SCHEDULED FOR ORAL ARGUMENT FEBRUARY 27, 2012

No. 11-5349

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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STEPHEN LAROQUE, ANTHONY CUOMO, JOHN NIX, KLAY NORTHRUP, LEE RAYNOR, and KINSTON CITIZENS FOR NON-PARTISAN VOTING,

Plaintiffs-Appellants

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, et al.,

Defendants-Appellees

_____

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

_____

BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE

_____

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Attorney General, as appellee, certifies that:

1. Parties

All parties, intervenors, and amici appearing before the district court are listed in the Brief for Appellants.

2. Rulings Under Review

Reference to the rulings at issue appear in the Brief for Appellants.

3. Related Cases

This case was previously before this Court. *LaRoque* v. *Holder*, No. 10-5433, 650 F.2d 777 (D.C. Cir. 2011). A related case is pending before this Court. *Shelby County* v. *Holder*, No. 11-5256. Two related cases are pending in district court. *Arizona* v. *Holder*, No. 1:11-CV-01559 (D.D.C.); *Florida* v. *United States*, No. 1:11-cv-01428 (D.D.C.) (three-judge court). *Georgia* v. *Holder*, No. 1:10-cv-1062 (D.D.C.), listed as a related case by appellants, was dismissed on joint motion of the parties on November 2, 2010. Three pending declaratory judgment actions pose the constitutionality of Section 5 as potential alternative claims. See *Texas* v. *United States*, No. 1:11-cv-1303 (D.D.C.) (three-judge court); *Texas* v. *Holder*, No. 1:12-cv-128 (D.D.C.) (three-judge court); *South Carolina* v. *United States*, No. 1:12cv203 (D.D.C.) (three-judge court).

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GLOSSARY

AGSC Br. – Brief filed by the United States in *Shelby County*, No. 11-5256 (D.C. Cir.)

DOJ – Department of Justice

DOT – Department of Transportation

FCC – Federal Communications Commission

FERC – Federal Energy Regulatory Commission

J.A. – Joint Appendix

KCNV – Kinston Citizens for Nonpartisan Voting

LULAC – League of United Latin American Citizens

S.C.J.A. – Shelby County Joint Appendix

VRA – Voting Rights Act

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment for the defendant and defendants-intervenors. The district court had jurisdiction under 28 U.S.C. 1331 and 42 U.S.C. 1973*l*(b), except that the district court lacked jurisdiction over plaintiffs' claims regarding Section 5(c), 42 U.S.C. 1973c(c). The district court's final order was entered December 22, 2011. Joint Appendix (J.A.) 317-318. Plaintiffs-appellants timely filed their notice of appeal December 22, 2011. J.A. 319. This court lacks jurisdiction over plaintiffs' claims because the case is moot.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this case is moot.

2. Whether plaintiffs have standing to challenge the constitutionality of Section 5(c) of the Voting Rights Act (VRA), 42 U.S.C. 1973c(c).

3. Whether the 2006 Reauthorization of Section 5 of the VRA, 42 U.S.C. 1973c, is appropriate legislation to enforce the Fourteenth and Fifteenth Amendments.

4. Whether the 2006 amendments to the preclearance standard in Section 5 of the VRA, 42 U.S.C. 1973c(b)-(d), are appropriate legislation to enforce the Fourteenth and Fifteenth Amendments.

5. Whether the 2006 amendments to the preclearance standard in Section 5 of the VRA, 42 U.S.C. 1973c(b)-(d), violate the nondiscrimination requirements of the Fifth Amendment.

STATUTES AND REGULATIONS

Relevant regulations, in addition to those in appellants' brief, are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This is a facial challenge to the constitutionality of the 2006 Reauthorization of Section 5 of the Voting Rights Act (VRA). 42 U.S.C. 1973c; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§4-5, 120 Stat. 577-581 (2006 Reauthorization), and to the 2006 amendments to the preclearance standard in Section 5, 42 U.S.C. 1973c(b)-(d). The district court granted summary judgment to the Attorney General and the defendant-intervenors.

A. The Voting Rights Act

1. The Fifteenth Amendment, which prohibits racial discrimination in voting, was ratified in 1870. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310 (1966). "The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2508 (2009) (*Northwest Austin II*). Beginning in

1890, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began systematically disenfranchising black citizens. *South Carolina*, 383 U.S. at 310-311. Before and during this process, jurisdictions throughout the South used dilutive devices to minimize the effectiveness of the votes cast by black citizens who remained eligible to register and vote. *Shelby County* v. *Holder*, No. 10-0651, 2011 WL 4375001 at *3 (D.D.C. Sept. 21, 2011), appeal pending, No. 11-5256 (docketed Sept. 27, 2011), *Shelby County* Joint Appendix (S.C.J.A.) 485-486; Brief for the Attorney General in *Shelby County* (AGSC Br.) at 49-51. Federal legislation enacted in 1957, 1960, and 1964 did "little to cure the problem." *South Carolina*, 383 U.S. at 313.

2. In 1965, Congress enacted the VRA, Pub. L. No. 89-110, 79 Stat. 437 (1965 Act), "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina*, 383 U.S. at 309.

Section 5 of the VRA provided that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain administrative preclearance from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 1965 Act, §5, 79 Stat. 439. In either case, preclearance could be granted only if the jurisdiction

demonstrated that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.* It has long been established that the effect prong of the preclearance standard prohibits only voting changes "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

Rather than identifying by name the jurisdictions that would be subject to Section 5, Congress described them in Section 4(b) as those jurisdictions that: (1) maintained a prohibited test or device on November 1, 1964; and (2) had registration or turnout rates below 50% of the voting age population in November 1964. 1965 Act, §4(b), 79 Stat. 438. These criteria encompassed Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and 39 counties in North Carolina. 28 C.F.R. Pt. 51 App. The VRA also included a "bail-in" provision, under which a jurisdiction found to have violated the voting guarantees of the Fifteenth Amendment could be subjected to preclearance requirements, and a "bailout" provision, under which a jurisdiction could terminate coverage by showing it had not discriminated. 1965 Act, §§3(c), 4(a), 79 Stat. 437-438.

The Supreme Court upheld the constitutionality of Sections 4(b) and 5 in *South Carolina*, 383 U.S. at 323-337, finding both provisions authorized by Section 2 of the Fifteenth Amendment.

3. Congress reauthorized Section 5 in 1970, 1975, and 1982. *Northwest Austin II*, 129 S. Ct. at 2510. The Supreme Court reaffirmed the constitutionality of Section 5 after each reauthorization. See *ibid.* (citing *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999)).

In 2006, Congress reauthorized Section 5 for 25 years. The constitutionality of the 2006 Reauthorization was upheld in *Northwest Austin Municipal Utility District Number One* v. *Mukasey*, 573 F. Supp. 2d 221, 235-283 (D.D.C. 2008) (three-judge court) (*Northwest Austin I*). That judgment was reversed in *Northwest Austin II*, which resolved the case on statutory grounds and did not resolve the constitutional question. 129 S. Ct. at 2508, 2513-2517.

4. Congress also amended Section 5 in 2006, in response to the Supreme Court's decisions in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003); and *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*). Congress found that these decisions "misconstrued Congress' original intent in enacting the Voting Rights Act of 1965," "narrowed the protections afforded by section 5," and "significantly weakened" the Act's effectiveness. 2006 Reauthorization, §2(b)(6), 120 Stat. 578.

Ashcroft held that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the

relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." 539 U.S. at 479. While the Court recognized that "the comparative ability of a minority group to elect a candidate of its choice" is an "important" factor in determining whether a plan is retrogressive, "it cannot be dispositive or exclusive." *Id.* at 480. Thus, the Court held, a State may choose to create districts in which a minority group constitutes a sufficient majority that its ability to elect its candidates of choice is "virtually guarantee[d]." *Id.* at 480-481. Or the State may choose to create a larger number of districts in which minority voters have a substantial, but smaller representation, and thus will have only the possibility of electing the candidates of their choice, or perhaps only of influencing the outcome of the election, with or without a coalition with other groups. *Id.* at 481-482. "Section 5," the Court held, "gives States the flexibility to choose one theory of effective representation over the other." *Id.* at 482.

The House Judiciary Committee found that the Court's decision in *Ashcroft* "turns Section 5 on its head" by directing courts to "defer to the political decisions of States rather than the genuine choice of minority voters regarding who is or is not their candidate of choice." H.R. Rep. No. 478, 109th Cong., 2d Sess. 69 (2006) (2006 House Report). The Court's "'new' analysis," the Committee stated,

"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. Permitting these trade-offs is inconsistent with the original and current purpose of Section 5." *Ibid.* The retrogression standard applied before the *Ashcroft* ruling, the Committee explained, was responsible for the electoral gains made by minority communities since enactment of the VRA, and the *Ashcroft* standard put those gains at risk. *Id.* at 70.

Congress added subsections (b) and (d) to Section 5, clarifying that voters' ability to elect their candidates of choice remains the central inquiry of the preclearance determination:

> (b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.
>
> * * * * *
>
> (d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

42 U.S.C. 1973c(b), (d).

In *Bossier II*, the Court held for the first time[1] that, in the context of intentional vote dilution, the purpose prong of the preclearance standard is limited to voting changes with a retrogressive purpose. 528 U.S. at 328. "[*N*]*o matter how unconstitutional it may be*," the Court later explained, "a plan that is not retrogressive should be precleared under § 5." *Ashcroft*, 539 U.S. at 477 (quoting *Bossier II*, 528 U.S. at 336).

The House Judiciary Committee explained that "[t]hrough the 'purpose' requirement, Congress sought to prevent covered jurisdictions from enacting and enforcing voting changes made with a clear racial animus, regardless of the measurable impact of such discriminatory changes." 2006 House Report 66. Congress thus enacted Section 5(c), to make it clear that preclearance should be denied if the voting change was motivated by *any* discriminatory purpose:

> (c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

42 U.S.C. 1973c(c).[2]

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[1] See *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 486 (1997).

[2] The original Section 5 became Section 5(a), and the wording of the preclearance standard therein was changed from "does not have the purpose and will not have the effect" to "neither has the purpose nor will have the effect," to clarify that both prongs must be satisfied. 2006 Reauthorization §5(2), 120 Stat. 580; 2006 House Report 65 n.168.

B. Plaintiffs-Appellants

Plaintiffs are proponents of a 2008 referendum to change the method of electing the Mayor and City Council of the City of Kinston, North Carolina from partisan to nonpartisan elections. J.A. 5, 8. The individual plaintiffs are registered voters and residents of Kinston. J.A. 5-6. Plaintiff John Nix was a candidate for the Kinston City Council who planned to run for office unaffiliated with any party. J.A. 6, 53. The organizational plaintiff, Kinston Citizens for Nonpartisan Voting (KCNV), consists of registered Kinston voters and prospective candidates who supported the referendum. J.A. 6-7.

The City of Kinston, in Lenoir County, North Carolina, is subject to Section 5. 30 Fed. Reg. 9897 (Aug. 7, 1965). After the nonpartisan referendum was adopted by the City's voters, Kinston submitted the proposed change to the Attorney General for Section 5 review. J.A. 45. On August 17, 2009, the Attorney General interposed an objection to the proposed change on the ground that it would have a discriminatory effect. J.A. 45-47. The objection letter explained that, although Kinston is a majority-black city by population, black voters had constituted a minority of the City's electorate in three of the last four elections. J.A. 45. Black voters had, the letter explained, "had limited success in electing candidates of choice during recent municipal elections" in Kinston. J.A. 46. This limited success resulted from black voters' cohesive support for minority

candidates in the Democratic primaries, in which black voters were a larger share of the electorate, combined with the willingness of a small, but consistent, number of white Democratic voters to support the Democratic nominee in the general election, regardless of that candidate's race. J.A. 46. Because Kinston is a majority Democratic city, this resulted in the election of some black voters' candidates of choice. J.A. 46. However, as the letter explained, the degree of racially-polarized voting in Kinston was such that, rather than voting for black Democratic candidates, a majority of white Democrats supported white Republican candidates in the general election. J.A. 46. The limited amount of white cross-over voting, which was necessary for black voters to elect their candidate of choice while they remained a minority of the electorate in the general election, was due largely to party loyalty and would be eviscerated by removing partisan identification on election ballots. J.A. 46. Thus, "while the motivating factor for this change may be partisan," the objection letter concluded, "the effect will be strictly racial." J.A. 46.

