No. 11-5256

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELBY COUNTY,

Plaintiff-Appellant,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,

Defendant-Appellee.

and

ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al.,

Intervenor Defendants-Appellees.

On appeal from the United States District Court for the District of Columbia

No. 1:10-cv-00651-JDB

BRIEF OF THE STATES OF ARIZONA AND GEORGIA AS AMICI CURIAE IN SUPPORT OF THE APPELLANT'S BRIEF

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INTERESTS OF THE AMICI STATES

This case concerns whether the 2006 reauthorization of the Voting Rights Act ("VRA" or "the Act") violates the Constitution by continuing to disregard the equal sovereignty among the States. Section 5 of the VRA, 42 U.S.C. § 1973c, requires federal approval of any change affecting voting in Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota (collectively "Covered Jurisdictions") based on the formula provided in Section 4(b) of the VRA, 42 U.S.C. § 1973b.

The Amici States recognize that Section 5 has contributed to eliminating voting discrimination in the Covered Jurisdictions. However, the current reauthorization of the VRA left unmodified an antiquated formula that is not congruent and proportional to the harm that the VRA was enacted to correct. Instead, the VRA applies arbitrarily to the Covered Jurisdictions, none of which use discriminatory tests or devices, and which have higher voter turnout than, or lower disparity in minority voter turnout than, the non-covered jurisdictions.

The 109th Congress reauthorized the VRA with the same coverage formula as previous enactments, while failing to examine the current status of non-covered jurisdictions. As a result, the Covered States are denied the fundamental principles of equal sovereignty and equal footing. Because the VRA's purpose is to eradicate

voting discrimination for all of the United States citizens,[1] treating States differently is not congruent with the Act's purpose. The Amici States respect the purpose of the VRA but ask this Court to hold that the current enactment of Sections 4(b) and 5 are unconstitutional because they are not appropriately tailored to correct any current voting discrimination that may exist anywhere in the country.

SUMMARY OF THE ARGUMENT

The VRA requires the Covered Jurisdictions to submit practices, procedures, or legislation having any effect on voting to the Attorney General of the United States or to file a lawsuit to determine whether it is acceptable. This preclearance procedure applies only to those jurisdictions that (1) required citizens to pass a test before voting in certain years, and (2) that had less than fifty percent voter registration or voter turnout for their populations in 1964, 1968, or 1972. In 1975, Congress amended the Act to expand the definition of test or device to include jurisdictions where more than five percent of the population is considered a "language minority."

The United States Supreme Court recently expressed grave concerns regarding the continued use of this formula to determine whether jurisdictions

[1] "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

should be covered by the preclearance requirements of the VRA. *Nw. Austin Mun. Utility Dist. No. One v. Holder ("NAMUDNO")*, 129 S. Ct. 2504 (2009). The Court noted that the VRA might violate the fundamental principles of equal sovereignty of the States and be unconstitutional because its formula is not "justified by current needs." *Id*. at 2512.

In its haste to reauthorize the VRA, Congress did not make any specific findings to support its decision not to modernize the formula. Instead, Congress justified its decision to continue requiring the Covered Jurisdictions to participate in preclearance by celebrating the great strides that had been made in those jurisdictions and apparently relying on the old adage that "if it ain't broke, don't fix it." Unfortunately, the VRA's formula is broken and needs to be fixed. The formula ignores massive changes in population demographics throughout the country, differences in voter registration and voter turnout in all fifty States, the disparities between voter registration and voter turnout for the entire population of a given State and the registration and turnout for its various minority populations, and the number of minorities serving public office throughout the entire country. If Congress had studied these changes, it could have updated the coverage formula to ensure that the VRA preclearance requirement applied only to those areas of the country that most need it.

Because the current statutory scheme does not correspond to current conditions, the federal government's invasion into state sovereignty and unequal treatment of States are not justified. This Court should therefore declare Sections 4(b) and 5 of the VRA unconstitutional.

