No. 12-96

In The
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF ARIZONA, GEORGIA, SOUTH CAROLINA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICI STATES

The Voting Rights Act ("VRA" or "Act") created two different classifications of States: covered and uncovered. Section 5 of the VRA, 42 U.S.C. § 1973c, requires Alabama, Alaska, Arizona,* Georgia,* Louisiana, Mississippi, South Carolina,* Texas, and Virginia (and every sub-jurisdiction within those States), and portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota* (collectively "Covered Jurisdictions"), based on the formula provided in Section 4(b) of the VRA, 42 U.S.C. § 1973b, to seek approval of all statutory or procedural changes that affect voting before implementing or enforcing the changes. This Court has recognized that the Act imposes burdens on Covered Jurisdictions and "differentiates between the States" in a way that departs from the fundamental principle of equal sovereignty among States. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). The amici States (*), which are all Covered Jurisdictions substantially burdened by the VRA, have a direct and compelling interest in having this Court evaluate whether the court of appeals correctly determined that the VRA's "severe remedy of preclearance remain[s] 'congruent and proportional.'" (Pet. App. at 62a.)

Contrary to other anti-discrimination statutes, such as the Civil Rights Act of 1964, 42 U.S.C. § 1983, and the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 5 of the VRA shifts the burden of proof to the Covered Jurisdictions to seek federal

approval *before* enforcing any statutory or procedural change affecting voting and to demonstrate that the proposed voting change will not have a discriminatory effect. On the other hand, Section 2 of the VRA, 42 U.S.C. § 1973, provides more customary relief, in that a plaintiff who alleges that he or she has been the victim of some form of voting discrimination may file a lawsuit against the offending jurisdiction. Section 2 applies to all of the States equally, as well as any of the sub-jurisdictions within the States. However, because obtaining preclearance does not protect a Covered Jurisdiction from litigation under Section 2, Covered Jurisdictions alone bear the burden of Section 5 preclearance without any concomitant benefit.

Since *Northwest Austin*, the "federalism costs" associated with Section 5, 557 U.S. at 202, have only continued to increase while the statute's benefits have all but vanished. In particular, the Department of Justice ("DOJ") has interpreted Section 5 to force the Covered Jurisdictions to spend millions of dollars and thousands of attorney hours to preclear an ever-expanding array of laws. The most vivid example comes from voter-identification laws: Indiana's sovereign policymakers are free to enact such requirements, *see Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), but as a result of DOJ's administrative fiat, the equally sovereign policymakers in Covered Jurisdictions are not, *see* DOJ File Nos. 2011-2775 (Texas) and 2011-2495 (South Carolina).

Section 5 has served a noble purpose, but its remedy is no longer justified by the decades-old

coverage formula. Congress has refused to amend the statute after this Court identified its infirmities in *Northwest Austin* and it seems unlikely that Congress will reconsider this issue before the current iteration of the VRA approaches expiration in 2031. Meanwhile, the federal government will continue to treat amici States and other Covered Jurisdictions as unequal sovereigns. The amici States urge this Court to overturn the coverage formula of Section 4(b) and the preclearance obligation of Section 5 because those provisions are no longer congruent and proportional to the current state of voter rights nationwide, yet impose costly and time-consuming burdens on an arbitrary group of states and localities without any reference to current conditions in those jurisdictions.

SUMMARY OF ARGUMENT

In *Northwest Austin*, the Court noted that Section 5's departure from traditional notions of equal sovereignty enjoyed by all of the fifty states "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203. But when Congress reauthorized Section 5 of the VRA in 2006, it used the same coverage formula as previous enactments and failed to examine the current status of non-covered jurisdictions. As the Court noted, "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political

conditions." *Id.* The Court should declare the 2006 reauthorization of the VRA is unconstitutional because its antiquated formula to determine which states are covered is neither congruent nor proportional to the harms that exist in the Covered States.

Section 5 applies arbitrarily to the Covered Jurisdictions. No Covered Jurisdiction uses discriminatory tests or devices, and many have higher voter turnout or lower disparity in minority voter turnout, than numerous uncovered jurisdictions. The Covered States therefore are denied the fundamental principles of equal sovereignty and equal footing. Treating States differently no longer serves the Act's purpose of eradicating voting discrimination for *all* United States citizens.[1] Section 5 was an important and necessary part of the effort to end voter discrimination in this country, but has now outlived its purpose. The current enactment of Section 5 under the pre-existing coverage formula of Section 4(b) is unconstitutional because it is not appropriately tailored to correct any current voting discrimination that may exist anywhere in the country.