C. Procedural History

1. Appellants' Claims

Appellants filed this action alleging that Section 5, as amended and reauthorized in 2006, is not appropriate legislation to enforce the Fourteenth or Fifteenth Amendments, J.A. 13-14 (Count I); and that Section 5, as amended in

2006, violates the nondiscrimination requirements of the Fifth, Fourteenth, and Fifteenth Amendments, J.A. 14-15 (Count II). Plaintiffs assert only a facial challenge to the constitutionality of Section 5. J.A. 233; Appellants' Br. 6.

2. Dismissal Of Plaintiffs' Complaint And The First Appeal

The district court dismissed plaintiffs' complaint in its entirety, ruling that none of the plaintiffs had standing and that they lacked a cause of action. *LaRoque* v. *Holder*, 755 F. Supp. 2d 156 (D.D.C. 2010).

This Court reversed the dismissal of Count I as to plaintiff Nix, holding that, as a candidate for municipal office, Nix had standing and a cause of action to challenge Congress's authority to enact the 2006 Reauthorization of Section 5. *LaRoque* v. *Holder*, 650 F.3d 777, 785-793 (D.C. Cir. 2011) (*LaRoque II*). The Court also vacated the dismissal of Count II, and remanded the case for consideration of plaintiffs' standing to assert Count II and the merits of their claims. *Id.* at 793-796.

3. The Decision Below

On remand, the district court granted judgment to the defendant and defendants-intervenors. J.A. 222-318. Relying on its intervening decision in *Shelby County*, the district court first ruled that the 2006 Reauthorization of Section 5 was appropriate legislation to enforce the Fourteenth and Fifteenth Amendments. J.A. 223; see S.C.J.A. 481-631.

The court next addressed what it denominated plaintiffs' Count I-B – their claim that Congress exceeded its enforcement authority when it enacted the 2006 amendments to Section 5. J.A. 238-295. The court concluded that Nix had standing to challenge Sections 5(b) and (d), the amendments to the retrogression prong, but not Section 5(c), the amendment to the purpose prong. J.A. 241-250. The court also ruled that the other individual plaintiffs lacked standing as voters or referendum supporters, and that KCNV had standing because one of its members has standing. J.A. 249. The court also ruled that Nix's and KCNV's claims were ripe for review. J.A. 250-251. And the court concluded that the occurrence of the 2011 elections in Kinston did not moot the case, finding that Nix's alleged injury "is of the type that is 'capable of repetition, yet evading review.'" J.A. 251 (citation omitted).

On the merits, the district court concluded that the amendments to both the purpose and the retrogression prongs of the preclearance standard are appropriate legislation. J.A. 251-295. As in *Shelby County*, the court subjected the amendments to congruence and proportionality review. J.A. 251-270.

Finally, the court addressed Count II – plaintiffs' claim that the 2006 amendments violate Equal Protection. J.A. 295-313. For the same reasons applicable to Count I, the court concluded that plaintiffs Nix and KCNV (hereinafter appellants) had standing to challenge Sections 5(b) and (d), but not

Section 5(c), but that the remaining plaintiffs lacked standing as voters or referendum supporters. J.A. 295-300. It then upheld all three amendments against appellants' Equal Protection claims. J.A. 300-313.

4. Developments Since The District Court's Decision

Prompted by information obtained during a review of a voting change submitted on September 7, 2011, by Lenoir County, in which Kinston is located, the Attorney General withdrew the objection to Kinston's proposed change to nonpartisan elections, on February 10, 2012. Feb. 10, 2012, letter from Thomas E. Perez to James P. Cauley III (Feb. 10 letter);[3] January 30, 2012, letter from Thomas E. Perez to James. P. Cauley III (Jan. 30 letter).[4] Lenoir County's submission proposed a change in the method of election of the County School Board from partisan to nonpartisan elections. Jan. 30 letter 1. On November 7, 2011, the Department of Justice (DOJ) requested supplemental information from Lenoir County regarding county elections since 2000, and the County submitted the requested information on December 12, 2011. Jan. 30 letter 1; see also

[3] The February 10 letter was submitted to the Court on February 10, 2012.

[4] The January 30, 2012, letter is attached to the February 10 letter and also was submitted to the Court on January 30, 2012.

November 7, 2011, letter from T. Christian Herren to Deborah R. Stagner 1-2.[5] Accordingly, the Attorney General was required to determine, by February 10, 2012, whether to preclear that change. 28 C.F.R. 51.37(b)(3). The Attorney General notified Lenoir County on February 10, 2012, that he did not object to the change. See Feb. 10 letter 1-2.

In the course of analyzing Lenoir County's submission, DOJ reviewed current population and electoral data for Kinston, and determined that there might have been a "substantial change in operative fact" warranting reconsideration of the 2009 Kinston objection. Jan. 30 letter 1 (quoting 28 C.F.R. 51.46(a)). The Department notified Kinston of its intention to reconsider the objection on January 30, 2012. Jan. 30 letter. In particular, as the February 10 letter explained, current information indicates that the black proportion of both the voting age population and voter turnout in Kinston has increased since the time of the August 17, 2009, objection. Feb. 10 letter 2. At the time of the 2009 objection, black voters "typically" were a minority of those turning out to vote and had "limited success in electing candidates of choice to the city council." Feb. 10 letter 2. In contrast, in the November 2011 election, black voters constituted a majority of the Kinston

[5] The November 7, 2011, letter is attached to the copy of the January 30, 2012, letter submitted to the Court on January 30, 2012.

electorate and "elected their candidates of choice to a majority of the seats on the Kinston City Council for the first time in modern times." Feb. 10 letter 2. Based upon these increases in the black proportion of the voting-age population and voter turnout, as well as "consistently high levels of black political cohesion," DOJ concluded that black voters are now able to elect their candidates of choice in Kinston "in either partisan or nonpartisan elections." Feb. 10 letter 2. Because DOJ therefore concluded that the change to nonpartisan elections "is not impermissibly retrogressive under Section 5," it withdrew its 2009 objection to Kinston's change from partisan to nonpartisan elections. Feb. 10 letter 2.

SUMMARY OF ARGUMENT

This case is moot because the Attorney General has withdrawn the objection to Kinston's proposed change to nonpartisan elections. Plaintiff Nix's standing was based upon alleged injuries caused by the continuation of partisan elections in Kinston, which, in turn, was caused by the Attorney General's objection. Now that the objection has been withdrawn, Nix will be free to run in nonpartisan municipal elections in 2013 and thereafter. He thus no longer has a personal stake in this litigation.

Appellants lack standing to challenge the constitutionality of Section 5(c), which provides that the purpose prong of the preclearance standard requires a jurisdiction to prove that its submission was not motivated by any discriminatory

purpose. The Attorney General's former objection to Kinston's proposed change to nonpartisan voting was based entirely on its retrogressive effect. Thus Section 5(c) did not cause Nix's alleged injuries. Nor would an order invalidating Section 5(c) redress those injuries. Because Section 5(c) is severable from the remainder of the statute, such an order would have no effect on the objection or the change to nonpartisan elections.

The 2006 Reauthorization of Section 5 is valid legislation to enforce the Fourteenth and Fifteenth Amendments. The burdens imposed by the preclearance requirement are "justified by current needs." *Northwest Austin II*, 129 S. Ct. at 2512. Congress assembled abundant evidence of continued intentional voting discrimination by the covered jurisdictions. On the basis of that evidence, Congress found that Section 5 remained necessary to remedy and prevent such continued discrimination and to protect the gains made by minority voters. The reauthorization of the preclearance requirement was a congruent and proportional legislative response to such continued discrimination.

When Congress reauthorized Section 5, it chose to continue covering the jurisdictions already subject to the preclearance requirement. This "disparate geographic coverage" is "sufficiently related to the problem it targets." *Northwest Austin II*, 129 S. Ct. at 2512. First, Section 4(b), which defines the jurisdictions covered by Section 5, describes those jurisdictions with the worst historical records

of discrimination. Second, Congress made findings of continued voting discrimination as well as a continued need for the preclearance requirement in those jurisdictions. And evidence in the legislative record, confirmed by additional evidence in this case, establishes that voting discrimination was more prevalent in those jurisdictions than in the non-covered jurisdictions. Finally, the VRA includes "bail-in" and "bailout" provisions that address any under- or over-inclusiveness in the coverage provision. The number of bailouts has accelerated substantially in recent years.

The 2006 amendments to Section 5 are valid legislation to enforce the Fourteenth and Fifteenth Amendments. Congress enacted the Amendments to overturn the standards adopted by the Court's decisions in *Bossier II* and *Ashcroft*, which departed from the preclearance standard long enforced by the Attorney General and the lower courts. Congress found that the decisions "narrowed the protections afforded by section 5," and "significantly weakened" the Act's effectiveness. 2006 Reauthorization, §2(b)(6), 120 Stat. 578. Both amendments were congruent and proportional legislative responses to the evidence of intentional discrimination in the legislative record.

The 2006 amendments to Section 5 do not violate the nondiscrimination requirements of the Fifth Amendment. Contrary to appellants' claims, neither Amendment creates a quota or requires jurisdictions to engage in unlawful racial

gerrymandering. To the extent the amended preclearance standard requires consideration of race, it is a narrowly tailored means of preventing and remedying continued voting discrimination.

ARGUMENT

I

THIS CASE IS MOOT

Because the Attorney General has withdrawn the objection to Kinston's proposed change to nonpartisan elections, appellants no longer have a personal stake in the outcome of this action. Accordingly, this case is moot.[6]

"[F]ederal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Thus, "[t]he parties must continue to have a 'personal stake in the outcome' of the lawsuit" at all stages of the litigation. *Id.* at 478 (citations omitted).

In this case, Nix's standing was based upon two alleged injuries – that the partisan election system made ballot-access more costly and time-consuming, and that that system caused him a competitive disadvantage in the election. *LaRoque II*, 650 F.3d at 786. Because these alleged injuries resulted from the preemption of

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[6] In addition to the arguments made herein, see also the Attorney General's Motion to Dismiss, to be filed February 14, 2012.

the nonpartisan referendum, they were "fairly traceable to" the Attorney General's enforcement of Section 5, *id.* at 789-790, and would be redressed "by a judgment declaring section 5 unconstitutional," *id*. at 791. Now, however, the Attorney General's preclearance of Kinston's proposed change to nonpartisan elections has "remove[d] the federal barrier to the implementation of the nonpartisan referendum, and absent that barrier, there is no reason to believe that the Kinston city council would refrain from carrying out its state-law duty to put the referendum * * * into effect." *Ibid.* As a result, Nix will be able to run in nonpartisan elections in 2013 and thereafter.

Nix seeks only prospective relief in this action: a declaratory judgment that Section 5 and the 2006 amendments to Section 5 are unconstitutional, an injunction barring the Attorney General from enforcing Section 5 against Kinston's implementation of the referendum, and an injunction barring the Attorney General from enforcing Section 5 in the future. J.A. 15; see also J.A. 35-36. He no longer has a cognizable interest in that relief.

