No. 12-81

IN THE

Supreme Court of the United States

JOHN NIX, *et al.*,

Petitioners,

v.

ERIC 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

BRIEF OF INTERVENOR-RESPONDENTS JOSEPH M. TYSON, W.J. BEST, SR., A. OFFORD CARMICHAEL, JR., GEORGE GRAHAM, JULIAN PRIDGEN, WILLIAM A. COOKE, AND THE NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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QUESTIONS PRESENTED

1. Whether this cause of action is no longer justiciable because it is moot and the source of Plaintiffs' standing—an objection to the conducting of municipal election in Kinston, NC, under a non-partisan scheme—cannot be reasonably expected to injure Plaintiffs in the future.

2. Whether Congress acted within its authority under the Fourteenth and Fifteenth Amendments when it reauthorized and amended Section 5 of the Voting Rights Act in 2006 after assessing the continuing need for its protections for minority voters in covered jurisdictions.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, the North Carolina State Conference of Branches of the NAACP is a § 503(c)(4) affiliate of the National Association for the Advancement of Colored People, Inc., which is a not-for-profit corporation organized under the laws of New York and does not issue shares to the public.

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Intervenor-Respondents Joseph M. Tyson, W.J. Best, Sr., A. Offord Carmichael, Jr., George Graham, Julian Pridgen, William A. Cooke, and the North Carolina State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) respectfully submit this response urging the Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Hoping to persuade this Court to strike down one of the most important pieces of civil rights legislation in American history, Petitioners ask this Court to grant review in a case that is plainly moot. Under Article III, however, any challenge to the constitutionality of the Voting Rights Act must await a live case and controversy. This Petition does not present one.

Petitioners filed this facial challenge to sections of the Voting Rights Act, 42 U.S.C. 1973c, after the Department of Justice initially denied preclearance to a proposed voting change in Kinston, North Carolina, that would have replaced the city partisan electoral system with a non-partisan system. While the litigation was pending, the Department of Justice reconsidered its position and granted preclearance. The change at issue is administratively precleared and will be implemented in the next city council elections. Petitioners have already won their case, albeit on more narrow grounds than they would have liked. The fate of the Voting Rights Act should not be decided based on the arguments of plaintiffs who are not impacted by the law or a case that has become moot.

In 1965, Congress passed the Voting Rights Act ("VRA"), P.L. 89-110, 42 U.S.C. §§ 1973–1973aa-6, in order to combat racial discrimination in voting and to enforce the Fifteenth Amendment, which prohibits the denial of the right to vote "on account of race, color, or previous condition of servitude." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 325 (1966). The VRA was passed pursuant to § 2 of the Fifteenth Amendment, which authorizes Congress to enforce §1 of the Amendment. *Id*. at 308.

Since its passage, the VRA has been reauthorized and amended by Congress multiple times, most recently in 2006, and has withstood various legal challenges to its constitutionality. *Katzenbach*, 383 U.S. at 337 (upholding Section 5 after 1965 enactment); *Georgia v. United States*, 411 U.S. 526, 535 (1973) (upholding the constitutionality of the 1970 extension of Section 5); *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (upholding Section 5 after 1975 reauthorization); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282-83 (1999) (upholding Section 5 after 1982 reauthorization). *Accord*, *Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221, 282-83 (D.D.C. 2008), vacated and remanded on other grounds sub. nom. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 577 U.S. 193 (2009); *Shelby Co. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. May 18, 2012).

In the 2006 reauthorization of the VRA, Congress accumulated a substantial record demonstrating the continuing need for the protections of Section 5. Pet. App. 181a-183a. When it reauthorized the VRA in 2006, Congress invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. *See* H.R. Rep. No. 109-478, at 90 ("[T]he Committee finds the

authority for this legislation under amend. XIV, § 5 and amend. XV, § 2"); *id.* at 53 & n.136 (noting that Congress is acting under its Fourteenth and Fifteenth Amendment powers in reauthorizing the Voting Rights Act). Congress also amended Section 5 by adding to § 1973c three new subsections in response to two Supreme Court decisions that "misconstrued Congress's original intent . . . and narrowed the protections" of Section 5: *Reno v. Bossier Parish*, 528 U.S. 320 (2000) (*Bossier II*), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Pub.L. 109-246, §2, July 27, 2006, 120 Stat. 577.

