No. 12-96

IN THE
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

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

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

AMICUS CURIAE BRIEF OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus the Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold and restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people.[1]

In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as amicus curiae or on behalf of parties before this Court in several cases addressing the constitutional limits on federal power, including *National Federation of Independent Business* v. *Sebelius*, 132 S.Ct. 2566 (2012); *American Electric Power Co.* v. *Connecticut*, 131 S.Ct. 2527 (2011); *Bond* v. *United States*, 131 S.Ct. 2355 (2011); *Reisch* v. *Sisney*, No. 09-953, *cert. denied*, 130 S.Ct. 3323

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[1] No counsel for a party authored this brief in whole or in part. No monetary contributions were made with the intent to fund the preparation or submission of the brief. This brief is submitted pursuant to the blanket consents on file with the Court.

(2010); *Rapanos* v. *United States*, 547 U.S. 715 (2006); *GDF Realty Investments, Ltd.* v. *Norton*, No. 03-1619, *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, LLC* v. *Norton*, No. 03-761, *cert. denied*, 540 U.S. 1218, *reh'g denied*, 541 U.S. 1006 (2004); *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Schaffer* v. *O'Neill*, No. 01-94, *cert. denied*, 534 U.S. 992 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

Congress exceeded its constitutional authority when it reauthorized Voting Rights Act (VRA) Section 5 preclearance based on "second-generation barriers" to voting.

Preclearance is an intrusive remedy with substantial federalism costs, and the Court only upheld this drastic measure after it was first adopted nearly fifty years ago due to extraordinary circumstances. Specifically, certain jurisdictions were cycling through first-generation voting barriers "for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). First-generation barriers are unconstitutional discriminatory devices that actually prevent citizens from voting, like literacy tests and grandfather clauses. See *id*., at 311. With Section 5, Congress purported to

target only Fifteenth Amendment violations. The Fifteenth Amendment applies only to state action, and it prohibits only intentional racial discrimination that prevents citizens from voting.

Section 5 achieved great success in "banish[ing] the blight of racial discrimination in voting" in the covered jurisdictions. *Id.*, at 308. When Congress reauthorized Section 5 in 2006, there was no contemporary evidence of the "exceptional conditions" that existed in the covered jurisdictions in 1965. *Id.*, at 334–335. Instead, Congress relied on some evidence of racially polarized voting in 2006 and the claim that this constituted a continuing vestige of discrimination, as opposed to the barriers that prevented citizens from voting in 1965.

These findings are insufficient to sustain Section 5. Racially polarized voting—cited as evidence of "discrimination"—does not prove any Fifteenth Amendment violation, because it is neither state action nor unconstitutional government discrimination. Nor do VRA Section 5 enforcement, VRA Section 2 enforcement, or the history of dispatching federal election observers provide sufficient evidence of the persistent and pervasive Fifteenth Amendment violations that would be necessary to justify Section 5's reauthorization.

Section 5 preclearance simply is not tailored to fix the alleged problems that Congress

purported to target with the 2006 reauthorization. Congress readopted the old preclearance coverage formula that explicitly targets only those jurisdictions that used first-generation barriers decades ago. If Congress really intended to remedy racially polarized voting through Section 5 preclearance, then it would have adjusted the coverage formula. Instead, Congress left in place an arbitrary coverage formula that infringes on the sovereignty of States.

ARGUMENT

I. PRECLEARANCE WAS DESIGNED TO REMEDY FIRST-GENERATION VOTING BARRIERS, NOT SECOND-GENERATION BARRIERS.

A. First- Versus Second-Generation Voting Barriers.

Congress reauthorized Section 5 preclearance in 2006 based on so-called "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARAA), Pub. L. No. 109-246, §2(b)(2), 120 Stat. 577, 577 (2006). Congress cited evidence of racially polarized voting, *id.* §2(b)(3), 120 Stat. at 577; Section 5 preclearance enforcement, §2(b)(4), 120 Stat. at 577;

Section 2 lawsuits in covered jurisdictions, §2(b)(4)(C)-(D), 120 Stat. at 578; and dispatching of federal election observers, §2(b)(5), 120 Stat. at 578. Congress acknowledged that evidence of "second generation" barriers shows only "vestiges of discrimination in voting." *Id.* §2(b)(2), 120 Stat. at 577. Yet none of the findings evidences the type of "barrier" that actually prevents anyone from voting that Section 5 was originally crafted to remedy.

