No. 12-96

In the Supreme Court of the United States

SHELBY COUNTY, ALABAMA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress acted within its authority to enforce the constitutional prohibition against discrimination in voting when it reauthorized Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (Section 5), in 2006, on the basis of an extensive record demonstrating that, despite considerable progress under Section 5's remedial framework, discrimination against minority voters continues to be a serious problem in covered jurisdictions and that Section 5 remains a valuable tool in preventing, remedying, and deterring such discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-110a) is reported at 679 F.3d 848. The opinion of the district court (Pet. App. 111a-291a) is reported at 811 F. Supp. 2d 424.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2012. The petition for a writ of certiorari was filed on July 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Although the Fourteenth and Fifteenth Amendments have since 1870 guaranteed United States citizens' right to vote free of discrimination on the basis of race, "the blight of racial discrimination in voting * * * infected the electoral process in parts of our

country for nearly a century" thereafter. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Beginning in 1890, some States—located mostly in the South—undertook a systematic campaign to disenfranchise minority voters. *Id.* at 310-312. After many decades of inaction, Congress eventually responded, first by enacting the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, which authorized the Attorney General to seek injunctions against public and private interference with voting on racial grounds. *South Carolina*, 383 U.S. at 313. When that measure proved insufficient, Congress enacted the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86, which expanded the Attorney General's litigation power by authorizing him to join States as party defendants, giving him access to local voting records, and empowering courts to register voters in areas where there had been systematic discrimination. *South Carolina*, 383 U.S. at 313. That legislative response also proved insufficient, prompting Congress to enact Title I of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, which provided for expedited treatment of voting cases before three-judge courts and made illegal some of the tactics that had been used to disenfranchise African-Americans in federal elections. *South Carolina*, 383 U.S. at 313.

With each legislative response, Congress intended to further "facilitat[e] case-by-case litigation against voting discrimination." *South Carolina*, 383 U.S. at 313. But each measure "proved ineffective for a number of reasons." *Id.* at 314. As this Court explained in *South Carolina*, voting litigation is "unusually onerous to prepare" and is "exceedingly slow." *Ibid.* In addition, "some of the States affected" by litigation authorized by these congressional enactments "merely switched to dis-

criminatory devices not covered by" favorable federal decrees. *Ibid.*

Faced with the fact that a serious and invidiously discriminatory obstacle to the proper functioning of our democracy had proved nearly impervious to traditional legislative remedies, Congress enacted more aggressive and unusual measures as part of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.* The purpose of the VRA, as this Court put it, was to "rid the country of racial discrimination in voting." *South Carolina*, 383 U.S. at 315. The VRA combined permanent enforcement measures applicable nationwide with temporally and geographically limited measures applicable to the areas in which Congress had found pervasive voting discrimination. *Id.* at 315-316. Section 5 of the Act applies to specified jurisdictions and prohibits such covered jurisdictions from adopting or implementing any change in a "standard, practice, or procedure with respect to voting" without first obtaining a preclearance determination from either the Attorney General of the United States or the United States District Court for the District of Columbia. 42 U.S.C. 1973c. In order to obtain preclearance, the jurisdiction must demonstrate that the proposed change does not have the purpose and will not have the effect of discriminating on the basis of race. *Ibid.* Section 5 addressed the problems Congress had identified with case-by-case adjudication by "prescrib-[ing] remedies" that "go into effect without any need for prior adjudication." *South Carolina*, 383 U.S. at 327-328.

When Congress enacted Section 5, "[i]t knew precisely which states it sought to cover and crafted the criteria" set forth in the statutory coverage provision in order "to capture those jurisdictions." Pet. App. 6a-7a.

Rather than identify particular States by name in the statute's text, Congress chose to describe (in Section 4(b) of the VRA, 42 U.S.C. 1973b(b)) the jurisdictions it wished to cover by listing two voting-related criteria shared by each such jurisdiction: (1) the use of a defined voting test or device as of November 1, 1964, and (2) a voter registration or turnout rate that was below 50% in the 1964 presidential election. § 4, 79 Stat. 438. Those criteria—often referred to as the "coverage formula"—were thus "reverse-engineer[ed]" to describe the jurisdictions Congress knew it wanted to cover based on "evidence of actual voting discrimination." Pet. App. 56a.

In order to address any potential over- and under-inclusiveness attributable to using the Section 4(b) criteria to specify the geographic scope of Section 5's coverage, Congress included "bail-in" and "bail-out" procedures. Under Section 3(c)'s bail-in standard, a federal court may order a jurisdiction found to have violated the Constitution's prohibition on voting discrimination to obtain preclearance for some or all future voting changes. 42 U.S.C. 1973a(c). Under Section 4(a)'s original bailout standard, a jurisdiction could terminate its coverage by demonstrating that it had not used a test or device for a discriminatory purpose (and therefore should not have been covered in the first place). VRA, 79 Stat. 438.

This Court upheld the temporary provisions of the VRA, including Sections 4(b) and 5, as appropriate means of enforcing the guarantees of the Fifteenth Amendment. *South Carolina*, 383 U.S. at 323-337.

b. Congress reauthorized Sections 4(b) and 5 in 1970 (for five years), 1975 (for seven additional years), and 1982 (for 25 additional years). See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314;

Act of Aug. 6, 1975 (Act of 1975), Pub. L. No. 94-73, Tit. II, 89 Stat. 400; Voting Rights Act Amendments of 1982 (1982 Amendment), Pub. L. No. 97-205, 96 Stat. 131. In 1975, Congress also significantly expanded Section 5's reach to cover jurisdictions that had engaged in widespread discrimination against minority voters including members of identified racial groups described in the statute as "language minority" groups. Act of 1975, 89 Stat. 401-402; Pet. App. 8a. In 1982, Congress significantly eased the bailout standard by allowing jurisdictions and subjurisdictions to bail out if they could demonstrate that they had complied with specified nondiscrimination requirements for ten years. 1982 Amendment, § 2(b)(2), 96 Stat. 131; see Pet. App. 9a, 128a-129a. This Court upheld the constitutionality of Sections 4(b) and 5 after each reauthorization. See *Georgia* v. *United States*, 411 U.S. 526, 534-535 (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).

c. In 2006, Congress again reauthorized Section 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, § 2(b)(1)-(2), 120 Stat. 577. After holding extensive hearings to learn about ongoing voting discrimination in the country and whether there remained a need for Section 5 in covered jurisdictions in particular, Congress concluded that, "without the continuation of the [VRA's] protections, 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." *Id.* § 2(b)(9), 120 Stat. 578. Congress also de-

termined 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" Fifteenth Amendment. *Id.* § 2(b)(7), 120 Stat. 578. Although Congress recognized that, as a "direct result" of the VRA, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters," it concluded that "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." *Id.* § 2(b)(1)-(2), 120 Stat. 577.

In addition to reauthorizing Section 5 for an additional 25 years, Congress amended Section 5's substantive standard in two ways. The first amendment provides that an election change motivated by any racially discriminatory purpose may not be precleared, regardless of whether the change is retrogressive. See 42 U.S.C. 1973c(c). That change supplanted this Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*), that changes motivated by discrimination, even though unconstitutional, were not a basis for denying preclearance if the intent was "discriminatory but nonretrogressive." *Id.* at 341. The second amendment provides that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice." 42 U.S.C. 1973c(b) and (d). That change supplanted this Court's statutory holding in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), that a proposed redistricting plan was not retrogressive even though it reduced minority voters' ability to elect their candidates of choice because it created new districts in

which minority voters could potentially influence the outcome of an election. *Id.* at 480-482.

d. Immediately after the 2006 reauthorization, a jurisdiction in Texas filed suit seeking to bail out of coverage under Sections 4(b) and 5, and in the alternative challenging the constitutionality of the 2006 reauthorization of Section 5. A three-judge court held that the jurisdiction was ineligible to apply for bailout and rejected the constitutional challenge. *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 235-283 (D.D.C. 2008).