Subsection (c) restored the VRA's original criteria for determining whether new voting regulations should be pre-cleared. In *Bossier II*, this Court held that voting changes must have a discriminatory and retrogressive purpose in order to be denied preclearance. *Bossier II*, 528 U.S. at 341. By adding subsection (c) to the VRA, Congress clarified that denial of preclearance may be based on a finding of any discriminatory purpose. 42 U.S.C. 1973c(c).

Subsections (b) and (d) addressed what test should be used to determine whether a voting change had a prohibited retrogressive effect under Section 5's "effects" prong. In *Georgia v. Ashcroft*, the Court instituted a new and complex "totality of the circumstances" test for determining whether a voting change had a prohibited retrogressive effect under Section 5's "effects" prong. 539 U.S. at 479-80. In response, subsections (b) and (d) restored the standard articulated in *Beer v. United States*, 425 U.S. 130, 141 (1976), examining whether voting changes diminish the ability of minorities "to elect their preferred candidates of choice." Pub.L. No. 109-246, §§ 5(b), (d), 120 Stat. at 581; 42 U.S.C. §§ 1973c(b), (d).

After the reauthorization and amendments to the Voting Rights Act, voters in Kinston, North Carolina, passed a referendum in November 2008 that would have replaced the city's partisan electoral system with a nonpartisan system. Pet.App. 18a. Because Kinston, a city in Lenoir County, is a covered jurisdiction under Section 5 of the VRA, it was required to submit the referendum for preclearance before implementation. *Id.* 18a-19a. In a letter dated August 17, 2009, the Justice Department denied preclearance for the referendum based on the fact that eliminating party affiliation on the ballot would "likely reduce the ability of blacks to elect candidates of choice." *Id.* 19a. The Justice Department explained that, in its view, the limited success of African American voters in electing candidates of choice to the Kinston City Council has depended upon "crossover voting" by whites. *Id.* Citing this voting dynamic, the Justice Department determined that, because of a high degree of racial polarization in Kinston elections, eliminating party affiliation on the ballot would cause black candidates to lose a significant amount of white crossover votes, thereby reducing the ability of blacks to elect candidates of choice. *Id.* 19a-20a.

After the City Council decided not to pursue judicial preclearance, Petitioners brought a facial constitutional challenge to Section 5. *Id.* 20a. Count I of their complaint was a facial challenge to the constitutionality of Section 5, identical to the challenge brought in the Shelby County case. *Id.* 24a. Count II of Petitioners' complaint challenged specifically the 2006 Amendments as violative of the equal protection component of the Fifth Amendments. *Id.* 26a. The District Court granted Defendants' and Defendant-Intervenors' motions to dismiss for lack of standing and failure to allege a legally cognizable cause of action.

On appeal, the D.C. Circuit found that Petitioners did have standing to pursue Count I of their complaint, and remanded for further determination as to whether or not they had standing in regards to Count II. *Id.* 21a-22.

On remand, the District Court found that its holding in the Shelby County case controlled the decision on the merits on Count I—that Congress acted within its enforcement powers under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 in 2006. *Id.* 27a. The District Court further found that Congress was within its Fifteenth Amendment enforcement authority in enacting the 2006 Amendments—subsection (c) and subsections (b) and (d). *Id.* 65a; 96a. On Count II, the District Court found that Petitioners had standing to challenge subsections (b) and (d) of the Amendments (the "Ashcroft fix") but did not have standing to challenge subsection (c). *Id.* 96a-97a. The court, though, went on to analyze the merits of the challenges to both Amendments, and found that the Amendments withstood constitutional scrutiny. *Id.* 105a; 117a. Petitioners appealed to the D.C. Circuit. *Id.* 3a.

On January 30, 2012, the Department of Justice notified the City of Kinston that based on its review of information presented to it in a submission seeking preclearance of a proposed change to nonpartisan elections for the Lenoir County Board of Education, the Department would reconsider its objection to see if there had been a "substantial change in operative fact" that would warrant withdrawal of that objection. *Id.* 3a. On February 10, 2012, the Department of Justice formally withdrew its objection and precleared the Kinston referendum, allowing future elections to be conducted

as nonpartisan elections. *Id*. After extensive briefing on mootness, the D.C. Circuit vacated the judgment of the District Court and remanded the case with instructions to dismiss for lack of jurisdiction. *Id.* 7a.

