No. 12-96

In The Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

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

Respondents.

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

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

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INTERESTS OF THE AMICI STATES[1]

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

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[1] The Amici States gave notice of their intent to file this brief to counsel for the parties on August 14, 2012. *See* Sup. Ct. R. 37(2)(a). The Amici States do not need consent of the parties to file this brief. *See* Sup. Ct. R. 37(4).

In *Northwest Austin*, the only State that filed an amicus brief arguing that Section 5 should be declared unconstitutional was Georgia. Brief of Georgia Governor Sonny Perdue as Amicus Curiae Supporting Appellant, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322). The Governor of Alabama filed an amicus brief supporting neither party to provide the Court with information regarding Alabama's progress in voting rights and present anecdotal evidence regarding its experience under Section 5. Brief of the Hon. Bob Riley, Governor of the State of Alabama, Amicus Curiae Supporting Neither Party, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322). Several other States filed a brief in support of the VRA, arguing that the burdens imposed by Section 5 were not onerous and were justified by the benefits. Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York, as Amici Curiae Supporting Appellees, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322).

Since *Northwest Austin*, the "federalism costs, associated with Section 5 have only continued to increase while the statute's benefits have all but vanished. *Id*. at 202. In particular, the Department of Justice ("DOJ") has interpreted Section 5 to force the Covered Jurisdictions to spend millions of dollars and thousands of attorney hours to preclear an ever-expanding array of laws. The most vivid example comes from voter-identification laws: Indiana's

sovereign policymakers are free to enact such requirements, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), but on account of DOJ's administrative fiat, the equally sovereign policymakers in Covered Jursidictions are not, *see* DOJ File Nos. 2011-2775 (Texas) and 2011-2495 (South Carolina).

Section 5 served a noble purpose, and America is a freer and better place for it. But Congress's refusal to amend the statute after this Court identified its infirmities in *Northwest Austin*, coupled with DOJ's willful applications of Section 5, means that this Court is the last and only branch of the federal government that can defend the States' coequal sovereignty. The Amici States have a common interest in resolving this issue now – before the Covered Jurisdictions have to spend still more money and time, and forgo still more elections without validly enacted state laws, on account of a statute premised on problems that are now two generations old. If this Court denies certiorari now, it will only delay the inevitable – the increasing costs associated with preclearance under the VRA, the statute's decreasing benefits, and the ever-increasing number of appeals that Covered Jurisdictions will be forced to file before Section 5's inevitable demise.

SUMMARY OF ARGUMENT

In *Northwest Austin*, the Court noted that Section 5's departure from traditional notions of equal

sovereignty enjoyed by all of the fifty states "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203. When Congress reauthorized Section 5 of the VRA in 2006, it used the same coverage formula as previous enactments and failed to examine the current status of uncovered jurisdictions. As the Court noted, "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* The Court should grant certiorari here because the 2006 reauthorization of the VRA's antiquated formula is neither congruent nor proportional to the harm that the VRA was enacted to correct.

Because Section 5 applies arbitrarily to the Covered Jurisdictions, none of which uses discriminatory tests or devices, and many of which have higher voter turnout, or lower disparity in minority voter turnout, than many of the uncovered jurisdictions, the Covered States are denied the fundamental principles of equal sovereignty and equal footing. Because the VRA's purpose is to eradicate voting discrimination for *all* United States citizens,[2] treating States differently is not congruent with the Act's purpose. The Amici States respect the original purpose of the VRA but ask this Court to grant certiorari

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

and hold that the current enactment of Section 5 under the pre-existing coverage formula of Section 4(b) is unconstitutional because it is not appropriately tailored to correct any current voting discrimination that may exist anywhere in the country.

ARGUMENT

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

The court of appeals acknowledged that Congress did not make a finding that "racial discrimination in voting was 'concentrated in the jurisdictions singled out for preclearance'" when Congress reauthorized Section 5 of the VRA in 2006 under the pre-existing coverage formula of Section 4(b) of the VRA. (Pet. App. at 53a (quoting *Nw. Austin*, 557 U.S. at 203).) And the court acknowledged that the data it reviewed supported use of the outdated formula for only some of the Covered Jurisdictions. (*Id.* at 54a.) It nonetheless upheld Congress's continued use of Section 4(b)'s formula by speculating that the lack of evidence of discriminatory practices in the Covered Jurisdictions arose from Section 5's deterrent effect (*id.* at 42a-44a) and noting that bailout ensures that "section 5 covers only those jurisdictions with the worst records of racial discrimination in voting" (*id.* at 57a). The

court's analysis is seriously flawed – the obsolete formula is not linked to current conditions and therefore intrudes on the Covered States' sovereignty and the supposed remedy of bailout is illusory. The Court should grant review to address the constitutionality of Sections 4(b) and 5 of the VRA because of significant and unjustified burdens that the law continues to impose on Covered Jurisdictions.

