Nos. 12-81, 12-96

In the Supreme Court of the United States

John Nix, et al.

Petitioners,

v.

Eric H. Holder Jr., et al.

Respondents.

Shelby County, Alabama

Petitioner,

v.

Eric H. Holder Jr., et al.,

Respondents.

On Appeal from the U.S. Court of Appeals for the District of Columbia Circuit

Brief of *Amicus Curiae* Cato Institute In Support of Petitioners in Both Cases

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QUESTIONS PRESENTED

1. Has the modern application of the Voting Rights Act resulted in an exercise of extra-constitutional authority by the federal government that conflicts with the Act's very purpose?

2. Can Voting Rights Act Sections 2 and 5 coexist? If not, which section is the more appropriate remedy for remedying voter disenfranchisement?

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INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

Nix and *Shelby County* implicate a constitutional overreach too long suffered in jurisdictions where the federal government found, nearly half a century ago, discrimination against African-American voters. The goal of preventing voter disenfranchisement is unquestionably just (and constitutional), but it is no longer served by Section 5 of the Voting Rights Act. This provision now only perpetuates the very race-based political decisions the Act was intended to stop.

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given timely notice of intent to file and written communications from Petitioners' and Respondents' counsel (in both cases) consenting to the filing of this brief has been submitted to the Clerk. Pursuant to Rule 37.6, *amicus* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

"The historic accomplishments of the Voting Rights Act are undeniable." *Nw. Austin Mun. Util. Dist. No. One v. Holder ("NAMUDNO"),* 557 U.S. 193, 201 (2009). Its modern application, however, is problematic to say the least. Sections 2 and 5 conflict with each other, with the Fourteenth and Fifteenth Amendments, and with the orderly implementation of fair elections. These tensions—constitutional, statutory, and practical—undermine the VRA's legacy of vindicating the voting rights of all citizens.

Jurisdictions covered by Section 5 are subject to utterly predictable litigation, the outcome of which is often dependent on judges' views of how to satisfy both the VRA's race-conscious mandates and the Fifteenth Amendment's command to treat people of all races equally under law. When added to legislators' partisan interests, this navigation between the VRA's Scylla and the Constitution's Charybdis inevitably crashes the electoral vessel onto judicial shoals.

Moreover, Section 5's preclearance system is an anachronism. As this Court found three terms ago,

> 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. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide.

Id. at 203-04 (citing Edward Blum & Lauren Campbell, *Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act* 3-6 (AEI, 2006)).

Indeed, the list of Section 5 jurisdictions is bizarre: six states of the Old Confederacy (and certain counties in three others), plus Alaska, Arizona, and counties or townships in other states ranging from New Hampshire to South Dakota. Curiously, (only) three New York counties are covered, all boroughs in New York City. What is going on in the Bronx, Brooklyn, and Manhattan that is not in Queens or Staten Island? Four members of this Court famously hail from Gotham, each from a different borough; perhaps they know something the rest of us don't.

And all of this mess stems from the presumption that election regulations in certain places are illegal until proven otherwise. But three generations of federal intrusion on state prerogatives have been more than enough to kill Jim Crow.

The Voting Rights Act has exceeded expectations in making this nation "a more perfect union." Barack Obama, *A More Perfect Union*, Address at the National Constitution Center (Mar. 18, 2008) (transcript available at http://www.americanrhetoric.com/speeches/barackobamaperfectunion.htm). While celebrating its achievements, we must recognize that this success has obviated its constitutional legitimacy. Moreover, the VRA's incongruities present the prototypical situation of legal problems that are capable of repetition, yet evading review. *See*, *e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973) (internal citations omitted). This Court needs to address the fundamental constitutional defects arising under the modern VRA.

ARGUMENT

I. THIS COURT MUST RECONSIDER THE CONTINUING VIABILITY OF THE VOTING RIGHTS ACT BECAUSE THIS HISTORIC LEGISLATION NO LONGER SERVES ITS ORIGINAL PURPOSE

A. The VRA, Once Justified by Jim Crow, Is Now "an Eye Glazing Mess"[2]

1. Successful at First

The Voting Rights Act has become "one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions." Richard Pildes, *Introduction* to David Epstein, *The Future of the Voting Rights Act* xiv (2006).

