No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA
PETITIONER,

v.

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

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

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioner

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QUESTION PRESENTED

As reformulated by this Court, this case presents the question:

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

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. Inter Tribal Council of Arizona*, No. 12-71; *Arizona v. United States* ("*Arizona*"), No. 11-182, ___ U.S. ___ (June 25, 2012); *Chamber of Commerce v. Whiting,* No. 09-115, 563 U.S. __, 131 S. Ct. 1968 (2011), *Horne v. Flores*, 557 U.S. 433, n. 10, 129 S. Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief), and *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008).

AULDF supports the Petitioners' arguments and agrees with its reasons for requesting reversal of the decision below. AULDF writes separately to identify instances in which litigants have used § 5 for political ends to block state efforts to implement reasonable, non-discriminatory reforms in voting laws and to explain why hesitation is justified before

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[1] Pursuant to Rule 37.2(b), *amicus* certifies that counsel for Respondents, Petitioners and Respondents-Intervenors have provided the Clerk with blanket consents to file amicus briefs. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

relying on the gross number of successful § 2 claims in covered jurisdictions to justify the extension of § 5's coverage until 2031.

PRELIMINARY STATEMENT

As this Court recently observed, "The historical accomplishments of the Voting Rights Act are undeniable." *Northwest Austin Municipal Utility District Number 1 v. Holder*, 129 S. Ct. 2504 (2009). When Congress devised the coverage formula in § 4(b) of the Act in 1965, it captured the jurisdictions it wanted to capture by focusing on the States that, as of November 1, 1964, used tests and devices to limit voter participation or had voter registration and turnout rates of less than 50% in the November 1964 presidential election. At that time, for example, only 19.45% of the black residents of voting age in Alabama were registered to vote. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). By the presidential election of 2004, the average African-American registration in the original covered states had improved to 68.2%, a rate higher than the rest of the country, and Alabama had a minority turnout rate of "almost 70 percent." See Abigail Thernstrom, VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS (2009), at 192 ("Voting Rights and Wrongs"). In fact, the rate of minority voter turnout exceeded that of the majority in Georgia and Mississippi in that 2004 election.

Those and other changes in the performance and behavior in the covered jurisdictions prompted

this Court to note that "the Act imposes current burdens and must be justified by present needs." *Northwest Austin*, 129 S. Ct. at 2512. This case presents the question whether those "current burdens," which will now be in place until 2031, can be justified by "present needs." In the judgment of AULDF, the current application of § 5, which is governed by a statutory formula that uses 40-year old election results, cannot be so justified.

The history of the Voting Rights Act, generally, and § 5 in particular, is one that has responded to positive change on the part of the covered jurisdictions with continued and increased oversight. For its part, this Court has recognized that § 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking imposes substantial federalism costs." *Northwest Austin*, 129 S. Ct. at 2512 (quoting *Lopez v. Monterey County*, 525 U.S. 266 (1999)(internal quotation deleted). With time, the intrusion, which was justifiable at the outset, should be seen as more difficult to sustain. Indeed, to the extent that the initial intrusion was seen as temporary and based on "exceptional" conditions, see *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), the now-expected 66-year life of § 5 strains the meaning of both concepts.

AULDF recognizes that, when it first upheld §§ 4(b) and 5 against a constitutional challenge in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), this Court saw that Congress faced an "unremitting and ingenious defiance of the Constitution" which

the then-existing legal remedies could not defeat. This Court recognized that, while conditioning the implementation of changes in the voting laws and practices in the covered jurisdictions on administrative or judicial preclearance was an "uncommon exercise of congressional power, … exceptional conditions can justify legislative measures not otherwise appropriate." *Id.*, at 334. Those "exceptional conditions" included the covered jurisdictions' creation of new rules "for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.*, at 335.

The "exceptional conditions" which justified an "uncommon exercise of congressional power" in 1965 are no longer present. Objective indicia like voter registration and turnout rates and the number of elected African-American officials attest to the significance of the change in the covered jurisdictions.

Notwithstanding the accomplishments of the covered jurisdictions, Congress decided to reauthorize § 5 for another 25 years in 2006. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub.L. 109-246, 120 Stat. 577. It didn't stop at another 25 years, though. Instead, Congress rewarded the covered jurisdictions for their progress by tightening the screws. It overturned this Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000).