Under these circumstances, the "capable-of-repetition" exception to the mootness doctrine is inapplicable. See *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998). That exception is available only when "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the

same action again." *Ibid.* (citations omitted); see *Pharmachemie B.V.* v. *Barr Labs., Inc.*, 276 F.3d 627, 633-634 (D.C. Cir. 2002) (emphasizing that plaintiff's claims must "satisfy both prongs of this narrow exception").

The district court correctly concluded that the passage of the 2011 elections did not moot this case because Nix's claims previously met both prongs of this test. Because Nix intended to run for office again in 2013, his claims were capable of repetition because he was "likely – indeed, nearly certain – to suffer the same injury in his 2013 run for Kinston city council." J.A. 251. And his claims might evade review because "election litigation frequently outlast election cycles." J.A. 251. But the Attorney General's preclearance of the change to nonpartisan voting means that the "capable of repetition" prong is no longer satisfied. There is now *no* "reasonable expectation" that Nix will be forced to run for office in a partisan election system because of the operation of Section 5. Cf. *LaRouche* v. *Fowler*, 152 F.3d 974, 978-979 (D.C. Cir. 1998) (plaintiff's injuries were capable of repetition because it was likely, not only that that he would run for President again, but also that he would again be faced with a rule similar to the one he sought to

challenge).[7] Thus, Nix's alleged injuries have been decoupled from his claims that Section 5 is unconstitutional and from the relief he seeks in this lawsuit.

In some instances, "if a plaintiff's specific claim has been mooted, [he] may nevertheless seek declaratory relief forbidding an agency from imposing a disputed policy in the future, so long as the plaintiff has standing to bring such a forward-looking challenge and the request for declaratory relief is ripe." *City of Houston* v. *HUD*, 24 F.3d 1421, 1429 (D.C. Cir. 1994); see *Southern Co. Servs.* v. *FERC*, 416 F.3d 39, 44 n.2 (D.C. Cir. 2005). Nix has asserted no cognizable injury that would entitle him to seek such relief. His alleged injuries stemmed solely from the preemption of Kinston's change to nonpartisan elections. The possibility that the Attorney General will object to another submission that will cause injury to Nix is too "conjectural [and] hypothetical" to support standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[8] In the absence of an objection to a particular voting practice that demonstrably causes him harm, Nix is simply asserting a

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[7] Once preclearance is obtained, Section 5 provides no further remedy. *Lopez* v. *Monterey Cnty.*, 519 U.S. 9, 23 (1996). Neither the statute nor the Attorney General's regulations contemplate further reconsideration of the Kinston submission. Nor may any private party seek judicial review of the decision to withdraw the objection. *Morris* v. *Gressette*, 432 U.S. 491, 504-505 (1977); *Harris* v. *Bell*, 562 F.2d 772, 773-775 (D.C. Cir. 1977).

[8] The 2009 objection that led to this litigation was the first objection to any proposed voting change in either Kinston or Lenoir County. J.A. 8-9.

generalized grievance that he shares with the voters of all the covered jurisdictions. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); see *Giles* v. *Ashcroft*, 193 F. Supp. 2d 258, 263 (D.D.C. 2002). He lacks standing to assert such a claim.

Finally, the capable-of-repetition doctrine requires "a reasonable expectation that the *same* complaining party [will] be subject to the same action again." *Spencer*, 523 U.S. at 17 (emphasis added); see *Pharmachemie B.V.*, 276 F.3d at 633-634. Thus, the fact that other parties might be injured by the enforcement of Section 5 is irrelevant to this analysis. In any event, the question of the constitutionality of Section 5 will not "evade review," even in this larger sense. In addition to *Shelby County*, pending before this Court, two other cases challenging the constitutionality of the 2006 Reauthorization are pending in district court. *Arizona* v. *Holder*, No. 1:11-CV-01559 (D.D.C.); *Florida* v. *United States*, No. 1:11-cv-01428 (D.D.C.) (three-judge court). *Florida* raises issues regarding the constitutionality of the 2006 amendments similar to those appellants raised here. Indeed, *any* jurisdiction covered by Section 5 may file an action challenging its constitutionality. Thus, this is not a situation in which the constitutionality of the statute will evade judicial review due to the timing of election cycles.

Because appellants no longer have a personal stake in this litigation, it is moot. This Court should therefore vacate the district court's judgment, and

remand with instructions to dismiss the complaint. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997).

II

APPELLANTS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 5(c)

Appellants lack standing to challenge the constitutionality of Section 5(c), which amended the purpose prong of the preclearance standard to require a jurisdiction to prove that its submission was not motivated by any discriminatory purpose. To establish the "irreducible constitutional minimum of standing," appellants "must establish an 'injury in fact' fairly traceable to the Attorney General's enforcement of section 5 and redressable by a decision invalidating that statute." *LaRoque II*, 650 F.3d at 785-786 (quoting *Lujan*, 504 U.S. at 560-561). Plaintiffs must demonstrate standing for each claim they seek to raise. *Daimler Chrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006). And standing requirements must be especially strictly construed here where appellants raise a constitutional challenge to an Act of Congress, out of "[p]roper regard for the complex nature of our constitutional structure." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

This Court held that Nix's standing was based upon alleged injuries stemming from the preemption of the proposed change to nonpartisan elections in

Kinston. *LaRoque II*, 650 F.3d at 786. Those injuries were "fairly traceable to" the Attorney General's enforcement of Section 5, *id.* at 789-790, and would be redressed "by a judgment declaring section 5 unconstitutional," *id*. at 790. This Court remanded, however, for a determination whether Nix has standing to assert Count II – appellants' claim that the 2006 amendments to Section 5 violate Equal Protection. *Id.* at 793-796.

The district court correctly ruled that Nix lacks standing to challenge the constitutionality of Section 5(c) as to either Count I or Count II because he has not demonstrated that his injuries were caused by this provision or will be redressed by a ruling invalidating it. J.A. 241, 295-296. Appellants do not challenge the district court's rulings that the other individual plaintiffs lack standing, or that KCNV's standing derives from Nix's standing. J.A. 249, 295-300. Nor do they seek to ground Nix's standing on any alleged injuries other than those that arose from the Attorney General's enforcement of Section 5 with regard to the Kinston objection. Appellants' Br. 13-24.

A. Nix Has Not Demonstrated That Section 5(c) Caused His Injury

Even were the objection still extant, Nix has not demonstrated that his inability to run for office in a nonpartisan election in 2011 was caused by Section 5(c). To establish standing, Nix's alleged harms must have resulted from the Attorney General's former objection to Kinston's proposed change to nonpartisan

elections. Otherwise, he is simply asserting a generalized grievance that he shares with the voters of Kinston and all the covered jurisdictions. *Warth*, 422 U.S. at 499.

Section 5(c) amended the purpose prong of the Section 5 standard. The Attorney General's objection to Kinston's submission, however, was based solely on the retrogressive *effect* of the proposed change. J.A. 46 ("[W]hile the motivating factor for this change may be partisan, the effect will be strictly racial."). Thus, the record in this case affirmatively establishes that, based on the facts considered by the Attorney General as they existed in 2009, he would have objected to the submission without regard to the existence of Section 5(c), and any injury suffered by Nix was not traceable to the existence of Section 5(c).

Further, now that the objection has been withdrawn and the nonpartisan election change precleared, any possibility that Section 5(c) might cause Nix harm in the future is highly speculative. Cf. *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (where standing depends upon allegations of future harm, the "threatened injury must be 'certainly impending' to constitute injury in fact.") (citation omitted). First there is now no possibility that the Attorney General will reconsider the application of Section 5(c) to the Kinston referendum following a decision invalidating Sections 5(b) and (d). See Appellants' Br. 21-22. Second, as explained on pp. 21-22, *supra*, the possibility that Nix might suffer harm as the

result of the application of Section 5(c) to another proposed voting change is too speculative to support standing.

Because he cannot establish causation, Nix lacks standing to challenge the constitutionality of Section 5(c).

B. Nix Has Not Demonstrated That A Declaration That Section 5(c) Is Unconstitutional Would Redress His Injury

As this Court explained in *LaRoque II*, the Section 5 preclearance requirement "appears in subsection (a), not subsections (b)-(d)." 650 F.3d at 794. This is significant because Section 5(c) (as well as (b) and (d)) is severable from the preclearance requirement in Section 5(a). And Section 5(c) is severable from Sections 5(b) and (d). Thus, because the Attorney General's former objection – which caused Nix's alleged injuries – was not based on Section 5(c), invalidating that provision would not provide him any redress.

1. The district court correctly concluded that each of the 2006 amendments is severable from the remainder of the statute, including the preclearance requirement in Section 5(a). J.A. 245-247. The "'normal rule' is 'that partial, rather than facial, invalidation is the required course.'" *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (citation omitted). When statutes contain a constitutional defect, courts generally "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the

remainder intact.'" *Ibid.* (citation omitted). Severance is appropriate when the remainder of the statute is "(1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." *United States* v. *Booker*, 543 U.S. 220, 258-259 (2005) (citations omitted). As the district court explained, "[a]ll three conditions are met here." J.A. 245.

First, Section 5(a) is constitutionally valid. As explained in Part III.B., *infra*, Congress had the authority to enact the 2006 Reauthorization. And plaintiffs do not contend that the preclearance standard as it existed prior to the amendments is unconstitutionally discriminatory. See *LaRoque II*, 650 F.3d at 794.

Second, Section 5(a) is capable of operating independently of subsections (b), (c), and (d), as it has done since 1965. Section 5(a) is the mechanism that suspends all voting changes pending administrative or judicial review, and that contains the general preclearance standard. 42 U.S.C. 1973c(a). Striking down subsections (b), (c), or (d) would retain that preemptive mechanism, as well as the standard that applied prior to the 2006 amendments. Similarly, Sections 5(b) and (d), which relate to the effects prong of the standard, are capable of operating without Section 5(c), which relates to the purpose prong.

Finally, were there any doubt, the VRA's severability clause is decisive evidence of Congress's intent to preserve the Act even if segments are found to be

unconstitutional.[9] An explicit severability clause creates a presumption favoring severability that cannot be overcome absent "strong evidence that Congress intended otherwise." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

No such evidence exists here. Appellants' citation of isolated statements critical of the preclearance standard as it existed before the amendments does not support their incredible assertion that the Congress that sought to *strengthen* Section 5 would have preferred no Section 5 to a Section 5 without the 2006 amendments. Of course Congress preferred Section 5 with the amendments. But that is the wrong question. As the Supreme Court has explained:

> Every legislature that adopts, in a single enactment, provision A plus provision B intends (A + B); and that enactment, which reads (A + B), is invariably a 'unified expression of that intent,' so that taking away A from (A + B), leaving only B, will invariably 'clearly undermine the legislative purpose' to enact (A + B). * * * The relevant question * * * is not whether the legislature would prefer (A + B) to B. * * * [It] is whether the legislature would prefer not to have B if it could not have A as well.

Leavitt v. *Jane L.*, 518 U.S. 137, 143(1996).

Appellants' contention, Appellants' Br. 19, that severability is a merits question with no relationship to standing is foreclosed by *INS* v. *Chadha*, 462 U.S.

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[9] See 42 U.S.C. 1973p, "If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."

919, 931-936 & n.7 (1983). *Chadha* addressed the severability of the one-house veto at issue in that case before addressing standing, and then explained its effect on standing, stating that "[i]f the veto provision violates the Constitution, *and is severable*, the deportation order against Chadha will be cancelled. Chadha *therefore has standing* to challenge the order of the Executive mandated by the House veto." *Id*. at 936 (emphasis added); see also *Advantage Media, L.L.C.* v. *City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006); *National Fed'n of the Blind of Tex., Inc.* v. *Abbott*, 647 F.3d 202, 211 (5th Cir. 2011); *Cache Valley Elec. Co.* v. *Utah DOT*, 149 F.3d 1119, 1123-1124 (10th Cir. 1998), cert. denied, 526 U.S. 1038 (1999); *Contractors Ass'n of E. Pa., Inc.* v. *City of Philadelphia*, 6 F.3d 990, 996-998 (3d Cir. 1993).

