No. 07-77

IN THE
Supreme Court of the United States

BOB RILEY, GOVERNOR OF ALABAMA,

Appellant,

v.

YVONNE KENNEDY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF *AMICUS CURIAE* OF THE PROJECT ON FAIR REPRESENTATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE[1]

The Project on Fair Representation at the American Enterprise Institute ("The Project") is a public interest organization dedicated to the promotion of equal opportunity and racial harmony. The Project works to advance race-neutral principles in the areas of education, public contracting, public employment, and voting. Through its resident and visiting academics and fellows, The Project conducts seminars and releases publications relating to the Voting Rights Act ("VRA"). American Enterprise Institute fellow Edward Blum, The Project's director, testified before Congress regarding the reauthorization of Section 5 of the VRA.

The Project has a direct interest in this case. It opposed the 2006 reauthorization of Section 5 of the VRA on the basis that it runs contrary to the principles of race neutrality to which it is dedicated and to the American ideal of individual equality to which The Project is profoundly committed. For these reasons, The Project respectfully submits this brief in support of Appellant and urges the Court to reverse the judgment below.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, Amicus states that no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION

This appeal arises from the district court's determination that (1) two race-neutral decisions by the Alabama Supreme Court, although grounded in state law, required "preclearance" from the Department of Justice ("DOJ") under Section 5 of the VRA; and (2) the "change" supposedly wrought by these decisions was retrogressive. In addition to being flatly incompatible with a proper interpretation of Section 5, the district court's decision, as Appellant explains, "'exacerbate[s] the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality.'" Brief of Appellant at 46, Riley v. Kennedy (No. 07-77) (Jan. 14, 2008) ("App. Br.") (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*"). Indeed, the facts of this case underscore that Section 5 can no longer be defended as a necessary deviation from our federal system of government.

The VRA was enacted in 1965 to defeat the systemic and on-going effort to deny African-Americans the right to vote secured by the Fifteenth Amendment, U.S. Const. amend. XV, § 1. Although the Fifteenth Amendment made intentionally discriminatory voting practices unlawful, the promise of an equal right to cast a ballot remained unfulfilled. In response, Congress enacted Section 5 of the VRA, which required "covered jurisdictions" to obtain "preclearance" from the federal government before making any "change" in voting practices. Pub. L. No. 89-110, § 5, 79 Stat. 437 (1965). The constitutionality of Section 5, "an extraordinary departure from the traditional course of relations

between the States and Federal Government," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-501 (1992), was upheld in *Katzenbach v. South Carolina*, 383 U.S. 301 (1966).

In rejecting South Carolina's challenge, the Court took account of the acts of defiance that prompted the legislation. This evidence suggested that preclearance was the only remedy that could overcome the obstacle posed by these "exceptional conditions" and "unique circumstances." *Id.* at 334-35. Given the detailed record of intentional discrimination, the Court reasonably concluded that Section 5 was a "rational means" of enforcing the "constitutional prohibition of racial discrimination in voting." *Id.* at 324. Nearly fifteen years later, the Court again upheld Section 5 under this rational basis standard. *City of Rome v. United States*, 446 U.S. 156, 177 (1980). In dissent, however, then-Justice Rehnquist argued that Congress' Fifteenth Amendment "enforcement" authority is limited to enacting legislation necessary "to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit." *Id.* at 213 (Rehnquist, J., dissenting).

This appeal again draws the constitutionality of Section 5 into question. The Alabama Supreme Court merely held that a state law was inconsistent with the Alabama Constitution and that this law was not revived by subsequent legislation. App. Br. 24-25. In concluding that these race-neutral decisions were subject to federal preclearance, the district court thus effectively held that "state courts have no authority—at least absent further federal permission, which here was refused—to remedy

the unconstitutional defect, and the State . . . must keep in place a practice held invalid under state law." *Id.* 26 (quoting omitted). As Appellant explained, this result is constitutionally problematic in that it "would not be 'congruent and proportional,' within the meaning of *City of Boerne v. Flores*, 521 U.S. 507 (1997), to any threat posed to Fifteenth Amendment rights in this particular context." App. Br. 48.

While Appellant has persuasively explained why Section 5, as interpreted by the district court, could be unconstitutional as applied here, the organic defects in this law actually render it facially invalid. By abandoning the "rational basis" standard employed in *Katzenbach*, and replacing it with a "congruent and proportional" inquiry, *Boerne* essentially adopted the position taken by then-Justice Rehnquist in *Rome*. Although this analytical change alone warrants revisiting the constitutionality of Section 5, it was Congress' 2006 decision to reauthorize Section 5, 42 U.S.C. § 1973c (2006) ("new Section 5"), in a way that completely divorces it from the Fifteenth Amendment that renders it unsustainable at this juncture. Section 5 is not the same law the Court upheld in 1965 and 1980 and the factual support for a federal preclearance regime has eroded over time. The combination of these factors renders new Section 5 unconstitutional in at least two ways.

First, Congress failed to compile any evidence that continuing intrusion into the province of state and local governments remained necessary to prevent intentionally discriminatory voting practices. Indeed, Congress was presented with compelling evidence that these jurisdictions had broken free from their

discriminatory past. Ignoring this evidence, Congress relied on inapt proxies, such as Section 2 suits and Section 5 objections interposed by DOJ, to justify the reenactment of Section 5 for another 25 years. Under *Boerne*, Congress must support its legislative judgment with evidence that the law actually addresses an ongoing and pervasive violation of the Fifteenth Amendment. Congress utterly failed to do so here. Given the transformative changes that have occurred in states such as Alabama over the last half-century, and the concomitant lack of evidence supporting reauthorization, the "federalism costs exacted by § 5 preclearance" are no longer justified. *Miller v. Johnson*, 515 U.S. 900, 926 (1995).

