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Statement of James U. Blacksher
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Voting Rights and Election Administration in Alabama

My name is James Blacksher. Thank you for inviting me to testify. I am a white native of Alabama and have been practicing law in Alabama since 1971, engaged primarily in representing African Americans in civil rights and voting rights litigation.

I argued – and lost – *City of Mobile v. Bolden* (1980) in the Supreme Court, but with the help of co-counsel we won on remand to the district court.

I testified in Congressional hearings leading to enactment of the 1982 Voting Rights Amendments. Four years later the Supreme Court in *Thornburg v. Gingles* (1986) cited and adopted the three-prong test proposed in my Hastings Law Review article for purposes of establishing a violation of Section 2 of the Voting Rights Act.

With Edward Still and Larry Menefee, I represented plaintiffs in the *Dillard v. Crenshaw County* class action, which changed the method of electing members of over 180 local governments in Alabama.

I have represented African Americans in litigation following redistricting of the Alabama House and Senate districts and Congressional districts in every decade since the 1980 census. Most recently, I represented the plaintiffs before the Supreme Court in *Alabama Legislative Black Caucus v. Alabama* (2015), which held that many of the Alabama House and Senate districts were racially gerrymandered.

Currently I am one of the lawyers representing African Americans in these

pending cases:

Lewis v. Alabama: challenging the 2016 state law that struck down Birmingham’s minimum wage ordinance

Alabama State Conference of the NAACP v. Alabama: challenging the at-large election of members of the Alabama Supreme Court and Courts of Appeals

Thompson v. Merrill: challenging the disfranchisement of Alabama citizens with felony convictions

Alabama State Conference of the NAACP v. City of Pleasant Grove: challenging the at-large method of electing the city council

I am a co-author of an amici curiae brief for the Eleventh Circuit Court of Appeals supporting plaintiffs-appellants in *Greater Birmingham Ministries v. Merrill*, challenging Alabama’s photo voter ID law

The Continuity of Alabama’s Historical Policy of Political White Supremacy

Alabama’s motto is “We dare defend our rights,” and throughout its history to the present Alabama has invoked states’ rights to preserve white supremacy and to subordinate its black citizens in the political, social, and economic role of a cheap labor force. The most crucial component of this white supremacist policy has always been either denying or suppressing the right to vote of African Americans.

In the several voting rights cases currently pending in federal trial and appellate courts the State of Alabama is arguing that its history of discrimination no longer matters, and that today’s majority-white Legislature must be presumed to be acting free of any racial motives. But if racial motives are only occasionally expressed openly,¹ since *Shelby County v. Holder* (2013) Alabama has more

¹ E.g., see *United States v. McGregor*, 824 F.Supp.2d 1339, 1345 (M.D. Ala. 2011) (member of the Legislature “derisively referring to blacks as

aggressively taken advantage of what I call the architecture of white supremacy, embedded in its 1901 Constitution, further to restrict the right to vote, to deny its black citizens equal opportunity to elect candidates for statewide office, to segregate black representatives in the Legislature, and, perhaps most importantly, to suppress the powers of local governments elected by black majorities. These actions speak louder than words to demonstrate how Alabama’s historical policy of white supremacy still dominates our political culture. Indeed, now there is even social science confirming the persistence of this racially discriminatory culture. “At its core, behavioral path dependence suggests that the political attitudes of a place or a region—such as the Black Belt—can persist across generations, nurtured by institutions, laws, families, and communities. This idea of path dependence in politics more broadly suggests that significant historical forces, and the attendant political economic and political incentives that they produce, can create patterns that pass down through generations over time—and these patterns can outlast the original institutions and incentives.”² The following is a very abbreviated summary of the historical events that still shape the political culture of our state.

Before the Civil War, the Alabama Black Belt contained the wealthiest counties in the United States based on white per capita population. So Alabama invoked its state’s rights to secede from the Union in order to preserve the legalized slavery that produced this wealth.

The enfranchisement of black men in the 1868 Reconstruction Constitution, controlled by Republicans, created a dire threat to white landowners in the Black Belt, whose majority-black electorates taxed land to raise revenues for schools and public services that benefitted the freedmen. White Conservative Democrats regained control of state government in 1874 by “drawing the color line,” that is, making white solidarity a party issue. The 1875 Redeemer Constitution could not disfranchise the freedmen for fear of federal enforcement of the Fifteenth Amendment, ratified in 1870. So to protect whites in the majority-black counties

‘Aborigines’”).

