No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
Respondent.

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

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The State of Texas has been subject to section 5 of the Voting Rights Act since 1975, when the coverage formula was expanded to include any jurisdiction in which at least five percent of the voting-age citizens were members of a single language-minority group, election materials were printed only in English, and less than fifty percent of voting-age citizens voted or registered to vote in the most recent presidential election.

While the preclearance regime's coverage formula has remained the same for over 35 years, much else has changed. *See Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("Things have changed in the South."). Today Texas law requires bilingual ballots, *see* TEX. ELEC. CODE §§ 272.001-.010, and voter turnout in presidential elections exceeds fifty percent, *see, e.g.*, U.S. Census Bureau, Voting and Registration: Historical Time Series Tables A-5a, A-5b, http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html (last visited Jan. 2, 2013). Moreover, the congressional record in 2006 showed that blacks registered and voted at higher rates than whites in Texas in every federal election from 1996 to 2004, and Latino citizens in Texas registered to vote at higher rates than Latinos in non-covered jurisdictions in every federal election from 1980 to 2002. *See* H.R. REP. NO. 109-478, at 14 (2006).

But as the need for section 5's extraordinary measures has waned, the preclearance regime's

burdens have increased. Texas's effort to gain preclearance for its recently enacted voter-identification law is a case in point. In 2011, the Texas Legislature enacted a voter-identification law patterned after the law this Court upheld in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). Yet for nearly two years, the Civil Rights Division of the Department of Justice has used every weapon in its arsenal to thwart the implementation of a law that this Court has recognized as a legitimate and constitutional fraud-prevention measure. Because of section 5, the State of Texas *still* is unable to implement its voter-identification law—a law that Indiana and non-covered jurisdictions may enact and enforce without any interference from federal authorities.

Texas's ongoing efforts to gain preclearance of its voter-identification law demonstrate that section 5 continues to impose "substantial federalism costs" at a time when the need for a preclearance regime has receded—even after *Northwest Austin* warned that section 5 must be construed and enforced in a manner that mitigates intrusions into state policymaking. *See* 557 U.S. at 202.

SUMMARY OF ARGUMENT

The constitutionality of Congress's decision to reauthorize section 5's preclearance regime must be measured against the burdens that decision currently imposes on covered jurisdictions. *See Northwest Austin*, 557 U.S. at 203. The preclearance proceedings involving Texas's voter-identification law illustrate the enormous burdens of the section 5 regime. Section 5 has empowered the Department of Justice to thwart the implementation of a constitutional voter-identification measure with abusive and heavy-handed tactics.

DOJ's actions during the preclearance process indicate that the Department has not heeded this Court's decision in *Northwest Austin* and leave no doubt that DOJ will continue to enforce section 5 in a manner that aggravates rather than mitigates the "federalism costs" imposed by the preclearance regime. *See id.* at 202. The only way for this Court to alleviate these unwarranted and burdensome federalism costs is to declare the reauthorization of section 5 unconstitutional.

ARGUMENT

On May 27, 2011, Texas enacted a voter-identification law similar to the Indiana statute that this Court upheld in *Crawford v. Marion County*. The Texas law, also known as Senate Bill 14 (or SB 14), requires persons voting at the polls to present one of the following forms of photographic

identification: (1) a driver's license, election identification certificate, or personal identification card issued by the State; (2) a U.S. military identification card that contains the person's photograph; (3) a U.S. citizenship certificate that contains the person's photograph; (4) a U.S. passport; or (5) a Texas license to carry a concealed handgun. Acts 2011, 82nd Leg., R.S., Ch. 123 § 14.[1] SB 14 will make the "election identification certificate" available to persons who lack other forms of acceptable photo identification. The certificate will be issued free of charge.[2]

Unlike Indiana, Texas is a "covered jurisdiction" under section 5, so it cannot implement its voter-identification law until it obtains "preclearance" from

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[1] Each of these forms of identification must be either unexpired or expired no earlier than 60 days before the date of presentation.