First-generation voting barriers, in contrast, are unconstitutional discriminatory devices that actually prevent citizens from voting. These devices include literacy tests, grandfather clauses, property qualifications, "good character" tests, and "understand[ing]" tests. See *Katzenbach*, 383 U.S., at 311.

B. Preclearance Was Designed To Prevent Jurisdictions From Adopting New Unconstitutional First-Generation Voting Barriers.

The Voting Rights Act was designed as a remedy to those first-generation barriers that were then widely used to intentionally deny minorities the ability to vote. See *id.*, at 311–312. Certain sections of the Voting Rights Act directly enforced the Fifteenth Amendment by prohibiting first-generation barriers. See*, e.g.*, 42 U.S.C. §1973(a) (private cause of action to enforce §1 of Fifteenth Amendment); §1973b(a)

(banning discriminatory devices in covered jurisdictions); §1973h (banning poll taxes); §1973i(a) (banning voting prohibitions and refusals to count such votes).

Case-by-case enforcement, however, proved ineffective at eradicating these unconstitutional devices that prevented citizens from voting. When a court invalidated a jurisdiction's use of a particular unconstitutional device, that jurisdiction would "merely switch[] to discriminatory devices not covered by the federal decrees" or "enact[] difficult new tests designed to prolong the existing disparity between white and Negro registration." *Katzenbach*, 383 U.S., at 314.

Congress therefore enacted Section 5 preclearance to prevent jurisdictions from using these catch-me-if-you-can tactics to ignore the Constitution. See *Beer* v. *United States*, 425 U.S. 130, 140 (1976) ("Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down."). Preclearance was designed to prevent jurisdictions from circumventing direct prohibitions on first-generation voting barriers. By requiring covered jurisdictions to preclear all changes to their voting laws, Congress stopped these jurisdictions from cycling through unconstitutional discriminatory devices.

Preclearance, however, was an intrusive remedy devised to address extraordinary circumstances. Preclearance "authorizes federal intrusion into sensitive areas of state and local policymaking," which "imposes substantial 'federalism costs.'" *Nw. Austin Mun. Util. Dist.* v. *Holder*, 557 U.S. 193, 202 (2009) (quoting *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282 (1999)). Such a drastic remedy was permissible, this Court ruled, when necessary to combat "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S., at 335. The Court therefore explained that Congress had the authority to enact Section 5 preclearance initially, as it was "[u]nder the compulsion of these unique circumstances." *Ibid.*

This Court found preclearance constitutional on the basis that it would stop certain jurisdictions from cycling through unconstitutional first-generation voting barriers—that is, devices that actually prevented citizens from voting. And it worked; preclearance eradicated first-generation voting barriers by preventing jurisdictions from adopting new unconstitutional devices. See *Nw. Austin*, 557 U.S., at 202.

When Congress reauthorized Section 5 in 2006, however, Congress had before it no evidence that there still existed widespread and

relentless efforts by state and local governments to prevent minorities from voting. Nor was there evidence that pervasive intentional discrimination would resume but for Section 5's continued application. Congress instead reauthorized Section 5 based on "second generation barriers"—interpreted by the Court of Appeals to mean "vote dilution techniques"[2]—and other evidence of "continued discrimination." VRARAA §2(b)(2), (b)(4), 120 Stat. at 577. These are nothing like the unconstitutional first-generation barriers that jurisdictions were using decades ago, and they cannot sustain Section 5.

Second-generation barriers, which implicate only the weight of a vote cast, do not establish the requisite nexus between Section 5's intrusive remedy and the Fifteenth Amendment violations that Section 5 was designed to cure. See *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997) (congressional enforcement powers require "congruence and proportionality");

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[2] *Shelby County, Ala.* v. *Holder*, 679 F.3d 848, 878 (D.C. Cir. 2012). The Department of Justice and the lower courts have given greater import to "second-generation" barriers than Congress did in reauthorizing Section 5. Congress cited such barriers as evidence of "vestiges of discrimination," but never specifically identified any second-generation barrier that prevented citizens from voting. VRARAA §2(b)(2), 120 Stat. at 577.

