NO. 12-96

In the
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

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

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

BRIEF OF FORMER GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici Hans von Spakovsky, J. Christian Adams, Clint Bolick, Roger Clegg, Charles J. Cooper, Robert N. Driscoll, William Bradford Reynolds, and Bradley Schlozman have all served in senior positions in the Civil Rights Division of the Department of Justice. *Amicus* Joel Mandelman served as Deputy General Counsel of the U.S. Commission on Civil Rights. *Amici* have extensive experience with the Voting Rights Act and the Department's enforcement policies, and have a substantial interest in ensuring that that any race-based remedial measures, such as Section 5 of the Act, comply with the Constitution. A number of *amici* joined a brief in support of the petitioner in the last major constitutional challenge to Section 5, *Northwest Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322.

SUMMARY OF ARGUMENT

This Court has rarely mentioned Section 5 of the Voting Rights Act ("VRA") in recent years without mentioning in the same breath the serious constitutional issues raised by that provision. Section 5 prohibits "covered jurisdictions" from implementing any changes to their election procedures until those changes are submitted to, and approved by, either the Attorney General or a three-judge district court. *See* 42 U.S.C. § 1973c. In doing

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Counsel for all parties have consented to the filing of this brief.

so, Section 5 differentiates between the states despite "our historic tradition that all the states enjoy 'equal sovereignty'"; uses a coverage formula based on 40-year-old data that no longer reflects where discrimination is most likely to occur; and forces states to rely excessively on racial considerations in designing their election policies. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04 (2009); *see also Perry v. Perez*, 132 S.Ct. 934, 942 (2012) (noting the "'serious constitutional questions' raised by § 5's intrusion on state sovereignty").

In light of this Court's repeated articulation of the constitutional flaws of Section 5, Congress and DOJ could have taken a number of different steps to ease those concerns and place the statute on more sound constitutional footing. Congress, for example, could have updated the coverage formula to ensure a better fit between current burdens and current needs, or relaxed the substantive standard for granting preclearance. DOJ, for its part, could have adopted a restrained enforcement strategy that minimized costly litigation and quickly precleared voting changes in covered jurisdictions that were similar to valid statutes in non-covered jurisdictions.

Instead, both Congress and DOJ have taken a number of actions that have only exacerbated the already-serious constitutional flaws of Section 5. In the 2006 reauthorization of the VRA, Congress abrogated two of this Court's most important decisions interpreting Section 5, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"). Both of those decisions relied on the canon of

constitutional avoidance and were critical to preventing an unconstitutionally overbroad application of Section 5. Yet the 2006 reauthorization discards *Georgia* and *Bossier Parish II*, and significantly expands the substantive grounds on which DOJ or the district court can refuse to preclear a change in voting procedures.

DOJ, too, has used Section 5 to block a number of voting changes in covered jurisdictions that closely resemble laws already in force in non-covered jurisdictions. For example, this Court has held that an Indiana statute requiring voters to present photo identification is facially constitutional, *see Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), yet DOJ has sought to prevent Texas and South Carolina from adopting similar legislation. Worse yet, many of DOJ's objections to preclearance rely on amorphous allegations of discriminatory "purpose" that cannot be resolved without extensive and costly discovery and, often, a full trial on the merits. Covered jurisdictions are subject to these burdens solely because of a formula that relies on nearly 40-year-old data and has taken no account whatsoever of the fact that "[t]hings have changed" over the intervening four decades. *Northwest Austin*, 557 U.S. at 202.

Moreover, rampant intervention by private parties and interest groups in recent Section 5 cases has significantly exacerbated the inherent constitutional burdens of the statute. Private intervention is unobjectionable in a normal case in which the plaintiff bears the burden of proof. But it is a staggering intrusion into state sovereignty in the

Section 5 context, as intervention allows private parties and interest groups to flip the burden of proof to a covered jurisdiction to justify its duly enacted laws. Indeed, the D.C. district court has routinely allowed private intervenors to raise claims and arguments that DOJ itself has found to be meritless. Intervention by dozens of private parties also significantly increases the monetary costs of Section 5 litigation by compounding the burdens of discovery, motions practice, briefing, and trial. Private parties have a more-than-adequate remedy for any alleged discrimination under Section 2 of the VRA and the Equal Protection Clause. Allowing them to have a second bite at the apple by intervening in Section 5 cases serves no purpose other than to magnify the burdens of the preclearance remedy for covered jurisdictions.

