No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF NICHOLAS DEB. KATZENBACH, DREW S. DAYS, III, JOHN R. DUNNE, BRIAN K. LANDSBERG, BILL LANN LEE, J. STANLEY POTTINGER, AND JAMES P. TURNER AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ELISSA J. PREHEIM
DAVID D. FAUVRE
SHERI L. SHEPHERD
ARNOLD & PORTER LLP
555 Twelfth St. N.W.
Washington, D.C. 20004
(202) 942-5000

SAMUEL R. BAGENSTOS
Counsel of Record
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 267-4728

Counsel for Amici Curiae

March 25, 2009

221695

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

CONSTITUTION AND STATUTES

MISCELLANEOUS

Cited Authorities

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are former Attorney General of the United States Nicholas deB. Katzenbach and former officials in the Civil Rights Division of the United States Department of Justice. Collectively, they have served during both Democratic and Republican administrations. They have substantial experience with the Department's implementation of the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Amici* believe that their collective experience will illuminate the issues before the Court. *Amici* write this brief principally to respond to the brief filed on behalf of Abigail Thernstrom and five former Justice Department officials ("Thernstrom *Amici*"). That brief urges this Court to strike down the reauthorized Section 5 on the ground that it authorizes or demands unconstitutional race-based districting. The Thernstrom *Amici's* argument relies principally on the ground that the United States Department of Justice, which administers the statute, is purportedly a serial violator of the Constitution with a "proven track record of using [its] power to require at least presumptively unconstitutional racial districting." Thernstrom Br. 34.

But that supposed "track record" involves a handful of cases during a brief period immediately following the

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

1990 census—*i.e.*, nearly two decades ago—when this Court's precedents, exemplified by *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), appeared to permit the use of race in drawing electoral districts so long as the district lines did not dilute the votes of any group, and when this Court was not even applying strict scrutiny to "benign racial classification[s]" adopted by the federal government, *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 563 (1990). Since this Court made clear in *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), and *Miller v. Johnson*, 515 U.S. 900 (1995), that districting decisions trigger strict scrutiny when race is the "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *id.* at 916—and since this Court made clear in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that all racial classifications, state and federal, trigger strict scrutiny—the Department of Justice has assiduously complied with those principles. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5412-13 (Jan. 18, 2001). *Amici* who served in the Department after this Court's decisions in *Shaw I*, *Miller*, and *Adarand* were responsible for ensuring that the Department complied with those decisions. Their experience contradicts the assertions in the Thernstrom brief. A list of *amici* follows.

Nicholas deB. Katzenbach. Nicholas deB. Katzenbach served as the Deputy Attorney General from 1962-1965 and as the Attorney General of the United States from 1965-1966, during which time he helped draft the Voting Rights Act of 1965 and he argued the constitutionality of the Voting Rights Act

before this Court in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). He was Under Secretary of State from 1966-1969. Prior to that time, he was a law professor for eight years and then served as Assistant Attorney General of the Office of Legal Counsel. Since his government service, Katzenbach has served as General Counsel of the IBM Corporation and as Chairman of the Board of Directors of the MCI Corporation.

Drew S. Days, III. Drew S. Days, III, served as Assistant Attorney General for Civil Rights from 1977-1981 and as Solicitor General of the United States from 1993-1996. Prior to his service in the Civil Rights Division, he was an attorney for the NAACP Legal Defense and Education Fund. Since his government service, Days has been the Alfred M. Rankin Professor of Law at the Yale Law School.

John R. Dunne. John R. Dunne served as Assistant Attorney General for Civil Rights from 1990-1993. Prior to that time, he served over 20 years in the New York State Senate. Since his government service, Dunne has been an attorney in private practice.

Brian K. Landsberg. Brian K. Landsberg was an attorney in the Civil Rights Division from 1964-1986, where he served as Chief of the Appellate Section from 1974-1986. In 1993, he returned to the Division to serve as Acting Deputy Assistant Attorney General for Civil Rights. Since his government service, Landsberg has been a professor at the McGeorge School of Law at the University of the Pacific. He is the author of two books on the Division's civil rights enforcement: Enforcing Civil Rights - Race Discrimination and the Department of

Justice (Univ. Press of Kan. 1997) and Free at Last to Vote: Alabama and the Origins of the Voting Rights Act (Univ. Press of Kan. 2007).

Bill Lann Lee. Bill Lann Lee served as Assistant Attorney General for Civil Rights from 1997-2001. Prior to that time, he was an attorney for the NAACP Legal Defense and Education Fund for 18 years. Since his government service, Lee has been an attorney in private practice; he chaired the bipartisan National Commission on the Voting Rights Act.

J. Stanley Pottinger. J. Stanley Pottinger served as Assistant Attorney General for Civil Rights from 1973-1977. Prior to that time, from 1970-1973, he served as Director of the Office of Civil Rights at the Department of Health, Education, and Welfare. Since his government service, Pottinger has been a lawyer in private practice, an investment banker, and an author.

