No. 12-96

In the Supreme Court of the United States

Shelby County, Alabama,
Petitioner,

v.

Eric H. Holder Jr., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of *Amicus Curiae* Cato Institute In Support of Petitioner

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January 2, 2013

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*.

Shelby County implicates a constitutional overreach too long suffered in jurisdictions where the federal government found, 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 ("VRA"). This provision now only perpetuates the very race-based political decisions it was intended to stop. "Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory." *Nw. Austin Mun. Util. Dist. No. One v. Holder* ("*NAMUDNO*"), 557 U.S. 193, 226 (2009) (Thomas, J., concurring in part and dissenting in part).

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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 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." *NAMUDNO*, 557 U.S. at 201. Its modern application, however, is problematic to say the least. Sections 2 and 5 conflict with each other, the Fourteenth and Fifteenth Amendments, and with the orderly implementation of fair elections. Jurisdictions covered by Section 5 are constantly subject to utterly predictable litigation, the outcome of which is often dependent on judges' views of how to satisfy both Section 5's race-conscious mandates and the Constitution's command to treat people equally under the law. These tensions—constitutional, statutory, and practical—undermine the VRA's legacy of vindicating the voting rights of all citizens.

Moreover, Section 5's preclearance system is an anachronism. As this Court found four terms ago, "[t]he 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." *Id.* at 203. For example, the racial gap in voter registration and turnout is lower in the states originally covered by Section 5 than 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 South (and some counties in three others), plus Alaska, Arizona, and counties or townships in other states ranging from New Hampshire to South Dakota. As *amicus*'s counsel has

noted in previous briefs and other writings, (only) three New York counties are covered, all boroughs in New York City. *See*, *e.g.*, Ilya Shapiro, *The Court Should Reconsider the Constitutionality of the VRA's Outmoded and Unworkable Section 5*, ScotusBlog (Sept. 11, 2012), http://www.scotusblog.com/2012/09/online-vra-symposium-the-court-should-reconsider-the-constitutionality-of-the-vras-outmoded-and-unworkable-section-5. Perhaps the four members of this Court who hail from that fair city know something that the rest of us don't.

All of this mess stems from the presumption that election laws in certain places are illegal until proven otherwise. But three generations of federal intrusion 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 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).

In *NAMUDNO*, this Court warned Congress of its "serious misgivings about the constitutionality of Section 5." 557 U.S. at 202 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Congress has done nothing to fix the apparent defects and so the Court cannot avoid addressing its doubts any longer. It is now time for the Court to declare Section 5 unconstitutional.

ARGUMENT

I. SECTION 5 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.

When Congress enacted the VRA, Jim Crow was not going quietly into the night. Enforcing the Fifteenth Amendment required an overwhelming exercise of federal power—radical legislation that in-

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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 August 2009 posts about the book at the Volokh Conspiracy blog.

volved 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. at 926).

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). His point was valid, 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. Such a temporary distortion was justified in 1965, but 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, commensurate with its success. Even as black political participation increased, federal power over local affairs grew.

In the 1970s, the government moved more places into Section 5's clutches. An arbitrary, careless change in the statistical trigger, for example, made those 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. Indeed, this Court had already read Section 5 to provide a remedy for vote dilution that squared with the VRA's structure and delegated to distant DOJ attorneys a limited task: stopping the institution of new electoral arrangements that undermined the 1965 Act. *Beer v. United States*, 425 U.S. 130, 141 (1976).

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.

Blacks thus came to be treated as politically different. The VRA was interpreted (and later amended) to mandate the drawing of legislative districts effectively reserved for black candidates. Federal officials' power 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.

Even if race-conscious maps were once temporarily justified to overcome systemic racism, that experience does not justify today's racial gerrymanders. Serious costs have accompanied 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.

That is, racial gerrymandering keeps "RACE, RACE, RACE," at the forefront of our minds. T. Alexander Aleinikoff & Samual Issarcharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich. L. Rev. 588, 610 (1993). Such racial sorting creates advantaged and disadvantaged

groups; some that are privileged and some that are subordinate. The majority-minority districts which the DOJ demands in Section 5 cases become safe for minority candidates but have also turned white voters into what voting rights scholars call "filler people." *Id*. at 601.

