No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF STATE OF ALABAMA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

In 2013, there should not be the Uncovered States of America and the Covered States of America. There should be the United States of America. Other States have persuasively explained why their experiences support this proposition. This brief provides Alabama's own, unique perspective. George Wallace and Bull Connor used to be in Alabama, and Selma and the Edmund Pettus Bridge still are. These people and places were particularly responsible for making the preclearance mechanism necessary and appropriate in 1965. Things that have happened in Alabama in the meantime should thus be particularly instructive in determining whether Congress can employ the same extraordinary measure now.

Alabama's experience on these fronts is consistent with the Court's assessment four Terms ago. Things in the South have, indeed, changed. *See Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009). Alabama has a new generation of leaders with no connection to the tragic events of 1965. The effects of those events on voting and political representation have now, thankfully, faded away. These on-the-ground realities show that the 2006 Congress abdicated its constitutional responsibilities when it simply reimposed, on Alabama and other States ready to be equal partners in the Union, burdens that previously were necessary and appropriate only because of a defiance and recalcitrance whose vestiges no longer exist.

SUMMARY OF ARGUMENT

Congress justifiably applied §5's preclearance mechanism to Alabama in 1965, and then again in 1970, 1975, and 1982. But 2006 was a different story. As necessary and proper as §5 was to correct injustices committed by Alabamians in the 1960s and to maintain the fragile balance in the years that followed, its 25-year reauthorization in 2006, using the decades-old coverage formula, was not a necessary and appropriate response to problems that are currently present.

A. Alabama more than earned its spot on §5's original coverage list in 1965. Through violence and willful defiance of federal law, Alabama maintained an all-white legislature and low black voter-registration and turnout rates in 1965. When Congress justifiably renewed §5 in 1970, 1975, and 1982, Alabama's progress had been minimal.

But that was a long time ago. When Congress renewed §5 in 2006, Alabama had long closed the registration and turnout gaps. African Americans compose a percentage of Alabama's legislature that reflects the overall population numbers in the State. Alabama's governments have shed their systematic defiance of federal civil-rights law. DOJ has not objected to a statewide preclearance submission from Alabama in 16 years. In fact, in the decade leading up to §5's 2006 renewal, DOJ objected to only 0.06% of preclearance submissions from all levels of government in Alabama. Alabama still grapples with race-relations issues, but they are the same kind of issues every State currently is endeavoring to solve. The recalcitrance and defiance are now gone.

B. Section 5 is not a proportionate response to problems Alabama faces today. During the past ten years, the State has experienced §5's burdensome effects in a variety of ways. It was fair for Congress to impose those costs on Alabama in 1965, 1970, 1975, and 1982, but it is not fair for Congress to impose those costs today.

ARGUMENT

The other State amici have persuasively demonstrated that at a minimum, Congress acted beyond its enumerated powers when it renewed §4(b)'s coverage formula in 2006. As Judge Williams wrote below, the criteria §4(b) sets for imposing the preclearance requirement are not "adequate in themselves to justify the extraordinary burdens" associated with the requirement that these jurisdictions preclear all changes in their voting laws with the federal government. Pet. App. 70a. Nor do those criteria "draw a rational line between covered and uncovered jurisdictions." *Id.* No sensible formula would force Alaska to preclear all changes in its voting laws based on a mistake made by a single city within its borders. Nor would any sensible formula force Arizona to preclear these changes while not requiring Nevada to do the same.

But the constitutional problem before this Court runs much deeper than that. The record before the 2006 Congress was insufficient to allow it to apply, to *any* American jurisdiction, the emergency measure it first undertook during the Civil Rights era. At the very least, the record was insufficient to justify renewing the measure not simply for five more years—

the amount of time the 1965 Congress originally thought prudent—but for a term five times as long. If the 2006 Congress had the power to impose these burdens on particular States, it did not have the power to do so for a term that insulated a quarter-century's worth of elected representatives from responsibility for the costs the measure imposes.

In light of Alabama's unique role in the history of §5, its experience is especially instructive on these fronts. It was one of those States that, as this Court put it, was all too "familiar to Congress" in 1965 as a "geographic area[] where immediate" and extraordinary action was "necessary." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). But in part because of §5, Alabama and other southern States have changed. Despite the race-relations issues Alabama and every other State continue to face, there are real, documented reasons to conclude that the acute concerns that justified the drastic preclearance remedy are now part of the past. As things currently stand, §5 will impose, through 2031, substantial and unfair burdens on many Alabama officials who were not even born in 1965. Congress could not rationally decide that it needed to extend this remedy to this new era.