Defining that appropriate balance, however, was not the VRA's original aim. Its original purpose was simply to enfranchise southern blacks who were still being denied their voting rights a century after the Civil War. "The statute has become such an eye glazing mess that it's easy to forget that in 1965 it was beautifully designed and absolutely essential." Abigail Thernstrom, *The Messy, Murky Voting Rights Act: A Primer*, Volokh Conspiracy (Aug. 17, 2009), http://volokh.com/2009/08/17/the-messy-murky-voting-rights-act-a-primer.

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[2] This section is based on the work of Abigail Thernstrom, legal historian and vice-chairman of the U.S. Commission on Civil Rights, particularly her book *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* (2009) and her series of blogposts about the book at the Volokh Conspiracy blog.

When Congress enacted the VRA, Jim Crow was not going quietly into the historical night. Black ballots were the levers of change that white supremacists most feared, so enforcing the Fifteenth Amendment required an overwhelming exercise of federal power—radical legislation that involved an unprecedented intrusion of federal authority into state and local elections. *See Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (noting that Section 5, "which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs'" (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

The VRA effectively put southern states under federal electoral receivership. It suspended literacy tests, provided for the use of federal registrars, and demanded that suspect jurisdictions obtain preclearance of proposed electoral changes. A reverse-engineered statistical trigger identified these "covered" jurisdictions; the burden to prove that changes in voting procedure were free of racial animus—to prove a negative—lay on these Section 5 jurisdictions.

Justice Black worried that the provision compelled states to "beg federal authorities to approve their policies," so distorting our constitutional structure as to nearly eradicate the distinction between federal and state power. *South Carolina v. Katzenbach*, 383 U.S. 301, 358 (1966) (Black, J., concurring in part and dissenting in part). It was a valid point, but the VRA succeeded where all other attempts to secure voting rights failed: black voter registration skyrocketed.

The enforcement authority that would remedy a century of Fifteenth Amendment violations thus amounted to what might be called "federal wartime

powers." As on other occasions when wartime powers were invoked, however, the consequence was a serious distortion of constitutional order. Abigail Thernstrom, *Race-Conscious Districting: Needed and Costly*, Volokh Conspiracy (Aug. 18, 2009), http://volokh.com/2009/08/18/race-conscious-districting-needed-and-costly. Such a temporary distortion was justified in 1965, but it is not today.

2. Moving in the Wrong Direction

Section 5 was an emergency provision with an expected life of five years that instead has been repeatedly renewed. Every renewal became an occasion for expanding the VRA; never did Congress consider whether the law's unprecedented reach should instead be reduced in recognition of its success. Even as black political participation increased, federal power over local affairs grew.

In the 1970s, the government placed more groups and places into Section 5's clutches. An arbitrary, careless change in the statistical trigger, for example, made three New York boroughs subject to preclearance even though black New Yorkers had been freely voting since the Fifteenth Amendment's enactment in 1870, and had held municipal offices for decades. Hispanics, Asian Americans, American Indians, and Alaskan Natives became eligible for federal protection, even though their experience at the polls was not remotely comparable to that of southern blacks.

In 1982, Congress rewrote what had been an innocuous preamble, Section 2, morphing it into a powerful tool to attack election practices anywhere in the nation that had the "result" of denying the right to vote on account of race. But Section 2 as rewritten guaranteed electoral equality in some absolute

sense—undefined and indefinable. The obvious proportionality inquiry rests on profound misunderstandings about the "natural" distribution of various groups across the sociopolitical landscape. Racist exclusion should instead have been the concern.

The VRA thus moved in an unanticipated direction. Its original vision was one all decent Americans share: equal access to the political process, with blacks free to form coalitions and choose candidates in the same manner as everyone else. But in certain places, equality could not be reached simply by giving blacks the vote. Ballot access was insufficient after centuries of slavery, another century of segregation, ongoing racism, and persistent resistance to black political power. More aggressive measures were needed.

