No. 12-

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Shelby County, Alabama.

Respondents are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shelby County, Alabama ("Petitioner") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is available at 679 F.3d 848 and is reprinted in the Appendix ("App.") at 1a-110a. The opinion of the United States District Court for the District of Columbia is available at 811 F. Supp. 2d 424 and is reprinted at App. 111a-291a.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its decision on May 18, 2012. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment to the United States Constitution, 42 U.S.C. § 1973b, and 42 U.S.C. § 1973c are reprinted in the Appendix.

INTRODUCTION

Article IV and the Tenth Amendment reserve to the States the power to regulate elections. Notwithstanding, the Fifteenth Amendment authorizes Congress to enforce

against the States that amendment's guarantee of the right to vote free from discrimination on account of race, color or previous condition of servitude. It is this Court's duty to ensure that Congress appropriately remedies Fifteenth Amendment violations without usurping the States' sovereign powers. Shelby County asks the Court to protect this important federalism interest.

Congress invoked its Fifteenth Amendment enforcement authority to pass the Voting Rights Act of 1965 ("VRA") "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The VRA established a network of prophylactic remedies designed to remedy unconstitutional voting discrimination. Among them, Section 2 creates a private right of action to enforce the Fifteenth Amendment and prophylactically bans any state practice that even unintentionally "results in a denial or abridgment" of voting rights. 42 U.S.C. § 1973(a). Congress also outlawed literacy tests, poll taxes, and other ballot-access restrictions being used to disenfranchise African-Americans, Pub. L. No. 94-73, § 102, 89 Stat. 400 (1975); 42 U.S.C. § 1973h, and passed a "bail in" provision that could subject any jurisdiction found to have violated constitutionally-protected voting rights to judicially-supervised preclearance, *id.* § 1973a(c). None of these enactments is challenged here.

Rather, this Petition puts at issue Congress' decision in 2006 to reauthorize until 2031 the preclearance obligation of Section 5 of the VRA under the pre-existing coverage formula of Section 4(b) of the VRA. The preclearance regime is "one of the most extraordinary remedial

provisions in an Act noted for its broad remedies" and a "substantial departure … from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). Section 5's preclearance obligation goes far "beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Nw. Austin*"). By singling out particular jurisdictions for coverage, Section 4(b) "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* at 203.

This Court has twice upheld the preclearance regime against facial constitutional challenge under then-prevailing conditions in covered jurisdictions. *Katzenbach*, 383 U.S. at 303; *City of Rome v. United States*, 446 U.S. 156 (1980). In 1966, the Court held that preclearance was an "uncommon exercise of congressional power" that would not have been "otherwise appropriate" but for the "exceptional conditions" and "unique circumstances" then documented by Congress. *Katzenbach*, 383 U.S. at 334-35. The Court upheld Section 4(b)'s coverage formula because it accurately captured "the geographic areas where immediate action seemed necessary" and where "local evils" had led to significant Fifteenth Amendment violations. *Id.* at 328-29. The 1975 reauthorization was upheld given the "limited and fragile" progress that had been made in the decade since the VRA's enactment. *Rome*, 446 U.S. at 182.

More recently, addressing the 2006 reauthorization, the Court recognized that "[s]ome of the conditions" that it "relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter 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. Moreover, the "evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* at 203. Because Congress has not since acted to rectify these problems, the constitutional validity of Sections 5 and 4(b) must now be resolved.

This Petition is the ideal vehicle to settle these important issues. Because the District Court for the District of Columbia ("DDC") has exclusive jurisdiction over challenges to the VRA's constitutionality, 42 U.S.C. § 1973*l*(b), and in light of the comprehensive decisions and dissent below, there is nothing to be gained from further vetting. Moreover, Congress has shown no interest in revisiting these issues in the wake of *Northwest Austin* and the Executive's recent refusals to preclear voting changes considered routine in non-covered jurisdictions underscores the severity of the burden that the preclearance regime imposes on covered jurisdictions. Delaying review of these unsettled issues to a future case will only make the situation worse.

The Court is understandably reluctant to decide avoidable constitutional questions. But the Court's "duty as the bulwark of a limited constitution against legislative encroachments" requires it to definitively settle important federalism questions when they are squarely presented. *Nw. Austin*, 557 U.S. at 205. The Court should grant the Petition.

STATEMENT OF THE CASE

A. History of the Voting Rights Act

1. The Voting Rights Act of 1965

The VRA included numerous judicially enforceable provisions (including Section 4(a)'s suspension of tests and devices) that directly confronted voting practices then employed throughout the South to infringe Fifteenth Amendment rights. But given deplorable conditions, Congress determined that even "sterner and more elaborate measures" were required. *Katzenbach*, 383 U.S. at 309. "After enduring nearly a century of systematic resistance to the Fifteenth Amendment," *id.* at 328, Congress was aware that adverse judgments would only lead offending states to adopt new discriminatory devices and local officials to defy court orders or simply close their registration offices, *id.* at 314.

To foreclose continuing and systematic evasions of constitutional guarantees, Section 5 required a "covered jurisdiction" to obtain preclearance before implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1,

1964." Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965). The Department of Justice ("DOJ") or the DDC could not preclear any change that had either "the purpose" or "the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).