Second, even if there were sufficient evidence to justify continued federal preclearance for these covered jurisdictions, new Section 5 is not limited to redressing intentional discrimination—the evil addressed by the Fifteenth Amendment. Before *Boerne*, this Court had interpreted Section 5 to prevent changes in voting practices that had a retrogressive effect. *Beer v. United States*, 425 U.S. 130 (1976). Under the *Beer* standard, discriminatory purpose was not part of the Section 5 equation. *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) ("*Bossier Parish I*"). After *Boerne*, however, the Court shifted away from this "effects" test toward a "totality of circumstances" standard that looked to purpose and inched Section 5 closer to the constitutional line. *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Under the *Ashcroft* standard, for example, the views of minority legislators and widespread support from the minority community became central to the Section 5 analysis. These new considerations, among others, injected some measure of purpose into Section 5.

New Section 5 overruled *Ashcroft* and restored the *Beer* "effects" test. H. R. Rep. No 109-478, at 71 (2006) ("[T]he Committee makes clear that Congress explicitly rejects all that logically follows from Justice O'Connor's statement [from *Georgia v. Ashcroft*] that 'In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice.'"). By retreating from *Ashcroft* to the pre-*Boerne* "effects" test, 42 U.S.C. § 1973c(b) (2006), Congress eliminated any basis for defending Section 5 as "enforcing" legislation. "Congress does not enforce a constitutional right by changing what the right is." *Boerne*, 521 U.S. at 519.

Finally, even if a federal veto over the voting changes of covered jurisdictions remains an appropriate means of enforcing the Fifteenth Amendment, new Section 5 makes race the "predominant, overriding factor" in violation of the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. 630, 649 (1993). Even under the predecessor law, the tension between Section 5 and the Equal Protection Clause was evident. *Ashcroft*, 539 U.S. at 491 (Kennedy J., concurring). New Section 5 makes this conflict impossible to avoid; it fossilizes minority percentages in all covered jurisdictions for the next 25 years, 42 U.S.C. § 1973c(b), (d), and denies the States any flexibility in structuring their election laws. Under new Section 5 race is not a predominant factor—it is the only factor. "There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

ARGUMENT

I. THE HISTORY OF THE VOTING RIGHTS ACT

A. *The Voting Rights Act of 1965*

The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. The Fifteenth Amendment protects against intentional discrimination. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62 (1980).[2] Although "the commitment was clear, the reality remained far from the promise. Manipulative devices and practices were soon employed to deny the vote to blacks."[3] *Rice v. Cayetano*, 528 U.S. 495, 513 (2000). "Progress was slow, particularly when litigation had to proceed case by case, district by district, sometimes voter by voter." *Id.*

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[2] In *Bolden*, the Court determined that Section 2 of the VRA paralleled the Fifteenth Amendment. *Id.* at 61. Although Congress overturned this interpretation of Section 2 in the 1982 Amendments to the Voting Rights Act, and clarified that it intended Section 2 to reach discriminatory effects as well as discriminatory purpose, *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986), *Bolden* remains this Court's authoritative interpretation of the scope of the Fifteenth Amendment.

[3] There is no question that "an insidious and pervasive evil . . . had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309; *see, e.g.*, *Guinn v. United States*, 238 U.S. 347 (1915) (grandfather clause); *Terry v. Adams,* 345 U.S. 461 (1953) (white primary); *United States v. Thomas*, 362 U.S. 58, 80 (1960) (registration challenges).

In 1965, "to banish the blight of racial discrimination in voting," *Katzenbach*, 383 U.S. at 308, Congress enacted the VRA "under its authority to enforce the Fifteenth Amendment's proscription against voting discrimination." *Lopez v. Monterey County*, 525 U.S. 266, 269 (1999). The VRA was a watershed legislative event, which at its "heart," consisted of a "complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant." *Katzenbach*, 383 U.S. at 315. The VRA has two central enforcement provisions: Section 2, 42 U.S.C. § 1973, and Section 5, *id.* § 1973c. The provisions "combat different evils" and "impose very different duties upon the States." *Bossier Parish I*, 520 U.S. at 447.

Section 2 provides that

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a). Section 2 is directed at existing voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97-417, at 28, reprinted in 1982 U.S.C.C.A.N. 177, 205 (1982). Section 2 applies in all fifty States, "was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute," *Bolden*, 446 U.S. at 61, and is not at issue in this appeal.

Section 5, in contrast, was highly controversial. Unlike Section 2, it applied only to southern states and other "covered jurisdictions." 42 U.S.C. § 1973b. By its terms, Section 5 prevented any "covered jurisdiction" from changing a "standard, practice or procedure with respect to voting" until either DOJ or the District Court for the District of Columbia ("DDC") "preclear[ed]" it as "not hav[ing] the purpose and . . . effect of denying or abridging the right to vote on account of race or color . . . ." *Id.* § 1973c. Section 5 thus subjected voting regulations in covered jurisdictions to a federal veto and, therefore, "stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 177 (2007); *Berry v. Doles*, 438 U.S. 190, 200-01 (1978) (Powell, J., concurring) ("It must be remembered that the Voting Rights Act imposes restrictions unique in the history of our country on a limited number of selected States.").

