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

BRIEF IN OPPOSITION FOR RESPONDENTS-INTERVENORS

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COUNTER-QUESTION PRESENTED

Whether Congress properly exercised its enforcement powers under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) of the Voting Rights Act in 2006 based upon the record of ongoing discrimination in the covered jurisdictions.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, none of the Respondents-Intervenors in this case has a parent corporation or issues any stock. The Alabama State Conference of the National Association of Colored People is an affiliate of the national NAACP.

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REASONS FOR DENYING THE WRIT

After giving due consideration to this Court's decision in *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) ("*Nw. Austin*"), the Court of Appeals for the District of Columbia Circuit correctly upheld the constitutionality of the 2006 reauthorization of Section 5 and Section 4(b) of the Voting Rights Act of 1965 against Shelby County's facial challenge. 42 U.S.C. 1973c; 42 U.S.C. 1973b(b). Review by this Court is not required.

Shelby County's primary argument for granting certiorari is insubstantial. The decisions below by the Court of Appeals and the District Court follow – and do not conflict with – this Court's previous decisions. The Court of Appeals, like the District Court, upheld Section 5 and Section 4(b) based upon the rationale and clear dictates of *Nw. Austin*. The decision of the Court of Appeals -- written by Judge Tatel and joined by Judge Griffith -- carefully and scrupulously considered whether Section 5's "'current burdens'" are "'justified by current needs,'" and whether Section 4(b)'s "'disparate geographic coverage is sufficiently related to the problem that it targets.'" App. at 14a-15a; 679

F.3d 848, 858-59 (D.C. Cir. 2012) (quoting *Nw. Austin*, 557 U.S. at 203). Likewise, the District Court's detailed and tightly reasoned opinion fully weighed the lengthy record upon which the Court of Appeals subsequently relied, applied the same legal standards, and arrived at the same conclusions. App. at 111a; *Shelby County v. Holder*, 811 F.Supp. 2d 424 (2011).

No other jurisprudential concerns weigh heavily in favor of granting certiorari. If certiorari is denied the facial constitutionality of Section 5 in the District of Columbia Circuit will be settled with no further need for this Court's review. Facial challenges being generally disfavored,[1] as-applied challenges would remain available if certiorari is denied. Should a federal court in another circuit reach a different conclusion on the facial question (assuming that anything other than as-applied challenges can be raised in a Section 5 enforcement action), then a grant of certiorari at that time to resolve the circuit split would be consistent with this Court's jurisprudence.[2]

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[1] *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200 (2008); *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450-51 (2008).

[2] There is no split among the lower courts on the questions presented here. Only one other court, the United States District Court for the District of South Dakota, has confronted the question of Section 5's constitutionality since the 2006 reauthorization. In that case, the State of South Dakota challenged the constitutionality of the 2006 reauthorization of Section 5, relying on the same arguments made in this case; the district court rejected the state's argument that Section 5 preclearance and the Section 4(b) coverage provision are now

I. The Court of Appeals and District Court Applied a Standard of Review That Followed This Court's Precedents

The Court of Appeals began its analysis with an extended consideration of the appropriate standard of review. The court noted that the disagreement which *Nw. Austin* had left unresolved – whether the constitutionality of the 2006 reauthorization should be analyzed via "congruence and proportionality," as set out in *City of Boerne v. Flores*, 521 U.S. 507 (1997), or via the "any rational means" standard discussed in *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) – had continued, with Shelby County arguing for the former and the Attorney General advocating for the latter.

The Court of Appeals concluded that *Nw. Austin* sent "a powerful signal that congruence and proportionality is the appropriate standard of review." App. at 16a.[3] The court then considered in detail how this standard should be applied, looking to this Court's prior decisions applying "congruence and proportionality," and this Court's decisions in

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outdated. *See Janis v. Nelson*, 2009 U.S. Dist. LEXIS 121086 at *26-30 (D. S.D. Dec. 30, 2009).

[3] Judge Tatel's opinion observed that the two questions posed by this Court in *Nw. Austin* define an inquiry that seems analogous to the *City of Boerne* "congruence and proportionality" inquiry. By applying this standard, which is "arguably more rigorous" than what is generally described as the "'rationality'" standard employed in *South Carolina v. Katzenbach*, App. at 16a, the ruling of the Court of Appeals should stand regardless of whether *City of Boerne* or *Katzenbach* controls.

Katzenbach and *City of Rome v. United States*, 446 U.S. 156 (1980), upholding the constitutionality of Section 5. As the Court of Appeals noted, *City of Boerne* itself "relied quite heavily on *Katzenbach* for the proposition that section 5, as originally enacted and thrice extended, was a model of congruent and proportional legislation." App. at 16a. The District Court similarly conducted its comprehensive review of the record employing a "congruence and proportionality" analysis. App. at 161a-162a.

Shelby County asserts that the Court of Appeals "deferred to Congress in ways alien to the *Boerne* line of decisions," Petition at 23, and that this "infected every aspect of [the court's] analysis." *Id.* at 24. Yet, the County nowhere identifies precisely how or where the Court of Appeals introduced such "alien" deference. This Court in fact has emphasized, as the Court of Appeals recognized, that the deference about which Shelby County complains is a core constitutional principle: "when Congress acts pursuant to its enforcement authority under the Reconstruction Amendments, its judgments about 'what legislation is needed . . . are entitled to much deference.'" App. at 21a (quoting *Boerne*, 521 U.S. at 535) (ellipses in original). This is uniquely the case when Congress legislates with respect to racial discrimination in voting. As the Court explained in *Nw. Austin*, "the Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 557 U.S. at 205.

