No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA

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

BRIEF OF DICK THORNBURGH, DREW S. DAYS, III, JOHN R. DUNNE, BILL LANN LEE, J. STANLEY POTTINGER, PAUL F. HANCOCK, JAMES P. TURNER, WILLIAM R. YEOMANS, BRIAN K. LANDSBERG, AND GILDA R. DANIELS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Amici are a group of former officials in the U.S. Department of Justice, including former Attorney General Dick Thornburgh, former Solicitor General Drew S. Days, III, and former officials in the Civil Rights Division. They have served during both Democratic and Republican administrations, and they have substantial experience with the Department's implementation of the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. 1973. Amici respectfully submit that their collective experience may illuminate the issues before the Court.

Amici write this brief principally to respond to contentions raised in two amicus briefs filed in support of petitioner contending that constitutional concerns regarding the Voting Rights Act are "exacerbate[d]" by the 2006 amendments to Section 5's substantive standards. See *Shelby County* v. *Holder*, Brief of Former Government Officials Hans von Spakovsky *et al.* (No. 12-96) (von Spakovsky Br.); *Shelby County* v. *Holder*, Brief of John Nix *et al.* (No. 12-96) (Nix Br.).

Amici former Justice Department officials submit this brief to demonstrate that neither the text of the 2006 amendments nor their interpretation gives rise to constitutional concerns, at least no concerns regarding the amendments' facial validity. Moreover, the Justice Department's enforcement record demonstrates that the concerns articulated by petitioner's amici are

[1] The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

purely speculative. The Department has enforced Section 5 in a manner faithful to the Constitution, the statutory text, and this Court's precedent.

A list of amici follows.

Dick Thornburgh served as Attorney General from 1988-1991, under Presidents Ronald Reagan and George H.W. Bush. Preceding that service, he was Governor of Pennsylvania from 1979-1987.

Drew S. Days, III, served as Solicitor General from 1993-1996. He also served as Assistant Attorney General for Civil Rights from 1977-1980.

John R. Dunne served as Assistant Attorney General for Civil Rights from 1990-1993.

Bill Lann Lee served as Assistant Attorney General for Civil Rights from 1997-2001. Since his government service, he has chaired the bipartisan National Commission on the Voting Rights Act.

J. Stanley Pottinger served as Assistant Attorney General for Civil Rights from 1973-1977.

Paul F. Hancock served in the Civil Rights Division of the Justice Department for 27 years, including as director of the Voting Rights Act litigation program and later as Acting Assistant Attorney General for Civil Rights.

James P. Turner was an attorney in the Civil Rights Division from 1965-1994. He served as Deputy Assistant Attorney General for Civil Rights from 1969-1994, and as Acting Assistant Attorney General for Civil Rights from 1993-1994.

William R. Yeomans served in the Justice Department from 1978-2005, with 24 years in the Civil

Rights Division, including as Chief of Staff and Acting Assistant Attorney General for Civil Rights.

Brian K. Landsberg served in the Civil Rights Division for 22 years, including as Chief of the Appellate Section from 1974-1986 and as Acting Deputy Assistant Attorney General for Civil Rights in 1993.

Gilda R. Daniels served in the Civil Rights Division from 1995-1998 and 2000-2006, including as Deputy Chief of the Voting Section.

SUMMARY OF THE ARGUMENT

A. Although the question on which this Court granted review concerns only the continued validity of Section 4B of the Voting Rights Act's coverage formula, petitioner's amici attempt to interject two additional constitutional challenges that are not properly before the Court. Relying on pure speculation, amici urge that the Department of Justice will apply the 2006 amendments to Section 5's substantive standards in an unconstitutional manner.

The Court should refuse to consider these arguments. Petitioner made no such argument below, nor in the petition for certiorari. Moreover, amici's arguments amount to a broad facial challenge of the type rightly disfavored by this Court. Rather than speculate about theoretical unconstitutional conduct on the part of the Department of Justice, the Court should apply the presumption of regularity and address any problematic applications of the law if and when they occur.

B. Even if the Court does consider amici's challenges, the 2006 amendments to Section 5 are constitutional as written, interpreted, and enforced.

Section 5's amended purpose prong bars voting changes enacted with discriminatory intent, reflecting Congress's unremarkable determination that the Justice Department should not preclear voting laws intended to burden minority voters disproportionately. Petitioner's amici do not challenge the substance of the standard, but rather complain of the burden of establishing a lack of discriminatory intent. But, in application, the covered jurisdiction carries its prima facie case simply by making a straightforward showing that the change has a legitimate, non-discriminatory rationale. Since 2006, the amendment has provided the basis for only a handful of preclearance denials, none of which petitioner's amici challenge.

Section 5's amended retrogression standard evinces Congressional disagreement with the statutory interpretation set forth in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), in one narrow context: the fragmentation of geographically compact ability-to-elect districts into potentially illusory "influence" districts. The amendment disallows such fragmentation. It was intended in part to streamline the preclearance process to make it *less* onerous, and has accomplished that goal throughout the 2010 redistricting cycle. Moreover, the amended retrogression standard is directed at compact districts that would result from neutral redistricting principles. Regarding these districts, the amendment simply protects the ability of minority voters to elect candidates "on terms similar to other communities," H.R. Rep. No. 109-478, 70 (2006)—embodying the very purpose of the Voting Rights Act.

C. Far from raising constitutional concerns, the recent enforcement of Section 5 demonstrates its

continued necessity and vitality. Recent preclearance denials include a jurisdiction with a large Hispanic population seeking to abandon professional Spanish translations of its election materials and reduce the number of bilingual poll workers; a state's program purportedly designed to strike non-citizen voters from its voter rolls under a method disproportionately striking African-American and Hispanic *citizens* registered to vote; and a municipality that rescheduled its elections from high-turnout November to low-turnout July just as African Americans reached a majority of the voting-age population.

Petitioner's amici ignore this record. Instead, they mischaracterize the Justice Department's enforcement record with respect to voter ID laws and speculate that the Department will require minority-maximization redistricting. Contrary to amici's assertions, when evaluating voter ID laws, the Justice Department has acted consistently with this Court's holding in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), focusing on the burden the law imposes on prospective voters and any provisions aimed at mitigating that burden. The Department has precleared such laws more often than not. And speculation that the Department will demand so-called "max-black" redistricting is baseless; such enforcement is prohibited under *Miller* v. *Johnson*, 515 U.S. 900, 923-925 (1995), and the Department's regulations expressly provide that enforcement of Section 5 shall adhere to this Court's precedent.