* * *

Rather than heed this Court's repeated calls for restraint, Congress' and DOJ's recent actions—as well as unchecked private intervention in judicial preclearance cases—have only worsened the grave constitutional flaws of Section 5. Things have unquestionably changed for the better in covered jurisdictions over the last 40 years, yet the burdens of Section 5 have become more onerous. Enough is enough. Because the political branches are unable or unwilling to adapt Section 5 to dramatically changed circumstances, this Court's intervention is now warranted. The Court should hold that conditions in covered jurisdictions no longer "continue to justify" the extraordinary burdens imposed by Section 5. *Northwest Austin*, 557 U.S. at 211.

ARGUMENT

I. EVEN A SIMPLE REAUTHORIZATION OF SECTION 5 IN ITS EXISTING FORM WOULD HAVE BEEN UNCONSTITUTIONAL

The 2006 reauthorization of Section 5 would not have passed constitutional muster even if Congress had made no substantive changes to the statute. As Shelby County explains, the formula used to determine which jurisdictions are covered by Section 5 relies on badly outdated data and fails to identify the jurisdictions most likely to engage in discriminatory voting practices. Pet. Br. 43-54; *see also Shelby County v. Holder*, 679 F.3d 848, 889-900 (D.C. Cir. 2012) (Williams, J., dissenting) (concluding that the "equivocal evidence" of discrimination in covered jurisdictions cannot "sustain" Section 5). Indeed, the disparity in voter registration rates between African-American and white citizens in covered jurisdiction has "nearly vanished," and minority registration and turnout rates *exceed* those of white voters in several covered jurisdictions. *Northwest Austin*, 557 U.S. at 227 (Thomas, J., concurring in part and dissenting in part).

Even if there were some plausible nexus between the coverage formula and likely constitutional violations, the severe remedy of forcing covered jurisdictions to seek advance federal approval of their duly enacted laws is "so out of proportion . . . that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997); *see* Pet. Br. 24-33; *Northwest Austin*, 557 U.S. at 228 (Thomas, J., concurring in part and dissenting in part) (concluding

that "the existence of discrete and isolated incidents of interference with the right to vote" is not "sufficient justification for the imposition of § 5's extraordinary requirements").

Section 5's use of an "effects" test also raises serious constitutional concerns, as it forces covered jurisdictions to engage in race-conscious decisionmaking. For example, covered jurisdictions will face a strong incentive to engage in racial gerrymandering in order to ensure racially proportionate election results. *See* Part III.B, *infra*; *see also Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (noting that the disparate-impact provisions in Title VII raise serious equal protection concerns because they "place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes").

The Fourteenth and Fifteenth Amendments protect every citizen's right to vote and right to have that vote accurately tallied, regardless of the voter's race. But no citizen has a constitutional right to any particular electoral *outcome—i.e.*, being represented by someone of the same race, national origin, or ethnic background. Yet Section 5's "effects" test mandates just such a result—a particularly dramatic illustration of why the statute exceeds Congress' enforcement authority under the Fourteenth and Fifteenth Amendments.

II. CONGRESS AGGRAVATED THE INHERENT CONSTITUTIONAL DEFECTS OF SECTION 5 BY OVERRULING THIS COURT'S DECISIONS AND ALTERING THE SUBSTANTIVE STANDARD FOR PRECLEARANCE

In order to obtain preclearance under Section 5, a covered jurisdiction must demonstrate that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). The "limited substantive goal" of Section 5 is to ensure that "'no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise.'" *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

When Congress reauthorized Section 5 in 2006, it did not write on a blank slate. This Court's decisions in *Georgia v. Ashcroft* and *Bossier Parish II* had interpreted both the "purpose" and "effects" prongs of the statutory test in a manner that ameliorated the inherent constitutional burdens of the statute. Remarkably, Congress abrogated both of those decisions in the 2006 reauthorization. As a result, even though covered jurisdictions have made great progress since the VRA was enacted in 1965—and now perform as well as (or better than) non-covered jurisdictions on most measures of voting equality, *see Northwest Austin*, 557 U.S. at 202-04; Pet. Br. 28-33, 43-54—it has become considerably harder for covered jurisdictions to meet the substantive standard for preclearance.

