore “afforded such jurisdictions immediately available protection in the form

of . . . [a] 'bailout' suit." *Ibid.*

To bail out under the current provision, a jurisdiction must seek a declaratory judgment from a three-judge District Court in Washington, D. C. 42 U. S. C. §§1973b(a)(1), 1973c(a). It must show that for the previous 10 years it has not used any forbidden voting test, has not been subject to any valid objection under §5, and has not been found liable for other voting rights violations; it must also show that it has "engaged in constructive efforts to eliminate intimidation and harassment" of voters, and similar measures. §§1973b(a)(1)(A)–(F). The Attorney General can consent to entry of judgment in favor of bailout if the evidence warrants it, though other interested parties are allowed to intervene in the declaratory judgment action. §1973b(a)(9). There are other restrictions: To bail out, a covered jurisdiction must show that every jurisdiction in its territory has complied with all of these requirements. §1973b(a)(3). The District Court also retains continuing jurisdiction over a successful bailout suit for 10 years, and may reinstate coverage if any violation is found. §1973b(a)(5).

As enacted, §§4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years. §4(a), 79 Stat. 438. We upheld the temporary Voting Rights Act of 1965 as an appropriate exercise of congressional power in *Katzenbach*, explaining that "[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." 383 U. S., at 308. We concluded that the problems Congress faced when it passed the Act were so dire that "exceptional conditions [could] justify legislative measures not otherwise appropriate." *Id.*, at 334–335 (citing *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398 (1934), and *Wilson v. New*, 243 U. S. 332 (1917)).

Congress reauthorized the Act in 1970 (for 5 years),

Opinion of the Court

1975 (for 7 years), and 1982 (for 25 years). The coverage formula remained the same, based on the use of voting-eligibility tests and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972. 42 U. S. C. §1973b(b). We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provisions. *Georgia v. United States*, 411 U. S. 526 (1973); *City of Rome v. United States*, 446 U. S. 156 (1980); *Lopez v. Monterey County*, 525 U. S. 266 (1999). Most recently, in 2006, Congress extended §5 for yet another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577. The 2006 Act retained 1972 as the last baseline year for triggering coverage under §5. It is that latest extension that is now before us.

B

Northwest Austin Municipal Utility District Number One was created in 1987 to deliver city services to residents of a portion of Travis County, Texas. It is governed by a board of five members, elected to staggered terms of four years. The district does not register voters but is responsible for its own elections; for administrative reasons, those elections are run by Travis County. Because the district is located in Texas, it is subject to the obligations of §5, although there is no evidence that it has ever discriminated on the basis of race.

The district filed suit in the District Court for the District of Columbia, seeking relief under the statute's bailout provisions and arguing in the alternative that, if interpreted to render the district ineligible for bailout, §5 was unconstitutional. The three-judge District Court rejected both claims. Under the statute, only a "State or political subdivision" is permitted to seek bailout, 42 U. S. C.

§1973b(a)(1)(A), and the court concluded that the district was not a political subdivision because that term includes only “counties, parishes, and voter-registering subunits,” *Northwest Austin Municipal Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 232 (2008). Turning to the district’s constitutional challenge, the court concluded that the 25-year extension of §5 was constitutional both because “Congress . . . rationally concluded that extending [§]5 was necessary to protect minorities from continued racial discrimination in voting” and because “the 2006 Amendment qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting.” *Id.*, at 283. We noted probable jurisdiction, 555 U. S. ___ (2009), and now reverse.

II

The historic accomplishments of the Voting Rights Act are undeniable. When it was first passed, unconstitutional discrimination was rampant and the “registration of voting-age whites ran roughly 50 percentage points or more ahead” of black registration in many covered States. *Katzenbach, supra*, at 313; H. R. Rep. No. 109–478, p. 12 (2006). Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites. *Id.*, at 12–13. Similar dramatic improvements have occurred for other racial minorities. *Id.*, at 18–20. “[M]any of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated.” *Id.*, at 12; *Bartlett v. Strickland*, 556 U. S. 1, ___ (2009) (slip op., at 5) (plurality opinion) (“Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote”).

Opinion of the Court

At the same time, §5, “which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial ‘federalism costs.’” *Lopez, supra*, at 282 (quoting *Miller v. Johnson*, 515 U. S. 900, 926 (1995)). These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of §5. *Katzenbach*, 383 U. S., at 358–362 (Black, J., concurring and dissenting); *Allen*, 393 U. S., at 586, n. 4 (Harlan, J., concurring in part and dissenting in part); *Georgia, supra*, at 545 (Powell, J., dissenting); *City of Rome*, 446 U. S., at 209–221 (Rehnquist, J., dissenting); *id.*, at 200–206 (Powell, J., dissenting); *Lopez*, 525 U. S., at 293–298 (THOMAS, J., dissenting); *id.*, at 288 (KENNEDY, J., concurring in judgment).

Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C. The preclearance requirement applies broadly, *NAACP v. Hampton County Election Comm’n*, 470 U. S. 166, 175–176 (1985), and in particular to every political subdivision in a covered State, no matter how small, *United States v. Sheffield Bd. of Comm’rs*, 435 U. S. 110, 117–118 (1978).

Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. See generally H. R. Rep. No. 109–478, at 12–18.

These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements. See Issacharoff, Is Section 5 of the Voting Rights

Act a Victim of Its Own Success? 104 Colum. L. Rev. 1710 (2004). It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.

The Act also differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty.” *United States v. Louisiana*, 363 U. S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845)); see also *Texas v. White*, 7 Wall. 700, 725–726 (1869). Distinctions can be justified in some cases. “The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.” *Katzenbach, supra*, at 328–329 (emphasis added). But 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.

These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. See *Georgia v. Ashcroft*, 539 U. S. 461, 491–492 (2003) (KENNEDY, J., concurring) (“Race cannot be the predominant factor in redistricting under our decision in *Miller v. Johnson*, 515 U. S. 900 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 seem to be what save it under §5”). Additional constitutional concerns are raised in saying that this tension between §§2 and 5 must persist in covered jurisdictions and not elsewhere.

The evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration

Opinion of the Court

and turnout is lower in the States originally covered by §5 than it is nationwide. E. Blum & L. Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3–6* (American Enterprise Institute, 2006). Congress heard warnings from supporters of extending §5 that the evidence in the record did not address “systematic differences between the covered and the non-covered areas of the United States[,] . . . and, in fact, the evidence that is in the record suggests that there is more similarity than difference.” The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., 10 (2006) (statement of Richard H. Pildes); see also Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *Yale L. J.* 174, 208 (2007) (“The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would . . . disrupt settled expectations”).

The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. The district argues that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,” Brief for Appellant 31, quoting *City of Boerne v. Flores*, 521 U. S. 507, 520 (1997); the Federal Government asserts that it is enough that the legislation be a “rational means to effectuate the constitutional prohibition,” Brief for Federal Appellee 6, quoting *Katzenbach, supra*, at 324. That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test.

In assessing those questions, we are keenly mindful of our institutional role. We fully appreciate that judging

the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called on to perform.” *Blodgett v. Holden*, 275 U. S. 142, 147–148 (1927) (Holmes, J., concurring). “The Congress is a co-equal branch of government whose Members take the same oath we do to uphold the Constitution of the United States.” *Rostker v. Goldberg*, 453 U. S. 57, 64 (1981). The Fifteenth Amendment empowers “Congress,” not the Court, to determine in the first instance what legislation is needed to enforce it. Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the District Court determined “document[ed] contemporary racial discrimination in covered states.” 573 F. Supp. 2d, at 265. The District Court also found that the record “demonstrat[ed] that section 5 prevents discriminatory voting changes” by “quietly but effectively deterring discriminatory changes.” *Id.*, at 264.