This Court's "*Boerne* line of decisions" repeatedly has identified the Voting Rights Act as a model of congruence and proportionality, and

consistently has cited with approval to this Court's decisions upholding the constitutionality of Section 5. *See, e.g.*, *Boerne*, 521 U.S. at 531-33 (contrasting Section 5 favorably to the Religious Freedom and Restoration Act, and noting that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide'") (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (op. of Harlan, J.)); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (comparing Section 5 favorably to Title I of the Americans With Disabilities Act, and observing that Section 5 "was 'appropriate' legislation to enforce the Fifteenth Amendment's protection against racial discrimination in voting.") (citing *Katenzbach*, 383 U.S. at 308); *Nev. Dep't. of Human Res.. v. Hibbs*, 538 U.S. 721, 736 (2003) (observing that, when Congress enacts legislation designed to combat forms of discrimination that trigger a heightened level of scrutiny, such as gender- or race-based discrimination, it is "easier for Congress to show a pattern of state constitutional violations" to justify remedial legislation) (citing, *inter alia*, *Katzenbach*, 383 U.S. at 308-313); *Tennessee v. Lane*, 541 U.S. 509, 520, n.4 (2004) (describing cases upholding various provisions of the Voting Rights Act). All of these decisions suggest that some degree of judicial deference is appropriate where, as here, Congress enacts legislation designed to protect the express Constitutional prohibition on racial discrimination in voting.

II. The Court of Appeals and District Court Directly Answered the Questions Set Forth in *Nw. Austin*

Both the Court of Appeals and the District Court directly and explicitly employed the analytic framework set forth by this Court in *Nw. Austin*, centering their reviews on the "two principal inquiries": whether the "'current burdens'" imposed by Section 5 "are 'justified by current needs,'" and whether Section 5's "'disparate geographic coverage is sufficiently related to the problem it targets.'" App. at 14a-15a (quoting *Nw. Austin*, 557 U.S. at 203); App. at 114a, 280a (same).

1. This Court recognized in *Nw. Austin* that "Congress amassed a sizable record in support of its decision to extend the preclearance requirements, a record the [*Nw. Austin*] District Court determined 'document[ed] contemporary racial discrimination in covered states.'" 557 U.S. at 205. The Court of Appeals independently "thoroughly scrutinize[d] the record" and found that "overt racial discrimination persists in covered jurisdictions." App. at 48a. The District Court's own "assessment of all the evidence in the legislative record" similarly concluded that "[a]lthough some scholars voiced concern during the 2006 reauthorization hearings that 'the Act has been so effective it will be hard to produce enough evidence of *intentional discrimination by the states* so as to justify the extraordinary preclearance remedy for another 25 years' . . . Congress succeeded in doing just that." App. at 196a-97a (internal citations omitted) (emphasis in original).

The record before Congress included: (1) 626 DOJ objections from 1982 to 2004 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 potentially discriminatory voting changes; (3) 653 successful lawsuits under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, between 1982 and 2005 providing relief from discriminatory practices in at least 825 covered counties; (4) tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions; (5) 105 successful Section 5 enforcement actions brought against covered jurisdictions between 1982 and 2004; (6) 25 preclearance denials by the District Court for the District of Columbia between 1982 and 2004; (7) examples of "overt hostility to black voting power by those who control the electoral process"; (8) evidence that Section 5 has a strong deterrent effect; and (9) that Section 2 is not an adequate remedy for racial discrimination in voting in the covered jurisdictions. App. at 24a, 29a-46a. [4]

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[4] For example, the State of Alabama's record since the extension of Section 5 in 1982 showed that the Attorney General objected to 46 Section 5 submissions from Alabama, including seven from the state itself and 39 from local jurisdictions. Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 371 (2006) ("Legislative Options Senate Hearing"); Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 90 (2006). Many of the objections were based upon evidence of purposeful discrimination. 1 Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing

Within that record the Court of Appeals noted "numerous examples of modern instances of racial discrimination in voting" relied upon by Congress in amending and extending the Act in 2006. *Id*. at 29a (internal quotation marks omitted). In addition to these "flagrant" examples, the Court of Appeals reviewed "several categories of evidence in the record [that] support Congress's conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." *Id*. at 31a. The District Court similarly concluded after reviewing the record of Section 5 objections that the "House Committee on the Judiciary had good reason to conclude in 2006 that Section 5 was still fulfilling its intended function of preventing covered jurisdictions from implementing voting changes 'intentionally developed to keep minority voters and candidates from succeeding in the political process.'" App. at 220a (quoting H.R. Rep. No. 109-478, at 36 (2006)).

The substantial evidence of intentional racial discrimination in the record is particularly significant. Between 1980 and 2004, the Attorney General issued at least 423 objections based in whole

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Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. 264, 267, 275, 321, 350, 415, 435 (2005); Legislative Options Senate Hearing, at 383-84. And on August 25, 2008, the Attorney General objected to annexations and a redistricting plan for the City of Calera in Shelby County, Alabama, because the city failed to show the absence of a discriminatory purpose or effect. Section 5 Objection Letter from Grace Chung Becker, Acting Assistant Attorney General, to Dan Head, Esq., August 25, 2008. Available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082508.pdf (last visited Sep. 20, 2012).

or in part on discriminatory purpose. App. at 33a. As recently as the 1990s, 43 percent of all objections were based on intent alone, while another 31 percent were based on a combination of intent and effect. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F.Supp.2d 221, 252 (D. D.C. 2008). Congress found that "such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21.

