[Oral Argument Tentatively Scheduled for February 27, 2012]

No. 11-5349

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

STEPHEN LAROQUE, ET AL.,

Appellants,

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 (NO. 10-561 (JDB))

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellants—Stephen LaRoque, Anthony Cuomo, John Nix, Klay Northrup, and Kinston Citizens for Non-Partisan Voting—certify as follows:

1. Parties and Amici

Stephen LaRoque, Anthony Cuomo, John Nix, Klay Northrup, and Kinston Citizens for Non-Partisan Voting were Plaintiffs in the court below and are Appellants in this Court. Lee Raynor was also a Plaintiff in the court below, but is now deceased. Eric H. Holder, Jr., Attorney General of the United States, was the Defendant in the court below, and will be an Appellee in this Court. Joseph M. Tyson, W.J. Best, Sr., A. Offord Carmichael, Jr., George Graham, Julian Pridgen, William A. Cooke, and the North Carolina Conference of Branches of the National Association for the Advancement of Colored People were Defendant-Intervenors in the court below and will be Appellees in this Court. There were no amici below and none have filed an appearance in this Court.

Appellant Kinston Citizens for Non-Partisan Voting is an unincorporated membership association dedicated to eliminating the use of partisan affiliation in local elections in Kinston, North Carolina. Its members consist of registered voters in Kinston who have joined the association because they agree with its objectives and its means for achieving them. Its members are natural persons who have no ownership interests and who have issued no shares or debt securities to the public.

2. Ruling Under Review

The ruling under review is an Order Granting the Defendant and Defendant-Intervenors' Motions for Summary Judgment, Denying the Plaintiffs' Motion for Summary Judgment, and Denying as Moot the Defendant-Intervenors' Motion to Dismiss. The Order, issued by Judge John D. Bates and dated December 22, 2011, was entered as Dkt. No. 71 in the court below and is located at JA 317-18. The court issued a Memorandum Opinion explaining the Order on December 22, 2011. It has not yet been published in the Federal Supplement, but it was entered as Dkt. No. 70 in the court below, and it is located at JA 222-316 and available on Westlaw at 2011 WL 6413850.

3. Related Cases

The case under review was previously appealed to this Court in Case No. 10-5433. There is a related case currently pending in this Court. *Shelby Cnty. v. Holder*, No. 11-5256. There also are the following related cases in the United States District Court for the District of Columbia: *Arizona v. Holder*, 11-cv-1559; *Florida v. United States*, 11-cv-1428; and *Georgia v. Holder*, 10-cv-1062.

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* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

OTHER AUTHORITIES

GLOSSARY

ADA	Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*
DOJ	Department of Justice
FMLA	Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*
Govt.Shelby.Br.	Brief for the Attorney General as Appellee *Shelby Cnty. v. Holder*, No. 11-5256 (D.C. Cir.) Doc. No. 1345212 (Dec. 1, 2011)
Shelby.Br.	Brief for Appellant *Shelby Cnty. v. Holder*, No. 11-5256 (D.C. Cir.) Doc. No. 1339375 (Nov. 1, 2011)
Shelby.JA	Joint Appendix *Shelby Cnty. v. Holder*, No. 11-5256 (D.C. Cir.) Doc. No. 1339376 (Nov. 1, 2011)
Shelby.Reply.Br.	Reply Brief for Appellant *Shelby Cnty. v. Holder*, No. 11-5256 (D.C. Cir.) Doc. No. 1347956 (Dec. 15, 2011)
VRA	Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*

STATEMENT OF JURISDICTION

Plaintiffs-Appellants brought a facial constitutional challenge to Section 5 of the VRA, as reauthorized and amended in 2006, 42 U.S.C. § 1973c. JA 222. 28 U.S.C. § 1331 conferred subject-matter jurisdiction. On December 22, 2011, the district court entered a final order granting summary judgment to Defendant and Defendant-Intervenors. JA 317-18. Plaintiffs' notice of appeal was timely filed that day. *Id.* 319. 28 U.S.C. § 1291 confers appellate jurisdiction.

STATEMENT OF ISSUES

(1) Whether the 2006 version of Section 5, as reauthorized and amended, exceeds Congress' enforcement powers under the Fourteenth and Fifteenth Amendments;

(2) Whether the 2006 amendments to Section 5 violate the Constitution's nondiscrimination guarantees; and

(3) Whether Plaintiffs' standing extends to the "discriminatory purpose" amendment, 42 U.S.C. § 1973c(c).

STATEMENT OF PERTINENT PROVISIONS

Relevant statutory provisions are reproduced in the addendum hereto.

STATEMENT OF FACTS AND CASE

A. Section 5's Reauthorization And Expansion In 2006

1. Section 5 of the VRA preemptively "suspend[s] all changes in state election procedure[s]" in selectively "covered jurisdiction[s]" "until they [are] submitted to and approved by a three-judge Federal District Court in Washington, D.C.[] or the Attorney General." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129

S. Ct. 2504, 2509 (2009). Although enacted pursuant to Congress' authority "to enforce" the Fourteenth and Fifteenth Amendments "by appropriate legislation," *see id.* at 2508-09, Section 5 drastically exceeds the ban on *intentional* racial discrimination imposed by those Reconstruction Amendments, *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997) ("*Bossier I*"), and even exceeds Section 2 of the VRA, which imposes a prophylactic nationwide ban on voting practices that have a statutorily defined discriminatory "*result[]*," *see* 42 U.S.C. § 1973 (emphasis added).

Instead, Section 5, as originally enacted in 1965, targeted a unique problem: in "areas where voting discrimination ha[d] been most flagrant," "case-by-case litigation was inadequate to combat [such discrimination], because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered," *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 328 (1966), which "had the effect of undoing or defeating the rights recently won by nonwhite voters" under normal anti-discrimination litigation, *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (internal quotation marks omitted). *See also City of Rome v. United States*, 446 U.S. 156, 180-82 (1980). Faced with such "dire" and "exceptional" circumstances, the Supreme Court upheld the 1965 enactment, which was a "temporary" five-year measure, as well as subsequent reauthorizations in 1970 (for five years) and 1975 (for seven years). *See Nw. Austin*, 129 S. Ct. at

2510; *see also Lopez v. Monterey Cnty.*, 525 U.S. 266, 282-85 (1999) (rejecting a narrow as-applied challenge to the twenty-five-year reauthorization in 1982).

2. In 2006, Congress again reauthorized Section 5. *See Nw. Austin*, 129 S. Ct. at 2510. Notably, Congress extended the preclearance requirement's temporal scope for 25 more years without modifying the geographic or topical scope of voting changes covered, even though, by then, the election data used in the formula to select the "covered jurisdictions" was 34 to 42 years old. *See id.* at 2509-10; *see also* 42 U.S.C. §§ 1973b(b), 1973c(a).

Even more notably, Congress for the first time *expanded the substantive grounds for denying preclearance*. Under the 1965 enactment, preclearance could be denied *only* if the jurisdiction failed to prove that its voting change lacked the "purpose" or "effect" of causing "a *retrogression*" in minorities' "effective exercise of the electoral franchise," as determined by "*all the relevant circumstances*." *See Georgia v. Ashcroft*, 539 U.S. 461, 466, 477, 479 (2003) (emphases added); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328-29, 335-36 (2000) ("*Bossier II*"). The 2006 Congress, however, vehemently asserted that *Ashcroft* and *Bossier II* had "misconstrued … and narrowed the protections afforded by section 5." 42 U.S.C. § 1973 note, Findings (b)(6); *see also* H.R. Rep. No. 109-478, at 65-72, 93-94 (2006); S. Rep. No. 109-295, at 15-21 (2006). Accordingly, Congress abrogated *Ashcroft*'s "totality of the circumstances"

standard for determining retrogression, requiring instead that jurisdictions specifically prove that their change will not "diminish[] the ability" of minorities "to elect their preferred candidates of choice." *See* 42 U.S.C. § 1973c(b),(d). Likewise, Congress abrogated *Bossier II*'s retrogression limitation, requiring instead that jurisdiction additionally prove that even a change that does not make minorities worse off lacks the "discriminatory purpose" of not making them better off. *See id.* § 1973c(c). Congress thus ignored warnings that these standards would raise serious constitutional concerns due to the excessive burden on covered jurisdictions, including the excessive consideration of race required. *See, e.g.*, *Bossier II*, 528 U.S. at 336; *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

The "appropriateness" of the 2006 version of Section 5 as constitutional "enforcement" legislation was promptly challenged, but the Supreme Court resolved the case on statutory grounds. *See Nw. Austin*, 129 S. Ct. at 2508, 2513-17. Before doing so, however, it explained that Section 5's "preclearance requirements and … coverage formula" "raise serious constitutional questions" due to "federalism concerns" about the burdens imposed. *See id.* at 2511-13.

B. Plaintiffs' Challenge To The 2006 Version Of Section 5

1. In November of 2008, voters in Kinston, North Carolina, overwhelmingly passed a referendum to replace the existing system of partisan local elections with the system of nonpartisan local elections employed by almost

every other municipality in the state. JA 37-38, 230-31. But because Kinston is located within a county covered by Section 5, the City had to obtain preclearance before implementing the referendum. *Id.* 231.

The City sought administrative preclearance, but the Attorney General objected. *Id.* 45-47, 231-32. His sole basis was that "the elimination of party affiliation on the ballot will likely reduce the ability of blacks to elect candidates of choice." *Id.* 46, 231. He reasoned that, "given a change [to] non-partisan elections, black[-]preferred candidates [would] receive fewer white cross-over votes," because they could no longer depend on "either [an] appeal to [Democratic] party loyalty or the ability [of Democrats] to vote a straight [party-line] ticket." *Id.* 46, 231-32. The City Council voted not to seek judicial preclearance. *Id.* 34, 232.

2. Plaintiffs then brought this facial constitutional challenge to Section 5. *Id.* 5, 232. Plaintiffs are private individuals and a membership organization, all of whom were referendum proponents, and two of whom also were party-unaffiliated candidates in the November 2011 Kinston City Council election. *See id.* 48-52, 232. Plaintiff John Nix, in particular, demonstrated that partisan elections in Kinston would increase his ballot-access costs and his Democratic opponents' likelihood of victory. *Id.* 53-56, 230-31.[1]

[1] Indeed, Nix has since lost to the three Democrats in the November 2011 election, though his claims are "capable of repetition, yet evading review," given his intention to run in the November 2013 election. *See* JA 214, 251.

Plaintiffs' complaint raised two facial constitutional challenges to the 2006 version of Section 5. In Count I, they raised an enumerated-powers challenge, claiming that "Section 5, *as amended and extended* in 2006, is not a rational, congruent or proportional means to enforce the Fourteenth and Fifteenth Amendment[s'] nondiscrimination requirements." *Id.* 13-14 (emphasis added). In Count II, they raised an equal-protection challenge, claiming that "Section 5, as amended in 2006, … violates the nondiscrimination requirements of the Fifth, Fourteenth and Fifteenth Amendments." *Id.* 14-15.

