Oral Argument Currently Unscheduled
(Removed From February 27, 2012, Calendar)

No. 11-5349

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN LAROQUE, ET AL.,

Appellants,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA (NO. 10-561 (JDB))

REPLY BRIEF FOR APPELLANTS

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DOJ	Department of Justice
Govt.Br.	Brief for the Attorney General as Appellee *LaRoque v. Holder*, No. 11-5349 (D.C. Cir.) Doc. No. 1358195 (Feb. 13, 2012)
Govt.Shelby.Br.	Brief for the Attorney General as Appellee *Shelby Cnty. v. Holder*, No. 11-5256 (D.C. Cir.) Doc. No. 1345212 (Dec. 1, 2011)
Pltfs.Br.	Brief for Appellants *LaRoque v. Holder*, No. 11-5349 (D.C. Cir.) Doc. No. 1351560 (Jan. 6, 2012)
Pltfs.MTD.Resp.	Appellants' Response to the Attorney General's Motion to Dismiss as Moot *LaRoque v. Holder*, No. 11-5349 (D.C. Cir.) Doc. No. 1359504 (Feb. 21, 2012)
Shelby.JA	Joint Appendix *Shelby Cnty. v. Holder*, No. 11-5256 (D.C. Cir.) Doc. No. 1339376 (Nov. 1, 2011)
Shelby.Tr.	Transcript of Oral Argument *Shelby Cnty. v. Holder*, No. 11-5256 (D.C. Cir.) Doc. No. 1358151 (Jan. 19, 2012)
VRA	Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*

SUMMARY OF ARGUMENT

After nearly two years of litigation, DOJ belatedly tried to moot this appeal by conjuring up a transparent pretext to justify its purported "withdrawal" of its objection to Kinston's referendum. *See* Govt.Br. 13-15, 18-23; Pltfs.MTD.Resp. 1-2 & n.1. Not only is that outrageous and brazen effort plainly meritless, Pltfs.MTD.Resp. 2-10, but it likely reflects DOJ's desperate realization that there is even less merit to its defense of Section 5 here. At every turn, DOJ (and its supporting Intervenors) regurgitate the district court's opinion, while studiously avoiding Plaintiffs' appellate arguments and the Supreme Court's constitutional holdings in *Nw. Austin Mun. Dist. No. 1 v. Holder*, 129 S. Ct. 2509 (2009).

1. On justiciability, although DOJ implicitly concedes that the district court correctly held that Plaintiff Nix has standing to bring a facial constitutional challenge against most of the 2006 version of Section 5, DOJ repeats the court's conclusion that Nix lacks standing to challenge the "discriminatory purpose" prong of the 2006 preclearance standard. DOJ, however, does not even bother to respond to the majority of Nix's arguments for why he has standing to challenge *all* of Section 5. Instead, DOJ repeatedly invokes its purported "withdrawal" of the objection, thereby making the basic error of confusing whether this appeal is now moot (it is not) with whether Nix had standing to sue initially (he did).

2. On the 2006 reauthorization of the preclearance procedure, DOJ flouts the holding in *Nw. Austin* that Section 5's "current burdens … must be justified by current needs," including especially "a showing that [its] disparate geographic coverage is sufficiently related to the problem that it targets." 129 S. Ct. at 2512. To be sure, having been sternly rebuked by this Court for completely ignoring that holding in its earlier appellate briefing, *see* Shelby.Tr. 32:22-35:16, 59:2-60:10, DOJ has now paid lip-service to it by slapping in a perfunctory discussion of *Nw. Austin* at the outset of its argument section. *See* Govt.Br. 31-32. But it thereafter reverts to its old ways, essentially opining that Section 5 should be upheld simply because Congress created a large record and is entitled to deference.

In particular, DOJ makes two fundamental errors in defending the reauthorized preclearance procedure. *First*, DOJ rejects the critical proposition that Section 5's extraordinary preclearance regime can be justified only as a means of bolstering ordinary Section 2 litigation in those jurisdictions where such litigation is particularly inadequate. But, as Judge Tatel correctly observed, when one reads the Supreme Court's precedents, "what [one] see[s] is [that] the Court was really justifying Section 5 on the basis of the ineffectiveness of case by case litigation." *See* Shelby.Tr. 13:15-20; *see also City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."). Indeed, an ineffective Section 2 is

the only logical justification for imposing Section 5 on top of Section 2 in certain specified jurisdictions, and it is the only justification that provides a judicially manageable standard when assessing the mountain of data that Congress compiled. *Second*, DOJ contends that Section 5's disparate geographic coverage can be upheld based primarily on the fact that Congress focused on jurisdictions with the worst historical records of discrimination. But a jurisdiction's ancient misdeeds cannot possibly justify Section 5's "departure from the fundamental principle of equal sovereignty," *see Nw. Austin*, 129 S. Ct. at 2512, because that is not a "rational" means, in either "theory" or "practice," for identifying the jurisdictions where "case-by-case litigation" is *currently* "inadequate," *see South Carolina v. Katzenbach*, 383 U.S. 301, 328, 330 (1966).

3. On the 2006 amendments to the substantive preclearance standard, DOJ does not even acknowledge *Nw. Austin*'s general statement that the "federalism concerns" with the preclearance procedure "are underscored by the argument" that the substantive preclearance standard renders "[r]ace … the predominant factor" in electoral decisionmaking. *See* 129 S. Ct. at 2512. Yet the 2006 amendments squarely implicate *Nw. Austin*'s concern about the interplay between "federalism concerns" and excessive "considerations of race." *See id.*

First, by abrogating *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and adopting a flat ban on any voting change that "diminish[es] the ability" of minorities "to

elect their preferred candidates of choice," *see* 42 U.S.C. § 1973c(b),(d), the 2006 Congress imposed a rigid quota-floor based on past minority electoral success that makes race the "dispositive [and] exclusive" factor under Section 5. *See Ashcroft*, 539 U.S. at 480; *see also id.* at 491-92 (Kennedy, J., concurring), *cited in Nw. Austin*, 129 S. Ct. at 2512. *Second*, by abrogating *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) ("*Bossier II*"), and allowing DOJ to interpose "discriminatory purpose" objections, *see* 42 U.S.C. § 1973c(c), the 2006 Congress "exacerbate[d]" in several ways "the 'substantial' federalism costs that the preclearance procedure already exacts." *Bossier II*, 528 U.S. at 336 (citing, *inter alia*, *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995)); *see also Miller*, 515 U.S. at 917, 924-27 (criticizing DOJ's policy of using "discriminatory purpose" objections to coerce jurisdictions into maximizing future minority electoral prospects).

