No. 12-81

In the Supreme Court of the United States

JOHN NIX, ET AL.,

Petitioners,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 statement contained in the Petition for a Writ of Certiorari remains accurate.

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The Government has no credible argument for opposing this Court's immediate review of the facial constitutionality of the 2006 version of Section 5. And the Government has no persuasive justification for alternatively suggesting that this Court should deny review here and grant review only in *Shelby County v. Holder*, No. 12-96. That would require the petitioner there to brief and argue *for the first time* the important and difficult questions that Petitioners here have consistently raised about the impact of the 2006 substantive amendments on the 2006 preclearance reauthorization—questions that the Government implicitly concedes must be answered when deciding Section 5's facial validity, as Judge Williams explained in his *Shelby County* dissent.

To be sure, the Government contends that there is a vehicle problem here because the D.C. Circuit held that Petitioners' appeal was mooted when DOJ belatedly purported to preclear the specific voting change whose injurious suspension initially gave Petitioners standing to facially challenge Section 5. But the Government does not dispute that the D.C. Circuit failed to require it to prove that Section 5 cannot reasonably be expected to injure Petitioners in the future, and the Government's *post hoc* defense of that failure is clearly erroneous. The Government thus has confirmed that the mootness question is itself cert-worthy and, indeed, summarily reversible.

I. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW OF THE 2006 VERSION OF SECTION 5 IN THIS CASE ARE UNTENABLE

A. The Government's Reasons To Decline Any Review Now Of The 2006 Reauthorization Cannot Be Taken Seriously

The Government initially asserts that this Court should not review Section 5's facial constitutionality *at all*, because it believes the D.C. Circuit in *Shelby County* correctly decided the issue. *Nix* AG BIO 27; *Shelby* AG BIO 16-31. But, whatever one's view of the merits, there is no reasonable argument that this Court should refrain from definitively resolving Section 5's validity. This Court unanimously observed that the 2006 reauthorization of Section 5's preclearance procedure poses "serious constitutional questions," *Nw. Austin Mun. Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009), and the D.C. Circuit's divided decision is an obviously inadequate final answer given the monumental implications for the Nation's federal structure and electoral system. Permanently deferring to the D.C. Circuit is particularly inappropriate since the majority refused to consider the impact of the 2006 amendments on the preclearance reauthorization (given Shelby County's failure to raise the issue). *See Nix* Pet. 13.

The Government next contends that this Court should at least *delay* its review of Section 5's facial constitutionality, which would enable factual development concerning "bail-out" while still leaving as-applied challenges available. *Shelby* AG BIO 31-33. Shelby County's reply brief explains why it is patently unreasonable to delay facial review for

those reasons. More importantly, having already given Congress three years to fix the problems identified in *Nw. Austin*, this Court cannot realistically delay its review of Section 5 any longer. As this Court likely is well aware, it soon will be deluged with mandatory direct appeals under Section 5, because this year's election has given rise to a number of cases where judicial preclearance has been denied and constitutional arguments have been raised. *See, e.g.*, *Texas v. Holder*, No. 12-128, Dkt. Nos. 341, 345 (D.D.C.) (denying preclearance for Texas's voter-identification law and establishing a briefing schedule on Texas's constitutional challenge that ends in mid-November of 2012). Thus, the real question is not *whether* or even *when* this Court will decide Section 5's facial constitutionality, but *what vehicle* it will end up using. Granting review in this case and *Shelby County* clearly would be better than being forced to decide in one of the inevitable direct appeals where, like *Nw. Austin*, the constitutional claims will be presented ancillary to a fact-specific preclearance request.

B. The Government's Reasons Not To Review The 2006 Amendments In This Case Are Imprudent

It warrants emphasis that the Government does not dispute that, if this Court reviews the 2006 reauthorization in *Shelby County*, it can and should consider the 2006 amendments' impact. *See Nix* AG BIO 27-28. The Government apparently agrees with Petitioners and Judge Williams that it is "impossible to assess [the coverage] formula without first looking at the burdens § 5 imposes on covered jurisdictions." *See Nix* Pet. 13, 20-25.

