No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR JOHN NIX, ANTHONY CUOMO, AND DR. ABIGAIL THERNSTROM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICI CURIAE*

John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom respectfully submit this brief as *amici curiae* in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

John Nix and Anthony Cuomo are voters in the covered jurisdiction of Kinston, North Carolina, and Nix was a candidate for Kinston City Council in 2011 who intends to run again in 2013. They previously brought a facial constitutional challenge against Section 5 after the Justice Department had denied preclearance for a voter-approved referendum to hold local elections on a nonpartisan basis. DOJ initially objected because the Democratic candidates preferred by black voters would lose the electoral benefit of straight-party-ticket voting. But the lawsuit was mooted on appeal when DOJ abruptly changed its position just weeks before oral argument, belatedly purporting to withdraw its earlier objection and to preclear the referendum. *See LaRoque v. Holder*, 831 F. Supp. 2d 183, 192-93 (D.D.C. 2011), *vacated as moot*, 679 F.3d 905 (D.C. Cir. 2012), *cert. denied sub nom. Nix v. Holder*, --- S. Ct. ----, 2012 WL 2955934 (Nov. 13, 2012). Nevertheless, Nix and Cuomo submit this *amicus* brief on the unconstitutionality of Section 5 in the hope of ensuring that the injuries they suffered in the past will never be repeated in the future.

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[1] The parties' letters of consent to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Dr. Abigail Thernstrom is an adjunct scholar at the American Enterprise Institute and Vice Chair of the U.S. Commission on Civil Rights. She is presenting her personal opinion as an election-law expert, not the Commission's views. She long has acknowledged that the original Section 5, as enacted in 1965, was a critical and constitutional emergency measure to enforce equal voting rights for blacks in the Jim Crow South. She believes, though, that the new Section 5, as reauthorized and amended in 2006, no longer serves that vital function and instead perpetrates race-conscious electoral decisionmaking that is fundamentally inconsistent with equal voting rights for all citizens. *See generally* Abigail Thernstrom, *Redistricting in Today's Shifting Racial Landscape*, 23 Stanford. L. & Pol'y Rev. 373 (2012).

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Amici recognize that the parties and the court below extensively addressed the constitutional issue raised by the 2006 Congress' decision to reauthorize Section 5's preclearance procedure without updating the old coverage formula. *Amici* thus will limit their arguments on that issue to a few fundamental points that warrant special emphasis.

Amici will focus instead on an *additional* constitutional issue that has received much less consideration—namely, the 2006 Congress' decision to amend Section 5's substantive preclearance standard by overruling this Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) ("*Bossier II*"), thereby newly expanding the grounds for denying preclearance. *Amici* respectfully submit that this Court must review the 2006 amendments along with the 2006 reauthorization.

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In particular, as Judge Williams's dissent below correctly observed, "it is impossible" to decide whether the reauthorized preclearance procedure's "coverage formula" is "sufficiently related to the problem it targets" without "looking at the burdens" imposed by the amended substantive preclearance standard. Pet.App. 70a-71a. This Court simply cannot assess whether Section 5's preclearance procedure is a valid means of enforcing the constitutional ban on intentional racial voting discrimination without fully examining what those means actually are—*i.e.*, what is substantively required to obtain preclearance. After all, there is an inherent connection between the scope and race-consciousness of the substantive preclearance standard and the appropriateness of the preclearance procedure as enforcement legislation. As the standard becomes more expansive in invalidating voting practices, the procedure's burden on covered jurisdictions becomes greater, and the procedure's likelihood of targeting unconstitutional intentional discrimination diminishes. Thus the procedure's coverage formula must become less accurate. Indeed, this Court specifically recognized that relationship when it noted that the "federalism concerns" with the preclearance procedure are "underscored by the argument" that the preclearance standard makes race "the predominant factor" in electoral decisionmaking. *See Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

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SUMMARY OF ARGUMENT

I. The extraordinary preclearance regime selectively imposed by Section 5 of the VRA can be justified only if the ordinary antidiscrimination litigation generally authorized by Section 2 of the VRA (and other laws) is uniquely inadequate in the covered jurisdictions. Indeed, even the D.C. Circuit acknowledged that this is the "critical factor" that must exist under this Court's cases in order for Section 5 to constitute appropriate enforcement legislation under the Reconstruction Amendments. Pet.App. 25a-26a. Yet, while the majority below purported to review the 2006 version of Section 5 in light of that critical factor, it failed to account sufficiently for two significant issues: the dramatic changes in the jurisdictions covered by the preclearance procedure, and the dramatic changes in the substantive preclearance standard. As reauthorized and amended in 2006, Section 5 "imposes current burdens" that no longer can "be justified by [any] current need[]" to supplement Section 2. *See Nw. Austin*, 557 U.S. at 203.

II. Preclearance Procedure. Before 2006, Section 5's preclearance procedure bolstered Section 2 because it was "aimed at areas" where "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting" due to "the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 328 (1966); *accord City of Boerne v. Flores*, 521 U.S. 507, 525-26 (1997). In 2006, however, it was "[ir]rational in both practice and theory" (*South Carolina*, 383

U.S. at 330) to conclude that this special "evil that § 5 is meant to address" was still "concentrated in the jurisdictions singled out for preclearance" more than three decades earlier, and that it would remain that way for the next twenty-five years. *See Nw. Austin*, 551 U.S. at 203-04.

The contrary conclusion of the D.C. Circuit majority is fundamentally flawed. Although the majority emphasized certain evidence of continuing discrimination in the covered jurisdictions, it identified no evidence that such lingering discrimination was so entrenched and pervasive as to defy redress under normal anti-discrimination litigation. *See* Pet.App. 44a-48a. Moreover, the majority's primary evidence to justify the disparate treatment of covered and non-covered jurisdictions was the allegedly greater incidence of successful Section 2 lawsuits in the covered jurisdictions. *See id.* 49a-55a. The logic is dubious. We contend that this fact instead reveals that section 2 is a highly effective remedy in the covered jurisdictions. Likewise, in defending the coverage formula, the majority heavily relied on the statutory provisions for "bail-out" and "bail-in." *See id.* 61a-66a. But, for purposes of identifying the jurisdictions where Section 2 is inadequate, those provisions are at best entirely irrelevant and at worst counter-productive.