Shelby County argues that Section 5 is no longer needed because there has been an increase in the number of minority elected officials and because (according to the County) minority voter registration and turnout are approaching parity with the white population. Petition at 27. These gains are important, but they are the very things that will be at risk if the Section 5 remedy is ended prematurely. H.R. Rep. No. 109-478, at 56. Furthermore, as the courts below noted, these gains have not been uniform, nor have they been independent of Section 5 and other federal remedies.

Congress found that gains by minority candidates remain uneven, both geographically and by level of office. H.R. Rep. No. 109-478, at 33-34. The Court of Appeals noted the congressional findings that no African American candidates had been elected to statewide office in Mississippi, Louisiana or South Carolina. App. at 23a; *see also* App. at 204a-205a. The District Court similarly noted the extent to which the election of African-American and Latino candidates lagged their respective shares of the voting age population in the

covered states. App. at 204a-205a. The House committee report noted that African Americans accounted for only 21 percent of state legislators in six southern states where the black population averaged 35 percent – Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina. H.R. Rep. No. 109-478, at 33. The House committee report further found that the number of Latinos and Asian Americans elected to office nationwide "has failed to keep pace with [the] population growth" of those two communities. *Id*.

Moreover, minority electoral success largely has been a function of the creation of majority-minority election districts. For example, Congress found that as of 2000, only 8 percent of African American Congressmen were elected from majority-white districts, and that no Native Americans or Hispanics "have been elected to office from a majority white [Congressional] district."[5] H.R. Rep. No. 109-

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[5] Alabama well illustrates this pattern. As of 2005 no African Americans held statewide office in Alabama. Two incumbent African American state Supreme Court justices, who initially had been appointed, were defeated by white opponents in 2000. Every African American member of the Alabama Legislature was elected from a single member district with an effective black voter majority. 2 Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. at 3199 (2005) (statement of James U. Blacksher). See also Blacksher, *et al*., Voting Rights In Alabama: 1982-2006, 17 SO. CAL. REV. L. & SOC. JUST. 249, 249 (2008) ("voting remains largely racially polarized, and black candidates rarely are elected in majority-white districts"). And most of the majority black districts had to be ordered by federal courts. *Id*. at 260 *et seq*.

478, at 34, citing *Protecting Minority Voters: The Voting Rights Act at Work 1982–2005*, The National Commission on the Voting Rights Act, February 2006, at 38, 43-46.

With respect to voter registration and turnout, the Court of Appeals noted the congressional findings showing "continued registration and turnout disparities" in South Carolina, and in particular in Virginia. App. at 23a. The District Court found that the disparities in voter registration and turnout were "comparable to the disparity the *City of Rome* Court called 'significant.'" App. at 202a-203a (citations omitted). The District Court further noted that disparities affecting Hispanic voter registration were "more severe" than Congress had credited due to the double-counting of white Hispanics. *Id*. at 202-203a.

In sum, 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." App. at 48a. The District Court concluded that "Congress satisfied its burden in 2006 of identifying a continuing 'history and pattern of unconstitutional . . . discrimination by the States' . . . which was sufficient to justify the reauthorization of Section 5 as remedial, prophylactic enforcement legislation." App. at 270a, (quoting *Garrett,* 531 U.S. at 368). The District Court further noted that "the evidence of unconstitutional voting discrimination in the 2006 legislative record far exceeds the evidence of unconstitutional discrimination found sufficient to uphold the challenged legislation in *Hibbs* and *Lane."*

Id. at 260a. *See also* 120 Stat. 577, sec. 2(b) (Congress' summary of the findings and evidence upon which it relied in extending and amending the preclearance requirement). These conclusions were entirely in keeping with *City of Rome,* where this Court upheld the 1975 reauthorization of Section 5 based upon largely the same categories of evidence.[6]

2. With respect to the Section 4(b) coverage provisions, the Court of Appeals and District Court correctly found that voting discrimination remains concentrated in the Section 5 covered jurisdictions, based upon an intensive review of the legislative record.

Shelby County's argument that the Section 2 data relied upon by Congress "fails to show a meaningful difference between covered and noncovered jurisdictions," Petition at 32-33, is contradicted by the Court of Appeals' findings. The "most concrete evidence comparing covered and noncovered jurisdictions," App. at 49a, came from studies of vote dilution litigation brought under Section 2 of the Voting Rights Act, including a study of published Section 2 decisions entered into the

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[6] The House committee report concluded that during the 1982-2006 period, "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at large voting and implementing majority vote requirements." H.R. Rep. No. 109-478, at 36.

legislative record (the "Katz study"). These data showed a significant difference between covered and non-covered jurisdictions. Among the 114 published decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. *Id*. Thus, while the covered jurisdictions contain less than 25 percent of the country's population, they accounted for 56 percent of successful reported Section 2 litigation since 1982. *Id*. The pattern shown in the published decisions was corroborated by a summary of unpublished Section 2 decisions predating the 2006 reauthorization, which showed "even more pronounced" differences between the covered and non-covered jurisdictions. *Id*. at 51a-52a[7] Moreover, because Section 5 "deters or blocks many discriminatory voting laws before they can ever take effect and become the target of section 2 litigation," the Court of Appeals observed that "if discrimination was evenly distributed throughout the nation, we would expect to see fewer successful

