No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, MISSISSIPPI, AND NORTH CAROLINA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

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INTEREST OF *AMICI CURIAE*

Shelby County, Alabama, challenges the preclearance process contained in Section 5 of the Voting Rights Act on the ground that the extraordinary problems of discrimination that led to its enactment in 1965 no longer exist, and that the burdens it imposes on States and localities are no longer justifiable. *Amici* States New York, California, Mississippi, and North Carolina are for several reasons particularly well qualified to provide the Court with a perspective that should inform any effort to resolve that claim.

Mississippi, North Carolina, New York, and California are among the sixteen States covered in whole or in part by Section 5's preclearance process, and thus have extensive first-hand experience with the costs and benefits of its operation. Moreover, *Amici* States contain a substantial number of minority voters affected by the enforcement of Section 5: Mississippi has the largest proportion of African-American voters of any State in the country, North Carolina has the seventh largest proportion of such voters, and New York and California contain some of the largest and most diverse counties among the covered jurisdictions.

In the experience of *Amici* States, claims that the preclearance process imposes substantial burdens on the covered jurisdictions or unreasonably intrudes on state sovereignty are mistaken. Rather, for *Amici* States, "'[t]he benefits of Section 5 greatly exceed the minimal burdens that Section 5 may impose on States and their political subdivisions.'" Pet. App. 276a-277a (quoting *Amicus* Br. for North Carolina, Arizona, California, Louisiana,

Mississippi and New York at 17, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 815239, at *2). Moreover, those claims wrongly minimize the significant and measurable benefits Section 5 has produced in helping *Amici* States move toward their goal of eliminating racial discrimination and inequities in voting. The Section 5 preclearance process has helped bring about tremendous progress in the covered jurisdictions and continues to be a vital mechanism to assist *Amici* States in working to achieve the equality in opportunities for political participation that is a foundational principle of our democracy.

Amici States share the commitment to eliminating racial discrimination in voting rights that animates the federal Voting Rights Act. The record assembled by Congress to support the reauthorization of Section 5 in 2006 shows what *Amici* States know to be true: that Section 5 continues to play an important role in Mississippi, North Carolina, New York, and California, as well as in the other covered jurisdictions.

SUMMARY OF ARGUMENT

With overwhelming bipartisan support in 2006, Congress reauthorized the preclearance process contained in Section 5 of the Voting Rights Act. Preclearance has historically been a vital safeguard, and it remains today an essential tool for preventing voting discrimination. Tremendous progress has been made in *Amici* States and other covered jurisdictions in protecting the rights of minority voters. Congress reasonably determined in 2006 that the protections of the preclearance process are still necessary to preserve, secure, and extend these historic

accomplishments in eliminating voting discrimination, a goal that *Amici* States share.

In *Amici* States' experience, the substantial benefits of the preclearance process have outweighed its burdens on covered jurisdictions. Preclearance is a streamlined administrative process that has been refined over the years to reduce the burden on covered jurisdictions. Moreover, preclearance provides substantial benefits to covered States and localities by serving as a critical means to identify and deter retrogressive and discriminatory voting-related changes. To the extent that Section 5 imposes federalism costs, its compliance burdens are minimal in light of the unique and irreplaceable protections preclearance ensures.

If preclearance were eliminated, case-by-case litigation—principally under Section 2 of the Voting Rights Act—would be the sole means for protecting minority voters in covered jurisdictions. But Congress never intended such a result, and practical experience has confirmed that Section 2 is no substitute for Section 5's preclearance protections. Preclearance fosters governmental transparency and generates the information necessary to assess the impact of voting changes; it suspends enforcement of proposed voting laws before discriminatory changes are implemented; and, by imposing those safeguards, it serves a powerful deterrent function that case-by-case litigation would not provide. Moreover, increased Section 2 litigation would impose federalism costs of its own—replacing the minimal administrative obligations of making preclearance submissions to the U.S. Department of Justice ("DOJ") with the prospect of costly and time-consuming litigation every time a voting change is proposed.