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III. Preclearance Standard. Before 2006, Section 5's preclearance standard bolstered Section 2 because it was narrowly "directed at preventing a particular set of invidious practices that had the effect of undoing or defeating the rights recently won by nonwhite voters" in normal anti-discrimination litigation. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900,

925 (1995) (internal quotation marks omitted). *First*, the preclearance standard was *limited to retrogression* and thus "prevent[ed] nothing but backsliding" from the status quo achieved through Section 2 litigation: so long as the jurisdiction could prove that the voting change at issue did not have the purpose or effect of making a minority group worse off, the jurisdiction was entitled to preclearance *without additionally having to disprove* any potential accusation that it had "discriminated" against another change that would have made the group *better off* (*e.g.*, creating an additional majority-minority district). *See Bossier II*, 528 U.S. at 328-36. *Second*, retrogression was analyzed under a *"totality of the circumstances" inquiry* modeled on Section 2's "results" test: even where the change would reduce a minority group's ability to elect its preferred candidates, the jurisdiction could prove that the change was permissible if the reduction was *justified* by off-setting increases in the group's overall political power or *excused* by the constraints of traditional governance principles. *See Ashcroft*, 539 U.S. at 479-85. Notably, this Court warned that, absent these substantive limits, the preclearance standard would raise serious constitutional concerns due to the excessive burden on covered jurisdictions, including the excessive consideration of race required. *See Bossier II*, 528 U.S. at 336; *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

In 2006, however, Congress abrogated *Ashcroft* and *Bossier II*. *See* 42 U.S.C. § 1973c(b)-(d). It vehemently accused this Court of having "misconstrued … and narrowed the protections afforded by section 5." *Id.* § 1973 note, Findings (b)(6); *see also* H.R. Rep. No. 109-478, at 65-72, 93-94

(2006) (*e.g.*, *Ashcroft* made preclearance "a wasteful formality" and "hopelessly unadministerable," which "would encourage States … to turn black and other minority voters into second class voters"); S. Rep. No. 109-295, at 15-21 (2006) (*e.g.*, *Bossier II* forced "the federal government" to "giv[e] its seal of approval to practices that violate the Constitution").

Judge Williams's dissent below concisely summarized the constitutional problems caused by eliminating the crucial substantive limits recognized in those decisions. *First*, in § 1973c(b),(d), Congress made a minority group's "ability to elect" its preferred candidate the "exclusive focus" of retrogression and absolutely "foreclose[d] th[e] choice" to "diminish[]" minorities' electoral chances for any reason. *See* Pet.App. 73a-75a. Thus, by "restricting the flexibility" of covered jurisdictions to prove to federal authorities that countervailing considerations exist under a broader inquiry, the "ability to elect" standard "mandates" a "particular brand" of "race-conscious decisionmaking"—*i.e.*, a rigid floor for minorities' expected electoral success—that "aggravates both the federal-state tension … and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." *See id.* *Second*, in § 1973c(c), Congress "requir[ed] covered jurisdictions affirmatively to prove [the] absence" of "discriminatory purpose" for even non-retrogressive changes, despite the difficult burden of proving that negative, let alone DOJ's exploitation of that difficulty pre-*Bossier II* "in its pursuit of maximizing majority-minority districts at any cost." *See id.* 75a-76a. Thus, the "discriminatory purpose" standard, "at worst, restored [DOJ's] implicit command that States engage in presumptively

unconstitutional race-based districting, and at best, exacerbated the substantial federalism costs that the preclearance procedure already exacts." *See id.* (citations and internal quotation marks omitted).

Accordingly, the 2006 preclearance standard has the "fundamental flaw" that DOJ "is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). And notably, this Court in *Nw. Austin* cited Justice Kennedy's *Ashcroft* concurrence when suggesting that the preclearance standard exacerbated the "constitutional concerns" with the preclearance procedure. 551 U.S. at 203.

In sum, Congress' persistent failure to heed this Court's constitutional teaching clearly shows that the 2006 version of Section 5 is not valid enforcement legislation. Congress ignored the lesson of *South Carolina*, *Boerne*, and *Nw. Austin* that the preclearance procedure must target jurisdictions where normal anti-discrimination laws currently are uniquely inadequate. And Congress ignored the lesson of *Bossier II*, *Ashcroft*, and *Nw. Austin* that the preclearance standard must target voting changes that implicate the statute's supplemental role in protecting the status quo achieved by normal anti-discrimination laws. Considering these errors together, it is hard to deny that Congress' true goal in Section 5 was not to remedy unconstitutional intentional discrimination, but instead to provide minorities in jurisdictions with ancient histories of discrimination with an affirmative-action-like scheme to improve their electoral success, by explicitly banning voting changes that reduce their

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electoral chances and by implicitly coercing changes that increase their chances. *See Miller*, 515 U.S. at 924-27. Thus, rather than a "remedial or preventive object," Congress is "attempt[ing] a substantive change in constitutional protections," by banning changes that impose "incidental burdens" on minorities or that fail to confer potential benefits, without any true "concern" whether "the object or purpose of the [change]" was intentionally discriminatory. *See Boerne*, 521 U.S. at 531-32; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989).

ARGUMENT

I. SECTION 5 CANNOT BE RATIONALLY JUSTIFIED UNLESS SECTION 2 AND OTHER NORMAL ANTI-DISCRIMINATION LAWS ARE UNIQUELY INADEQUATE IN THE COVERED JURISDICTIONS

Section 5 goes well beyond the constitutional ban on intentional discrimination, since it presumptively invalidates "*all* changes to state election law—however innocuous—until they have been precleared." *Nw. Austin*, 557 U.S. at 202. This is an "extraordinary burden-shifting procedure[]" that reverses the normal presumption of innocence in Anglo-American jurisprudence. *Bossier II*, 528 U.S. at 335. It also is "an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 500-01 (1992). Thus, the critical question is what would justify imposing this extraordinary regime on selected jurisdictions. And the answer is that the only rational justification

would be the unique inadequacy of ordinary anti-discrimination laws in the covered jurisdictions.

A. This Court Previously Upheld Section 5 Only Based On The Extraordinary Need To Bolster Ordinary Anti-Discrimination Remedies In Targeted Jurisdictions

In *South Carolina*, this Court held that the 1965 Congress was justified in originally enacting Section 5, but only because "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *See* 383 U.S. at 328, 334-35. Specifically, traditional anti-discrimination litigation was stymied by "the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [such] lawsuits," including, most notably, "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." *Id.* at 328, 335. Given such "unremitting and ingenious defiance of the Constitution," "the unsuccessful remedies … [of] the past [had] to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the [Reconstruction] Amendment[s]" in the "areas where voting discrimination ha[d] been most flagrant." *Id.* at 309, 315. In short, this Court upheld Section 5 as an "uncommon exercise of congressional power," because it "recognized that *exceptional conditions* can justify legislative measures *not otherwise appropriate*" and that Congress had enacted Section 5 "[u]nder the

compulsion of these *unique* circumstances." *Id.* at 334-35 (emphases added).

Likewise, when this Court upheld the 1975 reauthorization of Section 5 in *City of Rome v. United States*, 446 U.S. 156 (1980), it emphasized that Congress' 7-year extension of the 10-year-old provision was following in the wake of a "century of obstruction" that still burdened minority voting rights. *See id.* at 180-82. A real risk existed that the "modest and spotty" "progress" achieved by then would have been "destroyed through new procedures and techniques" if Congress "remove[d] th[e] preclearance protections." *Id.* at 181. This Court thus deemed "unsurprising and unassailable" "Congress' considered determination" in 1975 that "a 7-year extension … was necessary *to preserve the 'limited and fragile' achievements* … and to promote further amelioration of voting discrimination." *Id.* at 182 (emphasis added).