The constitutionality of Section 5 was immediately tested. South Carolina claimed that Section 5 "exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution." *Katzenbach*, 383 U.S. at 323. Recognizing the "exceptional conditions" and "unique circumstances" before it, *id.* at 334-35, the Court explained that the factual record compiled by Congress demonstrated a history of States resorting to the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *id.* at 335; and the inability of Congress to combat such discriminatory practices with less drastic

remedies, *id.* at 313 ("Congress has repeatedly tried to cope with the problem . . . . Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination."). Against this backdrop, the Court sustained Section 5 under a rational basis standard. *Id.* at 324 ("As against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting.") (emphasis added).

As the Court explained, the acts of intentional discrimination cataloged by Congress had produced a wide racial disparity in voter registration and turnout. *Id.* at 313, 330. Given this "reliable evidence of actual voting discrimination," and the "absence of proof that [the covered jurisdictions] have been free of substantial voting discrimination in recent years," *id.* at 328-30, Congress "had reason to suppose that these States might try . . . to evade the remedies for voting discrimination contained in the Act itself," *id.* at 335; H.R. Rep. No. 94-196, at 57-58 (1975). Section 5 thus was a necessary response to the contemporaneous evidence that "minorities were openly denied the right to participate in the political process by State and local officials." H.R. Rep. No. 109-478, at 7 (2006).

Nearly fifteen years later, the Supreme Court again upheld Section 5 as a constitutional exercise of Congress' Fifteenth Amendment enforcement power in *City of Rome v. United States*, 446 U.S. 156 (1980). The city argued that Section 5, "to the extent that it prohibits voting changes that have only a discriminatory effect, is unconstitutional." *Id.* at 173. In particular, Section 1 of

the Fifteenth Amendment "prohibits only purposeful racial discrimination in voting, and . . . in enforcing that provision pursuant to [Section] 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect." *Id.* The Court again upheld Section 5 because "Congress could *rationally* have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Id.* at 177 (emphasis added) (footnote omitted).

Then-Justice Rehnquist dissented, flatly rejecting the idea that "Congress has the authority under its enforcement powers to determine, without more, that electoral changes with a disparate impact on race violate the Constitution, in which case Congress by legislative act could effectively amend the Constitution." *Id.* at 210 (Rehnquist, J., dissenting). As he explained, "[t]his result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government." *Id.* at 211 (citations omitted). The application of the overly-deferential rational basis standard of review was particularly troubling given the lack of evidence of intentional discrimination: "The facts of this case readily demonstrate the fallacy underlying the Court's determination that congressional prohibition of Rome's conduct can be characterized as enforcement of the Fourteenth or Fifteenth Amendment." *Id.* at 207. In the end, "[t]o permit congressional power to prohibit the conduct challenged in this case requires state and local

governments to cede far more of their powers to the Federal Government than the Civil War amendments ever envisioned." *Id.* at 220.

B. *The Court's Rejection of DOJ's Expansive Interpretation of Section 5*

DOJ has repeatedly asked this Court to read Section 5 expansively to protect against any number of discriminatory "effects" far removed from the statute's language, purpose, and constitutionally limited reach. The Court has consistently declined DOJ's invitation. In *Beer v. United States*, 425 U.S. 130 (1976), the Court rejected DOJ's argument that the failure to ensure that a minority group is represented in proportion to its representation in the general population was a basis for denying preclearance under Section 5. Rather, "the purpose of § 5 has always been to insure 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 their electoral franchise." *Id.* at 141. Thus, under *Beer*, "[i]f a change resulted in minority voters losing ground, then the change was not entitled to federal approval. On the other hand, if the change retained the existing voting strength of minority voters or increased that voting strength, then the change merited federal approval." Michael J. 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). "A discriminatory purpose (or lack thereof) played no role in the Section 5 effects prong. Motive did not matter." *Id.*

After *Beer*, this Court continued to reject DOJ's various constructions of Section 5. In particular, the Court rejected DOJ's argument that a "clear" violation of Section 2 was a basis for denying preclearance under Section 5. *Bossier Parish I*, 520 U.S. at 481-82. The Court also rejected DOJ's argument that preclearance should be denied if a discriminatory, although non-retrogressive, purpose motivated a voting change. *Bossier Parish II*, 528 U.S. at 328 (explaining that the "language of [Section 5] leads to the conclusion that the 'purpose' prong . . . covers only retrogressive dilution."). "The result of the *Bossier* decisions was that federal review of voting changes was left with little except for the retrogressive effects test." Pitts, 32 Pepp. L. Rev. at 279.

More recently, and of particular importance here, the Supreme Court considered the denial of preclearance to Georgia's post-2000 census redistricting plan in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). As of the 2000 census, Georgia had thirteen majority-minority districts; Georgia's 2000 redistricting plan called for the "unpacking" of black voters from the most heavily concentrated majority-minority districts in order to create more "influence" districts—where black voters could affect the outcome of the elections. Georgia sued in the DDC for preclearance. In objecting to the plan, DOJ focused on three of Georgia's thirteen majority-minority districts; in these three districts, minority representation in the voting population was slightly reduced by the redistricting plan. Indeed, the percentage of black registered voters in each of these three districts dropped just below 50%. DOJ thus concluded that the plan was retrogressive. *Id.* at 472-73. The district court agreed.

