IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendants, v. KENNETH SULLIVAN, *et. al.*, Defendant-Intervenors	Civil No. 1:11-cv-01428-CKK-MG-ESH

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff State of Florida respectfully moves this Court for entry of an Order granting summary judgment to Plaintiff on Counts 5 and 6 of the Second Amended Complaint. In particular, Plaintiff moves for summary judgment that Section 4(b) and Section 5 of the Voting Rights Act of 1965, as amended, are unconstitutional. Plaintiff further requests that the Court issue a permanent injunction against Defendant Attorney General Eric H. Holder, Jr., enjoining enforcement of Section 4(b) and Section 5 of the Voting Rights Act. There is no genuine issue as to any material fact, and Plaintiff is entitled to judgment as a matter of law.

Pursuant to Local Civil Rule 7, Plaintiff is filing a Memorandum of Points and Authorities and a Statement of Material Facts. Plaintiff also requests oral argument on this Motion.

Plaintiff respectfully prays that this Court enter an Order granting Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

/s/ William S. Consovoy

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Dated: May 23, 2012

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STATEMENT OF MATERIAL FACTS IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff State of Florida ("Florida") submits the following statement of material facts as to which Florida contends there is no genuine issue:

1. Florida is a State of the United States of America. *See* Act for the Admission of the States of Iowa and Florida into the Union, 5 Stat. 742 (1845).

2. Florida is not a covered jurisdiction under Section 4(b) of the Voting Rights Act ("VRA"). V1 117.

3. However, five of Florida's 67 counties are covered jurisdictions. V1 117. These five counties are Collier, Hardee, Hendry, Hillsborough, and Monroe Counties (the "Covered Counties"). V1 117.

4. The Covered Counties became covered under Section 4(b) after the 1975 amendments to the Voting Rights Act. *See* V1 127-28.

5. Since 1975, Section 2 of the VRA has permanently banned nationwide any "voting qualification or prerequisite to voting or standard, practice, or procedure," 42 U.S.C. § 1973(a), that "den[ies] or abridge[s] the right of any citizen of the United States to vote because he is a member of a language minority group," *id.* § 1973b(f)(2). *See also* Act of Aug. 6, 1975, Pub. L. No. 94-73, § 206, 89 Stat. 400, 402 (1975).

6. In addition, since 1975, jurisdictions covered under Section 203 of the VRA have been barred from "provid[ing] voting materials only in the English language" and required to provide election materials and assistance "in the language of the applicable minority group as well as in the English language." *Id.* § 301, 89 Stat. at 402-03 (codified at 42 U.S.C. § 1973aa-1a).

7. Florida has been covered under Section 203, subject to certain exceptions, since October 5, 2011. *See* 76 Fed. Reg. 63602 (Oct. 13, 2011).

8. Collier County was covered under Section 203 from the Census Bureau's initial determination until June 20, 1984, and during that time it was required to provide bilingual materials and assistance in Spanish. *See* 41 Fed. Reg. 29998 (July 20, 1976); 49 Fed. Reg. 25887 (June 25, 1984). From July 22, 2002, until October 5,

2011, Collier County was required to provide bilingual materials and assistance in the Seminole language. *See* 67 Fed. Reg. 48871 (July 26, 2002); 76 Fed. Reg. 63602.

9. Hardee County has been covered under Section 203 since the Census Bureau's initial determination and continues to be required to provide bilingual materials and assistance in Spanish. *See* 41 Fed. Reg. 29998 (July 20, 1976); 49 Fed. Reg. 25887; 57 Fed. Reg. 43213 (Sept. 18, 1992); 67 Fed. Reg. 48871; 76 Fed. Reg. 63602.

10. Hendry County was covered under Section 203 from the Census Bureau's initial determination until June 20, 1984, and during that time it was required to provide bilingual materials and assistance in Spanish. *See* 41 Fed. Reg. 29998; 49 Fed. Reg. 25887. From September 15, 1992, until July 22, 2002, Hendry County was required to provide bilingual materials and assistance in the Mikasuki and Muskogee languages. *See* 57 Fed. Reg. 43213; 67 Fed. Reg. 48871. Since July 22, 2002, Hendry County has been required to provide bilingual materials and assistance in Spanish and continues to do so. *See* 76 Fed. Reg. 63602.

11. Hillsborough County was covered under Section 203 from the Census Bureau's initial determination until June 20, 1984, and was required to provide bilingual materials and assistance in Spanish. *See* 41 Fed. Reg. 29998; 49 Fed. Reg. 25887. Since September 15, 1992, Hillsborough County has been required to provide bilingual materials and assistance in Spanish and continues to do so. *See* 57 Fed. Reg. 43213; 67 Fed. Reg. 48871; 76 Fed. Reg. 63602.

12. Monroe County was covered under Section 203 from the Census Bureau's initial determination until June 20, 1984, and was required to provide bilingual materials and assistance in Spanish. *See* 41 Fed. Reg. 29998; 49 Fed. Reg. 25887.

13. More than 50% of the voting age citizens residing in each of the Covered Counties registered and voted in the 2000 presidential election, as demonstrated in Table 1.[1]

Table 1

Voter Registration and Turnout Statistics in the Covered Counties in 2000

	Citizen Voting Age Population	Voter Registration	Voter Turnout	Voter Registration Percentage	Voter Turnout Percentage
Collier	174381	123572	95320	70.9%	77.1%
Hardee	16297	10886	6645	66.8%	61.0%
Hendry	19547	16268	8950	83.2%	55.0%
Hillsborough	688068	499427	369467	72.6%	74.0%
Monroe	60011	48409	34095	80.7%	70.4%

14. On May 19, 2011, Governor Rick Scott signed into law Committee Substitute for Committee Substitute for House Bill No. 1355 (the "Act"), an omnibus bill revising the Florida Election Code. V1 117-18. The 80 sections of the Act addressed a wide range of subjects. V1 118, 130; V16 8942, 8977-8993.

[1] Voter registration and turnout statistics were obtained from the Florida Department of State at http://enight.dos.state.fl.us/Index.asp?ElectionDate=11/7/2000 &DATAMODE. Citizen voting age population statistics were obtained from the U.S. Census Bureau at http://www.census.gov/population/www/cen2000/briefs/phc-t31/tables /tab02-09.pdf.

15. The Department of Justice has administratively precleared all but three of the provisions of the Florida Election Code that the Act amended. V1 118; V5 2592.

16. Florida now seeks judicial preclearance for the Act's changes to three provisions regarding: (1) third-party voter registration organizations, Fla. Stat. § 97.0575; (2) inter-county address changes, *id.* § 101.045; and (3) early voting, *id.* § 101.657. V1 21-23, 24-27.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

CL	Florida's Conclusions of Law
DCL	Defendants' Conclusions of Law
DFF	Defendants' Findings of Fact
DOJ	Department of Justice
FF	Florida's Findings of Fact
RCL	Reply Florida's Conclusions of Law
RFF	Reply Florida's Findings of Fact
RFRA	The Religious Freedom Restoration Act of 1993
V	Volume of the Appendix
VRA	Voting Rights Act of 1965
VRARAA	Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

I. SUMMARY OF THE ARGUMENT

The Fifteenth Amendment guarantees that "[t]he 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," U.S. Const. amend. XV, § 1, and empowers Congress "to enforce this article by appropriate legislation," *id*. § 2. Congress enacted the Voting Rights Act of 1965 ("VRA") "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." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Several provisions of the VRA, including Sections 2 and 4(a), directly confronted discriminatory state and local voting practices.

More radically, Section 5 reallocated power over election practices from state and local authorities to the federal government by forbidding the implementation of any voting change in a jurisdiction covered by Section 4 unless the change neither "has the purpose nor . . . the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). Because "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) (citations and quotations omitted), Section 5 imposes "substantial federalism costs," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Nw. Austin*") (citation and quotations omitted). At the time of its enactment in 1965, Section 5 was constitutionally justified because of the "exceptional conditions" and "unique circumstances" that existed in the covered jurisdictions, *Katzenbach*, 383 U.S. at 334-35, namely the "unremitting

and ingenious defiance of the Constitution," *id*. at 308, which rendered case-by-case litigation ineffectual, *see id*. at 328.

Congress's decision to reauthorize Section 5 under Section 4(b)'s coverage formula in 2006 raised "serious . . . questions" as to the statute's constitutionality. *Nw. Austin*, 557 U.S. at 204. Last week, the D.C. Circuit resolved a few of those questions. *See Shelby County, Ala. v. Holder*, No. 11-5256, 2012 WL 1759997 (D.C. Cir. May 18, 2012). The Court correctly tested whether Section 5 and Section 4(b) remain "appropriate" enforcement legislation under the Fifteenth Amendment by evaluating whether there is "'congruence and proportionality'" between the injury the statute is redressing and the remedy chosen by Congress. *Shelby County*, 2012 WL 1759997, at *6-7 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). But the Court incorrectly decided two issues regarding the preclearance obligation under that standard.

First, the D.C. Circuit incorrectly held that Section 5 remains a "congruent and proportional" remedy when measured against the evidence of racial discrimination in the legislative record. *See id.* at *10-21. To be "congruent," Section 5 must address a coordinated campaign of discrimination intended to circumvent the remedial effects of direct enforcement of Fifteenth Amendment voting rights—*i.e.*, a documented record of "unremitting and ingenious defiance" of Fifteenth Amendment rights. *Katzenbach*, 383 U.S. at 309. The 2006 extension of Section 5 simply was not supported by evidence of systematic and recurring discrimination against racial minorities. In short, "[t]hings have changed in the South." *Nw. Austin*, 557 U.S. at 202. For that reason, Congress was forced to rely on so-called "'second generation barriers'" to voting, including vote

dilution, to justify Section 5's reauthorization. Because the record lacked current evidence of coordinated discrimination on the basis of race, and simultaneously expanded Section 5's substantive reach, the statute is no longer a "congruent and proportional" remedy under *Boerne*.