ARGUMENT

I. The Voting Rights Act Departs from the Fundamental Principle of Equal Sovereignty Among the States.

The VRA treats some States differently "despite our historic tradition that all the States enjoy 'equal sovereignty.'" *Nw. Austin Mun. Utility Dist. No. One v. Holder ("NAMUDNO")*, 129 S. Ct. at 2512 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). This notion of equal sovereignty has existed since the thirteen original colonies became the first States and was invoked whenever new States joined the union. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224 (1845) ("The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned."); *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900) ("It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations."); *Louisiana*, 363 U.S. at 16; *Coyle v. Smith*, 221 U.S. 559, 567 (1911); *United States*

v. Alaska, 521 U.S. 1 (1997); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

In *Coyle*, the Supreme Court discussed what has become known as the "equal footing" doctrine,[2] stating the following with regard to new States being on equal footing with the original States.

> 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.

Coyle, 221 U.S. at 567. The Court further noted that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the union will not be the Union of the Constitution." *Id.* at 580.

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[2] *See e.g.*, *Nevada v. Watkins*, 914 F.2d 1545, 1555–56 (9th Cir. 1990) (discussing the doctrine with respect to the Department of Energy's desire to establish the nation's first long-term geologic repository for nuclear waste in Nevada); *Potter v. Murray City*, 760 F.2d 1065, 1067–68 (10th Cir. 1985) (discussing the doctrine in the context of a Utah statute regarding plural marriage).

The Supreme Court has long held that the equal footing doctrine applies to political rights and sovereignty. *United States v. Texas*, 339 U.S. 707, 716 (1950). In that case, the Court stated the following:

> There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. *The requirement of equal footing was designed* not to wipe out those diversities but *to create parity as respects political standing and sovereignty*.

Id. (emphasis added).

Congress passed the VRA under the authority of Section 2 of the Fifteenth Amendment to enact "appropriate" measures to effectuate the constitutional prohibition against racial discrimination in voting. *Katzenbach*, 383 U.S. at 308. In *Katzenbach*, the Court devoted just one paragraph to the principle. 383 U.S. at 328–329. There, the Court was unconcerned[3] with the disparate treatment of the

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[3] Justice Black, in his dissent , was much more concerned and disapproving of Congress's actions to control the legislation of a few States. Quoting Article IV, Section 4 of the Constitution, he stated the following:

> Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to

(continued . . .)

Covered Jurisdictions because the VRA was limited to "geographic areas where immediate action seemed necessary." *Id*. at 328. The Court cited *Coyle*, stating that the doctrine of equality of the States applied only to the terms upon which they were admitted to the Union, and "not to the remedies for local evils which have subsequently appeared." *Id*. at 329. But *Coyle* does not support that proposition. On the contrary, the Court specifically noted that the intention of the equal footing doctrine was to ensure that all of the States, regardless of when they joined the Union, had equal sovereignty, and that the equality of the States was a fundamental right that must endure to preserve the meaning of a "Union of the Constitution." 221 U.S. at 580.

The *Katzenbach* Court referenced two other Supreme Court decisions in its discussion of the equal footing doctrine: *McGowan v. Maryland*, 366 U.S. 420, 427 (1961), and *Salsburg v. Maryland*, 346 U.S. 545 (1954). In *McGowan*, the Court considered the constitutional validity of Maryland's criminal statutes, which

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(continued . . .)

> every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

383 U.S. at 359–60 (Black, J., dissenting).

provided that certain actions were criminal in one county in Maryland, but not in others. 366 U.S. at 422–23. The Court examined whether the statutes in question violated the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 425–28. The portion cited by *Katzenbach* stated that "territorial uniformity is not a constitutional prerequisite" under the Equal Protection Clause. *Id*. at 427. But this case had nothing whatsoever to do with the equal sovereignty of the States of the Union. Likewise, in *Salsburg*, the Court considered whether a different Maryland statute violated the Equal Protection Clause because it admitted illegally seized evidence in prosecutions for certain misdemeanors in certain counties, but excluded such evidence for similar crimes in other counties. 346 U.S. at 549.

Of course, Katzenbach was logically less concerned about this doctrine where the Act was viewed as an extraordinary but temporary measure. The court's most recent examination of the VRA, almost fifty years after its passage, takes the issue of equal sovereignty more seriously. In *NAMUDNO*, the Supreme Court expressed concerns for the constitutionality of Section 5. 129 S. Ct. at 2511–12. A utility district in Texas filed suit under the bailout provision of the VRA, Section 4(a), 42 U.S.C. § 1973(a), and alternatively argued that Section 5 was unconstitutional. *Id*. at 2505. Because the Court held that the district was a jurisdiction permitted to seek bailout under Section 4(a), it avoided the issue of

Section 5's constitutionality. *Id*. at 2508. Nevertheless, the Court raised the issue of equal sovereignty:

> The Act also differentiates between the States, despite our historic tradition that all the States enjoy "equal sovereignty." . . . But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.