The Supreme Court reversed the decision and remanded the case to the district court. After reiterating that preclearance should be denied where the voting change "'would lead to a retrogression in the position of racial minorities with respect to the effective exercise of their electoral franchise,'" *Ashcroft*, 539 U.S. at 466 (quoting *Beer*, 425 U.S. at 141), the Court, for the first time, gave meaning to the "effective exercise of the electoral franchise" language of *Beer*, *id.* at 480. The Court outlined a "totality of the circumstances" retrogression test, under which retrogression depends upon "all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, [and] the extent of the minority group's opportunity to participate in the political process . . . ." *Id.* at 479-80. Retrogression analysis thus demands a subtle examination of a minority group's ability to elect candidates of its choice in "safe" and "coalition" districts, the group's ability to contribute to the outcome of elections in "influence" districts, the group's support for (or opposition to) minority incumbent representatives, and the political clout of those representatives. *Id.* at 482-85.

Ashcroft represented an important shift in the Section 5 inquiry away from the "straightforward" but problematic *Beer* retrogression test. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum. L. Rev. 1710, 1718 (2004) ("No reading of the plurality opinion in *Ashcroft* can fail to recognize that the Court substituted a highly nuanced totality-of-the-circumstances approach for the relatively rigid *Beer* retrogression test."); Richard L. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv.

L. Rev. 28, 96 (2004) (describing *Ashcroft* as "the most important decision in a generation on race and political equality" for replacing "a single, mandatory remedial regime with one that defines general objectives but leaves representative bodies, with black participation, more flexibility in choosing the means to realize those aims in varied contexts.").

C. *The 2006 Voting Rights Act Reauthorization Amendments*

In 2006, Congress reauthorized the VRA for another 25 years. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act and Reauthorization Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006). Congress amended Section 5 to allow a change to a voting system only if it "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a) (2006). Importantly, new Section 5 also included subsections (b) through (d), which provide:

> (b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the *ability* of any citizens of the United States on account of race or color . . . *to elect* their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.
>
> (c) The term "purpose" in subsections (a) and (b) of this section shall include *any discriminatory purpose*.

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

Id. (emphases added).

By adding the "ability to elect" language, Congress cast aside this Court's "totality of the circumstances" test and returned "the retrogression inquiry to what it was under the *Beer v. United States* standard." Persily, 117 Yale L.J. at 234; David T. Canon, *The Future of the Voting Rights Act*, 6 Election L.J. 266, 267 (2007) ("Congress did not follow this advice on flexibility, but rather restored the pre-*Georgia v. Ashcroft* retrogression standard."). Indeed, Congress left no room for doubt as to its objective. H. R. Rep. No 109-478, at 71 ("[T]he Committee makes clear that Congress explicitly rejects all that logically follows from Justice O'Connor's statement [from *Georgia v. Ashcroft*] that 'In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice.'").

II. NEW SECTION 5 DOES NOT "ENFORCE" THE FIFTEENTH AMENDMENT.

The 43 years since the passage of the VRA have worn away the "exceptional conditions" and "unique circumstances" that justified Section 5 as legislation enforcing the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 334-35. Indeed, there is no evidence that the States subject to preclearance under Section 5 any longer deserve to be singled out for special federal supervision. New Section 5's stringent preclearance

remedy cannot pass constitutional muster, even under the pre-*Boerne* rational basis standard. New Section 5, which is entirely divorced from the Fifteenth Amendment's ban on intentional discrimination, certainly cannot withstand *Boerne*'s more stringent standard of review.

A. *The Limits Of Congress' Fifteenth Amendment Enforcement Authority*

Boerne was a pathbreaking decision that placed real limits on Congress' enforcement authority under the Fourteenth and Fifteenth Amendments. The decision arose from Congress' attempt to overrule the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the First Amendment allows laws of general applicability to "be applied to religious practices even when not supported by a compelling government interest," *Boerne*, 521 U.S. at 514 (citing *Smith*, 494 U.S. at 885). Dissatisfied with the Court's interpretation of the First Amendment, Congress enacted the Religious Freedom Restoration Act ("RFRA"), declaring that government may *not* burden an individual's exercise of religion unless it can demonstrate that it used the least restrictive means to further a compelling government interest. *Id.* at 515-16 (citing 42 U.S.C. § 2000bb-1).

The Court struck down RFRA as exceeding Congress' power. In so doing, the Court cast aside the rational basis standard for determining whether legislation qualified as a legitimate exercise of Congress' Fourteenth Amendment enforcement authority. Starting from first principles, the Court emphasized that the

Constitution vests Congress with *enumerated* powers; "congressional enforcement power . . . is not unlimited." *Id.* at 518. Congress' authority "extends only to enforc[ing] the provisions of the Fourteenth Amendment." *Id.* at 519. Simply put,

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'

Id.

The Court explained that the limits of Congress' "enforcement" authority are judged by whether there are "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* at 520; David S. Day, *New Dimensions of Section 5 Enforcement Power*, 47 S.D. L. Rev. 366, 384 (2002) (explaining that *Boerne* and its progeny changed "the standard: from the deferential rational basis test to the non-deferential, searching scrutiny standard"). "The bottom line is that the Court has shifted its enforcement power doctrine away from the rationale explicated by the majority in *City of Rome* and has more or less adopted Justice Rehnquist's dissent in that case." Pitts, 32 Pepp. L. Rev. at 290.

With regard to RFRA, the Court concluded that to satisfy the "congruent and proportional" standard the legislation must either remedy past unconstitutional discrimination by States or prevent such discrimination. RFRA, however, could not "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. The Court found that "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry," mentioning "no episodes [of religious persecution] occurring in the past 40 years." *Id.* at 530. The Court recognized that Congress impermissibly sought to change the substantive constitutional standard; not simply to enforce the existing right against religious discrimination. *Id.* at 534-35. The Court stuck down the law.