The Voting Rights Act is hailed across the political spectrum as a crown jewel of American liberties and a monumental legislative achievement. Congress recently reenacted it with overwhelming majorities.

Like any statute, it is not vulnerable to challenge on the basis of baseless speculation concerning potential misinterpretation or wrongful enforcement.

ARGUMENT

I. THE SCOPE OF THE 2006 AMENDMENTS IS NOT PROPERLY BEFORE THE COURT

A. The Constitutionality Of The 2006 Amendments Was Not Challenged Below And Is Not Within The Court's Grant Of Certiorari

This case presents a constitutional challenge to the coverage formula set forth in Section 4(b) of the Voting Rights Act, 42 U.S.C. 1973b(b). It is not a challenge to the limited amendments to Section 5 adopted by Congress in 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006), codified at 42 U.S.C. 1973, *et seq.* Petitioner has not asked the Court to interpret the 2006 amendments, nor to assess how they have been applied. Indeed, petitioner concedes that Section 5, as amended, is properly applied to bailed-in jurisdictions found to have violated "any statute to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth Amendment." 42 U.S.C. 1973a(c); see Pet. Br. 57. The issue before the Court, then, is not whether the particular pre-clearance standard set forth in Section 5 is constitutional, but rather whether the jurisdictions covered by Section 4(b) should be subject to the preclearance process at all.

The Court's grant of certiorari reflects this scope: The Court limited the question presented to the constitutionality of "Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula." And the court of appeals below likewise recognized that the 2006

amendments' constitutionality was not before it. *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 883 (D.C. Cir. 2012) (noting that "Shelby County [had] neither challenge[d] the constitutionality of the 2006 amendments [n]or even argue[d] that they increase [S]ection 5's burdens.").

In these circumstances, petitioner's amici's challenge must be disregarded. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 538 U.S. 488, 497 (2003) (Court generally will not consider challenges to the judgment below advanced only by amici). And, although petitioner now raises—for the first time—an argument that the 2006 amendments impermissibly added to the burden of the preclearance process, Pet. Br. 25-27, the Court should disregard these belated contentions. See *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below.").

B. The 2006 Amendments Are Not Vulnerable To A Broad Facial Challenge

Moreover, even if the 2006 amendments were properly before this Court, petitioner and its amici raise, at most, a broad facial challenge. Such a challenge is "the most difficult challenge to mount," *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), as this Court will "uphold the law if there is any 'conceivabl[e]' manner in which it can be enforced" consistent with the constitution, *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, ---, 120 S. Ct. 1324, 135 (2010). The record of the amendments' enforcement since 2006, see pp. 24-34, *infra*, conclusively demonstrates petitioner's failure to meet this "heavy burden of persuasion." *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008).

Furthermore, this Court has been clear that "[f]acial challenges are disfavored for several reasons"—reasons vindicated here. *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450-451 (2008). Most importantly, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Ibid.*; see *ibid.* (quoting *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)). Facial challenges also "raise the risk of premature interpretation of statutes on the basis of factually barebones records" and "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 450 (internal quotations and citations omitted).

The submissions by petitioner's amici bear the hallmarks of a flawed facial challenge. Rather than addressing the 2006 amendments' text, interpretation, or enforcement, petitioner's amici rely on speculation "about hypothetical or imaginary cases." *Washington State Grange*, 552 U.S. at 450 (internal quotation marks and citations omitted); see pp. 28-35, *infra*. But "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." *United States* v. *Raines*, 362 U.S. 17, 22 (1960). Petitioner's amici also suggest that the amendments may lead the Justice Department to overreach in disregard of this Court's precedent. See, *e.g.*, von Spakovsky Br. 17-24. This naked speculation is refuted by the Department's

own regulations, which require fidelity to this Court's decisions. 28 C.F.R. 51.56. Even were it not, "judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971).

In any event, even if amici's argument were properly before the Court, it finds no support in the statute's text, interpretation, or enforcement. See pp. 9-34, *infra*.

II. THE 2006 AMENDMENTS TO SECTION 5'S PRECLEARANCE STANDARD ARE CONSTITUTIONAL

The 2006 amendments are constitutional as written. They are constitutional as interpreted by the Justice Department in regulations and guidelines promulgated under the Act. And they are constitutional as applied in the handful of preclearance decisions to which they have been relevant since 2006, none of which is presently before this Court.

A. Section 5's Prohibition Of Discriminatory Purpose Is Straightforward And Anchored To Well-Established Law

Congress's clarification of Section 5's purpose prong reflects its unremarkable conclusion that the Justice Department should not preclear a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" that has been enacted with an unconstitutional, discriminatory purpose. 42 U.S.C. 1973c(b).

Interpreting the former language of the statute, in 2000, this Court held that "the 'purpose' prong of § 5 cover[ed] only retrogressive dilution." *Reno* v. *Bossier*

Parish Sch. Bd., 528 U.S. 320, 328 (2000). As the Court recognized, under its interpretation, the statute required preclearance of a voting change enacted with a discriminatory purpose "that is *not* retrogressive—*no matter how unconstitutional it may be*." *Id.* at 336 (emphasis in original). In 2006, Congress indicated its disagreement by amending Section 5 to prohibit preclearance of voting changes enacted with "any discriminatory purpose," retrogressive or otherwise. 42 U.S.C. 1973c(c).

As amended, the purpose provision simply incorporates this Court's standard for unconstitutional discrimination. 28 C.F.R. 51.54(a) ("The Attorney General's evaluation of discriminatory purpose under [S]ection 5 is guided by the analysis in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)."); Department of Justice, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("2011 Guidance") (same); see 28 C.F.R. 51.56 ("In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and other Federal courts."). Section 5, as amended, operates to preclude intentional discrimination, in which no jurisdiction has any right to engage. U.S. Const. art. VI, cl. 2. The amendment therefore validly enforces the Fourteenth and Fifteenth Amendments. See *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) ("[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.") (emphasis in original).

