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

BRIEF FOR JOHN NIX, ANTHONY CUOMO, AND DR. ABIGAIL THERNSTROM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL E. ROSMAN
MICHELLE A. SCOTT
CENTER FOR
INDIVIDUAL RIGHTS
1233 20th St. NW
Suite 300
Washington, DC 20036

MICHAEL A. CARVIN
Counsel of Record
HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTORY AUTHORITIES

OTHER AUTHORITIES

BRIEF FOR *AMICI CURIAE*

John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom respectfully submit this brief as *amici curiae* in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

John Nix and Anthony Cuomo are voters in Kinston, North Carolina, and Nix was a candidate for City Council in 2011 and intends to run in 2013. They previously challenged Section 5 after DOJ denied preclearance for a Kinston referendum adopting nonpartisan elections, but the lawsuit was mooted on appeal when DOJ changed its position. *LaRoque v. Holder*, 831 F. Supp. 2d 183, 192-93 (D.D.C. 2011), *vacated as moot*, 679 F.3d 905 (D.C. Cir. 2012), *cert. denied sub nom. Nix v. Holder*, --- S. Ct. ----, 2012 WL 2955934 (Nov. 13, 2012).

Abigail Thernstrom is the Vice Chair of the U.S. Commission on Civil Rights, an adjunct scholar at the American Enterprise Institute, and a leading commentator on elections and race. *See, e.g.*, Abigail Thernstrom, *Redistricting in Today's Shifting Racial Landscape*, 23 Stan. L. & Pol'y Rev. 373 (2012). She is presenting her personal expert opinion, not the Commission's views.

---

[1] The parties' letters of consent to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person other than *amici* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. Section 5 of the VRA exceeds the Reconstruction Amendments' scope in two significant ways. *First*, it imposes in certain jurisdictions a unique preclearance procedure that presumptively invalidates "*all* changes to state election law[,] however innocuous," *Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009), which is an extraordinary reversal of the normal presumption of legitimacy afforded to sovereign enactments, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). *Second*, it permanently invalidates changes with a proscribed racial "effect," 42 U.S.C. § 1973c(a), even though the Constitution bars only practices with a "discriminatory purpose," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997) ("*Bossier I*"). Importantly, this extra-constitutional preclearance regime is imposed *on top of* Section 2 of the VRA, which, since 1982, already exceeds the Constitution's "purpose" ban by proscribing voting practices with certain discriminatory "results." 42 U.S.C. § 1973(a); *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).

Given that Section 5's requirements markedly exceed the Constitution's, and are (selectively) imposed in addition to Section 2's extra-constitutional "results" ban, how can the preclearance regime be deemed an appropriate effort to "enforce," rather than amend, the Constitution? The answer: only if it targets potentially unconstitutional laws that are somehow beyond the effective reach of Section 2's prophylactic "results" test and other normal anti-discrimination litigation. If the discrimination precluded by Section 5 can be adequately remedied under ordinary Section 2

litigation, then, by definition, its extraordinary preclearance regime is gratuitous and its selective imposition is unjustified discrimination among sovereigns entitled to equal treatment.

Accordingly, this Court upheld Section 5's prior iterations only to bolster Section 2's unique deficiencies in the covered jurisdictions. Section 5 supplemented Section 2 in areas where "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting" because of "obstructionist tactics," including, most notably, the "extraordinary stratagem" of replacing a judicially-enjoined discriminatory practice with another discriminatory change. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 334-35 (1966); *accord City of Boerne v. Flores*, 521 U.S. 507, 525-26 (1997). Consequently, while Section 2 litigation seeks to improve the discriminatory status quo, Section 5 preclearance was specially designed just to "freez[e]" the status quo so that it did not worsen while Section 2 cases were pending or after Section 2 decrees had been entered. *See Beer v. United States*, 425 U.S. 130, 140 (1976). Section 5's coverage formula and substantive standard were tailored to that narrow supplemental function. The formula targeted jurisdictions that recently had frustrated normal anti-discrimination litigation through "unremitting and ingenious defiance." *See South Carolina*, 383 U.S. at 309, 315. And the standard had the "limited substantive goal" of "prevent[ing] nothing but backsliding." *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000) ("*Bossier II*").

The test for Section 5's validity in 2006 is thus not whether significant voting discrimination still exists in the covered jurisdictions, or even whether it is more prevalent there than elsewhere, but whether Section 5's coverage formula and substantive standard appropriately target discrimination so pervasive and entrenched that it would defy effective remediation under Section 2. If Congress tomorrow requires certain state governments to obtain federal preclearance of all employment and housing policies, the proper inquiry obviously must be whether that oppressive, differential burden is needed to prevent racial discrimination that somehow escapes the federal remedies in Title VII and Title VIII, not merely whether employment and housing discrimination exists in the selected states.

Yet Section 5's reauthorized coverage formula cannot "be justified by [any] current need[]" to bolster Section 2 in 2006, *see Nw. Austin*, 557 U.S. at 203, and regardless, its substantive standard as amended in 2006 is not designed to bolster Section 2, *see* Pet.App. 72a-77a (Williams, J., dissenting).

II. Section 5's reauthorized coverage formula is no longer "rational in both practice and theory." *See South Carolina*, 383 U.S. at 330. The 2006 Congress, unlike its predecessors, did not target the jurisdictions which recently engaged in the most pervasive discrimination, let alone those where discrimination is so entrenched that Section 2 is currently inadequate. Nor did Congress otherwise find, much less marshal evidence to prove, that the specific "evil that § 5 is meant to address"—*i.e.*, ineffective Section 2 litigation—was somehow still "concentrated in the jurisdictions singled out for

preclearance" more than three decades earlier. *See Nw. Austin*, 557 U.S. at 203-04.

This evidentiary void is unsurprising. *First*, Section 2 itself is significantly more effective now. Whereas the statute previously imposed the "inordinately difficult" burden of proving *intentional* discrimination, Congress in 1982 adopted a prophylactic ban on discriminatory "results" that broadly ensnares all arguably unconstitutional discrimination. *See Gingles*, 478 U.S. at 43-44. And *second*, the covered jurisdictions themselves "have unquestionably improved" in significant ways, such that "the record suggests … more similarity than difference" between covered and non-covered jurisdictions. *See Nw. Austin*, 557 U.S. at 203-04.

Thus, the 2006 reauthorization of Section 5 would have been invalid even without the substantive amendments, because the coverage formula is no longer "aimed at areas" where "case-by-case litigation [is] inadequate." *See South Carolina*, 383 U.S. at 315, 328.

III. Even assuming that Section 5's coverage formula identifies the recalcitrant jurisdictions recently engaged in a "set of invidious practices" that thwart normal anti-discrimination litigation, the 2006 substantive amendments still render Section 5 invalid, because it is no longer "directed at preventing" such practices. *See Miller*, 515 U.S. at 925. The 2006 Congress, by abrogating this Court's decisions in *Ashcroft* and *Bossier II*, fundamentally expanded Section 5 beyond its proper function of supplementing Section 2.