Overturning *Georgia v. Ashcroft* "restrict[ed] the ability of states to experiment with different methods of maintaining (or perhaps even expanding) minority influence" on elected bodies. *Shelby County v. Holder*, 679 F. Supp. 2d 848, 886 (D.D.C. 2012)(Williams, J. dissenting). Instead, § 5 now "not only mandates race-conscious decision making, but a particular brand of it." *Id*.

Congress also overturned this Court's decision in *Reno v. Bossier Parish School Bd*., 528 U.S. 320 (2000), expanding the scope of the discriminatory purpose inquiry to include "any discriminatory purpose." Absent that change, the administrative and judicial inquiry in § 5 submissions and cases would have been limited to looking for a retrogressive purpose, or one that would leave minority voters in a worse position than before the change. Now, the Department of Justice can decline to preclear a covered jurisdiction's proposed change that leaves the minority in the same position as before if it finds that the majority acted with a discriminatory purpose. And the covered jurisdiction bears the burden of proving a negative—that it did not act with a discriminatory purpose.

Even as Congress tightened the screws on the covered jurisdictions, it left the coverage formula alone. That formula still looks at the 1964, 1968, and 1972 presidential elections and does not account for subsequent events. In fact, as Shelby County notes, if the formula looked at voting data for the 1996, 2000, and 2004 presidential elections, only Hawaii would be covered. Pet. Br. at 44, citing 151

Cong. Rec. H5131, H5181 (daily ed. July 13, 2006); cf. *Rice v. Cayetano*, 528 U.S. 495 (2000)(Hawaii's limitation of voting for members of Office of Native Affairs to Native Hawaiians violates the Fifteenth Amendment.).

SUMMARY OF ARGUMENT

More than eighty years ago, Justice Brandeis famously observed, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That opportunity belongs to each State that enters the Union.

The Voting Rights Act has been found to be an authorized departure from the "doctrine of equality of the states" in order to provide "remedies for local evils which have subsequently appeared." *South Carolina v. Katzenbach*, 383 U.S. at 328-29. This Court concluded that the Fifteenth Amendment empowered Congress to attack those local evils, which were reflected in the use of discriminatorily administered tests for voting and low rates of minority registration and turnout, through an "uncommon exercise of congressional power" that could be justified as a response to the then-prevailing "exceptional conditions." *Id.*, at 334.

Section 5 of the Voting Rights Act limits the ability of some States to serve as the "laboratories"

which Justice Brandeis envisioned. He spoke of "novel" steps, but there is little novel about voter ID laws, automatic recounts in tight elections, or absentee ballot reform. Those are unexceptional good government measures that a State might attempt. Section 5 blocks that kind of experimentation in some States, but not in others. Thus, Indiana can implement voter ID, but Texas cannot. Likewise, Alabama has had difficulty implementing automatic recount and absentee ballot reform measures, among other things. In order to justify the continuing "departure from the fundamental principle of equal sovereignty," this Court should "require a showing that [the Voting Rights Act's] disparate geographic coverage is sufficiently related to the problem that it targets." *Northwest Austin*, 129 S. Ct. at 2512.

When Congress decided to continue treating the covered States differently for another 25 years in 2006, one of the factors it relied on was the number of § 2 cases that were filed and brought to a successful conclusion in the covered States. Nearly 200 of the 653 cases that came to the attention of Congress are from Alabama. But the vast majority of those decisions, more than 180 of them, involved the same claim, a challenge to at-large election schemes, that was pursued against county commissions, county boards of education, and municipalities throughout Alabama. Treating those cases as 200 different cases dramatically overstates the differences between them. If treated as one theory, the gross number of cases becomes less and

the difference between covered and non-covered jurisdictions shrinks.

Indeed, when the justifications invoked by Congress are examined critically, as Shelby County, AULDF, and other amici will do, it should be clear to this Court that the "current burdens" imposed on the covered jurisdictions cannot be "justified by current needs." *Northwest Austin*, 129 S. Ct. at 2511. This Court should require Congress to revisit the formula it has used for more than 40 years as a basis for departing from the "fundamental principle of equal sovereignty." *Id.*, at 2512.

ARGUMENT

1. Section 5 limits covered jurisdictions from taking good government steps that non-covered jurisdictions can take without fear of denial of preclearance or second-guessing of preclearance submissions.