2. Just as Section 5(c) played no role in the Attorney General's objection, neither would an order invalidating Section 5(c) provide Nix with any redress for his injuries. First, Nix cannot demonstrate that his inability to run for office in a nonpartisan election in 2011 would be redressed by a decision invalidating that provision. The objection, which was based solely on the retrogressive effect of the proposed change to a nonpartisan election system, resulted from the operation of the preclearance requirement in Section 5(a), with the gloss provided by Sections 5(b) and (d). Because Section 5(c) is severable from the remainder of the statute – including not only Section 5(a), but also Sections 5(b) and (d) – an order striking

down Section 5(c) would not invalidate the Kinston objection retrospectively and thus would provide Nix no relief.

Similarly, Nix cannot establish any future injury in fact that would be redressed by an order invalidating Section 5(c). First, because Kinston's change to nonpartisan elections has now been precleared, there will be no occasion to reconsider the application of Section 5(c) to the Kinston submission. And any the possibility that Nix might suffer harm as the result of the application of Section 5(c) to another proposed voting change is too speculative to support standing. See pp. 21-22, *supra*.

Because Nix cannot demonstrate redressability, he lacks standing to challenge the constitutionality of Section 5(c).[10]

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[10] This reasoning is equally applicable to both Counts of the complaint. Appellants contend that the law of the case doctrine bars this Court from re-considering appellants' standing to challenge Section 5(c) as a part of Count I. Appellants' Br. 14-16. But a court may reconsider the law of the case if "evidence on a subsequent trial was substantially different." *Melong* v. *Micronesian Claims Comm'n*, 643 F.2d 10, 22 (D.C. Cir. 1980) (citing *White* v. *Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967)). Circumstances in this case are "substantially different" as a result of the Attorney General's withdrawal of the Kinston objection. Those changed circumstances make it even clearer that Nix's alleged injuries will not be redressed by a ruling invalidating Section 5(c), whether that ruling results from Count I or Count II.

III

THE 2006 REAUTHORIZATION OF SECTION 5 IS APPROPRIATE LEGISLATION TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

In *Northwest Austin II*, 129 S. Ct. at 2513, the Supreme Court declined to decide whether the 2006 Reauthorization of Section 5 was appropriate legislation to enforce either the Fourteenth or Fifteenth Amendment. The Court did, however, recognize the "serious constitutional questions" presented by the 2006 Reauthorization. *Ibid.*

First, the Court acknowledged both the "historic accomplishments" of the VRA and the "federalism costs" presented by the preclearance requirement. *Northwest Austin II*, 129 S. Ct. at 2511. The Court noted that "[s]ome of the conditions that" had justified Section 5 in the past – particularly voter registration and turnout rates, numbers of minority office holders, and "[b]latantly discriminatory evasions of federal decrees" – had "unquestionably improved." *Ibid.* Nonetheless, the Court stated, "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance." *Id.* at 2511-2512. The Court made it clear that "[p]ast success alone * * * is not adequate justification to retain the preclearance requirements." *Id.* at 2511. The Act's "current burdens," the Court stated, "must be justified by current needs." *Id.* at 2512.

Second, the Court expressed concern that the need for the preclearance requirement might no longer be concentrated in the covered jurisdictions. *Northwest Austin II*, 129 S. Ct. at 2512. Section 5's "disparate geographic coverage" the Court stated, requires a demonstration that it is "sufficiently related to the problem that it targets." *Ibid.*

The Court also recognized, however, that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Northwest Austin II*, 129 S. Ct. at 2513 (citation omitted). And the Court emphasized that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Ibid.*

A. The 2006 Reauthorization Of Section 5 Is Justified By Current Needs

In *Northwest Austin II*, the Court declined to decide not only whether the 2006 Reauthorization is appropriate legislation, but also whether, in deciding that question, a court should apply rational basis review or congruence and proportionality analysis. 129 S. Ct. at 2512-2513 (citing *South Carolina*, 383 U.S. 301, 324 (1966); *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). In stating that the provision's "current burdens * * * must be justified by current needs," however, the Court was emphasizing that, under either standard, the Reauthorization can be upheld only if it was based upon evidence of *current*

evidence of voting discrimination and a *current* need for preclearance. As explained below and more fully in the Attorney General's brief in *Shelby County*, AGSC Br. 24-62, the Reauthorization withstands scrutiny under either rational basis review or congruence and proportionality analysis, because Congress amassed a large record of voting discrimination in covered jurisdictions from 1982 through 2006 and correctly concluded that Section 5 continues to be justified by current needs. The district court correctly ruled that the 2006 Reauthorization is appropriate legislation to enforce the Fourteenth and Fifteenth Amendments. S.C.J.A. 481-632.

In 2006, Congress "amassed a sizable record in support of its decision to extend the preclearance requirements." *Northwest Austin II*, 129 S. Ct. at 2513; see S.C.J.A. 496-497 (21 hearings, more than 15,000 pages of testimony, documents, and statistical analyses). Based on that record, Congress made specific findings of current voting discrimination and the continued need for the preclearance requirement in the covered jurisdictions. In particular, Congress found that while "progress has been made in eliminating first generation barriers experienced by minority voters, * * * vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." 2006 Reauthorization, §2(b)(1) & (2), 120 Stat. 577. Congress found evidence of

"continued discrimination" in the covered jurisdictions in "the hundreds of objections [to proposed voting changes] interposed" by the Attorney General, Section 5 enforcement actions, denials of judicial preclearance, litigation under Section 2 of the VRA, 42 U.S.C. 1973, and other voting rights provisions, continued racially-polarized voting and vote dilution, and the assignment of observers to monitor elections. *Id.* §§2(b)(4), (5), (8), 120 Stat. 577-578. "Despite the progress made by minorities under" the VRA since 1965, Congress concluded that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment." *Id*. §2(b)(7), 120 Stat. 577.

Congress found that, without the preclearance requirement for covered jurisdictions, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization, §2(b)(9), 120 Stat. 578. That "predictive judgment" must be accorded "substantial deference" by the courts. *Turner Broad. Sys., Inc.* v. *F.C.C.*, 520 U.S. 180, 195 (1997) (citation omitted). And Congress's factual findings are "entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985).

Moreover, Congress's findings are well-supported by abundant evidence in the legislative record, and confirmed by additional evidence submitted to the district court. See AGSC Br. 24-47, 71-72; S.C.J.A. 547-601.[11]

1. Appellants erroneously contend that this evidence of current discrimination is insufficient, and that the preclearance requirement is warranted only to remedy discrimination backed by obstructionist tactics that cannot be remedied through traditional case-by-case litigation. Appellants' Br. 28-37.

First, notwithstanding appellants' selective quotation from *South Carolina*, 383 U.S. 301, and *Rome*, 446 U.S. 156 (see, *e.g.*, Appellants' Br. 30), neither decision based its conclusion that Section 5 was appropriate legislation solely on evidence of obstructive tactics or gamesmanship by the covered jurisdictions. See AGSC Br. 56-58. In *South Carolina*, for example, the Court explained that Congress's earlier efforts to facilitate litigation had had limited success not only because of the defendant jurisdictions' defiance, but also because "[v]oting suits are unusually onerous to prepare," and because of the "ample opportunities for delay afforded voting officials and others involved in the proceedings." 383 U.S.

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[11] This brief does not include a full recitation of the evidence before Congress of ongoing voting discrimination in covered jurisdictions. In addition to the district court's decision in *Shelby County* and the Attorney General's brief in that case, cited in the text, the district court in *Northwest Austin I*, 573 F. Supp. 2d at 246-268, engaged in an exhaustive review of the legislative record.

at 314. The Court did note that "some" of the covered States "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," *Id.* at 335. But the Court also made clear that, in enacting the VRA, Congress intended to "banish the blight of racial discrimination in voting" that was so prevalent "in parts of our country," whatever form such discrimination took. *Id.* at 308.

In *Rome,* the Court did not rely on *any* contemporaneous evidence of the kind of obstructive tactics appellants contend are required to sustain the 2006 Reauthorization. Rather, in holding that the preclearance requirement remained appropriate, the Court relied upon the same kind of evidence that Congress assembled in 2006, noting the "century of obstruction" that had preceded enactment of the VRA, and examining evidence of disparities in voter registration and turnout rates, numbers of minority elected officials, and the number and types of objections interposed by the Attorney General since that enactment. See *Rome*, 446 U.S. at 180-182. Indeed *Rome* acknowledged the progress made in minority voter registration and turnout and put special emphasis on the need for Section 5 to prevent vote dilution. *Ibid.*; AGSC Br. 54-55.

Second, the statement in *Northwest Austin II* that the Act's "current burdens * * * must be justified by current needs," 129 S. Ct. at 2512, does not support

appellants' exceedingly limited view of the evidence available to justify Section 5. The Court noted the improvements in minority registration and turnout and in the election of minority officials, just as it had in upholding Section 5 in *Rome*, 446 U.S. at 180-182, and stated that "[b]latantly discriminatory evasions of federal decrees are rare," *id.* at 2511. But it also acknowledged the possibility that "these improvements are insufficient and that conditions continue to warrant preclearance." *Id.* at 2511-2512. As explained above, Congress assembled abundant evidence of *current* discrimination and found that there was a continued need for preclearance.

Third, the very purpose of Section 5 is to provide a flexible remedy to prevent covered jurisdictions from engaging in new and "ingenious" methods of voting discrimination, including the kind of obstruction and gamesmanship that was prevalent before the VRA was enacted. See *South Carolina*, 383 U.S. at 334-335; AGSC Br. 58. By preventing covered jurisdictions from implementing voting changes without obtaining preclearance, Congress simply removed the opportunity for such gamesmanship by covered jurisdictions. If such behavior had continued through 2006, that would have been an indication that Section 5 is not the effective remedy Congress knows it to be. *Northwest Austin I*, 573 F. Supp. 2d at 274.

Fourth, it is simply not true that the legislative record contains no evidence of obstructive tactics by covered jurisdictions. Appellants' Br. 32, 34. Indeed, the

legislative record includes numerous examples in which Section 5 enforcement actions and/or objections blocked efforts by covered jurisdictions to deny minority voting rights, often preserving gains made through previous litigation: *e.g.*, the abrupt cancellation of an election in Kilmichael, Mississippi, three weeks before it was scheduled, when it became apparent that minority voters had the opportunity to elect the Mayor and four of five council members, S.C.J.A. 565-566; efforts by officials in Waller County, Texas, to prevent students at a predominantly black university from voting in county elections, after a court had upheld their right to do so, S.C.J.A. 578-579; Mississippi's attempt to restore its discriminatory dual registration requirement, after it had been judicially invalidated (S.C.J.A. 579-580); actions by at least two Alabama jurisdictions to dismantle remedies imposed in Section 2 actions (AGSC Br. 7-8, 32-33); and a proposed polling place change "calculated to discourage turnout among minority voters and * * * undermine the electoral opportunities created" as a remedy in a Section 2 lawsuit (AGSC Br. 30); see also 2006 House Report 36-40.