James P. Turner. James P. Turner was an attorney in the Civil Rights Division from 1965-1994. He served as Deputy Assistant Attorney General for Civil Rights from 1969-1994, and as Acting Assistant Attorney General for Civil Rights from 1993-1994.

SUMMARY OF ARGUMENT

The arguments raised by the Thernstrom *Amici* are not properly before this Court. The Thernstrom *Amici* essentially concede that Section 5 of the Voting Rights Act, as amended in 2006, *is* valid prophylactic legislation as applied to voting changes other than redistricting; their argument relates exclusively to the statute's application to claims of vote dilution in redistricting. But there is no redistricting issue in this case—nor could there be, as Appellant does not elect its board members from districts. Moreover, the Appellants have never challenged the amendments Congress made to the preclearance standard—whether in the district court, in their Jurisdictional Statement, or in their opening brief on the merits—and the district court did not address any such challenge. Indeed, the Thernstrom *Amici* make clear that what they seek is an advisory opinion regarding the constitutionality of amended Section 5 as it might be applied in the future to circumstances different from those at issue here. The Court accordingly should not reach the challenges asserted for the first time by the Thernstrom *Amici*.

In any event, the amendments to the preclearance standard are constitutional. The amendment to the purpose prong of Section 5 requires denial of preclearance to voting changes with "any discriminatory purpose." 42 U.S.C. § 1973c(c). To be sure, that provision sweeps more broadly than did Section 5's purpose prong as interpreted prior to 2006—which, per this Court's decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 (2000) (*Bossier II*), required denial of preclearance only when a change was

motivated by a *retrogressive* purpose. But it sweeps no more broadly than does the Constitution itself. The amendment to the purpose provision merely incorporates the standard this Court has adopted to determine whether discrimination violates the Fourteenth and Fifteenth Amendments. *See Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 67 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240 (1976).

The Thernstrom *Amici* cannot point to anything in the amended purpose standard that in any way purports to "require race-based districting that subordinates traditional districting principles." Thernstrom Br. 26. Rather, in arguing that the amended Section 5 triggers strict scrutiny and is unconstitutional, they simply assert that the Department of Justice will apply that provision—in violation of its plain text and of this Court's decisions in *Shaw I*, *supra*, and *Miller*, *supra*—to require such districting. Their assertion rests on nearly two-decade-old allegations that "[d]uring the 1990 redistricting cycle" the Department found discriminatory purpose and denied preclearance—in a handful of cases involving statewide redistricting—when states "fail[ed] to maximize the number of majority-minority districts." Thernstrom Br. 18. But those allegations involve conduct that occurred before *Shaw I* and *Miller*—and before this Court made clear that strict scrutiny applies to all federally imposed racial classifications. There is no evidence that the Department has disregarded *Shaw I* and *Miller* in its administration of the preclearance process in the years since this Court decided those cases. Indeed, the Department issued guidance that specifically

acknowledges that its preclearance decisions must take account of, and be constrained by, the principles adopted in those cases. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5412-13 (Jan. 18, 2001). To conclude, from allegations of conduct in the 1990 redistricting cycle, that a facially constitutional statute should be invalidated based on the presumption that the Department will *apply* that statute unconstitutionally, would fundamentally deny the respect this Court owes to coordinate branches of government.

Nor are the Thernstrom *Amici* correct to say that the amended Section 5 *effects* standard "locks in all existing majority-minority districts until 2031" and does so "regardless of intervening demographic or other changes." Thernstrom Br. 26, 28. Both this Court and the Department of Justice have long recognized that demographic and constitutional constraints may require a voting change to be precleared *even if it is retrogressive*. *See City of Richmond v. United States*, 422 U.S. 358, 370-72 (1975); Guidance Concerning Redistricting, *supra*, at 5412-13; Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987) (codified at 28 CFR § 51.54). Although the 2006 amendments changed the standard for determining what is retrogressive, it made absolutely no change to the settled principle that even a retrogressive plan must be precleared if the alternative is a constitutional violation. Thus, the amended Section 5 will never require maintenance of majority-minority districts that violate *Shaw I* and *Miller*. The Thernstrom *Amici* are simply

wrong to suggest that the amended effects test bars all reductions in minority voting-age population in the districts covered by Section 5.

ARGUMENT

I. The Constitutionality Of The Amendments To Section 5's Preclearance Standard Is Not Properly Before The Court

The Thernstrom *Amici*'s constitutional challenge to the amendments to Section 5's preclearance standard is not properly before this Court. Appellant did not present this argument below, in its Jurisdictional Statement, or in its opening brief before this Court. Throughout these proceedings, Appellant has challenged Congress's decision to *extend* Section 5 for another 25 years without permitting jurisdictions like it to bail out; the extension, Appellant has argued, lacks congruence and proportionality under *City of Boerne v. Flores*, 521 U.S. 507 (1997). But Appellant has not challenged the *changes* Congress made to the preclearance standard, and the district court issued no ruling on such a challenge. In these circumstances, the Thernstrom *Amici*'s challenge must be disregarded. *See*, *e.g.*, *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001) (declining to address issue that was raised only by *amici* and not raised or decided below); *FW/PBS*, *Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below.").