DOJ ignores virtually all of the foregoing precedent, along with most of the arguments that Plaintiffs made in their opening brief. DOJ may feel free to side-step this important issue, but this Court cannot and the Supreme Court will not. Instead, this Court should hold that the amended preclearance standard "attempt[s] a substantive change in constitutional protections," *see Boerne*, 521 U.S. at 532, and contains the "fundamental flaw" of "a[] scheme in which [DOJ] is permitted or directed to encourage or ratify a course of unconstitutional conduct," *see Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

ARGUMENT

I. THIS APPEAL IS JUSTICIABLE

DOJ limits its attack on Nix's standing to his ability to challenge the "discriminatory purpose" amendment in 42 U.S.C. § 1973c(c), thereby implicitly conceding—as the court below held—that Nix has standing to challenge the reauthorization of the preclearance requirement in 42 U.S.C. § 1973c(a) by itself, as well as the "ability to elect" amendments in 42 U.S.C. § 1973c(b),(d). *See* Govt.Br. 23-30. Moreover, the limited attack that DOJ does level is meritless. Our opening brief made four distinct arguments why Nix has standing to raise *all* the claims asserted here. DOJ fails to respond to virtually every one of them, instead repeatedly and inappositely relying on its erroneous mootness argument.

A. Nix initially demonstrated that, under this Court's earlier decision in *LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011) ("*LaRoque II*"), his standing to raise Plaintiffs' enumerated-powers challenge to Section 5, as reauthorized *and* amended in 2006, is "law-of-the-case." Pltfs.Br. 14-16. Notably, DOJ *agrees* with that argument's two critical premises—namely, (1) "Count I" of the complaint "alleg[es] that Section 5, *as amended* and reauthorized in 2006, is not appropriate legislation to enforce the Fourteenth or Fifteenth Amendments," and (2) this Court in *LaRoque II* "reversed the dismissal of Count I as to plaintiff Nix, holding that … [he] had standing and a cause of action to challenge Congress's authority to enact

the 2006 Reauthorization of Section 5." *Compare* Govt.Br. 10-11 (emphasis added), *with* Pltfs.Br. 14-15.

DOJ's only response is that "law of the case" no longer applies because "[c]ircumstances" are now "substantially different" due to the purported "withdrawal of the Kinston objection." Govt.Br. 30 n.10. But that response "confuse[s] mootness with standing." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The objection's purported "withdrawal" has nothing to do with whether "[t]he requisite personal interest … exist[ed] *at the commencement of the litigation (standing)*." *Id.* (emphasis added). At most, it implicates whether that interest sufficiently "continue[s] … [in] existence (mootness)." *Id.* (And, as Plaintiffs have explained, on the latter question, DOJ has failed to meet *its* "heavy burden" of proving that the case was mooted by its "voluntary conduct" in purportedly "withdrawing" the objection. *See id.*; Pltfs.MTD.Resp. 2-10.) DOJ thus essentially concedes that this Court is compelled by its prior ruling to hold that Nix has standing to challenge the *entire* 2006 version of Section 5 on enumerated-powers grounds.

B. Nix next demonstrated that, even as a *de novo* matter, he has standing to challenge the 2006 amendments *as part of* his enumerated-powers challenge to the 2006 reauthorization, because enumerated-powers challenges under *Boerne* are "facial attacks" that invalidate the entire "piece of legislation" at issue. Pltfs.Br.

16-18. Nix further demonstrated that the district court actually agreed with this standing argument, but mistakenly asserted that Nix had not pressed it below. *Id.* 18. Because DOJ predictably lacks any response to this well-established law, it just ignores it.

Not only does DOJ's tacit concession support this basis for Nix's standing to bring his entire enumerated-powers claim, but it also refutes DOJ's assertion elsewhere that "the proper remedy" if "one or more of the Amendments is unconstitutional" "would be to sever that portion of the statute." *See* Govt.Br. 54 n.17. *Boerne* and its progeny would require facial invalidation of the entire 2006 reauthorization as a matter of constitutional law, Pltfs.Br. 16-18, regardless of whether Congress would want the invalid amendments to be "severed" from the preclearance procedure's reauthorization as a matter of legislative intent (which, in any event, it would not, *infra* at 10-11).

C. Nix also demonstrated that he has standing to challenge the "discriminatory purpose" amendment in § 1973c(c) for the same essential reason that the district court held that he has standing to challenge the "ability to elect" amendments in § 1973c(b),(d). Namely, assuming that the "ability to elect" standard is unconstitutional, DOJ's objection to the referendum relying on that standard must be voided, and the referendum cannot be precleared on reconsideration without satisfying the allegedly unconstitutional "discriminatory

purpose" standard. Pltfs.Br. 21-24. Here too, DOJ's sole rejoinder is that it itself purportedly has now "reconsidered" and "withdrawn" its objection. *See* Govt.Br. 25-26, 29-30. Again, though, its appellate-stage machinations are irrelevant to standing (and fail to create mootness). *Supra* at 6. And notably, this now-uncontested basis for Nix's standing applies, not just to Plaintiffs' enumerated-powers claim, but also to their equal-protection claim.

D. Finally, the only standing argument made by Nix that DOJ actually contests is his claim that the 2006 amendments are non-severable from the 2006 preclearance reauthorization as a matter of legislative intent. *Compare* Pltfs.Br. 18-21, *with* Govt.Br. 26-29. Of course, this Court need not even reach this issue if it agrees with Nix on the arguments above that DOJ fails to contest, because they are sufficient to support Nix's standing to bring all his claims. In any event, at every level, DOJ is wrong about severability.