In at least three instances, § 5 has hampered the ability of a covered State to implement what it sees as good government reforms. First, Texas has been unable to implement its voter ID law, even though it is unclear whether it disenfranchises anyone, because a three-judge court found its attempt to disprove retrogression unpersuasive. Second, two cases from Alabama illustrate how, notwithstanding a State's good faith efforts, its compliance with § 5 will not necessarily bring it the peace of mind envisioned by Congress and the Constitution. Instead, in both cases, the State found

itself with laws that could not be enforced because a court found fault with the State's submissions, which had already been approved by the Department of Justice.

A. Section 5 affects a covered State's ability to adopt methods to identify the qualifications of voters.

Since 1965, §§ 4(b) and 5 of the Voting Rights Act have divided the States into covered and non-covered jurisdictions. The non-covered jurisdictions can change their election-related laws without seeking permission from the Attorney General or the United States District Court for the District of Columbia. The non-covered jurisdictions can also do things that the covered jurisdictions cannot.

The lower court joined Congress in reasoning that § 5 has only a positive deterrent effect, blocking the covered jurisdictions from making changes that might be deemed to have the purpose or effect of impairing the ability of minority voters to participate in the electoral process. *Shelby County v. Holder*, 679 F. 3d at 871-72. But that is only part of the picture. Covered jurisdictions can also be blocked from making changes that a State might see as beneficial or at least non-discriminatory, as the following examples show. And those changes can be made by non-covered jurisdictions with far less difficulty.

Take voter ID, for example. As this Court has explained, "While the most effective method of

preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). Accordingly, there is nothing facially unconstitutional about requiring prospective voters to present photo identification before voting. The States' interests in deterring and detecting voter fraud, safeguarding voter confidence, and counting only the votes of eligible voters are sufficient to justify a State's decision to enact such a requirement.

Significantly, when the parties challenging the validity of voter identification laws have been put to their proof, they have been unable to identify anyone who was prevented from voting because of the requirement. In Indiana, the district court found that the challengers had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Indiana law] or who will have his or her right to vote unduly burdened by its requirements." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006). Similarly, in Georgia litigation which followed the administrative preclearance of a voter identification law, the district court concluded, "[T]he fact that Plaintiffs, in spite of their efforts, have failed to uncover anyone 'who can attest that he/she will be prevented from voting' provides significant support for a conclusion that the photo ID requirement does not unduly burden the right to vote." *Common*

Cause of Georgia v. Billups, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007).[2]

In contrast, when a covered jurisdiction seeks preclearance, it bears the burden of showing that the change will not be discriminatory. In *Texas v. Holder*, __ F. Supp. 2d __, 2012 WL 3743676 (D.D.C. October 12, 2012) (three-judge court), the court declined to judicially preclear the Texas voter ID law because it would likely have a retrogressive effect. After criticizing the studies the parties offered to show the possession or non-possession of qualifying identification papers on the part of voters, the court stated, "[N]o party has submitted reliable evidence as to the number of Texas voters who lack photo ID, much less the rate of ID possession among different racial groups." *Id*., at [44]. The effect of that failure fell on Texas because the burden was Texas's to bear; the court explained that it had "little trouble" ruling against Texas "[b]ecause all of Texas's evidence on retrogression is some combination of

[2] The Plaintiffs' efforts in the Georgia case included an e-mail from Plaintiffs' counsel that a participant in the ACLU's Voting Rights Project forwarded to his "Key Georgia Contacts" under the subject line "URGENT REQUEST FOR HELP IN THE PHOTO ID CASE." John Fund and Hans von Spakovsky, WHO'S COUNTING? HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK (2012), at 65 ("WHO'S COUNTING?"). Fund and von Spakovsky write, "This broad appeal, sent to advocacy groups, churches, and other organizations all over Georgia, failed to turn up anyone to support the claim made by the plaintiffs that the voter ID law would prevent any Georgian from voting." *Id.*

invalid, irrelevant, and unreliable ...." *Id.*, at [44-45].[3]

In short, § 5 divides the States into two camps even with respect to their ability to use an election administration tool that this Court has said is constitutional. That division demonstrates that the § 5 preclearance process does not solely block disfavored practices.