[2] Under SB 14, voters who fail to bring proper photo identification to the polls may cast a provisional ballot. And those provisional ballots will be counted if the voter presents proper photo identification to the voter registrar within six days after the election, or if the voter executes an affidavit stating that the voter has a religious objection to being photographed or that he has lost his photo identification in a natural disaster that occurred within 45 days of the election. *See* SB 14 §§ 17-18. Voters who are disabled or over the age of 65 are authorized to submit their ballots by mail and can therefore vote without obtaining photo identification. TEX. ELEC. CODE §§ 82.002-.003.

either the Department of Justice or a federal court. *See* 42 U.S.C. § 1973c(a). Although Texas submitted SB 14 to DOJ for administrative preclearance in July 2011, the State's voter-identification requirement *still* has not been precleared. Part I of this brief describes how DOJ used section 5 to delay for as long as possible the implementation of Texas's law. Part II discusses the implications for the constitutionality of section 5 and its coverage formula.

I. DOJ RELENTLESSLY WORKED TO THWART TEXAS'S VOTER-IDENTIFICATION LAW DURING PRECLEARANCE PROCEEDINGS.

DOJ's determination to delay the implementation of SB 14 demonstrates how section 5 can be used to prevent a constitutional (but newly enacted) election law from taking effect before an upcoming election.

First, when Texas sought administrative preclearance, DOJ took seven months to make a decision that the statute requires to be made in 60 days.

Second, DOJ insisted that Texas produce evidence of significant in-person voter impersonation, despite this Court's holding in *Crawford* that States need not produce *any* evidence of in-person voter impersonation to justify a photo-identification law.

Third, DOJ forced twelve members of the Texas legislature to sit for depositions and explain why

they supported SB 14. It is unheard of for legislators to be subjected to depositions in ordinary constitutional litigation, even when legislative purpose is at issue in a case.

Finally, DOJ has adopted vague and shifting interpretations of section 5 and its "non-retrogression" doctrine. Covered jurisdictions are denied clear notice of the standard by which their laws will be judged, while DOJ is left with nearly unlimited discretion to withhold preclearance from any voting-related measure that it dislikes.

A. DOJ Unreasonably Delayed Its Review Of SB 14 Before Announcing Its Decision To Withhold Preclearance.

On July 25, 2011, Texas submitted SB 14 to DOJ for preclearance. Although the Voting Rights Act requires the Attorney General to rule on a preclearance request within 60 days of submission,[3]

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[3] *See* 42 U.S.C. § 1973c(a) ("Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such [preclearance] proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.").

Texas asked DOJ for expedited consideration so that it could train poll workers and otherwise prepare to implement the law for the 2012 election. *See Texas v. Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012), Expedited Complaint for Declaratory Judgment (ECF No. 1) Ex. 2 at 2.

DOJ responded by giving Texas the opposite of expedited consideration. Exactly 60 days after Texas submitted SB 14 for administrative preclearance, and on the last possible day for DOJ to respond, DOJ notified Texas that its preclearance submission was "insufficient to enable us to determine" whether SB 14 complies with section 5. *See* Expedited Complaint Ex. 3 (Sept. 23, 2011). DOJ demanded a wide variety of new information regarding the racial makeup of registered voters in Texas. *Id*. at 2-3.

DOJ could have requested this additional information shortly after Texas made its submission. Instead, DOJ waited until the statutory deadline for issuing its preclearance decision to request these data. Texas responded on October 4, 2011, explaining that much of the racial data sought by DOJ was unavailable because Texas does not collect racial information from voting registrants. *See* United States' Statement in Support of Its Request to Depose and Seek Documents from State Legislators and Staff (ECF No. 69) Ex. 5 (Letter from Ann McGeehan to Thomas Perez at 6 (Oct. 4, 2011)).

Nevertheless, on November 16, 2011—six weeks after the State had informed DOJ that it did not

have the requested information—DOJ reiterated its demand for these non-existent voter data, and threatened to deny preclearance unless Texas produced them.