Consequently, blacks came to be treated as politically different. The VRA was amended to mandate the drawing of legislative districts effectively reserved for black candidates. The power of federal authorities to force jurisdictions to adopt "racially fair" maps conflicted starkly with the Constitution's federalism guarantees, while the entitlement of designated racial groups to legislative seats was discordant with traditional notions of democratic competition.

But serious costs accompany race-driven election regulation, costs that have increased as racism has waned. Nearly 20 years ago, this Court described race-driven electoral maps as "an effort to 'segregate . . . voters' on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (O'Connor, J.) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). Such maps threaten "to stigmatize individuals by reason of their membership in a racial group." *Id.* at 631.

3. Congress Exacerbates the Anachronism

The VRA is disconnected from the reality of modern American life. Blacks hold public office at all levels and have reached the pinnacles of every field of private endeavor. The extreme problems that once made VRA necessary no longer exist. Still, in 2006, Congress overwhelmingly renewed the VRA, including Section 5, for another 25 years. A campaign by so-called civil rights groups had persuaded Congress that race relations remain frozen in the past, that America is still plagued by persistent disfranchisement, and that minority voters in covered jurisdictions (through a formula last updated in 1975) should remain unable to participate in political life without electoral set-asides—and that those jurisdictions should not run elections without federal oversight.

"Discrimination [in voting] today is more subtle than the visible methods used in 1965. However, the effects and results are the same," the House Judiciary Committee reported. H.R. Rep. No. 109-478, at 6 (2006). "Vestiges of discrimination continue to exist . . . [preventing] minority voters from fully participating in the electoral process," the amended statute itself read. Pub. L. No. 109-246 § 2(b)(1)(2) (2006).

No evidence supported such extreme claims. The skepticism of those who can't forget Jim Crow is understandable, but the South they remember is gone (and the discrimination that existed there never did in Alaska, Arizona, Manhattan, etc.). As the Court declared in *NAMUDNO*, "things have changed in the South" and "conditions . . . relied upon in upholding the statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved." 557 U.S. at 202.

Massive disfranchisement is ancient history, as unlikely to return as segregated water fountains. America is no longer a land where whites hold the levers of power and minority representation depends on extraordinary federal intervention, consistent with the Constitution only as an emergency measure. Today, southern states have some of the highest black voter-registration rates in the nation; over 900 blacks hold public office in Mississippi alone. Abigail Thernstrom, *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections* 11 (2009).

By the 2008 election, a stunning 69.7 percent of the black population was registered to vote and turnout rates were similarly impressive. Thom File & Sarah Crissey, *U.S. Census Bureau Population Reports: Voting and Registration in the Election of November 2008* 4 (2010), *available at* http://www.census.gov/prod/2010pubs/p20-562.pdf. By 2008, there were 41 members of the Congressional Black Caucus; almost 600 African-Americans held seats in state legislatures, and another 8,800 were mayors, sheriffs, school board members, and the like. Forty-seven percent of these officials lived in Section 5 states, even though those states contained only 30 percent of the nation's black population. Thernstrom, *Voting Rights—and Wrongs* 203. The bottom line is indisputable: *Section 5 states elect black candidates at higher rates than the rest of the country*.

But without the threat of federal interference, would southern state legislatures feel free to engage in mischief? It seems wildly improbable, even in the Deep South. Indeed, one of the latest VRA remedial orders involved a black Democratic Party county chairman in Mississippi conspiring to discriminate

against white voters. *See*, *e.g.*, *Appeals Court Upholds Noxubee Voting Rights Ruling*, Picayune Item, Mar. 3, 2009, http://picayuneitem.com/statenews/x2079285859/Appeals-court-upholds-Noxubee-voting-rights-ruling.

