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

BRIEF OF THE NATIONAL BLACK CHAMBER OF COMMERCE AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution.

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INTEREST OF THE AMICUS CURIAE[1]

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African-American-owned businesses and advocates on behalf of the 2.1 million black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

The Chamber rejects the assumption underlying Congress's reauthorization of Section 5 of the Voting Rights Act that the exceptional circumstances which justified close federal oversight of the electoral practices of many states and localities in 1965 and 1975 persist today. They do not. The Chamber and its members and affiliates work hand-in-hand with government at all levels to foster an environment in which black-owned businesses can take root and thrive. The government officials who are partners in this effort are people of good faith, and do not deserve to be labeled and treated as presumptive discriminators. Federal control of elections, through

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[1] Pursuant to Rule 37.6, counsel for the amicus certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

the "preclearance" process, undermines these officials' authority and flexibility, to the ultimate detriment of their constituents, many of them minorities. Worse, Section 5 has been abused in some instances *to enforce* stereotypes regarding minority voters' preferences and affiliations, preventing voters who do not embody these stereotypes from electing their candidates of choice.

The Chamber supports vigorous enforcement of those federal laws that prohibit actual voting discrimination, including the Fifteenth Amendment and Section 2 of the Voting Rights Act. By contrast, Section 5 is no longer necessary to combat widespread and persistent discrimination in voting and now, perversely, serves as an impediment to race-neutral voting and to the empowerment of state and local officials who represent minority constituencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Whether the "current burdens" of Section 5 of the Voting Rights Act of 1965 ("VRA") are "justified by current needs," *Nw. Austin Mun. Util Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) ("*Nw. Austin*"), depends on the availability and effectiveness of less intrusive remedies to combat discrimination in voting practices. As *Katzenbach* explained, "exceptional conditions can justify legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Though the Fifteenth Amendment had barred voting discrimination over 90 years before, "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration" in a group of states that flouted

federal law through discriminatory administration of voting requirements. *Id.* at 313. As quickly as Congress acted to prohibit particular means of discrimination by facilitating case-by-case litigation, these jurisdictions contrived new ones, exhibiting an "unremitting and ingenious defiance of the Constitution." *Id.* at 309. In the face of this massive resistance and the failure of more traditional remedies, Congress exercised its Fifteenth Amendment power in an "inventive manner" by "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims" through Section 5's temporary preclearance regime, which it confined to those specific regions where "immediate action seemed necessary." *Id.* at 327-28.

The exceptional conditions that prevailed in 1965 and justified "one of the most extraordinary remedial provisions in an Act noted for its broad remedies," *United States v. Bd. Of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting), no longer exist. In today's South, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Nw. Austin*, 557 U.S. at 202. And crucially, the legislative record supporting the VRA's 2006 reauthorization identifies not a single example of any state "contriving new rules . . . for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees"—the precise evil that motivated and justified the extraordinary remedy of Section 5. *Katzenbach*, 383 U.S. at 335. Instead, "the majority of § 5 objections today concern redistricting" and other claims of vote dilution. Pet.

App. 99a (Williams, J., dissenting) (citing Peyton McCrary, et al., The Law of Preclearance: Enforcing Section 5, in *The Future of the Voting Rights Act* 20, 25 tbl.2.1 (2006)).

Decades of judicial experience, reflected in the case reports, demonstrate that less intrusive alternative remedies are more than adequate to combat the remaining voting discrimination identified in the 2006 legislative record. Foremost among them is Section 2 of the VRA. 42 U.S.C. § 1973(a). Section 2 prophylactically bans any practice that "results in a denial or abridgement of the right of any citizen of the United States to vote," whether or not motivated by an intent to discriminate. This remedy is both expeditious, with courts in many instances issuing preliminary injunctions in a matter of days, and flexible, empowering courts to supervise the replacement of invalidated districting plans. And its burden on plaintiffs is far less than in other civil cases, given that Section 2 provides for reimbursement of attorneys' fees, expert fees, and other expenses, 42 U.S.C. § 1973*l*(e), even in cases where the federal Department of Justice ("DOJ") intervenes and largely assumes the burden of litigation. *See, e.g., King v. Illinois State Board of Elections*, 410 F.3d 404, 424 (7th Cir. 2005). There can be no question that Section 2 litigation is equal to defeating the "second generation barriers" cited by Congress as justifying reauthorization of Section 5. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b), 120 Stat. 577, 577-78 (2006) ("VRARAA").

But if there was any question, Section 2's protections are reinforced by the Section 3(c) "pocket trigger," which provides a judicially-supervised preclearance remedy targeted at any state or local jurisdiction that has violated the voting guarantees of the Fourteenth or Fifteenth Amendment. 42 U.S.C. § 1973a(c). Because Section 3(c) applies nationwide and is triggered only by actual constitutional violations, it sidesteps the equality and congruence problems of the inflexible and outdated Section 4(b) coverage formula that applies to Section 5. *See Nw. Austin*, 557 U.S. at 203-04. Moreover, Section 3(c)'s preclearance remedy offers greater flexibility, in terms of duration and breadth of coverage, applying either to all changes to voting practices (as under Section 5) or only to those identified by the court as presenting a special risk of discrimination. *See Jeffers v. Clinton*, 740 F. Supp. 2d 585, 601-02 (E.D. Ark. 1990). Although there is no indication in the 2006 legislative record that Section 2 decrees are being evaded by recalcitrant jurisdictions, the pocket trigger is available to defeat the kind of "unremitting and ingenious defiance" that marked the pre-VRA era and is no less powerful or less effective to that end than the Section 5 preclearance regime.