[1] "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

ARGUMENT

I. The Decision, Upholding Section 4(b)'s Outdated Coverage Formula and Section 5's Preclearance Requirement, Is Seriously Flawed and Undermines the Principle of Equal Sovereignty.

The court of appeals acknowledged that Congress did not make a finding that "racial discrimination in voting was 'concentrated in the jurisdictions singled out for preclearance'" when Congress reauthorized Section 5 of the VRA in 2006 under the pre-existing coverage formula of Section 4(b) of the VRA. (Pet. App. at 53a (quoting *Nw. Austin*, 557 U.S. at 203).) It nonetheless upheld Congress's continued use of Section 4(b)'s formula by speculating that lack of evidence of discriminatory practices in the Covered Jurisdictions arose from Section 5's deterrent effect (*id.* at 42a-44a) and noting that bailout ensures that "section 5 covers only those jurisdictions with the worst records of racial discrimination in voting" (*id.* at 57a). The court's analysis is seriously flawed for two reasons: (1) the obsolete formula is not linked to current conditions and therefore intrudes on the Covered States' sovereignty, and (2) the supposed remedy of bailout is illusory. The Court should overturn Sections 4(b) and 5 of the VRA because those sections of the law unjustifiably intrude on the Covered States' sovereignty and impose significant and unwarranted burdens on Covered Jurisdictions.

Congress passed the VRA under the authority of Section 2 of the Fifteenth Amendment to enact

"appropriate" measures to effectuate the constitutional prohibition against racial discrimination in voting. *Katzenbach*, 383 U.S. at 308. Section 5 goes well beyond the Fifteenth Amendment's prohibition against racial discrimination in voting by "plac[ing] the burden on covered jurisdictions to show their voting changes are nondiscriminatory *before* those changes can be put into effect." *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 431 (D.D.C. 2011). The VRA thus treats some States differently "despite [the Court's] historic tradition that all the States enjoy 'equal sovereignty.'" *Nw. Austin,* 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). But Section 5's "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*

This Court put Congress on notice regarding Section 5's constitutional infirmities: "The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* at 203; *see also id.* at 216 (Thomas, J., concurring in judgment in part and dissenting in part) ("The Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional."). The Court further

emphasized that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." *Id*. at 204. But the Court remained "keenly mindful of [its] institutional role," *id*. at 204, resolved the case on non-constitutional grounds, and charged the political branches with fixing both the VRA's antiquated coverage formula and the blunt instrument of preclearance, *id*. at 205-06.

But Congress has done nothing since *Northwest Austin*, and the Covered Jurisdictions continue to labor under a coverage formula that is now forty years old. And the DOJ has exacerbated the VRA's federalism costs by broadening its interpretation of Section 5 and denying preclearance to an ever-widening array of sovereign state prerogatives. *See* § I(B)(1) *infra*.

A. The Court of Appeals Erred in Finding that Congress Had Adequate Data to Justify the Continued Use of the Section 4(b) Formula.

The VRA requires a jurisdiction to comply with the preclearance obligations if it satisfied two conditions. First, the jurisdiction must have used a forbidden test or device[2] to determine voter eligibility in

[2] The VRA defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret

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1964, 1968, or 1972. 42 U.S.C. § 1973b. Second, the jurisdiction must have had – again in 1964, 1968, or 1972 – less than fifty percent of the citizens of voting age registered to vote, or less than fifty percent of the citizens in the jurisdiction voting in the then-most recent presidential election. 42 U.S.C. § 1973c.

Because the Act references specific years, some States, such as Delaware, remain uncovered even though they used a test or device prohibited by Section 4(c) in both 1964 and 1968. *See* Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (1965); Determination Regarding Literacy Tests, 35 Fed. Reg. 12354 (1970); Dave Leip's Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/ (follow "1996" hyperlink; then follow "%VAP M" hyperlink). Because voter registration fell below fifty percent *after* 1972 rather than during that year, Delaware need not seek preclearance for its laws. *Id.* In contrast, Arizona was not using a test or device in 1975, when Congress amended the Act to add language minorities to the coverage formula.[3] *See*

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any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b(c).