Instead, the Government primarily contends that this Court can do so in *Shelby County* itself, even though the petitioner there did not raise these arguments below and perfunctorily raises them now only in a single paragraph of its petition. *Nix* AG BIO 28; *Shelby* Pet. 18-19. But while this Court has the power to consider the 2006 amendments in *Shelby County* despite such minimal briefing, it would be an *indisputably more prudent exercise of certiorari discretion to ensure full briefing* on such an important and complex question. That plainly is best accomplished by additionally granting review in this case, given that Petitioners here devoted more than half of their briefs below to the 2006 amendments, the district court issued a lengthy opinion focused on the merits of our "significant" arguments, *Nix* Pet.App. 10a, 44a-96a, and even Judge Williams' dissent in *Shelby County* heavily emphasized them, *id.* 229a-236a.

The Government's only rationale for eschewing that obvious course of action is the mootness question presented here. *Nix* AG BIO 26-27. But, just as this Court benefited from considering the Michigan affirmative-action cases together even though there was a justiciability issue in *Gratz v. Bollinger*, 539 U.S. 244, 259-68 (2003), so too this Court would benefit from considering this case alongside *Shelby County*, *Nix* Pet. 26-27, especially since the D.C. Circuit's mootness holding is itself cert-worthy and, indeed, summarily reversible.

Finally, the Government separately suggests that the 2006 amendments' direct abrogation of this Court's narrowing construction of Section 5 is of no concern, because Congress' overriding of this Court's

judgments was "necessary in order to protect the progress minority voters had made since 1965." *See Nix* AG BIO 28-30. Tellingly though, this benign description completely ignores Judge Williams' powerful dissent in *Shelby County*. That opinion, like this Court's decisions before it, shows instead how the 2006 amendments "aggravate[] both the federal-state tension … and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination," by "exacerbat[ing] the substantial federal costs that the preclearance procedure already exacts" and by effectively "command[ing] that States engage in presumptively unconstitutional race-based districting." *See Nix* Pet. 22-24; *Nix* Pet.App. 231a-235a.

Indeed, these tensions have surfaced in cases like *Texas v. United States*, No. 11-1303, --- F. Supp. 2d ----, 2012 WL 3671924 (D.D.C. Aug. 28, 2012), which held that the new "ability to elect" standard prohibited Texas from changing an *overwhelmingly white district* that elected a *white Democrat* into one more likely to elect a Republican, simply because the minorities there also supported that white Democrat in general elections. *See id.* at *38-43. This exemplifies how the "ability to elect" standard is a preferential quota-floor that protects any "electoral advantage" of the political party disproportionately supported by minorities in any district with a cognizable minority population, thus "unnecessarily infus[ing] race into virtually every redistricting" in covered jurisdictions. *See Bartlett v. Strickland*, 556 U.S. 1, 20-23 (2009) (plurality opinion); *see also* Nicholas Stephanopoulos, *Why the Supreme Court May Soon Strike Down a Key Section of the Voting Rights Act*, The New Republic (Sept. 10, 2012).

II. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW OF THE D.C. CIRCUIT'S MOOTNESS DECISION ARE UNTENABLE

A. The Government Obfuscates Its True Motive For "Withdrawing" The Kinston Objection, But Tacitly Concedes That It Was To Moot Petitioners' Appeal

Our petition challenged DOJ to represent to this Court that our "appeal *played no role* in its decision-making concerning its purported 'withdrawal' of the [Kinston] objection." *Nix* Pet. 11-12. The Solicitor General instead obliquely asserts that "[t]he evidence before the Attorney General in connection with his review of the [new] Lenoir County voting change *amply and independently supported his decision* to withdraw [the old Kinston] objection." *Nix* AG BIO 25 n.8 (emphasis added).

To put the Government's carefully phrased non-denial denial in plain English: DOJ's *true motive* for "withdrawing" its objection was in fact to moot Petitioners' appeal, but DOJ *could have* independently made the same discretionary decision "on the merits." Nowhere does the Government represent that DOJ *would have* done so but for Petitioners' appeal. Instead, despite countless objections over the years and "160 instances" where objections have been reconsidered, the declaration cited by the Government identifies *only one other time* when reconsideration occurred absent any request from the covered jurisdiction. *See id.* 19 n.6.

In sum, whether or not DOJ hypothetically would have "withdrawn" the objection absent Petitioners' pending appeal, the reason DOJ actually did so was undoubtedly to moot our appeal.