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

This Court issued a unanimous warning regarding Section 5's constitutional infirmities:

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions

> singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.

Id. at 203; *see also id*. at 216 (Thomas, J., concurring in judgment in part and dissenting in part). The Court further emphasized that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." *Id*. at 204. But the Court remained "keenly mindful of [its] institutional role," *id*. at 204, resolved the case on nonconstitutional grounds, and charged the political branches with fixing both the VRA's antiquated coverage formula and the blunt instrument of preclearance, *id*. at 205-06.

But Congress has done nothing since *Northwest Austin*, and the Covered Jurisdictions continue to labor under a coverage formula that is now 40 years old. And piling error on error, DOJ has exacerbated the VRA's federalism costs by broadening its interpretation of Section 5 and denying preclearance to an ever-widening array of sovereign state prerogatives.

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

The VRA requires a jurisdiction to comply with the preclearance obligations if it satisfied two conditions. First, in 1964, 1968, or 1972, the jurisdiction must have

required a person to satisfy the requirements of a "test or device"[3] in order to vote. 42 U.S.C. § 1973b. Second, the jurisdiction must have had – again in 1964, 1968, or 1972 – less than fifty percent of the citizens of voting age registered to vote, or less than fifty percent of the citizens in the jurisdiction voting in the then-most recent presidential election. 42 U.S.C. § 1973c.

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

[3] The VRA defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b(c).

Before the S. Subcomm. on Constitutional Rights of the Comm. on the Judiciary, 94th Cong. (April 30, 1975) (Testimony of Sen. Goldwater, explaining that Arizona did not use English-only ballots in 1974 or thereafter). But because Arizona did not include Spanish in its ballots in 1964, 1968, and 1972, it became and remains a Covered Jurisdiction.

Because Congress never intended the preclearance requirements to be permanent, fixing the determination on a then-recent presidential election year was logical when it originally enacted the VRA. As time passes, however, Congress's reasoning grows less justifiable.[4] No jurisdiction, covered or uncovered, currently uses a test or device, and Covered Jurisdictions are no more likely than uncovered jurisdictions to have low voter turnout. In eighteen of the forty-one States that are not Covered Jurisdictions in their entirety, the percentage of voting age persons who voted was less than fifty percent during one or more presidential elections since the 1982 amendment to the VRA: Arkansas (1988, 1996, 2000), California (1984, 1988, 1992, 1996, 2000), Delaware (1996), Florida (1984, 1988, 1996, 2000), Hawaii (1984, 1988, 1992, 1996, 2000, 2004, 2008), Illinois (1996), Indiana

[4] In addition, the successive reauthorizations of the VRA have rendered the notion of its enactment as a temporary solution to an extraordinary problem a misnomer. Congress originally enacted the VRA for five years in 1965. Congress renewed it subsequently in 1970 (for five years), then in 1975 (for seven years), then in 1982 (for twenty-five years), and again in 2006 (for twenty-five years). *Nw. Austin*, 557 U.S. at 200.

(1996, 2000), Kentucky (1988, 1996), Maryland (1988, 1996), Nevada (1984, 1988, 1996, 2000), New Mexico (1988, 1996, 2000), New York (1988, 1996, 2000), North Carolina (1984, 1988, 1996, 2000), Oklahoma (1988, 1996, 2000), Pennsylvania (1996), Tennessee (1984, 1988, 1996, 2000), Utah (1996), and West Virginia (1988, 1996, 2000). *See* Dave Leip's Atlas, *supra* (select applicable election year on left panel and then select "%VAP M"). Eleven of these states have never been partially or fully Covered Jurisdictions: Arkansas, Delaware, Illinois, Indiana, Kentucky, Maryland, Nevada, Pennsylvania, Tennessee, Utah, and West Virginia. *Compare* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited August 13, 2012) *with* Department of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited August 13, 2012).

