No. ______

In the Supreme Court of the United States

JOHN NIX, ET AL.,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2006, Congress reauthorized and amended Section 5 of the Voting Rights Act of 1965, which requires federal preclearance of all changes to state and local voting practices in certain covered jurisdictions. *See* 42 U.S.C. § 1973c. The questions presented are:

1. Whether the 2006 version of Section 5 exceeds Congress' enforcement powers under the Fourteenth and Fifteenth Amendments given that: (a) Congress retained a three-decade-old formula for selecting the jurisdictions that will be covered by the preclearance procedure; and (b) Congress significantly expanded the substantive standard for denying preclearance by abrogating two of this Court's decisions that had narrowly construed it.

2. Whether the Justice Department mooted Petitioners' appeal when it unilaterally purported to "reconsider" and "withdraw" the particular preclearance objection that was injuring Petitioners, but failed to demonstrate that Section 5 could not reasonably be expected to injure Petitioners in the future.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners here, who were Plaintiff-Appellants below, are: John Nix; Anthony Cuomo; and Kinston Citizens for Non-Partisan Voting ("KCNV"). KCNV is an unincorporated membership association of registered voters in Kinston, North Carolina, who are dedicated to eliminating the use of partisan affiliation in local elections in Kinston. KCNV does not have a parent corporation, and no publicly held company has an ownership stake of 10% or more in KCNV.

In addition, Stephen LaRoque and Klay Northrup were Plaintiff-Appellants below, and Lee Raynor was a Plaintiff in the district court. They are not petitioning for review here. Accordingly, while this case was captioned *LaRoque v. Holder* in the courts below, it is now captioned *Nix v. Holder* in this Court.

The principal Respondent here, who was the Defendant-Appellee below, is: Eric H. Holder, Jr., Attorney General of the United States.

Additional Respondents here, who were the Defendant-Intervenor-Appellees below, are: Joseph M. Tyson; W.J. Best, Sr.; A. Offord Carmichael, Jr.; George Graham; Julian Pridgen; William A. Cooke; and the North Carolina Conference of Branches of the National Association for the Advancement of Colored People.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nix, Cuomo, and KCNV respectfully submit this petition for a writ of certiorari.

OPINIONS

The opinion of the Court of Appeals for the D.C. Circuit (Pet.App. 1a) is reported at 679 F.3d 905. The opinion of the District Court for the District of Columbia (Pet.App. 8a) is reported at 831 F. Supp. 2d 183. An earlier opinion of the D.C. Circuit (Pet.App. 123a) is reported at 650 F.3d 777.

Opinions in a parallel case, *Shelby County v. Holder*, are relevant here. The opinion of the D.C. Circuit (Pet.App. 159a) is reported at 679 F.3d 848. The opinion of the D.C. District Court (Pet.App. 269a) is reported at 811 F. Supp. 2d 424.

JURISDICTION

The D.C. Circuit entered judgment on May 18, 2012. 28 U.S.C. § 1254(1) confers statutory jurisdiction to review that judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces parts of the Fourteenth and Fifteenth Amendments. U.S. Const., amends. XIV, XV. It also reproduces parts of the Voting Rights Act of 1965, as amended ("VRA"), 42 U.S.C. § 1973 *et seq.*, including Section 5, as reauthorized and amended in 2006, *id.* § 1973c.

STATEMENT OF THE CASE

This Court has recognized that, as reauthorized and amended by the 2006 Congress, Section 5's "preclearance requirements and … coverage formula raise serious constitutional questions." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009). The opportunity and duty to resolve some of those questions are presented in *Shelby County v. Holder*, where a divided panel of the D.C. Circuit upheld Congress' power to reauthorize Section 5's old preclearance procedure *without* amendment. But, as that court recognized, *Shelby County* does not adequately present the question whether Congress exceeded its power by reauthorizing Section 5 *with* a newly amended and expanded substantive preclearance standard that abrogates two of this Court's decisions, because the plaintiff there did not raise that significant argument. Petitioners here, however, pressed it below, and it was passed upon by the district court (before DOJ tried to moot the appeal). Thus, to facilitate a timely and definitive resolution of the exceptionally important question whether the 2006 version of Section 5 is facially valid, this Court should grant review of both cases.

1. A background description of Section 5's statutory evolution underscores the significance of the unique aspect of Petitioners' facial challenge.

a. Section 5 preemptively "suspend[s] all changes in state election procedure[s]" in selectively "covered jurisdiction[s]" "until they [are] submitted to and approved by a three-judge Federal District Court in Washington, D.C.[] or the Attorney General." *Id.* at 198. Although enacted pursuant to Congress' authority "to enforce" the Fourteenth and

Fifteenth Amendments "by appropriate legislation," *see id.* at 197-98, Section 5 drastically exceeds the ban on *intentional* racial discrimination imposed by those Reconstruction Amendments, *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997) ("*Bossier I*"), and even exceeds Section 2 of the VRA, which imposes a prophylactic nationwide ban on voting practices that have a statutorily defined discriminatory "*result[]*," *see* 42 U.S.C. § 1973 (emphasis added).

Instead, Section 5's preclearance regime, as enacted in 1965, targeted a unique problem: in "areas where voting discrimination ha[d] been most flagrant," "case-by-case litigation was inadequate to combat [such discrimination], because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 328 (1966). This "particular set of invidious practices … had the effect of undoing or defeating the rights recently won by nonwhite voters" under normal anti-discrimination litigation. *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (internal quotation marks omitted); *see also City of Rome v. United States*, 446 U.S. 156, 180-82 (1980).

Faced with such "dire" and "exceptional" circumstances, this Court upheld the 1965 enactment, which was a "temporary" five-year measure, as well as subsequent reauthorizations in 1970 (for five years) and 1975 (for seven years). *Nw. Austin*, 557 U.S. at 199-200; *see also Lopez v. Monterey Cnty.*, 525 U.S. 266, 282-85 (1999) (rejecting a narrow as-applied challenge to the twenty-five-year reauthorization in 1982).

b. In 2006, Congress again reauthorized Section 5. *Nw. Austin*, 557 U.S. at 200. Notably, Congress extended the preclearance requirement's temporal scope for 25 more years without modifying the geographic or topical scope of voting changes covered, even though, by then, the election data used in the formula to select the "covered jurisdictions" was 34 to 42 years old. *Id.* at 198-200; *see also* 42 U.S.C. §§ 1973b(b), 1973c(a). For present purposes, though, what is even more notable is that Congress for the first time *expanded the substantive grounds for denying preclearance*.