Even if the Thernstrom *Amici*'s challenge had been properly raised, it would not be appropriate for this Court to reach it. The duty to decide whether Congress, a coordinate branch of government, has acted within its powers in enacting legislation is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Accordingly, this Court cannot invalidate an Act of Congress on its face so long as *any* "set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see Tennessee v. Lane*, 541 U.S. 509, 530-31 (2004) (holding that, having determined that Title II of the Americans with Disabilities Act is a valid exercise of Congress's Fourteenth Amendment enforcement power as applied to the context before the Court, the Court "need go no further"—even if some applications of that statute would exceed Congress's power). This rule is an application of the basic principle that Article III of the United States Constitution gives federal courts authority to review the constitutionality of an Act of Congress "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

The Thernstrom *Amici*'s challenge to Section 5's amended preclearance standard focuses entirely on the application of those amendments to redistricting plans. There is, however, no redistricting plan at issue in this case, and for good reason—Appellant does not even elect its board members from districts. As a result, Appellant

would lack standing to challenge Section 5's possible application to redistricting. Appellant faces no "actual and imminent," as opposed to "conjectural or hypothetical," injury that is fairly traceable to the application of Section 5 to redistricting. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009). Section 5, of course, extends to a "wide range" of voting changes *other* than redistricting. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502 (1992).[2] Those changes include changes to "the manner of voting," such as the moving or consolidation of polling places; changes to "candidacy requirements and qualifications"; and changes "affecting the creation or abolition of an elective office." *Id.* at 502-03. The Thernstrom *Amici* acknowledge that, as applied to those non-redistricting sorts of voting changes, the amended Section 5 "*is* simply a prophylactic prohibition against devices that exclude access to the ballot, and does not coerce racial favoritism or proportionality." Thernstrom Br. 10 (emphasis in original). Under this Court's precedents, that concession is sufficient to defeat the Thernstrom *Amici*'s facial challenge, even if a justiciable

[2] In fact, of the approximately 4,000 to 6,000 Section 5 submissions received by the Justice Department each year, "[r]edistricting plans are only a small portion of those submissions." *Voting Rights Act: Section 5 of the Act — History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 9, Serial No. 109-79, Vol. I (2005) (statement of Bradley J. Schlozman, then-Acting Assistant Attorney General of the Civil Rights Division, United States Department of Justice). During the two years immediately following a decennial census, redistrictings constitute less than 20% of the total number of preclearance requests, and that number drops below 10% in the other eight years of the decade. *See id.* at 9-10.

facial challenge were properly before this Court. *See Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (stating that all members of the Court "agree that a facial challenge must fail where the statute has a plainly legitimate sweep") (internal quotation marks omitted).

Indeed, in the last two pages of their brief, the Thernstrom *Amici* state—with admirable candor—that what they seek from this Court is nothing more or less than an advisory opinion regarding whether the amended Section 5 is constitutional insofar as it might be applied in the future to different parties and facts than those presented in this case. Thernstrom Br. 36-37 ("[W]e emphasize that receiving the Court's guidance now on § 5's constitutionality in the redistricting context is extremely important" as "[r]edistricting will begin in 2011."). But "the judicial power to decide cases and controversies does not include the provision of purely advisory opinions to the Executive." *Clinton v. Jones*, 520 U.S. 681, 700 (1997).

II. The Amendments To Section 5's Preclearance Standard Are Constitutional

Even if they were properly before this Court, the Thernstrom *Amici*'s constitutional challenges to the amendments to Section 5 would be unavailing. Section 5 has always provided that preclearance should be withheld if a proposed voting change is discriminatory in purpose or effect. The 2006 amendments to the Voting Rights Act made changes to both the purpose and effect

prongs of the statute. Contrary to the contentions of the Thernstrom *Amici*, those changes are constitutional.

A. By Requiring Denial of Preclearance to Changes with "Any Discriminatory Purpose," Congress Merely Incorporated This Court's Own Standard for Unconstitutional Discrimination

In *Bossier II*, this Court held that "the 'purpose' prong of § 5 covers only retrogressive dilution." 528 U.S. at 328. Thus, even if a proposed voting change reflected purposeful discrimination on the basis of race—and thus violated the Constitution—*Bossier II* required preclearance of that change so long as the purpose was not to make things *worse* than they had been in the past. *See id.* at 336 (requiring preclearance of "a plan that is *not* retrogressive—*no matter how unconstitutional it may be*"). In the 2006 amendments to the statute, Congress overturned that ruling. Section 5 now provides that "any discriminatory purpose" behind a voting change—not just a retrogressive purpose—warrants a denial of preclearance. 42 U.S.C. § 1973c(c).[3] Because the amended purpose provision simply incorporates this Court's own standard for unconstitutional discrimination, *see Washington v. Davis*, 426 U.S. 229 (1976), it is valid legislation to enforce the Fourteenth