In the same vein, a 2008 Clarksdale, Mississippi, newspaper editorial noted that "[t]here's probably less chance today of election discrimination against minorities occurring in Mississippi—given the high number of African-Americans in elected office, including as county election commissioners—than in many parts of the country not covered by the Voting Rights Act." Quoted in Abigail Thernstrom, *A Period Piece*, Volokh Conspiracy (Aug. 20, 2009), http://volokh.com/2009/08/20/a-period-piece. Yet Section 5 still "presumes that minorities are powerless to protect their own election interests in places where they actually have the most clout." *Id.*

Racial progress has rapidly outpaced the law, and the voting rights challenges of greatest concern today—hanging chads, electronic-voting glitches, etc.—bear no relation to those that plagued us in 1965. The South has changed, America has changed, and it's time for this Court to change constitutional understandings regarding the VRA as well.

Recognizing that Section 5 is "no longer constitutionally justified" is not "a sign of defeat." *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in part and dissenting in part). As Justice Thomas wrote, a declaration that Section 5 is unconstitutional "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA." *Id.* at 229. The Court should declare victory and excise Section 5.

B. Section 5 Conflicts with the Constitution[3]

At its inception, the VRA stood on firm constitutional ground; it was pure antidiscrimination legislation designed to enforce basic rights. A clear principle justified its original enactment: skin color should be irrelevant when states determine voting eligibility. Unfortunately, clarity has been lost. Nearly 50 years later, the law has become what Judge Bruce Selya described as a "Serbonian bog." *Uno v. Holyoke*, 72 F.3d 973, 977 (1995). The legal landscape looks solid but is really a quagmire into which "plaintiffs and defendants, pundits and policymakers, judges and justices" have sunk. *Id.*

In *NAMUDNO*, this Court fired unmistakable warnings at Congress. Although it recognized the historic achievements of the VRA, the Court stated that "past success alone" is no longer "adequate justification to retain the preclearance requirements." 557 U.S. at 202. The Court had originally upheld Section 5 as a temporary exercise of federal power, concluding that "exceptional conditions could justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 334-335. But the statutes that Congress subsequently passed go far beyond enforcing voting rights and, perversely, encourage segregation through racial gerrymandering.

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[3] This section is based on the work of Roger Clegg, president of the Center for Equal Opportunity and former DOJ official, particularly *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-2009 Cato Sup. Ct. Rev. 35 (2009).

1. Substantial Federalism Costs

Rather than lifting the VRA's constraints on federalism, Congress in 2006 heightened the tension between the states and federal government by overruling *Bossier Parish II* and *Ashcroft* and amending preclearance requirements such that electoral changes must be rejected when they are believed to exhibit "any discriminatory purpose" or "diminish[ ] the ability of minority citizens…to elect their preferred candidates of choice." 42 U.S.C. § 1973c.

Yet the Constitution preserves the powers of the states to regulate elections. *Georgia v. Ashcroft*, 539 U.S. 461, 461-62. Absent a compelling justification or "exceptional conditions" (such as pervasive, invidious racial discrimination), election law falls within states' reserved powers and is an essential element of their sovereignty. See *NAMUDNO*, 557 U.S. at 216 (Thomas, J., concurring in part and dissenting in part) ("In the specific area of voting rights, this Court has consistently recognized that the Constitution gives the States primary authority over the structuring of electoral systems." (citations omitted)); *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) ("[Preclearance is] a substantial departure . . . from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable.").

In *NAMUDNO*, this Court cited numerous cases acknowledging Section 5's "intrusion into sensitive areas of state and local policymaking" and expressing "serious misgivings about the constitutionality of Section 5." 557 U.S. at 202 (quoting *Miller*, 515 U.S. at 926). Neither Congress nor this Court can avoid these glaring constitutional doubts any longer.

