No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA, PETITIONER

v.

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

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

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c, under the pre-existing coverage formula of Section 4(b) of the VRA, 42 U.S.C. 1973b(b), exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-110a) is reported at 679 F.3d 848. The opinion of the district court (Pet. App. 111a-291a) is reported at 811 F. Supp. 2d 424.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2012. The petition for a writ of certiorari was filed on July 20, 2012, and was granted on November 9, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App. C, *infra*, 12a-28a.

STATEMENT

1. a. Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, is one of the most consequential, and amply justified, exercises of federal legislative power in our nation's history. Although the Fourteenth and Fifteenth Amendments have, since 1870, guaranteed citizens the right to vote free of discrimination on the basis of race, "the blight of racial discrimination in voting"—which manifested itself in the most blatant and virulent forms—continued to "infect[] the electoral process in parts of our country for nearly a century" thereafter. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Congress repeatedly tried to address the problem by enacting laws "facilitating case-by-case litigation against voting discrimination." *Id.* at 313. But voting litigation is "unusually onerous to prepare" and "exceedingly slow," and "some of the States affected" by federal decrees "merely switched to discriminatory devices not covered by" them. *Id.* at 313-314. Faced with obdurate and enduring resistance that undermined the proper functioning of our democracy, Congress enacted more aggressive and distinctive measures as part of the VRA, Pub. L. No. 89-110, 79 Stat. 437 (1965 Act).

Section 5 applies to specified jurisdictions, and prohibits them from adopting or implementing any change in a "standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. 1973c. To obtain preclearance, the jurisdiction must demonstrate that the proposed change does not have the purpose and will not have the effect of discriminating on the basis of race. *Ibid.* Section 5 sought to

overcome the inefficacy of case-by-case adjudication by "prescrib[ing] remedies" that "go into effect without any need for prior adjudication" and would initially stay in place for five years. *South Carolina*, 383 U.S. at 327-328.

When Congress enacted Section 5, "[i]t knew precisely which states it sought to cover and crafted the criteria" set forth in the statutory coverage provision in order "to capture those jurisdictions." Pet. App. 6a-7a. Rather than identify particular States by name in the statute's text, Congress chose to describe (in Section 4(b) of the VRA, 42 U.S.C. 1973b(b)) the jurisdictions it wished to cover by listing two voting-related criteria that it knew were shared by each such jurisdiction: (1) the use of a defined voting test or device as of November 1, 1964, and (2) a voter registration or turnout rate that was below 50% in the 1964 presidential election. § 4(b), 79 Stat. 438. Those criteria—often referred to as the "coverage formula"—do not themselves identify the particular voting problems with which Congress was most concerned. Rather, the criteria were "reverse-engineer[ed]" to describe in objective, voting-related terms the jurisdictions Congress had already determined it wanted to cover based on "evidence of actual voting discrimination." Pet. App. 56a.

Because Congress used objective criteria to describe the covered jurisdictions rather than identify them by name, the scope of the coverage had the potential to be both over- and under-inclusive. Congress therefore included "bail-in" and "bailout" procedures. Under Section 3(c)'s bail-in standard, a federal court may order a jurisdiction found to have violated the Constitution's prohibition on voting discrimination to obtain preclearance for some or all future voting changes. 42 U.S.C.

1973a(c). Under Section 4(a)'s original bailout standard, a jurisdiction could terminate its coverage by demonstrating that it had not used a test or device for a discriminatory purpose (and therefore should never have been covered). 1965 Act § 4(a), 79 Stat. 438.

This Court upheld the provisions of the VRA, including Sections 4(b) and 5, as appropriate means of enforcing the guarantees of the Fifteenth Amendment. *South Carolina*, 383 U.S. at 323-337.

b. Congress reauthorized Sections 4(b) and 5 in 1970 (for five years), 1975 (for seven additional years), and 1982 (for 25 additional years). See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975 (1975 Amendment), Pub. L. No. 94-73, Tit. I, 89 Stat. 400; Voting Rights Act Amendments of 1982 (1982 Amendment), Pub. L. No. 97-205, 96 Stat. 131. In 1975, Congress also expanded Section 5's reach to cover jurisdictions that had engaged in widespread discrimination against minority voters, including members of identified racial groups described in the statute as "language minority" groups. 1975 Amendment, § 203, 89 Stat. 401-402; Pet. App. 8a. In 1982, Congress significantly eased the bailout standard: Whereas bailout originally extended only to jurisdictions that could show they should not have been covered in the first place, the amended standard allows jurisdictions and subjurisdictions to bail out if they can demonstrate that they have complied with enumerated nondiscrimination requirements for ten years. 1982 Amendment § 2(b)(4), 96 Stat. 131-132; see Pet. App. 9a, 128a-129a. This Court upheld the constitutionality of Sections 4(b) and 5 after each reauthorization. See *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *City of Rome* v. *United States*,

446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999).

c. In 2006, Congress again reauthorized Section 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Amendment), Pub. L. No. 109-246, 120 Stat. 577. Congress held extensive hearings over many months to investigate both (i) whether ongoing problems of voting discrimination in covered jurisdictions justified extending the life of Section 5 and (ii) whether the most egregious voting discrimination remained largely concentrated in covered jurisdictions. Following that review, Congress enacted the 2006 Amendment by a unanimous (98-0) vote in the Senate and a nearly unanimous (390-33) vote in the House of Representatives.

Congress did so on the basis of statutory findings that, "without the continuation of the [VRA's] protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), 120 Stat. 578. Congress further found that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the" Fifteenth Amendment. § 2(b)(7). Congress recognized that, as a "direct result" of the VRA, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters." § 2(b)(1). Congress determined, however, 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." § 2(b)(2).

In addition to reauthorizing Section 5 for an additional 25 years, Congress amended Section 5's substantive standard in two ways. First, Congress provided that an election change motivated by racially discriminatory purpose may not be precleared, whether or not the change is retrogressive. See 42 U.S.C. 1973c(c). That change supplanted this Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*) that changes motivated by discrimination were not a basis for denying preclearance unless retrogressive. Second, Congress provided that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. 1973c(b) and (d). That change supplanted this Court's statutory holding in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), that a proposed redistricting plan was not retrogressive even though it reduced minority voters' ability to elect their candidates of choice because it created new districts in which minority voters could potentially influence the outcome of an election.

d. Immediately after the 2006 reauthorization, a jurisdiction in Texas filed suit seeking to bail out of coverage under Sections 4(b) and 5, and in the alternative challenging the constitutionality of the 2006 reauthorization of Section 5. A three-judge court held that the jurisdiction was ineligible to apply for bailout and rejected the constitutional challenge. *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 230-283 (D.D.C. 2008) (*Northwest Austin (D.D.C.)*).

This Court reversed the statutory bailout holding and declined to reach the constitutional question. *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193 (2009) (*Northwest Austin*). The Court's resolution of

the statutory question significantly expanded the number of jurisdictions eligible to apply for bailout compared to the Department of Justice's previous understanding of the scope of Section 4(a). *Id.* at 206-211. Although the Court did not decide the constitutional question, the Court (like Congress) acknowledged the progress minority voters had made in covered jurisdictions, in "significant" part because of "the Voting Rights Act itself." *Id.* at 202. Noting that "these improvements" may be "insufficient and that conditions [may] continue to warrant preclearance under the Act," the Court observed that "the Act imposes current burdens and must be justified by current needs." *Id.* at 203. The Court also noted Section 5's distinctive differentiation between covered and noncovered States, and explained that its "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Ibid.*

2. As a political subdivision of the fully covered State of Alabama, petitioner has been required to comply with Section 5 since 1965. 30 Fed. Reg. 9897 (Aug. 7, 1965). In April 2010, petitioner filed suit seeking a declaratory judgment that Sections 4(b) and 5 of the VRA are facially unconstitutional and a permanent injunction barring their enforcement. Pet. App. 145a, 149a.

The district court granted summary judgment to the Attorney General. Pet. App. 114a-115a, 291a. Based on a detailed review of the "extensive 15,000-page legislative record" supporting the 2006 reauthorization, the court concluded that Congress had found ample evidence of a history and ongoing pattern of voting discrimination in covered jurisdictions. *Id.* at 114a, 130a-132a, 189a-255a, 270a-290a. The court also credited Congress's conclusion that Section 2's nationwide prohibition against discriminatory voting practices and proce-

dures, 42 U.S.C. 1973b, would be an "inadequate remedy" in covered jurisdictions. Pet. App. 269a-270a (quoting H.R. Rep. No. 478, 109th Cong., 2d Sess. 57 (2006)). Finally, the court rejected petitioner's challenge to the scope of Section 5's geographic coverage. *Id.* at 280a-290a.

3. The court of appeals affirmed. Pet. App. 1a-110a. Relying on this Court's decision in *Northwest Austin* to set the framework for its analysis, the court first concluded that Section 5's burdens are justified by current needs, as demonstrated by the extensive record Congress amassed of "widespread and persistent racial discrimination in voting in covered jurisdictions." *Id.* at 25-26a. The court also concluded that Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets," *id.* at 48a, relying on evidence before Congress comparing the degree of voting discrimination in covered and noncovered jurisdictions, *id.* at 49a-51a, 130a. The court rejected petitioner's argument that it was irrational for Congress to maintain the coverage criteria in Section 4(b), *id.* at 55a-61a, explaining that Congress first "identified the jurisdictions it sought to cover" based on evidence of voting discrimination in those areas and then "reverse-engineer[ed] a formula to cover those jurisdictions," *id.* at 56a-57a. The court concluded that the statute's bail-in and bailout provisions further ensure that Section 5 applies to jurisdictions with the worst recent records of voting discrimination. *Id.* at 61a-65a.

Judge Williams dissented, explaining that he would find Section 4(b)'s coverage provision unconstitutional even if Congress might be justified in continuing to impose Section 5's preclearance remedy in some covered jurisdictions. Pet. App. 70a, 78a, 104a.

SUMMARY OF ARGUMENT

The right to vote is essential to securing the fundamental rights embodied in our Constitution, and invidious racial discrimination is the most pernicious form of governmental discrimination prohibited by the Constitution. Congress therefore acts at the zenith of its constitutional authority when it enforces the guarantees of the Fourteenth and Fifteenth Amendments by enacting legislation to protect citizens from racial discrimination in voting, as it has with Section 5.

When it originally enacted Section 5, and in connection with each prior reauthorization, Congress made the considered judgment that the statute's distinctive preclearance regime and focused geographic coverage were justified by then-current needs that were of pronounced significance in the covered jurisdictions. This Court upheld Section 5 after its initial enactment and each of its prior reauthorizations. Congress's 2006 reauthorization is entitled to the same respect from this Court because it is grounded in the same analysis, and is fully justified on the basis of the legislative record and the congressional findings. The decision to reauthorize Section 5 ultimately rests on empirical assessments of social conditions and predictive judgments that the Constitution entrusts to Congress, and those judgments should receive great deference.

Congress examined the treatment of minority voters in covered jurisdictions and throughout the country. Congress learned that, since 1982, approximately 2400 discriminatory voting changes had been blocked by more than 750 Section 5 objections. Without Section 5, the only way to challenge those voting changes would have been through case-by-case litigation, a system that would have resulted in years of discriminatory treat-

ment of minority voters and required an enormous expenditure of resources by all sides. Congress also learned that more than half of the objections interposed in the relevant period were based at least in part on a concern with discriminatory purpose. Blocking changes adopted with a discriminatory purpose necessarily blocks unconstitutional state action.