Notably, this Court in *Boerne* later reaffirmed that it had upheld Section 5 based on the demonstrated inadequacy of Section 2 in the covered jurisdictions when the VRA was first enacted. In particular, "[t]he new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws … and the slow, costly character of case-by-case litigation." *See Boerne*, 521 U.S. at 525-26.

Finally, consistent with Section 5's special function of "bolster[ing]" Section 2 by protecting the status quo achieved through the latter's enforcement, *see Nw. Austin*, 557 U.S. at 198, this Court repeatedly emphasized before 2006 that Section 5 had a more "limited purpose" and "combat[ed] different evils" than Section 2. *Reno v. Bossier*

Parish Sch. Bd., 520 U.S. 471, 477 (1997) ("*Bossier I*"); *accord Ashcroft*, 539 U.S. at 478 ("[T]he § 2 inquiry differs in significant respects from a § 5 inquiry."). Specifically, Section 5 "prevent[ed] nothing but backsliding." *Bossier II*, 528 U.S. at 335; *accord Ashcroft*, 539 U.S. at 477 ("Section 5 … has [the] limited substantive goal … [of] insur[ing] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); *Miller*, 515 U.S. at 925 ("Section 5 was directed at preventing a particular set of invidious practices that had the effect of undoing or defeating the rights recently won by nonwhite voters." (internal quotation marks omitted)). For that reason, unlike Section 2, Section 5 was not designed to eliminate every *unconstitutional* voting *law*, but only *retrogressive* voting *changes*. *Ashcroft*, 539 U.S. at 477 ("[A] voting change with a discriminatory but nonretrogressive purpose or effect does not violate § 5[,] … *no matter how unconstitutional it may be*." (quoting *Bossier II*, 528 U.S. at 336)). Section 2 would suffice to prevent such changes.

B. Section 5 Is A Gratuitous Burden Wherever Normal Anti-Discrimination Laws Are An Effective Remedy

It is clear that this Court previously has upheld Section 5 *only* when Congress had permissibly determined that Section 2 and other anti-discrimination laws would be inadequate in the covered jurisdictions. Where instead those laws are *already an effective remedy* against "intentional racial discrimination in voting," Congress cannot

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"rationally have concluded" that Section 5's preclearance regime is *also* needed, *Rome*, 446 U.S. at 177, because that "is so out of proportion … that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *Boerne*, 521 U.S. at 532. Accordingly, whereas entrenched and pervasive discrimination that defies effective remediation through ordinary case-by-case litigation is an "exceptional condition[]" [that] can justify legislative measures not otherwise appropriate," *South Carolina*, 383 U.S. at 334-35, the mere existence of intentional discrimination that lacks that *impervious quality* is a "lesser harm" for which the "[s]trong measure[]" of federal preclearance is "an unwarranted response," *Boerne*, 521 U.S. at 530.

To be sure, the persistence of unconstitutional intentional discrimination alone justifies Section 2 and other laws that employ "case-by-case" litigation to eradicate practices that are unconstitutional or likely to reflect such intentional discrimination. Unlike such laws, however, Section 5 does not ban practices that plaintiffs demonstrate are likely discriminatory, but rather presumptively prohibits *all* changes until the jurisdiction proves they are *not* discriminatory. It is the need for this "extraordinary burden-shifting procedure[]"that must be justified, *Bossier II*, 528 U.S. at 335, and it must be justified *on top* of Section 2's already prophylactic ban on discriminatory "results," *see* 42 U.S.C. § 1973. That justification burden thus cannot possibly be satisfied based on discrimination that Section 2 is capable of effectively redressing, because otherwise Section 5 is necessarily a gratuitous burden.

For example, this Court has uphold prophylactic federal remedies concerning access to state courts

and family leave for state employees. *See Tennessee v. Lane*, 541 U.S. 509, 516-17, 522-34 (2004); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724, 728-40 (2003). But the burden of justifying those prophylactic remedies was obviously far less than would have existed to justify a federal *preclearance* requirement compelling State governments *to suspend all policies* affecting courthouse access and employee leave until they could convince federal authorities that those policies lacked any discriminatory "purpose" or "effect." Even more obviously, the justification burden would have been exponentially more difficult if that intrusive preclearance requirement were added *on top* of the prophylactic remedies upheld by this Court. The only legitimate remedial purpose conceivably served by such a preclearance regime would be to reach discrimination that somehow escaped the grasp of the other prophylactic remedies.

The burden of demonstrating Section 2's inadequacy is thus actually *higher* that it was when *South Carolina* and *Rome* were decided, because Section 2 is now *more effective* at preventing unconstitutional discrimination. Before 1982, Section 2 required an express finding of discriminatory intent. *City of Mobile v. Bolden*, 446 U.S. 55, 60-63 (1980) (plurality opinion). But then Congress adopted a prophylactic standard that bans even *unintentionally* discriminatory "results," because the old intent requirement "place[d] an 'inordinately difficult' burden of proof on plaintiffs." *See Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).

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Finally, it warrants emphasis that the D.C. Circuit below nominally *agreed* with the foregoing legal analysis. It explained that the "critical factor"

in this Court's previous cases upholding Section 5 was Congress' permissible determination that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." Pet.App. 25a. And it further suggested that Congress would have "no justification for requiring states to preclear their voting changes" "if section 2 litigation is adequate to deal with the magnitude and extent of constitutional violations in covered jurisdictions." *See id.* 26a. But, as we now show, the D.C. Circuit failed to sufficiently consider how, as reauthorized and amended in 2006, the old preclearance procedure and the new substantive standard have unmoored Section 5 from its limited supplemental function of bolstering Section 2.

II. THE 2006 PRECLEARANCE PROCEDURE NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2

At the outset, the 2006 Congress' decision not to update the coverage formula is irrational in theory, because there is no conceivable basis for presuming that the set of jurisdictions where Section 2 was inadequate *between 1964 and 1972* is even remotely comparable to the set of jurisdictions where Section 2 was inadequate *in 2006* (let alone was likely to be inadequate *until 2031*). *See* Pet.App. 69a-70a (Williams, J., dissenting). Unsurprisingly, therefore, the retained coverage formula is also irrational in practice, because the covered jurisdictions do not currently pose a meaningful threat of intentional discrimination that evades Section 2, and there is not currently a meaningful difference between the covered and non-covered jurisdictions in this regard

(or any other). *See id.* 79a-99a. Judge Williams's dissent and Petitioner's opening brief have set forth the factual basis for these conclusions in great detail, so *amici* instead will focus on three fundamental legal errors underlying the D.C. Circuit majority's contrary conclusion.