Under Section 5's prior iterations, preclearance could be denied *only* if the jurisdiction failed to prove that its voting change did not have the "purpose" or "effect" of causing "a *retrogression*" in minorities' "effective exercise of the electoral franchise," as determined by "*all the relevant circumstances*." *See Georgia v. Ashcroft*, 539 U.S. 461, 466, 477, 479-80 (2003) (emphases added); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335-36 (2000) ("*Bossier II*"). In other words, so long as the change did not "retrogress"—*i.e.*, make a minority group worse off—jurisdictions were not forced *to disprove* the potential accusation that they had "discriminated" against another change that would have made the group *better off*. *See Bossier II*, 528 U.S. at 328-36. Moreover, even where the change would reduce a minority group's ability to elect its preferred candidates, jurisdictions could prove that the change was permissible if the reduction was *justified* by off-setting increases in the group's overall political power or *excused* by the constraints of traditional governance principles. *See Ashcroft*, 539 U.S. at 479-85.

The 2006 Congress, however, vehemently asserted that *Ashcroft* and *Bossier II* had "misconstrued … and narrowed the protections afforded by section 5." 42 U.S.C. § 1973 note, Findings (b)(6); *see also* H.R. Rep. No. 109-478, at 65-72, 93-94 (2006) (*e.g.*, *Ashcroft* made Section 5 "a wasteful formality" and "hopelessly unadministerable" statute, which perversely "would encourage States … to turn black and other minority voters into second class voters"); S. Rep. No. 109-295, at 15-21 (2006) (*e.g.*, *Bossier II* forced "the federal government" to "giv[e] its seal of approval to practices that violate the Constitution"). Accordingly, Congress abrogated *Ashcroft*'s flexible, "Section 2"-like "totality of the circumstances" standard for determining retrogression, requiring instead that jurisdictions specifically prove that the change will not "diminish[] the ability" of minorities "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b),(d). Likewise, Congress abrogated *Bossier II*'s retrogression limitation, requiring instead that jurisdictions additionally prove that even a change that does not make minorities worse off lacks the "discriminatory purpose" of not making them better off. *Id.* § 1973c(c). In so doing, Congress ignored this Court's warnings that these expanded standards raised serious constitutional concerns due to the excessive burden on covered jurisdictions, including the excessive consideration of race required. *E.g.*, *Bossier II*, 528 U.S. at 336; *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring).

c. The "appropriateness" of the 2006 version of Section 5 as constitutional "enforcement" legislation was promptly challenged in *Nw. Austin*, but this Court resolved that case on statutory

grounds. 557 U.S. at 196-97, 206-11. Before doing so, however, it explained that Section 5's "preclearance requirements and … coverage formula raise serious constitutional questions." *Id.* at 204.

In particular, this Court identified various "federalism concerns" triggered by the possibility that the "current burdens" imposed by Section 5 can no longer "be justified by current needs." *Id.* at 201-04. The most obvious concern was that "[t]he evil" that the Section 5 process was "meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," *id.* at 203-04, in part because "[s]ome of the conditions that [this Court previously had] relied upon in upholding" Section 5's preclearance procedure "have unquestionably improved," *id.* at 202-03.

Perhaps less obvious, but of critical importance here, was this Court's renewed emphasis that "[t]hese federalism concerns" were "underscored" by the "tension" between Section 5's substantive preclearance standard and the Constitution's race-neutrality principles. *Id.* at 203. Specifically, "[r]ace cannot be the predominant factor" in electoral decision-making under the Constitution, but excessive "considerations of race … seem to be what save" certain electoral changes under Section 5. *Id.* (quoting *Ashcroft*, 539 U.S. at 491-92 (Kennedy, J., concurring)).

2. This litigation arose when DOJ applied the amended standard to deny preclearance to a voting change in Kinston, North Carolina.

a. In November of 2008, Kinston's voters overwhelmingly passed a referendum to replace the existing system of partisan local elections with the

system of nonpartisan local elections employed in most other municipalities in the state. Pet.App. 18a. But since Kinston is located within a county covered by Section 5, the City had to obtain preclearance before implementing the referendum. *Id.* 18a-19a.

The City sought administrative preclearance, but DOJ objected in August of 2009. *Id.* 19a-20a, 462a-466a. Its sole basis was that "the elimination of party affiliation on the ballot will likely reduce the ability of blacks to elect candidates of choice." *Id.* 19a, 464a. DOJ reasoned that, "given a change [to] non-partisan elections, black[-]preferred candidates [would] receive fewer white cross-over votes," because they could no longer depend on "either [an] appeal to [Democratic] party loyalty or the ability [of Democrats] to vote a straight [party-line] ticket." *Id.* 19a-20a, 463a-465a. The City did not seek judicial preclearance. *Id.* 20a.

b. Petitioners then brought this facial constitutional challenge to Section 5 in April of 2010. *Id.* 20a-21a. Petitioners were proponents of Kinston's nonpartisan-elections referendum, and Nix in particular also intended to run as a party-unaffiliated candidate in the November 2011 Kinston City Council election. *Id.* 20a. Nix alleged that he was injured by Section 5's preemption of Kinston's state-law duty to implement the referendum, because partisan elections would increase his ballot-access costs and his Democratic opponents' likelihood of victory. *Id.* 2a-3a; *see also id.* 127a, 131a-132a.[1]

[1] Indeed, Nix eventually lost in the 2011 election while the case was still pending in the district court, but that did not moot the case given his intent to run again in 2013. Pet.App. 43a.