In short, America has experienced an amazing transformation since 1965. The costs of race-conscious districting now far outweigh their benefits—and they represent an obstacle to political equality. Black political progress would likely be greater if race-conscious districting were viewed as a temporary remedy for unmistakably racist electoral practices (the lesser of various evils) rather than a tool for "racially proportionate" representation (which cannot be constitutionally justified).

3. The Justice Department's Complicity in Perverting Section 5

Regardless of Congress's intent, jurisdictions seeking Section 5 preclearance quickly began filing most requests with the Justice Department rather than the D.C. district court. DOJ was expected to function as a surrogate court, using legal standards from court opinions in a process akin to administrative decision-making. The reality has been quite different, as *Miller v. Johnson*, 515 U.S. 900, demonstrates.

Miller tells the remarkable story of a lawless Republican DOJ that forced Georgia to accept a districting plan drawn by the ACLU in its capacity as advocate for black state legislators. The ACLU's "max-black" plan served GOP interests by "bleaching" districts of black (and presumably Democratic) voters.

Georgia's redistricting committees increased the number of majority black congressional districts from

one to two—even though the state had no obligation to give minorities more "safe" districts. After all, the point of preclearance was to prevent states from depriving blacks of the gains that basic enfranchisement promised, not to ensure a "fair" number of seats. *Beer*, 425 U.S. at 140. Georgia plainly met the law's demands, but DOJ still rejected its maps, informing the state that it had not adequately explained its failure to create a third majority-minority district. This "third district," however, would have connected neighborhoods in metropolitan Atlanta to black residents on the coast, 260 miles away and "worlds apart in culture." *Miller v. Johnson*, 515 U.S. at 908. "In short," this Court continued, "the social, political and economic makeup of the Eleventh District [told] a tale of disparity, not community." *Id.*

The preclearance process was not supposed to work as it did in Georgia and elsewhere during the Reagan-Bush years. By 1991, the vision of DOJ as a more "accessible" court had completely broken down. The Civil Rights Division's Voting Rights Section was operating as "a law office for minority plaintiffs, working as partners with civil rights advocacy groups." Abigail Thernstrom, *DOJ: A Law Office Working for Minority Plaintiffs*, The Volokh Conspiracy (Aug.19, 2009), http://volokh.com/2009/08/19/doj-a-law-office-working-for-minority-plaintiffs. *See also* Roger Clegg, *The Future of the Voting Rights Act after* Bartlett *and* NAMUDNO, 2008-2009 Cato Sup. Ct. Rev. 35, 50 (2009) ("[C]ollaboration between liberal federal bureaucrats and activist federal judges . . . has replaced a colorblind ideal with politically correct color consciousness.")

4. Congress Exacerbates the Anachronism

Section 5 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 the provision 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 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) would remain unable to participate in political life without electoral set-asides—and that those jurisdictions should not run elections without federal oversight.

To justify Section 5's expansion of federal power as "appropriate" Fifteenth Amendment legislation, Congress identified second-generation barriers that it said still warranted federal intervention. "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. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 2(b)(1)(2), 120 Stat. 577 (2006).

Yet the reauthorization process failed to produce evidence to support continued federal intrusion; its reasoning was built on isolated incidents and specu-

lation. The natural inference to draw is that Congress could not have established *Katzenbach*-compliant findings precisely because the VRA had worked!

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. Abigail Thernstrom, *Voting Rights—and Wrongs* 203 (2009). The bottom line is indisputable: Section 5 states elect black candidates at higher rates than elsewhere.

Without the threat of federal interference, would state legislatures feel free to engage in mischief? It seems wildly improbable, even in the Deep South. As Justice Thomas put it in *NAMUDNO*,

> There is no evidence that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting. Without such evidence, the charge can only be premised on outdated assumptions about racial attitudes in the covered jurisdictions.