3. The district court dismissed Plaintiffs' complaint, holding they lacked standing for either claim. *See LaRoque v. Holder*, 755 F. Supp. 2d 156, 159, 168 (D.D.C. 2010) ("*LaRoque I*"). This Court, however, "reverse[d]" on "count one" because Plaintiff Nix has "standing … to pursue … the merits of that claim," and vacated on "count two" because "plaintiffs' standing" there "raise[d] complex questions unaddressed by the district court." *See LaRoque v. Holder*, 650 F.3d 777, 780, 795-96 (D.C. Cir. 2011) ("*LaRoque II*").

On remand, the district court announced that, despite "the D.C. Circuit's mandate direct[ing] [it] to consider the merits of Count I," it had to partially "reconsider the issue of Count I standing." JA 238. Though conceding Plaintiffs' standing to bring an enumerated-powers claim challenging the 2006 preclearance reauthorization, the court decided to revisit whether Plaintiffs have standing for

what it characterized as the "subpart[]" of that claim challenging "the enactment of the 2006 amendments," which supposedly this Court "did not focus on" even though it was "more like Count II['s]" equal-protection challenge to the amendments. *See id.* 235-38 (emphasis added). The court ultimately concluded that Nix had standing to challenge the amendments in § 1973c(b),(d), but not § 1973c(c). *Id.* 249, 295-97; *see also id.* 239-51. But recognizing that this Court might again "disagree[] with [its] conclusion on standing," the court "explain[ed] how it would rule on the merits" of everything, so that this Court can "address the merits immediately" if standing exists. *Id.* 250.

4. On the merits, the district court first held that Plaintiffs' enumerated-powers challenge to the reauthorized preclearance requirement in § 1973c(a), independent of the substantive amendments in § 1973c(b)-(d), was rejected in the court's recent decision in *Shelby County v. Holder*, No. 10-651 (D.D.C. Sept. 21, 2011), *appeal filed*, No. 11-5256 (D.C. Cir.). *See* JA 237; *see also* Shelby.JA 483-84, 519-631. The court further held that the "ability to elect" standard in § 1973c(b),(d) does not exceed Congress' enforcement powers or violate equal-protection requirements. JA 291-95, 309-13; *see also id.* 278-91, 303-09. The court finally also would have held that the "discriminatory purpose" standard in § 1973c(c) does not exceed Congress' enforcement powers or violate equal-protection requirements. *Id.* 266-70, 302-03; *see also id.* 259-66.

SUMMARY OF ARGUMENT

1. Plaintiff Nix has standing to challenge the facial constitutionality of the 2006 version of Section 5—not just the reauthorized preclearance requirement in § 1973c(a) and the "ability to elect" amendments in § 1973c(b),(d), but also the "discriminatory purpose" amendment in § 1973c(c).

First, under *LaRoque II*, Nix's standing to bring the Count I enumerated-powers challenge to Section 5, as reauthorized *and* amended in 2006, is law-of-the-case. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 & n.3, 1394-95 & n.6 (D.C. Cir. 1996) (en banc). *Second*, Nix has standing to challenge the 2006 amendments as *part* of his facial enumerated-powers attack on the 2006 reauthorization *as a whole*. *See City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997); *Sabri v. United States*, 541 U.S. 600, 609-10 (2004). *Third*, Nix has standing to challenge the amendments because he contends they are *non-severable* from the reauthorization. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 682-83, 685 (1987); *Davis v. United States*, 131 S. Ct. 2419, 2434 n.10 (2011). *Fourth*, Nix has standing to seek the amendments' invalidation even apart from the reauthorization: invalidating the "ability to elect" standard would void the Attorney General's objection to the referendum (which relied on that standard) and thus require the objection's reconsideration; likewise, invalidating the "discriminatory purpose" standard would prevent that standard from being applied during such reconsideration. *See*

FEC v. Akins, 524 U.S. 11, 25 (1998); *LaRoque II*, 650 F.3d at 791. Although the district court correctly applied the fourth rationale to the "ability to elect" standard, it erred in not otherwise finding standing. JA 239-50.

2. Section 5's old "coverage formula" and new "preclearance requirements" in 2006 "raise serious constitutional questions" whether "Congress exceeded its … enforcement power[s]" under the Reconstruction Amendments. *See Nw. Austin*, 129 S. Ct. at 2512-13. That is true whether applying *Boerne*'s "congruence and proportionality" test or *South Carolina*'s supposedly laxer "rationality" test. *See id.* Either way, Congress cannot "rationally have concluded that … [it is redressing] intentional racial discrimination," *Rome*, 446 U.S. at 177, where the putative enforcement legislation "is so out of proportion to [that] supposed remedial or preventive object," *Boerne*, 521 U.S. at 532. Because "exceptional conditions can justify legislative measures not otherwise appropriate," *South Carolina*, 383 U.S. at 334-35, "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *Boerne*, 521 U.S. at 530. Here, due to dramatic changes in the jurisdictions covered by the preclearance procedure and dramatic changes in the substantive preclearance standard, the 2006 version of Section 5 "imposes current burdens" that can no longer "be justified by current needs." *See Nw. Austin*, 129 S. Ct. at 2512.

The preclearance procedure can only be "justif[ied] [as a] legislative measure[] not otherwise appropriate" when "exceptional conditions" exist that render "case-by-case litigation … inadequate to combat widespread and persistent discrimination in voting." *See South Carolina*, 383 U.S. at 328, 334-35. By 2006, however, "conditions … ha[d] unquestionably improved" in the jurisdictions targeted more than three decades ago, *see Nw. Austin*, 129 S. Ct. at 2511, and any residual problems could be redressed through "federal decrees" under Section 2, *see id.* Moreover, whatever "evil[s]" remain are "no longer … concentrated" in the covered jurisdictions, *see id.* at 2512, which renders Section 5's "coverage formula … [ir]rational in both practice and theory," *see South Carolina*, 383 U.S. at 330. In short, the 2006 preclearance procedure lacks any rational relationship to attacking the type of entrenched and pervasive unconstitutional discrimination that defies redress under ordinary Section 2 litigation and necessitates the extraordinary Section 5 remedy despite the serious federalism costs entailed. The district court thus fundamentally erred by fixating on "the modern existence of intentional racial discrimination in voting" in the covered jurisdictions, Shelby.JA 483; *see also id.* 547-631, because that generic inquiry ignores the critical question whether such discrimination is *uniquely* difficult to redress through Section 2.

The amended substantive preclearance standard is "so out of proportion to [the] supposed remedial or preventive object" of preempting intentional

discrimination which defies redress under Section 2 that it can only be understood "to attempt a substantive change in constitutional protections" for minorities in the covered jurisdictions. *See Boerne*, 521 U.S. at 532; *see also Nw. Austin*, 129 S. Ct. at 2512 (emphasizing that "federalism concerns" "are underscored" by the "tension" between Section 5's preclearance standard and the Constitution's presumptive mandate of race-neutrality). By abrogating *Ashcroft*'s "totality of the circumstances" retrogression standard, Congress eliminated a jurisdiction's flexibility to convince federal authorities that a proposed change does not reduce minorities' effective exercise of the right to vote; the new standard instead imposes a rigid quota-floor against "diminishing" minorities' "ability … to elect their preferred candidates of choice," regardless of the jurisdiction's legitimate reasons or justifications. *Compare Ashcroft*, 539 U.S. at 479-85, *with* 42 U.S.C. § 1973c(b),(d). Likewise, by abrogating *Bossier II*'s retrogression limitation, the 2006 Congress eliminated a jurisdiction's freedom to select among changes that do not implicate Section 5's supplemental concern with backsliding changes that make minorities worse off; moreover, the new "discriminatory purpose" objection imposes a coercive pressure to accept any suggested change that makes minorities better off, due to the onerous difficulty of proving that the jurisdiction's preference for a less ameliorative change is not maliciously motivated. *Compare Bossier II*, 528 U.S. at 335-36, *with* 42 U.S.C. § 1973c(c). The district court obscured these

fundamental flaws by ignoring Section 5's limited supplemental function, mischaracterizing the burden on jurisdictions, and misinterpreting the scope of the amendments. JA 267-69, 291-95, 302-03, 309-13.

Consequently, therefore, the 2006 version of Section 5 exceeds Congress' "enforcement" powers because it has the precise defects identified in *Boerne*. The "legislative record lacks examples of modern instances" of unconstitutional discrimination that meaningfully defies redress under Section 2 and distinguishes the covered jurisdictions. *See Boerne*, 521 U.S. at 530. Congress thus adopted a "[s]trong measure[]" that is an "unwarranted response" to whatever "lesser [harm]" now exists. *See id.* Moreover, Congress "criticized the Court's reasoning" in narrowly construing Section 5, *see id.* at 515, and Congress' responsive amendments cross "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing [constitutional] law," which is a key "distinction [that] exists and must be observed," *see id.* at 519-20. "Simply put," the 2006 enactment "is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of [race]," but rather is intended to eliminate "incidental burdens" on minorities' electoral success. *See id.* at 531-32, 534-35.

3. Finally, the 2006 substantive amendments likewise violate the Constitution's nondiscrimination guarantees. The amended preclearance standard,

correctly interpreted according to its plain text, has the "fundamental flaw" of a "scheme" where DOJ is "directed" (in § 1973c(b),(d)) and "permitted" (in § 1973c(c)) "to encourage or ratify a course of unconstitutional conduct"—namely, the compelled preservation and coerced improvement of expected minority electoral success. *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Such "outright racial balancing" is "patently unconstitutional." *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] … *de novo*" "the district court's denial of appellants' motion for summary judgment and grant of appellees' cross motion for the same." *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir. 2008). Summary judgment is proper only if one party "is entitled to judgment as a matter of law." *Flynn v. Dick Corp.*, 481 F.3d 824, 828-29 (D.C. Cir. 2007).

II. PLAINTIFF NIX HAS STANDING TO CHALLENGE THE FACIAL CONSTITUTIONALITY OF THE 2006 VERSION OF SECTION 5, INCLUDING THE "DISCRIMINATORY PURPOSE" AMENDMENT

Nix now indisputably has standing to bring an enumerated-powers challenge to Section 5 premised *solely* on the argument that the 2006 Congress exceeded its enforcement powers by reauthorizing the procedural preclearance requirement in § 1973c(a), *independent* of the substantive amendments to the preclearance standard in § 1973c(b)-(d). *LaRoque II*, 650 F.3d at 780, 793; JA 234-38. The

disputed question is the extent to which, if that threshold argument fails, Nix has standing to argue additionally that the substantive amendments: (1) cause the 2006 reauthorization *as a whole* to exceed Congress' enforcement powers; or *at least themselves* (2) exceed Congress' enforcement powers, or (3) violate the Constitution's nondiscrimination guarantees. For several reasons, Nix has standing to challenge all the amendments in all these ways.