At the outset, DOJ is fundamentally mistaken in arguing that Nix's standing turns on whether he is legally correct that the amendments are non-severable from the reauthorization. *See id.* 28-29. Nix cited myriad cases explaining that standing turns on whether the relief *requested* would redress his injury, not on his *entitlement* to that relief. Ptlfs.Br. 19. DOJ does not even attempt to distinguish those cases. Instead, it merely asserts that Nix's position "is foreclosed by" *INS v. Chadha*, 462 U.S. 919 (1983), which supposedly requires consideration of

severability at the standing stage. Govt.Br. 28-29. But DOJ significantly over-reads that case. To be sure, *Chadha* did observe that, "[i]f the veto provision violates the Constitution, and is severable, the deportation order against Chadha will be canceled" and he "therefore has standing." *See* 462 U.S. at 936. That affirmative statement of why Chadha had standing, however, is not the same as the negative statement that, if the veto provision was *not* severable, then Chadha would *not* have had standing. (That would be like saying that, if the veto provision was not unconstitutional, then Chadha would not have had standing.) Instead, if the veto provision had been non-severable, then Chadha simply would not have been entitled to his requested relief on the merits, thus rendering it unnecessary to resolve the constitutional question. That entirely prudential concern explains why *Chadha* only "deem[ed] it appropriate"—rather than compulsory—"to address questions of severability first." *Id.* at 931 n.7.

Notably in this regard, the severability question in *Chadha* was wholly distinct from the constitutional question, which made it appropriate to analyze the former as a threshold issue. *See id.* at 931-35. That, however, often will not be the case when analyzing severability. Instead, as demonstrated below, the remedial question whether Congress would want the challenged provisions to be severed will often be intertwined with the provisions' constitutional merits, thus rendering the inquiry unsuitable for threshold adjudication at the standing stage. Pltfs.Br. 19.

DOJ again ignores this serious defect with its position.

In all events, Nix is correct that the reauthorized preclearance requirement would no longer function in a manner acceptable to Congress once the amendments to the preclearance standard are invalidated. *Id.* 19-21. As explained, Congress (erroneously) believed that *Ashcroft* had made Section 5 "a wasteful formality" that perversely "encourage[d] States … to turn black and other minority voters into second class voters," and that *Bossier II* only caught "incompetent retrogressor[s]" while forcing "[t]he federal government" to "giv[e] its seal of approval to practices that violate the Constitution." *See* H.R. Rep. No. 109-478, at 67, 70, 94 (2006); S. Rep. No. 109-295, at 16 (2006).

Although DOJ denigrates these findings as "isolated statements" when it comes to severability, Govt.Br. 28, it then hypocritically relies on the same exact legislative sentiments as the central merits justifications for the amendments. Specifically, it argues that the "*Ashcroft* standard did not remedy—and *could easily worsen*—the problem," since it "was impossibly challenging to administer," *see id.* 55-57 (emphasis added), and that the "*Bossier II* standard … would have required preclearance" by federal authorities of changes with "no legitimacy at all," *id.* 66-68. In short, DOJ itself disproves its assertion that the 2006 Congress merely "sought to *strengthen*" the pre-2006 version of Section 5, but "would have preferred" that version to "no Section 5" at all. *See id.* 28. Congress does not

typically "prefer" enforcement statutes that it has expressly found to be inefficient and ineffective, let alone *counter-productive*, and certainly not when the statute imposes an indisputable and extraordinary burden on local self-governance, *infra* at 13. Indeed, the 2006 Congress could not have held such a "preference" consistent with its constitutional duty to ensure that the "[s]trong measure[]" of Section 5 was not "an unwarranted response" to racial voting discrimination. *See Boerne*, 521 U.S. at 530. It is thus self-evident that Congress reauthorized Section 5 *only* because it was *also* restoring what it believed to be "the longstanding interpretation of Section 5 [by DOJ and lower courts] that predated [*Ashcroft* and *Bossier II*]" and that "had been essential to … the progress that had been made since 1965." *See* Govt.Br. 52-53 (citing 42 U.S.C. § 1973 note, Findings (b)(6)).

II. THE 2006 REAUTHORIZATION OF THE PRECLEARANCE PROCEDURE EXCEEDS CONGRESS' ENFORCEMENT POWERS

There is only one "current need[]" that can possibly justify the "current burden[]" imposed by Section 5's extraordinary federal preclearance procedure, *see Nw. Austin*, 129 S. Ct. at 2512: namely, the existence of "exceptional conditions" in "target[ed]" areas with such "flagrant" discrimination that "case-by-case litigation" under Section 2 is "inadequate to combat [it]." *See South Carolina*, 383 U.S. at 328-29, 334-35. Because DOJ stubbornly refuses to acknowledge this fundamental point, its defense of the preclearance procedure's reauthorization in 2006 is incoherent and standardless.

A. The Extraordinary Burden That Section 5 Currently Imposes Can Be Justified Only By A Current Need To Bolster Ordinary Section 2 Litigation

Plaintiffs have demonstrated that, as a matter of precedent, Section 5 has always been justified by Section 2's *particular inadequacy* in redressing unconstitutional discrimination in the covered jurisdictions. Pltfs.Br. 25-28. And they have further demonstrated that, as a matter of logic, that justification is the only conceivable one that can support the federal preclearance regime's extraordinary interference with local self-governance: such a burdensome regime would be *gratuitous* if ordinary case-by-case litigation is adequate for redressing voting discrimination in the covered jurisdictions, just as it is for redressing other types of discrimination in those jurisdictions and for redressing voting (and other) discrimination in the non-covered jurisdictions. *Id.* 28-32. DOJ's efforts to undermine these critical points all fail.

1. DOJ begins by accusing Plaintiffs of taking the unduly narrow position that Section 5 can be justified only by the existence of "tactics or gamesmanship" employed by jurisdictions to evade case-by-case litigation. Govt.Br. 35-38. But DOJ attacks a straw-man. Such "extraordinary stratagem[s]" certainly were an important historical reason that Section 2 litigation was inadequate in the covered jurisdictions, but Plaintiffs were crystal clear that inadequacy today could more generally occur in areas where discrimination is so

"widespread and persistent" that Section 2 litigation there would require an "inordinate amount of time and energy." Pltfs.Br. 25-26 (quoting *South Carolina*, 383 U.S. at 328, 335); *see also id.* 10, 28, 34.

2. DOJ further insists that Congress need not even demonstrate that Section 2 is inadequate in this more general sense, because "the preclearance requirement is [not] necessarily more intrusive than statutes requiring case-by-case litigation." Govt.Br. 45. That is a truly astonishing assertion. In more candid times, "[e]ven the Department of Justice has described [Section 5] as a 'substantial departure … from ordinary concepts of our federal system,'" a description upon which Justice Stevens relied when characterizing the statute's "encroachment on state sovereignty [as] significant and undeniable." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (dissenting opinion); *see also* Pltfs.Br. 25 (citing several similar cases). Moreover, even suspending disbelief and treating Section 2 and Section 5 as equally intrusive does not change the fundamental point: given that Congress has *already* imposed the intrusion of Section 2 on covered jurisdictions, the only rational justification for *adding* the intrusion of Section 5 is if Section 2 is ineffective.