557 U.S. at 226 (Thomas, J., concurring in part and dissenting in part).

This Court recognized in *NAMUDNO*, that "things have changed in the South" and declared that "conditions . . . relied upon in upholding the statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved." 557 U.S. at 202. 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.). Widespread 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. Thernstrom, *Voting Rights—and Wrongs* 11. *See also NAMUDNO*, 557 U.S. at 227 (Thomas, J., concurring in part and dissenting in part) (surveying statistical evidence).

Indeed, 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, Black Panther intimidation, etc.—bear no relation to those that plagued us in 1965. Nevertheless, the VRA's most radical provisions survive, addressing yesterday's problems. The South has changed, America has changed, and it's time for this Court to change constitutional understandings regarding Section 5 as well.

B. Section 5 Conflicts with Important Constitutional Principles[3]

Congress's 2006 reauthorization of Section 5—and its antiquated coverage formula—was not only detached from America's new reality, it exacted substantial costs to federalism and distorted the principles of equal protection under the laws. Congress went far beyond enforcing voting rights and, perversely, encouraged racial gerrymandering.

1. Federalism Costs

Instead of removing what was supposed to be a temporary intrusion on federalism, Congress's 2006 VRA reauthorization heightened the tension between the states and federal government. That is, the Constitution protects the primary powers of the states to regulate elections. *Georgia v. Ashcroft*, 539 U.S. 461, 461-62 (2003). 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

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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).

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 many cases acknowledging Section 5's "intrusion into sensitive areas of state and local policymaking." 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 basic tenets of federalism in two principal ways. The first lies in the preclearance regime's mandate for anticipatory review. Mandatory preclearance acts as a prior restraint on election law, an area generally reserved to the states. Also, anticipatory review ensnares every state and local electoral rule proposed by a covered jurisdiction. To obtain preclearance a covered jurisdiction must prove not just the absence of "any discriminatory purpose" but that the proposed voting change will not detract from a minority group's "ability to elect" its preferred candidate. 42 U.S.C. § 1973c (2006). Under this regime, whether the proposal affects a voter's actual exercise of the right to vote is no longer the ultimate question. Covered jurisdictions cannot legislate based on perfectly valid—even compelling—interests if there is some incidental effect on racial balancing.

Similarly, the need for covered jurisdictions to "prove the absence of a discriminatory purpose" conjures up memories of DOJ's campaign of "maximizing majority-minority districts at any cost." *Shelby County v. Holder*, 679 F.3d 848, 888 (D.C. Cir. 2012) (Williams, J., dissenting). As Judge Williams commented below, this standard, "at worst restored the DOJ's 'implicit command that states engage in presumptively unconstitutional race-based districting'" *id.* at 885 (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.* ("*Bossier Parish II*"), 528 U.S. 320, 336 (2000)).

The second federalism violation 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 and, therefore, completely arbitrary. *NAMUDNO*, 557 U.S. at 203 ("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*, 679 F.3d at 885 (Williams, J., dissenting). Congress did not even review the coverage formula when it reauthorized the VRA in 2006.

And not only does the outdated coverage formula itself strain our federalism, DOJ has not treated the states subject to Section 5 equally. For example, Shelby County and jurisdictions within it have submitted more than 680 preclearance filings since the VRA's inception. By contrast, New Hampshire's 10 covered jurisdictions have failed to make submissions

for at least 20 voting changes (and perhaps as many as 90). While Shelby County was ruled ineligible for bailout for its failure to submit *one* voting change, DOJ fast-tracked New Hampshire's bailout requests! *See* Hans von Spakovsky, *Crooked Justice*, National Review Online (Dec. 4, 2012), http://www.nationalreview.com/articles/334688/crooked-justice-hans-von-spakovsky.

2. Unequal Protection

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 Constitu-

tion, no racial group should be assured "safe" districts 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, continual efforts to invent new justifications for Section 5 sow 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 v. Johnson*, 521 U.S. 74 (1997). The segregated districts that racial gerrymandering creates have led to uncompetitive elections, increased polarization (racial and ideological), and the insulation of Republican candidates 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).

3. Racially Disparate Purpose vs. 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 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, 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).