Fifth, the House Judiciary Committee specifically found that "case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process," and "that Section 2 would be ineffective to protect the rights of minority voters." 2006 House Report 57. Indeed, Congress heard extensive evidence that Section 2 –

available only to challenge voting practices and procedures that are already in place – is an inadequate remedy by itself. Most Section 2 actions take two to five years to make their way through the court system, during which time the challenged practice remains in place. *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 101 (2005) (*History, Scope, & Purpose*) (testimony of Earls). A candidate elected under what turns out to be an illegal voting scheme will nevertheless enjoy the significant advantages of incumbency in future elections. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 13-14 (2005) (*Impact & Effectiveness*) (testimony of Kemp); *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 97 (2006) (*Evidence of Continued Need*) (testimony of Rogers). In some cases, an illegal voting practice must remain in effect for several election cycles before Section 2 plaintiffs can gather enough evidence to demonstrate its discriminatory effect. *History, Scope, & Purpose* 92 (testimony of Perales). As the Court recognized in *South Carolina*, such delays in the enforcement of voting rights are unacceptable: "[t]he burden is too heavy – the wrong to our citizens is too serious – the damage to our national conscience is too

great not to adopt more effective measures than" case-by-case litigation. 383 U.S. at 315 (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965)); see *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). In contrast, under Section 5, discriminatory voting practices may be forestalled immediately. *History, Scope, & Purpose* 101 (testimony of Perales).

Section 2 also places a heavy financial burden on minority voters challenging illegal election practices and schemes. *History, Scope, & Purpose* 97 (testimony of Perales); *id*. at 92 (testimony of Perales). Section 5, in contrast, places the comparatively small financial burden associated with preclearance on covered jurisdictions. See *id.* at 79 (testimony of Earls). This shifting of financial burden is especially important "in local communities and particularly in rural areas, where minority voters are finally having a voice on school boards, county commissions, city councils, water districts and the like." *Id.* at 84 (statement of Earls). In such areas, voters generally "do not have access to the means to bring litigation under Section 2 of the Act, yet they are often the most vulnerable to discriminatory practices." *Ibid*.; see 2006 House Report 43 (Section 5 is "especially [important] in protecting smaller, more rural communities within

covered States, where Federal oversight has been limited and non-compliance extensive."). Notably, the General Counsel of North Carolina's Board of Elections testified that complying with Section 5's preclearance scheme is much less burdensome in terms of "costs, time, and labor" for covered jurisdictions than defending against Section 2 claims. *Reauthorization of the Voting Rights Act's Temporary Provisions: Policy Perspectives & Views from the Field: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 120 (2006) (*Policy Perspectives & Views From the Field*) (statement of Wright).

Finally, Section 2 leaves the burden of proof on minority plaintiffs to demonstrate discriminatory effect, while Section 5 places the burden on jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *History, Scope, & Purpose* 83 (statement of Earls); *Evidence of Continued Need* 97 (testimony of Rogers). Jurisdictions are in a much better position than individual citizens to amass information about the potentially discriminatory effect or purpose of voting procedures or systems, without incurring undue expense. And the House Judiciary Committee specifically found that this burden-shifting had been and remained essential to Section 5's effectiveness. 2006 House Report 65-66.

Appellants protest that Section 2 is a more effective remedy than it was before 1982 because plaintiffs are no longer required to prove intentional

discrimination to establish a violation of Section 2. Appellants' Br. 30-31. But that is no answer to the House Judiciary Committee's finding that, in the period between 1982 and 2006, Section 2 litigation alone was not an adequate remedy for ongoing discrimination in the covered jurisdictions. 2006 House Report 57. The 1982 amendments to Section 2 have not made litigation any speedier or less burdensome. Indeed, the "Senate factors" that form the backbone of the totality of the circumstances analysis in a Section 2 lawsuit are the very factors the courts applied in assessing claims of unlawful voting discrimination under the Constitution and the pre-1982 version of Section 2. See *Thornburgh* v. *Gingles*, 478 U.S. 30, 36-37 (1986); S. Rep. No. 417, 97th Cong., 2d Sess. 23, 28-29 (1982) (1982 Senate Report) (citing *White* v. *Regester*, 412 U.S. 755, 765-769 (1973); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305-1306 (5th Cir. 1973) (en banc)); see AGSC Br. 36-38. Moreover, establishing the *Gingles* prerequisites – that a "bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group" – is the very type of proof that may require evidence collected over several election cycles. *Gingles*, 478 U.S. at 49.

2. As explained in the Attorney General's brief in *Shelby County*, the 2006 Reauthorization is a congruent and proportional response to continued voting discrimination in the covered jurisdictions. AGSC Br. 62-65. Appellants,

however, contend that the record of discrimination is inadequate to justify the burden-shifting nature of the Section 5 preclearance requirement. Appellants' Br. 29. And they criticize the district court's decision because they contend that it did not delineate the "type or level of discrimination legally necessary to justify" continued application of the preclearance requirement. Appellants' Br. 37 (emphasis omitted).

In particular, appellants criticize the district court's reliance on *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004) – cases in which the Court upheld legislation enacted pursuant to Congress's authority to enforce the Fourteenth Amendment. Appellants' Br. 29-30. These cases, according to appellants, are inapposite because they do not involve a preclearance requirement. Appellants are wrong on several counts.

First, the legislative record of discrimination in *Hibbs* and *Lane* "pales in comparison" to the evidence before Congress when it enacted the 2006 Reauthorization. *Northwest Austin I*, 573 F. Supp. 2d at 271; see AGSC Br. 61-63.[12] In *Hibbs*, the Court found sufficient evidence of employment discrimination

[12] The level of voting discrimination in the covered jurisdictions also greatly exceeds the evidence of unconstitutional conduct found wanting by the Court in (continued…)

against women in States' employment leave policies to justify prophylactic legislation based only on historical judicial findings of gender-based discrimination by the States dating back to the 19th century and some evidence of discrimination against men in the provision of parental leave. 538 U.S. at 729-730. In *Lane*, the Court found sufficient evidence of invidious discrimination against individuals in the provision of public services to justify prophylactic legislation applied to courts based on "only two reported cases finding that a disabled person's federal constitutional rights [to access to judicial proceedings] were violated." 541 U.S. at 544 (Rehnquist, C.J., dissenting). Here, as discussed, the record of relevant discrimination far outstripped the records in those cases.

Moreover, Section 5's preclearance remedy is much more directly related to the record of discrimination before Congress than was the remedy at issue in *Hibbs*. The Family Medical Leave Act, which the Court found was enacted to

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(…continued)

Boerne and similar cases. See *Boerne*, 521 U.S. at 530 ("no episodes [of religious persecution] occurring in the past 40 years"); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) ("only eight patent-infringement suits prosecuted against the States in" 110 years); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 369 (2001) (citing "half a dozen examples from the record" involving employment discrimination by States).

combat gender discrimination in workplace leave policies, does not prohibit such discrimination or indeed, any type of discrimination. Nonetheless, the Court held that this remedy – a remedy that makes no reference to gender or to discrimination – was an appropriate means of enforcing the Fourteenth Amendment's prohibition of gender-based discrimination. *Hibbs*, 538 U.S. at 740.

The Section 5 preclearance requirement, in contrast, directly addresses the extensive record of voting discrimination documented in the legislative record, preventing the implementation of discriminatory voting changes *before* minority voters have been deprived of their rights to vote and to participate in the political process.

Appellants' contention that the preclearance requirement is necessarily more intrusive than statutes requiring case-by-case litigation is also belied by *Boerne* and its progeny. Indeed, the Court repeatedly has held out Section 5 as a prime example of legislation that is congruent and proportional. See *Lane*, 541 U.S. at 519 n.4; *Hibbs*, 538 U.S. at 737-738; *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373 (2001); *Boerne*, 521 U.S. at 526. Further, in light of the record of continued discrimination in the covered jurisdictions, remedies obtained through litigation that may be fully effective in other contexts are inadequate to protect the fundamental right to vote. A plaintiff injured by employment or housing discrimination, for example, may be made whole through back pay, damages, and

equitable remedies, even if such relief is available only after some delay. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-422 (1975) (back pay); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763-770 (1976) (retroactive seniority); *Marable* v. *Walker*, 704 F.2d 1219, 1220-1221 (11th Cir. 1983) (compensatory damages and injunctive relief); *United States* v. *West Peachtree Tenth Corp.*, 437 F.2d 221, 228 (5th Cir. 1971) (federal courts are authorized "to eliminate the present effects of past discrimination"). As Congress learned, however, voters may have to wait several election cycles before obtaining relief in a Section 2 case. During that time, legislation will be enacted and other public decisions made, while those elected reap the benefits of incumbency. As a result, Section 5 is sometimes the only timely means of blocking discriminatory voting changes and preventing backsliding from gains achieved through Section 2 litigation. See pp. 38-43, *supra*.

B. Section 5's Disparate Geographic Coverage Is Sufficiently Related To The Problem It Targets

1. When Congress reauthorized Section 5 in 2006, it chose to continue covering the jurisdictions that were already subject to the preclearance requirement and that had not bailed out. Section 4(b), which describes the jurisdictions subject to Section 5, remains appropriate legislation for three reasons. First, it describes the jurisdictions with the worst records of discrimination. *South Carolina*, 383

U.S. at 329-330. Second, Congress acted based on (1) findings that voting discrimination continued to exist in those specific jurisdictions and that Section 5 preclearance remained necessary to protect minority voting rights there, and (2) comparative evidence establishing that voting discrimination was more prevalent in those jurisdictions than in the non-covered jurisdictions.

Third, Section 4(b) is not the only coverage provision in the VRA. Under Sections 3(c) and 4(a), non-covered jurisdictions that discriminate may be judicially subjected to preclearance, and covered jurisdictions that do not discriminate may escape coverage by bailing out. 42 U.S.C. 1973a(c), 1973b(a). Indeed, the number of bailouts has been accelerating, with 40% of all successful bailout cases under the 1982 bailout criteria occurring since 2009. See AGSC Br. 66-77. And that number will continue to grow in the near future. Two bailout actions are currently pending in district court, including one by a county with a population of more than 400,000.[13] The parties in both actions are engaged in negotiations which, if successful, will terminate coverage not only for those counties, but also for six subjurisdictions within their borders. In addition, DOJ

[13] *Prince William Cnty.* v. *Holder*, No. 1:12-cv-00014 (D.D.C.) (three-judge court); *King George Cnty.* v. *Holder*, No. 1:11-cv-02164 (D.D.C.) (three-judge court).

has a number of active bailout investigations, encompassing more than 100 jurisdictions and subjurisdictions from a range of States.

Sections 3(c), 4(a), and 4(b), together, create a flexible, workable means of applying Section 5 preclearance to the jurisdictions that continue to discriminate. They are "sufficiently related to the problem [they] target[]," *Northwest Austin II*, 129 S. Ct. at 2512, because they continue to require preclearance of the jurisdictions with the worst history of discrimination, as well as a current record of discrimination, while allowing those that no longer discriminate to bail out.

2. The evidence before Congress of continued discrimination in the covered jurisdictions is set forth in the Attorney General's brief in *Shelby County*. AGSC Br. 24-47, 58-60; see also S.C.J.A. 547-601; *Northwest Austin I*, 573 F. Supp. 2d at 246-268. As explained therein, Congress's finding that Section 5 preclearance remains necessary to protect minority voting rights in the covered jurisdictions was supported by ample evidence of voting discrimination, including intentional discrimination in those jurisdictions. That continued discrimination was documented in Congress's detailed review of Section 5 enforcement since 1982, including a substantial number of objections based on discriminatory purpose. Congress also found evidence of continued discrimination in the covered jurisdictions in its review of Section 2 litigation, federal-observer coverage, evidence of vote dilution and racially-polarized voting, continued disparities in

registration and turnout data and numbers of minority elected officials, and evidence that Section 5 deters voting discrimination by the covered jurisdictions.[14]

3. The evidence before Congress also demonstrates that voting discrimination is more prevalent in the covered than in the non-covered jurisdictions. A study before Congress showed that 56% of reported Section 2 cases with favorable outcomes for minority plaintiffs occurred in covered jurisdictions, which contain less than 25% of the nation's population and are located mostly in just 10 of the 50 States. AGSC Br. 35, 71; 2006 House Report 53 (finding that more than half the successful Section 2 cases were brought in covered jurisdictions).