A. Law-Of-The-Case

This Court already held that Nix "has both standing and a cause of action to pursue count one." *LaRoque II*, 650 F.3d at 780. Under Complaint ¶ 34, Count I's enumerated-powers challenge is to "Section 5, *as amended* and extended in 2006," and it is based, "among other reasons," on the contention that "*the more onerous 2006 standards* do not broadly enforce the [Constitution's] nondiscrimination guarantees." JA 14 (emphases added). Thus, this Court's mandate "to consider the merits of th[e] claim" in "count one" *encompasses* Plaintiffs' argument that the substantive amendments exceed Congress' enforcement powers. *LaRoque II*, 650 F.3d at 780. That decision is now "law-of-the-case," which "should not be revisited." *LaShawn A.*, 87 F.3d at 1393 & n.3.

Yet the district court willfully ignored that bedrock rule, because this Court "apparently" "did not focus on" the "subpart[]" of Count I challenging the amendments and "did not envision a Count I decision addressing the

constitutionality of only the amendments." *See* JA 236-38. Both the premise and the conclusion are demonstrably wrong.

Factually, this Court knew that Plaintiffs' enumerated-powers claim challenged the amendments. This Court clearly read Complaint ¶ 34, because it quoted from it when describing Count I. *See LaRoque II*, 650 F.3d at 783. The district court, not this Court, has misunderstood the scope of Plaintiffs' claim. Plaintiffs' enumerated-powers challenge to the amendments is not *just* a "subpart[]" of Count I *limited* to "only" the amendments. *See* JA 236-38. Although Plaintiffs do contend that, *at a minimum*, the amendments themselves must be invalidated as exceeding Congress' enforcement powers, they *principally* contend that the amendments' invalidity is one of the "reasons" supporting their broader claim that *all of* "Section 5, as amended and extended in 2006," exceeds Congress' enforcement powers. *Id.* 14 (¶ 34); *see also infra* at Part II.B (*Boerne* authorizes such facial challenges).

Legally, moreover, any misunderstanding this Court may have had about the scope of Count I is irrelevant. "The law-of-the-case doctrine … turns on whether a court previously decided upon a rule of law[,] … not whether, or how well, it explained the decision." *LaShawn A.*, 87 F.3d at 1394. Indeed, the "doctrine applies to questions decided 'explicitly or [even] by necessary implication.'" *Id.* at 1394-95 & n.6. Accordingly, the district court should have "consider[ed] the

merits" of Plaintiffs' *entire* "count one" enumerated-powers challenge, *LaRoque*, 650 F.3d at 780, and this Court must do so now, *LaShawn A.*, 87 F.3d at 1394.

B. Facial Challenge Under *Boerne*

Nix has standing to challenge the 2006 amendments on enumerated-powers grounds because that challenge is part of his broader enumerated-powers attack on the 2006 preclearance reauthorization. Namely, the fact that Congress exceeded its enforcement powers when enacting the amendments does not *just* invalidate them, but the *entire* reauthorization.

Under *Boerne*, courts police "the distinction [that] exists and must be observed" "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." 521 U.S. at 519-20. The *Boerne* inquiry is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. Given the purpose and nature of that test, it applies to the challenged legislation *as a whole*: "[t]he answer to the question *Boerne* asks—whether *a piece of legislation* attempts substantively to redefine a constitutional guarantee—logically focuses on *the manner in which the legislation operates* to enforce that particular guarantee." *See Tennessee v. Lane*, 541 U.S. 509, 530 n.18 (2004) (emphasis added); *see also Sabri*, 541 U.S. at 609-10 (recognizing that *Boerne* challenges are permissible "facial attacks" on the entire relevant statute).

For example, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that "Title I" of the ADA exceeded Congress' enforcement powers. *Id.* at 360, 364-65, 374. Even though the specific facts implicated only the statutory provisions prohibiting intentional discrimination and requiring reasonable accommodations, the Court considered Title I *as a whole*, including separate provisions requiring accessible facilities and prohibiting disparate impacts. *Id.* at 360-62, 372-73. Likewise, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), the Court held that Congress' enforcement powers did not authorize the "Patent Remedy Act." *Id.* at 630-31, 647. Even though the specific facts involved only intentional infringement, the Court considered the Act as a whole, including its independent application to unintentional infringement. *Id.* at 645-47; *id.* at 653 n.4 (Stevens, J., dissenting).

Perhaps most relevant, even though *Nw. Austin* was a *pre-enforcement* facial challenge, the Supreme Court observed that the "federalism concerns" with the preclearance requirement are "underscored by the argument" that the preclearance standard "unconstitutional[ly]" makes race "the predominant factor" in electoral decisionmaking. 129 S. Ct. at 2508, 2512. As *Nw. Austin* reflects, the direct relationship between the preclearance standard and the preclearance requirement—far more direct than the statutory relationships in *Garrett* and *Florida Prepaid*—

"underscores" that enumerated-powers challenges to Section 5 must consider the 2006 enactment's collective validity.

Indeed, the court below *admitted* that *Boerne* authorizes that facial challenge, but asserted that it did not "read[] plaintiffs' papers" to be making such an argument. JA 249 n.4. That is baffling, because Plaintiffs made that argument unambiguously and repeatedly. For example, on remand from *LaRoque II*, Plaintiffs cited *Boerne*, *Sabri*, *Lane*, and *Nw. Austin* in arguing that "the *entire 2006 reauthorization* is invalid if the 2006 amendments exceed Congress' enforcement powers." D.D.C. Dkt. No. 58 at 42 n.8; *see also* D.D.C. Dkt. No. 67 at 4 ("[S]uccess on *either prong* of [the Count I] enumerated-powers challenge—including *only* on the prong challenging the 2006 amendments—would lead to the *facial invalidation* of Section 5 under the 'congruence and proportionality' test.").

C. Statutory Non-Severability

Wholly apart from *Boerne*, Nix has standing to challenge the 2006 amendments because he contends they are *non-severable* from the preclearance reauthorization. JA 245. That non-severability contention establishes the causation and redressability necessary for Nix to challenge the amendments to eliminate his injury from the reauthorization. *See Alaska Airlines*, 480 U.S. at 682-83 (plaintiffs challenged a law's "legislative-veto" provision because it was "nonseverable" from the law's "duty-to-hire provisions" that injured them).

The district court rejected this argument by holding the amendments are severable from the reauthorization. JA 245-47. But "in assessing plaintiffs' standing, [courts] must assume [plaintiffs] will prevail on the merits." *LaRoque II*, 650 F.3d at 785. Accordingly, redressability is defeated only where "the relief *requested* ... would not have remedied th[e] injury in fact," *not* where there is "uncertainty" about the relief's "existence" or availability. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 96 (1998); *see also Alaska Airlines*, 480 U.S. at 683 (holding the "legislative-veto" was "severable" and thus *affirming* the merits denial, rather than *dismissing* for lack of standing). In short, "weakness on the merits" in "obtaining relief" should not be "confuse[d] … with absence of Article III standing." *Davis*, 131 S. Ct. at 2434 n.10. And that is particularly true in the severability context, where, as illustrated below, analysis of legislative intent is often intertwined with substantive merits questions concerning the scope and effect of the relevant provisions, and thus unsuitable for threshold adjudication.

In any event, the district court erred in holding the amendments severable from the reauthorization, because the unamended standard plainly would not "function in a *manner* consistent with the intent of Congress." *See Alaska Airlines*, 480 U.S. at 685. The 2006 Congress believed that *Ashcroft* had made Section 5 "a wasteful formality" and "hopelessly unadministerable" statute, which perversely "would encourage States … to turn black and other minority voters into second

class voters." H.R. Rep. No. 109-478, at 70, 94. Likewise, the 2006 Congress believed that, under *Bossier II*, "[t]he federal government" was "giving its seal of approval to practices that violate the Constitution," while in return catching only "incompetent retrogressor[s].'" *Id.* at 67; S. Rep. No. 109-295, at 16. It thus would not remotely be "consistent with Congress' basic objectives" to reauthorize an onerous preclearance regime that Congress (erroneously) viewed as inefficient and ineffective. *See United States v. Booker*, 543 U.S. 220, 258-59 (2005).

To be sure, as the district court emphasized, "there was no serious discussion of whether failing to reauthorize Section 5 at all was preferable to reauthorizing Section 5 as construed by [*Ashcroft* and *Bossier II*]." JA 246. But that silence reflects the absence of any serious dispute: no reasonable legislator would impose the extraordinary costs of preclearance on the covered jurisdictions and federal government while believing the process was "a wasteful formality" that gave a federal "seal of approval to practices that violate the Constitution." Similarly, the court unduly relied on the severability clause contained in the VRA since 1965. *See id.* "[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause," *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968), which is "not an inexorable command," *Reno v. ACLU*, 521 U.S. 844, 884 n.49 (1997). The critical question, instead, is whether the provisions that operate "independently of that which is invalid" (*Free Enter. Fund v. Pub. Co.*

Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010)) would still "function in a *manner* consistent with the intent of [the 2006] Congress." *Alaska Airlines*, 480 U.S. at 685. Here, *no* provision operates "independently" of the invalid amendments, because the "manner" in which the pre-2006 standard operated was *itself* what Congress deemed unacceptable, precipitating the amendments.

D. Reconsideration Of The Referendum Objection

Even assuming the preclearance reauthorization survives an order facially invalidating the amendments, Nix has standing to seek that relief, given the favorable effect on the Attorney General's objection to the referendum.

As the district court correctly held (JA 241-44), because the Attorney General's sole ground for denying preclearance was the "ability to elect" standard in § 1973c(b),(d), those amendments are "fairly traceable" to Nix's injuries from the referendum's suspension, even though the Attorney General "might [have] reach[ed] the same result" under the old "totality of the circumstances" standard. *Akins*, 524 U.S. at 25. As the court also correctly held (JA 247-49), "[f]or similar reasons," Nix's injuries will be "redress[ed]" by facial invalidation of the "ability to elect" amendments, as that will require "set[ting] aside" the objection and reconsidering it under the "[]proper legal ground." *Akins*, 524 U.S. at 25; *see also LaRoque II*, 650 F.3d at 791 ("[T]he Attorney General's actions pursuant to [an] unconstitutional statute would be void.").

Where the court erred, however, is by overlooking the effect of that reasoning on Nix's standing to challenge the "discriminatory purpose" standard in § 1973c(c). That the Attorney General did not apply the "discriminatory purpose" standard when he *previously* objected (JA 241) is irrelevant under *Akins* and *LaRoque II*, because that objection will be "void" if Nix successfully challenges the "ability to elect" standard. *See id.* 247. During the resulting reconsideration, the referendum must satisfy the "discriminatory purpose" standard to be precleared. Thus, assuming Nix successfully challenges the "ability to elect" standard—as this Court must—he also has standing to challenge the "discriminatory purpose" standard, in order to prevent the Attorney General from "bas[ing] [his] decision" during reconsideration "upon [that] improper legal ground." *See Akins*, 524 U.S. at 25.