A. The Alabama of 2013 is not the Alabama of 1965—or of 1970, 1975, or 1982.

When this Court has considered whether renewing §5 at a particular moment in our Nation's history was within Congress's powers, it has cited covered jurisdictions' lack of progress in three areas:

1. Registration and voting;

2. Minority participation in state government; and
3. Preclearance submissions and DOJ objections.

See City of Rome v. United States, 446 U.S. 156, 180-81 (1980). These factors serve as guideposts in assessing the country's need for the preclearance mechanism over the course of its history—from its original enactment in 1965, through its interim reenactments in 1970, 1975, and 1982, up to its most recent reenactment in 2006.

As applied to Alabama, these guideposts show that the State is not irrevocably bound to its tragic past. Just as America has changed since 1965 and even since 1982, so has Alabama. Whatever race-relations issues now exist in the State, they are the same kinds of problems that every State in this Nation faces. They are not the willful defiance and conscious disregard for voting rights that led Congress to adopt this measure in 1965, and to renew it in 1970, 1975, and 1982. The Alabama of today is meaningfully different in every material respect from the Alabama of each of those previous years, and Congress violated the Constitution when it refused to recognize as much.

1. Alabama in 1965

Preclearance was the 1965 Congress's extraordinary remedy for an extraordinary problem. *See United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). That problem centered in the South. For nearly a decade, southern officials had frustrated the Civil Rights

Acts by treating federal litigation, as Professor Karlan has put it, like a "game of Whac-A-Mole." Tr. of Oral Argument at 47, *Riley v. Kennedy*, 533 U.S. 406 (2008). Whenever a DOJ lawsuit would successfully knock down a particular discriminatory device, a new one would pop up. Section 5's novel requirement that these jurisdictions obtain federal preclearance before enforcing any changes to their voting laws "was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976) (internal quotation marks omitted).

Alabama was a primary culprit. One of the most vivid examples of the evasions came out of Selma, the town that infamously became a household name, along with its bridge that spans the Alabama River, on Bloody Sunday, March 7, 1965. Four years earlier, only 156 of 15,000 voting-age African-Americans in the county where Selma is located were registered to vote. *See* H.R. Rep. No. 89-439, at 5 (1965) , *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. To ameliorate the problem, the United States sued the county registrars for violating the Civil Rights Act. *Id.* But while the case was pending, new registrars took office, thereby forcing the district court to deny relief. *Id.* The court of appeals eventually reversed and issued an injunction, but the gamesmanship continued. *Id.* The new registrars soon defied the court's order by heightening the county's application standards. *Id.* This prompted the United States to file yet another lawsuit. *Id.* While this new case proceeded,

Alabama implemented two new, statewide "literacy and knowledge-of-government tests." *Id.* at 6.

Defiance in places like Selma denied African-Americans both the franchise and their proper representation within state government. Before 1965, less than 20% of eligible black Alabamians were registered to vote, while almost 70% of white Alabamians were registered. *See* H.R. Rep. No. 89-439, at 5; S. Rep. No. 94-295, at 6 (1975). Correspondingly, not a single African-American served in the state legislature. *See* Charles S. Bullock, III & Richard Keith Gaddie, *An Assessment of Voting Rights Progress in Alabama* tbl.5 (Am. Enterprise Inst. 2005), *available at* http://www.aei.org/files/2006/05/05_VRAAlabama-study.pdf (hereinafter "Bullock & Gaddie").

2. Alabama in 1970

Despite the pressing situation in Alabama and other southern States, the 1965 Congress took a notably cautious approach. It did not impose the preclearance requirement indefinitely or even for an extended period of time. It instead provided that the mechanism would terminate after only five years—when at least a third of the Senators who voted on the original measure could reevaluate the need for its continued existence.

When Congress engaged in that process, it concluded that extending the mechanism for five more years, for what one committee report called a "cooling off period," made sense. H.R. Rep. No. 109-478, at 9 (2006) (quoting H.R. Rep. No. 91-397, at 4 (1970)). The record from Alabama amply supported that decision and this Court's endorsement of it in *Georgia v. United States*, 411 U.S. 526, 535 (1973).