Finally, the state courts are an additional bulwark against infringement of voting rights. The state courts routinely enforce federal voting law—including the requirements of the VRA, Fourteenth Amendment, and Fifteenth Amendment—as well as state law requirements that go beyond the protections of federal law. In recent election cycles, for example, state courts have enjoined the operation of voter identification laws and supervised the proce-

dural and substantive aspects of legislative reapportionment. Such litigation, while effective at protecting voting rights, is far less intrusive than Section 5's preclearance regime. Yet the legislative record reflects that, as in other recent cases where the Court has struck down exercises of Congress's enforcement powers, "Congress . . . barely considered the availability of state remedies." *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 643 (1999); *see also Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1335 (2012). In this way, Congress has once again failed to "tailor" an asserted exercise of its enforcement powers "to remedy or prevent conduct transgressing the Fourteenth [or Fifteenth] Amendment's substantive provisions." *Id.* at 1333 (internal quotation marks omitted).

The logic of *Katzenbach* and *City of Rome v. United States*, 446 U.S. 156 (1980), does not support Congress's latest 25-year reauthorization of the VRA's preclearance regime. Today's redistricting challenges and vote dilution cases are nothing like the "extraordinary circumstances" that justified "the federalism costs exacted by § 5 preclearance," *Miller v. Johnson*, 515 U.S. 900, 926 (1995). The relevant difference is that they are amenable to case-by-case adjudication by federal and state courts, with the backstop of the Section 3(c) pocket trigger in the unlikely instance that a jurisdiction attempts to evade a court decree. For that reason, the 2006 reauthorization of Section 5 is not a valid means of enforcing the substantive provisions of the Fourteenth and Fifteenth Amendments.

ARGUMENT

I. The Court Has Always Considered the Availability and Effectiveness of Alternative Remedies When Reviewing Exercises of Congress's Fourteenth and Fifteenth Amendment Enforcement Powers

The Fifteenth Amendment does not grant Congress plenary power to regulate states' electoral practices. As Congress itself recognized in the 1965 Act, suspending facially nondiscriminatory voting regulations and subjecting them to review for discriminatory purpose or effect was so novel and aggressive an exercise of its enforcement power that it applied the VRA's preclearance requirement only to those jurisdictions employing tests or devices to violate the Fifteenth Amendment's affirmative prohibition and did so only on an emergency basis, limited to five years. Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965).

This Court upheld that enactment as specifically justified by "widespread resistance" to the constitutional prohibition against racial discrimination in voting. As it explained, laws providing for case-by-case adjudication had "done little to cure the problem of voting discrimination," *Katzenbach*, 383 U.S. at 313, due to certain states' intransigence:

> Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the

> federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

Id. at 314 (footnotes omitted).

The Court reasoned that these "exceptional circumstances" could "justify legislative measures not otherwise appropriate," including the Section 5 preclearance regime. *Id.* at 334. Because the legislative record showed that certain states "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," Congress "had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.* at 335. And because the alternative of "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting," preclearance "was clearly a legitimate response to the problem." *Id.* at 328; *see also Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (upholding the VRA's bar on certain language tests where Congress had found "the adequacy or availability of alternative remedies" to be lacking).

In *City of Rome*, the Court upheld the 1975 reauthorization of Section 5 for an additional seven years, again finding alternative remedies insufficient to protect voting rights. The legislative record showed that "[s]ignificant disparity persisted be-

tween the percentages of whites and Negroes registered in at least several of the covered jurisdictions," and Congress feared that, absent Section 5, the VRA's "limited and fragile" achievements could "be destroyed through new procedures and techniques" designed to evade case-by-case enforcement of voting rights. 446 U.S. at 181 (internal quotation marks omitted). Agreeing that the potential for continued "'unremitting and ingenious defiance of the Constitution'" had not dissipated within ten years of the VRA's enactment, the Court upheld Section 5's extension as "plainly a constitutional method of enforcing the Fifteenth Amendment." *Id*. at 182 (quoting *Katzenbach*, 383 U.S. at 309).

The Court has expressly relied on the reasoning of *Katzenbach* and *City of Rome*—including their focus on alternative remedies—in its cases concerning the scope of Congress's enforcement power under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores* identified the initial enactment of Section 5 of the VRA as a paradigmatic example of properly remedial legislation, explaining that its "unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation." 521 U.S. 507, 526 (1997) (citations omitted).

Accordingly, subsequent cases have surveyed the availability and effectiveness of less-intrusive alternatives to asserted prophylactic exercises of Congress's Fourteenth Amendment enforcement power. *Florida Prepaid*, for example, faulted Congress for ignoring "the availability of state remedies for patent infringement" when it sought to abrogate states' sovereign immunity for that conduct. 527 U.S. at 644.