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 im-

pact was at the forefront of another civil rights case that this Court decided four 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 citizens—will be challenged if they have a racially disparate impact. And jurisdictions are pressed to use racially segregated districting to ensure proportionate election results and thus engage in the very discrimination that the law forbids!

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In *NAMUDNO*, the Court declared that "current burdens . . . must be justified by current needs," 557 U.S. at 203. Meanwhile, Section 5's coverage formula should be "sufficiently related to the problem that it targets" to warrant abrogation of the equal sovereignty of states. *Id*. Congress's 2006 findings 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 not addressed the *NAMUDNO*'s concerns, but DOJ continues to interfere with benign electoral reforms.

Because the burdens imposed by Section 5 are not justified by "current needs," they fail to satisfy this Court's requirements for "appropriate" enforcement legislation as required by the Fourteenth and Fifteenth Amendments, and *Katzenbach*.

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.

Shelby County again brings 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.* ("*Bossier Parish I*"), 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 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, *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 and legislatures in covered jurisdictions 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. Murphy*, 347 F.3d 346 (1st Cir. 2003).

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. 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." *Perez v. Perry*, 835 F. Supp. 2d 209, 227 (W.D. Tex. 2011) (Smith, J., dissenting).

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 precleared, 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." *Ashcroft*, 539 U.S. at 477-78 (citing *Bossier Parish I*, 520 U.S. at 477). The distinction *Bossier Parish I* 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 (citing *Bossier Parish I*, 520 U.S. at 478). Is that a meaningful difference?

Indeed, even if it were clear that the analysis under the two sections is different, how those analyses 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.'" *Id.* 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. Section 5's selective applicability pre-

cludes the establishment of nationwide districting standards, confounding lower courts and producing different, often contradictory, treatment of voting rights in different states—in large part because Sections 2 and 5 themselves conflict with each other.

This confusing precedent leaves little hope for the evenhanded administration of justice across the nation—and the turmoil is needless. Indeed, Sections 2 and 5 stem from the same constitutional provision, the Fifteenth Amendment. Section 2 meant to ensure that the Amendment was enforced nationwide, while Section 5 kept a closer eye on states that were most apt to violate it in the 1960s. But the contradictory precedent that has emerged creates a near-impossible task for courts. The lack of clarity regarding the interplay of Sections 2 and 5 also means that constitutionally permitted districting is prohibited (in some states) by a statute passed to enforce the same constitutional guarantees. 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 burdens, that bloody conflict should be resolved in favor of Section 2. In affording aggrieved litigants a private right of action, Section 2 provides the appropriate means for enforcing the Fifteenth Amendment and remedying any state practice which "results in a denial or abridgment of voting rights," 42 USC § 1973a. 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.

Historically, case-by-case enforcement was designed to be the principal remedial mechanism for the enforcement of the VRA. In 1966, however, the *Katzenbach* Court ruled that Section 5's extraordinary federalism burdens were necessary, at least as an emergency measure, to effectively fight such "widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328. Yet in the absence of "exceptional conditions" and "unique circumstances"—*i.e.*, "intentional discrimination so pervasive that case-by-case enforcement of the VRA would be impossible," *id.* at 308—Section 5 would not have been an "appropriate" constitutional remedy. Today, "the extensive pattern of discrimination that led the Court to previously uphold Section 5 as [appropriate enforcement of] the Fifteenth Amendment no longer exists." *NAMUDNO*, 557 U.S. at 226 (Thomas concurring in part and dissenting in part). 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." *Id.* at 202.

Despite the VRA's extensive record in advancing racial equality in America, apparently the court below believes that the Jim Crow-era "exceptional conditions" and "unique circumstances" are still so pervasive that individualized enforcement under Section 2 is impossible—and that Section 2 cannot duplicate Section 5's purported "deterrent effect." The D.C. Circuit believes that Congress has produced sufficient evidence to conclude that discrimination remains so widespread and pervasive today that Section 2 is in-

adequate. Yet, Congress conceded, "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." See H. R. Rep. No. 109-478, at 12 (2006). Congress thus had to offer a new justification to explain why Section 2 remains inadequate.