[3] Congress expanded the definition of "test or device" to include the provision of English-only voting materials in circumstances in which the census data shows that more than five

(Continued on following page)

Extension of the Voting Rights Act of 1965: Hearing Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. (April 30, 1975) (Testimony of Sen. Goldwater, explaining that Arizona did not use English-only ballots in 1974 or thereafter). But because Arizona did not include Spanish in its ballots in 1964, 1968, and 1972, it became and remains a Covered Jurisdiction. These distinctions between coequal sovereigns cannot be justified on the basis of a formula that is outdated on its face.

Because Congress never intended the preclearance requirements to be permanent, fixing the determination on a then-recent presidential election year was logical when it originally enacted the VRA. Decades later, however, the facts no longer support that reasoning. No jurisdiction, covered or uncovered, currently uses a test or device, and Covered Jurisdictions are no more likely than uncovered jurisdictions to have low voter turnout. In eighteen of the forty-one States that are not covered jurisdictions in their entirety, the percentage of voting age persons who voted was less than fifty percent during one or more presidential elections since the 1982 amendment to the VRA: Arkansas (1988, 1996, 2000), California (1984, 1988, 1992, 1996, 2000), Delaware (1996), Florida (1984, 1988, 1996, 2000), Hawaii (1984, 1988, 1992, 1996, 2000, 2004, 2008), Illinois (1996), Indiana

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percent of the voting age citizens are members of a single language minority. 42 U.S.C. § 1973b(f)(3).

(1996, 2000), Kentucky (1988, 1996), Maryland (1988, 1996), Nevada (1984, 1988, 1996, 2000), New Mexico (1988, 1996, 2000), New York (1988, 1996, 2000), North Carolina (1984, 1988, 1996, 2000), Oklahoma (1988, 1996, 2000), Pennsylvania (1996), Tennessee (1984, 1988, 1996, 2000), Utah (1996), and West Virginia (1988, 1996, 2000). *See* Dave Leip's Atlas, *supra* (select applicable election year on left panel and then select "%VAP M"). Eleven of these states have never been partially or fully covered jurisdictions: Arkansas, Delaware, Illinois, Indiana, Kentucky, Maryland, Nevada, Pennsylvania, Tennessee, Utah, and West Virginia. *Compare* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited December 21, 2012) *with* Department of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited December 21, 2012).

Congress made no findings concerning these issues when it reauthorized the Act in 2006. This is because Congress did not engage in in-depth deliberations regarding the coverage formula.

This Court detailed the congressional deliberations that went into the original enactment of the VRA:

> Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received

> testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.

Katzenbach, 383 U.S. at 308-09.

In contrast, Congress reauthorized the VRA in 2006 on an expedited basis and without careful deliberation concerning the formula used to determine whether a jurisdiction should be covered by the Act. Senators John Cornyn[4] and Tom Coburn,[5] members of the Senate Judiciary Committee, explained their "significant reservations" about this rush to renew:

> Those concerns can generally be categorized as follows: (1) the record of evidence does not appear to reasonably underscore the decision to simply reauthorize the existing Section 5 coverage formula – a formula that is based on 33 to 41 year old data, and (2) the seemingly rushed, somewhat incomplete legislative process involved in passing the legislation prevented the full consideration of numerous improvements. . . . We also conclude that it would have been beneficial if

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[4] Senator Cornyn represents Texas, a Covered Jurisdiction. *See* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited December 21, 2012).

[5] Senator Coburn represents Oklahoma, an uncovered jurisdiction. *Id.*

> the Section 4 coverage formula had been updated in order to adhere to constitutional requirements. . . .

S. Rep. No. 109-295 at 25-26 (2006). The Senators continued by stating that the formula should be updated to "reflect the problems where they really exist and where the record demonstrates some justification for the assertion of Federal power and intrusion into the local and State electoral processes," but noted that Congress did not take the time to have "a full discussion of ways to improve the Act to ensure its important provisions were narrowly tailored and applied in a congruent and proportional way." *Id*. at 33-34. After the Report was submitted and the bill was sent to the Senate floor, the Senate passed it unanimously the very next day with only a brief debate. 152 Cong. Rec. S8012 (daily ed. July 20, 2006). However, the Senate Report itself notes that it was not provided, even in draft form, to members of the Senate before the floor debate. S. Rep. No. 109-295 at 55 (2006).