As noted, Section 5 originally played a distinct, complementary role: whereas Section 2 improved

the status quo, Section 5 merely preserved it. Specifically, Section 5's preclearance standard was *limited to retrogression* and thus "prevent[ed] nothing but backsliding" from the status quo achieved through Section 2 litigation: so long as a jurisdiction could prove that its preferred change did not have the purpose or effect of making minority voters worse off, it was entitled to preclearance, *regardless of whether* a different change would have made them *better off*. *See Bossier II*, 528 U.S. at 328-36. Furthermore, retrogression itself was analyzed under a *"totality of circumstances" inquiry* modeled on Section 2's "results" test: even where the change would reduce a minority group's ability to elect its preferred candidates, the jurisdiction could prove that the reduction was *justified* by offsetting increases in the group's overall political power or *excused* by traditional governance principles. *See Ashcroft*, 539 U.S. at 479-85.

Thus limited, Section 5 was an appropriate supplemental enforcement scheme. *First*, the retrogression standard only back-stopped the status quo for Section 2 litigation, rather than gratuitously duplicating Section 2's efforts to improve the status quo. *Second*, any changes that, without legitimate explanation, *worsened* the deplorable status quo in the Jim Crow South (or the improved status quo mandated by federal courts) could reliably be deemed intentionally discriminatory. And *third*, jurisdictions otherwise retained autonomy to make any non-retrogressive changes that they validly preferred, without first having *to prove* why they had rejected ameliorative alternatives preferred by minorities.

In 2006, however, Congress eviscerated the crucial substantive limitations cabining Section 5. And it did so despite having been warned of the serious constitutional concerns that these precise amendments would raise. *See Bossier II*, 528 U.S. at 336; *Ashcroft*, 539 U.S. at 491-92 (Kennedy, J., concurring).

Abrogating *Ashcroft*'s Section-2-like "totality of circumstances" retrogression standard, Congress prohibited any change that for any reason "diminish[es]" minority voters' "ability … to elect their preferred candidates." 42 U.S.C. § 1973c(b),(d). As Judge Williams' dissent explained, this inflexible "ability to elect" standard "mandates" a "particular brand" of "race-conscious decisionmaking"—*i.e.*, a rigid quota-floor for minorities' expected electoral success—that "aggravates both the federal-state tension … and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." *See* Pet.App. 73a-75a. Simply put, a mandatory quota-floor preserving predicted minority electoral success for 25 years cannot be a congruent, proportional, or rational means of *enforcing* the Constitution's nondiscrimination guarantees, both because it is in *stark tension* with those guarantees and because it ignores *obvious nondiscriminatory reasons* why voting changes may justifiably diminish minorities' electoral prospects.

Moreover, abrogating *Bossier II*'s retrogression limitation, Congress prohibited even non-retrogressive voting changes where the jurisdiction cannot convince federal authorities that it lacked "any discriminatory purpose" when rejecting a more ameliorative alternative for minorities. 42 U.S.C.

§ 1973c(c). This expansion exceeded Section 5's limited role of back-stopping the status quo for Section 2. It thus was gratuitous, because Congress did not and could not rationally find that Section 2's prophylactic "results" ban fails to effectively remedy purposeful discrimination. Moreover, the expansion beyond retrogression markedly increases Section 5's burdens and race-consciousness. It imposes on jurisdictions "the difficult burden" of "prov[ing] [the] negative" that they lacked a discriminatory purpose when refusing an alternative change, *Bossier I*, 520 U.S. at 480; *Bossier II*, 528 U.S. at 336, which is a difficulty DOJ exploited prior to *Bossier II* by objecting whenever jurisdictions failed to satisfy its "policy of maximizing majority-black districts," *see Miller*, 515 U.S. at 924-25. Thus, as Judge Williams's dissent explained, the new "discriminatory purpose" standard, "at worst, restored [DOJ's] implicit command that States engage in presumptively unconstitutional race-based districting, and at best, exacerbated the substantial federalism costs that the preclearance procedure already exacts." *See* Pet.App. 75a-76a.

Both 2006 amendments therefore have the "fundamental flaw" that DOJ "is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with [the] statutory directive." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Notably, this Court in *Nw. Austin* invoked that concurrence when suggesting that the preclearance standard raises "[a]dditional constitutional concerns" about Section 5. *See* 557 U.S. at 203. More generally, though, *any* expansion of the substantive standard in 2006 is inherently an "unwarranted response," because there

is no rational basis for concluding that covered jurisdictions needed "[s]trong[er]" oversight in 2006 than the South did in the 1960's. *See Boerne*, 521 U.S. at 530.

In sum, Congress' persistent failure to heed this Court's constitutional teaching underscores that the 2006 version of Section 5 is not valid enforcement legislation. Congress ignored the lesson of *South Carolina*, *Boerne*, and *Nw. Austin* that the coverage formula must target jurisdictions where normal anti-discrimination laws currently are inadequate. And Congress ignored the lesson of *Bossier II*, *Ashcroft*, and *Nw. Austin* that the preclearance standard must target voting changes that implicate the statute's supplemental role in protecting the status quo achieved by normal anti-discrimination laws. Collectively, this reveals that the 2006 Congress' goal was not to remedy unconstitutional discrimination, but to provide minorities in jurisdictions with ancient histories of discrimination with an affirmative-action-like scheme to improve their electoral success, by explicitly banning voting changes that reduce their electoral chances and by implicitly coercing changes that increase their chances. *See Miller*, 515 U.S. at 924-27. Rather than a "remedial or preventive object," therefore, Congress was "attempt[ing] a substantive change in constitutional protections," by prohibiting changes that impose "incidental burdens" on minorities or that fail to confer potential benefits, without any true "concern" whether "the object or purpose of the [change]" was intentionally discriminatory. *See Boerne*, 521 U.S. at 531-32; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989).

ARGUMENT

I. SECTION 5 CANNOT BE RATIONALLY JUSTIFIED UNLESS SECTION 2 AND OTHER NORMAL ANTI-DISCRIMINATION LAWS ARE UNIQUELY INADEQUATE IN THE COVERED JURISDICTIONS

The fundamental question here is what would justify imposing Section 5's extraordinary preclearance regime on selected jurisdictions. The answer is that the only rational justification would be the unique inadequacy of ordinary anti-discrimination laws in the covered jurisdictions.

A. This Court Previously Upheld Section 5 Only Due To The Extraordinary Need To Bolster Ordinary Anti-Discrimination Remedies In Targeted Jurisdictions

In *South Carolina*, this Court held that the 1965 Congress was justified in creating Section 5, but only because "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *See* 383 U.S. at 328, 334-35. Specifically, traditional anti-discrimination litigation was stymied by "the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in [such] lawsuits," including "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 328, 335. Given such "unremitting and ingenious defiance of the Constitution," "the unsuccessful remedies … [of] the past [had] to be replaced by sterner and more elaborate measures" "where voting discrimination ha[d] been most flagrant." *Id.* at 309, 315.