B. *New Section 5 Cannot Survive Review Under Boerne*

This Court's "congruent and proportional" test allows it to determine whether Congress, here, is actually enforcing the substantive guarantees of the Fifteenth Amendment or is instead abusing that authority to impose a new standard of voting fairness.[4] As explained below, new Section 5 bears no relation, either factually or legally, to the legislation enacted by Congress in 1965. The statute no longer focuses on eradicating the

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[4] The enforcement clauses of the Fourteenth and Fifteenth Amendment are co-extensive. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment.").

intentional acts of discrimination that the Fifteenth Amendment bans; rather, Congress is simply imposing on the States its preferred, and openly race-based, electoral system. New Section 5, which lacks evidence supporting the extension of a federal veto over state election law changes for another 25 years *and* substantively redefines the injury confronted by the Fifteenth Amendment, truly is a "federalism-and-separation-of-powers double-whammy." App. Br. 23.

1. Congress Failed to Produce Evidence That New Section 5 Was Necessary to Enforce the Fifteenth Amendment.

Because remedies rightfully exist only where there is a need to correct some wrong, the first step in determining whether a statute qualifies as valid "enforcement" legislation is to "identify with some precision the scope of the constitutional right at issue." *Bd. of Trs. Of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). As noted above, because Section 5 was enacted pursuant to the Fifteenth Amendment, the injury to be redressed is intentional racial discrimination by a state actor with regard to voting. *Bolden*, 446 at 61. The key question therefore is whether Congress identified a "modern" pattern of intentional discrimination in voting practices sufficient to trigger its Fifteenth Amendment enforcement authority. *Boerne*, 521 U.S. at 530. It did not.

The "exceptional conditions" and "unique circumstances" identified by the Court in *Katzenbach*, and relied upon by Congress in 1965, no longer exist. In passing new Section 5, Congress acknowledged that

significant progress has been made in eliminating first-generation barriers, and that minority vote registration, turnout, and representation have all increased substantially. H.R. Rep. No. 109-478, at § 2(b)(1), 120 Stat. 577. In the states entirely covered by Section 5, African-American voter registration and turnout percentages are higher than whites' in three instances and on par with whites' in the remaining states; in all, African-Americans in these states have higher registration and turnout numbers than *any* racial group outside covered jurisdictions. Charles S. Bullock & Ronald Keith Gaddie, *The Bulluck-Gaddie Voting Rights Studies: An Analysis of Section 5 of the Voting Rights Act*, American Enterprise Institute (2006), Addendum: *Impact of Using Non-Hispanic White Data*, 3-11 (June 6, 2006) ("Bullock-Gaddie Studies"); U.S. Comm'n on Civil Rights, *Reauthorization of the Temporary Provisions of the Voting Rights Act* Report 35-36 (April 2006).

The experience in Alabama illustrates this point. App. Br. 4-6. Whereas "[p]rior to 1965, the black registration rate in the State of Alabama lagged behind that of whites in that State by 49.9 percentage points" and "[i]n 1972, that disparity [remained at] 23.6 percentage points," H.R. Rep. No. 94-196, at 6 (1975), by 2004, the gap had vanished almost entirely. Today, black registration in Alabama is within a single percentage point of white registration, and black turnout is roughly a percentage point higher than white turnout. S. Rep. No. 109-295, at 11; U.S. Census Bureau, Voting and Registration in the Election of November 2004, Table 4a. As one study concluded, "Alabama, which had nearly as far to go as Mississippi along the path of voting

rights, has made tremendous strides in black voter participation and in descriptive representation." Bullock-Gaddie Studies Addendum: *Impact of Using Non-Hispanic White Data*, at 15. Moreover, the "effort at black voter mobilization has translated into significant gains in terms of descriptive representation . . . . Black state legislators are elected roughly in proportion to the eligible electorate. These black legislators have held positions of power and influence within their chambers." *Id.*

For these reasons, Congress was confronted with expert testimony repeatedly warning that it "would be hard-pressed to discover the same kinds of discriminatory voting practices that our predecessor[s] . . . encountered—the kinds of discriminatory practices documented in that 1961 report and others like it." Gerald A. Reynolds, *Reauthorization of the Voting Rights Act: Policy Perspectives and Views from the Field*; Testimony Before the House Commission on the Judiciary, Subcommittee on the Constitution (June 21, 2006) ("Reynolds Testimony"); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 Ohio St. L.J. 177, 179 (2005) ("I see very little in the DOJ evidence that Congress could use to support a case for a renewed Section Five").

In fact, the testimony concerning proof of unconstitutional discrimination demonstrated that there were six such instances against minorities between 1982 and 2006 in covered states, six more in non-covered states, and six more involving discrimination against whites. S. Rep. No. 109-295, at 13. Thus, the expert

testimony concluding that "there is no crisis in minority voting rights in 2006 compared to what there was in 1965 when the act was passed or in subsequent years" was basically uncontested. Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act*, American Enterprise Institute 2-3 (May 17, 2006) ("Blum & Campbell").

Nevertheless, Congress reauthorized for 25 more years because "40 years has not been a sufficient amount of time." Pub. L. 109-246 § 2(b)(7). In so doing, Congress rested its judgment on the following record evidence:

> 1. "[T]he 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 undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength."
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> 2. "[T]he number of requests for declaratory judgments [for preclearance] denied by the United States District Court for the District of Columbia."
>
> 3. "[T]he continued filing of section 2 cases that originated in covered jurisdictions."