For these reasons, it is irrelevant that *Boerne* and its progeny *previously* "held out Section 5 as a prime example of legislation that is congruent and proportional." *See* Govt.Br. 45. They so characterized the old Section 5 precisely

because the 1965 Congress had recognized "the ineffectiveness of the existing voting rights laws … [and] case-by-case litigation" "where voting discrimination ha[d] been most flagrant." *Boerne*, 521 U.S. at 525-26. It was "[u]nder the compulsion" of those "unique circumstances" and "exceptional conditions" that Congress could "justify legislative measures not otherwise appropriate." *South Carolina*, 383 U.S. at 334-35. Contrary to DOJ's suggestion here, the 1965 Congress never would have enacted Section 5, and the Supreme Court never would have upheld it, *even if* Section 2 would have been just as effective in the covered jurisdictions as all other forms of antidiscrimination litigation are everywhere.

Likewise, DOJ preposterously asserts that Section 5's preclearance regime is easier to justify than was the family-leave mandate upheld in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), simply because that provision created a prophylactic entitlement to unpaid family leave without any *individual* consideration of discrimination. *See* Govt.Br. 44-45. But that "across-the-board, routine employment benefit"—which Congress enacted to "reduc[e] employers' incentives to engage in discrimination," *Hibbs*, 538 U.S. at 737—is not even remotely comparable to a draconian requirement that employers obtain federal permission before changing their employment policies in any way. DOJ's inapt analogy, however, starkly confirms that its reasoning—like the district court's—inexorably leads to the conclusion that Congress could impose a federal

preclearance requirement *wherever* sufficient discrimination exists to justify a prophylactic anti-discrimination remedy. Pltfs.Br.29-32.

3. Finally, having rejected Section 5's historical and logical justification as a means of bolstering Section 2 where that remedy is uniquely inadequate, DOJ provides no alternative principled justification. Instead, after emphasizing that "Congress amassed a large record of voting discrimination in covered jurisdictions," DOJ, like the district court, baldly asserts that Congress' findings were sufficient, but principally relies on generic factors about Section 5 that would be *equally true* even if Congress had found *90% less* discrimination. *Compare* Govt.Br. 33, 42-43, *and* Govt.Shelby.Br. 62-65, *with* Pltfs.Br. 36-37. This arbitrary and standardless analysis is unavoidable once Section 5 is untethered from the only rational justification for its existence—*i.e.*, that preclearance is needed in those particular jurisdictions where normal litigation is ineffective.

B. The Preclearance Procedure No Longer Rationally Targets Jurisdictions Where Case-By-Case Litigation Is Inadequate

As Plaintiffs have shown, the legislative record demonstrates that Section 2 is not ineffective in the covered jurisdictions or any less effective there than in the non-covered jurisdictions. Because DOJ does not truly believe that such evidence is needed or available, it does not meaningfully argue otherwise.

1. Section 2 Litigation Is Not Inadequate In The Covered Jurisdictions

Plaintiffs have demonstrated that there is neither sufficient direct evidence of gamesmanship nor sufficient indirect evidence of entrenched discrimination to support a finding that Section 2 is ineffective in the covered jurisdictions. Pltfs.Br. 32-37. DOJ's half-hearted protestations to the contrary are baseless.

a. DOJ gamely asserts that Congress found that Section 2 litigation is inadequate because it is *generally* time-sensitive, costly, difficult, and has limited remedies. *See* Govt.Br. 38-41, 45-46. But Congress could not have believed that those supposed attributes of Section 2 justified Section 5, and this Court cannot possibly so hold.

Most obviously, the universality of those traits would have dictated extending Section 5 *nationwide*, given the absence of any rational reason to leave minorities in most of the country saddled with a purportedly "inadequate" remedy. *Compare South Carolina*, 383 U.S. at 328 (stressing instead "the *inordinate amount* of time and energy" required for "case-by-case litigation" in the South during the 1960s (emphasis added)). Indeed, reliance on such generic burdens would justify a preclearance regime for virtually any potentially discriminatory practice, given that the types of "burdens" identified by DOJ are traditional attributes of virtually *all* antidiscrimination litigation. For example, DOJ cannot seriously be contending that employment-discrimination plaintiffs bringing the sort

of *class-wide claims* at issue in Section 2 cases can quickly, cheaply, and easily obtain full redress for their alleged injuries. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In any event, DOJ drastically exaggerates the burdens of Section 2 litigation. To take the simplest example, DOJ's repeated refrain that Section 2 uniquely requires leaving the challenged practice in place during the course of litigation, *see* Govt.Br. 38-39, is belied by the countless Section 2 cases currently pending to challenge new redistricting plans *before* any elections are held under them. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934 (2012).

b. DOJ also fails to refute Plaintiffs' showing that, because Section 2 has prophylactically banned even some unintentionally discriminatory "results" since 1982, it is now *better suited* to redress unconstitutional discrimination than it was when Section 5 was originally enacted in 1965. Pltfs.Br. 30-31. DOJ's sole response is that the "results" test has not made litigation any "less burdensome," because the factors considered under that test are "the very factors" that courts considered in assessing *intentional* discrimination prior to 1982. *See* Govt.Br. 41-42. That, however, would come as quite a surprise to the 1982 Congress, which expressly justified the new "results" test based on its finding that the obligation to prove intent "place[d] an 'inordinately difficult' burden of proof on plaintiffs." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).

c. Finally, just as DOJ denigrates the important improvement in Section 2, it minimizes the critical difference between the type of voting discrimination that currently exists and the type that existed when Section 5 was originally enacted. Specifically, whereas the South during the 1960s was plagued with vote-denial schemes that "interfered with minorities' access to the ballot," modern voting discrimination typically involves vote-dilution schemes that "interfere with the weight of the ballots cast." *See* Shelby.JA 596-97. Although DOJ describes this as an inconsequential shift, *see* Govt.Br. 33, it actually has two fundamental implications for Section 2's adequacy in redressing intentional discrimination.