Congress also gathered evidence of voting discrimination from outside the Section 5 process, including: successful Section 2 suits filed against covered jurisdictions; continued disparities between minority voters' registration and participation rates as compared to those of non-Hispanic white voters; the Attorney General's experience in certifying and dispatching election observers; the persistence of severe racially polarized voting in covered jurisdictions; and testimony of experts, voters, and practitioners about ongoing intimidation, harassment, voter suppression, and intentionally dilutive practices by covered jurisdictions. Congress reasonably determined that there remains an unacceptable degree of discrimination against minority voters in covered jurisdictions, and that Section 2 of the VRA alone would afford an inadequate remedy in those jurisdictions.

Congress also acted well within its authority in concluding that it should maintain Section 5's existing geographic coverage scope. Congress gathered evidence comparing the extent of voting discrimination in covered and noncovered jurisdictions since the prior reauthorization, and that evidence showed that discrimination remains substantially more prevalent in covered jurisdictions. A particularly probative comparator is the prevalence of Section 2 suits with outcomes favorable to minority plaintiffs: Although Section 5 itself halts the

implementation of new discriminatory practices, Congress found that covered jurisdictions nonetheless accounted for much more than their proportional share of such cases.

Congress accordingly left unaltered the statutory coverage criteria in Section 4(b) of the VRA. That provision describes covered jurisdictions in terms of objective, election-related criteria that were reverse-engineered to capture the jurisdictions Congress knew it wanted to cover when initially enacting the VRA. Congress in 2006 determined that the same jurisdictions should continue to be covered.

Because of the statute's bail-in and bailout mechanisms, moreover, Section 5's geographic scope is not set in stone. Covered jurisdictions that have not discriminated against minority voters for ten years, as evidenced by statutorily defined indicia, may terminate their coverage. In the short time since this Court's decision in *Northwest Austin* expanded the number of jurisdictions eligible to apply for bailout, the number of bailouts has sharply increased. There is every reason to think that jurisdictions exhibiting a reformed commitment to nondiscriminatory conduct will continue to bail out of coverage. For covered jurisdictions that fail to do so, Congress's reasoned judgment that it needs to extend the life of what has been the most successful means of fighting a most egregious constitutional problem should be sustained.

ARGUMENT

THE 2006 REAUTHORIZATION OF SECTIONS 4(b) AND 5 OF THE VOTING RIGHTS ACT VALIDLY ENFORCES THE GUARANTEES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

Assuring the sanctity of the right to vote is essential to our democratic system of government. That right, as this Court has said, is "preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966); see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). The guarantee that the government will not invidiously discriminate against individuals because of their race is equally fundamental. Nearly 150 years ago, the Nation adopted two constitutional amendments prohibiting States from infringing citizens' right to equal participation in the political system because of their race. But securing the promise of those amendments has required a great struggle.

To be sure, progress has been made in the last 50 years, much of it as a direct result of Section 5, and it is true that we are now a very different nation. In 2006, however, Congress made the considered judgment that there remains considerable work to do and that Section 5 remains essential to doing it. That assessment was not undertaken lightly or without appreciation of the differential obligations the statute places upon covered jurisdictions; Congress held 21 hearings, amassing thousands of pages of evidence. And in an era of sharp partisan division within the legislative branch, Congress voted nearly unanimously to reauthorize Section 5. That judgment is entitled to deference and should be upheld, just as the Court affirmed Congress's comparable judgments in enacting and repeatedly reauthorizing Section 5 previously.

Because Sections 4(b) and 5 of the VRA are valid means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments, they do not violate Article IV of the Constitution or the Tenth Amendment. The restrictions embodied in the Fourteenth and Fifteenth Amendments "are directed to the States, and they are to a degree restrictions of State power." *Ex parte Virginia*, 100 U.S. 339, 346 (1880). Congress's legitimate enforcement of those restrictions "is no invasion of State sovereignty." *Ibid.*; see *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-283 (1999).

A. When Congress Enacted Section 5, And In Its Previous Reauthorizations, It Determined Both That Section 5's Burdens Were Justified By Then-Current Needs And That Its Geographic Scope Was Tailored To The Problem It Targets

Although the question before the Court is whether Section 5 of the Voting Rights Act today remains a valid means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments, this Court explained in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966), that the "constitutional propriety" of that provision "must be judged with reference to the historical experience which it reflects." That experience demonstrates Congress's active role in assessing the evolving problem of voting discrimination and tailoring its response. Congress's 2006 reauthorization is of a piece with its prior actions.

1. "The first century of congressional enforcement of the [Fifteenth] Amendment * * * can only be regarded as a failure." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009); see *South Carolina*, 383 U.S. at 310. During that period, southern States enacted various means of preventing minority

citizens (primarily African-Americans) from registering to vote and casting ballots. *Id.* at 310-311. Congress eventually responded in the 1950s and 1960s with a series of enforcement measures that "depended on individual lawsuits filed by the Department of Justice." *Northwest Austin*, 557 U.S. at 197. But those measures proved ineffective. See *id.* at 197-198; *South Carolina*, 383 U.S. at 314, 335. Congress again responded by enacting the VRA, which includes (in Section 2) another means of case-by-case litigation. But having tried and failed for decades to combat voting discrimination in the South through piecemeal litigation, Congress also enacted the stronger medicine of Section 5 for "areas where voting discrimination has been most flagrant." *Northwest Austin*, 557 U.S. at 198.

2. Congress assumed that Section 5's preclearance regime for covered jurisdictions would not be necessary forever, and provided that it would expire in five years unless reauthorized. See 1965 Act § 4(a), 79 Stat. 438. In so doing, Congress ensured that future legislatures would periodically assess whether the burdens imposed by Section 5 continued over time to "be justified by current needs." *Northwest Austin*, 557 U.S. at 203. Congress has taken that obligation seriously each time it has reauthorized Section 5.

As the end of Section 5's initial five-year period approached, Congress held 14 hearings to examine the state of affairs in covered jurisdictions. See H.R. Rep. No. 397, 91st Cong., 1st Sess. 2 (1969) (*1969 House Report*); 116 Cong. Rec. 5517-5518, *Joint View of 10 Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965* (1970) (*Joint View*). Congress recognized that significant progress had been made, in large part because of Section 5. *Joint View*

5521. But the evidence amassed by Congress showed that ongoing discrimination in covered jurisdictions remained sufficiently severe to necessitate Section 5's extension. *Id.* at 5520-5521.

In 1975, Congress again "gave careful consideration to the propriety of readopting § 5's preclearance requirement," holding 20 days of hearings. *City of Rome* v. *United States*, 446 U.S. 156, 181 (1980); H.R. Rep. No. 196, 94th Cong., 1st Sess. 4 (1975) (*1975 House Report*); S. Rep. No. 295, 94th Cong., 1st Sess. 10 (1975) (*1975 Senate Report*). Congress again acknowledged that Section 5 had continued to advance the voting rights of minority citizens in covered jurisdictions. *1975 House Report* 6-8; *1975 Senate Report* 13-15. Relying on the character and extent of Section 5 objections interposed by the Attorney General, however, Congress concluded that "the nature of that progress ha[d] been limited" and that there were many "gains yet to be achieved." *1975 Senate Report* 13-15. Congress thus again reauthorized Section 5 (this time for seven years). 1975 Amendment. This Court upheld the extension, concluding that "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable." *City of Rome*, 446 U.S. at 182.

In 1982, Congress again reauthorized Section 5 after examining in detail—over 27 days of hearings—the extent of voting discrimination in covered jurisdictions. H.R. Rep. No. 227, 97th Cong., 1st Sess. 2 (1981) (*1981 House Report*); S. Rep. No. 417, 97th Cong., 2d Sess. 3 (1982) (*1982 Senate Report*). Although Congress concluded that Section 5's preclearance requirement remained an effective means of combating voting discrimi-

nation in the covered jurisdictions, *1981 House Report* 7-11; *1982 Senate Report* 4-9, Congress determined that covered jurisdictions continued to erect discriminatory barriers to registration and voting and continued to use discriminatory dilutive techniques. *1981 House Report* 13-20; *1982 Senate Report* 9-14. Congress therefore reauthorized Section 5 for an additional 25 years (thereby capturing two redistricting cycles). 1982 Amendment, § 2(b)(6), 96 Stat. 133.

3. Congress has also undertaken, in connection with each reauthorization, the second inquiry highlighted in *Northwest Austin*—*i.e.*, examining whether the "statute's disparate geographic coverage [has remained] sufficiently related to the problem that it targets." 557 U.S. at 203. In 1975, for example, Congress investigated voting discrimination in noncovered jurisdictions, particularly discrimination against racial minority groups "who are from environments in which the dominant language is other than English." *1975 Senate Report* 24; *id.* at 24-30. Finding "overwhelming evidence" of "the voting problems encountered by language minority citizens," Congress expanded the scope of Section 5 to cover jurisdictions where such discrimination was the most severe, including States such as Texas, Alaska, and Arizona. *Id.* at 30-31; 1975 Amendment §§ 201-208, 89 Stat. 400-402. In 1982, Congress again considered whether to expand the geographic scope of Section 5—this time rejecting a proposal to extend Section 5 to every jurisdiction in the nation because it could not make the same "extensive * * * findings of voting discrimination" nationwide that it had made and reaffirmed for covered jurisdictions. *1982 Senate Report* 14-15.

When Congress opted in 1982 to retain Section 5's existing geographic coverage, it also provided a new means for jurisdictions to bail out of that coverage. A covered jurisdiction originally could bail out only by showing that it should not have been covered in the first place (*i.e.*, by showing that it had not used a test or device to discriminate). 1965 Act § 4(a), 79 Stat. 438. In 1982, Congress enabled a covered jurisdiction to bail out by demonstrating that it has not discriminated for ten years, as measured by statutory criteria such as compliance with Sections 2 and 5. 1982 Amendment § 2(b)(5)(B), 96 Stat. 131-133. Congress intended that the new bailout standard would afford an "incentive to comply" with Section 5. *1982 Senate Report* 14.

4. When Congress considered whether to reauthorize Section 5 in 2006, it again focused on (i) whether the provision's burdens are justified by current needs, and (ii) whether its geographic scope remains sufficiently related to its purpose. As explained in the following pages, Congress answered both questions in the affirmative, based on investigations similar in nature and scope to the investigations it had undertaken (and this Court had approved) in the past. In reviewing Congress's nearly unanimous judgment, this Court has explained that it must remain "keenly mindful of [its] institutional role," cognizant that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [any] Court is called on to perform.'" *Northwest Austin*, 557 U.S. at 204-205 (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

When examining Congress's exercise of its authority to enforce the Fifteenth Amendment's guarantees, this Court has repeatedly stated that "Congress may use any rational means to effectuate the constitutional prohibi-

tion of racial discrimination in voting." *South Carolina*, 383 U.S. at 324; see *id.* at 325-327 (adopting rationality standard of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)); *City of Rome*, 446 U.S. at 175-178; *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *Lopez*, 525 U.S. at 282-285. The Court has also described Congress's authority to enforce the Fourteenth Amendment's prohibition on race discrimination in broad terms:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [Reconstruction] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Virginia, 100 U.S. at 345-346; see also *Tennessee* v. *Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States."). The Court should apply that understanding in assessing the constitutionality of Congress's 2006 reauthorization.

The "congruence and proportionality" framework more recently articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), is fully consistent with that understanding here, where Congress seeks to enforce an established right rather than redefine the Constitution's protections. In *Boerne* and the cases that followed, the Court has emphasized that Congress is entitled to greater leeway in determining when and by what means it may exercise its authority to enforce the Fourteenth Amendment (and by implication the Fifteenth Amend-

ment) when it acts to enforce a right subject to heightened constitutional protection. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003); *Lane*, 541 U.S. at 528-529. Section 5 of the VRA operates at the intersection of the most fundamental of constitutional rights and the most invidious form of discrimination. Both the "any rational means" formulation articulated in *South Carolina*, 383 U.S. at 324, and the congruence-and-proportionality framework articulated in *Boerne* (at least as applied to a statute prohibiting racial discrimination in voting) demand substantial deference to Congress's considered judgment that Section 5 of the VRA remains an appropriate means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments.