---

[3] By contrast, Congress left intact this Court's holding in *Reno v. Bossier Parish School Board*, 520 U.S. 471, 485 (1997) (*Bossier I*) that a violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, cannot alone provide a basis for denying preclearance under Section 5.

and Fifteenth Amendments. *See United States v. Georgia*, 546 U.S. 151, 158 (2006) (stating that "no one doubts that" Congress may provide remedies for actual constitutional violations).[4]

The Thernstrom *Amici* argue that Congress's decision to incorporate the *Washington v. Davis* standard somehow triggers strict scrutiny and threatens constitutional principles. They assert that the amendment to the purpose provision of Section 5 "authorize[s] the Department [of Justice] to use its 'discriminatory purpose' power to again require race-based districting that subordinates traditional districting principles." Thernstrom Br. 26. That assertion is curious, because the Constitution *itself* prohibits states from diluting minority voting strength with a discriminatory purpose. *See Rogers*, 458 U.S. at 617; *City of Mobile*, 446 U.S. at 67.

---

[4] This Court's decision in *Bossier II* rested on principles of statutory interpretation. *See* 528 U.S. at 329-36 (emphasizing that a retrogressive effect had already been held to be necessary to violate Section 5's effects prohibition, and that, because the words "purpose" and "effect" were textually parallel terms in that section, a retrogressive purpose must be necessary to violate the section's purpose prohibition). Because purposeful discrimination violates the Constitution, it cannot violate the Constitution for Congress to prohibit that conduct, and shifting the burden of proof to jurisdictions with a significant history of discrimination is appropriate in light of Congress's "wide berth in devising appropriate remedial and preventative measures for unconstitutional actions." *Lane*, 541 U.S. at 520; *see City of Rome v. United States*, 446 U.S. 156, 181-82 (1980) (Section 5's burden shift is appropriate response to history of discrimination by covered jurisdictions).

The Thernstrom *Amici* repeatedly disparage the prohibition on purposeful discrimination. They call it a "free-floating purpose inquiry" (Thernstrom Br. 34), and frequently render the word "purpose" in quotation marks (*id.* at 3, 15, 17). They also complain about the supposed complexity of the discriminatory purpose inquiry; they urge, for example, that it requires a "subjective, open-ended assessment of the submitting jurisdiction's 'purpose'" (*id.* at 16-17), and a "speculative and amorphous analysis of whether the alternative was rejected "'because of," not merely "in spite of,'" its 'dilutive' effect" (*id.* at 15-16 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979))). But as their citation to *Feeney* suggests—as does their citation, in the next sentence, to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977)—this sort of discriminatory purpose analysis is the *standard analysis* this Court applies in all Fourteenth and Fifteenth Amendment discrimination cases.

In criticizing that analysis as "extraordinarily open-ended and amorphous in the redistricting context" (Thernstrom Br. 16), the Thernstrom *Amici* disregard the experience of the Department of Justice, which has found the *Arlington Heights* analysis fully administrable in the Section 5 context. *See Voting Rights Act: Section 5—Preclearance Standards*, *Hearing Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 109th Cong. 8, Serial No. 109-69 (2005) (testimony of Mark A. Posner, former Special Counsel for Section 5, United States Department of Justice). More important, they ignore this Court's cases, which make clear that the discriminatory purpose requirement

"applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination." *City of Mobile*, 446 U.S. at 67; *see also Rogers*, 458 U.S. at 617 (holding that the *Washington v. Davis*/*Arlington Heights* standard governs constitutional vote dilution cases). Indeed, *Washington v. Davis* itself held that the purposeful discrimination requirement applies across the board in Fourteenth Amendment race cases—and it explicitly invoked a *redistricting* case, *Wright v. Rockefeller*, 376 U.S. 52 (1964), as an example of the point. *Davis*, 426 U.S. at 240 (citing *Wright*).

Because the amended purpose provision merely incorporates the very standard that this Court has applied to determine whether the Fourteenth and Fifteenth Amendments have been violated, the Thernstrom *Amici* are simply wrong to say that the amended provision "contains an 'implicit command that States engage in presumptively unconstitutional race-based districting.'" Thernstrom Br. 2 (quoting *Miller*, 515 U.S. at 927). Contrary to the Thernstrom *Amici*'s assertion, the amended purpose provision does *not* authorize the Department of Justice "to find discriminatory purpose whenever a covered jurisdiction has failed to create a race-based district, even where the district is plainly at odds with traditional districting principles" (Thernstrom Br. 18), or to "use its 'discriminatory purpose' to again require race-based districting that subordinates traditional districting principles" (*id.* at 26). And it certainly does not permit the Department "to force Georgia to create a third majority-[minority] district that ignores standard districting principles" (*id.*) or to deny preclearance if it determines that "*improvements* to minority voting

strength" are "not sufficiently far-reaching to maximize minority voting strength" (*id.* at 33-34). As this Court underscored, a state does not engage in unconstitutional intentional discrimination simply by failing to maximize minority voting strength or following traditional districting principles. *See Miller*, 515 U.S. at 924 (holding that a "policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan 'so discriminates on the basis of race or color as to violate the Constitution'" (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976))).[5]

