ORAL ARGUMENT SCHEDULED FOR JANUARY 19, 2012
No. 11-5256

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELBY COUNTY, ALABAMA,
Appellant,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Appellees.

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

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GLOSSARY

AG	Brief for Attorney General
Br.	Brief for Appellant
DOJ	Department of Justice
Int.	Brief for Defendant-Intervenors
JA	Joint Appendix
MIR	More Information Requests
RFRA	The Religious Freedom Restoration Act of 1993
VRA	Voting Rights Act
VRARAA	Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

STATUTES AND REGULATIONS

All relevant statutes are contained in the Addendum to Appellant's Opening Brief.

SUMMARY OF THE ARGUMENT

Tacitly acknowledging the difficulty of sustaining the extraordinary remedy of preclearance as an "appropriate" response to the current conditions in those jurisdictions covered under Section 4(b) of the Voting Rights Act of 1965, the Attorney General, Defendant-Intervenors ("Intervenors"), and their supporting *amici* (1) seek, in derogation of *City of Boerne v. Flores*, 521 U.S. 507 (1997) and its progeny, to substitute "rational basis" review for the "congruent and proportional" review properly defining the boundaries of "appropriate" Fifteenth Amendment enforcement action; (2) rely on a barrage of anecdotal evidence from the congressional record, some of which relates to private conduct and none of which matches the record of continuing defiance confronted in *Katzenbach v. South Carolina*, 383 U.S. 301 (1966), as sufficient basis for a 25-year extension of Section 5's preclearance obligation; and (3) transform the outdated coverage formula of Section 4(b) into a coded specification of jurisdictions with historic bad practices and sufficient questionable conduct to warrant being singled-out for comprehensive federal supervision of their electoral processes.

As explained below, these arguments fall woefully short of the mark. The District Court's conclusion that "congruence and proportionality" review applied was inescapable. The record before Congress in 2006 could not support a pre-clearance remedy that effectively puts state and local electoral authority into

federal receivership for another twenty-five years. And even if it could, Section 4(b)—whether treated as a formula or a coded specification—is neither rational in theory nor in practice. Evidence of voting discrimination is no longer concentrated in the covered jurisdictions and there is no fit between the reasons for imposing preclearance and the formula employed for choosing which jurisdictions will be subject to coverage.

Framing this dispute is the judicial obligation to safeguard the division of powers that lies at the heart of our constitutional system and critically shields all citizens from the risk created by overwhelming centralized power. The Civil War Amendments addressed certain states' blatant abuses of the powers reserved to them, made clear those rights states could not transgress, and empowered Congress to enforce state responsibilities. But when Congress legislates under these Amendments, it acts against the states themselves and necessarily invades their powers. Courts thus must ensure that Congress has properly targeted state interference with constitutionally-protected rights and is invading state sovereignty only as needed to secure those rights. That heavy judicial responsibility is what caused the Court to express its grave concerns in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009) ("*Nw. Austin*"), and it is that responsibility and those concerns which the Government essentially has failed to acknowledge but to which this Court must now respond.

ARGUMENT

I. THE ATTORNEY GENERAL IMPROPERLY SEEKS TO EVADE REVIEW UNDER THE *BOERNE* FRAMEWORK.

A. The Attorney General Incorrectly Argues That *Boerne* Does Not Apply To All Enforcement Legislation.

Whether Section 5 remains "appropriate" Fifteenth Amendment enforcement legislation must be evaluated under *Boerne*'s three-step framework. JA 521-22. The Attorney General acknowledges that the *Boerne* standard applies to both Fourteenth and Fifteenth Amendment enforcement legislation. Brief of Attorney General ("AG") 15. He nevertheless asks this Court to apply "rational basis review" to legislation seeking to "enforce protections at the core" of the Fourteenth and Fifteenth Amendment. *Id*. 18. This novel exception to the *Boerne* standard cannot be squared with Supreme Court precedent.

Since *Boerne*, the Supreme Court has uniformly applied the congruence-and-proportionality framework to *all* cases challenging enforcement legislation. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004). Not once has the Court suggested that *Boerne* does not apply to "core" enforcement legislation. The Attorney General argues that *Lopez v. Monterey County*, 525 U.S. 266 (1999), applied rational-basis review "without suggesting that its intervening decision in

Boerne required a different analysis." AG 15. But *Lopez* actually relies on both *Boerne* and *Katzenbach*, "reaffirming that *Katzenbach*, *City of Rome*, and *Boerne* are consistent in their evolving descriptions of Congress's enforcement power under the Fourteenth and Fifteenth Amendments." JA 543.

In fact, *Boerne* and its progeny make clear that Sections 4(b) and 5 are subject to congruence-and-proportionality review. In each case, the Supreme Court repeatedly referred to the Voting Rights Act of 1965 as the quintessentially congruent and proportional remedy given the extraordinary circumstances then existing in the covered jurisdictions. The *Boerne* Court referenced *Katzenbach* no fewer than eleven times, relying on it to support the necessity of congruence-and-proportionality review. 521 U.S. at 530. Furthermore, in reviewing the Religious Freedom Restoration Act ("RFRA"), the Supreme Court engaged in a detailed comparison of RFRA and the Voting Rights Act of 1965 to illustrate why the former failed this exacting review and the latter passed. *Id.* at 530-33. The decisions applying *Boerne* have similarly cited the voting rights cases when discussing the *Boerne* framework, *e.g.*, *Florida Prepaid*, 527 U.S. at 638-39; *Kimel*, 528 U.S. at 89, and used the Voting Rights Act of 1965 as a point of comparison for purposes of congruence-and-proportionality review, *Garrett*, 531 U.S. at 373; *Hibbs*, 538 U.S. at 737.

It is impossible to reconcile these decisions with the Attorney General's argument that *Boerne* does not apply to "core" enforcement legislation. The Court's reliance on *Katzenbach* as the foundation for "congruence and proportionality" review would make no sense if a different standard applied to "core" enforcement. And the Court's point-by-point comparison of the legislative record amassed in support of the Voting Rights Act of 1965 to the records under review in *Boerne* and *Garrett* would not have been "instructive" if Sections 4(b) and 5 were to be judged against an entirely different standard.