It is true that Section 5 imposes a burden on covered jurisdictions that is not imposed equally on all sovereign States. But the text of the Fourteenth and Fifteenth Amendments vests Congress with the power to enforce their substantive prohibitions through "appropriate legislation." From our country's history and the context in which the amendments were adopted, it is to be expected that Congress would focus its enforcement authority on jurisdictions most resistant to those constitutional guarantees. As this Court's decisions make clear, legislation is appropriate, and therefore within Congress's authority, so long as Congress is enforcing the rights guaranteed by those amendments and not defining new rights, see *Boerne*, 521 U.S. at 519-520, and the burden and scope of the obligations Congress imposes are justified by current needs. The 2006 reauthorization fully meets those standards. Section 5 is therefore an appropriate exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments, notwithstanding its differential treatment of the States. See

United States v. *Morrison*, 529 U.S. 598, 626-627 (2000) (favorably noting, for purposes of congruence-and-proportionality review, that Section 5 is "directed only to those States in which Congress found that there had been discrimination"); *South Carolina*, 383 U.S. at 328-329 (noting that the "doctrine of the equality of States" does not bar selective application of "remedies for local evils" where they appear).

B. Section 5's Preclearance Requirement Is Justified By Current Needs

There is no question that "[t]hings have changed in the South" since 1965. *Northwest Austin*, 557 U.S. at 202. But Congress made the considered judgment in 2006 (as it had in 1970, 1975, and 1982) that covered jurisdictions continue to resist minority voters' equal enjoyment of the right to participate in the political process. Congress held 21 hearings, heard from scores of witnesses, and amassed more than 15,000 pages of evidence regarding ongoing voting discrimination in covered jurisdictions. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 5, 11 (2006) (*2006 House Report*); S. Rep. No. 295, 109th Cong., 2d Sess. 2, 10 (2006) (*2006 Senate Report*). Just as it had with each previous reauthorization, Congress found that the voting rights of minority citizens in covered jurisdictions had improved, largely thanks to Section 5, but that discrimination against minority voters persists in those jurisdictions to an unacceptable degree.

1. Congress found substantial evidence of ongoing discrimination in covered jurisdictions

By a nearly unanimous vote, Congress codified the results of its investigation in statutory findings. 2006 Amendment § 2(b), 120 Stat. 577-578. Congress recog-

nized that "[s]ignificant progress ha[d] been made in eliminating first generation barriers experienced by minority voters" and that such "progress is the direct result of the Voting Rights Act of 1965." § 2(b)(1). But Congress found 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." § 2(b)(2). The phrase "first generation barriers" describes barriers to registration and the ability to cast a vote. The phrase "second generation barriers" refers to other means of depriving minority voters of the opportunity to participate in the democratic process on an equal basis—means such as discriminatory management of district lines, the adoption of at-large election schemes, and other dilutive techniques. In 1970, 1975, and 1982, Congress concluded that, as minority citizens secured the right to register and vote in greater numbers, covered jurisdictions made increasing resort to such dilutive techniques for discriminatory purposes. See *1982 Senate Report* 6; *1981 House Report* 17-18; *1975 Senate Report* 27; *1975 House Report* 19; *1969 House Report* 7; see also *Briscoe* v. *Bell*, 432 U.S. 404, 405-406 (1977). Congress reached the same conclusion in 2006.

a. Evidence from the Section 5 process

By halting the implementation of any voting change until there is a determination that the change is not intended to discriminate and will not have the effect of discriminating on the basis of race, Section 5 effectively exposes voting discrimination in covered jurisdictions. In assessing the continuing need for Section 5, it therefore makes sense for Congress to rely on evidence from the preclearance process, as this Court recognized in

City of Rome. 446 U.S. at 181 ("The recent objections entered by the Attorney General * * * clearly bespeak the continuing need for this preclearance mechanism.") (quoting *1975 House Report* 10). In 2006, Congress found "[e]vidence of continued discrimination" in "the hundreds of [Section 5] objections interposed" since 1982. 2006 Amendment § 2(b)(4)(A) and (8); see *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 2d Sess. 272 (2006) (*Continued Need*).

i. The 2006 record demonstrates that Section 5 continues to play an active role in preventing and deterring constitutional violations and maintaining the progress achieved since enactment of the VRA. The number of objections interposed by the Attorney General and the District Court for the District of Columbia has not dwindled, as one would expect had Section 5 outlived its usefulness. Between 1982 and 2006, more than 750 Section 5 objections blocked the implementation of approximately 2400 discriminatory voting changes.[1] See *2006 House Report* 21-22, 36; *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 104-2595 (2005) (*History, Scope, & Purpose*) (reproducing objections); see also Pet. App. 31a-35a, 206a-220a.

Petitioner argues (Br. 29-30) that Section 5 is no longer needed because the proportion of objections, as compared to the number of submitted changes, has diminished over time. But petitioner's statistical analysis paints a materially incomplete picture. Over the

[1] The Department of Justice tracks the number of individual changes objected to in each objection letter.

years, covered jurisdictions have made an ever-increasing number of submissions for preclearance, from 300-400 per year in the early 1970s to 4000-5000 per year in the 1990s and 2000s. *2006 House Report* 22. What is particularly important, however, is the number of discriminatory voting changes that were blocked by Section 5—and that number has not significantly decreased over time. It is true that the number of objections per year from 1968-1982 was slightly higher than the number from 1982 to the present. See *Continued Need* 172. But that number remains substantial, and it actually *increased* in the post-1982 time period in several covered States, *id.* at 60 (Louisiana); *id.* at 54 (2/3 of objections in Mississippi interposed after 1982). That evidence indicates that the incidence of discrimination has remained significant over time in covered jurisdictions.

ii. To be sure, not all Section 5 objections represent a finding of unconstitutional discrimination. Pet. Br. 30. But Congress learned that more than half of the objections interposed by the Attorney General blocked implementation of changes the Attorney General concluded were intentionally discriminatory, thereby directly implicating constitutional violations.[2] Pet. App. 33a; see *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 8 (2005) (*Preclearance Standards*). One study before Congress found a "consistent increase over time of objections

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[2] Petitioner attempts (Br. 35) to dismiss all of the Attorney General's purpose-based objections on the basis of this Court's decision in *Miller* v. *Johnson*, 515 U.S. 900 (1995). But the infirmity identified in that case (and related cases) was limited to a handful of statewide redistricting objections in the early 1990s. See p. 43, *infra*.

based on the purpose prong." *Id.* at 134. In particular, the study found that 43% of all objections interposed in the 1990s were based on intent alone and that an additional 31% were based on a combination of intent and effect. *Id.* at 136.

Examples of intentionally discriminatory voting changes blocked by Section 5 abound. In 2001, for example, the Attorney General interposed an objection when the all-white incumbent town governance in Kilmichael, Mississippi, attempted to cancel an election shortly after black citizens had become a majority of the registered voters. *History, Scope, & Purpose* 1616-1619. When the citizens of Kilmichael finally voted (as a result of the Attorney General's objection), they elected the town's first African-American mayor and three African-American aldermen. *2006 House Report* 37. In 2000, the Attorney General objected to a redistricting plan for the school board in Webster County, Georgia, because the jurisdiction had "intentionally decreas[ed] the opportunity of minority voters to participate in the electoral process" after the county elected a majority-black board for the first time. *History, Scope & Purpose* 830-833. Similarly, the Attorney General objected in 1998 to a redistricting plan for the city of Grenada, Mississippi, because the plan was adopted with the "purpose to maintain and strengthen white control of a City on the verge of becoming majority black." *Id.* at 1606-1612; see also *id.* at 1760-1763 (1987 objection to a change in the method of election in Bladen County, North Carolina, because "the board [of commissioners] undertook extraordinary measures to adopt an election plan [that] minimizes minority voting strength" in order to "maintain white political control to the maximum extent possible"). And in 1991, the Attorney General

objected to Mississippi's legislative redistricting plans, which were "calculated not to provide black voters in the Delta with the equal opportunity for representation required by the [VRA]," and the enactment of which was "characterized by overt racial appeals." *Id.* at 1410-1413; see *Modern Enforcement of the Voting Rights Act: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 22 (2006) (*Modern Enforcement*).

Thus, although there has been progress in the South since 1965, the problem of voting discrimination in covered jurisdictions remains serious. In the most recent round of statewide redistricting, the three-judge District Court for the District of Columbia unanimously concluded that Texas intentionally discriminated against minority voters in redrawing portions of several statewide plans.[3] See *Texas* v. *United States*, No. 11-1303, 2012 WL 3671924, at *18-*21, *59-*63, *65-*73 (Aug. 28, 2012), appeal pending, No. 12-496 (S. Ct.) (filed Oct. 19, 2012). In redrawing its congressional districts, for example, Texas removed from the only three African-American ability-to-elect districts (and from one Hispanic ability district) the major economic engines of each district as well as the home district office of each incumbent. *Id.* at *19-*20, *67-*69. The State performed "[n]o such surgery" on any majority Anglo districts, declined at trial to defend its behavior on partisan grounds, and offered no explanation other than "coincidence." *Ibid.*; see *id.* at *20 n.31. The court concluded

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[3] Petitioner contends (Br. 52-53) that the evidence before Congress as of 2006 is the only evidence relevant to Section 5's continued viability. But this Court has considered post-enactment evidence when determining whether Congress validly exercised its authority under the Reconstruction Amendments. See *Lane*, 541 U.S. at 524-525 & nn.6-8, 11, 13-14; *Hibbs*, 538 U.S. at 733-734 & nn.6-9.

that "[t]he improbability of these events alone could well qualify as a 'clear pattern, unexplainable on grounds other than race,'" that would "lead [it] to infer a discriminatory purpose." *Id.* at *20 (internal citation omitted). In addition, in redrawing its congressional and State House plans, Texas split hundreds of voting precincts throughout the State. See *id.* at *37, *72, *82. As the district court noted, partisan voting data are not available at that census-block-by-census-block level within precincts, although racial data are. *Id.* at *82-*83. That line-drawing behavior was evidence that Texas moved certain areas into or out of particular districts *because of* the racial composition of the areas rather than because of their partisan affiliations. See *id.* at *37, *72, *82-*83.

Because Section 5 places the burden of proof on the submitting jurisdiction, it is true that a purpose-based objection can be predicated on a failure to demonstrate the absence of discriminatory purpose rather than on an affirmative finding of illicit purpose. But as the district court in *Texas* recently explained, a covered jurisdiction can satisfy its burden "by making out a prima facie case for nondiscrimination," thereby shifting the burden to the Attorney General to rebut that showing. 2012 WL 3671924 at *13 & n.19. Both the district court in a judicial preclearance case and the Attorney General in an administrative preclearance matter assess the sufficiency of a jurisdiction's nondiscriminatory explanation under the criteria set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977). See 28 C.F.R. 51.54(a). That is also what a court would do in assessing a voting practice challenged as unconstitutional in case-by-case litigation. Thus, although the initial burden on a covered jurisdic-

tion is greater under Section 5, the ultimate substantive determination regarding discriminatory purpose is not materially different.

iii. Section 5 objections based on retrogressive effect reinforce the ongoing need for the provision. By halting the implementation of voting changes in covered jurisdictions that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer* v. *United States*, 425 U.S. 130, 141 (1976), Congress sought to protect the fragile gains minority voters had won and would continue to win through means such as case-by-case litigation, see *City of Rome*, 446 U.S. at 182. As this Court held in *City of Rome*, it was reasonable for Congress to "conclude[] that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it [is] proper to prohibit changes that have a discriminatory impact." *Id.* at 177 (footnote omitted). Section 5 essentially requires such a jurisdiction to consider whether its voting changes will further erode the voting rights of its minority citizens.