Second, the D.C. Circuit incorrectly held that Section 4(b)'s coverage formula "'is sufficiently related to the problem that it targets.'" *Shelby County*, 2012 WL 1759997, at *22-29 (quoting *Nw. Austin*, 557 U.S. at 203). Congress's retention of Section 4(b)'s archaic coverage formula is irrational "in both practice and theory," *Katzenbach*, 383 U.S. at 330, and therefore constitutionally indefensible. The coverage formula is irrational in theory because it is: (1) keyed to decades-old data that has no demonstrated connection to present-day circumstances; and (2) predicated on registration and turnout statistics instead of the "second generation" barriers upon which Congress relied to justify the reauthorization of Section 5. The coverage formula also is irrational in practice. Neither racially disparate voter registration and turnout statistics, nor the "second generation barriers" upon which Congress relied, are "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203.

Importantly, Florida also has brought a number of constitutional claims that the D.C. Circuit did not address in *Shelby County*, and which must therefore be addressed by this Court in the first instance. *First*, Congress's extension of Section 5's preclearance obligation beyond race to cover voting measures affecting language minorities, *see* 42 U.S.C. §§ 1973b(b), 1973b(f), was not an appropriate exercise of its enforcement power because Congress *never* documented a widespread pattern of state-sponsored interference

with language minority citizens' right to register and vote. Both in 1975 and in 2006, Congress relied primarily on evidence of "educational inequality" and scattered instances of general discrimination against language minority citizens to justify its action. In Congress's view, educational inequality led to low English proficiency, from which it extrapolated that the use of English-only materials constituted intentional voting discrimination. But such evidence is several steps removed from proof of systematic, direct, and intentional interference with the right to vote that cannot be addressed through case-by-case litigation under Section 2. Although Congress identified scattered allegations of intentional voting discrimination against language minority citizens, those abuses do not compare to the "unremitting and ingenious defiance" in the form of gamesmanship and subterfuge that African Americans faced across the South in 1965. *Katzenbach*, 383 U.S. at 309.

Second, the expansion of Section 4(b)'s coverage formula to include "language-minority" jurisdictions is unconstitutional in both theory and practice. Under the language minority coverage formula, a jurisdiction is considered to have used a prohibited "test or device" if, in November 1972, it: provided election materials or assistance in English only; and had a five percent citizen population of American Indians, Alaskan Natives, Asian Americans, or persons of Spanish heritage. 42 U.S.C. § 1973b(f). But this makes no sense in theory because the use of English-only election materials is not itself a reliable indicator of *intentional* voting discrimination and, in any event, the data is now forty years old. Nor is this formula rational in practice; it did not,

and still does not, accurately capture those jurisdictions where there is reliable evidence of actual voting discrimination against language minorities.

Third, even if sound in other respects, the preclearance obligation imposed on jurisdictions covered under the language-minority provisions is still "out of proportion," *Boerne*, 521 U.S. at 532, to the targeted harm because these jurisdictions are required to prove that a voting change does not interfere with voting rights on account of race or color. There simply is no "congruence or proportionality" between the harm targeted in language-minority jurisdictions and the requirement to preclear on racial grounds. Under *Boerne*, the basis for coverage under Section 4(b) must serve as the proper measure of Section 5's constitutional reach.

Fourth, the amendments to the preclearance standard independently invalidate the 2006 reauthorization of the VRA. In 2006, Congress expanded the substantive standard for preclearance in two ways. It required the denial of preclearance whenever federal authorities find "any discriminatory purpose" to exist, 42 U.S.C. § 1973c(c), and whenever the change "ha[s] the effect of diminishing the ability of [minority] citizens . . . to elect their preferred candidates of choice," *id.* § 1973c(b). These revised substantive standards increase the federalism burden of Section 5 beyond the breaking point, do not appropriately "enforce" the constitutional right to register and cast a ballot, and inappropriately force state officials to "engage in presumptively unconstitutional race-based [decisionmaking]," *Miller v. Johnson*, 515 U.S. 900, 927 (1995), thereby violating the Constitution's guarantee of equal protection. And, even if the so-called "ability to

elect" standard is inapplicable in this case, Defendants' "disparate impact" theory of retrogression is unconstitutional for these same reasons.

Fifth, and last, the Supreme Court has incorrectly interpreted Section 5 to require that a covered jurisdiction within a noncovered State must "seek preclearance before implementing [state] laws that effect voting changes in the [covered jurisdiction]." *Lopez v. Monterey County*, 525 U.S. 266, 278 (1999). This requirement lacks congruence and proportionality because it subjects to preclearance the laws of a state that has not been designated a historical wrongdoer in the voting rights context. But even if *Lopez* was correctly decided, it should be limited to its facts—*i.e.*, requiring a non-covered State to obtain preclearance only when the state-level change was sought by a covered jurisdiction trying to evade its obligations under Section 5. *See id*. at 288-89 (Kennedy, J., concurring). As the Three Voting Changes do not fit that pattern, requiring Florida to obtain preclearance here is unconstitutional.

II. EVOLUTION OF THE CONGRESSIONAL RATIONALE FOR IMPOSING PRECLEARANCE ON THE COVERED JURISDICTIONS

A. The Voting Rights Act Of 1965

Following the Fifteenth Amendment's ratification in 1870, certain states and localities initiated a campaign to systematically circumvent its substantive guarantee. In particular, "Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests . . . specifically designed to prevent [African-Americans] from voting." *Katzenbach*, 383 U.S. at 310. "At the same time, alternate tests were prescribed . . . to assure that white illiterates would not be deprived of the franchise. These included

grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter." *Id.* at 311. Worse still, these tests were discriminatorily administered. *Id.* at 312.

Congress responded by passing laws to "facilitat[e] case-by-case litigation" and the Supreme Court responded by striking down discriminatory voting tests and devices in case after case. *Id*. at 313. Yet widespread voting discrimination persisted, and it became clear to Congress that "a 'case by case' approach was ineffective in protecting the rights of minority citizens." H.R. Rep. No. 109-478, at 6-7 (2006). Even after favorable judgments were secured, these jurisdictions would adopt new discriminatory devices and local officials would defy court orders or simply close their registration offices. *Katzenbach*, 383 U.S. at 314. The VRA thus was enacted to defeat the coordinated effort to nullify the Fifteenth Amendment that had "infected the electoral process in parts of our country for nearly a century." *Id*. at 308. "After enduring nearly a century of systematic resistance to the Fifteenth Amendment," *id.* at 328, Congress fairly determined that "sterner and more elaborate measures" were required, *id.* at 309.

Several of these new measures imposed nationwide bans to directly confront the problem. Section 2 outlawed nationwide 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). Section 4(e) "prohibit[ed] the States from conditioning the right to vote" of "persons educated in American-flag schools in which

the predominant classroom language was other than English" on the ability to communicate in English. *Id.*, § 4(e), 79 Stat. at 439.

Other provisions were more targeted, but likewise directly confronted the problem. Section 4(a) banned "covered jurisdictions" from using voting "tests or devices," *id.* § 4(a), 79 Stat. at 438, such as literacy or character tests. Section 4(b) established the coverage formula: "[A]ny State or in any political subdivision of a state which . . . the Attorney General determine[d] maintained on November 1, 1964, any [prohibited] test or device, and with respect to which . . . the Director of the Census determine[d] 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." *Id*. § 4(b), 79 Stat. at 438.[1]

In contrast to these provisions, Section 5 did not directly target specific acts of voting discrimination. "Section 5 . . . was enacted for a different purpose: to prevent covered jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a)." *Nw. Austin*, 557 U.S. at 218 (Thomas, J., concurring in the judgment in part and dissenting in part) (citations omitted). Section 5 accomplished this goal by requiring covered jurisdictions to "preclear" any new law or any change to an existing law involving "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on

[1] The VRA also included a so-called "bail out" provision that allowed a covered jurisdiction to terminate coverage subject to a "claw back" mechanism, *id.* § 4(a), 79 Stat. at 438, as well as a "bail-in" mechanism that allowed federal courts to make non-covered jurisdictions subject to a separate preclearance procedure upon the finding of a violation of the Fourteenth or Fifteenth Amendments, *id.* § 3(c), 79 Stat. at 437-38.

November 1, 1964." Pub. L. No. 89-110, § 5, 79 Stat. at 439. Congress reasonably "feared that the mere suspension of existing tests [in Section 4(a)] would not completely solve the problem." *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969).

In light of this "historical experience," the Supreme Court rejected South Carolina's immediate challenge to Section 5. *Katzenbach*, 383 U.S. at 308. "[B]y 1965, Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination." *Nw. Austin*, 557 U.S. at 221 (Thomas, J., concurring in the judgment in part and dissenting in part). Given the legislative evidence of discrimination, "the specific remedies prescribed in the Act were an appropriate means of combating the evil." *Katzenbach*, 383 U.S. at 328. "[L]egislative measures not otherwise appropriate" were deemed constitutional under those "exceptional conditions" and "unique circumstances." *Id.* at 334-35. The Supreme Court upheld Section 4(b)'s coverage formula on that same understanding: Congress had gathered evidence that these were "the geographic areas where immediate action seemed necessary," and the coverage formula did not violate the "doctrine of the equality of States" because it was responsive to "local evils which have . . . appeared." *Id.* at 328-29.

