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No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Shelby County, Alabama.

Respondents are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is available at 679 F.3d 848 and is reprinted in the appendix to the Petition for Certiorari ("Pet. App.") at 1a-110a. The opinion of the United States District Court for the District of Columbia is available at 811 F. Supp. 2d 424 and is reprinted at Pet. App. 111a-291a.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its decision on May 18, 2012. Pet. App. 1a. This Court granted a timely petition for certiorari on November 9, 2012. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §1973, 42 U.S.C. §1973a, 42 U.S.C. §1973b, and 42 U.S.C. §1973c are reprinted in an addendum to this brief.

STATEMENT OF THE CASE

A. History of the Voting Rights Act

1. The Voting Rights Act of 1965

In 1965, 95 years after the Fifteenth Amendment's ratification, African-Americans were still widely denied

the right to vote throughout the South. Despite the Fifteenth Amendment's unequivocal command, as well as prior congressional efforts to strengthen the ability to challenge voting rights abuses in court, discriminatory devices and extra-legal harassment were rampant. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Further, states and localities routinely evaded curative judicial actions by enacting alternatives with the same discriminatory effect. *Id* at 312-15; *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969).

To end "nearly a century of systematic resistance to the Fifteenth Amendment" and "to banish the blight of racial discrimination in voting," *Katzenbach*, 383 U.S. at 308, 328, Congress invoked its Fifteenth Amendment enforcement authority to enact the Voting Rights Act of 1965 ("VRA"). The VRA created a network of stringent remedies that signaled Congress' determination to ensure that African-Americans could freely exercise the franchise. Section 2 of the VRA created a nationwide judicial remedy against any "voting qualification or prerequisite to voting, or standard, practice, or procedure … imposed or applied … to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. No. 89-110, §2, 79 Stat. 437 (1965). That remedy is available to both government and private plaintiffs.

Other VRA provisions operated against "covered" States and political subdivisions identified by a statutory formula. A jurisdiction became "covered" if it "maintained on November 1, 1964, any test or device" prohibited by Section 4(a) and "less than 50 per centum of the persons of voting age residing therein were registered on November

1, 1964" or "less than 50 per centum of such persons voted in the presidential election of November 1964." *Id.* §4(b), 79 Stat. at 438.[1] Congress determined that this formula accurately captured those jurisdictions where systematic voting abuses were ongoing and ingenious defiance was to be expected. To limit over- and under-inclusion, Congress permitted a presumptively covered jurisdiction to "bailout" by showing that it had not used a "test or device" in the preceding five years for the purpose or with the effect of denying or abridging the right to vote on account of race, *id.* §4(a), 79 Stat. at 438, and empowered federal courts in appropriate circumstances to "bail in" a non-covered jurisdiction found to have violated the Fifteenth Amendment, *id.* §3(c), 79 Stat. at 437.

Those temporary measures, which were enacted for a five-year period, included a prohibition on the use of certain voting qualifications (including literacy tests), *id.* §4(a), 79 Stat. at 438; an exposure to having federal examiners rather than state officials administer voting qualifications, *id.* §§6(b), 7, 9, 13(a), 79 Stat. at 440-44; and Section 5's unprecedented "preclearance" requirement, *id.* §5, 79 Stat. at 439. Section 5 overrode the prerogative of "covered" jurisdictions to establish voting practices and procedures by suspending "any voting qualification or prerequisite to voting, or standard, practice, or procedure

1. Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and parts of North Carolina, Arizona, Idaho, and Hawaii became covered under this formula. *See* 30 Fed. Reg. 9897 (Aug. 7, 1965); 30 Fed. Reg. 14505 (Nov. 19, 1965); 31 Fed. Reg. 19 (Jan. 4, 1966); 31 Fed. Reg. 982 (Jan. 25, 1966); 31 Fed. Reg. 3317 (Mar. 2, 1966). As a political subdivision of Alabama, Shelby County became a covered jurisdiction. Pet. App. 123a-124a.

with respect to voting different from that in force or effect on November 1, 1964" until the Attorney General or a three-judge court in Washington, DC was satisfied that the proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* Preclearance prevented flagrant Fifteenth Amendment violators "from circumventing the direct prohibitions imposed by provisions such as §§2 and 4(a)." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 218 (2009) ("*Nw. Austin*") (Thomas, J., concurring the judgment in part and dissenting in part).

In 1966, the Court rejected South Carolina's constitutional challenge to Section 5 preclearance and Section 4(b)'s coverage formula. *Katzenbach*, 383 U.S. at 324-33. Congress had compiled "reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act," which justified Fifteenth Amendment enforcement. *Id.* at 329. The legislative record painstakingly documented the web of discriminatory practices used to deny African-Americans ballot access, and statistical evidence verified the widespread impact of voting discrimination throughout the South. The "registration of voting-age Negroes 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. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration." *Id.* at 313. Moreover, "voter turnout levels in covered jurisdictions ha[d] been at least 12% below the national average in the 1964 Presidential election." *Nw. Austin*, 557 U.S. at 222 (Thomas, J.).

The Court nevertheless recognized that the VRA was an "uncommon exercise of congressional power" and a departure from the "doctrine of equality of the states." *Katzenbach,* 383 U.S. at 328-29, 334. Accordingly, the Court's decision turned on finding that Congress had evidence supporting the need for preclearance to combat systematic evasion and that the "covered" jurisdictions had been singled out by a formula "rational in both practice and theory." *Id.* at 330.

Preclearance met the urgent need to put an end to gamesmanship in covered jurisdictions. "Congress knew that some of the States covered by §4(b) of the Act had resorted to 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." *Id.* at 335. It thus "had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies prescribed for voting discrimination contained in the Act itself." *Id.* Given the failure of traditional alternatives, "the specific remedies in the Act were an appropriate means of combating the evil." *Id.* at 328. "[L]egislative measures not otherwise appropriate" were constitutional under those "exceptional conditions" and "unique circumstances." *Id.* at 334-35.

Section 4(b) was rational in theory because "the use of tests and devices for voter registration" were the "tool for perpetrating the evil," and a voting rate in the 1964 presidential election at least 12 points below the national average" was indicative of "widespread and persistent" efforts to disenfranchise African-Americans. *Id.* at 330-31. It was rational in practice because the formula omitted none of the jurisdictions where voting discrimination was

worst. *Id.* at 329. That there were "no States or political subdivisions exempted from coverage under §4(b) in which the record reveal[ed] recent racial discrimination involving tests and devices … confirme[d] the rationality of the formula." *Id*. at 331.

2. The 1970, 1975, and 1982 Reauthorizations

Congress had "expected that within a 5-year period Negroes would have gained sufficient voting power in the States affected so that special federal protection [by preclearance] would no longer be needed." H.R. Rep. No. 91-397, reprinted in 1970 U.S.C.C.A.N. 3277, 3281. In 1970, however, Congress found it necessary to reauthorize the expiring provisions for five years, Pub. L. No. 91-285, 84 Stat. 314 (1970), and to expand Section 4(b)'s formula to add coverage of any jurisdiction that had maintained a prohibited "test or device" on November 1, 1968, and had voter registration on that date or turnout in the 1968 presidential election of less than 50 percent, *id*. §4, 84 Stat. at 315.[2] Congress also extended Section 4(a)'s temporary ban on the use of any prohibited "test or device" to non-covered jurisdictions for a period of five years. *Id*. §6, 84 Stat. at 315. The Court upheld the reauthorization as constitutional for "the reasons stated at length in *South Carolina v. Katzenbach*." *Georgia v. United States*, 411 U.S. 526, 435 (1973).

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2. Parts of Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York, and Wyoming became covered because of the 1970 reauthorization. 36 Fed. Reg. 5809 (Mar. 27, 1971); 39 Fed. Reg. 16912 (May 10, 1974).

In 1975, Congress extended the VRA's temporary provisions for seven years, Pub. L. No. 94-73, 89 Stat. 400 (1975), and further expanded coverage to any jurisdiction that had maintained a prohibited "test or device" on November 1, 1972, and had voter registration on that date or turnout in the 1972 presidential election of less than 50 percent, *id.* §202, 89 Stat. at 401.[3] Also, the nationwide ban on prohibited "tests or devices" was made permanent. *Id.* §201, 89 Stat. at 400.

The Court upheld the 1975 reauthorization. In doing so, it stressed that the "7-year extension of the Act was necessary to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination." *City of Rome v. United States*, 446 U.S. 156, 182 (1980). As the Court explained, "significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions" and "though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their

3. Congress also amended the definition of "test or device" to include "any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language," in a jurisdiction where more than 5% "of the citizens of voting age residing in such State or political subdivision are members of a single language minority." Pub. L. No. 94-73, §203, 89 Stat. at 401-402. Alaska, Arizona, Texas, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota, fell within the 1975 reauthorization. 40 Fed. Reg. 43746 (Sept. 23, 1975); 40 Fed. Reg. 49422 (Oct. 22, 1975); 41 Fed. Reg. 784 (Jan. 5, 1976); 41 Fed. Reg. 34329 (Aug. 13, 1976).

number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions." *Id.* at 180-81.

In 1982, Congress reauthorized the VRA for 25 years. Pub. L. No. 97-205, 96 Stat. 131 (1982). Congress did not amend Section 5 or Section 4(b)'s coverage formula, but altered Section 4(b)'s bailout provision in several ways. First, Congress permitted a "political subdivision" within a fully-covered State to seek bailout. *Id.* §2(b)(2), 96 Stat. at 131. Second, Congress made bailout eligibility contingent on specific categories of conduct by all "governmental units" within the territory seeking bailout. *Id.* §2(b)(4)(D), 96 Stat. at 131-32. Third, Congress expanded the "clawback" period of the bailout provision from five years to ten years. *Id.* §2(b)(5), 96 Stat. at 133.