A seemingly innocuous adjustment in the location or number of polling sites, for instance, can have substantial adverse consequences for minority voters in covered jurisdictions. In 1992, the Attorney General objected to the relocation of a polling place in Johnson County, Georgia, from the county courthouse to the American Legion, noting that "the American Legion in [that county] has a wide-spread reputation as an all-white club with a history of refusing membership to black applicants" and was "used for functions to which only whites are welcome." *History, Scope, & Purpose* 726-728. The Attorney General concluded that "the atmosphere at the

American Legion is considered hostile and intimidating to potential black voters, and it appears that locating a polling place there has the effect of discouraging black voters from turning out to vote." *Id.* at 727. In 2006, the Attorney General objected to a Texas jurisdiction's plan to reduce the number of polling sites because it would result in a remarkably uneven assignment of voters, with more than ten times as many voters assigned to the precincts with the highest proportion of minority voters than to the precincts with the lowest proportion. *Modern Enforcement* 83-84. Such a change would have materially affected the ability of minority voters to cast their ballots.

Additionally, retrogression-based objections often halt the implementation of broader changes that would undo hard-won progress for minority voters in covered jurisdictions. During the redistricting cycle following the 2000 Census, for example, the Attorney General objected to statewide redistricting plans for Arizona and Texas that would have dismantled existing districts in which Hispanic voters possessed the ability to elect their candidates of choice (without replacing those districts with other ability-to-elect districts) even though each State had sizeable Hispanic populations. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 19 (2005) (*Impact and Effectiveness*); *History, Scope, & Purpose* 87, 496-501, 524-529, 2518-2523. And in some instances when the D.C. district court or the Attorney General concludes that a change is retrogressive, preclearance may be denied on that basis alone without reaching the question whether the change is also inten-

tionally discriminatory. See, *e.g.*, *Texas*, 2012 WL 3671924, at *36-*37.

iv. Congress also concluded that Section 5 continues to *deter* unconstitutional discrimination. *2006 House Report* 24. Congress heard repeatedly that "Section 5 has a strong deterrent effect" that has prevented jurisdictions from implementing discriminatory voting changes. *Continued Need* 34; see also, *e.g.*, *id.* at 13, 88, 92, 303, 127, 310, 365; *Preclearance Standards* 44-45; *Impact and Effectiveness* 66; *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 22-23 (2006) (*Section 5 Pre-Clearance*); *History, Scope, & Purpose* 84.

Congress's recognition of Section 5's deterrent effect cannot be dismissed as "speculative." Pet. Br. 19. The recent preclearance litigation over South Carolina's photo-identification requirement affords a concrete refutation of that charge. The Attorney General objected to the new photo-identification law as South Carolina initially presented it. As the judicial preclearance action progressed, South Carolina officials repeatedly altered their understanding of what the law requires and how it would be enforced until the law had evolved to a form that the court could preclear. *South Carolina* v. *United States*, No. 12-203, 2012 WL 4814094, at *4 (D.D.C. Oct. 10, 2012) (three-judge court). The evolution of that law—from one raising "serious concerns" about its effect on African-American voters to one "accomplish[ing] South Carolina's important objectives while protecting every individual's right to vote"—is directly attributable to the Section 5 process. *Id.* at *21 (Bates, J., concurring); *id.* at *22 ("[T]he history of [the photo-

identification law] demonstrates the continuing utility of Section 5 of the Voting Rights Act.").

An additional tangible indication of Section 5's deterrent effect relied on by Congress comes from the "administrative mechanism, known as a 'more information request'" (MIR). *2006 House Report* 40; see Pet. App. 32a-36a, 220a-223a. In certain instances, an MIR causes a jurisdiction to alter a proposed change after concluding "that the change would be objected to as violating the Act if it were not withdrawn." *Continued Need* 124; *History, Scope, & Purpose* 93-94. Since 1982, more than 205 voting changes have been withdrawn in response to MIRs. *2006 House Report* 41. A recent study concluded that MIRs were particularly effective during the period from 1999 to 2005, deterring many times more suspect changes than had formal objections. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 221 (2006).

b. Other evidence of ongoing discrimination

As previous Congresses had done when reauthorizing Section 5, Congress in 2006 also examined indicia of voting discrimination outside the Section 5 process, including "the tens of thousands of Federal observers dispatched to monitor polls in [covered] jurisdictions," "the continued filing of section 2 cases that originated in covered jurisdictions," continued race-based disparities in registration and participation rates, and direct evidence of voter suppression and intimidation. 2006 Amendment § 2(b)(4)(C), (7), and (8); *2006 House Report* 12-45, 52-53.

i. Section 8 of the VRA authorizes the Attorney General to assign federal observers to monitor polling places in covered jurisdictions when, *inter alia*, he has

received meritorious complaints "that efforts to deny or abridge the right to vote under the color of law on account of race or color * * * are likely to occur." 42 U.S.C. 1973f(a)(2)(A). Congress gathered evidence that the Attorney General had made such assignments based on the "reasonable belief that minority citizens are at risk of being disenfranchised," often through "harassment and intimidation inside polling locations." *2006 House Report* 44; see Pet. App. 38a-40a, 240a-245a. In several covered States, the number of elections with assigned federal observers was greater after 1982 than it had been between 1965 and 1982. See *Continued Need* 78-80. The evidence before Congress established that the Attorney General often sends observers to covered jurisdictions precisely because minority voters recently faced discrimination there. See, *e.g.*, *id.* at 182-183, 302 (observers sent to Greensboro, Alabama, after white election officials attempted to prevent black voters from entering polling places following election of first black officials to local office in 1992); *id.* at 3533 (observers sent to Pike County, Georgia, in 1990 for special election after originally scheduled election was enjoined because city held illegal after-hours voter registration session open to whites only); *id.* at 3578 (observers sent to Humphreys County, Mississippi, in 1993 after finding that polling-place officials had harassed black voters); *id.* at 3642-3643 (observers sent to Galveston and Jefferson Counties in Texas in 1996 after white poll watchers harassed minority voters).

ii. Congress also found that "[e]vidence of continued discrimination includes * * * the continued filing of section 2 cases that originated in covered jurisdictions." 2006 Amendment § 2(b)(4)(C). Analysis of reported Section 2 cases reveals widespread judicial findings of

serious voting discrimination against minority voters in covered jurisdictions. See, *e.g.*, *Continued Need* 14; see *id.* at 340 (South Dakota); *id.* at 251, 283-287 (maps and table showing number of county-level voting practices altered as a result of Section 2 litigation in, *e.g.*, Alabama (275), Texas (274), Georgia (76), Mississippi (74), and North Carolina (56)); *History, Scope, & Purpose* 78 (Texas, North Carolina, Alabama).[4]

One notable example was the subject of this Court's decision in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006). The Court found that Texas adopted a congressional districting plan in 2003 bearing "the mark of intentional discrimination that could give rise to an equal protection violation" by purposefully diminishing the voting strength of a cohesive Latino community. *Id.* at 440. The Court explained that the State's intentional splitting of that cohesive minority population "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive," and that "the State took away the Latinos' opportunity" to elect their candidate of choice precisely "because Latinos were about to exercise it." *Id.* at 439-440.

iii. Congress also continued to rely in 2006 on disparities in registration and turnout rates between minority and nonminority voters. When this Court upheld the 1975 reauthorization of Section 5 in *City of Rome*, it

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[4] Petitioner dismisses (Br. 36) much of the Section 2 evidence because most Section 2 suits that are resolved in plaintiffs' favor do not result in a finding of intentional discrimination. But that practice by courts adjudicating such suits reflects the general rule of constitutional avoidance—a finding of intentional discrimination is tantamount to a finding of unconstitutional conduct.

noted that, "largely as a result of" the VRA, registration of black voters "had improved dramatically since 1965." 446 U.S. at 180. Nevertheless, the Court credited Congress's conclusion that a significant disparity remained in at least certain covered jurisdictions, including disparities of between 16 and 24 percentage points in Alabama, Louisiana, and North Carolina. *1975 House Report* 6; *1975 Senate Report* 13. Comparable disparities persisted in 2006 (particularly between Hispanic and Anglo citizens), when Congress found gaps of between 11 and 20 percentage points in registration and turnout rates in Virginia and Texas. *2006 House Report* 25, 31. In fact, when the statistics are adjusted to distinguish between "White Hispanic" and "White non-Hispanic" residents, the gaps are even more notable, showing that both black and Hispanic registration rates continue to lag behind those of non-Hispanic whites in all but one covered State. *Northwest Austin (D.D.C.)*, 573 F. Supp. 2d at 248; see Pet. App. 200a-203a.

iv. Beyond the quantitative and statistical evidence, Congress also gathered thousands of pages of testimony and documents chronicling ongoing problems of vote suppression, voter intimidation, and vote dilution throughout covered jurisdictions. Examples of vote suppression, far beyond what can be summarized here, included minority voters threatened with arrest or prosecution for voting, *Continued Need* 3619-3620, 3979, poll workers telling language minority voters that they should not vote if they do not speak English, *id.* at 350, 3980, and large-scale efforts to challenge minority voters' registration, *id.* at 93. Examples of vote dilution included techniques such as dilutive redistricting plans, discriminatory annexations, anti-single-shot rules, and at-large election systems. *Id.* at 20, 123.

Thus, while it is true that things have changed in covered jurisdictions, the abundant evidence collected by Congress demonstrated that discrimination remains a serious problem that fully justifies Section 5 as appropriate legislation to enforce the basic guarantees of the Fourteenth and Fifteenth Amendments. *2006 House Report* 6. Congress found that the progress made in combating that discrimination "is the direct result of the Voting Rights Act." 2006 Amendment § 2(b)(1). But Congress made the predictive judgment that further enforcement of Section 5 is necessary because, without its "protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Amendment § 2(b)(9). After careful review, a near-unanimous Congress—including members representing jurisdictions covered by Section 5—voted to reauthorize the law. That determination is entitled to "much deference" by this Court. *Boerne*, 521 U.S. at 536.

2. Petitioner's Attempts To Minimize The Legislative Record Are Unavailing

Petitioner argues (Br. 27-33) that much of the evidence Congress considered—and, by implication, much of the evidence previous Congresses considered—is irrelevant to assessing whether Section 5 is justified by current needs. Petitioner is incorrect.

a. Petitioner first asserts (Br. 27-28) that Congress was limited in 2006 to considering evidence that covered jurisdictions continued to engage in "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpet[u]ating voting discrimination in the face of adverse federal court decrees." Br. 27-28

(quoting *South Carolina*, 383 U.S. at 335). Petitioner misperceives the Congress's focus in enacting Section 5 and this Court's focus in upholding it.

Although the Court noted in *South Carolina* that "some" of the States covered under Section 5 had engaged in the type of brazen obstruction petitioner describes, it also recognized that not all covered States had been so unsubtle in their discriminatory tactics. 383 U.S. at 329-330, 335. Both Congress and this Court instead primarily focused on the limited effectiveness of case-by-case litigation. See *id.* at 314-315, 327-328. In 2006, Congress again concluded that the same problems with case-by-case litigation persist today. See pp. 39-41, *infra*.