B. Reauthorizations Of The Voting Rights Act From 1970 To 1992

Congress "expected that within a 5-year period Negroes would have gained sufficient voting power in the States affected so that special federal protection would no longer be needed." H.R. Rep. No. 91-397 (1969), reprinted in 1970 U.S.C.C.A.N. 3277, 3281. In 1970, however, Congress reauthorized the temporary provisions of the VRA for

another five years. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970). The 1970 reauthorization expanded Section 4(b)'s coverage formula to include 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. Congress also added Section 201 to the VRA to ban the use of any prohibited "test or device" in non-covered jurisdictions for a period of five years. Pub. L. No. 91-285, § 6, 84 Stat. at 315.

In 1975, Congress reauthorized the VRA for another seven years. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). The 1975 reauthorization again expanded Section 4(b)'s coverage formula to include 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. In addition, Congress made permanent Section 201's nationwide prohibition on discriminatory "tests or devices." *Id.* § 201, 89 Stat. at 400. As a result, every State and political subdivision throughout the nation was permanently forbidden from using any prohibited "test or device" irrespective of the coverage of Section 4(b).

Congress also expanded the VRA to protect certain "language minorities"—persons of Spanish heritage, American Indians, Asian Americans, and Alaskan Natives. *Id.* § 207, 89 Stat. at 402. To "enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution," Congress added Section 4(f) to prohibit voting laws that "deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group," *id.* § 203, 89 Stat. at 401, and

incorporated that prohibition into both Section 2's nationwide ban and Section 5's preclearance standard, *id.* § 206, 89 Stat. at 402. Section 4(f)(3) extended coverage under Section 4(b) to jurisdictions that, on November 1, 1972, had a single-language minority population consisting of more than 5% of its voting age citizens, maintained "any practice or requirement" of providing English-only voting or registration materials, and had voter turnout or registration under 50% in that year's presidential election. *Id.* § 203, 89 Stat. at 401-02. Finally, Congress added Section 203, requiring bilingual elections in certain jurisdictions under a separate coverage formula. *Id.* § 301, 89 Stat. at 402-03.

The Supreme Court upheld the 1975 reauthorization of Section 5. *See City of Rome v. United States*, 446 U.S. 156 (1980). The Court sustained Congress's determination that, a mere ten years after the original enactment, 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." *Id*. at 182. No party challenged the new provisions of the VRA that protect language minorities.

In 1982, Congress reauthorized most of the VRA for another twenty-five years. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982). Congress reauthorized Section 203's bilingual election requirement, but only for seven more years. *Id.* § 4, 96 Stat. at 134. In 1992, Congress reauthorized Section 203 for fifteen more years, bringing the provision in line with the rest of the VRA. Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992). Neither the 1982 nor 1992 reauthorizations were subjected to a facial challenge.

C. The 2006 Reauthorization Of The Voting Rights Act

In 2006, Congress reauthorized the entire VRA for another twenty-five years without reducing the burden imposed by preclearance or updating Section 4(b)'s coverage formula. 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 found vast improvements in African-American voter registration and turnout and concluded that "[t]he record reveal[ed] 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.* at 12.

Congress nevertheless extended preclearance for another twenty-five years based on its determination 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. The evidence of "second generation barriers" included "racially polarized voting," *id.* § (2)(b)(3), 120 Stat. at 577, as well as "the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia" and "objections interposed by the Department of Justice in covered jurisdictions; the 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 Voting Rights Act of 1965," *id.* § 2(b)(4), (8), 120 Stat. at 577-78.

Further, Congress *expanded* the substantive standard for preclearance in two ways, rejecting two Supreme Court decisions: *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier II*"). First, Congress required the denial of preclearance whenever a voting change was undertaken because of "any discriminatory purpose," 42 U.S.C. § 1973c(c), as opposed to a retrogressive purpose (overruling *Bossier II*). Second, Congress required the denial of preclearance whenever the change "ha[s] the effect of diminishing the ability of [minority] citizens . . . to elect their preferred candidates of choice," *id.* § 1973c(b), as opposed to the more "holistic" approach to retrogression adopted in the *Ashcroft* decision, *Shelby County*, 2012 WL 1759997, at *33 (Williams, J., dissenting).

The constitutionality of the 2006 reauthorization of Section 5's preclearance obligation and Section 4(b)'s coverage formula was immediately challenged in the *Northwest Austin* litigation. Although that litigation was ultimately resolved on statutory grounds, the Supreme Court nevertheless concluded that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of the dramatic changes in the covered jurisdictions since 1965. *Nw. Austin*, 557 U.S. at 204. The Court made clear that "the [VRA] imposes current burdens and must be justified by current needs" and that "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." *Id.* at 203. In *Shelby County*, the D.C. Circuit upheld Section 5 and Section 4(b) against a challenge brought by a jurisdiction subject to coverage based on racial discrimination.

III. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Where, as here, "the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Wyo. Outdoor Council v. Dombeck*, 148 F. Supp. 2d 1, 7 (D.D.C. 2001).

IV. ARGUMENT

A. Congress May "Enforce" The Fifteenth And Fourteenth Amendments Only "By Appropriate Legislation."

The Reconstruction Amendments grant Congress the authority to "enforce" their substantive guarantees by "appropriate legislation." U.S. Const. amend. XV, § 2; U.S. Const. amend. XIV, § 5. "As broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.). It is "remedial"—not substantive. *Katzenbach*, 383 U.S. at 326. "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003), but there is a crucial difference between "prophylactic legislation" and the "substantive redefinition of the . . . right at issue," *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 821 (2000), which "must be observed," *Boerne*, 521 U.S. at 520.

The Supreme Court has established a three-step process for evaluating whether Congress has appropriately exercised its enforcement authority. *First*, a court must

"identify with some precision the scope of the constitutional right at issue." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). *Second*, the court must "examine whether Congress identified a history and pattern of unconstitutional" government action. *Id.* at 368. *Third*, the court must determine whether "[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530.

This process applies equally to Fifteenth Amendment cases. The enforcement clauses of the two Amendments are co-extensive. *See id.* at 518 (enforcement clauses are "parallel"); *Garrett*, 531 U.S. at 373 & n.8 (enforcement clauses are "virtually identical"); *see also Romeu v. Cohen*, 265 F.3d 118, 133 n.3 (2d Cir. 2001) (Walker, J., concurring). Indeed, the Supreme Court has identified the Voting Rights Act of 1965 (as originally enacted) as a paradigmatic example of congruent and proportional enforcement legislation. *See Boerne*, 521 U.S. at 518; *Garrett*, 531 U.S. at 373.

B. Imposing Preclearance On Jurisdictions Under Section 4(b)'s Coverage Formula Is No Longer An "Appropriate" Means Of Enforcing The Fifteenth Amendment.

1. Reauthorizing Section 5 Was Not "Appropriate" Based On The Limited Probative Evidence Of Voting Discrimination Against Racial Minorities Before Congress In 2006.

a. Congress Was Required To Document A Widespread Pattern Of "Ingenious Defiance" Of The Fifteenth Amendment.

Section 1 of the Fifteenth Amendment outlaws "purposefully discriminatory denial or abridgement by government of the freedom to vote." *Bolden*, 446 U.S. at 65

(plurality opinion); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 482 (1997) ("*Bossier I*") (the Fifteenth Amendment "requires a showing of intent"). This ban is "self-executing" and not dependent on "further legislative specification." *Katzenbach*, 383 U.S. at 325. Congress is empowered under Section 2 of the Fifteenth Amendment only to "remed[y]" violations of the ban on voting discrimination. *Id.* at 326.

Many of the VRA's provisions, such as Section 2 and Section 4(a), directly enforce the Fifteenth Amendment. But Section 5 goes further. It is a prophylaxis that "goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 557 U.S. at 202. Preclearance was an emergency solution to the drastic problem of certain state and localities systematically "'contriving new rules' to continue violating the Fifteenth Amendment 'in the face of adverse federal court decrees.'" *Id*. at 197-98 (quoting *Katzenbach*, 383 U.S. at 335).

Section 5 was "appropriate" enforcement legislation *only* because of the dire and intractable circumstances that confronted Congress in 1965. The *Katzenbach* Court clearly considered Section 5 an "uncommon exercise of congressional power" that was "appropriate" enforcement legislation only because of the "exceptional conditions" and "unique circumstances" present at that time. *Id.* at 334-35. 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., concurring in the judgment in part and dissenting in part). To warrant reauthorization of Section 5,

Congress was required in 2006 to show that such "unremitting and ingenious defiance" of the Fifteenth Amendment continued to persist. *Id*. at 226. It did not do so.

The D.C. Circuit concluded that Section 5 was enacted to solve a different problem—"the inadequacy of case-by-case litigation" under Section 2. *Shelby County*, 2012 WL 1759997, at *12. But the distinction drawn by the D.C. Circuit is illusory. The reason *why* "Congress had found that case-by-case litigation was inadequate" was necessarily because of the unrelenting defiance and gamesmanship occurring in the covered jurisdictions. *Katzenbach*, 383 U.S. at 328. Section 2 was not uniquely inadequate because of the costs and burdens associated with traditional litigation. It was inadequate because of "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. Only "[u]nder the compulsion of these unique circumstances" could a measure as intrusive as Section 5 be deemed constitutional. *Id*.

b. Congress Failed To Document A Widespread Pattern Of Systematic Resistance That Would Make Case-By-Case Enforcement Of The Fifteenth Amendment Impossible.

(1) Only Evidence In The Legislative Record Documenting State-Sponsored Interference With The Right To Register To Vote And Cast A Ballot Is Probative Of "Ingenious Defiance" Of The Fifteenth Amendment.