On appeal, this Court reversed the statutory bailout holding and declined to reach the constitutional question. *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193 (2009) (*Northwest Austin*). The Court's resolution of the statutory question significantly expanded the number of jurisdictions eligible to apply for bailout compared to the Department of Justice's previous understanding of the scope of Section 4(a). *Id.* at 206-211. Although the Court did not decide the constitutional question, the Court acknowledged (as Congress did in 2006) the progress minority voters have made in covered jurisdictions. *Id.* at 202. Like Congress, the Court attributed a "significant" portion of that progress "to the Voting Rights Act itself." *Ibid.* Noting that "these improvements" may be "insufficient and that conditions [may] continue to warrant preclearance under the Act," the Court observed that "the Act imposes current burdens and must be justified by current needs." *Id.* at 203. The Court also noted Section 5's unusual differentiation between covered and non-covered States, and explained that its "disparate geographic coverage" must be "sufficiently related to the problem that it targets." *Ibid.*

2. The State of Alabama has been a covered jurisdiction subject to Section 5 since 1965. 30 Fed. Reg. 9897 (Aug. 7, 1965). As a subdivision of Alabama, petitioner is also subject to Section 5. Pet. App. 112a, 145a. In April 2010, petitioner filed suit in the District Court for the District of Columbia, seeking a declaratory judgment that Sections 4(b) and 5 of the VRA are facially unconstitutional and a permanent injunction barring enforcement of those provisions. *Id.* at 145a, 149a. Petitioner alleges that Congress exceeded its authority under the Fourteenth and Fifteenth Amendments when it reauthorized Sections 4(b) and 5 in 2006, thereby violating the Tenth Amendment and Article IV of the Constitution. Pet. App. 149a-150a.

The district court granted summary judgment to the Attorney General, holding that Congress validly acted pursuant to its authority to enforce the guarantees of the Fourteenth and Fifteenth Amendments when it reauthorized Sections 4(b) and 5 of the VRA in 2006. Pet. App. 114a-115a, 291a. The district court acknowledged this Court's questions, expressed in *Northwest Austin*, about the continued constitutional viability of Section 5 and the scope of its geographic coverage. *Id.* at 142a-144a. With those concerns in mind, the court undertook a detailed review of the "extensive 15,000-page legislative record" supporting the 2006 reauthorization. *Id.* at 114a, 191a-255a, 288a-290a. Applying the congruence-and-proportionality inquiry of *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (*Boerne*), the district court examined the evidence before Congress about the state of voting discrimination since the 1982 reauthorization—including testimony, reports, and data that revealed persisting racial disparities in voter registration, turnout, and minority electoral success; the nature

and number of Section 5 objections, including a significant number of objections based on discriminatory intent; the number of successful Section 5 enforcement actions; Section 2 lawsuits with outcomes favorable to minority voters[1]; the Attorney General's requests for more information from jurisdictions submitting changes for preclearance and those jurisdictions' reaction to such requests; the Attorney General's use of federal observers; the prevalence of racially polarized voting and the role it plays in jurisdictions' use of dilutive techniques; and Section 5's deterrent effect. Pet. App. 12a, 130a-132a, 191a-255a.

Based on its exhaustive review of the record, the court confirmed that Congress had found ample evidence of a history and ongoing pattern of purposeful, state-sponsored voting discrimination in covered jurisdictions. Pet. App. 189a-270a. The court also credited Congress's conclusion that Section 2 alone would be an "inadequate remedy" for discrimination in covered jurisdictions. *Id.* at 269a-270a (quoting H.R. Rep. No. 478, 109th Cong., 2d Sess. 57 (2006)). The court further concluded that Section 5's preclearance remedy is a congruent and proportional means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments, particularly in light of the meaningful limitations built into Section 5, including the bailout mechanism. *Id.* at 270a-280a.

The district court also considered petitioner's challenge to the scope of Section 5's geographic coverage, as

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[1] Section 2 of the VRA applies nationwide and prohibits the imposition of any voting practice or procedure in a manner that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a).

embodied in Section 4(b). Pet. App. 280a-290a. Cognizant of this Court's observation that Section 4(b)'s disparate geographic coverage need be "sufficiently related" to the problem Section 5 targets, *id.* at 281a (quoting *Northwest Austin*, 557 U.S. at 203), the district court concluded that Congress appropriately retained the existing coverage scope only after examining whether voting discrimination both "persisted in the jurisdictions traditionally covered by Section 4(b)" and "remained more prevalent in these jurisdictions than in the [non-covered] jurisdictions." *Id.* at 282a.

The court rejected petitioner's argument that Section 4(b) was invalid because it retained "triggers" tied to decades-old election data. The court explained that the triggers "were never selected because of something special that occurred in those years; instead, they were chosen as mere proxies for identifying those jurisdictions with established histories of discriminating against racial and language minority voters." Pet. App. 285a. "Notwithstanding the passage of time since the coverage formula was last updated," the court concluded, discrimination in voting remained a serious problem in covered jurisdictions. *Id.* at 285a-286a. The court also explained that Congress had compared contemporary voting discrimination in covered and non-covered jurisdictions based on, *inter alia*, evidence revealing that covered jurisdictions accounted for more than twice their proportional share (adjusted for population) of Section 2 lawsuits with outcomes favorable to minority voters—even with Section 5's preclearance remedy in place in those covered jurisdictions. *Id.* at 288a-289a. The court therefore concluded that Congress's decision to maintain the existing scope of coverage (*i.e.*, jurisdictions previously covered that had not bailed out) was a constitutional

means of combating voting discrimination because it was "sufficiently related to the problem that it targets." *Id.* at 290a.

5. The court of appeals affirmed in a divided decision. Pet. App. 1a-110a.

a. The court of appeals relied on this Court's decision in *Northwest Austin* as the framework for its analysis, noting that the relevant inquiry is "whether section 5's burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem." Pet. App. 16a. Applying the *Boerne* framework, the court of appeals embarked on a "searching" and "probing" review of the legislative record, cognizant that Congress "acts at the apex of its power" when it "seeks to combat racial discrimination in voting." See *id.* at 19a-22a.

The court first addressed whether Section 5's burdens are justified by current needs. The court rejected petitioner's argument that the only evidence relevant to the inquiry is evidence of "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment." Pet. App. 24a. The court explained that the validity of Section 5 does not rest on "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965," noting that such behavior is "virtually impossible" with Section 5 in place. *Id.* at 24a-26a. The inquiry turns instead, the court explained, on "whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate." *Id.* at 25-26a. The court also rejected petitioner's argument that it could only consider evidence of direct and intentional interference with the right to register and vote, to

the exclusion of evidence of intentional vote dilution. *Id.* at 26a-27a. The court explained that such discrimination violates the Fourteenth Amendment and is therefore relevant to the inquiry given that Congress relied on both the Fourteenth and Fifteenth Amendments in reauthorizing Section 5. *Id.* at 27a-28a. The court further explained that "tactics like intentional vote dilution are in fact decades-old forms of gamesmanship" that discriminate against minority voters and were "well known" to Congress in 1965 and in 2006. *Id.* at 28a-29a.