We will not shrink from our duty “as the bulwar[k] of a limited constitution against legislative encroachments,” *The Federalist* No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton), but “[i]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case,” *Escambia County v. McMillan*, 466 U. S. 48, 51 (1984) (*per curiam*). Here, the district also raises a statutory claim that it is eligible to bail out under §§4 and 5.

JUSTICE THOMAS argues that the principle of constitutional avoidance has no pertinence here. He contends that even if we resolve the district’s statutory argument in its favor, we would still have to reach the constitutional question, because the district’s statutory argument would not afford it all the relief it seeks. *Post*, at 1–3 (opinion concurring in judgment in part and dissenting in part).

We disagree. The district expressly describes its constitutional challenge to §5 as being “in the alternative” to its

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statutory argument. See Brief for Appellant 64 (“[T]he Court should reverse the judgment of the district court and render judgment that the district is entitled to use the bailout procedure or, in the alternative, that §5 cannot be constitutionally applied to the district”). The district’s counsel confirmed this at oral argument. See Tr. of Oral Arg. 14 (“[Question:] [D]o you acknowledge that if we find in your favor on the bailout point we need not reach the constitutional point? [Answer:] I do acknowledge that”). We therefore turn to the district’s statutory argument.

III

Section 4(b) of the Voting Rights Act authorizes a bailout suit by a “State or political subdivision.” 42 U. S. C. §1973b(a)(1)(A). There is no dispute that the district is a political subdivision of the State of Texas in the ordinary sense of the term. See, e.g., Black’s Law Dictionary 1197 (8th ed. 2004) (“A division of a state that exists primarily to discharge some function of local government”). The district was created under Texas law with “powers of government” relating to local utilities and natural resources. Tex. Const., Art. XVI, §59(b); Tex. Water Code Ann. §54.011 (West 2002); see also *Bennett v. Brown Cty. Water Improvement Dist. No. 1*, 272 S. W. 2d 498, 500 (Tex. 1954) (“[W]ater improvement district[s] . . . are held to be political subdivisions of the State” (internal quotation marks omitted)).

The Act, however, also provides a narrower statutory definition in §14(c)(2): “[P]olitical subdivision’ shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” 42 U. S. C. §1973l(c)(2). The District Court concluded that this definition applied to the bailout provision in §4(a), and that the district did not qualify, since it is not a county or parish

and does not conduct its own voter registration.

“Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case.” *Lawson v. Suwannee Fruit & S. S. Co.*, 336 U. S. 198, 201 (1949); see also *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755, 764 (1949); *Philko Aviation, Inc. v. Shackel*, 462 U. S. 406, 412 (1983). Were the scope of §4(a) considered in isolation from the rest of the statute and our prior cases, the District Court’s approach might well be correct. But here specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision.

Importantly, we do not write on a blank slate. Our decisions have already established that the statutory definition in §14(c)(2) does not apply to every use of the term “political subdivision” in the Act. We have, for example, concluded that the definition does not apply to the preclearance obligation of §5. According to its text, §5 applies only “[w]henEVER a [covered] State or political subdivision” enacts or administers a new voting practice. Yet in *Sheffield Bd. of Comm’rs*, 435 U. S. 110, we rejected the argument by a Texas city that it was neither a State nor a political subdivision as defined in the Act, and therefore did not need to seek preclearance of a voting change. The dissent agreed with the city, pointing out that the city did not meet the statutory definition of “political subdivision” and therefore could not be covered. *Id.*, at 141–144 (opinion of STEVENS, J.). The majority, however, relying on the purpose and structure of the Act, concluded that the “definition was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage under §4(b).” *Id.*, at 128–129; see also *id.*, at 130, n. 18 (“Congress’s exclusive objective in §14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under §4(b)”).

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We reaffirmed this restricted scope of the statutory definition the next Term in *Dougherty County Bd. of Ed. v. White*, 439 U. S. 32 (1978). There, a school board argued that because “it d[id] not meet the definition” of political subdivision in §14(c)(2), it “d[id] not come within the purview of §5.” *Id.*, at 43, 44. We responded:

“This contention is squarely foreclosed by our decision last Term in [*Sheffield*]. There, we expressly rejected the suggestion that the city of Sheffield was beyond the ambit of §5 because it did not itself register voters and hence was not a political subdivision as the term is defined in §14(c)(2) of the Act. . . . [O]nce a State has been designated for coverage, §14(c)(2)’s definition of political subdivision has no operative significance in determining the reach of §5.” *Id.*, at 44 (internal quotation marks omitted).

According to these decisions, then, the statutory definition of “political subdivision” in §14(c)(2) does not apply to every use of the term “political subdivision” in the Act. Even the intervenors who oppose the district’s bailout concede, for example, that the definition should not apply to §2, which bans racial discrimination in voting by “any State or political subdivision,” 42 U. S. C. §1973(a). See Brief for Intervenor-Appellee Texas State Conference of NAACP Branches et al. 17 (citing *Smith v. Salt River Project Agricultural Improvement and Power Dist.*, 109 F. 3d 586, 592–593 (CA9 1997)); see also *United States v. Uvalde Consol. Independent School Dist.*, 625 F. 2d 547, 554 (CA5 1980) (“[T]he Supreme Court has held that this definition [in §14(c)(2)] limits the meaning of the phrase ‘State or political subdivision’ only when it appears in certain parts of the Act, and that it does not confine the phrase as used elsewhere in the Act”). In light of our holdings that the statutory definition does not constrict the scope of preclearance required by §5, the district ar-

gues, it only stands to reason that the definition should not constrict the availability of bailout from those pre-clearance requirements either.

The Government responds that any such argument is foreclosed by our interpretation of the statute in *City of Rome*, 446 U. S. 156. There, it argues, we made clear that the discussion of political subdivisions in *Sheffield* was dictum, and “specifically held that a ‘city is not a “political subdivision” for purposes of §4(a) bailout.” Brief for Federal Appellee 14 (quoting *City of Rome*, *supra*, at 168).

Even if that is what *City of Rome* held, the premises of its statutory holding did not survive later changes in the law. In *City of Rome* we rejected the city’s attempt to bail out from coverage under §5, concluding that “political units of a covered jurisdiction cannot independently bring a §4(a) bailout action.” 446 U. S., at 167. We concluded that the statute as then written authorized a bailout suit only by a “State” subject to the coverage formula, or a “political subdivision with respect to which [coverage] determinations have been made as a separate unit,” *id.*, at 164, n. 2 (quoting 42 U. S. C. §1973b(a) (1976 ed.)); see also 446 U. S., at 163–169. Political subdivisions covered because they were part of a covered State, rather than because of separate coverage determinations, could not separately bail out. As JUSTICE STEVENS put it, “[t]he political subdivisions of a covered State” were “not entitled to bail out in a piecemeal fashion.” *Id.*, at 192 (concurring opinion).