The Attorney General relies heavily on language from *Katzenbach* and *Rome* suggesting that "'Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.'" AG 17 (quoting *Katzenbach*, 383 U.S. at 324). Those cases relied on *Ex Parte Virginia*, 100 U.S. 339 (1879), and *M'Culloch v. Maryland*, 17 U.S. 316 (1819), in articulating the applicable legal standard, *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *Katzenbach*, 383 U.S. at 326-27, which the Attorney General argues *Boerne* "did not disturb," AG 17. But *Boerne* explained that its framework was a nuanced enhancement of the *Katzenbach* legal standard. JA 521-22. *Ex Parte Virginia* and *M'Culloch* described Congress's enforcement authority in "broad terms." *Boerne*, 521 U.S. at 517. But "[a]s broad as the congressional enforcement power is, it is not unlimited." *Id.* at 518. Congruence-and-proportionality set that boundary.

Looking to the text and framing history of the Reconstruction Amendments, *Boerne* specifically rejected the argument that the legal standard for reviewing enforcement legislation is the same standard applied to "Congress's power under the Necessary and Proper Clause." AG 20. The first draft of the Fourteenth Amendment provided: "'The Congress shall have power to make all laws which *shall be necessary and proper* to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.'" *Boerne*, 521 U.S. at 520 (quoting Cong. Globe, 39th Cong., 1st Sess. 1034 (1866)) (emphasis added). That proposal "encountered immediate opposition" from Members of Congress "across the political spectrum," who felt that it "gave Congress too much legislative power." *Id.* As a consequence, the Fourteenth Amendment was revised to its current form.

Boerne's reliance on Congress's deliberate substitution of "appropriate" for "necessary and proper" is decisive here. Foremost, it shows that *Boerne* is not limited to Congress's enforcement of rights at the periphery of the Reconstruction Amendments. Race was the central focus of the Reconstruction Congress. *Id.* at 523; AG 18. Any determination based on the text and framing of those Amendments *a fortiori* applies to "core" legislation addressing racial discrimination. Moreover, the contemporaneous evidence of the Fourteenth

Amendment's framing conclusively demonstrates that *Boerne* is not only controlling precedent, but correct as an original matter: the Reconstruction framers deliberately refused to "vest in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation." *Boerne*, 521 U.S. at 524. In other words, they refused to grant Congress the same expansive authority afforded to it under Article I of the Constitution.

When Congress exercises its enumerated powers in Article I, it is exercising *substantive* authority to directly regulate individual behavior. Thus, there is no risk that Congress will substantially alter the meaning of, for example, the Commerce Clause through prophylactic legislation. Whatever the proper scope of Congress's authority under the Commerce Clause may be, legislation is either regulating "Commerce … among the several States" or it is not. But that is not the case when Congress exercises its authority to "enforce" the Reconstruction Amendments. Although those Amendments are self-executing, *Katzenbach*, 383 U.S. at 425, Congress was granted limited authority to ensure that each Amendment's substantive command is not circumvented by recalcitrant jurisdictions. That authority includes the enactment of "[l]egislation which deters or remedies constitutional violations … even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Boerne*, 521 U.S. at 518.

The authority to act prophylactically raises special concerns that do not arise when Congress exercises its enumerated powers. The enforcement "power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). The enforcement authority thus is strictly "'remedial,'" meaning that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id*. (quoting *Katzenbach*, 383 U.S. at 326). The Attorney General's contention that this is only a concern for prophylactic enforcement legislation targeting non-"core" rights is unsustainable.

At bottom, the Attorney General would have this Court believe that the *Boerne* line of cases has no significance at all to the voting rights enforcement. But that does not accord with reality. He cannot escape the fact that *Boerne* and its progeny are the direct legacy of *Katzenbach*. The Attorney General is entitled, of course, to disagree with *Boerne*'s elaboration and refinement of the standard of review applied in *Katzenbach* and *Rome*. But this Court is not the proper forum for relitigating the Supreme Court's conclusion that the *Boerne* standard must be

used to judge the constitutionality of *all* Fourteenth Amendment and Fifteenth Amendment enforcement legislation.

B. The Attorney General Incorrectly Argues That *Boerne* Should Be Applied Less Rigorously Here.

The Attorney General and Intervenors also try to evade rigorous judicial review by asserting that *Boerne* should be applied with "substantial deference," Brief of Defendant-Intervenors ("Int.") 12; AG 23, under the Court's decision in *Hibbs* and *Lane*. But neither decision suggested that *Boerne* should be applied deferentially. Brief for Appellant ("Br.") 16-19. The Court merely explained that it was "easier" for Congress to identify a pattern of unconstitutional discrimination when it relied on overt disability and gender-based classifications as evidence. *Hibbs*, 538 U.S. at 729; *Lane*, 541 U.S. at 521. Because such classifications "are presumptively invalid, most of the States' acts of … discrimination violated the Fourteenth Amendment." *Hibbs*, 538 U.S. at 736.

In any event, this cases resembles *Boerne*—not *Hibbs* and *Lane*. In *Boerne*, it was "difficult" for Congress to document a pattern of unconstitutional discrimination because RFRA targeted "laws of general applicability which place incidental burdens on religion." 521 U.S. at 530-31. The same is true here. Section 5 does not target only those laws that intentionally discriminate against voters within the meaning of the Fifteenth Amendment. Section 5 targets *all* state voting laws in order to prevent voting changes that have the "'effect' of diluting or

abridging the right to vote on account of race[.]" *Beer v. United States*, 425 U.S. 130, 141 (1976). Like RFRA, then, Section 5 targets state laws that are presumed valid under the Constitution. Br. 17-18.