In light of its prophylactic benefits, the geographic coverage of Section 5 is also reasonable. In reauthorizing Section 5, Congress was entitled to look not only to the specific coverage formula contained in Section 4(b) of the Voting Rights Act, but also to the Act's bail-in and bailout provisions, which provide alternative avenues for adjusting preclearance requirements to reflect current conditions. Through bail-in, a noncovered jurisdiction that engages in voting discrimination can be ordered to comply with Section 5's preclearance procedures; and through bailout, a covered jurisdiction that demonstrates a clean record can terminate its preclearance obligations. These tailoring mechanisms are rarely, if ever, included in remedial legislation, and their presence in the Voting Rights Act is sufficient to sustain the Act against facial invalidation of its coverage and preclearance provisions.

ARGUMENT

I. Preclearance of Voting Changes Continues to Be a Proper Means of Enforcing the Voting Rights Guaranteed by the Fifteenth Amendment

A. The preclearance process does not impose undue burdens on covered jurisdictions.

Both the practical experience of *Amici* States and the evidence in the congressional record confirm that the administrative obligations associated with Section 5 compliance are not substantial. At every stage—data compilation, submission of materials to DOJ, and review of the materials by DOJ—the process has been streamlined to minimize the burden on covered jurisdictions.

The materials necessary for DOJ's limited Section 5 review are ordinarily both readily accessible and easy to assemble. In general, covered jurisdictions need only compile enough information to help DOJ determine whether a voting-related change was adopted with a discriminatory purpose or will have the effect of worsening the position of minority voters. The information relevant to that analysis is often part of the legislative record compiled in the period preceding adoption of the new law or change.

Congress heard testimony that preparing Section 5 preclearance submissions is "a task that is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the [election] change to begin with." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) ("*Benefits and Costs*") (testimony of Armand Derfner). As one election official testified, "preclearance requirements are routine and do not occupy an exorbitant amount of time, energy or resources." *Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 13 (2006) (quotation marks omitted) ("*Policy Perspectives*") (testimony of Donald Wright).

Nor is the actual submission of the Section 5 preclearance materials a costly undertaking. Although, in the past, covered jurisdictions could make administrative submissions only on paper by postal or other physical delivery service, they can now also submit materials

by fax or electronic transmission. Moreover, increasing numbers of jurisdictions maintain the relevant records electronically, facilitating the process of collecting and submitting the necessary materials. State and local officials are also generally able to prepare Section 5 submissions easily using templates from previous submissions. Congress heard evidence from one official that "[t]he ease and cost of such submissions also improves with the use of previous submissions in an electronic format to prepare new submissions. In my experience, most submissions are routine matters that take only a few minutes to prepare using electronic submission formats readily available to me." *Policy Perspectives*, *supra*, at 313 (emphasis omitted) (testimony of Donald Wright).

Nor has Section 5 review of voting changes proven significantly burdensome or intrusive on the time of those officials who prepare materials for submission to DOJ. Generally, counsel and staff personnel familiar with the Section 5 preclearance process prepare administrative submissions. Thus, the Section 5 preclearance process is often both routine and familiar to the relevant submitting officials. *See* 152 Cong. Rec. H5054 (2006) ("Pre-clearance requirements are routine, and do not occupy exorbitant amounts of time, energy or re-sources." (quotation marks omitted)). These officials, given their familiarity and experience with the process, help ensure that the initial submission is complete and contains all of the relevant information that DOJ needs to make its preclearance determination. The evidence before Congress showed that covered jurisdictions often "have staff counsel that prepare submissions as part of their ongoing duties, so additional costs are not incurred in those situations. The costs of submissions are significantly reduced by ensuring that they are promptly and correctly submitted the first

time." *Policy Perspectives*, *supra*, at 313. Moreover, Congress also received evidence confirming that election officials in covered jurisdictions "viewed Section 5 as a manageable burden providing benefits in excess of costs and time needed for submissions." *Id.*