Although the 1982 reauthorization was not challenged facially, the Court twice interpreted Section 5 to limit the federalism burden of preclearance. In *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) ("*Bossier II*"), the Court cautioned that interpreting Section 5's discriminatory "purpose" preclearance requirement too broadly would exacerbate federalism costs "perhaps to the extent of raising concerns about §5's constitutionality," *id.* at 336. It thus interpreted the "purpose" prong to impose only the "trivial" burden of proving the absence of a "retrogressive" purpose. *Id.* at 331.

The Court cabined the intrusiveness of Section 5's "effect" prong in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). It interpreted "effective exercise of the electoral franchise," the retrogression standard first set forth in *Beer v. United States*, 425 U.S. 130 (1976), to take into

account a "minority group's opportunity to participate in the political process" and not just "the comparative ability of a minority group to elect a candidate of its choice." *Id.* at 479-80. This test more closely tracked the constitutional standard, which guarantees electoral opportunity not electoral results, and thus helped to avoid the equal-protection problems associated with making minority candidate success the exclusive focus of preclearance determinations. *Id.* at 491 (Kennedy, J., concurring).

3. The 2006 Reauthorization

Prior to Section 5's expiration, Congress held reauthorization hearings addressing particular topics, including the preclearance standard, this Court's interpretations of Section 5 between 1982 and 2006, evidence supporting the "continuing need" for preclearance, and possible modification of the coverage formula. The Senate and House of Representatives issued reports summarizing their findings. H.R. Rep. No. 109-478 (2006) ("*House Report*"); S. Rep. No. 109-295 (2006) ("*Senate Report*").

In 2006, Congress reauthorized the VRA for another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) ("VRARAA"). Congress acknowledged "that the number of African-Americans who are registered and who turn out to cast ballots ha[d] increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." *House Report* at 12. Congress also found that "the disparities between

African-American and white citizens who are registered to vote ha[d] narrowed considerably in six southern States covered by the temporary provisions … and … North Carolina." *Id.* Congress concluded that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated." *Id.*

Despite these gains, Congress did not update Section 4(b)'s coverage formula, choosing again to base coverage on election data from 1964, 1968, and 1972. Nor did Congress ease Section 5's preclearance burden. Instead, it made the burden more onerous by amending Section 5 to overrule *Bossier II* and *Ashcroft*. Section 5's "purpose" prong now denies preclearance to a change made for "any discriminatory purpose," 42 U.S.C. §1973c(c), and its "effect" prong now requires denial of preclearance if the change "diminish[es] the ability of [minority] citizens … to elect their preferred candidates of choice," *id.* §1973c(b), (d). And unlike in 1965, 1970, and 1975—where Congress imposed preclearance for periods of five and seven years despite deep and widespread voting discrimination in covered jurisdictions—the 2006 reauthorization extended Section 5 for an additional twenty-five years.

Congress justified reauthorization by finding that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." VRARAA, §2(b)(2), 120 Stat. at 577. These "second generation" barriers were evidenced by racially polarized voting; Section 5 preclearance statistics; "section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement

actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the [VRA]." *Id.* §2(b)(8), 120 Stat. at 578.

4. The *Northwest Austin* Litigation

In resolving a constitutional challenge by a covered jurisdiction on statutory grounds, the Court in *Northwest Austin* held that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of dramatic changes in the covered jurisdictions. 557 U.S. at 204. Writing for eight Justices, Chief Justice Roberts explained that Section 5 "imposes current burdens and must be justified by current needs," and Section 4(b)'s "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." *Id.* at 203. "These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. Additional constitutional concerns are raised in saying that this tension between §§2 and 5 must persist in covered jurisdictions and not elsewhere." *Id.*

Justice Thomas would have decided the merits of the constitutional challenge. In his view, "the lack of current evidence of intentional discrimination with respect to voting" meant that Section 5 "could no longer be justified as an appropriate mechanism for enforcement of the Fifteenth Amendment." *Id.* at 216. Justice Thomas recognized that "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." *Id.* at 229.

B. Proceedings Below

1. In April 2010, Shelby County, seeking resolution of the "serious constitutional questions" unresolved in *Northwest Austin,* sought a declaration that Section 5 and Section 4(b) are facially unconstitutional and a permanent injunction prohibiting the Attorney General from enforcing those provisions. The district court granted summary judgment to the Attorney General, Pet. App. 111a-291a, and Shelby County timely appealed.

2. By a 2-1 vote, the D.C. Circuit affirmed. Writing for the majority, Judge Tatel concluded that "*Northwest Austin* sets the course for our analysis," thus requiring that Section 5's "'current burdens'" be justified by "'current needs'" and that Section 4(b)'s "'disparate geographic coverage [be] sufficiently related to the problem that it targets'" to justify its departure from the fundamental principle of "'equal sovereignty.'" *Id.* 14a-15a (quoting *Nw. Austin*, 557 U.S. at 203).

Turning to the evidence needed to sustain Section 5's reauthorization, the court concluded that preclearance need not be justified by "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment." *Id.* 24a. In its view, the issue was

not "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate." *Id.* 26a. Also, although acknowledging that "the Supreme Court … has [n]ever held that [intentional] vote dilution violates the Fifteenth Amendment," the court concluded that Congress could rely on such evidence because Section 5 also enforces the Fourteenth Amendment. *Id.* 27a.

"Having resolved these threshold issues," *id.* 29a, the court held the legislative record sufficient to sustain Section 5. It found that "the record contains numerous 'examples of modern instances' of racial discrimination in voting," *id.* 29a (quoting *City of Boerne v. Flores*, 521 U.S. 507 530 (1997)), and that "several categories of evidence in the record support Congress' conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed," *id.* 31a. The court also concluded that Section 5's "deterrent" effect supported reauthorization, *id.* 47a, and ultimately held that Congress' decision was "reasonable" and "deserves judicial deference," *id.* 68a, 48a.

The court also upheld Section 4(b). It rejected Shelby County's argument that the formula is no longer rational in theory as "rest[ing] on a misunderstanding" because Congress did not rely on any logical connection between the concededly outdated triggers for coverage and the evidence on which Congress purported to rely. *Id.* 56a. The court concluded that the coverage triggers "were

never selected because of something special that occurred in those years." *Id.* Congress "identified the jurisdictions it sought to cover … and then worked backward reverse-engineering a formula to cover those jurisdictions." *Id.* The court nevertheless recognized that whether Section 4(b) was constitutional "present[ed] a close question" given the evidence of Section 2 litigation that Congress included in the legislative record. *Id.* 58a (discussing the Katz Study of Section 2 litigation).

Relying on a post-enactment declaration that the United States submitted to the district court, the court found that several covered States "appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." *Id.* 59a. The court reasoned that these States "appear comparable to some non-covered states only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary." *Id* 59a-60a. Finally, (again relying on post-enactment evidence) it concluded that the availability of bail-in and bailout alleviated any remaining concerns with Section 4(b)'s imperfections. *Id.* 61a-65a.

3. Judge Williams dissented. He found Section 4(b)'s coverage criteria defective whether "viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of §5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?)." *Id.* 70a. Per Judge Williams, although "sometimes a skilled dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder … Congress hasn't proven so adept." *Id.*

Judge Williams explained that the requirement that Section 4(b) be "sufficiently related to the problem it targets" means that "[t]he greater the burdens imposed by §5, the more accurate the coverage scheme must be." *Id.* 71a. He found several aspects of the preclearance regime troubling. First, Section 5 creates severe federalism problems by "mandat[ing] anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes." *Id.* Second, Section 5's "broad sweep" applies "without regard to kind or magnitude" of the voting change. *Id.* 72a. Third, the 2006 amendments to the preclearance standard increased Section 5's federalism burden and "not only disregarded but flouted Justice Kennedy's" equal-protection concerns. *Id.* 73a.

Judge Williams agreed that "[w]hether Congress is free to impose §5 on a select set of jurisdictions also depends in part … on possible shortcomings in the remedy that §2 provides for the country as a whole." *Id.* 77a. But he added that "it is easy to overstate the inadequacies of §2, such as cost and the consequences of delay" because "plaintiffs' costs for §2 suits can in effect be assumed by" the Department of Justice ("DOJ"), and where DOJ does not step in, "§2 provides for reimbursement of attorney and expert fees for prevailing parties." *Id.* (citing 42 U.S.C. §1973*l*(e)). Further, courts can "use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." *Id.* 77a-78a.

Judge Williams then reasoned that "a distinct gap must exist between the current level of discrimination in the covered and uncovered jurisdictions in order to

justify subjecting the former group to §5's harsh remedy, even if one might find §5 appropriate for a subset of that group." *Id.* 78a. Instead he found a negative correlation "between inclusion in §4(b)'s coverage formula and low black registration or turnout," noting that "condemnation under §4(b) is a marker of higher black registration and turnout." *Id.* 83a. The same was true for minority elected officials. *Id.* 85a.