Finally, although Nix's *standing* does not turn on his merits entitlement to a remedial order vacating the Attorney General's objection, *see supra* at 19, Plaintiffs note that such relief would be proper here. Specifically, that remedy is neither an "as-applied challenge" that Plaintiffs have disavowed nor review that is barred by *Morris v. Gressette*, 432 U.S. 491 (1977). *See LaRoque II*, 650 F.3d at 783, 795 (discussing these issues).

An order vacating the objection would not be relief for an "as-applied" claim—*i.e.*, a claim that either "challeng[es] the Attorney General's" exercise of

statutory discretion when "object[ing] to Kinston's [referendum]," or "assert[s] that there is [something] *uniquely unconstitutional* about the application … to Kinston." *LaRoque I*, 755 F. Supp. 2d at 162 (emphasis added). Rather, as the district court correctly held, vacating the objection would be relief for Plaintiffs' claim that the 2006 amendments are *facially* invalid: "if the amendments are unconstitutional, the Attorney General's actions pursuant to them would be void." JA 247 (citing *LaRoque II*, 650 F.3d at 791).

Likewise, as this Court carefully observed, although *Morris* and its progeny have held that Section 5 *implicitly* precludes judicial "review [of] the propriety of an Attorney General objection," they did so *only* in circumstances where the plaintiff could still "obtain a *de novo* judicial evaluation of whether … [Section 5's] requirements were constitutional." *LaRoque II*, 650 F.3d at 783; *see also Webster v. Doe*, 486 U.S. 592, 603 (1988) ("Congress[ional] inten[t] to preclude judicial review of constitutional claims … must be clear," because denying a plaintiff "any judicial forum for a colorable constitutional claim" would raise a "serious constitutional question."). The *Morris* line thus provides no support for "totally depriv[ing] plaintiffs of judicial redress," *see City of Rome v. United States*, 450 F. Supp. 378, 382 & n.3 (D.D.C. 1978), but Plaintiffs here would suffer precisely that deprivation if *Morris* eliminated their entitlement to a remedy deemed necessary for their suit. *Cf. LaRoque*, 650 F.3d at 791 ("[T]he Attorney

General's *ultra vires* action under an allegedly unconstitutional federal statute could hardly deprive Nix of standing" to challenge that very statute.).

III. THE 2006 VERSION OF SECTION 5 EXCEEDS CONGRESS' ENFORCEMENT POWERS BECAUSE THE PRECLEARANCE PROCEDURE NOW LACKS ANY RATIONAL RELATIONSHIP TO REDRESSING INTENTIONAL DISCRIMINATION

In arguing that the 2006 version of Section 5 facially exceeds Congress' enforcement powers, Plaintiffs will focus in this Part on the constitutional defects with the unmodified reauthorization of the preclearance *procedure*, while addressing in the next Part the constitutional defects with the amended *substantive* preclearance standard. The flaw in the reauthorized preclearance process is simple. Whereas the original regime justifiably targeted jurisdictions where discrimination was so entrenched and evasive that normal anti-discrimination litigation would be inadequate, the reauthorized regime's extraordinary federalism costs are now gratuitous, given that ordinary anti-discrimination litigation is no longer ineffective in those jurisdictions and certainly no less effective there than elsewhere.

A. The Original Preclearance Procedure Was Justified By An Extraordinary Need To Bolster Ordinary Anti-Discrimination Remedies In Targeted Jurisdictions

Section 5 goes well beyond the constitutional ban on intentionally discriminatory voting practices, because it presumptively invalidates "*all* changes to state election law—however innocuous—until they have been precleared." *Nw. Austin*, 129 S. Ct. at 2511. This wholesale preemption of local voting changes

until a jurisdiction proves its innocence—including even changes that were not arguably or potentially discriminatory—is an "extraordinary burden-shifting procedure[]" that reverses the normal presumption of Anglo-American jurisprudence. *See Bossier II*, 528 U.S. at 335. It is also "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). Preclearance "imposes substantial 'federalism costs,'" *Lopez*, 525 U.S. at 282, by depriving local governments of the ability "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). The critical question, then, is whether the 2006 Congress had a legitimate basis for denying citizens of selected jurisdictions the most basic attribute of self-governance.

1. In *South Carolina*, the Supreme Court held that the 1965 Congress had such a basis when it enacted 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. The pernicious effect of such "unremitting and ingenious defiance of the Constitution" (*id.* at 309) was clear: in Alabama, Louisiana, and Mississippi, for example, "registration of voting-age whites ran roughly 50 percentage points or more ahead of [black] registration." *Id.* at 313. Therefore, in the "areas where voting discrimination ha[d] been most flagrant," "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]." *Id.* at 309, 315. In short, the 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." *See id*. at 334-35 (emphases added).

Likewise, when the Court in *Rome* upheld the 1975 reauthorization of Section 5, 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* 446 U.S. at 180-82. A real risk existed that the "modest and spotty" "progress" achieved thus far would be "destroyed through new procedures and techniques" if Congress "remove[d] th[e] preclearance

protections." *Id.* at 181. The 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).

Consistent with Section 5's unique function of "bolster[ing]" Section 2 by protecting and supplementing the nondiscrimination gains achieved through the latter's enforcement, *see Nw. Austin*, 129 S. Ct. at 2509, the Supreme Court repeatedly reaffirmed before 2006 that 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)). In short, Section 5 had a more "limited purpose" and "combat[ed] different evils" than Section 2. *Bossier I*, 520 U.S. at 477; *accord Ashcroft*, 539 U.S. at 478 ("[T]he § 2 inquiry differs in significant respects from a § 5 inquiry."). Indeed, unlike Section 2, Section 5 was not even 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)).

2. The district court thus fundamentally erred in holding that the "current need[] … justify[ing] Congress's 2006 [preclearance] reauthorization" is "the modern existence of intentional racial discrimination in voting" in the "covered jurisdictions." Shelby.JA 483-84. The cases cited above demonstrate that the proper question when reviewing the extraordinary preclearance remedy is not whether discrimination exists, but whether it is the type of intractable discrimination that defies effective remediation through ordinary "case-by-case" litigation. Absent discrimination with that *impervious quality*, the mere existence of intentional discrimination, even in sizeable quantities, is a "lesser harm" for which the "[s]trong measure[]" of federal preclearance is "an unwarranted response." *See Boerne*, 521 U.S. at 530; *see also South Carolina*, 383 U.S. at 334-35 ("[E]xceptional conditions can justify legislative measures not otherwise appropriate."). In short, "[p]erfect compliance with the [Reconstruction] Amendment[s'] substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ [the] broad prophyla[xis]" of federal preclearance. *Nw. Austin*, 129 S. Ct. at 2526 (Thomas, J., dissenting in relevant part).

To be sure, "the modern existence of intentional racial discrimination in voting" plainly justifies Section 2 and other laws that employ "case-by-case" litigation to eradicate voting practices that are unconstitutional or likely to reflect such intentional discrimination. *See infra* at 50-53 (describing Section 2's prophylactically structured "results" test). 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[]" (*Bossier II*, 528 U.S. at 335) that must be justified, and it must be justified *on top* of Section 2's already broad mandate against discriminatory "results." 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, Title II of the ADA imposes prophylactic requirements facilitating access to State courts for disabled individuals, which the Supreme Court held is valid enforcement legislation given the unconstitutional discrimination against such individuals that Congress identified. *Lane*, 541 U.S. at 516-17, 522-34; *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724, 728-40 (2003) (holding that the FMLA's prophylactic requirement that State employers provide unpaid family leave is justified by the unconstitutional

workplace gender discrimination that Congress identified). But the burden of justifying the prophylactic remedies in the ADA and FMLA 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 was added *on top* of the prophylactic provisions in the ADA and FMLA. The only remedial purpose conceivably served by such a preclearance regime would be to reach discrimination that somehow escaped the prophylactic grasp of those statutes.

That is precisely why the Supreme Court's decisions upholding Section 5 have emphasized that the legislative record revealed the type of "widespread and persistent discrimination" backed by "obstructionist tactics" that would render Section 2 an "inadequate" and "unsuccessful remed[y]." *See South Carolina*, 383 U.S. at 309, 328; *see also Rome*, 446 U.S. at 181 (Section 5 still needed "to insure" that the "limited and fragile" "progress [would] not be destroyed through new procedures and techniques"). Indeed, the burden of demonstrating Section 2's inadequacy is *higher* now than it was when *South Carolina* and *Rome* were decided: before 1982, Section 2 required an express finding of discriminatory

intent, *see City of Mobile v. Bolden*, 446 U.S. 55, 60-63 (1980) (plurality opinion), but Congress then 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).

The district court ignored this fundamental legal issue. It spent more than 50 pages painstakingly detailing "the modern existence of intentional racial discrimination in voting" in the "covered jurisdictions," Shelby.JA 483-84, 547-601, without ever explaining why that discrimination legally justifies reauthorizing Section 5 *regardless of whether* Section 2 is inadequate to independently redress such discrimination. Worse still, the court highlighted its error by emphasizing that "the evidence of unconstitutional voting discrimination in the 2006 legislative record far exceeds the evidence of unconstitutional discrimination found sufficient to uphold the challenged legislation in both *Hibbs* and *Lane*." *See id.* 604-07. As discussed, that analogy is entirely inapt, because neither case involved a federal *preclearance* regime, which requires a far more "insidious" and "ingenious" type of discrimination to justify the substantial federalism costs entailed. *See Rome*, 446 U.S. at 182 (quoting *South Carolina*, 383 U.S. at 309). Under the district court's absurd reasoning, *Hibbs* and *Lane* authorize Congress to impose a federal preclearance regime over every State decision affecting courthouse access and

employee leave, simply because the Court upheld the ADA and FMLA. The court's failure to grasp this critical legal distinction—between typical unconstitutional discrimination for which ordinary remedies suffice and the unique unconstitutional discrimination for which the extraordinary remedy of federal preclearance is necessary—dooms its entire analysis of the legislative record.

B. The Reauthorized Preclearance Procedure No Longer Rationally Targets Intentional Discrimination That Defies Redress Under Ordinary Anti-Discrimination Remedies

The 2006 reauthorization of Section 5 cannot be justified as an appropriate supplement to Section 2. *First*, the covered jurisdictions no longer pose a meaningful threat of intentional discrimination that evades Section 2. *Second*, there is no longer any meaningful difference between the covered and non-covered jurisdictions in this regard (or any other).

1. Section 5's Preclearance Requirement Is No Longer Needed To Bolster Section 2

The "current burdens" imposed by Section 5 cannot "be justified by current needs." *See Nw. Austin*, 129 S. Ct. at 2511. Unlike in *South Carolina* and *Rome*, the 2006 legislative record reveals neither direct nor circumstantial evidence of unconstitutional discrimination that is impervious to Section 2 litigation.

a. There is no direct evidence of "obstructionist tactics invariably encountered" in Section 2 suits that renders such "case-by-case litigation … inadequate" in the covered jurisdictions. *See South Carolina*, 383 U.S. at 328.