Not surprisingly, the Thernstrom *Amici* can point to nothing in the amended purpose requirement of Section 5 that purports to authorize the Department of Justice to "require race-based districting that subordinates traditional districting principles." Thernstrom Br. 26. Instead, their argument relies almost entirely on allegations that "*[d]uring the 1990 redistricting cycle*, the Department routinely denied

---

[5] The Thernstrom *Amici* assert that there is not "any judicial review" of the Attorney General's decision to deny preclearance. Thernstrom Br. 18. That assertion is misleading at best. Although the Attorney General's decision to *grant* preclearance is final and nonreviewable, *see Morris v. Gressette*, 432 U.S. 491 (1977), when the Attorney General *denies* preclearance the submitting jurisdiction is entitled, by the very terms of Section 5, to a *de novo* trial of the issue before a three-judge district court, with direct review to this Court. *See* 42 U.S.C. § 1973c(a). As the many judicial preclearance cases that have reached this Court demonstrate, that process is certainly a "practical" means of obtaining judicial review. *Cf.* Thernstrom Br. 17-18 n.3 (internal quotation marks omitted).

preclearance to redistricting plans" based on discriminatory purpose where those plans "fail[ed] to maximize the number of majority-minority districts." Thernstrom Br. 18 (emphasis added). These allegations involve a handful of statewide redistrictings that took place three presidential administrations and nearly two decades ago. And far from a "routine" practice, there are only two instances in which this Court concluded that the Department required "maximization": the Georgia redistricting, *Miller*, 515 U.S. at 917, 925-26, and the North Carolina redistricting, *Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (*Shaw II*), both of which followed the 1990 census. In general, "[t]he Department utilized the well-established framework for conducting discriminatory purpose analyses set forth by the Supreme Court in the Arlington Heights case." *Voting Rights Act: Section 5—Preclearance Standards*, *supra*, at 14.

In any event, the Georgia and North Carolina objections that were the subject of *Miller* and *Shaw II* occurred at a time when the state of constitutional law was very different than it is today. When covered jurisdictions were drawing redistricting plans and submitting them for preclearance during the 1990 redistricting cycle, this Court had not yet ruled that the Constitution could be violated by race-based line drawing that did not deny or dilute any individual's or group's vote. That ruling did not come until 1993, in *Shaw I*, 509 U.S. at 649-50, and the contours of *Shaw I*'s constitutional prohibition on "racial gerrymandering" were not clear until 1995, when this Court decided *Miller*, 515 U.S. at 915-17, 920-23. Nor had the Court ruled, by the time of the 1990 redistricting

cycle, that racial classifications adopted by the federal government receive the same strict scrutiny as those adopted by the states. That ruling did not come until 1995, when this Court decided *Adarand*, 515 U.S. at 226-27; *cf. Metro Broad.*, 497 U.S. at 563 (applying only intermediate scrutiny to "benign racial classification[s]" adopted by the federal government).

When the Department of Justice was reviewing preclearance submissions during the 1990 redistricting cycle, the then-existing precedent most relevant to the issues the Court would later address in *Shaw I* and *Miller* was *United Jewish Organizations*, *supra*. This Court's decision in *United Jewish Organizations* was, to be sure, "highly fractured." *Shaw I*, 509 U.S. at 651. But it provided substantial support for the proposition that, in the absence of vote dilution, "racial gerrymandering" did not violate the Constitution. *See id.* at 658-59 (White, J., joined by Blackmun and Stevens, JJ., dissenting) (noting that a majority of justices "held that plaintiffs were not entitled to relief under the Constitution's Equal Protection Clause" because "members of the white majority could not plausibly argue that their influence over the political process had been unfairly canceled or that such had been the State's intent" (citations omitted)). Indeed, in *Shaw I* itself, four justices dissented on the ground that *United Jewish Organizations* foreclosed the cause of action for nondilutive "racial gerrymandering" that the Court adopted there. *See id.* at 658-59 (White, J., joined by Blackmun and Stevens, JJ., dissenting); *id.* at 684 (Souter, J., dissenting). *Miller*, too, was decided over the dissent of four justices. *See Miller*, 515 U.S. at 934 (Ginsburg, J., joined by Stevens and Breyer, JJ., and

by Souter, J., in part, dissenting). The failure of Department of Justice officials, in 1990, "to predict the future course of constitutional law," *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (internal quotation marks omitted), does not justify invalidating a congressional enactment today based on the presumption that the Department will disregard this Court's decisions in the future.