On January 24, 2012, having waited nearly six months without a decision from DOJ, the State filed suit in federal district court seeking judicial preclearance of SB 14. DOJ did not issue a decision denying administrative preclearance until March 12, 2012—exactly 60 days after the State's last administrative preclearance supplemental submission and once again on the last possible day for DOJ to respond. United States' Notice of Filing Section 5 Determination (ECF No. 11) Attach. 1 at 5. In total, DOJ took *more than seven months* to issue a preclearance ruling that the statute requires to be made within 60 days. By resorting to these dilatory tactics and ignoring Texas's request for expedited consideration, DOJ disregarded *Northwest Austin*'s instruction to interpret and enforce section 5 in a manner that mitigates the "federalism costs" associated with the preclearance regime.

B. DOJ Disregarded This Court's Decision In *Crawford* By Demanding That Texas Produce Evidence Of Significant In-Person Voter Impersonation To Justify Its Photo-Identification Requirement.

In its letter denying preclearance, DOJ criticized Texas's submission because it did not include

evidence of "significant" in-person voter fraud occurring in Texas. *Id.* at 2 ("[W]e note that the state's submission did not include evidence of significant in-person voter impersonation not already addressed by the state's existing laws."). Yet this Court previously held in *Crawford* that evidence of in-person voter impersonation is not needed to justify a photo-identification law. *See Crawford*, 553 U.S. at 194 (Stevens, J.). And DOJ *never asked* Texas to produce evidence of in-person voter impersonation during the administrative preclearance process—even though DOJ repeatedly demanded other additional information from the State over the course of several months. Texas would have produced this information if requested.

Crawford holds that the State's interests in preventing opportunities for fraud and safeguarding public confidence in the integrity of the election process are so strong that they permit a State to require photo identification regardless of whether voter impersonation is actually occurring in that State. *Id.* at 196-197. DOJ's stance cannot be squared with *Crawford*; its preclearance-denial letter indicates that preclearance will be withheld from every photo-identification law enacted in covered jurisdictions unless the State produces not only some evidence but *significant* evidence of in-person voter impersonation.

Public statements by Attorney General Eric Holder reflect a similar unwillingness to respect this

Court's decision in *Crawford*. In a televised interview on NBC's Nightly News, the Attorney General explained why he had withheld preclearance from Texas's and South Carolina's voter-identification laws:

> Because the solutions that have been proposed go to things that do not exist, or go to a problem that does not exist. In the interaction, for instance, that we had with Texas, where we asked them to tell us, show us, the statistical proof that there is voter fraud in Texas, we got nothing, not a question of what the statistics were, we got nothing from Texas. . . . [T]here is no statistical proof that vote fraud is a big concern in this country, in-person vote fraud is a big concern in this country, and as a result, these voter-ID laws are solutions that deal with a problem that does not really exist. . . . [T]here is no proof that our elections are marred by in-person voter fraud.[4]

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[4] Extended Interview: Attorney General Holder on Voting Rights, http://video.msnbc.msn.com/nightly-news/46724699#46724699 (last visited Jan. 2, 2013).

It is troubling enough that the Attorney General and the Department of Justice appear to be using section 5 to circumvent this Court's decision in *Crawford*. But it is more disturbing that DOJ's reliance on the supposed non-existence of voter impersonation is so far removed from DOJ's limited responsibility of confirming that voting laws comply with section 5's substantive requirements. Section 5 protects the ability of minority voters to elect their candidate of choice. *See* 42 U.S.C. § 1973c(d). Yet DOJ has never attempted to connect its complaints about the alleged lack of voter impersonation to this requirement.

C. DOJ Forced Twelve Members of the Texas Legislature To Sit For Depositions In An Effort To Uncover Evidence Of Discriminatory Purpose.

When DOJ filed its answer in the judicial-preclearance proceedings, it did not allege that SB 14 was enacted with a discriminatory purpose. *See* Answer (ECF No. 68) ¶ 42 ("Defendant lacks knowledge or information sufficient to form a belief as to whether Plaintiff's photo identification law was enacted with a racially discriminatory purpose and therefore, denies the same."). The next day DOJ claimed that it "does not have sufficient information at this time to state a position on whether Texas has or has not met its burden to establish that S.B. 14 was enacted without any discriminatory purpose." United States' Statement in Support of Its Request

to Depose and Seek Documents from State Legislators and Staff (ECF No. 69) at 3 n. 1.