Section 5 violates the Tenth Amendment and basic tenets of federalism in two principal ways. The first is that the preclearance regime undermines the "fundamental principle of equal sovereignty" by "differentiating between the states" with a coverage formula that is now unsubstantiated, invalid, and, therefore, completely arbitrary. *Id*. at 203 ("The evil that section 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."). Moreover, "the greater the burdens imposed by section 5, the more accurate the coverage scheme must be." *Shelby County v. Holder,* 679 F.3d 848, 885 (D.C. Cir. 2012) (Williams, J., dissenting). Yet Congress did not review the coverage formula when it reauthorized the VRA in 2006.

The second Tenth Amendment violation lies in the preclearance regime's mandate for anticipatory review. Mandatory preclearance acts as a prior restraint on election law, a policy area generally reserved to the states. In addition, anticipatory review ensnares every state and local electoral rule proposed by a covered jurisdiction. To obtain preclearance a covered jurisdiction must prove both the absence of "any discriminatory purpose" and that the proposed voting change will not detract from a minority group's "ability to elect" its preferred candidate. Under this regime, whether the proposal affects a voter's actual exercise of the right to vote is no longer the ultimate question. Now deviating from that central inquiry, the exclusive focus becomes whether a proposed rule affects a minority groups' ability to elect their "preferred candidate" (whatever that means). As a conse-

quence, covered jurisdictions lose the freedom to show that plans formulated based on other factors warrant consideration. Besides restricting state autonomy, the "ability to elect" constraint coerces states to adopt "a particular brand of race conscious decision-making" that treats minorities as a monolithic bloc. *Id*. at 887.

Similarly, the requirement that covered jurisdictions "prove the absence of a discriminatory purpose" conjures up memories of DOJ's campaign of "maximizing majority-minority districts at any cost." *Id*. at 888. As Judge Williams commented below, the discriminatory purpose standard, "at worst restored the DOJ's 'implicit command that states engage in presumptively unconstitutional race-based districting'" *Id*. (quoting *Miller*, 515 U.S. at 927), and "at best, 'exacerbated the substantial federalism costs that the preclearance procedure already exacts'." *Id*. (quoting *Reno v. Bossier Parish School Bd.*, 528 U.S. at 336).

2. Equal Protection Problems

The Court again faces here the tension between Section 5 and the Constitution's non-discrimination mandate. As Justice Kennedy noted in *Ashcroft*, Section 5 imposes a serious dilemma when consideration of race would constitutionally condemn a proposed regulation just as preclearance demands it. 539 U.S. at 491 (Kennedy, J., concurring) ("There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive."). Judge Williams below echoed Justice Kennedy's concerns: Section 5 "not only mandates race-conscious decision-making, but a particular brand of it" that departs from "the Reconstruction Amendments'

commitment to nondiscrimination." *Shelby County*, 679 F.3d at 887-888 (Williams, J., dissenting).

The VRA quite literally denies the equal protection of the laws by providing legal guarantees to some racial groups that it denies others. For example, a minority group may be entitled to a racially gerrymandered district while other groups are not so entitled and indeed may lack protection against districting that hurts them. *This is nothing if not treating people differently based on race.* Under the Constitution, no racial group should be assured "safe" districts or districts of "influence" unless all other groups are given the same guarantee—an impossibility even if it were a good idea.

Despite having achieved so much success early on, the continual effort to invent new justifications for Section 5—as well as Congress's prescription of one-dimensional remedies for electoral equality—are sowing the seeds for future conflict. The racial balkanization Section 5 fosters is so pernicious that this Court has repeatedly warned about its unconstitutionality. *See, e.g.*, *NAMUDNO*, 557 U.S. 193; *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Branch v. Smith*, 538 U.S. 254 (2003); *Abrams*, 521 U.S. 74. The segregated districts that racial gerrymandering creates have led to uncompetitive elections, increased polarization (racial and ideological), and the insulation of Republican candidates and incumbents from minority voters—as well as the insulation of minority candidates and incumbents from white voters (contributing to these politicians' difficulties in running for statewide office). As Chief Justice Roberts wrote, it is "a sordid business, this divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006).