² AVIDIT ACHARYA, MATTHEW BLACKWELL, AND MAYA SEN, *DEEP ROOTS* (Princeton Studies in Political Behavior) (pp. 11-12). Princeton University Press. Kindle Edition (2018).

the 1875 Constitution put numerous restrictions on home rule and gave the Governor and Legislature complete control over local governments.

From 1874 to 1901 whites in the Black Belt used economic retaliation and violent terrorism to make their black majorities a “captive” vote. Black votes were fraudulently cast by Black Belt whites to give them control over state government as well as their local officials.

White populists revolted in the 1890s against fraudulent rule by the partnership of Black Belt landowners and urban industrialists. This “Bourbon Aristocracy” preserved their power over state government by agreeing to the 1901 Constitution, which disfranchised blacks – and poor whites – with poll taxes, literacy tests, crimes aimed at blacks, and total discretion for voter registrars. By including disfranchised blacks in the apportionment of seats to each county, Black Belt whites ensured their continuing control of the Legislature. And the restrictions on home rule were preserved to guard against future re-enfranchisement of local black majorities. Writing for a unanimous Supreme Court, Justice Rehnquist acknowledged that Alabama’s 1901 Constitution established the state’s official policy of white supremacy. *Hunter v. Underwood* (1985). Alabama is still governed by its 1901 Constitution.

Political white supremacy required uniting almost all white voters behind one political party. There was – and still is – a prevailing fear that a white political faction might unite with even a few black voters to capture state offices. So the Democratic Party established the all-white primary in 1902. Even the few black Alabamians who managed to register were excluded from the only election that mattered. In the 1920s and 1930s the Conservatives who controlled the Democratic Party invoked white supremacy to repeal laws that gave white dissenters an opportunity to elect candidates of their choice, such as Senator Hugo Black. But President Truman’s 1948 executive order desegregating the military caused Conservative Democrats to bolt the national party. They held a Dixiecrat convention down the street at Boutwell Auditorium here in Birmingham, and its Presidential slate carried Alabama in 1948.

When the Supreme Court struck down the Texas white primary, *Smith v. Allwright* (1944), Alabama adopted the Boswell Amendment, which gave white voter registrars total discretion to administer a read-and-understand test. A federal

court declared the Boswell Amendment unconstitutional in 1949. *Davis v. Schnell*. But the Democratic primary remained the only election that mattered until well into the 1970s.

As a few more African Americans were able to register to vote, the Legislature passed the infamous Tuskegee gerrymander, which expelled all black residents from that Black Belt city. The U.S. Supreme Court ruled that the gerrymander violated the Fifteenth Amendment. *Gomillion v. Lightfoot* (1961). Black Belt whites' control of the Legislature was seriously threatened when Chief Justice Earl Warren announced the constitutional principle of one person, one vote and ordered reapportionment of the Alabama Legislature. *Reynolds v. Sims* (1964).

When President Lyndon Johnson procured passage of the 1964 Civil Rights Act, Sen. Barry Goldwater voted against it and won the Republican nomination for President. As a result, Goldwater carried Alabama in 1964, and Republican candidates won all five of the contested Alabama Congressional seats (two incumbent Democrats were unopposed). Following Bloody Sunday at the Edmund Pettus Bridge in Selma, the Voting Rights Act of 1965 struck down Alabama's literacy tests and other devices, and black voter registration rapidly increased. At the same time, urged on by Governor George Wallace's racist appeals, white voter registration also increased.

The Alabama Democratic Party did not remove "white supremacy" from its logo on the official state general election ballot until 1966. Thereafter it attempted to prevent white flight to the Republican Party by adopting a platform of states' rights and opposition to federal interference. George Wallace fiercely opposed federal courts' enforcement of civil rights and voting rights laws, but he did not switch parties, and that delayed the mass movement of white Alabamians to the Republican Party. During the transition of white voters from the Democratic to Republican Party, some white and black Democrats were able to use "stealth politics" to win a few statewide offices, including the Alabama Supreme Court. Oscar Adams and Ralph Cook became the only two African Americans to be elected to statewide office in the history of Alabama. The ability of black and white voters to form winning coalitions to elect the Governor and some members of the Legislature presented a direct threat to Alabama's historical, constitutionally based policy of political white supremacy.