REASONS FOR DENYING THE PETITION

I. Petitioners' Cause of Action is No Longer Justiciable and Was Properly Dismissed as Moot

A case becomes moot, and thus, non-justiciable under Article III, when the court cannot give any "effectual" relief to the party seeking it. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992); *Firefighter's Local 1784 v. Stotts*, 467 U.S. 561, 569-71 (1984). Even more basically, this Court has noted, "mootness…simply deprives us of our power to act." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). This case is a textbook example of a situation in which nothing a court could do would affect Petitioners' injury and basis for standing. There is no exception to mootness that is applicable in this case, nor is this case a proper or necessary vehicle for the review of the constitutionality of Section 5 of the Voting Rights Act.

A. The Voluntary Cessation of Allegedly Illegal Conduct Exception to Mootness is Inapplicable in the Instant Case

Petitioners pin their hopes for continuation of this case, despite the absence of any live controversy, on a narrow exception to the principle of mootness. This Court has noted that a defendant's voluntary cessation of allegedly illegal conduct does moot a case where, "(1) it can be said with assurance that there is no reasonable

expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal citations omitted). Thus, when it appears that Defendants' voluntary conduct has mooted Plaintiffs' case, Defendants must demonstrate that these two prongs are satisfied. The Department of Justice amply met that burden with the Court of Appeals for the District of Columbia Circuit, and that court appropriately found the action should be dismissed as moot. Pet. App. 7a.

In this particular case, the two prongs of the voluntary cessation analysis are somewhat intertwined. The second prong is satisfied because the Department of Justice is authorized by its longstanding regulations to withdraw objections based on changed facts, 28 C.F.R. § 51.46, and it made such a withdrawal in this case. Pet.App. 4a-5a. The withdrawal of the objection ensured that Petitioners "obtained everything that [they] could recover" from this lawsuit, and thus the case was moot. *Id.* 7a. Moreover, Petitioners can be assured that the alleged violation—the interposing of an objection to a non-partisan election method that injured Petitioner Nix by depriving him of competitive electoral advantages—cannot recur. An objection withdrawn thus is no different than preclearance granted. Once a covered jurisdiction has complied with the § 5 approval requirements, no further remedy exists under Section 5. *Allen v. State Board of Elections*, 393 U.S. 544, 549-50 (1969); *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996). The D.C. Circuit further cited its prior decision in *Harris v. Bell*, 562 F.2d 772 (D.C. Cir. 1977), which assumed there was "no basis for allowing judicial review of the Attorney General's determination that

previously unavailable information justifies withdrawal of an objection." *Id.* at 774. Once preclearance is granted or an objection is withdrawn, there is absolutely no mechanism by which the Department could reinstate its objection. *See* 28 C.F.R. § 51 *et seq*. Thus, because of the longstanding departmental regulations governing the application of Section 5, the Department of Justice was able to satisfy its burden and assure the D.C. Circuit that the voluntary cessation exception to mootness was not applicable in the current situation.

Aside from making clear that this was not the type of situation that the voluntary cessation exception was designed to address, the D.C. Circuit also addressed the specific points on the mootness issue raised by Petitioners (points again made in the Petition for Writ of Certiorari). Petitioners claimed to identify three future potential injuries that they could reasonably expect to recur absent resolution of their constitutional claims: that Section 5 might still injure them in the future in relation to other changes that require preclearance; that Petitioner Nix will not be able to seek a new election from the State Board of Elections without a finding that Section 5 is unconstitutional; and that the partisan election method is still in place because the Department of Justice does not have the authority to withdraw an objection. The D.C. Circuit correctly identified the faulty logic and/or erroneous legal theory supporting each of these potential injuries.

Petitioners argue that Section 5 might still injure them in the future by suggesting that North Carolina State House Representative Stephen LaRoque, one of the original plaintiffs in this action, intends to file local bills for Lenoir County that will require preclearance.