Indeed, the Attorney General's and Intervenors' arguments for why this case is not like *Boerne* fundamentally ignore Section 5's expansive sweep. The Attorney General, for example, suggests that this case is like *Mitchell*. AG 23. In *Mitchell*, however, the Supreme Court upheld Congress's nationwide extension of the ban on literacy tests because "Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." 400 U.S. at 132. In contrast, Section 5 does not target "a particular type of voting qualification … with a long history as a notorious means to deny and abridge voting rights on racial grounds." *Boerne*, 521 U.S. at 533. The preclearance obligation suspends "all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 129 S. Ct. at 2511.

Intervenors similarly argue that this case does not present the same concerns confronted in *Boerne* because, unlike RFRA, "Section 5 enforces undisputed constitutional rights against undisputed constitutional evils." Int. 16. But there is no undisputed constitutional right to be free from complying with laws that federal officials have not precleared, and voting laws "diminishing [minorities'] ability …

to elect their preferred candidates of choice," 42 U.S.C. § 1973c(b), are not an undisputed constitutional evil, *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). Section 5 seeks to prevent interference with the right to vote in precisely the same way that RFRA sought to prevent religious discrimination: by suspending neutral laws of general applicability on the ground that some fraction of those laws will have "the unconstitutional object of targeting" minority voters. *Boerne*, 521 U.S. at 529.

Finally, Intervenors contend that Section 5 does not require the level of scrutiny employed in *Boerne* because, unlike RFRA, Section 5 enforces rather than redefines the Fifteenth Amendment. Int. 13, 16-17. As they admit, however, *id*. 13, that is precisely the question the *Boerne* inquiry is designed to answer, *Hibbs*, 538 U.S. at 728 ("We distinguish appropriate prophylactic legislation from substantive redefinition … by applying the test set forth in *City of Boerne*." (quotation marks omitted)). It would be absurd for a court to predetermine how rigorously to apply the *Boerne* inquiry based on what that court believes the answer to that inquiry will be.

II. THE ATTORNEY GENERAL INCORRECTLY ARGUES THAT SECTION 5'S PRECLEARANCE OBLIGATION REMAINS A CONSTITUTIONAL MEANS OF ENFORCING THE FIFTEENTH AMENDMENT.

A. The Attorney General Incorrectly Argues That Section 5 Can Be Sustained Under The Fourteenth Amendment.

The Attorney General and Intervenors concede, AG 21; Int. 21, that the Supreme Court has reviewed Section 5 exclusively under the Fifteenth Amendment, *Katzenbach*, 383 U.S. at 308-10, 324-29; *Georgia v. United States*, 411 U.S. 526, 534 (1973); *Rome*, 446 U.S. at 180-82. And because the Fifteenth Amendment protects the right to freely register and vote, not the weight the vote is accorded once cast, Appellant's Br. 9-10, 26-27, the Court "has *never* held that vote dilution violates the Fifteenth Amendment," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000) (emphasis added) ("*Bossier Parish II*"). The Attorney General and Intervenors concede, as they must, that Shelby County "is correct that the Supreme Court has not yet determined whether a State's intentional dilution of racial minorities' votes violates the Fifteenth Amendment." AG 48; Int. 23-24 (same).

These concessions are critically important here. Like the district court, Appellant's Br. 26, the Attorney General and Intervenors attempt to defend Section 5 from constitutional challenge based almost exclusively on vote dilution evidence, AG 25, 37-38, 40-41, 48-56, 63; Int. 20-24, 26-35, 50-52. They are compelled,

therefore, to ask this Court to hold that Section 5 enforces the Fourteenth Amendment. AG 21-23; Int. 6, 10-12.[1] The Court cannot oblige.

As an initial matter, upholding Section 5 based on vote dilution evidence under the Fourteenth Amendment would entirely remove this case from the umbrella of *Katzenbach* and *Rome*. The Attorney General and Intervenors can argue that Section 5 appropriately enforces the right protected by the Fifteenth Amendment under those decisions. Or they can pursue the novel argument that Section 5 enforces the Fourteenth Amendment. But they cannot have it both ways. The Attorney General and Intervenors counter that *Rome* relied on dilution evidence. AG 54-55; Int. 20-22. As noted above, however, they concede that *Rome* relied exclusively on the Fifteenth Amendment to uphold Section 5 and the Supreme Court has *never* held that vote dilution infringes that Amendment. Those concessions are irreconcilable with the idea that *Rome* relied on vote dilution evidence to uphold Section 5. Br. 27-28. If the issue had been decided in that case, there would have been nothing to debate in *Reno v. Bossier Parish Sch. Bd.*,

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[1] Intervenors ask that the Court take the even bolder step of holding that vote dilution violates the Fifteenth Amendment. Int. 23-24. But a plurality of the Supreme Court has explained why that argument is misplaced. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 65 (1980). Legislative redistricting can form the basis of a Fifteenth Amendment claim under certain circumstances, Br. 28-29, but a challenge to a legislative redistricting on vote dilution grounds cannot, *Holder v. Hall*, 512 U.S. 874, 919-20 (1994) (Thomas, J., concurring).

528 U.S. 320, 334 n.3 (2000) ("*Bossier Parish II*"). That decision does not even mention *Rome*.

To conclude that Section 5 enforces the Fourteenth Amendment, moreover, would conflict with the statute itself. *Morse v. Republican Party of Va.*, 517 U.S. 186, 210-11 (1996) ("The preamble to the statute expressly identifies the 'fifteenth amendment' as the constitutional provision the Act was designed to implement."). The Attorney General does not contest that the 2006 reauthorization relied on the Fourteenth Amendment *only* as a basis for the language-minority provisions of the statute. AG 48-49. To solve this problem, the Attorney General inappropriately asks this Court to assume that Section 5 enforces the Fourteenth Amendment notwithstanding the statute's indication to the contrary. AG 48-49.

The Attorney General is correct that normally "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). But it *does* depend on which source of authority Congress sought to invoke. *Id.* ("Here it is plain from the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause."). And the Supreme Court has been reluctant to search for congressional intent in this setting: "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should

not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981).

