No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

-v.-

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF OPPOSING MOTIONS TO AFFIRM

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INTRODUCTION

The America that has elected Barack Obama as its first African-American president is far different than when §5 was first enacted in 1965. Appellees barely acknowledge the deep-rooted societal change, preferring to assume that conditions remain similarly dire despite overwhelming evidence to the contrary. There is no warrant for continuing to presume that jurisdictions first identified four decades ago as needing extraordinary federal oversight through §5 remain uniformly incapable or unwilling to fulfill their obligations to faithfully protect the voting rights of all citizens in those parts of the country.

As the Court recognized in upholding previous enactments of §5, it was the persistent strategy of staying one step ahead of court-ordered remedies employed by earlier generations of officials that made case-by-case enforcement of voting rights impossible and justified §5's unparalleled federal intrusion into local government as a temporary measure. Congress did not adduce such a pattern enduring to 2006, and appellees cannot demonstrate one in the legislative record. While instances of voting discrimination still occur, they are by no means confined to covered jurisdictions, and citizen voting rights are ably protected in covered and noncovered jurisdictions alike by permanent protections enshrined in the VRA, particularly §2.

The Court's precedent makes clear that Congress cannot distort the federalist structure by wielding the

biggest stick at its disposal simply because preempting every local change affecting voting is the most convenient way of quashing those few that violate the Reconstruction Amendments. Just as Congress could not require preclearance of state enactments affecting religion, the elderly, or the disabled without demonstrating the congruence and proportionality of such a broad prophylactic, it cannot continue to impose a federal veto over changes affecting voting on the contemporary record.

At the very least, the Court should recognize that the VRA itself contains a mechanism with the potential to trim §5's overbroad contours. The bailout provision only has that potential if applied—in accordance with its text—to permit any political subdivision that demonstrates a history of compliance to exempt itself from preclearance. The restrictive, virtually useless interpretation of bailout adopted by the district court makes a mockery of the congressional promise of bailout availability and cannot on that basis save §5.

ARGUMENT

I. The Court Should Review the Proper Interpretation of the Bailout Statute.

Congress intended the bailout statute as a meaningful mechanism for political subdivisions to excuse themselves from the burdens of preclearance by showing a ten-year track record of voting-rights

compliance, not, as the district court interpreted it, as a hollow promise, inaccessible to any but a few political subdivisions in a single commonwealth. The district court's interpretation of §4(a), 42 U.S.C. §1973*b*(a) (2006), violates statutory text and this Court's precedent. Worse, that interpretation has numerous unintended consequences throughout the VRA and makes it impossible for §5, 42 U.S.C. §1973*c*, to be held congruent and proportional.

Appellees acknowledge that affirming the holding that the district is ineligible to pursue bailout requires treating "political subdivision" as a defined term in the VRA. But the only definition of "political subdivision" excluding entities like the district is in §14(c)(2), 42 U.S.C. §1973*l*(c)(2), which the Court has plainly held applies only for defining which entities can be designated for separate coverage. *Dougherty County, Ga., Board of Educ.* v. *White*, 439 U.S. 32, 43-44 (1978); *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 128-129 (1978); see *United States* v. *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 554-555 (CA5 1980).

Sheffield "expressly rejected the suggestion that the city of Sheffield was beyond the ambit of §5 because it did not itself register voters and hence was not a political subdivision as the term is defined in §14(c)(2) of the Act." *Dougherty County*, 439 U.S., at 44. *Sheffield* recognized, instead, "that Congress never intended the §14(c)(2) definition to limit the substantive reach of the Act's core remedial provision once an area of a nondesignated State had been

determined to be covered." 435 U.S., at 129. Dispelling any notion that *Sheffield*'s cabining of the §14(c)(2) definition was mere dicta, *Dougherty County* noted that "Section 5 applies to all changes affecting voting made by 'political subdivision[s]' of States designated for coverage," and squarely held that §14(c)(2) did not exclude a school board from being a "political subdivision." *Dougherty County*, 439 U.S., at 43-44. Appellees cannot explain away *Dougherty County*'s explicit recognition that *Sheffield* confined §14(c)(2) to the designation context, leaving "political subdivision" a nondefined term elsewhere in the VRA. *Cf. Sheffield*, 435 U.S., at 129 ("'[P]olitical subdivision' was understood as referring to an area of the State.").