"[A] few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses," was an insufficient basis for an intrusive remedy that "made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration." *Id.* at 644, 647; *see also Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000) (surveying state law remedies for age discrimination by state employers in the course of striking down a federal remedy); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 n.5 (2001) (striking down a federal remedy requiring special accommodations for disabled state employees where, "by the time that Congress enacted the [Americans with Disabilities Act] in 1990, every State in the Union had enacted such measures").

In the previous term, the Court held that application of the Family and Medical Leave Act's self-care leave provision to state employers was not a properly tailored exercise of Congress's enforcement power in light of state law remedies:

> [A]s a remedy, the provision is not congruent and proportional to any identified constitutional violations. At the time of the FMLA's enactment, ninety-five percent of state employees had paid sick-leave plans at work, and ninety-six percent had short-term disability protection. State employees presumably could take leave for pregnancy-related illnesses under these policies, and Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies. "Con-

> gress . . . said nothing about the existence or adequacy of state remedies." *Florida Prepaid*, 527 U.S. at 644. It follows that abrogating the States' immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if the existing state leave policies would have sufficed.

Coleman, 132 S. Ct. at 1335 (citation and internal quotation marks omitted).

In sum, under this Court's jurisprudence, it is Congress's burden to show that existing, less-intrusive remedies under federal or state law are ineffective to address and prevent violations of the substantive provisions of the Fourteenth or Fifteenth Amendments before it may act to enforce those provisions prophylactically.

II. Alternative Remedies, Less Intrusive Than Section 5, Are Adequate To Combat Lingering Discrimination

Although acknowledging the central importance of alternative remedies to determining whether "the current burdens imposed by section 5 [are] 'justified by current needs,'" Pet. App. 22a (quoting *Nw. Austin*, 557 U.S. at 203), the court below failed to apply faithfully the standard set in this Court's cases. As it explained, the "emphasis on the inadequacy of case-by-case litigation makes sense: if section 2 litigation is adequate to deal with the magnitude and extent of constitutional violations in covered jurisdictions, then Congress might have no justification for requiring states to preclear their voting changes." *Id.* at 26a. Thus, "what is needed to make section 5

congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate." *Id.*

Yet the court below erred in carrying out that inquiry in two respects. First, it blithely rejected *Katzenbach's* recognition that only the "unique circumstances" present at that time—i.e., "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees"—justified what the Court identified as "an uncommon exercise of congressional power" that was "not otherwise appropriate." 383 U.S. at 334-35; *see* Pet. App. 25a. Instead, it denied (incorrectly) "that such gamesmanship was necessary to the Court's judgment [in *Katzenbach*] that section 5 was constitutional" and stated (incorrectly) that *City of Rome* "sustained section 5's constitutionality without ever mentioning gamesmanship of any kind." Pet App. 25a; *see City of Rome*, 446 U.S. at 181 (quoting congressional findings regarding the risk of gamesmanship "through new procedures and techniques").

Second, the court below accepted as conclusive the legislative record's "fleeting references" to alternative remedies "essentially repeating the testimony of the witnesses," *Florida Prepaid*, 527 U.S. at 644, that "section 2 claims involve 'intensely complex litigation that is both costly and time-consuming'" and that Section 2 is therefore inadequate. Pet. App. 45a (quoting Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 96 (2006)). In all of one paragraph, reciting a few scattered quotations from the legislative record, it adopted Congress's blanket conclusion that

case-by-case litigation "'would be ineffective to protect the rights of minority voters.'" *Id.* at 45a-46a (quoting H.R. Rep. No. 109-478, at 57 (2006)).

Such blind deference to Congress's assertion of its enforcement power is inappropriate. *City of Boerne*, 521 U.S. at 536 ("Congress' discretion is not unlimited . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). And it is especially misplaced here, where Congress's conclusions regarding the failings of alternative remedies find no support in the legislative record and where the Court may refer to an extensive body of case law that contradicts any assertion that redistricting and other vote dilution claims are not susceptible to case-by-case adjudication.

A. Case-by-Case Adjudication Under Section 2 and Section 1983

Although Section 5 was initially targeted at circumvention of court decrees enforcing Fifteenth Amendment rights, typically through the inventive "misuse of tests and devices," today "the majority of § 5 objections today concern redistricting" and other claims of vote dilution. Pet. App. 99a (Williams, J., dissenting). Congress itself found that "first generation barriers" to the right to vote are now rare, and it therefore premised the extension of Section 5 on "second generation barriers constructed to prevent minority voters from fully participating in the electoral process"—in other words, practices that may affect the weight of a vote once cast. VRARAA §§ 2(a)(1), (2). They include such things as "annexation, at-large voting, and the use of multi-member districts,"

when "enacted to dilute minority voting strength." VRARAA § 2(a)(4).

Challenges to such practices are, of course, the bread and butter of litigation under Section 2 of the VRA. Section 2 establishes a nationwide remedy for any practice that "results in a denial or abridgement of the right of any citizen of the United States to vote," whether or not motivated by discriminatory intent. 42 U.S.C. § 1973. Because vote dilution claims are not concentrated in states and localities subject to Section 5, *see Nw. Austin*, 557 U.S. at 203-04; Pet. App. 49a-50a (discussing the Katz study of Section 2 cases), federal courts have routinely adjudicated such claims, on a case-by-case basis, under Section 2. This experience demonstrates that Section 2 provides an effective remedy for unlawful vote dilution.