> 4. The "tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the Voting Rights Act of 1965."

Id. § 2(b)(4) & (b)(8), 120 Stat., at 577-78. Despite Congress' citation to these findings as "[e]vidence of continued discrimination" against racial minorities, *id.* § 2(b)(4), any modest level of scrutiny completely undermines this claim.

First, Section 5 objections and Section 2 litigation are inapt proxies for intentional discrimination. For instance, the Attorney General regularly objects to annexation or redistricting schemes that do not maximize the number of majority-minority districts, that do not protect white candidates from minority competition and vice versa, and that do not guarantee reserved African-American and Hispanic seats, none of which bears any relation to unconstitutional conduct. Hasen, 66 Ohio St. L.J. at 192-93. In fact, it probably signals the opposite. *Miller*, 515 U.S. at 924-27; *Bolden*, 446 U.S. at 66-67, 74. In any event, more successful Section 2 actions have taken place in non-covered jurisdictions than in covered ones since 1982. Blum & Campbell at 11; Edward Blum, *Section 5 of the Voting Rights Act: The Importance of Pre-Clearance*, Testimony Before the House Committee on the Judiciary, Subcommittee on the Constitution, at 2 (Oct. 25, 2005) ("Blum Testimony").

Congress' faulty reasoning aside, the number of objections is itself miniscule even if every one of the Attorney General's objections were based on unconstitutional conduct; 0.7% of all submissions resulted in an objection between 1982—when Section 5

was last reauthorized—and 2004. Reynolds Testimony (June 21, 2006). In 2003, 0.17% of submissions received an objection, 0.06% received one in 2004, and 0.03% received one in 2005. Blum & Campbell 11; Persily, 117 Yale L.J. at 199-200. This evidence alone should be sufficient to conclude that intentional discrimination is no longer a widespread problem in the covered jurisdictions. Blum & Campbell 10 ("No valid argument can be made to extend Section 5 based on the number of objections; the number of objections has reached an all-time low while black voter participation and minority elected officials numbers have soared.").[5]

Advocates for Section 5's renewal relied on other evidence of discrimination; however, Congress did not rely on it and, in any event, it would have failed to disclose the kind of pervasive intentional discrimination found in connection with previous authorizations of the Act. Because there are no more poll taxes, literacy tests, grandfather clauses, or other examples of systemic voting abuses on the basis of race, new Section 5's advocates relied in Congress on the presence of racial bloc/polarized voting, *see, e.g.*, Laughlin McDonald & Daniel Levites, ACLU, *The Case for Extending and Amending the Voting Rights Act* 9-14 (2006) ("ACLU Report"), H.R. Rep. No. 109-478, at 34-35; and "hostility to minority political participation," as evidenced by the

[5] Because the DDC uses the same standards as DOJ and does not require a showing of unconstitutional conduct in order to invoke Section 5's requirements, resort to those statistics proves no more useful. Nor does the evidence of federal observers being dispatched to monitor elections; the statute requires only complaints regarding unequal voting opportunities, not evidence of intentional discrimination. 42 U.S.C. § 1973f(a).

"unpacking" of majority-minority districts into "coalition" or "influence" districts at issue in *Ashcroft*, ACLU Report at 14-16; as evidence of intentional discrimination. Racially polarized voting is not evidence of unconstitutional discrimination and is of no relevance where not accompanied by evidence of discriminatory intent. *Bolden*, 446 U.S. at 64.

And, ironically, Section 5 *depends* on racially polarized voting by focusing entirely on the racial makeup of a given district to determine the minority community's ability to elect the candidate of its choice. For this reason, the "unpacking" of majority-minority districts was explicitly found to be of a legitimate *benefit* to racial minorities in *Ashcroft*. 539 U.S. at 481 (explaining that "spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice" and "has the potential to increase 'substantive representation' in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group.") (citation omitted).

Finally, although Congress did not even try, it could not have relied on acts of unconstitutional conduct from previous decades to justify the new Section 5. *Bolden*, 446 U.S. at 74 ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."). Rather, only "modern" acts of systemic voting abuses *in the covered jurisdictions meaningfully greater than those in non-covered jurisdictions* could sustain legislation as far-reaching as new Section 5. No such evidence exists. Blum Testimony

at 2 ("[A]pplying the same methods of analysis that we used on the covered jurisdictions to non-covered states such as Tennessee, Arkansas, and New Mexico . . . reveals no difference between them."). The "unremitting and ingenious defiance of the Constitution" that supported the need for Section 5 is in the past. *Katzenbach*, 383 U.S. at 309.

Indeed, Congress was completely silent as to why preclearance remains necessary where (1) the other protections of the Voting Rights Act remain; (2) there is no showing of jurisdictions continually staying one step ahead of the law; (3) there is no evidence that traditional litigation would be insufficient to vindicate constitutional rights; and (4) there is equal or greater evidence of intentional discrimination outside of covered states as within them. Given Congress' failure to offer a concrete argument for why *only* the preclearance model of new Section 5 would do, speculation that the gains made would dissipate in the absence of Section 5 is entirely unfair. Issacharoff, 104 Colum. L. Rev. at 1731 (explaining that "[i]f the burden for change is certainty of outcome, then the status quo always prevails" and that it is likely that "the combination of section 2 of the Voting Rights Act, the protections of the Fourteenth Amendment, and the fact of being in the process and at the table would afford much protection").[6]

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[6] Congress' failure to consider a less intrusive means of protecting voting rights further illustrates that Congress did not heed this Court's warning that enforcement legislation must, over time, "be adapted to the mischief and wrong which the [Fifteenth] Amendment was intended to provide against," *Boerne*, 521 U.S. at 532 (quotation omitted).