But by 2000 the Republican “Southern Strategy” had successfully cued white voters, particularly through its anti-civil rights Presidential campaigns, and the mass movement of Alabama’s white voters to the Republican Party was nearly complete. Justice Cook was defeated in 2000, and today there are no African Americans serving in offices elected statewide. Now in Alabama the Republican Party is perceived as the party of whites, and the Democratic Party is perceived as the party of blacks. With rare exceptions the Republican primary is the only election that matters in races for Governor, Lieutenant Governor, Secretary of State, Supreme Court, and other statewide offices. In the Legislature, after the 2018 elections, there remain only two white Democrats, one in the House and one in the Senate, both of whom were elected from majority-black districts. All but one of the twenty-seven black House members and all seven black Senators are elected from majority-black districts.

The Voting Rights Act has had its greatest impact on local governments, where the number of African Americans elected to county and municipal offices increased dramatically after passage of the 1982 Voting Rights Amendments. See Jerome Gray and James U. Blacksher, *The Dillard Cases and Grassroots Black Political Power*, 46 CUMB. L. REV. 311 (2016). “By the year 2000, black elected officials had achieved close to representational parity on county commissions, county school boards, and city councils in Alabama, reflecting the black voting age population of 22.7% in the state. Alabama may be the only state in the nation today that can make that claim. By 2010, when the last *Dillard* cases were dismissed, there were 757 black local elected officials.” *Id.* at 312-13.

This increase in the number of blacks elected to local governments presents the threat to white supremacy that provoked the anti-home rule provisions in the 1875 Constitution and that continue today in the 1901 Constitution.³ Alabama

³ See Will Parker, *Still Afraid of “Negro Domination?”: Why County Home Rule Limitations in the Alabama Constitution of 1901 Are Unconstitutional*, 57 ALA. L. REV. 545 (2005); See also Wayne Flynt, *Alabama’s Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67, 68 (2001); Peyton McCrary et al., *Alabama* in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 38, 42 (Chandler Davidson & Bernard Grofman eds. 1994); MALCOLM COOK McMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND

cited these “advances at the local level” in its amicus brief in *Shelby County v. Holder* (2013). But it failed to acknowledge that this and other examples of increased black participation in the political process – increased black voter registration and turnout and black representation in the Legislature – had been achieved through federal court litigation and U.S. Department of Justice enforcement of Section 5 of the Voting Rights Act. The State of Alabama has done virtually nothing voluntarily to provide its black citizens equal opportunity, and the architecture of its policy of white supremacy, embedded in the 1901 Constitution, remains fully in place. Chief Justice Roberts was correct when he wrote in *Shelby County* that “history did not end in 1965.” Alabama’s history of political white supremacy has never ended, has never been repudiated, and is continually being reinforced.

Immediately after *Shelby County v. Holder* was handed down Alabama proceeded to implement and enact new racially discriminatory restrictions on the ability of its citizens to register and vote, including a photo ID law, closure of driver license offices in the Black Belt, and a request for authorization to require proof of citizenship in the federal voter registration form. At least 66 polling places have been closed, and the City of Evergreen in Conecuh County has been bailed in under Section 3c of the VRA following litigation challenging a number of discriminatory voting practices.

See

<https://www.naacpldf.org/wp-content/uploads/State-local-responses-post-Shelby-4.3.2019.pdf>.

At the same time the State of Alabama is placing more racially discriminatory burdens on citizens’ right to vote, with filibuster-proof white Republican majorities in both the House and Senate the Legislature has resumed implementing Alabama’s historical practice of restricting majority-black local governments’ home rule powers.

There has been a particular focus on Birmingham, whose over \$400 million operating budget is by far the largest in the state controlled by a black majority. The House redistricting plan the Legislature passed in 2012 eliminated the nine

SECTIONALISM 222 n.28 (1955) (Alabama’s “very strong antebellum tradition” of democracy at the county level was “sacrificed to ‘white supremacy.’”).

majority-black and nine majority-white district balance in the Jefferson County House Delegation, which had provided black legislators the ability to block unwanted local bills, and replaced it with ten majority-white and only eight majority-black districts.