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[7] Since 1982, there have been at least 686 unpublished successful Section 2 cases, amounting to a total of some 800 published and unpublished cases with favorable outcomes for minority voters. Of these, approximately 81 percent were brought against Section 5 covered jurisdictions. App. 51a. Of the eight states with the highest number of successful Section 2 cases per million residents, all but one was covered in whole or in part. The only exception was Arkansas. While it was not covered by Section 4(b), in 1990 Arkansas was bailed-in to Section 5 coverage by a court order. *See Jeffers v. Clinton*, 740 F.Supp. 585, 601-02 (E.D. Ark. 1990). Congress concluded that the need for Section 5 was evident from "the continued filing of section 2 cases that originated in covered jurisdictions," many of which resulted in findings of intentional discrimination. 120 Stat. 577, sec. 2(b)(4)&(5).

section 2 cases in covered jurisdictions than in non-covered jurisdictions. . . . Yet we see substantially more." *Id*. at 55a.[8]

The District Court likewise examined the pattern of reported Section 2 decisions and found that "the fact that more than 56% of the successful Section 2 suits since 1982 have been filed in covered jurisdictions -- even though those jurisdictions contain only 39.2% of the country's African-American population, 31.8% of the Latino population, 25% of the Native American population, and less than 25% of the overall population -- suggests that unconstitutional discrimination remains more prevalent in covered than in non-covered jurisdictions." App. at 288a. The District Court further noted that "the disproportionate number of successful Section 2 suits in covered jurisdictions is all the more remarkable considering that Section 5 blocks and deters discrimination in covered jurisdictions, and, consequently, one would expect to see fewer Section 2 cases there." *Id.* (internal quotation marks omitted).

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[8] In Alabama alone, during this period there were 12 successful reported Section 2 cases and a total of 192 successful Section 2 cases, reported and unreported. 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. at 251 tbl. 5 (2006). As further appears from the legislative history, decisions since 1982 have found numerous and ongoing examples of intentional discrimination in Alabama at the state and local levels. Senate Hearing, Legislative Options Senate Hearing, at 372.

The Court of Appeals emphasized that, in examining Section 5's geographic coverage, the entire coverage scheme must be considered, which includes not only the Section 4(b) coverage formula, but also the bailout provisions of Section 4 and the bail-in provisions of Section 3, 42 U.S.C. § 1973a. "[W]e look not just at the section 4(b) formula, but at the statute as a whole, including its provisions for bail-in and bailout." App. at 61a. The bailout and bail-in provisions of Section 5 address the theoretical possibilities of over and under inclusiveness and help "ensure Congress' means are proportionate to [its] ends."[9] *Boerne*, 521 U.S. at 533. Bailout plays an "important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting," App. at 62a, by providing those jurisdictions with "a clean record on voting rights" the means for terminating coverage. *Id*. at 63a. Thus, bailout "helps 'ensure Congress' means are proportionate to [its] ends,'" *id.* at 62a (quoting *Boerne*, 521 U.S. at 533), and "that section 5 is

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[9] 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 provision was to provide local jurisdictions with an incentive to change their voting practices by eliminating structural and other barriers to minority political participation. To be eligible for 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). *Nw. Austin* further liberalized bailout by holding that "all political subdivisions," and not only those that conduct voter registration, are entitled to seek exemption from Section 5. *Nw. Austin*, 557 U.S. at 211.

'sufficiently related to the problem it targets,'" *id.* at 64a (quoting *Nw. Austin*, 557 U.S. at 203).[10] Bail-in under Section 3(c) continues to address the theoretical underinclusiveness of the coverage formula. App. at 65a.[11]

Although Judge Williams' dissent differed with the majority's conclusions concerning the Section 4(b) coverage provisions, he did not dispute that successful reported Section 2 cases were disproportionately concentrated in the covered jurisdictions, which was the principal factor upon which the majority relied. Instead, Judge Williams' dissent would have placed greater emphasis on a state-by-state comparison, and would not have credited other evidence that the majority found corroborated the Katz study. The Katz study showed a clear disproportion of successful, reported Section 2 decisions in the covered jurisdictions as a whole, whereas Judge Williams' dissent broke the data into state-by-state figures; even those disaggregated data,

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[10] 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. App. 62a. The jurisdictions included 30 counties, 79 towns and cities, 21 school boards, and six utility or sanitary districts. In addition, the Attorney General is actively considering more than 100 additional jurisdictions for bailout. *Id.* at App. 61a-63a.

[11] Pursuant to 42 U.S.C. § 1973a(c), a court that 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. App. 61a-62a.

however, showed that four of the five top states (using his methodology) are covered by Section 5. App. at 91a-92a.

Judge Williams' dissent would not have credited, on the "covered jurisdictions" side of the discrimination ledger, the 626 objections interposed by the Attorney General from 1982 to 2006, as well as other evidence of ongoing discrimination in the covered states identified by Congress. Judge Williams' conclusion that Section 5 objections do not represent probative evidence of discriminatory conduct, *id.* at 94a, is inconsistent with this Court's holding in *Rome*, where the Court upheld the 1975 reauthorization of Section 5 specifically by crediting Congress' conclusion that the Attorney General's objections do constitute significant evidence of ongoing discrimination. 446 U.S. at 181 ("'The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism.'") (ellipses in original).[12] Furthermore, while Judge Williams declined to consider the substantial information relating to unpublished Section 2 decisions, his dissent fails to show that the majority erred by treating this evidence as corroborating the Katz study, while still "approach[ing] this data with caution."[13] App. at 54a.