Katzenbach, 383 U.S., at 328. Congress purported to target, through Section 5, only Fifteenth Amendment violations, and this Court has "never held that vote dilution violates the Fifteenth Amendment." *Reno* v. *Bossier Parish Sch. Board,* 528 U.S. 320, 334 n.3 (2000) ("*Bossier II*"). Indeed, Congress's record supporting Section 5's original authorization consisted of evidence of gamesmanship by covered jurisdictions denying minorities the right to vote—not evidence of practices affecting the weight of votes already cast. Vote dilution is within the province of Section 2, a separate and permanent component of the VRA implicating the Fourteenth Amendment. *Georgia* v. *Ashcroft,* 539 U.S. 461, 478 (2003). This Court has "consistently understood" Section 2 and Section 5 to "combat different evils and, accordingly, to impose very different duties upon the States." *Id.*, at 477–478 (quoting *Reno* v. *Bossier Parish Sch. Board*, 520 U.S. 471, 477 (1997) ("*Bossier I*")). VRA Section 2 already provides a comprehensive remedy for addressing any potential problems posed by practices that affect the weight of the votes cast.

II. THE EVIDENCE THAT CONGRESS CREDITED AS PROOF OF DISCRIMINATION IS CONSTITUTIONALLY INSUFFICIENT TO JUSTIFY PRECLEARANCE.

To constitutionally justify Section 5's reauthorization, Congress in 2006 needed to

compile a record of pervasive and "systematic resistance to the Fifteenth Amendment" in the covered jurisdictions that was not redressable by case-by-case litigation. *Katzenbach*, 383 U.S., at 328; see *Nw. Austin*, 557 U.S., at 224 (THOMAS J., concurring in the judgment in part and dissenting in part).

Congress did not do so. Much of the evidence Congress cited as proof of "vestiges of discrimination in voting" or simply as proof of "continued discrimination" is not probative of Fifteenth Amendment violations at all. VRARAA §2(b)(2), (b)(4), 120 Stat. at 577. And any evidence that is probative does not come close to approximating the "unremitting and ingenious" campaign of discrimination that justified "legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S., at 309, 334.

A. Racially Polarized Voting

Congress cited "racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965" as a basis for reauthorizing Section 5. VRARAA §2(b)(3), 120 Stat. 577. Congress touted this as the "clearest and strongest evidence" for the continued necessity of preclearance. H.R. Rep. No. 109-478, p. 34 (2006). But the existence of racially polarized voting is not evidence of intentional government discrimination in voting—the only type of discrimination that Congress is empowered to remedy under the

Fifteenth Amendment. See, *e.g.*, *Terry* v. *Adams*, 345 U.S. 461, 472–473 (1953) (Frankfurter, J.).

The Fifteenth Amendment prohibits only the "purposefully discriminatory denial or abridgment *by government* of the freedom to vote." *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (emphasis added). It authorizes Congress only to remedy "action 'by the United States or by any state,' and does not contemplate wrongful individual acts." *James* v. *Bowman*, 190 U.S. 127, 135 (1903). A Fifteenth Amendment violation thus requires a showing of government action and intent to discriminate, and no violation will be found when minorities are free to "register and vote without hindrance." *Bolden,* 446 U.S., at 65.

The evidence that Congress amassed of racially polarized voting cannot prove a single Fifteenth Amendment violation because it is neither government action nor discriminatory. Congress defined racially polarized voting as the pattern in which "voting blocs within the minority and white communities cast ballots along racial lines."[3] H.R. Rep. No. 109-478, p. 34

[3] Racially polarized voting is generally portrayed as white voters refusing to support minority-preferred candidates. But polarization is equally dependent upon the reverse: minority voters refusing to support candidates preferred by white voters.

(2006). Of course, this is the result of private free choice and not state action. *Bolden*, 466 U.S., at 63–65; *Nw. Austin*, 557 U.S., at 228 (THOMAS, J., concurring in the judgment in part and dissenting in part)). This Court has held that such patterns are not evidence of unconstitutional discrimination, unless accompanied by evidence of discriminatory intent on the part of the government. See *Bolden,* 466 U.S., at 64–65 (citing *Smith* v. *Allwright*, 321 U.S. 649 (1944); see *Terry*, 345 U.S., at 473 ("To find a denial or abridgment of the guaranteed voting right to [a racial minority group], . . . one must find that the State has had a hand in it.").

Perhaps recognizing the error in casting polarization as evidence of a Fifteenth Amendment violation, the Attorney General has suggested that racially polarized voting is relevant as a predicate—albeit only one of many—to vote dilution. [4] This fall-back argument fails for many reasons.