Because the Fifteenth Amendment prohibits interference with the ability to register to vote and cast a ballot, only evidence probative of interference with *that* right is relevant to the constitutional inquiry described above. In *Katzenbach* and *City of Rome*, the Court relied on evidence of widespread, intentional, and direct interference with the

right to vote through violence, intimidation, and electoral gamesmanship. *Katzenbach*, 383 U.S. at 310-16; *City of Rome*, 446 U.S. at 182. In both cases, the Court also relied on registration data, turnout statistics, and the election of minorities to public office, all of which the Court considered reasonable barometers for verifying the pervasive nature of the voting discrimination and gamesmanship identified in the legislative record. *Katzenbach*, 383 U.S. at 313, 329-30; *City of Rome*, 446 U.S. at 180-81. *City of Rome* also 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 considered "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. 329.

In 2006, however, Congress did not rely on such evidence. Instead, Congress rested its reauthorization of the preclearance obligation on the existence of so-called "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." VRARAA, § 2(b)(2), 120 Stat. at 577. Although the D.C. Circuit disagreed, *see Shelby County*, 2012 WL 1759997, at *14-21, none of this evidence is probative of the "systematic resistance to the Fifteenth Amendment" that justified the enactment of Section 5 in 1965, *Katzenbach*, 383 U.S. at 328.

Racially polarized voting. Congress referred to racially polarized voting, which "occurs when voting blocs within the minority and white communities cast ballots along racial lines," as the "clearest and strongest evidence" of the need to reauthorize Section 5. H.R. Rep. No. 109-478 at 34; VRARAA, § 2(b)(3), 120 Stat. at 577. But the Fifteenth Amendment "relates solely to action 'by the United States or by any state,' and does not contemplate wrongful individual acts." *James v. Bowman*, 190 U.S. 127, 135 (1903).

Individual voting patterns are not governmental discrimination and thus may not be remedied under the Fifteenth Amendment. *Terry v. Adams*, 345 U.S. 461, 473 (1953). Nor are they evidence of intentional discrimination—state-sponsored or otherwise.

Vote dilution. Scattered throughout the record are examples of intentional discrimination that involved redistricting. These examples do not involve interference with the ability to freely register and cast a ballot, but rather predominantly involve vote dilution. They are therefore irrelevant. The Fifteenth Amendment has been the exclusive basis for upholding Section 5, *see Katzenbach*, 383 U.S. at 308-10, and the Supreme Court has "never held that vote dilution violates the Fifteenth Amendment," *Bossier II*, 528 U.S. at 334 n.3.

Preclearance statistics. Preclearance statistics are "poor proxies for intentionally discriminatory state action in voting, for a number of reasons." 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). As an initial matter, their statistical significance is questionable given that there is no real volume of objections on which to rely. *Infra* at 22. More importantly, a preclearance objection does not necessarily signal intentional voting discrimination. Instead, an objection may simply represent the fact that "the evidence as to the purpose or effect of the change is conflicting." 28 C.F.R. § 51.52(c).

More information requests ("MIRs"). Congress noted that "since 1982, over 205 voting changes have been withdrawn as a result of Section 5's MIR tool." H.R. Rep. No. 109-478 at 41. An MIR, however, is merely evidence that the Department of Justice

("DOJ") has "insufficient information . . . to make a [preclearance] determination." *Id.* at 40. An MIR itself is not proof of intentional voting discrimination. And there is no evidence in the legislative record that any of the withdrawals or other responses to MIRs were admissions of discrimination.

Section 5 enforcement litigation. The most that a Section 5 enforcement action can establish is that a voting change—and quite possibly a nondiscriminatory voting change—was not properly submitted for preclearance. These failures may result from a mistaken understanding of the VRA's requirements, a good faith belief that the change was not subject to preclearance, *Lopez*, 525 U.S. at 278, or a principled objection to Section 5's federal oversight, H.R. Rep. No. 109-478 at 41-44. Moreover, "it is not known how many *successful* Section 5 enforcement actions have been filed, either by the Department of Justice or private citizens." 1 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 109th Cong., 2d Sess. at 186 (Mar. 8, 2006).

Federal observers. The presence of a federal observer in a jurisdiction reflects no more than that there was "a reasonable belief that minority citizens [were] at risk of being disenfranchised." H.R. Rep No. 109-478, at 44. This evidence, therefore, indicates only that a federal official predicted that there might be conduct with the effect of disenfranchising minority citizens, which—if it occurred—*might* or *might not* involve purposeful discrimination. It is pure speculation to conclude that this evidence proves the existence of pervasive intentional discrimination in the covered jurisdictions.

Section 2 litigation. Because "§ 2 [does] not have an intent component," a Section 2 violation does not demonstrate the persistence of systematic voting discrimination. *Bossier I*, 520 U.S. at 482. Moreover, many of the Section 2 cases in the study relied on by Congress involved no finding of intentional discrimination, were not resolved on the merits, or both. Ellen Katz & The Voting Rights Initiative, VRI Database Master List ("VRI Master List") (cited in *To Examine the Impact & Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 974, 1018-20 (Oct. 18, 2005)).[2]

(2) The Limited Probative Evidence Does Not Show Widespread Intentional Voting Discrimination.

Although the D.C. Circuit disagreed, *see Shelby County*, 2012 WL 1759997, at *14-21, evaluation of the probative evidence shows there is no longer systematic resistance to the Fifteenth Amendment in the covered jurisdictions that cannot be solved through case-by-case litigation. As Congress acknowledged, "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; H.R. Rep. No. 109-478 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"). These "first generation barriers"

[2] To the extent that Section 2 litigation has been successful in the last 25 years, it proves not that Section 5 remains necessary, but that it is no longer needed because jurisdictions subject to adverse judgments in traditional litigation are no longer ignoring federal decrees.

were the dominant evidence that Congress used to justify Section 5 in 1965, and are the proper target of Fifteenth Amendment enforcement. But as Congress concluded, these "first generation barriers" no longer provide a constitutional justification for imposing preclearance on the covered jurisdictions. *See also* S. Rep. No. 94-295, at 14 (1975); H.R. Rep. No. 109-478 at 18 (showing that between 1975 and 2006, the number of African-American elected officials in covered jurisdictions jumped from 963 to 3700—an increase of about 372%); *id*. at 22-24 (showing that between 1982 and 2005, the DOJ objection rate dropped to .071%.).

By any measure, there has been significant progress since 1965 and 1975. To be sure, the Supreme Court upheld the 1975 authorization despite statistical improvements because it simply did not trust the progress made over barely a decade. *See City of Rome*, 446 U.S. at 182 (upholding Congress's conclusion that extending the Act "was necessary to preserve the 'limited and fragile' achievements of the Act"). But constitutional justification can no longer be found in this high level of distrust. Congress is not entitled to blindly assume that discriminatory attitudes from 45 years ago persist today and will endure for decades to come. It must produce a legislative record of a continuing pattern of discrimination pervasive enough to justify preclearance. It did not.

c. Preclearance Lacks Congruence And Proportionality To The Evidence Of Fifteenth Amendment Violations Documented In The 2006 Legislative Record.

Even if it were "possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States," *Garrett*, 531 U.S. at 372, preclearance "is so out of proportion to a supposed remedial or preventative object that it cannot be

understood as responsive to, or designed to prevent, unconstitutional behavior," *Boerne*, 521 U.S. at 532. Like RFRA, Section 5's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions" regarding any change in voting laws. *Id*. The record compiled by Congress may be sufficient for *some* remedy—such as Section 2—but it is woefully insufficient to justify a prophylactic remedy as sweeping as Section 5.

2. Section 4(b) Of The VRA No Longer Appropriately Enforces The Fifteenth Amendment.

Even if the preclearance obligation could be upheld as "appropriate" enforcement legislation, Section 4(b)'s coverage formula cannot. The formula, unchanged since 1975, premises coverage on whether states and political subdivisions maintained prohibited tests or devices in 1964, 1968, and 1972, and whether those jurisdictions had low voter registration or turnout in those election cycles. 42 U.S.C. § 1973b(b). It is no longer a congruent means of selecting those most likely to engage in unconstitutionally retrogressive behavior through 2031.

The "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. It must be justified "in both practice and theory." *Katzenbach*, 383 U.S. at 330. (1) Does the formula's trigger for coverage correspond to the problem Congress is employing its enforcement authority to remedy? (2) Is the formula in fact capturing those jurisdictions where the problem Congress is remedying uniquely exists such that the departure from the principle of equal

sovereignty can be constitutionally justified? Although the D.C. Circuit disagreed, *see Shelby County*, 2012 WL 1759997, at *22-29, the current coverage formula fails both of these tests.

a. Section 4(b)'s Coverage Formula Does Not Correlate To The Problem Congress Sought To Address When It Reauthorized Section 5 In 2006.

In *Katzenbach*, the Court found the formula constitutionally sound as a theoretical matter 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"—tied coverage to the specific problem to be addressed by the Fifteenth Amendment: the "widespread and persistent" use of intentionally discriminatory tactics to prevent 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 it to low registration and voting rates was appropriate "for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Id*. at 330.

But the decades-old data coverage formula bears no relation whatsoever to current conditions. The discriminatory tests and devices targeted in Section 4(b) have been permanently banned for over 35 years. Pub. L. No. 94-73, § 102, 89 Stat. 400 (codified at 42 U.S.C. § 1973aa). And the rates of registration and voting in 1964, 1968, and 1972 clearly do not represent the "current political conditions" in the covered jurisdictions. *Nw. Austin*, 557 U.S. at 203; *see also* S. Rep. No. 109-295 at 26-27.