Evidence of "second generation" barriers only further undermined the formula. *Id.* 91a-93a. "The five worst uncovered jurisdictions … have worse records than eight of the covered jurisdictions …. Of the ten jurisdictions with the greatest number of successful §2 lawsuits, only four are covered …. A formula with an error rate of 50% or more does not seem 'congruent and proportional.'" *Id.* 93a. Judge Williams rejected as unreliable the Attorney General's post-enactment survey of "purportedly successful, but unreported §2 cases." *Id.* 93a-94a. Judge Williams also attributed no significance to Section 5's "deterrent effect" as it "would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin*'s insistence that 'current burdens … must be justified by current needs' would mean little if §5's supposed deterrent effect were enough to justify the current scheme." *Id.* 94a. And he explained that "tacking on a waiver procedure such as bailout" could never solve the coverage formula's severe problems. *Id.* 101a (citation and quotation omitted).

Judge Williams thus concluded that "[b]ased on any of the comparative data available to us, and particularly those metrics relied on in *Rome*, it can hardly be argued that there is evidence of a substantial amount of voting

discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in *Katzenbach*." *Id.* 96a. "[T]here is little to suggest that §4(b)'s coverage formula continues to capture jurisdictions with especially high levels of voter discrimination." *Id.* 104a. Section 4(b) could not satisfy "*Northwest Austin*'s requirement that current burdens be justified by current needs." *Id.*

SUMMARY OF THE ARGUMENT

The Fifteenth Amendment's guarantee that "[t]he right of citizens … to vote shall not be denied or abridged by … any State on account of race, color or previous condition of servitude," U.S. Const. amend. XV, §1, limits but does not usurp the States' sovereign power to regulate elections, *see Oregon v. Mitchell*, 400 U.S. 112, 126 (1970). When Congress, as in the VRA, seeks "to enforce this article," U.S. Const. amend. XV, §2, it is the Article III responsibility of this Court to ensure that Congress is reacting to constitutional violations and has appropriately addressed them without intruding into matters reserved to the States under the Tenth Amendment or unjustifiably denying equal State sovereignty. *See Nw. Austin*, 557 U.S. at 205.

The VRA created a network of prophylactic remedies designed "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S. at 308. Section 2, as amended, creates a nationwide right of action and bans any law that even unintentionally "results in a denial or abridgment" of the right to vote. 42 U.S.C. §1973(a). Congress also has permanently outlawed literacy

tests and other ballot-access restrictions that were used to disenfranchise minority voters. And Congress has enacted a "bail in" provision that can subject any state or local jurisdiction found to have violated constitutional voting rights to judicially-supervised preclearance. None of these provisions is challenged here.

Shelby County challenges the reauthorization until 2031 of Section 5's preclearance obligation and Section 4(b)'s coverage formula. Section 5 exacts a heavy, unprecedented federalism cost by forbidding the implementation of all voting changes in jurisdictions identified by Section 4(b) until federal officials are satisfied that the changes do not undermine minority voting rights. *Nw. Austin*, 557 U.S. at 202. And Section 4(b)'s coverage formula "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* at 203 (citation and quotation omitted). Whether these "legislative measures not otherwise appropriate" remain constitutional under current conditions is the crux of this case. *Katzenbach*, 383 U.S. at 335.

This Court has previously upheld the preclearance regime against facial constitutional challenge under conditions then-prevailing in covered jurisdictions. *Id.* at 303; *Rome*, 446 U.S. at 180-81. But "[p]ast success alone … is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202. Section 5 "imposes current burdens and must be justified by current needs." *Id.* at 203. Absent the documented "widespread and persisting" pattern of constitutional violations and the continuing alteration of discriminatory voting laws to circumvent minority litigation victories that supported preclearance in the first place, Section 5's federalism cost is too great. *Katzenbach*, 383 U.S. at 309.

In 2006, Congress was unable to develop this record. Congress acknowledged that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated." *House Report* at 12. Indeed, there is broad agreement that "[t]hings have changed in the South .... Blatantly discriminatory evasions of federal decrees are rare." Voter registration and turnout "now approach parity" and "minority candidates hold office at unprecedented levels." *Nw. Austin*, 557 U.S. at 202 (citations omitted).

At most, the 2006 legislative record shows scattered and limited interference with voting rights, a level plainly insufficient to sustain Section 5 preclearance. The lower court speculated that the lack of evidence of discriminatory practices in the covered jurisdictions arose not from changed attitudes, but from Section 5's "deterrent" effect. Pet. App. 42a-44a. But speculative deterrence is plainly insufficient to impose preclearance. Congress needed to find that Section 5 was justified under actual conditions uniquely present in the covered jurisdictions; it could not proceed from an unsubstantiated and unbounded assumption that the covered jurisdictions have a latent propensity to discriminate that does not exist elsewhere in the country. *Nw. Austin*, 557 U.S. at 226 (Thomas, J.); Pet. App. 94a (Williams, J.).

In 2006, Congress shifted its reliance to evidence of "second generation" barriers that are not even remotely probative of intentional interference with the right to vote—let alone the kind of systematic violations that previously justified Section 5. *Nw. Austin*, 557 U.S. at 228 (Thomas, J.); Pet. App. 97a (Williams, J.). Moreover, Congress could not legitimately rely on vote dilution to

fill the gap in the legislative record. Vote dilution does not violate the Fifteenth Amendment, *Bossier II*, 528 U.S. at 334 n.3, and this Court has never upheld Section 5 under the Fourteenth Amendment, Pet. App. 27a. Preclearance is not an appropriate remedy for practices that affect the weight of votes cast and can be effectively addressed via Section 2.

Nothing in the legislative record indicates that more traditional and less intrusive remedies such as 42 U.S.C. §1983 and Section 2 of the VRA are an inadequate solution for the residuum of voting discrimination. In fact, "the majority of §5 objections today concern redistricting," Pet. App. 99a (Williams, J.), and Section 2 is an effective vehicle for challenging redistricting changes—especially statewide redistricting plans. Moreover, there is no evidence in the legislative record that adverse Section 2 decrees are being evaded by recalcitrant jurisdictions, and the discriminatory tests and devices that recalcitrant jurisdictions employed to make case-by-case litigation futile have been permanently banned.

Unlike Section 5's sweeping suspension of all voting changes, Section 2 creates a nationwide right of action allowing direct challenge to discriminatory voting laws and thus ties its remedy to proven violations. Especially in conjunction with Section 3's bail-in mechanism, which can be utilized to remedy a judicial finding that a jurisdiction has violated constitutional voting rights, Section 2 is now the "appropriate" prophylactic remedy for any pattern of discrimination that Congress documented in the 2006 legislative record.

But even if preclearance were still appropriate for *some* jurisdictions, Section 4(b)'s coverage formula is a wholly inappropriate mechanism for identifying them. In *Katzenbach*, the Court upheld Section 4(b)'s coverage formula because it accurately captured "the geographic areas where immediate action seemed necessary" and where "local evils" had caused significant violations of Fifteenth Amendment voting rights. 383 U.S. at 328-29. The Court therefore found the formula "rational in both practice and theory." *Id.* at 330. In other words, Section 4(b)'s "disparate geographic coverage [must be] sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. "The evil that §5 is meant to address" must remain "concentrated in the jurisdictions singled out for preclearance" and must "account[s] for current political conditions." *Id.* The reauthorized coverage formula cannot meet this standard.

The formula is not rational in theory. *Katzenbach* held that the "the misuse of tests and devices … was the evil for which the new remedies were specifically designed" and that "a low voting rate [was] pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S. at 330-31. Thus, the Court found a rational connection between the triggers for coverage and the problems that preclearance was devised to remedy. But that rational connection no longer exists. Congress justified Section 5's reauthorization based on "second generation" barriers in the record, which relate primarily to the weight of a vote once cast. Yet coverage under Section 4(b) continues to depend only on registration and turnout data from 1964, 1968, and 1972, which point to decades-old ballot-access interference. Accordingly, there is a serious mismatch

between the formula's triggers for coverage and the purported constitutional basis for reauthorization of preclearance.

The formula fares no better in practice. If the statutory benchmarks for coverage had been applied to the last three presidential elections preceding reauthorization, Hawaii (which is not covered) would be the only State subject to preclearance. Further, the "second generation barriers" are not "concentrated in the jurisdictions singled out for coverage." *Nw. Austin*, 557 U.S. at 203. Section 2 litigation and racially polarized voting occur nationwide. If Congress were serious about imposing preclearance on jurisdictions where such problems are most prominent, States like New York, Illinois, and Tennessee would have been covered instead of many (if not most) of the covered jurisdictions. The "modest palliative" of bailout, which now looks to a covered jurisdiction's ongoing compliance with Section 5 rather than whether it should have been covered in the first place, cannot save such an inappropriate formula. Pet. App. 101a (Williams, J.).

* * *

The Voting Rights Act of 1965 changed the course of history in the covered jurisdictions. But the record before Congress in 2006 bears little resemblance to the record that led the Court to uphold Section 5's sweeping prophylactic remedy in *Katzenbach* and *Rome*. "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." *Nw. Austin*, 557 U.S. at 226 (Thomas, J.). Sections 5 and 4(b) have accomplished their

mission and their encroachment on Tenth Amendment rights and the constitutional principle of equal sovereignty is no longer appropriate.

ARGUMENT

I. Congress Did Not Build A Record Of Current Conditions Establishing That Section 5 Preclearance Remains Appropriate.

Northwest Austin "sets the course" for evaluating whether reauthorizing Section 5 for another 25 years appropriately enforces the Fifteenth or Fourteenth Amendment. Pet. App. 14a. Section 5 "imposes current burdens and must be justified by current needs" because "[p]ast success alone … is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202-03.[4] Congress must establish, in other words, that "exceptional conditions" and "unique circumstances" previously justifying "legislative measures not otherwise appropriate" still exist. *Katzenbach*, 383 U.S. at 334. As shown below, changes over time have foreclosed that finding.