Section 5 was a generalized remedial mechanism once necessary for turning the tide against such "systematic resistance to the Fifteenth Amendment" and defeating "obstructionist tactics," *Katzenbach*, 383 U.S. at 328, but 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.

Rather than rely on the evidentiary standard articulated by the *Katzenbach* Court, Congress reauthorized Section 5 by contriving a new rationale for this "uncommon exercise of congressional power"—the existence of "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." VRA Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 2(b)(2). Thus, the evidence that Congress produced was not "probative of the type of purposeful discrimination" that compelled Congress to enact Section 5. *NAMUDNO*, 557 U.S. at 228 (Thomas, J., concurring in part and dissenting in part). Other evidence it produced had no bearing on the original justifications for Section 5 and "is plainly insufficient to sustain such an extraordinary remedy." *Id*. "[E]vidence of 'second generation barriers' cannot compare to the prevalent and pervasive voting discrimination of the 1960's." *Id*.

The Court of Appeals scoured the congressional record, citing several examples of discriminatory voting practices as evidence that Section 5's comprehensive remedy is still necessary. Apart from the objections that some congressional findings are more speculative than fact-based, the reality is that

> Perfect compliance with the Fifteenth Amendment's substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.

Id. at 229. All of the evidence of voter discrimination relied on by Congress and the Court of Appeals to conclude that Section 2 is inadequate is discrete and limited, not systemic and widespread. Congress failed to produce any evidence that discriminatory voting is so endemic in nationwide voting practices that it warrants the extraordinary remedy that *Katzenbach* warily approved as a temporary emergency measure nearly 50 years ago.

The Court of Appeals misleadingly concluded that that whether Section 2 is inadequate is Congress's decision, not the Court's. *Shelby County*, 679 F.3d at 873. It is emphatically the province of the judiciary, however, to say what the law is and whether Section 5's constitutional burden is "appropriate" given the alternative of Section 2 enforcement. In upholding Section 5, the *Katzenbach* Court refused to simply de-

fer to Congress' assertion that such a radical measure was required to enforce the Fifteenth Amendment. Why should Congress deserve more deference now, half a century later? As in *Katzenbach*, this Court must conduct its own analysis to ascertain whether Section 5's extraordinary remedy is still appropriate. That is a constitutional question, not a political one, so deference to Congress would only reinforce the chaotic state of VRA jurisprudence and maintain the same battles in state legislatures and federal courts.

Another objection raised by the Court of Appeals involves the cost and expediency of VRA enforcement under Section 2. The lower court was concerned that plaintiffs with limited resources would be unable to litigate fact-intensive cases. 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.* Indeed, Section 2 was no constraint to a series of challenges in the 1980s to at-large voting districts in various Alabama counties. The Section 2 litigants were ultimately successful in obtaining consent decrees against most of the defendants, including Shelby County. *See Shelby County v. Holder*, 811 F. Supp.2d 424, 442-44 (D.D.C. 2011) (describing *Dillard* litigation, including the Section 2 decree that still applies to Shelby County).

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." *Shelby* County, 679 F.3d at 888 (Williams, J., dissent-

ing) (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 warranted because other legislation exists to fully enforce the Fifteenth Amendment's guarantees: Section 2.

III. THIS CASE EXEMPLIFIES SECTION 5'S CONSTITUTIONAL DEFECTS

A. Lost in the Serbonian Bog

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 (1st Cir. 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.*

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. Districts drawn to maximize the voting power of a racial group encourage voters to talk only to the similarly minded. One of Congress's "second generation barriers" that weighed heavily on the court below was the finding "that not one African

American had yet been elected to statewide office in Mississippi, Louisiana, or South Carolina" *Shelby County*, 679 F.3d at 862, but such conditions are products of Section 5! Black elected officials are disinclined to run and unprepared to win races in majority-white constituencies.

In safe seats, meanwhile, politicians are under no pressure to run as centrists. Their ideology, along with a reluctance to risk campaigns in unfamiliar settings, perhaps explain why so few members of the Congressional Black Caucus have run for statewide office. As of 2006, for example, all 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 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). Non-mainstream actors can play important roles in shaping legislation, of course, but when a historically excluded group subsequently chooses the political periphery, it risks perpetuating its outsider status. The marginalization that the VRA targets instead becomes entrenched.