Ironically, the VRA has become an obstacle to racial integration. Race-based districts have kept most black legislators from the political mainstream—precisely the opposite of what the law's framers intended. As of 2006, for example, all Congressional Black Caucus members were more liberal than the average white Democrat. Abigail Thernstrom, *Looking Forward*, Volokh Conspiracy (Aug. 21, 2009), http://volokh.com/2009/08/21/looking-forward. Majority-minority districts reward politicians who make the sort of racial appeals that are the staple of invidious identity politics. People across the political spectrum end up with more extreme views than they would otherwise hold when they talk only to those who are similarly-minded. *See generally* Cass Sunstein, *Republic.com* (2001).

Not all black politicians have been trapped in safe minority districts, of course. Barack Obama himself lost a congressional race but went on to win a statewide election. A decade earlier, Mike Coleman became the first black mayor of Columbus, Ohio, with the strategy: "Woo the white voters first . . . then come home to the base later." Gwen Ifill, *The Breakthrough: Politics and Race in the Age of Obama* 227 (2009). Unfortunately, such candidates remain the exception. The VRA was meant to level the playing field but has been used to maximize black districts. The ugly implication is that black politicians need such help to win—but then their message is honed to appeal to limited constituencies. The marginalization that the VRA targets instead becomes entrenched.

3. Confusing Purpose and Effect

To be sure, certain jurisdictions had played cat-and-mouse games with voting-rights enforcement—provoking Section 5's preclearance response. Fair enough, but it is problematic that later VRA amendments outlawed both actions with a racially disparate "purpose" and those with a racially disparate "effect"—so again that which the Constitution permits is illegal under a law meant to enforce the Constitution.

Whenever the government bans actions that merely have racially disparate *impacts*, two bad outcomes are encouraged that would not be if the government only policed actual racial discrimination.

First, actions that are perfectly legitimate are abandoned. Focusing obsessively on guaranteeing majority-minority districts detracts from experimentation with alternative methods of advancing minority political power and may prevent the election of pragmatic candidates who can create "biracial coalitions which [could be] key to passing racially progressive policies." *Shelby County*, 679 F.3d at 887 (Williams, J., dissenting) (quoting David Epstein & Sharyn O'Hallaran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 Am. J. Pol. Sci. 367, 390-92 (1999)). For instance, Judge Williams explained below that in *Ashcroft*, Georgia "gave covered jurisdictions an opportunity to make trade-offs between concentrating minority voters in increasingly safe districts and spreading some of those voters out into additional districts; the latter choice, the Court pointed out, might increase the 'substantive representation' they enjoy and lessen the risks of 'isolating minority voters from the rest of the state' and of 'narrowing their political influence to

only a fraction of political districts'." *Id*. (quoting *Ashcroft*, 539 U.S. at 481). A similar dynamic may be at work in the reforms at issue in *Nix*.

Second, if the action is valuable enough, surreptitious racial quotas will be adopted so that the action no longer produces a racially disparate impact. In staffing, for example, an employer who requires employees to have high school diplomas and who does not want to be sued for the resulting racially disparate impact has two choices: abandon the requirement (and hire employees he believes to be less productive) or implement racial hiring quotas (engaging in the very discrimination that the statute supposedly bans). This tension between the anti-racism mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact was at the forefront of another civil rights case that this Court decided three terms ago. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53 (2009) (analyzing *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009)). Justice Scalia noted there that this tension is so strong that disparate impact statutes may violate the Constitution's equal protection guarantee. 129 S. Ct. at 2682 (Scalia, J., concurring).

We see the same phenomenon in the VRA context. Some legitimate voting practices—*e.g.*, ensuring that voters are U.S. citizens—will be challenged if they have a racially disparate impact. In racial gerrymandering cases, jurisdictions will be pressed to use racially segregated districting to ensure proportionate election results and thus engage in the very discrimination that the underlying law forbids!