In addition, DOJ has administered the Section 5 review process with a significant degree of flexibility and latitude, taking into account the unique circumstances and crises that sometimes emerge within the covered jurisdictions. As some of *Amici* States have experienced, DOJ has expedited its review of voting changes, where possible, recognizing the crises and challenges that sometimes befall covered jurisdictions. For example, after Hurricane Katrina, DOJ issued a letter to Mississippi acknowledging that DOJ would be ready to expedite its review of any last-minute voting changes that may have resulted from the hurricane. *Id.* at 141-42. In other instances, DOJ has made swift preclearance determinations—well before the end of its statutorily required sixty-day review period. *Benefits and Costs*, *supra*, at 10-11 (noting if there is a sudden need for a new polling place, that can be precleared very swiftly if there is an election coming up) (testimony of Armand Derfner); *Policy Perspectives*, *supra*, at 312 (election official noting that he "never had a situation where the USDOJ has failed to cooperate with our agency or local government to ensure that a preclearance issue did not delay an election") (testimony of Donald Wright). *Amici* States have found that DOJ has administered Section 5 in a manner that neither obstructs nor infringes upon the dignity and sovereignty of the States.

Shelby County argues that "Section 5 will foreclose the implementation of more than 100,000 electoral changes unless and until they are precleared." Pet.

Br. 25. But this number vastly exaggerates the actual time and expense associated with Section 5 compliance. Although the preclearance process applies to any changes to voting practices, as a historical matter DOJ has generally reviewed those changes expeditiously and raised objections to only the few voting changes that it found to have a discriminatory purpose or effect. Moreover, submissions of multiple voting changes are often made in a single filing, and this neither slows nor impairs DOJ's ability to conduct a speedy review. DOJ's careful and targeted exercise of its Section 5 review has been a hallmark of its enforcement of preclearance for decades: the objection rate has always been only a fraction of the thousands of voting changes for which it receives notice. *See* H.R. Rep. No. 109-478, at 22 (2006); S. Rep. No. 109-295, at 13 (2006). Thus, as a practical matter, the preclearance process permits the vast majority of voting changes to be implemented as originally enacted, with only minimal delay. *See* 42 U.S.C. § 1973c(a) (permitting voting change if no objection is raised within sixty days).

Finally, there is no basis to conclude that Section 5 as it is implemented today is more burdensome for covered jurisdictions than the alternative proposed by Shelby County and endorsed by the dissent below (Pet. App. 77a): a world in which the preclearance process is replaced by a dramatic increase in the amount of case-by-case litigation.

If every DOJ objection were to be replaced by Section 2 litigation, the burden on covered jurisdictions would arguably be more severe. If a voting change is found to be discriminatory, a court injunction blocking the change under Section 2 is at least as intrusive as a DOJ objection under Section 5 because, as this Court has recognized,

a judicial injunction against an election procedure is an "extraordinary and precipitous nullification of the will of the people." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 458 (2008). And the streamlined administrative review of Section 5 is far less onerous than the "'intensely complex . . . costly and time-consuming'" nature of Section 2 litigation, Pet. App. 45a (quoting *Modern Enforcement of the Voting Rights Act: Hearing before the S. Comm. on the Judiciary*, 109th Cong. 96 (2006) ("*Modern Enforcement*")), which can cost millions of dollars and hundreds of hours for States or localities to defend, *see Benefits and Costs*, *supra*, at 80. Indeed, one of the most significant benefits of the preclearance process to covered jurisdictions is that a Section 5 objection will prevent a problematic voting change from taking effect, thereby reducing the likelihood that a jurisdiction will face costly and protracted Section 2 litigation.