Examining the legislative record, the court found substantial probative evidence of ongoing constitutional violations that justified Congress's conclusion "that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy." Pet. App. 29a. In particular, the court cited "[j]ust a few" of the "numerous" examples of "flagrant racial discrimination" and "overt hostility to black voting power by those who control the electoral process." *Id.* at 29a-31a. It also emphasized the more than 600 objections interposed by the Attorney General between 1982 and 2004, including at least 423 objections based on discriminatory purpose; more than 800 voting changes withdrawn or modified by covered jurisdictions in response to the Attorney General's "more information requests," from which Congress could reasonably infer at least some discriminatory intent; 653 successful Section 2 actions in covered jurisdictions, some with findings of intentional discrimination, providing relief from discriminatory practices in at least 825 counties; 622 separate dispatches of multiple observers to covered jurisdictions based on the likelihood of Fourteenth or Fifteenth Amendment violations; 105 successful Section 5 enforcement actions against recalcitrant jurisdictions;

and 25 unsuccessful judicial preclearance actions by covered jurisdictions. *Id.* at 31a-42a. The court further explained that Congress had reached a reasoned and well-supported judgment that Section 2 was inadequate to combat the serious and widespread intentional voting discrimination that persisted in covered jurisdictions. *Id.* at 45a-47a. Based on its independent examination of the record, the court therefore concluded that "overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance" and that "section 5's 'current burdens' are indeed justified by 'current needs.'" *Id.* at 48a.

The court next turned to whether Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets." Pet. App. 48a. The court emphasized that the answer "depends not only on section 4(b)'s formula, but on the statute as a whole, including its mechanisms for bail-in and bailout." *Ibid.* The court considered evidence before Congress comparing the degree of voting discrimination in covered and non-covered jurisdictions, including a study (known as the Katz study) of reported Section 2 decisions nationwide between 1982 and 2004. *Id.* at 49a; see also *id.* at 130a. When the data was adjusted to reflect population differences in covered and non-covered jurisdictions, the study showed that "the rate of successful section 2 cases in covered jurisdictions * * * is nearly four times the rate in non-covered jurisdictions," and that the overall success rates of Section 2 cases are higher in covered jurisdictions. *Id.* at 49a-51a. Those findings, the court concluded, indicate that "racial discrimination in voting remains 'concentrated in the jurisdictions singled out for preclearance.'" *Id.* at 49a (quoting *Northwest Austin*, 557 U.S. at 203). The court also took account of un-

published Section 2 decisions with outcomes favorable to minority plaintiffs, which revealed that 81% of successful Section 2 cases nationwide were filed in the covered jurisdictions. *Id.* 51a-55a. The court found that especially notable because one might expect to find fewer such suits in covered jurisdictions given that Section 5 would be expected to halt the implementation of discriminatory voting changes. *Id.* at 55a.

The court rejected petitioner's argument that it was irrational for Congress to maintain the criteria in Section 4(b) because it was tied to decades-old data and untied to the types of second-generation barriers with which Congress was primarily concerned in 2006. Pet. App. 55a-61a. The court explained that "Congress identified the jurisdictions it sought to cover—those for which it had 'evidence of actual voting discrimination,' [*South Carolina*], 383 U.S. at 329—and then worked backward, reverse-engineering a formula to cover those jurisdictions." *Id.* at 56a. Congress thus originally selected the criteria in Section 4(b) because they "served as accurate proxies for pernicious racial discrimination in voting," and the relevant question in 2006 therefore was whether the VRA "continues to identify the jurisdictions with the worst problems." *Id.* at 57a. In addition, the court explained that the statute's bail-in and bailout provisions further ensure that Section 5 applies only to those jurisdictions with the worst recent records of voting discrimination. *Id.* at 61a-65a. The court also pointed to this Court's decision in *Northwest Austin*, which greatly increased the number of jurisdictions eligible to apply for bailout, noting that 30% of successful bailout actions since 1965 had occurred in the three years between *Northwest Austin* and the court of appeals' decision. *Id.* at 63a. Considering the statute as a whole, the

court concluded that Section 4(b), together with the bail-in and bailout mechanisms, "continues to single out the jurisdictions in which discrimination is concentrated." *Id.* at 65a.

c. Judge Williams dissented, explaining that he would find Section 4(b)'s coverage provision unconstitutional even if Congress might be justified in continuing to impose Section 5's preclearance remedy in some covered jurisdictions. Pet. App. 70a, 78a, 104a. Judge Williams considered Section 5's "mandate[d] anticipatory review," its placement of the burden of proof on the jurisdiction submitting a change, and its substantive purpose and retrogression standards (as amended in 2006) in concluding that Section 5 imposes substantial burdens on covered jurisdictions. *Id.* at 71a-77a. Judge Williams also disagreed with Congress's judgment that Section 2 alone would be an inadequate means of remedying and deterring voting discrimination in covered jurisdictions. *Id.* at 77a-78a. After reviewing the legislative record, *id.* at 79a-102a, Judge Williams would have held that the 2006 reauthorization of Section 4(b) was not a congruent and proportional means of enforcing the guarantees of the Fourteenth and Fifteenth Amendment.

ARGUMENT

Petitioner asks this Court to review the court of appeals' determination that Congress validly acted pursuant to its constitutional authority to enforce the Fourteenth and Fifteenth Amendments when it reauthorized Sections 4(b) and 5 of the Voting Rights Act in 2006. Although that is certainly an important question of federal law, review by this Court is not warranted.

This Court has "acknowledge[d] the necessity of" Congress's use of "strong remedial and preventive measures" under its Fourteenth and Fifteenth Amend-

ment enforcement powers "to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne* v. *Flores*, 521 U.S. 507, 526 (1997). Section 5 of the VRA is the quintessential example of such a remedy. See *id.* at 525-527. Prior to the 2006 reauthorization, this Court had already upheld the constitutionality of Section 5 on four occasions, spanning multiple reauthorizations. *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282-285 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 177-178 (1980); *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337 (1966).

With regard to the latest reauthorization in 2006, the court of appeals correctly applied settled legal principles in reviewing the 15,000-page legislative record, determining that Congress correctly identified a pervasive constitutional problem, and concluding that Congress's reauthorization of Section 5 (including its maintenance of the existing coverage scope) was a congruent and proportional means of enforcing the Fourteenth and Fifteenth Amendments. In particular, the court of appeals conformed its analysis to the framework this Court set forth only three years ago in *Northwest Austin Municipal Utility District Number One* v. *Holder*, 557 U.S. 193 (2009), correctly rejecting petitioner's facial challenge. Petitioner did not seek en banc review of the panel decision. Review by this Court is not warranted.