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[12] For example, Judge Williams' analysis ranks Georgia as the 21st state in Section 2 cases, however, as the majority discussed, there is a wealth of other information showing that voting discrimination remains a substantial problem in that state. App. at 58a-59a.

[13] Shelby County's complaint about post-enactment evidence concerns the McCrary declaration submitted by the United

3. The decision of the Court of Appeals was entirely consistent with other decisions by this Court, and Shelby County's claim that the "decision below cannot be squared with any of the Court's decisions," Petition at 29, is patently incorrect. While Shelby County acknowledges that this Court "has twice upheld" the constitutionality of Section 5 in *South Carolina v. Katzenbach*, *supra*, and *City of Rome v. United States*, *supra*, Petition at 3, its Petition fails to cite either *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), which upheld the constitutionality of Section 5 as reauthorized in 1982,[14] or *Georgia v. United States*, 411 U.S. 526, 535 (1973), in which this Court upheld the constitutionality of Section 5 as reauthorized in 1970 ("for the reasons stated at length in *South Carolina v. Katzenbach* . . . we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment.").

States, which corroborated the evidence from the Katz study of published Section 2 decisions, by compiling data – largely in the reauthorization congressional record, App. at 54a [679 F3d at 878] – which addressed unpublished Section 2 decisions. It follows, therefore, that this evidence is not post-enactment evidence as such, since it dealt with litigation that both occurred before the 2006 reauthorization and generally was before Congress. Accordingly, the limited sense in this evidence might be labeled as "post-enactment" provides no basis upon which to exclude it.

[14] In *Lopez* this Court rejected a claim by the State of California that "§ 5 could not withstand constitutional scrutiny if it were interpreted to apply to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere." *Id.*

Lopez in particular undercuts Shelby County's attempts to limit the scope of Section 5 to intentional discrimination, reaffirming the holding in *City of Rome* that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." 525 U.S. at 282-83. The Court, reaffirming its ruling in *Katzenbach*, further held "once a jurisdiction has been designated, the Act may guard against both discriminatory animus and the potentially harmful *effect* of neutral laws in that jurisdiction." *Id.* at 283. *Cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

In addition, one month before the extension of Section 5 in 2006, this Court decided *LULAC v. Perry*, 548 U.S. 399 (2006) (finding that a Texas congressional redistricting plan violated Section 2 of the Voting Rights Act), in which all eight justices who addressed the issue agreed that states have a "compelling state interest" in complying with the Section 5 preclearance requirement. *Id.* at 475 n.12, 485 n.2, 518.

4. Shelby County contends that "Section 2 is now the 'appropriate' prophylactic remedy for any pattern of discrimination documented by Congress in 2006." Petition at 29. But as Congress concluded in

extending Section 5 in 2006, the "failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action." H.R. Rep. No. 109-478, at 57. This conclusion was entirely consistent with this Court's prior decisions,[15] and was based upon extensive contemporary evidence that reliance upon Section 2 litigation would place the burden of proof on the victims of discrimination rather than its perpetrators and impose a heavy financial burden on minority plaintiffs, and that Section 2 litigation is heavily work-intensive, cannot prevent enactment of discriminatory voting measures, and allows discriminatorily-elected officials to remain in office

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[15] In *Katzenbach*, the Court stressed that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." 383 U.S. at 328; *see also id.* at 313-15 (explaining why case-by-case litigation had "proved ineffective"). *City of Rome* also found that: "Case-by-case adjudication had proved too ponderous a method to remedy voting discrimination." 446 U.S. at 174. *Accord*, *Boerne*, 521 U.S. at 526 (Section 5 was "deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation"); *Georgia v. United States*, 411 U.S. at 538 n.9 ("[t]he very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting"). The Court relied on similar findings in *Tennessee v. Lane*, 541 U.S. at 511, to sustain the constitutionality of a challenged statute: "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response'" (alteration in original) (quoting *Hibbs*, 538 U.S. at 737).

for years until litigation is concluded. App. at 45a-46a. *See, e.g.,* 1 Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. 92, 97, 101 (2005) (testimony of Nina Perales); *id.* at 79, 83-84 (testimony of Anita Earls); 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution, of the H. Comm. on the Judiciary, 109th Cong. 97 (2006) (testimony of Joe Rogers). A Federal Judicial Center study, for example, found that voting cases required nearly four times more work than the average district court case and ranked as the fifth most work-intensive of the 63 types of cases analyzed. App. at 45a.

III. The Court of Appeals Correctly Rejected Shelby County's Attempts to Arbitrarily Define Away Relevant Evidence

The Court of Appeals considered and correctly rejected Shelby County's efforts to exclude evidence plainly relevant to *Nw. Austin's* "two principal inquiries." The County's arguments in this regard are inconsistent with the Supreme Court's directives in *Nw. Austin*, and are contrary to the Supreme Court's holding in *Katzenbach* that, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source." 383 U.S. at 330.

1. With respect to identifying the "current needs" for the Section 5 remedy, Shelby County sought to prevent a genuine review of the current record by insisting that only "evidence . . . of the sort present at the time of Katzenbach," App. at 25a, is

relevant, and by "urg[ing the D.C. Circuit to disregard much of the evidence Congress considered," *id*. at 26a, which showed that covered jurisdictions have engaged in repeated acts of intentional vote dilution.