This Court thus held that the 1965 Congress acted permissibly "[u]nder the compulsion of these unique circumstances." *Id.* at 334-35; *see also City of Rome v. United States*, 446 U.S. 156, 180-82 (1980) (concluding that the 1975 Congress' 7-year extension of the 10-year-old provision "was necessary to preserve the 'limited and fragile' achievements" that likely would have been "destroyed through new procedures and techniques"). Notably, this Court in *Boerne* reaffirmed that it had upheld Section 5 due to the demonstrated inadequacy of Section 2 in the covered jurisdictions. "The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws … and the slow, costly character of case-by-case litigation." *See Boerne*, 521 U.S. at 525-26.

Consistent with Section 5's special function of "bolster[ing]" Section 2 by protecting the status quo achieved through the latter's enforcement, *see Nw. Austin*, 557 U.S. at 198, this Court repeatedly emphasized before 2006 that Section 5 had a more "limited purpose" and "combat[ed] different evils" than Section 2. *Bossier I*, 520 U.S. at 477; *accord Ashcroft*, 539 U.S. at 478 ("[T]he § 2 inquiry differs in significant respects from a § 5 inquiry."). Specifically, Section 5 "prevent[ed] nothing but backsliding." *Bossier II*, 528 U.S. at 335; *accord Ashcroft*, 539 U.S. at 477 ("Section 5 … ha[d] [the] limited substantive goal … [of] insur[ing] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); *Miller*, 515 U.S. at 925 ("Section 5 was directed at preventing a particular set of invidious practices that had the effect of

'undoing or defeating the rights recently won by nonwhite voters.'"). Accordingly, unlike Section 2, Section 5 was not designed to eliminate *unconstitutional* voting *laws*, but only *retrogressive* voting *changes*. *Ashcroft*, 539 U.S. at 477 ("[A] voting change with a discriminatory but nonretrogressive purpose or effect does not violate § 5[,] … *no matter how unconstitutional it may be*." (quoting *Bossier II*, 528 U.S. at 336)).

B. Section 5 Is A Gratuitous Burden Wherever Normal Anti-Discrimination Laws Are An Effective Remedy

It is common-sense why this Court previously upheld Section 5 only given the inadequacy of Section 2 and other anti-discrimination laws in the covered jurisdictions. If such laws *already effectively remedy* "intentional racial discrimination in voting," Congress cannot "rationally … conclude[]" that Section 5 preclearance is *also* needed, *see Rome*, 446 U.S. at 177, because that "is so out of proportion … that it cannot be understood as … designed to prevent[] unconstitutional behavior," *see Boerne*, 521 U.S. at 532. Accordingly, the mere existence of intentional discrimination, if redressable through normal litigation, does *not* "[]warrant[]" the "[s]trong measure[]" of federal preclearance. *See id.* at 530.

To be sure, the persistence of unconstitutional discrimination justifies Section 2 and other laws that employ "case-by-case" litigation to eradicate practices that are likely intentionally discriminatory. Unlike such laws, however, Section 5 does not ban practices that plaintiffs demonstrate are likely discriminatory, but rather presumptively prohibits *all* changes until the jurisdiction proves they are *not* discriminatory.

This "extraordinary burden-shifting procedure[]" is what must be justified, *Bossier II*, 528 U.S. at 335, and it must be justified *on top* of Section 2's prophylactic ban on discriminatory "results," 42 U.S.C. § 1973(a). That justification burden cannot possibly be satisfied based on discrimination that Section 2 effectively redresses, because otherwise Section 5 is necessarily a gratuitous intrusion.

For example, this Court has upheld prophylactic federal remedies concerning access to state courts and family leave for state employees. *See* Pet.App. 17a-18a. But the burden of justifying those remedies was obviously far less than would have existed to justify a *preclearance* requirement compelling states *to suspend all policies* affecting such topics until they could convince federal authorities that their policies lacked any discriminatory "purpose" or "effect." And the justification burden would have been exponentially more difficult if that intrusive preclearance requirement were added *on top* of the prophylactic remedies already upheld by this Court. The only remedial purpose conceivably served would be to reach discrimination that somehow escaped the grasp of the other prophylactic remedies.

Notably, the majority below nominally *agreed* with this analysis. It recognized that Congress would have "no justification for requiring states to preclear their voting changes" "if section 2 litigation is adequate to deal with the magnitude and extent of constitutional violations in covered jurisdictions," because the "critical factor" in this Court's cases upholding Section 5 was that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *See id.* 25a-26a.

The 2006 Congress, however, failed to apply, let alone satisfy, that standard. Section 5's old coverage formula does not target jurisdictions where Section 2 litigation is inadequate, and its new substantive standard does not target unconstitutional practices that would evade effective Section 2 remediation.

II. SECTION 5's COVERAGE FORMULA NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2

The 2006 Congress' decision not to update the coverage formula is irrational in theory, because there is no conceivable basis for presuming that the jurisdictions where Section 2 was inadequate *between 1964 and 1972* are remotely the same as the jurisdictions where Section 2 was inadequate *in 2006* (let alone will be *until 2031*). *See* Pet.App. 69a-70a (Williams, J., dissenting). Unsurprisingly, therefore, the retained coverage formula is irrational in practice, because the covered jurisdictions do not currently pose a meaningful and distinguishable threat of intentional discrimination that evades Section 2. *See id.* 79a-99a. Judge Williams's dissent and Petitioner's brief detailed the factual basis for these conclusions, so *amici* focus on four fundamental legal errors underlying the majority's contrary conclusions.

First, the majority ignored that the burden of demonstrating Section 2's inadequacy is significantly *higher* than when *South Carolina* and *Rome* were decided, because Section 2 is now far *more effective* at preventing unconstitutional discrimination. Before 1982, Section 2 required a *finding* of discriminatory intent. *City of Mobile v. Bolden*, 446

U.S. 55, 60-63 (1980) (plurality opinion). But because that old intent requirement "place[d] an 'inordinately difficult' burden of proof on plaintiffs," Congress in 1982 adopted a prophylactic standard banning even *unintentionally* discriminatory "results." *Gingles*, 478 U.S. at 43-44.

Second, the majority had no legitimate basis for concluding that Section 2 is inadequate in the covered jurisdictions. While the majority emphasized the continued existence of discrimination there, it identified no congressional "finding" or evidence that such residual discrimination would overwhelm Section 2 litigation. *See* Pet.App. 44a-45a. Instead, it relied on *generic* evidence that raising Section 2 claims "is both costly and time-consuming." *See id.* 45a-48a. But what matters is not the *normal* burdens of bringing anti-discrimination litigation, but rather "the *inordinate amount* of time and energy required to overcome the *obstructionist tactics invariably encountered*" in "case-by-case litigation … to combat widespread and persistent discrimination in voting." *See South Carolina*, 383 U.S. at 328 (emphases added). The 2006 Congress obviously did not believe that the *typical* burdens of Section 2 litigation rendered it *generally* inadequate, because, like all other Congresses, it relied exclusively on case-by-case litigation in *non-covered* jurisdictions. Indeed, under the majority's illogical contrary reasoning, preclearance is *always* justified because it is always cheaper and quicker *for plaintiffs* than normal litigation. For example, because Title VII litigation against state employers requires time and money, federal preclearance of all state employment decisions would be warranted.