Section 5's preclearance remedy was specifically designed to remove most opportunities for jurisdictions to engage in such blatant voting discrimination. Because a covered jurisdiction may not adopt a voting change without preclearance, it cannot evade a federal judicial decree by adopting new strategies for disenfranchising minority voters. In that respect, Section 5 has been a resounding success, and when this Court upheld the 1975 reauthorization of Section 5 in *City of Rome*, it did not inquire whether covered jurisdictions had continued to engage in the most notorious forms of voting discrimination. See 446 U.S. at 180-182. Indeed, if the obstructionist tactics that characterized the behavior of some covered jurisdictions in the 1950s and 1960s had continued unabated, that would be a strong indication that Section 5 had failed. Section 5's effectiveness at preventing covered jurisdictions from continuing the most brazen forms of voting discrimination should not be held against it. Section 5 is designed to halt implementation of *all* discriminatory voting changes. In 2006, Congress

took seriously its duty to periodically assess whether the provision's burdens remain justified by current needs and concluded that the persistence of more subtle (but no less consequential) forms of discrimination warranted reauthorizing Section 5.[5]

b. Petitioner also argues (Br. 32-33) that, even within the limited category of brazen obstruction by covered jurisdictions, the only evidence relevant to the ongoing need for Section 5 is evidence that jurisdictions continue to prevent minority voters from registering and casting votes (*i.e.*, first-generation barriers). That is so, petitioner argues (Br. 32), because the Fifteenth Amendment bars intentional interference with access to the ballot and nothing more. This Court has not decided whether the Fifteenth Amendment bars intentional vote dilution on the basis of race. See *City of Mobile* v. *Bolden*, 446 U.S. 55, 65-66 (1980). But it has decided that such intentional discrimination violates the Equal Protection Clause of the Fourteenth Amendment. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982). Thus, while the government believes Congress has authority under the Fifteenth Amendment to address discriminatory dilutive tactics, Congress has unquestioned authority to address such unconstitutional behavior pursuant to its authority to enforce the Fourteenth Amendment. See *2006 House Report* 53 & n.136, 90.

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[5] For examples of Section 5 objections induced by jurisdictions' adoption of changes that would undermine the effect of successful Section 2 actions, see *History, Scope, & Purpose*, 330-332, 340-343, 429-434, 607-608, 678-680, 795-797, 812-814, 907-910, 1141-1144, 1207-1210, 1360-1361, 1384-1386, 1388-1390, 1402-1404, 1516-1521, 1538-1540, 1574-1579, 1730-1732, 1823-1825, 1833-1836, 1935-1937, 1957-1959, 2041-2043, 2212-2213, 2269-2271, 2300-2303, 2307-2311.

Congress and this Court have long recognized covered jurisdictions' history of employing intentionally dilutive techniques—such as at-large elections, racial gerrymandering, selective annexations, and anti-single-shot requirements—to limit the effectiveness of minority citizens' exercise of the franchise. Pet. App. 28a, 116a-117a; *City of Rome*, 446 U.S. at 160; *Perkins* v. *Matthews*, 400 U.S. 379, 389 (1971); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 550, 565-566 (1969); *Continued Need* 142-143; *Impact and Effectiveness* 1139-1140, 1161-1168, 1196-1197, 1205-1208, 1223-1228, 1244, 1263. Each time Congress has reauthorized Section 5, it has noted that, although the VRA has successfully reduced barriers to minority participation, Section 5 remains necessary because covered jurisdictions continued to employ other means, including dilutive techniques, to minimize minority voters' effectiveness. See, *e.g.*, *1982 Senate Report* 6, 10, 12 n.31; *1981 House Report* 7, 18; *1975 House Report* 10-11; *1975 Senate Report* 16-18; *1969 House Report* 7-8.

Petitioner attempts to downplay the significance of the evidence of intentional vote dilution, arguing both that there are only a handful of Section 2 findings of such discrimination and that Congress may not rely on evidence of racially polarized voting. In making the first assertion (see Br. 32), petitioner disregards the hundreds of Section 5 objections interposed between 1982 and 2006, many of which blocked the implementation of intentionally dilutive changes. Nor is petitioner correct (Br. 32-33) that the only dilutive technique available to covered jurisdictions is district line-drawing, which petitioner asserts can be remedied by a judicial decree. Setting aside the necessity of redrawing district lines on at least a decennial basis, the record is replete with

examples of covered jurisdictions' use of additional dilutive techniques. Petitioner itself was one of several defendants in a statewide Section 2 suit resulting in a finding that the Alabama legislature had intentionally discriminated against African-American voters by authorizing counties to switch from single-member districts to at-large voting, prohibiting single-shot voting in at-large elections, and requiring numbered posts in at-large elections. *Dillard* v. *Crenshaw Cnty.*, 640 F. Supp. 1347, 1356-1360 (M.D. Ala. 1986).

Petitioner also errs in dismissing out of hand (Br. 31) evidence of racially polarized voting. Racially polarized voting of course is not state action and thus cannot itself violate the Constitution. But evidence of pervasive racially polarized voting bears directly on the continued need for Section 5 because it is a necessary precondition for intentionally dilutive changes to achieve their intended discriminatory effect. See, *e.g.*, *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 49-61 (2005). In a jurisdiction where minority voters and nonminority voters consistently choose the same candidates, changing district lines would rarely dilute minority voting strength. This Court has repeatedly explained the critical role of racially polarized voting in diluting the effectiveness of minority voting strength. See, *e.g.*, *City of Rome*, 446 U.S. at 183-184; *Rogers*, 458 U.S. at 616; *Thornburg* v. *Gingles*, 478 U.S. 30, 46-61 (1986). Congress was justified in making a statutory finding that "continued evidence of racially polarized voting in each of the" covered jurisdictions "demonstrates that racial and language minorities remain politically vulnerable,

warranting the continued protection of the" VRA. 2006 Amendment § 2(b)(3).[6]

3. Section 5 is appropriately tailored to remedy the documented discrimination in covered jurisdictions

a. Congress reasonably determined that, given the extensive evidence of voting discrimination in covered jurisdictions, case-by-case adjudication remains an inadequate guarantee of the constitutional rights of minority voters in covered jurisdictions. Petitioner asserts (Br. 37-38) that Section 2 affords a sufficient remedy. But that is a judgment for Congress to make, and after months of hearings, Congress concluded otherwise. See Pet. App. 45a-47a, 277a-278a. This Court has repeatedly affirmed that Congress is entitled to flexibility in choosing a legislative remedy when it has already tried and failed to cure a constitutional problem through alternate means. In *South Carolina* and *City of Rome*, for example, the Court acknowledged that Congress was justified in enacting Section 5's preclearance remedy after previous attempts at legislative solutions had failed. See 383 U.S. at 309-315; 446 U.S. at 174. Similarly, the Court in *Hibbs* acknowledged that, "where previous legislative attempts ha[ve] failed" to cure a constitutional problem, "[s]uch problems may justify added prophylactic measures in response." 538 U.S at 737.

The record before Congress documented three shortcomings of Section 2 litigation. First, Section 2 is purely an after-the-fact remedy. Section 2 actions can take years to litigate, during which time the challenged prac-

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[6] Petitioner's assertion (Br. 48) that there were "105 instances of racially polarized voting" in the record before Congress ignores the hundreds of objection letters noting the existence of racially polarized voting throughout covered jurisdictions.

tice, no matter how discriminatory, remains in place. If a candidate is elected under what turns out to be an illegal voting scheme, that individual will nonetheless enjoy significant advantages of incumbency. *Impact and Effectiveness* 13-14; *Continued Need* 97. Although preliminary injunctions may be available in some cases, an illegal voting practice often must remain in effect for several election cycles before a Section 2 plaintiff can gather enough evidence to prove a discriminatory effect. *History, Scope, & Purpose* 92. For example, the *Dillard* litigation (in which petitioner was a defendant) took nearly two decades to reach a resolution. See Pet. App. 145a-147a; *Dillard* v. *Baldwin Cnty. Comm'rs*, 376 F.3d 1260, 1262 (11th Cir. 2004); p. 38, *supra*.

Second, Section 2 places the burden of proof on minority plaintiffs to demonstrate discrimination, while Section 5 places the burden on covered jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *Continued Need* 97. Covered jurisdictions are much better positioned than individual citizens to amass information about potential discrimination in voting procedures without incurring undue expense. That is particularly so with respect to the purpose prong: a jurisdiction need only establish initially that it has a legitimate nondiscriminatory reason for enacting a particular change, and the jurisdiction is in the best position to know that reason.

Finally, Section 2 places a heavy financial burden on minority voters who challenge illegal election practices. See *History, Scope, & Purpose* 92, 97. Section 5, on the other hand, alleviates the financial burden on minority voters and places a comparatively modest financial burden associated with preclearance—especially for the

vast majority of changes submitted for administrative preclearance—onto covered jurisdictions. The financial burden of Section 2 litigation is particularly pronounced in local communities and rural areas, "where minority voters are finally having a voice on school boards, county commissions, city councils, water districts and the like," but generally "do not have access to the means to bring litigation under Section 2 of the Act, [though] they are often the most vulnerable to discriminatory practices." *Id.* at 84. Congress also heard testimony that complying with Section 5 is much less burdensome for covered jurisdictions in terms of "costs, time, and labor" than defending against Section 2 claims. *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 11-13, 120-121 (2006) (*Policy Perspectives*).[7]

b. Petitioner asserts (*e.g.*, Br. 11) that Section 5 also burdens covered jurisdictions in less tangible ways by, *e.g.*, requiring adoption of voting practices that would be illegal under Section 2. In particular, petitioner suggests that Section 5 requires covered jurisdictions to make race the predominant factor in redistricting and requires jurisdictions to guarantee electoral success for

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[7] The dissenting opinion below incorrectly assumes (Pet. App. 77a) that "plaintiffs' costs for § 2 suits can in effect be assumed by the Department of Justice by its either exercising its authority to bring suit itself or by intervening in support of the plaintiff." As noted, p. 22, *supra*, more than 750 Section 5 objections halted the implementation of approximately 2400 discriminatory voting changes between 1982 and the mid-2000s.

minority populations. That is incorrect and reflects a misunderstanding of Section 5's operation.

This Court has long held that a legislature may be cognizant of racial demographics in the process of redistricting, as long as race is not the predominant consideration. See *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995); see also *Vieth* v. *Jubelirer*, 541 U.S. 267, 336 (2004). That reflects recognition that race is one axis along which citizens form communities of interest—as with, for instance, geographic proximity, similar socioeconomic status, a shared school district, political affiliation, and religious identity. Although the Constitution properly forbids reliance on race above all else in drawing district lines, it does not require jurisdictions to blind themselves to the natural occurrence of racial communities of interest within their borders so as to render minority citizens more vulnerable to dilution of their political effectiveness. Section 5 follows the same model. Indeed, the Attorney General's regulatory guidance governing the submission of redistricting plans for Section 5 preclearance expressly states that a retrogressive redistricting plan may be entitled to Section 5 preclearance when a jurisdiction cannot draw a less retrogressive plan without violating equal protection principles by making race a predominant consideration. 76 Fed. Reg. 7472 (Feb. 9, 2011).

The recent statewide redistricting in Texas illustrates how Section 5's purpose prong *prevents* rather than encourages the consideration of race above other traditional districting factors. The district court concluded that Texas had divided hundreds of existing precincts, redrawing district lines on a census-block-by-census-block level. Although Texas claimed that it was motivated by partisanship, partisan voting data are

unavailable below the precinct level. *Texas*, 2012 WL 3671924 at *81-*82. Racial data are available at the census-block level, however, indicating that Texas elevated racial considerations above all others in dividing preexisting political units. See *id.* at *37, *72, *82-*83.