First, the majority found no legitimate evidence that Section 2 is inadequate in the covered jurisdictions. While the majority emphasized the continued existence of racial voting discrimination there, it identified no evidence that such residual discrimination would overwhelm Section 2 litigation. *See* Pet.App. 44a-45a. Instead, it relied on *generic* evidence that litigating Section 2 claims "is both costly and time-consuming." *See id.* 45a-48a. But what concerned the 1965 Congress and this Court in *South Carolina* was not the *normal* burdens of bringing anti-discrimination litigation, but rather "the *inordinate amount* of time and energy required to overcome the *obstructionist tactics invariably encountered*" in "case-by-case litigation … to combat widespread and persistent discrimination in voting." *See* 383 U.S. at 328 (emphases added). Yet the current litigation burden under Section 2 is not even remotely comparable to that which existed in the Jim Crow South. Not only have things "changed in the South," *see Nw. Austin*, 557 U.S. at 2511, but Section 2 itself has changed, because its post-1982 "results" test is a far more effective weapon against unconstitutional discrimination, *supra* at **x**.

Second, the majority found no legitimate evidence that the coverage formula is a rational dividing line that separates the jurisdictions where Section 2 is inadequate from the jurisdictions where

Section 2 is adequate. To the contrary, the majority's primary evidence proffered to justify the statute's "departure from the fundamental principle of equal sovereignty" (*Nw. Austin*, 557 U.S. at 203) was the allegedly greater incidence of successful Section 2 lawsuits in the covered jurisdictions. *See* Pet.App. 49a-55a. But we suggest that this only demonstrates, Section 2 is a perfectly adequate remedy in the covered jurisdictions.

Finally, in defending the scope of the coverage formula, the majority heavily relied on the separate provisions giving courts limited "bail-out" and "bail-in" authority. *See id.* 61a-66a. But Congress has the constitutional obligation to justify the "*statute's* disparate geographic coverage," *see Nw. Austin*, 557 U.S. at 203 (emphasis added), and thus it obviously cannot foist the duty on courts to rewrite the statute. For example, Congress could not arbitrarily impose Section 5 only on jurisdictions east of the Mississippi and then defend that irrational choice by giving courts limited "bail-out" and "bail-in" power. In any event, consideration of the "bail-out" and "bail-in" process indicates that Section 5's "disparate geographic coverage" is not "sufficiently related to the problem that it targets." *See id.* The majority emphasized that "the pace of bailout[s]" has been increasing recently. *See* Pet.App 63a. But that just proves that the 2006 Congress was grossly over-inclusive in failing to remove those jurisdictions from coverage. Likewise the majority emphasized that "[f]ederal courts" have imposed "bail-in" as a remedy for adjudicated constitutional violations. *See id.* 61a-62a; *see also* 42 U.S.C. § 1973a(c). But it is patently irrational to try to capture non-covered jurisdictions where case-by-case litigation is *inadequate* by

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requiring the prosecution of a *successful* lawsuit, *let alone* one where the plaintiff has the "inordinately difficult" burden of proving *intentional* discrimination, *Gingles*, 478 U.S. at 44.

III. THE 2006 PRECLEARANCE STANDARD NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2

As a threshold matter, *any toughening* of the preclearance standard in 2006 would be irrational, because no one could possibly contend that Section 2 is *less adequate* now than it was in 1965, such that Section 5 somehow needed to be strengthened. Moreover, the particular amendments made by the 2006 Congress starkly confirm that its true goal had nothing to do with bolstering the inadequacies of Section 2. The old standard, as crafted by the 1965 Congress and construed by this Court, furthered Section 5's limited supplemental function of preventing unwarranted backsliding, while otherwise preserving the flexibility of covered jurisdictions to choose their own electoral systems. But the new standard transforms Section 5 into a rigid entitlement scheme that mandates and coerces electoral preferences for minorities until 2031, an astonishing two-thirds of a century after the passage of the 1965 act.

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A. The Original Preclearance Standard Targeted The Types Of Backsliding That Would Undermine Section 2's Enforcement

1. The Old Section 5's Limitation To Retrogressive Changes

Consistent with Section 5's supplemental anti-backsliding function, the "effect" and "purpose" prongs were limited to retrogression. *Bossier I*, 520 U.S. at 476-80; *Bossier II*, 528 U.S. at 333-36. That constraint reduced the federalism costs imposed on jurisdictions and prevented DOJ from converting Section 5 into a tool for coercing increased minority electoral success.

a. It is crucial to recall that the retrogression limitation decreased compliance burdens on jurisdictions and increased their autonomy. Section 5 generally imposes "the difficult burden" of "prov[ing] a negative," namely, "proving the *absence* of [the prohibited] purpose and effect." *Bossier I*, 520 U.S. at 480. Restricting the inquiry to retrogression at least eased the burden: proving that a change lacked a retrogressive effect only "require[d] a comparison of [the] jurisdiction's new voting plan with its existing plan," *id.* at 478. Proving the absence of a discriminatory dilutive effect would have "impose[d] a demonstrably greater burden" by "necessitat[ing]" comparisons with "hypothetical, undiluted plan[s]" selected from among countless ways to structure election practices, *id.* at 480, 484. Because the retrogression "benchmark" was the readily identifiable status quo, it was much simpler to adopt a change that jurisdictions could prove would not result in backsliding, *see id.* at 480. They were relieved of the more "complex undertaking" of demonstrating that the change would not be worse than other possible alternatives, *see Bossier II*, 528 U.S. at 332. Jurisdictions likewise retained more of their autonomy under the retrogression standard,

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since their preclearance options were constrained only by the status quo, not by hypothetical alternatives that were more favorable to minorities.

Furthermore, these general benefits were heightened by the "purpose" prong. To prove the absence of retrogressive purpose, the jurisdiction had the relatively "trivial" task of confirming that it was not an "incompetent retrogressor" that had inadvertently adopted a non-backsliding change. *See Bossier II*, 528 U.S. at 331-32. But to prove the absence of discriminatory purpose, the jurisdiction would have had the "demonstrably greater burden," *Bossier I*, 520 U.S. at 484, of proving that its failure to select "a hypothetical, undiluted plan" was race-neutral rather than intentionally discriminatory, *Bossier II*, 528 U.S. at 336. Congress itself has warned that it is "inordinately difficult" to ascertain a discriminatory "purpose" from the adoption of voting changes, which typically involves varied interests of myriad legislators selecting among countless proposals. *See Gingles*, 478 U.S. at 44; S. Rep. No. 97-417, at 36-37 (1982). And it therefore would have been even more "inordinately difficult" to "prov[e] the *absence* of discriminatory purpose" in such circumstances, given that "it is never easy to prove a negative." *See Bossier I*, 520 U.S. at 480. Thus, as *Bossier II* held, requiring jurisdictions to do so would have "exacerbate[d] the 'substantial' federalism costs that the preclearance procedure already exact[ed], … perhaps to the extent of raising concerns about § 5's constitutionality." *See* 528 U.S. at 336.