1. Section 2 litigation has been proven to provide expeditious relief from voting practices challenged as violating Fourteenth and Fifteenth Amendment rights and, in particular, practices resulting in vote dilution. The *Arbor Hill* challenge to Albany County's legislative redistricting plan is typical in every respect but for the unusually extensive documentation of its procedural history. *See* Pet. App 51a (noting that many or most Section 2 claims are "settled or otherwise resolved without a published opinion"). Following the 2000 Census, the county legislature adopted a redistricting plan that created a single majority-minority district in the City of Albany and several additional districts containing minority populations of up to 48 percent. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436, 440 (N.D.N.Y. 2003). A coali-

tion of civil rights organizations brought suit, alleging that the plan diluted minority voting strength in violation of Section 2 of the VRA, and sought to enjoin the County from conducting elections—including those scheduled several months thence—until a lawful plan was adopted. *Id*. at 439. The district court conducted a hearing and then granted a preliminary injunction, after which the County submitted a revised plan that the court accepted as compliant with the VRA. *Arbor Hill Concerned Citizens v. County of Albany*, 357 F.3d 260, 262 (2d Cir. 2004). Ultimately, the district court oversaw a special election under the revised redistricting plan and later approved a consent decree among the parties making further modifications to district boundaries. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 419 F. Supp. 2d 206, 208 (N.D.N.Y. 2005). The total time from the complaint to approval of the revised plan was six months, and the entry of a preliminary injunction at the outset ensured that no voter suffered any degree of harm. *Id*. Having prevailed on the merits, the plaintiffs were awarded fees and costs. *Id*. at 212.

In those rare cases where courts have not had the luxury of *months* to act on Section 2 claims, they have done their work in *weeks* or even *days*. For example, within six weeks in 2003, federal courts issued three separate opinions in a Section 2 vote dilution challenge to the use of punch-card balloting machines in California's gubernatorial recall election. *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc). On August 7, the plaintiffs brought their claims seeking relief under Section 2 and the Fourteenth

Amendment's Equal Protection Clause. *Id.* The district court denied their motion for an injunction 13 days later, on August 20. *Id.* A three-judge panel of the Ninth Circuit reversed that decision on September 15, enjoining the election. *Id.* That same day, the appeals court voted to rehear the case en banc, vacating the panel opinion. *Id.* The case was reargued seven days later, and then decided in a published opinion affirming the district court's decision the very next day, September 23. *Id.* at 914. The election was held two weeks later, *id.* at 916, without reported incident.

District courts have not been shy about using preliminary injunctions and restraining orders to preserve the status quo and protect against suspect changes to voting practices. For example, it took all of three days for a district court to enter a temporary restraining order against a suspect change to Ohio election procedures, challenged under Section 2, that allowed election boards to bar observers during the in-person absentee voting period prior to election day. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 360 (6th Cir. 2008). And it took the Sixth Circuit all of one day to stay that order as an abuse of discretion because the claim was unlikely to succeed on the merits. *Id.* at 362.

This kind of protective use of preliminary injunctions and restraining orders while the merits of Section 2 claims are considered on an expedited basis is typical. *See, e.g.*, *Tigrett v. Cooper*, 855 F. Supp. 2d 733 (W.D. Tenn. 2012) (district court granted preliminary injunction two weeks after plaintiffs filed Section 2 vote dilution claim); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (dis-

trict court granted preliminary injunction against Georgia's voter identification requirement alleged to violate Section 2 twelve days after motion was filed); *United States v. Berks County, Pa.*, 2 Elec. L.J. 437 (2003) (district court granted preliminary injunction against treatment of Spanish-speaking voters alleged to violate Section 4(e) eight days after motion was filed); *St. Bernard Citizens for Better Government v. St. Bernard Parish Sch. Bd.*, No. 02-2209 (E.D. La. 2002), 2002 WL 2022589 (district court granted preliminary injunction against adoption of redistricting plan alleged to dilute black voting strength in violation of Section 2 five days after motion was filed and after two days of evidentiary hearings); *Page v. Bartels*, 248 F.3d 175, 181 (3d Cir. 2001) (district court entered a temporary restraining order on the same day that Section 2 vote dilution claim was filed); *United States v. Town of Cicero*, No. 00C-1530 (N.D. Ill. 2000), 2000 WL 3432276 (district court granted temporary restraining order against new candidate residency requirement alleged to violate Section 2 two days after complaint was filed); Section 2 and Section 5 Litigation Post 1982, 17 S. Cal. Rev. L. and Soc. Just. 540, 553 (2008) (describing preliminary injunction against New York's non-voter purge law in *United Parents Ass'n v. New York City Bd. of Elections*, No. 89 Civ. 0612 (E.D.N.Y. 1989)); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982) (district court granted preliminary injunction against polling place placement alleged to violate Section 2 one day after motion was filed).

Claims that Section 2 actions are inadequate because they may take several years from start to finish miss the mark. *See* Pet. App. 45a-46a. Where

preliminary relief is available, as it is in suits showing a likelihood of success and risk of imminent harm, "proponents of a discriminatory law" are not in fact able to "enjoy its benefits . . . before the law is overturned. *Id*. Section 2 prevents that.

