No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

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

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REPLY BRIEF FOR PETITIONER

Respondent Holder ("Respondent") concedes that Petitioner Shelby County ("Petitioner") has presented what "is certainly an important question of federal law." Brief for the Respondents in Opposition ("BIO") at 15; *see also Nix v. Holder*, No. 12-81, Brief for the Respondents in Opposition ("Nix BIO") at 27 ("[T]he constitutionality of Section 5 is an important federal question."). Effectively conceding that certiorari is appropriate, *see* Nix BIO at 27 (acknowledging that the Court "may … be inclined to grant certiorari" in this case), Respondent and Respondents-Intervenors principally use their briefs in opposition to preview their merits arguments.

It would serve no purpose for Petitioner to further burden the certiorari record with the many reasons why the majority decision below and Respondents' arguments fail to respond adequately to the concerns expressed by this Court in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009) ("*Northwest Austin*"). The petition, Justice Thomas's opinion in *Northwest Austin*, and Senior Judge Williams's dissent demonstrate why the majority opinion below should not be the final word on whether this "unusual" statute, BIO at 30, "is justified by current needs," *Nw. Austin*, 557 U.S. at 203. Given its substantial federalism costs and enormous practical burdens on States and other covered jurisdictions, there are grave doubts about the constitutionality of preclearance under any applicable standard, *see* Brief of the National Black Chamber of Commerce as Amicus Curiae in Support of Petitioner, No. 12-96 (filed Aug. 23, 2012) at 23-28. Moreover, the amicus briefs filed by several covered States on their own behalf and their pursuit of constitutional challenges in on-going

preclearance litigation reinforce both the importance and inevitability of having the question presented by Petitioner "settled by this Court" in accordance with Rule 10(c). *See* Brief of Arizona, Alabama, Georgia, South Carolina, South Dakota, and Texas as Amici Curiae in Support of Petitioner ("Covered States Amicus Brief") at 3 ("If this Court denies certiorari now, it will only delay the inevitable—the increasing costs associated with preclearance under the VRA, the statute's decreasing benefits, and the ever-increasing number of appeals that Covered Jurisdictions will be forced to file before Section 5's inevitable demise.").

Respondent does not contest that this case is an appropriate vehicle for definitively resolving the facial constitutionality of Section 5 and Section 4(b). *Compare* Nix BIO at 15-27. Nor could he. As previously explained, there is no justiciability problem, and the decision below comprehensively addressed Petitioner's claims. *See* Pet. 22. In addition, as Respondent acknowledges, all of the relevant issues are squarely before the Court, including Petitioner's argument that the federalism burden of Section 5 has been exacerbated by the provisions of the 2006 amendments to Section 5 of the Voting Rights Act that overruled *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). *See* Nix BIO 28 ("[T]here is no apparent obstacle to this Court's consideration" of the impact of the revisions to the "substantive standard when assessing the constitutionality of Section 5's reauthorization" in this case.) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)); Br. of Former Department of Justice Officials as Amicus Curiae in Support of Petitioner at 14 ("Congress' abrogation of *Georgia* and *Bossier Parish II* is properly before the

Court, and only underscores the unconstitutionality of Section 5."). Petitioner is prepared to fully brief all of these issues on the merits.

With little to say after having effectively conceded that the Petition meets this Court's criteria for a grant of certiorari, Respondent creates and then attacks a straw man. He claims that "Petitioner urges this Court to grant the petition … in order to review particular (sometimes hypothetical) applications of Section 5," BIO at 31, such as preclearance denials of voter ID requirements and early voting changes. He then urges the Court to consider those issues in as-applied challenges to Section 5 rather than in the present facial challenge. BIO at 32. But Petitioner does not seek the resolution of those particular applications of Section 5 here. Rather, Petitioner referenced those particular applications of Section 5 solely to highlight how DOJ's response to *Northwest Austin* has exacerbated the problematic aspects of the preclearance regime. They illustrate the practical effect of Section 5's severe federalism burdens, as well as the disparate treatment of covered and non-covered States under the statute's selective and outdated coverage formula. In short, these applications underscore the need for prompt review by this Court.

Respondent's only argument, then, for deferring resolution of the facial constitutionality of Section 5 and Section 4(b) is to await "a more fulsome record on bailouts … in the wake of *Northwest Austin*." BIO at 33. But that argument has no merit for several reasons. First, *Northwest Austin*'s interpretation of bailout eligibility did not expand bailout availability for the covered States or sub-jurisdictions responsible for voter registration

whose bleak bailout prospects are well documented by amici covered States. *See* Covered States Amicus Brief at 26-27. As those States explained, even if a State or political subdivision has had a perfect record of compliance since 1965, each failure by a governmental unit within its geographic boundaries resets the ten-year clock on that jurisdiction's ability to bailout. *Id.* at 27. Accordingly, any impact of increased bailout eligibility is limited to smaller sub-jurisdictions so numerous that envisioning the withering away of the preclearance obligation through statutory bailout is a "mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in the judgment in part and dissenting in part). Indeed, even crediting Respondent's bailout statistics, which are inflated by post-enactment evidence, *see* Pet. at 34-35 & n.5, only a tiny percentage (approximately 1.5%) of the more than 12,000 covered jurisdictions have bailed out of coverage since 1984. *See* BIO at 24 n.6 ("[B]ailout has been granted in 36 cases (reaching a total of 190 jurisdictions).")