In addition, requiring jurisdictions to disprove "discriminatory purpose" would have greatly expanded DOJ's coercive power during the

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administrative-preclearance process. As the pre-*Bossier II* period illustrates, the well-recognized difficulty of proving the absence of discriminatory motive conferred virtually unbridled discretion on a results-oriented DOJ to deem "discriminatory" the failure to adopt any alternative change it preferred.

b. Specifically, before *Bossier II*, this Court in *Miller* found that DOJ frequently objected on "discriminatory purpose" grounds in order *to coerce* racially gerrymandered changes that increased minority electoral success, even adopting a "policy of maximizing majority-black districts" and "accept[ing] nothing less than abject surrender to its maximization agenda." 515 U.S. at 917, 924-27. For example, in *Miller*, DOJ claimed that Georgia's "refusal … to create a third majority-minority district" reflected a discriminatory purpose, even though that district violated "all reasonable standards of compactness and contiguity." *Id.* at 919, 923-24. Georgia thus was forced to adopt a "[g]eographic[] … monstrosity" "connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County." *Id.* at 908-09; *see also Shaw v. Hunt*, 517 U.S. 899, 903, 912 (1996) (similar in North Carolina).

As *Miller* admonished, DOJ's "policy" of increasing minority electoral success "seem[ed] quite far removed from" the anti-backsliding "purpose of § 5." 515 U.S. at 926. Instead, "[DOJ]'s implicit command that States engage in [such] presumptively unconstitutional race-based [decisionmaking] br[ought] [Section 5] … into tension" with the Constitution's nondiscrimination guarantees. *Id.* at 927. And tellingly, *Bossier II* cited *Miller* when it later held that the 1965 Congress had never actually

authorized "discriminatory purpose" objections, thus avoiding the "exacerabate[d] … federalism costs" and "concerns about … constitutionality" presented by that broader preclearance power over non-retrogressive changes. *See* 528 U.S. at 335-36.

2. The Old Section 5's "Totality Of The Circumstances" Test For Determining Retrogression

When assessing whether a change would lead to "retrogression" in minorities' voting rights, *Ashcroft* held that Section 5 required a "totality of the circumstances" test, which this Court modeled on Section 2's analogous "results" test. 539 U.S. at 479-85. That holistic and flexible inquiry helped avoid creating a rigid quota-floor based on past minority electoral success, which would have limited the autonomy of jurisdictions without even plausibly redressing intentional discrimination, let alone the invidious backsliding justifying Section 5.

a. It is important to explain at the outset why Section 5's retrogressive "effects" test must be holistic and flexible. The reasons flow from the two constitutional concerns implicated whenever Congress "enforces" a constitutional ban on *intentional* discrimination by enacting a statutory ban on *facially neutral* laws that merely have a *disparate effect*.

First, although prophylactic "effects" tests can legitimately smoke out facially neutral laws where "the risk of purposeful discrimination" is high but proving that motive would be "inordinately difficult," *Rome*, 446 U.S. at 177; *Gingles*, 478 U.S. at 44, such tests must be carefully scrutinized. There is always the danger that Congress is instead "attempt[ing] a

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substantive change in constitutional protections" that would eliminate the intentional-discrimination requirement altogether. *See Boerne*, 521 U.S. at 532. In reviewing an "effects" test, there is a direct relationship between its validity as enforcement legislation and the breadth of available defenses: as more defenses are allowed for justifications that plausibly would motivate a race-neutral actor, then practices falling outside those defenses "have [an increasingly] significant likelihood of being unconstitutional," *see id.*; conversely, the fewer defenses provided, the more akin to a "quota" the "effects" test becomes, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682-83 (2009) (Scalia, J., concurring).

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Second, especially careful scrutiny is needed where prophylactic "effects" tests *also* affirmatively threaten the rights of non-minorities. Namely, in some circumstances, an overly demanding or rigid "effects" test will not only go beyond prophylactically eliminating intentional discrimination against minorities, but will become a "powerful engine of … discrimination" *against non-minorities*. *See Johnson v. Transp. Agency*, 480 U.S. 616, 676-77 (1987) (Scalia, J., dissenting); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989); *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). Not all "effects" tests carry this additional risk: for example, "effects" prohibitions that eliminate *barriers* to the ability of *individuals to cast a vote*—such as the literacy-test ban upheld in *Katzenbach v. Morgan*, 384 U.S. 641, 646-47 (1966)—do not adversely affect non-minorities, because they *expand* opportunities for *all* voters, minority and non-minority alike. But "effects" tests are double-edged when used in the voting-rights context to invalidate practices with a

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dilutive impact on a *group*'s collective ability *to elect* its preferred candidates. Because there are a fixed number of offices, electoral success is necessarily a *zero-sum game*: a ban on diminishing one group's ability to elect its preferred candidates necessarily creates a floor below which its expected representation may not fall and a corresponding ceiling on other groups' expected representation.

b. Section 2 exemplifies how a holistic and flexible "effects" test targets practices that are likely intentionally discriminatory, while avoiding conferring electoral advantages on minorities.

This Court has emphasized that Section 2's "results" test does not mandate "electoral advantage," "electoral success," "proportional representation," or electoral "maximiz[ation]" for minority groups. *See Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*"); *Gingles*, 478 U.S. at 96-97 (O'Connor, J., concurring in the judgment) (citing S. Rep. No. 97-417, at 193-94); *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). Rather, the "ultimate right of § 2 is equality of opportunity," *LULAC*, 548 U.S. at 428, reflecting the statutory command that "political processes" must be "*equally* open to participation" and cannot provide "*less* opportunity" for minorities, 42 U.S.C. § 1973(b) (emphases added); *see also Bartlett*, 556 U.S. at 20 (plurality opinion). Indeed, even an *unequal* ability for minorities to elect their preferred candidates is not itself an unlawful "result," because Section 2 plaintiffs must show that minorities "have less 'opportunity' than others 'to participate in the political process *and* to elect

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representatives of their choice.'" *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

Consistent with this broad focus on "equality of opportunity," Section 2 requires a "fact-intensive" inquiry into "the totality of the circumstances," including the "tenuous[ness]" or strength of the "policy underlying the … contested practice." *See Gingles*, 478 U.S. at 44-46 (citing S. Rep. No. 97-417, at 29); *see also* 42 U.S.C. § 1973(b). And this Court has "structure[d] … the statute's 'totality of circumstances' test" (*De Grandy*, 512 U.S. at 1010) in ways that help to avoid conferring electoral advantages on minorities and to target the test instead at facially neutral practices that likely involve intentionally disparate treatment.

First, this Court has adopted threshold requirements that narrow Section 2's focus to practices reflecting a high potential for intentional discrimination. Specifically, plaintiffs bringing a vote-dilution claim to redraw district lines must prove, at the outset, that there is a "geographically compact" minority community, *Abrams v. Johnson*, 521 U.S. 74, 91 (1997), that could constitute a majority of the electorate, *Bartlett*, 556 U.S. at 12-16 (plurality opinion), in a district adhering to "traditional districting principles[,] such as maintaining communities of interest and traditional boundaries," *Abrams*, 521 U.S. at 92; *LULAC*, 548 U.S. at 433. Satisfying these preconditions essentially establishes a *prima facie* case of adverse disparate treatment. Race-neutral line-drawers presumably would draw a "majority-minority" district that is compact and complies with traditional districting principles, just as such districts are routinely drawn for non-minority groups. Thus, once

the "prima facie" elements are satisfied, the failure to create such an intuitive district is an "action[] … from which one can infer, if [it] remain[s] unexplained, that it is more likely than not that [the] action[] … [was] discriminatory." *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978). In short, the preconditions focus on whether minorities are receiving *equal* treatment, while denying them *preferential* treatment—*i.e.*, they avoid compelling the creation of districts favorable to minority groups when such districts would *not* be formed for other groups under traditional districting principles. *See Bartlett*, 556 U.S. at 20-21 (plurality opinion).