To emphasize: *The principal use of Section 5 today is to coerce state and local jurisdictions into devising plans with an eye on race, to ensure that minorities will elect representatives of the right color.*

* * *

In *NAMUDNO*, the Court declared that "current burdens . . . must be justified by current needs," 557 U.S. at 203. Meanwhile, Section 4(b)'s coverage formula should be "sufficiently related to the problem that it targets" to justify its infringement on the equal sovereignty of states. *Id*. Congress's findings underlying the 2006 re-authorization were woefully inadequate to substantiate that "exceptional conditions" or "current needs" existed to justify the extraordinary burdens and enforcement powers they claimed. Since that time, not only has Congress refused to address the inadequacy of their findings in light of *NAMUDNO*, but the Department of Justice continues to interfere with benign electoral reforms.

Because the burdens imposed by Section 5—the substantial federalism costs and the equal protection violations discussed *supra*—are not justified by "current needs," they fail to satisfy this Court's requirements for "appropriate" constitutional enforcement legislation as required by the Fourteenth Amendment, the Fifteenth Amendment, and *Katzenbach*. For the same reason, the coverage formula of section 4 (b) cannot be deemed "congruent and proportional."

II. SECTIONS 2 AND 5 ARE AT A "BLOODY CROSSROADS"

A. The Conflict between Sections 2 and 5 Creates Bad Law

The VRA's outdated provisions no longer advance the Fifteenth Amendment's simple bar on race-based disenfranchisement. *See NAMUDNO*, 557 U.S. at 210. Worse yet, racial equality is hindered by the complex judicial web surrounding VRA implementation. Courts face significant challenges in trying to avoid racial discrimination while administering the inherently race-conscious VRA.

Nix and *Shelby County* bring the tension between Sections 2 and 5 to the fore: Courts confront a "bloody crossroads" at the intersection of these provisions. While we know from *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), that each section requires a distinct inquiry, courts often face Section 2 claims while also having to draw electoral maps that have to comply with Section 5. While neither the DOJ nor the D.C. district court is supposed to deny Section 5 preclearance on Section 2 grounds, *Georgia v. Ashcroft*, 539 U.S. at 478, courts are effectively forced to wear both hats. Their apparent inability to do so is not surprising given the lack of applicable standards.

Many courts have labored to satisfy the VRA in the context of a cacophony of precedent—some that invokes only Section 5, some only Section 2, and some that references both sections. What's more, certain elements of the two inquiries overlap, even as this and other courts have consistently maintained that—at least in some measure—they are distinct. *See, e.g.*, *Bartlett v. Strickland,* 556 U.S. 1; *Georgia v. Ashcroft*, 539 U.S. 461; *Metts v. Murph*y, 347 F.3d 346 (1st Cir.

2003); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, (D.S.C., 2002).

For example, in evaluating an election regulation under Section 5, a court conducts a "retrogression" analysis to ensure the proposed rule doesn't reduce the ability of minorities to elect their preferred candidates. 42 U.S.C. § 1973c (2006); *Beer v. United States*, 425 U.S. 130 (1976). But there is no justiciable definition of what constitutes the "ability to elect."

Ignoring for the moment that ambiguity, if a court concludes that retrogression would result under a proposal, "court-ordered reapportionment plans are subject in some respects to stricter standards than are plans developed by a state legislature. This stricter standard applies, however, only to remedies required by the nature and scope of the violation." *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (internal citations omitted). Okay, but in what respects these standards are "stricter," what constitutes "remedies," and which remedies are "required" (and under what circumstances) is far from clear.

If that weren't cryptic enough, Congress's 2006 prohibition on electoral regulations promulgated with "any discriminatory purpose," regardless of effect, further muddied the waters. Without legislative guidance as to what constitutes a "discriminatory purpose," lower courts are left only to "hope that . . . the Supreme Court will provide appropriate and immediate guidance." Interim House Order (Doc. 528) at 29 (Smith, J., dissenting), *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Nov. 23, 2011).