A. This Court's Decisions in *Georgia v. Ashcroft* and *Bossier Parish II* Were Critical To Alleviating the Constitutional Flaws of Section 5

1. *Bossier Parish II* involved a challenge to the new electoral districts for a Louisiana school board. It was undisputed that, compared to the preexisting "benchmark" plan, the new plan "did not worsen the position of minority voters," and thus did not have a retrogressive effect. 528 U.S. at 324. The Attorney General nonetheless denied preclearance, arguing that new plan had a discriminatory purpose because the Parish did not maximize the number of majority-minority districts. *Id.* at 325.

This Court squarely rejected DOJ's interpretation of the "purpose" test, holding that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." *Id.* at 341. That is, the relevant inquiry is not whether there was *any* discriminatory purpose, but whether there was a *specific* purpose to retrogress minority voting strength compared to the benchmark plan. As the Court explained, Section 5 "prevents nothing but backsliding, and preclearance under Section 5 affirms nothing but the absence of backsliding." *Id.* at 336. A holding that Section 5 reached any kind of discriminatory purpose also would have been inconsistent with this Court's decisions interpreting the "effects" prong of the statute as requiring "*retrogressive* effects." *Beer*, 425 U.S. at 141 (emphasis added); *see id.* (noting that "a legislative reapportionment that enhances the position of racial minorities with respect to their

effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account or race").

The decision in *Bossier Parish II* expressly turned on the canon of constitutional avoidance. This Court emphasized that extending Section 5 to "discriminatory but nonretrogressive vote-dilutive purposes" would "blur the distinction between Section 2 and Section 5," and "change the Section 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." 528 U.S. at 336. That reading of the statute would "exacerbate the 'substantial' federalism costs the preclearance procedure already exacts . . . perhaps to the extent of raising concerns about Section 5's constitutionality." *Id.*

2. *Georgia v. Ashcroft*, which addressed Georgia's redistricting plans following the 2000 census, was an equally important decision regarding the "effects" prong of the preclearance standard. The challenged plans, which were strongly supported by African-American legislators, "unpacked" the most heavily concentrated majority-minority districts in order to create several new "influence" districts. 539 U.S. at 470-71. That is, the legislature chose to reduce the number of districts with a black voting age population in excess of 60% and instead create additional districts with a black voting age population between 25% and 50%. The goal of this plan was to "bring[] people together" by eliminating districts that overwhelmingly consisted of voters of a single race. *Id.* at 470. The district court nonetheless refused to preclear Georgia's plans,

holding that the plans had a retrogressive effect because they reduced the opportunity for the "black candidate of choice" to win election, and "diminish[ed] African American voting strength" in existing majority-minority districts. *Id.* at 474.

This Court reversed. The Court held that the question whether a challenged practice has a retrogressive effect "depends on an examination of *all the relevant circumstances*, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Id.* at 479 (emphasis added). The comparative ability of a minority group to elect a candidate of its choice is "important" in the retrogression inquiry but "cannot be dispositive or exclusive." *Id.* at 480.

The Court further held that "Section 5 gives States the flexibility to choose one theory of effective representation over the other." *Id.* at 482. Some states might choose to create a small number of "safe" majority-minority districts. That approach "virtually guarantee[s]" the election of the group's preferred candidate, but "risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts." *Id.* at 480-81. Alternatively, a state might choose to create "influence districts" with lower percentages of minority voters. This increases the risk that the preferred candidate will lose, but promotes the creation of multi-racial coalitions. *Id.* at 481. The core holding of *Georgia* is that Section 5 does not mandate one approach over the other, but

leaves each state substantial discretion about how best to accommodate its own unique interests. *See id.* at 483 (Section 5 "leaves room for States to use these types of influence and coalitional districts").

The Court emphasized once again that "[t]he purpose of the [VRA] is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Id.* at 490. Thus, "the [VRA], as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Id.* at 490-91.

Justice Kennedy concurred. While agreeing that "our decisions controlling the § 5 analysis require the Court's ruling here," he noted that "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5." *Id.* at 491 (Kennedy, J., concurring). Justice Kennedy emphasized that "the discord and inconsistency" between § 2 and § 5 "should be confronted," and that "[t]here is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Id.*