Second, even after Section 2 plaintiffs have satisfied the preconditions, Section 2 defendants can justify the seemingly disparate treatment under the "totality of the circumstances" analysis, essentially *rebutting* the inference of discriminatory motive. For example, defendants can show there was a strong "policy underlying [their] … contested practice" of not creating the district at issue. *See Gingles*, 478 U.S. at 45 (citing S. Rep. No. 97-417, at 29). Or defendants can show that, despite any inequality in the minorities' ability to *elect* their preferred candidates, they retain an *equal* "opportunity … to participate in the political process." *See Chisom*, 501 U.S. at 397. By thus construing Section 2 to protect only overall minority voting equality, this Court helped ensure that Section 2 does not go beyond "enforcing" the Constitution's nondiscrimination guarantees and become a threat to the nondiscrimination rights of non-minorities.

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c. Of course, the "effects" tests in Section 2 and Section 5 necessarily differ to the extent that Section 2 compares a jurisdiction's existing plan with a

"hypothetical, undiluted plan" provided by plaintiffs, whereas Section 5 compares a new plan to the "jurisdiction's existing plan." *Ashcroft*, 539 U.S. at 478-79. Apart from that different baseline though, *Ashcroft* made clear that the same type of holistic and flexible approach for determining "dilution" under Section 2's "results" test was required when determining "retrogression" under Section 5's "effects" test. Specifically, this Court held that, just as "*in the § 2 context*, a court or [DOJ] should assess the totality of circumstances in determining retrogression under § 5." *Id.* at 484 (emphasis added); *see also id.* at 479-85 (primarily relying on *Gingles* and *De Grandy*, which are Section 2 cases). Consequently, preclearance authorities were instructed that, as under Section 2, "[i]n assessing the totality of the circumstances, [they] should not focus solely on the comparative ability of a minority group to elect a candidate of its choice," but instead must "examin[e] … all the relevant circumstances." *Id.* at 479-80. And, as with Section 2, the most important other relevant circumstances were "the extent of the minority group's opportunity to participate in the political process[] and the feasibility of creating a nonretrogressive plan." *Id.*

Moreover, in applying that "totality of the circumstances" approach, *Ashcroft* avoided preferential treatment of minorities and increased jurisdictions' flexibility in structuring their electoral systems where their decisions did not implicate intentional discrimination.

First, with respect to *electing* minority-preferred candidates, *Ashcroft* afforded jurisdictions significant *discretion* to draw district lines and choose among theories of representation. Specifically, rather than

being forced to maintain "a small[] number of safe majority-minority districts," jurisdictions had the option to "spread[] out minority voters over a greater number of districts" where such voters were a numerical minority but "may have [had] the opportunity to elect a candidate of their choice … by creating coalitions [with nonminority] voters." *Id.* at 480-81; *see also Bartlett*, 556 U.S. at 13 (plurality opinion) (terming these "cross-over" districts). *Ashcroft* held that "Section 5 g[ave] States the flexibility to choose one theory of effective representation over the other," even if that choice put at some risk minorities' past electoral successes because majority-minority districts were "safer" than "cross-over" districts. 539 U.S. at 482.

Second, and more important, *Ashcroft* emphasized that an increased ability for minorities "to participate in" and "influence" the "political process" was a "highly relevant factor in [the] retrogression inquiry," which could *off-set and justify* an indisputable reduction in minorities' power "to win[] elections." *Id.* Thus, even where a new plan had more districts "where minority voters may not be able to elect a candidate of choice," no retrogression occurred if the jurisdiction "increase[d] the number of representatives sympathetic to the interests of minority voters," *id.* at 482-83, or potentially even if it just "[m]aintain[ed] or increase[ed] legislative positions of power for minority voters' representatives of choice," *id.* at 483-84.

Third, and perhaps most important, *Ashcroft* held that, even where a voting change indisputably diminished minorities' overall voting power to win elections and influence the political process, that still could be *excused* depending on "the *feasibility* of

creating a nonretrogressive plan." *Id.* at 479 (emphasis added). Section 5 thus did not force jurisdictions to preserve minority voting power without any regard whether that would subordinate sufficiently important race-neutral interests, such as traditional districting principles.

In sum, by employing Section 2's "totality of the circumstances" approach, *Ashcroft* adopted a holistic and flexible retrogression inquiry that did not mandate *über alles* preservation of minorities' ability to elect, but instead allowed electoral diminution if the jurisdiction could prove to federal authorities that the diminution was justified by an off-setting increase in political influence or excused by infeasibility under traditional governance principles. Obviously, where the jurisdiction carried its burden of proof, such changes did not implicate Section 5's "limited substantive goal" of preventing invidious "backsliding," *see id.* at 477, let alone indicate a "risk of purposeful discrimination," *see Rome*, 446 U.S. at 177. Even more obviously, "command[ing]" jurisdictions to engage in "race-based" decision-making to avoid the electoral diminution resulting from such non-invidious changes would have "br[ought] [Section 5] … into tension" with the Constitution's nondiscrimination guarantees. *See Miller*, 515 U.S. at 927.

Indeed, Justice Kennedy's concurring opinion in *Ashcroft* was explicit about the necessity of avoiding interpretations of Section 5 that required excessive race-based efforts to preserve minority electoral success: "Race cannot be the predominant factor in redistricting [or other electoral decisionmaking] … [y]et considerations of race that would doom [an election] plan under the Fourteenth Amendment or §

2 seem to be what save it under § 5." 539 U.S. at 491. And *Nw. Austin* quoted that concurrence when describing the "constitutional concerns" created by the "tension" between Section 5's preclearance standard and the nondiscrimination mandate of the Constitution and Section 2. 557 U.S. at 203.

B. The New Preclearance Standard Imposes A Rigid Scheme Of Racial Preferences For Minorities

1. The New Section 5's "Ability To Elect" Mandate

The 2006 Congress required that preclearance be denied whenever jurisdictions "diminish[]" a minority group's "ability … to elect their preferred candidates of choice," 42 U.S.C. § 1973c(b),(d), thereby "explicitly *reject[ing]* all that logically follows" from *Ashcroft*'s flexible "totality of the circumstances" retrogression standard, H.R. Rep. No. 109-478, at 71. More than forty years after Section 5 was enacted, Congress was absolutely unwilling to "permit[] [jurisdictions] to break up districts where minorities form a clear majority of voters and replace them with vague concepts such as influence, coalition, and opportunity." S. Rep. No. 109-295, at 19-20. It believed that "spread[ing] minority voters" out of such safe districts would "turn[] Section 5 on its head" and "turn black and other minority voters into second class voters." H.R. Rep. No. 109-478, at 69-71. "[T]he relevant analysis" thus has been transformed into nothing more than an inflexible "comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change." *Id.* at 71.

a. Unlike the Section 2 "results" test and the old Section 5 "effects" standard, this new "ability to elect" standard is an unyielding *quota-floor* based on past minority electoral success.