B. The Government's Narrow Construction Of Its Burden Of Proving Mootness Under The "Voluntary Conduct" Doctrine Conflicts With Decisions Of This Court, The D.C. Circuit Itself, And Various Other Circuit Courts

Our petition demonstrated that the D.C. Circuit erroneously failed to place on DOJ, as a defendant asserting mootness based on its own "voluntary conduct," the "heavy burden" of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected" to injure the plaintiffs in the future. *See Nix* Pet. 28-31 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). In response, the Government implicitly concedes that the D.C. Circuit did not apply this standard, but argues that it nonetheless can satisfy that burden for the *Kinston objection* and need not satisfy that burden for *Section 5*. *Nix* AG BIO 24-26. The Government contends that the "allegedly wrongful conduct" here was merely "the Attorney General's 2009 objection to Kinston's nonpartisan-election referendum," which "has been irrevocably withdrawn and the referendum precleared." *Id.* 24. It claims that "Petitioners overstate their case significantly in describing the relevant 'allegedly wrongful behavior' as 'Section 5's 2006 reauthorization and expansion,'" because that "erroneously defin[es] the scope and cause of their injuries more broadly than the courts adjudicating their case have." *Id.* 24-26. This response is demonstrably wrong.

As a threshold problem, the D.C. Circuit ignored the "voluntary conduct" standard altogether, rather than holding the standard was satisfied based on the

limited "wrongful behavior" characterization that the Government now advances. *Nix* Pet.App. 1a-7a. Even more problematic, the Government's newly minted defense of the D.C. Circuit's mootness decision is irreconcilable with the D.C. Circuit's *own* earlier opinion holding that Petitioner Nix had standing and a cause of action. Specifically, the D.C. Circuit *already rejected* the Government's argument that Petitioners are challenging the Attorney General's objection, concluding instead that they are challenging Section 5 on its face:

> [P]laintiffs have repeatedly confirmed that they are now arguing only that section 5, as reauthorized in 2006, is *facially* unconstitutional.... According to plaintiffs, their injuries flow not from the Attorney General's objection, but rather from section 5's allegedly unconstitutional preemption of voting changes that have failed to receive preclearance.... [W]e agree with plaintiffs that "neither law nor logic requires them to challenge the Attorney General's failure to alleviate the statutorily imposed injury in order to challenge Congress' infliction of that injury in the first place."

Id. 151a-152a. Accordingly, the Government should heed its own admonition: it cannot avoid review "by erroneously defining the scope and cause of [Petitioners' claim] more [narrowly] than the courts adjudicating their case have." *See Nix* AG BIO 26.

Moreover, it makes no sense at the mootness stage for the Government to fixate on the *particular* injury that originally supported Petitioners' standing to bring their *facial* challenge. It is irrelevant

whether the initial injury to Petitioners caused by Section 5's preclearance regime is factually different from any future injury that reasonably could be expected, because the specific *facts* are immaterial in a *facial* challenge. All that matters is that Respondents cannot disprove that *some* injury from Section 5 remains reasonably likely. *See Laidlaw*, 528 U.S. at 190 ("[T]he prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.").

Notably, the Government cites no case supporting its illogical argument that the "voluntary conduct" doctrine applies only if the initial injury caused by the facially challenged practice is precisely the same as the potential future injury identified. And abundant precedent confirms that mootness doctrine does not require such identity of injury.

For example, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), this Court held that the future injury in an "as-applied" challenge need only be "materially similar" to the initial injury in order to invoke the "capable of repetition, yet evading review" mootness doctrine. *Id.* at 463. More importantly, this Court did not suggest that even that limited "similarity" requirement is necessary for "the more typical case involving only facial attacks," presumably because it recognized that factual similarity is immaterial in facial challenges. *See id.* Likewise, in all four of the circuit-court cases our petition cited applying the "voluntary conduct" mootness doctrine, the plaintiff's initial injury that conferred standing to bring its facial challenge had been *irrevocably redressed* to the maximum extent

feasible by the defendant's voluntary conduct (as the Government alleges is true for the suspension of Kinston's referendum), but the facial challenge still was not moot because the federal defendant could not prove that the challenged practice could not reasonably be expected to impose a *new injury* on the plaintiff in the future (as the Government cannot prove for Section 5). *Nix* Pet. 30.