Id. at 2512. The Court justifiably had concerns that Section 5 is no longer adequately tailored to correct the problems that it was intended to address, as the coverage formula was based on data that was then more than thirty-five years old and failed to account for current political conditions. *Id*. Here, the Court has the opportunity to directly address those concerns and strike down Sections 4(b) and 5 as unconstitutional for precisely those same reasons.

Because the VRA is triggered by the specific years of 1964, 1968, and 1972, instead of current conditions, the Act's burdens are increasingly unjustifiable. As discussed more fully below, the obsolete formula does not take into account conditions that currently exist throughout the country. Furthermore, by deferring the definition of "language minorities" to the Census Bureau, Congress created another vehicle for dramatically unequal treatment of the States.

A. Section 4's Outdated Coverage Formula Leads to an Increasingly Unjustified Departure from the Principle of Equal Sovereignty.

Since the VRA became effective, a jurisdiction was covered by the preclearance obligations if it satisfied two conditions. First, the jurisdiction must have required a person to satisfy the requirements of a "test or device"[4] in order to vote. Second, the jurisdiction must have had less than fifty percent of the citizens of voting age registered to vote, or less than fifty percent of the citizens in the jurisdiction voting in the then-most recent presidential election. 42 U.S.C. §§ 1973b, 1973c. The coverage formula considers only whether these conditions existed in three specific years: 1964, 1968, and 1972. Pub. L. 89-110, § 4, 79 Stat. 438. Congress added the two later years with the first two amendments to the Act. Pub. L. 91-285, § 4, 84 Stat. 314–15; Pub. L. 94-73, § 202, 89 Stat. 400–402.

Because the Act references a specific year, some States such as Delaware remain uncovered even though they used a test or device prohibited by Section 4(c) in both 1964 and 1968, and later had voter registration fall below fifty percent. *See* Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights

[4] The VRA defines "test or device" as "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." 42 U.S.C. 1973b(c).

Act of 1965, 30 Fed. Reg. 9897 (1965); Determination Regarding Literacy Tests, 35 Fed. Reg. 12354 (1970); Dave Leip's Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/ (follow "1996" hyperlink; then follow "%VAP M" hyperlink). Likewise, States such as Arizona that were not using a test or device in 1975, when Congress amended the Act to add so-called language minorities to the coverage formula, became and remain Covered Jurisdictions. *See* Extension of the Voting Rights Act of 1965: Hearing Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. (April 30, 1975) (Testimony of Sen. Goldwater, explaining that Arizona did not use English-only ballots in 1974 or thereafter).

Because the preclearance requirements were never intended to be permanent, fixing the determination on a recent presidential election year was logical. As time passes, however, the rationale is no longer justified. No jurisdiction currently uses a test or device, and Covered Jurisdictions are no more likely than uncovered jurisdictions to have low voter turnout. In eighteen of the forty-one states that are not covered jurisdictions in their entirety, the percentage of voting age persons who voted was less than fifty percent during one or more presidential elections since the 1982 amendment to the VRA: Arkansas (1988, 1996, 2000), California (1984, 1988, 1992, 1996, 2000), Delaware (1996), Florida (1984, 1988, 1996, 2000), Hawaii (1984, 1988, 1992, 1996, 2000, 2004, 2008), Illinois (1996), Indiana (1996, 2000), Kentucky (1988, 1996), Maryland (1988, 1996), Nevada (1984, 1988, 1996, 2000), New Mexico (1988, 1996, 2000), New York (1988, 1996, 2000), North

Carolina (1984, 1988, 1996, 2000), Oklahoma (1988, 1996, 2000), Pennsylvania (1996), Tennessee (1984, 1988, 1996, 2000), Utah (1996), and West Virginia (1988, 1996, 2000). *See* Dave Leip's Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/ (select applicable election year on left panel and then select "%VAP M"). This includes eleven states that have never been partially or fully covered jurisdictions at any point in time: Arkansas, Delaware, Illinois, Indiana, Kentucky, Maryland, Nevada, Pennsylvania, Tennessee, Utah, and West Virginia. *Compare* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited November 7, 2011) *with* Department of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited November 7, 2011).