First, the new standard makes no pretense of preserving "*equality* of opportunity," instead openly decreeing a "*guarantee* of electoral success for minority-preferred candidates." *See LULAC*, 548 U.S. at 428 (emphases added). Minority groups in covered jurisdictions now have a *federal entitlement* until 2031 that no voting change may "diminish" their expected "ability to elect" their preferred candidates below the level of their past electoral success. And, of course, that floor on the level of expected minority electoral success is necessarily a ceiling on non-minorities' expected electoral success. *Supra* at **x-y**.

Second, as a result, the new standard will mandate far more race-based decisionmaking in the covered jurisdictions than ever before. Most obviously, every existing "safe" majority-minority and "cross-over" district must be preserved until 2031. Because such districts "virtually guarantee the election of a minority group's preferred candidate," *see Ashcroft*, 539 U.S. at 480-81, even a shift to a slightly less "safe" district—where the group need only "pull, haul, and trade" for a few more non-minority votes, but still "may lose," *see id.*—would necessarily "*diminish[] the ability*" of the group "to elect [its] preferred candidates of choice," 42 U.S.C. § 1973c(b) (emphasis added). The 2006 legislative history vividly confirms Congress' abhorrence of dismantling these districts. *Supra* at **x**. But "entrench[ing]" such districts "by statutory

command" pose[s] constitutional concerns." *See Bartlett*, 556 U.S. at 21, 23-24 (plurality opinion).

The new standard also will require the preservation of every functioning "influence" district. Although reducing the minority population in such districts had *never* properly been found to cause retrogression under the old standard, *compare, e.g.*, *LULAC*, 548 U.S. at 445-47 (plurality opinion), *with id.* at 478-81 (Stevens, J., dissenting in relevant part), reducing the minority population in such districts now will indisputably "diminish the ability" of the remaining minorities "to elect their preferred candidates." After all, in such districts, minorities "can play a substantial or decisive role in the electoral process" and can at least sometimes, if not "always[,] elect the candidate of their choice," even if not *guaranteed* to do so in every election. *See Ashcroft*, 539 U.S. at 488-89. Reducing the minority population thus would lower minority-preferred candidates' chances of winning (from, say, 25% to virtually nil), which would plainly "diminish" minorities' "ability to elect."

Accordingly, Section 5's ambit will be greatly expanded, because districts with minority voting-age populations as small as 20-30% can function as "influence" districts in certain circumstances. *See id*; *LULAC*, 548 U.S. at 443-46 (plurality opinion); *id.* at 479-81 & n.15 (Stevens, J., dissenting in relevant part). And by thus subjecting to federal scrutiny even districts with relatively small minority populations, the new standard "unnecessarily infuse[s] race into virtually every redistricting, raising serious constitutional questions." *See id.* at 446 (plurality opinion) (citing *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring)).

Indeed, this problem is vividly illustrated by the recent decision in *Texas v. United States*, No. 11-1303, --- F. Supp. 2d ----, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), *appeal filed*, No. 12-496 (U.S. Oct. 19, 2012). There, the district court held that the new "ability to elect" standard prohibited Texas from changing an *overwhelmingly white district* that elected a *white Democrat* into one more likely to elect a Republican, simply because the *34.4%* of minority voters also supported that white Democrat in general elections. *See id.* at *38-43. This exemplifies how, even in districts with relatively small minority populations, the "ability to elect" standard operates as a preferential quota-floor that protects any "electoral advantage" of the political party disproportionately supported by the minorities.

Third, the draconian nature of the new quota-floor tied to past minority electoral success is exacerbated by Congress' uncompromising refusal to provide *any* defense or justification, no matter how compelling, that would authorize bending the quota. Indeed, the "diminish[] the ability … to elect" standard, 42 U.S.C. § 1973c(b), unambiguously eliminated *Ashcroft*'s inquiries into "feasibility" or "the minority group's opportunity to participate in the political process," 539 U.S. at 479; *supra* at **x-y**. And that was an intentional decision. H.R. Rep. No. 109-478, at 71 ("Congress explicitly *rejects* all that logically follows from [*Ashcroft*]'s statement that … the comparative ability of a minority group to elect a candidate of its choice … cannot be dispositive.").

Thus, for example, jurisdictions must entirely subordinate traditional districting principles if needed to preserve majority-minority districts weakened by natural demographic shifts, such as the

welcome trends of residential integration and suburban migration. *Contra Miller*, 515 U.S. at 916, 919. Indeed, automatic preservation is required even if a minority group is statistically *over-represented* in a jurisdiction, because, under the new Section 5, unlike Section 2, the existence of "proportional representation" is wholly *irrelevant* to whether the group's "ability … to elect" has been "diminish[ed]." *Compare* 42 U.S.C. § 1973c(b), *with De Grandy*, 512 U.S. at 1020-24. Perhaps most perversely of all, the number of minority-preferred officials elected must be unthinkingly preserved even if *opposed by the minority community itself* due to their preference for more political "influence" overall. *Contra Ashcroft*, 539 U.S. at 480-84.

In sum, by abrogating *Ashcroft*, the "ability to elect" standard bars changes that merely impose the types of "incidental burdens" on minorities that other voters equally face, and that may even benefit minorities' overall voting power. *See Boerne*, 521 U.S. at 531. Such changes clearly do not "have a significant likelihood of being unconstitutional." *See id.* at 532. Moreover, in banning such changes, Section 5 now makes "[r]ace … the predominant factor" in electoral decisionmaking. *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Even before the 2006 amendments, this tendency of Section 5 was viewed as "a fundamental flaw" by Justice Kennedy, *id.*, and, notably, this Court emphasized that perceived defect in *Nw. Austin*, 557 U.S. at 203.

b. Judge Williams's dissent below agreed with these arguments by *amici*, Pet.App. 73a-75a, but the majority refused to consider them, *id.* 66a-67a. And while the district court in the Kinston litigation

rejected them, *LaRoque*, 831 F. Supp. 2d at 214-28, 232-38, its two primary reasons were without merit.

First, the court concluded that rigidly limiting the retrogression inquiry to minorities' "ability to elect" their preferred candidates "was necessary to avoid giving cover to intentional discrimination and to prevent an administrability nightmare." *Id.* at 228. That was so, the court reasoned, because *Ashcroft*'s "amorphous 'totality of the circumstance' factors" were too "subjective" and "unpredictable." *See id.* at 226. The court's premise and conclusion were manifestly erroneous.