Because Section 2 litigation is so costly and burdensome, reliance on case-by-case litigation alone would reduce the overall burdens on covered jurisdictions only if such litigation failed to reach some of the discriminatory voting changes currently caught by the preclearance process. But such a result would reduce the burden on States and localities only by degrading the overall level of protection currently afforded to minority voters—raising the risk that citizens will be denied the right to vote on the basis of their racial or language-minority status, and undermining the States' own interest in preventing discriminatory voting changes. For the reasons given below, the preclearance process provides valuable and irreplaceable protections for minority voters in covered jurisdictions, and Congress reasonably determined in 2006 that preclearance should

continue to complement case-by-case litigation in the areas where the two remedies have worked effectively together for decades.

B. Preclearance is a critical complement to case-by-case litigation.

For nearly fifty years, preclearance has operated as an essential complement to case-by-case litigation, serving "to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process." *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). Shelby County does not contend that remedies for voting discrimination are no longer needed; it contends rather that preclearance is no longer necessary because Section 2 is a sufficient remedy. *See* Pet. Br. 20, 33. But Congress has repeatedly determined that Section 2 is not a sufficient remedy in jurisdictions with a substantial history of voting discrimination, and that determination was amply supported by the record before Congress in 2006.[1]

As this Court has recognized, Sections 2 and 5 "differ in structure, purpose, and application," *Holder v. Hall*, 512 U.S. 874, 883 (1994) (opinion of Kennedy, J.), and they have long been understood "to combat different evils," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997). Section 5's importance as "a prophylactic tool in the important war against discrimination in voting," *id.* at 491 (Thomas, J., concurring), depends on a set of features unique to the preclearance process. As important

[1] We do not here separately survey the record before Congress of continuing voting discrimination, which others have amply described. *See* U.S. Br. 20-39; Pet. App. 22a-48a, 256a-270a.

and effective as Section 2 may be standing alone, it simply does not duplicate the crucial attributes that have made preclearance "[t]he most important . . . remedial measure[]" in the Voting Rights Act, *City of Lockhart v. United States*, 460 U.S. 125, 139 (1983) (Marshall, J., concurring in part and dissenting in part).

As explained above, if the Section 5 preclearance process were replaced by vastly increased litigation activity under Section 2, the result would not significantly reduce the burdens imposed on covered jurisdictions. Moreover, it would greatly reduce the effectiveness of the Voting Rights Act in combating voting discrimination because of at least three important features of preclearance that would be lost without Section 5.

First, the preclearance process makes available information that would otherwise be difficult to obtain, by requiring covered jurisdictions to provide, for every voting change, enough documentation to demonstrate that the proposed change has neither a discriminatory purpose nor effect. *See Branch v. Smith*, 538 U.S. 254, 263 (2003); *Georgia v. United States*, 411 U.S. 526, 540 (1973). That documentation includes not only copies of the new voting rule and its predecessor, but also, *inter alia*, an explanation of the differences between the two, an estimate of the voting change's impact on racial or language minorities, and certain demographic information. *See* 28 C.F.R. §§ 51.26-.28. The amount of information generated by preclearance is significant. "In a typical year, [DOJ] receives between 4,500 and 5,500 Section 5 submissions, and reviews between 14,000 and 20,000 voting changes." Civil Rights Div., DOJ, *Section 5 Resource Guide*, http://www.justice.gov/crt/about/vot/

sec_5/about.php (last visited Jan. 31, 2013). DOJ provides public notice of all Section 5 submissions and solicits comments and information on all proposed voting changes. *See* 28 C.F.R. §§ 51.32-.33; Civil Rights Div., DOJ, *Notices of Section 5 Submission Activity*, http://www.justice.gov/crt/about/vot/sec_5/notices.php (last visited Jan. 31, 2013).

Absent Section 5, it would be difficult or in some cases impossible for interested parties to obtain the information needed to determine whether and where to bring a Section 2 lawsuit, or even to learn that a voting change is contemplated. This is particularly true in the case of smaller governmental entities that may attract less scrutiny. And although Section 5's information-forcing function imposes some costs on covered jurisdictions, the costs of gathering and submitting the information are relatively small because most of the information submitted for preclearance is readily available to covered jurisdictions. See *supra* Point I.A. By contrast, litigation under Section 2 imposes much more substantial costs on both the jurisdiction and those who would challenge voting changes.