1. The court of appeals correctly rejected petitioner's facial challenge to the constitutionality of Sections 4(b) and 5 of the VRA. From the outset of its analysis, the court of appeals embraced this Court's opinion in *Northwest Austin*, noting the Court's specific questions concerning assessment of the continued constitutionality

of Section 5, and tailoring its own analysis to account for those concerns. See Pet. App. 14a ("*Northwest Austin* sets the course for our analysis.").

a. Attempting first to answer this Court's question whether Section 5's current burdens are justified by current needs, see *Northwest Austin*, 557 U.S. at 202, the court of appeals engaged in an exhaustive review of the 15,000-page legislative record assembled by Congress in 2006. Pet. App. 9a, 24a-55a, 58a-64a. "Congress," this Court explained in *Northwest Austin*, "amassed a sizeable record in support of its decision to extend the preclearance requirements." 557 U.S. at 205. Applying the analysis described in this Court's decision in *Boerne*, the court of appeals correctly concluded that the evidence of voting discrimination in covered jurisdictions was more than enough to justify Congress's reliance on its authority to enforce the Fourteenth and Fifteenth Amendments in reauthorizing Section 5.[2]

Although the court of appeals expressly found that Congress appropriately relied on its authority to enforce the protections of both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5, see Pet. App. 27a-28a, petitioner makes no suggestion that the record was insufficient to justify Congress's reliance on its authority under Section 5 of the Fourteenth Amendment. If the only question petitioner would have this Court address is whether the 2006 reauthorization can

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[2] Although the government disagrees with the court of appeals that *Boerne* provides the appropriate framework for reviewing the constitutional questions presented in this case, that is not a reason to grant the petition for a writ of certiorari. As the court of appeals explained, the result in this case would have been the same if the court had applied the rationality standard of *South Carolina* rather than the congruence-and-proportionality framework of *Boerne*. Pet. App. 16a.

be justified under the Fifteenth Amendment, the resolution of that constitutional question will have no practical consequence because the statute has been upheld under the Fourteenth Amendment as well. Even with respect to Congress's exercise of its authority to enforce the Fifteenth Amendment, petitioner does not argue that, taken as a whole, the record before Congress in 2006 was insufficient to establish that voting discrimination continues to be widespread in covered jurisdictions. Petitioner instead attempts to pare down the relevant evidence based on a mistaken understanding of the Constitution and the history of Section 5 of the VRA.

First, petitioner argues (Pet. 24-25, 27-28) that, in considering whether to reauthorize Section 5 in 2006, Congress was limited to considering evidence that covered jurisdictions continued to engage in "systematic resistance to the Fifteenth Amendment." Pet. 27 (quoting *South Carolina*, 383 U.S. at 328). The court of appeals correctly rejected that argument, which misunderstands this Court's decision in *South Carolina* and Congress's original intent in enacting Section 5. The type of gamesmanship petitioner would have Congress rely on, to the exclusion of all other evidence of discrimination (even unconstitutional discrimination), was not Congress's sole focus in originally enacting Section 5 or the focus of this Court in upholding it. Although the Court in *South Carolina* noted that "some" jurisdictions had engaged in evasion of the Constitution's antidiscrimination mandates, it also acknowledged that it was the cumbersome nature of case-by-case adjudication that prompted Congress to adopt the preclearance requirement. 383 U.S. at 314-315, 327-328. To the extent gamesmanship did play a role in the adoption of Section 5, the preclearance mechanism constrains the opportuni-

ty for such behavior. See Pet. App. 25a. Jurisdictions must now demonstrate that new voting practices are not discriminatory *before* implementing them. Although Congress did find evidence of some covered jurisdictions' continued efforts to evade the nondiscrimination mandate of Section 5, see *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 273 (D.D.C. 2008),[3] the lack of additional evidence of that kind simply demonstrates that Section 5 is working in this regard.

Second, petitioner argues (Pet. 26) that, even within the narrow category of evidence of systematic resistance to the Fifteenth Amendment, Congress was limited to considering evidence of intentional interference with the right to register to vote and to cast a ballot, and could not rely on evidence of vote dilution. The court of appeals correctly rejected that argument, see Pet. App. 26a-29a, which finds no basis in law or logic. Even assuming petitioner were correct that the Fifteenth Amendment does not prohibit intentional acts of vote dilution on the basis of race—a point the government does not concede—it is well established that the Fourteenth Amendment does prohibit such action. It defies common sense to suggest that Congress was prohibited from considering evidence of unconstitutional discrimination by covered jurisdictions in deciding whether to

[3] For examples of Section 5 objections induced by recalcitrant jurisdictions' attempts to evade the force of successful Section 2 actions, see *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 330-332, 340-343, 429-434, 607-608, 678-680, 795-797, 812-814, 907-910, 1141-1144, 1207-1210, 1360-1361, 1384-1386, 1388-1390, 1402-1404, 1516-1521, 1538-1540, 1574-1579, 1730-1732, 1823-1825, 1833-1836, 1935-1937, 1957-1959, 2041-2043, 2212-2213, 2269-2271, 2300-2303, 2307-2311 (2005).

exercise its authority to enforce constitutional guarantees. This Court's statement in *South Carolina* that Section 5 is a valid means of enforcing the Fifteenth Amendment does not mean that it cannot also be a valid means of enforcing the Fourteenth Amendment.

As the court of appeals' exhaustive opinion reveals, the record before Congress of recent voting discrimination in covered jurisdictions is extensive. That record is "replete with direct and circumstantial evidence of contemporary voting discrimination by covered jurisdictions—voting discrimination that occurred despite the existence of Section 5." Pet. App. 270a. For example, Congress examined the Attorney General's enforcement of Section 5—just as previous Congresses had with the approval of this Court, see *City of Rome*, 446 U.S. at 181—and learned that the Attorney General had interposed more than 750 objections (administratively and in judicial preclearance actions) between 1982 and 2006, see H.R. Rep. No. 478 at 21-22, and that those objections had prevented implementation of more than 2400 discriminatory voting changes. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 104-2595 (2005) (*History, Scope, & Purpose*) (reproducing objection letters). Significantly, Congress learned that a sizeable portion of the Attorney General's objections (at least 423 between 1982 and 2004, see Pet. App. 33a) were interposed at least in part because a jurisdiction had acted with a discriminatory purpose. Intentional discrimination against minority voters is exactly the type of action the Fourteenth and Fifteenth Amendments empower Congress to prevent.

Examples of intentional discrimination blocked by Section 5 are numerous. As but one notable example, in 2001, the Attorney General interposed an objection regarding Kilmichael, Mississippi, after the all-white incumbent town governance tried to cancel an election shortly after black citizens had become a majority. *History, Scope, & Purpose* 1616-1619. When the citizens of Kilmichael finally voted, they elected the town's first African-American mayor and three African-American aldermen. H.R. Rep. No. 478, *supra*, at 36-37. There are numerous additional examples. See Pet. App. 29a-31a; see also, *e.g.*, *History, Scope & Purpose* 830-833 (2000 objection to redistricting plan for Webster County, Georgia, school board undertaken to "intentionally decreas[e] the opportunity of minority voters to participate in the electoral process" after majority black board was elected); *id.* at 1606-1612 (1998 objection to redistricting plan for Grenada, Mississippi, adopted with "purpose to maintain and strengthen white control of a City on the verge of becoming majority black").

Very recently, a three-judge court found that Texas engaged in intentional discrimination against its black and Latino citizens when it drew new boundaries for its congressional and State Senate districts following the 2010 decennial census. *Texas* v. *United States*, No. 11-1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), notice of appeal filed, Docket entry No. 234 (D.D.C. Aug. 31, 2012).[4] The court concluded, for example, that Texas

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[4] Although petitioner contends (Pet. 33-34) that the only evidence relevant to the continuing viability of Section 5 is the evidence that was presented to Congress in 2006, that assertion is at odds with this Court's approach to congressional-authority questions. The Court considers post-enactment evidence when determining whether Congress had the constitutional authority to promulgate a law, including

had redrawn congressional district lines to remove the home offices of numerous incumbent minority legislators from their districts without inflicting the same burden on even one Anglo legislator—a pattern the court determined was "unexplainable on grounds other than race." 2012 WL 3671924, at *20 (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). The court also noted that, "[i]n the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost." *Ibid.* (citing cases). Such a pattern confirms Congress's determination that Section 5 is still needed in covered jurisdictions.