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[4] Evidence of racially polarized voting is not the same as evidence of retrogressive vote dilution. Unconstitutional vote dilution occurs where changes in voting procedures "nullify" the ability of minority voters "to elect the candidate of their choice" and is unconstitutional. *Shaw* v. *Reno,* 509 U.S. 630, 641 (1993) (citation and internal quotation marks omitted). But there is no constitutional right to the "electoral success [of] minority-preferred

First, there is no evidence that Congress intended to justify Section 5 based on the fact that racially polarized voting could be a predicate for vote dilution; the evidence supports only that Congress erroneously considered it to be evidence that Section 5 was still needed for minorities to be able to vote and run for office. See H.R. Rep. No. 109-478, p. 34 (2006) (describing polarization as evidence "of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process"). Had Congress "truly understood" polarization to be relevant because it is a predicate for unconstitutional vote dilution, "one would expect some mention of that conclusion in the Act's legislative findings." *Board of Trustees of Univ. of Ala.* v. *Garrett,* 531 U.S. 356, 371 (2001). There is none. *Ibid*.

Second, even if racially polarized voting can be a predicate for vote dilution, that cannot justify Section 5 preclearance. As explained in Part I.B., Section 5 was designed to remedy Fifteenth Amendment violations, but vote dilution does not violate the Fifteenth Amendment. *Bossier II*, 528 U.S., at 334 n.3.

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candidates." *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 428 (2006). As private action wholly separate from voting procedures, racial bloc voting cannot justify Section 5.

Moreover, preclearance is neither a logical nor a necessary tool to remedy instances of vote dilution. See *supra* Part I.B.

Finally, Congress's reliance on racially polarized voting as justification for Section 5 is particularly unwarranted, because if Section 5 affects racial polarization at all, it likely exacerbates it rather than diminishes it. The Department of Justice previously interpreted Section 5 to require gerrymandering that creates voting districts composed of primarily minority voters, in order to satisfy the burden of non-retrogression given changing populations.[5] This Court, however, has recognized that such gerrymanders "exacerbate the very patterns of

[5] For example, in North Carolina, the Department of Justice pursued a "policy of maximizing the number of majority-black districts." *Shaw* v. *Hunt*, 517 U.S. 899, 913 (1996). To comply with the Justice Department's aims, the North Carolina legislature was required to create a district resembling a "bug splattered on a windshield," and a "more unusually shaped" district "wind[ing] in snakelike fashion" for 160 miles. *Shaw* v. *Reno*, 509 U.S., at 635 (citation and internal quotation marks omitted). The Department pursued the same policy in Georgia. *Miller* v. *Johnson,* 515 U.S. 900, 925 (1995) ("In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.").

racial bloc voting that majority-minority districting is sometimes said to counteract," by reinforcing racial stereotypes making elected officials "more likely to believe that their primary obligation is to represent only the members of [a particular racial] group." *Shaw* v. *Reno*, 509 U.S. 630, 648 (1993). By retaining Section 5 preclearance, the government would perpetuate the precise racially polarized voting tendencies that the government purports to condemn.[6]

Far from being "strong evidence" for the continued justification of Section 5, racially polarized voting is never a Fifteenth Amendment violation, much less an "insidious and pervasive" pattern of "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S., at 309. Racially polarized

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[6] There is, at the very least, inconsistency in denouncing racially polarized voting while simultaneously lamenting failures to draw majority-minority districts to insulate African-American and white voters from each other, and presuming that a minority group has a single "candidate of choice" different from non-minority voters. See *Bolden*, 466 U.S., at 88 (Stevens, J., concurring) ("There is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics.").

voting therefore falls far short of justifying Section 5's "substantial departure from ordinary concepts of our federal system." *United States* v. *Board of Commr's of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (alteration and footnote omitted).

B. Section 5 Enforcement Statistics

Congress also considered as evidence of "discrimination" 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 enforcement actions . . . in covered jurisdictions since 1982." VRARAA §2(b)(4)(A), 120 Stat. at 577. Additionally, Congress compiled statistics of the "number of requests for declaratory judgments denied by the United States District Court for the District of Columbia" as support for reauthorization. *Id.* §2(b)(4)(B), 120 Stat. at 577. Modern preclearance statistics, however, are "poor proxies for intentionally discriminatory state action in voting, for a number of reasons." Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane, 66 Ohio St. L. J. 177, 190 (2005).