The dissenting opinion below warned of hypothetical unconstitutional applications of Section 5. Pet. App. 73a, 103a-110a. But any statute can be applied in an unconstitutional way; that does not mean it is unconstitutional on its face. As with any law, particular applications of Section 5 may be challenged, and this Court stands as the final arbiter. In the years immediately following the post-1990 redistricting, for example, this Court held that the Attorney General's application of Section 5 to a handful of statewide redistricting plans required the relevant States to violate the Equal Protection Clause. See *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Miller*, *supra*; *Abrams* v. *Johnson*, 521 U.S. 74 (1997). The Department of Justice responded by adjusting its enforcement of Section 5. See 28 C.F.R. 51.56 ("In making determinations [under Section 5,] the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts."). There is no indication that the Attorney General's enforcement of Section 5 today raises any constitutional concerns; but that in any event would properly be the subject of an as-applied challenge, not a basis for invalidating the statute in its entirety in this facial challenge.

The dissenting opinion also relied on recent state laws requiring in-person voters to show identification in order to cast a vote, contending that it is irrational that noncovered States can enact such laws while covered States cannot. Pet. App. 103a. That is incorrect in both its premise and conclusion. Although the Attorney Gen-

eral has objected to voter-identification requirements recently enacted by two covered States (South Carolina and Texas), he has not objected to voter-identification requirements adopted by several other fully or partially covered States (*e.g.*, Arizona, Georgia, Louisiana, Michigan, New Hampshire, and Virginia). The South Carolina objection exemplifies Section 5's efficacy, as explained. See pp. 29-30, *supra*. As for Texas, a three-judge court recently concluded that Texas's voter-identification law could not be implemented because the State failed to establish that it will not discriminate against minority voters. *Texas* v. *Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), notice of appeal filed, Docket entry No. 366 (D.D.C. Dec. 19, 2012). The Texas law significantly differs from the Indiana law upheld in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), see 2012 WL 3743676 at *13, which in any event did not present the question whether that law had the purpose or effect of discriminating on the basis of race. Because all States are subject to Section 2, all States are barred from adopting voter-identification requirements that have the purpose or effect of discriminating on the basis of race. It is true that jurisdictions covered by Section 5 bear the burden of demonstrating that their laws do not have such an intent or effect; but the shift of the burden that attends Section 5 coverage is justified by covered States' history and record of voting discrimination.

c. Petitioner errs in arguing (Br. 25-27) that the two major substantive amendments to Section 5 in 2006 increased the burdens on covered jurisdictions in a manner augmenting the arguments against the provision's continued constitutionality.

In 2006, Congress clarified that it intended Section 5 to block all intentionally discriminatory changes, not just changes adopted with a purpose to retrogress. That amendment, which superseded this Court's interpretation of the purpose prong in *Bossier II*, reflects Section 5's general focus on voting changes and is unobjectionable.

The retrogression standard this Court established in *Beer* allows the preclearance decisionmaker to determine whether a proposed change itself (isolated from other factors) will have a discriminatory effect. In making that determination, the Attorney General (or a three-judge court) compares minority voters' rights under the benchmark practice today (*i.e.*, when the new practice is submitted for preclearance) with those rights under the proposed practice today. By comparing operation of the two practices at the same moment in time, the Attorney General can assess the *effect* of the change isolated from other changes such as demographic shifts. But there is no need to limit *purpose* objections under Section 5 to changes intended to retrogress. If a proposed change is intended to discriminate on the basis of race, it "has the purpose * * * of denying or abridging the right to vote on account of race." 42 U.S.C. 1973c(a). Congress was therefore justified in clarifying that Section 5 halt implementation of unconstitutional changes by denying preclearance to any voting change with a discriminatory purpose. Cf. *United States* v. *Georgia*, 546 U.S. 151, 158 (2005) ("[N]o one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.") (ellipsis in original).

Congress also amended Section 5's retrogression prong to supplant this Court's decision in *Georgia* v. *Ashcroft*, 539 U.S. 461, 480-482 (2003), which held that a proposed redistricting plan, while reducing minority voters' ability to elect their candidates of choice, was non-retrogressive because it created new districts in which minority voters could potentially influence election outcomes. See *2006 House Report* 71 & n.197. That amendment, too, is unobjectionable and fails to advance petitioner's position.

Congress determined that allowing covered jurisdictions to dismantle ability-to-elect districts while creating influence districts (the existence of which is much harder to assess) would invite dilutive tactics and undermine the progress minority voters have gained. *2006 House Report* 70; *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 50, 136, 139 (2005) (*Judicial Evolution*). Congress also heard extensive testimony that *Ashcroft*'s rule was impossible to administer, particularly in the short time-frame for administrative preclearance, see, *e.g.*, *Impact and Effectiveness* 889; *Section 5 Pre-Clearance* 8, and that switching the focus from ability-to-elect districts to influence districts would compromise the integrity of the process by enabling the injection of partisanship into Section 5 determinations, *Section 5 Pre-Clearance* 33; *Judicial Evolution* 26.

Petitioner errs in suggesting (Br. 9) that the amended retrogression provision requires a guarantee of minority electoral success. A change is retrogressive under Section 5 only if it diminishes minority voters' demonstrated "ability * * * to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). But any group

with the *ability* to elect a candidate of choice will from time to time fail to do so, and Section 5 imposes no requirement to prevent such an outcome. The amended retrogression standard leaves intact the settled principle that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished." *Bush* v. *Vera*, 517 U.S. 952, 983 (1996) (O'Connor, J.) (plurality).[8]

Section 5's retrogression scheme also leaves intact States' discretion to choose among nondiscriminatory voting practices and procedures. Section 5 does not dictate which voting practices covered jurisdictions must use nor when jurisdictions must alter existing practices. It therefore does not intrude on States' prerogative to set voter qualifications on a nondiscriminatory basis. Section 5 is remedial, ensuring that, when a covered jurisdiction does opt to change its voting practices and procedures, it does not thereby disadvantage minority voters. And even within that framework, a State is generally free to respond to a preclearance objection by choosing among nonretrogressive alternatives.

C. Section 5's Geographic Scope Is Tailored To The Problem It Seeks To Remedy

Based on the foregoing evidence, Congress determined that an extension of Section 5 was necessary in order to "banish the blight of racial discrimination in voting" in the jurisdictions that were covered at the time of the reauthorization. *South Carolina*, 383 U.S. at 308. To accomplish that, Congress could have repealed Sec-

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[8] Amicus Nix is incorrect in asserting (Br. 30) that Section 5 requires jurisdictions to maintain "influence districts."

tion 4(b)'s coverage criteria and enacted a provision stating that all jurisdictions subject to Section 5 as of July 27, 2006, would remain covered until the provision next expired or until a jurisdiction bailed out pursuant to Section 4(a). Congress instead left Section 4(b) untouched, but the effect was exactly the same. Congress did not redetermine from scratch which jurisdictions should be subject to Section 5 in 2006 by reapplying the criteria set forth in Section 4(b). Congress used those criteria in 1965, 1970, and 1975 to determine which jurisdictions to bring under the prophylactic remedy of Section 5, and this Court has upheld those determinations. See *South Carolina*, 383 U.S. at 329-333; *Briscoe*, 432 U.S. at 409-415. In 2006, Congress opted not to extend Section 5 to any new jurisdictions (just as it did in 1982). Instead, it maintained the existing geographic scope after determining that voting discrimination remained concentrated in covered jurisdictions.

1. Although the geographic scope of Section 5 is expressed in terms of the criteria included in Section 4(b), it has long been clear—and this Court has long understood—that those criteria were not selected because Congress was specifically focused on the voting-related concerns the criteria reflect. On the contrary, Congress sought to address all forms of voting discrimination in the jurisdictions it sought to cover. And Congress was particularly concerned about methods of voting discrimination it may not yet have seen. After holding extensive hearings in 1965, Congress determined which areas of the country were engaged in the most egregious forms of voting discrimination. Congress opted to apply Section 5's distinctive scheme only to those areas with the worst records of discrimination.

Congress then "reverse-engineer[ed]" the coverage criteria in Section 4(b) to describe in objective terms those jurisdictions Congress already knew it wanted to cover. Pet. App. 56a-57a; see also *South Carolina*, 383 U.S. at 329; H.R. Rep. No. 439, 89th Cong., 1st Sess. 13-14 (1965); Pet. App. 285a-287a. The registration and turnout triggers included in Section 4(b), along with the test-or-device requirement, thus provided a means of describing—without expressly naming—the jurisdictions with a history of "widespread and persistent discrimination in voting." *South Carolina*, 383 U.S. at 328; see also, *e.g.*, *1975 House Report* 3, 22-23. Accordingly, as early as the first reauthorization, Congress noted that an improvement in the criteria included in Section 4(b) alone would not "serve as a criterion for determining when the discriminatory efforts" of covered jurisdictions "had been sufficiently eradicated to warrant removing the safeguards which made the improvement possible." *Joint View* 5521.

Petitioner thus misunderstands the purpose and function of Section 4(b) in complaining (*e.g.*, Br. 40-41) that the coverage criteria are decades old. Contrary to the assertion of amici covered States (Br. of Arizona, *et al.* 9), the distinctions drawn among States by Section 4(b) are based on their respective records of voting discrimination, *not* on the enumerated statutory proxies. Those criteria are tied to decades-old data because the determinations about which jurisdictions had "perpetrat[ed] the evil" of voting discrimination to a degree warranting initial coverage were made decades ago. The relevant question in 2006 was not what modern objective criteria could be substituted for the criteria included in Section 4(b) in order to describe the same covered jurisdictions. The question was whether Sec-

tion 5 is still needed in the covered jurisdictions—a question Congress answered overwhelmingly in the affirmative.

2. Petitioner also argues (Br. 32-54) that Congress should not have maintained the same geographic scope in 2006 because the evidence failed to show that voting discrimination remains concentrated in the covered jurisdictions. Petitioner is incorrect.

In addition to showing that discrimination against minority voters in covered jurisdictions continues to an unacceptable degree in absolute terms, the evidence before Congress also demonstrated that "[t]he evil that § 5 is meant to address"—racial discrimination in voting—is "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U.S. at 203. Although, as this Court has suggested, see *City of Rome*, 446 U.S. at 181, information from the Section 5 process is the most reliable indicator of whether covered jurisdictions continue to discriminate, such information by definition is unavailable for noncovered jurisdictions. In comparing covered and noncovered jurisdictions, Congress therefore relied on national indicators such as successful Section 2 suits, disparities in registration and turnout rates, and the prevalence of racially polarized voting. See Pet. App. 49a-61a, 232a-248a, 287a-290a. And in each indicator, Congress found evidence that minority voters remain worse off in jurisdictions covered by Section 5. See, *e.g.*, *2006 House Report* 25-34; *Section 5 Pre-Clearance* 36-37, 66-68.

The data concerning Section 2 suits with favorable outcomes for minority plaintiffs are a particularly significant indicator that voting discrimination remains concentrated in the covered jurisdictions. Congress had before it a study showing that covered jurisdictions

accounted for 56% of all reported Section 2 decisions between 1982 and 2005 with favorable outcomes for minority citizens. Pet. App. 49a; see also *Impact and Effectiveness* 964-1124 (the Katz study). Petitioner understates that data in arguing (Br. 50-51) that Section 2 decisions show no difference between covered and noncovered States. Covered jurisdictions contain less than 25% of the nation's total population, and the nine fully covered States contain only 32% of the nation's African-American population and 28% of the nation's Hispanic population.[9] Covered jurisdictions thus account for much more than their proportional share of plaintiffs' successful suits in reported Section 2 decisions. The study further showed that "the rate of successful [reported] section 2 cases in covered jurisdictions * * * is nearly four times the rate in non-covered jurisdictions" when controlling for total population, and that the absolute rate of success also is higher in covered jurisdictions. Pet. App. 49a-51a.