Most importantly, Section 2 is far more effective in attacking intentional vote dilution than intentional vote denial. Because there are countless ways to suppress minorities' ability to cast their votes, Section 2 suits in the vote-denial context were particularly vulnerable to "the extraordinary stratagem of contriving new rules … in the face of adverse federal court decrees." *South Carolina*, 383 U.S. at 335. By contrast, because vote-dilution claims involving minorities' group-voting power typically arise in the context of districting, it is much more difficult for jurisdictions to evade a Section 2 decree. Any invalidated districts will be replaced *one time* with valid ones—jurisdictions cannot continually "contriv[e] new" *districts* "in the face of adverse federal court decrees." *Id.*

Moreover, the consequences from any discrimination that manages to evade Section 2 are less severe. Unlike the outright "disenfranchisement" perpetrated by vote-denial schemes, vote-dilution schemes merely impose a generalized burden on a racial group's supposed collective entitlement to a "fair" share of electoral power. *See Holder v. Hall*, 512 U.S. 874, 891-936 (1994) (Thomas, J., concurring in the judgment). Thus, even though intentional racial "vote dilution" is a constitutionally cognizable injury, it is nonetheless an undoubtedly "lesser" "harm" than the "vote denial" that gave birth to the "[s]trong measure[]" of Section 5. *See Boerne*, 521 U.S. at 530.

2. Section 2 Litigation Is No Less Adequate In The Covered Jurisdictions Than In The Non-Covered Jurisdictions

As Plaintiffs argued, Section 5's "disparate geographic coverage" cannot possibly be "sufficiently related to the problem that it targets," *Nw. Austin*, 129 S. Ct. at 2512, because it is not even "rational in both practice and theory," *South Carolina*, 383 U.S. at 330. Once again, DOJ pays no more than lip-service to these constitutional standards.

a. Plaintiffs demonstrated that Section 5's scope of coverage is irrational in theory, because the 2006 Congress made no effort to identify the jurisdictions where Section 2 is *currently* most inadequate (or even where there now exists the most discrimination). Pltfs.Br. 38-39. DOJ candidly concedes that Congress failed

to do so, yet then proffers justifications for that legislative omission that would make a mockery of *Nw. Austin*.

Like the district court, DOJ emphasizes that Congress "require[d] preclearance of the jurisdictions with the worst history of discrimination, as well as a current record of discrimination, while allowing those that no longer discriminate to bail[-]out," and also separately providing for the possibility that "non-covered jurisdictions that discriminate may be judicially subjected to preclearance" through "bail-in." *See* Govt.Br. 46-48. But, as Plaintiffs have explained, that is a frank confession that Congress was *not* trying to justify "current burdens" by "current needs," *see Nw. Austin*, 129 S. Ct. at 2512, because it instead gave primary weight to a jurisdiction's ancient sins rather than its present transgressions. Pltfs.Br. 39-41. After all, if Section 5 were being enacted *for the first time* in 2006, it would indisputably be irrational to focus coverage on the jurisdictions who had the "worst history of discrimination" in the 1960s and earlier, rather than on those with the worst records of discrimination in the 21st century. Yet there is no valid reason for using that irrational coverage criteria just because Section 5 was *reauthorized* in 2006: the distinction is relevant at most to whether it was "politically feasible" to "chang[e] the formula" given the "settled expectations" of non-covered jurisdictions, which the Supreme Court has all but held is an illegitimate basis for retaining the decades-old coverage decision. *See Nw. Austin*, 129 S. Ct. at 2512.

Ironically, DOJ's heavy reliance on "bail-out" and "bail-in" is perhaps the starkest proof that Section 5's "geographic coverage" is not "sufficiently related to the problem that it targets." *See id.* The fact that "the number of bail[-]outs has been accelerating" and "will continue to grow in the near future," *see* Govt.Br. 47, simply confirms that the 2006 Congress was grossly overinclusive. Had it done its job properly, rather than relying on courts to redraw the coverage map through "bail-out" actions, then there would not have been an explosion of "bail-outs," because the right jurisdictions would have been covered initially. Even more damning, though, is DOJ's reliance on "bail-in" to address the obvious underinclusivity problems from the dated coverage decision. *Id.* The fatal flaw is that "bail-in" is authorized only as a *judicial remedy* after a "find[ing] that violations of the fourteenth or fifteenth amendment … have occurred." 42 U.S.C. § 1973a(c). But, of course, the preclearance procedure is supposed to be targeting jurisdictions where case-by-case litigation is *inadequate*, and those are the jurisdictions *least* likely to be subjected to such a judicial remedy.

b. Plaintiffs also demonstrated that Section 5's scope of coverage is irrational in practice, because the covered jurisdictions are not materially distinguishable from the non-covered jurisdictions with respect to the adequacy of Section 2 litigation (or any other metric). Pltfs.Br. 41-43. DOJ fails to adduce any meaningful contrary evidence.

Having repeatedly trumpeted the thousands of pages of legislative evidence concerning discrimination in the covered jurisdictions, DOJ, much like the district court, can now produce only a single scrap of data from the legislative record as support for its assertion that Section 5's scope of coverage is rational. Namely, DOJ stresses that 56% of the reported Section 2 cases between 1982 and 2006 that had favorable outcomes for minorities were brought in covered jurisdictions. *See* Govt.Br. 49.

The dispositive response to DOJ's reliance on Section 2 cases is that the existence of successful Section 2 cases in the covered jurisdictions vividly confirms that Section 2 is an adequate remedy and that Section 5 cannot be justified. Indeed, for Section 5 purposes, a disproportionately and unexpectedly *low share* of successful Section 2 suits in a given jurisdiction would be a more serious indicator that case-by-case litigation was inadequate there for some reason.

In any event, even treating the existence of Section 2 cases as somehow tending to support the need for Section 5, DOJ's evidence can hardly be said to be "sufficiently related to the problem that it targets." *See Nw. Austin*, 129 S. Ct. at 2512. A collective 56-44% statistical disparity in "favorable" reported Section 2 cases for minorities is not sufficiently probative evidence of a meaningful difference in the adequacy of Section 2 litigation to overcome "our historic tradition" of "equal sovereignty." *See id.* That is especially true given that: (1)

the disparity virtually disappears if one instead compares the *more recent* favorable cases from 1990-2006 (fully covered States (29) / non-covered States (25)); and (2) the disparity *flips* if one instead compares the more probative category of cases involving *unconstitutional* discrimination (fully covered States (11) / non-covered States (18)). *See* http://sitemaker.umich.edu/votingrights/files/masterlist.xls. Indeed, there can be no serious dispute once one realizes that five of nine fully covered States (AK, AZ, GA, SC, and VA) have the same or lower number of favorable reported Section 2 cases as four of the non-covered States (AR, IL, PA, and TN). *See* Govt.Br. 50-51.[1]