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

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

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

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

Katzenbach, 383 U.S at 308-09.

In contrast, and despite the 12,000-plus pages of reports and numerous congressional hearings, Congress passed the VRA's reauthorization in 2006 on an expedited basis and without careful deliberation over the formula used to determine whether a jurisdiction should be covered by the Act. Senators John Cornyn[5] and Tom Coburn,[6] members of the Senate Judiciary Committee, explained their "significant reservations" about this rush to renew:

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

[5] Senator Cornyn represents Texas, a Covered Jurisdiction.

[6] Senator Coburn represents Oklahoma, an uncovered jurisdiction. *See* Department of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited August 13, 2012).

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

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

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

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

> the bill that passed out of committee included a finding section before any hearings were held. No changes to those findings were made.

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

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

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

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

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

300 pages of appendices to the Report included (1) summaries of the reported cases or settlements finding discrimination against voters in the Covered Jurisdictions and the uncovered jurisdictions; (2) a summary of the evidence gathered by the House and Senate concerning voting discrimination; and (3) a discussion of the lawsuits or enforcement actions, statistics, and anecdotal evidence for thirty-five of the fifty states. *Id*. at 65-363. All of the Covered Jurisdictions were represented by pages of discussion, while some of the uncovered States, such as Nebraska or Tennessee, had only single paragraphs of anecdotal evidence presented. The Report and its appendices presented no evidence whatsoever regarding Arkansas, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Nevada, New Hampshire, North Dakota, Oregon, Utah, Vermont, or West Virginia. The absence of evidence does not compel the conclusion that there were no instances of voter discrimination in the listed states, but fortifies the claim that the Senate failed to collect and incorporate such evidence in its report.

Once the bill was sent to the floor, the Senate quickly passed it without engaging in meaningful debate regarding the outdated formula. Several Senators expressed concern, but recommended passage of the bill nonetheless. 152 Cong. Rec. S7983 (daily ed. July 20, 2006) (statement of Sen. Chambliss discussing some hesitation about leaving unaddressed the issue of modernizing the formula); 152 Cong. Rec. S7986-87 (daily ed. July 20, 2006) (statement of Sen.

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

Congress did not explore the problem of voting discrimination throughout the entire country, and therefore failed to demonstrate the "great care" that the *Katzenbach* Court required as justification for the "uncommon exercise of congressional power" contained in the1965 version of the VRA, power that was permissible only due to the "exceptional conditions" and "unique circumstances" present in 1965.

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

When the VRA was initially enacted in 1965, Congress found that there was significant evidence of voting discrimination in the southern States. But the United States is a different country than it was

forty-seven years ago. According to the U.S. Census Bureau, in 1960, there were approximately 183 million people in the country; in 2010, there were 308.7 million people – a 68% increase. *Compare* 1 U.S. Census of Population: 1960, *Characteristics of the Population*, at xvii (1964), *with* Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 1, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf. Certain regions have grown quickly while others have grown much more slowly. *Id*. As discussed below, these changes in the States' respective populations have significantly changed the picture regarding minority representation as voters and elected officials. Congress failed to analyze or even recognize these shifts, which leaves the VRA even further out of step with the current circumstances in this country.

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

According to the 2000 and 2010 censuses, Nevada is by far the fastest growing State in the country, while Arizona is the second fastest. Census 2000 Brief on Population Change and Distribution: 1990-2000 at 3, http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf; Census 2010 Brief on Population Change and Distribution: 2000 to 2010 at 2, http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. Nevada's Hispanic

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

The voting registration and turnout records for Arizona and Nevada are also similar. During the 2000 election, 53.3% of Arizona's total citizenry were registered voters and 46.7% voted, and in Nevada 52.3% were registered and 46.5% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2000, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2000/tab04a.pdf (last visited November 7, 2011). But Nevada's Hispanic population was less represented. *Id*. In Arizona, 33.4% of its Hispanic population registered to vote and 27.1% voted; while in Nevada, 23.9% of its population registered and only 20.4% voted. *Id*.

In 2004, Arizona's record showed that 60.3% of the total population registered and 54.3% voted. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (follow "Detailed Tables" hyperlink; then follow Table 4a "XLS" hyperlink). The Arizona Hispanic

population's numbers were 30.5% and 25.5%, respectively. *Id*. Nevada, on the other hand, had 56.8% of its entire population registered, with 51.3% actually voting. *Id*. The Nevada Hispanic population's numbers were 27.6% and 23.8%, respectively. *Id*.