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4. "[T]he questions the Court raised" in *Northwest Austin* are the "very questions one would ask to determine whether section 5 is 'congruen[t] and proportional[ ] [to] the injury to be prevented.'" Pet. App. 16a (quoting *Boerne*, 521 U.S. at 520). Although *Boerne* has been applied in the Fourteenth Amendment setting, it should apply equally in Fifteenth Amendment cases given the "parallel" enforcement clauses. *Boerne*, 521 U.S. at 518. Regardless, Section 5 and Section 4(b) are no longer "appropriate" enforcement legislation under any applicable standard of review.

A. The widespread and ingenious voting discrimination that once made Section 5 preclearance an appropriate enforcement remedy has ended.

The Court repeatedly has found that Section 5 imposes burdens on States different in kind from any other federal enforcement remedy. "[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, 461-62 (1991). Preclearance overrides that sovereign authority and goes far "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." *Nw. Austin*, 557 U.S. at 202. It thus prevents covered jurisdictions from "respond[ing], through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). By design, then, Section 5 is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies" and a "substantial departure … from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting).

Section 5's federalism costs are also concrete. Preclearance has an outsized effect on the basic operation of state and local government. Based on the experience of covered jurisdictions between 1982 and 2006, renewed

Section 5 will foreclose the implementation of more than 100,000 electoral changes unless and until they are precleared. *Senate Report* at 13-14. Under Section 5, a covered jurisdiction that wishes to change its laws must either go "hat in hand to [DOJ] officialdom to seek approval," Pet. App. 71a (Williams, J.), or embark on expensive litigation in a remote judicial venue if it wishes to make any voting change. Both routes can be burdensome and require covered jurisdictions to allocate substantial resources to Section 5 compliance. Brief of Arizona, Alabama, Georgia, South Carolina, South Dakota, and Texas as Amici Curiae in Support of Petitioner at 23-26, No. 12-96 (filed August 23, 2012). "Without any measureable benefit, preclearance compliance has over the past decade required the commitment of state and local resources easily valued at over a billion dollars." Modern Enforcement of the Voting Rights Act, Hearing before the Senate Committee on the Judiciary, 109th Cong., at 110 (May 10, 2006) (Coleman).

Congress compounded the burdens of preclearance in 2006 by expanding the *substantive* grounds for denying preclearance at a time when the "conditions that [the Court] relied upon in upholding the statutory scheme in *Katzenbach* and [*Rome*] ha[d] unquestionably improved." *Nw. Austin*, 557 U.S. at 202. Given this improvement in conditions throughout the covered jurisdictions, *any* increase in the preclearance burden is by definition "an unwarranted response" to the problem confronting Congress. *Boerne*, 521 U.S. at 530. There is no justification for making it more difficult to secure preclearance in 2006 than it was in 1965.

Congress' changes to Section 5 only made matters worse. "As a practical matter it is never easy to prove a negative." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier I*") (citations and quotations omitted). But preclearance must now be denied unless a covered jurisdiction proves the absence of "any discriminatory purpose." VRARAA, 120 Stat. at 577 (2006). Congress thus ignored this Court's warning that imposing such a difficult preclearance burden "would exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's constitutionality." *Bossier II*, 528 U.S. at 321-22 (citations and quotations omitted).

The amended preclearance standard also forecloses any change that diminishes a minority group's "ability to elect" a favored candidate even if it would not interfere with any voter's "effective exercise of the electoral franchise," *Beer*, 425 U.S. at 141. By changing Section 5's mission from preventing "backsliding," *Bossier II*, 528 U.S. at 335, to ensuring a certain number of minority-preferred elected officials, Congress further detached Section 5 from its original anti-discrimination objective. The "ability to elect" standard makes preclearance far more difficult to secure, *see, e.g., Texas v. United States*, 831 F. Supp. 2d 244 (D.D.C. 2011), and exacerbates the concern that, by making race the "predominant factor," Congress has created a "scheme in which [DOJ] is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). The 2006 preclearance standard thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between

§5 and the Reconstruction Amendments' commitment to non-discrimination." Pet. App. 75a (Williams, J.).

2. A uniquely burdensome enforcement remedy that radically departs from the ordinary operation of our federal system can be supported only by a legislative record documenting "current needs" of corresponding magnitude. It was the "unremitting and ingenious defiance" of the Fifteenth Amendment that justified this uncommon remedy in *Katzenbach*. 383 U.S. at 309. Then, registration data, turnout statistics, and the absence of minorities in public office, all of which the Court deemed reasonable barometers of pervasive interference with the right to register and vote, showed that the defiance was unremitting. *Id.* at 313, 329-30. In *Rome*, the Court further examined the "number and nature of [Section 5] objections interposed by the Attorney General" between 1965 and 1975. 446 U.S. at 181. This was all considered "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. at 329. Thus, while the "suspension of new voting regulations pending preclearance was an extraordinary departure from the traditional course of relations between the States and the Federal Government," it was "constitutional as a permitted congressional response to the unremitting attempts by some state and local officials to frustrate their citizens' equal enjoyment of the right to vote." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992) (citing *Katzenbach*, 383 U.S. at 334).

But more than the documented refusal to honor Fifteenth Amendment guarantees made preclearance necessary; preclearance responded to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination in the

face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 328, 335. The congressional record documented the "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." *Beer*, 425 U.S. at 140; *Allen*, 393 U.S. at 548. Hence, "Section 5 was directed at preventing a particular set of invidious practices that had the effect of undo[ing] or defeat[ing] the rights recently won by nonwhite voters." *Miller*, 515 U.S. at 925.

The invidious practice of subtly and continuously altering discriminatory voting laws to circumvent the effect of minority litigation victories gave Congress "reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under these unique circumstances, Congress responded in a permissibly decisive manner." *Katzenbach*, 383 U.S. at 335. In short, "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." *Nw. Austin*, 557 U.S. at 225 (Thomas, J.).

3. The 2006 legislative record failed to document "current needs" that could justify the "current burdens" of preclearance. Nothing in the record suggests that covered jurisdictions remain engaged in the pervasive voting discrimination and electoral gamesmanship that once made case-by-case adjudication of constitutional violations a futile enterprise and spurred Congress to act. Section 5 is only constitutionally defensible as a last resort. Because such extraordinary conditions no longer exist, Congress failed to "justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 334.

Evidence related to restricted ballot access that the Court relied on in *Katzenbach* and *Rome* confirms that current conditions cannot justify preclearance. As Congress found, "significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected officials." VRARAA, §2(b)(1), 120 Stat. at 577; *House Report* at 12 (concluding 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"). "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." *Nw. Austin*, 557 U.S. at 202.

The "number and nature" of Section 5 objections, *Rome*, 446 U.S. at 181, further confirms that a prior restraint is unnecessary. Between 1982 and 2004, only 0.74% of all preclearance submissions resulted in an objection (752 of 101,440 submissions). *Senate Report* at 13. Even more significantly, the objection rate has been declining steadily. In 1982, the objection rate was 2.32%; by 2003, the rate had fallen to 0.17%, and the rates in 2004 and 2005 were 0.06% and 0.02%, respectively.[5] *Id*. In the year before Section 5's reauthorization, the Attorney General objected to *one* preclearance submission. By comparison, the objection rate between 1965 and 1974 was 14.2%. *House Report* at 22. That difference is massive.

5. The Senate Report indicates that the objection rate was 0.002% in 2005. This figure is inaccurate. It reflects a computational error that becomes apparent when the numbers of submissions are compared with the number of objectives.

If that rate had prevailed, there would have been 14,404 objections between 1982 and 2004 instead of only 752. This evidence does not remotely suggest "unremitting" and "ingenious" defiance of minority voting rights.

Furthermore, unlike the "nature" of preclearance objections from the years immediately following the VRA's passage, modern preclearance denials are "poor proxies for intentional discriminatory state action in voting." Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 Ohio St. L.J. 177, 190 (2005). A preclearance denial provides no proof of intentional discrimination because Section 5's proper focus during the relevant period was retrogression. *Ashcroft*, 539 U.S. at 480; *Miller*, 515 U.S. at 926. And even when the Attorney General went beyond his statutory authority to block preclearance submissions based on a covered jurisdiction's purportedly discriminatory intent, he often did so in pursuit of the unconstitutional "'black-maximization' policy." *Miller*, 515 U.S. at 921. Nor are more information requests from the DOJ ("MIRs") evidence of a constitutional violation; they show only that the Attorney General has "insufficient information … to enable" him "to make a [preclearance] determination." *House Report* at 40. Preclearance statistics between 1982 and 2006—administrative or judicial—thus are not "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. at 329.[6]

6. A Section 5 enforcement action is similarly unreliable, *see* VRARAA, §2(b)(4)(A), as it can establish only that a voting change—and quite possibly a nondiscriminatory one—was not properly submitted for preclearance.

The other evidence of "second generation" barriers is even less indicative of voting discrimination. Racially polarized voting, which Congress called the "clearest and strongest evidence" of the need to reauthorize Section 5, *House Report* at 34; VRARAA, §2(b)(3), 120 Stat. at 577, is not governmental discrimination—the only type of conduct Congress may remedy, *Terry v. Adams*, 345 U.S. 461, 473 (1953)—let alone intentional discrimination. "[T]he continued filing of section 2 cases," VRARAA, §2(b)(4)(C), 120 Stat. at 578, establishes nothing more than a yet-unproven allegation that a law not requiring proof of intentional discrimination has been violated, *Chisom v. Roemer*, 501 U.S. 380, 393 (1991). And the dispatching of election observers, VRARAA, §2(b)(5), 120 Stat. at 578, reflects only the Attorney General's prediction that there *might* be conduct with the effect of disenfranchising minority citizens, which *might* or *might not* be intentional voting discrimination. *House Report* at 44. In sum, "second generation" evidence "bears no resemblance to the record initially supporting §5, and is plainly insufficient to sustain such an extraordinary remedy." *Nw. Austin*, 557 U.S. at 228 (Thomas, J.).