B. Congress Worsened the Inherent Problems of Section 5 by Overruling *Georgia* and *Bossier Parish II*

Because of the badly outdated coverage formula and disproportionate remedy, even a simple

reauthorization of Section 5 would have been unconstitutional. *See supra* Part I. But the 2006 reauthorization goes far beyond that, by significantly broadening the substantive grounds on which voting changes can be denied preclearance. Congress expressly overruled this Court's decisions in *Georgia* and *Bossier Parish II*, even though both of those decisions relied on the canon of constitutional avoidance and were critical to alleviating Section 5's inherent constitutional defects. That is, despite "warning upon warning upon warning regarding Section 5's constitutional frailties," Congress "responded in its 2006 extension of Section 5 not with conciliation toward the Court's concerns but by poking the Court in the eye."[2]

1. As explained above, *Georgia* gave states significant discretion to choose whether to have a smaller number of "safe" majority-minority districts or a larger number of "influence" districts. The 2006 amendments to the VRA foreclose that choice. Congress rejected *Georgia*'s totality-of-the-circumstances analysis and instead provided that the sole inquiry is whether the challenged law "has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b); *see also id.* § 1973c(d) (providing that the purpose of this amendment "is to protect the ability of [minority] citizens to elect their preferred candidates of choice").

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[2] Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 American Univ. L. Rev. 1575, 1652-53 (2010).

The "exclusive focus" of Section 5 is now "whether the plan diminishes the ability of minorities (always assumed to be a monolith) to 'elect their candidates of choice,' irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration—and thus less of the political isolation that concentration spawns." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting). As Judge Williams explained, this amendment to Section 5's substantive standard "not only mandates race-conscious decisionmaking, but a particular brand of it." *Id.*

The effect will be ossification of existing majority-minority districts, which will prevent policymakers from experimenting with different types of districts that may promote good governance and cooperation between racial groups. For example, influence and coalition districts may "increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group." *Georgia*, 539 U.S. at 481. Yet the 2006 amendment to Section 5 creates a one-way ratchet that bars covered jurisdictions from making existing majority-minority districts less "safe." This is a severe intrusion into state redistricting prerogatives, and it guarantees that racial considerations will continue to be front and center in the redistricting process.

Congress' overruling of *Georgia* thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between Section 5 and the Reconstruction Amendments'

commitment to nondiscrimination." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting).

2. In the 2006 reauthorization, Congress also abrogated this Court's decision in *Bossier Parish II* by adding to Section 5 a new provision stating that the term "purpose" "shall include *any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added); *see also* H.R. Rep. No. 109-478, at 93 (Congress "rejects the Supreme Court's holding in *Reno v. Bossier Parish*").

This change is no mere technicality. *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 217 n.165 (2007) (arguing that the "potential impact" of overruling *Bossier Parish II* "should not be understated"). Because Section 5 reverses the ordinary burden of proof, the new "any discriminatory purpose" standard will effectively force covered jurisdictions to prove that hundreds of legislators *did not* act with a particular motivation in passing the challenged law. *See Elkins v. United States*, 364 U.S. 206, 218 (1960) (it is "never easy to prove a negative"); *Patterson v. New York*, 432 U.S. 197, 211 n.13 (1977) (finding it "generally unfair" to require a litigant to prove a negative).

That inherently amorphous inquiry will be even more complicated when race and partisan affiliation are closely correlated. This Court has repeatedly held that discriminatory purpose requires an action to be taken "'because of,' not merely in 'spite of,'" racial considerations. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). That is, "a jurisdiction may engage in constitutional political gerrymandering,

even if it so happens that the most loyal Democrats happen to be [minority] Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("[c]aution is especially appropriate" before finding a discriminatory purpose when "the voting population is one in which race and political affiliation are highly correlated"). When the burden of proof is on the state, and race and partisanship substantially overlap, it will be extremely difficult for the state to prove that it was acting with a legitimate partisan purpose rather than an unlawful racial purpose. As a result, Section 5 will often serve to protect the *political party* favored by minority voters, even if the challenged voting change was not made "on account of" (*i.e.*, because of) racial considerations.

Moreover, if Section 5 broadly bars "any" discriminatory purpose, then DOJ can use it to block voting changes on grounds that have nothing to do with retrogression. Indeed, in *Bossier Parish II*, DOJ divined a discriminatory purpose from the district's *failure to maximize* minority seats, even though it was undisputed that there was no actual retrogression compared to the benchmark plan. 528 U.S. at 324-25; *see also Miller*, 515 U.S. at 927 (DOJ's "implicit command that States engage in presumptively unconstitutional race-based districting brings the Act . . . into tension with the Fourteenth Amendment").