Congress made no findings concerning these factual anomalies when its members considered reauthorizing the Act. This is because Congress did not engage in in-depth deliberations regarding the coverage formula. The *Katzenbach* Court detailed the congressional deliberations that went into the original enactment of the VRA:

> Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.

Id. at 308–09. In contrast, and despite the 12,000-plus pages of reports studied and numerous congressional hearings held, the 109th Congress passed the VRA's reauthorization on an expedited basis and without careful deliberation over the formula used to determine whether a jurisdiction should be covered by the Act. Senators John Cornyn[5] and Tom Coburn,[6] members of the Senate Judiciary Committee, remarked on this rush to renew:

> [W]e do hold some significant reservations about a number of important issues. Those concerns can generally be categorized as follows: (1) the record of evidence does not appear to reasonably underscore the decision to simply reauthorize the existing Section 5 coverage formula—a formula that is based on 33 to 41 year old data, and (2) the seemingly rushed, somewhat incomplete legislative process involved in passing the legislation prevented the full consideration of numerous improvements. . . . We also conclude that it would have been beneficial if the Section 4 coverage formula had been updated in order to adhere to constitutional requirements . . . .

S. Rep. No. 109-295 at 25–26 (2006). They continued, by stating that the formula should be updated to "reflect the problems where they really exist and where the record demonstrates some justification for the assertion of Federal power and

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[5] Senator Cornyn represents Texas, which is a Covered Jurisdiction.

[6] Senator Coburn represents Oklahoma, which is a non-covered jurisdiction. *See* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited October 28, 2011)

intrusion into the local and State electoral processes," but noted that Congress did not take the time to have "a full discussion of ways to improve the Act to ensure its important provisions were narrowly tailored and applied in a congruent and proportional way." *Id*. at 33–34. After the Report was submitted and the bill was sent to the Senate floor, the Senate passed it unanimously the very next day with only a brief debate.[7] 152 Cong. Rec. S8012 (daily ed. July 20, 2006).

At least two commentators have noted Congress's unusual haste and lack of in-depth deliberations in passing the VRA reauthorization. First, California Institute of Technology Professor J. Morgan Krousser noted that President George W. Bush "wished to cite the imminent passage of the Act as evidence of racial progress under his Administration in a speech, arranged at the last minute, marking his first appearance as president before a convention of the National Association for the Advancement of Colored People." J. Morgan Krousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 Tex. L. Rev. 667, 670 (2008); *see also* 152 Cong. Rec. S7064 (daily ed. July 20, 2006) (statement of Sen. Leahy). Second, Professor Krousser noted the anomaly of the Senate's passing the bill only one day after the Senate Judiciary Committee's reporting:

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[7] The Senate had adopted a unanimous consent order providing for "up to 8 hours" of debate on the bill, although Senate Majority Leader Bill Frist doubted that all of that time would be necessary. 152 Cong. Rec. 7949 (daily ed. July 20, 2006).

> In 1965, the Senate passed the VRA forty-six days after the Judiciary Committee reported it. Voting Rights Act of 1965, 21 Cong. Q. Almanac 533, 544–45 (1965). In 1982, the time between reporting and passage in the Senate was forty-five days. Voting Rights Act Extended, Strengthened, 38 Cong. Q. Almanac 373, 376 (1982).

Id. at 670 n.3. Professor Krouser further posited that committee reports are generally published well before a bill is to be discussed on the floor so that members can fully understand the proposed legislation's provisions and implications. *Id*. at 761. Here, the Senate Report itself notes that it was not provided, even in draft form, to members of the Senate prior to the floor debate. S. Rep. No. 109-295 at 55.

University of Michigan Law Professor Ellen D. Katz likewise opined that Congress failed to truly deliberate the VRA's renewal, stating that "Congress, to be sure, amassed a detailed evidentiary record, but, the argument goes, that it did so not to guide its decision-making, but rather to justify a decision it had already made." Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 Fla. L. Rev. 991, 994 (2009).