In 1982, however, Congress expressly repudiated *City of Rome* and instead embraced “piecemeal” bailout. As part of an overhaul of the bailout provision, Congress amended the Voting Rights Act to expressly provide that bailout was also available to “political subdivisions” in a covered State, “though [coverage] determinations were *not* made with respect to such subdivision as a separate unit.” Voting Rights Act Amendments of 1982, 96 Stat. 131,

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codified at 42 U. S. C. §1973b(a)(1) (emphasis added). In other words, Congress decided that a jurisdiction covered because it was within a covered State need not remain covered for as long as the State did. If the subdivision met the bailout requirements, it could bail out, even if the State could not. In light of these amendments, our logic for denying bailout in *City of Rome* is no longer applicable to the Voting Rights Act—if anything, that logic compels the opposite conclusion.

Bailout and preclearance under §5 are now governed by a principle of symmetry. “Given the Court’s decision in *Sheffield* that all political units in a covered State are to be treated for §5 purposes as though they were ‘political subdivisions’ of that State, it follows that they should also be treated as such for purposes of §4(a)’s bailout provisions.” *City of Rome, supra*, at 192 (STEVENS, J., concurring).

The Government contends that this reading of *Sheffield* is mistaken, and that the district is subject to §5 under our decision in *Sheffield* not because it is a “political subdivision” but because it is a “State.” That would mean it could bail out only if the whole State could bail out.

The assertion that the district is a State is at least counterintuitive. We acknowledge, however, that there has been much confusion over why *Sheffield* held the city in that case to be covered by the text of §5. See *City of Rome*, 446 U. S., at 168–169; *id.*, at 192 (STEVENS, J., concurring); see also *Uvalde Consol. Independent School Dist. v. United States*, 451 U. S. 1002, 1004, n. 4 (1981) (Rehnquist, J., dissenting from denial of certiorari) (“[T]his Court has not yet settled on the proper construction of the term ‘political subdivision’”).

But after the 1982 amendments, the Government’s position is untenable. If the district is considered the State, and therefore necessarily subject to preclearance so long as Texas is covered, then the same must be true of all other subdivisions of the State, including counties. That

would render even counties unable to seek bailout so long as their State was covered. But that is the very restriction the 1982 amendments overturned. Nobody denies that counties in a covered State can seek bailout, as several of them have. See Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., 2599–2834 (2005) (detailing bailouts). Because such piecemeal bailout is now permitted, it cannot be true that §5 treats every governmental unit as the State itself.

The Government’s contrary interpretation has helped to render the bailout provision all but a nullity. Since 1982, only 17 jurisdictions—out of the more than 12,000 covered political subdivisions—have successfully bailed out of the Act. App. to Brief for Jurisdictions That Have Bailed Out as *Amici Curiae* 3; Dept. of Commerce, Bureau of Census, 2002 Census of Governments, Vol. 1, No. 1, pp. 1, 22–60. It is unlikely that Congress intended the provision to have such limited effect. See *United States v. Hayes*, 555 U. S. ___, ___ (2009) (slip op., at 10).

We therefore hold that all political subdivisions—not only those described in §14(c)(2)—are eligible to file a bailout suit.

* * *

More than 40 years ago, this Court concluded that “exceptional conditions” prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. *Katzenbach*, 383 U. S., at 334. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its

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preclearance requirements.

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 08–322

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, APPELLANT *v.* ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[June 22, 2009]

JUSTICE THOMAS, concurring in the judgment in part and dissenting in part.

This appeal presents two questions: first, whether appellant is entitled to bail out from coverage under the Voting Rights Act of 1965 (VRA); and second, whether the preclearance requirement of §5 of the VRA is unconstitutional. Because the Court’s statutory decision does not provide appellant with full relief, I conclude that it is inappropriate to apply the constitutional avoidance doctrine in this case. I would therefore decide the constitutional issue presented and hold that §5 exceeds Congress’ power to enforce the Fifteenth Amendment.

I

The doctrine of constitutional avoidance factors heavily in the Court’s conclusion that appellant is eligible for bailout as a “political subdivision” under §4(a) of the VRA. See *ante*, at 11. Regardless of the Court’s resolution of the statutory question, I am in full agreement that this case raises serious questions concerning the constitutionality of §5 of the VRA. But, unlike the Court, I do not believe that the doctrine of constitutional avoidance is applicable here. The ultimate relief sought in this case is not bailout eligi-

bility—it is bailout itself. See First Amended Complaint in No. 06–1384 (DDC), p. 8, Record, Doc. 83 (“Plaintiff requests the Court to declare that the district has met the bail-out requirements of §4 of the [VRA] and that the preclearance requirements of §5 . . . no longer apply to the district; or, in the alternative, that §5 of the Act as applied to the district is an unconstitutional overextension of Congress’s enforcement power to remedy past violations of the Fifteenth Amendment”).

Eligibility for bailout turns on the statutory question addressed by the Court—the proper definition of “political subdivision” in the bailout clauses of §4(a) of the VRA. Entitlement to bailout, however, requires a covered “political subdivision” to submit substantial evidence indicating that it is not engaging in “discrimination in voting on account of race,” see 42 U. S. C. §1973b(a)(3). The Court properly declines to give appellant bailout because appellant has not yet proved its compliance with the statutory requirements for such relief. See §§1973b(a)(1)–(3). In fact, the record below shows that appellant’s factual entitlement to bailout is a vigorously contested issue. See, e.g., NAACP’s Statement of Undisputed Material Facts in No. 06–1384 (DDC), pp. 490–492, Record, Doc. 100; Attorney General’s Statement of Uncontested Material Facts in No. 06–1384 (DDC), ¶¶19, 59, Record, Doc. 98. Given its resolution of the statutory question, the Court has thus correctly remanded the case for resolution of appellant’s factual entitlement to bailout. See *ante*, at 16.

But because the Court is not in a position to award appellant bailout, adjudication of the constitutionality of §5, in my view, cannot be avoided. “Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional read-

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ing.” *Clark v. Martinez*, 543 U. S. 371, 395 (2005) (THOMAS, J., dissenting). To the extent that constitutional avoidance is a worthwhile tool of statutory construction, it is because it allows a court to dispose of an entire case on grounds that do not require the court to pass on a statute’s constitutionality. See *Ashwander v. TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of”); see also, e.g., *Mayor of Philadelphia v. Educational Equality League*, 415 U. S. 605, 629 (1974). The doctrine “avoids decision of constitutional questions where possible, and it permits one lawsuit, rather than two, to resolve the entire controversy.” C. Wright, *The Law of Federal Courts* §19, p. 104 (4th ed. 1983). Absent a determination that appellant is not just eligible for bailout, but is entitled to it, this case will not have been entirely disposed of on a nonconstitutional ground. Cf. Tr. of Oral Arg. 14 (“[I]f the Court were to give us bailout . . . the Court might choose on its own not to reach the constitutional issues because we would receive relief”). Invocation of the doctrine of constitutional avoidance is therefore inappropriate in this case.

The doctrine of constitutional avoidance is also unavailable here because an interpretation of §4(a) that merely makes more political subdivisions *eligible* for bailout does not render §5 constitutional and the Court notably does not suggest otherwise. See *Clark, supra*, at 396 (THOMAS, J., dissenting). Bailout eligibility is a distant prospect for most covered jurisdictions. To obtain bailout a covered jurisdiction must satisfy numerous objective criteria. It must show that during the previous 10 years: (A) no “test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color”; (B) “no final judgment of any court of the United States . . .

has determined that denials or abridgments of the right to vote on account of race or color have occurred anywhere in the territory of” the covered jurisdiction; (C) “no Federal examiners or observers . . . have been assigned to” the covered jurisdiction; (D) the covered jurisdiction has fully complied with §5; and (E) “the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under [§5].” §§1973b(a)(1)(A)–(E). The jurisdiction also has the burden of presenting “evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.” §1973b(a)(2).