Finally, the district court suggested that the numbers above are distorted by Section 5's deterrent effect, such that there would be a greater disparity had Section 5 not been in place. Shelby.JA 627-28. But it would have been rare for a legitimate Section 5 objection to preempt a valid Section 2 claim, given that: (1) Section 5 had a different substantive standard than Section 2, *Ashcroft*, 539 U.S. at

[1] DOJ tries to bolster its evidence by having one of its own employees manufacture a chart that purports to show an 81% disparity when *unreported* cases are also considered. *See* Govt.Br. 49-51; Shelby.JA 437-40. What DOJ fails to mention, however, is that the unreported cases in the covered jurisdictions were identified by the National Commission on the VRA, whereas the unreported cases in the non-covered jurisdiction were identified—or, more precisely, *not* identified—by its own staff members. Shelby.JA 94-98, 438-39. Regardless of whether it is *ever* appropriate to consider evidence outside the legislative record in an enumerated-powers challenge such as this, surely it is never appropriate to have the sole piece of evidence on a critical question be DOJ's self-serving and hard-to-verify claim that its own staff purportedly did not "find" any more relevant information.

477-79; (2) a Section 2 violation was not itself a basis for a Section 5 objection, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477-85 (1997) ("*Bossier I*"); and (3) Section 5's retrogression standard did not reach the failure to *improve* minority electoral prospects, *Bossier II*, 528 U.S. at 336, which is the heart of a Section 2 claim for vote dilution, *Bossier I*, 520 U.S. at 479-80. And that is especially true given the specific manner in which DOJ had "long enforced" Section 5 in non-compliance with *Ashcroft* and *Bossier II*, *see* Govt.Br. 52-53—*i.e.*, by objecting to changes merely because they flunked the "ability to elect" quota, *see Ashcroft*, 539 U.S. at 487, or because they failed to increase minority electoral prospects to DOJ's satisfaction, *see Miller*, 515 U.S. at 917, 924-27. Particularly given the absence of any other probative evidence, this Court cannot rely on an assumed and unquantified deterrent effect to satisfy *Nw. Austin*'s mandate.

III. THE 2006 AMENDMENTS TO THE SUBSTANTIVE PRECLEARANCE STANDARD EXCEED CONGRESS' ENFORCEMENT POWERS

Another reason why Section 5's "current burdens" cannot be justified by "current needs," *see Nw. Austin*, 129 S. Ct. at 2512, is that the 2006 Congress had no legitimate justification for making the substantive preclearance standard stricter than the 1965 Congress had deemed necessary at the height of Southern defiance. Moreover, the "federalism concerns" with the preclearance procedure "are underscored by the argument" that the preclearance standard makes

"considerations of race" "the predominant factor" in electoral decisionmaking. *See id.* (citing *Ashcroft*, 539 U.S. at 491-92 (Kennedy, J., concurring)). Indeed, by abrogating *Ashcroft* and *Bossier II*, the amended preclearance standard now has the "fundamental flaw" of "a[] scheme in which [DOJ] is permitted or directed to encourage or ratify a course of unconstitutional conduct." *See Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring). Consistent with its strategy of trying to moot this appeal to prevent this Court's consideration of the issue, DOJ generally refuses to squarely confront Plaintiffs' arguments.

A. The Mere Expansion Of The 1965 Preclearance Standard Exceeds Congress' Enforcement Powers

As Plaintiffs have argued, it necessarily was "an unwarranted response" for the 2006 Congress to make Section 5 a "[s]trong[er] measure[]" to attack the current "harm," *see Boerne*, 521 U.S. at 530, given that conditions unquestionably have not worsened since 1965. Pltfs.Br. 58-59. Notably, DOJ does not even try to defend the district court's demonstrably false suggestions that the 2006 amendments were either necessary to address new problems from "vote dilution" or consistent with the 1965 Congress' intent. *Id.* 59-60.

Instead, DOJ rests on its assertion that, even if the 2006 amendments do not reflect the 1965 Congress' intent, they accurately reflect the manner in which the original preclearance standard had been "long enforced by the Attorney General and the lower courts," and those enforcement measures "had been essential to the

protection of minority voting rights." *See* Govt.Br. 52-53. It is entirely implausible, however, that the 1965 Congress failed to take every conceivable "appropriate" measure given the "unremitting and ingenious defiance" that it faced, *South Carolina*, 383 U.S. at 309, 334-35, or that the measure it actually adopted would have been ineffective were it not for persistent misapplication by DOJ and the lower courts.

Moreover, the 2006 Congress' belief that overruling *Ashcroft* and *Bossier II* was necessary for Section 5 as a whole to "protect" minority voting rights simply underscores the invalidity of the *entire* reauthorization. As discussed below, among other flaws with the 2006 amendments, the "ability to elect" mandate imposes a rigid quota-floor based on past minority electoral success, and "discriminatory purpose" objections enable DOJ to coerce increases in future minority electoral success. The 2006 Congress' view that such racially-preferential treatment was the true source of "the progress that ha[s] been made since 1965," *see* Govt.Br., 53, confirms that not even the reauthorization of the preclearance procedure was independently "designed to prevent[] unconstitutional behavior," *see Boerne*, 521 U.S. at 532. Instead, the reauthorization was merely in service of the amended preclearance standard's "attempt [to] substantive[ly] change … constitutional protections" by eliminating "incidental burdens" on minority voters. *See id.* at 531-32.

B. The "Ability To Elect" Preclearance Mandate Exceeds Congress' Enforcement Powers

The 2006 Congress imposed a flat ban on any voting change that "diminish[es]" a minority group's "ability … to elect their preferred candidates of choice." *See* 42 U.S.C. § 1973c(b),(d). Plaintiffs have demonstrated how that "ability to elect" standard abrogated *Ashcroft*'s flexible, Section-2-like, "totality of the circumstances" standard for determining retrogression. Pltfs.Br. 48-58. And they have further demonstrated how that unyielding quota-floor based on minority electoral success restricts local autonomy in ways that are not remotely designed to redress intentional discrimination and that instead discriminate against members of the majority. *Id.* 61-72. DOJ's brief largely consists of repeating the district court's conclusions without addressing Plaintiffs' challenges to those conclusions.