B. Section 5 derailed an otherwise appropriate request for a recount in Alabama.

In 1999, fifteen years after the original submission, Alabama learned that its 1984 submission of new regulations governing the use of electronic voting equipment was only partially valid. The State learned that fact when a challenger who didn't want the recount successfully invoked § 5 to block the incumbent's effort to obtain one, when the first count of votes put them only 37 votes apart out of more than 212,000 cast.

The 1998 election for Sheriff of Jefferson County, Alabama, produced an instance in which the

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[3] The court said that its decision didn't "hinge merely on Texas's failure to prove a negative." *Id.*, at [45] (internal quotation and citation omitted). Instead, it went on to set out what it saw as a retrogressive effect.

Texas has declared that it intends to appeal from the three-judge court's denial of judicial preclearance, but further proceedings have been stayed pending a decision in this case on whether the reauthorization of § 5 in 2006, using the formula in § 4(b), is a constitutional exercise of Congress's powers.

State was not allowed to conduct a recount in a tight election, the margin of which was 37 votes. At that time, Alabama statutory law limited the grounds for an election contest and did not provide for a recount in advance of filing an election contest. A regulation promulgated in 1983 by the State's Electronic Voting Committee, however, empowered a qualified elector to request a recount of the ballots cast on electronic voting equipment before filing a contest and to use the results of the recount as a basis for the contest if it produced a count large enough to change the result. When the State submitted the Electronic Voting Committee's regulations, all of which were brand new, for preclearance in 1984, it pointed to the use of the new equipment, but not the basis for contest. See *Boxx v. Bennett*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999).

The 1998 election was the first time anyone had attempted to use the recount provision in the regulations, but a three-judge court blocked that effort. It concluded that the State's 1984 preclearance letter did "not put the Attorney General on notice that the submission included a provision creating a pre-election contest recount which could serve as a new basis for an election contest under Alabama law." *Id.*, at 1227.[4] More specifically, the court found that the State "did not identify the recount provision in an unambiguous and recordable

[4] AULDF notes that the Justice Department appeared as an amicus in support of the plaintiffs in *Boxx*. Nonetheless, the court's focus remained on what the State told the Attorney General, not what the Attorney General might have known.

manner" and rejected the State's contention that the regulations, which applied only where electronic voting equipment was used, stood on their own.

In short, 15 years after the State submitted the regulations for administrative preclearance, the State could not use them because it didn't use the right words. The Department of Justice never said it didn't know about the change; despite its amicus participation, the court didn't require it to say what it knew or didn't know.

In a concurring opinion, one judge suggested that empowering any qualified elector to ask for a recount had the potential for discriminatory application. He pointed to statements of the state court trial judge considering the actual election contest to the effect that the challengers were targeting black voters and precincts. *Boxx*, 50 F. Supp. 2d at 1232 (Thompson, J., concurring). The statements on which the concurring judge relied proved unworthy of that reliance.

When it reviewed the appeal from the election contest, the Alabama Supreme Court found numerous problems with that trial judge's procedures and with his ability to render an accurate count. *Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999). The Alabama Supreme Court noted that the contestants identified 274 voters suspected of having cast illegal or invalid ballots. Of the 274, only 64 were from the Bessemer Division of Jefferson County; the contestants also pointed to between 100 and 200 absentee ballots in the Birmingham

Division that were claimed to be invalid. *Id.*, at 1119. The trial judge ruled in favor of the challenger stating that he had counted "every single uncounted ballot" and that the challenger won. *Id.*, at 1120. The Supreme Court of Alabama twice remanded the case, the first time so that the trial judge could specify the materials he relied on and allow the parties to examine them as Alabama law required. *Id.*, at 1120 citing Ala. Code (1975) § 17-15-7(2).[5] After the trial court complied with that order, the Alabama Supreme Court reviewed those materials and found the trial court's count to be incorrect. In the end, the Alabama Supreme Court found that the incumbent won by 6 votes. *Id.*, at 1162.

An election result this close would have triggered an automatic recount in at least one neighboring non-covered jurisdiction. See, e.g., Fla. Stat. 102.141(7). The effect of the three-judge court's ruling was to deny Alabama the chance to conduct a recount under similar circumstances.