In addition to considering evidence of intentional discrimination, Congress relied on other types and sources of evidence that previous Congresses had relied on to justify prior reauthorizations. Based on that evidence, the court of appeals concluded that Section 5's "'current burdens' are indeed justified by 'current needs.'" Pet. App. 48a; see *id.* at 29a-48a, 194a-196a, 198a-270a.[5] That material included evidence of the inadequacy of Section 2 as a remedy for voting discrimination in covered jurisdictions due to the cost and time-consuming nature of

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laws enacted pursuant to Congress's authority to enforce the Reconstruction Amendments. See *Tennessee* v. *Lane*, 541 U.S. 509, 524-525 & nn.6-8, 11, 13-14 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 733-734 & nn.6-9 (2003); cf. *Gonzales* v. *Raich*, 545 U.S. 1, 19 n.28, 21 n.31 (2005); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 143 n.6 (1948).

[5] Nor did the court of appeals fill any gap in the record by "speculat[ing]" about either Section 5's deterrent effect or "a latent desire [by covered jurisdictions] to discriminate." Pet. 27. The court reasonably deferred to Congress's predictive judgment, based on the record, that current levels of voting discrimination in the covered jurisdictions would be substantially worse without Section 5. Pet. App. 42a-44a; see *id.* at 252a-255a, 267-270a.

case-by-case adjudication. *Id.* at 45a-47a; see *id.* at 269a-270a, 277a-278a.

b. The court of appeals also correctly rejected petitioner's argument (see Pet. 29-35) that Congress acted irrationally in 2006 when it opted to maintain Section 5's existing geographic scope. As the court of appeals correctly explained, the coverage criteria included in Section 4(b) were "reverse-engineer[ed]" to describe in objective terms those jurisdictions Congress knew it wanted to cover because of their long histories of racial discrimination in voting. Pet. App. 56a-57a; see also *South Carolina*, 383 U.S. at 329; H.R. Rep. No. 439, 89th Cong., 1st Sess. 13-14 (1965); Pet. App. 285a-287a. The registration and turnout triggers included in Section 4(b) thus, along with the test-or-device requirement, simply provided a means of describing the jurisdictions with a history of "widespread and persistent discrimination in voting." *South Carolina*, 383 U.S. at 328.

When Congress considered whether to reauthorize Section 5 in 2006, it examined the current problem of voting discrimination in covered jurisdictions, *i.e.*, in jurisdictions described by the criteria in Section 4(b) that had not yet bailed out of coverage. And Congress determined that the record of discrimination in those jurisdictions continued to justify the imposition of Section 5's preclearance requirement. Because the purpose of Section 5 has always been to rid (or sufficiently ameliorate) widespread voting discrimination in particular areas, Congress did not devise new coverage triggers in 2006. See Pet. App. 285a-286a. Rather, it reasonably sought to determine whether indicia of ongoing voting discrimination in the currently covered jurisdictions warranted again extending Section 5.

Importantly, Congress retained the statutory bailout (and bail-in) provisions, such that a jurisdiction's status as a covered jurisdiction need not remain static. The constitutionality of the VRA's determination of covered jurisdictions can only be fairly judged in the context of the statute as a whole, including the statute's built-in mechanism for a jurisdiction to earn a change in its status from covered to non-covered (or vice-versa). Covered jurisdictions that can demonstrate they have complied with specific nondiscrimination requirements for a ten-year period can seek bailout. See 42 U.S.C. 1973a(c), 1973b(a); Supplemental Apps. A & B, *infra* (listing jurisdictions that have been subject to preclearance under Section 3(c) or have terminated coverage under Section 4(a)). This Court has consistently described bailout as a critical limiting feature contributing to Section 5's constitutionality, see *City of Boerne*, 521 U.S. at 533; *South Carolina*, 383 U.S. at 331, but petitioner disregards the statute's bailout feature. Moreover, this Court's recent decision in *Northwest Austin* significantly expanded the number of jurisdictions eligible to apply for bailout—an expansion that has already made a material difference in the rate at which nondiscriminating jurisdictions are opting out of Section 5, see Pet. App. 63a.[6] Section 5 is unique among legisla-

[6] Since the current bailout provision became effective in 1984, bailout has been granted in 36 cases (reaching a total of 190 jurisdictions). Half of those cases (accounting for 64% percent of bailed-out jurisdictions) have been filed since this Court's decision in *Northwest Austin*. Supplemental App. B at 4a-8a. Those 18 cases include the first ever bailouts from jurisdictions in Alabama, California, Georgia, and Texas; the first bailout from a jurisdiction in North Carolina since 1967; and the largest ever bailout, in terms of population, in Prince William County, Virginia. See *Florida* v. *United States*, No. 11-cv-1428, Docket entry No. 122-3, at ¶¶ 34 (D.D.C. June 25, 2012)

tion enacted pursuant to Congress's Reconstruction Amendments authority in that it both requires Congress to reconsider the propriety of the legislation on a regular basis, see 42 U.S.C. 1973b(a)(7) ("The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the [2006 reauthorization]."), and permits jurisdictions subject to the legislation to engage in self-help by demonstrating that they no longer deserve to be covered.

The court of appeals properly credited the evidence before Congress demonstrating that "[t]he evil that § 5 is meant to address"—racial discrimination in voting—is "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U.S. at 203. In weighing that question, Congress and the court of appeals looked to evidence of voting discrimination arising outside of the Section 5 process, including successful Section 2 suits, data regarding minority voter registration and turnout, federal observer coverage, and the continued existence of racially polarized voting at every level of government and in both partisan and nonpartisan elections. Pet. App. 49a-61a; see *id.* at 232a-248a, 287a-290a.

The data regarding Section 2 suits with outcomes favorable to minority plaintiffs is particularly notable. As the court of appeals explained, if voting discrimination were distributed evenly throughout the country, one would expect to find a smaller proportion of successful Section 2 cases in covered jurisdictions, where Section 5 would have blocked implementation of new discrimina-

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(three-judge court) (Berman Decl.). There are also two pending bailout actions in which the Attorney General has notified the plaintiff jurisdictions that he will consent to their bailout. See Supplemental App. B at 8a-9a.

tory voting practices. Pet. App. 55a. But Congress learned that 56% of all reported Section 2 decisions with outcomes favorable to minority plaintiffs arose in covered jurisdictions, even though covered jurisdictions contain less than 25% of the nation's population. *Id.* at 49a. As the court of appeals explained, "the rate of successful [reported] section 2 cases in covered jurisdictions * * * is nearly four times the rate in non-covered jurisdictions." *Id.* at 49a-50a. The absolute rate of success is also higher in covered jurisdictions, with "40.5 percent of published section 2 decisions in covered jurisdictions result[ing] in favorable outcomes for plaintiffs, compared to only 30 percent in non-covered jurisdictions." *Id.* at 51a.