This Court has consistently recognized that Section 5 imposes a heavy toll on federalism. *Bossier Parish II*, 528 U.S. at 336; *Lopez*, 525 U.S. at 282; *Bossier Parish I*, 520 U.S. at 481. The "federalism costs exacted by § 5 preclearance" were understandably justified "as a necessary and constitutional response to some States' 'extraordinary stratagem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.'" *Miller*, 515 U.S. at 926 (quoting *Katzenbach*, 383 U.S. at 335). However, this "does not mean they can be justified" absent the factual predicate that necessitated the enactment of Section 5 over 40 years ago. *Id.* at 926-27. Given the failure of Congress to produce any evidence akin to the deplorable acts of discrimination that prompted the passage of the VRA, new Section 5 is no longer a defensible deviation from our federal system.

2. New Section 5 Does Not Redress Intentional Discrimination.

Even if the evidence before Congress supported a continued need for a statutory remedy enforcing the Fifteenth Amendment, new Section 5 does not address this concern. As noted above, new Section 5 restored the *Beer* retrogression standard, abandoning the more subtle and flexible approach adopted in *Ashcroft*. Persily, 117 Yale L.J. at 234 ("By adding the words 'ability . . . to elect' to the new section 5, Congress attempted to overrule *Georgia v. Ashcroft* and return the retrogression inquiry to what it was under the *Beer v. United States* standard."). Under *Beer*, however, it was

irrelevant whether the change in law was prompted by a discriminatory motive; preclearance did

> *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.

Bossier Parish II, 528 U.S. at 335.

Thus, as this Court explained, preclearance could not be denied to a plan "that is *not* retrogressive—*no matter how unconstitutional it may be* . . . ." *Id.* at 335-36. Indeed, this Court expressly recognized that the *Beer* test was not congruent with the Fifteenth Amendment: "Even if § 5 did not have a different baseline than the Fifteenth Amendment, appellants' argument that § 5 should be read in parallel with the Fifteenth Amendment would fail for the simple reason that we have never held that vote dilution violates the Fifteenth Amendment." *Bossier Parish II*, 528 U.S. at 334 n.3. Thus, as implicitly recognized by this Court, new Section 5 is not "parallel" to the Fifteenth Amendment. Pitts, 32 Pepp. L. Rev. at 281 (explaining that *Boerne* "stemm[ed] from the Court's unwillingness to allow Congress to use its enforcement power to legislate a complete shift in constitutional norms" and that "the paradigm of such a complete shift would appear to occur when Congress substitutes a pure effects test for a constitutional purpose test").

Rather than enforcing the Fifteenth Amendment, new Section 5 is "merely an attempt to substantively redefine the States' legal obligations with respect" to voting practices. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000). That is, Congress strengthened Section 5, not because "more elaborate measures" would be needed "in order to satisfy the clear commands of the Fifteenth Amendment," *Katzenbach*, 383 U.S. at 309, but because Congress decided that its policy goals could not be implemented under the statute as previously written. This Congress may not do. *Id.* at 326 ("On the rare occasions when the Court has found an unconstitutional exercise of [the 15th Amendment's enforcement] powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment."). Congress' goal of ensuring the "*ability* of . . . citizens *to elect* their preferred candidates of choice," 42 U.S.C. § 1973c(b), has nothing to do with the Fifteenth Amendment.[7]

Indeed, by rejecting the "totality of circumstances" approach adopted in *Ashcroft*, Congress ensured Section 5's constitutional infirmity. *Ashcroft* introduced at least some measure of discriminatory purpose into the Section 5 inquiry; that is, while *Ashcroft* certainly did not bring

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[7] Though "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional," *Boerne*, 521 U.S. at 532, the same cannot be said where there is no indication that the congressional enactment reaches *any* unconstitutional conduct. *Rome*, 446 U.S. at 202 (Powell, J., dissenting); *id.* at 213 (Rehnquist, J., dissenting); *Lopez*, 525 U.S. at 296 (Thomas, J., dissenting).

Section 5 exactly in line with the constitutional standard, "[s]ome of the evidentiary factors that [it] adds to the retrogression test look more like factors that would help to determine whether a discriminatory purpose was at work." Pitts, 32 Pepp. L. Rev. at 301 (2005). In particular, "[t]he consideration of the views of minority legislators is the new factor that most clearly seems to put an element of purpose into the Section 5 effects test." *Id.* Moreover, "widespread minority support for the change seemingly gives an imprimatur that purposeful discrimination was not at work in the adoption of the voting change." *Id.* at 302.[8]

By overturning *Ashcroft*, and replacing its test with a standard that "unnecessarily infuse[s] race into virtually every redistricting," new Section 5 "rais[es] serious constitutional questions." *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2625 (2006) ("*LULAC*"). Because of the 2006 amendments, Section 5 can no longer be "properly interpreted" as "encourage[ing] the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." *Ashcroft*, 539 U.S. at 491. Congress thus left this Court no choice but to strike down the law.