It is irrelevant that *Sheffield* and *Dougherty County* were not interpreting post-1982 §4(a). Both cases squarely considered §14(c)(2), the only possible source of a restrictive definition of "political subdivision."

City of Rome v. *United States*, 446 U.S. 156 (1980), did nothing to alter the *Sheffield-Dougherty County* cabining of §14(c)(2). *Rome* did not construe "political subdivision" in isolation. *Rome* simply applied the pre-1982 statute, which permitted bailout only by separately covered political subdivisions, a condition the city clearly failed to satisfy. 446 U.S., at 167-168.

Nor has Congress abrogated the *Sheffield-Dougherty County* limitation. When Congress altered

the bailout regime in 1982, it could easily have confined bailout to political subdivisions meeting §14(c)(2)'s definition by incorporating that definition into §4(a) or amending §14(c)(2). Congress did neither.

The district court pinned its textual analysis on the phrase "though [coverage] determinations were not made with respect to such subdivision as a separate unit," following the comma in §4(a)(1), 42 U.S.C. §1973*b*(a)(1). Intervenors embrace that analysis, but the Attorney General ignores it, perhaps recognizing that the phrase does not—grammatically or logically—incorporate §14(c)(2)'s definition into §4(a). The language is neither surplus nor limiting. Rather, it is inclusive language clarifying, after *Rome*, that separate coverage is no longer required. Congress did, as intervenors suggest it could have, simply "provide[] that 'any political subdivision' could seek bailout." Intervenors' MTA 14; see 42 U.S.C. §1973*b*(a)(1).

Moreover, treating "political subdivision" as defined by §14(c)(2), as the district court did and appellees urge this Court to affirm, has sweeping consequences throughout the VRA that cannot have been intended by Congress and that conflict with four decades of judicial interpretation. Because "political subdivision" appears numerous times throughout the VRA, applying §14(c)(2) outside the coverage context eviscerates much of the VRA's substantive protection and distorts the preclearance regime itself.

Under the Act's plain text, with "political subdivision" defined by §14(c)(2) governmental subunits other than counties (or their equivalents) could not institute a suit for judicial preclearance. See 42 U.S.C. §1973*c*(a). Noncounty subunits would, in fact, be exempt from compliance with §2's substantive prohibition of discrimination. See *id.* §1973. The definition would remove noncounty subunits from prohibitions on discriminatory voting requirements or prerequisites and tests or devices. See *id.* §1973(a); *id.* §1973*b*(a)(1). Noncounty subunits would not be prohibited from using voting qualifications or prerequisites to deny language minorities the right to vote or required to provide non-English election information. See 42 U.S.C. §1973*b*(f)(2); *id.* §1973*b*(f)(4). Neither courts nor the Attorney General could assign observers to monitor elections in any noncounty subunit. See 42 U.S.C. §1973*a*; *id.* §1973*f*(a)(1)-(2). And if observers were assigned, noncounty subunits could not petition for their removal. See 42 U.S.C. §1973*k*(c).

Aside from distorting the entire VRA by restrictively defining "political subdivision," the district court's statutory interpretation exacerbates §5's constitutional infirmity. An unworkable bailout mechanism cannot tailor §5 to be congruent and proportional. The Court should correct the district court's restrictive application of bailout, which conflicts with precedent and statutory text and intensifies preclearance's constitutional problems.

II. The Court Should Review the Constitutionality of the 2006 Enactment of §5.

Preclearance is grounded in a fundamental presumption that state and local governments uniformly cannot be trusted to enact voting laws and ordinances that comply with the Constitution and federal voting laws. Preclearance does not merely create federal substantive rights; it uniquely injects the federal executive and judiciary into state and local legislative processes, giving the federal government a direct veto over state and local enactments that "remains alone in American history in its intrusiveness on values of federalism." Persily, Options and Strategies for Renewal of Section 5 of the Voting Rights Act, 49 Howard L.J. 717, 718 (2006). But Congress acted on a record grossly insufficient to consign numerous jurisdictions, determined by data 40 years old, to seemingly perpetual federal preemption of core state lawmaking and policymaking prerogatives.