Neither the statutory findings nor the House or Senate Reports contain any such adverse conclusion regarding covered jurisdictions' conduct when Section 2 cases are being litigated or enforced. Instead, such "[b]latantly discriminatory evasions of federal decrees are rare." *See Nw. Austin*, 129 S. Ct. at 2511.

To be sure, as the district court noted, Section 2 litigation is "expensive and time-consuming to litigate and hard to win," because plaintiffs "must prove that particular voting practices are, in fact, discriminatory" and often can do so only "*after* [the practices] have already been implemented to the detriment of minority voters." Shelby.JA 619-20; *see also id.* 598-99 (emphasizing the "deterrent effect" provided by Section 5). But Congress obviously did not believe that these generally shared attributes of *all* anti-discrimination litigation uniquely render "Section 2 … insufficient to protect minority voting rights," because otherwise Congress would have extended Section 5 *nationwide*, rather than callously leaving minorities in non-covered jurisdictions saddled with the supposed "inadequacy of alternative remedies like Section 2." *See id.* 619-20.

Accordingly, the "time and energy" that concerned the Court in *South Carolina* was not the typical burdens of civil litigation, but rather "the *inordinate amount* of time and energy required to overcome the *obstructionist tactics invariably encountered*" in "case-by-case litigation" to enforce voting rights in the South during the 1960s. *See* 383 U.S. at 328 (emphases added). Furthermore,

those already exceptional burdens were exacerbated by the fact that, even under the VRA, anti-discrimination plaintiffs at the time—before the 1982 enactment of Section 2's "results" test—faced the "inordinately difficult" burden of proving discriminatory *intent*. *Supra* at 30-31. Yet, under the district court's facile reasoning, none of those extraordinary burdens was material. Instead, for example, Congress could impose a federal preclearance regime on all State policies affecting housing, public employment, and handicap-accessibility, simply because that would be easier for possible victims of discrimination than litigating under the already prophylactic protections of existing anti-discrimination laws.

b. Furthermore, there is not even circumstantial evidence that "pervasive voting discrimination" renders Section 2 ineffective, such that "the advantage of time and inertia" must be "shift[ed] … from the perpetrators of the evil to its victims." *See Rome*, 446 U.S. at 182. Again, neither the statutory findings nor the House or Senate Reports conclude that any discrimination occurring in the covered jurisdictions defies redress under Section 2. Instead, "we are now a very different Nation," for the "exceptional conditions" in those jurisdictions "have unquestionably improved." *See Nw. Austin*, 129 S. Ct. at 2511, 2516.

To be sure, the district court exhaustively examined evidence in the legislative record demonstrating the persistence of some unconstitutional discrimination in the covered jurisdictions. Shelby.JA 547-601. But Shelby

County has thoroughly explained why that evidence does not remotely satisfy the relevant legal standard—*i.e.*, whether the unconstitutional discrimination that exists is so widespread and entrenched as to render Section 2 an inadequate remedy. *See* Shelby.Br. 29-49; Shelby.Reply.Br. 15-23. Rather than rehashing that detailed analysis here, Plaintiffs will focus on two fundamental legal flaws with the district court's treatment of the legislative record.

First, the court made only a single finding that arguably could support the conclusion that Section 2 is inadequate in the covered jurisdictions, yet that finding is demonstrably false. Specifically, the court asserted that, after analyzing "the three types of evidence" considered in *Rome*, "the legislative record amassed by Congress in support of the 2006 reauthorization of Section 5 *is at least as strong* as that held sufficient to upheld the 1975 reauthorization of Section 5 in [*Rome*]." Shelby.JA 601-603 (emphasis added). That assertion cannot be taken seriously, and it is contradicted by Congress' own findings.

The 1975 Congress emphasized that overall "minority political progress" on voter registration and elected officials had been "modest and spotty." *Rome*, 446 U.S. at 180-81. In stark contrast, the 2006 Congress found that "[s]ignificant progress ha[d] been made" concerning "registered minority voters … and minority representation," and thus it *omitted* those categories from its "evidence of continued discrimination." 42 U.S.C. § 1973 note, Findings (b)(1),(4); *see also*

Shelby.Br. 39-40, 47-48 (detailing differences between 1975 and 2006); Shelby.Reply.Br. 19-21 (same). Nor did "the number and nature of objections interposed by the Attorney General" (*Rome*, 446 U.S. at 181) suggest the same type of problems in 2006 that they did in 1975. Shelby.Br. 41, 48; *see also id.* 29-31. Ultimately, whatever problems may linger, "[t]he historic accomplishments of the [VRA]" by 2006, *see Nw. Austin*, 129 S. Ct. at 2511, simply cannot be equated with the "'limited and fragile' achievements" of 1975, *see Rome*, 446 U.S. at 182.

Second, after the court spent 50 pages compiling evidence of unconstitutional discrimination, Shelby.JA 547-601, it provided no *principled standard* for analyzing whether the type and amount of discrimination identified justified Section 5's reauthorization. In particular, other than its erroneous reliance on *Rome* (*id.* 601-03), and its inapposite analogy to *Hibbs* and *Lane* (*id.* 604-608), the court cited the following factors in upholding Section 5: (1) a summary of the raw numbers concerning certain categories of evidence (*id.* 603-04); (2) the deference to which Congress is entitled (*id.* 608-09); (3) the volume of the legislative record (*id.* 609-10); (4) the historical context that Section 5 is a reauthorized law that had been previously upheld (*id.* 610-12); (5) the statute's temporal and geographic limits (*id.* 613-15, 620-21, 623-29); and (6) the availability of statutory "bail-out" (*id.* 625-28). But, of course, none of those

factors says anything about *the type or level* of discrimination legally necessary to justify Section 5's extraordinary preclearance regime.

For example, imagine if the court had identified 90% less discrimination, and then consider how that would have affected its analysis: category (1) would be 90% smaller, and categories (2)-(6) *would be exactly the same*. So what *legal principle* would determine whether Section 5 was constitutional given the 90% reduction? The answer is that no such principle exists. That is the inescapable problem with defining the "current need[]" that justifies Section 5 as the bare "existence of intentional racial discrimination in voting." *Id.* 483. *Some* discrimination will *always* exist, and there is no principled place to draw the line, once Section 5 is unmoored from its unique justification. By contrast, when, as in *South Carolina* and *Rome*, the inquiry is not whether discrimination exists, but whether the *type* of discrimination that exists *defies redress under Section 2*, Congress and the courts can assess the *nature* of that discrimination, rather than viewing its *size* and casting an arbitrary vote as to whether that amount suffices.

2. Section 5's Coverage Formula No Longer Targets Jurisdictions Where Section 2 Needs Bolstering

Because Section 5 applies only to certain covered jurisdictions, its "departure from the fundamental principle of equal sovereignty" additionally "requires a showing that [its] disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 129 S. Ct. at 2509. At a minimum, that

means that Section 5's coverage formula must be "rational in both practice and theory." *South Carolina*, 383 U.S. at 330. Yet it is neither.

a. The coverage formula is not rational in theory because, unlike in 1965, Congress made no effort to identify the "most flagrant" discriminators in 2006, *see South Carolina*, 383 U.S. at 315, 328-29, let alone to tailor coverage to those jurisdictions or even to determine that the covered jurisdictions could be so described. Neither the statutory findings nor the House or Senate Reports contain any determination that the covered jurisdictions currently present the most serious risk of unconstitutional discrimination, let alone unconstitutional discrimination that defies redress under Section 2. Indeed, apparently recognizing that any *current* data could not establish that the covered jurisdictions are the "most flagrant" culprits, Congress blinded itself to such data. Instead, it simply retained the existing coverage formula *for the next 25 years*, even though the formula was based on election results that were *already 34 to 42 years old—i.e.*, from the 1964, 1968, and 1972 elections. *See Nw. Austin*, 129 S. Ct. at 2509-10.

That decision, standing alone, demonstrates Section 5's invalidity. The extraordinary burden of federal preclearance obviously would not be congruent or rational if imposed on States east of the Mississippi River, but not on those to the west. Yet the 2006 Congress' perpetuation of preclearance based on ancient election data is no more rational or indicative of where entrenched voting

discrimination currently exists. Rather, the only plausible explanation for Congress' choice is the absence of "politically feasible alternatives" due to the "disrupt[ion] [of] settled expectations" that otherwise would occur, which the Supreme Court has strongly suggested is constitutionally inadequate. *See Nw. Austin*, 129 S. Ct. at 2512 (quoting Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 208 (2007)).

The district court, however, concluded that the coverage formula is theoretically rational because it "continue[s] to focus on those jurisdictions with the worst *historical* records of voting discrimination," given that the election data in the formula were originally "chosen as mere proxies for identifying those jurisdictions with established histories of discriminat[ion]." Shelby.JA 625-27. But that observation renders the formula even *more* irrational, because it means that Congress subjected jurisdictions to 25 years of federal superintendence, not merely for wrongdoing in elections held 34 to 42 years ago, but for even *older* "historical" misdeeds. That is the antithesis of justifying "current burdens" by "current needs." *See Nw. Austin*, 129 S. Ct. at 2512. It improperly treats "past discrimination" as an "original sin" that taints subsequent generations with "no logical stopping point." *Cf. Mobile*, 446 U.S. at 74 (plurality opinion); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989). Indeed, the major reason the "legislative record" in *Boerne* was constitutionally insufficient—"[i]n

contrast to the record which confronted Congress and the Judiciary in the voting rights cases"—was that it "lack[ed] examples of *modern* instances" of the relevant unconstitutional practice "occurring in the past *40 years*." 521 U.S. at 530 (emphases added). *Boerne* thus confirms the common-sense point that *Katzenbach* surely would have invalidated Section 5 if, akin to the 2006 Congress, the 1965 Congress had irrationally targeted, not the "most flagrant" discriminators *in 1965*, but instead the "most flagrant" discriminators *between 1900 and 1930*.

The district court tried to salvage the 2006 Congress' reliance on "the worst *historical* records of voting discrimination" by observing that Congress *also* "found substantial evidence of contemporary voting discrimination by the very same jurisdictions." Shelby.JA 626-27. But the degree of such discrimination is unquestionably far less serious than existed in *South Carolina* and *Rome*, *supra* at 25-27, 32-37, and so the mere lingering presence in the covered jurisdictions of some lesser, undefined degree of unconstitutional conduct cannot justify *selectively limiting coverage* to them based on their past. Moreover, even in a counter-factual world where discrimination in those jurisdictions remains just as bad as in 1965, Congress still would have no rational justification for refusing to inquire whether *any new jurisdictions* had sunk to such lows. Whether the current degree of discrimination in a jurisdiction is sufficiently dire that Section 2 is inadequate and

Section 5 is needed has nothing to do with the type of discrimination that existed there more than three decades ago.