As relevant here, Petitioners claimed that "Section 5, as amended and extended in 2006, is not a rational, congruent or proportional means to enforce the Fourteenth and Fifteenth Amendment's nondiscrimination requirements." *Id.* 458a-459a. Petitioners made two arguments in support of that enumerated-powers claim: *first*, that the old preclearance procedure was no longer adequately justified or tailored given current circumstances in the covered jurisdictions compared to non-covered jurisdictions; and *second*, that the new substantive preclearance standard was excessively burdensome and race-conscious. *Id.* 459a.[2]

c. The district court initially granted DOJ's motion to dismiss Petitioners' claim for lack of standing and a cause of action. *Id.* 123a. It essentially reasoned that only the City of Kinston could challenge the constitutionality of Section 5's preemption of the referendum. *See id.* 131a-134a.

But the D.C. Circuit reversed. *Id.* 124a. It held that (at least) Nix, as an aggrieved "candidate for public office," had "standing and a cause of action to pursue" his claim "that Section 5, as reauthorized in 2006, exceeds Congress' Fourteenth and Fifteenth Amendment enforcement powers." *Id.*; *see also id.* 136a-152a. It thus "remand[ed] for the district court to consider the merits of that claim." *Id.* 124a.

d. While the case was pending on remand, the same district court issued its decision in *Shelby*

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[2] Petitioners also claimed that the amended preclearance standard itself violates the Constitution's nondiscrimination guarantees. Pet.App. 459a-460a. That claim was dismissed in the courts below, and Petitioners are not pressing it here.

County. There, a covered jurisdiction in Alabama had brought a facial constitutional challenge to the preclearance procedure's 2006 reauthorization. *Id.* 270a, 306a-307a. In a lengthy summary-judgment opinion surveying the legislative record, the court upheld the "reauthorization of the preclearance requirement … as well as the preservation of the traditional coverage formula," given "the modern existence of intentional racial discrimination in voting." *Id.* 272a; *see also id.* 314a-447a.

e. Shortly thereafter, the district court issued its summary-judgment opinion in this case. It noted that its *Shelby County* opinion disposed of the part of Petitioners' enumerated-powers claim that challenged the stand-alone reauthorization of the old preclearance procedure, independent of the new substantive preclearance standard. *Id.* 26a-27a. But the court acknowledged that the part of Petitioners' enumerated-powers claim challenging the 2006 enactment based on the amended standard "raise[d] significant issues" that "no other challenger … has raised." *Id.* 10a.

The court thus analyzed at length, but ultimately rejected, Petitioners' arguments that the expanded standard for denying preclearance had rendered Section 5 excessively burdensome and race-conscious. *First*, the court upheld Congress' new requirement that jurisdictions prove the change would not "diminish[] the ability" of minorities "to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b),(d). Although that "ability to elect" standard abrogated *Ashcroft*'s flexible, "Section 2"-like "totality of the circumstances" retrogression standard, 539 U.S. at 479-85, the court reasoned that

it "was necessary to avoid giving cover to intentional discrimination and to prevent an administrability nightmare that would itself harm covered jurisdictions." Pet.App. 95a-96a; *see also id.* 65a-96a. *Second*, the court upheld Congress' new requirement that jurisdictions prove that even a non-retrogressive change which does not make minorities worse off also lacks the "discriminatory purpose" of not making them better off. 42 U.S.C. § 1973c(c). Although that "discriminatory purpose" standard abrogated *Bossier II*'s retrogression limitation, 528 U.S. at 328-36, the court reasoned that it was not too "intrusive" since it merely "shifted" the burden to make jurisdictions "prove the absence of discrimination." Pet.App. 63a; *see also id.* 52a-65a.[3]

f. Petitioners' appeal was expedited for contemporaneous decision with *Shelby County* by a single D.C. Circuit panel. *See id.* 1a-2a, 159a-161a.

But then, in February of 2012, just days before the Government's brief was due and weeks before oral argument was scheduled, DOJ dropped a bombshell: it unilaterally had "reconsidered," and purportedly "withdrawn," its objection to Kinston's referendum, nearly 2.5 years after it had been interposed. *Id.* 3a. DOJ claimed that its extremely

[3] Technically, for the "discriminatory purpose" standard, the district court held only that Petitioners lacked standing to challenge it, because that standard, unlike the "ability to elect" standard, was not applied by DOJ when denying preclearance to Kinston's referendum. Pet.App. 28a-42a. But, recognizing that appellate courts might again "disagree[] with [its] conclusion on standing," the district court "explain[ed] how it would rule on the merits" of everything, so that appellate courts could "address the merits immediately" if standing exists. *Id.* 41a-42.

belated change of position was motivated by "new evidence" that it had "received in a separate preclearance proceeding," which supposedly showed that nonpartisan elections would no longer diminish the ability of blacks in Kinston to elect their preferred candidates. *See id.*; *see also id.* 471a-475a.

But that suggestion of changed circumstances is meritless. DOJ emphasized that blacks became "a majority of the electorate" in 2011 and had achieved unprecedented success in that year's *partisan election*, yet DOJ did not suggest or show that the black "majority" was sufficiently large or cohesive that their preferred candidates could or would have won *without* the "crossover voting by whites" that DOJ previously claimed was the "critical" benefit of partisan elections. *Compare id.* 473a-474a, *with* 463a-465a. In fact, there was no new "majority," since the 2012 electoral data was materially indistinguishable from the 2009 data. *Compare id.* 463a (in 2009, blacks were an estimated 66.6% of total population and 64.6% of registered voters, yet a minority of actual voters in 3 of the past 4 elections and perhaps a "slight" majority in the fourth), *with id.* 473a (in 2012, blacks were an estimated 65% of voting-age population and 65.4% of registered voters, yet were (apparently) a minority of actual voters in 2009 and an (unquantified) majority in 2011).

Instead, the "new evidence" was a transparent pretext for DOJ to try to moot this case to avoid defending on appeal the 2006 amendments, which Shelby County had not raised. Petitioners challenged DOJ to represent to the D.C. Circuit that this appeal *played no role* in its decision-making concerning its purported "withdrawal" of the

objection. DOJ conspicuously failed to make that representation below, and Petitioners are confident that the Solicitor General cannot do so here.