These extensive requirements may be difficult to satisfy, see Brief for Georgia Governor Sonny Purdue as *Amicus Curiae* 20–26, but at least they are objective. The covered jurisdiction seeking bailout must also meet subjective criteria: it must “(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected [under the Act]; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.” §§1973b(a)(1)(F)(i)–(iii).

As a result, a covered jurisdiction meeting each of the objective conditions could nonetheless be denied bailout because it has not, in the subjective view of the United States District Court for the District of Columbia, engaged in sufficiently “constructive efforts” to expand voting opportunities, §1973b(a)(1)(F)(iii). Congress, of course, has complete authority to set the terms of bailout. But its

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promise of a bailout opportunity has, in the great majority of cases, turned out to be no more than a mirage. As the Court notes, only a handful “of the more than 12,000 covered political subdivisions . . . have successfully bailed out of the Act.” *Ante*, at 16;¹ see Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 Wash. U. L. Q. 1, 42 (1984) (explaining that “the conditions for termination of coverage have been made so restrictive that bailout will continue to be impossible for most jurisdictions”). Accordingly, bailout eligibility does not eliminate the issue of §5’s constitutionality.

II

The Court quite properly alerts Congress that §5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional. See *ante*, at 7–9. And, although I respect the Court’s careful approach to this weighty issue, I nevertheless believe it is necessary to definitively resolve that important question. For the reasons set forth below, I conclude that the lack of current evidence of intentional discrimination with respect to voting renders §5 unconstitutional. The provision can no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment.

A

“The government of the United States is one of delegated powers alone. Its authority is defined and limited

¹All 17 covered jurisdictions that have been awarded bailout are from Virginia, see *ante*, at 15–16, and all 17 were represented by the same attorney—a former lawyer in the Voting Rights Section of the Department of Justice, see Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in *Voting Rights Act Reauthorization of 2006*, p. 257, n. 1 (A. Henderson ed. 2007). Whatever the reason for this anomaly, it only underscores how little relationship there is between the existence of bailout and the constitutionality of §5.

by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people.” *United States v. Cruikshank*, 92 U. S. 542, 551 (1876); see also *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 848 (1995) (THOMAS, J., dissenting). In the specific area of voting rights, this Court has consistently recognized that the Constitution gives the States primary authority over the structuring of electoral systems. See, e.g., *White v. Weiser*, 412 U. S. 783, 795 (1973); *Burns v. Richardson*, 384 U. S. 73, 84–85 (1966). “No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.” *Oregon v. Mitchell*, 400 U. S. 112, 125 (1970) (opinion of Black, J.).

State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority. See U. S. Const., Amdt. 10 (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”); see also *Alden v. Maine*, 527 U. S. 706, 713 (1999). In the main, the “Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” *Gregory v. Ashcroft*, 501 U. S. 452, 461–462 (1991) (internal quotation marks omitted).

To be sure, state authority over local elections is not absolute under the Constitution. The Fifteenth Amendment guarantees that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” §1, and it grants Con-

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gress the authority to “enforce” these rights “by appropriate legislation,” §2. The Fifteenth Amendment thus renders unconstitutional any federal or state law that would limit a citizen’s access to the ballot on one of the three bases enumerated in the Amendment. See *Mobile v. Bolden*, 446 U. S. 55, 65 (1980) (plurality opinion) (the Fifteenth Amendment guards against “purposefully discriminatory denial or abridgment by government of the freedom to vote”). Nonetheless, because States still retain sovereign authority over their election systems, any measure enacted in furtherance of the Fifteenth Amendment must be closely examined to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement of this ban on discrimination.

There is certainly no question that the VRA initially “was passed pursuant to Congress’ authority under the Fifteenth Amendment.” *Lopez v. Monterey County*, 525 U. S. 266, 282 (1999). For example, §§2 and 4(a) seek to implement the Fifteenth Amendment’s substantive command by creating a private cause of action to enforce §1 of the Fifteenth Amendment, see §1973(a), and by banning discriminatory tests and devices in covered jurisdictions, see §1973b(a); see also *City of Lockhart v. United States*, 460 U. S. 125, 139 (1983) (Marshall, J., concurring in part and dissenting in part) (explaining that §2 reflects Congress’ determination “that voting discrimination was a nationwide problem” that called for a “general prohibition of discriminatory practices”). Other provisions of the VRA also directly enforce the Fifteenth Amendment. See §1973h (elimination of poll taxes that effectively deny certain racial groups the right to vote); §1973i(a) (“No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote . . . or willfully fail or refuse to tabulate, count, and report such person’s vote”).

Section 5, however, was enacted for a different purpose:

to prevent covered jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§2 and 4(a). See *Reno v. Bossier Parish School Bd.*, 520 U. S. 471, 477 (1997) (explaining that §§2 and 5 “combat different evils” and “impose very different duties upon the States”). Section 5 “was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory.” *Beer v. United States*, 425 U. S. 130, 140 (1976) (internal quotation marks omitted).

The rebellion against the enfranchisement of blacks in the wake of ratification of the Fifteenth Amendment illustrated the need for increased federal intervention to protect the right to vote. Almost immediately following Reconstruction, blacks attempting to vote were met with coordinated intimidation and violence. See, e.g., L. McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* 34 (2003) (“By 1872, the legislative and executive branches of state government . . . were once again firmly in the control of white Democrats, who resorted to a variety of tactics, including fraud, intimidation, and violence, to take away the vote from blacks, despite ratification of the Fifteenth Amendment in 1870 . . .”).² A

²See also S. Rep. No. 41, 42d Cong., 2d Sess., pt. 7, p. 610 (1872) (quoting a Ku Klux Klan letter warning a black man from Georgia to “stay at home if you value your life, and not vote at all, and advise all of your race to do the same thing. You are marked and closely watched by K. K. K. . . .”); see also Jackson Daily Mississippian, Dec. 29, 1887, reprinted in S. Misc. Doc. No. 106, 50th Cong., 1st Sess., 14 (1888) (“[W]e hereby warn the negroes that if any one of their race attempts to run for office in the approaching municipal election he does so at his supremest peril, and we further warn any and all negroes of this city against attempting, at their utmost hazard, by vote or influence, to foist

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soon-to-be victorious mayoral candidate in Wilmington, North Carolina, for example, urged white voters in an 1898 election-eve speech: “Go to the polls tomorrow and if you find the negro out voting, tell him to leave the polls, and if he refuses kill him; shoot him down in his tracks.” S. Tolnay & E. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930*, p. 67 (1995).

This campaign of violence eventually was supplemented, and in part replaced, by more subtle methods engineered to deny blacks the right to vote. See *South Carolina v. Katzenbach*, 383 U. S. 301, 310–312 (1966). Literacy tests were particularly effective: “as of 1890 in . . . States [with literacy tests], more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write,” *id.*, at 311, because “[p]rior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write,” see also *id.*, at 311, n. 10.³ Compounding the tests’ discriminatory impact on blacks, alternative voter qualification laws such as “grandfather clauses, property qualifications, [and] ‘good character’ tests” were enacted to protect those whites who were unable to pass the literacy tests. *Id.*, at 311; see

on us again this black and damnable machine miscalled a government of our city” (publishing resolutions passed by the Young White Men’s League of Jackson)).