Given that Congress was fully aware of these complex issues when it reauthorized Section 5 in 2006, it would be particularly inappropriate for the Court to invoke Congress's Fourteenth Amendment enforcement authority on its behalf. Congress is entitled to decide which Amendment it is seeking to enforce when it passes remedial legislation. It appears that the Attorney General and Intervenors want this Court to defer to Congress except in the only instance when it actually should. Furthermore, there are strong reasons why Congress would have considered Section 2—not Section 5—as the appropriate means of enforcing the voting rights protected by the Fourteenth Amendment. *Infra* at 26-27.

B. The Attorney General Cannot Show That Congress Identified The Unconstitutional Pattern Of Electoral "Gamesmanship" Needed To Sustain The Preclearance Obligation.

Section 5 was enacted for a singular purpose: to combat "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." *Katzenbach*, 383 U.S. at 335. In 2006, therefore, Congress needed to similarly document a pattern of rampant discrimination and electoral gamesmanship to meet

its requirement under the second step of the *Boerne* framework. Br. 19-23. Congress did not fulfill its obligation. *Id*. 38-46.

The Attorney General challenges the premise by arguing that "Congress did not limit its consideration to such practices before previous reauthorizations." AG 56. And Intervenors go so far as to contend that "[t]here is no place in *Katzenbach* or *Rome* where the Court suggested in any way that congressional authority to enact or reauthorize Section 5 is dependent on Congress identifying violations of this nature." Int. 19. But the Court has left no doubt that Section 5's unprecedented intrusion into state sovereignty was only constitutional as an emergency response to longstanding and continuing denial of voting rights. *Katzenbach*, 301 U.S. at 334 ("[E]xceptional conditions can justify legislative measures not otherwise appropriate."); *Rome*, 446 U.S. at 182. While a prior restraint is not a tool that Congress may employ at its discretion, in 1965 "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Katzenbach*, 383 U.S. at 335. To renew Section 5 in 2006, Congress needed to establish that those same "unique circumstances" still existed in the covered jurisdictions.

The Attorney General does not attempt to identify a pattern of such discrimination in the legislative record. He first argues that preclearance "renders such gamesmanship impossible" and secondly that "evidence of disparities in voter registration and turnout rates, numbers of minority elected officials, and the number and types of objections interposed by the Attorney General" are an acceptable substitute for evidence of gamesmanship. AG 56-58. Thus, under the first theory the need for preclearance can be established by the projected beneficial effect of preclearance in foreclosing future misconduct. This argument would justify permanently placing the covered jurisdictions in federal receivership without regard to current conditions. Br. 53. No court has endorsed the radical idea that an "emergency" provision as expansive and constitutionally problematic as Section 5 could ever be made permanent and *Nw. Austin* made crystal clear that the 2006 reauthorization had to be justified by current conditions. The Attorney General has to show that Congress met this burden.

The Intervenors claim that certain jurisdictions have engaged in electoral gamesmanship. Int. 26-35. But virtually every example relies on the fact that the jurisdiction in question drew multiple Section 5 objections, which is not evidence of intentional discrimination given the vast difference between the preclearance standard and the standard for determining a Fifteenth Amendment violation. Br. 29-31. Intervenors' remaining examples were either successfully resolved through

Section 2 litigation or settled. But even if all of these examples are credited, they still fall woefully short of the level of evidence needed to sustain Section 5. There are over 12,000 covered jurisdictions and there have been an untold number of voting changes over the last twenty-five years. It is no surprise that the legislative record includes some examples of voting discrimination. The question is whether the emergency that justified Section 5 still exists. *Nw. Austin*, 129 S. Ct. at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part). These examples do not nearly meet that standard.

With respect to the second argument, the Attorney General is correct that voting statistics can be "reliable evidence" of pervasive voting discrimination and gamesmanship. *Katzenbach*, 383 U.S. at 329. But Congress found that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated," H.R. Rep. No. 109-478 at 11 (2006); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2(b)(1), 120 Stat. 577, 577 (2006) ("VRARAA"), and the Supreme Court reached the same conclusion, *Nw. Austin*, 129 S. Ct. at 2511. Moreover, out of thousands of preclearance submissions in each of the two years preceding the 2006 reauthorization, DOJ lodged *one* objection. Br. 41-43. Thus, such statistics only undermine the case for Section 5's reauthorization. Br. 38-43.

The Attorney General contests this conclusion by asking this Court to limit the data to a comparison of non-Hispanic white voting statistics to black voting statistics. AG 45-46. But doing so renders the key question—*i.e.*, whether there has been substantial registration and turnout improvement in the covered jurisdictions since 1965 and 1975—impossible to answer as the Census did not begin reporting estimates for non-Hispanic whites until 1998. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess., 147 (June 13, 2006). Moreover, the constitutionality of the VRA is limited to the legislative record, *infra* at 31, and Congress's figures compare whites and African-Americans. Congress wisely chose to orient the data in a way that allowed it to determine whether there has been massive statistical improvement since the 1965 and 1975 reauthorizations of Section 5. The improvement is undeniable:

Voter Registration Rates									
	1965			1972			2004		
	White	Black	**Gap**	White	Black	**Gap**	White	Black	**Gap**
Alabama	69.2	19.3	**49.9**	80.7	57.1	**23.6**	73.8	72.9	**0.9**
Georgia	62.6	27.4	**35.2**	70.6	67.8	**2.8**	63.5	64.2	**-0.7**
Louisiana	80.5	31.6	**48.9**	80.0	59.1	**20.9**	75.1	71.1	**4.0**
Mississippi	69.9	6.7	**63.2**	71.6	62.2	**9.4**	72.3	76.1	**-3.8**
North Carolina	96.8	46.8	**50.0**	62.2	46.3	**15.9**	69.4	70.4	**-1.0**
South Carolina	75.7	37.3	**38.4**	51.2	48.0	**3.2**	74.4	71.1	**3.3**
Virginia	61.1	38.3	**22.8**	61.2	54.0	**7.2**	68.2	57.4	**10.8**