Second, Section 5 temporarily suspends enforcement of proposed voting changes until either DOJ or a three-judge district court determines that the change is not discriminatory. *See Georgia*, 411 U.S. at 538. This provisional remedy addresses the significant, irreparable harms caused by the implementation of a discriminatory voting rule. The right to vote is "one of the most fundamental rights of our citizens." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (Kennedy, J., plurality op.). Elections held under unlawful voting rules are often impossible to unwind, making the loss of a vote permanent even if a

court subsequently recognizes the election's illegitimacy. *See, e.g.*, *McDaniel*, 452 U.S. at 133 n.5 (noting that district court permitted primary election to occur under challenged change); *Allen v. State Bd. of Elections*, 393 U.S. 544, 571-72 (1969) (declining to set aside already-conducted elections); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (noting that "equitable considerations" might prevent court from interfering with imminent election "even though the existing apportionment scheme was found invalid"). And the results of such elections can alter the distribution of power in far-reaching ways that cannot be remedied by the correction of future voting rules: for example, incumbents incur powerful "[n]ame recognition and other advantages" that often persist so long as they seek reelection, *McConnell v. FEC*, 540 U.S. 93, 307 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). The preclearance process avoids these irreparable injuries by ensuring that new voting rules in the covered jurisdictions do not come into effect until an expedited review determines that a change has neither a discriminatory purpose nor a discriminatory effect.

Case-by-case litigation can provide this kind of interim relief only in the limited situations where there are plaintiffs who are sufficiently knowledgeable and aggrieved about a discriminatory voting change to bring suit in the first place—and who are then willing and able to spend the significant time and resources necessary to "satisfy the heavy burden required for preliminary injunctive relief." Pet. App. 47a. To be sure, individual litigants are sometimes in a position to bring Section 2 cases and obtain preliminary relief. But the obstacles are so great—and the harm from even temporary

implementation of a discriminatory voting change so high—that case-by-case litigation is, as Congress recognized, inadequate to protect against that harm.

Private litigants are unlikely to marshal the information, resources, and evidence necessary to obtain preliminary relief from discriminatory voting changes. As with other examples of discriminatory exclusion from the "opportunity to participate in the democratic process," *Powers v. Ohio*, 499 U.S. 400, 406-408, 414-415 (1991) (identifying voting and jury service as the "most significant" such opportunities), individual citizens often "possess[] little incentive or resources to set in motion the arduous process needed to vindicate [their] own rights," *Holland v. Illinois*, 493 U.S. 474, 489 (1990) (Kennedy, J., concurring). That is particularly true in the voting rights context, since Section 2 cases are usually "very, very costly" and complex. *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 65 (2006) (testimony of J. Gerald Hebert).

Although DOJ and private litigants may be able to muster the resources in particular cases to obtain preliminary relief, they cannot do so for all of the tens of thousands of voting changes that the preclearance process currently covers. The dissent below suggested that DOJ could simply transfer "whatever resources it stopped spending on § 5" not only to fund its own Section 2 cases, but also to assume the costs of private litigation. Pet. App. 77a. But the costs of litigation are so much greater than the costs of preclearance that it blinks reality to

suppose that such a transfer of resources would result in funding litigation on the scale needed to substitute for preclearance.

Third, the prospect that every voting change will be reviewed produces Section 5's "most significant impact": its deterrent effect. 152 Cong. Rec. S7969 (2006) (testimony of Sen. Dianne Feinstein). Officials within the covered jurisdictions know that every voting change will be reviewed by DOJ for the potential effect on minority voters. That review makes officials more mindful, leading them to exercise a greater degree of due diligence in considering the potential impacts of new voting laws. As Congress found, "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, *supra*, at 24.