³Although tests had become the main tool for disenfranchising blacks, state governments engaged in violence into 1965. See Daniel, *Tear Gas, Clubs Halt 600 in Selma March*, *Washington Times Herald*, Mar. 8, 1965, pp. A1, A3 (“State troopers and mounted deputies bombarded 600 praying Negroes with tear gas today and then waded into them with clubs, whips and ropes, injuring scores. . . . The Negroes started out today to walk the 50 miles to Montgomery to protest to [Governor] Wallace the denial of Negro voting rights in Alabama”); Banner, *Aid for Selma Negroes*, *N. Y. Times*, Mar. 14, 1965, p. E11 (“We should remember March 7, 1965 as ‘Bloody Sunday in Selma.’ It is now clear that the public officials and the police of Alabama are at war with those citizens who are Negroes and who are determined to exercise their rights under the Constitution of the United States”).

also *Lopez, supra*, at 297 (THOMAS, J., dissenting) (“Literacy tests were unfairly administered; whites were given easy questions, and blacks were given more difficult questions, such as the number of bubbles in a soap bar, the news contained in a copy of the *Peking Daily*, the meaning of obscure passages in state constitutions, and the definition of terms such as *habeas corpus*” (internal quotation marks omitted)).

The Court had declared many of these “tests and devices” unconstitutional, see *Katzenbach, supra*, at 311–312, but case-by-case eradication was woefully inadequate to ensure that the franchise extended to all citizens regardless of race, see *id.*, at 328. As a result, enforcement efforts before the enactment of §5 had rendered the right to vote illusory for blacks in the Jim Crow South. Despite the Civil War’s bloody purchase of the Fifteenth Amendment, “the reality remained far from the promise.” *Rice v. Cayetano*, 528 U. S. 495, 512–513 (2000); see also R. Wardlaw, *Negro Suffrage in Georgia, 1867–1930*, p. 34 (Phelps-Stokes Fellowship Studies, No. 11, 1932) (“Southern States were setting out to accomplish an effective nullification of the war measures of Congress”).

Thus, by 1965, Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination. By that time, race-based voting discrimination had “infected the electoral process in parts of our country for nearly a century.” *Katzenbach*, 383 U. S., at 308. Moreover, the massive scale of disenfranchisement efforts made case-by-case enforcement of the Fifteenth Amendment impossible, if not Sisyphean. See *id.*, at 309 (“Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment”); *Rice, supra*, at 513 (“Progress

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was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter”); Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 *Geo. J. L. & Pub. Pol’y* 41, 44 (2007) (“In 1965, it was perfectly reasonable to believe that *any* move affecting black enfranchisement in the Deep South was deeply suspect. And only such a punitive measure [as §5] had any hope of forcing the South to let blacks vote” (emphasis in original)).

It was against this backdrop of “historical experience” that §5 was first enacted and upheld against a constitutional challenge. See *Katzenbach, supra*, at 308. As the *Katzenbach* Court explained, §5, which applied to those States and political subdivisions that had employed discriminatory tests and devices in the previous Presidential election, see 42 U. S. C. §1973b(b), directly targeted the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” 383 U. S., at 309; see also *id.*, at 329 (“Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act”). According to the Court, it was appropriate to radically interfere with control over local elections only in those jurisdictions with a history of discriminatory disenfranchisement as those were “the geographic areas where immediate action seemed necessary.” *Id.*, at 328. The Court believed it was thus “permissible to impose the new remedies” on the jurisdictions covered under §4(b) “at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years.” *Id.*, at 330.

In upholding §5 in *Katzenbach*, the Court nonetheless noted that the provision was an “uncommon exercise of congressional power” that would not have been “appropriate” absent the “exceptional conditions” and “unique cir-

cumstances” present in the targeted jurisdictions at that particular time. *Id.*, at 334–335. In reaching its decision, the Court thus refused to simply accept Congress’ representation that the extreme measure was necessary to enforce the Fifteenth Amendment; rather, it closely reviewed the record compiled by Congress to ensure that §5 was “‘appropriate’” antievasion legislation. See *id.*, at 308. In so doing, the Court highlighted evidence showing that black voter registration rates ran approximately 50 percentage points lower than white voter registration in several States. See *id.*, at 313. It also noted that the registration rate for blacks in Alabama “rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964.” *Ibid.* The Court further observed that voter turnout levels in covered jurisdictions had been at least 12% below the national average in the 1964 Presidential election. See *id.*, at 329–330.

The statistical evidence confirmed Congress’ judgment that “the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees” was working and could not be defeated through case-by-case enforcement of the Fifteenth Amendment. *Id.*, at 335. This record also clearly supported Congress’ predictive judgment that such “States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.” *Ibid.* These stark statistics—in conjunction with the unrelenting use of discriminatory tests and practices that denied blacks the right to vote—constituted sufficient proof of “actual voting discrimination” to uphold the preclearance requirement imposed by §5 on the covered jurisdictions as an appropriate exercise of congressional power under the Fifteenth Amendment. *Id.*, at 330. It was only “[u]nder

Opinion of THOMAS, J.

the compulsion of these unique circumstances [that] Congress responded in a permissibly decisive manner.” *Id.*, at 335.

B

Several important principles emerge from *Katzenbach* and the decisions that followed it. First, §5 prohibits more state voting practices than those necessarily encompassed by the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment. The explicit command of the Fifteenth Amendment is a prohibition on state practices that in fact deny individuals the right to vote “on account of” race, color, or previous servitude. In contrast, §5 is the quintessential prophylaxis; it “goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D. C.” *Ante*, at 7. The Court has freely acknowledged that such legislation is preventative, upholding it based on the view that the Reconstruction Amendments give Congress the power “both to remedy and to *deter* violation of rights guaranteed thereunder by prohibiting a *somewhat broader* swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Kimel v. Florida Bd. of Regents*, 528 U. S. 62, 81 (2000) (emphasis added).

Second, because it sweeps more broadly than the substantive command of the Fifteenth Amendment, §5 pushes the outer boundaries of Congress’ Fifteenth Amendment enforcement authority. See *Miller v. Johnson*, 515 U. S. 900, 926 (1995) (detailing the “federalism costs exacted by §5”); *Presley v. Etowah County Comm’n*, 502 U. S. 491, 500–501 (1992) (describing §5 as “an extraordinary departure from the traditional course of relations between the States and the Federal Government”); *City of Rome v. United States*, 446 U. S. 156, 200 (1980) (Powell, J., dis-

senting) (“The preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act”); *Lopez*, 525 U. S., at 293 (THOMAS, J., dissenting) (“Section 5 is a unique requirement that exacts significant federalism costs”); *ante*, at 7 (“[Section] 5, which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial federalism costs” (internal quotation marks omitted)).

Indeed, §5’s preclearance requirement is “one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a ‘substantial departure . . . from ordinary concepts of our federal system’; its encroachment on state sovereignty is significant and undeniable.” *United States v. Sheffield Bd. of Comm’rs*, 435 U. S. 110, 141 (1978) (STEVENS, J., dissenting) (footnote omitted). This “encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity.” *City of Rome, supra*, at 201 (Powell, J., dissenting). More than 40 years after its enactment, this intrusion has become increasingly difficult to justify.