S. Rep. No. 109-295 at 11 (2006); S. Rep. No. 94-295 at 14 (1975); H.R. Rep. No. 109-478 at 12.

Moreover, any gaps in registration and turnout between non-Hispanic whites and blacks is not probative of peculiar voting interference in covered jurisdictions. The national registration gap between non-Hispanic whites and blacks is 9.1%. U.S. Census Bureau, Voting and Registration in the Election of November 2004 tbl. 4a., Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States, *available at* http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls ("*Census Report*"). As the Census Report shows, six fully-covered States fared better than the national average: Alabama (2.0), Georgia (3.8), Louisiana (5.5), Mississippi (-2.5), South Carolina (4.4), and Texas (5.2). *Id.* On the other hand, Massachusetts has a 26.7% gap. *Id.*

The Attorney General also argues that the Court should rely on registration and turnout gaps between white non-Hispanics and Hispanics in Texas, Virginia, Georgia, and a few other states. AG 46. But the 2004 Census Bureau Report reveals that there is nothing singular about the covered jurisdictions in this regard either. The national registration gap for white non-Hispanics and Hispanics is 39.2%, and the gaps in non-covered states like Maryland (54.0) and Oklahoma (52.2) exceeds or is on par with almost every covered state. *Census Report*. Furthermore, when citizenship data is taken into account, the gaps shrink

significantly. The registration gap in Georgia, for example, drops from 60 points to 27.1 points. And again, covered states fare better than the national average. *Id*. The national registration gap between white non-Hispanic citizens and Hispanic citizens is 17.3%. Louisiana (13.6), Mississippi (9.9), South Carolina (-5.0), Texas (16.0), and Virginia (15.2) are all better than the national average. *Id*.

In light of these statistics, the Attorney General and Intervenors retreat to invoking the so-called "second-generation" barriers. AG 26-41; Int. 45-50. But unlike registration and turnout statistics, these barriers are not probative of interference with Fifteenth Amendment rights. Br. 24-28. And because second-generation evidence was not relied on in *Katzenbach* and *Rome*, it cannot be relied on here either. The Attorney General and Intervenors cannot claim that this appeal is controlled by precedent and then ask this Court to rely on evidence that plays no part in those cases.

In *Katzenbach* and *Rome*, moreover, the Court credited statistical evidence that bore a logical relationship to interference with the ability to register and cast a ballot. *Infra* at 27-30. Instead of attempting to show the same logical connection here, the Attorney General and Intervenors rely on isolated examples to substantiate the statistical relevance of "second-generation" barriers. AG 29-44; Int. 45-52. But if the Attorney General and Intervenors want to rely on instances of voting interference, they have to show that those isolated examples are part of a

larger pattern of systematic discrimination and gamesmanship with respect to the jurisdiction at issue. If the Attorney General and Intervenors instead want to rely on statistical evidence as a proxy for that concrete evidence, they must explain why those logically indicate the existence of systematic Fifteenth Amendment discrimination. But they have done neither. On a statistical level, "second-generation" barriers bear no connection to interference with the ability to register and vote. Br. 26-38. And the isolated examples do not even remotely show that any jurisdiction—let alone multiple covered jurisdictions—are engaged in the type of deplorable and systematic behavior that prompted an exasperated Congress to turn to the prior restraint of preclearance as its last line of defense against pervasive intransigence. *Id*.

Ultimately, the Attorney General and Intervenors rest not on evidence of rampant voting discrimination, but on the absence of it under the guise of the so-called "deterrent" effect. AG 29; Int. 52-53. Deterrence indulges the unsubstantiated premise that without Section 5 the covered jurisdiction would revert to their historic discriminatory ways. Br. 37-38. Indeed, the district court simply assumed that the isolated examples in the legislative record "represent only a fraction of those instances that otherwise would have occurred in the absence of Section 5." JA 601. The theory is not only offensive, *Nw. Austin*, 129 S. Ct. at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part), but it

cannot be tested. As evidence of voting discrimination in the covered jurisdictions continued to abate, the "deterrent" effect would be assigned the credit. This is simply a recipe to justify permanently depriving covered jurisdictions of their constitutional prerogative to regulate state and local elections.

C. The Attorney General's Arguments For Why The Preclearance Obligation Is Congruent And Proportional To The Harm Identified In The Legislative Record Are Misplaced.

Even if Congress succeeded in identifying a pattern of discrimination sufficient to invoke its remedial authority under the Fifteenth Amendment, imposing preclearance on *all* voting laws "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. In order to make this determination, the Court must examine both the nature of the remedy and the severity of the harm it is being employed to address: "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id*. at 530.

The Attorney General and Intervenors basically ignore the nature of the preclearance remedy. AG 75; Int. 73-74. But the "substantial federalism costs" imposed by Section 5 are central to any evaluation of its proportionality. *Nw. Austin*, 129 S. Ct. at 2511. Section 5 uniquely interferes with the machinery of

local government and targets an aspect of sovereignty that the Constitution specifically insulated from federal encroachment: the regulation of state and local elections. *Mitchell*, 400 U.S. at 125; *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991). "State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority." *Nw. Austin*, 129 S. Ct. at 2520 (Thomas, J., concurring in the judgment in part and dissenting in part). Moreover, "[f]ederalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

Not only is the preclearance obligation itself uniquely problematic, but the standard for preclearance exacerbates those federalism concerns. Section 5 has always imposed "the difficult burden" of "prov[ing] a negative," namely, "proving the *absence* of [the prohibited] purpose and effect." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 470, 480 (1997) ("*Bossier Parish I*"). The Court consistently interpreted Section 5, therefore, to only address retrogression—*i.e.*, in seeking preclearance a jurisdiction only had to show that the voting change did not make minority voters worse off than they had been under the benchmark plan. *Beer*, 425

U.S. at 141. Indeed, the Court made clear that preclearance was justifiable *only* because the preclearance standard was closely tied to the problem that Congress targeted when it enacted Section 5: electoral backsliding. *Bossier Parish I*, 520 U.S. at 478-80. When DOJ interpreted Section 5 to prevent voting changes with "discriminatory but nonretrogressive vote-dilutive purposes," the Court thus held that "[s]uch a reading would … exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality." *Bossier Parish II*, 528 U.S. at 336.