By overruling *Bossier Parish II*, Congress has now reauthorized the same type of free-ranging "purpose" inquiry under which DOJ pursued its patently

unconstitutional failure-to-maximize policies throughout the 1990s. *See Shelby County*, 679 F.3d at 887-88 (Williams, J., dissenting) (discriminatory purpose claims under Section 5 were "precisely the device that [DOJ] had employed in its pursuit of maximizing majority-minority districts at any cost"). As Professor Persily presciently explained in 2007, "[t]here is a risk that the purpose inquiry will turn into another opportunity for partisan infection of the preclearance process—for example, with a Democratic-leaning DOJ determining that all Republican gerrymanders in jurisdictions with heavy minority populations have discriminatory purposes or finding that failure to maximize the number of majority-minority districts constitutes discriminatory purpose." Persily, 117 Yale L.J. at 217 n.165. At the very least, "[t]he purpose inquiry provides a lot of discretion to the DOJ," and "[j]urisdictions may feel that they must accede to DOJ pressures applied in the short, stressful period preceding an election." *Id.*

3. The D.C. Circuit majority refused to address Congress' alteration of the preclearance standard on the ground that Shelby County had not brought a *separate* challenge to the substantive amendments to Section 5. *See Shelby County*, 679 F.3d at 883-84. But Shelby County did bring a facial challenge to "Congress' decision in 2006 to reauthorize until 2031 the preclearance obligation of Section 5 of the VRA under the pre-existing coverage formula." Pet. 2. The substantive standard for granting preclearance is critical to any assessment of whether Section 5, on its face, is "congruen[t] and proportional[]" to the harm Congress sought to remedy. *Boerne*, 521 U.S. at 520. As Judge Williams explained, "[t]o answer

that question one must necessarily first assess the severity of the consequences of coverage." *Shelby County*, 679 F.3d at 888 (Williams, J., dissenting).[3] Congress' abrogation of *Georgia* and *Bossier Parish II* is properly before the Court, and further underscores the unconstitutionality of the 2006 reauthorization of Section 5.

III. DOJ'S AGGRESSIVE ENFORCEMENT STRATEGY HAS FURTHER EXACERBATED SECTION 5'S CONSTITUTIONAL DEFECTS

Not content with both the reauthorization of Section 5 and a significant expansion of the substantive grounds on which preclearance can be denied, DOJ has also doubled down on an aggressive enforcement strategy that has dramatically increased the costs and burdens borne by covered jurisdictions.

In particular, DOJ has refused to preclear a number of state laws in covered jurisdictions that are routinely implemented in non-covered jurisdictions. As a result, covered jurisdictions must engage in costly and wasteful litigation in order for their statutes to take effect, while similar laws in non-covered jurisdictions are presumptively valid and may take effect immediately. *See Shelby County*, 679 F.3d at 885 (Williams, J., dissenting) (Section 5

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[3] The majority was also wrong on the facts, as Shelby County did challenge Congress' modifications of the substantive preclearance standard. *See* Plaintiff's Consolidated Reply Memorandum in Support of Motion for Summary Judgment at 50-51, Dkt. 65, No. 1:10-cv-651 (D.D.C. Dec. 13, 2010); Reply Brief for Appellant at 24-25, No. 11-5256 (D.C. Cir. Dec. 15, 2011).

requires "state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes"). The sole reason for this grossly disparate treatment is a formula based on 40-year-old data that fails to acknowledge in any way that "[t]hings have changed" in covered jurisdictions since the VRA was enacted in 1965. *Northwest Austin*, 557 U.S. at 202.

A. DOJ Has Refused To Preclear Legislation That is Unquestionably Permissible in Non-Covered Jurisdictions

1. The second-class status of covered jurisdictions is most readily apparent in the context of laws requiring voters to present photo identification at the polls.

This Court has emphasized that "[t]here is no question about the legitimacy or importance of [a] State's interest in counting only the votes of eligible voters." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op.). Moreover, "the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* While "the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.*; *see also id.* at 197 (noting that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process").

The Court thus rejected a facial challenge to Indiana's voter identification law. For most voters,

the law was unlikely to "even represent a significant increase over the usual burdens of voting." *Id.* at 198. And, although "a somewhat heavier burden may be placed on a limited number of persons," the Court concluded that the "severity" of this burden would be lessened by a provision allowing voters to cast provisional ballots if they did not have photo identification at the polls. *Id.* at 199. The challengers bore a "heavy burden of persuasion," and this Court found that the "precise interests advanced by the State" were "sufficient to defeat [the] facial challenge. *Id.* at 200, 203; *see also id.* at 204 (Scalia, J., concurring) (concluding that the "burden at issue is minimal and justified").