Moreover, the coverage formula suffers from another fundamental theoretical flaw. Although the statutory coverage factors are tied to the ability to cast a ballot, Congress did not reauthorize Section 5 based on evidence of interference with ballot access. *See supra* at 12-13. This mismatch between Section 4(b)'s statutory coverage triggers and the kind of evidence relied on by Congress, *i.e.*, evidence of vote dilution and other "second generation" evidence that Congress relied on to purportedly identify the locus of current voting discrimination, renders the coverage formula irrational in theory and thus incongruent under *Boerne*.

b. Section 4(b)'s Formula No Longer Singles Out For Coverage Jurisdictions Uniquely Interfering With The Right Congress Is Seeking To Protect Through Preclearance.

In *Katzenbach*, the Court found the coverage formula constitutionally sound in practice because it accurately captured those jurisdictions where there was "reliable evidence of actual voting discrimination." 383 U.S. at 329. The formula accurately captured those jurisdictions that had "misuse[d] . . . tests and devices" as "this was the evil for which the new remedies were specifically designed." *Id.* at 331. As the Court explained, 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, the tests and devices had been permanently banned and the measurable indicators of voting interference no longer indicated a unique problem in the covered jurisdictions. "[T]he 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. In

fact, if Congress had sought to impose preclearance based on voting data from the 1996, 2000, and 2004 presidential elections, only Hawaii would have been a covered State. 151 Cong. Rec. H5131, H5181 (daily ed. July 13, 2006). For this reason alone, the "disparate geographic coverage" of Section 4(b) is not "sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203.

Moreover, the "evil § 5 is meant to address" is no longer "concentrated in the jurisdictions singled out for preclearance." *Id.* Congress was alerted that it would be constitutionally problematic to "identify continuing problems in the covered jurisdictions . . . in complete isolation from consideration of whether similar problems exist in non-covered sites." *The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d. Sess., at 200 (May 16, 2006) ("Continuing Need for Section 5 Preclearance") (testimony of Pildes). But the issue was never "addressed in any detail in the [Senate] hearings . . . or in the House." *Id.* at 200. Congress cannot properly exercise its enforcement authority if it does not even seriously study whether the "statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203.

Had Congress studied the issue, it would have learned that there are not any "systematic differences between the covered and the non-covered areas[;] . . . in fact, the evidence that is in the record suggests that there is more similarity than difference." Continuing Need for Section 5 Preclearance at 10 (testimony of Pildes) (quoted in *Nw. Austin*, 557 U.S. at 204). The Section 2 and racially polarized voting statistics in the legislative record—the only "second generation barriers" that can plausibly bear on this

question[3]—confirm the coverage formula's obsolescence. The record disclosed more Section 2 lawsuits filed, as well as more Section 2 suits that resulted in findings of intentional discrimination, in non-covered jurisdictions than in covered jurisdictions. *See* VRI Master List.[4] Moreover, of the 105 instances of racially polarized voting since 1982 identified in the Katz Study, only 52 were in covered jurisdictions. *Id*.[5]

As Judge Williams persuasively demonstrated, a state-by-state comparison of Section 2 and racially polarized voting statistics confirms the irrationality of using Section 4(b)'s formula to address "second generation barriers." *See Shelby County*, 2012 WL 1759997, at *36-43 (Williams, J., dissenting). For example, of the States with the highest number of Section 2 lawsuits filed since 1982, the nine covered States make up only 5 of the top 10, 6 of the top 14, and 7 of the top 26. VRI Database Master List.[6] The outcome is the same for racially polarized voting. Of the 105 instances of racially polarized voting, only 4 of the 10 States with the highest number of instances of racially polarized voting are covered. *Id*.

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[3] Section 5 preclearance actions and statistics provide no basis for a comparative analysis of covered and noncovered jurisdictions for the obvious reason that non-covered jurisdictions are not subject to preclearance.

[4] *See also* Continuing Need for Section 5 Preclearance at 202 (testimony of Pildes); Introduction to the Expiring Provisions at 30 (May 9, 2006) (testimony of Issacharoff); 151 Cong. Rec. H5182 (daily ed. July 13, 2006).

[5] *See also* Introduction to the Expiring Provisions at 29 (testimony of Hasen); 151 Cong. Rec. H5180 (daily ed. July 13, 2006); *Voting Rights Act: Section 5 of the Voting Rights Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess., at 3272 (Oct. 25, 2005) (statement of Walton).

[6] Notably, in Florida, only 3 of the 23 Section 2 lawsuits in the State were filed in the Covered Counties. *See* VRI Database Master List.

Moreover, bailout can no more solve the formula's severe overinclusiveness than the bail-in provision can solve the formula's severe underinclusiveness. *See Shelby County*, 2012 WL 1759997, at *42-43 (Williams, J., dissenting). Were those provisions sufficient, Congress could dispense entirely with its obligation to build a legislative record and randomly select jurisdictions for coverage, but then immunize such random selection from constitutional scrutiny through bailout. This cannot be the law.[7]

C. Imposing Preclearance On Jurisdictions Under Section 4(b)'s Language Minority Coverage Formula Is Not An "Appropriate" Means Of Enforcing The Fourteenth Amendment.

Even if it is a "close question" whether there was sufficient evidence in the legislative record to warrant reauthorization of the preclearance obligation under Section 4(b)'s coverage formula for racial discrimination, *see Shelby County*, 2012 WL 1759997, at *26, there was unquestionably insufficient evidence of voting discrimination against language minorities to justify preclearance under Section 4(b)'s language minority coverage formula. First, Congress failed to compile a sufficient record to warrant reauthorization of Section 5's protection of language minority citizens. In fact, a review of the legislative record in 1975 and in 2006 shows that Congress has never adequately justified that expansion of Section 5. Second, the expansion of the coverage formula to include "language-minority" jurisdictions has *never* been justifiable in practice or theory. The trigger for coverage has never corresponded to the targeted problem, and the formula

[7] In any event, to the extent the bail-in effectively targets jurisdictions that should be covered, it actually undermines the constitutionality of Section 4(b) because it constitutes a narrower, and more appropriate, means of imposing preclearance. *See* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation & Dynamic Preclearance*, 119 Yale L. J. 1992, 2024 (2010).

has never in fact captured those jurisdictions where the targeted problem uniquely exists. Thus, even accepting the D.C. Circuit's decision in *Shelby County*, Congress's decision to reauthorize the preclearance obligation for the Covered Counties was still unconstitutional under *Boerne*.

1. The Expansion Of The Preclearance Obligation To Protect Language Minority Citizens Is Not An "Appropriate" Means Of Enforcing The Fourteenth Amendment.

a. Congress Was Required To Document A Widespread Pattern Of Intentional Interference With Language Minority Citizens' Access To The Ballot.

When Congress expanded the extraordinary remedy of preclearance in 1975, it did so to ensure for language minority citizens the same right to ballot access that it had sought originally to protect for African Americans in 1965. Congress purported to have compiled a record "filled with examples of the barriers to registration and voting that language minority citizens encounter in the electoral process." S. Rep. No. 94-295, at 25 (1975). On the basis of this record, Congress decided to "expand the protections of the Voting Rights Act to insure [language minority citizens] free access to the franchise." *Id.* at 30-31. Finding that English-only elections "exclude[d] [language minority citizens] from participation in the electoral process," Congress made it a prohibited "test or device" for any jurisdiction with a five percent citizen population of American Indians, Alaskan Natives, Asian Americans, or persons of Spanish heritage to have maintained, on November 1, 1972, "any practice or requirement" of providing English-only voting or registration materials. Pub. L. No. 94-73, § 203, 89 Stat. at 401-02.

In short, for purposes of the *Boerne* analysis, the "constitutional right in question" is the same. *Garrett*, 531 U.S. at 368. But because the Fifteenth Amendment protects an equal right to ballot access only with respect to race, Congress purported to justify this expansion of preclearance as a remedy to enforce the Fourteenth Amendment. *See* S. Rep. No. 94-295, at 35-37; 42 U.S.C. § 1973b(f)(1). As the Supreme Court has held, the Fourteenth Amendment protects any citizen's right "to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336.

Thus, Congress was required to compile evidence probative of a "pattern" of interference with *that* right. *Garrett*, 531 U.S. at 370. And to warrant preclearance, the evidence had to show widespread, intentional, and direct interference with language minority citizens' right to vote through violence, intimidation, and gamesmanship. *Supra* at 15-17. Anything less would not justify further expanding an already "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992).

b. Congress Has Never Documented A Widespread Pattern Of State-Sponsored Interference With Language Minority Citizens' Right To Register To Vote And Cast A Ballot.

(1) The Legislative Record In 1975 Did Not Show Systematic State-Sponsored Interference With Language Minority Citizens' Right To Ballot Access.

Although Congress purported to find "overwhelming evidence of voting discrimination against" persons of Spanish heritage, Asian Americans, American Indians, and Alaskan Natives, S. Rep. No. 94-295, at 30-31, it reported only one category of evidence that related to all four groups. Citing court cases, Congress found that all four

groups faced a "pattern of educational inequality" resulting from "the failure of state and local officials to afford equal educational opportunities," and "have been the target of discrimination in almost every [other] facet of life," including employment. *Id.* at 28-30.

But none of this evidence was proof of systematic, direct, and intentional interference with the right to register to vote or cast a ballot. *Even Congress did not claim that it was.* Rather, Congress merely suggested that such discrimination outside the voting context had led to "high illiteracy rates for language minority citizens." *Id.* at 30. Congress reasoned from there that "[t]he failure of states and local jurisdictions to provide adequate bilingual registration and election materials and assistance undermine[d] the voting rights of [those] non-English-speaking citizens and *effectively* exclude[d] otherwise qualified voters from participating in elections." *Id.* (emphasis added). The evidence was, by Congress's own logic, at least two steps removed from the denial of the right to vote.