Second, bailout is not responsive to Shelby County's challenge to Section 4(b) either in "theory" or in "practice," *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), and cannot save the ill-fitting coverage formula. Unlike in 1965, the current problems with the coverage formula are so pronounced that tinkering at the margins will not render it constitutional. App. 99a-101a (Williams, J., dissenting). As the Court has explained, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. Because Congress refused to examine that issue, this Court's review is needed.

Bailout is neither responsive to over-inclusiveness nor a complete remedy. As originally enacted in 1964, bailout was intended to address the inadvertent overreach of the coverage formula as to jurisdictions that "should not have been covered in the first place." BIO at 4. But after the 1982 amendments to the VRA, that is no longer the case. Under the current statute, a covered jurisdiction cannot secure bailout by demonstrating that it should not have been subject to preclearance in the first place. Nor are the bailout criteria purely objective. Rather, covered jurisdictions also must prove to the satisfaction of the DOJ and the federal district court in Washington, D.C. that they:

> (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected [under the Act]; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

42 U.S.C. § 1973b(a)(1)(F)(i)-(iii).

Moreover, even if a covered jurisdiction can satisfy these highly subjective criteria, it remains subject to Section 5's clawback provision, *id.* § 1973b(a)(5), which essentially requires a jurisdiction to continue to satisfy the statutory criteria for bailout for a ten-year period before

that jurisdiction is fully removed from coverage. Thus, bailout does not afford a jurisdiction "a change in its status from covered to non-covered." BIO at 24. And it certainly does not exonerate jurisdictions that should have never been covered in the first place. Rather, it basically turns covered jurisdictions into parolees that may ultimately be liberated from coverage only if they continue to comply with the statutory criteria for an additional ten-year period of supervised release.

DOJ's implementation of the bailout mechanism illustrates the point. For example, DOJ required Pinson, Alabama, as a condition of bailout, to take "certain additional constructive measures" including the formation of a "citizens' advisory group that is representative of the City's diversity" to make election recommendations to the City and a reporting requirement to the United States within 90 days after any municipal election administered by the City that details the "steps taken to increase opportunities for recruitment and participation of a diverse group of poll officials as well as the total number of persons by race who served as election officials in the election." *City of Pinson v. Holder*, 12-cv-255 (D.D.C. Apr. 20, 2012) (Doc. 11) (¶¶ 47-50); *see also City of Sandy Springs v. Holder*, No. 10-cv-1502 (D.D.C. Oct 26, 2010) (Doc. 8) (¶¶ 44-51) (imposing similar "administration and reports requirements" as a condition to bailout). If DOJ viewed bailout as an acknowledgement of the formula's over-inclusiveness, it would not require a jurisdiction to agree to onerous conditions to secure bailout (even beyond the onerous statutory criteria themselves).

In short, there is no nexus between bailout under the current version of the VRA and the over-inclusiveness of

Section 4(b)'s coverage formula. It is, at most, a "modest palliative" that can in no way solve the massive problems with the current coverage formula. App. 101a (Williams, J., dissenting). The post-1982 bailout has not had, and cannot be expected in the foreseeable future to have, any significant impact on the actual coverage triggered by the Section 4(b) formula. Waiting for confirmation that bailout will not redress the constitutional injury being suffered by covered States thus will only make matters worse. Pet. 34-35.

* * *

As Respondent repeatedly emphasizes, it was *this* Court that spoke definitively to the constitutionality of the VRA's 1965 enactment in *Katzenbach*, 383 U.S. 301, and after each subsequent reauthorization of the statute as measured against the applicable Congressional record. BIO at 5 (citing *Georgia v United States*, 411 U.S. 526 (1973); *City of Rome v. Unites States*, 446 U.S. 156 (1980); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999)). Principles of constitutional avoidance foreclosed prompt review of the 2006 reauthorization in *Northwest Austin* and sensibly afforded Congress the opportunity to address the "serious constitutional questions" the Court raised in that decision. 557 U.S. at 204. But given Congress' failure to respond, covered States "likely will be forced to continue to operate under the unconstitutional burdens of Sections 4 and 5 of the VRA unless and until this Court removes them. The Court should do so now." Covered States Amicus Brief at 27.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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