Third, the majority had no legitimate basis for concluding that the coverage formula is a rational dividing line separating the jurisdictions where Section 2 is inadequate from the jurisdictions where it is adequate. As noted, the 2006 Congress itself concluded that Section 2 was generally effective in the non-covered jurisdictions, and Congress' "record" itself belies the notion that Section 2 was somehow *specially* ineffective in the covered jurisdictions, because it suggests "more similarity than difference" between the non-covered and covered jurisdictions. *See Nw. Austin*, 557 U.S. at 204. Indeed, the majority's primary evidence justifying the statute's "departure from the fundamental principle of equal sovereignty" (*id.* at 203) was the allegedly greater incidence of successful Section 2 lawsuits in the covered jurisdictions. *See* Pet.App. 49a-55a. But that logic is upside-down. Even if the showing is accurate, *but see id.* 90a-95a (Williams, J., dissenting), it simply confirms that Section 2 is a highly effective remedy in the covered jurisdictions.

Finally, the majority heavily relied on the separate provisions giving courts limited authority to "bail-out" and "bail-in" jurisdictions. *See* Pet.App. 61a-66a. But Congress has the constitutional obligation to justify the "*statute's* disparate geographic coverage," *see Nw. Austin*, 557 U.S. at 203 (emphasis added), and so it cannot foist the duty on courts and covered jurisdictions to redraw the map on an *ad hoc* basis. For example, Congress could not arbitrarily impose Section 5 only on jurisdictions east of the Mississippi River and then defend that irrational choice by giving courts limited "bail-out" and "bail-in" powers. In any event, consideration of these powers further indicates that

Section 5's "disparate geographic coverage" is not "sufficiently related to the problem that it targets." *See id.* The majority emphasized that "the pace of bailout[s]" has been increasing recently. *See* Pet.App 63a. But that only proves the 2006 Congress was grossly over-inclusive in failing itself to remove those jurisdictions from coverage. Likewise, the majority emphasized that "[f]ederal courts" have imposed "bail-in" as a remedy for adjudicated constitutional violations. *See id.* 61a-62a; *see also* 42 U.S.C. § 1973a(c). But it is patently irrational to try to capture non-covered jurisdictions where case-by-case litigation is *inadequate* by requiring that a *successful* lawsuit be brought, *let alone* one satisfying the "inordinately difficult" burden of proving *intentional* discrimination, *see Gingles*, 478 U.S. at 44.

III. SECTION 5's SUBSTANTIVE STANDARD NO LONGER RATIONALLY REMEDIES INTENTIONAL DISCRIMINATION THAT DEFIES REDRESS UNDER SECTION 2

Even assuming that *perpetuating* Section 5 would have been constitutional, the 2006 *expansion* of the substantive standard confirms the statute's lack of congruence, proportionality, and rationality. Initially, *any* strengthening of Section 5 in 2006 would be irrational, because Section 2 obviously was not *less* effective than in the 1960's South. More importantly, the specific amendments adopted show that the 2006 Congress' goal was neither bolstering the inadequacies of Section 2 nor even attacking unconstitutional discrimination. The amended standard instead transforms Section 5 into a rigid entitlement scheme that mandates and coerces electoral preferences for minorities until 2031.

A. The Old Preclearance Standard Targeted Backsliding That Undermined Section 2's Enforcement

1. The Old Section 5's Limitation To Retrogressive Changes

Section 5's "effect" and "purpose" prongs previously were limited to retrogression from the status quo. *Bossier I*, 520 U.S. at 476-80; *Bossier II*, 528 U.S. at 333-36. That distinct, narrow anti-backsliding role complemented Section 2's effort to improve the status quo, reduced jurisdictions' federalism costs, and prevented DOJ from coercing increased minority electoral success.

a. Because Section 5 substantively addressed "different evils" than Section 2, *Bossier I*, 520 U.S. at 477, it was a useful supplement rather than a gratuitous redundancy. Section 2 addressed whether the status quo was worse for minorities than some "hypothetical alternative." *Bossier II*, 528 U.S. at 334. In contrast, Section 5 inherently and "uniquely" addressed *alterations* to the status quo, because it "deal[t] only and specifically with *changes* in voting procedures," and asked whether they were worse *than the status quo*. *Id.* "[F]reezing" the status quo was appropriate, because the covered jurisdictions were "undoing or defeating" Section 2 litigation "by passing new discriminatory voting laws," *see Miller*, 515 U.S. at 925-26, and such changes carried an overwhelming "risk of purposeful discrimination," *see Rome*, 446 U.S. at 177.

b. The retrogression limitation also decreased jurisdictions' compliance burdens and increased their autonomy. Section 5 imposes "the difficult burden" of "prov[ing] a negative"—namely, "proving the

absence of [the prohibited] purpose and effect." *Bossier I*, 520 U.S. at 480. Limiting the inquiry to retrogression eased the burden: proving a change lacked a retrogressive effect only "require[d] a comparison of [the] jurisdiction's new voting plan with its existing plan," *id.* at 478; proving instead the absence of a discriminatory dilutive effect would have "impose[d] a demonstrably greater burden" by "necessitat[ing]" comparisons with "hypothetical, undiluted plan[s]" selected from among countless electoral alternatives, *id.* at 480, 484. Jurisdictions thus retained greater autonomy. They could more freely select valid changes that demonstrably would not retrogress from the status quo "benchmark," *see id.* at 480, since they did not first have to perform the more "complex undertaking" of *proving* that the changes also would not be worse than possible alternatives, *see Bossier II*, 528 U.S. at 332.

Importantly, these benefits were heightened under the "purpose" prong. Proving the absence of retrogressive purpose required only the relatively "trivial" task of showing that jurisdictions were not "incompetent retrogressor[s]" that had inadvertently adopted non-backsliding changes. *See id.* at 331-32. Proving instead the absence of discriminatory purpose would have imposed the "demonstrably greater burden," *Bossier I*, 520 U.S. at 484, of showing that jurisdictions' refusal to select "a hypothetical, undiluted plan" was not intentionally discriminatory, *Bossier II*, 528 U.S. at 336. Congress itself has warned that it is "inordinately difficult" to ascertain whether a voting practice has a discriminatory "purpose," given overlapping interests of different legislators selecting among various proposals. *See Gingles*, 478 U.S. at 44; S. Rep. No.