This claim highlights both Petitioners' misunderstanding of the first prong of the analysis examining whether the alleged violation can reasonably be expect to recur and the reasons why speculative future injuries cannot be the basis for Article III standing. To begin with, the first prong of the mootness analysis cannot be read so broadly as to encompass any wildly imaginative possible injury—even injuries that would not have been sufficient to sustain a finding of Article III standing at the time the complaint was filed. That is to say, the claim that Section 5 might potentially create an actionable injury at some point in the future would not have been sufficient to create standing to bring this case, and thus a reviewing court performing the voluntary cessation analysis cannot allow the first prong to be manipulated to assert standing based on sheer speculation. Here, Petitioners' standing derived from the suspension of the non-partisan election scheme which prevented Nix from getting his "name on the general-election ballot more cheaply and easily," and subjected him to disadvantage when compared to Democratic candidates benefiting from straight-ticket voting. Pet. App. 137a-138a. The Court of Appeals recognized the legally protected interest in such competitive advantages, and noted that Nix would have such advantages but for the Section 5 objection interposed. *Id.* 144a. The Court of Appeals finding of Article III standing was linked to this very particular injury—an injury which cannot reasonably be expected to recur. After granting preclearance, the Department of Justice cannot reinstate an objection. Thus, Nix and others will be free to run for municipal office under a nonpartisan election scheme.

Additionally, Stephen LaRoque is no longer a member of the North Carolina General Assembly, having resigned as of August 1, 2012, after being indicted by a federal

grand jury on charges of stealing from federally-funded nonprofits under his direction. *See*, North Carolina General Assembly, Members by District, Representative Stephen A. LaRoque, available at http://www.ncga.state.nc.us/gascripts/members/membersByDistrict.pl?sChamber=H&nDistrict=10; *see also*, *United States v. LaRoque*, 4:12-cr-00088-H (E.D.N.C.) (Docket #1, Indictment, Jul. 17, 2012). Obviously, no longer being a member of the General Assembly, LaRoque is not in a position to file local bills affecting Lenoir County, let alone get them passed by the General Assembly. And, even if LaRoque were in a position to introduce a local bill such as the photo Voter ID bill he mentioned, which he is not, Petitioners have offered no explanation as to why the hypothetical objection by the Department of Justice to such a bill would cause Petitioner Nix an injury as a candidate for municipal office. Petitioners' whole line of argument in this regard only further cements the reasons why Article III standing requires that concrete injuries be identified, and it confirms the Court of Appeals' sound conclusion that vague claims of potential future injury were too speculative to constitute a "cognizable injury caused by Section 5." Pet.App. 7a.

Second, Petitioner Nix claims that Section 5 continues to injure him by preventing him from requesting that the State Board of Elections order a new Kinston City Council election. Pet. 32-34. On this issue, Petitioner Nix has not filed such a request, let alone asserted an intention to make such a request of the State Board—thus, the entire discussion surrounds a conjectural potential filing which may or may not ever occur. Second, even if this Court were to rule Section 5 unconstitutional, it would not change Nix's position in regards to the North Carolina

State Board of Elections. Nix still needs to affirmatively petition the Board for a new election, and he has not done so. Additionally, the withdrawal of the objection based on changed circumstances alone—circumstances that were present at the time of the election—would be plausible grounds for such a request even absent this Court finding Section 5 unconstitutional. And, most importantly, the D.C. Circuit noted that there was substantial doubt as to whether the State Board had the statutory authority to revoke a certificate of election after elected officials had been sworn in. Pet.App. 7a. Thus, where the question is whether the "same complaining party [will] be subject the same action again," *Spencer v. Kemna*, 523 U.S. at 17, this hypothetical scenario painted by Petitioners is simply too speculative and remotely connected to the original action to serve as a basis for a finding that the injury to Nix is likely to recur.

Finally, and most incredibly, Petitioners continue to claim that, irrespective of the Department's withdrawal of the objection, Kinston's 2013 elections may still be run as partisan elections. Pet. 34-36. The D.C. Circuit rightly rejected Petitioners' assertion that the Department of Justice does not have the authority to withdraw an objection, noting that regulations promulgated by the Department of Justice give it direct authority to withdraw an objection. *See* 28 C.F.R. § 51.46 (the Attorney General may reconsider an objection "[w]here there appears to have been a substantial change in operative fact or relevant law"). The authority of the Department of Justice to promulgate such regulations has been acknowledged by this Court, see *Georgia v. United States*, 411 U.S. 526, 536-37 (1973), and it has given such regulations "substantial deference." *Lopez v. Monterey County*, 525 U.S. 266,

281 (1999). Additionally, minority voters would likely be laughed out of court if they, as Petitioners suggest, try to enjoin the use of "nonpartisan elections by persuasively arguing that the referendum still has not been validly precleared." Courts have been crystal clear in holding that determinations by the Attorney General under Section 5 are not susceptible to review or challenge by minority voters. *Morris v. Gresette*, 432 U.S. 491, 507 n. 24 (1977); *Reaves v. Dep't of Justice*, 355 F. Supp. 2d 510, 514 (D.D.C. 2005).