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

Despite the similar populations, a smaller percentage of Hispanic voters in Nevada are voting than in Arizona. In the Senate Judiciary Committee Report, there were only two pieces of anecdotal evidence regarding possible voting discrimination in Nevada, but both involved discrimination against Hispanic voters. S. Rep. No. 109-295 at 277 (summarizing anecdotal evidence that Hispanics have been told they need to speak English or have a driver's license in order to vote and that voter registration forms for some Hispanics were found in dumpsters and not submitted). Congress made no findings concerning the number of minorities elected to office in Nevada or regarding the possibility of racial polarization in its elections. This lack of justification by Congress for the different treatment of Arizona and Nevada

despite the stark similarities in their current populations and voter turnout records is evidence that the VRA's formula is neither congruent with, nor proportional to, the goal of eliminating discrimination in voting. Further, Congress's failure to take into account these similar statistics shows that its decision to continue using the outdated coverage formula is arbitrary.

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

Thirty states presently have laws in place that may require voters to show identification at the polls in November. *Voter Identification Requirements*, National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (last visited August 13, 2012). Whether the laws may be effective depends greatly on whether the jurisdiction is Covered or not. Since 2001, nearly 1,000 bills have been introduced in forty-six states. *Id*. Twenty-one states passed major legislation between 2003 and 2011. *Id*. New voter-identification laws were passed in Alabama, Colorado, Montana, North Dakota, and South Dakota in 2003; Alabama had to request preclearance (*id*.), which DOJ granted on August 15,

2003 (DOJ File Nos. 2003-2245; 2003-3434).[7] In 2004, Arizona voters passed a voter-identification law. *Gonzalez v. Arizona*, 624 F.3d 1162, 1169 (9th Cir. 2010) (en banc). The DOJ precleared Arizona's law. *See* DOJ File No. 2004-5004. In 2005, new laws were passed in Indiana, New Mexico, and Washington, while Georgia passed legislation to strengthen its existing voter-identification law. *See Voter Identification Requirements*, *supra*. Georgia had to request preclearance, while the other States did not. The DOJ precleared Georgia's law on August 26, 2005. *See Common Cause/Georgia, League of Women Voters of Ga., Inc. v. Billups*, 439 F. Supp. 2d 1294, 1303 (N.D. Ga. 2006).

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

[7] Alabama has enacted a new voter-identification law that has not yet been submitted for preclearance and which will not take effect until 2014.

statute imposes 'excessively burdensome requirements' on any class of voters." *Id*. at 202.[8]

South Carolina and Texas, both Covered Jurisdictions, have not yet been permitted to enforce their voter-identification requirements, despite the fact that these laws are similar to the Indiana law upheld in *Crawford*. The DOJ denied preclearance for South Carolina's voter-identification law. *South Carolina v. U.S.*, D.D.C. Cause No. 1:12-cv-203 (CKK, BMK, JDB) (Doc. 1). South Carolina has filed a declaratory-judgment action, seeking reconsideration of DOJ's preclearance denial. *Id.* Trial begins on August 27, 2012. *Id*. at Doc. 155.

Texas, like South Carolina, requested DOJ's preclearance. Despite Texas's responses to DOJ's repeated requests for more information, DOJ still had not provided a preclearance decision six months after the State's initial submission. *Texas v. Holder*, D.D.C. Cause No. 1:12-cv-00128 (RMC, DST, RLW) (Doc. 1). By then, DOJ had rejected South Carolina's similar law and, facing a likely similar rejection, Texas opted to file a declaratory judgment seeking preclearance. *Id*. The DOJ eventually rejected Texas's request for administrative preclearance nearly seven months after the initial submission. Trial was held from July 10 through 13, 2012, and Texas is awaiting a

[8] The Ninth Circuit held that Arizona's voter-identification law did not violate Section 2 of the VRA. *Gonzalez*, 624 F.3d at 1194.

preclearance decision from the district court – more than a year after its legislature enacted the voter-identification law.

Judge Williams asked in his dissent in this case "Why should voter ID laws from South Carolina and Texas be judged by different criteria . . . from those governing Indiana?" (Pet. App. 94a.) Judge Williams could not find a rational explanation other than the *historical* records of the Covered Jurisdictions, but noted that such a focus appears to be "foreclosed by *Northwest Austin*'s requirement that current burdens be justified by current needs." (*Id*. at 95a.) This dramatic disparity in the treatment of similar States is incompatible with our history of treating the States as equal sovereigns and warrants this Court's review.