That evidence is significantly fortified by taking into account unreported and settled Section 2 suits with outcomes favorable to minority plaintiffs. That information is contained in a study by the National Commission on the Voting Rights Act that was before Congress, and that was supplemented in this litigation with a study by Department of Justice historian Peyton McCrary.[7] Pet. App. 51a. It reveals that 81 percent of all Section 2 cases with outcomes favorable to minority plaintiffs were filed in the covered jurisdictions. *Ibid.* When the data are broken down by State, there is a very high correlation between the jurisdictions with the highest rate of

[7] Petitioner insists (Pet. 33-34) that the court of appeals erred in considering the post-enactment McCrary study. As discussed at note 4, *supra*, this Court has previously relied on evidence that was not before Congress in determining whether there is a sufficient record of constitutional violations to warrant exercise of Congress's enforcement authority under the Reconstruction Amendments. Moreover, most of the data that formed the basis of the McCrary study (61 of 99 cases) was before Congress in 2006. See C.A. J.A. 88-101, 110-116, 436-444.

such cases, adjusted for population, and the jurisdictions that are covered by Section 5. *Id.* at 51a-53a; see C.A. J.A. 436-444. And two of the non-covered States with a high rate of Section 2 outcomes favorable to minority plaintiffs—Arkansas and New Mexico—have at times been subject to preclearance through the bail-in mechanism. Pet. App. 52a; see Supplemental App. A, *infra*. That evidence reflects that the geographic scope of Section 5 continues to map onto the jurisdictions with the worst records of voting discrimination. And any covered jurisdiction that has ceased its discriminatory ways may take steps to terminate its coverage through bailout. See *South Carolina*, 383 U.S. at 331; 42 U.S.C. 1973b(a).

Petitioner argues (Pet. 32-33) that the court of appeals erred by relying on Section 2 outcomes that did not involve express findings of intentional discrimination. Some of the Section 2 cases Congress considered did include such findings of unconstitutional discrimination. See Pet. App. 232a. But because a court need not make an express finding of intentional discrimination in order to find that a voting practice violates Section 2, see 42 U.S.C. 1973—and because courts are appropriately reluctant to make constitutional findings when other grounds will suffice to resolve a particular case—it is unsurprising that there were not more judicial findings of unconstitutional conduct in the 2006 legislative record. And, although a finding of discriminatory effect does not always indicate an underlying discriminatory purpose, the "totality of the circumstances" test employed in Section 2 effects cases is designed to identify facially neutral practices that are likely to be intentionally discriminatory. See *Thornburgh* v. *Gingles*, 478 U.S. 30, 36-37 (1986).

In sum, the court of appeals carefully applied this Court's decisions in reviewing the expansive record of voting discrimination Congress considered in 2006. The court concluded that Section 5's current burdens on covered jurisdictions are justified by current needs, and that Section 5's preclearance remedy applies where it is most needed. Because Sections 4(b) and 5 are appropriate legislation to enforce the Fourteenth and Fifteenth Amendments, they do not violate the Tenth Amendment or Article IV of the Constitution, as petitioner argues (Pet. 1-2). This Court has explained that "the Reconstruction Amendments by their very nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez*, 525 U.S. at 282-283; see *id.* at 284-285; *Boerne*, 521 U.S. at 518; *City of Rome*, 446 U.S. at 179-180.

2. Petitioner is also incorrect in suggesting (Pet. 23-25) that the court of appeals' decision conflicts with decisions of this Court because the court of appeals mistakenly applied the type of "deferential review" applicable to "Article I authority or administrative agency actions" rather than the more stringent type of review applicable under *Boerne*'s congruence-and-proportionality analysis. As petitioner admits (Pet. 24), the court of appeals acknowledged its duty to engage in a "more searching" review of the legislative record in light of Section 5's unique features, see Pet. App. 21a. And the court did just that. The court of appeals carefully delved into the thousands of pages of evidence before Congress in order to ascertain "whether Congress had evidence of a pattern of constitutional violations on the part of the [covered jurisdictions] in th[e] area" of voting discrimination. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 729 (2003). In light of Section 5's distinct federal-

ism implications, the court decided to conduct a "more searching" review than this Court's review in the *Boerne* line of cases. Pet. App. 20a-21a.

In reviewing the legislative record, the court of appeals applied the well-settled principle that it is "easier for Congress to show a pattern of * * * constitutional violations," *Hibbs*, 538 U.S. at 736, when strict scrutiny applies because classifications subject to strict scrutiny are presumptively invalid. See Pet. App. 19a. When a state actor discriminates in voting on the basis of race, it infringes the most fundamental constitutional right on the most constitutionally suspect basis. See *ibid.*; see also *Tennessee* v. *Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting) ("Giving § 5 [of the Fourteenth Amendment] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions."). The court of appeals' recognition that such discriminatory actions are likely to be unconstitutional was faithful to this Court's teachings in the area of Congress's authority to enforce the Fourteenth and Fifteenth Amendments.

Although the court of appeals did not defer to Congress's determination that there remains a constitutional problem in need of a legislative solution, it did accord some deference to Congress on its choice of a legislative response to the identified problem. Pet. App. 47a. That, too, is perfectly in keeping with this Court's cases. It is the role of this Court to define what the Constitution prohibits. But once Congress identifies a serious constitutional problem in accordance with this Court's hold-

ings, the Constitution assigns to the legislature principal responsibility for determining how to remedy that problem. Congress is not without limits in its choices—the choice must at a minimum be rational and in the court of appeals' view must be a congruent and proportional response to the identified problem. But it is Congress that has expertise in choosing among available legislative options. This Court reaffirmed that principle in *Northwest Austin*, stating that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 557 U.S. at 205; see *Boerne*, 521 U.S. at 536; cf. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) ("I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States.").

That is particularly true—and deference is particularly warranted—when Congress "ha[s] already tried unsuccessfully to address" the relevant problem through other legislative means, *Hibbs*, 538 U.S. at 737, but has found the problem to be "difficult and intractable," *Kimel* v. *Florida Bd. of Regents,* 528 U.S. 62, 88 (2000). That is quintessentially the situation here. Before it resorted to the strong medicine of Section 5, Congress tried unsuccessfully to address the problem of voting discrimination in particular areas of the country through other means. See *South Carolina,* 383 U.S. at 313. Cognizant of the unusual nature of Section 5, Congress has required itself to periodically review the statute's operation. In the course of doing so, Congress has become exceedingly familiar with its implementation and has periodically amended aspects of its operation (by, *e.g.*, extending its geographic scope, liberalizing the bailout mechanism, and amending its substantive stand-

ard). In 2006, Congress again familiarized itself with the operation of the statute; 98 Senators and 390 Representatives then voted to extend Section 5's application in the currently covered jurisdictions for an additional 25 years, subject to a review by Congress after 15 years. The court of appeals applied settled legal principles in affirming Congress's nearly unanimous determination that Section 5 remains an appropriate means of enforcing the guarantees of the Fourteenth and Fifteenth Amendments.

3. Petitioner urges this Court to grant the petition for a writ of certiorari in order to review particular (sometimes hypothetical) applications of Section 5. See Pet. 19-20. Dissenting Judge Williams also expressed concern about particular (sometimes hypothetical) Section 5 objections. See Pet. App. 73a, 103a-110a.[8] Even if there were merit to those concerns, such case-specific issues would not provide a legitimate basis for sustaining a facial attack on the constitutionality of Section 5—and therefore provide no basis for granting the petition in this case.