Nevertheless, DOJ's brief included declarations from four Democratic state legislators who voted against the voter-identification law. Each declaration contained conclusory allegations that SB 14 had been enacted with a racially discriminatory purpose. *See id.* at 11 (citing declarations of Representative Anchia, Representative Veasey, Senator Ellis, and Senator Uresti). DOJ argued that "[t]hese statements by first-hand witnesses of the process by which S.B. 14 was developed and enacted are indicia of discriminatory purpose more than sufficient to warrant discovery of legislators and their staff." *See id.* at 12-13.

Then, relying on declarations that were drafted by DOJ attorneys for legislators who opposed SB 14,[5] DOJ embarked on a massive fishing expedition in the hope of uncovering some evidence of racially discriminatory purpose. DOJ demanded that dozens of state legislators and their staff sit for depositions to explain their reasons for supporting SB 14. DOJ eventually deposed four members of the Texas Senate, eight members of the Texas House of

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[5] Representatives Anchia and Veasey testified under oath that their declarations had been drafted by attorneys at the Department of Justice. *See* Texas Proposed Findings of Fact and Conclusions of Law (ECF No. 202) ¶¶ 127, 128.

Representatives, two legislative staff members, three current and former members of the Governor's staff, and three current and former members of the Lieutenant Governor's staff. Many of these depositions lasted for seven hours, the maximum time allotted under the Federal Rules of Civil Procedure. Worse, these legislators were subjected to questioning not only from DOJ's lawyers but also from the different groups of lawyers representing the 25 intervening parties.

It is unheard of for state legislators to be forced to sit for depositions in ordinary constitutional litigation, even when a plaintiff is alleging that a state law was enacted with a forbidden purpose. We have been unable to find *any* case outside of section 5 preclearance proceedings in which a litigant was permitted to depose members of a state legislature and grill them on their motives for supporting a law. *See Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 268 (1977) (holding that litigants cannot compel testimony from state legislators absent "extraordinary instances"); *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008) (forbidding plaintiffs in an eminent-domain dispute to depose "pertinent government officials" and discover their "emails, confidential communications, and other pre-decisional documents" because this would represent "an unprecedented level of intrusion"). Yet DOJ routinely seeks to depose state legislators in contested preclearance proceedings,

even arguing that "contested preclearance actions" are per se "'extraordinary circumstances' in which legislators may be called to the stand." *See* Defendant's Response in Opposition to Plaintiff's Motion for a Protective Order (ECF No. 57) at 6.

DOJ and the intervenors aggravated this situation by subjecting the State's legislators to undignified and unprofessional questioning during their depositions. One of the career attorneys at the Department of Justice propounded the following question to State Representative Patricia Harless:

> Did Texans have more confidence in their elections when elections were limited on the basis of race?

Harless Tr. at 129:16-17.

A lawyer from the ACLU posed this loaded question to State Senator Tommy Williams:

> Have you ever heard that African Americans in your district consider you to be racially biased against minorities?

Williams Depo. Tr. at 237:1-3.

And counsel for the Texas League of Young Voters asked the Lieutenant Governor's Chief of Staff:

> Are you aware of the assertions that the Lieutenant Governor campaign for this year's Republican nomination

> for the Senate have resort[ed] to bigotry?

Brunson Depo. Tr. at 168:14-16.

These questions serve no purpose other than to harass and embarrass the deponent. It is unacceptable that section 5 allows the legislators of a sovereign State to be subjected to this type of questioning when the very existence of section 5's preclearance requirement already pushes constitutional boundaries.

D. DOJ Has Adopted Vague And Shifting Interpretations Of Section 5 That Fail To Give Covered Jurisdictions Notice Of What Is Permitted And Allow DOJ To Withhold Preclearance From Any Law That It Dislikes.

DOJ's interpretations of section 5 are so vague and indeterminate that a covered jurisdiction has no way of knowing how it can "prove" nonretrogression to the satisfaction of the Department of Justice or a randomly selected three-judge panel. It is always possible for DOJ (or a federal court) to say that a covered jurisdiction has "failed to carry its burden" of proving nonretrogression, either by demanding that the State produce evidence that is impossible to obtain, or by invoking new theories of "retrogression" and requiring the State to rebut them.