In 2003, Alabama amended its election laws to allow for an automatic recount when the margin is

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[5] In pertinent part, Ala. Code (1975) § 17-15-7(2), provides that, when a court examines election materials pursuant to a contest, it should consider, among other things, "the need to insure that votes are accurately cast and counted" and "the need to ensure that all persons and candidates involved in the election have the opportunity to observe the examination and ensure that an examination does not wrongfully alter the election results." *Id.* In addition, "The court must, when so requested by any party or candidate involved in the contest, allow such party or candidate, and his agents, to observe all of the examination proceedings." *Id.*

"not more than one-half of one percent of the ballots cast for the office, or the ballot measure," unless the defeated candidate waives the procedure. Ala. Code (2005) §17-13-12(a). In addition, if the recount changes the result, the outcome of the recount shall be grounds for a contest. Ala. Code (2005) § 17-13-12(j). Notwithstanding the Attorney General's amicus participation in *Boxx* against the State, the new automatic recount provision was administratively precleared. That administrative preclearance suggests that concerns about the discriminatory potential were unfounded.

C. Section 5 blocked Alabama's absentee ballot reform.

In the 1994 elections, the State of Alabama had a problem with the use of absentee ballots in a number of the Black Belt counties. In Greene County, Alabama, absentee ballots were sent to 14 people at the post office box used by the local Democratic Party, 24 were sent to the acting chairman of the local Democratic Party, and 8 to the address of the Greene County Sewer and Water Authority. Winthrop E. Johnson, COUNTING VOTES IN ALABAMA: WHEN LAWYERS TAKE OVER A STATE'S POLITICS (1999), at 78. More than 1000 absentee ballots were mailed by five people who brought "suitcases of ballots" to the post office. John Fund and Hans von Spakovsky, WHO'S COUNTING? at 106. The Alabama Legislature subsequently enacted a law which revised the procedures for obtaining absentee ballots and the State submitted it to the Department of Justice, where that law was

administratively precleared. Or, so the State thought.

Given some of the problems with absentee ballots in the 1994 election, the State sought to limit the places to which ballots could be mailed. After the change, voters could have ballots mailed to them at their places of residence or delivered to them in person, but not mailed to the place they regularly received mail, as before. That would prevent the mailing of ballots to the office of the local Democratic Party, for example, but some complained that the Postal Service didn't deliver the mail to residences in some smaller parts of rural counties; in those locations, the mail was available through General Delivery or through a post office box. *Ward v. State of Alabama*, 31 F. Supp.2d 968 (M.D. Ala. 1998)(three-judge court).

In retrospect, the change might not have worked. But the State was unable to test it and change it if necessary because a preclearance lawsuit found that the State didn't use the magic words. In *Ward*, the three-judge court said that a redlined version of the prior law that was an exhibit to the submission was not enough to put the Attorney General on notice of the change because the submission letter didn't point to that redline. The court went on to say that, if the letter had referred the Attorney General to the redline, the submission of the redline "might" be sufficiently clear to satisfy the State's burden. *Id*., at 972.

The court rejected the State's arguments, which included pointing out that the Department of Justice had asked questions and, one might think, if it did not ask, it had no concern with the provision. Again, the Department of Justice participated as an amicus against the State, but did not say what it knew or produce its files for inspection.

The three-judge court's opinion almost turns on the use or non-use of magic words. If the State had pointed to the redline in its letter, as the court deemed necessary, it might or might not have been sufficient. The three-judge court hardly informs the State how to tell whether pointing to a redline in a future letter will be sufficient or when it might have to say more.

These three examples demonstrate that § 5 is not only effective in blocking disfavored practices; it also attacks valid election procedures on highly technical or procedural grounds that have little or nothing to do with the underlying purpose of the law.

2. Congress erred in relying on the gross number of § 2 cases as a factor supporting its extension of § 5 for another 25 years.

When Congress reauthorized § 5 for another 25 years in 2006, it justified its action by pointing to, among other things, the number of successful § 2 lawsuits that had been filed in the covered

jurisdictions between 1982 and 2005.[6] In AULDF's judgment, that number is soft for two reasons. First, nearly 200 of those 653 cases come from Alabama, and all but a handful of those involve a challenge to at-large election schemes. One theory, thus, explains more than 180 cases, some of which involve tiny municipalities. Second, in a number of those cases, the remedy imposed exceeded the powers of the district court. Accordingly, in addition to the overinclusive and underinclusive elements discussed in Judge Williams's opinion see *Shelby County v. Holder*, 679 F.3d at 895-98 (Williams, J., dissenting), these elements undercut any finding of "current burdens" needed to justify Congressional action.