Petitioners also claim that the Attorney General must not have the authority to withdraw objections otherwise "new Administrations, with different voting-rights philosophies, could engage in blanket 'withdrawals' of prior objections." Pet. 35. First, since 1977 (*Harris v. Bell*), it has been assumed that the Department of Justice had the authority to withdraw objections. Since then, Administrations have changed numerous times, and never once have "blanket withdrawals" occurred. Petitioners offer no explanation as to why "blanket withdrawals" would begin now when they have not happened in the past. And, though not voluminous, the Department of Justice withdrawals of objections are not rare, and have not created intolerable or unworkable uncertainty in covered jurisdictions or amongst minority voters in those jurisdictions. *See* Department of Justice Section 5 Objection Determinations, available at http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (a chronological listing, by state, of the Section 5 objections interposed, continued or withdrawn by the Attorney General since 1965).

In short, the Department of Justice has satisfied its burden of showing that this case is now moot, and the

voluntary cessation exception to mootness does not apply to these facts. *See County of Los Angeles v. Davis*, 440 U.S. at 627, 631; *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974).

B. This Case Is Not an Appropriate or Necessary Vehicle for This Court's Potential Review of the Constitutionality of Section 5

Petitioners repeatedly assert the need for immediate review of the constitutionality of Section 5 of the Voting Rights Act, and claim that such review cannot be accomplished without separately considering the 2006 Amendments. Neither claim is persuasive.

Petitioners rely heavily on *Nw. Austin Mu. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009), in support of their argument that Section 5 is unconstitutional and that review of this case "is imperative." Pet. 14. But Petitioners fail to acknowledge that in *Nw. Austin*, this Court cautioned that voting rights improvements achieved under the Act since 1965 may be "insufficient and that conditions continue to warrant preclearance under the Act." 557 U.S. at 203. *Nw. Austin* expressly declined to address the question of whether Section 5 is unconstitutional, *id.* at 211, and does not support the conclusion that it is. In the mere three years since *Nw. Austin* was decided, another lower court, based on scrupulous review of the vast record assembled by Congress during the 2006 reauthorization process, has concluded that Section 5 and its 2006 Amendments are a constitutional exercise of Congress' authority under the Fourteenth and Fifteenth Amendments. *Shelby Co. v. Holder*, 679 F.3d 848, 852-53 (D.C. Cir. May 18, 2012). That holding is entirely consistent with a series of decisions by this Court upholding the constitutionality of Section

5 as originally enacted and subsequently reauthorized. *Katzenbach*, 383 U.S. at 337; *Georgia*, 411 U.S. at 535; *City of Rome*, 446 U.S. at 183, *Lopez*, 525 U.S. at 282-83. Such judicial consistency is not normally regarded as demonstrating an imperative need for immediate review. Indeed, the opposite is true.

Additionally, Petitioners also err in asserting that a review of Section 5 cannot be accomplished without this case. This assertion is difficult to credit. Had the bailout question not allowed this Court to exercise its constitutional avoidance prerogative, it seems likely that this Court would have addressed the constitutionality question of Section 5 in *Nw. Austin*—without specifically addressing the separate question of whether the Amendments to Section 5 violate the Fourteenth and Fifteenth Amendments of the Constitution (as that question was not raised in *Nw. Austin*). And the majority of the D.C. Circuit below was able to make a determination on the constitutionality of the Act without that separate analysis. *Shelby Co.*, 679 F.3d at 853. There is simply no compelling reason why this Court would not be able to resolve the constitutionality of the Act if it chooses to do so, in a case that meets the justiciability requirements of Article III without also accepting review in this non-justiciable case.

Importantly, Petitioners fail to acknowledge in their Petition that they have never been found to have standing to challenge subsection (c) of the 2006 Amendments. Thus, this Court's review of that challenge now does not merely turn on whether or not the issue is moot, but also on whether Petitioners are "entitled to have the court decide the merits of the dispute or of particular