Case-by-case litigation lacks a comparable deterrent effect. Individual plaintiffs will be able to review and challenge a voting change only if they receive notice of that change and then muster sufficient resources to initiate an action. While certain large voting changes (such as redistricting) may regularly attract individual lawsuits, *see* Pet. Br. 20, smaller and more local voting changes will often and predictably escape any genuine scrutiny—even though such changes often have the most significant effect on individual voters' lives. *See Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 84 (2005). Case-by-case litigation thus does not replicate the same powerful deterrent effect that currently prevents discriminatory voting changes from being implemented in the first instance.

For these reasons, case-by-case litigation has not since 1965 stood by itself as the sole remedy for voting discrimination in the covered States. Shelby County and its *amici* do not dispute that the preclearance requirements in covered jurisdictions have been responsible for much of the progress that the Voting Rights Act has achieved during the last fifty years. *See* Pet. Br. 22 ("The Voting Rights Act of 1965 changed the course of history in the covered jurisdictions."); Br. for *Amici Curiae* Arizona et al. 4 ("Section 5 was an important and necessary part of the effort to end voter discrimination in this country. . . .").[2] Eliminating the preclearance process altogether would fundamentally change the legal landscape in the covered States, creating a regulatory vacuum in the space that preclearance once occupied to protect the most fundamental political right. *See Reynolds*, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

II. The Bailout and Bail-in Procedures of the Voting Rights Act Provide a Tailored Response to Changing Local Conditions and Thereby Defeat This Facial Challenge to the Act's Geographic Coverage

1. When Congress enacted Section 5, it limited the application of preclearance through a unique tailoring mechanism. Rather than applying nationwide, the

[2] For example, one researcher has found a positive statistical correlation between Section 5 and voter registration and turnout in California. *See* Jessica Lee, *The Effects of Section 5 of the Voting Rights Act: A California Case Study* (May 20, 2009) (unpublished honors thesis, Stanford University), *available at* http://publicpolicy.stanford.edu/node/349.

preclearance process was limited to only a discrete number of covered jurisdictions identified by the coverage formula of Section 4(b). 42 U.S.C. § 1973b(b). And rather than being static, Section 5's geographic range has always been subject to revision under two procedures that Congress has periodically liberalized to more accurately reflect current conditions. The bailout procedure, Section 4(a), permits a covered jurisdiction to terminate its Section 5 obligations upon a showing that it no longer suffers from voting discrimination. 42 U.S.C. § 1973b(a). The bail-in procedure, Section 3(c), addresses the opposite concern: it permits noncovered jurisdictions to be brought within the ambit of Section 5 upon a showing that they *do* suffer from voting discrimination. 42 U.S.C. § 1973a(c).

Like the preclearance process, the Voting Rights Act's tailoring mechanism is itself an "extraordinary departure" from Congress's ordinary way of applying legislation. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. 491, 500 (1992). Congress's other remedial legislation rarely, if ever, goes to such lengths to tailor the burdens of a federal law. Outside the voting rights area, when Congress determines that remedial legislation is needed, it generally enacts laws that interfere with state sovereignty *nationwide*, even when the evidence of constitutional violations comes from only a handful of States. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-32 (2003) (explaining the record underlying the Family and Medical Leave Act); *see also id.* at 753 (Kennedy, J., dissenting) (criticizing the legislative record for focusing on only three States).

And Congress's enactments are usually *permanent*, with no opportunity—other than the possibility of legislative amendment—for the States to contend that

they no longer fall within the original justification for a law. Thus, this Court has upheld several statutes abrogating state sovereign immunity for civil rights laws on the basis of evidence of state discrimination preceding each enactment. *See Tennessee v. Lane*, 541 U.S. 509, 524-26 (2004) (disability); *Hibbs*, 538 U.S. at 730 (gender); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (race). But this Court has never suggested that these statutes must be reevaluated to determine whether current conditions continue to justify these laws.

The Voting Rights Act's tailoring mechanism departs from both of these ordinary characteristics of federal remedial legislation, and in each case it does so in order to reduce the intrusion on state sovereignty. The targeted rather than nationwide scope of the preclearance process prevents Section 5 from applying more broadly than necessary, confining it to those regions of the country where Congress had specific evidence of voting discrimination. *See City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997) (discussing Voting Rights Act). And the bailout and bail-in procedures permit Section 5's coverage to be adjusted to more accurately reflect current conditions.