But even if the Court gives weight to all of the evidence in the legislative record, it at most shows scattered and limited interference with Fifteenth Amendment rights in some covered jurisdictions and thus cannot sustain a remedy as intrusive as preclearance. Like the Religious Freedom Restoration Act, Section 5's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions." *Boerne*, 521 U.S. at 532. Given Section 5's unprecedented federalism costs, *Nw. Austin*, 557 U.S. at 202, "[t]he burden remains with Congress to prove that the urgent

circumstances warranting §5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute," *id.* at 229 (Thomas, J.).

In addition, most of this scattered evidence relates to vote dilution. Pet. App. 28a-29a. But vote dilution does not violate the Fifteenth Amendment, *Bossier II*, 528 U.S. at 334 n.3; Pet. App 27a, thus distinguishing this case from *Katzenbach* and *Rome*, which upheld Section 5 exclusively under the Fifteenth Amendment. And even assuming that Congress also acted under Section 5 of the Fourteenth Amendment, the legislative record does not reflect vote dilution so serious as to warrant preclearance of all voting changes. Congress identified only twelve published judicial decisions between 1982 and 2006 with a finding of intentional discrimination, and half of them involved discrimination against white voters. *Senate Report* at 13. Nor is there evidence that covered jurisdictions have tried to evade federal decrees arising from a judicial finding of intentional vote dilution.

In any event, the character of modern vote dilution cannot justify preclearance. Whereas the South during the 1960s was plagued with vote-denial schemes interfering with ballot access, modern vote dilution claims involve diminishing the effect of ballots once cast. Because there are countless ways to suppress minorities' ability to cast votes, Section 2 suits in the vote-denial context were particularly vulnerable to "the extraordinary stratagem of contriving new rules … in the face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 335. In contrast, because vote-dilution claims involving minorities' group-voting power typically arise in the districting context, it

is nearly impossible for a jurisdiction to evade a Section 2 decree. Any invalidated district will be replaced with a valid one under judicial supervision; jurisdictions simply cannot continually "contriv[e] new" *districts* "in the face of adverse federal court decrees." *Id.* Section 2 is an effective way of redressing vote dilution.

Indeed, given current conditions, other remedies already on the books are "appropriate" remedies "drawn in narrow terms to address or prevent" any residuum of voting discrimination that exists throughout the nation. *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1334 (2012). Voters denied their constitutional rights can bring a Section 1983 action for declaratory and injunctive relief and may recover attorneys' fees if victorious. *See* 42 U.S.C. §1988. Moreover, Section 2 applies nationwide, permitting specific challenges to discriminatory voting practices and focusing a judicial remedy on proven violations. *United States v. Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts that … Congress [has] the power to 'enforce … the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."). Section 2 also prophylactically bans any practice that even unintentionally "results in the denial or abridgment" of the right to vote. 42 U.S.C. §1973(a). Especially in conjunction with Section 3's bail-in mechanism, Section 2 can effectively remedy the "lesser" harm that Congress documented in 2006, *Boerne*, 521 U.S. at 530.

B. The lower court's reasons for upholding Section 5 conflict with this Court's decisions and would justify preclearance in perpetuity.

The court of appeals did not dispute that the first-generation barriers relied upon in *Katzenbach* and *Rome* were no longer present. Pet. App. 22a-23a. Instead, it relied upon legal theories alien to this Court's decisions analyzing the scope of Congress' enforcement authority. If the lower court's reasoning is correct, preclearance would no longer be an extraordinary remedy for rampant constitutional evasion—but a permanent usurpation of the Tenth Amendment powers reserved to the States.

1. By treating the judicial task as akin to review of agency decisions, Pet. App. 47a, the court inappropriately deferred to Congress in every aspect of its analysis. The judiciary has the Article III responsibility to ensure that Congress has documented "reliable evidence of actual voting discrimination" before exercising its enforcement authority. *Katzenbach*, 383 U.S. at 329; *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("Congress may impose prophylactic §5 legislation" only when "there has been an identified history of relevant constitutional violations."). In *Boerne*, the Court rejected Congress' determination that a "widespread pattern of religious discrimination" existed, because the legislative record did not document constitutional violations. 521 U.S. at 531. Congress may rely on evidence from "any probative source." *Katzenbach*, 383 U.S. at 330. But the ultimate responsibility for deciding whether that evidence establishes a constitutional violation rests with this Court. *Mitchell*, 400 U.S. at 125-26; *Boerne*, 539 U.S. at 519-20; *Nw. Austin*, 557 U.S. at 224-26 (Thomas, J.).

The court below acknowledged its obligation to ensure that Congress documented "substantial probative evidence" of a widespread pattern of voting discrimination, Pet. App. 47a, yet upheld Section 5 principally by deferring to Congress on the evidence's probative value. For example, it relied on preclearance objections that purportedly were based on a finding of discriminatory intent, *id.*, without determining whether those Section 5 objections were based on constitutional violations or, instead, the Attorney General's mistaken interpretation of that standard. And the court had every reason to believe that preclearance objections based on a finding of intentional discrimination during the relevant period deviated from the constitutional standard. *See, e.g.*, *Miller*, 515 U.S. at 917 (explaining that DOJ "would accept nothing less than abject surrender to its maximization agenda"); Introduction to the Expiring Provisions of the Voting Rights Act, 109th Cong. at 216 (May 9, 2006) (Hasen) (explaining that the Attorney General followed a "policy of objecting to certain state actions that were perfectly constitutional").[7]

7. The court also deferred to Congress' supposed judgment that "absolute numbers" of preclearance objections were more probative than "objection rates." Pet. App. 35a. But nothing in the legislative record suggests that Congress made such a determination. Moreover, looking to absolute numbers ignores that there were six times as many submissions between 1982 and 2004 (101,400) than between 1965 and 1982 (15,416). *House Report* at 22. The annual objection rate is thus far more probative of current conditions. Otherwise, there would be no difference between 100 objections out of 200 submissions or 100 objections out of 1,000,000 submissions.

The court's deference to Congress' assessment of the evidence also pervaded its examination of other second-generation evidence. It acknowledged that MIRs "are less probative of discrimination" than preclearance objections, but permitted Congress to conclude that "some" of them are probative. Pet. App. 35a-36a. It found deployment of observers "hardly conclusive evidence of unconstitutional discrimination," but held that Congress "could reasonably rely upon it as modest additional evidence of current needs." *Id.* 40a. It found Congress "reasonably concluded that successful section 2 suits provide powerful evidence of unconstitutional discrimination," *id.* 38a, even though such suits, *i.e.*, those "resulting in outcomes favorable to minority plaintiffs," *id.* 49a, included many suits with no finding of intentional discrimination, suits not resolved on the merits, or both, Ellen Katz et al., *Documenting Discrimination in Voting*, 39 U. Mich. J.L. Reform 643, 653-54 n.35 (2006).[8] And, finally, it found Congress "could reasonably have concluded" that all 105 Section 5 enforcement actions could "provide at least some evidence" supporting reauthorization because *two* of them suggested intentional discrimination. Pet. App. 40a.

The Constitution grants Congress power to *enforce* the Reconstruction Amendments, not to rewrite them. The Court thus must draw "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."

8. For example, one case was included in the legislative record as a successful Section 2 case even though it was dismissed because the suit "challenged the lawfulness of a system which was no longer viable" and there was "a scant amount of evidence in support of the claims." *Fayetteville v. Cumberland County*, No. 90-2029, 1991 WL 23590, at *2 (4th Cir. Feb. 28, 1991).

Boerne, 521 U.S. at 519. The court below abdicated that Article III duty by deferring to Congress' conclusion that the legislative record includes "reliable evidence," *Katzenbach*, 383 U.S. at 329, of a widespread pattern of "relevant constitutional violations," *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). "[A]s broad as the congressional enforcement power is, it is not unlimited." *Boerne*, 521 U.S. at 518. If Congress can dictate the constitutional significance of the evidence in the legislative record, "it is difficult to conceive of a principle that would limit congressional power." *Id.* at 529.

2. Not only did the lower court indulge in excessive deference, it held Congress to a lighter evidentiary burden than precedent allows. Ignoring this Court's repeated conclusion that Section 5 was an appropriate response to evasionary tactics and electoral gamesmanship, *supra* at 5, the court looked exclusively to the "magnitude" of violations to decide whether "section 2 litigation remains inadequate." Pet. App. 26a. It claimed that the inherent characteristics of case-by-case adjudication necessitated preclearance because "section 2 claims involve 'intensely complex litigation that is both costly and time-consuming," despite the availability of preliminary injunctive relief. *Id.* 45a (internal citations and quotations omitted). But Congress could not have thought that it was the almost universal attributes of traditional litigation that made Section 2 ineffective. If it had, Section 5 would have been extended nationwide.