1. Like the district court, DOJ heavily emphasizes the claim that *Ashcroft*'s flexible standard "was impossibly challenging to administer" and could allow "intentional discrimination … under the guise of creating influence districts." *See* Govt.Br. 55-58, 72-74. Yet DOJ completely fails to address the two fundamental flaws that Plaintiffs previously identified with that claim of excessive flexibility. *First*, the claim is illogical, both because the jurisdiction bears the burden of proof in preclearance proceedings and because *Ashcroft*'s "totality of the circumstances" retrogression standard was closely modeled on Section 2's "totality of the circumstances" standard for discriminatory "results." Pltfs.Br. 66-67.

Accordingly, jurisdictions were able to invoke *Ashcroft*'s flexibility *only* if they could *convince* DOJ or D.C. federal judges that any diminution of a minority group's "ability to elect" was justifiable or excusable, under the same sort of holistic analysis that has long been employed under Section 2. *Second*, the claim of excessive flexibility is irrelevant, because the proper way to cabin open-ended race-conscious standards is to structure them as the Supreme Court has done for Section 2, not to adopt a rigid race-based quota instead. *Id.* 67-68. For example, Congress could have narrowed or barred the consideration of supposedly problematic factors like the "views" or "legislative positions" of "minority-preferred legislators," *see* Govt.Br. 75, rather than completely eliminating the "totality of the circumstances" standard and replacing it with a standard where the *only relevant factor* is whether minorities' "ability … to elect" has been "diminish[ed]," 42 U.S.C. § 1973c(b).

2. DOJ disagrees that *Ashcroft*'s flexibility was necessary to keep the retrogression standard focused on changes that are likely to reflect intentional discrimination. *See* Govt.Br. 65-66. But DOJ merely cites cases holding that "effects" tests *may* be valid means of enforcing bans on intentional discrimination. *Id.* Plaintiffs, of course, never disputed that well-established point. Instead, they were making the equally well-established point that what distinguishes a valid "effects" test from an invalid "quota" is the breadth of available defenses: the

more defenses available, the more likely a defendant who falls outside those defenses actually has an improper intent; whereas, the fewer defenses available, the more akin to a "quota" the "effects" test becomes. Pltfs.Br. 48-50. Where, as here, an "effects" test makes any adverse impact on minorities' expected electoral success the *sole* determinant of liability—wholly without regard to the jurisdiction's justifications or excuses, no matter how compelling—that "effects" test is plainly a quota-floor that is not even arguably designed to attack voting changes that are likely motivated by discriminatory purpose.

Nor is DOJ correct that Section 5's "effects" test is more likely to be targeting intentional discrimination, regardless of the breadth of defenses available, simply because it is limited to retrogressive changes. *See* Govt.Br. 66. There are countless non-discriminatory reasons why a change might "undo the gains minority voters have won in the past," *id.*, just as there are countless non-discriminatory reasons why a change might not create new gains for minority voters. Instead, again, what is probative of discriminatory intent is not whether the particular change had a retrogressive effect or merely a dilutive effect, but the degree to which the jurisdiction has latitude to justify the adverse effect on non-discriminatory grounds. Yet the "ability to elect" standard strips jurisdictions of all such defenses.

3. DOJ disputes that the "ability to elect" standard imposes "an unyielding *quota floor* based on past minority electoral success." *See id.* 58-65, 74-75. But its scattershot of supporting arguments are all wrong.

First, DOJ observes that § 1973c(b) does not "guarantee minority electoral *success*," but only their "*ability* … to elect," which DOJ claims is significant because "ability does not invariably lead to success." *See* Govt.Br. 59-60 (emphases added). However, § 1973c(b) still imposes a quota-floor on expected electoral "ability," even though it does not go so far as to impose a quota-floor on actual electoral "success." To analogize, a law prohibiting an employer from making fewer *job offers* to minority applicants than it did the prior year is a quota even though it does not guarantee the "successful" result that the same amount of minorities will be *hired* as the last year—because some minorities may decline the racially preferential offer and thus fail to take advantage of their "ability" to obtain the job. Similarly, § 1973c(b) is a quota that prevents any reduction in minorities' "ability to elect" their preferred candidates, even though minorities ultimately may not exercise their race-based advantage, by declining to turn out to vote. In short, § 1973c(b)'s quota is simply tied to an election's *ex ante* rules rather than its *ex post* results—*i.e.*, no electoral practices may be changed that are *expected* to diminish minority success.

Second, DOJ repeatedly contends that the purpose of the "ability to elect" standard was merely to prevent the consideration of "influence" districts as a defense to retrogression, and thus the 2006 amendments do not foreclose defenses to retrogression based on other "factors," such as "demographic changes" or "traditional districting criteria." *See id.* 58-59, 75. That contention, however, is foreclosed by the plain text of the amended standard, which unambiguously bars any change that "diminish[es]" a minority group's "ability … to elect," *even if* the reason for that diminution is consideration of "demographic changes" or "traditional districting criteria." 42 U.S.C. § 1973c(b). If Congress had wanted to leave intact *Ashcroft*'s "totality of the circumstances" standard other than with respect to the consideration of "influence" districts and related "factors" such as the "views" or "legislative positions" of "minority-preferred legislators," *see* Govt.Br. 75, then Congress could and would have done so. Instead, however, it made the "ability to elect" the "dispositive [and] exclusive" statutory factor, thereby entirely eliminating the "totality of the circumstances" standard, *including* the "feasibility" inquiry that previously justified consideration of factors such as "demographic changes" or "traditional districting criteria." *See Ashcroft*, 539 U.S. at 479-80; *see also* H.R. Rep. No. 109-478, at 71 ("Congress explicitly *rejects* all that logically follows from [*Ashcroft*]'s statement that … the comparative ability of a minority group to elect a candidate of its choice … cannot be dispositive.").

Third, DOJ asserts that the "ability to elect" standard "did not displace preexisting Section 5 case law holding that even a retrogressive change must nonetheless be precleared in certain circumstances." *See* Govt.Br. 61-62. But the cases cited by DOJ are inapposite. As for *Beer v. United States*, 425 U.S. 130 (1976), that case did not, per DOJ's suggestion, create an atextual "defense or justification" for changes that otherwise would have violated Section 5's plain text. *See* Govt.Br. 62. Instead, *Beer* held that the plain text of the statutory ban on changes that have the "effect" of "abridging the right to vote," 42 U.S.C. § 1973c(a), is properly *interpreted* as limited to retrogressive effects. *See Beer*, 425 U.S. at 141; *Bossier II*, 528 U.S. at 329. As for *City of Richmond v. United States*, 422 U.S. 358 (1975), that "*ex necessitate*" "exception to normal retrogressive-effect principles" was only "justified by the peculiar circumstances presented in annexation cases." *Bossier II*, 528 U.S. at 330-31.