The Court of Appeals correctly rejected Shelby County's argument that, in 2006, the court (and thus Congress) could only take into account the most prevalent form of discrimination that existed in 1965, *i.e.*, interference with the right to register and cast ballots. To accept this argument necessarily would turn the "current needs" inquiry on its head by arbitrarily excluding from consideration other current forms of voting discrimination. Indeed, the circa-1965 discrimination affecting voter registration and ballot access largely has been outlawed by the Voting Rights Act, which prohibits use of the discriminatory tests and devices that many covered jurisdictions relied upon prior to the Act's adoption. 42 U.S.C. § 1973aa. Shelby County thus seeks to cloak its desired foreordained conclusion in the garb of a decision rule. Shelby County's related argument – that only evidence of widespread "gamesmanship" (*i.e.*, the evasion of judicial injunctions by the adoption of new discriminatory provisions) can justify reauthorization of Section 5 – is no less tendentious, as it would require evidence of conduct that "section 5 preclearance makes . . . virtually impossible." App. at 25a.

Similarly, Shelby County demanded that the Court of Appeals ignore repeated instances of intentional and unconstitutional minority vote dilution because, according to the County, such discrimination is prohibited only by the Fourteenth

Amendment, and Section 5 is solely a Fifteenth Amendment remedy. However, "Congress expressly invoked its authority under both the Fourteenth and Fifteenth Amendments" in reauthorizing Section 5, which was well within its province to do when confronted with a record of unconstitutional schemes to dilute minority voting strength. *Id.* at 27a. Shelby County's argument to the contrary is squarely contradicted by this Court's ruling in *City of Rome*, which sustained the 1975 reauthorization of Section 5 based on Congress' finding that "'[a]s registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength.'" *Id.* at 28a (quoting *Rome*, 446 U.S. at 181). As this Court explained in its very first decision construing Section 5, *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969), "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." This Court has never held that, in reauthorizing Section 5, Congress may not rely on evidence of unconstitutional schemes to dilute minority voting power;, nor has this Court held that vote dilution is not a type of voting discrimination addressed by Section 5. *See also Georgia v. United States*, 411 U.S. at 534 (redistricting plans "have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5").

Shelby County further argues that Congress' findings concerning the deterrent effect of Section 5 must be disregarded. At the outset, it would seem nonsensical to ignore evidence that remedial legislation has operated to deter unconstitutional conduct in considering whether that legislation was

properly reauthorized, and, indeed, Shelby County does not appear to go that far. Instead, Shelby County repeats Judge Williams' dissenting view that Section 5's deterrent effect is speculative and cannot serve as a perpetual justification. Petition at 27-28. However, Congress cited specific evidence supporting its conclusion as to Section 5's important deterrent effect. App. 42-43aa, 55a. Congress described preclearance as a "vital prophylactic tool," and that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21. Congress found that "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes is the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24. Congress concluded based on the abundant evidence before it that Section 5 had a deterrent effect, a finding the Court of Appeals declined to "second guess." App. at 44a.[16] *Cf. Northwest Austin*, 557 U.S. at 205 (noting that the District Court in that case also found that "the record 'demonstrat[ed] that section 5 prevents discriminatory voting changes' by 'quietly but effectively deterring discriminatory changes.'"). Moreover, Section 5's

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[16] *See Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (courts "are not at liberty to second-guess congressional determinations and policy judgments"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("courts must accord substantial deference to the predictive judgments of Congress"); *United States Dept. of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (noting "the heavy presumption of constitutionality to which a 'carefully considered decision of a coequal and representative branch of Government' is entitled").

deterrent effect was just one of many categories of evidence that Congress relied upon, so this in no sense resembles the "worst case" situation – where deterrence is claimed as the sole reason for reauthorizing Section 5 -- about which Judge Williams' dissent expressed concern.

2. The Court of Appeals also correctly rejected Shelby County's efforts to exclude evidence relevant to determining whether Section 5's geographic coverage remains sufficiently well targeted.

Shelby County complains that the coverage formula "rel[ies] on 'decades-old data." App. at 56a. But as the Court of Appeals observed, the issue presented is not whether the initial coverage determinations were correct; instead, "[t]he question [is] whether [the coverage formula], together with bail-in and bailout, continues to identify [for coverage] the jurisdictions with the worst problems," *id.* at 57a, which necessarily involves a review of current data. As discussed above, a review of the current data demonstrates the continued fit between Section 5 coverage and contemporary voting discrimination in the United States.

The Court of Appeals also correctly rejected Shelby County's argument that evidence of vote dilution is irrelevant to the geographic coverage question. Shelby County contends that there is a statutory bar to considering evidence of vote dilution in evaluating the statute's geographic coverage because the Section 4(b) coverage formula relies on factors related to ballot access. But, as the Court of Appeals explained, this contention "rests on a misunderstanding of the coverage formula." *Id.* at

56a. Congress relied on ballot access factors to make the initial coverage determinations not because that was "all it sought to target, but because [these factors] served as accurate proxies for pernicious racial discrimination in voting." *Id.* at 57a.

IV. Post-Enactment Evidence Corroborates the Court of Appeals

This Court is not foreclosed from considering post-enactment evidence that bears directly upon the constitutionality of congressional legislation. The Court of Appeals appropriately recognized that a court may consider relevant and probative "post-enactment evidence." App. at 54a (citing *Tennessee v. Lane*, 541 U.S.at 524-25 nn. 6-9 & 13).