But even if Section 2 litigation does have the sometimes frustrating attributes of ordinary civil litigation, case-by-case enforcement is hardly futile under current conditions. In 1965, "Congress had found that case-by-case litigation

was inadequate to combat widespread and persistent discrimination in voting, *because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits*." *Katzenbach*, 383 U.S. at 328 (emphasis added). Absent similar evidence in the 2006 legislative record, or at least evidence of discrimination in covered jurisdictions "so extensive that elimination of it through case-by-case enforcement would be impossible," *Nw. Austin*, 557 U.S. at 225 (Thomas, J.), there is no basis for upholding Section 5. If the efficient prevention of isolated violations could sustain the invasive preclearance obligation, then Section 5 would be a constitutional remedy even where the legislative record documents the existence of minimal voting discrimination. Such a result cannot be reconciled with *Katzenbach* or any other decision.

Under the lower court's constitutional reasoning, preclearance could be imposed to counteract any perceived threat of Fourteenth or Fifteenth Amendment violation given the lure of prior restraint. Instead of creating a right of action to remedy discrimination against the disabled in accessing judicial services, *Lane*, 541 U.S. at 517, or against women in the workplace, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003), Congress could suspend the right of state and local governments to make physical changes to their facilities or make changes to their employee leave policies "until they have been precleared by federal authorities in Washington, D.C," *Nw. Austin*, 557 U.S. at 202. But *Katzenbach* teaches that an unprecedented preclearance remedy requires evidence of systematic violations not remediable by less restrictive means. Federalism interests cannot be trampled solely in the interest of an efficient remedy.

3. Finally, the court of appeals paradoxically cited the absence of current voting discrimination as proof that preclearance should continue for 25 years. At every turn, the court assumed that the lack of evidence was the result of Section 5's alleged "deterrent" effect, finding "that Section 5 deters jurisdictions from even attempting to enact [discriminatory] laws, thereby reducing the need for section 2 litigation in covered jurisdictions." Pet App. 38a. Based on this line of reasoning, the court found that "Congress had 'some reason to believe that without [section 5's] deterrent effect on potential misconduct,' the evidence of continued discrimination in covered jurisdictions 'might be considerably worse.'" *Id*. 42a-43a (quoting *Senate Report* at 11).

But this is precisely the kind of "supposition and conjecture" that cannot sustain enforcement legislation. *Coleman*, 132 S. Ct. at 1336. There is no evidence in the legislative record suggesting that the racial animus of the 1960s in covered jurisdictions has been hibernating for two generations. Congress is not entitled to blindly assume that the concededly fragmentary evidence of voting discrimination is the product of Section 5 deterrence. That offensive theory, *see Nw. Austin*, 557 U.S. at 226 (Thomas, J.), could never be disproved. As verifiable evidence of voting discrimination continued to abate, the "deterrent" effect would be assigned the credit thus depriving covered jurisdictions of the constitutional prerogative to regulate their own elections "to the crack of doom. Indeed, *Northwest Austin*'s insistence that 'current burdens … must be justified by current needs' would mean little if §5's supposed deterrent effect were enough to justify the current scheme." Pet. App. 94a (Williams, J.) (internal citation omitted).

II. Congress Did Not Document Current Conditions Justifying Section 4(b)'s Unequal Treatment of Sovereign States.

Even if preclearance might remain an appropriate response to ongoing discrimination in *some* jurisdictions, Section 4(b)'s formula is no longer an "appropriate" means of determining the jurisdictions that should be subject to coverage. 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." *Nw. Austin*, 557 U.S. at 203. An appropriate coverage formula must be "rational in both practice and theory." *Katzenbach*, 383 U.S. at 330. As shown below, the archaic coverage formula reauthorized in 2006 is neither.

A. Section 4(b)'s coverage formula is no longer rational in theory.

1. In *Katzenbach*, the Court found Section 4(b)'s formula sound in theory because its inputs—"the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average"—reliably indicated a "widespread and persistent" use of intentionally discriminatory tactics to keep minorities from voting. 383 U.S. at 330-31. Tying coverage to "the use of tests and devices for voter registration" was appropriate because "of their long history as a tool for perpetrating the evil"; tying coverage to low registration and turnout rates was appropriate "for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Id.* at 330.

But this now decades-old data does not describe current conditions. The discriminatory tests and devices targeted in Section 4(b) have been permanently banned for over 35 years, and the rates of minority registration and voting in 1964, 1968, and 1972 are vastly different from the "current political conditions" in the covered jurisdictions, *Nw. Austin*, 557 U.S. at 203. As "[v]oter turnout and registration rates now approach parity," there is no rational basis for Congress' determination that election data from 1964, 1968, and 1972 identifies those jurisdictions likely to discriminate between 2007 and 2031. *Id.* at 202. It would have made little theoretical sense for Congress to base coverage in 1965 on voting data from the 1916, 1920, and 1924 elections. It made even less sense to rely on data from 1964, 1968, and 1972 in 2006. The coverage formula is unconstitutional for this reason alone.

2. The coverage formula also suffers from another fundamental theoretical flaw. Although the statutory coverage factors—registration and turnout statistics—reflect interference with the ability to cast a ballot, Congress did not reauthorize Section 5 to deal with the "first generation" problem of ballot access. Congress found that ballot-access problems had largely been solved and instead justified reauthorization based on "second generation" barriers to electoral success. *Supra* at 9-11. Therefore, there is a serious mismatch between the problem that Congress targeted and the triggers for coverage under Section 4(b)'s formula. Vote dilution and the other "second generation" barriers affect voting impact, *see Thornburg v. Gingles*, 478 U.S. 30, 48 (1986), but they do not deny ballot access to anyone and thus do not "inevitably affect the number of actual voters," *Katzenbach*, 383 U.S. at 330.

It is irrational to retain a coverage formula that utilizes indicators of interference with the ability to cast a ballot in order to identify jurisdictions that employ electoral practices undermining the effectiveness of the ballot once cast. Congress' failure to change the coverage formula to respond to its shift in focus is particularly problematic because there are readily available criteria and data that would have identified those States and localities where these "second generation" problems are most prevalent.

The court of appeals acknowledged these arguments but brushed them aside. The court found it unnecessary to evaluate the theoretical basis for Section 4(b)'s coverage formula and suggested that theoretical irrationality was not "Shelby County's real argument." Pet. App. 57a. But that is demonstrably wrong. Shelby County advanced this issue and briefed it extensively both in the district court (including in supplemental briefing on whether the reauthorization of Section 4(b) was "rational in both practice and theory," Pet. App. 292a-293a) and on appeal. As the coverage formula's theoretical basis was one of the key reasons for upholding it in *Katzenbach*, Shelby County has always pressed this issue.

3. Brushing aside the absence of theoretical justification for the formula, the court asserted that Shelby County's argument "rests on a misunderstanding of the coverage formula" because Congress "identified the jurisdictions it sought to cover … and then worked backward, reverse-engineering a formula to cover those jurisdictions." *Id.* 56a. In the court's view, the triggers "were never selected because of something special that occurred in [the identified] years" and "tests, devices, and low participation

rates" were not Congress' main targets; they were instead "proxies for pernicious racial discrimination in voting." *Id.* 56a-57a. According to the court of appeals, the only question to be answered "is not whether the formula relies on old data or techniques, but instead whether it … continues to identify the jurisdictions with the worst problems." *Id.* 57a.

But determining whether the formula is rational in practice is not a substitute for testing it in theory. *Katzenbach* concluded that the formula was constitutional in part because there was a rational connection between the triggers for coverage and the problems preclearance was designed to remedy. Refusing to squarely address this aspect of the inquiry ignores the Court's recent warning that the formula must be "sufficiently related to the problem" targeted by Congress. *Nw. Austin*, 557 U.S. at 203. Bypassing this question admits that it has no answer.

B. Section 4(b)'s coverage formula is no longer rational in practice.

1. In *Katzenbach*, the Court found that Section 4(b)'s coverage formula when tested in practice accurately captured those jurisdictions where there was "reliable evidence of actual voting discrimination." 383 U.S. at 329. Those jurisdictions that had "misuse[d] … tests and devices" were committing the "evil for which the new remedies were specifically designed." *Id.* at 331. Thus, that "no States or political subdivisions [were] exempted from coverage under §4(b) in which the record reveal[ed] recent racial discrimination involving tests and devices … confirm[ed] the rationality of the formula." *Id.*

By 2006, however, suspect tests and devices had been permanently banned and the evidence in the legislative record of comparative voter registration and turnout data "suggests that the coverage formula lacks any rational connection to current levels of voter discrimination." Pet. App. 95a (Williams, J.). In fact, had Congress tied preclearance to voting data from the 1996, 2000, and 2004 Presidential elections in order to capture those jurisdictions with current first-generation problems, *none* of the currently covered States would be subject to preclearance—only Hawaii would be covered. 151 Cong. Rec. H5131, H5181 (daily ed. July 13, 2006).

Moreover, "the racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nationwide." *Nw. Austin*, 557 U.S. at 203. For example, a comparison of white and black registration and turnout rates from the 2004 election demonstrates that there is "no positive correlation between inclusion in §4(b)'s coverage formula and low black registration or turnout. Quite the opposite. To the extent that any correlation exits, it appears to be negative—*condemnation under §4(b) is a marker of higher black registration and turnout*." Pet. App. 83a (Williams, J.) (emphasis added); *Senate Report* at 11 ("[P]resently 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."). The formula thus clearly "fails to account for current political conditions." *Nw. Austin*, 557 U.S. at 203.

2. If "second generation barriers" are now the "evil §5 is meant to address," that evil is not "concentrated in the jurisdictions singled out for coverage." *Id.* "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.'" *Id.* at 204 (quoting The Continuing Need for Section 5 Pre-Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., at 10 (May 16, 2006) (Pildes) ("*Continuing Need*")). It was readily apparent that "identify[ing] continuing problems in the covered jurisdictions, such as racially polarized voting, in complete isolation from consideration of whether similar problems exist in non-covered sites" was constitutionally problematic. *Continuing Need* at 200 (Pildes).