The discriminatory purpose standard is well-defined by reference to this Court's precedents. Analysis under the standard begins with a simple requirement that the covered jurisdiction provide a reasonable explanation for its voting change. See pp. 12-14, *infra*. Thereafter, the factors set forth in *Village of Arlington Heights* are considered: whether the decision's impact "bears more heavily on one race than another"; the decision's historical background; the sequence of events leading up to the decision, including whether there are procedural abnormalities or substantive departures from the factors ordinarily considered; and the decision-makers' contemporaneous statements. 28 C.F.R. 51.57(e); 2011 Guidance at 7471. These finite and concrete factors form a "longstanding yardstick for determining discriminatory intent." *Texas* v. *United States*, --- F. Supp. 2d ---, No. 11-1303, 2012 WL 3671924, at *13 (D.D.C. Aug. 28, 2012), *appeal filed* No. 12-496 (U.S. Oct. 19, 2012); see *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-489 (1997) (collecting Section 5 preclearance decisions applying *Village of Arlington Heights* analysis).

Moreover, the Justice Department has found the *Village of Arlington Heights* analysis fully administrable in the Section 5 context. See *Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. On the Constitution of the H. Judiciary Comm.*, 109th Cong. 8, Serial No. 109-69 (2005) (testimony of Mark A. Posner, former Special Counsel for Section 5, Department of Justice).[2]

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[2] The *Village of Arlington Heights* analysis will not permit the Justice Department to withhold preclearance of all redistricting plans that fail to adopt a so-called "max-black" approach, as

B. Denial Of Preclearance To Voting Standards Or Procedures Enacted With A Discriminatory Purpose Cannot Be Considered Unduly Burdensome

No jurisdiction, covered or uncovered, has a sovereign right to enforce a voting law enacted with discriminatory intent. U.S. Const. art VI, cl. 2. That Section 5 prevents a covered jurisdiction from enforcing a voting law enacted with discriminatory intent cannot, therefore, constitute an undue burden. Implicitly acknowledging as much, petitioner's amici contend not that the substantive purpose prong itself is problematic, but instead that the requirement to "prove a negative"—the absence of discriminatory intent—presents an overly burdensome, nearly insurmountable obstacle. von Spakovsky Br. 14-16; Nix Br. 34-38. This concern echoes one voiced by petitioner. Pet. Br. 25-26.

Judicial interpretation of the Section 5 purpose prong requires no extraordinary or impossible showing. Instead, the covered jurisdiction only "must present some prima facie evidence 'to show that [its] voting changes are nondiscriminatory.' " *Florida* v. *United States*,--- F. Supp. 2d ---, No. 11-1428, 2012 WL 3538298, at *38 (D.D.C. Aug. 16, 2012) (citing *Shelby*

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petitioner's amici purportedly fear. von Spakovsky Br. 15-16; Nix Br. 35. To the contrary, Department regulations and guidance—ignored by petitioner and its amici—expressly provide that "[a] jurisdiction's failure to adopt the maximum possible number of majority-minority districts *may not* be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose." 28 C.F.R. 51.59(b) (emphasis added); 2011 Guidance at 7471 (same); see *Miller* v. *Johnson*, 515 U.S. 900, 923-925 (1995) (prohibiting the practice); 28 C.F.R. 51.56 (providing that Justice Department will be guided by the Court's precedent).

Cnty. v. *Holder*, 811 F. Supp. 2d 242, 431 (D.D.C. 2011)). "As a practical matter, this means that the plaintiff must come forward with evidence of legitimate, nondiscriminatory motives for the proposed changes to [its] voting laws." *Ibid.* (quoting *State of New York* v. *United States*, 874 F. Supp. 394, 400 (D.D.C. 1994)). This requirement—essentially just to show a rational basis for the law—cannot be considered onerous or unusual. Cf. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-447 (1985).

Once the jurisdiction makes such a showing, the burden " 'shifts to the Attorney General,' to provide some evidence to 'refute the covered jurisdiction's prima facie showing.' " *Florida*, 2012 WL 3538298, at *38 (quoting *Bossier*, 528 U.S. at 332). The Attorney General's evidence, if any, will relate to the *Village of Arlington Heights* factors. *Id.* at *39; see 28 C.F.R. 51.57(e). Only "[w]hen each party has met its production burden" will the Court assess discriminatory purpose. *Florida*, 2012 WL 3538298, at *38. The Justice Department's preclearance process follows the same framework. See 28 C.F.R. 51.52(a) ("the Attorney General shall make the same determination that would be made by the court in an action for declaratory judgment under Section 5"); cf. United States' Mot. to Affirm in Part, *Texas* v. *United States*, No. 12-496, 27 (U.S. Dec. 7, 2012) (reflecting Justice Department's acceptance of burden-shifting approach).

Far from proving a negative, the covered jurisdiction need only demonstrate that evidence of a legitimate purpose outweighs the evidence of discriminatory intent. Only where the record reflects evidence of racial hostility and the law lacks a

discernible purpose does the jurisdiction's burden become weighty. And that is what Congress intended. H.R. Rep. No. 109-478, 68 (2006) (attempts to "'purposefully' keep minority groups 'in their place' have no role in our electoral process and are precisely the types of changes Section 5 is intended to bar").

C. The Handful Of Preclearance Denials Based On The 2006 Purpose Prong Revision Illustrate Effective And Straightforward Enforcement

The revised purpose definition, portrayed as a vast expansion by petitioner and its amici, is anything but. A survey of enforcement since 2006 illustrates the point.

Since the amendment, only three jurisdictions' redistricting plans have been denied preclearance under the revised purpose prong. In each instance, the covered jurisdiction failed to provide *any* rational explanation for its proposed plan.[3] One of these three, Texas, bypassed the Justice Department and was denied judicial preclearance for its post-2010 statewide redistricting plans. See *Texas* v. *United States*, 2012 WL 3671924, at *1, *37. In Texas's U.S. House redistricting, incumbent representatives of African-

[3] The Justice Department denied preclearance to a non-redistricting voting change, in *sui generis* circumstances. See Letter from Wan J. Kim, Assistant Attorney General, to Tommy Coleman (Sept. 12, 2006) (refusing preclearance where Randolph County Board of Registrars met, without notice or rational explanation, to reassign the African-American Chair of the Randolph County Board of Education from his ability-to-elect District 4 to predominately-white District 5, despite a court decision expressly determining his residence to be in District 4; the change would have ensured his defeat in the upcoming re-election).