Non-covered jurisdictions are thus free to enact laws requiring voters to present photo identification, and Indiana, Kansas, Pennsylvania, and Tennessee have done just that. Those statutes are deemed facially valid, and the burden of proof is on the plaintiffs in any Section 2 or Equal Protection challenge.

In light of this Court's decision in *Marion County*, one might have expected that DOJ would readily preclear voter identification statutes in covered jurisdictions as well. Instead, however, DOJ sought to prevent Texas and South Carolina from implementing statutes that closely resemble the Indiana law this Court found to be facially constitutional.[4] Both cases have entailed massive

[4] The Texas and South Carolina statutes are also similar to a Georgia voter identification law that DOJ precleared in 2005 under the previous administration.

document discovery, dozens of intervenors, dueling expert witnesses, and trials with live testimony. Even though the Texas and South Carolina statutes were both enacted in May 2011, neither was in force for the fall 2012 election cycle because Section 5 litigation remained pending.[5]

This disparate treatment is particularly baffling given that Texas and South Carolina have *higher* minority registration and voting rates, and more African-American elected officials, than Indiana. *See Shelby County*, 679 F.3d at 902 (Williams, J., dissenting). Yet DOJ has refused to allow Texas' and South Carolina's duly enacted statutes to take effect, and the Attorney General has grossly mischaracterized these statutes as "poll taxes."[6] It strains credulity to suggest that statutes offering *free* identification to voters—and that are similar to a statute this Court found to be facially constitutional—are akin to the most egregious form of voting discrimination from the Jim Crow era. *See Gonzalez v. Arizona*, 677 F.3d 383, 408-410 (9th Cir. 2012) (*en banc*), *cert. granted* No. 12-71 (rejecting

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[5] After nearly a year of litigation, South Carolina received judicial preclearance of its voter identification statute, albeit not in time for the 2012 election cycle. *See South Carolina v. United States*, 2012 WL 4814094 (D.D.C. Oct. 10, 2012). The D.C. district court refused to preclear Texas' voter identification law, *see Texas v. Holder*, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), and Texas has announced that it intends to appeal that decision.

[6] *See* Charlie Savage, *Holder, at NAACP Event, Criticizes Voter ID Laws* (July 10, 2012), *available at* http://thecaucus.blogs.nytimes.com/2012/07/10/holder-at-n-a-a-c-p-event-criticizes-voter-id-laws/.

argument that a proof-of-citizenship requirement was analogous to a poll tax because that requirement "is related to the state's legitimate interest in assessing the eligibility and qualifications of voters … and the burden is minimal under [*Marion County*]").

2. These are not isolated examples. Eighteen states do not currently offer *any* in-person early voting.[7] Yet DOJ refused to preclear a Florida law that merely altered the days and times of early voting, while preserving the same total number of early voting hours (and adding new weekend hours and days). In refusing to preclear that change, DOJ advanced exactly the sort of amorphous, purpose-based claim that this Court found constitutionally problematic in *Bossier Parish II*, but that Congress reinvigorated in the 2006 reauthorization.[8] Florida was not allowed to implement these trivial changes in its election procedures until it proved the negative that its legislators were *not* acting with such a purpose.

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[7] *See* National Conference of State Legislatures, *Absentee and Early Voting* (updated September 4, 2012), *available at* http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx.

[8] *See* United States' Proposed Findings of Fact and Conclusions of Law at 17-25, *Florida v. Holder*, No. 1:11-cv-01428 (D.D.C. May 3, 2012); *see also* United States' Proposed Findings of Fact and Conclusions of Law at 24, *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. June 25, 2012) (asserting that Texas' "stated purposes" for adopting a photo identification requirements "cloak a discriminatory purpose"); *id.* at 63-71.