A study in the record in this case indicates that, when unreported cases are included, the disparity between covered and uncovered jurisdictions is overwhelming: 81% of Section 2 cases with favorable outcomes for minority plaintiffs occurred in the covered jurisdictions. J.A. 165-172; see AGSC Br. 71-72. The following tables, from the record in *Shelby County*, display the numbers of reported and unreported Section 2 cases with outcomes favorable to minority

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[14] Congress examined each of the covered States separately and in detail. See *Evidence of Continued Need* 250-287, 1308-2092.

plaintiffs for the nine fully-covered States and for non-covered States from August 1982 through 2005:

Fully-Covered States	Reported Section 2 Cases With Outcomes Favorable to Minority Plaintiffs	Reported and Unreported Section 2 Cases With Outcomes Favorable to Minority Plaintiffs
Alabama	12	192
Alaska	0	0
Arizona	0	2
Georgia	3	69
Louisiana	10	17
Mississippi	18	67
South Carolina	3	33
Texas	7	206
Virginia	4	15
Total (9 States)	***57***	***601***

Non-Covered States		
Arkansas	4	28
Colorado	2	3
Connecticut	1	2
Delaware	1	1
Hawaii	1	1
Idaho	0	0
Indiana	1	4
Iowa	0	0
Illinois	9	11
Kansas	0	0
Kentucky	0	0
Maine	0	0
Maryland	2	5
Massachusetts	1	3
Minnesota	0	0
Missouri	1	2
Montana	2	5
Nebraska	1	1

Non-Covered States	Reported Section 2 Cases With Outcomes Favorable to Minority Plaintiffs	Reported and Unreported Section 2 Cases With Outcomes Favorable to Minority Plaintiffs
Nevada	0	0
New Jersey	1	2
New Mexico	0	7
North Dakota	0	1
Ohio	2	2
Oklahoma	0	0
Oregon	0	0
Pennsylvania	3	4
Rhode Island	1	2
Tennessee	4	6
Utah	0	1
Vermont	0	0
Washington	0	0
West Virginia	0	0
Wisconsin	1	1
Wyoming	0	0
Total (34 States)	***38***	***92***

S.C.J.A. 438-440.[15] There were 36 successful, reported and unreported Section 2 actions in the 40 counties in North Carolina subject to Section 5. S.C.J.A. 441.

Although one might expect to find more successful Section 2 cases in non-covered jurisdictions because Section 5 has blocked the implementation of the great majority of discriminatory voting changes since 1965, in fact the opposite is

[15] The Supplemental McCrary Declaration also includes data for covered and non-covered counties and townships in the partially-covered States, such as New York and Florida. See S.C.J.A. 441-443. This data has limited utility for comparison purposes, however, because, except in North Carolina, there are many more non-covered than covered counties in each of these States.

true. Almost all the fully-covered States, as well as North Carolina, had more successful Section 2 actions than any of the non-covered States. The non-covered States with the most Section 2 actions were Arkansas, with 28, and Illinois, with 11; no other non-covered State had more than 7. Notably, Arkansas and a county in Illinois have been required by court order to preclear certain changes pursuant to Section 3(c). See S.C.J.A. 433. In contrast, except for Alaska and Arizona, the number of successful Section 2 actions in the fully-covered States ranged from 15 in Virginia to 206 in Texas.[16]

IV

THE 2006 AMENDMENTS ARE APPROPRIATE LEGISLATION TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

Appellants contend that the 2006 amendments are not appropriate enforcement legislation because they have expanded Section 5's protections. Appellants' Br. 58-59. But, even if the Court's holdings in *Bossier II* and *Ashcroft*

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[16] A finding that either the 2006 Reauthorization or the 2006 amendments are not supported by Congress's authority under the Fourteenth and Fifteenth Amendments would not invalidate Section 5 as applied to federal elections because Congress has plenary authority under the Elections Clause to dictate and oversee the procedures related to federal elections, including districting. *Smiley* v. *Holm*, 285 U.S. 355, 366-367 (1932); *Oregon* v. *Mitchell*, 400 U.S. 112, 122, 124 (1970) (Black, J.). This Court need not address that basis for some applications of Section 5, however, because Kinston does not conduct federal elections and appellants therefore are not harmed by Section 5's application to any federal election.

reflected Congress's original intent in enacting Section 5 (see Appellants' Br. 60), it is undisputed that the standards set forth in those decisions departed from the preclearance standard long enforced by the Attorney General and the lower courts. See 2006 House Report 65 (*Bossier II* and *Ashcroft* "interpreted Section 5 to allow preclearance of voting changes that would have previously drawn objections"); see J.A. 255-256. Congress also found that the longstanding interpretation of Section 5 that predated these decisions had been essential to the protection of minority voting rights and that the standards articulated by the Court threatened the progress that had been made since 1965. 2006 Reauthorization, §2(b)(6), 120 Stat. 578; 2006 House Report 65-72.

Moreover, as the district court explained, the proper question is whether the amendments are within the range of permissible legislative options available to Congress as remedies for the "substantial evidence of discrimination in voting" before it, not "where [those remedies] fall[] in the range relative to past legislation." J.A. 255. As the district court correctly concluded, the amendments were justified by current needs and thus a congruent and proportional response to

evidence of continued voting discrimination in the covered jurisdictions. J.A. 258-295. [17]

A. Sections 5(b) And (d) Are Appropriate Remedies

Section 5(b), which amended Section 5's retrogression prong, provides that preclearance should be denied for proposed voting changes that have "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 [language minority status], to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). Section 5(d) provides that "[t]he purpose of subsection (b) * * * is to protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C. 1973c(d). The purpose of the amended retrogression prong, the House Judiciary Committee explained, was to "clarify the types of conduct that Section 5 was intended to prevent, including those techniques that diminish the ability of the minority group to elect their preferred candidates of choice." 2006 House Report 65. By adding these provisions, Congress intended "to restore Section 5 and the effect prong to the standard of analysis set forth by this Committee during its examination of Section

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[17] Because the Amendments are severable from the rest of Section 5 (see Part II.B.1., *supra*), if this Court concludes that one or more of the Amendments is unconstitutional on either the grounds asserted in Count I or Count II, the proper remedy would be to sever that portion of the statute, "while leaving the remainder intact." *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006).

5 in 1975." 2006 House Report 71 & n.197 (citing H.R. Rep. No. 96, 94th Cong., 1st Sess. 60 (1975)).

1. The district court correctly concluded that the amendments to the retrogression prong are appropriate legislation to enforce the Fourteenth and Fifteenth Amendments. J.A. 270-295. First, as the district court explained, Congress assembled substantial evidence of intentional voting discrimination in the covered jurisdictions, particularly intentional vote dilution in the redistricting context. J.A. 270-275.

Second, Congress heard abundant evidence about the negative impact the *Ashcroft* standard would have on Section 5 enforcement. J.A. 278-284. "A consistent theme," as the court explained, "was that the standard laid out in *Ashcroft* was impossibly challenging to administer, particularly within the 60-day period in which the Department of Justice must make preclearance decisions." J.A. 278. The *Ashcroft* standard, witnesses at Congressional hearings explained, introduced uncertainty into the preclearance standard that would make the process more difficult for everyone, including the covered jurisdictions. J.A. 279-281. In particular, there were no clear standards defining what constituted an influence district or the circumstances in which the creation of influence districts would make up for the loss of ability-to-elect districts. J.A. 279-281. Witnesses expressed concern that, particularly because of this lack of standards, the *Ashcroft*

analysis would permit jurisdictions to fragment minority communities, thus undermining their political power, in the guise of creating influence districts.[18] J.A. 281-282.

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[18] Indeed, as Congress learned, covered jurisdictions have long used fragmentation, or "cracking" of minority communities to dilute the minority vote. See, *e.g.*, *Evidence of Continued Need* 141 (describing districting plans designed to ensure that "no district will contain a majority of minority voters * * * by 'crack[ing]' minority neighborhoods and spread[ing] their voters among several districts"; *Impact & Effectiveness* 1171 (1971 Georgia Congressional districting plans "divided the concentration of black population in the metropolitan Atlanta area into the Fourth and Fifth districts to insure that the Fifth would be majority-white"); *id.* at 1185-1186 (1980 Louisiana Congressional districting plan divided black community in New Orleans area to create two majority-white districts); *Busbee* v. *Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983) (1981 Georgia redistricting plan again "fragmented the large and contiguous black population * * * by splitting that population between two Congressional districts, thus minimizing the possibility of electing a black to Congress in the Fifth Congressional District"); U.S. Comm'n on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 90 (1981) ("Jurisdictions * * * have split areas with a high concentration of minorities into several districts, so that minorities do not represent a substantial proportion of the population in any district.").

Moreover, in appropriate circumstances, such fragmentation often precluded preclearance before *Ashcroft*. See, *e.g.*, *Evidence of Continued Need* 790 (describing objection to 1993 redistricting plan for Randoph County, Georgia, that fragmented the black population, thereby "limiting the opportunity for black voters to elect candidates of their choice"); *id.* at 1514, 1552 (1983 objection to College Park, Georgia, redistricting plan that packed black population into one district and fragmented the remainder among four other districts); *id.* at 1546 (objection to 1991 Georgia State Senate redistricting plan that fragmented black population in three areas of the State); *id.* at 1618-1619 (objections to 1983 and 1992 redistricting plans for Pointe Coupee Parish, Louisiana, school board and police

(continued…)

Finally, Congress heard that the *Ashcroft* analysis would introduce undue partisanship into the preclearance process, and that it might well favor the interests of individual legislators at the cost of minority voters. J.A. 282-284. In short, as the district court summarized, "Congress gathered extensive evidence that discriminatory and dilutive techniques remained a significant problem, and that the *Ashcroft* standard did not remedy – and could easily worsen – the problem." J.A. 284.

Against this background, as the district court explained, the amended retrogression prong, which denies preclearance to voting changes that diminish minority voters' ability to elect the candidates of their choice, "directly responds to" the problem Congress identified – "intentional vote dilution aimed at making minority votes less effective." J.A. 291. "The legislation is thus precisely congruent to the problem." J.A. 291.

The amended retrogression standard is also a proportionate response, as the district court concluded. J.A. 291-295. As was true before *Ashcroft*, the amended standard will not permit jurisdictions to comply with Section 5 by replacing

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(…continued)

jury redistricting plans that packed black voters into one district, while fragmenting the remainder among other districts); *id.* at 1660 (1991 objection to Louisiana State Senate redistricting plan, which cracked black populations in two areas).

ability-to-elect districts with influence districts. But, as the district court explained, Congress heard "considerable testimony" that incorporating influence districts into the Section 5 analysis "would have had deeply problematic results." J.A. 291-292. Similarly, the amendments eliminated the totality of the circumstances test injected by *Ashcroft* because Congress heard substantial testimony that that test created uncertainty and problems of enforcement. J.A. 292. Moreover, as explained *infra*, pp. 62-65 , the amendments do not exclude consideration of other factors that might justify a retrogressive plan, including compliance with the Constitution, adherence to traditional districting criteria, and demographic changes. Because the amendments' modifications to the *Ashcroft* standard were no more than what was necessary to accomplish Congress's goal of preventing intentional vote dilution in the covered jurisdictions, they are appropriate legislation to enforce the Fourteenth and Fifteenth Amendments.

2. Appellants' arguments to the contrary are based upon their erroneous contention that the "ability to elect" standard "is an unyielding *quota floor* based on past minority electoral success." Appellants' Br. 61.