During the Senate debate, Senator Coburn again voiced his concerns with the rush to renew the VRA:

> My point is that it is unfortunate that we insisted on doing this on an expedited basis when the act does not expire for a year. . . . Because of the political nature of this bill and the fear of being improperly classified as "racist," the bill was crafted and virtually passed before any Senator properly understood any of the major changes. For example, the bill that passed out of committee

> included a finding section before any hearings were held. No changes to those findings were made.

152 Cong. Rec. S7990 (daily ed. July 20, 2006) (statement of Sen. Coburn). Senator Cornyn echoed this sentiment, opining that the hurried process "prohibited the kind of debate and discussion and perhaps amendment process that might have been helpful to protect the act against future legal challenges." 152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn).

Congress expressed the rationale for renewing the VRA with the laudable and necessary intention of protecting the voting rights of *all* citizens. *See* H.R. Rep. No. 109-478 at 6 (2006). But neither the House nor the Senate seriously considered modernizing the coverage formula to reflect current circumstances throughout the country.

The House Judiciary Committee, in fact, emphasized the strides made in the Covered Jurisdictions and did not discuss at any length the similar needs in the uncovered jurisdictions. The Committee noted the results from the previous incarnations of the VRA and summarized its findings that substantial discrimination continued to exist in 2006 in the Covered Jurisdictions. *Id*. at 25. The Committee referenced limited anecdotal evidence that allegedly justified continuing preclearance obligations for some of the Covered Jurisdictions, but failed to include any evidence in its findings concerning the rights of voters

in uncovered jurisdictions. The House Report contains no findings regarding the non-covered States' population changes, voter registration and turnout, or record of minority individuals elected. *See Voting Rights Act: An Examination of the Scope of Criteria for Coverage Under the Special Provisions of the Act*, 109th Cong., 1st Sess., at 92 (Oct. 20, 2005) (statement of Hebert). Moreover, testimony showed that "most seem to agree that [the formula] is outdated" and that "this is an area that Congress should give serious consideration and study to." *Id*. Nonetheless, the issue was never "addressed in any detail in the [Senate] hearings or in the House" and "little evidence in the [legislative] record reexamines whether systematic differences exist between the currently covered and non-covered jurisdictions." *The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess., at 200-01 (May 16, 2006) (testimony of Pildes); *see also Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Committee on the Judiciary*, 109th Cong., 2d Sess., at 21-22 (May 4, 2006) (testimony of Clegg) ("[V]ery little if any evidence compares covered jurisdictions to noncovered jurisdictions, and what comparisons there are undermine the bill.").

Likewise, the Senate Judiciary Committee Report barely examined the history or current record of voting discrimination in the uncovered jurisdictions. *See generally* S. Rep. No. 109-295 (2006). The nearly 300 pages of appendices to the Report included (1)

summaries of the reported cases or settlements finding discrimination against voters in the Covered Jurisdictions and the uncovered jurisdictions; (2) a summary of the evidence gathered by the House and Senate concerning voting discrimination; and (3) a discussion of the lawsuits or enforcement actions, statistics, and anecdotal evidence for thirty-five of the fifty states. *Id*. at 65–363. All of the Covered Jurisdictions were represented by pages of discussion, while some of the uncovered States, such as Nebraska and Tennessee, had only single paragraphs of anecdotal evidence presented. The Report and its appendices included no evidence regarding Arkansas, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Nevada, New Hampshire, North Dakota, Oregon, Utah, Vermont, or West Virginia. The absence of evidence does not compel the conclusion that there were no instances of voter discrimination in the listed states, but fortifies the claim that the Senate failed to collect and incorporate such evidence into its report.

Once the bill reached the floor, the Senate quickly passed it without engaging in meaningful debate regarding the outdated formula. Several Senators expressed concern, but recommended passage of the bill nonetheless. 152 Cong. Rec. S7983 (daily ed. July 20, 2006) (statement of Sen. Saxby Chambliss discussing some hesitation about leaving unaddressed the issue of modernizing the formula); 152 Cong. Rec. S7986-87 (daily ed. July 20, 2006) (statement of Sen. Jefferson Sessions discussing the significant progress that Alabama had made in eliminating voting

discrimination while noting that the same could not be said of fourteen other jurisdictions that are not covered by Section 5 and noting that he "would have expected Congress" to take action by modernizing Section 5); 152 Cong. Rec. S7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn expressing a desire that Congress focus on "places where the problems really do exist and where the record demonstrates with some justification for the assertion of Federal power and intrusion into the local and State electoral processes").