American and Hispanic ability-to-elect districts saw their respective offices meticulously excised from their districts. *Id.* at *19-20. The same fate did not befall a single representative of a majority-white district. *Id.*[4] "The only explanation Texas offere[d] for this pattern [was] 'coincidence.' " *Id.* The district court rejected that explanation, citing the "substantial surgery" to ability-to-elect districts, the complete exclusion of African-American and Hispanic representatives from the redistricting process, and the plan's expedited consideration in a special legislative session "quite different from what [Texas had] seen in the past." *Id.* at *21.

The City of Clinton, Mississippi, likewise failed to offer any plausible explanation for its post-2010 redistricting plan. See Letter from Thomas E. Perez, Assistant Attorney General, to Kenneth Dreher (Dec. 3, 2012). Despite an African-American population that had doubled in the prior 20 years to 34 percent of Clinton's population, the city's redistricting afforded minority voters no ability to elect a candidate of choice in any of the six wards. *Ibid.* The redistricting plan—adopted on an expedited schedule without consideration of alternatives—fragmented minority population centers to reach this result. *Ibid.* The only explanation the city gave for the fragmentation was that it was "not possible to devise a constitutionally valid ward in which African American voters have the ability to elect candidates of choice to office." *Ibid.* This explanation proved flatly incorrect. *Ibid.*

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[4] The "economic engines" of these districts—*e.g.*, hospitals, universities, arenas, and even the Alamo—were likewise excised. *Texas* v. *United States*, 2012 WL 3671924, at *20. Majority white districts managed to avoid similar surgery. *Ibid.*

The City of Natches, Mississippi similarly failed to offer any rational explanation for its decision—for the fourth consecutive redistricting cycle—to reduce the African-American population of its Ward 5, which had nearly been an ability-to-elect district. See Letter from Thomas E. Perez, Assistant Attorney General, to Everett T. Sanders (Apr. 30, 2012). Ward 5 happened to hold the balance of power on Natches's Board of Aldermen. See *ibid.* The city's sole explanation was that the reduction of the African-American population in Ward 5 was needed to prevent retrogression elsewhere. *Ibid.* That explanation proved false. *Ibid.*

In light of this record, the most that can be said about the burden imposed by the amended purpose prong is that a covered jurisdiction cannot meet evidence of discriminatory intent with silence, falsehoods, or implausible assertions of coincidence. The record refutes amici's hyperbolic suggestion that the modified purpose prong "will effectively force covered jurisdictions to prove that hundreds of legislators *did not* act with a particular motivation." von Spakovsky Br. 14 (emphasis added).[5] Such speculation cannot form the basis for striking down an act of Congress. *Washington State Grange*, 552 U.S. at 455 (quoting *Pullman Co.* v. *Knott*, 235 U.S. 23, 26 (1914)) ("A statute 'is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are.' ").

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[5] The Nix amici further speculate that the purpose analysis is so withering as to coerce covered jurisdictions to "prioritiz[e] changes that improve minorities' expected electoral success." Nix Br. 37. Setting aside the fundamental implausibility of this suggestion, amici do not cite a single instance of such coercion.

D. Section 5, As Amended, Continues To Serve Important Purposes Distinct From Those Served By Section 2

Section 5 performs the important function of "shifting 'the advantage of time and inertia' " from those who have enacted discriminatory voting laws to the laws' victims. *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980) (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 309 (1966)). Section 5 thus redresses the problem that, if discriminatory voting changes take effect, those harmed cannot be adequately compensated, and those benefited may be more firmly ensconced in positions of power. See *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 861 (D.C. Cir. 2012).

Petitioner's amici argue that preclearance should be used only to prevent "backsliding." Nix Br. 3 (quoting *Georgia* v. *Ashcroft*, 539 U.S. 461, 477 (2003)). They further assert that if preclearance may be denied for any discriminatory purpose, Section 5 will no longer serve its limited purpose of freezing "the status quo so that it do[es] not worsen while Section 2 cases [are] pending." *Id.* at 3, 18-19.

These arguments fail to address the fact that that Congress could reasonably conclude that a voting change enacted with a discriminatory purpose would likely worsen the status quo, *i.e.*, that there is a risk the change would achieve its discriminatory objective. See *Personnel Admin. of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979) (" 'Discriminatory purpose' implies * * * that the decision maker * * * selected or reaffirmed a particular course of action at least in part 'because of' * * * [expected] adverse effects upon an identifiable group."); see also *Bacchus Imports, Ltd.* v. *Dias*, 468

U.S. 263, 271 (1984) (noting that in dormant Commerce Clause context, evidence of discriminatory purpose alone is sufficient to support finding of economic protectionism). Moreover, the statute's plain language cannot accommodate amici's attempt to distinguish between, on the one hand, those voting laws that *do* have retrogressive effect, which they argue are the historical focus of Section 5, and, on the other, those laws that *intend* to have a discriminatory effect but may not. See 42 U.S.C. 1973c(a) (covered jurisdiction must establish that change in voting law "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color"). Section 5 reaches all laws enacted with a discriminatory intent, preventing their proponents from inflicting an irreparable injury.

E. The Limited 2006 Revision To The Retrogression Standard Protects Certain Ability-To-Elect Districts From Fragmentation And Does Not Pose Constitutional Concerns

Ballot access alone does not guarantee effective exercise of the electoral franchise, as votes may be diluted through discriminatory districting. Accordingly, protection of the "ability of minority groups to participate in the political process" must be paired with protection of their ability "to elect their choices to office." *Beer* v. *United States*, 425 U.S. 130, 141 (1976) (quoting H.R. Rep. No. 94-196, at 60 (1975)). The latter protection is the focus of the 2006 amendments to the Section 5 effects prong, which now provides that no voting procedure should "diminish the ability" of protected citizens to "elect their preferred candidates of choice." 42 U.S.C. 1973c(b), (d).