The remaining evidence reported by Congress relates almost exclusively to the experience of Mexican Americans in Texas. For that reason alone, the evidence failed to show a *widespread* pattern of interference with language minority citizens' right to ballot access. But that is not the only reason. Much of the evidence related to vote dilution. *Id.* at 27-28. That evidence is not probative of interference with the ability to freely register and cast a ballot, but rather concerns the weight of the ballot once cast. Other evidence documented threats and intimidation by private citizens. *Id.* at 26. Those actions, however deplorable, are not probative because Congress is empowered under the

Fourteenth Amendment to remedy only governmental discrimination. *See United States v. Morrison*, 529 U.S. 598, 620-21 (2000).

The record did include testimony citing abuses in a handful of Texas counties. Witnesses charged that Mexican Americans did not receive bilingual assistance at the polls, that Mexican-American voters were given misinformation on polling places and voting procedures, that Mexican-American voters were harassed at the polls, and that Mexican-American poll watchers suffered similar treatment. *Id.* at 25-26; *see also* Linda Chavez, Out of the Barrio: Toward a New Politics of Hispanic Assimilation 47-48 (1991). But these abuses, while serious, do not even remotely compare to the "unremitting and ingenious defiance" that African Americans faced across the South in 1965. *Katzenbach*, 383 U.S. at 309.

Finally, Congress pointed to the turnout and registration statistics nationwide for persons of Spanish heritage, as well as their ability to attain elected office. In 1974, "34.9 percent of persons of Spanish origin were registered to vote compared to 63.5 percent for Anglos." S. Rep. No. 94-295, at 30. That same year, "[o]nly 22.9 percent of Spanish origin persons voted in the . . . national election, less than one-half the rate of participation for Anglos." *Id.* But as Senator Barry Goldwater testified, those numbers did not take into account that many persons of Spanish origin were ineligible to vote:

> Results from the current population survey of the Bureau of the Census show that 40 percent of all Spanish-origin persons who were not registered in 1974 reported they were not citizens. With this group of noncitizens removed from the statistics, it means that fully 60 percent of all Spanish-origin citizens were registered and 40 percent voted in 1974.

Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., at 720 (Apr. 30, 1975).

Congress's findings about elected officials of Spanish origin are similarly flawed. Congress found that, in Texas and New York, "[t]he proportion of elected officials who are Mexican American or Puerto Rican . . . [wa]s substantially lower than their proportion of the population." S. Rep. No. 94-295, at 26-27. But these numbers only tell half the story. At the time the 1975 Reauthorization was passed, two Mexican Americans served as governors in the United States, one Mexican American was a U.S. Senator, and five Hispanics were members of Congress. *See* Chavez 47. By comparison, at that same time, most elected African Americans "held only relatively minor positions [and] none held statewide office." *City of Rome*, 446 U.S. at 180.

At bottom, the legislative record in 1975 failed to establish that persons of Spanish heritage, Asian Americans, American Indians, and Alaskan Natives faced discrimination in voting in any way comparable to that faced by African Americans in the South before 1965. Indeed, the DOJ found the record "not compelling" and concluded that it did not make "a strong case . . . of widespread deprivations of the right to vote of non-English-speaking persons." *Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., at 543-44 (Apr. 29, 1975) (testimony of J. Stanley Pottinger, Jr., Assistant Attorney General for Civil Rights).

(2) The Legislative Record In 2006 Is Even Less Compelling Than The Record In 1975.

Having failed to justify expanding preclearance to language minorities in 1975, Congress could not have possibly done so in 2006 given that "the number of language minority citizens who have registered to vote, turned out to vote, and who are casting ballots for preferred candidates of their choice has increased" in the intervening 31 years. H.R. Rep. No. 109-478, at 18-19. As of 2000, "more than 5,200 Latinos had been elected to office, including 25 to the United States House of Representatives and two to the United States Senate." *Id.* at 19. For example, Florida elected a Hispanic Governor in 1986, has elected two Hispanic U.S. Senators since 2000, and currently has three Hispanic U.S. Representatives. Asian Americans, Native Americans, and Native Alaskans have also seen important electoral gains. *Id.* at 19-20.

To justify reauthorization, Congress thus turned to the same evidence of "second generation barriers" that it relied on in reauthorizing Section 5 more generally—racially polarized voting, preclearance statistics, MIRs, Section 5 enforcement litigation, federal observers, and Section 2 litigation. But for all the reasons already discussed, *see supra* 18-21, none of this evidence is probative of the widespread interference with the right to ballot access that is needed to warrant a remedy as extreme as the preclearance obligation. Moreover, this "second generation" evidence was even weaker with respect to language minorities. Congress also relied on some of the same types of non-probative evidence it had looked to in 1975. It reported receiving evidence of vote dilution throughout the country. *See* H.R. Rep. No. 109-478, at 45. It also highlighted "instances

where citizens who are unable to speak English proficiently have encountered degraded educational opportunities" and "examples of unequal educational opportunities." *Id.* at 50, 51. Neither is proof of direct and intentional interference with the right to register to vote or cast a ballot.

Last, Congress pointed to evidence of noncompliance with Section 203's bilingual-election requirement. H.R. Rep. No. 109-478, at 52. But those failures are not necessarily the result of intentional discrimination; instead, the evidence suggests that they resulted from a mistaken understanding of the VRA's requirements. The primary problem is not complete failure to comply but rather inadequate compliance—"providing some form of written or oral assistance, but not both." *Id.* More important is the success of Section 203 enforcement litigation at bringing jurisdictions into full compliance, *id.*, and the "immediate impact" of doing so, *id.* at 19. These facts show that preclearance is not necessary. Case-by-case litigation under Section 203 has proven to be more than sufficient to rectify any voting discrimination against language minorities.[8]

c. Preclearance Lacks Congruence And Proportionality To The Evidence Of Voting Discrimination Against Language Minority Citizens.

Even assuming that Congress has established some "pattern of unconstitutional discrimination" against language minority citizens, preclearance is not proportional to the

[8] Congress identified only a few instances of intentional voter harassment of language minority citizens. *Id.* at 45. These examples—which are fewer even than the small number of abuses cited in 1975—do not even come close to showing that case-by-case litigation would be futile. *See Garrett*, 531 U.S. at 369-70 (concluding that "half a dozen examples from the record" of governmental discrimination fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 [of the Fourteenth Amendment] legislation must be based").

harm identified. The record compiled by Congress (even reaching back to 1975) may warrant some prophylactic remedy—such as Section 203 or 4(e)—but it comes nowhere near justifying the suspension of "*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. Congress failed from the outset to heed the Court's caution that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 334).

2. Section 4(b)'s Language Minority Coverage Formula Is Not An "Appropriate" Means Of Enforcing The Fourteenth Amendment.

a. Section 4(b)'s Language Minority Coverage Formula Has Never Correlated To The Problem Congress Sought To Address Either In Expanding Or Reauthorizing Preclearance To Protect Language Minority Citizens.

Because coverage under the language minority provisions also is triggered, in part, by decades-old election data, it is irrational in theory for the reasons discussed above. *See supra* at 24-25. In addition, the inputs for the language minority coverage formula were never tied to the specific problem sought to be addressed: intentional interference with the right of language minority citizens to access the ballot. Under Section 4(f)(3), a jurisdiction is considered to have used a prohibited "test or device" if, in November 1972, it: (1) provided election materials or assistance in English only; and (2) had a five percent citizen population of American Indians, Alaskan Natives, Asian Americans, or persons of Spanish heritage. But even Congress acknowledged that the provision of English-only voting materials or assistance, even in areas with a significant language-minority population, is not itself a reliable indicator of *intentional* voting discrimination. At most,

even accepting Congress's chain of inferences, English-only election materials or assistance "*effectively* exclude[]" minority citizens from voting, due to the presence of a number of other factors. S. Rep. No. 94-295, at 30 (emphasis added). In fact, far from having a "long history as a tool for" voting discrimination, *Katzenbach*, 338 U.S. at 330, the provision of English-only election materials can serve a variety of non-discriminatory purposes, *see Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess., at 161-66 (June 13, 2006) (Statement of Chavez).

The formula's methodology for identifying persons of Spanish heritage also is flawed in theory. The determination was made by the Census Bureau, which applied three different tests for different parts of the country: (1) "persons of Spanish language"[9] in 42 states and the District of Columbia; (2) "persons of Spanish language" as well as "persons of Spanish surname"[10] in Arizona, California, Colorado, New Mexico, and Texas; and (3) "persons of Puerto Rican birth or parentage"[11] in New Jersey, New York, and Pennsylvania. S. Rep. No. 94-295, at 24 n.14. Each of the tests is itself a flawed and

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[9] "Persons of Spanish language" comprise "persons of Spanish mother tongue and all other persons in families in which the head or wife reported Spanish as his or her mother tongue." *See* U.S. Dept of Commerce, Bureau of the Census, 1970 Census of Population, Vol. I Characteristics of the Population, United States Summary, § 2, app. B, at App-18 ("1970 Census"), *available at* http://www.census.gov/prod/www/abs/decennial/1970cenpopv1.html.

[10] "Persons of Spanish surname" were identified "by means of a list of over 8,000 Spanish surnames originally compiled by the Immigration and Naturalization Service" in 1936. *See* 1970 Census at App-18.

[11] "Persons of Puerto Rican birth or parentage" included "persons born in Puerto Rico and persons born in the United States or an outlying area with one or both parents born in Puerto Rico." *See* 1970 Census at App-18.

arbitrary measure of a person's proficiency in the English language. Those flaws are compounded by the arbitrary application of some of the tests in some states but not in others: A person with a Spanish surname would have counted for purposes of determining preclearance coverage if he lived in Colorado, but not if he lived in New York, unless he was born in Puerto Rico or had Puerto Rican parents, and not if he lived in Iowa, unless he or his parents were native Spanish speakers.