Finally, it is irrelevant that, in limited circumstances, courts have the statutory power to "bail[-]out" covered jurisdictions and "bail-in" non-covered jurisdictions. Shelby.JA 491-92, 615-17, 627. Congress cannot satisfy *its* constitutional obligation to justify the "*statute's* disparate geographic coverage" (*Nw. Austin*, 129 S. Ct. at 2512 (emphasis added)) by foisting the duty on courts to rewrite the statute. Again, Congress could not arbitrarily impose Section 5 on only jurisdictions east of the Mississippi and then defend that irrational choice by giving courts limited "bail-out" and "bail-in" power.

b. Moreover, a *de novo* review of the legislative record confirms that the scope of the theoretically irrational coverage formula is, unsurprisingly, irrational in practice. "[T]here is considerable evidence that [the formula] fails to account for current political conditions." *See Nw. Austin*, 129 S. Ct. at 2512. Indeed, the Supreme Court emphasized that even "supporters of extending § 5" acknowledged that "the evidence in the record" fails to identify "systematic differences between the covered and the non-covered areas" and "in fact … suggests that there is more similarity than difference." *Id.* (quoting Professor Richard Pildes).

The most damning evidence of the formula's irrationality in practice is the opinion below. In stark contrast to the 50+ pages the court spent detailing

intentional discrimination in the covered jurisdictions, Shelby.JA 547-601, it could muster little more than *two pages* to support its conclusion that "the record does contain several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in [the historically covered] jurisdictions," *id.* 627-29. Especially telling, that paltry showing came *after* the court requested post-argument briefing on this precise question, *id.* 25, and then spent more than seven months "carefully review[ing] the extensive 15,000-page legislative record," *id.* 483. Moreover, the few scraps of data the court ultimately identified as "significant" are trivial at best and misleading at worst. *See* Shelby.Br. 34-35, 64-65, 71 (refuting alleged disparities); Shelby.Reply.Br. 35 (same); *see also* D.D.C. Dkt. No. 23 at 34-35 (discussing further evidence of the equivalence of covered and non-covered jurisdictions).

Furthermore, the "historic tradition that all the States enjoy 'equal sovereignty'" (*Nw. Austin*, 129 S. Ct. at 2512) requires at least that Section 5's coverage formula be reviewed on a state-by-state basis, if not jurisdiction-by-jurisdiction. Yet Section 5 plainly flunks such a review, *see* Shelby.Br. 65-67; Shelby.Reply.Br. 33-35, and the district court did not even suggest otherwise. Thus, as observed by a scholar cited in *Nw. Austin* (129 S. Ct. at 2512), "the coverage formula for section 5 is both overinclusive and underinclusive of jurisdictions of concern with respect to their record of minority voting rights

violations," leaving it "difficult to defend a formula which, for example, covers counties in Michigan and New Hampshire, but does not cover the counties in Ohio and Florida with the most notorious voting rights violations in recent elections." Persily, *supra*, at 208 (footnote omitted).

IV. THE 2006 VERSION OF SECTION 5 EXCEEDS CONGRESS' ENFORCEMENT POWERS BECAUSE THE SUBSTANTIVE PRECLEARANCE STANDARD NOW LACKS ANY RATIONAL RELATIONSHIP TO REDRESSING INTENTIONAL DISCRIMINATION

The substantive amendments to the preclearance standard exacerbate the foregoing flaws with the 2006 version of Section 5 as enforcement legislation—indeed, they *independently* invalidate the entire 2006 enactment. Whereas the old standard furthered Section 5's supplemental anti-backsliding role by holistically considering whether a voting change caused a retrogression in minorities' effective exercise of the franchise, while otherwise preserving the flexibility of citizens in covered jurisdictions to choose their own electoral systems, the new standard transforms Section 5 into a rigid entitlement scheme that mandates and coerces electoral preferences for minorities until 2031.

A. The Original Preclearance Standard Focused On The Types Of Backsliding That Would Undermine Section 2's Enforcement, Rather Than Fixating On Minority Electoral Success

As discussed above, the specific "evil" that justified the "[s]trong measure[]" of Section 5's preclearance procedure (*Boerne*, 521 U.S. at 530) was the threat that

Section 2 would be hindered by "a particular set of invidious practices that had the effect of undoing or defeating the rights recently won by nonwhite voters." *See Miller*, 515 U.S. at 925 (internal quotation marks omitted). Thus, as shown below, the 1965 Congress and the Supreme Court carefully crafted and construed Section 5's preclearance standard to be consistent with the "limited substantive goal" of preventing such "backsliding," *see Ashcroft*, 539 U.S. at 477, while avoiding unduly "curtailing [jurisdictions'] traditional general regulatory power" or "imposing a heavy litigation burden on [them]," *see Boerne*, 521 U.S. at 534, let alone "command[ing] [them to] engage in presumptively unconstitutional race-based [decisionmaking]," *see Miller*, 515 U.S. at 927.

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 II*, 528 U.S. at 333-36; *Bossier I*, 520 U.S. at 476-80. 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. Importantly, 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. But

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, whereas 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. Therefore, because the retrogression "benchmark" was the readily identifiable status quo, it was relatively simpler to adopt a change that jurisdictions could prove would not result in backsliding, *see id.* at 480, as they were relieved of the more "complex undertaking" of proving the change would not be worse than some possible alternative, *see Bossier II*, 528 U.S. at 332. Jurisdictions likewise retained more of their autonomy under the retrogression standard, since their preclearance options were constrained only by the status quo, not by hypothetical alternatives that were more favorable to minorities.

Of particular importance, these general benefits were heightened in the specific context of 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" who 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 disprove discriminatory purpose 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.

Perhaps more important, requiring jurisdictions to disprove "discriminatory purpose" would have greatly expanded DOJ's power. In "the typical … situation" where changes are made before imminent elections, it "is rarely practical" to seek preclearance "via a declaratory judgment[] from" an impartial three-judge district court, and so DOJ is the only decision-maker realistically available. *See Johnson v. Miller*, 929 F. Supp. 1529, 1532 n.5 (S.D. Ga. 1996) (per curiam). Given the well-recognized difficulty of proving the absence of discriminatory motive, a

results-oriented DOJ would have had virtually unbridled discretion to deem "discriminatory" the failure to adopt any alternative change it preferred. And that is precisely what happened during the pre-*Bossier II* period when DOJ erroneously asserted the authority to make "discriminatory purpose" objections.

b. Specifically, before *Bossier II*, the Supreme Court in *Miller* found that DOJ frequently objected on "discriminatory purpose" grounds *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' effective exercise of voting rights, *Ashcroft* held that Section 5 required a "totality of the circumstances" test, which the 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. Such a racial preference for minorities, of course, would have limited the autonomy of jurisdictions without any connection to redressing intentional discrimination, let alone the invidious backsliding justifying Section 5.

a. It must be emphasized at the outset why it was necessary that Section 5 contain a holistic and flexible retrogressive "effects" test. 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 to ensure they operate that way. The risk always exists that Congress is instead "attempt[ing] a 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 provided 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 that are provided, the more akin to a "quota" the "effects" test becomes, *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682-83 (2009) (Scalia, J., concurring).

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). To be clear, 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 have a double-edged nature in the voting-rights context when used to invalidate practices with a *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 Congress crafted, and the Supreme Court construed, an "effects" test holistically and flexibly, thus helping to target Section 2 at practices that are likely intentionally discriminatory, while avoiding conferring electoral advantages on minorities.

The Supreme 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*, 129

S. Ct. 1231, 1246 (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*, 129 S. Ct. at 1246 (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 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 the 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, the 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*, 129 S. Ct. at 1241-43 (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. Consequently, 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). The threshold requirements thus focus on whether minorities are receiving *equal* treatment, while denying them *preferential* treatment—*i.e.*, the preconditions 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*, 129 S. Ct. at 1246-47 (plurality opinion).

Second, even once Section 2 plaintiffs have satisfied the threshold requirements, Section 2 defendants can justify the seemingly disparate treatment under the "totality of the circumstances" analysis, essentially *rebutting* the inference of a discriminatory motive to deny minorities voting equality. 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 they could show that, despite any inequality in the minorities' ability to *elect* their preferred representative, minorities retained an *equal* "opportunity … to participate in the political process." *See Chisom*, 501 U.S. at 397. By thus construing Section 2 to guarantee only overall minority voting equality, the 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.

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, the 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 forcing jurisdictions to

maintain "a small[] number of safe majority-minority districts," *Ashcroft* gave them 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*, 129 S. Ct. at 1242 (plurality opinion) (terming these "cross-over" districts). To be sure, eliminating "safe" majority-minority districts—where "the election of a minority group's preferred candidate" was "virtually guarantee[d]"—increased the "risk that the minority group's preferred candidate may lose" and the attendant "risk [of] fewer minority representatives." *Ashcroft*, 539 U.S. at 480-81, 483. But conversely, creating "cross-over" districts decreased the "risks [of] isolating minority voters from the rest of the State[] and … narrowing [their] political influence to only a fraction of political districts." *Id.* at 481. *Ashcroft* held that "Section 5 g[ave] States the flexibility to choose one theory of effective representation over the other," even if that choice somewhat diminished minorities' past electoral successes. *Id.* at 482.

Second, and equally 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 offset an indisputable reduction in minorities' power "to win[] elections." *Id.* After all, the "power to influence the political process is not limited to winning elections," since

minorities can influence even a candidate who is "elected without decisive minority support." *Id.* Accordingly, no retrogression occurred under a new plan that would elect "fewer minority representatives" or had more districts "where minority voters may not be able to elect a candidate of choice," *if* the jurisdiction "increase[d] the number of representatives sympathetic to the interests of minority voters." *Id.* at 482-83. Moreover, even if the diminution in electable districts was *not* offset by districts where minorities could "influence" sympathetic representatives, "[m]aintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, c[ould] show the lack of retrogressive effect under § 5," since "[t]he ability to exert more control over [the lawmaking] process is at the core of exercising political power." *Id.* at 483-84. Likewise, it was also "significant" whether the change had the "support" of the minority community. *Id.* at 484.

Third, and perhaps most important, *Ashcroft* held that—however minority voting power was measured—the Section 5 retrogression inquiry required considering "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 regard to whether that would subordinate sufficiently important race-neutral interests, such as traditional districting principles or good-government electoral reforms. For example, if an urban majority-minority district

lost sizeable numbers of minority voters due to suburban housing integration, federal authorities could not conclude that compelled continuation of that district through racial gerrymandering was needed to avoid a retrogressive effect. *Cf. Miller*, 515 U.S. at 916, 924-27 (holding that the refusal to subordinate traditional race-neutral principles "does not support an inference" of "discriminatory intent").

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 overall voting power could be preserved through increased political influence or that preservation was not feasible 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 Ashcroft*, 539 U.S. at 477, or even 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. 129 S. Ct. at 2512.

B. The Expansion Of The Original Preclearance Standard Is Unconstitutional Given That Conditions In The Covered Jurisdictions Indisputably Have Not Deteriorated

Despite the critical function that *Ashcroft* and *Bossier II* served in preserving the limits of the 1965 preclearance standard, the 2006 Congress abrogated those decisions, finding that they had "misconstrued … and narrowed the protections afforded by section 5." 42 U.S.C. § 1973 note, Findings (b)(6). In doing so, Congress clearly exceeded its enforcement powers.