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[8] In addition, "the inquiry into influence districts will look to whether candidates actively seek minority votes and, more importantly, after seeking those votes, whether the candidates assist their minority constituents or vote in favor of issues minority voters overwhelmingly support." Pitts, 32 Pepp. L. Rev. at 302. That is, "this amounts to a purpose-type analysis because it will look at whether legislators elected with minority support are just using those voters to get elected without providing some tangible benefits once assuming office." *Id.*

Boerne, 521 U.S. at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'") (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

III. NEW SECTION 5 CANNOT BE RECONCILED WITH THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT.

At a more fundamental level, new Section 5 is unconstitutional because it *requires* discrimination on the basis of race in violation of the Fourteenth Amendment. The "central mandate" of the Equal Protection Clause "is racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904 (citations omitted). This constitutional ban on racial discrimination "obtains with equal force regardless of 'the race of those burdened or benefited by a particular classification,'" *id.* at 904 (quotation omitted), and applies to both the Federal and State governments, *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). Moreover, the equal protection guarantee of the Fourteenth Amendment fully extends to federal and state voting laws. *Shaw*, 509 U.S. at 649; *Miller*, 515 U.S. at 905;*Wright v. Rockefeller*, 376 U.S. 52, 56 (1964).

Indeed, this Court has made clear that voting laws that make race the "predominant, overriding factor" violate the Equal Protection Clause. *Miller*, 515 U.S. at

920; *LULAC*, 126 S. Ct. at 2664; *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). The tension between the Equal Protection Clause and Section 5 of the VRA has been evident for some time. *Beer*, 425 U.S. at 141 (concluding that a redistricting plan valid under Section 5 is invalid if it "so discriminates on the basis of race or color as to violate the Constitution"); *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment . . . seem to be what save it under § 5."); *LULAC*, 126 S. Ct. at 2625 (explaining that the "infus[ion] of race into virtually every redistricting rais[es] serious constitutional questions").

New Section 5 openly makes race the "predominant" factor in deciding whether preclearance should be granted and, therefore, cannot pass constitutional muster. As detailed above, new Section 5 prohibits any voting change that "will have the effect of diminishing" a minority group's "ability . . . to elect [its] preferred candidates of choice." 42 U.S.C. § 1973c(b), (d). New Section 5, therefore, fossilizes current minority percentages in all covered voting districts for 25 years regardless of changes in facts and circumstances. In so doing, Section 5 not only prevents the intentional dissolution of majority-minority districts and requires the creation of such districts when others naturally dissipate—it expressly prevents *any* diminution in minority voting percentages.

For example, under new Section 5, "[i]f a 25% minority district has a 10% chance of electing the minority-preferred candidate . . . section 5 would prevent decreasing the minority percentages in a way that might

reduce the candidate's chances of election from slim to none." Persily, 117 Yale L.J. at 245. Similarly, "it would be retrogressive to replace a district with a 100% probability of electing the minority's preferred candidate with one with only a 90% probability, without compensating for the drop elsewhere in the plan." *Id.* As a result, Section 5 "broaden[s] the retrogression inquiry to include any district where minorities have some chance of electing their preferred candidates." *Id.* at 244-45. By changing the focus of retrogression solely to maintaining minority voting percentages, Section 5 ensures that race is the predominant, perhaps the only, factor influencing redistricting plans in covered jurisdictions.

In past cases, the Court has successfully avoided this constitutional thicket by rejecting DOJ's overly broad construction of Section 5. In *Miller*, for example, DOJ defended a redistricting plan where "[r]ace was . . . the predominant, overriding factor," 515 U.S. at 920, as necessary to comply with Section 5, *id.* at 922. In rejecting this race-based "maximization policy," under which DOJ required "States to create majority-minority districts wherever possible," as beyond the command of Section 5, the Court explained that such a plan raised "serious constitutional concerns." *Id.* at 925-26. DOJ's "implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, into tension with the Fourteenth Amendment." *Id.* at 927 (internal citations omitted). Because the Court rejected DOJ's "interpretation of the statute," it was able to "avoid the constitutional problems that interpretation raises." *Id.* (citations omitted).

DOJ then insisted, when the case returned to the Court, that the redistricting plan rejected in *Miller* was the "baseline" for determining whether the revised plan was retrogressive. *Abrams v. United States*, 521 U.S. 74, 95 (1997). The Court disagreed; the "1992 plan, constitutional defects and all, [could not] be the benchmark." *Id.* at 97. "Section 5 cannot be used to freeze in place the very aspects of a plan found to be unconstitutional." *Id.* at 97. Together, *Miller* and *Abrams* make clear that compliance with Section 5 is not a legitimate basis for drawing racially gerrymandered voting plans. Such a practice would allow Congress to read the Fourteenth Amendment out of this Court's voting rights jurisprudence.[9]

New Section 5, however, does just that. Congress has revived almost every race-focused DOJ construction of Section 5 struck down by this Court as constitutionally problematic over the last 30 years; the statute clearly makes race the predominant factor in every redistricting decision. Put simply, new Section 5 requires covered jurisdictions to violate the Fourteenth Amendment in order to comply with a statute. In a contest between the

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[9] Given *Abrams*, the district court's reliance on the state law struck down by the Alabama Supreme Court as the baseline for the Section 5 retrogression inquiry was plain error. App. Br. 35-38. The law was never "in effect" for purposes of Section 5. *Abrams*, 521 U.S. at 97. Moreover, allowing a precleared, but concededly unconstitutional, state law to serve as the retrogression baseline under Section 5 grants DOJ a supervisory role of state courts that cannot be squared with basic principles of federalism and separation of powers. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting)

two, the statute must give way. "There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive." *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

CONCLUSION

For the reasons set forth herein, the judgment of the district court should be reversed.

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