When Texas sought administrative preclearance of its voter-identification law, DOJ rejected SB 14

primarily on the ground that the State had failed to prove that registered voters with Spanish surnames possess state-issued photo identifications at rates that equal or exceed the rate of identification possession among registered voters without Spanish surnames. *See* United States Notice of Filing Section 5 Determination (ECF No. 11) Attach. 1 (Letter from Thomas Perez to Keith Ingram at 5 (Mar. 12, 2012)) (claiming that "the state has not met its burden of proving that, when compared to the benchmark, the proposed requirement will not have a retrogressive effect" and noting that DOJ's database analysis "show[s] that over 600,000 registered voters do not have either a driver's license or personal identification card issued by DPS [and] that a disproportionate share of those registered voters are Hispanic"). And DOJ maintained this stance throughout the preclearance litigation, claiming that section 5 required Texas to prove that rates of photo-identification possession among minority registered voters equal or exceed the rates of photo-identification possession among non-minority registered voters. *See, e.g.*, The Attorney General's Proposed Findings of Fact and Conclusions of Law (ECF No. 223) at 56 (arguing that an alleged ID disparity established that "SB 14 will severely retrogress black and Hispanic voters' effective exercise of the electoral franchise").

At trial, the State exposed the many problems with DOJ's identification-disparity theory. First,

DOJ's no-match data considered only state-issued photo identifications, and never even considered possession of passports, military identification, or citizenship certificates—even though each of these qualifies as acceptable photo identification under SB 14. *See* Opinion (ECF No. 340) at 34-35. Second, DOJ's efforts to "match" entries in the state databases were biased against Hispanics because DOJ insisted on exact-name matches, and Hispanic names are more likely to generate discrepancies when entered into state databases. *See* Trial Tr. July 10, 2012 (AM) 12:16-22, 21:15-23:15; Opinion (ECF No. 340) at 37. Third, DOJ's expert witness failed to remove 50,000 deceased individuals from the State's voter-registration database (even though he removed these individuals from the State's driver's license database), causing his analysis to significantly overstate the number of registered voters who lack photo identification. *See* Opinion (ECF No. 340) at 35-36. DOJ's claim in court that "over 1.5 million" registered voters in Texas lack photo identification was demonstrably untrue; evidence at trial revealed that DOJ's "no-match" list included many people who have photo identification, including President George W. Bush, U.S. Senators Kay Bailey Hutchison and Phil Gramm, state Senator Leticia Van de Putte, state Representative Aaron Pena, and persons who had moved from Texas years ago. *See* Trial Tr. July 12, 2012 (PM) 49:3-19, 51:14-19, 52:18-53:17, 55:14-57:4, 59:15-60:21; 61:11-62:19, 63:6-12, 64:5-25, 70:3-9, 71:8-9. State Director

of Elections Keith Ingram and his wife appeared *twice* on DOJ's no-match list—even though both of them have Texas driver's licenses. Trial Tr. July 9, 2012 (AM) 73:25-75:14. Numerous voters who appeared on DOJ's "no-match" list were found in the state's driver's license database, and DOJ's expert witness was unable to explain at trial how those voters had made it on to his no-match list. The district court rejected every single piece of the DOJ expert's analysis. Opinion (ECF No. 340) at 37.

Although the State so thoroughly discredited DOJ's ID-disparity theory that the district court found it to be "plagued by several methodological flaws," the district court nevertheless held that Texas failed to prove that rates of photo-identification possession among minority registered voters equal or exceed the rates of photo-identification possession among non-minorities. *Id*. at 44-45. But how exactly is Texas (or any other State) supposed to "prove" the absence of a disparity in photo-identification possession? Since 1965, Texas has not asked voters to report their race or ethnicity when they register to vote, so there is no reliable way to determine the race of a registered voter in Texas.