In 2015, over the objections of black members of Jefferson County's delegation, the Legislature passed a statute giving majority-white municipalities in Jefferson County and neighboring majority-white county governments power to appoint members to the Birmingham Water Works Board, which previously had been appointed solely by the Birmingham City Council. Ala.Code § 11-50-300 et seq. This diluted the political power of a majority-black electorate over one of the most profitable water systems in Alabama and a valuable asset for Birmingham's economic development.

In 2015 and 2016, the Birmingham City Council, a body composed of nine elected councilors, all but two of whom were African-American, took steps to address the low wages and poverty persistent in this predominantly African-American city. Despite a long history of racial discrimination in Alabama African Americans have been able to build political power in urban areas where they are a majority of the population. Alabama's three largest cities are majority-African-American. Birmingham is Alabama's largest city and has a population that is 73% black. After pleading unsuccessfully with the Legislature for over a year to raise the minimum wage, on February 23, 2016, the Birmingham City Council unanimously passed and the Mayor signed an ordinance raising the minimum wage incrementally to \$10.10. Two days later, over the objections of every black member of the House and Senate, the Legislature passed and the Governor signed a statute that voided Birmingham's minimum wage ordinance and prohibited all municipalities from regulating minimum wages or any other matters involving employer-employee relationships in their cities. Black workers and voters in Birmingham challenged this preemption statute in federal court, citing violations of Section 2 of the Voting Rights Act and the U.S. Constitution, alleging that the Legislature was implementing Alabama's judicially acknowledged, white supremacist policy of suppressing local black majority governments. *Lewis v. Alabama*. The district court dismissed their complaint on grounds that the statute did not implicate voting and thus could not violate the VRA, and that the plaintiffs lacked standing to sue the State of Alabama, the Alabama Attorney General, and City of Birmingham. An Eleventh Circuit panel

upheld dismissal of the VRA claim, but reversed dismissal of the constitutional claim. However, the Court of Appeals granted en banc rehearing and has scheduled argument for the week of June 24.

In 2017 the Legislature enacted the Alabama Memorial Preservation Act. Ala. Code § 41-9-231 et seq. The Act provides that “[n]o architecturally significant building, memorial building, memorial street, or monument which is located on public property and has been so situated for 40 or more years may be relocated, removed, altered, renamed, or otherwise disturbed.” Ala. Code § 41-9-232(a). Most memorials to the Confederacy were erected in the periods during the first three decades of the Twentieth Century (coinciding with the passage of Jim Crow laws) and during the 1950s and 1960s (during resistance to the Civil Rights Movement) -- well within the time period protected by the Act, but no memorials on public property celebrating the Civil Rights Movement are 40 years old. After the Mayor of Birmingham ordered a black plywood shell to be placed around the base of a Confederate memorial at an entrance to Linn Park (the park between City Hall and the Jefferson County Courthouse), the Alabama Attorney General sued the City for a declaratory judgment that it had violated the Act plus a \$25,000/day fine. The Jefferson County Circuit Court ruled that the state law violated the First Amendment. The Attorney General has appealed to the Alabama Supreme Court.

A Call For Congressional Action

I ask this Committee to consider the following changes to the Voting Rights Act:

1. Restore Alabama to coverage under Section 5 of the VRA – along with other states with continuing histories of discrimination against racial and language minorities. Chief Justice Roberts’ majority opinion in *Shelby County v. Holder*, 540 U.S. 529 (2013), holding the coverage formula in Section 4(b) unconstitutional, is not based on any provision contained in the Constitution but on “our historic tradition that all the States enjoy equal sovereignty.” *Id.* at 540.⁴

⁴ See James Blacksher and Lani Guinier, *Free At Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right To Vote*, *Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39 (March 2014), which traces the origins of the

Alabama has interpreted this extra-constitutional declaration of equal sovereignty as an invitation to reassert its states' right to implement racially discriminatory policies that deny or abridge the right to vote and that submerge the electoral power of its black and Latino citizens, who now are forced to initiate civil actions on their own after the discriminatory policies have been implemented. The cases cited in this statement show how time-consuming and expensive litigation under Section 2 of the Voting Rights Act and the Constitution is, and how difficult it is to overcome the burdens of proof being placed on plaintiffs by the Supreme Court and lower courts, who continually narrow the scope of the VRA's protection.