Congress did not explore the problem of voting discrimination throughout the entire country, and therefore failed to demonstrate the "great care" that the *Katzenbach* Court required as justification for the "uncommon exercise of congressional power" contained in the 1965 version of the VRA, power that was only justified because of the "exceptional conditions" and "unique circumstances" present in 1965.

In addition, the successive reauthorizations of the VRA have rendered the notion of its enactment as a temporary solution to an extraordinary problem a misnomer. Congress originally enacted the VRA for five years in 1965, renewed it subsequently in 1970 (for five years), then in 1975 (for seven years), then in 1982 (for twenty-five years), and again in 2006 (for twenty-five years). *Nw. Austin*, 557 U.S. at 200. If the Court does not strike down the coverage formula now, the amici States will very likely continue to be unequal sovereigns until at least 2031, despite an utter lack of evidence that such treatment is justified.

B. Current Conditions Do Not Justify the VRA's Departure from the Fundamental Principle of Equal Sovereignty Among the States.

When the VRA was initially enacted in 1965, Congress found that there was significant evidence of voting discrimination in the southern States. But the United States is a different country than it was forty-seven years ago. According to the U.S. Census Bureau, in 1960, there were approximately 183 million people in the country; in 2010, there were 308.7 million people – a 68% increase. *Compare* 1 U.S. Census of Population: 1960, *Characteristics of the Population*, at xvii (1964), *with* Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 1, http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf (last visited December 21, 2012). Certain regions have grown quickly while others have grown much more slowly. *Id*. As discussed below, these changes in the States' respective populations have significantly changed the picture regarding minority representation as voters and elected officials. Congress failed to analyze or even recognize these shifts, which leaves the VRA even further out-of-step with the current circumstances in this country.

1. Arizona and Nevada Are Strikingly Similar in Population Makeup, Voter Registration, and Voter Turnout, but Are Treated Differently by the VRA.

According to the 2000 and 2010 censuses, Nevada is by far the fastest growing State in the country,

while Arizona is the second fastest. Census 2000 Brief on Population Change and Distribution: 1990-2000 at 3, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf; Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 2, http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. Nevada's Hispanic population more than doubled in the last twenty years, increasing from 10.4% of the population to 26.5%. *Compare* Census 2000 Brief on the Hispanic Population at 4, http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf *with* Census 2010 Brief on the Hispanic Population at 6, http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf. During the same time period, Arizona's Hispanic population grew from 18.8% to 29.6%. *Compare* Census 2000 Brief on the Hispanic Population at 4, *with* Census 2010 Brief on the Hispanic Population at 6.

The voting registration and turnout records for Arizona and Nevada are also similar. During the 2000 election, 53.3% of Arizona's total citizenry were registered voters and 46.7% voted, and in Nevada 52.3% registered and 46.5% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2000, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2000/tab04a.pdf (last visited December 21, 2012). But a smaller percentage of Nevada's Hispanic population than Arizona's Hispanic population participated in the voting process. *Id.* In Arizona, 33.4% of its Hispanic population registered to vote and 27.1% voted; while in Nevada,

23.9% of its population registered and only 20.4% voted. *Id.*

In 2004, Arizona's record showed that 60.3% of the total population registered and 54.3% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (follow "Detailed Tables" hyperlink; then follow Table 4a "XLS" hyperlink). The Arizona Hispanic populations of total registered voters and those actually voting were 30.5% and 25.5%, respectively. *Id.* Nevada, on the other hand, had 56.8% of its entire population registered, with 51.3% actually voting. *Id.* The Nevada Hispanic population's numbers were 27.6% and 23.8%, respectively. *Id*.

In the 1972 election, only 49.5% of Nevada's voting age residents voted. (*See* Dave Leip's Atlas, *supra* (follow "1972" hyperlink; then follow "%VAP" hyperlink)). Also, none of Nevada's current laws protecting non-English-speaking voters had been enacted. (*See* Nev. Rev. Stat. § 293.2699 (added 2003); Nev. Rev. Stat. § 293.296 (added 1973); Nev. Rev. Stat. § 293C.282 (added 1997).) In spite of these facts, Arizona is a Covered Jurisdiction while Nevada has never been covered.