For example, petitioner and Judge Williams both cite recent state laws requiring in-person voters to show

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[8] Certain of the burdens Judge Williams identified were based either on hypothetical applications of Section 5 that Judge Williams did not indicate had ever been found in covered or non-covered jurisdictions, or on a misunderstanding of the way in which Section 5 is and has been applied. See Pet. App. 73a (hypothesizing computer-based redistricting that does not take into account any communities of interest, racial or otherwise); *id.* at 103a (suggesting that covered jurisdictions are not permitted to adopt voter ID requirements); *id.* at 104a-110a (suggesting that Section 5 protects the right of "a minority group's majority" to elect its candidate of choice without taking into account whether there is material racially polarized voting in the relevant jurisdiction) (emphasis omitted).

identification in order to cast a vote. Pet. 20; Pet. App. 103a. Relying on this Court's decision in *Crawford* v. *Marion County Election Board*, 553 U.S. 181 (2008), both argue that it is unfair that non-covered jurisdictions can enact such laws while covered jurisdictions cannot. This premise is mistaken. Although the Attorney General has objected to voter-ID requirements recently enacted by two covered States (South Carolina and Texas), he has not objected to voter-ID requirements adopted by several other fully or partially covered States (*e.g.*, Arizona, Georgia, Louisiana, Michigan, New Hampshire, and Virginia). A three-judge court recently concluded that Texas's voter-ID law could not be implemented because the State failed to establish that it will not discriminate against minority voters. *Texas* v. *Holder*, No. 12-cv-128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012). But the Texas law at issue in that case significantly differs from the Indiana law at issue in *Crawford*. See *id.* at *13. Moreover, the Court in *Crawford* had no occasion to consider whether Indiana's law had the effect or intent of discriminating on the basis of race. See 553 U.S. at 202-203 (noting that the Court was considering the law's application to "all Indiana voters"). Because all States are subject to Section 2, all States are prohibited from adopting voter-ID requirements that have the purpose or effect of discriminating on the basis of race. It is true that jurisdictions covered by Section 5 bear the burden of demonstrating that their laws do not have such an intent or effect; but the shift of the burden that comes with Section 5 coverage is justified for the reasons set forth above.

Petitioner also complains (Pet. 20) that the State of Florida was required to preclear its changes to early voting hours while non-covered States are not required

to have early voting hours at all. Of course, covered jurisdictions are also not required to provide early voting hours. But once they do, they may not change existing practices if the change would be discriminatory. In any case, this Court may review any particular application of Section 5 on direct appeal from a three-judge court. The concerns expressed by petitioner and Judge Williams that Section 5 is being applied in an inappropriate manner—concerns the government vigorously disputes—are properly raised in challenges to particular applications rather than in this facial challenge to the constitutionality of an act of Congress.

4. Denying review of this facial challenge would enable development of a more complete record on the operation and effect of the statute's bailout mechanism following this Court's decision in *Northwest Austin*. As explained, the ability of covered jurisdictions to make use of the bailout mechanism has increased substantially in the wake of that decision. See pp. 24-25 & n.6, *supra*. An understanding of the way in which the bailout mechanism works in practice is critical to an informed assessment of the constitutionality of the statutory coverage provision. Insofar as the Court may be inclined in the future to grant review of the question of the constitutionality of the 2006 reauthorization, awaiting review until a more fulsome record on bailouts develops in the wake of *Northwest Austin* would facilitate a more informed analysis of the statute's continued constitutionality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

Jurisdictions That Have Been Ordered by a District Court to Comply With Preclearance Requirement Pursuant to Bail-in Mechanism in Section 3(c) of the Voting Rights Act

1. Thurston County, Nebraska, see *United States* v. *Thurston Cnty.*, C.A. No. 78-0-380 (D. Neb. May 9, 1979);
2. Escambia County, Florida, see *McMillan* v. *Escambia Cnty.*, C.A. No. 77-0432 (N.D. Fla. Dec. 3, 1979);
3. Alexander County, Illinois, see *Woodring* v. *Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983);
4. Gadsden County School District, Florida, see *N.A.A.C.P.* v. *Gadsden Cnty Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984);
5. State of New Mexico, see *Sanchez* v. *Anaya*, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984);
6. McKinley County, New Mexico, see *United States* v. *McKinley Cnty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986);
7. Sandoval County, New Mexico, see *United States* v. *Sandoval Cnty.*, C.A. No. 88-1457-SC (D.N.M. May 17, 1990);
8. City of Chattanooga, Tennessee, see *Brown* v. *Board of Comm'rs of City of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990);

9. Montezuma-Cortez School District RE01, Colorado, see *Cuthair* v. *Montezuma-Cortez Sch. Dist. No. RE-1*, No. 89-C-964 (D. Colo. Apr. 8, 1990);

10. State of Arkansas, see *Jeffers* v. *Clinton*, 740 F. Supp. 585 (E.D. Ark. May 16, 1990), appeal dismissed, 498 U.S. 1129 (1991);

11. Los Angeles County, California, see *Garza & United States* v. *Los Angeles Cnty.*, C.A. Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 25, 1991);

12. Cibola County, New Mexico, see *United States* v. *Cibola Cnty.*, C.A. No. 93-1134-LH/LFG (D.N.M. Apr. 21, 1994);

13. Socorro County, New Mexico, see *United States* v. *Socorro Cnty.*, C.A. No. 93-1244-JP (D.N.M. Apr. 11, 1994);

14. Alameda County, California, see *United States* v. *Alameda Cnty.*, C.A. No. C95-1266 (SAW) (N.D. Cal. Jan. 22, 1996);

15. Bernalillo County, New Mexico, see *United States* v. *Bernalillo Cnty.*, C.A. No. 93-156-BB/LCS (D.N.M. Apr. 22, 1998);

16. Buffalo County, South Dakota, see *Kirke* v. *Buffalo Cnty.*, C.A. No. 03-CV-3011 (D.S.D. Feb. 10, 2004);

17. Charles Mix County, South Dakota, see *Blackmoon* v. *Charles Mix Cnty.*, C.A. No. 05-CV-4017 (D.S.D. Dec. 4, 2007); and

18. Village of Port Chester, New York, see *United States* v. *Village of Port Chester*, C.A. No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006).

APPENDIX B

Covered Jurisdictions That Have Successfully Terminated Section 5 Coverage Pursuant to Bail-out Mechanism in Section 4(a) of the Voting Rights Act

Jurisdictions Successfully Bailed Out of Section 5 Coverage Before August 5, 1984

1. Wake County, North Carolina, see *Wake Cnty.* v. *United States*, No. 1198-66 (D.D.C. Jan. 23, 1967);
2. Curry, McKinley, and Otero Counties, New Mexico, see *New Mexico* v. *United States*, No. 76-0067 (D.D.C. July 30, 1976);
3. Towns of Cadwell, Limestone, Ludlow, Nashville, Reed, Woodland, Connor, New Gloucester, Sullivan, Winter Harbor, Chelsea, Sommerville, Carroll, Charleston, Webster, Waldo, Beddington, and Cutler, Maine, see *Maine* v. *United States*, No. 75-2125 (D.D.C. Sept. 17, 1976);
4. Choctaw and McCurtain Counties, Oklahoma, see *Choctaw and McCurtain Cntys.* v. *United States*, No. 76-1250 (D.D.C. May 12, 1978);
5. Campbell County, Wyoming, see *Campbell Cnty.* v. *United States*, No. 82-1862 (D.D.C. Dec. 17, 1982);
6. Towns of Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and Wrentham, Massachusetts, see *Massachusetts* v. *United States*, No. 83-0945 (D.D.C. Sept. 29, 1983);

7. Towns of Groton, Mansfield, and Southbury, Connecticut, see *Connecticut* v. *United States*, No. 83-3103 (D.D.C. June 21, 1984);

8. El Paso County, Colorado, see *Board of Cnty. Comm'rs* v. *United States*, No. 84-1626 (D.D.C. July 30, 1984);

9. Honolulu County, Hawaii, see *Waihee* v. *United States*, No. 84-1694 (D.D.C. July 31, 1984); and

10. Elmore County, Idaho, see *Idaho* v. *United States*, No. 82-1778 (D.D.C. July 31, 1984).

Jurisdictions Successfully Bailed Out of Section Coverage After August 5, 1984

1. City of Fairfax, Virginia (including City of Fairfax School Board), see *City of Fairfax* v. *Reno*, No. 97-2212 (D.D.C. Oct. 21, 1997);