During the expedited debate on the Senate floor, Senator Coburn again voiced his concerns with the rush to renew the VRA:

> Some Senators have said that we have carefully considered this bill and the effects it will have on our Nation based on the number of hearings we had. Yet Member attendance at these hearings was incredibly low. At the first two hearings on section 5, only one Senator

> attended. At the third, five Senators attended. Five Senators did not attend any of the committee's hearings. Five Senators attended only portions of one hearing. This is not meant as criticism because I only attended part of two hearings.
>
> My point is that it is unfortunate that we insisted on doing this on an expedited basis when the act does not expire for a year. The committee conducted eight hearings in 9 workweeks—and during times when it was clear that most Senators would be absent. We held four hearings during the immigration debate on the floor and held two hearings during rollcall votes on the floor. Because of the political nature of this bill and the fear of being improperly classified as "racist," the bill was crafted and virtually passed before any Senator properly understood any of the major changes. For example, the bill that passed out of committee included a finding section before any hearings were held. No changes to those findings were made.

152 Cong. Rec. S7990 (daily ed. July 20, 2006) (statement of Sen. Coburn). This statement was echoed by Senator Cornyn who opined that the expedited process "prohibited the kind of debate and discussion and perhaps amendment process that might have been helpful to protect the act against future legal challenges." 152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn).

Both houses of Congress expressed the rationale for renewing the VRA with the laudable and necessary intention of protecting the voting rights of all citizens. The House of Representatives Committee on the Judiciary made the following statement:

> The right to vote is the most fundamental right in our democratic system of government because its effective exercise is preservative of all others. Prior to the enactment of the VRA, parts of the United States condoned the unequal treatment of certain citizens, including denying the most fundamental right of citizenship—the right to vote. The vestiges of such discrimination continue today. In enacting the VRA in 1965, Congress sought to protect the Nation's most vulnerable citizens' right to vote. In renewing and extending the VRA, Congress sought to ensure that even greater numbers of our citizens were protected, including citizens whose primary language is not English, and to ensure that all aspects of the right to vote are protected, including the right to cast a meaningful ballot.
>
> Substantial progress has been made over the last 40 years. . . .

H.R. Rep. No. 109-478 at 6 (2006). Despite this stated intention to protect the rights of citizenship for *all* citizens, neither the House nor the Senate seriously considered modernizing the coverage formula to reflect the current circumstances.

The House Judiciary Committee focused on the strides made in the previously Covered Jurisdictions and did not discuss at any length the similar needs in the uncovered jurisdictions. The Committee noted the results in the previous incarnations of the VRA and summarized its findings that substantial discrimination continued to exist in 2006 in the Covered Jurisdictions. *Id*. at 25. The Committee noted that Covered Jurisdictions still exhibited the following characteristics: (1) disparities in minority voter registration and voter turnout; (2) continued disparity between the number of white and African American elected

officials; (3) lack of support for Latino, Asian American, Native American, and Alaska Native elected officials; and (4) racially polarized voting. *Id*. at 25–36. The Committee found that there was a record of continued efforts to discriminate in the Covered Jurisdictions. *Id*. at 56. The Committee referenced anecdotal evidence that allegedly justified continuing preclearance obligations for some of the Covered Jurisdictions, but there is no evidence in its findings concerning the rights of voters in non-covered jurisdictions. The House Report does not contain any findings regarding the non-covered States' population changes, voter registration and turnout, record of minorities elected, and racial polarization.[8]

Likewise, the Senate Judiciary Committee Report, despite its length, barely examined the history or current record of voting discrimination in the non-covered jurisdictions. *See generally*, S. Rep. 109-295 (2006). The Report included a discussion of the VRA's purpose and history, a Section-by-Section summary of the bill, a cost estimate, a regulatory impact evaluation, and the marked-up changes to the existing law made by the bill. *Id*. The nearly 300 pages of appendices included (1) summaries of the reported cases or settlements finding discrimination against voters in the Covered Jurisdictions and the non-covered jurisdictions; (2) a

[8] As the Appellant points out, racially polarized voting is neither governmental discrimination nor evidence of intentional discrimination, and therefore, it lends no support to the renewal of Section 5. (Opening Brief at 36–37.)

summary of the evidence gathered by the House and Senate concerning voting discrimination; and (3) a discussion of the lawsuits or enforcement actions, statistics, and anecdotal evidence for thirty-five of the fifty states. *Id*. at 65–363. All of the Covered Jurisdictions were represented by pages of discussion, while some of the non-covered States such as Nebraska or Tennessee had only single paragraphs of anecdotal evidence presented. There was no evidence whatsoever in the appendices regarding Arkansas, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Nevada, New Hampshire, North Dakota, Oregon, Utah, Vermont, or West Virginia.