C. The Preclearance Requirements Are Arbitrary and Burdensome.

As with the voter-identification laws discussed above, Section 5's preclearance obligations lead to other absurdities. The Covered States and their political subdivisions must obtain federal preclearance before they enforce any change in a voting-related standard, practice, or procedure. *See* 42 U.S.C. § 1973c; 28 C.F.R. § 51.1. Changes requiring preclearance include:

- "Any change in qualifications or eligibility for voting";
- "Any change concerning registration, balloting, and the counting of votes and

any change concerning publicity for or assistance in registration or voting"; and

- "Any change in the boundaries of voting precincts or in the location of polling places."

28 C.F.R. § 51.13(a), (b), (d). At the state level, the various attorneys general monitor legislation for "covered" changes and submit those changes to DOJ for preclearance. If a change originates at the local level, the local officials identify and submit the change.

1. Updating Alabama's Voting Machinery to Comply with the Help America Vote Act of 2002 ("HAVA").

HAVA contains detailed standards for the type of voting machinery a State may employ. *See* 42 U.S.C. § 15481. In Alabama, each of the State's sixty-seven counties handled the process of purchasing HAVA-compliant machines. The Alabama Attorney General spearheaded a unified preclearance submission, which included the necessary information under 28 C.F.R. § 451.27 for each county. The DOJ precleared the changes for use in the June 2006 primary election.[9] But, because Alabama's 450 municipalities

[9] *See* DOJ File Nos. 2006-2900, 2006-3444, 2006-3446, 2006-3449, 2006-3450, 2006-3454, 2006-3470 through 2006-3484, 2006-3533, 2006-3537, 2006-3539 through 2006-3541, 2006-3548, 2006-3551, 2006-3555, 2006-3556, 2006-3568 through 2006-3580, and 2006-3583 through 2006-2594.

manage their own elections, when the time came for them to hold their own elections in 2008, they had to devote the time and expense to submit their own preclearance materials – even though they used the same voting machines as their corresponding counties. This example demonstrates both the burden and arbitrariness of the preclearance requirements. These requirements were all the more absurd because, at least in this instance, because the changes these governments had to preclear were simply their good-faith efforts to comply with *another* federal statute.

2. Arizona's Decision to Close Several Motor Vehicle Department Branches.

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

On June 21, 2012, Arizona requested preclearance to close an MVD location within the Pima County Justice Court in Tucson, Arizona. The submission noted that there were three other voter registration locations in the immediate vicinity – one of which was the Pima County Recorder's Office in the very same

building as the MVD office that was closing. This type of administrative decision should be left to the local jurisdictions. But because of Section 5, Arizona's MVD had to wait until it received DOJ's preclearance letter to effectuate that change. *See* DOJ File No. 2012-3656.

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

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

Like Congress, the majority below found solace in the bailout provision, stating that as of May 9, 2012, 136 jurisdictions and sub-jurisdictions had successfully bailed out. (Pet. App. 57a.) But no Covered State has ever been allowed to bail out, and as Judge Williams noted in his dissent, bailout does not remove federal oversight. (Pet. App. 92a (stating that "for a decade after bailout, the court 'retain[s] jurisdiction' just in case the Justice Department or 'any aggrieved person' wishes to file a motion 'alleging that conduct has occurred which . . . would have precluded' bailout in the first place.").) Further, the 1982 reauthorization of the VRA tightened the substantive standards for bailout:

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

Id. citing 42 U.S.C. § 1973b(a)(1). No State is likely to ever successfully bail out because it must prove that it (and *all* of its sub-jurisdictions) meets all the bailout requirements for the ten years preceding its declaratory judgment seeking bailout. If even one sub-jurisdiction receives an objection letter from DOJ for a voting change, the ten-year time period starts anew. Covered Jurisdictions such as the Amici States likely will be forced to continue to operate under the unconstitutional burdens of Sections 4 and 5 of the VRA unless and until this Court removes them. The Court should do so now.

CONCLUSION

The Court should grant certiorari to Shelby County and declare Sections 4(b) and 5 of the Voting Rights Act unconstitutional.

Respectfully submitted this 23rd day of August, 2012.

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