2. Plaintiffs need not bear the financial burden of bringing meritorious voting rights litigation. The VRA provides for reimbursement of attorneys' fees, expert fees, and expenses to prevailing parties. 42 U.S.C. §1973*l*(e); *see also* 42 U.S.C. § 1988 (providing the same for § 1983 actions). In the *Arbor Hill* litigation described above, the district court awarded the plaintiffs substantial attorneys' fees and costs, amounting to over $160,000. 419 F. Supp. 2d at 212. This was based on an hourly rate of $210 for experienced attorneys, which was typical or even high for practice in New York's Middle District in 2005, and included $28,000 for an appeal that raised only "narrow issues." *Id*. at 211.

Far from unusual, such fee awards are routine for prevailing private parties in voting rights cases. Indeed, the lower courts have generally held, based on the policy considerations underlying § 1973*l*(e) and § 1988, that prevailing voting rights plaintiffs "are entitled to their attorneys' fees as a matter of course." *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 415 (7th Cir. 2005) (internal quotation marks omitted); *see also LULAC v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228 (5th Cir. 1997) (prevailing party "is entitled to an award of reasonable attorneys' fees"); *Love v. Deal*, 5 F.3d 1406, 1409-10 & n.4 (11th Cir. 1993) (district court's discretion to deny fees to prevailing party is "exceedingly narrow"); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1419

(9th Cir. 1988) ("Attorneys' fees should be awarded in vote dilution claims unless special circumstances make such an award unjust."); *cf. New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980) (holding that, under such fee-shifting statutes, "the court's discretion to deny a fee award to a prevailing plaintiff is narrow").

The court below ignored the availability of fee- and expense-shifting to Section 2 and Section 1983 plaintiffs. Instead, it simply repeated a witness's bare assertion from the legislative record that such litigation is "costly." Pet. App. 45a (quoting Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 96 (2006)). It also cited, without explanation as to its relevance, testimony mentioning a Federal Judicial Center study reporting that a panel of judges estimated that "voting" cases typically require about as much "judicial work" as antitrust, civil RICO, patent, and environmental cases. *Id.* (citing An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 141 (2006)); *see* Patricia Lombard, et al., Federal Judicial Center, 2003-2004 District Court Case-Weighting Study 5 (2005). In fact, this testimony states, on the very same page, that the chief barrier to bringing Section 2 claims is the expense of hiring expert witnesses, a problem that Congress addressed in 2006 by amending the VRA to entitle prevailing plaintiffs to "reasonable expert fees" and "other reasonable litigation expenses." VRARAA § 6 (amending 42 U.S.C. § 1973*l*(e)).

3. The Department of Justice ("DOJ") may assume the entire burden of Section 2 litigation either by bringing suit itself or by intervening in suits brought by private parties. 42 U.S.C. § 1973j(d); *see, e.g., United States v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004) (Section 2 vote dilution case brought by the Attorney General); *Brown v. Bd. of School Comm'rs*, 706 F.2d 1103, 1107 (11th Cir. 1983) (Section 2 vote dilution case in which Attorney General intervened). As the Court has recognized, this provision exists to compensate for the potential "inadequacy" of private-party litigation. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 n.21 (1969). Quite appropriately, the DOJ's Voting Section brings or intervenes in Section 2 litigation in every region of the nation. *See* DOJ, Cases Raising Claims Under Section 2 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php ("DOJ Section 2 Case List") (listing recent cases). "So far as Departmental resource constraints are concerned, narrowing § 5's reach would, as a matter of simple arithmetic, enable it to increase § 2 enforcement with whatever resources it stopped spending on § 5." Pet. App. 77a (Williams, J., dissenting). Regardless, the Court has never held that federal resource constraints justify abrogation of state sovereignty. *Cf. Printz v. United States*, 521 U.S. 898, 932 (1997).

4. Judicial decrees under Section 2 in vote dilution cases are generally not susceptible to evasion or circumvention. In redistricting challenges in which a plan is rejected for diluting minorities' voting strength, the district court supervises its replacement or, where necessary, "undertake[s] the 'unwel-

come obligation' of creating an interim plan" itself. *Perry v. Perez*, 132 S. Ct. 934, 940 (2012); *see also Arbor Hill*, 419 F. Supp. 2d at 208 (describing procedural history of replacement of invalidated redistricting plan). In either circumstance, there is simply no opportunity for a jurisdiction to evade the requirements of the law.

This is equally true for other practices potentially giving rise to Section 2 violations, such as "annexation, at-large voting, and the use of multi-member districts." VRARAA § 2(a)(4). For example, after the DOJ challenged a Florida county's at-large method of electing county commissioners, the district court enjoined an approaching election and, following a trial on the merits, ruled that the at-large method of election violated Section 2 and directed the parties to propose remedial plans within one month. *United States v. Osceola County, Florida*, 475 F. Supp. 2d 1220 (M.D. Fl. 2006). Finding the county's proposed plan insufficient to remedy the violation, the district entered a remedial order adopting the single-member district map proposed by DOJ and scheduling a special election under the court-approved plan. *United States v. Osceola County, Florida*, 474 F. Supp. 2d 1254 (M.D. Fl. 2006). DOJ's case records show that this is a typical course of events for Section 2 claims that are actually litigated; many, however, are simply settled by consent decree, prior to any adversarial proceedings and without any opportunity for evasion. *See* DOJ Section 2 Case List.