The 2006 amendments have a narrow purpose, namely to address a specific disagreement over the definition of retrogression—a disagreement relevant only in the context of *some* redistricting plans. See pp. 23-24, *infra*. In *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), this Court considered a state senate redistricting plan that reduced the African-American voting-age population in three previously majority-minority districts to "just over 50 [percent]," which made it at least "marginally less likely that minority voters [could] elect a candidate of their choice in those districts." *Id.* at 486. At the same time, the plan increased the African-American voting-age population in four districts where African Americans remained a voting-age minority. *Id.* at 487. Interpreting Section 5, the Court concluded that the addition of these non-majority "influence" districts *could* render the redistricting plan non-retrogressive. *Ibid.* The Court concluded that "[t]he State may choose, consistent with § 5, that it is better to risk having fewer minority representatives" in order to attain "greater overall minority" influence. *Id.* at 483.

The amended Section 5 reflects Congress's conclusion, contrary to *Georgia*, that retrogression generally occurs where minority voters are removed from certain ability-to-elect districts and fragmented into districts in which they have only a lesser, undefined "influence" in the electoral process. 42 U.S.C. 1973c(b), (d); see *LaRoque* v. *Holder*, 831 F. Supp. 2d 183, 223 (D.D.C. 2011), vacated as moot, 679 F.3d 905 (D.C. Cir. 2012), cert. denied *sub nom. Nix* v. *Holder*, No. 12-81, 133 S. Ct. 610, 2012 WL 2955934 (Nov. 13, 2012). The legislative record indicates that the amendments are directed at "geographically compact" majority-minority districts. H.R. Rep. 109-

478, at 70. These are the districts that would result from adherence to neutral redistricting principles, such as "compactness and contiguity" and regard for "natural or artificial boundaries" like rivers or municipal borders. 28 C.F.R. 51.59(a)(6). Where the Voting Rights Act has operated to create or protect such districts, the "ability to elect" standard preserves them, *at least* against their substitution for potentially illusory "influence" districts. See H.R. Rep. 109-478, at 69-70 (2005); accord *Georgia*, 539 U.S. at 493-494 (Souter, J., dissenting) (noting that "without the anchoring reference to electing a candidate of choice," the nonretrogression principle would be "substantially diminished" and "practically unadministrable").

Petitioner's amici contend that this limited revision to the retrogression standard, applicable only in limited contexts, simply "ossif[ies] existing majority-minority districts." von Spakovsky Br. 13; see Nix Br. 29. As an initial matter, this is not a redistricting case, and redistricting cases necessarily involve unique facts. See 2011 Guidance, 76 Fed. Reg. at 7471-7472. Consequently, the Court's general reluctance to pass "judgment on [a] fact-poor record" should be particularly acute here. *Sabri* v. *United States*, 541 U.S. 600, 609 (2004); see *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 198-199 (2008).

Furthermore, although the height of post-2010 redistricting has passed, amici have not identified a single instance where the amended retrogression standard has been misapplied. See pp. 23-24, *infra*. Speculation that the standard *could* be misapplied founders on the principle that hypothetical harms do not justify " 'premature interpretation of statutes on the basis of factually barebones records.' " *Washington*

State Grange v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Sabri*, 541 U.S. at 609).

There are at least four additional reasons why the speculative ossification argument fails. First, as the legislative history reflects, the ability-to-elect standard focuses primarily on protecting "geographically compact" majority-minority districts from fragmentation *via* redistricting—that is, protects districts that would have existed in a world of race-neutral redistricting. See H.R. Rep. 109-478 (noting standard provides that a "geographically compact minority group" will be able to elect its preferred "candidates * * * to office—on terms similar to other communities"). The governing Justice Department regulations reflect this focus. See 28 C.F.R. 51.59(a) (in determining retrogressive effect, Department will consider minority fragmentation, dilution, departure from objective redistricting criteria, compactness, and contiguity, and regard for naturally occurring boundaries).

Second, "courts and the Justice Department are required to consider certain constitutional mandates, including compliance with the one person one vote principle and equal protection principles." *LaRoque*, 831 F. Supp. 2d at 224. As the Department has recognized, retrogression analysis necessarily incorporates these constitutional mandates, which, under some circumstances, can and do require dilution of ability-to-elect districts. See 28 C.F.R. 51.59(a); 2011 Guidelines at 7472.

Third, over time, overall population decline may result in the elimination of an ability-to-elect district. 2011 Guidelines at 7472; cf. Letter from Thomas E.

Perez, Assistant Attorney General, to Michael S. Green (Apr. 13, 2012) (denying preclearance to county's elimination of both ability-to-elect districts, but noting that reduction to one ability-to-elect district may have been permitted).

Finally, as racially polarized voting diminishes, minority ability to elect may require ever-smaller percentages of the voting population. Cf. *Bartlett* v. *Strickland*, 556 U.S. 1, 25 (2009) (opinion of Kennedy, J.). The Department's guidelines recognize this fact. "In determining whether the ability to elect * * * continues in the proposed [redistricting] plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment." 2011 Guidelines, 76 Fed. Reg. at 7471. "Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction," including "voting patterns within the district, voter registration and turnout information." *Ibid.* These are not static factors; nor, consequently, is the racial composition of an ability-to-elect district. See *ibid.*[6] Amici's suggestion that majority-minority districts will be frozen in perpetuity lacks foundation, and this Court

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[6] Petitioner's amici inexplicably contend that the amended retrogression standard "requires preserving every functioning 'influence' district." Nix Br. 30. They fail to address the authority to the contrary. See *LaRoque*, 831 F. Supp. 2d at 223 ("Influence districts do not fit within the terms of the amendments because voters who only 'influence' an election are not able to choose, and then elect, the candidates who best represent them."); *Texas* v. *United States*, 831 F. Supp. 2d 244, 265 (D.D.C. 2011) ("Redistricting can have no retrogressive effect on an ability to elect that has not yet been realized."). Nor do amici identify a single denial of preclearance on this basis.

should not presume that the 2006 amendments to Section 5 will be applied in that manner.