The court's premise was illogical. There is no conceivable way that *Ashcroft*'s flexible standard facilitated intentional discrimination or was otherwise too subjective to be administrable. Critically, jurisdictions "bear[] the burden of proof in [a preclearance] action," and so they could ultimately prevail *only if* either DOJ or D.C. federal judges were *convinced* that any reduction in minorities' "ability to elect" was warranted under the "totality of the circumstances." *Ashcroft*, 539 U.S. at 471, 479. More generally, *Ashcroft*'s standard was modeled on Section 2's "results" test, *supra* at **x**, which likewise considers the "totality of the circumstances" rather than making minorities' "ability to elect" the sole relevant criterion, *supra* at **x-y**.

The court's conclusion was equally flawed. This Court has squarely held that "the fact that the implementation of a program capable of providing individualized consideration [of race] might present administrative challenges does not render constitutional an otherwise problematic system" that "makes race a decisive factor." *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003). Congress thus should have

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addressed any alleged problems with *Ashcroft*'s vagueness or administrability the same way that this Court handled the Section 2 "results" test on which *Ashcroft* was modeled: by carefully "structur[ing] … the statute's 'totality of the circumstances' test," *De Grandy*, 512 U.S. at 1010, while still ensuring that it protects *only* "equality of opportunity," *LULAC*, 548 U.S. at 428.

Second, the court claimed that the "ability to elect" standard "do[es] not create [a] facial quota" because it does not impose an "utterly inflexible prohibition on retrogression." *See LaRoque*, 831 F. Supp. 2d at 236-37. But that claim is refuted by the statutory text, which unambiguously bans any change that "*diminish[es]* the ability" of minorities "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b) (emphasis added); *see also* H.R. Rep. No. 109-478, at 71 ("Congress explicitly *rejects* all that logically follows from [*Ashcroft*]'s statement that … the comparative ability of a minority group to elect a candidate of its choice … cannot be dispositive."). Likewise, while the court emphasized that DOJ currently contends that it will not apply the "ability to elect" standard as an absolute mandate, *LaRoque*, 831 F. Supp. 2d at 236-37, this Court cannot "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly," *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

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2. The New Section 5's "Discriminatory Purpose" Objection

The 2006 Congress further required that preclearance be denied whenever jurisdictions fail to disprove "any discriminatory purpose," 42 U.S.C.

§ 1973c(c), thereby eliminating *Bossier II*'s critical focus on retrogressive changes. Congress complained that the "purpose" prong would catch only "incompetent retrogressor[s]" while forcing "the federal government" to "giv[e] its seal of approval to practices that violate the Constitution." H.R. Rep. No. 109-478, at 67; S. Rep. No. 109-295, at 16.

a. Through that simplistic reasoning, Congress blithely "exacerbate[d] the 'substantial' federalism costs that the preclearance procedure already exacts," apparently indifferent as "to the extent" that doing so "rais[ed] concerns about § 5's constitutionality." *Bossier II*, 528 U.S. at 336.

First, the "discriminatory purpose" standard drastically restricts the *local autonomy* of jurisdictions, by forcing them to consider proposed alternatives to their preferred non-retrogressive change. *Supra* at **x-y**. Yet there is no legitimate "enforcement" justification for "curtailing their traditional general regulatory power" in this way. *See Boerne*, 521 U.S. at 534.

Whereas requiring preclearance of *retrogressive* changes originally served the permissible enforcement purpose of preempting changes that *worsened* the already deplorable *status quo* in the South, preempting non-retrogressive changes with an allegedly discriminatory purpose is "an unwarranted response to [the] lesser" "evil presented" by jurisdictions that simply have not *improved* the electoral chances of minorities to the satisfaction of DOJ, *see id.* at 530—particularly since truly "discriminatory" changes are now easily reachable through Section 2's prophylactic "results" test. Moreover, in many circumstances, it is indisputably irrational "[t]o deny preclearance to a

plan that is *not* retrogressive" based on the mere existence of a *more* ameliorative alternative, because that would "leav[e] in effect a status quo that is even worse." *See Bossier II*, 528 U.S. at 335-36.

Second, the costs of increased federal oversight are exacerbated by the difficulty of *disproving* discriminatory intent concerning a *non-retrogressive* change. *Supra* at **x-y**. Again, there is no legitimate "enforcement" justification for "imposing [this] heavy litigation burden on [jurisdictions]." *See Boerne*, 521 U.S. at 534.

Once more, this problem is vividly illustrated by the recent Texas redistricting decision. The court held that the State failed to meet its burden of proving that its changes to the boundaries of a Senate district "were wholly partisan" and "untainted by considerations of race." *Texas*, 2012 WL 3671924, at *26. But the *only* reason the court gave for questioning the State's explanation was that "the legislature deviated from typical redistricting procedures and excluded minority voters from the process." *Id.* Of course, that does not even remotely suggest, let alone prove, discriminatory purpose, given that the court found that the changes *did not diminish* the ability of minorities in the district to elect their preferred candidates, *id.* at *21-23.

Third, the difficulty of disproving discriminatory intent to federal authorities plainly enables DOJ to "implicit[ly] command that States engage in presumptively unconstitutional race-based" decisionmaking, *Miller*, 515 U.S. at 927—*i.e.*, to prioritize ameliorative changes that increase minorities' expected electoral chances. *Supra* at **x-y**. Tellingly, *Bossier II* cited *Miller* for the proposition that authorizing "discriminatory purpose" objections

would "rais[e] concerns about § 5's constitutionality." 528 U.S. at 336. Section 5 thus now contains the "fundamental flaw" of "a[] scheme in which," as a practical matter, "[DOJ] is permitted … to encourage … a course of unconstitutional conduct." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

b. Here, again, the dissent below agreed with *amici*'s arguments, Pet.App. 75a-76a, but the majority refused to consider them, *id.* 66a-67a, and the Kinston district court rejected them, *LaRoque*, 831 F. Supp. 2d at 207-14, 232. Yet, once more, the court's two primary reasons were meritless.

First, the court concluded that the "discriminatory purpose" preclearance standard is not too "intrusive," reasoning that it merely "shift[s]" the burden to covered jurisdictions to prove the absence of "unconstitutional conduct." *Id.* at 213. That facile response willfully ignores this Court's repeated warnings that this exact burden-shift raises serious constitutional concerns because it unduly burdens jurisdictions' preclearance efforts and constrains their local autonomy. *Supra* at **a-b, c-d**.

Second, the court refused to consider the related risk that DOJ can misuse "discriminatory purpose" objections "to extract its preferred results" from jurisdictions, reasoning that this risk "is not the proper subject of a facial challenge." *LaRoque*, 831 F. Supp. 2d at 213-14. To the contrary, though, DOJ's coercive *capabilities* under the "discriminatory purpose" standard are an important part of the reason why that standard *facially* imposes a "heavy litigation burden" on jurisdictions. *See Boerne*, 521 U.S. at 534. In other words, that DOJ, as a practical matter, "*is permitted* … to encourage … a course of unconstitutional conduct" is a "fundamental flaw" in

the 2006 "scheme." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) (emphasis added).

CONCLUSION

Accordingly, this Court should hold that Section 5, as reauthorized and amended in 2006, is unconstitutional, and it should reverse the judgment below.

Respectfully submitted,

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