Determined to provoke a constitutional confrontation, Congress amended Section 5 in 2006 to overturn *Bossier Parish II* by requiring the denial of preclearance to a voting change with "any discriminatory purpose." 42 U.S.C. § 1973c(c); H.R. Rep. No. 109-478 at 51. Accordingly, a covered jurisdiction must now bear the burden of proving, for example, that its choice of one redistricting plan over some other "hypothetical, undiluted plan," *Bossier Parish II*, 528 U.S. at 336, was not made with a "discriminatory purpose," *Bossier Parish I*, 520 U.S. at 484, even if the plan it chose is not retrogressive. The already serious federalism costs imposed by Section 5 have been pushed beyond the breaking point.

In light of these federalism costs, there can be no question that preclearance is out of proportion to the limited evidence of discrimination in the legislative record. Br. 47. Like the district court, the Attorney General tries to solve this

problem by pointing to *Hibbs* and *Lane*. AG 60-62. But he refuses to grapple with the fact that the preclearance remedy is far broader than the remedies reviewed by the Court in those cases. Br. 49-51. It is the sweeping nature of the remedy that makes Section 5 vastly different from the post-*Boerne* cases in which the Supreme Court upheld Congress's invocation of enforcement authority. Like RFRA, Section 5's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions," and suspending the implementation of voting changes which there is no "reason to believe" have a "significant likelihood of being unconstitutional." *Boerne*, 521 U.S. at 529, 532.

Shelby County does not argue, however, that Congress is without authority to address the instances of voting discrimination contained in the legislative record. Absent the systematic discrimination and electoral gamesmanship that necessitated Section 5's enactment, Section 2 is the targeted enforcement mechanism most appropriate for redressing the residuum of voting discrimination that exists throughout the nation. Vote dilution is redressable under Section 2. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). Section 2 is an effective vehicle for challenging statewide decennial redistricting plans—the principal target of those urging the reauthorization of Section 5. AG 38; Int. 27-29. Moreover, it creates a nationwide private right of action permitting direct challenge to discriminatory voting laws and provides for a remedy only for proven violations. Section 2,

especially in conjunction with Section 3's bail-in mechanism, *infra* at 36-38, is the "appropriate" remedy for the "lesser" harm documented by Congress in 2006. *Boerne*, 521 U.S. at 530.

III. THE ATTORNEY GENERAL INCORRECTLY ARGUES THAT SECTION 4(B)'S COVERAGE FORMULA REMAINS A CONSTITUTIONAL MEANS OF ENFORCING THE FIFTEENTH AMENDMENT.

Even if the legislative record is sufficient to sustain Section 5, the formula that determines coverage is irrevocably flawed because it is neither rational in theory nor in practice. Br. 56-73. The coverage formula is irrational in theory because it is based on decades-old voting data and because its trigger is tied to "first generation" interference with the ability to register and vote when Congress reauthorized Section 5 to combat "second generation" barriers that dilute the weight of the vote once cast. The coverage formula is irrational in practice because it deprives the covered jurisdictions of "equal sovereignty" despite the fact that the voting discrimination relied on by Congress is no longer concentrated in those jurisdictions.

A. The Attorney General Has Failed To Defend Section 4(b) As Rational In Theory.

Like the district court, the Attorney General and Intervenors fail to seriously grapple with the question of whether the coverage formula is rational in theory. Br. 58-61. They neither explain why it is rational to rely on decades-old voting

data nor why it is theoretically rational to premise coverage on registration and turnout statistics to locate vote dilution. Rather, they contend that because the coverage formula was reverse-engineered, AG 67; Int. 55-56, no theoretical defense is required despite *Katzenbach*'s clear instruction to the contrary. 383 U.S. at 330.

In their view, the "characterization" of Section 4(b) as a coverage formula "can be misleading because it suggests that … [Congress] used the formula to determine which jurisdictions should be covered by Section 5," AG 67, and they thus may entirely disclaim the relevance of the statutory criteria to the actual coverage determination, Int. 58-59. Intervenors criticize Shelby County as "mistaken[]" in focusing "on the role played by the coverage formula in determining which jurisdictions are covered today" and the fact that the "'coverage formula bears no relation whatsoever to current conditions.'" Int. 58 (quoting Appellant's Br. 58). Given that *Nw. Austin* directly questioned the formula's constitutionality because it "is based on data that is now more than 35 years old" and thus "fails to account for current political conditions," *Nw. Austin*, 129 S. Ct. at 2512, it is of course the Attorney General and Intervenors who are mistaken. Their failure to offer any theoretical defense of Section 4(b) is constitutionally fatal under controlling precedent.

To be sure, the Attorney General and Intervenors do argue that the formula "is and has always been geographically targeted at those areas with a particularly egregious history of voting discrimination." AG 70. In other words, Section 4(b) is rational in theory because it continues to target States that had the most egregious records of discrimination in the mid-1960s, rather than those with the worst records in 2006. *Id*. To endorse such a "theory" would allow the coverage formula to exist in perpetuity based on long-past events, a result at odds with the understanding that Section 5 is a "temporary" measure, S. Rep. No. 109-295 at 31, and the undeniable logic that "[p]unishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose." *Nw. Austin*, 129 S. Ct. at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part). Wisely, the Supreme Court has instead held that "the Act imposes current burdens [and] must be justified by current needs." *Id*. at 2512; *Katzenbach*, 330 U.S. at 328 (targeting "certain sections of the country" where "substantial voting discrimination presently occurs").

The Attorney General also fails to address the mismatch between the criteria for coverage and the kind of discrimination targeted by Congress in 2006. The Intervenors address the argument, but appear to misunderstand it. It is not that Congress must target first-generation barriers to voting for purposes of formulating the coverage triggers, Int. 60-61; it is simply that the statutory criteria for coverage

must correspond to the problem found by Congress in 2006. Congress cannot rationally combat vote dilution by basing coverage on registration and turnout data. The statute should be struck down for this reason alone.