97-417, at 36-37 (1982). For example, "race [often] correlates closely with political behavior," rendering it difficult to distinguish between those motives. *See Easley v. Cromartie*, 532 U.S. 234, 257 (2001). It therefore would have been even more "inordinately difficult" to "prov[e] the *absence* of discriminatory purpose" concerning non-retrogressive changes, since "it is never easy to prove a negative." *See Bossier I*, 520 U.S. at 480. That effectively would have forced jurisdictions to prove that the status quo lacked a discriminatory "result" compared to the hypothesized alternative—*i.e.*, the very Section 2 analysis that *Bossier I* held would dramatically complicate the Section 5 process, *id.*—and then *additionally* prove that none of their myriad officials eschewed that alternative for discriminatory reasons. *Bossier II* thus held that requiring jurisdictions to disprove "discriminatory purpose" would have "exacerbate[d] the 'substantial' federalism costs" of "the extraordinary burden-shifting procedure[]," "perhaps to the extent of raising concerns about § 5's constitutionality." 528 U.S. at 335-36.

Equally important, DOJ's coercive power during administrative preclearance would have greatly increased. As the pre-*Bossier II* period illustrates, the difficulty of disproving discriminatory motive gave DOJ virtually unbridled discretion to deem "discriminatory" the failure to adopt any alternative that better enhanced minority electoral success.

c. Before *Bossier II*, this Court in *Miller* found that DOJ frequently objected on "discriminatory purpose" grounds *to coerce* racially gerrymandered changes that increased minority electoral success, even adopting a "policy of maximizing majority-black

districts" and "accept[ing] nothing less than abject surrender to its maximization agenda." 515 U.S. at 917, 924-27. For example, DOJ had claimed that Georgia's "refusal … to create a third majority-minority district" was intentionally discriminatory, even though that district violated "all reasonable standards of compactness and contiguity." *Id.* at 919, 923-24. Georgia thus was forced to adopt a "[g]eographic[] … monstrosity." *Id.* at 908-09; *see also Shaw v. Hunt*, 517 U.S. 899, 903, 912 (1996).

Miller admonished that DOJ's "policy" of increasing minority electoral success "seem[ed] quite far removed from" the anti-backsliding "purpose of § 5." 515 U.S. at 926. Instead, "[DOJ]'s implicit command that States engage in [such] presumptively unconstitutional race-based [decisionmaking] br[ought] [Section 5] … into tension" with the Constitution's nondiscrimination guarantees. *Id.* at 927. Tellingly, therefore, *Bossier II* cited *Miller* when it held that "discriminatory purpose" objections would "exacerbate … federalism costs" and "concerns about … constitutionality." *See* 528 U.S. at 335-36.

2. The Old Section 5's "Totality Of Circumstances" Test For Determining Retrogression

Section 5's "retrogression" analysis previously entailed a "totality of circumstances" test modeled on Section 2's analogous "results" test. *Ashcroft*, 539 U.S. at 479-85. That nuanced and flexible inquiry helped avoid creating a rigid quota-floor for minority electoral success, which would have limited jurisdictions' autonomy without plausibly redressing intentional discrimination, let alone the invidious backsliding justifying Section 5.

a. Two constitutional concerns are implicated when Congress purportedly "enforces" a constitutional ban on *intentional* discrimination through a statutory ban on facially neutral laws with a *disparate effect*.

First, in *all* contexts, "effects" tests must be examined to prevent Congress from "attempt[ing] a substantive change in constitutional protections." *See Boerne*, 521 U.S. at 532. The inquiry is whether the test improperly bans the proscribed "effect" for its own sake, or as an appropriate means for smoking out practices carrying "the risk of purposeful discrimination." *See Rome*, 446 U.S. at 177. The test can "be fairly characterized in [the latter] fashion" if it allows the presumptively proscribed effect to be justified on legitimate, race-neutral grounds. *See Ricci v. DeStefano*, 557 U.S. 557, 594-95 (2009) (Scalia, J., dissenting). If such nondiscriminatory explanations are an available defense, then the failure to provide one creates the requisite "infer[ence]" of a potential "discriminatory" motive. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

Second, in the *group-representation* context, "effects" tests must be especially scrutinized, because there they contain the additional risk of becoming a "powerful engine of … discrimination" *against non-minorities*. *See Johnson v. Transp. Agency*, 480 U.S. 616, 676-77 (1977) (Scalia, J., dissenting). In particular, banning practices with the "effect" of *diluting the representation* of a minority *group* in a legislature (*e.g.*, district boundaries) is critically different than banning practices with the "effect" of *denying* the ability of *individual* minorities *to access*

the ballot (e.g., voter or candidate qualifications). Whereas the latter "effects" ban expands opportunities for *all* individuals, minorities and non-minorities alike, the former ban necessarily entails *limiting opportunities for non-minorities*, because group representation is a *zero-sum* game. For example, banning practices with the "effect" of diluting minority-preferred representatives below 20% necessarily caps majority-preferred representatives at 80%. And, of course, if there are no exceptions to that "effects" test, then it is a *quota*: prohibiting *any* practice with the "effect" of reducing the minority share below 20% is the same as mandating that the minority share be 20%.

Accordingly, it is especially critical that "effects" tests concerning minority vote *dilution* (as opposed to ballot *denial*) allow the presumptively proscribed effect to be justified on legitimate, race-neutral grounds. Whether described as an "effects" test or a quota, an unconditional mandate to avoid diluting minorities' opportunities for "electable" legislative seats *regardless* of the reasons for dilution is a "patently unconstitutional" cap on non-minorities' opportunities to exceed that guaranteed "racial balanc[e]." *See Grutter v. Bollinger*, 539 U.S. 306, 329-30 (2003). So it cannot possibly be a congruent, proportional, or rational means of "enforcing" the Constitution's nondiscrimination guarantees.

b. Section 2 exemplifies how a holistic and flexible "effects" test targets practices that are likely intentionally discriminatory, while avoiding conferring electoral advantages on minorities.

Section 2's "results" test does not mandate "electoral advantage," "electoral success,"

"proportional representation," or electoral "maximiz[ation]" for minority groups. *See Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*"); *Gingles*, 478 U.S. at 96-97 (O'Connor, J., concurring in the judgment); *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994). Rather, the "ultimate right of § 2 is *equality* of opportunity," *LULAC*, 548 U.S. at 428 (emphasis added), reflecting the statutory command that "political processes" must be "*equally* open to participation" and cannot provide "*less* opportunity" for minorities, 42 U.S.C. § 1973(b) (emphases added); *accord Bartlett*, 556 U.S. at 20 (plurality opinion). Indeed, even an unequal ability for minorities *to elect* their preferred candidates is not *alone* an unlawful "result," because minorities must "have less 'opportunity' than others 'to participate in the political process *and* to elect representatives of their choice.'" *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

Consistent with overall "equality of opportunity," Section 2 requires a "fact-intensive" inquiry into "the totality of the circumstances," including the "tenuous[ness]" or strength of the "policy underlying the … contested practice." *See Gingles*, 478 U.S. at 44-46 (citing S. Rep. No. 97-417, at 29); *see also* 42 U.S.C. § 1973(b). And this Court has "structure[d] … the statute's 'totality of circumstances' test" (*De Grandy*, 512 U.S. at 1010) to avoid conferring electoral advantages on minorities and to target likely intentional discrimination.