2. Shelby County seeks to invalidate here only one part of this integrated scheme, Section 4(b), on the argument that the coverage formula is "outdated." Pet. Br. 13, 57. But the baseline established by Section 4(b) was imperfectly tailored almost from the beginning, and has nonetheless repeatedly been sustained against that challenge. As this Court acknowledged in upholding Section 4(b) in 1966, even at the outset the coverage formula did not include *every* jurisdiction that engaged in voting discrimination,

and evidence of voting discrimination was much stronger for some covered jurisdictions than for others. *South Carolina v. Katzenbach*, 383 U.S. 301, 329-30 (1966).

But Congress never intended Section 4(b) to operate alone to identify covered jurisdictions. Rather, the coverage formula has always been part of a dynamic process of both exempting and including jurisdictions from the preclearance process based on changing conditions and experience. The baseline established by Section 4(b) thus reflected historical experience without giving that history controlling weight. And the bailout and bail-in provisions were enacted and later amended precisely to adapt the actual coverage of Section 5 to current conditions.

Today, the statutory triggers of Section 4(b) no longer accurately describe the areas of the country covered by Section 5 because successful bailouts and bail-ins have updated the list of jurisdictions to which the preclearance process applies. *See* U.S. Br. App. 1a-11a. The progress of this tailoring process may not be as swift as Shelby County and its *amici* prefer. But Congress is permitted to proceed by incremental steps in addressing national problems; it need not "embrace all the evils within its reach" when it legislates, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937), and its decision to do so "warrants considerable deference," *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982). With the Voting Rights Act, Congress built into the statute itself a process to incrementally alter the reach of Section 5. That tailoring mechanism is a virtue of the Act because it is so solicitous of the sovereignty of the covered States; it is not, as Shelby County would have it, a flaw that requires invalidating the preclearance process altogether.

3. The *amici* states opposing the 2006 reauthorization contend that bailout and bail-in are not practically available remedies. *See* Br. for *Amici Curiae* Arizona et al. 27; Br. for *Amicus Curiae* Alaska 29. But *Amici* States' experience demonstrates otherwise. The 1982 amendments to the Act "made bailout substantially more permissive" in two ways: it "allowed bailout by any jurisdiction with a 'clean' voting rights record over the previous ten years"; and it permitted *any* political subdivision within a covered State to seek bailout. Pet. App. 9a; *see* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205 § 2(b)(2), 96 Stat. 131, 131 (codified, as amended, at 42 U.S.C. § 1973b(a)(1)). As a result of those amendments, every covered jurisdiction that has requested a bailout since 1984 has received it. Civil Rights Div., DOJ, *Section 4 of the Voting Rights Act*, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 31, 2013).

Congress heard testimony that these bailout applications were neither costly nor time-consuming. "Legal expenses for the entire process of obtaining a bailout are on average about $5000." *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005) (statement of J. Gerald Hebert). And generally it takes less than five months to obtain a court order terminating a political subdivision's Section 5 responsibilities—indeed, one political subdivision in California was bailed out within ninety days of filing its petition, *see Alta Irrigation District v. Holder*, No. 11-cv-758 (D.D.C. July 15, 2011) (consent judgment and decree), *available at* http://www.justice.gov/crt/about/

vot/misc/alta_cd.pdf, although the process has sometimes been more prolonged, *see* Br. for *Amicus Curiae* Merced County, California, in Support of No Party 30-35. This experience demonstrates that the bailout procedure is a workable mechanism that allows eligible jurisdictions to exempt themselves from the requirements of Section 5. *See* H.R. Rep. No. 109-478, *supra*, at 61 (bailout "has proven to be achievable to those jurisdictions that can demonstrate an end to their discriminatory histories").