Shelby County appears to be of two minds on this issue. On one hand, it asserts that its challenge "is based on the 2006 legislative record and no other evidence is constitutionally cognizable." Petition at 22. On the other hand, the County repeatedly relies in its Petition upon post-enactment evidence, referring to Section 5 objections and litigation regarding photo identification requirements in South Carolina and Texas, and litigation regarding changes to Florida's early voting law; the County claims that this post-enactment evidence shows improper enforcement of Section 5 by the Attorney General.[17]

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[17] Shelby County also faults Congress for not conducting hearings or proposing bills following the decision in *Nw. Austin*. Petition at 21. But Congress conducted extensive hearings in 2005 and 2006 to consider the need for continuation of Section 5. It held 21 hearings, heard from more than 90 witnesses, and compiled a massive record of more than 15,000 pages of evidence, including testimony on the burdens of Section 5. *See* H.R. Rep. No. 109-478, at 5 (2006); S. Rep. No.

Since Shelby County filed its Petition, however, the District Court for the District of Columbia has issued rulings in the Texas and Florida cases, as well as in another Section 5 declaratory judgment action brought by Texas, that put Shelby County's arguments in a rather different light.

Shelby County claims that Florida was "forced into preclearance litigation" to prove that reducing early voting is not discriminatory, when other states "have no early voting at all." Petition at 20. On August 16, 2012, however, the three-judge court in *Florida v. United States* denied Section 5 preclearance to Florida's early voting changes, finding that they would likely result in retrogression within Florida's five covered counties. *Florida v. United States*, no. 1:11-cv-01428, 2012 U.S. Dist. LEXIS 115647 (D.D.C. August 16, 2012). Contrary to Shelby County's claim that the Department of Justice somehow forced Florida to file suit, the State in fact withdrew its early voting changes from administrative review and filed suit before the Attorney General had rendered a decision. *Id.* at *18. Moreover, following the denial of preclearance by the district court, the Attorney General precleared new non-retrogressive early voting hours for the five

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109-295, at 2-4 (2006). At the conclusion of its deliberations Congress, by a vote of 390 to 33 in the House and by a unanimous vote in the Senate, 90 to 0, amended and extended Section 5 for an additional 25 years. 152 Cong. Rec. S8012 (daily ed. July 20, 2006); 152 Cong. Rec. H5143-5207 (daily ed. July 13, 2006). Given its careful consideration of the continue need for Section 5, Congress cannot be faulted for not conducting additional subsequent hearings.

covered counties, thus completely refuting Shelby County's suggestion of Department of Justice intransigence. ECF docket no. 161.

On August 30, 2012, the three-judge court in *Texas v. Holder*, no. 1:12-cv-00128, 2012 U.S. Dist. LEXIS 127119 (D.D.C.), denied Section 5 preclearance on retrogression grounds to a requirement that voters present certain limited forms of government-issued photo identification in order to cast a ballot at the polls, which the Texas legislature had added to the state's existing voter identification law.[18] The three-judge court's unanimous decision refutes Shelby County's suggestion that the Attorney General's earlier decision denying administrative Section 5 preclearance was an abuse of discretion.

Two days earlier, on August 28, 2012, the three-judge court in *Texas v. United States*, no. 1:11-cv-1303, 2012 U.S. Dist. LEXIS 121685 (D.D.C.), denied Section 5 preclearance to three statewide redistricting plans. The court found that the

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[18] Although it did not make conclusions as to discriminatory purpose in light of its retrogression determination, the court noted that: "Ignoring warnings that SB 14, as written, would disenfranchise minorities and the poor, the legislature tabled or defeated amendments that would have: waived all fees for indigent persons who needed the underlying documents to obtain an EIC [Election Identification Certificate]; reimbursed impoverished Texans for EIC-related travel costs; expanded the range of identifications acceptable under SB 14 by allowing voters to present student or Medicare ID cards at the polls; required [Department of Public Safety] offices to remain open in the evening and on weekends; and allowed indigent persons to cast provisional ballots without photo ID." 2012 U.S. Dist. LEXIS at *96-97 (record citations omitted).

congressional redistricting plan both had a retrogressive effect, *id.* at *53, and a racially discriminatory purpose. *Id.* at *71.[19] The state senate plan was denied preclearance because the court found that it was motivated in part by a racially discriminatory purpose. *Id.* at *92. And the court denied preclearance to the state house plan on retrogression grounds, *id.* at *94; in addition, while it did not make a "purpose" determination on this plan, the court noted that, "at a minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Id.* at *131. Texas did not make an administrative Section 5 submission of any of these plans before it filed suit. *Id.* at *5.

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[19] The court found retrogression in several districts including District 23, an earlier version of which this Court found to violate Section 2 of the Voting Rights Act in 2006: "West Texas's CD 23 has a complicated history under the VRA. In 2006, the Supreme Court held that CD 23, as then constituted, violated section 2. *See LULAC v. Perry*, 548 U.S. 399, 425-42 (2006). In response, the U.S. District Court for the Eastern District of Texas redrew its boundaries in 2006 to be an 'opportunity district,' or one in which Hispanic voters would have an opportunity to elect their preferred candidates, as required by section 2. We now find that the Hispanic voters in CD 23 turned that opportunity into a demonstrated ability to elect, but that the 2010 redistricting took that ability away." 2012 U.S. Dist. LEXIS 121685 at *55 (record citations omitted).

V. The Constitutionality of the 2006 Amendments is Not Properly Before the Court

The constitutionality of Congress' 2006 amendments to the Section 5 preclearance standards is not properly presented for review by this Court.