Nevertheless, the D.C. Circuit allowed DOJ to manipulate the appellate review of Section 5's facial constitutionality. The court first concluded that DOJ's purported "withdrawal" of its objection effectively precleared Kinston's nonpartisan-elections referendum, which would eliminate Petitioner Nix's future injury in the 2013 election. *Id.* 4a-5a. And then the court held that *Petitioners* had failed *to prove* that Section 5 would otherwise injure them in the future. *Id.* 5a-7a. Critically, the court placed the burden on them to "offer … evidence" that such future injuries would occur, rejecting as "speculative" their allegations in this regard. *Id.*

g. That same day, the D.C. Circuit ruled in *Shelby County*, upholding Section 5's 2006 reauthorization by a 2-1 vote. *Id.* 159a, 161a.

Judge Tatel, writing for himself and Judge Griffith, held that Congress was justified in reauthorizing the old preclearance procedure because it could reasonably conclude from the legislative record that: (1) "serious and widespread intentional discrimination persisted in covered jurisdictions," against which "case-by-case enforcement" would be an "inadequate remedy," *id.* 203a; *see also id.* 181a-206a; and (2) the coverage formula "continues to single out the jurisdictions in which discrimination is concentrated," *id.* 224a; *see also id.* 206a-225a. Judge Williams dissented because he instead found the 2006 Congress' use of Section 5's old "coverage formula" to be "irrational," either in "justify[ing] the

extraordinary burdens of § 5" or in "draw[ing] a rational line between covered and uncovered jurisdictions." *Id.* 229a; *see also id.* 236a-263a.

Importantly for here, Judge Williams found it "impossible to assess [the coverage] formula without first looking at the burdens § 5 imposes on covered jurisdictions," because "[t]he greater the burdens imposed by § 5, the more accurate the coverage scheme must be" to be "sufficiently related to the problem it targets." *Id.* 229a-230a. After reviewing the "ability to elect" and "discriminatory purpose" amendments, he concluded—precisely as Petitioners here had argued—that the 2006 expansions to the substantive preclearance standard "make[] the § 5 burden even heavier," by significantly exacerbating the "federalism costs" and aggravating "the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." *Id.* 234a-235a; *see also id.* 231a-234a.

Notably, the majority did not dispute the merits of the dissent's "thoughtful arguments" that "the burden imposed by section 5 [had been] aggravated by the amendments." *Id.* 225a. Instead, it concluded that the dissent "face[d] [the] serious obstacle" that Shelby County had never raised them and thus had "forfeited" these "entirely unbriefed" arguments. *Id.* 225a-226a.[4]

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[4] The majority also suggested that, under *United States v. Salerno*, 481 U.S. 739, 745 (1987), any defects in the 2006 amendments would not warrant *facial* invalidation of the 2006 reauthorization. Pet.App. 226a-227a.

REASONS FOR GRANTING THE PETITION

The time has come for this Court to resolve the "serious constitutional questions" presented by the "preclearance requirements and … coverage formula" of Section 5, as reauthorized and amended in 2006. *See Nw. Austin*, 557 U.S. at 204. Not only has Congress declined to modify Section 5 in light of this Court's guidance in *Nw. Austin*, but the overzealous manner in which Section 5 is currently being applied has exacerbated the serious federalism costs that the extraordinary preclearance regime imposes on the citizens of covered jurisdictions. And now the D.C. Circuit has issued a divided decision in *Shelby County* on the reauthorized preclearance procedure's facial validity. Prompt review of that decision is imperative, for this Court must be the final word on the exceptionally important question presented.

But, as Judge Williams cogently observed in *Shelby County*, this Court cannot properly discharge that vital responsibility without fully considering the nature and degree of the burden that the substantive preclearance standard imposes. Of course, that requires assessing the impact of the 2006 Congress' choice to amend and expand the standard by abrogating this Court's decisions in *Ashcroft* and *Bossier II*. Namely, this Court must decide whether Judge Williams is correct that the 2006 amendments exacerbate Section 5's "federalism costs" and aggravate its "tension" with the Constitution's "commitment to nondiscrimination," Pet.App. 234a-235a, by creating "a scheme in which [DOJ] is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance," *Ashcroft*, 539 U.S. at 491-92 (Kennedy,

J., concurring). And the present case is the *only* one where this Court's review of the 2006 amendments will be assisted by full briefing and argument as well as a reasoned decision below: neither Shelby County nor any other Section 5 challenger has raised the arguments that Petitioners here have made.

Accordingly, *Shelby County* is clearly justiciable but will present an incomplete merits analysis, whereas this case will present the full merits analysis but has a threshold mootness issue. In similar situations where prompt review is vital but no single case is the perfect vehicle, this Court has granted review of multiple cases, despite individualized issues, to facilitate the comprehensive consideration of the question presented. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 259-60 (2003) (granting certiorari before judgment "so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances"). Indeed, the Solicitor General himself recently urged this Court to review two parallel cases—including one where, as here, the circuit court has not yet passed on the merits—"to ensure that the Court will have an appropriate vehicle in which to resolve the issues presented in a timely and definitive fashion." Petn. for a Writ of Cert. Before Judgment at 13-15, *Office of Personnel Management v. Golinski*, No. 12-16 (U.S. July 3, 2012) ("*Golinski* Petn."). The same course of action is also necessary and proper here.

That is especially true because the D.C. Circuit's mootness holding does not present a difficult question of justiciability, but rather a summarily reversible error. This Court has made crystal clear

that a defendant "asserting mootness" based on its own "voluntary conduct" bears the "heavy burden of persuading[] the court" that "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected" to injure the plaintiff in the future. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Yet here, the D.C. Circuit inexplicably relieved DOJ of its heavy burden—which DOJ could not possibly have satisfied—and instead faulted Petitioners for their supposed failure to introduce non-"speculative" "evidence" that Section 5 would likely injure them in the future, given DOJ's purported "withdrawal" of its objection. Thus, far from "view[ing] with a critical eye" the DOJ's "maneuvers designed to insulate [the district court's] decision from review," *Knox v. SEIU, Local 100*, 132 S. Ct. 2277, 2287 (2012), the D.C. Circuit made the fundamental error of "confus[ing] mootness with standing … and as a result plac[ing] the burden of proof on the wrong party," *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (per curiam) (summarily reversing).

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

I. THE FACIAL CONSTITUTIONALITY OF THE 2006 VERSION OF SECTION 5 IS AN EXCEPTIONALLY IMPORTANT QUESTION THAT WARRANTS IMMEDIATE REVIEW

The national interest urgently requires this Court's decision on Section 5's facial validity. Yet a conclusive determination requires considering the effect of the 2006 amendments. Thus, to ensure a

timely and definitive resolution, this Court should grant both this case and *Shelby County*.