The Fifteenth Amendment gives Congress no more power to redefine substantive constitutional rights than the Fourteenth Amendment, and the 2006 enactment of §5 cannot be upheld because it is not congruent and proportional to a pattern of unconstitutional conduct sufficient to justify that extraordinary preclearance remedy. The question of the proper standard for evaluating congressional authority is far from "academic," Intervenors MTA 3, and instead presents a compelling reason for plenary review of this case. The district court's primary holding

affirmed §5's constitutionality by interpreting *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), to provide for rational-basis review and rejecting *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), as articulating a different, more stringent, and inapplicable standard. There is substantial disagreement whether *Boerne* applies a different standard than *Katzenbach*, as the district court believed, or merely elaborated on the same standard, as the district has consistently argued, *e.g.*, JS 24-25. The importance of this issue is highlighted by the degree to which appellees run from defending the standard selected by the district court. (Intervenors, oddly, impute the district court's view to the district and attack it. Intervenors MTA 22.) The district court's holding stands as important persuasive authority for other courts reviewing exercises of Congress's power to enforce the Fifteenth Amendment, and the district court is the only lower court with jurisdiction over preclearance and bailout litigation.

Appellees rely on cases upholding prior enactments of §5 as though they formed some "superprecedent" requiring a determination that the 2006 reenactment was constitutional. Appellees mistake the relevant unit of analysis—a particular congressional action reenacting §5 on a record specifically developed to support that reenactment—for a Platonistic "Section 5" divorced from the contexts of its several reenactments. *Katzenbach*, *Georgia* v. *United States*, 411 U.S. 526 (1973), and *Rome* confirm, at most, that the particular, time-limited enactment of

§5 reviewed in each case fell within Congress's power given the record on which Congress based its action.[1]

Equally important, appellees' treatment of precedent gets things exactly backward. The accretion of precedents has occurred as the evidentiary basis for congressional action has become ever more remote in time. Moreover, appellees' reliance on those precedents as sufficient to justify the 2006 (and, apparently, all future) reenactments demonstrates the bankruptcy of their argument that the quarter-century expiration provision renders the 2006 reenactment congruent and proportional. Time limits are meaningless if *Katzenbach* and *Rome* made §5 perpetually renewable without reference to contemporary evidence.

Appellees breathlessly cite the volume and breadth of the 2006 congressional record but ignore that, in the congruence-and-proportionality analysis, quality precedes quantity. To justify prophylactic legislation, Congress must first demonstrate a "history and pattern," *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 (2001), of "conduct transgressing the . . . substantive provisions" it seeks to enforce and "tailor its legislative scheme to remedying or preventing such conduct," *Fla. Prepaid*

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[1] *Lopez* v. *Monterey County* did not address §5's constitutionality, only its reach. See 525 U.S. 266, 282-284 (1999). The Court has never decided the constitutionality of the 1982 reenactment. See Karlan, Section 5 Squared, 44 Hous. L. Rev. 1, 11-12 (2007).

Postsecondary Educ. Expense Board v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999). Under either the Fourteenth or Fifteenth Amendment, this requires a showing of a pattern of *purposeful* discrimination. See *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993); *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality op.).

The few examples of intentional discrimination identified by Congress do not approach the defiant deviousness of the 1960s South that was the impetus for preclearance. Appellees decry the district's focus on gamesmanship as necessary to justify §5, arguing incorrectly that isolated instances of intentional discrimination are sufficient to support reenactment. The paucity of such examples within the massive congressional record speaks volumes about the proportionality of the enormous sweep of §5 to present-day conditions. But more importantly, gamesmanship is the problem to which §5 has always been tailored. State and local governments' attempts to stay one step ahead of litigation remedies was the sole reason that traditional case-by-case prosecution of discriminatory voting practices became unworkable, requiring a uniquely preemptive remedy. Contrary to appellees' assertions, the Court has expressly recognized that gamesmanship is the core problem targeted by the preemptive prophylaxis of §5. *Miller* v. *Johnson*, 515 U.S. 900, 926-927 (1995); *Beer* v. *United States*, 425 U.S. 130, 140 (1976). Without evidence that state and local governments continue to outrun the VRA, which appellees must acknowledge is not the case, there can be no showing that case-by-case challenges to

discrimination under §2 and the other substantive provisions of the VRA are somehow uniquely effective only in noncovered jurisdictions.