One report in the legislative record identified a total of 653 successful § 2 lawsuits, in both reported and unreported decisions, during that time. See *Voting Rights Act: Evidence of Continued Need:*

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[6] The count begins in 1982 for a reason. That is the year in which Congress overturned this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In *Bolden*, this Court held that § 2 prohibited only intentional discrimination, not disparate effect. In response, Congress added a results test to the language of § 2, codifying a "totality of the circumstances" test that does not require a showing of intentional discrimination.

The elimination of the requirement to prove intentional discrimination "precipitate[d] an unparalleled increase in section 2 litigation, as well as an unprecedented rate of success for plaintiffs." Anthony A Peacock, DECONSTRUCTING THE REPUBLIC: VOTING RIGHTS, THE SUPREME COURT, AND THE FOUNDERS' REPUBLICANISM RECONSIDERED (2008), at 80. (footnotes omitted.)

Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary, 201, (2006)("*Evidence of Continued Need*"). That number of successful § 2 cases represents the total of the published cases, which comes from a study by Professor Ellen Katz[7], and the unpublished decisions, which were assembled by the staff of The National Commission on the Voting Rights Act. See *Evidence of Continued Need* at 251 (reporting 12 successful reported cases and a total of 192 decisions for Alabama).

For its part, the Court of Appeals said that it couldn't "ignore the sheer volume" of such cases. *Shelby County v. Holder*, 679 F. 3d at 869. It reasoned that the number of such cases outweighed the limitations inherent in the structure of § 2, which is not limited to cases that include a showing of unconstitutional intentional discrimination. *Id.*, at 868-69. Likewise, it implicitly assumed that all § 2 lawsuits are equal.

The "sheer volume of successful Section 2 cases" is misleading for at least two reasons. First, as Senior Judge Williams pointed out in his dissent, the results of the McCrary study might support a "more tailored coverage formula," but not the one in § 4 (b). *Shelby County v. Holder*, 679 F. 3d at 897 (Williams, J., dissenting). Second, with respect to

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[7] The final Katz report can be found at http://sitemaker.umich.edu/votingrights/files/masterlist.xls.

Alabama, the count of 192 successful reported and unreported cases is inflated because, for the vast majority of those cases, the same practice of at-large election schemes for local governmental bodies was at issue.[8]

In his dissent, Senior Judge Williams noted that, when the reported cases were sorted by state, some of the covered states stood out and others were not readily distinguishable from some of the non-covered states. 679 F. 3d at 897 (Williams, J., dissenting). He explained that a "more narrowly tailored" formula which captured Mississippi, Alabama, and Louisiana, as well as the covered portions of South Dakota and North Carolina "might be defensible." *Id*. As for the other covered jurisdictions, two fully covered states (Arizona and Alaska) did not have any such cases, and the other covered jurisdictions were "indistinguishable" from the non-covered jurisdictions. *Id*. He pointed out, "Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered (five if we add back in the covered portion of South

[8] In her report, Professor Katz identified nine reported successful § 2 cases for Alabama. That count includes the case of *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992)(three-judge court). That case may represent a successful § 2 challenge, but it's not as if the State had a long-standing illegal practice that had to be remedied. Rather, *Wesch* arose after the Alabama Legislature proved unable to enact a congressional redistricting plan that reflected the results of the 1990 Census. In the end, the court adopted a remedial plan that was used until after the 2000 Census results were received. Thus, there is good reason to doubt whether *Wesch* belongs in her count.

Dakota)." *Id.* Judge Williams concluded, "A formula with an error rate of 50% or more does not seem 'congruent and proportional." *Id.*

As for the Alabama count, the vast majority of the § 2 claims involved challenges to the wide-spread practice of at-large elections. The relief awarded did not just involve a change to single-member districts. Instead, the district court, often with the consent of the parties to the cases, frequently changed the size of the governing body, imposed cumulative or limited voting schemes, or both. Section 2 did not empower the district court to make these changes, whether the parties agreed to them or not.