A. It Is Essential That This Court Promptly Review The 2006 Reauthorization Of Section 5's Preclearance Procedure

Section 5 is "extraordinary legislation otherwise unfamiliar to our federal system." *Nw. Austin*, 557 U.S. at 211. "[B]y suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.," Section 5 "authorizes federal intrusion into sensitive areas of state and local policymaking." *Id.* at 202. And by "differentiat[ing] between the States," Section 5 "depart[s] from the fundamental principle of equal sovereignty." *Id.* at 203. "These federalism costs have caused Members of this Court to express serious misgivings about the constitutionality of § 5." *Id.* at 202.

In *Nw. Austin*, this Court *unanimously* gave Congress clear notice that the 2006 reauthorization "imposes current burdens and must be justified by current needs." *Id.* at 203; *accord id.* at 226 (opinion of Thomas, J.). Indeed, eight Justices strongly warned that, given "current political conditions," "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," *id.* at 203 (opinion of the Court), and Justice Thomas would have invalidated Section 5 on that ground, *id.* at 226-29. Yet, in the three years since, Congress has refused to take any action, declining to update (or even revisit) the preclearance regime to ensure that its "disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203 (opinion of the Court).

Given the Legislature's inaction, this constitutional question can no longer be "avoid[ed]" by the Judiciary. *See id.* at 197. And the D.C. Circuit's divided decision in *Shelby County* cannot be the final word on this "important" and "difficult" issue of federalism. *See id.* at 197, 211. Ultimately, it is this Court that bears "the duty" to serve "as the bulwark of a limited constitution against legislative encroachments" by performing "the gravest and most delicate" task of "judging the constitutionality of an Act of Congress." *See id.* at 204-05.

Nor will further percolation be useful for this Court's ultimate review. The courts below in *Shelby County* and this case have exhaustively analyzed the legislative record under this Court's precedents. Moreover, practically speaking, it is unlikely that further percolation will meaningfully occur. The D.C. Circuit's precedent in *Shelby County* will typically be controlling, because the D.C. District Court has exclusive jurisdiction of cases seeking to enjoin Section 5's enforcement. *See* 42 U.S.C. § 1973*l*(b); *Florida v. United States*, No. 11-1428, Order at 3 (D.D.C. June 5, 2012) (three-judge court noting that, though its judgment would be directly appealed here rather than to the D.C. Circuit, it still "considers itself bound by … *Shelby County*").

Regardless, any delay in this Court's ultimate review of Section 5 is intolerable for the millions of citizens of covered state and local jurisdictions who are currently being deprived of their "freedom" to exercise "a voice in shaping the destiny of their own times without having to rely" upon the "processes that control a remote central power." *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). The

ongoing loss of their basic right to self-governance is especially troubling given the perversely aggressive and onerous manner in which Section 5 has recently being applied, despite *Nw. Austin*'s admonitions.

For example, as Judge Williams emphasized in his *Shelby County* dissent, DOJ has begun interposing Section 5 objections to voter-identification requirements, creating the spectacle that covered jurisdictions are being blocked from implementing laws that are virtually identical to ones that have been upheld by this Court and implemented in many non-covered jurisdictions. Pet.App. 261a-262a. Similarly, Texas's redistricting policies would have been "wholly ignore[d]" under the purported mantle of Section 5 absent this Court's expedited intervention in January, *Perry v. Perez*, 132 S. Ct. 934, 942-44 (2012) (per curiam), and the D.C. District Court *still* has not ruled on whether those policies actually contravened the statute at all, *see Texas v. United States*, No. 11-1303 (D.D.C.) (post-trial briefs filed on February 6, 2012).

Indeed, this very case is the poster-child for the heightened federalism costs recently inflicted by Section 5. In 2008, Kinston's voters enacted the nonpartisan-elections referendum "by an almost 2 to 1 margin." Pet.App. 18a. Even though blacks were 64.6% of registered voters at the time, DOJ in 2009 objected to this good-government measure because it supposedly would have hurt blacks by hurting Democrats. *See id.* 463a-465a. Yet, once it became clear, nearly 2.5 years later, that this aggressive objection would expose the amended preclearance standard to this Court's scrutiny, DOJ purported to "withdraw" it under a fig-leaf of new evidence.

Supra at 10-12. Although Petitioners here are not bringing an as-applied challenge, Pet.App. 21a, the suspect history of the Kinston objection underscores the pressing need for this Court's facial review of the extraordinary statutory scheme that enabled it.

B. The 2006 Reauthorization's Validity Cannot Properly Be Reviewed Without Considering The 2006 Substantive Amendments

In his *Shelby County* dissent, Judge Williams correctly observed that "it is impossible" to decide whether the reauthorized preclearance procedure's "coverage formula" is "sufficiently related to the problem it targets" without "looking at the burdens" imposed by the amended substantive preclearance standard. Pet.App. 229a. For "[t]he greater the burdens imposed by § 5, the more accurate the coverage scheme must be." *Id.* 229a-230a.

That relationship, as Judge Williams recognized, flows inexorably from the test established in *City of Boerne v. Flores*, 521 U.S. 507 (1997), to determine whether Congress has exceeded its enforcement powers under the Reconstruction Amendments. The *Boerne* test inquires whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. That inquiry polices "the distinction [that] exists and must be observed" "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.* at 519-20. Given the nature and purpose of the test, this Court has explained that it applies to the challenged law *as a whole*: "[t]he answer to the question *Boerne* asks—whether *a piece of legislation* attempts

substantively to redefine a constitutional guarantee—logically focuses on *the manner in which the legislation operates* to enforce that particular guarantee." *See Tennessee v. Lane*, 541 U.S. 509, 530 n.18 (2004) (emphases added).