Once the bill was sent to the floor, the Senate quickly passed it without engaging in meaningful debate regarding the outdated formula. Several Senators expressed concern, but recommended passage of the bill nonetheless. 152 Cong. Rec. S7983 (daily ed. July 20, 2006) (statement of Sen. Chambliss discussing some hesitation about leaving unaddressed the issue of modernizing the formula); 152 Cong. Rec. S7986–87 (daily ed. July 20, 2006) (statement of Sen. Sessions discussing the significant progress that Alabama had made in eliminating voting discrimination while noting that the same could not be said of fourteen other jurisdictions that are not covered by Section 5 and noting that he "would have expected Congress" to take action by modernizing Section 5). Senator Cornyn

stated the following in response to a concern that updating the formula would remove nearly all of the country from Section 5's preclearance obligations:

> As I understand it, the map, after an update to cover the most recent three Presidential elections, would look something like this. In other words, rather than the nine covered jurisdictions, you would see jurisdictions around the country, both at the State and local level—primarily at the local level—that would focus on the places where the problems really do exist and where the record demonstrates with some justification for the assertion of Federal power and intrusion into the local and State electoral processes.

152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn). Because Congress did not explore the problem of voting discrimination throughout the entire country, it cannot be said to have demonstrated the "great care" that the *Katzenbach* Court cited as justification for the 1965 version of the VRA.

B. The Expansion to Language Minorities Resulted in Dramatic and Unjustified Discrimination Against Certain States.

When the VRA was passed in 1965, it defined "test or device" as:

> 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.

42 U.S.C.A. § 1973b(c). Such requirements are obviously an effort to combat Jim Crow laws designed to interfere with the rights guaranteed under the Fifteenth

Amendment. In 1975, Congress expanded the scope of the VRA to protect "language minorities," when it expanded the definition of "test or device" to include:

> 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.

42 U.S.C.A. § 1973b(f)(3). This definition of "test or device" applies only to the coverage formula added by the 1975 amendments to the Act, and therefore looks only to the state of voter registration in 1972. Thus, it suffers from the same problems that arise from an evaluation being frozen in time discussed in the previous section. By leaving the determination of whether five percent of the citizens of a State are "members of a single language minority" to the Census Bureau, however, this amendment results in even more dramatic and unjustifiable unequal treatment of the various States.

The Census Bureau defined "Spanish heritage" three different ways. S. Rep. No. 94-295 n.14 (1975) (summarizing definition); H.R. Rep. 94-196 n.16 (1975) (same). One definition included all members of a family in which either the husband or wife spoke Spanish as their "mother tongue." S. Rep. No. 94-295 n.14

(1975). The second definition simply considered a citizen's last name. *Id*. Finally, the Census Bureau employed a third definition that was limited to those of Puerto Rican birth or parentage. *Id*. As is illustrated in the chart below, these three definitions were then applied in three different combinations to three groups of States.

	"Spanish language" defined as: "persons of Spanish mother tongue and all other persons in families in which the head or wife reported Spanish as his or her mother tongue"	"Spanish surname" defined as: "a list of over 8,000 Spanish surnames originally complied by the Immigration and Naturalization Service (and later updated by the Bureau of Census)"	"Puerto Rican birth or parentage" defined as: "persons born in Puerto Rico and persons born in the United States or an outlying area with one or both parents born in Puerto Rico"
Forty-two States and the District of Columbia	Included	-	-
Arizona, California, Colorado, New Mexico, and Texas	Included	Included	-
New Jersey, New York, and Pennsylvania	-	-	Included
Source: U.S. Department of Commerce, Bureau of the Census, 1970 Census of Population, Vol. I Characteristics of the Population, Pt. 1 United States Summary, Section 2, Appendix B App-17 to -18 (Issued June 1973).			