Third, to accommodate the tension between the constitutional imperatives of the Fifteenth and Tenth Amendments—a balance between allowing the Federal Government to patrol state voting practices for discrimination and preserving the States’ significant interest in self-determination—the constitutionality of §5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible. See *Katzenbach*, 383 U. S., at 308 (“Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting”); *Katzenbach v. Morgan*, 384 U. S. 641, 667 (1966) (Harlan, J., dissenting) (“Congress made a detailed

Opinion of THOMAS, J.

investigation of various state practices that had been used to deprive Negroes of the franchise”). “There can be no remedy without a wrong. Essential to our holdings in [*South Carolina v. Katzenbach* and *City of Rome* was our conclusion that Congress was remedying the effects of prior *intentional* racial discrimination. In both cases, we required Congress to have some evidence that the jurisdiction burdened with preclearance obligations had actually engaged in such intentional discrimination.” *Lopez, supra*, at 294–295 (THOMAS, J., dissenting) (emphasis in original).

The Court has never deviated from this understanding. We have explained that prophylactic legislation designed to enforce the Reconstruction Amendments must “identify conduct transgressing the . . . substantive provisions” it seeks to enforce and be tailored “to remedying or preventing such conduct.” *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 639 (1999). Congress must establish a “history and pattern” of constitutional violations to establish the need for §5 by justifying a remedy that pushes the limits of its constitutional authority. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356, 368 (2001). As a result, for §5 to withstand renewed constitutional scrutiny, there must be a demonstrated connection between the “remedial measures” chosen and the “evil presented” in the record made by Congress when it renewed the Act. *City of Boerne v. Flores*, 521 U. S. 507, 530 (1997). “Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” *Ibid.*

C

The extensive pattern of discrimination that led the Court to previously uphold §5 as enforcing the Fifteenth Amendment no longer exists. Covered jurisdictions are not now engaged in a systematic campaign to deny black

citizens access to the ballot through intimidation and violence. And the days of “grandfather clauses, property qualifications, ‘good character’ tests, and the requirement that registrants ‘understand’ or ‘interpret’ certain matter,” *Katzenbach*, 383 U. S., at 311, are gone. There is thus currently no concerted effort in these jurisdictions to engage in the “unremitting and ingenious defiance of the Constitution,” *id.*, at 309, that served as the constitutional basis for upholding the “uncommon exercise of congressional power” embodied in §5, *id.*, at 334.

The lack of sufficient evidence that the covered jurisdictions currently engage in the type of discrimination that underlay the enactment of §5 undermines any basis for retaining it. Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose. Those supporting §5’s reenactment argue that without it these jurisdictions would return to the racially discriminatory practices of 30 and 40 years ago. But there is no evidence that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting. Without such evidence, the charge can only be premised on outdated assumptions about racial attitudes in the covered jurisdictions. Admitting that a prophylactic law as broad as §5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.

The current statistical evidence confirms that the emergency that prompted the enactment of §5 has long since passed. By 2006, the voter registration rates for blacks in Alabama, Louisiana, and Mississippi had jumped to 71.8%, 66.9%, and 72.2%, respectively. See App. to Brief for Southeastern Legal Foundation as *Amicus Curiae* 6a–7a (hereinafter SLF Brief). Therefore, in contrast to the *Katzenbach* Court’s finding that the “registration of vot-

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ing-age whites ran roughly 50 percentage points or more ahead of Negro registration” in these States in 1964, see 383 U. S., at 313, since that time this disparity has nearly vanished. In 2006, the disparity was only 3 percentage points in Alabama, 8 percentage points in Louisiana, and in Mississippi, black voter registration actually exceeded white voter registration by 1.5 percentage points. See App. to SLF Brief 6a–7a. In addition, blacks in these three covered States also have higher registration numbers than the registration rate for whites in noncovered states. See E. Blum & L. Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3–6* (American Enterprise Institute, 2006); see also S. Rep. No. 109–295, p. 11 (2006) (noting that “presently in seven of the covered States, African-Americans are registered at a rate higher than the national average”; in two more, black registration in the 2004 election was “identical to the national average”; and in “California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election . . . was higher than that for whites”).

Indeed, when reenacting §5 in 2006, Congress evidently understood that the emergency conditions which prompted §5’s original enactment no longer exist. See H. R. Rep. No. 109–478, p. 12 (2006) (“The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated”). Instead of relying on the kind of evidence that the *Katzenbach* Court had found so persuasive, Congress instead based reenactment on evidence of what it termed “second generation barriers constructed to prevent minority voters from fully participating in the electoral process.” §2(b)(2), 120 Stat. 577. But such evidence is not probative of the type of purposeful discrimination that prompted Congress to enact §5 in 1965. For example, Congress relied upon evidence of racially polar-

ized voting within the covered jurisdictions. But racially polarized voting is not evidence of unconstitutional discrimination, see *Bolden*, 446 U. S. 55, is not state action, see *James v. Bowman*, 190 U. S. 127, 136 (1903), and is not a problem unique to the South, see Katz, Aisenbrey, Baldwin, Cheuse, & Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of The Voting Rights Act Since 1982, 39 U. Mich. J. L. Reform 643, 665 (2006). The other evidence relied on by Congress, such as §5 enforcement actions, §§2 and 4 lawsuits, and federal examiner and observer coverage, also bears no resemblance to the record initially supporting §5, and is plainly insufficient to sustain such an extraordinary remedy. See SLF Brief 18–35. In sum, evidence of “second generation barriers” cannot compare to the prevalent and pervasive voting discrimination of the 1960’s.

This is not to say that voter discrimination is extinct. Indeed, the District Court singled out a handful of examples of allegedly discriminatory voting practices from the record made by Congress. See, e.g., *Northwest Austin Municipal Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d. 221, 252–254, 256–262 (DDC 2008). But the existence of discrete and isolated incidents of interference with the right to vote has never been sufficient justification for the imposition of §5’s extraordinary requirements. From its inception, the statute was promoted as a measure needed to neutralize a coordinated and unrelenting campaign to deny an entire race access to the ballot. See *City of Boerne*, 521 U. S., at 526 (concluding that *Katzenbach* confronted a “widespread and persisting deprivation of constitutional rights resulting from this country’s history of racial discrimination”). Perfect compliance with the Fifteenth Amendment’s substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden

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remains with Congress to prove that the extreme circumstances warranting §5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.

* * *

In 1870, the Fifteenth Amendment was ratified in order to guarantee that no citizen would be denied the right to vote based on race, color, or previous condition of servitude. Congress passed §5 of the VRA in 1965 because that promise had remained unfulfilled for far too long. But now—more than 40 years later—the violence, intimidation, and subterfuge that led Congress to pass §5 and this Court to uphold it no longer remains. An acknowledgment of §5's unconstitutionality represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA.

Com mtg
F42

WEDNESDAY, JUNE 17, 2009

OFF THE FLOOR--ELECTION LAW (MILLMAN)

Assembly Print:

1580-B

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BROOK-KRASNY, COLTON, BRENNAN, CASTRO, LUPARDO, BING, MAYERSOHN,
SEMINERIO, ROSENTHAL, MCENENY, SCHIMEL--

An act to amend the election law, in relation to enacting the agreement
among the states to elect the president by national popular vote

2009 JUN 22 PM 4: 36

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GENERAL COUNSEL
BD. OF ELECTIONS
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 FY1

Steven H. Richman

From: Steven H. Richman
Sent: Tuesday, June 16, 2009 11:42 AM
To: *Commissioners; *ExecutiveManagement; *Legal Department
Subject: FW: Statewide Voter Registration List Regulations Matter

The State Board has formally proposed the Amendment to its Rules on June 10, 2009. The Board has until July 27, 2009.