issues" when it comes to subsection (c). *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The District Court in this case found that Petitioners could not establish standing to challenge subsection (c)—the *Bossier II* "purpose" amendment—because that amendment could not be causally linked to Petitioner Nix's injury. Pet.App. 97a. The Attorney General denied preclearance based on the fact that eliminating party affiliation on the ballot would "likely reduce the ability of blacks to elect candidates of choice." *Id.* 464a. The Department of Justice did not claim that a racially discriminatory purpose motivated the referendum; in fact, the Department indicated that it understood the "motivating factor" for the change to be "partisan." *Id.* 465a. The Department objected specifically because it could not "conclude that the city sustained its burden of showing that the proposed changes do not have a retrogressive effect." *Id.* 463a. There is no causal link between the Attorney General's objection to subsection (c), which provides that "[t]he term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose," and the denial of preclearance which lead to Nix' injury. 42 U.S.C.A. § 1973c. In the lower court, Plaintiffs failed to offer any evidence that the Attorney General relied on subsection (c) in interposing its objection to the referendum. Pet.App. 31a. Having failed from the very beginning to establish Article III standing to challenge subsection (c), Petitioners cannot be permitted to mix that challenge in with the others and sneak it before this Court under an exception to the mootness rule.

Finally, Petitioners cite a number of cases for the proposition that this Court has approved the review of multiple cases raising separate aspects of the issue, even where the lower court had not yet decided on the merits

of one of the cases. Pet. 26. However, a petition for writ of certiorari before judgment, as governed by Supreme Court Rule 11, is completely distinguishable from this Court's review of cases that are moot and non-justiciable. None of the cases cited by Petitioners involved cases where the justiciability of the issue was in question. Pet. 26-27. And Petitioners certainly do not cite a single case where this Court granted certiorari on a case where the controversy was moot, even when consolidated with cases that unquestionably satisfied Article III. In short, because a reviewing court is without the power to act on moot issues, moot cases such as this one can never be an appropriate vehicle for the decision of significant constitutional questions.

II. Petitioners' Claims that Section 5 and the 2006 Amendments are Unconstitutional Do Not Warrant Review

Even if this case were not moot, which it most assuredly is, there still is no merit to Petitioners' claim that the Court should grant review to address the merits of this case. As discussed earlier, Section 5 of the Voting Rights Act has been repeatedly upheld as constitutional by this Court. *See supra* p. 1. The District Court in this action relied upon *Nw. Austin* and its own decision in *Shelby County v. Holder*, Pet. App. 269a-447a, in concluding that the reauthorization of Section 5's general preclearance procedure was "a congruent and proportional, or rational, response to the problem of discrimination in voting." Pet. App. 26a-27a. *See also* Pet. App. 27a ("This Court will not revisit its conclusion in *Shelby County* that long-standing, state-sponsored, intentional discrimination in voting justified the reauthorization of Section 5's general preclearance procedure").

The district court decision in *Shelby County* was affirmed by the Court of Appeals. Pet. App. 159a-268a. Its lengthy opinion upholding the constitutionality of Section 5 cited the general categories of evidence relied upon by Congress in amending and extending the Act in 2006, including: (1) 626 DOJ objections to voting changes that would have the purpose or effect of discriminating against minorities; (2) "more information requests" from DOJ regarding Section 5 submissions which resulted in the withdrawal or modification of over 800 voting changes; (3) 653 successful lawsuits under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973; (4) tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions; (5) 105 successful Section 5 enforcement actions; (6) 25 preclearance denials by the District Court for the District of Columbia; (7) evidence that Section 5 has a strong deterrent effect; and (8) that Section 2 was an inadequate remedy for racial discrimination in voting in the covered jurisdictions. Pet. App. 182a-206a. Based on this legislative record, the Court of Appeals concluded that: "After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference." Pet. App. 206a. See 120 Stat. 577, sec. 2(b) (summarizing the findings and evidence upon which Congress relied in amending and extending the Voting Rights Act).

Given the extensive record before it of continued discrimination in voting, Congress concluded with near unanimity that the extension and amendment of the Voting Rights Act was necessary, and that without its continuation "racial and language minority citizens will be deprived of the opportunity to exercise their right

to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 120 Stat. 577, sec. 2(b)(9). The vote to amend and extend Section 5 was 390 to 33 in the House, and 98 to 0 in the Senate. 152 Cong. Rec. S8012 (daily ed. July 20, 2006); 152 Cong. Rec. H5143-5207 (daily ed. July 13, 2006). The legislative record and the considered judgment of Congress, particularly when protecting the right to vote against racial discrimination, "are entitled to much deference" and a "presumption of validity." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). A quick review of the analysis conducted by the lower court in this action, prior to its decision being vacated on mootness grounds, makes clear that this case does not warrant review on the merits of the challenge.