Similarly, in November 2008, voters in Kinston, North Carolina (which is a majority African-American city) approved a referendum shifting to a system of non-partisan local elections. Countless jurisdictions in the United States use some form of non-partisan elections to choose local officials or judges. Yet DOJ refused to preclear the Kinston plan on the rather paternalistic theory that minority candidates would receive fewer "crossover" votes if they could not identify themselves as Democrats. *See LaRoque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012), *cert. denied* No. 12-81.[9] After nearly three years of litigation, and on the eve of a second trip to the D.C. Circuit, DOJ withdrew its objection and mooted the case. *Id.*

B. DOJ Has a Long Record of Overreach in Section 5 Cases

This overreach is nothing new. Throughout the 1990s, DOJ routinely invoked a discriminatory "purpose" as the basis for withholding preclearance from redistricting plans that did not *maximize* minority voting strength. For example, in *Miller v. Johnson*, DOJ twice denied preclearance of Georgia's redistricting plans on the ground that the state "'failed to explain adequately' its failure to create a third majority-minority district." 515 U.S. at 907. Georgia eventually obtained administrative preclearance from DOJ only by adopting a severely gerrymandered plan that used the ACLU's so-called "max-black" plan as the benchmark. *Id.* at 907-08.

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[9] *Amicus* J. Christian Adams expresses no position on the Kinston case.

DOJ's approach to preclearance effectively forced Georgia to violate the Equal Protection Clause. Race was "the predominant, overriding factor" explaining why the new plan attached to existing districts "various appendages containing dense majority-black populations." *Id.* at 920. As this Court explained, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear that [DOJ] was driven by its policy of maximizing majority-black districts." *Id.* at 924. The Court found DOJ's position to be "insupportable," and emphasized that "[w]e do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 922-24. "In utilizing § 5 to require States to create majority-minority districts wherever possible, [DOJ] expanded its authority under the statute beyond what Congress intended and we have upheld." *Id.* at 925. DOJ eventually agreed to pay nearly $600,000 in attorneys' fees to the plaintiffs for the protracted litigation in the *Miller* case.[10]

Similarly, in a case arising out of Louisiana's 1990 redistricting, DOJ "let it be known that preclearance would not be forthcoming for any plan that did not include at least two 'safe' black districts out of seven." *Hays v. Louisiana*, 839 F. Supp. 1188,

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[10] *See* Letter from William Moschella, Assistant Attorney General, to Hon. James Sensenbrenner (Apr. 12, 2006) at 3, *at* http://www.scribd.com/doc/48673021/2006-0412-Ltr-to-House-of-Rep-re-Voting-Rights-Act-Procedures ("Moschella Letter") (detailing cases in which the Civil Rights Division was admonished by a court or forced to pay attorneys' fees to the opposing party).

1196 n.21 (W.D. La. 1993). The court held that "neither Section 2 nor Section 5" justifies this approach, and that DOJ's position was "nothing more than . . . 'gloss' on the [VRA]—a gloss unapproved by Congress and unsanctioned by the courts." *Id.*; *see also id.* (DOJ "arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies"); *Hays v. Louisiana*, 936 F. Supp. 360, 369, 372 (W.D. La. 1996) (DOJ "impermissibly encouraged—nay, mandated—racial gerrymandering," and "the Legislature succumbed to [DOJ's] illegitimate preclearance demands"). DOJ paid more than $1.1 million to settle claims for attorneys' fees arising out of the *Hays* case. *See* Moschella Letter at 4.[11]

IV. EXCESSIVE INTERVENTION BY PRIVATE PARTIES AND INTEREST GROUPS IN JUDICIAL PRECLEARANCE CASES HAS COMPOUNDED THE INHERENT CONSTITUTIONAL BURDENS OF SECTION 5

Finally, rampant intervention by private parties in judicial preclearance cases has significantly increased both the federalism costs and the monetary costs of the preclearance regime. This is not just some procedural technicality: in several recent Section 5 cases, states have been forced to litigate against dozens of interest groups and private parties in addition to DOJ. For example, in *Texas v. Holder*,

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[11] *See also Shaw v. Hunt*, 517 U.S. 899, 912-13 (1996) (holding that North Carolina redistricting plan violated the Equal Protection Clause, and that DOJ's insistence upon the maximum number of race-based districts was "unsupportable").

No. 12-cv-203 (D.D.C.), Texas' judicial preclearance suit was opposed by more than 30 private intervenors, represented by 36 attorneys (compared to just 10 DOJ attorneys). *See also South Carolina v. United States*, No. 12-cv-203 (D.D.C.) (court allowed intervention by 18 private parties, represented by more than 25 attorneys); *Texas v. United States*, No. 11-cv-1303 (D.D.C) (intervention by 24 private parties, represented by 22 lawyers); *Florida v. United States*, No. 11-cv-1428 (D.D.C.) (29 private intervenors, represented by 19 attorneys).