The Census Bureau's definitions of "Spanish language" and "Puerto Rican birth or parentage" included white English speakers raised in the United States within the calculation of "language minorities" if they married a native Spanish speaker or were born to vacationers in Puerto Rico. As such, a white English speaker would be classified as belonging to a "language minority" upon marriage to a Spanish speaker in Baltimore

but not when the couple moved to Atlantic City. Likewise, a white English speaker who took the Spanish surname of her husband would be considered a member of a language minority in Phoenix, but not if the couple moved to Las Vegas. These arbitrary definitions are not congruent with the purpose of the Fifteenth Amendment and cannot be used to justify the different treatment accorded to the States.

II. Current Conditions Do Not Justify the VRA's Departure from the Fundamental Principle of Equal Sovereignty Among the States.

When the VRA was initially enacted in 1965, Congress found that there was significant evidence of voting discrimination in the southern States. But the United States is a different country than it was forty-six years ago. According to the U.S. Census Bureau, in 1960, there were approximately 183 million people in the country; in 2010, there were 308.7 million people—a 168 % increase. *Compare* 1 U.S. Census of Population: 1960, *Characteristics of the Population*, at xvii (1964); Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 1, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf. Certain regions have grown quickly while others have grown much more slowly. *Id*. As discussed below, these changes in the States' respective populations have significantly changed the picture regarding minority representation as voters and elected officials. This section examines two States with almost identical demographics and two States passing almost identical legislation, while demonstrating that the VRA causes these States to be treated dramatically differently.

A. Arizona and Nevada Are Strikingly Similar in Population Makeup, Voter Registration, and Voter Turnout, but Are Treated Differently by the VRA.

According to the 2000 and 2010 censuses, Nevada is by far the fastest growing State in the country. Census 2000 Brief on Population Change and Distribution: 1990–2000 at 3, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf; Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 2, http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. Nevada's Hispanic population more than doubled in the last twenty years, going from just over 1.2 million in 1990 to just over 2.7 million in 2010 and increasing from 10.4 % of the population to 26.5 %. *Compare* Census 2000 Brief on the Hispanic Population at 4, http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf with Census 2010 Brief on the Hispanic Population at 6, http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf.

During the same time period, Arizona has been the second fastest growing State. Census 2000 Brief on Population Change and Distribution: 1990–2000 at 3; Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 2. Arizona's Hispanic population went from 18.8 % to 29.6 %. *Compare* Census 2000 Brief on the Hispanic Population at 4, with Census 2010 Brief on the Hispanic Population at 6.

The voting registration and turnout records for Arizona and Nevada are also similar. During the 2000 election, 53.3 % of Arizona's total citizenry were registered voters and 46.7 % voted, and in Nevada 52.3 % registered and 46.5 % voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2000, http://www.census.gov/hhes/www/socdemo/voting/ publications/p20/2000/tab04a.pdf (last visited November 7, 2011). But Nevada's Hispanic population was less represented. *Id*. In Arizona, 33.4 % of its Hispanic population registered to vote and 27.1 % voted; while in Nevada, 23.9 % of its population registered and only 20.4 % voted. *Id*.

In 2004, Arizona's record showed that 60.3 % of the total population registered and 54.3 % voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (follow "Detailed Tables" hyperlink; then follow Table 4a "XLS" hyperlink). The Arizona Hispanic population's numbers were 30.5 and 25.5 %, respectively. *Id*. Nevada, on the other hand, had 56.8 % of its entire population registered, with 51.3 % actually voting. *Id*. The Nevada Hispanic population's numbers were 27.6 and 23.8 %, respectively. *Id*.

The last time either State had used English-only voting materials was 1972. In the 1972 election, only 49.5% of Nevada's voting age residents voted. (*See*

http://uselectionatlas.org/RESULTS/ (follow "1972" hyperlink; then follow "%VAP" hyperlink)). Also, none of Nevada's current laws protecting non-English-speaking voters had been enacted. (*See* Nev. Rev. Stat. § 293.2699 (added 2003); Nev. Rev. Stat. 293.296 (added 1973); Nev. Rev. Stat. § 293C.282 (added 1997).) In spite of these facts, Arizona is a Covered Jurisdiction while Nevada has never been covered. (See above in Section I at p. 14.)