A. Section 5 is Constitutional Even Under the More Exacting *Boerne* Standard

Contrary to Petitioners' assertions, *City of Boerne*, and subsequent cases applying the "congruence and proportionality" standard of review, relied upon by Petitioners, support the constitutionality of Section 5 and do not support a grant of certiorari. In *City of Boerne* the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), which had been enacted by Congress based upon its enforcement powers under Section 5 of the Fourteenth Amendment. 521 U.S. at 536. In doing so, the Court concluded there was an absence of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. The Court defined "congruence and proportionality" as an agreement "between the means used and the ends to be achieved. The appropriateness of remedial measures

must be considered in light of the evil presented." *Id.* at 530. However, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that was constitutional.

City of Boerne cited the Act's suspension of literacy tests as an appropriate measure enacted under the Fifteenth Amendment "to combat racial discrimination in voting." *Id.* at 518. It expressly stated that the seven year extension of Section 5 in 1975 and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States." *Id.* Section 5 was an "appropriate" measure "'adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'." *Id.* at 532 (quoting *The Civil Rights Cases*, 109 U.S. 3, 13 (1883)). Congress acted in light of the "evil" of "racial discrimination [in voting] which in varying degrees manifests itself in every part of the country." *Id.* at 526 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 284 (1970)). The legislative record disclosed "95 years of pervasive voting discrimination," and "modern instances of generally applicable laws passed because of [racial] bigotry." *Id.* at 527, 530. By contrast, the legislative history of RFRA, in the view of the Court, contained no such evidence, leading it to conclude that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

City of Boerne further held that while legislation implementing the Fourteenth Amendment did not require "termination dates" or "geographic restrictions . . . limitations of this kind tend to ensure Congress' means

are proportionate to ends legitimate." *Id.* at 533. In addition to allowing bailout, Section 5 contains a number of other limitations on its coverage which further argue for the congruence and proportionality of the statute: confinement to those regions of the country where voting discrimination had been most flagrant; limitation to a discrete class of state laws, i.e., state voting laws; and, the existence of a coverage termination date. *Id.* at 532-33.

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court invalidated a portion of Title I of the Americans with Disabilities Act of 1990 (ADA) allowing state employees to recover money damages by reason of the state's failure to comply with the statute. The Court concluded there was no evidence of a "pattern of unconstitutional discrimination on which § 5 [of the Fourteenth Amendment] legislation must be based." 531 U.S. at 370. However, the Court underscored the constitutionality of the Voting Rights Act and again singled it out as a preeminent example of appropriate legislation enacted to enforce the race discrimination provisions of the Civil War Amendments in the area of voting. *Id.* at 373.

And in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), the Court invalidated the Patent Remedy Act, 35 U.S.C. §§ 271(h) & 296(a), allowing suits against a state because "Congress identified no pattern of patent infringement by the States, let alone a pattern of unconstitutional violations." *Id.* at 640. But as in *City of Boerne*, the Court in *Florida Prepaid* expressly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and

Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race. *Id.* at 639. In sum, none of the *City of Boerne* line of cases cast doubt on the constitutionality of Section 5 of the Voting Rights Act. To the extent they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality.

B. The Coverage Formula is Appropriate

Petitioners claim the coverage formula is outdated and unconstitutional. Pet. 4, 14. Congress, however, found that: "The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." 120 Stat. 577, sec. 2(b)(3). And as the Court of Appeals held in *Shelby County v. Holder*, 679 F.3d at 883, the section 4(b) formula "continues to single out the jurisdictions in which discrimination is concentrated." Pet.App. 224a. In reaching this conclusion, and in addition to the extensive evidence discussed above, the Court of Appeals relied upon: (1) an analysis of published and unpublished Section 2 litigation which showed significant "disparities in the level of discrimination between covered and non-covered jurisdictions;" (2) the fact that Section 5 "deters or blocks many discriminatory voting laws before they can ever take effect;" (3) the number of submissions by covered jurisdictions that have been withdrawn from consideration; (4) the submissions that have been altered in order to comply with Section 5; and (5) the fact that

disparate geographic coverage "remains sufficiently related to the problem that it targets." *Id*. 207a-214a.

As important, the Court of Appeals further held that the Act's geographic coverage "depends not only on section 4(b)'s formula, but on the statute as a whole, including its mechanisms for bail-in and bailout." *Id.* 207a. As the Court explained in *City of Boerne*, the availability of bailout "reduce[s] the possibility of overbreadth" and helps "ensure Congress' means are proportionate to [its] ends." 521 U.S. at 533.