Registration and turnout among black voters in Alabama still lagged far behind corresponding figures for whites. In the summer of 1970, the state Democratic Party nominated George Wallace, who had been governor when Congress passed §5 in 1965, for what would become his second term. And Alabama still did not have a single black legislator. *See* Bullock & Gaddie, *supra*, at tbl.5.

Events between 1965 and 1970 had highlighted even more racial disparities within Alabama's government. In 1968, the Justice Department had sued several state agencies over hiring and promotion practices for appointed positions. Those agencies had passed over 49 black applicants in favor of "lower-ranking white applicants." *United States v. Frazer*, 317 F. Supp. 1079, 1086-87 (M.D. Ala. 1970). As a result, in a state that was 25% black, African Americans held only 3.1% of government jobs. *See id.*

3. Alabama in 1975

The 1970 Congress provided for the 5-year reenactment to expire in 1975, but Congress at that time determined that another 7-year renewal, until 1982, made sense. Although some things had changed in Alabama by then, the record from the State still amply supported that extension. As this Court would later conclude, the extension "was necessary," in Alabama and other southern States, "to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination." *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

Voter registration and turnout, while showing signs of progress, remained unsolved problems. The

registration rates, for example, showed promise, but still were not where they needed to be. From 1965 to 1975, black voter registration rose from 19.3% to 57.1%. *See* S. Rep. No. 94-295, at 6 (1975). Yet the gap between blacks and whites still languished at 23.6%. *Id.* at 6.

Meanwhile, the composition of state government remained largely unchanged. George Wallace was still at the helm, and 11 legislators who had been in office in 1965 still held seats there. *Compare Roster of the Senate of Alabama*, ALA. S. J. 2136-38 (1965), *and Roster of the House of Representatives of Alabama*, ALA. S. J. 2139-42 (1965), *with Roster of the Senate of Alabama*, ALA. S. J. 3753-54 (1975), *and Roster of the House of Representatives of Alabama*, ALA. S. J. 3757-62 (1975). Only two African-Americans served in the state senate, and only 13 in the house. Bullock & Gaddie, *supra*, at tbl.5. Meanwhile, DOJ's suit over racial disparities in state appointed positions remained unresolved.

4. Alabama in 1982

Alabama had made still more progress when the 1975 Congress's 7-year renewal was set to lapse. But the 1982 Congress chose to reenact the statute again, and that decision again found support in evidence from Alabama. The State had closed the gaps on voter registration and turnout even further, but the discrepancy between blacks and whites, exceeding 10% on both fronts, remained far above the average for non-southern States. Bullock & Gaddie, *supra*, at tbls.2 & 3. Meanwhile, change in Alabama government still was slow-going. Governor Wallace, though by that time renouncing his prior segregationist

views, would be elected again that fall, to his fourth term. African-American representation in the state legislature was virtually unchanged. Bullock & Gaddie, *supra*, at tbl.5. And the federal court in the suit over Alabama's appointment process entered a comprehensive injunction monitoring the State's conduct. *See United States v. Frazer*, No. 2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976).

These concerns supported Congress's decision to reauthorize the Act at that time, but it is fair to question whether Congress chose a constitutionally appropriate length for the reenactment. Although States like Alabama were closer than they had ever been to erasing the registration and turnout gaps, Congress did not choose a provisional 5- or 7-year term like the previous reenactments. It instead opted for a 25-year term, such that the statute would not expire until 2007. That decision entrenched, for a quarter-century, a mechanism that by design was supposed to be temporary. It rendered a generation of congressional representatives unaccountable for the measure's federalism costs. And time eventually would show that the 25-year term was far longer than Alabama and the other southern States needed to catch up with the rest of the Union.

5. Alabama today

When it comes to voting rights, Alabama at the time of the 1982 reauthorization's expiration was not its grandfather's State. It was not even its father's. Around two-thirds of the people who now call Alabama home were not yet in kindergarten in 1965. *See Interim Projections of the Population by Selected Age Groups for the United States and States*, U.S. Census

Bureau, *available at* http://wonder.cdc.gov/wonder/help/populations/population-projections/summary tabb1.xls. And it shows.

By 2006, the important indicia that justified §5's original enactment and its previous reauthorizations had dramatically changed. The original justification for preclearance, and the need "to preserve the 'limited and fragile' achievements of the Act" that justified the previous renewals, were things of the past. *City of Rome*, 446 U.S. at 182.