In the Court of Appeals, "Shelby County neither challenge[d] the constitutionality of the 2006 amendments or even argue[d] that they increase section 5's burdens." App. at 66a. *See also id*. at 76a ("Shelby did not argue that either of these amendments is unconstitutional") (Williams, J., dissenting). The Court of Appeals properly declined to consider these issues since they were "entirely unbriefed, and as we have repeatedly made clear, 'appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" *Id*. at 66a-67a (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)). Since Shelby County neither challenged in the lower courts the constitutionality of the 2006 amendments, nor argued that they increase Section 5's burdens, the County has waived any such arguments.[20]

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[20] *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not pressed upon below."); *Spietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (deeming argument as to application of federal maritime law waived because it was not raised below).

In addition, as the Court of Appeals correctly observed, the 2006 amendments "are implicated only in a subset of cases," *id.* at 67a, and thus are best addressed in the context of a preclearance dispute that substantively presents the question of the amendments' nature and scope. Accordingly, since the instant case presents no such preclearance dispute, this is an independent reason for not addressing the 2006 amendments in this litigation.[21]

Shelby County contends, in its Statement of the Case, that the 2006 amendments "increased the already significant federalism burden preclearance imposes of covered jurisdictions." Petition at 10. Nonetheless, the County's Petition does not appear to assert that the constitutionality of the 2006 reauthorization is affected by the 2006 amendments to the Section 5 preclearance standards. The Petition does not assert that the D.C. Circuit erred when it concluded that these amendments may not properly be considered in this case. Nor does Shelby

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[21] For these reasons, the majority did not address, on the merits, Judge Williams' assertion that the amendments have created new burdens on covered jurisdictions. Judge Williams' dissent incorrectly describes the history of Section 5 and is contrary to Congress' findings, as the amendments, in fact, merely restored the longstanding interpretations and applications of Section 5 which had been abrogated by *Georgia v. Ashcroft*, 539 U.S. 461 (2003), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*). As Congress stated: "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 (2006).

County ask this Court to review either of the alternative legal determinations made by the D.C. Circuit in this regard – that Shelby County's failure to brief the "preclearance amendments" issue below precluded consideration of this issue, and that Shelby County's facial challenge fails to present the requisite concrete circumstances in which the judiciary may appropriately consider the nature and scope of the amendments.

For these reasons, any grant of certiorari in this appeal should preclude consideration of a facial challenge to the 2006 amendments.

VI. The Question Presented is Incorrect

Finally, should certiorari be granted, the correct question before the Court would be whether Congress acted within its authority under both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) in 2006. Thus, if certiorari is granted, the Court should reject Shelby County's proposed "question presented" because it ignores the explicit congressional invocation of enforcement authority under the Fourteenth Amendment. Intervenors have submitted the correct "question presented" for consideration by the Court.

As discussed above, Congress specifically relied upon its enforcement authority under both the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 in 2006. 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 (stating that the reauthorization is based on both Amendments).

Congress' Fourteenth Amendment authority, therefore, would be integral to the question before the Court.

Shelby County has provided no substantial reason to disregard Congress' stated reliance upon both the Fourteenth and Fifteenth Amendments. Shelby County does not – and could not – contend that the Fourteenth Amendment fails to reach racial discrimination in voting, nor does Shelby County identify any limitation in that Amendment's enforcement clause that would preclude Congress from enacting remedial legislation to prevent and deter such discrimination. It is well established that the Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination in voting by state and local governments. *E.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985); *Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973). *See also LULAC v. Perry*, 548 U.S. at 440 (Texas' congressional redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation."). And the enforcement clauses of the Fourteenth and Fifteenth Amendments grant Congress "parallel power," *Boerne*, 521 U.S. at 518, and, in fact, use "virtually identical" language. *Garrett*, 531 U.S. at 373. Accordingly, it was entirely proper for Congress to rely on both Amendments when it acted to reauthorize Section 5 and Section 4(b) in 2006.

Shelby County observes that this Court's prior decisions upholding the constitutionality of Section 5 relied exclusively on the Fifteenth Amendment. Petition at 26 (citing *Katzenbach*, 383 U.S. at 308-10; *Rome*, 446 U.S. at 180-82). *See also Lopez v.*

Monterey County, 525 U.S. at 283-84. While true, this also says very little since these cases included no discussion of the Fourteenth Amendment, and thus included no ruling on whether Congress may rely on both Amendments in enacting remedies for racial discrimination in voting. Instead, it merely seems that the Supreme Court's past focus on the Fifteenth Amendment was a function of jurisprudential historical development, and carried no substantive significance.[22]

[22] In 1966, when the Court in *Katzenbach* first addressed the constitutionality of the Voting Rights Act, constitutional rulings regarding discrimination in voting generally relied on the Fifteenth Amendment. *E.g., Louisiana v. United States*, 380 U.S. 145, 153 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); *Smith v. Allwright*, 321 U.S. 649, 666 (1944). However, beginning in the 1970s, the Supreme Court built upon its one-person, one-vote rulings under the Fourteenth Amendment to hold that a different form of vote dilution – one that denies minority voters the opportunity to elect candidates of choice – also violates the Fourteenth Amendment. *See White v. Regester*, *supra.* Thus, constitutional law as applied to discrimination in voting has progressed to including the prohibitions in both the Fourteenth and Fifteenth Amendments.

CONCLUSION

The petition for a writ of certiorari should be denied.

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