First, threshold requirements narrow Section 2's focus to practices reflecting a high potential for

intentional discrimination. Specifically, plaintiffs bringing a vote-dilution claim to redraw district lines must initially prove that there is a "geographically compact" minority community, *Abrams v. Johnson*, 521 U.S. 74, 91 (1997), that could constitute a majority of the electorate, *Bartlett*, 556 U.S. at 12-16 (plurality opinion), in a district adhering to "traditional districting principles[,] such as maintaining communities of interest and traditional boundaries," *Abrams*, 521 U.S. at 92; *LULAC*, 548 U.S. at 433. These preconditions essentially establish a *prima facie* case of disparate treatment. Race-neutral line-drawers presumably would draw a compact "majority-minority" district that complies with traditional principles, just as such districts are routinely drawn for non-minority groups. Thus, once the "prima facie" elements are satisfied, the failure to create such an intuitive district is an "action[] … from which one can infer, if [it] remain[s] unexplained, that it is more likely than not that [the] action[] … [was] discriminatory." *Cf. Furnco*, 438 U.S. at 576.

Second, even after Section 2 plaintiffs have satisfied the preconditions, Section 2 defendants can justify the seemingly disparate treatment under the "totality of circumstances" analysis, essentially *rebutting* the inference of discriminatory motive. For example, defendants can show there was a strong "policy underlying [their] … contested practice," *Gingles*, 478 U.S. at 45 (citing S. Rep. No. 97-417, at 29), or that minorities retain an *equal* "opportunity … to participate in the political process" *despite* any inequality in their ability to *elect* their preferred candidates, *see Chisom*, 501 U.S. at 397.

In short, Section 2's "results" test ensures that minorities receive *equal* treatment, while denying them *preferential* treatment—*i.e.*, refusing to mandate districts favorable to minorities when such districts would *not* be formed for others under traditional principles. *See Bartlett*, 556 U.S. at 20-21 (plurality opinion).

c. Of course, the "effects" tests in Section 2 and Section 5 necessarily differ in that Section 2's dilutive "results" test compares a jurisdiction's existing plan with a "hypothetical, undiluted plan," whereas Section 5's "retrogression" test compares a new plan to the "jurisdiction's existing plan." *Ashcroft*, 539 U.S. at 478-79. Apart from that different baseline though, *Ashcroft* held that the same flexible approach was required: just as "*in the § 2 context*, a court or [DOJ] should assess the totality of circumstances in determining retrogression under § 5." *Id.* at 484 (emphasis added); *see also id.* at 479-85 (primarily relying on *Gingles* and *De Grandy*, which are Section 2 cases). Consequently, as under Section 2, the inquiry "should not focus solely on the comparative ability of a minority group to elect a candidate of its choice," but must "examin[e] … all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process[] and the feasibility of creating a nonretrogressive plan." *Id.* at 479-80.

Moreover, in structuring that "totality of circumstances" analysis, *Ashcroft* avoided preferential treatment of minorities and preserved jurisdictions' autonomy where intentional discrimination was not implicated.

First, on the *election* of minority-preferred candidates, *Ashcroft* afforded jurisdictions significant *discretion* to draw district lines based on different theories of representation. Rather than maintaining "a small[] number of safe majority-minority districts," jurisdictions could "spread[] out minority voters over a greater number of districts" where they were a numerical minority but "may have [had] the opportunity to elect a candidate of their choice … by creating coalitions [with nonminority] voters." *Id.* at 480-81; *see also Bartlett*, 556 U.S. at 13 (plurality opinion) (terming these "cross-over" districts). *Ashcroft* thus held that "Section 5 g[ave] States the flexibility to choose one theory of effective representation over the other," even if that choice put at some risk minorities' past electoral successes because majority-minority districts were "safer" than "cross-over" districts. 539 U.S. at 482.

Second, and more important, *Ashcroft* held that minorities' increased ability "to participate in" and "influence" the "political process" was a "highly relevant factor," which could *offset and justify* an indisputable reduction in their power "to win[] elections." *Id.* Thus, even where a new plan had more districts "where minority voters may not be able to elect a candidate of choice," no retrogression occurred if the plan "increase[d] the number of representatives sympathetic to the[ir] interests," *id.* at 482-83, or potentially even just "[m]aintain[ed] or increase[ed] legislative positions of power for [their] representatives of choice," *id.* at 483-84.

Third, and most important, *Ashcroft* held that, even where a change indisputably diminished minorities' overall voting power, that still could be

excused depending on "the *feasibility* of creating a nonretrogressive plan." *Id.* at 479 (emphasis added). Section 5 thus did not force jurisdictions to preserve minority voting power if that would subordinate sufficiently important race-neutral interests, such as traditional districting principles.

In sum, by employing Section 2's "totality of the circumstances" approach in the retrogression context, *Ashcroft* did not mandate preservation of minorities' ability to elect, but flexibly allowed electoral diminution if justified by an offsetting increase in political influence or excused by infeasibility under traditional governance principles. Because Section 5 thus allowed the "effect" of diminution where explained by nondiscriminatory factors, it targeted practices suggesting a "risk of purposeful discrimination," *see Rome*, 446 U.S. at 177, and thereby reduced the "tension" with the Constitution's nondiscrimination guarantees, *see Miller*, 515 U.S. at 927. Indeed, Justice Kennedy's concurring opinion in *Ashcroft* was explicit about the necessity of avoiding interpretations where "what save[s] [a change] under § 5" are "considerations of race that would doom [it] under the Fourteenth Amendment or § 2." 539 U.S. at 491.

B. The New Preclearance Standard Imposes A Rigid Scheme Of Racial Preferences

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

The 2006 Congress required that preclearance be denied whenever jurisdictions "diminish[]" a minority group's "ability … to elect their preferred candidates," 42 U.S.C. § 1973c(b),(d), thereby abrogating *Ashcroft*'s critical "totality of

circumstances" retrogression standard. More than forty years after Section 5's enactment, Congress was unwilling to "permit[] [jurisdictions] to break up districts where minorities form a clear majority of voters and replace them with vague concepts such as influence, coalition, and opportunity." S. Rep. No. 109-295, at 19-20 (2006). It believed that "spread[ing] minority voters" out of such safe districts would "turn[] Section 5 on its head" and "turn black and other minority voters into second class voters." H.R. Rep. No. 109-478, at 69-71 (2006). Thus, because "Congress explicitly *reject[ed]* all that logically follows from [*Ashcroft*]'s statement" that electoral diminution "cannot be dispositive," "the relevant analysis" is now an inflexible "comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change." *Id.* at 71.

a. Unlike Section 2's "results" test and Section 5's old "retrogression" standard, the new "ability to elect" standard is an unyielding *quota-floor* tied to past minority electoral success.