Section 2 litigation has also proven robust to address changes in voting qualifications. After Georgia amended its voter identification requirement in 2005 to require a government-issued photo identification,

a coalition of civil rights groups brought suit, alleging, *inter alia*, a Section 2 violation, and obtained a preliminary injunction. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009). When the state amended its law to allow additional forms of identification, the plaintiffs amended their complaint and obtained a second injunction. *Id*. at 1347-48. Ultimately, following a bench trial, the district court allowed the law to go into effect, a decision affirmed by the Eleventh Circuit. *Id*. at 1348, 1355, *cert. denied*, *NAACP v. Billups*, 129 S. Ct. 2770 (2009). Although Georgia amended its law and adjusted its implementation procedures several times during the course of litigation, at all times the district court maintained control and saw that its rulings were enforced.

It should come as little surprise, then, that the legislative record contains no evidence of attempts to evade or circumvent judicial decrees in Section 2 vote dilution cases, only (as the court below noted) "examples of modern instances of racial discrimination in voting." Pet App. 29a-31a. There is simply no indication that jurisdictions today have the inclination or the ability to resist federal courts' decrees under Section 2.

5. Finally, it should not be overlooked that Congress's 1982 amendment of Section 2 substantially eased plaintiffs' burden of persuasion. In *Mobile v. Bolden*, 446 U.S. 55 (1980), this Court held that, "in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Thornburg v.*

Gingles, 478 U.S. 30, 35 (1986). The 1982 VRA amendments, however, "substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone." *Id.* In this way, Congress removed "an inordinately difficult burden for plaintiffs," who might otherwise be stymied by "the defendant's ability to offer a non-racial rationalization for a law which in fact purposefully discriminates." S. Rep. No. 97-419, at 36 (1982); *see generally* Abigail Thernstrom, More Notes from a Political Thicket, 44 Emory L.J. 911, 914 n.15 (1995) ("The revised § 2 was a gift to minority plaintiffs . . . .").

As Judge Williams observed, "it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay," Pet. App. 77a (Williams, J., dissenting), particularly when those inadequacies are stated in the abstract, divorced from federal courts' extensive experience conducting Section 2 litigation. *E.g.*, Pet. App. 45a-46a (doing just that). But decades of experience demonstrates that Section 2 provides a robust prophylactic remedy for the lingering "second generation barriers" identified by Congress as justifying its latest 25-year extension of Section 5's far more invasive preclearance regime.

B. The Section 3 "Pocket Trigger"

But the Court need not find that Section 2 could combat any hypothetical "unremitting and ingenious defiance of the Constitution" undertaken by jurisdictions now subject to Section 5 because the VRA contains an additional preclearance remedy in Section 3(c) targeted precisely at any such "pockets of discrimination." H.R. Rep. No. 89-439, at 13 (1965).

"A hybrid of sections 2 and 5, the pocket trigger combines an enforcement action with a prophylactic remedy." Travis Crum, The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance, 119 Yale L.J. 1992, 2006 (2010) ("Crum"). It authorizes a federal court to retain jurisdiction over a state or local jurisdiction found to have violated the Fourteenth or Fifteenth Amendment's protections of voting rights. 42 U.S.C. § 1973a(c). While the court retains jurisdiction, which it may do "for such period as it may deem appropriate," changes to voting practices are subject to the same preclearance requirement as under Section 5—that is, no change may go into effect until it has been submitted to the Attorney General and the Attorney general has had sixty days to interpose an objection. *Id*. By regulation, the Attorney General has provided that the same procedures apply as under Section 5. 28 C.F.R. § 51.8. Changes to which the Attorney General objects, or that are challenged by private parties, are reviewed by the court under the same standard that prevailed under Section 5 until its 2006 amendment—i.e., only a change that the jurisdiction can prove "does not have the purpose and will not have the effect of denying or abridging the right to vote" may go into effect. *Compare* § 1973a(c) *with* § 1973c(a) (1975); *see City of Rome*, 446 U.S. at 183 n.18.

Due to the heavy burden of this preclearance process, a Section 3(c) enforcement initiative, whether undertaken by DOJ or private litigants, could be expected to have a strong deterrent effect among jurisdictions at risk of coverage, in addition to (as with Section 5) the deterrent effect on jurisdictions that

are already covered. See H.R. Rep. No. 109-478, at 22. The pocket trigger thereby offers the possibility of broader deterrence of constitutional violations than Section 5, which is all but irrelevant to jurisdictions outside of its static coverage formula.