The Department of Justice objections cannot be considered evidence of purposefully discriminatory state action, because Section 5 is

a prophylactic remedy that prohibits conduct beyond what is forbidden by the Constitution. Prior to 2006, the question whether a voting change was entitled to preclearance under Section 5 depended on whether the change "would lead to a retrogression in the position of racial minorities," not whether the change was motivated by discrimination. See *Ashcroft,* 539 U.S., at 480 (citation and internal quotation marks omitted). Indeed, in the nearly three decades between *Beer* (1976) and *Ashcroft* (2003), the preclearance analysis did not even consider the existence of discriminatory intent. Pitts, Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine), 32 Pepp. L. Rev. 265, 273 (2005). It is no surprise then that an objection is not tantamount to an instance of intentional discrimination.[7]

Congress likewise failed to discount illegitimate objections. For example, in the 1990s, the Department of Justice adopted a

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[7] Even those objections based on discriminatory purpose do not prove that a voting practice change was motivated by discrimination. An objection is merely "one side's opinion" about the purpose because there has been no trial or formal hearing to resolve the question. Voting Rights Act: Section 5—Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 29-30 (2005) (testimony of Roger Clegg).

"policy of objecting to certain State actions that were perfectly constitutional, a policy the Supreme Court later rejected." An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 9 (2006) (statement of Richard L. Hansen); see *Miller*, 515 U.S., at 917–919 (rejecting as intentionally discriminatory the Department's policy of denying preclearance to plans that failed to maximize majority-minority districts intentionally). These illegitimate objections, too, are included within the tally of those used to justify Section 5's reauthorization. H.R. Rep. No. 109-478, pp. 21–24, 36–40 (2006).

Even taking Congress's objection statistics at face value, those statistics cannot demonstrate persisting discrimination on any significant scale in the covered jurisdictions. The evidence relied upon by Congress proved that objections are steadily declining. S. Rep. No. 109-295, p. 13 (2006). Between 1982 and 2004, only 0.74% of preclearance submissions resulted in an objection (752 of 101,440 submissions). See *ibid.*; see also H.R. Rep. No. 109-478, p. 22 (2006). Though the early 1990s witnessed an increase, the Department was then using the invalid policy that it would object to any proposed change that did not maximize the number of majority-minority districts. See *Miller*, 515 U.S., at 921. Not surprisingly, once

that invalid policy was discredited, the number of objections declined precipitously. S. Rep. No. 109-295, p. 13 (2006) (noting 61 objection letters issued in 1994, and only seven issued in 1996, the year after the *Miller* decision issued). The Department objected to only three out of 5,211 submissions in 2004, and to just a single submission out of 4,734 in 2005. *Ibid.*

The fact that the Department submitted "more information requests" to covered jurisdictions seeking preclearance is even less probative of intentional discrimination than the objections. H.R. Rep. No. 109-478, p. 40 (2006). Congress noted that "since 1982, over 205 voting changes have been withdrawn" as a result of these requests. *Id.*, p. 41. But these statistics prove only that the Department lacked sufficient evidence to make a preclearance determination—not that the Department had determined the proposed change to be illegal. *Id.*, p. 40.

Further, the decision by state and local governments to withdraw submitted changes in the face of such inquiries may suggest efforts to comply with the Constitution—the very opposite of overt defiance. They could also indicate that bureaucratic hurdles have deterred covered jurisdictions from making voting changes at all, regardless of whether those changes could be upheld as constitutional. In either event, they

are not evidence of persistent voting discrimination in the covered jurisdictions.

C. Section 2 Enforcement Actions

Congress's reauthorization of Section 5 was also predicated upon evidence of "the continued filing of section 2 cases that originated in covered jurisdictions." VRARAA, §2(b)(4)(C)-(D), 120 Stat. at 578. This evidence fails to justify Section 5's remedy for multiple reasons.

Section 2 litigation is not evidence of intentional discrimination prohibited by the Fifteenth Amendment. For one thing, the mere filing of a lawsuit does not prove a Section 2 violation. Moreover, Section 2 does not have an intent component, which is necessary to show a Fifteenth Amendment violation. *Bossier I,* 520 U.S. 471, 482 (1997). In fact, out of all of the Section 2 cases filed since 1982, Congress identified only twelve reported decisions finding unconstitutional discrimination in covered jurisdictions. S. Rep. No. 109-295, p. 13 (2006) & App. 1. Half of these involved discrimination against white voters. *Ibid.*

Given the dearth of cases finding intentional discrimination against minorities, the Attorney General has attempted to infuse relevance into the remaining Section 2 actions by arguing that this Court should also credit unpublished decisions and favorable settlements. But the study that the Attorney

General relied upon—the Report of the National Commission on the Voting Rights Act—revealed only 11 findings of intentional discrimination in covered jurisdictions since 1982. See The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong. 10 (2006) (testimony of Richard H. Pildes); S. Rep. No. 109-295, p. 102 (2006). And those cases described as "favorable settlements" are no evidence whatsoever of intentional discrimination that prevents citizens from voting.