Alabama had effectively excised its prior discrepancies in registration and turnout. In every year since 1990, African-Americans had registered and voted in larger percentages in Alabama than in States outside the South. *See* Bullock & Gaddie, *supra*, tbls.2 & 3; *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 44-45 (2005) (statement of Ronald Gaddie). By 2004 and continuing through the most recent available data from 2008, Alabama had virtually eliminated the registration gap, to less than one percent, between black and white voters. *See* S. Rep. No. 109-295, at 11 (2006); *Voting and Registration in the Election of November 2008*, U.S. CENSUS BUREAU tbl.4b, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html (last visited Dec. 28, 2012). Alabama's black voters out-participated white Alabamians in both the 2004 and 2008 general elections. S. Rep. No. 109-295, at 11; Bullock & Gaddie, *supra*, tbl.3; *Voting and Registration in the Election of November 2008*, *supra*, tbl.4b.

State officials' systematic defiance of federal authority is also a thing of the past. DOJ has not even objected to a state-wide Alabama preclearance submission in more than 16 years. In fact, in the 10 years preceding the 2006 reauthorization, DOJ had lodged objections to only 0.06% of preclearance submissions from *all* levels of government in Alabama: state, county, and municipal. *See* U.S. DEP'T JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/al_obj2.php (last visited Dec. 28, 2012). The only known sustained objection related to Calera, a city in Shelby County. *See* DOJ File No. 2008-1621.

Long gone, by 2006, were Governor Wallace and Alabama's all-white legislature. African Americans hold seats in the legislature at percentages that are roughly commensurate with Alabama's 26% African-American population. *See* Bullock & Gaddie, *supra*, tbl.5 (listing data for 2005 legislature); *Quick Facts for Alabama*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/01000.html (last visited Dec. 27, 2012). Alabama has made similar advances at the local level. A report submitted to the 2006 Congress showed that between 1975 and 2001, the number of elected black officials increased nearly five-fold, from 161 to 756. Bullock & Gaddie, *supra*, tbl.4.

Gone, too, was African-Americans' thin representation in other areas. In 2003, the United States and Alabama jointly asked the federal district court to terminate its injunction on state hiring practices. The parties explained that the injunction was no longer appropriate because "the racial make-up of Alabama's government is dramatically different from what it was in 1970." *United States v. Flowers*, 444 F. Supp. 2d 1192, 1193 (M.D. Ala. 2006). The

"dramatic[]" difference was that as of 2003, African Americans constituted 39% of Alabama's government workforce, a figure more than 10 percentage points greater than their representation in the general population. *Id.*

Alabama is not suggesting that it has somehow eliminated all of the race-relations issues within its borders. The State is no doubt still grappling with these issues in 2013. But they represent the same kinds of concerns governments throughout the nation, covered and non-covered, are earnestly trying to address. Meanwhile, the distinct problems that justified Congress's "uncommon exercise of congressional power" have gone away. *Katzenbach*, 383 U.S. at 334. Congress amassed no evidence in 2006 that Alabama's current leadership and their successors stand poised to "engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting" through 2031. *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

B. The 25-year reauthorization will impose unwarranted burdens on States.

The length of the 2006 extension creates particular constitutional problems. The 1975 reenactment's 7-year limit, like the 1965 Act's 5-year termination date, "tend[ed] to ensure" that the preclearance measure was "proportionate" to the harm Congress was addressing at those times. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997). In contrast, with no evidence that the same kind of constitutional harm was occurring in 2006, Congress opted for a 25-year timeframe. In making that

choice, Congress abandoned any appearance of ensuring that this legislation would remain necessary and appropriate. It chose to avoid, for two-and-a-half decades, "taking the blame for" the measure's "burdensomeness and for its defects." *Printz v. United States*, 521 U.S. 898, 930 (1997). And it chose to impose the burdens of preclearance, long after any plausible basis for doing so had expired, on a generation of state leaders whose attitudes, beliefs and openness to change exceed their predecessors' in every way.

The other State amici have given examples of how the extension is already causing their leaders to bear burdens of this sort. The pages that follow relate similar examples from Alabama. They show that preclearance is now largely serving not to achieve the laudable goals that Congress originally had in mind, but rather to undermine good government in a variety of ways.

1. The preclearance mechanism inhibits nondiscriminatory state-law reforms.

The preclearance mechanism is making it substantially more difficult for Alabama's current leaders to achieve important, much-needed reforms. Preclearance is, at the very least, delaying those reforms for long amounts of time. And it is doing so even though these reforms are obviously nondiscriminatory.