In addition, a more comprehensive study undertaken in the course of this litigation indicates that the differential between covered and noncovered jurisdictions is even more pronounced when considering settled and unreported Section 2 suits with outcomes favorable to minority plaintiffs. That information, derived from a study presented to Congress by the National Commission on the Voting Rights Act and supplemented in this litigation with a study by a Department of Justice histo-

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[9] See *Statistical Abstract of the United States, State Rankings, Black or African-American Population Alone, Number—July 2008*, http://www.census.gov/compendia/statab/2012/ranks/rank12.html; *Statistical Abstract of the United States, State Rankings, Hispanic or Latino Population, Number—July 2008*, http://www.census.gov/compendia/statab/2012/ranks/rank16a.html.

rian, shows that 81% of all Section 2 cases with outcomes favorable to minority plaintiffs between 1982 and 2005 were filed in covered jurisdictions. J.A. 35a-76a, 144a-155a.

Petitioner attempts (Br. 47-48, 51-53) to distort the Section 2 data by focusing on the absolute number of such cases per State without regard to population differences. But such differences matter. If a study revealed that Rhode Island and Texas had the same number of traffic incidents per year, we would conclude that Texas drivers are much safer, not that Texas and Rhode Island drivers are equally safe. When data are broken down by State, the Section 2 data show a very high correlation between the jurisdictions with the greatest number of Section 2 actions with outcomes favorable to minority plaintiffs and the jurisdictions covered by Section 5—including in absolute terms, but particularly when adjusted for population. Pet. App. 51a-53a. Of the twelve States with the highest number of successful published and unpublished Section 2 cases per million residents,[10] eleven are either covered, partially covered, or have at times been subject to preclearance through the VRA's bail-in mechanism. Pet. App. 52a-53a; see App. A, *infra* (listing 18 jurisdictions, including the States of Arkansas and New Mexico, ordered to obtain preclearance pursuant to Section 3(c)).

The Section 2 data must be understood, moreover, against the backdrop of Section 5. Section 5's preclearance requirement halts the implementation of retro-

[10] Those States are Alabama, Arkansas, Georgia, Louisiana, Mississippi, Montana, New Mexico, North Carolina, South Carolina, South Dakota, Texas, and Virginia. See Pet. App. 53a (chart compiled by court of appeals, which disaggregates covered and noncovered areas in North Carolina and South Dakota).

gressive and intentionally discriminatory voting changes. Where that mechanism is in place, one would expect to see fewer successful Section 2 actions over time, not more. That there have been more successful Section 2 suits in covered jurisdictions (many more, when adjusted for population)—even after Section 5 has been in place in those jurisdictions for 50 years—reinforces that the incidence of voting discrimination in those jurisdictions continues to be higher than in noncovered jurisdictions. That is particularly so when the Section 2 data are viewed in light of the entire record before Congress. See Pet. App. 44a-45a (summarizing evidence of discrimination in covered jurisdictions).

3. Finally, the geographic scope of Section 5 is not reflected in the coverage criteria in Section 4(b) alone. In Section 3(c), Congress provided that additional jurisdictions may be "bailed-in" to the preclearance regime if a court determines that they have violated the Fourteenth or Fifteenth Amendments. 42 U.S.C. 1973a(c). Since 1984, moreover, every covered jurisdiction has had the power to terminate its coverage pursuant to Section 4(a)'s bailout provision by ceasing discrimination within its borders. 42 U.S.C. 1973b(a). Petitioner suggests (Br. 55-56) that Congress's amendment of the bailout standard in 1982 made the statute more burdensome rather than less. But as discussed, p. 4, 17, *supra*, the original bailout standard could only correct initial coverage determinations that were over-inclusive. See *South Carolina*, 383 U.S. at 331-332. Under that standard, bailout would have been impossible for petitioner. See Alabama Am. Br. 5-10. The amended bailout standard, in contrast, permits a covered jurisdiction to terminate its coverage if it can demonstrate that neither it nor any of its subjurisdictions has discriminated for ten years

based on prescribed indicia. 42 U.S.C. 1973b(a). In so doing, Congress provided an incentive to covered jurisdictions to end voting discrimination within their borders, *1981 House Report* 32, granting them a measure of control over whether and how long they remain covered.

Congress heard extensive testimony, moreover, that it is neither unduly difficult nor expensive for eligible jurisdictions to bail out of Section 5 coverage. *Policy Perspectives* 265-266; *Modern Enforcement* 8, 26; *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 353-355 (2006). Indeed, the Justice Department has consented to every bailout action filed by an eligible political subdivision since the amended bailout standard became effective in 1984. And in *Northwest Austin*, this Court vastly expanded the number of jurisdictions eligible to seek bailout (compared to the Justice Department's previous understanding of Section 4(a)), and since that decision in 2009, the rate of successful bailouts has rapidly increased. See App. B, *infra*.

Since the current bailout standard took effect in 1984, there have been 38 successful bailout actions, resulting in the termination of Section 5 coverage for 196 different jurisdictions. See App. B, *infra*. More than half of those cases (20) were filed in the less than four years since *Northwest Austin*, accounting for 65% of the total number of jurisdictions that have bailed out. *Ibid.* Those recent bailouts include the first ever bailouts from jurisdictions in Alabama, California, Georgia, and Texas; the first bailout from a jurisdiction in North Carolina since 1967; the largest bailout at least since

1984 in terms of population, in Prince William County, Virginia; and the largest bailout at least since 1984 in terms of the number of subjurisdictions, in Merced County, California, which included 84 subjurisdictions. *Ibid.* (reliable population and subjurisdiction data are not available for the pre-1984 bailouts). There are also two additional bailout actions pending court approval, including a bailout of all covered jurisdictions in New Hampshire (which likely could have obtained bailout under the original bailout standard had it sought to do so). See Consent Judgment and Decree (proposed), *New Hampshire* v. *Holder*, No. 12-1854 (D.D.C., filed Dec. 21, 2012) (three-judge court).

Petitioner and certain amici argue (Pet. Br. 54-55; Alaska Am. Br. 12) that the possibility of bailout is illusory for covered States because they cannot bail out if one of their political subdivisions has, *e.g.*, drawn a Section 5 objection or lost a Section 2 case. Of course, that argument does not account for the opportunity of many covered subjurisdictions within covered States to bail out—an opportunity manifestly exhibited by the increased number of bailouts in the few years since *Northwest Austin*. More to the point, requiring covered jurisdictions to demonstrate that governmental units within their boundaries have not discriminated in voting is reasonable. Section 5 is intended to protect minority voters in covered jurisdictions and, as Congress explained in 1982, "the Fifteenth Amendment places responsibility on the [S]tates for protecting [the] voting rights" of its citizens. *1982 Senate Report* 56. States also have "significant statutory and practical control" over the election practices of their political subdivisions. *Ibid.* The amended bailout provision thus "contemplate[s] the same level of state responsibility and protec-

tion as was contemplated by the framers of the Fifteenth Amendment, and the drafters of the 1965 Act." *Id.* at 57; *ibid.* ("States have historically been treated as the responsible unit of government for protecting the franchise."). Congress understood, moreover, that "[w]here state attorneys general have been active in advising and educating local officials about their obligation, e.g., Virginia, there has been much less non-compliance with the law than in other covered states." *Ibid.* Indeed, it has been more than nine years since the Commonwealth of Virginia or any of its political subdivisions has incurred a Section 5 objection, lost a Section 2 case, or had federal examiners or observers.

Moreover, the Attorney General enforces the bailout criteria in a flexible and practical manner. For example, if a jurisdiction seeking bailout discovers that it failed to submit voting changes in the previous ten years, the Attorney General will review those changes and, if they are determined not to be retrogressive or intentionally discriminatory, will retroactively preclear them. See Merced County Am. Br. 36-38; Alaska Am. Br. 15-18. Amicus Alaska's insistence (Br. 18-22) that the Attorney General should not be afforded such flexibility is puzzling in light of the bailout provision's explicit statement that bailout should not be denied based on violations of voting laws that "were trivial, were promptly corrected, and were not repeated." 42 U.S.C. 1973b(a)(3); see *Northwest Austin*, 557 U.S. at 207 (adopting a "broader reading of the bailout provision" because of the structure of the VRA and underlying constitutional issues).

Petitioner also complains (Br. 56) that bailout is not a real option because a jurisdiction that successfully bails out may be subject to Section 5 anew if it is found to have violated its citizens' voting rights in the ten years

following the bailout. 42 U.S.C. 1973b(a)(5). A jurisdiction with a sufficiently egregious historical record of discriminating against minority voters to warrant Section 5 coverage is poorly positioned to complain about the possibility that its terminated coverage will be reactivated if it resumes its discriminatory ways. In any event, no jurisdiction that has bailed out under the current standard has ever been recove red. Even if petitioner were correct that bailout is currently an illusory option, however, that is by definition an argument for easing of the bailout standard, not a basis for going further to second-guess Congress's careful determination of which jurisdictions should be covered.

Because Sections 3(c), 4(a), and 4(b) together continue to identify jurisdictions in which racial discrimination in voting remains concentrated, Section 5's "disparate geographic coverage [remains] sufficiently related to the problem that it targets," *Northwest Austin*, 557 U.S. at 203.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Jurisdictions That Have Been Ordered by a District Court to Comply With Preclearance Requirement Pursuant to Bail-in Mechanism in Section 3(c) of the Voting Rights Act

1. Thurston County, Nebraska, see *United States* v. *Thurston Cnty.*, C.A. No. 78-0-380 (D. Neb. May 9, 1979);
2. Escambia County, Florida, see *McMillan* v. *Escambia Cnty.*, C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979);
3. Alexander County, Illinois, see *Woodring* v. *Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983);
4. Gadsden County School District, Florida, see *N.A.A.C.P.* v. *Gadsden City Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984);
5. State of New Mexico, see *Sanchez* v. *Anaya*, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984);
6. McKinley County, New Mexico, see *United States* v. *McKinley Cnty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986);
7. Sandoval County, New Mexico, see *United States* v. *Sandoval Cnty.*, C.A. No. 88-1457-SC (D.N.M. May 17, 1990);
8. City of Chattanooga, Tennessee, see *Brown* v. *Board of Comm'rs of City of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990);

9. Montezuma-Cortez School District RE01, Colorado, see *Cuthair* v. *Montezuma-Cortez Sch. Dist. No. RE-1*, No. 89-C-964 (D. Col. Apr. 8, 1990);

10. State of Arkansas, see *Jeffers* v. *Clinton*, 740 F. Supp. 585 (E.D. Ark. May 16, 1990), appeal dismissed, 498 U.S. 1129 (1991);

11. Los Angeles County, California, see *Garza & United States* v. *Los Angeles Cnty.*, C.A. Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991);

12. Cibola County, New Mexico, see *United States* v. *Cibola Cnty.*, C.A. No. 93-1134-LH/LFG (D.N.M. Apr. 21, 1994);

13. Socorro County, New Mexico, see *United States* v. *Socorro Cnty.*, C.A. No. 93-1244-JP (D.N.M. Apr. 11, 1994);

14. Alameda County, California, see *United States* v. *Alameda Cnty.*, C.A. No. C 95-1266 (SAW) (N.D. Cal. Jan. 22, 1996);

15. Bernalillo County, New Mexico, see *United States* v. *Bernalillo Cnty.*, C.A. No. 93-156-BB/LCS (D.N.M. Apr. 22, 1998);

16. Buffalo County, South Dakota, see *Kirke* v. *Buffalo Cnty.*, C.A. No. 03-CV-3011 (D.S.D. Feb. 10, 2004);

17. Charles Mix County, South Dakota, see *Blackmoon* v. *Charles Mix Cnty.*, C.A. No. 05-CV-4017 (D.S.D. Dec. 4, 2007); and

18. Village of Port Chester, New York, see *United States* v. *Village of Port Chester*, C.A. No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006).