B. The Attorney General Has Failed To Defend Section 4(b) As Rational In Practice.

The coverage formula is irrational in practice because "there is considerable evidence that [it] fails to account for current political conditions." *Nw. Austin*, 129 S. Ct. at 2512. There are no "systematic differences between the covered and the non-covered areas of the United States[;] … in fact, the evidence that is in the record suggests that there is more similarity than difference." *The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d. Sess., at 10 (May 16, 2006) (testimony of Pildes) (quoted in *Nw. Austin*, 129 S. Ct. at 2512). Indeed, "the racial gap in voter registration and turnout" at the time of reauthorization was "lower in the States originally covered by § 5 than it [wa]s nationwide." *Nw. Austin*, 129 S. Ct. at 2512. And the evidence in the legislative record of Section 2 litigation and racially polarized voting illustrates that neither is concentrated in the covered jurisdictions: many (if not most) of the covered States would not have been covered had Congress identified the individual States that had the highest incidence of second-generation barriers to voting. Br. 64-67, 72. As the "evil § 5 is meant to address" is no longer "concentrated in the jurisdictions" singled out for coverage, it is

unsurprising that Congress made no finding of a meaningfully greater incidence of "second-generation barriers" in the covered jurisdictions. VRARAA, § 2(b)(4), 120 Stat. 577.

The Attorney General and Intervenors counter that Congress did not need to determine the extent to which evidence of voting discrimination existed in the non-covered jurisdictions. In their view, Congress only needed to examine the covered jurisdictions and "determine whether the level of ongoing voting discrimination in covered jurisdictions was sufficient to merit an extension of Section 5." AG 71; Int. 59. But "a 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." *Nw. Austin*, 129 S. Ct. at 2512. The suggestion that this Court ignore the Supreme Court is totally unwarranted.

The Attorney General alternatively argues that there were "studies before Congress and before the district court" showing that voting discrimination is "more prevalent in the covered jurisdictions than in non-covered jurisdictions." AG 71. But these studies cannot save Section 4(b). First, one of these studies is based on extra-record evidence, which cannot be used to defend Section 4(b) or 5 against a facial challenge like this one. JA 514 (holding that the Act must "rise or fall on the

record that Congress created … in 2006").[2] Second, all of the Attorney General's cited evidence relates to Section 2 litigation with "favorable outcomes for minority plaintiffs." As Shelby County has explained, Appellant's Br. 34-35, such evidence is misleading at best and otherwise incapable of providing a legitimate basis for "depart[ing] from the fundamental principle of equal sovereignty," *Nw. Austin*, 129 S. Ct. at 2512, especially given that the National Commission on the Voting Rights Act acknowledges that a "significant" number of Section 2 cases "resolved favorably to plaintiffs" occurred in non-covered jurisdictions, 1 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 109th Cong., 2d Sess. at 208 (Mar. 8, 2006). Third, the evidence of Section 2 litigation, especially when viewed state-by-state, actually confirms the irrationality of the coverage formula. Br. 64-67.

Intervenors attempt to shore up the Attorney General's half-hearted effort to marshal record evidence showing differences in voting discrimination between covered and non-covered jurisdictions, but they too fall short. Intervenors argue that evidence of preclearance objections, MIRs, and Section 5 declaratory judgment actions support the coverage formula, Int. 61-62, even though such evidence can be found only in covered jurisdictions, Br. 64. They also distort the

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[2] The Attorney General submitted this same post-reauthorization study to the district court through a declaration from one of its employees. JA 88, 436; AG 71. The district court correctly refused to rely on this extra-record evidence.

evidence of Section 2 litigation by arguing that less than one quarter of the nation's total population lives in covered jurisdictions and reasoning from there that, "[a]djusted for population, there were more than three times as many successful Section 2 cases in the covered jurisdictions than in non-covered jurisdictions." Int. 66. But Section 2 litigation will be found primarily in jurisdictions where there is a substantial minority population. *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 2d Sess., at 30 (May 9, 2006) (testimony of Issacharoff).[3] Intervenors thus misleadingly inflate the value of their cited evidence by suggesting that some sort of *per capita* comparison of Section 2 litigation is constitutionally meaningful.

When Intervenors finally address the record evidence of Section 2 litigation, they again misconstrue and otherwise overstate the evidence of such litigation in covered jurisdictions. For example, they claim that of the States with the highest number of Section 2 lawsuits filed since 1982, only one of the "top ten" States was a non-covered State. Int. 68. But this statistic is highly misleading. Intervenors

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[3] Indeed, the NAACP has recently stated that voting problems tend to occur in "states that [have] experienced high rates of minority population growth and political participation," including such non-covered States as Nevada, Missouri, Maryland, Wisconsin, and Ohio. *Defending Democracy: Confronting Modern Barriers to Voting Rights in America*, NAACP Legal Defense and Educational Fund, Inc. & the NAACP, 13 (Dec. 5, 2011), http://naacp.3cdn.net/67065c25be9ae43367_ml brsy48b.pdf.

wish to treat partially-covered States as "covered" even though nearly all of the Section 2 litigation in those States arose in non-covered jurisdictions. For example, all 15 of the Section 2 cases filed in California were filed in non-covered jurisdictions, and 20 of the 23 Section 2 cases filed in Florida were filed in non-covered jurisdictions. Ellen Katz & The Voting Rights Initiative, VRI Database Master List ("*VRI Master List*") (cited in *To Examine the Impact & Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 974, 1019-20 (Oct. 18, 2005)). Thus, these States are properly considered as non-covered States for the purposes of this comparison. Even discounting the Section 2 cases filed in the covered jurisdictions of these States, non-covered States make up 3 of the top 6 and 4 of the top 8 States with the highest number of Section 2 suits filed since 1982. Intervenors' citation to "success rates" is similarly misleading. Even aside from their dubious definition of "success," Intervenors' own data indicates that the lowest success rates tended to be from covered States. Int. 68 (e.g., Georgia – 21.4%; Texas – 26.5%).