Two recent examples prove the point. Alabama's legislature recently took on the task of rewriting its entire election code to conform with advances in modern voting technology. *See* ALA. CODE §17-17-1 *et seq*. The Legislature also modernized and unified its

laws relating to government at the county level, a process that included setting residency requirements for county commissioners. *See id.* §11-3-1(a). In non-covered jurisdictions, these sorts of extensive, ameliorative changes could have gone into effect as soon as the legislature and governor reached a deal on what their omnibus bills would say. That is not what happened in Alabama. Instead, lawyers for the State spent months preparing massive documents seeking DOJ's permission to implement these laws. These submissions, which exceeded 1,000 pages in some instances, had to account for the histories of all code provisions affected by the new acts. *See* DOJ File No. 2007-3488; DOJ File Nos. 2008-427, 2008-1576, 2008-3861, 2008-5601. And despite the submissions' detail and the laws' facially nondiscriminatory nature, DOJ in one of these instances asserted that it needed more information. *See* DOJ File No. 2007-3488. In the end, DOJ approved both measures. But the process put the reforms on hold for more than a year after Alabama's leaders wanted them to go into effect.

2. Preclearance inhibits States' attempts to comply with federal law.

The 2006 reenactment is also having the ironic effect of making it more difficult for Alabama to move its governmental practices into alignment with *federal* law.

For example, §5 substantially impeded Alabama's attempts to end a web of corruption that had led DOJ to prosecute about a dozen state legislators. *See, e.g.*, Lee Roop, *Schmitz Guilty of Fraud*, *Loses Seat*, HUNTSVILLE TIMES, Feb. 25, 2009, at 1A, *available at*

2009 WLNR 4117366. For decades, many legislators had received a paycheck from state-run community colleges, creating legitimate concerns that they were peddling their legislative influence for sham jobs. When Alabama sought to ban the practice in 2007, the proponents of the *status quo* lobbied DOJ to object to the proposed change in state law. Their theory that DOJ deem the policy discriminatory was facially meritless: they claimed that many black legislators would either resign or not seek re-election if they were not allowed to simultaneously receive paychecks from the community colleges. DOJ File No. 2007-4397, Letter from Edward Still to John Tanner, Chief, Voting Section (Sept. 18, 2007). Rather than reject the legislators' concerns immediately, DOJ required Alabama to address the issue by submitting detailed historical information and employment statistics by race. *See* DOJ File No. 2007-4397, Letter from John Tanner, Chief, Voting Section to Bradley Byrne, Chancellor (Nov. 2, 2007). A team of state attorneys undertook the stout task of complying with that request, and DOJ eventually did not object. *See* DOJ File No. 2007-4397, "Supplemental Submission Under Section 5, Voting Rights Act of 1965." But in the meantime, the §5 process had stalled, and made much more burdensome, the State's effort to reform a system that DOJ itself believed to be corrupt.

Section 5 also made it harder for Alabama to implement the Help America Vote Act of 2002, 42 U.S.C. §15301 *et seq*. HAVA effectively required 54 of the State's counties and 450 of its municipalities to start using new voting machines, and also required several changes to Alabama's mail-in voter-regi-

stration form. *See id.* §15483. But simply complying with those mandates was not enough. Section 5 also required covered jurisdictions to obtain DOJ preclearance before they could use the federally mandated machines and registration form. Alabama and its subdivisions overcame that difficulty, but only after filing several voluminous submissions with DOJ. *See* DOJ File Nos. 2006-2900, 2006-3444, 2006-3446, 2006-3449, 2006-3450, 2006-3454, 2006-3470 through 2006-3484, 2006-3533, 2006-3537, 2006-3539 through 2006-3541, 2006-3548, 2006-3551, 2006-3555, 2006-3556, 2006-3568 through 2006-3580, 2006-3583 through 2006-3594, 2006-4509.

3. The preclearance mechanism allows DOJ to discriminate between covered States.

Judge Williams rightly noted the "oddity," inherent in §5, of giving the federal government power to block covered States from enforcing the same laws that are in force and fully legal in uncovered States. Pet. App. 102a. The preclearance mechanism also creates a separate, equally troubling potential for disparate treatment. It makes it possible for DOJ to approve a particular state-law reform in some covered States, while objecting to the same in others.