The Thernstrom *Amici* have not offered a shred of evidence that, since *Shaw I* and *Miller*, the Department of Justice has refused to preclear a redistricting plan unless it subordinated traditional districting principles in an effort to maximize minority voting strength. Indeed, after *Shaw I* and *Miller*, the Department issued guidance that specifically recognized that the principles adopted in those cases are among the constraints that may require preclearance of a retrogressive change. *See* Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5412-13 (Jan. 18, 2001). If, in the future, the Department disregards the rules of constitutional law this Court settled in *Shaw I* and *Miller*, a covered jurisdiction can bypass the Department entirely and seek preclearance in the District Court for the District of Columbia. *See* 42 U.S.C. § 1973c(a). And a private party could always file a lawsuit under *Shaw I* and *Miller* themselves. But to *presume* that the United States Department of Justice will apply the purpose prong of Section 5 unconstitutionally, and to invalidate the statute itself based on that presumption, would fail to accord the proper respect to coordinate branches of government. As this Court has explained:

> A possibility always exists, of course, that the legitimate objectives of any law or legislative

> program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.

Tilton v. Richardson, 403 U.S. 672, 679 (1971). Because the amended purpose provision of Section 5 does nothing more than incorporate the standard that this Court has itself adopted to assess unconstitutional discrimination under the Fourteenth Amendment, that provision is a valid exercise of Congress's power to enforce that Amendment. The Court may not apply strict scrutiny and invalidate that provision based on the presumption—a presumption at odds with published Department guidance—that the Department of Justice will disregard this Court's *Shaw I* and *Miller* jurisprudence and refuse to enforce the provision according to its terms.

B. The Amended Retrogression Standard Does Not Demand Violations of *Shaw I* and *Miller*

In addition to the changes to Section 5's purpose standard, the 2006 amendments to the Voting Rights Act also changed its effects standard. *See* 42 U.S.C. § 1973c(b), (d).[6] The Thernstrom *Amici* assert that the

[6] Congress amended Section 5's effects standard to measure retrogression by determining whether the change at issue will diminish minority citizens' ability "to elect their preferred candidates of choice," rather than whether it will diminish minority citizens' influence in the political or electoral process. 42 U.S.C. § 1973c(b); *see id.* § 1973c(d) ("[t]he purpose

(Cont'd)

amended effects test triggers strict scrutiny and violates the Constitution because it has a "nakedly racial purpose" (Thernstrom Br. 32); that it "locks in all existing majority-minority districts until 2031," and does so "regardless of intervening demographic or other changes" (*id.* at 26, 28); and that it therefore operates as a "quota ceiling on nonminorities' ability to elect" (*id.* at 27). These assertions rest on a fundamental misunderstanding of the amended effects prohibition.

Since the enactment of the Voting Rights Act in 1965, Section 5 has prohibited voting changes with a discriminatory effect. In its authoritative decision in *Beer*, this Court read the effects provision of Section 5 as requiring "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." 425 U.S. at 141. On

---

(Cont'd)

of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice"). Subsection (b) states:

> 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, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

Id. § 1973c(b).

its face, the original Section 5 effects provision contained "no defense or justification" (*cf.* Thernstrom Br. 27) that would permit a voting change that diminished minority voting strength. But this Court recognized that Section 5 could not be understood as imposing an utterly inflexible prohibition on retrogression. Thus, in *City of Richmond v. United States*, 422 U.S. 358 (1975), the Court held that an annexation that reduced the black population percentage in Richmond, Virginia, from 52 percent to 42 percent did not violate Section 5's effects prohibition. *See id.* at 370-72. It was enough, this Court held, that the city's election plan "fairly reflect[ed] the strength of the Negro community as it exist[ed] *after* the annexation." *Id.* at 371 (emphasis added).

In a similar vein, the Department of Justice has long refused to "read *Beer* to require the reflexive imposition of objections in total disregard of the circumstances involved or the legitimate justifications in support of changes that incidentally may be less favorable to minority voters." Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987). In particular, the Department has recognized that retrogression can be justified where a plan that maintains preexisting minority voting strength would violate the Constitution: "[I]n the redistricting context, there may be instances occasioned by demographic changes in which reductions of minority percentages in single-member districts are unavoidable, even though 'retrogressive,' i.e., districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength." *Id.* Since this Court made clear, in *Shaw I* and *Miller*, that the Constitution prohibits nondilutive

racial gerrymandering, the Department has recognized that a retrogressive redistricting plan must nonetheless be precleared if the only alternative is a plan that violates the principles articulated in those cases. *See* Guidance Concerning Redistricting, *supra*, at 5413 ("[P]reventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases."); Letter from Bill Lann Lee, Acting Assistant Attorney General, to John C. Henry, Esq., 3 (May 20, 1998) (stating that "a reduction in minority voting strength that is required by the United States Constitution does not violate Section 5" and specifically recognizing that a *Shaw* violation may warrant "some reduction in minority voting strength").[7] And even where retrogression was not justified, it was settled law that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished." *Bush v. Vera*, 517 U.S. 952, 983 (1996) (opinion of O'Connor, J.).