And the opportunity for DOJ (or a court) to impose a similarly impossible burden of proof on a State exists in every preclearance proceeding, not just those involving voter-identification laws. Moving a polling place? Prove that it won't cause any member of a racial or language minority group

to walk or drive greater distances. Changing the time period for early voting? Prove that the racial composition of those who will cease voting in response to the change mirrors the racial makeup of the overall electorate. Enacting any type of voter-identification law? Prove the absence of any racial disparities in ID possession. Whether these "impossible burdens" will in fact be imposed on the State seeking preclearance rests entirely with the discretion of DOJ or the relevant three-judge panel. And even when a State is capable of proving "nonretrogression" under some specific theory, it remains possible for DOJ (or a federal court) to demand that the State satisfy a different theory of "nonretrogression"—perhaps by demanding that the State prove equal rates of photo-identification possession among *eligible* rather than registered voters. And the chosen theory of "nonretrogression" will depend on whether DOJ (or the federal court) wants to preclear or thwart the law.

All of this becomes evident when one considers that DOJ's refusal to preclear SB 14 is irreconcilable with its decision to preclear Georgia's voter-identification law in 2005. *See* GA. CODE ANN. § 21-2-417. Opponents of the Georgia law claimed that it would impose severe burdens on minority voters, and that minority voters in Georgia were more likely than non-minority voters to lack the photo identification needed to vote at the polls. *See, e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340,

1354 (11th Cir. 2009). Yet DOJ precleared the Georgia law, even though preclearance surely would have been denied under the version of "nonretrogression" that DOJ espoused during the Texas preclearance proceedings. And DOJ precleared Georgia's law without requiring the State to produce evidence that voter impersonation was occurring at the polls.

If section 5 allows DOJ to preclear Georgia's voter-identification law, but then redefine "nonretrogression" in a manner that would require preclearance to be withheld from Texas's and Georgia's voter-identification laws, then section 5 not only fails to provide fair notice to covered jurisdictions but also fails to cabin the discretion of federal officers in a manner that will avoid arbitrary decisionmaking. DOJ undeniably has changed its definition of "nonretrogression" from the time when it precleared Georgia's voter-identification law, and DOJ has not offered any explanation to reconcile its decision to preclear Georgia's voter-identification law with its refusal to preclear SB 14.[6]

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[6] The same vagueness and indeterminacy emerge in the redistricting context, where DOJ and the courts fail to provide any useful guidance to covered jurisdictions on what "nonretrogression" means. *See Texas v. United States*, No. 11-1303, 2012 WL 3671924, at *2 (D.D.C. Aug. 28, 2012) (holding that section 5 requires court to apply a "multi-factored, functional analysis" in determining retrogression). *See also*

Northwest Austin affirmed that the States enjoy "equal sovereignty" under the Constitution. 557 U.S. at 203. Even if one accepts the distinction that section 5 draws between covered and non-covered jurisdictions, section 5 still violates the Constitution by infringing the equal sovereignty of the States *within* the section 5 coverage formula. Georgia's photo-identification law was precleared by the Department of Justice without requiring the State to prove that minority registered voters were as likely as non-minorities to possess photo identification. The caprice exhibited by the Department of Justice in its responses to the Georgia and Texas voter-identification laws is not consistent with the equal sovereignty that the Constitution and the decisions of this Court secure to each of the several States.

Texas v. United States, 831 F. Supp. 2d 244, 272 (D.D.C. 2011) (holding that section 5 preclearance "does not lend itself to a formalistic inquiry and complexity is inherent in the statute," and that it "can rarely be measured by a simple statistical yardstick"); *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.").

II. WHEN SECTION 5'S PRECLEARANCE REGIME IMPOSES SUCH HEAVY BURDENS ON COVERED JURISDICTIONS, ITS COVERAGE FORMULA MUST BE PRECISELY DRAWN AND BASED ON CURRENT DATA.

It cannot be denied that section 5's coverage formula is out of kilter. As this Court noted in *Northwest Austin*, "[t]he statute's coverage formula is based on data that [are] now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." 557 U.S. at 203. Now the data are more than 40 years old and, as this Court has already observed, "the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide." *Id.* In Texas, blacks vote at *higher* rates than whites, and Hispanic voter registration and turnout is *higher* in Texas than it is in States outside the South. *See* H.R. REP. NO. 109-478, at 14. The court of appeals's opinion upholding section 5 and its coverage formula cannot stand when considered in light of the heavy burdens imposed by the preclearance regime and the drastically improved voting patterns in the South.