F. The Amended Retrogression Standard Has Been Applied Without Incident In A Full Redistricting Cycle

The 2006 extension of the Voting Rights Act was intended to cover two full redistricting cycles. See *Shelby Cnty.*, 811 F. Supp. 2d at 499. The first cycle, following the 2010 Census, is mostly complete. Only Texas—which proceeded directly to a three-judge panel—had its redistricting plan blocked as retrogressive. See *Texas* v. *United States*, 2012 WL 3671924. Every other statewide redistricting plan met the retrogression standard. Department of Justice, Status of Statewide Redistricting Plans, *available at* http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last accessed Feb. 1, 2013). Moreover, only approximately 15 local jurisdictions have failed to satisfy the retrogression standard, and petitioner's amici fail to identify a single one in which the 2006 amendments were determinative.

Given this record, there is no credible argument that the 2006 retrogression amendments increase the preclearance burden imposed on covered jurisdictions. In fact, as the *LaRoque* Court recognized, the amendments likely have made the preclearance process more straightforward. See *LaRoque,* 831 F. Supp. 2d at 218-219 (citing legislative concerns that *Georgia* decision made "preclearance decisions 'less predictable and more open to subjective judgments, individual preconceptions and even political biases' "); Fed. Resp. Br. 46 (collecting legislative history reflecting these concerns).

III. THE JUSTICE DEPARTMENT'S RECORD OF ENFORCEMENT IS CONSISTENT WITH THE TEXT AND PURPOSE OF SECTION 5

Recent enforcement of Section 5 has reflected two priorities: protecting minority voting rights and due regard for state and local interests in enforcement of nondiscriminatory voting laws. The record of approximately 30 denials of preclearance since 2006 reflects these priorities. See pp. 25-28, *infra*.

Instead of addressing this record, petitioner's amici focus on a supposed disparity between the ability of uncovered jurisdictions to condition the right to vote on the presentation of photo ID and the inability of covered jurisdictions to do so. Neither the facts nor the law support their argument. The Justice Department has granted preclearance to photo ID laws in the State of Georgia, and in covered jurisdictions in Michigan and New Hampshire; and the district court has precleared South Carolina's photo ID law for future application. *South Carolina* v. *United States*, --- F. Supp. 2d ---, No. 12-203, 2012 WL 4814094, at *19-21 (D.D.C. Oct. 10, 2012). Moreover, photo ID laws in covered jurisdictions, like those in uncovered jurisdictions, rise or fall depending on the burden imposed on voters and the ameliorative processes accorded voters for whom that burden is too great.

In addition, amici's emphasis on long-past Section 5 enforcement practices in order to suggest concerns about the Act going forward is misplaced and inaccurate. Enforcement decisions made in the 1980s and 1990s—prior to this Court's more recent relevant decisions—shed little light on the "current burdens" imposed by Section 5. *Northwest Austin Mun. Utility Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009). To

the extent past decisions are demonstrative of anything, it is the "[p]ast success" of the Act that this Court has consistently recognized. See, *e.g.*, *ibid.*

A. Recent Enforcement Of Section 5 Demonstrates Its Continued Vitality

A review of the approximately 30 preclearance denials since 2006 reveals the importance of Section 5 in precluding discriminatory voting changes before proponents of such changes are permitted to "win[] elections" under them "and gain[] the advantage of incumbency." *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 861, 872 (D.C. Cir. 2012). Rather than giving rise to constitutional concerns, this record of enforcement has remedied them.[7]

For example, the Justice Department has refused to preclear a number of voting laws with the purpose or effect of limiting minority ballot access. Despite a continued increase in Hispanic voters, Gonzales County, Texas, proposed to replace professional translation of election materials with Google-translate and to reduce the number of bilingual poll workers. See Letter from Thomas E. Perez, Assistant Attorney General, to Robert T. Bass (Mar. 12, 2010). Citing retrogressive purpose and effect, the Department denied preclearance. *Ibid.* Similarly, Runnels County, Texas, proposed to replace the bilingual worker assigned to each polling place with a single

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[7] In addition, as noted by Respondent, this Court has considered post-enactment evidence when determining whether Congress validly exercised its authority under the Reconstruction Amendments. Fed. Resp. Br. 25, n. 3; see, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 524-525 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 733-734 & nn. 6-9 (2003).

(purportedly bilingual) county official available by phone. See Letter from Thomas E. Perez, Assistant Attorney General, to Melissa Ocker (June 28, 2010). Again noting retrogressive purpose and effect, the Department denied preclearance. *Ibid.* (Runnels County had also improperly failed to submit the change for preclearance immediately, and, while the change was in effect, one "bilingual" official made available by telephone was not, in fact, proficient in Spanish. *Ibid.*) In addition, the Department denied preclearance to a Georgia voter verification process that errantly and disproportionately struck minority voters from the voting rolls, unless those voters took additional steps to verify their eligibility—including appearing at the county courthouse with three days' notice. Letter from Loretta King, Assistant Attorney General, to Hon. Thurbert E. Baker (May 29, 2009); see also *Morales* v. *Handel*, No. 08-03172, Dkt. Entry 113 (N.D. Ga. Aug. 24, 2010) (discussing Georgia's revisions to its verification process and subsequent Justice Department preclearace).

The Justice Department has also refused to preclear voting changes with the purpose or effect of limiting minority representation at the very time that representation was about to shift the balance of power. For example, the African-American voting-aged population in the Cities of Augusta and Richmond, Georgia, which share a consolidated municipal government, has been steadily growing. See Letter from Thomas E. Perez, Assistant Attorney General, to Dennis R. Dunn (Dec. 21, 2012). The 2010 Census reflected that African Americans had reached a majority of the voting-age population. *Ibid.* Shortly thereafter, the Georgia legislature passed a bill drafted so as to apply only to Augusta-Richmond, which

rescheduled municipal elections from November (when African-American turnout is high) to July (when it is not). *Ibid.* Preclearance was rejected on the basis of retrogressive purpose and effect. *Ibid.* In Charles Mix County, South Dakota, the county elected its commissioners from three single-member districts, one of which was a Native American ability-to-elect district. See Letter from Grace C. Becker, Acting Assistant Attorney General, to Sara Frankenstein (Feb. 11, 2008). Just as a Native American won a primary in that district, and was to run unopposed to be the county's first Native American commissioner, the county increased its commission to include five representatives—the additional two hailing from at-large districts. *Ibid.* The proposed change was denied preclearance. *Ibid.* In the Beaumont Independent School District of Jefferson County, Texas, African-American and Hispanic voters—constituting approximately 56 percent of the population—had become the majority in four of seven districts. See Letter from Thomas E. Perez, Assistant Attorney General, to Melody T. Chappel (Dec. 21, 2012). The district redistricted, creating five districts and two at-large seats. *Ibid.* Only one African-American candidate had won an at-large election for any office in that district in the prior ten years. *Ibid.* Citing retrogressive purpose and effect, the Department denied preclearance. *Ibid.*

Unwilling to grapple with this record of enforcement, amici focus instead on photo ID requirements and the illusory fear that the Justice Department will mandate "max-black" redistricting. As addressed below, they fail to identify any constitutional concerns.