Section 5 was a radical solution to "a particular set of invidious practices that had the effect of undo[ing] or defeat[ing] the rights recently won by nonwhite voters." *Miller v. Johnson*, 515 U.S. 900, 925 (1995); *Beer v. United States*, 425 U.S. 130, 140 (1976). Unlike a traditional litigation remedy targeting specific acts of voting discrimination, Section 5 suspended all voting changes pending preclearance to prevent recalcitrant "jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a)." *Nw. Austin*, 557 U.S. at 218 (Thomas, J.) (concurring in the judgment in part and dissenting in part).

Section 4(b) relied on a formula to identify the jurisdictions subject to preclearance. A state or political subdivision became subject to preclearance if it "maintained on November 1, 1964, any test or device" prohibited by Section 4(a) and "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964" or "less than 50 per centum of such persons voted in the presidential election of November 1964." *Id.* § 4(b), 79 Stat. at 438. As a political subdivision of Alabama, Shelby County became a covered jurisdiction under this formula. App. 123a-124a.[1]

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1. Also, Section 3(c) created a bail-in mechanism whereby federal courts could impose preclearance on any non-covered jurisdiction found to have violated the Fourteenth or Fifteenth

The Court upheld Section 5 as constitutional because of a demonstrated history of "widespread and persistent discrimination" and "obstructionist tactics." *Id.* at 328. "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act." *Id.* at 329. Especially given the massive racial disparity in registration and turnout rates, "Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination." *Nw. Austin*, 557 U.S. at 221 (Thomas, J.). Preclearance—an "uncommon exercise of congressional power"—appropriately enforced the Fifteenth Amendment only because of the "exceptional conditions" and "unique circumstances" that Congress had documented. *Katzenbach*, 383 U.S. at 334-35.

The Court upheld Section 4(b)'s coverage formula on the same legislative record because it appropriately enforced the Fifteenth Amendment "in both practice and theory." *Id.* at 330. The formula was sound in theory because "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average" pointed to the "widespread and persistent" use of discriminatory tactics to prevent African-Americans from voting and the clear threat of continuing evasion. *Id.* at 330-31. The formula was sound in practice because it accurately captured those

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Amendments. 42 U.S.C. § 1973a(c). The VRA also included a "bailout" provision that allowed a covered jurisdiction to terminate coverage by making a requisite showing (subject to a "claw back" mechanism). Pub. L. No. 89-100, § 4(a), 79 Stat. at 438.

jurisdictions where "reliable evidence of actual voting discrimination" was so severe and distinctive that the disparate application of preclearance was constitutionally justified. *Id.* at 329.

2. The 1970, 1975, and 1982 Reauthorizations

Congress had "expected that within a 5-year period Negroes would have gained sufficient voting power in the States affected so that special federal protection would no longer be needed." H.R. Rep. No. 91-397 (1969). In 1970, however, Congress reauthorized the temporary provisions of the VRA for five years, Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970), in order "to safeguard the gains in negro voter registration thus far achieved, and to prevent future infringements of voting rights based on race or color," H.R. Rep. No. 91-397, 1970 U.S.C.C.A.N. at 3281.

The 1970 reauthorization expanded the coverage formula to include any jurisdiction that had maintained a prohibited "test or device" on November 1, 1968, and had voter registration on that date or turnout in the 1968 presidential election of less than 50 percent. Pub. L. No. 91-285, § 4, 84 Stat. at 315. The statute also extended Section 4(a)'s ban on the use of any prohibited "test or device" to non-covered jurisdictions for a period of five years. *Id.* § 6, 84 Stat. at 315.

In 1975, Congress reauthorized the VRA for seven more years, Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975), further expanding coverage to any jurisdiction that had maintained a prohibited "test or device" on November 1, 1972, and had voter registration on that date

or turnout in the 1972 presidential election of less than 50 percent, *id.* § 202, 89 Stat. at 401. Congress also extended the preclearance obligation to certain States and political subdivisions that provided electoral materials only in English in order to protect language minority groups. *Id.* § 203, 89 Stat. at 401-02, and it made permanent the nationwide ban on discriminatory "tests or devices." *Id.* § 201, 89 Stat. at 400.

The Court upheld the 1975 reauthorization of Section 5, finding that a "[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions" and that, "though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions." *Rome*, 446 U.S. at 180-81. Only ten years removed from Section 5's enactment, the Court rejected what it viewed as a request to overrule the *Katzenbach* decision. *Id.* at 180.

In 1982, Congress reauthorized the VRA for another 25 years. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982). Although this reauthorization was not challenged facially, the Court became concerned that interpreting the discriminatory "purpose" preclearance requirement too broadly would exacerbate federalism costs "perhaps to the extent of raising concerns about § 5's constitutionality." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*"). The Court also grew concerned with the intrusiveness of the "effect" prong and adopted a standard geared more toward a "minority group's opportunity to

participate in the political process" and less toward "the comparative ability of a minority group to elect a candidate of its choice." *Georgia v. Ashcroft*, 539 U.S. 461, 479-80 (2003). This interpretation ensured that the "effect" prong more closely tracked the constitutional standard, and it avoided the serious equal-protection problems associated with focusing preclearance on minority electoral success. *Id.* at 491 (Kennedy, J., concurring).