The challenge to at-large district schemes began with a lawsuit by the United States. In 1984, the Eleventh Circuit Court of Appeals held that the system used to elect the county commissioners and members of the Board of Education of Marengo County, Alabama, had a discriminatory effect on minority voters. *United States v. Marengo County Commission*, 731 F. 2d 1546 (11th Cir. 1984). Under that system, as modified in 1955, the county commission was elected on an at-large basis, with four commissioners being elected from residency districts.

African-American plaintiffs used the *Marengo County Commission* decision as a springboard to challenge the at-large system used to elect the county commissioners in nine Alabama counties. See *Dillard v. Crenshaw County Commission*, 831 F. 2d 246, 247 n. 1 (11th Cir. 1987).

Subsequently, the district court allowed the *Dillard* Plaintiffs to expand their claim to cover 183 county commissions, county boards of education, and municipalities that also used at-large schemes to elect their governing bodies. See *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988). Of those 183 jurisdictions, 176 settled, as to liability, remedy, or both, agreeing to the entry of an interim consent judgment and the certification of a plaintiff class of black residents. *Id.* Later, the parties agreed to treat 165 of those jurisdictions as separate lawsuits, with their own docket number. *Id.*

Given that the same state practice—at-large election schemes—was at issue in each case, treating each of the *Dillard* cases as a separate successful § 2 lawsuit overstates the number of them. This is particularly true given the number of the cases that resulted in settlement.

Moreover, many of those cases involved smaller municipalities, which lacked the resources to contest liability and remedy. The cases against these municipalities illustrate the extraordinary reach of § 2 of the Voting Rights Act, and the related intrusiveness of § 5. Each of the small municipalities involved in the *Dillard* cases would have to get permission from the Attorney General of the United States to change their district lines or move a polling place.

There are numerous examples of such cases among the 183 *Dillard* cases, and the affected municipalities lie all over the State of Alabama. Some of them are: Loachapoka[9] (180 residents in the 2010 Census); Orrville[10] (204 residents); Pickensville[11] (608 residents); Silas[12] (452 residents); Autaugaville[13] (870 residents); and many more. In *Dillard v. North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989)[14], the district court held that the town violated § 2 by intentionally withholding candidacy requirement information and forms from two African-American candidates; in the underlying case, the municipality, which has 145 residents

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[9] Dillard v. Town of Loachapoka, Case No. 87-cv-1248, in the United States District Court for the Middle District of Alabama. Loachapoka is in Lee County, Alabama, not far from Auburn. The 2010 Census results are available at, among other places, www.ador.state.al.us/licenses/census.

[10] Dillard v. Town of Orrville, Case No. 87-cv-1270, in the United States District Court for the Middle District of Alabama. Orrville is in Dallas County, Alabama. The county seat of Dallas County is Selma.

[11] Dillard v. Town of Pickensville, Case No. 87-cv-1275, in the United States District Court for the Middle District of Alabama. Pickensville is in Pickens County, Alabama, which borders on Mississippi.

[12] Dillard v. Town of Silas, Case No. 87-cv-1291, in the United States District Court for the Middle District of Alabama. Silas is in Choctaw County, Alabama, which lies on the Mississippi border south of Pickens County.

[13] Dillard v. Town of Autaugaville, Case No. 87-cv-1157, in the United States District Court for the Middle District of Alabama. Autaugaville is in Autauga County, in south central Alabama, north of Montgomery.

[14] Professor Katz includes this decision in her report.

according to the 2010 Census, agreed to a five-member commission elected from single-member districts. *Id*., at 1473.

Separate and apart from the number of cases, the relief awarded exceeded the court's powers under § 2. That agreed to relief generally started with a change to single-member districts. In some jurisdictions, though, the *Dillard* Plaintiffs and the district court found it necessary to change the size of the governing body or adopt different schemes of voting in order to provide what the district court believed to be meaningful relief. In Chilton County, for example, the relief involved increasing the size of the county commission and board of education from five to seven members elected using a scheme of cumulative voting. See *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988).[15] The district court approved that plan even though the "threshold of exclusion" (12.5%) under the plan was greater than the minority population (11.9% of the county's total population). *Id*., at 874-75.