Despite the similar populations, a smaller percentage of Hispanic voters in Nevada are voting than in Arizona. In the Senate Judiciary Committee Report, there were only two pieces of anecdotal evidence regarding possible voting discrimination in Nevada,

but both involved discrimination against Hispanic voters. S. Rep. No. 109-295 at 277 (summarizing anecdotal evidence that Hispanics have been told they need to speak English or have a driver's license in order to vote and that voter registration forms for some Hispanics were found in dumpsters and not submitted). Congress made no findings concerning the number of minorities elected to office in Nevada or the possibility of racial polarization in its elections. This lack of justification by Congress for the different treatment of Arizona and Nevada, despite the stark similarities in their current populations and voter turnout records, is evidence that the VRA's formula is neither congruent with, nor proportional to, the goal of eliminating discrimination in voting. Further, Congress's failure to take into account these similar statistics shows that its decision to continue using the outdated coverage formula is arbitrary.

2. Several States Adopted Voter-Identification Laws but Experienced Dramatically Different Treatment Under the VRA.

Thirty states presently have laws in place that may require voters to show identification at the polls in November. *Voter Identification Requirements*, National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (last visited December 21, 2012). Whether the laws may be effective depends greatly on whether the jurisdiction is covered or not. Since 2001, nearly 1,000

bills have been introduced in 46 states. *Id*. Twenty-one states passed major legislation between 2003 and 2011. *Id.* Alabama, Colorado, Montana, North Dakota, and South Dakota passed new voter identification laws in 2003; Alabama had to request preclearance (*id*.), which DOJ granted on August 15, 2003 (DOJ File Nos. 2003-2245; 2003-3434).[6] In 2004, Arizona voters passed a voter identification law. *Gonzalez v. Arizona*, 624 F.3d 1162, 1169 (9th Cir. 2010) (en banc). The DOJ precleared Arizona's law.[7] *See* DOJ File No. 2004-5004. In 2005, Indiana, New Mexico, and Washington passed new voter identification laws, while Georgia passed legislation to strengthen its existing voter identification law. *See Voter Identification Requirements*, *supra*. Georgia had to request preclearance, while the other States did not. The DOJ precleared Georgia's law on August 26, 2005. *See Common Cause/Georgia, League of Women Voters of Ga., Inc. v. Billups*, 439 F. Supp. 2d 1294, 1303 (N.D. Ga. 2006).

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[6] Alabama has enacted a new voter identification law that has not yet been submitted for preclearance and which will not take effect until 2014. Ala. Code § 17-9-30 (2012); *see also Voter Identification Requirements, supra,* at table 1, n.1.

[7] A group of plaintiffs challenged Arizona's voter identification law under Section 2 of the VRA, among other claims. *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012), *cert. granted on other grounds sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 476 (2012) (No. 12-71). The Ninth Circuit Court of Appeals, upon rehearing en banc, affirmed the district court's denial of the VRA claim. *Id.* at 407. This Court granted certiorari on a question of preemption.

Indiana enacted a law providing that voters who were unable to produce photo identification on election day could cast a provisional ballot that would be counted only if the voter produced an appropriate affidavit or produced photo identification before the court clerk within ten days following the election. *Crawford*, 553 U.S. at 185-86. Because Indiana is not covered by Section 5, it did not have to seek preclearance. This Court upheld the facial validity of Indiana's law, stating that the Court could not "conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Id*. at 202.

The DOJ has not yet permitted South Carolina and Texas,[8] both Covered Jurisdictions, to enforce their voter-identification requirements despite the fact that these laws are similar to the Indiana law upheld in *Crawford*. After DOJ denied administrative preclearance for South Carolina's revised voter identification law, the State filed a declaratory-judgment action seeking reconsideration of the denial. *South Carolina v. United States*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 1.) South Carolina has had a voter identification law since 1988. *South Carolina v. U.S.*, ___ F. Supp. 2d ___, 2012 WL 4814094, at *1 (D.D.C. 2012). The new version, referred to as Act R54, created a new type of photo ID

[8] The State of Texas joined in the multi-state amicus brief at the petition stage, but has chosen to file its own separate amicus brief at the merits stage, in which it will likely discuss preclearance of its voter identification law.

that could be obtained for free at each county's election office. *Id*. In addition, R54 removed the $5 fee for DMV photo ID cards. *Id*.