3. The 2006 Reauthorization

In 2006, Congress reauthorized the VRA for another 25 years without easing the preclearance burden or updating the coverage formula. Congress found "that the number of African-Americans who are registered and who turn out to cast ballots ha[d] increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass[ed] those of white voters." H.R. Rep. No. 109-478, at 12 (2006). It also found that "the disparities between African-American and white citizens who are registered to vote ha[d] narrowed considerably in six southern States covered by the temporary provisions … and … North Carolina." *Id.* Thus, "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated." *Id.*

Congress nevertheless increased the already-significant federalism burden preclearance imposes on covered jurisdictions by overruling *Bossier Parish II* and *Ashcroft*. Pub. L. No. 109-246, 120 Stat. 577 (2006). Under the amended preclearance standard, Section 5's "purpose" prong now requires the denial of preclearance if the

voting change was made because of "any discriminatory purpose," 42 U.S.C. § 1973c(c), and the "effect" prong requires denial of preclearance whenever the change "diminish[es] the ability of [minority] citizens … to elect their preferred candidates of choice," *id.* § 1973c(b), (d).

Congress justified retaining (and indeed expanding) preclearance by finding that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." Pub. L. No. 109-246, §2(b)(2), 120 Stat. at 577. These "second generation barriers" included: racially polarized voting; various Section 5 preclearance statistics; "section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the [VRA]." *Id.*

The constitutionality of the 2006 reauthorization was immediately challenged in *Northwest Austin*. While relying on the canon of constitutional avoidance to resolve that appeal on statutory grounds, the Court concluded that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of the dramatic changes in the covered jurisdictions. *Nw. Austin*, 557 U.S. at 204. In particular, Section 5 "imposes current burdens and must be justified by current needs," and Section 4(b)'s "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. The Court added that "[t]hese federalism concerns

are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere." *Id.*

B. Proceedings Below

1. On April 27, 2010, Shelby County filed suit seeking resolution of the "serious constitutional questions" left open by *Northwest Austin*. In a 151-page opinion, the District Court granted summary judgment to Respondents. App. 111a-291a. It ruled that the constitutionality of Sections 5 and 4(b) must be judged under the congruence-and-proportionality standard of *City of Boerne v. Flores*, 521 U.S. 507 (1997), App. 161a-162a, but upheld both statutory provisions under that standard, App. 279a-280a, 290a. Shelby County timely appealed.

2. By a 2-1 vote, the D.C. Circuit affirmed. Writing for the majority, Judge Tatel concluded that "*Northwest Austin* sets the course for our analysis," thus requiring that Section 5's "'current burdens'" be justified by "'current needs'" and Section 4(b)'s "'disparate geographic coverage [be] sufficiently related to the problem that it targets'" in order to justify its departure from the fundamental principle of "'equal sovereignty.'" App. 14a-15a (quoting *Nw. Austin*, 557 U.S. at 203). In addition, the majority read *Northwest Austin* as "sending a powerful signal that [*Boerne*'s] congruence and proportionality [test] is the appropriate standard of review," App. 16a, and it purported to evaluate the constitutionality of Sections 5 and 4(b) under that standard.

The majority next considered the nature of the evidence that the legislative record needed to document in order to justify retaining the preclearance obligation for another 25 years. Rejecting Shelby County's argument that preclearance was appropriate only in the face of obstructionist tactics, the majority concluded that Congress need not document "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment" to reauthorize Section 5. App. 24a. Per the majority, the question was not "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate." App. 26a.

The majority also disagreed with Shelby County's argument that Congress could not rely on vote dilution evidence to establish the constitutional necessity of the preclearance regime since the VRA enforces the Fifteenth Amendment. App. 27a-28a. Acknowledging that "neither the Supreme Court nor this court has ever held that vote dilution violates the Fifteenth Amendment," App. 27a, the majority concluded that Section 5 also enforces the Fourteenth Amendment, which "prohibits [intentional] vote dilution," App. 27a.

"Having resolved these threshold issues," App. 29a, the majority held that the legislative record was sufficient to sustain Section 5. It found that "the record contains numerous 'examples of modern instances' of racial discrimination in voting," App. 29a (quoting *Boerne*, 521 U.S. at 530), and that "several categories of evidence in the record support Congress's conclusion

that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed," App. 31a. Finally, the majority dealt with the absence of widespread evidence of voting suppression by finding that Section 5's so-called "blocking" and "deterrent" effect bolstered Congress' reauthorization decision. App. 47a. The majority held that Congress' determination was "reasonable" and thus "deserves judicial deference." App. 68a, 48a.

The majority also upheld Section 4(b). App. 48a-66a. It rejected the argument that the coverage formula is irrational in theory because it relies on outmoded election data and creates an obvious mismatch between its first-generation triggers and the second-generation evidence in the legislative record. App. 56a. The majority found this "argument rests on a misunderstanding of the coverage formula" because "Congress identified the jurisdictions it sought to cover … and then worked backward, reverse-engineering a formula to cover those jurisdictions." App. 56a. In its view, "Shelby County's real argument is that the statute … no longer actually identifies the jurisdictions uniquely interfering with the right Congress is seeking to protect through preclearance." App. 57a.

The majority found Section 4(b)'s constitutionality "present[ed] a close question." App. 58a. The majority further acknowledged that, according to the Katz Study of Section 2 litigation included in the legislative record, of the ten fully covered (or almost fully covered) states, five "are about on par with the worst non-covered jurisdictions" and two "had no successful published section 2 cases at all." App. 58a. But relying on a post-enactment declaration that the United States submitted to the district court, the majority found that several covered States "appear to be

engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." App. 59a. The Court reasoned that these states "appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary." App. 59a-60a. Last, the majority concluded that bail-in and bail-out alleviated any remaining concerns with the coverage formula. App. 61a-65a.