As a threshold matter, *any expansion* of Section 5's substantive "protections" *in 2006* is not congruent, proportional, or rational. Not even the district court claimed that conditions in the covered jurisdictions have *deteriorated* since the 1965 Congress originally enacted the preclearance standard. Accordingly, it *necessarily* was "an unwarranted response" for the 2006 Congress to adopt a "[s]trong[er] measure[]" to attack the current "harm," *see Boerne*, 521

U.S. at 530—conditions are at least no worse than the "widespread and persistent discrimination" that confronted the 1965 Congress, *see South Carolina*, 383 U.S. at 328, and are in fact "unquestionably improved," *see Nw. Austin*, 129 S. Ct. at 2511.

The district court, however, concluded that there is no "theoretical" reason why the 2006 Congress' "range of options for remedial legislation" should be limited by the fact that it was "legislating more … assertively" than the 1965 Congress had. JA 255. As a "theoretical" matter, Congress certainly may expand "enforcement" legislation when appropriate—such as when the 1982 Congress added a "results" test to Section 2, *id.* 254-55, because the "discriminatory intent" requirement imposed an "inordinately difficult" burden, *supra* at 30-31. In reality, though, it is absurd to suggest that the 1965 Congress did not take *every* conceivably "appropriate" measure "[u]nder the compulsion" of "unremitting and ingenious defiance of the Constitution," or that the measures it took have been "inadequate" in prophylactically extirpating discrimination. *See South Carolina*, 383 U.S. at 309, 328, 334-35. The court half-heartedly suggested that the "different set of problems" posed by "second generation" vote-dilution justifies expanding the standard, JA 255, but that is inexplicable: vote-dilution is not a new phenomenon, Shelby.JA 597-98, and, regardless, the court failed to identify any *reason* why *Ashcroft* and *Bossier II* were acceptable in the vote-denial context but problematic in the vote-dilution context.

The district court also asserted that "it is not at all clear that the 2006 amendments actually represent an expansion to Section 5's preclearance standard," as opposed to a "restorat[ion]" of the 1965 standard that had been erroneously "altered" by *Ashcroft* and *Bossier II*. JA 255-56. That assertion contravenes the basic principle that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994). The court observed that *Rivers* acknowledges Congress' broad power to make laws that "retroactively" abrogate judicial decisions interpreting statutes, JA 257-58, but that is irrelevant: the 2006 amendments are prospective, *id.* 257, and, regardless, even retroactive amendments do not change "what the statute meant," but merely "undo … the undesirable past consequences" *of that meaning*, *Rivers*, 511 U.S. at 313.

C. The New Preclearance Standard No Longer Rationally Targets The Type Of Backsliding Changes That Would Undermine Section 2's Enforcement, But Rather Imposes A Rigid Scheme Of Racial Preferences For Minorities

Even if *some* expansion of the standard would have been appropriate, the 2006 amendments certainly were not. Instead, the amended preclearance standard now has the "fundamental flaw" of "a[] scheme in which [DOJ] is permitted or directed to encourage or ratify a course of unconstitutional conduct." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

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

The 2006 Congress adopted a preferential entitlement flatly prohibiting jurisdictions from "diminishing" a minority group's "ability … to elect their preferred candidates of choice," *see* 42 U.S.C. § 1973c(b),(d), because "Congress explicitly *reject[ed]* 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. Congress 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. Now, therefore, "the relevant analysis" 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 49-50.

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 61. But "entrench[ing]" such districts "by statutory command" pose[s] constitutional concerns." *See Bartlett*, 129 S. Ct. at 1247, 1249 (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."

The Section 5 inquiry and DOJ's power thus will be greatly expanded. Districts with minority voting-age populations from 20% to 30% can function as "influence" districts in the right circumstances. *See id*; *LULAC*, 548 U.S. at 443-46 (plurality opinion). For example, in *LULAC*, Justice Stevens, supported by the "unanimous opinion of the staff attorneys in the [DOJ] Voting Section," would have held that a district with a 25.7% black citizen voting-age population (548 U.S. at 443 (plurality opinion)) was a district where "blacks had the ability to elect

candidates of their choice," or at least could "play a substantial, if not decisive, role in the electoral process," such that Texas' failure to "offset[] [its] loss … with another district where black voters had a similar opportunity … was retrogressive" under the old Section 5. *See id.* at 479-81 & n.15 (Stevens, J., dissenting in relevant part). Since the new Section 5 has embraced this "diminish" the "ability to elect" view of retrogression, virtually all districts, even with relatively small minority populations, will be subject to federal scrutiny, thereby "unnecessarily infus[ing] 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)).

Third, the draconian nature of the new quota-floor tied to 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 54-57. 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 residential integration or suburban migration. *But see Miller*, 515 U.S. at 916, 919. Likewise, as this case illustrates, even though compelling reasons exist to depoliticize the judiciary by switching to nonpartisan judicial elections, those reasons will be irrelevant if the switch is found to diminish minorities' ability to elect. JA 46. 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. *See Ashcroft*, 539 U.S. at 480-84.

In sum, by abrogating *Ashcroft*, the "ability to elect" standard bars changes that, at worst, 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, *Nw. Austin* emphasized that perceived defect, 129 S. Ct. at 2512.

b. The district court gave several reasons why the "ability to elect" standard is valid enforcement legislation. They are all meritless.

First, the court justified the myopic "ability to elect" standard on the ground that *Ashcroft*'s flexible standard had presented "an administrability nightmare." JA 295. Specifically, the court claimed that *Ashcroft*'s "amorphous 'totality of the circumstances' factors" were too "subjective" and "unpredictable"—indeed, that *Ashcroft* was so malleable that it could be used as "a means to cloak intentional discrimination" by "intentional[ly] fragment[ing] … politically cohesive groups … under the guise of creating influence districts." *Id.* 291-92; *see also id.* 278-82. According to the court, Congress thus acted appropriately in eliminating this flexibility by taking "any factor that is not related to minorities' 'ability to elect' … off the table." *Id.* 288. Both the premise and the conclusion of that breathtaking holding are fundamentally flawed.

The court's premise is illogical, because there is no conceivable way that *Ashcroft*'s flexible standard facilitated intentional discrimination or was otherwise

too subjective to protect federal interests in an administrable manner. Critically, jurisdictions "bear[] the burden of proof in [a preclearance] action," *Ashcroft*, 539 U.S. at 471, and thus any subjectivity or uncertainty would be used as a shield against them, not as a sword by them. In other words, jurisdictions could avail themselves of *Ashcroft*'s flexibility *only* if either DOJ or D.C. federal judges were *convinced* that any reduction in minorities' "ability to elect" was justified under the "totality of the circumstances." *Id.* at 479. Perversely, then, the changes preempted by the new standard are those where both the state and federal governments *agree* that, all things considered, minorities' overall voting power has *not* been unduly diminished despite any diminution in their ability to elect their preferred candidate—hardly the types of changes that are "a means to cloak intentional discrimination," JA 292. And more generally, *Ashcroft*'s "totality of the circumstances" test plainly was not too subjective to be administrable, given that it was modeled on the "results" test that has governed Section 2 since 1982, *supra* at 30-31, which the 2006 Congress left undisturbed even though it too considers the "totality of the circumstances" rather than making minorities' "ability to elect" the sole relevant criterion, *supra* at 50-53.

Regardless, the court's conclusion is deeply pernicious, because it effectively holds that Congress can *always* impose a rigid race-based quota on state decisionmakers, given that a more flexible race-conscious standard is *always*

harder to administer and theoretically can *always* be used (however implausibly) as a pretext for intentional discrimination. Under that reasoning, for example, because a university admissions policy that purports to consider race in a permissibly "individualized" and "flexible" way (*Grutter*, 539 U.S. at 334) could conceivably be used as a pretext for discriminating *against minorities*, Congress could mandate that every state university in the covered jurisdictions instead "use a quota system" to admit minorities. *But see id.*; *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) ("[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."). To the contrary, of course, when confronted with open-ended race-conscious standards, like the Section 2 "results" test on which *Ashcroft* was modeled, the Supreme Court has carefully "structur[ed] … the statute's 'totality of the circumstances' test," *De Grandy*, 512 U.S. at 1010, so it that preserves "equality of opportunity," *LULAC*, 548 U.S. at 428. Any supposed problems with *Ashcroft*'s vagueness or administrability should have been addressed similarly.

Second, the court generically claimed that, even though § 1973c(b),(d) take "any factor that is not related to minorities' 'ability to elect' … off the table," JA 288, "they still do not create [a] facial quota," because they do not impose an "utterly inflexible prohibition on retrogression," *id.* 310-11. But that claim is

foreclosed by the statutory text, which unconditionally and 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."). The court cited *City of Richmond v. United States*, 422 U.S. 358, 370-72 (1975), as an example of permissible retrogression, JA 310, but that "*ex necessitate*" "exception to normal retrogressive-effect principles" was only "justified by the peculiar circumstances presented in annexation cases," *Bossier II*, 528 U.S. at 330-31. The court also interpreted DOJ's regulations to mean that DOJ will not treat the "ability to elect" standard as an absolute mandate, JA 310-11, but, even assuming the court properly interpreted those loophole-laden documents, courts 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).

Third, the court specifically claimed that the "ability to elect" standard does not freeze every majority-minority district in place, because it allows "*some* tradeoff[s]" with newly created "crossover" districts. JA 286-87, 294. Even under this view, however, the standard is still a quota tied to minority electoral success. As the court conceded, the total number of performing majority-minority districts

and "cross-over" districts cannot be reduced by "trading" for "influence" districts where a win is not guaranteed, *id.* 284-87, despite the fact that "requir[ing] crossover districts" when influence districts would otherwise preserve minority voting power "rais[es] serious constitutional questions" by "unnecessarily infus[ing] race into virtually every redistricting," *see Bartlett*, 129 S. Ct. at 1247 (plurality opinion). Furthermore, "safe" majority-minority districts still cannot be traded for *less-safe* "cross-over" districts where a minority victory is not "virtually guarantee[d]." *See Ashcroft*, 539 U.S. at 480-81. And even the court's implicit assertion that majority-minority districts can be traded for *equally* performing "cross-over" districts is largely illusory, given "the high degree of speculation and prediction attendant upon the analysis of crossover claims" involving new districts. *See Bartlett*, 129 S. Ct. at 1245 (plurality opinion).