First, the new standard does not preserve "*equality* of opportunity," instead decreeing a "*guarantee* of electoral success for minority-preferred candidates." *See LULAC*, 548 U.S. at 428 (emphases added). Minorities now have a *federal entitlement* until 2031 that no voting change may "diminish[]" their "ability … to elect their preferred candidates." 42 U.S.C. § 1973c(b). Of course, that floor on minorities' expected electoral success is necessarily a ceiling for non-minorities. *Supra* at 22-23.

Second, the new standard accordingly mandates far more race-based decisionmaking than ever

before. Most obviously, every existing "safe" majority-minority and "cross-over" district must be preserved. Such districts "virtually guarantee the election of a minority group's preferred candidate," *see Ashcroft*, 539 U.S. at 480-81, so even shifting to a slightly less "safe" district—where the group need only "pull, haul, and trade" for a few more non-minority votes, but still "may lose," *see id.*—would necessarily "*diminish*" the group's "ability to elect." The legislative history confirms Congress' abhorrence of dismantling such districts. *Supra* at 29. But "entrench[ing]" them "by statutory command … pose[s] constitutional concerns." *See Bartlett*, 556 U.S. at 21, 23-24 (plurality opinion).

The new standard also requires preserving every functioning "influence" district. Although reducing the minority population in such districts had *never* properly been found retrogressive before, *compare, e.g.*, *LULAC*, 548 U.S. at 445-47 (plurality opinion), *with id.* at 478-81 (Stevens, J., dissenting in relevant part), doing so now will indisputably "diminish" the remaining minorities' "ability to elect." After all, minorities in such districts "can play a substantial or decisive role in the electoral process," and can at least sometimes, if not "always[,] elect the candidate of their choice," even if not *guaranteed* to do so. *See Ashcroft*, 539 U.S. at 488-89. Reducing their population thus would lower their chances of winning (from, say, 25% to virtually nil), which plainly would "*diminish*" their "ability to elect."

Accordingly, Section 5's ambit will be greatly expanded, because districts with minority voting-age populations as small as 20-30% typically function as "influence" districts. *See id*; *LULAC*, 548 U.S. at

443-46 (plurality opinion); *id.* at 479-81 & n.15 (Stevens, J., dissenting in relevant part). So the new standard "unnecessarily infuse[s] race into virtually every redistricting, raising serious constitutional questions." *See id.* at 446 (plurality opinion).

Indeed, this is well illustrated by *Texas v. United States*, No. 11-1303, --- F. Supp. 2d ----, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), *appeal filed*, No. 12-496 (U.S. Oct. 19, 2012). The court held that the "ability to elect" standard prohibits Texas from changing an *overwhelmingly white district* without racially polarized voting that elected a *white Democrat* into a district more likely to elect a Republican, simply because the *34.4%* of minority voters also supported that white Democrat in general elections. *See id.* at *38-43. This exemplifies how, even in districts with relatively small minority populations, the "ability to elect" standard is a preferential quota-floor that protects any "electoral advantage" of the political party disproportionately supported by the minorities—namely, Democrats.

Third, the new standard does not permit departures from the quota for *any* reason. The plain text of the "diminish[] the ability … to elect" standard, 42 U.S.C. § 1973c(b), unambiguously eliminates *Ashcroft*'s inquiries into "feasibility" or "the minority group's opportunity to participate in the political process," *see* 539 U.S. at 479; *supra* at 26-28. And that was a deliberate decision. H.R. Rep. No. 109-478, at 71 ("Congress explicitly *rejects* all that logically follows from [*Ashcroft*]'s statement" that electoral diminution "cannot be dispositive.").

Thus, for example, jurisdictions must entirely subordinate traditional districting principles if

needed to preserve majority-minority districts weakened by natural demographic shifts, like recent residential integration and suburban migration. *Contra Miller*, 515 U.S. at 916, 919. Indeed, preservation is required even if minorities are statistically *over-represented*, because the existence of "proportional representation" is *irrelevant* to whether the group's "ability to elect" has been "diminished." *Contra De Grandy*, 512 U.S. at 1020-24. Perhaps most perversely, the number of minority-preferred officials elected must be unthinkingly preserved even if *opposed by the minority community itself* due to their preference for more political "influence" overall. *Contra Ashcroft*, 539 U.S. at 480-84.

In sum, the "ability to elect" standard bars changes that merely impose the types of "incidental burdens" on minorities that other voters face, *see Boerne*, 521 U.S. at 531, or that may even *benefit* minorities' overall voting power. Such changes clearly do not "have a significant likelihood of being unconstitutional." *See id.* at 532. Moreover, in banning such changes, Section 5 now makes "[r]ace … the predominant factor" in electoral decisionmaking. *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Even before the 2006 amendments, this tendency of Section 5 was viewed as "a fundamental flaw" by Justice Kennedy, *id.*, and this Court notably emphasized that perceived defect in *Nw. Austin*, 557 U.S. at 203.

b. Judge Williams's dissent below agreed with these arguments, Pet.App. 73a-75a, but the majority refused to consider them, *id.* 66a-67a. And while the district court in the Kinston litigation rejected them,

LaRoque, 831 F. Supp. 2d at 214-28, 232-38, its two primary reasons were meritless.

First, the court reasoned that rigidly limiting the retrogression inquiry to minorities' "ability to elect" their preferred candidates "was necessary to avoid giving cover to intentional discrimination and to prevent an administrability nightmare." *Id.* at 228. That was so because *Ashcroft*'s "amorphous 'totality of the circumstances' factors" were too "subjective" and "unpredictable." *See id.* at 226. This reasoning is entirely flawed.

A rigid "effects" test that eliminates *any* justification is obviously unnecessary to prevent pretextual or speculative justifications, because *Ashcroft* already foreclosed them by requiring the jurisdiction *to prove* its justification. Electoral diminution was allowed only if the jurisdiction *persuaded DOJ or D.C. federal judges* that it was warranted by legitimate factors. *Ashcroft*, 539 U.S. at 471, 479. Similarly, *Section 2's* analogous "totality of circumstances" test is obviously effectively applied by courts to defeat inadequate justifications. Regardless, Congress was obligated to address any alleged problems with *Ashcroft*'s vagueness or administrability the same way this Court handled Section 2's "results" test: by "structur[ing] … the statute's 'totality of the circumstances' test," *De Grandy*, 512 U.S. at 1010, to ensure *only* "equality of opportunity," *LULAC*, 548 U.S. at 428, rather than replacing it with a clear but rigid quota. Indeed, this Court has squarely held that "the fact that the implementation of a program capable of providing individualized consideration [of race] might present administrative challenges does not render

constitutional an otherwise problematic system" that "makes race a decisive factor." *Gratz v. Bollinger*, 539 U.S. 244, 274-75 (2003).