3. Judge Williams dissented, finding that Section 4(b)'s criteria for coverage are defective whether "viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?)." App. 70a. While "sometimes a dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder … Congress hasn't proven so adept." App. 70a.

According to Judge Williams, that Section 4(b) must be "sufficiently related to the problem it targets" means that "[t]he greater the burdens imposed by § 5, the more accurate the coverage scheme must be." App. 71a. He found several aspects of the preclearance regime troubling. First, Section 5 creates severe federalism problems by "mandat[ing] anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to [DOJ] officialdom to seek approval of any and all proposed voting changes." App. 71a. Second, Section 5's "broad sweep" applies "without regard to kind or magnitude" of the voting change. App. 72a. Third, the 2006 amendments to the preclearance standard increased Section 5's federalism burden and "not only disregarded

but flouted Justice Kennedy's concern" that the statute created serious equal-protection problems. App. 73a.

Judge Williams agreed that "[w]hether Congress is free to impose § 5 on a select set of jurisdictions also depends in part … on possible shortcomings in the remedy that § 2 provides for the country as a whole." App. 77a. But he added that "it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay" because "plaintiffs' costs for § 2 suits can in effect be assumed by [DOJ]" and where DOJ does not step in, "§ 2 provides for reimbursement of attorney and expert fees for prevailing parties." App. 77a (citing 42 U.S.C. § 1973*l*(e)). Further, courts can "use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." App. 77a-78a.

Against this backdrop, Judge Williams concluded that "a distinct gap must exist between the current levels of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to § 5's harsh remedy, even if one might find § 5 appropriate for a subset of that group." App. 78a. He found a negative correlation "between inclusion in § 4(b)'s coverage formula and low black registration or turnout," noting that "condemnation under § 4(b) is a marker of higher black registration and turnout." App. 83a. This was true for minority elected officials in the covered and noncovered jurisdictions as well. App. 85a.

"[S]econd generation" evidence in the record did not alter the picture. Judge Williams determined that "a number of factors undermine any serious inference" from federal election observer data. App. 87a. He also found that the Katz Study further undermined the formula,

especially when looking at the Section 2 data on a state-by-state basis. App. 91a-93a. "The five worst uncovered jurisdictions … have worse records than eight of the covered jurisdictions …. Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered …. A formula with an error rate of 50% or more does not seem 'congruent and proportional.'" App. 93a. Judge Williams rejected the McCrary declaration's survey of "purportedly successful, but unreported § 2 cases" as unreliable. App. 93a.

Judge Williams attributed no significance to the purported "blocking" or "deterrent effect" of preclearance because Section 5 objections are not a fair proxy for successful Section 2 lawsuits and "the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin*'s insistence that 'current burdens … must be justified by current needs' would mean little if § 5's supposed deterrent effect were enough to justify the current scheme." App. 94a. Judge Williams also concluded that the problems with the coverage formula could not be solved "by tacking on a waiver procedure such as bailout." App. 101a (citation and quotation omitted).

Judge Williams ultimately concluded that "[b]ased on any of the comparative data available to us, and particularly those metrics relied on in *Rome*, it can hardly be argued that there is evidence of a 'substantial' amount of voting discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in *Katzenbach*." App. 96a. Accordingly, "there is little to suggest that § 4(b)'s coverage formula continues to capture jurisdictions with especially high levels of voter discrimination." App. 104a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the D.C. Circuit "decided an important question of federal law that has not been, but should be, settled by this Court" and it did so "in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

I. The Constitutional Issues Presented In This Case Are Of Public Importance And Should Be Settled Now By This Court.

1. "[The] Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991). For covered jurisdictions, Section 5 arrests that sovereign authority as to "all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 557 U.S. at 202. Placing a jurisdiction in federal receivership raises fundamental questions of state sovereignty; and doing so selectively, absent compelling justification, unconstitutionally departs from the "historic tradition that all the States enjoy 'equal sovereignty.'" *Id.* at 202-03. In short, Congress' 2006 decision to reauthorize the VRA's preclearance regime for another 25 years "raise[s] serious constitutional questions" under any applicable standard. *Id.* at 204.

Congress compounded the problem by expanding the grounds for denying preclearance at a time when the "conditions that [the Court] relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* ha[d] unquestionably improved." *Id.* at 202. Preclearance must now be denied unless a covered jurisdiction can prove both

the absence of "any discriminatory purpose" and that the voting change will not diminish a minority group's "ability to elect" a favored candidate even if it would not interfere with any voter's "effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. The new preclearance standard thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." App. 75a (Williams, J., dissenting).

2. These federalism concerns are not academic. The preclearance regime has an outsized effect on the basic operation of state and local government. Based on the experience of covered jurisdictions between 1982 and 2007, Section 5 will foreclose the implementation of more than 100,000 electoral changes (more than 99% of which will be noncontroversial) unless and until they are precleared by federal officials in Washington, D.C. S. Rep. No. 109-295, at 13-14 (2006). Because of this prior restraint, a covered jurisdiction must either go "hat in hand to [DOJ] officialdom to seek approval," App. 71a, or embark on expensive litigation in a remote judicial venue if it wishes to make any change to its election system. It should be no surprise, then, that states such as Florida, Texas, and Alaska have joined Shelby County in challenging the 2006 reauthorization.[2]

These constitutional challenges arise, in significant part, in response to DOJ's needlessly aggressive exercise of preclearance authority. For example, DOJ

2. *See Florida v. United States*, No. 11-cv-1428-CKK-MG-ESH (D.D.C.) (Doc. 54); *Texas v. Holder*, No. 12-cv-128-RMC-DST-RLW (D.D.C.) (Doc. 25); *Samuelsen v. Treadwell*, No. 12-cv-00118-RRB-AK-JKS (D. Alaska) (Doc. 25).

has refused to preclear the Texas and South Carolina voter identification laws notwithstanding *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). As Judge Williams explained, there is simply no legitimate reason why "voter ID laws from South Carolina and Texas [should] be judged by different criteria … from those governing Indiana" when "Indiana ranks 'worse' than South Carolina and Texas in registration and voting rates, as well as in black elected officials" and there is no other obvious basis for placing South Carolina and Texas, but not Indiana, in federal receivership. App. 103a.