The 2006 amendments to Section 5's effects provision *made absolutely no change* to these principles. In amending the effects provision, Congress merely addressed a very specific controversy over the *definition* of retrogression—a controversy that is relevant only in the context of *some* redistricting plans. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), this Court considered whether a Georgia state senate redistricting plan was retrogressive. That plan reduced the black

---

[7] *Available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_052098.php.

voting-age population in three previously majority-minority districts to "just over 50%," which made it at least "marginally less likely that minority voters [could] elect a candidate of their choice in those districts." *Id.* at 486. But, at the same time, the plan increased the black voting-age population percentage in four other districts where blacks remained a voting-age *minority*. *See id.* at 487. The Court held that the district court should not have denied preclearance to the plan simply on the basis of the reduction in minority voting-age population in the three majority-minority districts; it directed the district court to consider, on remand, whether the addition of more non-majority "influence" or "coalitional" districts rendered the new plan, considered as a whole, nonretrogressive. *Id.* The Court explained that it would not necessarily be retrogressive for a state to trade existing districts in which minority voters had the opportunity to elect candidates of their choice for "'influence districts'—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Id.* at 482. The Court concluded that "[t]he State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters." *Id.* at 483.

It is on this narrow point that Congress took issue with this Court's retrogression jurisprudence. The amended Section 5, overturning *Georgia v. Ashcroft*, deems it retrogressive when a state trades away existing districts in which minority voters have the

opportunity to elect candidates of choice in order to create more districts in which minority voters have some undefined "influence" in the political or electoral process. Now, retrogression must be measured solely by whether the voting change will diminish minority citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b), (d). Congress thus agreed with the *Georgia v. Ashcroft* dissenters that "redefin[ing] effective voting power in § 5 analysis without the anchoring reference to electing a candidate of choice" leaves the nonretrogression principle "substantially diminished" and "practically unadministrable." *Georgia v. Ashcroft*, 539 U.S. at 493-94 (Souter, J., dissenting).[8] But the amendment to the effects provision did not change the principle that demographic or constitutional constraints may justify even a retrogressive redistricting plan under Section 5.

---

[8] The Thernstrom *Amici* assert (at 33) that the amendment to the effects provision reflects Congress's "outrage[]" at "the notion of Georgia being allowed to take some baby steps away from super-majority black districts." That is not a fair reading of the record. As the House committee report shows, Congress was not moved by outrage at what transpired on the ground in the State of Georgia, but by disagreement with the *Georgia* Court's conclusion that a state may diminish the ability of minority voters to elect the candidates of their choice and leave them to a difficult to define notion of "influence." *See* H.R. REP. NO. 109-478, at 69 (2006) ("Under its 'new' analysis, the Supreme Court would allow the minority community's own choice of preferred candidates to be trumped by political deals struck by State legislators purporting to give 'influence' to the minority community while removing that community's ability to elect candidates."); *id.* at 70 ("[T]he Committee is concerned by testimony indicating that '[m]inority influence is nothing more than a guise for diluting minority voting strength.'") (footnote omitted).

As this description should make clear, the amendment to the effects provision does not "lock[] in all existing majority-minority districts until 2031." Thernstrom Br. 28; *accord id.* at 4, 26.[9] What it presumptively locks in—subject to the same defenses that applied before the 2006 amendments—is minority voters' ability to elect the candidates of their choice. As racially polarized voting diminishes, minorities in those districts may be able to maintain the same ability to elect the candidates of their choice with smaller percentages of the population. *See Bartlett v. Strickland*, No. 07-689, 2009 WL 578634, at *16 (U.S. Mar. 9, 2009) (opinion of Kennedy, J.).[10]

---

[9] The Thernstrom *Amici* assert that the "existing majority-minority districts . . . raise serious Fourteenth Amendment concerns." Thernstrom Br. 28. But there is no constitutional concern with a majority-minority district *per se*. *See*, *e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 253 (2001). Such districts raise constitutional concerns only when race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," and the legislature "subordinate[s] traditional race-neutral districting principles . . . to racial considerations." *Miller*, 515 U.S. at 916. Indeed, where a majority-minority district is consistent with traditional districting principles (as when minorities make up a majority of the population of a sizeable city), it is the *failure* to draw such a district that will raise constitutional concerns. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (dividing Laredo, with its cohesive Latino community, bore "the mark of intentional discrimination").

[10] The Thernstrom *Amici* are therefore incorrect to state that the amended effects provision "*increases* federal race-conscious mandates in *inverse* proportion to the race-consciousness of the electorate." Thernstrom Br. 31-32. As we explain in text, as racially polarized voting decreases, the constraints the effects provision imposes on the states will necessarily loosen.