Fourth, DOJ claims that its regulations have never "require[d] the reflexive imposition of objections in total disregard of the circumstances involved." *See* Govt.Br. 62-65. But that is irrelevant. Before 2006, nothing in the plain text of Section 5 mandated such "reflexive imposition," which is precisely why *Ashcroft* was able to adopt a "totality of the circumstances" standard. Now, however, the "ability to elect" standard does mandate such objections. And this Court cannot "uphold an unconstitutional statute merely because the Government promise[s] to

use it responsibly." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010). Moreover, even if DOJ's regulations could somehow trump Section 5's plain text, those regulations do not actually render the "ability to elect" standard any less of a quota. For example, DOJ will grant preclearance where "no less retrogressive plan *can be* drawn due to []shifts in population," such as where "compliance with the one person, one vote standard *necessitates* the reduction of minority voting strength." *See* Govt.Br. 63-64 (emphasis added). But the "ability to elect" mandate remains a rigid quota even if it does not purport to require practices that are *independently unconstitutional* or otherwise impossible. To analogize, a law that guaranteed public housing for only minorities would still be a quota even if the law would not be followed when the requisite housing could be obtained only by violating the Takings Clause. Likewise, § 1973c(b) inflexibly preempts any change that "diminish[es] the ability" of minorities "to elect their preferred candidates of choice," subject only to the trivial qualifier that there is a viable less-retrogressive alternative.

Fifth, DOJ proclaims that the "ability to elect" standard does not require preserving every existing "safe" majority-minority and "cross-over" district. *See* Govt.Br. 60. Notably, DOJ does not repeat the district court's erroneous arguments concerning a jurisdiction's limited ability to make some "tradeoffs" among such districts. Pltfs.Br. 69-70. Rather, it merely observes that such districts

will require smaller minority percentages if racially polarized voting decreases. *See* Govt.Br. 60-61. But Plaintiffs have already demonstrated why a decrease in racially polarized voting will perversely *increase* the number of protected districts, Pltfs.Br. 71-72, and DOJ has no response whatsoever.

Sixth, DOJ reprises the district court's contentions that the "ability to elect" standard does not require preserving every functioning "influence" district and that this actually reduces Section 5's race-consciousness because such districts were protected under *Ashcroft*. *See* Govt.Br. 74-75. Once again, Plaintiffs previously refuted these points, Pltfs.Br. 70-71, and DOJ does not deign to reply.

Seventh, DOJ's last try is that retrogression is analyzed on a "statewide" basis. *See* Govt.Br. 61. That, of course, is wholly irrelevant. Although the analysis allows the "loss" of a minority-preference district in one place to be "offset" by the "gain" of such a district elsewhere, *id.*, it still requires preserving the overall number of minority-preference districts.

In sum, rather than attacking intentional discrimination that defies redress under ordinary Section 2 litigation, the new "ability to elect" preclearance standard makes "[r]ace … the predominant factor" in electoral decisionmaking and thereby "underscore[s]" the "federalism concerns" with the 2006 version of Section 5. *See Nw. Austin*, 129 S. Ct. at 2512.

C. "Discriminatory Purpose" Preclearance Objections Exceed Congress' Enforcement Powers

The 2006 Congress authorized objections based on "any discriminatory purpose." *See* 42 U.S.C. § 1973c(c). Plaintiffs have demonstrated how that abrogation of *Bossier II* significantly and needlessly increases the burdens that the preclearance process imposes on covered jurisdictions. Pltfs.Br. 72-77. Once again, DOJ's brief parrots the district court's conclusions without addressing Plaintiffs' challenges to those conclusions.

1. DOJ emphasizes that "discriminatory purpose" is the standard for a constitutional violation and then summarily asserts that "shifting the burden of proof to jurisdictions with a significant history of discrimination is appropriate." *See* Govt.Br. 66-67. Yet DOJ does not even attempt to respond to the Supreme Court's warnings that forcing jurisdictions in the preclearance context to prove that their voting changes lack a non-retrogressive discriminatory purpose is a serious and unnecessary burden. Pltfs.Br. 75. Indeed, that is precisely why *Bossier II* said that "discriminatory purpose" objections "exacerbate[] the 'substantial' federalism costs that the preclearance procedure already exacts, … perhaps to the extent of raising concerns about § 5's constitutionality." 528 U.S. at 336.

2. DOJ next observes that the failure to object on "discriminatory purpose" grounds would allow unconstitutional changes to go into effect and force minority voters to sue to enjoin them. *See* Govt.Br. 67-68. Yet, among other

things, DOJ does not even attempt to respond to the fact that truly discriminatory changes will be easily reachable under Section 2 suits given the evidence uncovered during the preclearance process, whereas interposing a "discriminatory purpose" objection to *non-retrogressive* changes may absurdly lock in place a status quo that is even worse. Pltfs.Br. 75-76.

3. DOJ finally contends that Plaintiffs cannot facially challenge the "discriminatory purpose" prong based on concerns that DOJ will once again misuse such objections by coercing jurisdictions to improve minority electoral prospects. *See* Govt.Br. 68-69. Yet DOJ does not even attempt to respond to the fact that *Nw. Austin* and multiple other Supreme Court opinions analyzing the facial scope or validity of Section 5 have commented on the excessive "considerations of race" attributable to the statute in general and "discriminatory purpose" objections in particular. Pltfs.Br. 76-77. Most notably, Justice Kennedy sweepingly declared that there is a "fundamental flaw" with "any scheme" where "[DOJ] is permitted … to encourage … a course of unconstitutional conduct." *Ashcroft*, 539 U.S. at 491 (concurring opinion).

CONCLUSION

This Court should hold that Section 5, as reauthorized and extended in 2006, is facially unconstitutional, and reverse the judgment below.

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Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as extended by this Court's order of January 4, 2012, (Doc. No. 1350948), because it contains 8248 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), as counted using the word-count function on Microsoft Word 2007 software.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 23, 2012, I caused eight copies of the foregoing document to be filed with the clerk of this Court by hand delivery, and I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, which will serve the following counsel for Appellees at their designated electronic mail addresses:

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