Similarly, Florida (which must obtain preclearance of statewide legislation because five of its 62 counties are covered jurisdictions) has been forced into preclearance litigation to prove that reducing early voting from 14 days to 8 days is not "discriminatory,"[3] when states such as Connecticut, Rhode Island, and Pennsylvania have no early voting at all.[4] Such questionable preclearance denials raise serious concerns about whether Section 5's mission has strayed from ensuring that discriminatory tactics do not disenfranchise minority voters to providing DOJ with a convenient and efficient means of imposing its preferred electoral system on the covered jurisdictions.

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3. DOJ opposed preclearance even though Florida still provided the same total number of early voting hours (96 hours) by expanding evening hours and mandating additional weekend hours. *Florida v. United States*, No. 11-cv-1428-CKK-MG-ESH (D.D.C.) (Doc. 54).

4. National Conference of State Legislatures: Absentee and Early Voting (July 22, 2011), *available at* http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx (last visited July 20, 2012).

3. Only this Court, the ultimate guardian and arbiter of the division of powers that lies at the heart of our constitutional system, *Boerne*, 521 U.S. at 528-29, can settle these important issues. Although previous decisions reviewing the VRA's constitutionality are instructive, there must be a contemporaneous assessment of whether Section 5's "current needs" justify its "current burdens" and whether Section 4(b)'s "departure from the fundamental principle of equal sovereignty" remains "sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. "Past success alone … is not adequate justification to retain the preclearance requirements." *Id.* at 202. These constitutional issues will continue to fester until they are definitively settled.

For understandable reasons, this Court "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Id.* at 205. But this prudent separation-of-powers doctrine presupposes that the political branches will respond when the Court expresses concern over whether a federal law will withstand constitutional scrutiny upon further review. *Mistretta v. United States*, 488 U.S. 361, 408 (1989) ("Our principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest.").

Yet in the more than three years after *Northwest Austin*, Congress held not one hearing, proposed not one bill, and amended not one law in response to the concern that Sections 5 and 4(b) cannot be constitutionally justified based on the record compiled in 2006. And instead of judiciously exercising its statutory authority in order to avoid confrontation, DOJ's actions have magnified

the burdens and inequities of the modern preclearance regime. *Supra* at 19-20.

This Court's intervention is therefore warranted. Because Congress' Fifteenth Amendment enforcement authority "is not unlimited," this Court must "determine if Congress has exceeded its authority under the Constitution." *Boerne*, 521 U.S. at 536. Both in this setting and in others, this Court has traditionally granted review whenever a serious challenge to Congress' enforcement authority arises. *See, e.g.*, *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). This case should not be an exception to that rule.

4. Shelby County's challenge provides an ideal vehicle for resolving the constitutionality of Sections 5 and 4(b). Unlike in *Northwest Austin*, Shelby County neither requested nor is eligible for bailout. App. 11a. Shelby County's challenge is based on the 2006 legislative record and no other evidence is constitutionally cognizable. *Infra* at 34a. There is no justiciability problem. App. 296a-297a. The decision below is binding precedent in the D.C. Circuit, the only Circuit in which this issue may be adjudicated, *supra* at 4, and its decision will provide the basis for this or any future review by the Court. The unresolved issues were thoroughly explored in the district court opinion and the majority and dissenting court of appeals opinions.

In acting on Shelby County's Petition, this Court must decide whether to allow the split decision below to stand as binding nationwide precedent or to acknowledge the importance of the issues presented and settle them.

Shelby County believes that the choice is obvious. The burdens imposed on it and other covered jurisdictions will continue until the constitutional issues left unanswered in *Northwest Austin* are definitively resolved by this Court. Indeed, the issues Shelby County raises inevitably will be presented to this Court until this cloud of uncertainty is lifted. The time to settle them is now.

II. Review Is Required Because The Court Of Appeals Incorrectly Decided These Important And Unsettled Constitutional Issues.

A. The court of appeals wrongly upheld Sections 5 and 4(b) by distorting *Boerne*'s "congruent and proportional" test.

1. The lower courts agreed that whether the preclearance regime remains "appropriate" enforcement legislation must be judged under the *Boerne* framework. App. 16a, 160a-161a. Under *Boerne*, the court must first "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, it must "examine whether Congress identified a history and pattern" of constitutional violations. *Id.* at 368. Third, it must find "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

2. While conceding the applicable standard, the majority deferred to Congress in ways alien to the *Boerne* line of decisions. The majority described its "job" as merely "to ensure that Congress's judgment is reasonable and rests on substantial probative evidence." App. 47a. But it confused the standard by which courts

review legislation enacted under Congress' Article I powers with review of Fifteenth Amendment remedial authority. Congress' enforcement authority under the Reconstruction Amendments is not substantive—it is strictly remedial. *Boerne*, 521 U.S. at 527. Treating the judicial task as akin to deferential review of Article I authority or administrative agency actions, App. 47a, abdicates the Court's duty to patrol "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Boerne*, 521 U.S. at 519.