The City Board's draft comments which was discussed at last week's meeting is on the agenda for action by the Commissioners today.

STEVEN H. RICHMAN
 General Counsel
 Board of Elections in the City of New York
 32 Broadway, 7th Floor
 New York, NY 10004-1609
 Tel: (212) 487-5338
 Fax: (212) 487-5342
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-----Original Message-----

From: Bernhardt, Doris [<mailto:dbernhar@law.nyc.gov>]
Sent: Tuesday, June 16, 2009 11:37 AM
To: Steven H. Richman
Cc: Proshansky, Eric
Subject: Statewide Voter Registration List Regulations Matter

Steve,

I am attaching a notice of the proposed amendments to Part 6217.5 of Title 9 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, removing the electronic signing requirements from NYSVoter, published in the New York State Register on June 10, 2009. The last day to submit comments on the amendments will be July 27, 2009. Please let us know if you would like to discuss this development.

Thanks,

Doris F. Bernhardt
 Assistant Corporation Counsel
 Affirmative Litigation Division
 New York City Law Department
 100 Church Street
 New York, NY 10007
 Tel: (212) 788-0996
 Fax: (212) 788-1633

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1 of 2 DOCUMENTS

NEW YORK STATE REGISTER

ISSUE: Volume XXXI, Issue 23

ISSUE DATE: June 10, 2009

SUBJECT: RULE MAKING ACTIVITIES

AGENCY: STATE BOARD OF ELECTIONS

2009-23 N.Y. St. Reg. 4

[A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]
[D> Text within these symbols is deleted <D]

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To view the next page, type .np* and ENTER.

To view a specific page, transmit p* and the page number. E.G. p*1.

PROPOSED RULE MAKING

NO HEARING(S) SCHEDULED

Bipartisan Processing of All Voter Registration Information

I.D. No. SBE-23-09-00006-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of section 6217.5(c) of Title 9 NYCRR.

Statutory authority: Election Law, sections 3-102 and 5-614; and L. 2005, ch. 24

Subject: Bipartisan processing of all voter registration information.

Purpose: Govern bipartisan voter registration processing of data and the transmission of same to the statewide voter registration list.

Text of proposed rule: Subtitle V of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended by amending Part 6217.5(c) Voter Registration Processing, to read as follows:

(c) All voter registration activity must be done by a bipartisan team of workers, to assure fairness and uniformity in the process.

1. Bipartisan processing:

i. Staff member(s) of one major political party review(s) and enters the information from either an individual application or a batch of applications [D> , electronically signing their work <D].

ii. The work on [D> that <D] [A> SUCH <A] application or batch of applications is proofread and reviewed by a staff member(s) of the opposite major political party[D> , who also electronically signs their work <D].

iii. Any edits or changes to the information initially entered must be made and [D> signed <D] [A> APPROVED, IN A BIPARTISAN PROCESS <A], by the two staff [D> persons <D] [A> MEMBERS <A] of opposite parties.

iv. Once [D> signed <D] [A> COMPLETED <A] by two staff [D> persons <D] [A> MEMBERS <A] of opposite parties, the information is sent from the county registration system to NYSVoter for inclusion on the statewide list of registered voters, and verification of each voter's identity.

Text of proposed rule and any required statements and analyses may be obtained from: Kimberly A. Galvin, New York State Board of Elections, 40 Steuben Street, Albany, NY 12207, (518) 474-6367, email: kgalvin@elections.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory Authority:

Election Law Section 3-102.1 provides for the State Board to promulgate rules and regulations relating to the administration of the election process; and Section 5-614, as added by Ch. 24 L. 2005, requires the State Board to promulgate regulations relative to the creation of the statewide voter registration list; the transmission of voter registration information by county boards of elections to the statewide voter registration list; and to establish minimum standards for statewide voter registration list maintenance.

2. Legislative Objectives:

In 2005, the Legislature amended the NYS Election Law to add a new section 5-614 in relation to creating a statewide voter registration list (Chapter 24 of the Laws of 2005). In 2007, the New York State Board of Elections finalized the adoption of rules which were required to be promulgated by this legislation relative to: the creation of the statewide voter registration list; the transmission of voter registration information by county boards of elections to the statewide voter registration list; and to establish minimum standards for statewide voter registration list maintenance. The statute further required that such rules and regulations shall be designed, to the maximum extent practicable, to allow each local board of elections to continue to use its existing computer infrastructure, computer software and database applications to access data from and transmit data to the statewide voter registration list.

After careful consideration of the real world performance after the initial implementation of the statewide voter registration list, this amendment is made to eliminate the mandate for the use of electronic signatures. The adjustment to the adopted rule relating to the bipartisan processing of voter registration information, eliminating the mandate for electronic signatures, will allow county boards of elections to continue to follow existing bipartisan procedures in place in each respective jurisdiction, thus ensuring fairness and accuracy of elections consistent with the legislative intent and the statutory requirements.

3. Needs and Benefits:

The proposed adjustments to the adopted rule, eliminating the mandate for electronic signatures, have been prepared while taking into consideration the statutory objectives and balancing the impact of the statute and these regulations on county boards of elections against the need for the constant affirmation of accuracy in order to maintain public confidence. The existing rule exceeded the legislative intent to create and support a statewide voter registration list that to the maximum extent practicable, allowing each local board of elections to continue to use its existing computer infrastructure. Compliance with the amended rule can be achieved utilizing long-established local bipartisan processes to ensure the integrity of the registration list and ensure both accuracy and authenticity of those lists while maintaining the fundamental requirement for bipartisan processing of voter registration information.

The amended regulation allows each local board of elections to continue to use its existing computer infrastructure, computer software and database applications to access data from and transmit data to the statewide voter registration list, while utilizing long-established local bipartisan processes.

Public trust in our elections is fundamental to governmental effectiveness. County boards of elections currently process voter registration information using bipartisan procedures adopted by the respective commissioners of the county board of elections. This is a continuation of an ongoing obligation.

4. Costs:

These amendments will add no additional costs for county boards of elections, and avoids significant costs if the existing rule were not amended in this manner. The cost associated with processing voter registration information by the county boards of elections is a standard business process, accomplished by county board employees and the costs are fixed. Saved or avoided costs would accrue by not developing and implementing significant changes to the existing county computer infrastructure, software and database applications; developing new policies and procedures; and, re-training county board of elections personnel in the processing and transmission of voter registration information.

This amendment shall not incur costs to the State.

5. Local Governmental Mandates:

These adjusted procedures are consistent with long-standing county board of elections bipartisan voter registration proceedings, is a standard business procedure, and eliminates a mandate for electronic signatures.

6. Paperwork:

These adjusted procedures do not reduce, increase, or modify compliance with paperwork or preparation of forms and will adjust the rules to accurately reflect the technical and functional requirements of the system that houses the statewide list.

7. Duplication:

These regulations do not duplicate or overlap with any other federal or state regulations.