Perhaps more importantly, the evidence of Section 2 cases that resulted in findings of intentional discrimination—the best indicator of constitutional violations—demonstrates that many more occurred in non-covered jurisdictions than in covered jurisdictions. Only 4 of the 20 States in which Section 2 cases

resulted in findings of intentional discrimination were fully covered States; and only 12 of the 33 cases that resulted in findings of intentional discrimination were from covered jurisdictions (including covered jurisdictions in partially covered States). *VRI Master List*.

Intervenors offer a grab-bag of "other statistical evidence" in an attempt to bolster their weak defense of Section 4(b). Int. 69-72. But evidence of racial appeals, racially polarized voting, and the purported lack of minority candidate success provide Intervenors no support. Racial appeals in elections—that is, the campaign strategies of candidates for office—are not a proxy for state-sponsored intentional discrimination. Similarly, racially polarized voting is neither evidence of state action nor of intentional discrimination. Moreover, the evidence of racially polarized voting demonstrates that it is a national phenomenon. Of the 105 instances of racially polarized voting since 1982 identified in the Katz Study, only 48 occurred in covered States. *VRI Master List*. Likewise, the record reflects that minority candidates have had *more* success in covered States than in non-covered States. Of the "35 African Americans [that] held statewide office" in 2000, AG at 47, twenty of these officials came from covered or partially-covered states. David A. Bositis, *Black Elected Officials: A Statistical Summary 2000*, Joint Center for Political and Economic Studies, 24 (2002), http://www.jointcenter.org/sites/default/files/upload/research/files/BEO-00.pdf (cited in 1 *Evidence of Continued*

Need at 247). Last, Intervenors suggest that the state-by-state reports support the coverage formula. But these reports actually highlight the fact that black voter registration and turnout tends to be higher in covered States than in non-covered States. *Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Committee on the Judiciary*, 109th Cong., 2d Sess., at 154, 177, 235 (May 4, 2006).

C. The Attorney General Incorrectly Argues That Bail-In And Bail-Out Are Capable Of Saving Section 4(b).

The Attorney General's and Intervenors' reliance on bail-in and bail-out is misplaced. AG 73-77; Int. 73-74. By their logic, Congress could dispense entirely with its obligation to build a legislative record upon which to tailor its exercise of enforcement authority and randomly select jurisdictions for coverage, but then immunize such random selection from constitutional scrutiny through bail-in and bail-out. That would be inconsistent with the "fundamental principle" of "equal sovereignty." *Nw. Austin*, 129 S. Ct. at 2512. In any event, bail-in and bail-out can at best ameliorate the formula's over- and under-inclusiveness at the margins.[4] Indeed, the Attorney General's own statistics demonstrate that these mechanisms

[4] Although *Katzenbach* noted that bail-out helped alleviate potential overbreadth concerns, 383 U.S. at 330, bail-out was then effectuated via a much simpler and more straightforward test (proof of no "test or device" in the preceding five years) than the present test, which involves the satisfaction of several objective and subjective criteria, 42 U.S.C. § 1973b(a)(1). Bailout also does not actually terminate coverage; the "clawback" provision subjects a bailed-out jurisdiction to continued federal oversight for ten years. *Id.* § 1973b(a)(5).

have only a negligible effect on the reach of the coverage formula. By the Attorney General's count, the number of jurisdictions that have either bailed in (17) or bailed out (87) is a tiny fraction of "the more than 12,000 covered political subdivisions" covered by Section 4(b). *Nw. Austin*, 129 S. Ct. at 2516. Even crediting the Attorney General's figures,[5] the minimal effect that the bail-in and bail-out mechanisms have had on coverage "only underscores how little relationship there is between the[ir] existence … and the constitutionality of [the coverage formula]." *Id*. at 2519 n.1 (Thomas, J.).

The bail-in mechanism (or "pocket trigger") actually undermines the constitutionality of Section 4(b) because it constitutes a narrower, and more appropriate, means of imposing preclearance. Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation & Dynamic Preclearance*, 119 Yale L.J. 1992, 1992 (2010) ("The pocket trigger is more likely to survive the congruence and proportionality test because it replaces an outdated coverage formula with a perfectly tailored coverage mechanism—a constitutional trigger."). The pocket trigger also underscores the formula's incongruence. The covered jurisdictions remain subject to preclearance so long as there is some evidence of

[5] The Attorney General's bail-out statistics are inflated by recent bailouts in the wake of *Nw. Austin*. These bail-outs were obviously not part of the record considered by Congress and thus could not help to justify reauthorization even if they amounted to more than a negligible portion of the total number of jurisdictions covered by Section 4(b).

the so-called "second-generation" barriers; but a non-covered State may become covered through bail-in only by virtue of a judicial finding of unconstitutional voting discrimination. The mere fact of historical coverage cannot justify, for example, treating Georgia, Arizona, and Shelby County, Alabama differently than "Arkansas, New Mexico, and Buffalo County, South Dakota," which "have at various times been subject to preclearance obligations pursuant to the bail-in provision." Int. 71.

CONCLUSION

For the foregoing reasons and those set out in its opening brief, Shelby County respectfully requests that the Court reverse the decision below and declare Section 5 and Section 4(b) of the VRA unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief is in compliance with the type-volume limitations of the Federal Rules of Appellate Procedure and the D.C. Circuit Rules because the Court on November 1, 2011 granted Shelby County's motion for an expansion of the word limits to 8,750 words for Shelby County's reply brief, and this brief contains 8,732 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), as counted using the word-count function on the 2003 version of Microsoft Word.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman.

Dated: December 15, 2011 /s/ Bert W. Rein

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2011, I electronically filed the original of the foregoing document with the Clerk of this Court by using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that within the next two business days eight copies of the foregoing document will be filed with the Clerk of this Court by hand delivery.

Dated: December 15, 2011 /s/ Bert W. Rein

Bert W. Rein
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