Nw. Austin confirms the truism that assessing the fit between the "injury" being addressed and the "means" for addressing it requires fully examining what those "means" actually are. Even though *Nw. Austin* involved a *pre-enforcement facial* challenge, this Court nonetheless observed that the "federalism concerns" with the preclearance procedure are "underscored by the argument" that the preclearance standard makes race "the predominant factor" in electoral decisionmaking. 557 U.S. at 203. As this reflects, there is an inherent connection between the scope and race-consciousness of the substantive preclearance standard and the "appropriateness" of the preclearance procedure as "enforcement" legislation: the more expansive the standard is in invalidating voting practices, the greater the procedure's "litigation burden" and "curtail[ment] [of jurisdictions'] traditional general regulatory power," and the lesser the procedure's likelihood of being "designed to identify and counteract state laws likely to be unconstitutional because of their [intentional] treatment of [race]." *See Boerne*, 521 U.S. at 534-35.

Thus, while Shelby County is certainly correct that the 2006 preclearance reauthorization would have been unconstitutional even if the pre-2006 substantive standard had been retained, this Court should not myopically focus on that hypothetical question, while blinding itself to the reality that the 2006 amendments dramatically changed the

substantive standard and thereby exacerbated Section 5's constitutional defects. In short, this Court obviously cannot assess whether Section 5 preclearance is valid without examining what is substantively required to obtain preclearance.

Indeed, this Court's review of challenged enforcement legislation routinely involves collective consideration of individual provisions that are far less applicable or related than here. For example, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), this Court held that "Title I" of the ADA exceeded Congress' enforcement powers. *Id.* at 360, 364-65, 374. Even though the specific facts implicated only the statutory provisions prohibiting intentional discrimination and requiring reasonable accommodations, this Court considered Title I as a whole, including separate provisions requiring accessible facilities and prohibiting disparate impacts. *Id.* at 360-62, 372-73. Likewise, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), this Court held that Congress' enforcement powers did not authorize the "Patent Remedy Act." *Id.* at 630-31, 647. Even though the specific facts involved only intentional infringement, this Court considered the Act as a whole, including its independent application to unintentional infringement. *Id.* at 645-47; *id.* at 653 n.4 (Stevens, J., dissenting).

Here, following *Nw. Austin*'s lead (and Petitioners' arguments in *this* case), Judge Williams cogently explained how the amended preclearance standard directly increases "the severity of the consequences of coverage" under the reauthorized preclearance procedure. Pet.App. 235a-236a.

First, Congress made a minority group's "ability to elect" its preferred candidate the "exclusive focus" of retrogression, thereby "restricting the flexibility" of covered jurisdictions to prove to federal authorities under a broader inquiry that countervailing considerations exist. *See id.* 232a-234a. Thus, by absolutely "foreclos[ing] th[e] choice" to "diminish[]" minorities' electoral chances for any reason, the "ability to elect" standard "mandates" a "particular brand" of "race-conscious decisionmaking"—*i.e.*, a rigid floor for minorities' expected electoral success—that "aggravates both the federal-state tension … and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." *See id.* 234a.

Second, Congress "requir[ed] covered jurisdictions affirmatively to prove [the] absence" of "discriminatory purpose," notwithstanding the difficult burden of proving that negative, let alone DOJ's exploitation of that difficulty *pre-Bossier II* "in its pursuit of maximizing majority-minority districts at any cost." *See id.* 234a-235a (citing *Miller*, 515 U.S. at 924). Thus, the "discriminatory purpose" standard, "at worst, restored [DOJ's] implicit command that States engage in presumptively unconstitutional race-based districting, and at best, exacerbated the substantial federalism costs that the preclearance procedure already exacts." *See id.* 235a (citations and internal quotation marks omitted).

Accordingly, Judge Williams concluded that, "when Congress passed the 2006 version of [Section 5], it not only disregarded but flouted Justice Kennedy's concern" in *Ashcroft* that "[c]onsiderations of race that would doom a redistricting plan under

the Fourteenth Amendment … seem to be what save it under § 5." *Id.* 232a; *compare also Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("There is a fundamental flaw … in any scheme in which [DOJ] is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive."), *with* H.R. Rep. No. 109-478, at 70 (*Ashcroft* "encourage[d] States … to turn black and other minority voters into second class voters"). The failure of the 2006 Congress to heed the warnings in *Ashcroft* and *Bossier II* conspicuously parallels the subsequent failure of Congress to heed *Nw. Austin*'s warning. More specifically, the 2006 amendments conclusively demonstrate that Congress' goal in reauthorizing Section 5 was not really to attack unconstitutional intentional discrimination in jurisdictions where Section 2 and other normal anti-discrimination legislation are *inadequate remedies*. *Cf. South Carolina*, 383 U.S. at 328. Instead, its true goal was to provide minorities in jurisdictions with past histories of discrimination with a scheme to improve their electoral success by explicitly banning voting changes that reduce their electoral chances and by implicitly coercing changes that increase their chances. *Cf. Miller*, 515 U.S. at 924-27. In other words, rather than a "remedial or preventive object," Congress was "attempt[ing] a substantive change in constitutional protections," by broadly banning voting changes that impose "incidental burdens" on minorities or that fail to confer potential benefits, without any "concern" whether "the object or purpose of the [change]" was intentionally discriminatory. *Cf. Boerne*, 521 U.S. at 531-32; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989).

In sum, under *Boerne* and its progeny, this Court must consider the amended preclearance standard when deciding whether the 2006 Congress exceeded its power in the reauthorized preclearance procedure. The D.C. Circuit majority in *Shelby County* thus fundamentally erred by suggesting that *Salerno*'s "no set of circumstances" test precluded such collective review in these "facial" challenges. *See* Pet.App. 226a-227a. To the contrary, this Court has squarely held that challenges under *Boerne* to putative "legislation under § 5 of the Fourteenth Amendment" are "valid[] … facial attacks" on the entire relevant statute. *See Sabri v. United States*, 541 U.S. 600, 609-10 (2004); *see also* Pet.App. 229a (Williams, J., dissenting) (further explaining why *Salerno*'s test poses no obstacle here).[5]

C. This Case Is A Necessary And Proper Vehicle To Review The 2006 Amendments

As just discussed, this Court's review of Section 5's 2006 reauthorization must encompass Congress' abrogation of *Ashcroft* and *Bossier II* in the 2006 amendments. The difficulty, of course, is that the D.C. Circuit has not passed on the issue, because of the plaintiff's failure to raise it in *Shelby County* and DOJ's efforts to moot the appeal in this case. But this Court's past certiorari practices in similar circumstances reveal a simple solution: grant review in both this case and *Shelby County.*

[5] The district court thus likewise erred in concluding that Petitioners lack standing to challenge the "discriminatory purpose" standard simply because DOJ had not applied that particular amendment when objecting to Kinston's referendum. *See* Pet.App. 31a.