The bail-in provision has likewise been used to extend preclearance to a number of formerly noncovered jurisdictions, on the basis of specific findings that those jurisdictions suffer from voting discrimination. *See generally* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2010 (2010) (discussing bail-in examples). For example, in *Jeffers v. Clinton*, Arkansas was bailed in after the district court found that "[t]he State ha[d] systematically and deliberately enacted" certain voting laws "in an effort to frustrate black political success in elections traditionally requiring only a plurality to win." 740 F. Supp. 585, 586 (E.D. Ark. 1990). New Mexico was likewise brought within the scope of Section 5 after a district court found that the State's 1982 redistricting plan constituted "a racially-motivated gerrymander." *See Sanchez v. King*, No. 82-0067-M, slip op. at 129 (D.N.M. Aug. 8, 1984). Finally, several political subdivisions have been required to submit voting changes for preclearance, again after specific findings that they engaged in voting discrimination. *See* U.S. Br. App. 1a-3a.

4. Shelby County concedes that the bail-in procedure is a "targeted" and "appropriate means of imposing

preclearance" based on a contemporaneous finding that a noncovered jurisdiction has engaged in "unconstitutional voting discrimination." Pet. Br. 57. But it contends that "bailout is incapable of saving Section 4(b)," in essence because there is not a one-to-one correspondence between the reasons for a jurisdiction's original inclusion, and the criteria for its bailout. Pet. Br. 54-55.

This argument incorrectly assumes that state sovereignty not only mandates a bailout procedure, but also requires that procedure to take a particular form. This Court has never so limited Congress's power. As noted earlier, outside the voting rights area, *none* of the laws that Congress has recently enacted pursuant to its enforcement powers under the Reconstruction Amendments offer an exemption procedure to the States. As a result, the mere existence of bailout and bail-in makes Section 5 more respectful of state sovereignty than other federal legislation enforcing those amendments.

In any event, whatever objections covered jurisdictions may have to the current administration of the bailout procedure, that procedure is more suited than this facial challenge as a mechanism for responding to changing conditions in this country. By providing a specialized process for adjusting the coverage of Section 5, the bailout procedure, along with the bail-in procedure, permits individual jurisdictions to "create a factual record" supporting their claims about the proper reach of the preclearance process. *United States v. Georgia*, 546 U.S. 151, 160 (2006) (Stevens, J., concurring).

Some other state *amici* have also raised objections to DOJ's particular interpretation or enforcement of the Voting Rights Act. *See, e.g.*, Br. for *Amici Curiae* Arizona

et al. 25-27; Br. for *Amicus Curiae* Texas 3-4; Br. for *Amicus Curiae* Alabama 14-20. But complaints about individual enforcement efforts—on which this group of *Amici* States takes no position—do not undermine the *facial* validity of Sections 4(b) and 5. This Court has recently made clear that the mere fact that a statute might "in practice" be unconstitutionally enforced does not require its facial invalidation when the statute "could be read" and enforced in a manner that "avoid[s] these concerns." *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012). As a result, the other state *amici*'s complaints about specific, allegedly improper enforcement efforts are best left to individual litigation, where courts can examine the "specific facts" necessary to determine whether DOJ's actions were reasonable. *Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2122 (1981) (statement of Drew Days).

Rejecting Shelby County's facial challenge here would not foreclose future bailout petitions or individual proceedings challenging DOJ's enforcement decisions. In some of those proceedings, individual jurisdictions may be able to prove that preclearance is no longer necessary due to their unique facts, or that DOJ's application of the Voting Rights Act is unreasonable. But that possibility is not a proper basis to forbid the application of Section 5 "wholesale" to *any* jurisdiction, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006); *see Lane*, 541 U.S. at 530 (limiting review of Title II of the Americans with Disabilities Act to the particular application at issue, access to the courts, rather than "its wide variety of applications"). In the meantime, sustaining Sections 4(b) and 5 on their face would permit

the unique remedy of preclearance to continue in the covered States—preserving and extending the historic accomplishments that the Voting Rights Act has already achieved.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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