APPENDIX B

Covered Jurisdictions That Have Successfully Terminated Section 5 Coverage Pursuant to Bailout Mechanism in Section 4(a) of the Voting Rights Act

Jurisdictions Successfully Bailed Out of Section 5 Coverage Before August 5, 1984

1. Wake County, North Carolina, see *Wake Cnty.* v. *United States*, No. 1198-66 (D.D.C. Jan. 23, 1967);

2. Curry, McKinley, and Otero Counties, New Mexico, see *New Mexico* v. *United States*, No. 76-0067 (D.D.C. July 30, 1976);

3. Towns of Cadwell, Limestone, Ludlow, Nashville, Reed, Woodland, Connor, New Gloucester, Sullivan, Winter Harbor, Chelsea, Sommerville, Carroll, Charleston, Webster, Waldo, Beddington, and Cutler, Maine, see *Maine* v. *United States*, No. 75-2125 (D.D.C. Sept. 17, 1976);

4. Choctaw and McCurtain Counties, Oklahoma, see *Choctaw and McCurtain Cntys.* v. *United States*, No. 76-1250 (D.D.C. May 12, 1978);

5. Campbell County, Wyoming, see *Campbell Cnty.* v. *United States*, No. 82-1862 (D.D.C. Dec. 17, 1982);

6. Towns of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and

Wrentham, Massachusetts, see *Massachusetts* v. *United States*, No. 83-0945 (D.D.C. Sept. 29, 1983);

7. Towns of Groton, Mansfield, and Southbury, Connecticut, see *Connecticut* v. *United States*, No. 83-3103 (D.D.C. June 21, 1984);

8. El Paso County, Colorado, see *Board of Cnty. Comm'rs* v. *United States*, No. 84-1626 (D.D.C. July 30, 1984);

9. Honolulu County, Hawaii, see *Waihee* v. *United States*, No. 84-1694 (D.D.C. July 31, 1984); and

10. Elmore County, Idaho, see *Idaho* v. *United States*, No. 82-1778 (D.D.C. July 31, 1984).

Jurisdictions Successfully Bailed Out of Section 5 Coverage After August 5, 1984

1. City of Fairfax, Virginia (including City of Fairfax School Board), see *City of Fairfax v. Reno*, No. 97-2212 (D.D.C. Oct. 21, 1997);

2. Frederick County, Virginia (including Frederick County School Board; Towns of Middletown and Stephens City; and Frederick County Shawneeland Sanitary District), see *Frederick Cnty. v. Reno*, No. 99-941 (D.D.C. Sept. 10, 1999);

3. Shenandoah County, Virginia (including Shenandoah County School Board; Towns of Edinburg, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock; Stoney Creek San-

itary District; and Toms Brook-Maurertown Sanitary District), see *Shenandoah Cnty. v. Reno*, No. 99-992 (D.D.C. Oct. 15, 1999);

4. Roanoke County, Virginia (including Roanoke County School Board and Town of Vinton), see *Roanoke Cnty. v. Reno*, No. 00-1949 (D.D.C. Jan. 24, 2001);

5. City of Winchester, Virginia, see *City of Winchester v. Reno*, No. 00-3073 (D.D.C. June 1, 2001);

6. City of Harrisonburg, Virginia (including Harrisonburg City School Board), see *City of Harrisonburg v. Reno*, No. 02-289 (D.D.C. Apr. 17, 2002);

7. Rockingham County, Virginia (including Rockingham County School Board and Towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford, and Timberville), see *Rockingham Cnty.* v. *Reno*, No. 02-391 (D.D.C. May 24, 2002);

8. Warren County, Virginia (including Warren County School Board and Town of Front Royal), see *Warren Cnty.* v. *Ashcroft*, No. 02-1736 (D.D.C. Nov. 26, 2002);

9. Greene County, Virginia (including Greene County School Board and Town of Standardsville), see *Greene Cnty.* v. *Ashcroft*, No. 03-1877 (D.D.C. Jan. 19, 2004);

10. Pulaski County, Virginia (including Pulaski County School Board and Towns of Pulaski and Dublin), see *Pulaski Cnty.* v. *Gonzales*, No. 05-1265 (D.D.C. Sept. 27, 2005);

11. Augusta County, Virginia (including Augusta County School Board and Town of Craigsville), see *Augusta Cnty.* v. *Gonzales*, No. 05-1885 (D.D.C. Nov. 30, 2005);

12. City of Salem, Virginia, see *City of Salem* v. *Gonzales*, No. 06-977 (D.D.C. July 27, 2006);

13. Botetourt County, Virginia (including Botetourt County School Board and Towns of Buchanan, Fincastle, and Troutville), see *Botetourt Cnty.* v. *Gonzales*, No. 06-1052 (D.D.C. Aug. 28, 2006);

14. Essex County, Virginia (including Essex County School Board and Town of Tappahannock), see *Essex Cnty.* v. *Gonzales*, No. 06-1631 (D.D.C. Jan. 31, 2007);

15. Middlesex County, Virginia (including Middlesex County School Board and Town of Urbanna), see *Middlesex Cnty.* v. *Gonzales*, No. 07-1485 (D.D.C. Jan. 7, 2008);

16. Amherst County, Virginia (including Town of Amherst), see *Amherst Cnty.* v. *Mukasey*, No. 08-780 (D.D.C. Aug. 13, 2008);

17. Page County, Virginia (including Page County School Board and Towns of Luray, Stanley, and Shenandoah), see *Page Cnty.* v. *Mukasey*, No. 08-1113 (D.D.C. Sept. 15, 2008);

18. Washington County, Virginia (including Washington County School Board and Towns of Abington, Damascus, and Glade Spring), see *Washington Cnty.* v. *Mukasey*, No. 08-1112 (D.D.C. Sept. 23, 2008);

19. Northwest Austin Municipal Utility District Number One, Texas, see *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, No. 06-1384 (D.D.C. Nov. 3, 2009);

20. City of Kings Mountain, North Carolina, see *City of Kings Mountain* v. *Holder*, 746 F. Supp. 2d 46 (D.D.C. Oct. 22, 2010);

21. City of Sandy Springs, Georgia, see *City of Sandy Springs* v. *Holder*, No. 10-1502 (D.D.C. Oct. 26, 2010);

22. Jefferson County Drainage District Number Seven, Texas, see *Jefferson Cnty. Drainage Dist. No. Seven* v. *Holder*, No. 11-461 (D.D.C. June 6, 2011);

23. Alta Irrigation District, California, see *Alta Irrigation Dist.* v. *Holder*, No. 11-758 (D.D.C. July 15, 2011);

24. City of Manassas Park, Virginia, see *City of Manassas Park* v. *Holder*, C.A. No. 11-749 (D.D.C. Aug. 3, 2011);

25. Rappahannock County, Virginia (including Rappahannock County School Board and Town of Washington), see *Rappahannock Cnty.* v. *Holder*, C.A. No. 11-1123 (D.D.C. Aug. 9, 2011);

26. Bedford County, Virginia (including Bedford County School Board), see *Bedford Cnty.* v. *Holder*, No. 11-499 (D.D.C. Aug. 30, 2011);

27. City of Bedford, Virginia, see *City of Bedford* v. *Holder*, No. 11-473 (D.D.C. Aug. 31, 2011);

28. Culpeper County, Virginia (including Culpeper County School Board and Town of Culpeper), see *Culpeper Cnty.* v. *Holder*, No. 11-1477 (D.D.C. Oct. 3, 2011);

29. James City County, Virginia (including Williamsburg-James City County School Board), see *James City Cnty.* v. *Holder*, No. 11-1425 (D.D.C. Nov. 9, 2011);

30. City of Williamsburg, Virginia, see *City of Williamsburg* v. *Holde*r, No. 11-1415 (D.D.C. Nov. 28, 2011);

31. King George County, Virginia (including King George County School District), see *King George Cnty.* v. *Holder*, No. 11-2164 (D.D.C. April 5, 2012);

32. Prince William County, Virginia (including Prince William County School District and Towns of Dumfries, Haymarket, Occoquan, and Quantico), see *Prince William Cnty.* v. *Holder*, No. 12-14 (D.D.C. April 10, 2012);

33. City of Pinson, Alabama, see *City of Pinson* v. *Holder*, No. 12-255 (D.D.C. April 20, 2012);

34. Wythe County, Virginia (including Wythe County School Board and Towns of Rural Retreat and

Wytheville), see *Wythe Cnty.* v. *Holder*, No. 12-719 (D.D.C. June 18, 2012);

35. Grayson County, Virginia (including Grayson County School Board and Towns of Fries, Independence, and Troutdale), see *Grayson Cnty.* v. *Holder*, No. 12-718 (D.D.C., July 20, 2012);

36. Merced County, California (including approximately 84 subjurisdictions), see *Merced Cnty.* v. *Holder*, No. 12-354 (D.D.C. Aug. 31, 2012);

37. Craig County, Virginia (including Craig County School District and Town of New Castle), see *Craig Cnty.* v. *Holder*, No. 12-1179 (D.D.C. Nov. 29, 2012); and

38. Carroll County, Virginia (including Carroll County School District and Town of Hillsville), see *Carroll Cnty.* v. *Holder*, No. 12-1166 (D.D.C. Nov. 30, 2012).

Bailout Actions Currently Pending

1. Towns and Townships of Rindge, Millsfield, Pinkham's Grant, Stewartstown, Stratford, Benton, Antrim, Boscawen, Newington, and Unity, New Hampshire, see *New Hampshire* v. *Holder*, No. 12-1854 (D.D.C.), proposed consent decree filed Dec. 21, 2012;

2. Browns Valley Irrigation District, California, see *Browns Valley Irrigation Dist.* v. *Holder*, No. 12-1597 (D.D.C.), proposed consent decree filed Jan. 2, 2013; and

3. City of Wheatland, California, see *City of Wheatland* v. *Holder*, No. 13-54 (D.D.C.), complaint filed Jan. 14, 2013.

APPENDIX C

1. 42 U.S.C. 1973a provides:

Proceeding to enforce the right to vote

(a) Authorization by court for appointment of Federal observers

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d[1] of this title to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or

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[1] See References in Text note below. [Reference states: "Section 1973d of this title, referred to in subsec. (a), was repealed by Pub. L. 109–246, § 3(c), July 27, 2006, 120 Stat. 580."]

color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

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

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

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

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political

subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

2. 42 U.S.C. 1973b provides in pertinent part:

Suspension of the use of tests or devices in determining eligibility to vote

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

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determina-

tions were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

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

voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

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

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

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

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

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I–A to I–C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

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

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

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

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

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

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

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

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

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

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

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a)

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

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

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter,

(2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

3. 42 U.S.C. 1973c provides:

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

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any

voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney

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

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

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

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

4. 42 U.S.C. 1973f provides:

Use of observers

(a) Assignment

Whenever—

(1) a court has authorized the appointment of observers under section 1973a(a) of this title for a political subdivision; or

(2) the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 1973b(b) of this title, unless a declaratory judgment has been rendered under section 1973b(a) of this title, that—

(A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title are likely to occur; or

(B) in the Attorney General's judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivi-

sion to comply with the 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment;

the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.

(b) Status

Except as provided in subsection (c), such observers shall be assigned, compensated, and separated without regard to the provisions of any statute administered by the Director of the Office of Personnel Management, and their service under subchapters I–A to I–C shall not be considered employment for the purposes of any statute administered by the Director of the Office of Personnel Management, except the provisions of section 7324 of title 5 prohibiting partisan political activity.

(c) Designation

The Director of the Office of Personnel Management is authorized to, after consulting the head of the appropriate department or agency, designate suitable persons in the official service of the United States, with their consent, to serve in these positions.

(d) Authority

Observers shall be authorized to—

(1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and

(2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated.

(e) Investigation and report

Observers shall investigate and report to the Attorney General, and if the appointment of observers has been authorized pursuant to section 1973a(a) of this title, to the court.