In 1982, Congress altered the bailout formula so that jurisdictions down to the county level could bail out independently. One of the main purposes of the new bailout was to provide local jurisdictions with an incentive to change their voting practices by eliminating structural and other barriers to minority political participation. To bailout a jurisdiction must show that it has not used a discriminatory test or device within the preceding ten years, has fully complied with the Voting Rights Act, and has engaged in constructive efforts to facilitate equal access to the electoral process. 42 U.S.C. § 1973b(a); S. Rep. No. 417, at 43-62 (1982). As of May 9, 2012, as a result of the liberalized bailout system, 136 jurisdictions had bailed out after demonstrating that they no longer discriminated in voting. Pet.App. 221a.

The availability of bail-in also addresses the potential under-inclusiveness of the coverage formula. *Id*. 167a. Pursuant to 42 U.S.C. § 1973a(c), a court which has found a violation of the Fourteenth or Fifteenth Amendment may retain jurisdiction for an appropriate period of time and subject a jurisdiction to the preclearance requirements

of Section 5. Two non-covered states, Arkansas and New Mexico, were subjected to partial preclearance under the bail-in provision, as well as jurisdictions in California, Florida, Nebraska, New Mexico, South Dakota, and the city of Chattanooga. Pet.App. 220a-221a.

The bailout and bail-in provisions of Section 5 reduce the possibilities of over- and under-inclusiveness and help "ensure Congress' means are proportionate to [its] ends." *City of Boerne*, 521 U.S. at 533. As the court concluded in *Shelby Co. v. Holder*, 679 F.3d at 883, "we see no principled basis for setting aside the district court's conclusion that section 5 is 'sufficiently related to the problem that it targets,' *Nw. Austin*, 129 S.Ct. at 2512." Pet.App. 224a.

C. The 2006 Amendments Were Not a "Dramatic" Substantive Change Exceeding Congress' Enumerated Powers Under the Fourteenth and Fifteenth Amendments

The 2006 Amendments to the Voting Rights Act did not, as Petitioners assert, "dramatically" change the substantive preclearance standards of Section 5. Pet. 21-2. The Amendments merely restored the longstanding interpretation and application of Section 5 which had been overturned by *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*). In response to these decisions, Congress found: "The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section

5 of such Act." 120 Stat. 577, sec. 2(b)(6); H.R. Rep. No. 109-478, at 2.

Congress explained in 2006 that *Bossier II*'s limitation of the purpose prong to only retrogressive purpose was inconsistent with Congress's intent that Section 5 prevents "[v]oting changes that 'purposefully' keep minority groups 'in their place,'" as well as purposefully retrogressive voting changes. H.R. Rep. No. 109-478, at 68. See S. Rep. No. 109-295, p.16 (*Bossier II* gives "approval to practices that violate the Constitution"). Congress thus restored the pre-*Bossier II* definition of the purpose standard to include "any discriminatory purpose." 42 U.S.C. § 1973c(c).

Likewise, in *Ashcroft*, the Court rejected the prior standard and approved a "totality of circumstances" analysis that included whether a minority group could "influence the election of candidates of its choice." 539 U.S. at 479-80. Congress concluded that the new standard introduced "substantial uncertainty" into the operation of Section 5, which was designed to protect "the effectiveness of minority political participation." H.R. Rep. No. 109-478, p. 70. *See also id.*, pp. 68 & 70 (*Ashcroft* not only made Section 5 "unadministerable" but "would encourage States . . . to turn black and other minority voters into second class voters"); S. Rep. No. 109-295, p.18 ("the *Georgia* standard is unworkable. The concept of 'influence' is vague"). In order to restore the "ability to elect" standard articulated in *Beer*, Congress added the language that a voting change was objectionable under Section 5 if it diminished the ability of minorities "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b) & (d). *See* H.R. Rep. No. 109-478, pp. 70-1.

The 2006 amendments to the Voting Rights Act did not dramatically change the substantive preclearance standards of Section 5, but merely restored the longstanding interpretation and application of Section 5 which had been abrogated by *Ashcroft* and *Bossier II*. And as the District Court held, "Congress made clear that the amendments represented a restoration of the proper Section 5 standard, not an expansion." Pet.App. 51a.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully Submitted,

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