The majority acknowledged that a "more searching" review of the legislative record is needed given Section 5's unprecedented burdens. App. 21a. But it honored this obligation in the breach, applying an overly deferential standard of review that infected every aspect of its analysis and thus effectively abandoning "vital principles necessary to maintain separation of powers and the federal balance." *Boerne*, 521 U.S. at 536.

3. Sections 5 and 4(b) are no longer constitutional under a proper application of *Boerne*. To reauthorize Section 5, Congress was required to document the kind of "widespread and persisting" pattern of Fifteenth Amendment violations that made the preclearance obligation constitutional in the first place: evasionary alteration of discriminatory voting laws to circumvent minority victories hard-won through traditional litigation. *Beer*, 425 U.S. at 140. It did not. *Nw. Austin*, 557 U.S. at 226-29 (Thomas, J.). And even if it were "possible to squeeze out of [the congressional record] a pattern of unconstitutional discrimination by the States," *Garrett*, 531 U.S. at 372, the preclearance obligation—especially given the burdensome amendments to the standard—"is

so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *Boerne*, 521 U.S. at 532.

Section 4(b) likewise fails under *Boerne*. Its formula is not proportional because coverage is no longer "placed only on jurisdictions" in which there is "intentional racial discrimination in voting." *Id.* at 533. The registration, turnout, and minority elected officials statistics previously relied on by this Court to justify selective coverage reveal no difference between covered and non-covered jurisdictions. *Infra* at 27. And even the "second generation barriers to voting" are not concentrated in the covered jurisdictions. *Id.* at 32-34. The formula also lacks congruence because of the complete mismatch between its triggers and the kind of evidence relied on by Congress to reauthorize the preclearance obligation. *Id.* at 30. Congress must ensure a close fit between the reasons for imposing preclearance and the formula employed for choosing the jurisdictions subject to that obligation. Because Congress clearly failed to do so here, Section 4(b)'s coverage formula fails congruence-and-proportionality review. App. 70a, 93a, 97a (Williams, J.).

B. The court of appeals should not have upheld Section 5's preclearance obligation under any applicable legal standard.

1. Irrespective of the standard of review, to reauthorize preclearance for another 25 years the 2006 Congress needed to document "exceptional conditions" that could "justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 335. Section 5's

constitutionality has always depended on a legislative showing that "current burdens" imposed on the covered jurisdictions by this extreme remedy are "justified by current needs." *Nw. Austin*, 557 U.S. at 203.

2. Contemporaneous evidence of systematic interference with the right to register and vote has always been required to trigger Fifteenth Amendment remedial authority. *Katzenbach*, 383 U.S. at 329 (legislative record was filled with "reliable evidence of actual voting discrimination"); *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("Congress may impose prophylactic § 5 legislation" when "there has been an identified history of relevant constitutional violations."). Here, Congress relied on "second generation" barriers that are not even remotely probative of intentional interference with the right to register and vote—let alone the kind of systematic violations that previously justified Section 5. *Nw. Austin*, 557 U.S. at 228 (Thomas, J.); App. 97a (Williams, J.). The majority should not have relied on this evidence to sustain Section 5.

Moreover, much of this evidence involved alleged vote dilution. App. 26a-29a. Because the Fifteenth Amendment has been the exclusive basis for upholding Section 5, however, *Katzenbach*, 383 U.S. at 308-10, 324-29; *Rome*, 446 U.S. at 180-82, the legislative record must document disenfranchisement—not vote dilution. *Miller*, 515 U.S. at 937-38. This Court has "never held that vote dilution violates the Fifteenth Amendment." *Bossier Parrish II*, 528 U.S. at 334 n.3. The majority incorrectly relied on evidence involving redistricting, annexations, at-large elections, and other practices that affect the weight of the vote once cast—not access to the ballot.

3. At most, the legislative record shows scattered and limited interference with Fifteenth Amendment voting rights in some covered jurisdictions. In *Katzenbach*, the Court relied on the compelling record of widespread infringement of voting rights coupled with a recent and deplorable history of "ingenious defiance" of traditional judicial remedies. 383 U.S. at 309. To sustain Section 5, this Court concluded that there must be current evidence in the legislative record of "systematic resistance to the Fifteenth Amendment." *Id.* at 328, 335.

No such record now exists. "Things have changed in the South .... Blatantly discriminatory evasions of federal decrees are rare." *Nw. Austin*, 557 U.S. at 202. Voter registration and turnout "now approach parity" and "minority candidates hold office at unprecedented levels." *Id.* at 202 (citing H.R. Rep. No. 109-478, at 12-18). "The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute." *Id.* at 229 (Thomas, J.).

To fill this gap, the majority went beyond the legislative record to speculate that the lack of evidence of discriminatory practices in the covered jurisdictions arose not from changed attitudes, but from Section 5's so-called deterrent effect. App. 42a-44a. Speculative deterrence is plainly insufficient to impose preclearance on the covered jurisdictions. Congress needed to find that Section 5 was justified under actual conditions uniquely present in the covered jurisdictions; it could not proceed from an unsubstantiated and unbounded assumption that the covered jurisdictions have a latent desire to discriminate

that does not exist elsewhere in the country. Congress is not entitled to reauthorize Section 5 for another 25 years based "on outdated assumptions about racial attitudes in the covered jurisdictions." *Nw. Austin*, 557 U.S. at 226 (Thomas, J.); App. 94a (Williams, J.).