In addition to its gross disproportion to the utter absence of any present-day pattern of unconstitutional voting-rights deprivations of the type §5 was originally designed to address, the absence of meaningful restrictions to the provision's geographic or temporal scope makes it incongruent to any constitutional violations Congress did identify. Appellees leave largely uncontested the district's argument that the continued imposition of §5's coverage formula is arbitrary and irrational. Their limited response is that the district "ignores the historical context that led to Section 5's adoption." Mukasey MTA 23. To the contrary, the district is fully cognizant that the formula originally "identif[ied] jurisdictions with particularly egregious histories of discrimination, where especially forceful measures against voting discrimination were deemed necessary" *forty years ago*, Intervenors MTA 35; the district rejects, however, the implicit corollary that §5 may be reauthorized without any substantive consideration whether the same or a similar pattern of conditions obtained in 2006. Although it is true that covered jurisdictions had the worst records of discrimination *as of 1964 or 1972*, more contemporary records of voting-rights enforcement do not support the lines drawn 30 or 40 years ago, and Congress made no attempt to reevaluate the coverage contours drawn by our grandfathers. Appellees point to evidence of §5 enforcement, but that evidence cannot justify continued imposition of §5's

coverage formula as rationally distinguishing between covered and noncovered jurisdictions because it descends immediately into tautology. Objections and more-information requests provide no basis for comparing covered and noncovered jurisdictions because, by virtue of the outdated coverage formula, the Department of Justice preemptively monitors voting changes only in those jurisdictions that were branded as discriminatory in 1965 and 1975 and, apparently, permanently so.

The bailout mechanism of §4(a) likewise fails to tailor the geographic scope of §5, especially if interpreted restrictively to exclude entities like the district. For most covered jurisdictions, bailout is an illusory remedy, whether because, like Texas counties, they lack sufficient control over their political subdivisions even to gather the necessary information to pursue bailout, let alone compel compliance with nondiscrimination requirements, or are simply so large as to make pursuing bailout hugely cost-inefficient. The few Virginia jurisdictions that have successfully bailed out are the exceptions that prove the rule of bailout's inadequacy. Despite Virginia's unique structures of local governance that eliminate the many problems faced by jurisdictions elsewhere, only fourteen counties and cities there have sought bailout; the single California county that attempted to follow them withdrew its request because it was unable to compel subdivisions to provide necessary information.

Nor do appellees provide any argument that the seemingly infinitely extensible time limitations on §5

actually provide a meaningful restriction to its scope. The argument that §5 needed to be extended for 25 years to provide incentives for bailout, see Intervenors MTA 33 n.9, is fallacious. In light of the serial reauthorization of §5, there can be no realistic concern that a covered jurisdiction would simply rely on a putative expiration date; Congress has clearly signaled that, until this Court clarifies the limits of congressional power, §5 will continue to be extended ad infinitum in unaltered form.

Appellees unjustifiably suggest that virtually all the progress our Nation has made in combating the scourge of racial discrimination in voting can be attributed solely to §5. They imply without a scintilla of support that all this progress would be undone overnight were §5 recognized as congressional overreaching, ignoring the enormous changes in American society since 1965 or even 1982. Amazingly, they never once mention the election of Barack Obama as president, an event "momentous for the generational change it heralds . . . and the racial progress it both acknowledges and promises." Editorial, President Obama, Wash. Post, Nov. 5, 2008, at A25. Indeed, America has now become "the first majority-white democracy on this planet to anoint a black person as national leader." Zimmerman, A Victory for America, and the World, washingtonpost.com, Nov. 5, 2008, at http://tinyurl.com/6oxcpw.

The Fifteenth Amendment permits some intrusion on state prerogatives—even a significant degree under emergency circumstances like those in 1965.

But it does not abrogate federalism as a principle of constitutional structure or place state electoral management permanently into federal receivership. Time and social progress have shifted the constitutional balance away from this most intrusive prophylactic measure, and the Court should remind Congress of its obligations to respect the Constitution's federalist structure. The 2006 reenactment of §5 is not a congruent and proportional response to *present-day* voting-rights circumstances; it was rather an improper and unconstitutional extension of a response appropriate to the scope and scale of problems two generations past into a never-ending future.

CONCLUSION

The Court should note probable jurisdiction and hear this matter on the merits.

Respectfully submitted,

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