Yet Congress never addressed this issue "in any detail in the [Senate] hearings or in the House" and "little evidence in the [legislative] record examines whether systematic differences exist between the currently covered and non-covered jurisdictions." *Id.* at 200-01 (Pildes). It may be that Congress was unwisely persuaded to conclude that it need not address the issue. *See id.* at 95 ("I do not believe that [*Boerne*] requires Congress to engage in a new and detailed comparison of voting practices and procedures and levels of minority participation and electoral success in covered and non-covered jurisdictions before renewing section 5.") (Karlan). Or Congress might have known that conducting such a study could make reauthorization more difficult to achieve. *See Nw. Austin*, 557 U.S. at 204 (citing Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 208 (2007)). Regardless, Congress

did not seriously consider whether the "statute's disparate geographic coverage is sufficiently related to the problem that it targets," *id.* at 203, let alone make an actual *finding* of meaningfully greater incidence of "second generation barriers" in the covered jurisdictions, VRARAA, §2(b)(4), 120 Stat. at 577. Given this failure, Congress was clearly acting as the proverbial "dart-thrower." Pet. App. 70a (Williams, J.).

Had Congress studied the issue, it would have been plain that there are no longer "systematic differences between the covered and the non-covered areas of the United States[;] … in fact, the evidence that is in the record suggests that there is more similarity than difference." *Continuing Need* at 10 (Pildes) (quoted in *Northwest Austin*, 557 U.S. at 204). Evidence of "second generation" barriers for which there is comparative data in the legislative record confirms that the "evil" Congress targeted in Section 5 is "no longer … concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203.

A state-by-state comparison of Section 2 litigation data and racially polarized voting statistics confirms the irrationality of using Section 4(b)'s formula to address "second generation barriers."[9] The Katz Study of Section

9. Section 2 litigation and racially-polarized voting statistics are the only "second generation barriers" that could plausibly bear on this issue. Preclearance statistics provide no basis for a comparative analysis because non-covered jurisdictions are not subject to Section 5. Similarly, during the relevant period, the Attorney General was authorized to send observers only to covered jurisdictions or non-covered jurisdictions bailed-in under Section 3. Pet. App. 240a-241a n.13.

2 litigation—which the court of appeals considered "the most concrete evidence comparing covered and non-covered jurisdictions in the legislative record," Pet. App. 49a—conclusively demonstrates that Congress did not correctly identify the States to be covered.

For example, taking the States with the highest number of Section 2 lawsuits filed since 1982, the nine fully-covered States are only 5 of the top 10, 6 of the top 14, and 7 of the top 26. *See* Ellen Katz & The Voting Rights Initiative, *VRI Database Master List*, *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls (cited in To Examine the Impact & Effectiveness of the Voting Rights Act: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., at 974, 1019-20 (Oct. 18, 2005)). In fact, non-covered Illinois had more Section 2 lawsuits filed since 1982 than all but three fully-covered States. *Id.* The same is true of New York, and Florida, even disregarding the suits filed against their scattered covered jurisdictions. Notably, one fully-covered State (Alaska) did not have a single reported Section 2 suit filed during the entire period covered by the legislative record. *Id.* Thus, if reported Section 2 suits were a proper basis for coverage, Alaska could be covered only if every State in the Union were covered.

Similarly, focusing on adjudicated Section 2 violations, fully-covered States make up only 5 of the top 10, 6 of the top 18, and 7 of all 25. *Id.* Neither Alaska nor Arizona had a single Section 2 violation, yet Illinois had more of these than five fully-covered States (and all of the partially covered States). *Id.* And of the 20 States with Section 2 lawsuits that resulted in findings of intentional

discrimination, only 4 were fully-covered States. *Id.* On the other hand, of the 6 States with more than one finding of intentional discrimination, 4 were non-covered States. *Id.*[10] In particular, Illinois and Tennessee had more Section 2 lawsuits that resulted in findings of intentional discrimination than all but one covered State. And with regard to Section 2 suits with "outcomes favorable to minority voters," fully-covered States make up only 4 of the top 8, 5 of the top 11, and 7 of all 30. *Id.* While Alaska and Arizona had none of these cases, there were more of these cases in non-covered Illinois and the non-covered portions of Florida than in five fully-covered States. *Id.*

The outcome is the same for racially polarized voting. Of the 105 instances of racially polarized voting, only 48 occurred in covered States, and only 52 in all covered jurisdictions. *Id.* Among those 105 instances, only 4 of the 10 States with the highest number of instances of racially polarized voting are fully-covered States. *Id.* Two fully-covered States (Arizona and Alaska) did not have a single reported suit with a finding of racially polarized voting. *Id.* On the other hand, non-covered Arkansas, Illinois, and Tennessee, and the non-covered portions of Florida and New York each had more instances of racially polarized voting than five of the nine fully-covered States. *Id.* Finally, of the 16 instances of racially polarized voting the Katz Study identified as having occurred after 2000, only 5 (or 31%) occurred in covered States. *Id.*

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10. Of the data in the Katz Study, intentional-discrimination findings should be the only relevant statistic since preclearance has always been justified primarily on the basis of "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. at 329.

Ultimately, whether the Court considers all of the Section 2 lawsuits filed or any subset thereof, the answer is the same: Section 4(b)'s formula is a "remarkably bad fit" to the problems Congress was addressing. Pet. App. 95a (Williams, J.); *id.* 93a ("A formula with an error rate of 50% or more does not seem 'congruent and proportional.'"). "There is a lot of paper, but not many facts or statistics to show why Georgia is different from Tennessee or why Texas is different from Oklahoma or why racially polarized voting in Wisconsin shouldn't be addressed with a remedy such as [Section 5]." 151 Cong. Rec. H5182 (daily ed. July 13, 2006) (Rep. Westmoreland).

3. Because the Katz Study could not provide a basis for defending Section 4(b)'s coverage formula on its own terms, the court of appeals was forced to dig deeper. First, it considered only a carefully selected slice of data—Section 2 cases resulting in outcomes "favorable to minority plaintiffs," a characterization that vastly overstates their significance, Pet. App. 132a (Williams, J.), especially as Congress looked only to "continued *filing* of Section 2 cases in covered jurisdictions," VRARAA §2(b)(4)(C), 120 Stat. at 578 (emphasis added). As noted above, many of these Section 2 cases involved no finding of intentional discrimination, were not resolved on the merits, or both; and some of the "outcomes" deemed "favorable to minority voters" merely reflected voluntary changes in voting laws. *See supra* at 36 and n.8.

Second, the court primarily reviewed this slice of data in the aggregate, lumping States into "covered" and "non-covered" categories. But aggregating denies equal dignity to each sovereign State by obscuring each State's individual record and thus concealing the fact that

many of them have records similar to (or better than) many non-covered States. As noted above, there was not a single Section 2 suit in Alaska or Arizona—much less a "successful" one—in the entire 24-year period. *VRI Database Master List*. Using the lower court's preferred metric, then, no non-covered State had a better record than Alaska or Arizona. Moreover, eight non-covered States or non-covered portions of partially-covered States had at least as many "successful" Section 2 suits as Georgia and South Carolina, and six had at least as many as Virginia. *See id*. Only three fully-covered States had more "successful" Section 2 suits than Illinois, and only four fully-covered States had more than Tennessee and Arkansas and the non-covered portions of New York and Florida. *See id*.

Had the court of appeals assessed each State on an individual basis, it would have discovered that the formula is both grossly under- and over-inclusive. In other words, the court could not possibly have concluded that the coverage formula captures "the jurisdictions with the worst problems." Pet. App. 57a. What the court labeled a "close question," *id*. 58a, is in fact not close at all.

Even viewing the covered States collectively, the Katz Study fails to show a meaningful difference between covered and non-covered jurisdictions. There were more Section 2 lawsuits filed in non-covered jurisdictions (171) than in covered jurisdictions (160). *See VRI Database Master List*. Additionally, there were almost twice as many Section 2 suits resulting in a finding of intentional discrimination in non-covered jurisdictions (21) than in covered jurisdictions (12), *id.*, and on a closer "reading of the cases Professor Katz lists, there are even fewer," Pet.

App. 97a (Williams, J.); *see also Continuing Need* at 202 ("[T]hese [Section 2] violations are not overwhelmingly or systematically concentrated in Section 5 areas; [the Katz] report itself documents that these violations arise in many places with significant minority populations…. Since 1990, for example, there are as many judicial findings of Section 2 violations in Pennsylvania as in South Carolina—and more in New York.") (Pildes).

To be sure, the court made much of the fact that covered jurisdictions "accounted for 56 percent of *successful* section 2 litigations since 1982." Pet. App. 49a (emphasis added). But a narrow 56% to 44% divide is woefully insufficient to justify retaining the outmoded coverage formula; as the National Commission on the Voting Rights Act found, this data shows that a "significant" number of Section 2 cases "resolved favorably to plaintiffs" occurred in non-covered jurisdictions. *See* Voting Rights Act: Evidence of Continued Need: Hearing. Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., at 208 (Mar. 8, 2006). Such a narrow covered-versus-non-covered split does not show that Section 2 litigation is concentrated in covered jurisdictions and thus cannot provide a legitimate basis for "depart[ing] from the fundamental principle of equal sovereignty," *Nw. Austin*, 557 U.S. at 203.