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 Break-*

through: Politics and Race in the Age of Obama 227 (2009). Alas, such candidates remain the exception.

Take, for instance, the recent case of Congressman Artur Davis, who might have become the first black governor of Alabama. As the "Obama of Alabama," Davis gained prominence in a majority-minority district established pursuant to the VRA. In 2010, Davis ran in the gubernatorial primary for the Democratic Party, the same party that had elected George Wallace and devised many of the tactics which had necessitated Section 5. He notably avoided making racial appeals, courting white voters and attempting to reach out to a broader, more racially diverse constituency. He lost the black vote, however, and failed to achieve a landmark achievement for racial equality. The episode illustrates how race-conscious districting balkanizes the population and keeps black legislators from the political mainstream. Had Davis not been marginalized from white Democratic constituencies as a congressman, for example, his candidacy might have attracted the majority of white Democrats—let alone Republicans—who oppose the Affordable Care Act (against which he voted).

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.

As an alternative to this unfortunate pattern, this Court could excise Section 5 from the VRA, which would lift constraints on state policy experimentation. Those aggrieved by redistricting or other

changes in election regulation could still enforce their Fifteenth Amendment rights through Section 2, while states would be free to devise innovative means to achieving greater racial integration.

B. Caught (Again) at the Bloody Crossroads

Once again this Court finds itself presented with yet another irreconcilable conflict between Sections 2 and 5 of the VRA. *Cf. Perry v. Perez*, 132 S. Ct. 934 (2012). That "bloody crossroads," *see supra*, lures covered jurisdictions like Shelby County into the inevitable trap of administering electoral schemes that do little to advance racial equality and often instead lead to racial balkanization. Shelby County is one of many jurisdictions required to maintain majority-minority districts under complex and conflicting standards. Avoiding racial discrimination under these circumstances, while subject to DOJ's administration of an inherently race-conscious VRA, is particularly difficult in such jurisdictions.

In *Perry*, this Court said, "redistricting is 'primarily the duty and responsibility of the State.'" 132 S. Ct. at 940 (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). When it goes to fulfill this constitutional duty, however, Shelby County must submit to Section 5 preclearance, assuring the federal government that its changes will not result in "retrogression." Prohibiting retrogression requires drawing district lines that ensure minority voters are the majority in set districts—an inherently race-conscious mandate.

Meanwhile, Section 2 prohibits "any State or political subdivision" from imposing any electoral practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. §1973(a). As noted

above, 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. at 47).

Section 2 thus requires race-based districting, even as Section 5 restricts that in theory but enables it (under what courts are told is a different standard) in practice. The Fourteenth and Fifteenth Amendments, meanwhile, call for race to be a non-factor in voting. Moreover, Section 5 arbitrarily prevents common national redistricting standards.

Like many jurisdictions trying to navigate between the VRA's Scylla and the Constitution's Charybdis, Shelby County finds itself stranded on judicial shoals. Meanwhile, Congress has never given Section 5 jurisdictions appropriate guidance on what constitutes a "discriminatory purpose." Consequently, Shelby County must contend with unraveling a complex web of overlapping Section 2 and 5 inquiries, with no applicable standards to guide its way. All of these factors amplify the unconstitutional character of Section 5 and restrict Shelby County from implementing "good government" principles. *Shelby County*, 679 F.3d at 886 (Williams, J., dissenting).

This Court should not allow DOJ to leverage Section 5 and further ensconce federal interference with state election administration. Section 2 is the more appropriate remedy—preserving the power of minorities to confront threats to the franchise while restoring the constitutional equilibrium.

CONCLUSION

The Voting Rights Act's Section 5 causes tremendous federalism and equal protection problems, all while enforcing arbitrary standards that conflict with the Fourteenth and Fifteenth Amendments. Recognizing that Section 5 is "no longer constitutionally justified," however, is not "a sign of defeat." *NAMUDNO*, 557 U.S. at 226 (Thomas, J., concurring in part and dissenting in part). Instead, 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 strike down Section 5.

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January 2, 2013