B. Voter ID Enforcement Demonstrates The Effective Functioning Of Section 5

Petitioner's amici asserted dichotomy of uncovered states free to require voters to present photo ID and covered states incapable of enforcing such a requirement, von Spakovsky Br. 17-21, is wrong on both the facts and the law.

First of all, among the photo ID laws passed by covered jurisdictions since 2006, more have been cleared (New Hampshire, Georgia, and Michigan), than not (Texas and South Carolina, the latter blocked for the 2012 election only). In addition, the Justice Department has precleared a number of state voter ID laws that require voters to present one of a broader class of non-photo IDs, like Social Security cards and utility bills. *E.g.*, Letter from T. Christian Herren, Jr., Chief, Voting Section to Joshua N. Lief (Aug. 20, 2012) (Virginia); see Fed. Resp. Br. in Opp. at 32 (discussing Arizona and Virginia preclearance). And covered jurisdictions are not the only ones who find their photo ID requirements subject to immediate challenge. See, *e.g.*, *Applewhite* v. *Commonwealth*, 54 A.3d 1, 3-5 (Pa. 2012) (expressing serious reservations regarding burden imposed by Pennsylvania's photo ID law due to delay in issuing required IDs); *Applewhite* v. *Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211, at *3 (Pa. Commw. Ct. Oct. 2, 2012) (enjoining enforcement of photo ID law for the 2012 election).

Second, as a legal matter, amici's argument relies on a misinterpretation of this Court's decision in *Crawford* v. *Marion County*, 553 U.S. 181 (2008). *Crawford* does not grant an automatic constitutional pass to any and all photo ID requirements. Rather, in

rejecting a *facial* challenge, the Court stressed the paucity of the evidentiary record of unreasonable burdens imposed by Indiana's particular photo-ID requirement and observed that the petitioners had "not introduced evidence of a single Indiana resident who will be unable to vote as a result" of the law. *Id.* at 188-189, 204. The Court's analysis focused on the burden imposed on Indiana voters, which it found to be minimal; the required photo IDs were free and widely available, and a trip to obtain one did not "represent a significant increase over the usual burdens of voting." *Id.* at 198-200.[8] The Court further stressed that any such burden was mitigated by the fact that voters lacking photo ID would not be denied ballot access. *Id.* Instead, they were afforded an opportunity to cast a provisional ballot to be supplemented, within 10 days, by an affidavit indicating, among other possibilities, that the "affiant is indigent and unable to obtain proof of identification." *Id.* at 186 n.2 (quoting Ind. Code Ann. § 3-11.7-5-2.5(c)). And the Court stressed that the statute remained subject to an as-applied challenge, particularly as to those burdens "imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting." *Id.* at 200.

Consistent with this Court's analysis in *Crawford*, the Justice Department's preclearance scrutiny of photo ID laws has focused on the burden imposed on protected voters by the particular statutes at issue and any provisions aimed at mitigating that burden.

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[8] The documents required to obtain a photo ID, *e.g.*, a birth certificate, were available for $3 to $12. *Crawford*, 553 U.S. at 198 n.17. The *Crawford* petitioners' facial challenge did not identify anyone incapable of paying this fee.

Accordingly, the Department has precleared photo ID laws where appropriate, as in New Hampshire, Michigan, and Georgia. New Hampshire's photo ID law, for example, provides for issuance of free photo IDs and permits voters without photo ID to vote upon execution of an affidavit affirming his or her identity, residence, and registration. See N.H. Rev. Stats. §§ 659:13, 260:21. Finding that these requirements neither were enacted with a discriminatory purpose nor would cause a retrogressive effect, the Department precleared the law. See Letter from T. Christian Herren, Jr., Chief, Voting Section, to J. Gerald Herbert (Sept. 4, 2012). Michigan's photo ID law, which permits a wide range of photo IDs, also allows any voter unable to obtain a photo ID to vote upon executing an affidavit affirming his or her identity. See Mich. Comp. Laws § 168.523. Finding no underlying discriminatory purpose nor retrogressive effect, the Department precleared the law. See Letter from Grace C. Becker, Acting Assistant Attorney General, to Brian DeBano (Dec. 26, 2007).

Similarly, Georgia requires in-person voters to present photo IDs that are available free of charge at offices in each of Georgia's (many) counties. Ga. Code Ann. § 21-2-417.1(a). But every voter is afforded the opportunity to vote by absentee ballot, which may be obtained without photo ID. *E.g.*, *Democratic Party of Ga., Inc.* v. *Perdue*, 288 Ga. 720, 726 (2011). These factors supported the Justice Department's conclusion that the law is compliant with Section 5. Letter from John Tanner, Chief, Voting Section, to Thurbert Baker (Apr. 21, 2006).[9]

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[9] Both the Michigan and Georgia preclearance decisions pre-dated *Crawford.*

By contrast, where a photo ID law imposes a disproportionate burden on minority voters and does not provide any means to mitigate that burden, Section 5 will bar its enforcement. See *Texas* v. *Holder*, No. 12-cv-128, 2012 WL 3743676, at *26-30, *32-33 (D.D.C. Aug. 30, 2012). Texas's photo ID law, a "strict, unforgiving" requirement described by the district court as "the most stringent in the country," required all voters to present one of a limited number of photo IDs. *Id.* at *33, *1. The most readily obtainable ID could be acquired from the Texas Department of Public Safety ("DPS"). *Id.* But "almost one-third of Texas's counties" lack a DPS office, and undisputed evidence reflected that certain voters would need to travel "200 to 250 mile[s] round trip" to the nearest office. *Id.* at *28. On this evidence, the court concluded that "when the closest office is 100 to 125 miles away," the "trip—especially for would-be voters having no driver's license [*i.e.*, those actually in need of obtaining a photo ID]—constitutes a 'substantial burden' on the right to vote." *Ibid.*[10] Texas conceded that the voters unable to meet this burden disproportionately would be those protected by Section 5. *Id.* at *29.