Despite the similar populations, a smaller percentage of Hispanic voters in Nevada are voting than in Arizona. In the Senate Judiciary Committee Report, there were only two pieces of anecdotal evidence regarding possible voting discrimination, but both involved discrimination against Hispanic voters. S. Rep. 109-295 at 277 (summarizing anecdotal evidence that Hispanics have been told they need to speak English or have a driver's license in order to vote and that voter registration forms for some Hispanics were found in dumpsters and not submitted). Congress did not make any findings concerning the number of minorities elected to office in Nevada or regarding the possibility of racial polarization[9] in its elections. This lack of justification by Congress for the different treatment of Arizona and Nevada despite the stark similarities in their current populations and voter turnout records is evidence that the VRA's formula is neither congruent with, nor proportional to, the goal of eliminating discrimination in voting. Further,

[9] See n.8 supra.

Congress's failure to take into account these similar statistics shows that its decision to continue using the outdated coverage formula is arbitrary.

B. South Carolina and Wisconsin Have Passed Similar Laws but Experienced Dramatically Different Treatment Under the VRA.

Neither South Carolina nor Wisconsin has used a "test or device" since at least 1964. At the time of the 2006 Reauthorization, both States had turnout of over 50 % in the 2004 presidential election. http://uselectionatlas.org/RESULTS/ (follow "2004" hyperlink; then follow "%VAP" hyperlink). Wisconsin's Hispanic population in 2000 made up 5.9 % of the total population as compared to 5.1 %in South Carolina. Thus, considering each factor used by Section 4's coverage formula, these States are quite similar. The only distinction between the States is that South Carolina was found to have used a test or device over forty years ago.

Meanwhile, no State is free of bad actors. During the floor debate on the VRA's reauthorization, then-Senator Obama noted the following:

> In Wisconsin, a flier purporting to be from the 'Milwaukee Black Voters League' was circulated in predominately African-American neighborhoods with the following message:
>
> If you've already voted in any election this year, you can't vote in the presidential election. If you violate any of these laws, you can get ten years in prison and your children will get taken away from you.

152 Cong. Rec. S7984 (daily ed. July 20, 2006) (statement of Sen. Obama).

Because it is uncovered, the VRA allows Wisconsin to require identification at the polls without seeking federal permission. *See* 2011 Assembly Bill 7, *available at* http://legis.wisconsin.gov/2011/data/AB-7.pdf. Obviously, if a citizen believes that the new legislation threatens the suffrage of minority voters, that citizen can bring a suit under the VRA, but the State's sovereignty is respected, and it does not need prior authorization from the federal government to enact statutes. When South Carolina passed a similar law, however, it had to seek federal approval before enforcing its law. On August 29, 2011, the Department of Justice ("DOJ") sought more information from South Carolina, asking of series of detailed questions about how South Carolina would administer its law. Letter from T. Christian Herren, Jr. to C. Havird Jones, Jr., Aug. 29, 2011 (attached as Exhibit A). As an example, the DOJ asked,

> Additionally, on August 16, 2011, the State supplemented its submission by providing the Department with an opinion of the South Carolina Attorney General . . . . The opinion defines "reasonable impediment" . . . please provide a description of how the "reasonable impediment" exemption standard will be applied, how voters will be notified of the standards and procedures, and the nature and schedule for training of county boards of registration and elections and county boards of canvassers regarding the "reasonable impediment" exemption standard.

Id. Thus, after submitting its law for review by federal authorities, South Carolina provided an attorney general opinion to address potential DOJ concerns. But that

response was not enough and the DOJ required South Carolina to provide even more information before the law its legislature passed could take effect. The DOJ required South Carolina's compliance despite the Supreme Court's ruling that voter identification laws do not impose a significant burden on voters' rights and are justified by important State interests. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 203 (2008). And, of course, no matter what the Court's opinion is of the impact of voter identification laws, surely this dramatic disparity in the treatment of two such similar States should be troubling in light of our history of treating the States as equal sovereigns.

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CONCLUSION

For the foregoing reasons, this Court should reverse the dismissal of Shelby County's claims and declare Sections 4(b) and 5 of the Voting Rights Act unconstitutional.

Respectfully submitted this 8th day of November, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,909 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 8th day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on November 8, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/M. Riordan

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