Last, even if the formula made theoretical sense in 1975, it no longer does. First, the single-language minority population numbers from 1972 are clearly outdated. Second, and more importantly, since 1975, bilingual elections have been required by Section 203 in jurisdictions where there is evidence that the single-language minority population has a high illiteracy rate or actually lacks English proficiency.[12] All voting practices or procedures that "deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group" have been permanently banned for over 35 years. Pub. L. No. 94-73, § 206, 89 Stat. at 402 (codified at 42 U.S.C. § 1973(a)).

[12] The coverage formula for Section 203 originally included jurisdictions where "more than 5 percent of the citizens of voting age . . . are members of a single language minority" and "the illiteracy rate of such persons as a group is higher than the national illiteracy rate." Pub. L. No. 94-73, § 301, 89 Stat. at 402-03. It now includes those jurisdictions, among others, where "more than 5 percent of the citizens of voting age . . . are members of a single language minority and are limited-English proficient." 42 U.S.C. § 1973aa-1a. Florida is subject to Section 203. SMF ¶ 7.

b. Section 4(b)'s Language Minority Coverage Formula Does Not Single Out For Coverage Those Jurisdictions Uniquely Interfering With The Right That Congress Is Seeking To Protect By Expanding Preclearance.

Also unlike the original formula, the language minority coverage formula has never accurately captured those jurisdictions where there was "reliable evidence of actual voting discrimination." *Katzenbach*, 383 U.S. at 329. In designing the original coverage formula, Congress "worked backwards" from the evidence of widespread voting discrimination that it had compiled. Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J. on Poverty L. & Pol'y 41, 49 (2007). But it made no such effort when designing Section 4(b)'s language minority coverage formula. By its own admission, Congress "simply appl[ied] the Act's special remedies to jurisdictions where language minorities reside in greatest concentrations and where there is evidence of low voting participation." S. Rep. No. 94-295, at 32.

But even if this formula had accurately captured the correct jurisdictions in 1975, it certainly does not today. The evidence in the 2006 legislative record shows that voting discrimination against language minority citizens is found more often in non-covered jurisdictions than in covered ones. For example, while *none* of the Covered Counties were implicated in anecdotal accounts of voting discrimination, five non-covered Florida counties were. S. Rep. No. 109-295, at 29. The Section 2 and racially polarized voting statistics in the legislative record tell a similar story. Of the Section 2 lawsuits filed, 109 involved a Latino, Asian American, or Native American plaintiff. *See* VRI Master List. Of those, only 36 involved covered jurisdictions. *Id.* And of the 28 instances of racially

polarized voting that involved a Latino, Asian American, or Native American plaintiff, only 9 were in covered jurisdictions. *Id.*[13]

D. The Requirement That Language-Minority Jurisdictions Preclear On Racial Grounds Lacks Congruence And Proportionality To The Harm Targeted In Those Jurisdictions.

Beyond all the constitutional infirmities already discussed, this case illustrates yet another problem with the preclearance obligation. Section 5 does not distinguish between jurisdictions covered solely under the language-minority coverage formula and all other covered jurisdictions. All covered jurisdictions must prove that a proposed change in law "neither has the purpose nor will have the effect of": (1) "denying or abridging the right to vote on account of race or color," 42 U.S.C. § 1973c(a); or (2) "deny[ing] or abridg[ing] the right of any citizen of the United States to vote because he is a member of a language minority group," *id.* § 1973b(f)(2), regardless of the reasons that trigger coverage. As a result, jurisdictions subject to preclearance solely by virtue of the language-minority coverage trigger, such as the Covered Counties, must preclear all voting changes on racial grounds as well.

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[13] That Florida must seek preclearance for the Three Voting Changes "highlights the oddity of § 4(b)." *Shelby County*, 2012 WL 1759997, at *43 (Williams, J., dissenting). For example, Florida must seek preclearance for a law amending its early-voting hours. *See* V1 271-73 (providing up to 96 hours of early voting). Yet four non-covered states (Maryland, Oregon, Rhode Island, and Washington) do not allow early voting *at all* and ten non-covered states (Connecticut, Delaware, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, and Pennsylvania) allow in-person early voting *only* if the voter provides an excuse or rationale for voting before Election Day. *See* V18 10175-76; *id*. 9982-83. That Florida cannot alter a means of voting that more than a dozen other non-covered states *forbid* exposes the fundamental constitutional problems with the coverage formula. *See, e.g. Shelby County*, 2012 WL 1759997, at *43-44 (Williams, J., dissenting) (discussing voter ID laws).

There is no congruence and proportionality between the harm targeted in language-minority jurisdictions and the requirement to preclear on racial grounds. The harm targeted in those jurisdictions is directly and completely addressed by the requirement that proposed changes in voting law not affect a citizen's right to vote "because he is a member of a language minority group." *Id.* § 1973b(f)(2). The statutory criteria for coverage itself proves the point. If these jurisdictions had a history of discrimination against racial minorities constitutionally sufficient to warrant preclearance of voting changes on that basis, such jurisdictions would have been covered on that basis. But they are not. Hence, requiring preclearance on racial grounds is an extraordinary, additional burden with no additional benefit. In other words, it is "so out of proportion to [the] supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532.

E. The 2006 Expansion Of The Substantive Standard For Preclearance Is Unconstitutional.

The amendments to the preclearance standard both exacerbate the foregoing constitutional flaws of—and independently invalidate—the 2006 reauthorization of the VRA. First, by making it markedly more difficult to obtain preclearance, these amendments multiply the federalism burden of Section 5. Second, because they further extend the distance between the constitutional right and the statutory standard, they render Section 5 invalid under *Boerne*. And third, the amendments (especially as interpreted by DOJ) require state officials to engage in race-based decisionmaking that cannot be reconciled with the Constitution's guarantee of equal protection.

1. The 2006 Amendment To Section 5's "Purpose" Prong Renders The Statute Unconstitutional.

As noted above, Section 5 already imposes substantial federalism costs. *See supra* at 22-23, 35-36. The 2006 amendments bear directly on whether this severe remedy remains justified. "Any answer to the question whether" the statute is "'sufficiently related to the problem it targets,' that is, whether it is 'congruent and proportional,' must be informed by the consequences" that follow from coverage. *Shelby County*, 2012 WL 1759997, at *32 (Williams, J., dissenting) (quoting *Nw. Austin*, 557 U.S. at 203) (internal citation omitted). By amending Section 5 to require denial of preclearance to a voting change with "any discriminatory purpose," as opposed to a "retrogressive purpose," *see Bossier II*, 528 U.S. at 340-41, Congress exacerbated Section 5's already-grave federalism costs. Section 5 generally imposes "the difficult burden" of "prov[ing] a negative"—namely, "proving the *absence* of [the prohibited] purpose and effect." *Bossier I*, 520 U.S. at 480. Restricting the inquiry to retrogression eased the burden. Proving that a change lacked retrogressive effect only "require[d] a comparison of [the] jurisdiction's new voting plan with its existing plan." *Id.* at 478. The additional burden of proving the absence of retrogressive purpose was then relatively "trivial," requiring only that the jurisdiction confirm that it was not an "incompetent retrogressor." *Bossier II*, 528 U.S. at 331-32.

In contrast, it would have been a significantly greater burden—"perhaps to the extent of raising concerns about § 5's constitutionality"—for a jurisdiction to *disprove* discriminatory purpose. *Id.* at 336. It is difficult enough to ascertain a discriminatory

"purpose" from the adoption of voting changes, which typically involves varied interests of myriad legislators selecting among countless proposals. *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986). To require a jurisdiction to prove the *absence* of such purpose would be exceedingly difficult and would, in the Court's view, "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts." *Bossier II*, 528 U.S. at 336. By rejecting *Bossier II*, Congress has dramatically increased the costs of federal oversight with no corresponding justification for doing so given the vast improvements in the covered jurisdictions since 1965.

Defendants' construction of the "purpose" prong only compounds the problem. They disclaim the applicability of the constitutional standard for determining whether a law has a discriminatory purpose, *see Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), demand that Florida disprove each of the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), assert that Florida must have "compelling" justifications for any voting change, and claim that Florida must waive privilege and compel individual legislators (even those from non-covered regions of the State) to testify as to their personal motives for supporting voting changes, all in order to obtain preclearance under the "purpose" prong of Section 5, DCL ¶¶ 12-14, 15-17, 107; V15 8751; V16 8773, 8807, 8812; *see* RCL ¶¶ 12-17, 31, 107(f). If this is the standard that must be met to prove the absence of discriminatory purpose, then the preclearance obligation is clearly unconstitutional under *Boerne*. Defendants' proposed standard is impossibly onerous and deviates so far from the constitutional

standard for intentional discrimination that the "purpose" prong cannot be seen as "enforcing" the Fourteenth or Fifteenth Amendment. *See Boerne*, 521 U.S. at 516-29.

The amendment also creates a serious equal-protection problem. The Supreme Court "previously found that assigning covered jurisdictions the burden of proving the *absence* of discriminatory purpose was precisely the device that the [DOJ] had employed in its pursuit of maximizing majority-minority districts at any cost." *Shelby County*, 2012 WL 1759997, at *34 (Williams, J., dissenting). Here too, DOJ appears intent on using the "purpose" prong to prevent Florida from making sensible and non-discriminatory voting changes because DOJ favors certain alternate procedures strictly for race-based reasons. "There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted . . . to encourage or ratify a course of unconstitutional conduct." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Yet "[b]y inserting discriminatory purpose into § 5, and requiring covered jurisdictions affirmatively to prove its absence, Congress appears to have, at worst, restored the Justice Department's implicit command that States engage in presumptively unconstitutional race-based" decisionmaking, and at best, "exacerbated the substantial federalism costs that the preclearance procedure already exacts." *Shelby County*, 2012 WL 1759997, at *34 (Williams, J., dissenting) (citations and quotations omitted).