Similarly, according to the 1980 Census, for example, the black population of Baldwin County was 16.19% of the total population, and a decrease to 13.86% was expected in the 1990 Census. The district court rejected the county Board of Education's proposal for a five-district plan finding

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[15] In her report, Professor Katz includes the Eleventh Circuit's summary affirmance of the district court's judgment. *Dillard v. Chilton County Bd. of Educ.*, 868 F. 2d 1274 (11th Cir. 1989).

that it would not give black voters "an equal opportunity to participate in the political process" and would submerge them in districts dominated by white voters. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. at 1469. Instead, the court adopted the seven-member plan proposed by the Dillard Plaintiffs, suggesting that the plan "provides full relief." *Id.*, at 1470.

The district court's confidence was unfounded. Baldwin County, which is across the bay from Mobile, grew dramatically, but most of the influx was white. According to the 2000 Census, the black population of Baldwin County was only 9.13% of the county's total population. See *Dillard v. Baldwin County Com'rs*, 376 F. 3d 1260, 1264 (11th Cir. 2004) ("As of the 2000 census, the county's African-American voting-age population had declined to 9.13%, and Baldwin County no longer had a minority-majority district."). The seven-member plan had been drawn with an eye toward proportionality, but events outstripped it.

After this Court's decision in *Holder v. Hall*, 512 U.S. 874 (1994), undercut the legality of the district court's remedy, challengers began to try to undo it. In *Holder*, a plurality of this Court held that the size of a governing body could not be the subject of a vote dilution challenge under § 2 because "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Id.*, 512 U.S. at 881; see also *Nipper v. Smith*, 39 F. 3d 1494, 1532 (11th Cir, 1994)(en banc)("[Under *Holder*, federal courts cannot mandate

as a section 2 remedy that a state or political subdivision alter the size of its elected bodies."); . *White v. Alabama*, 74 F. 3d 1058, 1072 (11th Cir. 1996).[16]

In *Wilson v. Minor*, 220 F. 3d 1297 (11th Cir. 2000), the Eleventh Circuit affirmed the district court's order vacating an injunction that changed the size of the county commission in Dallas County, Alabama. Before the injunction was entered, four commissioners were elected on an at-large basis from residency districts, and the probate judge, who was elected on a county-wide basis, served as ex officio chair, voting only to break ties. The injunction created a five-member commission elected from single-member districts. The court found that the pre-injunction "role, purpose, and power" of the probate judge were "significant[ly]" different from those of a fifth commissioner. *Id.*, at 1309.

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[16] Professor Katz includes *White v. Alabama* in her report. As with *Wesch*, see fn. 8, supra, there is reason to doubt that it should be so counted. In *White*, the Eleventh Circuit vacated a consent judgment that would have changed the size of the Alabama appellate courts, which are elected on a partisan basis, and created a selection process that would insure that the black voters in Alabama could select at least two representatives of their choice. The court held that "the district court, in fashioning its remedy, lacked the authority to require Alabama to increase the size of its appellate courts." *White v. Alabama*, 74 F. 3d at 1072. The remedy could not be sustained as a consent judgment either, because there were parties who objected to the proposed relief. *Id.*, at 1073. Far from being a successful invocation of § 2, *White v. Alabama* blocked its improper use.

Similarly, in *Dillard v. Baldwin County Comm'rs*, the Eleventh Circuit affirmed the district court's order dissolving the permanent injunction which increased the number of commissioners from five to seven. The court concluded, "If the [minority] group is too small to elect candidates of its choice in the absence of a challenged structure or practice, then it is the size of the minority population that results in the plaintiff's injury, and not the challenged structure or practice." *Id.*, 376 F. 3d at 1269.

These efforts to undo the overreaching of the *Dillard* remedies came to an end for two reasons. First, this Court's decision in *Lance v. Coffman*, 549 U.S. 437 (2007), undercut the standing of the challengers, leading to the vacatur of a remedial order and remand with instructions to dismiss the challenge. See *Dillard v. Chilton County Com'n*, 495 F. 3d 1324 (11th Cir. 2007). Second, the Alabama legislature passed a statute in which it essentially accepted the results in the *Dillard* cases which had not been the subject of challenges. Ala. Code (2008) § 11-3-1(c).

This Court should view the counting of the *Dillard* cases as individual cases with suspicion. If counted as one case with many branches, the total number of § 2 cases would be fewer than 500, not 653, and the difference between the covered and non-covered jurisdictions would no longer be 56% to 44%. AULDF believes that, if the cases were properly counted, the district court would have found the

number and distribution of § 2 cases far less significant.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to reverse the decision below.

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