Although the pocket trigger has been applied only sparingly to date—implying that Section 2 has been adequate to meet nearly all "barriers" to the right to vote outside of jurisdictions subject to Section 5—experience shows that it provides a flexible, targeted, and effective remedy to persistent discrimination, albeit one that is rarely needed. "Since 1975, section 3 has bailed-in two states, six counties, and one city: the State of Arkansas; the State of New Mexico; Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee." Crum, *supra*, at 2010. The New Mexico and Arkansas cases both began as redistricting challenges. A three-judge court held in 1982 that New Mexico's reapportionment plan of that year violated the Equal Protection Clause's one-person, one-vote standard and ordered the state to undertake a "good-faith effort to construct legislative districts on the basis of actual population." *Sanchez v. King*, 550 F. Supp. 13, 15 (D.N.M. 1982). The state's remedial plan, however, violated Section 2, and the state ultimately signed a consent decree that required it to preclear any redistricting plans for the next decade. Crum, *supra*, at 2010. The record reflects that New Mexico did so and that the Attorney General objected to one sub-

mission—a 1991 state senate plan—which the state subsequently remedied. *Id.*

Similarly, in *Jeffers v. Clinton*, 740 F. Supp. 585 (D. Ar. 1990), private litigants challenged Arkansas's apportionment plan as diluting the strength of black votes in violation of Section 2 and sought a preclearance remedy. Though the court did not find that the plan was motivated by conscious racial discrimination, it did identify a pattern of constitutional violations in the use of majority-vote requirements at the state and local levels. *Id.* at 594-95. It then considered several factors relevant to the imposition of preclearance:

> Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kinds of violations that would likely be prevented, in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments, independent of this litigation, make recurrence more or less likely?

Id. at 601. Based on those considerations, the court imposed a "limited preclearance remedy" applying only to majority-vote requirements in general elections and thereby tailored to the violations it had identified and the risk of future violations. *Id.* Subsequently, Arkansas has submitted changes to DOJ for preclearance, Crum, *supra*, at 2013, and DOJ has lodged no objections. *See* DOJ, Section 5 Objection Determinations, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php.

As these cases show, Section 3(c) "provides a targeted, flexible, and more responsive means of imposing preclearance" than the stale Section 4(b) formula that applies to Section 5. Crum, *supra*, at 2017; *see also* The Continuing Need for Section 5 Pre–Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 188 (2006) (testimony of Pamela Karlan) (describing Section 3(c)'s effectiveness and "more surgical[]" application); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 275 (D.D.C. 2008) (same). Though identical in operation to Section 5 once triggered, Section 3(c) coverage has a direct nexus with recent or ongoing constitutional violations, is limited to such duration as the court finds appropriate, and can be limited in scope to the kinds of changes presenting the greatest risk of further violations. And unlike Section 5, it applies nationwide and so does not depart from the fundamental principle of equal sovereignty. *See Nw. Austin*, 557 U.S. at 203. Should case-by-case litigation under Section 2 prove unequal to a jurisdiction's determination to discriminate in voting, Section 3 provides a remedy no less powerful than Section 5, with broader deterrent effect.

C. State Law Remedies and State Court Litigation

In exercising its enforcement powers to enact prophylactic remedies under the Fourteenth and Fifteenth Amendments, Congress may not simply assume that federal intervention is necessary but must assess states' own actions and the remedies available under state law. *See supra* § I (discussing, *inter alia*, *Florida Prepaid*, 527 U.S. at 643). Yet the legislative record in support of the 2006 extension of the

Section 5 preclearance regime is bereft of any discussion of state courts' enforcement of voting rights under federal and state law. Such enforcement is, in fact, routine; following the 2000 Census, for example, state courts reviewed the merits of sixteen redistricting plans, struck down six, and adopted their own plans twice. Voting and Democracy: Trends in State Self-Regulation of the Redistricting Process, 119 Harv. L. Rev. 1165, 1170-71 & n.42 (2006) ("State Self-Regulation") (listing cases).

Governed by the Supremacy Clause, U.S. Const. art. VI, cl. 2, state courts regularly enforce the requirements of federal law protecting voting rights, particularly in the redistricting context. To begin with, a number of state supreme courts review legislative reapportionment plans as a matter of course for compliance with the Fourteenth Amendment, Fifteenth Amendment, and VRA. *See, e.g., In re 2011 Redistricting Cases*, 274 P.3d 466 (Alaska 2012); *In re Colorado General Assembly*, 828 P.2d 185, 190 (Colo. 1992); *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So.2d 276 (Fla. 1992); *In re Apportionment of State Legislature-1992*, 486 N.W.2d 639 (Mich. 1992). Others consider federal-law challenges to reapportionment brought by private plaintiffs alongside state law claims. *E.g.*, *Peterson v. Borst*, 789 N.E.2d 460 (Ind. 2003) (Section 2 and Fourteenth Amendment claims); *McNeil v. Legislative Apportionment Comm'n of State*, 828 A.2d 840 (N.J. 2003) (Section 2, Fourteenth Amendment, and Fifteenth Amendment claims); *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989 (Pa. 2002) (Section 2 and Fourteenth Amendment claims); *In re Legislative Districting of State*,

805 A.2d 292 (Md. 2002) (Section 2, Fourteenth Amendment, and Fifteenth Amendment claims); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (Section 2 claim); *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (Section 2 and Section 5 claims); *Legislative Redistricting Cases*, 629 A.2d 646 (Md. 1993) (Section 2 and Fourteenth Amendment claims); *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992) (Section 2 claims).