Moreover, whatever the "persuasive power of this statistic" it dissolves once the Court "disaggregate[s] the data by state." Pet. App. 91a (Williams, J.). Although the Katz Study found 68 "successful" Section 2 cases in the sixteen fully or partially-covered States, Congress could have selected an almost entirely different set of States for coverage and reached the same result. For

example, more successful Section 2 suits (69) would have occurred in covered jurisdictions had Congress selected Arkansas (4), California (3), Colorado (2), Florida (7), Illinois (9), Louisiana (10), Maryland (2), Massachusetts (1), Montana (2), New York (5), North Carolina (10), Ohio (2), Pennsylvania (3), Tennessee (4), Virginia (4), and Wisconsin (1).

And this is not a contrived example. Even excluding all of the seven original fully-covered States, one could still compile a list of sixteen States with nearly as many successful Section 2 suits (65) as occurred in the covered jurisdictions (68): Arkansas (4), California (3), Colorado (2), Delaware (1), Florida (7), Illinois (9), Maryland (2), Montana (2), New York (5), North Carolina (10), Ohio (2), Pennsylvania (3), Rhode Island (1), Tennessee (4), Texas (9), and Wisconsin (1). Because Section 2 litigation is not concentrated in covered States, there are seemingly innumerable combinations that would prove this same point. In short, the Katz data do not at all suggest that the coverage formula is rational in practice. They demonstrate the opposite.

Seemingly aware of this problem, the lower court examined the Katz data state-by-state only after supplementing it with data included in a post-enactment declaration submitted by Peyton McCrary, a DOJ employee. Pet. App. 93a. The court conceded that the declaration should be "approach[ed] … with caution," *id.* 54a, because it was executed during this litigation and depended on extra-record evidence collected by different groups and pursuant to different methods than the Katz Study, *id.* The declaration also classified cases that were resolved through a settlement as "successful," despite

the fact that this inference is "exceptionally weak," as it "overlooks not only the range of outcomes embraced in the concept of settlement but also the strategic factors, including legal fees and reputational risk, that go into a jurisdiction's decision to settle." *Id*. 93a-94a (Williams, J.). Even ignoring these flaws, the McCrary declaration should never have been accepted. The statute's constitutionality must be measured against the legislative record alone. Pet. App. 299a-300a; *Coleman*, 132 S. Ct. at 1336-37; *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008).

In any event, the court's attempt to analogize the 2006 record to the 1965 record based on this extra-record evidence fails. The 1965 record documented States where "federal courts ha[d] repeatedly found substantial voting discrimination," a second category where "there was more fragmentary evidence of recent voting discrimination," and a third category where the use of tests and devices and low voter turnout justified coverage, "at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years." *Katzenbach*, 383 U.S. at 329-30. In contrast, the 2006 record could not possibly place any State within the first category and at most three States in the second category, "leav[ing] six fully covered states (plus several jurisdictions in partially covered states) in category three, many more than in 1966, when only two fully-covered states (Virginia and Alaska) were not included in either category one or two," Pet. App. 97a. (Williams, J.). It is worth emphasis that none of these States now employ tests or devices, making them unlike even the category-three cases of decades ago. Moreover, the jurisdictions arguably falling in category three have records virtually indistinguishable from (if not better than) several non-covered States.

Had Congress chosen to individually identify those States with the highest incidence of "second generation barriers," many (if not most) of the nine fully covered States would have avoided coverage. But States like New York, Illinois, and Tennessee and several others clearly would have been on that hypothetical coverage list. If Congress genuinely considered Section 2 litigation a legitimate barometer for whether a State should be subject to preclearance until 2031, it should not have retained the Section 4(b) formula, and it could not have targeted these nine States for coverage.

4. The court of appeals retreated to bailout as a solution to the irrationality of the coverage formula. Pet. App. 61a-64a. But there are several reasons why bailout is incapable of saving Section 4(b). First, history has shown that bailout can at best ameliorate over-inclusiveness only at the margin. Even ignoring that the court relied on bailout figures artificially inflated by post-reauthorization evidence, only a tiny percentage of the more than 12,000 covered jurisdictions have bailed out of coverage since 1982. Pet. App. 100a ("[O]nly 136 of the more than 12,000 covered political subdivisions (i.e., about 1%) have applied for bailout (all successfully).")

The reason why bailout is so infrequent is statutory. Bailout eligibility requires not only that a covered jurisdiction have a ten-year record of perfect compliance with statutory bailout criteria, but also that all of its sub-jurisdictions have the same spotless record. 42 U.S.C. §1973b. Because any failure resets the ten-year bailout clock, "the promise of a bailout opportunity has, in the great majority of cases, turned out to be no more than a mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J.). Bailout

clearly affects the scope of Section 4(b)'s coverage only at the margin, and it thus cannot possibly solve the formula's massive over- and under-inclusiveness problems. Pet. App. 99a-101a (Williams, J.).

Second, bailout today is fundamentally different from bailout in 1965. As originally enacted, the VRA permitted bailout for any jurisdiction that had not used a voting "test or device" in the preceding five years for the purpose or with the effect of denying or abridging the right to vote on account of race. *See supra* at 3. Bailout thus was intended to correct the formula's inadvertent overreach by removing jurisdictions that "should not have been covered in the first place." BIO at 4. But after the 1982 amendments to the VRA, that is no longer its purpose. Under the current statute, a covered jurisdiction cannot secure bailout by demonstrating that it should not have been covered in the first place. Nor are the statutory criteria purely objective. Rather, to secure bailout, covered jurisdictions also must prove to the satisfaction of DOJ and DDC that, among other things, they:

> (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.

42 U.S.C. §1973b(a)(1)(F)(i)-(iii).

And even if a covered jurisdiction can satisfy these highly subjective criteria, it remains subject to Section 5's "clawback" provision, *id.* §1973b(a)(5), which essentially requires a jurisdiction to continue to satisfy the statutory criteria for bailout for an additional ten-year period before becoming fully non-covered. Thus, bailout does not afford a jurisdiction "a change in its status from covered to non-covered." BIO 24. And it does not liberate jurisdictions that should have never been covered in the first place. Instead, it turns covered jurisdictions into parolees that may ultimately be liberated only if they (and their sub-jurisdictions) continue to comply with the statutory criteria during a ten-year period of supervised release.

DOJ's implementation of bailout illustrates the point. For example, DOJ recently required Pinson, Alabama, as a condition of bailout, to take "certain additional constructive measures" including the formation of a "citizens' advisory group that is representative of the City's diversity" to make election recommendations to the City and a report to the United States within 90 days after any municipal election administered by the City that details the "steps taken to increase opportunities for recruitment and participation of a diverse group of poll officials as well as the total number of persons by race who served as election officials in the election." *City of Pinson v. Holder*, 12-cv-255 (D.D.C. Apr. 20, 2012) (Doc. 11) (¶¶ 47-50); *see also City of Sandy Springs v. Holder*, No. 10-cv-1502 (D.D.C. Oct 26, 2010) (Doc. 8) (¶¶ 44-51) (imposing similar "administration and reports requirements" as a condition to bailout). If DOJ viewed bailout as an acknowledgement of the formula's over-inclusiveness, it would not force a jurisdiction to agree to onerous non-statutory conditions to secure bailout.

In short, there is no nexus between bailout under the current version of the VRA and the over-inclusiveness problem in Section 4(b)'s coverage formula. Bailout—as initially conceived in 1965—was a remedy for the coverage formula's over-inclusiveness rather than a reward for statutory compliance. But that has not been the case since 1982, and today's bailout is therefore, at most, a "modest palliative" that in no way solves the massive problems with the current coverage formula. Pet. App. 101a (Williams, J.). If bailout were sufficient to save an ill-fitting coverage formula, Congress could just randomly select jurisdictions for coverage so long as any unlucky jurisdiction could obtain relief from a federal court. The "fundamental principle" of equal sovereignty requires far more. *Nw. Austin*, 557 U.S. at 203.

Finally, the VRA's judicial bail-in provision further undermines the formula's constitutionality. *See* 42 U.S.C. §1973a(c). This provision is a nationwide, targeted, and far more appropriate means of imposing preclearance based on a specific judicial finding of unconstitutional voting discrimination. Unlike the outdated coverage formula, Section 3's bail-in mechanism does not depart from equal sovereignty by treating some States differently from others based on pre-enactment history that bears no rational connection to modern voting problems. A non-covered State may become covered through bail-in only by virtue of a judicial finding of unconstitutional voting discrimination. Under current conditions, that remedy coupled with Section 2 fully safeguards minority voting rights.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

ADDENDUM — RELEVANT STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution

Section 1. 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; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States,

or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Fifteenth Amendment to the United States Constitution

Section 1. 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Addendum

42 U.S.C. § 1973
Voting Rights Act § 2

§ 1973 – Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Addendum

42 U.S.C. § 1973a
Voting Rights Act § 3

§ 1973a – Proceeding to enforce the right to vote

(a) Authorization by court for appointment of Federal observers

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d of this title to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) Suspension of use of tests and devices which deny or abridge the right to vote

If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) Retention of jurisdiction to prevent commencement of new devices to deny or abridge the right to vote

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that

such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

42 U.S.C. § 1973b
Voting Rights Act § 4

§ 1973b – Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

> (1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any

State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

> (A) no such 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 or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(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 section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(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 subchapters I-A to I-C of this chapter; 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.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present 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.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees

of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on

account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William

C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential

election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973f or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Addendum

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons

educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive

and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating

to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. § 1973c
Voting Rights Act § 5

§ 1973c – Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

Addendum

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*,

Addendum

That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the

Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing

the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.