Second, the court claimed that the "ability to elect" standard "do[es] not create [a] facial quota" because it is not an "utterly inflexible prohibition on retrogression." *LaRoque*, 831 F. Supp. 2d at 236-37. But that claim is refuted by the statutory text, which unambiguously and intentionally bans *any* "diminish[ment]" of minorities' "ability to elect." *Supra* at 31. Likewise, while DOJ currently claims that it will not apply the standard as a quota, *LaRoque*, 831 F. Supp. 2d at 236-37, this Court cannot "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly," *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

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

The 2006 Congress further required that preclearance be denied whenever jurisdictions fail to disprove "any discriminatory purpose," 42 U.S.C. § 1973c(c), thereby abrogating *Bossier II*'s critical limitation to retrogressive changes. Congress complained that the old "purpose" prong was too narrow because it would catch only "incompetent retrogressor[s]" while forcing "the federal government" to "giv[e] its seal of approval to practices that violate the Constitution." H.R. Rep. No. 109-478, at 67; S. Rep. No. 109-295, at 16.

a. Congress eviscerated the unique supplemental function that traditionally justified Section 5, and its new justifications for expanding Section 5 are inadequate.

As noted, Section 5 preclearance was designed merely to *preserve* the status quo, while Section 2 litigation analyzed whether proposed *improvements* to the status quo were rejected in circumstances suggesting likely discriminatory motives. *Supra* at 11-12, 18. By injecting that Section 2 analysis of *deficiencies with the status quo* into the Section 5 inquiry through the "discriminatory purpose" standard, the 2006 Congress created a novel substantive overlap between the provisions, which required a novel justification for why Section 5 needed to duplicate Section 2.

Such justification is impossible, because subjecting non-retrogressive changes to further preclearance review is at best unwarranted and at worst gratuitous and even absurd. It is "an unwarranted response to [the] lesser" "evil presented" by jurisdictions that concededly have not *worsened* minorities' electoral chances, even if they have not *improved* them to DOJ's satisfaction. *See Boerne*, 521 U.S. at 530. Indeed, it is entirely gratuitous, since purposefully discriminatory changes are now easily reachable through Section 2's prophylactic "results" test. Moreover, in many circumstances, it is absurd "[t]o deny preclearance to a plan that is *not* retrogressive" based on the mere existence of a *more* ameliorative alternative, because that would "leav[e] in effect a status quo that is even worse." *Bossier II*, 528 U.S. at 335-36.

Congress' contrary concerns are meritless. There can be no symbolic perception that the Government bestows "approval" on non-retrogressive changes that are discriminatory, because this Court "ha[s] repeatedly noted" that "preclearance under § 5

affirms nothing but the absence of backsliding." *Id.* at 335. Likewise, the narrowness of the constraint imposed by the retrogressive-purpose standard is not a vice, but a constitutional *virtue*. *Id.* at 336.

b. Specifically, Congress blithely "exacerbate[d] the 'substantial' federalism costs that the preclearance procedure already exacts," apparently indifferent as "to the extent" that doing so "rais[ed] concerns about § 5's constitutionality." *Id.* Without any legitimate "enforcement" justification for "curtailing [jurisdictions'] traditional general regulatory power" or "imposing a heavy litigation burden on [them]," *see Boerne*, 521 U.S. at 534, the "discriminatory purpose" standard forces them to consider proposed alternatives to their preferred non-retrogressive change and imposes the difficult duty to prove that they lacked an invidious motive for eschewing those alternatives, *supra* at 18-20.

Again, this is well illustrated by the Texas redistricting decision. The court held that Texas failed to prove that its changes to a Senate district's boundaries "were wholly partisan" and "untainted by considerations of race." *Texas*, 2012 WL 3671924, at *26. But the *only* reason the court gave for questioning that explanation was that "the legislature deviated from typical redistricting procedures and excluded minority voters from the process." *Id.* Of course, that does not even remotely suggest, let alone prove, discriminatory purpose, especially since the court found that the changes *did not diminish* minorities' ability to elect their preferred candidates, *id.* at *21-23. Accordingly, even in the few districts with minority populations so small that the "ability to elect" quota is not a barrier,

the "discriminatory purpose" standard still "infuse[s] race into ... [the] redistricting, *see Bartlett*, 556 U.S. at 21 (plurality opinion), by coercing jurisdictions to adopt the districts that best promote the minority-preferred political party, on pain of costly and difficult litigation to justify the partisan configurations of majority-white districts.

Furthermore, the difficulty of disproving discriminatory intent enables DOJ to "implicit[ly] command that States engage in presumptively unconstitutional race-based" decisionmaking, *see Miller*, 515 U.S. at 927, by prioritizing changes that improve minorities' expected electoral success. *Supra* at 20-21. Tellingly, *Bossier II* cited *Miller* to suggest that "discriminatory purpose" objections would "rais[e] concerns about § 5's constitutionality." *See* 528 U.S. at 336. Section 5 thus now contains the "fundamental flaw" of "a[] scheme in which," as a practical matter, "[DOJ] is permitted … to encourage … a course of unconstitutional conduct." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

b. Again, the dissent below agreed with these arguments, Pet.App. 75a-76a, but the majority refused to consider them, *id.* 66a-67a, and the Kinston district court rejected them, *LaRoque*, 831 F. Supp. 2d at 207-14, 232. And again, the district court's two primary reasons were meritless.

First, the court concluded that the "discriminatory purpose" preclearance standard is not too "intrusive" because it merely "shift[s]" the burden to covered jurisdictions to prove the absence of "unconstitutional conduct." *Id.* at 213. That facile response ignores this Court's warning that this particular burden-shift is an "extraordinary" reversal

of federal-state relations that raises serious constitutional concerns by unduly burdening jurisdictions' preclearance efforts and constraining their local autonomy. *Supra* at 20.

Second, the court refused to consider DOJ's ability to employ "discriminatory purpose" objections "to extract its preferred results" from jurisdictions, reasoning that this risk "is not the proper subject of a facial challenge." *LaRoque*, 831 F. Supp. 2d at 213-14. But DOJ's coercive *capabilities* are an important reason why the "discriminatory purpose" standard *facially* imposes a "heavy litigation burden." *See Boerne*, 521 U.S. at 534. That DOJ is practically "*permitted* … to encourage … a course of unconstitutional conduct" is thus a "fundamental flaw" in the 2006 "scheme." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) (emphasis added).

CONCLUSION

Accordingly, this Court should hold that Section 5, as reauthorized and amended in 2006, is unconstitutional, and it should reverse the judgment below.

Respectfully submitted,

MICHAEL E. ROSMAN
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1233 20th St. NW
Suite 300
Washington, DC 20036

MICHAEL A. CARVIN
Counsel of Record
HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Amici Curiae