This unchecked intervention by private parties has exacerbated the constitutional burden of Section 5 in two distinct but related ways:

First, the D.C. district court has allowed private intervenors and interest groups to raise Section 5 objections to laws that DOJ has not challenged. For example, DOJ conceded that Texas' 2010 redistricting plan for the state senate had neither a retrogressive purpose nor a retrogressive effect, yet the district court allowed private parties to interpose objections to that plan under Section 5.[12]

In a run-of-the-mill case in which the plaintiff bears the burden of proof, intervention is simply a fact of life for litigants; indeed, it often promotes

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[12] *See Texas v. United States*, No. 11-cv-1303, 2012 WL 3671924, at *21 (D.D.C. Aug. 28, 2012) ("The United States has not objected to this plan, but the Davis Intervenors, the Texas State Conference of NAACP Branches, the League of United Latin America Citizens, and the Texas Legislative Black Caucus argue that the Senate Plan retrogresses and was enacted with discriminatory intent.").

efficiency by ensuring that similar claims are all litigated together in one forum. But Section 5, alone among all federal statutes, inverts the ordinary burden of proof and forces covered jurisdictions to justify their duly enacted laws. That is a severe intrusion into state sovereignty even when DOJ is responsible for determining which voting changes should be challenged. But it becomes constitutionally intolerable when a single private party or interest group is able to flip the burden of proof to a state to justify its own legislation. And that burden is only magnified by the new "purpose" standard from the 2006 reauthorization, which forces covered jurisdictions to *disprove* that they acted with a particular intent. *See supra* Part II.B.

Second, rampant intervention in Section 5 cases has also significantly increased the out-of-pocket litigation costs incurred by covered jurisdictions. Each additional intervenor means more discovery requests, more motions practice, more expert reports, and additional merits briefs that often raise distinct arguments and claims. Over the course of a six-month or year-long trial, these costs can become substantial.

Worse yet, these costs are unnecessary and redundant given that there is often substantial (if not complete) overlap between the private intervenors in a Section 5 preclearance case and the plaintiffs in a Section 2 challenge to the same state law. For example, in the pending challenges to Texas' new redistricting plans, more than half of the private

intervenors in the Section 5 case are also plaintiffs in the parallel Section 2 proceedings.[13]

Section 2 suits provide a more-than-adequate remedy for any alleged discriminatory practices. As this Court has explained, even "[w]here the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." *Morris v. Gressette*, 432 U.S. 491, 506–07 (1977). Parties concerned about the short-term impact of a recently enacted law "may as always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." *Shelby County*, 679 F.3d at 888 (Williams, J., dissenting). In short, "the ubiquitous availability of Section 2 is of course a reminder that Section 5 was created for the *specific* purpose of overcoming state and local resistance to federal antidiscrimination policy." *Id.* (emphasis added). As Shelby County explains, the pervasive discrimination and legislative gamesmanship that led Congress to enact Section 5 ceased to exist long ago, and can no longer justify the extraordinary preclearance remedy. Pet. Br. 27-33.

CONCLUSION

DOJ's current approach to Section 5 closely resembles its enforcement strategy during the 1990s, which was roundly rejected by the courts as indefensible and, indeed, unconstitutional. Because

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[13] *Compare Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex.) and *Davis v. Perry*, No. 5:11-cv-788 (W.D. Tex) (Section 2 cases); *with Texas v. United States*, No. 11-cv-1303 (D.D.C.) (Section 5 case).

of DOJ's aggressive approach to Section 5 enforcement—as well as rampant private intervention in judicial preclearance cases—covered jurisdictions must incur millions of dollars of costs, countless hours of wasted time, and the inherent sovereign indignity of being forced to go "hat in hand" to federal officials just to implement their duly enacted laws. And those laws are often nearly identical to facially valid legislation in non-covered jurisdictions.

The 2006 reauthorization of Section 5, which continues to rely on the badly outdated coverage formula, would have been unconstitutional even if Congress had preserved the preexisting substantive standard for preclearance and DOJ had taken a restrained approach to enforcement. Congress' failure to update the coverage formula, combined with its overruling of *Georgia* and *Bossier Parish II* and DOJ's aggressive enforcement strategy, cannot satisfy any plausible standard of constitutionality. The Court should hold that the 2006 reauthorization of Section 5 exceeded Congress' enforcement authority under the Fourteenth and Fifteenth Amendments.

Respectfully submitted,

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