First, appellants erroneously claim that Sections 5(b) and (d) grant to minority voters "a *federal entitlement* until 2031," and that it "will mandate more race-based decisionmaking." Appellants' Br. 62. Nothing in the language of the amended effects prong requires that it be applied as plaintiffs predict. As it has

been since its enactment, a major purpose of Section 5 is "to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques." *Beer*, 425 U.S. at 140-141 (citation omitted) (alterations in original). The new Sections 5(b) and (d) have not changed that purpose. Rather, the addition of these provisions simply clarifies, in the wake of *Ashcroft*, that Congress intended Section 5 to be enforced as the Attorney General and courts had enforced it since 1965 – *i.e.*, by specifying that a covered jurisdiction may not destroy existing gains achieved by minority voters by reducing the number of districts in which those voters are able to elect the candidates of their choice and replacing them with districts in which those voters may do nothing more than potentially influence the outcome of an election. As the House Judiciary Committee explained, "Section 5, if left uncorrected [after *Ashcroft*], would now allow States to turn black and other minority voters into second class voters who can influence elections of white [voters' candidates of choice,] but who cannot elect their preferred candidates, including candidates of their own race." 2006 House Report 70 (internal citation and quotation marks omitted).

Contrary to appellants' assertion, Appellants' Br. 62, the amended retrogression provision does not guarantee minority electoral success. Section 5(b) identifies a change as retrogressive if it diminishes minority voters' "ability * * *

to elect their preferred candidates of choice." 42 U.S.C. 1973c(b). But ability does not invariably lead to success. To guarantee voters' continued "ability" to elect candidates of their choice is not to ensure that they will in fact do so. The amended retrogression prong thus leaves intact the settled principle 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) (citation omitted) (opinion of O'Connor, J.) (plurality). Thus, the amended retrogression provision does not impose either a quota "floor" for minority electoral success or a "corresponding ceiling on other groups' expected representation" in a "zero-sum game," as appellants contend. Appellants' Br. 50.

Nor, contrary to plaintiffs' assertion, does the amended retrogression prong require the preservation of "every existing 'safe' majority-minority and 'cross-over' district," let alone "every functioning 'influence' district." Appellants' Br. 62-63. Under the amendments, a voting change is retrogressive only if it diminishes minority voters' ability to elect their candidates of choice. If racially-polarized voting comes to play a smaller role in elections in covered jurisdictions, minorities in existing ability-to-elect districts will be able to retain their current ability to elect the candidates of their choice with progressively smaller

percentages of the population. See J.A. 294 ("as racially polarized voting decreases, the number of districts affected by Section 5 decreases as well").

Further, as the Attorney General recognized before the Supreme Court's decision in *Ashcroft*, "in examining whether [a] new [districting] plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole." *Ashcroft*, 539 U.S. at 479. Thus even if the plan results in a "diminution of a minority group's effective exercise of the electoral franchise in one or two districts," the plan may not violate Section 5 if "the gains in the plan as a whole offset the loss in a particular district." *Ibid.*; cf. *LULAC* v. *Perry*, 548 U.S. 399, 427-442 (2006) (for purpose of Section 2 vote dilution inquiry, State cannot remedy dismantling of compact opportunity district through creation of a noncompact district elsewhere in the State).

Appellants' contentions that the amended effects prong is insufficiently flexible, does not permit sufficiently broad defenses, and requires covered jurisdictions to abandon traditional districting principles are similarly without merit. Although Section 5(b) replaced the *Ashcroft* test for determining whether a change is retrogressive, it did not displace preexisting Section 5 case law holding that even a retrogressive change must nonetheless be precleared in certain circumstances. The statement in the 2006 legislative history expressing an intent

to "*reject*[] all that logically follows from [*Ashcroft*]," 2006 House Report 71 (see Appellants' Br. 61), does not overrule those principles.

In fact, the original Section 5 effects provision, like the 2006 provision, on its face did not appear to permit any defense or justification for voting changes with a discriminatory effect. In *Beer*, however, the Supreme Court interpreted the discriminatory-effect provision in the original Section 5 to require only "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. Even before *Beer*, the Court had recognized that the statute could not be read as imposing an utterly inflexible prohibition on retrogression. 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 a covered city from 52% to 42% did not violate the effects prohibition, so long as the City's election plan "fairly reflect[ed] the strength of the Negro community as it exist[ed] after the annexation." *Id*. at 370-372.

Similarly, the Attorney General took the position, well before the decision in *Ashcroft*, that the prohibition on retrogression does not "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. 488 (Jan. 6, 1987). In particular, the Department of Justice has long recognized that retrogression can be justified when a plan that maintains preexisting minority voting strength would violate the Constitution: "in 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." 52 Fed. Reg. 488. Similarly, even before *Ashcroft*, the Department publicly explained that a retrogressive redistricting plan must nonetheless be precleared if the only alternative is a plan that subordinates traditional districting principles and violates the principles articulated in *Shaw* v. *Hunt*, 517 U.S. 899 (1996), and *Miller* v. *Johnson*, 515 U.S. 900 (1995). See *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act*, 66 Fed. Reg. 5413 (Jan. 18, 2001) (2001 *Redistricting Guidance*) ("preventing retrogression under Section 5 does not require jurisdictions to violate Shaw v. Reno and related cases").

The 2006 amendments do not alter these principles. Nor is there any merit to appellants' contention that the Attorney General will enforce Section 5 without regard to these principles. Indeed, the Attorney General's most recent *Redistricting Guidance* reaffirms their vitality, stating again that "preventing

retrogression under Section 5 does not require jurisdictions to violate Shaw v. Reno and related cases." *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7472 (Feb. 9, 2011) (2011 *Redistricting Guidance*). The 2011 *Guidance* also states that even retrogressive plans may be precleared where the jurisdiction can establish that no less retrogressive plan can be drawn due to "shifts in population or other significant changes since the last redistricting (*e.g.*, residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements)." 76 Fed. Reg. 7472. The 2011 *Guidance* also makes it clear that only limited departures from traditional redistricting principles may sometimes be required to comply with Section 5:

> [C]ompliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from *strict* adherence to certain of its redistricting criteria. For example, criteria that require the jurisdiction to make *the least possible change* to existing district boundaries, to follow county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or *in some cases*, require a certain level of compactness of district boundaries *may* need to give way *to some degree* to avoid retrogression.

76 Fed. Reg. 7472 (emphasis added). The 2011 *Guidance* further states that "[i]n evaluating alternative or illustrative plans, the Department of Justice relies upon plans that make the *least departure* from a jurisdiction's stated redistricting criteria needed to prevent retrogression," and that "[i]n assessing whether a less

retrogressive plan can reasonably be drawn, the geographic compactness of a jurisdiction's minority population will be a factor in the Department's analysis." 76 Fed. Reg. 7472 (emphasis added).

Thus, appellants are simply wrong when they claim that the amended retrogression prong will require jurisdictions to "entirely subordinate traditional districting principles, if needed to preserve majority-minority districts weakened by natural demographic shifts, such as residential integration or suburban migration." Appellants' Br. 65.

3. Appellants are also wrong in contending that the totality of the circumstances test adopted by *Ashcroft* is necessary to limit the application of the retrogression prong to voting changes where the risk of intentional discrimination is high. Appellants' Br. 49. The Supreme Court has made clear that "[w]hen Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520. As the Court wrote in *Rome*, "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." 446 U.S. at 177.

Moreover, the retrogression prong in Section 5 is more limited than effects tests in other legislation, including Section 2 of the VRA, because it prohibits only voting changes with a *retrogressive* impact. Where such voting changes demonstrably undo the gains minority voters have won in the past, there is all the more reason to suspect discriminatory intent.

Accordingly, the amended retrogression prong is proper legislation to enforce the Fourteenth and Fifteenth Amendments.

B. Section 5(c) Is An Appropriate Remedy

Section 5(c) provides that "any discriminatory purpose" underlying a voting change, and not just a retrogressive purpose, requires the denial of preclearance. 42 U.S.C. 1973c(c). Discriminatory purpose, of course, is the Supreme Court's test for identifying unconstitutional discrimination. See *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-268 (1977); *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *City of Mobile* v. *Bolden*, 446 U.S. 55, 61-64 (1980). In other words, as was the case before *Bossier II*, a covered jurisdiction may satisfy Section 5's purpose prong by showing that it did not violate the Constitution by intentionally discriminating.

Because the amended purpose prong authorizes denial of preclearance only when the covered jurisdiction violates the Constitution by engaging in intentional discrimination, it clearly is valid legislation to enforce the Fourteenth and Fifteenth

Amendments. See *United States* v. *Georgia*, 546 U.S. 151, 158 (2006) (Congress may provide remedies for actual constitutional violations). The amended purpose prong imposes on covered jurisdictions no substantive requirements beyond those that the Constitution itself imposes.

The only difference between administration of the amended purpose prong and ordinary litigation to enforce the Constitution is procedural: Section 5 shifts the burden of proof to the submitting jurisdiction. But 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 *Rome*, 446 U.S. at 181-182 (holding that shifting the burden of proof to covered jurisdictions properly responds to their history of discrimination).

Moreover, Congress not only assembled extensive evidence of intentional voting discrimination, S.C.J.A. 547-621, it also learned that, without the addition of subsection (c), Section 5 would require preclearance of many intentionally discriminatory voting changes, see J.A. 260-266. The *Bossier II* standard, for example, would have required preclearance of the 1981 Georgia Congressional redistricting plan that, while not retrogressive, was designed to prevent the election of a black member of Congress by splitting a cohesive, majority-black community.

See J.A. 263-265 (citing *Busbee* v. *Smith*, 549 F. Supp. at 516-518); 2006 House Report 66-68.

Congress also learned that removing Section 5 as a bar to such intentional discrimination would require more plaintiffs to carry the burden of litigation under Section 2, thereby, as the district court explained, impeding the "goal of 'shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims.'" J.A. 260 (quoting *South Carolina*, 383 U.S. at 328). As explained above, see pp. 38-43, *supra*, case-by-case litigation under Section 2 is an inadequate remedy for the continued voting discrimination in the covered jurisdictions. And those jurisdictions, with access to all the data underlying their decision-making process, are in a far better position than individual voters or groups of voters to prove or disprove the existence of discriminatory purpose.

Thus, appellants are simply wrong in contending that there is "no legitimate 'enforcement' justification" for denying preclearance to all intentionally discriminatory voting changes. Appellants' Br. 72-74 (citing *Boerne*, 521 U.S. at 534). The justification is "plain": "An official action * * * taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute." *City of Richmond*, 422 U.S. at 378.

Finally, as the district court recognized, appellants' core challenge to Section 5(c) stems from their contention that DOJ will misuse it "to extract its preferred

results in the redistricting context." J.A. 268. As explained in Part V.B., below, that contention is meritless. Nor is it "the proper subject of a facial challenge to subsection (c)." J.A. 269.

V

THE 2006 AMENDMENTS DO NOT VIOLATE EQUAL PROTECTION PRINCIPLES

The district court correctly rejected appellants' contention that the 2006 amendments to the Section 5 preclearance standard are unconstitutionally discriminatory on their face. J.A. 300-313.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid," *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), or at a minimum, that the provision lacks "a plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted). "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745. Moreover, courts adjudicating a facial challenge to a statute "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 552 U.S. at 450.

Because appellants have limited their claims to a facial challenge to the 2006 amendments, they cannot rest their arguments solely upon allegations about the manner in which the Attorney General has applied Section 5 in the past, or speculation about how the Attorney General will apply Section 5, as amended, in the future. In short, they cannot prevail by showing that Section 5 "might operate unconstitutionally under some conceivable set of circumstances." *Salerno*, 481 U.S. at 745. Rather, they must demonstrate that the "facial requirements" of the 2006 amendments are unconstitutional. *Washington State Grange*, 552 U.S. at 450.