In sum, the Government's *post hoc* and meritless defense of the decision below confirms that the D.C. Circuit's failure to place the full burden of proving mootness on the Government under the "voluntary conduct" doctrine warrants summary reversal, as in *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) (per curiam). At a minimum, it shows that the mootness question is independently cert-worthy rather than a vehicle problem.

C. The Government Does Not Try To Satisfy, And Could Not Possibly Satisfy, Its Full Burden Of Proving That Section 5 Cannot Reasonably Be Expected To Injure Petitioners In The Future

The Government makes no attempt to prove that Section 5 cannot reasonably be expected to injure Petitioners in any way in the future. *See Nix* AG BIO 22-23. The Government fails even to refute the reasonable expectation of the three future types of injury to Nix's candidacy that we identified.

First, as for a possible voter-identification law in Kinston, the Government argues that, now that Plaintiff LaRoque can no longer pass a "local bill" as an elected representative, Petitioners have not "hypothesize[d] a different route … for any such potential change[] to become law." *Id.* 23. That is

false. We noted that the North Carolina Legislature itself previously enacted a voter-identification law, which was vetoed by a lame-duck Governor and thus likely could be passed again next year (yet be denied preclearance to Nix's detriment). *Nix* Pet. 32.

Second, as for the possibility of re-running the 2011 Kinston City Council election, the Government argues that there is "uncertainty" as to whether new elections could be held under North Carolina law and so "th[is] Court would have to decide a question of state law that has never been fully briefed or argued." *Nix* AG BIO 21. That too is wrong: since the Government bears the burden of proving mootness, its failure to demonstrate below (or here) that new elections cannot be ordered warrants reversal. The Government also speculates that Section 5 cannot be invalidated and special elections held before the upcoming elections in November *of 2013*. *Id.* 21-22. But, whether or not that prediction is accurate, it is irrelevant, because Nix's opponents who prevailed in the unlawful 2011 partisan election are serving *four-year terms*, and there is more than enough time to hold special elections before November *of 2015*.[1]

Third, as for the validity of the purported objection "withdrawal," the Government argues that

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[1] The Government also observes that, prior to DOJ's purported "withdrawal" of its objection, Nix never indicated that he would seek to re-run the 2011 election. *Nix* AG BIO 20-21. But, before then, Nix never had any reason to mention that *additional* redress flowing from his requested declaratory judgment that Section 5 is facially unconstitutional, because the redress of obtaining nonpartisan elections in 2013 was indisputably sufficient to support his continued standing.

Petitioners are "ignor[ing] the existence of [28 C.F.R. § 51.46(a)]" and merely complaining that *sua sponte* "reconsideration" "is *not authorized* in the text of Section 5 itself." *Nix* AG BIO 18 (emphasis added). To the contrary, Petitioners' argument has always been that Section 5's text *affirmatively forecloses* DOJ's regulation. Specifically, while DOJ may promulgate regulations on administrative-preclearance questions as to which "§ 5 is … silent," *Georgia v. United States*, 411 U.S. 526, 536 (1973), Section 5 is *not* "silent" on DOJ's authority to reconsider objection decisions. Instead, it provides for reexamination authority *only* for early decisions *granting* preclearance, and that "disparate" treatment must be "presumed to be "intentional[]" and "purpose[ful]" under *Russello v. United States*, 464 U.S. 16, 23 (1983). *Nix* Pet. 34-35. The Government responds that the *Russello* presumption "proves too much" here, because there are "only two procedural specifications governing administrative preclearance included in Section 5." *Nix* AG BIO 19-20. But that is a *non sequitor.* The fact that Section 5 contains only two such specifications underscores that, while DOJ is *generally free* to promulgate reasonable regulations on other issues, DOJ cannot promulgate regulations *inconsistent* with the two issues statutorily specified and circumscribed.

In sum, the Government's flawed arguments confirm the D.C. Circuit's burden-flipping "error was a crucial one," because "it is impossible to conclude that [DOJ could] have borne [its] burden of establishing that it is absolutely clear" that Section 5 "cannot reasonably be expected" to injure Nix's candidacy. *See Adarand*, 528 U.S. at 222, 224.

CONCLUSION

Accordingly, this Court should grant the merits questions presented here and in *Shelby County*, and resolve the mootness question presented here either through summary reversal or plenary review.

Respectfully submitted,

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