There is no indication that state judges undertake the enforcement of federal requirements any less seriously than their counterparts on the federal bench. *See generally* State Self-Regulation, *supra*, at 1166 (describing how, as federal enforcement has flagged, "state supreme courts have become increasingly aggressive regulators of redistricting"). In the *Egolf* litigation, for example, New Mexico courts found that the state's house apportionment plan violated the Equal Protection Clause's one person, one vote requirement and risked diluting the voting strength of Native American and Hispanic populations. *Maestas v. Hall*, 274 P.3d 66, 74, 81 (N.M. 2012). Ultimately, the trial court devised its own map, based on the state legislature's and incorporating amendments proposed by the challengers, to remedy these defects. *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. 1st Dist-Santa Fe, Feb. 27, 2012). The same court addressed similar challenges regarding apportionment of the state senate, ultimately drawing districts to allow Native Americans an effective opportunity to elect candidates of choice under the VRA. *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. 1st Dist-Santa Fe, Jan. 16, 2012); *see also Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012)

(addressing similar claims regarding Minnesota's congressional districts though judicial redistricting panel); *Burling v. Chandler*, 804 A.2d 471 (N.H. 2002) (addressing Equal Protection Clause claims with court-designed plan).

The state courts also enforce state constitutional and statutory requirements regarding voting rights that are coextensive with, or go beyond, the requirements of federal law. Some state constitutions, as interpreted by state courts, provide stronger equal protection guarantees than the U.S. Constitution. In *Stephenson*, for example, the North Carolina Supreme Court held that the use of both single- and multi-member districts within the same redistricting plan was subject to strict scrutiny under the state constitution. 562 S.E.2d at 395; *see also Kruidenier v. McCulloch*, 142 N.W.2d 35, 1147-48 (Iowa 1966) (same, under Iowa Constitution).

Some state law requirements serve to limit partisan gerrymandering, for which federal law provides no easy remedy. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). The majority of states require contiguous boundaries for at least some electoral districts, require some electoral-district lines to follow preexisting political boundaries, or require some districts to satisfy compactness requirements. Justin Levitt, Where are the lines drawn?, http://redistricting.lls.edu/where-state.php. These requirements serve "to establish 'fair and effective representation for all citizens'" by limiting burdens on representational rights. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964)). They are typically enforced by state courts. *See, e.g., Twin Falls County v.*

Idaho Comm'n on Redistricting, 271 P.3d 1202 (Idaho 2012) (holding that redistricting plan violated preexisting-boundary requirements); *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003) (holding that redistricting plans violated contiguity and preexisting-boundary requirements); *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002) (holding that redistricting plan violated preexisting-boundary requirements).

Many states additionally require that redistricting plans "preserv[e] wherever possible . . . communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors." *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 209, 211 (Colo. 1982). These requirements, too, are typically enforced by state courts. *E.g.*, *id.*; *Vandermost v. Bowen*, 269 P.3d 446 (Cal. 2012); *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm'n*, 121 P.3d 843 (Ariz. 2005); *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003); *Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002); *Collins v. Bennett*, 684 So.2d 681 (Ala. 1995).

Recent litigation over states' voter identification law provides a powerful example of state courts' ability to protect voting rights under state law. Over the past decade, a number of states have enacted or strengthened voter-identification requirements, and, despite the potential for these practices to run afoul of federal law, the bulk of successful challenges to them have actually been in state courts. For example, in *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006), the Missouri Supreme Court affirmed a trial court decision enjoining the state's voter-

identification law as violative of the state constitution. The court explained, "Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart." *Id*. at 212. As a result, the voter-identification law was subject to strict scrutiny, which the court found it came nowhere near satisfying. *Id*. at 217. This was so despite that the law was no more burdensome than those that subsequently have been upheld by other states' courts, *e.g.*, *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011), and by this Court. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

Similarly, a Wisconsin court struck down that state's voter-identification law, holding it to be in violation of the state constitution. *League of Women Voters v. Walter*, No. 11-4669 (Wis. Cir. Mar. 12, 2012), 2012 WL 763586. The court's language was unequivocal, denying that the state had any authority to "disqualify an elector who possesses those qualifications on the grounds that the voter does not satisfy additional statutorily-created qualifications not contained" in the state constitution. *Id*. The state supreme court declined to hear the state government's appeal. 811 N.W.2d 821 (Wis. 2012).

The Pennsylvania courts struck a middle-ground position in litigation over that state's voter-identification law. After the trial court denied a preliminary injunction, the state supreme court brushed aside the plaintiffs' constitutional challenge to address the practical reality that difficulties in implementation might prevent compliance with the law's

policy of providing "liberal access" to acceptable identification. *Applewhite v. Pennsylvania*, 54 A.3d 1, 5 (Pa. 2012). Ultimately, the law was enjoined from going into effect in 2012, due to the likelihood that some individuals would be unable to obtain identification in time for elections, and the litigation continues. *Applewhite v. Pennsylvania*, No. 330-2012 (Pa. C. Oct. 2, 2012).

Whether or not the remedies available through state court litigation, standing alone, would suffice to protect Fourteenth and Fifteenth Amendment voting rights, they do call into question the necessity of so intrusive a federal remedy as the Section 5 preclearance regime. And taken together with more traditional and less invasive federal remedies, they are part of a robust system of overlapping protections that extend far beyond the Constitution's substantive requirements. It follows that the latest 25-year extension of Section 5 is not a proper exercise of Congress's Fourteenth and Fifteenth Amendment enforcement powers.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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