The amended effects prohibition therefore is not insensitive to "changes in voting patterns." *Cf.* Thernstrom Br. 4. Indeed, it is only the continuing *existence* of racially polarized voting that can make districting the sort of racial zero-sum game the Thernstrom *Amici* posit (Thernstrom Br. 11);[11] absent racially polarized voting, the maintenance of minorities' ability to elect the candidates of their choice can impose no "ceiling on nonminorities' ability to elect." *Cf.* Thernstrom Br. 27.

Nor does the amended effects provision set forth an "inviolable" prohibition that requires maintenance of minority voting strength "regardless of changes in . . . demographics," (*cf.* Thernstrom Br. 4), or regardless of any inquiry into "feasibility" or any other "defense or justification" (*cf. id.* at 27). It is true that the amended Section 5, like the original Section 5, does not contain any *express* defenses for retrogressive changes. But both this Court and the Department of Justice have recognized that demographic and constitutional constraints may appropriately justify a voting change that is retrogressive. *See* pp. 21-23, *supra*. The amendments to Section 5 changed the definition of retrogression, but they did not purport to alter the

---

[11] *See, e.g.*, *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4-5, Serial No. 109-75 (2005) (testimony of Laughlin McDonald); *id.* at 49-79 (testimony of Prof. Richard Engstrom); *Voting Rights Act: Evidence of Continued Need*, *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 301-02, Serial No. 109-103 (2006) (Appendix to the Statements of the Hon. Bill Lann Lee and the Hon. Joe Rogers).

principle that demographic or constitutional constraints may require preclearance even of some retrogressive changes. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citations omitted)). Accordingly, the amended effects provision would still require preclearance of a retrogressive redistricting plan where demographic changes made retrogression "unavoidable," Revision of Procedures, *supra*, at 488; *cf. City of Richmond*, 422 U.S. at 371 ("It is true that the black community, if there is racial bloc voting, will command fewer seats on the city council; and the annexation will have effected a decline in the Negroes' relative influence in the city. But a different city council and an enlarged city are involved after the annexation."), or where avoiding retrogression would require violating *Shaw I* and *Miller*, *see* Guidance Concerning Redistricting, *supra*, at 5413.

Nor is there anything problematic about Congress's prohibition of changes that "diminish[]" the opportunity to elect candidates of choice, 42 U.S.C. § 1973c(b). *Cf.* Thernstrom Br. 26. Diminishment of minority voting strength is what retrogression has always meant, and it is hardly novel to use "diminish" and "retrogress" as synonyms in this context. *See Bush v. Vera*, 517 U.S. at 983 (opinion of O'Connor, J.) ("Nonretrogression . . . mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." (emphasis omitted)). To the extent that the Thernstrom *Amici* mean to suggest that the amended effects provision would bar any reduction in the minority voting-age

population percentage in a district, the foregoing discussion should demonstrate that the provision will do no such thing. It is diminishment in the opportunity to elect, not in district demographics, that the amended provision defines as retrogressive. In many cases, a reduction in minority voting-age population percentage will not diminish the opportunity to elect candidates of choice.[12]

Finally, the decision to frame the effects test in terms of non-diminishment rather than in terms of "racial *equality*" (Thernstrom Br. 28) was not an innovation of the 2006 amendments to the Voting Rights Act. To the contrary, it is an essential part of the retrogression standard that has governed discriminatory effects analysis under Section 5 at least since *Beer*, *supra*. The Court has upheld Section 5, with its nonretrogression standard, because it applies to those areas of the country where a deep history of discrimination raises especial concern that a *diminution* of minority voting strength will be an *unequal* diminution. *See Lopez v. Monterey County*, 525 U.S. 266, 282-84 (1999); *City of Rome*, 446 U.S. at 181-82; *South Carolina v. Katzenbach*, 383 U.S. 301, 330-331 (1966); *see also* Brief for Intervenor-Appellees Texas State Conference of NAACP Branches, Austin Branch of the NAACP, and Nathaniel Lesane at 22-49. That analysis applies equally to the post-2006 effects language. Accordingly, this Court should neither apply strict scrutiny nor invalidate the amended effects test.

---

[12] *See Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 74-76 (D.D.C. 2002) (noting that "Section 5 is not an absolute mandate for maintenance of [majority-minority] districts" and that in certain circumstances "dilution of minority voting age population may have no retrogressive effect"), *vacated on other grounds by* 539 U.S. 461 (2003).

CONCLUSION

This Court should not reach the constitutional questions raised for the first time in the Thernstrom *Amici* brief. Should the Court reach those questions, however, it should reject the Thernstrom *Amici*'s arguments and affirm the judgment of the district court.

Respectfully submitted,

Samuel R. Bagenstos
Counsel of Record
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 267-4728

Elissa J. Preheim
David D. Fauvre
Sheri L. Shepherd
Arnold & Porter LLP
555 Twelfth St. N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Amici Curiae

March 25, 2009