2. The 2006 Amendment To Section 5's "Effect" Prong Renders The Statute Unconstitutional.

Congress's amendment to Section 5's "effect" prong is equally unconstitutional. First, as with the "purpose" prong, the amendment increases the statute's federalism

burden in several ways. In 2003, the Supreme Court held that whether a voting change had a "retrogressive" effect turned on the "totality of the circumstances." *Ashcroft*, 539 U.S. at 479-80. Those circumstances included not only "the ability of minority voters to elect their candidate of choice," but also the views of minority legislators, "the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Id*. Preclearance under the "effect" prong thus turned on the "examination of all the relevant circumstances," not "solely on the comparative ability of a minority group to elect a candidate of its choice." *Id*. at 479-80. In 2006, however, Congress overturned the *Ashcroft* standard and replaced it with a rigid standard focused solely on a minority group's "ability . . . to elect their preferred candidates of choice," 42 U.S.C. § 1973c(b), (d). By this amendment, Congress restricted "the flexibility of states to experiment with different methods of maintaining (and perhaps even expanding) minority influence." *Shelby County*, 2012 WL 1759997, at *33 (Williams, J., dissenting).

This amendment has made it more difficult for covered jurisdictions to secure preclearance. In the redistricting setting, this Court has interpreted the "ability to elect" standard to require a "complex inquiry" under which only "a minority group that constitutes a supermajority in a district will likely have the ability to elect its chosen candidate" and that only "[a] district with a minority voting majority of sixty-five percent (or more) essentially guarantees that, despite changes in voter turnout, registration, and other factors that affect participation at the polls, a cohesive minority group will be able to elect its candidate of choice." *Texas v. United States*, No. 11-1303, 2011 WL

6440006, at *16 (D.D.C. Dec. 22, 2011). This obvious increase in the federalism burden was unjustified given the massive improvement of the conditions in the covered jurisdictions since 1965. *See supra* at 21-22.

Moreover, the amendment deviates too far from the constitutional standard to be seen as *remedying* voting discrimination. The Constitution outlaws intentional interference with the opportunity to register and cast a ballot. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). With some trepidation, the Supreme Court has accepted that an "effects" test can prophylatically enforce that command. *Rome*, 446 U.S. at 177; *Gingles*, 478 U.S. at 44. But because of the significant risk that relying on "effects" to patrol for discriminatory intent may inappropriately bring about a "substantive change in constitutional protections," *Boerne*, 521 U.S. at 532, the Court has scrutinized "effects" tests to ensure a sufficient connection to the right protected by the Constitution.

Thus, in Section 2 cases, the Court has rejected any guarantee of "electoral advantage," "electoral success," or electoral "maximiz[ation]" for minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*"). When analyzing the proper role of an "effects" test in rooting out intentional discrimination, the Court has instead looked to "equality of opportunity" as the touchstone. *LULAC*, 548 U.S. at 428; *see also Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The "totality of circumstances" test adopted in *Ashcroft* followed directly from this tradition and ensured that Section 5 maintained the close nexus to the constitutional standard that *Boerne* requires. By rejecting that opportunity-based approach for one that focuses solely on ensuring

electoral results favorable to minority groups, the 2006 amendment is not congruent and proportional legislation.

For similar reasons, the "ability to elect" standard also creates equal-protection problems. As Justice Kennedy has warned, "[r]ace cannot be the predominant factor in redistricting [or other electoral decisionmaking] . . . [y]et considerations of race that would doom [an election] plan under the Fourteenth Amendment or § 2 would seem to be what save it under § 5." *Ashcroft*, 539 U.S. at 491; *see also Nw. Austin*, 557 U.S. at 203-04. "Unfortunately, when Congress passed the 2006 version of the VRA, it not only disregarded but flouted Justice Kennedy's concern." *Shelby County*, 2012 WL 1759997, at *33 (Williams, J., dissenting). In so doing, Congress openly sought a "guarantee of electoral success for minority-preferred candidates" instead of preserving "equality of opportunity" for all voters irrespective of race or language-minority status. *LULAC*, 548 U.S. at 428. By needlessly making race the overriding factor in all electoral legislation, Congress has required states to engage in the type of race-based decisionmaking that cannot be reconciled with the Equal Protection Clause.

Defendants have argued that the "ability to elect" standard has no application in a ballot-access case and, instead, ask this Court to adopt a "disparate impact" theory of retrogression. *See* FF ¶¶ 70, 93-94; DCL ¶¶ 93-94; RCL ¶¶ 60-69, 70-80, 93-95. But this standard is constitutionally flawed in all the same ways. First, this standard substantially increases the federalism burden in multiple respects. As this litigation shows, analyzing whether a change in a particular means of registering or voting has a "disparate impact" on minority voters requires the State to devote substantial resources to complex statistical

analysis. *E.g.,* V16 9038-61; *see id*. 8895-901, 8907-10. Moreover, instead of a standard appropriately focused on minority voters' opportunity to register and cast a ballot, this standard requires Florida to prove (as it has successfully done in this case), that a change in a particular means of registering and voting does not negatively impact minority voters' use of *those means*. FF ¶¶ 58-64, 67-71, 88-93, 112-116; RFF ¶¶ 54-116C. Given that Florida voters retain myriad avenues to register and vote irrespective of the Three Voting Changes, FF ¶¶ 54-57, 65-66, 83-87; RFF ¶¶ 54-57, 72-82, 83-87, Defendants' proposed standard substantially increases the federalism burden on covered jurisdictions and thus renders the statute unconstitutional.

Second, Defendants' proposed standard grossly deviates from the constitutional standard. As noted above, the Constitution protects against intentional interference with the ability to register and vote on account of race or language-minority status. *See supra* at 46. Defendants' proposed standard, however, does not respond to intentional interference with the *opportunity* to exercise the franchise—the proper standard for any "effect" provision in the voting-rights setting. *See supra* at 46-47. It instead probes interference with use of a particular means of registering or voting irrespective of whether the change deprives any voter a reasonable and fair opportunity to exercise the franchise. If Defendants are correct, "Congress' concern was with the incidental burdens imposed" by a change in a particular means of registering or voting, "not the object or purpose of the legislation." *Boerne*, 521 U.S. at 531. Under this approach, Section 5's "effect" prong "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.

It appears, instead, to attempt a substantive change in constitutional protections." *Id*. at 532.

Third, and last, this "disparate impact" standard raises serious equal-protection problems. Even if a state has made voting changes for non-discriminatory reasons, and even if the changes will not deny any voter a reasonable and fair opportunity to register and vote, preclearance will be denied under the Defendants' proposed standard if it has any negative impact—however minor—on minority voters' use of a particular means of registering or voting. In order to avoid denial of preclearance, then, jurisdictions will have to engage in precisely the type of race-based decisionmaking that the Fourteenth Amendment forbids. *Miller*, 515 U.S. at 927-28; *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681-83 (2009) (Scalia, J., concurring); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989). It clearly makes race the "predominant factor" in all electoral *decisionmaking*. *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

F. The Requirement That Non-Covered States Obtain Preclearance For Uniform, Statewide Voting Changes Exceeds Congress's Enforcement Authority.

The Supreme Court has interpreted Section 5 to require that, even if a State is not itself a covered jurisdiction, a covered jurisdiction within that State must "seek preclearance before implementing [state] laws that effect voting changes in the [covered jurisdiction]." *Lopez*, 525 U.S. at 278. Although Florida is not itself a covered jurisdiction, five counties within the State are covered. Florida has filed this suit pursuant to *Lopez* so that it may enforce the Three Voting Changes in all of its 67 counties. Florida submits, however, that requiring non-covered states to obtain preclearance for statewide

voting changes exceeds Congress's enforcement authority. The *Lopez* Court rejected this argument. *Id.* at 282-85. But, recognizing that this Court is bound by that judgment, Florida contends that *Lopez* is wrongly decided. Section 5 cannot "be extended to require preclearance of the State's enactments and remain consistent with the Constitution." *Id.* at 296 (Thomas, J., dissenting).

At a bare minimum, *Lopez* should be limited to its facts in order to limit the constitutional problems with requiring non-covered States to submit to the preclearance process.[14] In that case, it was "clear that the state enactments requiring the voting changes at issue in fact embodied the policy preferences and determinations of the county itself." *Id.* at 288 (Kennedy, J., concurring in judgment). For example, one of the state laws at issue in *Lopez* "stated on its face that it was enacted at the [covered] county's behest." *Id.* at 289. No such circumstances exist here. FF ¶¶ 9-53; RFF ¶¶ 9-53. Thus, it is unconstitutional to require Florida to obtain preclearance under the facts of this case.

V. CONCLUSION

For the foregoing reasons, Florida respectfully requests that this Court grant its motion for summary judgment, declare Sections 5 and 4(b) of the Voting Rights Act unconstitutional, and issue a permanent injunction against Defendant Attorney General Eric H. Holder, Jr., enjoining the enforcement of those sections of the VRA.

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[14] Indeed, Defendants have argued that preclearance should be denied because the State implemented the Three Voting Changes in the State's non-covered jurisdictions before receiving preclearance. *See* DFF ¶¶ 118-122; DCL ¶ 107g. If such an argument were to prevail, which it should not, it would mean there is no such thing as a "partially covered" State under *Lopez*. Any decision that would require a *non*-covered jurisdiction to refrain from implementing a voting change in *non*-covered portions of the state is constitutionally indefensible.

Respectfully submitted,

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