D. Dispatching Elections Observers To Covered Jurisdictions

Congress also sought to justify Section 5 based on its finding that "tens of thousands of Federal observers . . . have been dispatched to observe elections in covered jurisdictions." VRARAA §2(b)(5), 120 Stat. at 578. These dispatches do not support a continuing need for Section 5 because they are in no way dependent upon the existence of actual discrimination in voting.

The dispatch of federal elections observers is not evidence of actual discrimination because, as Congress expressly acknowledged, dispatches trigger upon Congress's "reasonable belief that minority citizens [were] at risk of being disenfranchised." H.R. Rep. No. 109-478, p. 44 (2006). Actual evidence of intentional discrimination is not required.

Ultimately, like so many of the other alleged indicators of "second-generation barriers," the dispatch of elections observers to covered jurisdiction evidences only a continued *suspicion* that discrimination, of some sort, continues in covered jurisdictions. This does not measure actual existence of ongoing discrimination. Congress's mere suspicion cannot possibly justify the reauthorization of Section 5 preclearance. *Katzenbach* demanded much more before upholding Section 5's intrusive remedy, and suspicion alone will never demonstrate a congruent and proportional remedy, much less one that justifies Section 5's significant federalism costs.

III. THE PRECLEARANCE COVERAGE FORMULA IS NOT TAILORED TO REMEDY SECOND-GENERATION BARRIERS.

The preclearance coverage formula is not calibrated to target jurisdictions with second-generation barriers and evidence of continued discrimination. Section 5's coverage formula as reauthorized in 2006 fails *Katzenbach*'s requirement that preclearance be "rational in both practice and theory." 383 U.S., at 330.

The coverage formula explicitly targets only those jurisdictions that used first-generation barriers decades ago. The formula examines whether jurisdictions had prohibited first-generation barriers in 1964, 1968, or 1972, and whether those jurisdictions had low voter

registration or turnout in those election cycles. 42 U.S.C. §1973b(b). The preclearance coverage formula in Section 4(b) has remained unchanged since 1975. See *Nw. Austin*, 557 U.S., at 203.

If Congress really intended Section 5 to remedy the specific problems it identified when reauthorizing preclearance in 2006, then it would have adjusted the coverage formula to cover jurisdictions that actually had such problems. For example, racially polarized voting is hardly limited to jurisdictions targeted by the existing coverage formula. Likewise, Section 2 litigation arises across the country. If Congress was actually trying to remedy such occurrences, then it should have attempted to do just that. Instead, Congress's reauthorization of Section 5 continued to single out certain jurisdictions based on data from two generations ago. This is especially striking because African-American voter turnout in 2008 appeared higher in covered states than in non-covered states.[8]

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[8] The Census Bureau provides African-American turnout data for eight of the nine covered states, and shows an average African-American turnout among those states of 65.9%. See Seaman, An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System, 30 St. Louis U. Pub. L. Rev. 9, 64 (2010). This is higher than the 64.7% national average. See United States Census Bureau, Voting and Registration in the Election of

"[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S., at 203; see *ibid.* (recognizing "our historic tradition that all the States enjoy 'equal sovereignty'" (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960))). Congress, though, did not even attempt to tailor the 2006 preclearance reauthorization to cover jurisdictions with second-generation barriers that reduce the effectiveness of certain votes. Congress did not try to identify any "local evils" that could possibly justify the disparate treatments of States. *Katzenbach*, 383 U.S., at 328-329.

Congress therefore violated "the sovereign status of the States," which retain "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden* v. *Maine*, 527 U.S. 706, 714 (1999). A State's election process is at the heart of its sovereignty. See *Oregon* v. *Mitchell*, 400 U.S. 112, 125 (1970) ("No function is more essential to the separate and independent existence of the States and their governments than the power to

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November 2008 – Detailed Tables, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html.

determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filing local public offices."). Yet Congress continues to interfere with the sovereignty of covered States by exercising a prior restraint over their election laws, regardless whether sufficient second-generation voting barriers exist within that State. Conversely, Congress has decreed that non-covered States are not subject to such a prior restraint, even if significant vote dilution occurs in the State. That arbitrary distinction demeans the dignity of the States, and it is not a valid use of Congress's Fifteenth Amendment enforcement power.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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