In addition, Texas provided no alternative ballot access for voters unable to obtain a photo ID (aside from limited exceptions for the disabled). See *Texas*, 2012 WL 3743676, at *29. Indeed, the Texas legislature had rejected an amendment that would

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[10] Further, the required photo ID could not be obtained without documentation costing at least $22, which the *Texas* court found to be more burdensome than the Indiana photo ID law upheld in *Crawford* and the Georgia photo ID law precleared by the Justice Department. *Texas*, 2012 WL 3743676, at *15-16.

have "allowed indigent persons to cast provisional ballots without photo ID." *Id.* at *33. Given the burdens it imposed, without material ameliorative provisions, the *Texas* court concluded that the photo ID requirement statute would have a retrogressive effect. *Id.* at *1. Thus, Section 5 barred enforcement of Texas's photo ID law because it was defined by characteristics that the laws in New Hampshire, Michigan, and Georgia lacked: for many voters the act of obtaining the required photo ID was substantially more burdensome than the act of voting itself, see *Crawford*, 553 U.S. at 199, and Texas provided no alternate ballot access for those voters.

The denial of preclearance to South Carolina lies between the poles of New Hampshire, Michigan and Georgia, on the one hand, and Texas, on the other—and illustrates Section 5's continuing efficacy. As enacted, South Carolina's photo ID requirement raised certain retrogression concerns. These included the limited availability of the required IDs and the ambiguous scope of the alternative ballot access, which permitted a voter without photo ID to vote only after executing an affidavit stating that he or she "suffers from a reasonable impediment that prevents the elector from obtaining photographic identification." See Letter from Thomas Perez, Assistant Attorney General, to C. Havird Jones, Jr. (Dec. 23, 2011). As the Justice Department noted, the "exception's vagueness raises the possibility that it will be applied differently from county to county * * * and thus risks exacerbating rather than mitigating the retrogressive effect of the new [photo ID] requirement." *Ibid.* In addition, there was a concern that the exception was circular. The South Carolina law required the affidavit to be notarized, which in turn may have required a

photo ID. See *South Carolina*, 2012 WL 4814094, at *7. Noting these concerns, among others, the Department denied preclearance, subject to reconsideration should South Carolina provide additional information concerning its enforcement plans.

Before a three-judge panel of the district court, South Carolina committed to an interpretation of the photo ID requirement under which, the court concluded, the law would not be retrogressive in purpose or effect. See *South Carolina*, 2012 WL 4814094, at *6 ("accept[ing] and adopt[ing], as a condition of pre-clearance, the expansive interpretation offered by the South Carolina Attorney General and the South Carolina State Election Commission"); *id.* at *21 (Bates, J., concurring) ("[T]o state the obvious, [the law] as now pre-cleared is not the [law] enacted in May 2011. It is understandable that the Attorney General * * * would raise serious concerns about South Carolina's voter photo ID law as it then stood."). This interpretation ensured that the alternative ballot access was expansive. Though the plain language of the statute required voters without a photo ID to attest to a "reasonable impediment" to obtaining one, South Carolina construed the statute to permit a voter to cast a ballot simply by attesting to his or her identity and his or her reason for failing to obtain a photo ID. *Id.* at *7. No reason given would be rejected as unreasonable unless demonstrably false. *Ibid.* In addition, South Carolina committed that the "process of filling out the [affidavit] must not become a trap for the unwary," and represented that would not become a *de facto* literacy test. *Id.* at *9-10. These constructions—rendered, as the district court noted, in "real time," *id.* at *4—ensured that the State's interest

in preventing voting fraud would be met without retrogressive consequences. *Id.* at *5.[11]

The *South Carolina* decision demonstrates the continued wisdom of Section 5. Rather than permitting a vague ballot access provision to take effect, subject to a multitude of potentially retrogressive interpretations, the Section 5 process led South Carolina to construe its law consistent with the unencumbered exercise of voting rights. As two of the panel's judges noted, Section 5 was the catalyst to this "evolutionary process." *South Carolina*, 2012 WL 4814094, at *21 (Bates, J., concurring).

C. Past Enforcement Of Section 5 Does Not Raise Current Constitutional Concerns

Justice Department regulations expressly provide that the enforcement of Section 5 "will be guided by the relevant decisions of the Supreme Court of the United States." 28 C.F.R. 51.56. In its preclearance decisions, the Department "shall make the same determination that would be made by the court in an action for declaratory judgment under [S]ection 5." 28 C.F.R. 51.52(a). Accordingly, where this Court's decisions have evolved, see, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 923-927(1995), Section 5 enforcement has evolved in kind. Petitioner's amici provide no evidence

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[11] Because the statute contemplated an eleven-month ramp-up period, and because certain of South Carolina's positions congealed only weeks before the 2012 election and required standardizing and simplifying the affidavit form, the district court could not conclude that the photo ID requirement was immediately compliant with Section 5 with respect to the 2012 election. *South Carolina*, 2012 WL 4814094, at *17-18. Instead, the court "preclear[ed] [the requirement] for *future* elections." *Id.* at *17 (emphasis in original).

that either the Justice Department or covered jurisdictions have engaged in prohibited minority maximization since this Court's decision in *Miller*. Amici's continued reference to "max-black" redistricting and other straw men prohibited by this Court's precedent is therefore misplaced. Amici provide the Court no reason to doubt that the Justice Department's lengthy track record of assiduous adherence to this Court's precedent and to the Department's own regulations embodying that precedent will continue. See, *e.g.*, *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449-450 (2008) ("In determining whether a law is facially invalid, we must be careful not to * * * speculate about 'hypothetical' or 'imaginary' cases."); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004) (and cases cited) (in absence of clear evidence to the contrary, presumption of regularity attaches to acts of public officers in discharging official duties).

CONCLUSION

For the foregoing reasons, neither the 2006 amendments to Section 5, nor the Justice Department's record of Section 5 enforcement poses constitutional concerns. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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