2. Amend the language of both Section 2 and Section 5 of the VRA explicitly to prohibit state actions that discriminatorily deny or abridge the electoral power of protected minorities and their elected representatives after the elections have been held. In *Hardy v. Wallace*, 603 F.Supp. 174, 176 (N.D. Ala. 1985) (three-judge court), Section 5 was invoked to prevent the Alabama Legislature from shifting power to appoint the racing commission in majority-black Greene County from the newly-elected black local legislative delegation to Governor George Wallace. But subsequently *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), held that “[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting.” *Id.* at 506. That holding has led lower federal courts to conclude that statutes like the one in *Hardy v. Wallace* and in the Birmingham minimum wage case are no longer actionable even under Section 2 of the VRA. This is a perverse result in light of the fact that submerging the powers of majority-black county governments was the very reason anti-home rule polices were placed in the 1875 Redeemer Constitution of Alabama and have been maintained since in the 1901 Constitution. Indeed, fear of local black electoral majorities was a main reason the white supremacist 1901 Constitution disfranchised African Americans. Congress needs to restore the ability of protected minorities to challenge under the VRA racially discriminatory suppression of their local elected officials' power to implement policies governing their counties and cities.

3. Exercise Congress' enforcement powers under Section 5 of the Fourteenth Amendment to declare that each citizen of the United States has a

“equal sovereignty” doctrine to *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

fundamental right to vote under the Constitution, relying in particular on the Privileges or Immunities Clause in Section 1 of the Fourteenth Amendment. Currently, even though some decisions of the Supreme Court under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment have said voting is a fundamental right, because it is not expressly enumerated in the Constitution the Court has not given it the protection other fundamental rights receive. Instead of subjecting state actions burdening the right to vote to strict scrutiny, unless a voting restriction is either too “severe” or proven to be racially discriminatory, federal courts apply a more deferential standard that balances the state’s interests against the citizen’s right to vote.⁵

Most Americans don’t realize there is no explicit right to vote in the Constitution. The Fifteenth, Nineteenth, and Twenty-sixth Amendments only prohibit states from administering voting practices that discriminate on the basis of race, gender, or age. Only after plaintiff citizens have succeeded in the difficult task of proving invidious discrimination does the state voting restriction get subjected to strict scrutiny, which requires the state to justify the restriction as narrowly tailored to further a compelling state interest.

But read Section 1 of the Fourteenth Amendment: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States....*” (Emphasis added). Today, what do Americans regard as the most important “privilege” of U.S. citizenship? Most would say the right to vote. And that’s what the 1866 Radical Republicans who drafted the Fourteenth Amendment intended at first. Then they realized the Fourteenth Amendment would not be ratified by many northern states, who were refusing to include black suffrage in their state constitutions. (Ironically, in order to regain admission to Congress, the former Confederate states were required to draft constitutions providing black men the right to vote.) So the drafters conceded that Congress could not *at that time* interpret the Privileges or Immunities Clause to provide the right to vote as a fundamental right of U.S. citizenship. Instead they included in Section 2 of the Fourteenth Amendment a penalty of reduced representation in the House if states denied suffrage “to any of the male inhabitants of such state....” Then they passed and obtained ratification of the Fifteenth Amendment. In 1874

⁵ E.g., see Armand Derfner and J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL’Y REV. 471 (2016).

the Supreme Court held, in a case brought by women suffragists, that these circumstances meant the Privileges or Immunities Clause did not include the right to vote. *Minor v. Happersett*. But Congress today has the power under Section 5 of the Fourteenth Amendment to repudiate the racial discrimination that burdened the Privileges or Immunities Clause during Reconstruction and declare affirmatively that the right to vote is a privilege of citizenship in the United States.

I urge this Committee to consider this option seriously. There is a right to vote already in the Constitution, and Congress has the power to require states to justify any impediments to the right to vote under standards of strict scrutiny. See James Blacksher and Lani Guinier, *Free At Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right To Vote*, *Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39 (2014).