8. Alternatives:

The adjustments to the adopted rule have been prepared while taking into account the statutory objectives to adopt a 'bottom-up approach' when creating the statewide voter registration list and the need to access data and transmit data to the statewide voter registration list while maintaining [*5] the integrity, accuracy and authenticity of the list. This amendment was made after careful consideration of real world performance after the initial implementation of the statewide voter registration list and this amendment allows for compliance while maximizing legislative intent to create and support a 'bottom-up' system, at no additional cost or risk to the ongoing operation and performance of the statewide voter registration list.

One alternative discussed was to do nothing and not amend this regulation. This option was rejected, as it would result in significant cost to county boards of elections and to the State Board to modify voter registration systems, the NYS Voter interface between the State Board and the county boards of elections and would add a potential risk to the existing NYS Voter system, all of which are currently performing well.

9. Federal Standards:

The Help America Vote Act (42 USC 15483(a)) mandated the establishment by New York State of a computerized statewide voter registration list. This regulation complies with that requirement without exceeding it.

10. Compliance Schedules:

Compliance can be achieved by the county boards of election immediately after adoption.

Regulatory Flexibility Analysis

1. Effect of Rule:

There are 58 local boards of elections which must meet these requirements. The amendment to the adopted regulation is anticipated to have no effect on small businesses.

2. Compliance Requirements:

This amendment to the adopted rule eliminates the mandate for electronic signatures and allows county boards of elections to be able to comply with the requirement for bipartisan processing of voter registration information utilizing their existing infrastructure and long-established bipartisan processes. Bipartisan procedures have been established by the respective commissioners of the county board of election who will also supervise staff compliance with these requirements.

3. Professional Services:

The county boards of elections and/or their designated staff will be able to develop and implement the requirements of the NYS Election Law and these regulations.

4. Compliance Costs:

These amendments will add no additional costs for county boards of elections and avoids significant costs by eliminating the mandate for electronic signatures. The costs associated with processing of voter registration information by the county boards of elections is a standard business process, accomplished by county board employees and such voter registration and related list maintenance activities are part of their job description.

This amendment shall not incur costs to the State.

5. Economic and Technological Feasibility:

County boards of elections are currently required by statute to process voter registration information using bipartisan procedures adopted by the respective commissioners of the county board of elections. The amendment eliminating the mandate for electronic signatures makes the rule more feasible for compliance by county boards of elections. This is a continuation of an ongoing obligation.

6. Minimizing Adverse Impact:

The adjustment to the adopted rule will continue a normal business process and have no adverse impact on the local boards of elections.

Public trust in our elections is fundamental to governmental effectiveness. These draft proposed regulations have been prepared while taking into considerations the statutory obligations and balancing the impact of the statute and these regulations on county boards of elections against the need for the constant affirmation of accuracy in order to maintain voter confidence.

7. Small Business and Local Government Participation:

The State Board has had discussions with county election commissioners, county boards of election staff members and certain voter registration system vendors to obtain their opinions and suggestions during the preparation of these draft regulations.

Rural Area Flexibility Analysis

The adjustment to the adopted rule will have a positive impact on jurisdictions from rural areas of New York State by allowing the county boards of elections to continue to utilize long-established bipartisan practices when processing voter registration information.

These draft proposed regulations have been prepared while taking into consideration the statutory obligations and balancing the impact of the statute and these regulations on county boards of election against the need for the constant affirmation of accuracy in order to maintain voter confidence. Public trust in our elections is fundamental to governmental effectiveness. The adjustment to the adopted rule will continue a normal business process and have no adverse effect on the local boards of elections that are impacted.

Job Impact Statement

It is evident from the nature and purpose of the rule that these regulations neither create nor eliminate employment positions and/or opportunities, and, therefore, have no adverse impact on employment opportunities in New York State.

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MIETRO

SATURDAY, JUNE 6, 2009

Firm to Give D.C. Information About Its Voting Devices

By TIM CRAIG
Washington Post Staff Writer

Sequoia Voting Systems agreed yesterday to turn over sensitive information to the D.C. Council about how the District's voting machines work and tabulate results, setting the stage for one of the most comprehensive probes on the reliability of electronic voting equipment.

The agreement is a response to the election night chaos in the September primaries, when Sequoia machines tabulated more ballots than there were voters, resulting in thousands of phantom votes.

Electoral change advocates said the agreement, finalized yesterday in D.C. Superior Court after the city threatened a lawsuit, is one of the first times a manufacturer of electronic voting machines has been forced to endure a public vetting of how its equipment tabulates returns.

"It is certainly going to serve as a precedent not just for further investigations in the District of Columbia, but around the country," said John Bonifaz, legal director for Voter Action, a national voting rights organiza-

tion.

According to a copy of the agreement, the District will have access to technical information on the internal workings of the machines, known as the source code.

The council, which will also get documents about how the machines were created and maintained, plans to turn the information over to a team of computer and legal experts to review.

"This is the first time, ever, that outside experts will be able to review the documents and everything that went into creating the source code," said council member Mary M. Cheh (D-Ward 3), who is heading the council investigation.

Michelle M. Shafer, vice president of communications and external affairs for Sequoia, said the company is "cooperating with the city council to resolve this matter without incurring further legal costs."

"We would like to move past this and resolve this once and for all and do what we can to make sure voters in D.C. feel confident

See VOTING, Page B4

Agreement Sets Stage For Voting Investigation

VOTING, From Page B1

about their voting system," Shafer said.

Bonifaz said he's hopeful that the investigation will provide clues to whether electronic voting machines are reliable and what, if any, safeguards need to be implemented to prevent mishaps.

In addition to the District, 17 states use Sequoia, one of three major providers of electronic voting machines, Cheh said.

Sequoia has turned over its source code to outside experts a few times before, but Cheh said the District will also have access to information that no other government or legal team has ever had a chance to review, including the blueprints for the company's machines.

Software experts are hopeful that the Sequoia data will unlock the mystery of the phantom votes, which initially produced inaccurate results in several contests, including two high-profile council races.

"Looking at the information we expect to get from Sequoia is the only way we will ever figure it out, if it is going to be figured out," said Jeremy Epstein, a senior computer scientist at Arlington County-based SRI International, who is expected to be on the team that will review the data.

Bonifaz said the council's probe could enhance calls for a return to paper ballots nationwide or, at the very least, a paper trail.

In 2007, Sequoia handed over data to the secretary of state's office in California as part of a review of the systems used there. As a result of that probe, Secretary of State Debra Bowen decertified Sequoia, as well as several other elec-

tion systems, after investigators determined that the machines could be hacked.

Last year, a New Jersey judge ordered Sequoia to turn over limited amounts of information related to elections in that state to a Princeton University computer scientist, Andrew W. Appel. He concluded that a computer expert could hack into Sequoia machines within seven minutes "using simple tools," according to the Newark Star-Ledger.

Shafer, who noted that California municipalities are still using Sequoia voting machines, said it's not fair to compare the District investigation to the probes in California and New Jersey.

"These are all different matters and all different equipment," she said.

Sequoia has been fighting for years to keep the inner workings of its machines from the public, saying they are trade secrets. The company initially refused to comply with a council subpoena in the fall. When the council persisted, the company asked for a \$20 million bond guaranteeing that the information would remain confidential, Cheh said.

She said she refused, and the District was scheduled to go to court last week to try to force the company to comply. But the company decided to reach an agreement instead.

As part of the deal, the city and its computer forensics team agreed to keep the company's "trade secrets" confidential. But Cheh said the council will be able to make public a report about potential vulnerabilities.

"They fought us tooth and nail till now, so I am pretty pleased we got this going," Cheh said. 16