A three-judge panel held a trial from August 27, 2012 through August 31, 2012. *South Carolina v. U.S.*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 300-309.) In a memorandum opinion, the panel granted preclearance, holding that the law did not have a discriminatory retrogressive effect and that it was not enacted for a discriminatory purpose. *South Carolina v. U.S.*, ___ F. Supp. 2d ___, 2012 WL 4814094, at *1 (D.D.C. 2012). However, because of the "numerous steps necessary to properly implement the law," the court did not grant preclearance for the 2012 elections. *Id*.

South Carolina submitted a bill of costs seeking over $90,000 in taxable costs to which DOJ objected. *South Carolina v. U.S.*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 310, 312.) While the court has not yet ruled on the bill of costs, it cannot be disputed that South Carolina incurred an enormous cost to preclear a law similar to one that Indiana was able to implement without the federal government's involvement.

Judge Williams questioned this inequity in his dissent in this case, stating: "Why should voter ID laws from South Carolina and Texas be judged by different criteria . . . from those governing Indiana?" (Pet. App. 94a.) Judge Williams could not find a rational explanation other than the *historical* records

of the Covered Jurisdictions, but noted that such a focus appears to be "foreclosed by *Northwest Austin*'s requirement that current burdens be justified by current needs." (*Id*. at 95a.) This dramatic disparity in the treatment of similar States is incompatible with our history of treating the States as equal sovereigns and warrants this Court's review.

C. The Preclearance Requirements Are Arbitrary and Burdensome.

As with the voter identification laws discussed above, Section 5's preclearance obligations lead to other absurdities. The Covered States and their political subdivisions must obtain federal preclearance before they enforce any change in a voting-related standard, practice, or procedure. *See* 42 U.S.C. § 1973c. Changes requiring preclearance include:

- "Any change in qualifications or eligibility for voting";
- "Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting"; and
- "Any change in the boundaries of voting precincts or in the location of polling places."

28 C.F.R. § 51.13(a), (b), (d). At the state level, the various attorneys general monitor legislation for "covered" changes and submit those changes to the

DOJ for preclearance. If a change originates at the local level, the local officials identify and submit the change.

1. Arizona's Budgetary Decision to Close Several Motor Vehicle Department Branches Required Preclearance.

Because Arizona, like many other States, has faced serious budget concerns over the past several years, the Arizona Motor Vehicle Department ("MVD") opted to close several branch offices. Arizona citizens who apply for a driver license or license renewal may, if otherwise qualified, register to vote or update their voter registration at the same time. Ariz. Rev. Stat. § 16-122. Thus, this decision to close the branch offices was a change concerning registration that necessitated a preclearance submission.

On June 21, 2012, Arizona requested preclearance to close an MVD location within the Pima County Justice Court in Tucson, Arizona. *See* DOJ File No. 2012-3656. The submission noted that there were three other voter registration locations in the immediate vicinity – one of which was the Pima County Recorder's Office in the very same building as the MVD office that was closing. *Id.* This type of administrative decision should be left to the local jurisdictions. But because of Section 5, Arizona's MVD had to wait until it received DOJ's preclearance letter to effectuate that change.

2. The DOJ Denied Georgia County Expedited Preclearance for Temporary Change of Venue Following Construction Delays.

On July 12, 2012, the Douglas County, Georgia Board of Elections & Registration learned that renovations would not be complete in time for the State's July 31 primary at two county schools serving as polling places. Fortunately, the problem was easily resolved as a substantive matter – both schools were within easy walking distance of another school that could serve as an alternative polling place. Four days later, on July 16, 2012, Douglas County sought expedited review of this change. Administrative Submission of Douglas County, Georgia, DOJ File No. 2012-4022. The detailed submission explained that this simple change would not have the purpose or effect of denying the right to vote on account of race, color, or membership in a language minority, and included a seven-page submission letter detailing 28 categories and subcategories of information, as well as multiple attachments. *See id*.

In spite of the simplicity of the requested change, the lack of any plausible discriminatory explanation, and the literal impossibility of *not* making the change, the DOJ did not preclear the Douglas County polling location changes before the election. The County was forced to move forward with the location change because the original polling places were unsafe, despite the Voting Rights Act provisions prohibiting implementation of an uncleared change.

In a September 13, 2012 letter, more than 40 days after the primary election, the Department of Justice finally notified Douglas County that while the Attorney General did not "interpose any objections" to the polling place change, the Department reserved the right to reexamine the county's submission. Response to Douglas County Georgia, DOJ File No. 2012-4022. The letter further noted that "Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes." *Id.* Douglas County thus remained under continued threat of federal administrative review and litigation because of a decision that was necessary to protect the health and safety of its citizens.