4. The court of appeals sought to avoid these record infirmities by holding that Congress did not need to document the kind of "unremitting and ingenious defiance of the Constitution" catalogued in *Katzenbach*. 383 U.S. at 309. In its view, Section 5 could be sustained so long as the legislative record showed the "inadequacy of case-by-case litigation" under Section 2. App. 26a. But it was not the ordinary costs and burdens associated with traditional litigation that rendered Section 2 inadequate in 1965. It was the covered States' "obstructionist tactics" and "systematic resistance to the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 328. Unrelenting defiance was the reason *why* case-by-case litigation was futile and Section 5 was justifiable as a last resort. Absent evidence that the systematic disenfranchisement of minority voters that made case-by-case enforcement impossible still exists, there is no constitutional basis for upholding Section 5. Congress' interest in preserving the administrative ease of preclearance is not a basis for retaining it.

In any event, nothing in the legislative record suggests that Section 2 litigation is inadequate today. The discriminatory tests and devices that once made case-by-case litigation futile have been permanently banned by Congress. *Supra* at 9. In addition, "the majority of § 5 objections today concern redistricting," App. 99a (Williams, J.), and Section 2 is an effective vehicle for challenging redistricting changes—especially statewide

decennial redistricting plans—the principal target of those urging reauthorization, App. 26a, 99a. Moreover, there is no evidence in the legislative record that adverse Section 2 judgments are being evaded or designed around by recalcitrant jurisdictions.

Unlike Section 5's intrusive and selective suspension of all voting changes, Section 2 creates a nationwide private right of action allowing direct challenge to discriminatory voting laws and bases its remedy on proven violations. Especially in conjunction with Section 3's bail-in mechanism, *infra* at 35, Section 2 is now the "appropriate" prophylactic remedy for any pattern of discrimination documented by Congress in 2006.

C. The court of appeals should not have upheld Section 4(b)'s coverage formula under any applicable legal standard.

1. Section 4(b) is unconstitutional whether *Boerne* applies or not. Under *Katzenbach*, the coverage formula must be "rational in both practice and theory." 383 U.S. at 330. In *Northwest Austin*, the Court doubted the formula's constitutionality because "the evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance" and because "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." 557 U.S. at 203; *Lane*, 541 U.S. at 564 (Scalia, J. dissenting) (allowing a prophylactic remedy to be imposed only "on those particular States" where the problem exists). The decision below cannot be squared with any of this Court's decisions.

2. Congress constitutionally justified Section 5's reauthorization based on evidence different from that it had previously relied upon; but Congress irrationally failed to tie coverage under Section 4(b) to that evidence. The majority sidestepped this problem by suggesting that the formula's theoretical irrationality is not "Shelby County's real argument." App. 57a. That is wrong; the issue was briefed extensively both in the district court and on appeal. App. 292a-293a. The majority dodged this "theory" challenge because there is no answer to it. The coverage formula relies on decades-old voting data and there is a serious mismatch between its triggers, which are based on ballot-access interference, and the "second generation" barriers in the record, which relate only to the weight of a vote once cast. App. 98a (Williams, J.).

The majority's nearest approach to this issue was asserting that, because the formula "continues to identify the jurisdictions with the worst problems," it "is rational in theory." App. 57a. But that is an argument for rationality in practice—not theory. In fact, the majority disclaimed the need to defend the formula on a theoretical level, concluding that the coverage triggers "were never selected because of something special that occurred in [the identified] years" and that "tests, devices, and low participation rates" were not Congress' main targets; they were "proxies for pernicious racial discrimination in voting." App. 56a-57a. But this is pure revisionism. *Katzenbach* held that the "the misuse of tests and devices … was the evil for which the new remedies were specifically designed" and that "a low voting rate [was] pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S. at 330-31. Thus, the

Court found a rational connection between the triggers for coverage and the problems that the preclearance was devised to remedy. Bypassing this question admits that it has no answer.

3. The majority's defense of the coverage formula at a practical level fares no better. As Judge Williams explained, of the four types of evidence in the legislative record for which comparative data exist:

> one (voter registration and turnout) suggests that the coverage formula completely lacks any rational connection to current levels of voter discrimination, another (black elected officials), at best does nothing to combat that suspicion, and, at worst, confirms it, and two final metrics (federal observers and § 2 suits) indicate that the formula, though not completely perverse, is a remarkably bad fit with Congress's concerns.

App. 95a.

Such a legislative record cannot possibly show that voting discrimination is "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203. Had Congress studied the issue, it might have reconsidered the formula. But although it was alerted to the problem, Congress never seriously studied the comparative records of covered and non-covered States. The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2d. Sess., at 200-01 (May 16, 2006) (testimony of Pildes) (noting that the issue was never "addressed in any detail in the [Senate] hearings … or in the House" and "little

evidence in the [legislative] record examines whether systematic differences exist between the currently covered and non-covered jurisdictions"). Congress cannot selectively impose preclearance if it fails to seriously study whether the identified problem is concentrated in the targeted jurisdictions.