When it would facilitate a more comprehensive consideration of a weighty question presented, this Court has not hesitated to review multiple cases raising separate aspects of the issue, *even where*, as here, the circuit court has not decided the merits in one of the cases. *E.g.*, *Gratz*, 539 U.S. at 259-60 (granting certiorari before judgment to review a companion affirmative-action case); *United States v. Booker*, 543 U.S. 220, 229 (2005) (same for federal sentencing guidelines' constitutionality); *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970) (same for multi-million-dollar valuation issues in regional railroad merger); *Brown v. Bd. of Educ.*, 344 U.S. 1, 3 (1952) (same for school segregation, at this Court's own suggestion).

Indeed, the Solicitor General recently invoked this practice in the parallel cases challenging the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7. Citing the precedents above, the Government seeks review of both a final judgment in the First Circuit and a case still pending in the Ninth Circuit, "to ensure that the Court will have an appropriate vehicle in which to resolve the issues presented in a timely and definitive fashion. *Golinski* Petn. at 13-15. Notably, the Government's sole explanation for why the Ninth Circuit case warrants review before judgment is that "[t]he district court's analysis may materially assist this Court's consideration" of "the applicable level of scrutiny." *Id.* at 13.

Compared to *Golinski* or any of this Court's past precedents, this is an *a fortiori* case for trying "to ensure that the Court will have an appropriate vehicle in which to resolve the issues presented in a

timely and definitive fashion." *See id.* at 15. Not only has this Court already decided that Section 5's extraordinary preclearance regime "raise[s] serious constitutional questions," *Nw. Austin*, 557 U.S. at 204, but Judge Williams has correctly determined that "it is impossible to assess" the reauthorized preclearance regime under *Boerne* without "looking at the burdens" imposed by the amended substantive preclearance standard, Pet.App. 229a.

Simply put, although this case may not be the theoretically ideal vehicle for reviewing the 2006 amendments given the alleged mootness issue, it is nevertheless a better vehicle when combined with *Shelby County* than *Shelby County* is standing alone, and there is no other realistic alternative. Specifically, this Court will *ensure* that it receives the benefit of Petitioners' briefing and argument here, as well as the district court's analysis below. Consequently, it then can resolve these arguments, either in this case if, as in *Gratz*, it disposes of the threshold justiciability issues in Petitioners' favor, 539 U.S. at 260-68, or at least in *Shelby County*, as Judge Williams did, Pet.App. 231a-236a.

In fact, though, the foregoing significantly overstates the extent to which mootness is a real vehicle problem here. The mootness question actually *bolsters* the cert-worthiness of this case, because, as explained below, it independently warrants review and, indeed, summary reversal. It thus presents no meaningful threat of preventing review of the 2006 amendments.

II. THE D.C. CIRCUIT'S MOOTNESS DECISION FLATLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

It is well established that a defendant alleging that its voluntary conduct has mooted a case bears the heavy burden of proving that its challenged conduct is not reasonably likely to injure the plaintiff in the future. But the D.C. Circuit erroneously relieved DOJ of that heavy burden, which it cannot possibly satisfy. As this Court has done in the past, summary reversal on the mootness question presented is warranted, but plenary review also would be an appropriate disposition in this situation.

A. DOJ Bears A Heavy Burden In Claiming That Its Voluntary Conduct Mooted Petitioners' Appeal

"[R]ightly refus[ing] to grant defendants … a powerful weapon against public law enforcement," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), this Court has adopted a "stringent" standard "for determining whether a case has been mooted by the defendant's voluntary conduct," *Laidlaw*, 528 U.S. at 189. Namely, "the party asserting mootness" bears the "heavy burden of persuading[] the court" that "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected" to injure the plaintiff in the future. *Id.* Thus, in this context, "the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, *but not too speculative to overcome mootness*." *Id.* at 190 (emphasis added).

Moreover, *appellate* courts must especially "view[] with a critical eye" intervening "maneuvers designed to insulate a decision from review." *See*

Knox, 132 S. Ct. at 2287. For "abandon[ing] the case at an advanced stage may prove more wasteful than frugal," to say nothing of the heightened likelihood in such situations that the defendant intends "to return to his old ways." *See Laidlaw*, 528 U.S. at 189, 192.

Indeed, the law here is so well settled that, in *Adarand Constructors v. Slater*, *supra*, this Court *summarily reversed* the Tenth Circuit for failing to apply it. There, a white plaintiff had successfully challenged a racially-preferential federal program. 528 U.S. at 219-20. While the Department of Transportation's appeal was pending, a state agency certified that the plaintiff was eligible for "disadvantaged business status," which, *if* accepted by DOT, would have entitled the plaintiff to the benefits of the very program being challenged. *Id.* at 220-21. The Tenth Circuit thus dismissed the case as moot, rejecting as "too conjectural and speculative" the possibility that DOT would refuse to accept the state agency's certification. *Id.* at 224. In summarily reversing, this Court explained that the Tenth Circuit had "confused mootness with standing … and as a result placed the burden of proof on the wrong party." *Id.* at 221. Since the case would be moot *only* if DOT accepted the certification, DOT bore the "heavy burden" of proving that it would do so, and it had failed to "satisfy this burden" due to potential flaws in the certification. *See id.* at 221-24.