But even if this Court's Section 5 guidance were easily applicable in a given case, that does not end the dispute. After a proposed rule has been pre-

cleared or judicially approved, Section 2 further complicates matters. Its language sounds similar to Section 5's—it invalidates laws that create inequality among races in electing their preferred representatives, 42 U.S.C. § 1973(b) (2006)—but don't be fooled, say the courts. This Court has "consistently understood" Section 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Georgia v. Ashcroft,* 539 U.S. at 477-78 (citing *Reno* v. *Bossier Parish,* 520 U.S. at 477). The distinction *Bossier Parish* draws is merely that Section 5 "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Id.* at 478. Is that a meaningful difference?

Indeed, even if it is relatively clear that courts intend the analysis under the two sections to be different; how those analyses should differ remains ambiguous. "In contrast to Section 5's retrogression standard, the 'essence' of a Section 2 vote dilution claim is that 'a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Georgia v. Ashcroft*, 539 U.S. at 478 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). This Section 2 process seems hardly different, however, from the very "retrogression" standard it distinguishes—a judicial assurance that a proposal "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (2006).

The result is untenable: Some states and counties are subject to Section 5's prolonged preclearance process while there has not yet been any judicial, legislative, or otherwise meaningful articulation of any

substantive difference between that selectively applied Section 5 analysis and the Section 2 review all states must satisfy. The contradictory precedent that has emerged creates a near-impossible task for courts administering the VRA. Section 5's dubious constitutionality weighs heavily in favor of declaring victory and moving on, with Section 2 as the proper remedy for addressing the problems Congress has identified.

B. Section 2 Is the Proper Remedy for the Problems Congress Identified

Given Section 5's unconstitutional burdens, that provision's conflict with Section 2 should be resolved in favor of the latter. In allowing a private right of action, Section 2 provides the appropriate means for enforcing the Fifteenth Amendment and ensuring that any state practice which "results in a denial or abridgment of voting rights," 42 USC § 1973a, can be effectively remedied. That private right of action is a more targeted remedy, empowering citizens to litigate specific discriminatory acts—in contrast to Section 5's broad sweep, which ensnares every voting change, no matter how miniscule or banal.

When the Court upheld the VRA in 1966 it found that Section 5's generalized remedial mechanism was necessary because individualized litigation under Section 2 could not effectively fight such "widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328. Although Section 5's generalized remedial role was once appropriate and necessary in turning the tide against such "systematic resistance to the Fifteenth Amendment" and defeating "obstructionist tactics" *id.*, modern instances of discrimination are discrete rather than systemic. Facetious

tests and sinister devices that eluded private rights of action are now permanently banned—while even Section 2 violations are exceedingly rare and not disproportionate to Section 5 jurisdictions.

Courts have also contemplated whether Section 2 provides an adequate remedy, raising concerns about the costs and expediency. The DOJ can essentially assume plaintiffs' costs for Section 2 suits, however, by either initiating the action itself or "intervening in support of the plaintiff as it often does." *Shelby County*, 679 F.3d at 888 (Williams, J., dissenting). Moreover, prevailing parties in a Section 2 suit are reimbursed attorney and expert fees. *Id*. As for the issue of expediency, when discriminatory practices are imminent and threaten injury before parties have had the opportunity to litigate, the courts may issue a preliminary injunction "to prevent irreparable harm caused by adjudicative delay." *Id*. (citing *Perry v. Perez*, 132 S. Ct. 934, 942 (2012)). Nothing in the legislative record of the 2006 VRA amendments suggests that Section 2 private rights of action would be an inadequate remedy.

In sum, Section 5's extraordinary measures are no longer constitutionally justifiable because entrenched discrimination is gone. The Court's conclusion in *Katzenbach* that section 5 is a necessary supplement to Section 2 is no longer warranted.

CONCLUSION

The Voting Rights Act has served its purpose but is now outmoded and unworkable. Section 5 in particular causes tremendous federalism and equal protection problems, all while enforcing arbitrary standards that conflict with the Fourteenth and Fifteenth Amendments and with Section 2. Accordingly, *amicus* respectfully urges this Court to grant review in either *Nix* and *Shelby County* (or both) regarding the continuing viability of this historic piece of legislation.

Respectfully submitted,

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