Fourth, the court also specifically claimed that the "ability to elect" standard permits jurisdictions to eliminate "influence" districts without creating an offsetting district, which it further suggested made Section 5 *less* race-conscious because such districts were protected under *Ashcroft*. JA 287, 294, 310, 312. That is doubly wrong. Post-2006, eliminating an "influence" district is barred under § 1973c(b), because doing so would "*diminish*" minorities' limited "ability to elect" their preferred candidates in such districts, which they can do sometimes, if not "always." *Supra* at 63-64. Although § 1973c(b)'s legislative history does

"make[] overwhelmingly clear" that the "ability to elect" standard *prevents* jurisdictions from *creating* "influence districts" *to trade* for a majority-minority or "cross-over" district, (JA 287 (citing H.R. Rep. No. 109-478, at 70)), that does not remotely support the distinct proposition that the "ability to elect" standard *allows* jurisdictions *to eliminate* "influence districts" without *any offset whatsoever*. Conversely, pre-2006, while *Ashcroft* did allow jurisdictions to use "influence districts" as a *defense against retrogression*, no case had *ever* remotely suggested that mere "influence" districts were themselves *protected from retrogression*. *Cf. Ashcroft*, 539 U.S. at 479-85; *LULAC*, 548 U.S. at 445-47 (plurality opinion). That is why the district court cited *no support* for its counterintuitive proposition that § 1973c(b) was *laxer on jurisdictions* than *Ashcroft*.

Finally, the court contended that the "ability to elect" standard has "an elegant, self-executing limitation," because, "as racially polarized voting decreases, the number of districts affected by Section 5 decreases as well." JA 293. Ironically, that is exactly backwards. As non-minority racial bloc voting decreases, the number of "cross-over" districts where minorities have the "ability to elect" will *increase*, and even the court conceded that "cross-over" districts are protected under the "ability to elect" standard. *Supra* at 69-70. Accordingly, under § 1973c(b), declining racial bloc voting by non-minorities will "unnecessarily infuse race into virtually every redistricting." *See Bartlett*, 129 S.

Ct. at 1247 (plurality opinion). Far from the saving grace that the court bizarrely suggested, this is a perverse constitutional defect that underscores the absurdity of the quota-floor imposed by the "ability to elect" standard.

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

The 2006 Congress also required that preclearance be denied whenever jurisdictions fail to disprove "any discriminatory purpose," 42 U.S.C. § 1973c(c), thus eliminating Section 5's critical focus on retrogressive changes. Congress was upset that the "purpose" prong would catch only "incompetent retrogressor[s]" while forcing "the federal government" seemingly 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, on pain of drawing an objection, to consider ameliorative alternatives to their preferred non-retrogressive change. *Supra* at 44-45. Yet there is no legitimate "enforcement" justification for thus "curtailing their traditional general regulatory power." *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 actually *irrational* "[t]o deny preclearance to a plan that is *not* retrogressive," because that "would risk leaving in effect a status quo that is even worse": for example, "the result of denying preclearance" to "a voting change with a discriminatory … purpose" but an "ameliorative effect" "would be to preserve a status quo with more discriminatory effect than the proposed change." *Bossier II*, 528 U.S. at 335-36.

Second, the costs of increased federal oversight are exacerbated by the increased difficulty of *disproving* discriminatory intent concerning a *non-retrogressive* change to federal authorities. *Supra* at 45-46. And, again, there is no legitimate "enforcement" justification for thus "imposing [this] heavy litigation burden on [jurisdictions]." *See Boerne*, 521 U.S. at 534. Indeed, by leaving *Bossier I* untouched, the 2006 Congress ratified the conclusion there that

disproving a Section 2 "results" violation would significantly complicate the already burdensome Section 5 process. 520 U.S. at 480. Yet disproving discriminatory purpose requires jurisdictions not only to engage in the "complex undertaking" of analyzing whether the proposed change has a greater discriminatory "result" than alternative practices, but the *added* burden of demonstrating that those alternatives were rejected for reasons unrelated to any alleged racial result. *See Bossier II*, 528 U.S. at 332.

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 46-48. 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. The district court gave several reasons why the "discriminatory purpose" standard is valid enforcement legislation. They are all meritless.

First, the court emphasized that "discriminatory purpose" objections are not too "intrusive" because they "differ[] in just one way from a straightforward ban on unconstitutional conduct: … the burden is shifted to the state actor to prove the absence of discrimination." JA 267-68. That facile response, however, willfully ignores the Supreme Court's repeated explanations that requiring jurisdictions *to disprove a non-retrogressive* discriminatory purpose *in the preclearance context* unduly burdens their preclearance efforts and constrains their local autonomy. *Supra* at 44-46, 72-74. The court thus seriously erred in analogizing this standard to the burden-shift for *retrogressive* changes or monetary liability for *proven* constitutional violations. JA 268. Nor did it attempt to reconcile its banal view of "discriminatory purpose" objections with *Bossier II*, which strongly admonished that such objections "exacerbate[] the 'substantial' federalism costs that the preclearance procedure already exacts, … perhaps to the extent of raising concerns about § 5's constitutionality." 528 U.S. at 336.

Second, the court apparently believed that it was "absurd" for preclearance authorities to allow unconstitutional, intentionally discriminatory changes to go into effect, because that "forc[ed] minority voters" to bring Section 2 litigation to obtain the ameliorative change that the jurisdiction had discriminatorily refused to adopt. *See* JA 259-60. That result, however, "str[uck] [the court] as an inconceivable prospect only because [it] refus[ed] to accept" (*Bossier II*, 528 U.S.

at 335) that Section 5 can be justified *only* as a means of furthering the "limited substantive goal" of preventing "backsliding" that would thwart Section 2's efficacy (*Ashcroft*, 539 U.S. at 477), *not* as a means of redressing non-retrogressive intentional discrimination that is easily reachable under Section 2's prophylactic "results" test. *Supra* at Part III.A. And again, the court erroneously equated a "discriminatory purpose" *objection* with the *existence* of discriminatory intent, when it really means only that the jurisdiction was unable to prove a negative to skeptical federal authorities. Indeed, where the preclearance process in fact uncovers clear evidence of discriminatory intent, the "burden" of filing a Section 2 case is virtually non-existent, because the already-established evidence of that intent will be pre-packaged into an easy Section 2 victory. Plus, even on the court's own premise, "discriminatory purpose" objections to *ameliorative* changes will often lead to the patently "absurd" result of "forcing" Section 2 plaintiffs to challenge the *even worse* status quo. *Bossier II*, 528 U.S. at 335-36.

Finally, the court refused to consider the problem that, as in the past, 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." JA 268-69. To the contrary, however, DOJ's coercive *capabilities* under the "discriminatory purpose" standard are a significant reason why that standard, *on its face*, poses a "heavy litigation burden" for jurisdictions. *See*

Boerne, 521 U.S. at 534. 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). Indeed, if such concerns could be raised only in as-applied attacks, then *Bossier II* would not have cited *Miller* for the broader proposition that allowing "discriminatory purpose" objections would "rais[e] concerns about *§ 5's constitutionality*," let alone would it have used such "as-applied" concerns to support its holding that "discriminatory purpose" objections were facially unauthorized. *See* 528 U.S. at 336 (emphasis added). Nor would *Nw. Austin* have cited Justice Kennedy's *Ashcroft* concurrence to support the proposition that Section 5's excessive "considerations of race" "underscored" the "federalism concerns" in that *facial pre-enforcement challenge*. *See* 129 S. Ct. at 2508, 2512.

V. THE 2006 AMENDMENTS VIOLATE THE CONSTITUTION'S EQUAL PROTECTION GUARANTEES

As the district court recognized, Plaintiffs' equal-protection challenge to the 2006 amendments is largely controlled by the analysis of the amendments' scope and effect when resolving Plaintiffs' enumerated-powers challenge. Specifically, the "ability to elect" standard in § 1973c(b),(d) imposes a rigid quota-floor based on minorities' past electoral success. *Supra* at 61-66. Such "outright racial balancing" is "patently unconstitutional." *See Grutter*, 539 U.S. at 330. The district court held that the "ability to elect" standard is not really an inflexible

quota, and that it is justifiable regardless given the subjective uncertainty of the *Ashcroft* standard, JA 309-312, but those arguments are erroneous. *Supra* at 66-72. Likewise, the "discriminatory purpose" standard in § 1973c(c) allows DOJ to coerce jurisdictions to increase minority electoral success. *Supra* at 72-74. And "[t]here is a fundamental flaw … in any scheme in which [DOJ] is permitted … to encourage … a course of unconstitutional conduct." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). The district court held that the risk from DOJ misuse of "discriminatory purpose" objections could not be raised in a facial challenge, JA 303, but that is incorrect. *Supra* at 74-77.

CONCLUSION

This Court should hold that Section 5, as reauthorized and extended in 2006, is facially unconstitutional, and reverse the judgment below.

January 6, 2012

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as extended by this Court's order of January 4, 2012, (Doc. No. 1350948), because it contains 17,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), as counted using the word-count function on Microsoft Word 2007 software.

January 6, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on January 6, 2012, I caused eight copies of the foregoing document to be filed with the clerk of this Court by hand delivery, and I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, which will serve the following counsel for Appellees at their designated electronic mail addresses:

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ADDENDUM

REPRODUCED AUTHORITIES

TABLE OF CONTENTS

FEDERAL STATUTORY PROVISIONS:

42 U.S.C. § 1973 note, Findings:

"(b) Findings.--The Congress finds the following:

"(1) Significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965 [Pub.L. 89-110, Aug. 6, 1965, 79 Stat. 437, as amended, which is principally classified to subchapters I-A, I-B, and I-C of chapter 20 of Title 42, 42 U.S.C.A. §§ 1973 et seq., 1973aa et seq., and 1973bb et seq., respectively; for complete classification, see Short Title note set out under 42 U.S.C.A. § 1971 and Tables].

"(2) However, vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.

"(3) The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.

"(4) Evidence of continued discrimination includes--

"(A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 [42 U.S.C.A. § 1973c] enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;

"(B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;

"(C) the continued filing of section 2 [42 U.S.C.A. § 1973] cases that originated in covered jurisdictions; and

> **"(D)** the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e) [42 U.S.C.A. § 1973b(e)], 4(f)(4) [42 U.S.C.A. § 1973b(f)(4)], and 203 [[42 U.S.C.A. § 1973aa-1a] of such Act to ensure that all language minority citizens have full access to the political process.

"(5) The evidence clearly shows the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982, as demonstrated in the counties certified by the Attorney General for Federal examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions.

"(6) The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act [42 U.S.C.A. § 1973c].

"(7) Despite the progress made by minorities under the Voting Rights Act of 1965, the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment [U.S.C.A. Const. Amend. XV] and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution.

"(8) Present day discrimination experienced by racial and language minority voters is contained in evidence, including the objections interposed by the Department of Justice in covered jurisdictions; the section 2 [42 U.S.C.A. § 1973] litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the Voting Rights Act of 1965.

"(9) The record compiled by Congress demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."

42 U.S.C. § 1973:

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 USC 1973a:

§ 1973a. Proceeding to enforce the right to vote

(a) Authorization by court for appointment of Federal observers

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d of this title to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) Suspension of use of tests and devices which deny or abridge the right to vote

If in a proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) Retention of jurisdiction to prevent commencement of new devices to deny or abridge the right to vote

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

42 U.S.C. 1973b:

§ 1973b. Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have

precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of

this section. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973f or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational

achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the

predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. § 1973c:

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification,

prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.