2. Frederick County, Virginia (including Frederick County School Board; Towns of Middletown and Stephens City; and Frederick County Shawneeland Sanitary District), see *Frederick Cnty.* v. *Reno*, No. 99-941 (D.D.C. Sept. 10, 1999);

3. Shenandoah County, Virginia (including Shenandoah County School Board; Towns of Edinburg, Mount Jackson, New Market, Strasburg, Toms Brook, and Woodstock; Stoney Creek Sanitary District; and Toms Brook-Maurertown Sanitary District), see *Shenandoah Cnty.* v. *Reno*, No. 99-992 (D.D.C. Oct. 15, 1999);

4. Roanoke County, Virginia (including Roanoke County School Board and Town of Vinton), see *Roanoke Cnty.* v. *Reno*, No. 00-1949 (D.D.C. Jan. 24, 2001);

5. City of Winchester, Virginia, see *City of Winchester* v. *Reno*, No. 00-3073 (D.D.C. June 1, 2001);

6. City of Harrisonburg, Virginia (including Harrisonburg City School Board), see *City of Harrisonburg* v. *Reno*, No. 02-289 (D.D.C. Apr. 17, 2002);

7. Rockingham County, Virginia (including Rockingham County School Board and Towns of Bridgewater, Broadway, Dayton, Elkton, Grottoes, Mt. Crawford, and Timberville), see *Rockingham Cnty.* v. *Reno*, No. 02-391 (D.D.C. May 24, 2002);

8. Warren County, Virginia (including Warren County School Board and Town of Front Royal), see *Warren Cnty.* v. *Ashcroft*, No. 02-1736 (D.D.C. Nov. 26, 2002);

9. Greene County, Virginia (including Greene County School Board and Town of Standardsville), see *Greene Cnty.* v. *Ashcroft*, No. 03-1877 (D.D.C. Jan. 19, 2004);

10. Pulaski County, Virginia (including Pulaski County School Board and Towns of Pulaski and Dublin), see *Pulaski Cnty.* v. *Gonzales*, No. 05-1265 (D.D.C. Sept. 27, 2005);

11. Augusta County, Virginia (including Augusta County School Board and Town of Craigsville), see *Augusta Cnty.* v. *Gonzales*, No. 05-1885 (D.D.C. Nov. 30, 2005);

12. City of Salem, Virginia, see *City of Salem* v. *Gonzales*, No. 06-977 (D.D.C. July 28, 2006);

13. Botetourt County, Virginia (including Botetourt County School Board and Towns of Buchanan, Fincastle, and Troutville), see *Botetourt Cnty.* v. *Gonzales*, No. 06-1052 (D.D.C. Aug. 28, 2006);

14. Essex County, Virginia (including Essex County School Board and Town of Tappahannock), see *Essex Cnty.* v. *Gonzales*, No. 06-1631 (D.D.C. Jan. 31, 2007);

15. Middlesex County, Virginia (including Middlesex County School Board and Town of Urbanna), see *Middlesex Cnty.* v. *Gonzales*, No. 07-1485 (D.D.C. Jan. 7, 2008);

16. Amherst County, Virginia (including Town of Amherst), see *Amherst Cnty.* v. *Mukasey*, No. 08-780 (D.D.C. Aug. 13, 2008);

17. Page County, Virginia (including Page County School Board and Towns of Luray, Stanley, and Shenandoah), see *Page Cnty.* v. *Mukasey*, No. 08-1113 (D.D.C. Sept. 15, 2008);

18. Washington County, Virginia (including Washington County School Board and Towns of Abington, Damascus, and Glade Spring), see *Washington Cnty.* v. *Mukasey*, No. 08-1112 (D.D.C. Sept. 23, 2008);

19. Northwest Austin Municipal Utility District Number One, Texas, see *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, No. 06-1384 (D.D.C. Nov. 3, 2009);

20. City of Kings Mountain, North Carolina, see *City of Kings Mountain* v. *Holder*, No. 10-1153 (D.D.C. Oct. 22, 2010);

21. City of Sandy Springs, Georgia, see *City of Sandy Springs* v. *Holder*, No. 10-1502 (D.D.C. Oct. 26, 2010);

22. Jefferson County Drainage District Number Seven, Texas, see *Jefferson Cnty. Drainage Dist. No. Seven* v. *Holder*, No. 11-461 (D.D.C. June 6, 2011);

23. Alta Irrigation District, California, see *Alta Irrigation Dist.* v. *Holder*, No. 11-758 (D.D.C. July 15, 2011);

24. City of Manassas Park, Virginia, see *City of Manassas Park* v. *Holder*, C.A. No. 11-749 (D.D.C. Aug. 3, 2011);

25. Rappahannock County, Virginia (including Rappahannock County School Board and Town of Washington), see *Rappahannock Cnty.* v. *Holder*, C.A. No. 11-1123 (D.D.C. Aug. 9, 2011);

26. Bedford County, Virginia (including Bedford County School Board), see *Bedford Cnty.* v. *Holder*, No. 11-499 (D.D.C. Aug. 30, 2011);

27. City of Bedford, Virginia, see *City of Bedford* v. *Holder*, No. 11-473 (D.D.C. Aug. 31, 2011);

28. Culpeper County, Virginia (including Culpeper County School Board and Town of Culpeper), see *Culpeper Cnty.* v. *Holder*, No. 11-1477 (D.D.C. Oct. 3, 2011);

29. James City County, Virginia (including Williamsburg-James City County School Board), see *James City Cnty.* v. *Holder*, No. 11-1425 (D.D.C. Nov. 9, 2011);

30. City of Williamsburg, Virginia, see *City of Williamsburg* v. *Holde*r, No. 11-1415 (D.D.C. Nov. 28, 2011);

31. King George County, Virginia (including King George County School District), see *King George Cnty.* v. *Holder*, No. 11-2164 (D.D.C. April 5, 2012);

32. Prince William County, Virginia (including Prince William County School District and Towns of Dumfries, Haymarket, Occoquan, and Quantico), see *Prince William Cnty.* v. *Holder*, No. 12-14 (D.D.C. April 10, 2012);

33. City of Pinson, Alabama, see *City of Pinson* v. *Holder*, No. 12-255 (D.D.C. April 20, 2012);

34. Wythe County, Virginia (including Wythe County School Board and Towns of Rural Retreat and Wytheville), see *Wythe Cnty.* v. *Holder*, No. 12-719 (D.D.C. June 18, 2012);

35. Grayson County, Virginia (including Grayson County School Board and Towns of Fries, Independence, and Troutdale), see *Grayson Cnty.* v. *Holder*, No. 12-718 (D.D.C. July 20, 2012); and

36. Merced County, California (including approximately 84 subjurisdictions), see *Merced Cnty.* v. *Holder*, No. 12-354 (D.D.C. Aug. 31, 2012).

Bailout Actions Currently Pending

1. Carroll County, Virginia (including Carroll County School District and Town of Hillsville), see *Carroll Cnty.* v. *Holder*, No. 12-1166 (D.D.C.), complaint filed July 17, 2012; and
2. Craig County, Virginia (including Craig County School District and Town of New Castle), see *Craig Cnty.* v. *Holder*, No. 12-1179 (D.D.C.), complaint filed July 18, 2012.