The court of appeals attempted to justify section 5 and its antiquated coverage formula by invoking the "Katz study." *See Shelby County, Ala. v. Holder*, 679 F.3d 848, 874-877 (D.C. Cir. 2012). But this study has been dismantled by scholarship that the court of appeals refused to acknowledge or cite. Professors Adam Cox and Thomas Miles have shown

that there has been a distinct downward trend in the rate of successful claims brought by section 2 plaintiffs since 1982. In the most recent years, there is no difference in the rate of claimant success in covered versus uncovered jurisdictions. *See* Adam B. Cox and Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 8, 45-46 (2008). The court of appeals's opinion ignores this unmistakable time trend in the data by improperly bunching together all of the section 2 claims filed since 1982. Professors Cox and Miles have also demonstrated that section 2 claimants in covered jurisdictions are less successful at the appellate level than claimants in non-covered jurisdictions. The higher rate of claimant success in covered jurisdictions appears only at the trial level—and even that has been in steady decline and is now negligible in the data from recent years. *Id.* at 38, 46-47; *see also* Adam B. Cox and Thomas J. Miles, *Documenting Discrimination?*, 108 COLUM. L. REV. SIDEBAR 31 (2008), http://www.columbialawreview.org/wp-content/uploads/2008/06/31_CoxMiles.pdf (last visited Jan. 2, 2013). And in all events, litigation success rates are not a reliable measure of actual discrimination because successful litigation outcomes are influenced by factors such as resources and attorneys' strategy that have no relation to the merits of the claim. *Id.* at 35-37.

The question for this Court to resolve is not whether the coverage formula is imprecise and outdated, but what should be done about it. When

the preclearance requirement becomes a weapon for DOJ to prevent or delay the implementation of voter-identification laws that have been approved as constitutional by the Supreme Court, that is an intolerable burden to impose on covered jurisdictions. And it cannot be justified unless the coverage formula is tailored to single out jurisdictions that *currently* cannot be trusted to respect the commands of the Fifteenth Amendment; it cannot be based on events that occurred more than 40 years ago. *Northwest Austin*, 557 U.S. at 203 ("[C]urrent burdens . . . must be justified by current needs."). The heavier the burdens imposed by section 5's preclearance regime, the more tightly drawn the coverage formula must be.

The State of Texas's experiences through a seven-month administrative preclearance process and a section 5 trial show that the burdens that section 5 imposes on covered jurisdictions are severe and extraordinary. Texas has had its voter-identification law delayed for nearly two years—even though States outside of section 5 can enact and implement similar laws without any interference from federal officials. There is no justification for continuing to subject Texas to section 5 when the "evil [it] is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." *Id.*

Worse, the Attorney General and the lawyers in DOJ have not heeded this Court's admonition in

Northwest Austin. That decision made clear that section 5—if it is to remain constitutional—must be interpreted and enforced in a manner that mitigates the "substantial federalism costs" that a preclearance regime imposes on covered jurisdictions. *Id*. at 202 (internal quotation marks omitted). Yet DOJ has responded by aggravating rather than mitigating the "federalism costs" associated with section 5. DOJ prevented Texas from implementing a voter-identification law that non-covered jurisdictions are free to enforce under *Crawford* and that covered jurisdictions were free to enforce less than a decade ago. DOJ unreasonably delayed its decision on Texas's request for administrative preclearance, then forced twelve of the State's legislators to sit for depositions during the preclearance proceedings. DOJ attempted to justify its decision to deny preclearance by claiming that Texas's voter-identification law is unnecessary as a policy matter. And it did all of this while adopting a vague and shifting definition of "non-retrogression" that denies covered jurisdictions fair notice of the standards against which their election changes will be judged. This is not the conduct of a Department of Justice that takes *Northwest Austin* seriously.

Stronger medicine is needed to rein in these abuses. The State of Texas respectfully asks this Court to strike down section 5 and its coverage formula under the congruence-and-proportionality test.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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January 2013