An Alabama-specific example could arise before this Court holds oral argument in this case. The Alabama Legislature has passed a statute, modeled on laws from other States, that requires voters to provide proof of citizenship when they register to vote. *See* ALA. CODE §31-13-28. DOJ precleared a virtually identical Arizona law in 2005. (This Court is set to decide, in *Arizona v. Inter Tribal Council*,

No. 12-71, the unrelated issue of whether Arizona's law is preempted as applied to federal elections.) More recently, in 2011, DOJ precleared Georgia's substantially similar law. Yet when Alabama asked DOJ to preclear Alabama's virtually identical enactment, the agency responded by requiring a supplemental submission that may make it impossible for the law to go into effect.

Rather than rely on the law's facially nondiscriminatory nature and previous decisions upholding these laws, the agency has demanded stacks of additional documents. Alabama is to specify, "[f]or each person currently registered to vote in the state," the "year of their initial registration to vote," their "year of birth," their "race," "the method by which they registered to vote," and "whether they have a Spanish surname." DOJ File Nos. 2011-5037 & 2011-5304, Letter from T. Christian Herren, Chief, Voting Section, to Winfield Sinclair, Assistant Attorney General, at 3 (Nov. 27, 2012). Alabama also is to determine "the number of individuals, by race and by Spanish surname," for whom it has issued driver's licenses and certain kinds of specialized ID cards. *Id.* And Alabama is to provide, among other things, "the names, race, and daytime telephone numbers of the persons making comments or suggestions" to the Legislature about the law as well as "[c]opies of any correspondence among or between members of the legislature, other elected officials, employees, consultants, and/or members of the public that addresses the proposed changes." *Id.* at 4.

Complying with these requests will not be easy. DOJ gave the State only 60 days to respond. Doing so will require the State to make dubious individ-

ualized, race-focused determinations about millions of people. Much of the information is not readily available in any preexisting database, and some of the information is privileged. Yet DOJ has said that if Alabama does not provide the information by January 27, the agency reserves the right to block the State from adopting the same, facially neutral law that has already been precleared for implementation in two other States. *See id.*

4. Section 5 undermines state sovereignty in unanticipated ways.

The reenactment also makes it harder for state officials to do their jobs in ways no one in Congress likely considered. One recent example arose this past August, when Hurricane Isaac threatened the Gulf Coast, and the governor ordered an evacuation. It just so happened that local elections had been scheduled for that time. As the storm approached the shores, DOJ sent a letter reminding Alabama that any "postponement of elections" due to the hurricane would be subject to its "review under Section 5." Letter from T. Christian Herren, Chief, Voting Rights Section, to Beth Chapman, Secretary of State, and Luther Strange, Attorney General, at 1 (Aug. 27, 2012). To DOJ's credit, it considered and approved the resulting preclearance requests on an expedited track. But at a time when state and local officials should have been focused on more pressing matters, they were seeking approval of their disaster response from the DOJ Voting Rights Section.

This example is extreme, but it underscores just how unnecessary and pervasive the preclearance mechanism has become. Imposing these sorts of bur-

dens on States was a necessary and appropriate exercise of emergency federal power when George Wallace was standing in a Tuscaloosa schoolhouse door and Bull Connor was turning hoses on innocent protestors on Birmingham's downtown streets. It is not a necessary and appropriate exercise of federal power under the different conditions present today.

* * *

Walking down those same Birmingham streets is a different experience now. Signs and monuments on the protestors' former march path document, for those tracing their steps in 2013, the events that happened in the same places six decades before—the courage of the Freedom Riders; the leadership of Dr. King and Rev. Shuttlesworth; the death of four little girls. *See generally* Candice Jackson, *Touring the Civil Rights Trail*, WALL ST. J., Mar. 7, 2009, http://online.wsj.com/article/SB123638803034058571.html. These memorials cannot erase the terrible things that happened in Alabama in the past, and they are not intended to do so. To the contrary, they serve to remind a new generation of Alabamians of the history they have inherited and their obligation to ensure that it does not happen again. In the years to come, the State's leaders will undoubtedly make mistakes in their attempts to help their fellow Americans form a more perfect Union. But the federal reforms of the Civil Rights Era have brought Alabama back to its proper place in the constitutional system, where "[t]he good faith of the States . . . provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall

be the supreme Law of the Land.'" *Alden v. Maine*, 527 U.S. 706, 755 (1999) (quoting U.S. CONST. art. VI). It is time for Alabama and the other covered jurisdictions to resume their roles as equal and sovereign parts of these United States.

CONCLUSION

The Court should reverse the judgment of the D.C. Circuit.

Respectfully submitted,

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