4. Presumably aware that most of the comparative evidence in the legislative record could not be relied on to uphold Section 4(b), the majority focused on the Katz Study of Section 2 litigation. App. 49a-51a. The majority conceded that the study showed that the bulk of the covered States are no different from their non-covered counterparts, App. 58a, but it then resorted to manipulating the Katz data. First, it considered only a carefully selected slice of the data—Section 2 cases resulting in outcomes described as "favorable to minority plaintiffs," a characterization that vastly overstates the significance of this evidence, App. 93a-94a (Williams, J.), especially considering that Congress cited only the "continued filing of Section 2 cases in covered jurisdictions," Pub. L. No. 109-246, §2(b)(4)(C), 120 Stat. at 577. The Katz Study indicates that many of these Section 2 cases involved no finding of intentional discrimination, were not resolved on the merits, or both; it also indicated that some of the "outcomes" deemed "favorable to minority voters" merely reflected changes in voting laws.

Second, the majority primarily reviewed this slice of data by aggregating it into "covered" and "non-covered" categories, a mode of analysis that fails to afford equal dignity to each sovereign State subject to coverage. *Nw. Austin*, 557 U.S. at 203. Even viewed in this skewed manner, however, the data fails to show a meaningful

difference between covered and noncovered jurisdictions. According to the Katz Study, there were more Section 2 lawsuits filed, as well as more resulting in a finding of intentional discrimination, in non-covered jurisdictions. Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), http://sitemaker.umich.edu/voting rights/files/masterlist.xls. And even if "successful" Section 2 lawsuits were the appropriate barometer, a 56% to 44% divide between covered and non-covered jurisdictions, especially given the limited number of cases overall, cannot justify retaining this outmoded coverage formula.

Third, the majority failed to properly review the Katz data state-by-state—the only mode of analysis that comports with the principle of equal sovereignty. Had it done so, the majority could never have found that the formula was actually capturing "the jurisdictions with the worst problems." App. 57a. If successful Section 2 litigation is the best measure of where the "worst problems" exist, then the coverage formula is both overinclusive—sweeping in states like Arizona and Alaska, which had no successful Section 2 cases—and underinclusive—omitting states like Montana, Arkansas, Delaware, Rhode Island, Hawaii, and Illinois, which had more successful Section 2 cases than South Carolina, Florida, Virginia, Texas, and Georgia. What the majority labeled a "close question," App. 58a, is in fact not close at all.

The majority examined the Katz data state-by-state only after supplementing it with the results of a post-enactment study that it conceded should be "approach[ed] … with caution," App. 54a, because it was conducted during this litigation and was partially dependent on extra-record evidence collected by different groups and

pursuant to different methods than the Katz Study, App. 93a-94a (Williams, J.). But the study should have been disregarded entirely. The law's constitutionality must be measured against the legislative record alone. App. 299a-303a; *Coleman*, 132 S. Ct. at 1336-37; *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008).

Looking for precedential support, the majority attempted to analogize the 2006 record to the 1965 record, suggesting the two were similar. App. 60a. But the 1965 record included a category of States where "federal courts ha[d] repeatedly found substantial voting discrimination," a second category where "there was more fragmentary evidence of recent voting discrimination," and a third category where the use of tests and devices and low voter turnout justified coverage, "at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years." *Katzenbach*, 383 U.S. at 329-30. In contrast, the 2006 record could not possibly result in any States falling within the first category, and at most only three States in the second category, "leav[ing] six fully covered states (plus several jurisdictions in partially covered states) in category three, many more than in 1966, when only two fully covered states (Virginia and Alaska) were not included in either category one or two." App. 97a. (Williams, J.).

5. The majority also relied on bail-out and bail-in to solve the massive problems with the coverage formula. But even setting aside the fact that the majority relied on

bailout figures inflated by post-reauthorization evidence,[5] only about 1% of all covered jurisdictions have bailed out since 1982. Bailout thus is "only the most modest palliative to § 5's burdens," App. 101a (Williams, J.), especially because bailed-out jurisdictions remain subject to the VRA's clawback provision for 10 years, *supra* at 6 n.1. Were bailout sufficient to save such an ill-fitting coverage formula, Congress could just randomly select jurisdictions for coverage so long as any unlucky jurisdiction could obtain some measure of relief from a federal court. Surely the "fundamental principle" of equal sovereignty requires more. *Nw. Austin*, 557 U.S. at 203.

Finally, judicial bail-in actually undermines the coverage formula's constitutionality. Bail-in is a narrower, more appropriate means of imposing preclearance because it is triggered by a prior judicial finding of unconstitutional voting discrimination, 42 U.S.C. § 1973a(c), and because it can be applied nationally. Unlike the outdated coverage formula, then, Section 3's bail-in mechanism does not "depart[] from the fundamental principle of equal sovereignty" by treating some States differently from others, *Nw. Austin*, 557 U.S. at 203.

* * *

Sections 5 and 4(b) of the VRA were essential to putting an end to "ingenious defiance" of Fifteenth Amendment voting rights in the covered jurisdictions. They were designed to overcome egregious discriminatory conditions that had persisted for 95 years and had made

5. Approximately one-third of all bailouts occurred in the wake of *Northwest Austin*, App. 63a, and thus were not in the legislative record before Congress in 2006 and cannot support the validity of Congress' judgment, *see supra* at 34.

case-by-case litigation and the ban on abusive tests and devices insufficient to overcome the rampant electoral gamesmanship that had plagued the South. In 1965, Congress built the kind of legislative record that is needed to sustain a prophylactic remedy as invasive and novel as preclearance and crafted a coverage formula that was sound in theory and in practice. In 2006, Congress did neither. It is now incumbent upon this Court to review the decision below and settle the issues arising from Congress' failure to fulfill its obligation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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