D. The Prospect of Bailout for the Covered States Is Illusory.

Congress justified the possibility that its coverage formula would be over- or under-inclusive, with the bailout and bail-in provisions. *Shelby Cnty.*, 811 F. Supp. 2d at 432-33. As discussed below, it would be essentially impossible for any of the amici States to bail out.

Like Congress, the majority below found solace in the bailout provision, stating that as of May 9, 2012, 136 jurisdictions and sub-jurisdictions had successfully bailed out. (Pet. App. 57a.) But no Covered State

has ever been allowed to bail out,[9] and as Judge Williams noted in his dissent, bailout does not remove federal oversight. (Pet. App. 92a (stating that "for a decade after bailout, the court 'retain[s] jurisdiction' just in case the Justice Department or 'any aggrieved person' wishes to file a motion 'alleging that conduct has occurred which . . . would have precluded' bailout in the first place.") (quoting 42 U.S.C. § 1973b(a)(5))). Further, the 1982 reauthorization of the VRA tightened the substantive standards for bailout:

> A covered jurisdiction can now obtain bailout if, and only if, it can demonstrate that, during the preceding *ten* years, it has (simplifying slightly): (1) effectively engaged in no voting discrimination (proven by the absence of any judicial finding of discrimination or even a Justice Department "objection" (unless judicially overturned); (2) faithfully complied with § 5 preclearance; (3) "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process"; and (4) engaged in "constructive efforts to eliminate intimidation and harassment of persons exercising rights protected" under the act and "in other

[9] The DOJ and the State of New Hampshire have jointly moved for entry of a bailout consent judgment and decree. *State of New Hampshire v. Holder*, D.D.C. Cause No. 1:12-cv-01854 (EGS, TBG, RMC) (Doc. 10). Unlike the amici states, New Hampshire has only ten covered towns and townships. *Id*.

> constructive efforts, such as the expanded opportunity for convenient registration."

(*Id*. (citing 42 U.S.C. § 1973b(a)(1)).)

None of the amici States is likely to ever successfully bail out because each state must prove that it (and *all* of its sub-jurisdictions) meets all the bailout requirements for the ten years preceding its declaratory judgment seeking bailout. If even one sub-jurisdiction receives an objection letter from DOJ for a voting change, the ten-year time period starts anew. Arizona, for example, has 667 sub-jurisdictions that are authorized to hold some form of election, including counties, cities, towns, school districts, and special taxing districts. The State of Arizona does not monitor those individual sub-jurisdictions to determine whether they are complying with Section 5 or whether they have ever received any preclearance objections. In fact, such oversight potentially violates Arizona law. The Arizona Supreme Court recently reiterated the long-held position that the framers of the Arizona Constitution valued local autonomy over the developing Nineteenth Century case law in other states that generally viewed cities and towns as subordinate to and dependent on the state's legislature for government authority. *City of Tucson v. Arizona*, 273 P.3d 624, 625-26, ¶¶ 7-8 (Ariz. 2012); *see also Strode v. Sullivan*, 236 P.2d 48, 53 (Ariz. 1951). As with Arizona's cities, the counties, school boards, and special taxing districts are responsible for submitting their respective voting changes for preclearance.

Because the State of Arizona has no method of ensuring that the sub-jurisdictions comply with Section 5, the State cannot affirmatively allege in a bailout action that no sub-jurisdiction has violated the VRA. Instead, the State will have to ask all of the sub-jurisdictions to voluntarily provide the necessary information and request the DOJ for each submission. This process in itself will cause the State (and the sub-jurisdictions) to use valuable staff time and resources. And if just one single sub-jurisdiction of the 667 received a preclearance objection or an unfavorable result in a Section 2 lawsuit in the past ten years, the bailout clock will start ticking again from the date of the most recent objection. As Justice Thomas noted in his dissent in *Northwest Austin*, the prospect of bailout for a State is nothing more than a "mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in the judgment in part and dissenting in part).

Covered jurisdictions such as the amici States likely will be forced to continue to operate under the unconstitutional burdens of Sections 4(b) and 5 of the VRA unless and until this Court removes them. The Court should do so now.

CONCLUSION

The Court should reverse the court of appeals' judgment.

Respectfully submitted this 31st day of December, 2012,

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