It is true that Section 5 requires covered jurisdictions to take race into account to some extent in deciding whether to adopt, or how to implement, a voting change. In order to succeed on their facial challenge, appellants must demonstrate that such limited consideration of race is never permissible because it always violates the Equal Protection Clause. Given Section 5's confirmed status as remedial legislation, appellants cannot succeed in that effort.

A. Sections 5(b) And (d) Are Not Facially Unconstitutional

As the discussion in Part IV.A., *supra*, makes clear, Sections 5(b) and (d) do not "impose[] a rigid quota-floor based on minorities' past electoral success" or require "outright racial balancing." Appellants' Br. 77. Rather, the amended retrogression prong of Section 5 prohibits voting changes that would cause

backsliding – "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. 130, 141 (1976). To the extent that the amended retrogression standard requires the consideration of race, it is not unconstitutionally discriminatory because it is a narrowly-tailored means of remedying ongoing voting discrimination.[19] Congress identified an ongoing pattern of voting discrimination in the covered jurisdictions, including intentional vote dilution. J.A. 305; see S.C.J.A. 547-601. As the district court correctly concluded, there is a compelling governmental interest in remedying and preventing that discrimination. J.A. 305-309.

Race-conscious governmental action may be necessary to remedy past intentional discrimination. *Parents Involved In Cmty. Schs.* v. *Seattle Sch. Dist.*, 551 U.S. 701, 720 (2007); *LULAC* v. *Perry*, 548 U.S. 399, 517-519 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) (compliance with non-retrogression mandate is justified to remedy past discrimination). Before enacting the 2006 amendments, Congress made express findings of continued voting discrimination in the covered jurisdictions, and those findings are well supported by the legislative record. See pp. 33-35, *supra*. Congress also found that "vestiges

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[19] As the district court and this Court have emphasized, appellants do not contend that the retrogression principle itself violates Equal Protection. J.A. 304-305; *LaRoque II*, 650 F.3d at 794.

of discrimination" remained "following nearly 100 years of disregard for the dictates of the 15th amendment," and that without the protections of Section 5, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization, §§2(b)(7), (9), 120 Stat. 578. And Congress found that the standard adopted by the Court in *Ashcroft* "misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act." 2006 Reauthorization, §2(b)(6), 120 Stat. 578. As the district court concluded, the "*Ashcroft* standard did not remedy – and could easily worsen – the problem" of intentional vote dilution in the covered jurisdictions. J.A. 284.

The amended retrogression prong of the preclearance standard is a narrowly-tailored provision designed to remedy and prevent the continued discrimination Congress identified, and to protect the fragile gains in minority voting rights achieved by the VRA. First, as the district court found, it is "precisely congruent to the problem" it seeks to remedy – intentional vote dilution in the covered jurisdictions – "because it forbids the entire category of behavior Congress found to be problematic." J.A. 291.

Second, as explained above, the retrogression standard does not operate as a quota. *Grutter* v. *Bollinger*, 539 U.S. 306, 334-335 (2003). It seeks to maintain

the status quo by preventing covered jurisdictions from dismantling existing districts in which minorities have the ability to elect candidates of their choice, without "reasonable and legitimate justification." *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 76 Fed. Reg. 21,249 (April 15, 2011) (revision to 28 C.F.R. 51.57(a)) (2011 *Revision of Procedures*). The Attorney General has made it clear that the enforcement of Section 5 will not require jurisdictions to violate the principles set forth in *Miller* and *Shaw*, and that demographic changes may justify preclearance of a retrogressive plan. See 2011 *Redistricting Guidance*, 76 Fed. Reg. 7472.

To be sure, the amended retrogression prong limits the justifications available to submitting jurisdictions. Unlike the *Ashcroft* standard, Sections 5(b) and (d) do not permit jurisdictions, without justification, to dismantle existing ability-to-elect districts by fragmenting the minority population among districts in which minority voters may merely influence the outcome of an election. Restoring this prohibition to the preclearance standard is necessary to fully remedy and prevent continued voting discrimination in the covered jurisdictions. As Congress learned, such fragmentation has long been a hallmark of vote dilution, and generally prevented preclearance of redistricting plans before *Ashcroft*. See n.18, *supra*; 2006 House Report 65 (finding that the Court had "interpreted Section 5 [in *Bossier II* and *Ashcroft*] to allow preclearance of voting changes that would have

previously drawn objections"). The House Judiciary Committee also found that "leaving the [*Ashcroft*] standard in place would encourage States to spread minority voters under the guise of 'influence' and would effectively shut minority voters out of the political process." 2006 House Report 70; see J.A. 280-282 (describing testimony that the *Ashcroft* standard "might allow jurisdictions to substantially dilute minority voting strength under the guise of creating more influence districts)." As the district court concluded, the introduction of influence districts into the preclearance standard "would have created a means to cloak intentional discrimination – that is, intentional fragmentation of politically cohesive groups – under the guise of creating influence districts." J.A. 292.

Moreover, the district court correctly concluded that the amended retrogression prong will *not* require the maintenance of existing districts in which minority voters can only influence the outcome of an election "because voters who only 'influence' an election are not able to choose, and then elect, the candidates who best represent them. Instead, they can only choose between candidates preferred by other groups." J.A. 287; see J.A. 310. The legislative history confirms this construction of the amendments. See 2006 House Report 70 ("voters who can influence elections of white candidates * * *cannot elect their preferred candidates"). This removal of protection from a large class of existing districts – in which minority voters constitute some substantial percentage but do not have the

ability to elect candidates of their choice – actually *reduces* the extent to which race would have been a consideration in the preclearance process under the *Ashcroft* standard. See J.A. 312.

Sections 5(b) and (d) also eliminate some of the "totality of the circumstances" factors that *Ashcroft* injected into the preclearance standard. J.A. 292. As explained above, however, the amended retrogression standard still permits consideration of a range of factors, including demographic changes, a jurisdiction's traditional districting criteria, geographic characteristics, and political boundaries. As Congress learned, moreover, including such factors as the views of existing minority-preferred legislators or the legislative positions of such legislators would create a preclearance process that was unwieldy and unduly "partisan, subjective and unpredictable." J.A. 292; see J.A. 278-284.

Thus, as the district court correctly concluded, "Congress restricted the scope of the racial inquiry when it enacted * * * subsection[s] (b) and (d), while at the same time tailoring the amendments to respond as effectively as possible to the problems of racial discrimination in voting." J.A. 313.

B. Section 5(c) Is Not Facially Unconstitutional

Section 5(c), which amended Section 5's purpose prong, provides that preclearance must be denied to a voting change that was motivated by "any discriminatory purpose." This provision is not facially race-conscious, let alone

unconstitutional. It simply incorporates the Supreme Court's well-established standard for identifying unconstitutional racial discrimination. Indeed, by its terms, this provision would require the Attorney General, or a court in a declaratory judgment action, to deny preclearance if a particular voting change was adopted with a purpose to discriminate against white voters.

Appellants nonetheless contend that Section 5(c) is facially unconstitutional because it "allows DOJ to coerce jurisdictions to increase minority electoral success." Appellants' Br. 78. The Attorney General intends no such coercion. Appellants' contention is based wholly upon a handful of instances – occurring two decades ago – in which redistricting plans subject to Section 5 review following the 1990 Census were later ruled to be unconstitutional racial gerrymanders. See Appellants' Br. 47-48 (citing *Miller*, 515 U.S. 900; *Shaw*, 517 U.S. 899). The Court made it clear in those cases that when a jurisdiction adheres to traditional districting principles, its failure to create additional majority-minority districts does not constitute intentional discrimination in violation of Section 5. *Miller*, 515 U.S. at 924; *Shaw*, 517 U.S. at 911-913. The Attorney General acknowledges that principle and has consistently applied it, since the decisions in *Miller* and *Shaw*, in enforcing Section 5. See, *e.g.*, 2011 *Redistricting Guidance*, 76 Fed. Reg. 7472; 2001 *Redistricting Guidance*, 66 Fed. Reg. 5413. In applying the purpose prong, the Department of Justice employs the *Arlington Heights*

factors for determining whether official action was motivated by a discriminatory purpose. 2011 *Revision of Procedures*, 76 Fed. Reg. 21,248-21,249 (revisions to 28 C.F.R. 51.54, 51.57); see *Arlington Heights*, 429 U.S. at 266-268; 2006 House Report 68.

Appellants point to no evidence that the Attorney General has applied Section 5's purpose prong to demand that a covered jurisdiction violate the rulings in *Miller* or *Shaw*. And nothing in the new Section 5(c) purports to alter those rulings. Because this provision does nothing more than prohibit preclearance of intentionally discriminatory voting changes, it does not violate the Constitution.

Appellants' speculation that the Attorney General might misapply Section 5(c) in the future also provides no basis for declaring that provision facially unconstitutional. It would be improper for this Court to presume that a coordinate branch of government will apply the new purpose prong unconstitutionally and in a manner inconsistent with its plain text. See *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971) ("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. * * * But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."); *Washington State Grange*, 552 U.S. at 450 (quoting *United States* v. *Raines*, 362 U.S. 17, 22 (1960)) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to

be exercised with reference to hypothetical cases thus imagined."). To do so would be to "short circuit the democratic process by preventing [a] law[] embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id*. at 451.

There is simply no basis for appellants' contention that Section 5(c) is facially unconstitutional.

CONCLUSION

The judgment of the district court should be vacated as moot. In the alternative, the judgment below should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B), and this Court's order of January 4, 2012. The brief was prepared using Microsoft Word 2007 and contains 17,500 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ *Linda F. Thome*
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Date: February 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012, the foregoing BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that I will cause eight paper copies of the foregoing BRIEF to be hand delivered to the Clerk of the Court on February 13, 2012.

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ADDENDUM

REPRODUCED AUTHORITIES
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28 C.F.R. 51.54

(a) Discriminatory purpose. A change affecting voting is considered to have a discriminatory purpose under section 5 if it is enacted or sought to be administered with any purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The term "purpose" in section 5 includes any discriminatory purpose. 42 U.S.C. 1973c. The Attorney General's evaluation of discriminatory purpose under section 5 is guided by the analysis in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

(b) Discriminatory effect. A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their effective exercise of the electoral franchise. Beer v. United States, 425 U.S. 130, 140–42 (1976).

(c) Benchmark.

> **(1)** In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting standard, practice, or procedure in force or effect at the time of the submission. If the existing standard, practice, or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage (specified in the Appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (c)(4) of this section, the comparison shall be with the last legally enforceable standard, practice, or procedure used by the jurisdiction.
>
> **(2)** The Attorney General will make the comparison based on the conditions existing at the time of the submission.
>
> **(3)** The implementation and use of an unprecleared voting change subject to section 5 review does not operate to make that unprecleared change a benchmark for any subsequent change submitted by the jurisdiction.
>
> **(4)** Where at the time of submission of a change for section 5 review there exists no other lawful standard, practice, or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a

method of election) the Attorney General's determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

(d) Protection of the ability to elect. Any change affecting 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, color, or membership in a language minority group to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of section 5. 42 U.S.C. 1973c.

28 C.F.R. 51.57

Among the factors the Attorney General will consider in making determinations with respect to the submitted changes affecting voting are the following:

(a) The extent to which a reasonable and legitimate justification for the change exists;

(b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;

(c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;

(d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change; and

(e) The factors set forth in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977):

> **(1)** Whether the impact of the official action bears more heavily on one race than another;
>
> **(2)** The historical background of the decision;
>
> **(3)** The specific sequence of events leading up to the decision;
>
> **(4)** Whether there are departures from the normal procedural sequence;
>
> **(5)** Whether there are substantive departures from the normal factors considered; and
>
> **(6)** The legislative or administrative history, including contemporaneous statements made by the decision makers.