Until the decision below, the circuit courts had received and followed this Court's clear message. Where, as here, federal agencies have ceased challenged conduct while litigation is pending, the circuits require them to do far more than assert that the plaintiff's risk of future injuries is "speculative";

the Government must prove that those injuries cannot reasonably be expected to occur:

- *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173-74 (9th Cir. 2009) (despite having belatedly made the requested administrative findings, the Government failed to meet its burden of *proving, rather than speculating*, that the plaintiff would not encounter similar delays in any future complaints that might be filed);
- *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1175 (11th Cir. 2006) (despite having removed the challenged provisions in certain forest plans, the Government failed *to eliminate uncertainty* as to whether previously approved projects continued to be governed by those provisions);
- *Rothe Dev. Corp. v. Dep't of Defense*, 413 F.3d 1327, 1332-33 (Fed. Cir. 2005) (despite having suspended the challenged affirmative-action program as factually unnecessary to meet the statutory goal, the Government failed to prove that it would not revive the program *if* the facts changed);
- *Ahrens v. Bowen*, 852 F.2d 49, 52-53 (2d Cir. 1988) (despite having granted a belated and *ad hoc* exemption to the challenged policy of treating punitive-damage awards as income, the Government's *strategic maneuver* suggested that it would apply the policy in the future *if* the plaintiff again happened to obtain a punitive-damage award).

B. The D.C. Circuit Erroneously Relieved DOJ Of Its Heavy Burden

"The only conceivable basis for a finding of mootness in this case is [DOJ's] voluntary conduct" in purporting to "withdraw" its objection to Kinston's referendum. *See Laidlaw*, 528 U.S. at 189; Pet.App. 3a-4a. Accordingly, DOJ should have had the "heavy burden" of proving that, in light of its purported "withdrawal," it is "absolutely clear that the allegedly wrongful behavior"—*i.e.*, Section 5's 2006 reauthorization and expansion—"cannot reasonably be expected" to impose future injury on Petitioner Nix's candidacy for Kinston City Council. *See Laidlaw*, 528 U.S. at 189.

But the D.C. Circuit inexplicably failed to hold DOJ to its burden. Instead, the court decided that the case was moot because of "[Petitioners'] inability to present" evidence of future injury that was not "too speculative." Pet.App. 5a-7a. Thus, in square conflict with *Laidlaw*, *Adarand*, and the four circuit court cases above, the D.C. Circuit simply "confused mootness with standing … and as a result placed the burden of proof on the wrong party." *Adarand*, 528 U.S. at 221. And as in all those cases, this burden-flipping "error was a crucial one." *See id.* at 222. Particularly given the essentially infinite number of potential voting changes that would benefit Nix's candidacy but be vulnerable to preclearance denial, "it is impossible to conclude that [DOJ could] have borne [its] burden of establishing that it is absolutely clear" that Section 5 "cannot reasonably be expected" to injure Nix's candidacy. *See id.* at 224.

Indeed, far from negating *every* reasonable expectation of future injury, DOJ did not even refute

the reasonable expectation of the three future injuries that Petitioners concretely identified:

First, Petitioners submitted a declaration from Stephen LaRoque, an elected representative in the North Carolina Legislature, which both announced his intention to introduce a "local bill" establishing a voter-identification requirement in Kinston's home county and also noted the Legislature's prior passage of a state-wide voter-identification bill that the Governor subsequently had vetoed. Pet.App. 476a-478a. The D.C. Circuit responded that this declaration was "far too speculative" to prove future injury from Section 5, because Petitioners had "offer[ed] … no evidence" that a voter-identification bill: (1) would be enacted, and (2) would draw a preclearance objection, but (3) would have benefited Nix's candidacy absent the objection. *Id.* 5a-6a.

Yet DOJ offered no evidence that any of those elements could *not* reasonably be expected to occur before November of 2013. For good reason: (1) the Governor cannot veto "local bills" and leaves office this year regardless, *see id.* 478a; (2) DOJ recently has been objecting consistently to voter-identification laws, *see id.* 261a-262a, on the ground that the burden of procuring identification functions as a "poll tax" falling disproportionately on minority voters, *see* Joe Holley, *Holder calls Texas voter ID law a 'poll tax,'* HOUSTON CHRON., July 11, 2012, at B1; and (3) the minority voters allegedly harmed by such laws overwhelmingly support Nix's Democratic opponents, *see* Pet.App. 463a.

Second, Nix contended that Section 5's existence prevents him from requesting "a new election" in the 2011 Kinston City Council race on the ground that

Section 5's forced retention of the partisan system was an "[i]rregularit[y] or impropriet[y]" that "taint[ed] the results of the entire election and cast doubt on its fairness." *See* N.C.G.S. § 163-182.13(a)(4). Here again, the D.C. Circuit deemed "[t]he prospect of a new election … too speculative," relying on an intermediate state court's unpublished opinion claiming that the Board of Elections lacks "statutory authority … to revoke a certificate of election" once officials have been sworn in. Pet.App. 7a (quoting *In re Caldwell Cnty. Election Protests of Hutchings*, No. COA03-1177, 2004 WL 1610347, at *3 (N.C. Ct. App. July 20, 2004)).

But *Hutchings* is inadequate support for the conclusion that new elections cannot be ordered, and is therefore wholly inadequate to satisfy *DOJ's burden of proving* that a new election could not reasonably be expected to occur here. That solitary case does not remotely support the extraordinary notion that North Carolina officials and courts are powerless to overturn certified elections, regardless of the extent of illegality or unconstitutionality later discovered. As a threshold matter, "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority." N.C. R. App. P. 30(e). More fundamentally, *Hutchings* plainly misconstrued the controlling precedent of *Cohoon v. Swain*, 5 S.E.2d 1 (N.C. 1939), which holds only that "[t]he certificate of election is not subject to attack *except in a civil action in the nature of a quo warranto proceeding*." *Id.* at 3 (emphasis added); *accord In re Election Protest of Fletcher*, 625 S.E.2d 564, 567 (N.C. Ct. App. 2006) (citing *Cohoon* and *Ledwell v. Proctor*, 19 S.E.2d 234, 236 (N.C. 1942)); *cf. United States v. Onslow Cnty.*, 683 F. Supp. 1021,

1023-24 (E.D.N.C. 1988) ("This court certainly has the power to order an election in conformity with constitutional and legislative principles.").

Third, Nix observed that DOJ's unilateral "reconsideration" of its objection to the referendum does not even ensure that Kinston's 2013 election will be run as a nonpartisan race: minority voters in Kinston can stop such nonpartisan elections by persuasively arguing that the referendum still has not been validly precleared, because DOJ's purported "withdrawal" of its objection is an *ultra vires* act under Section 5's plain text. Pet.App. 4a.

Section 5 generally bars the implementation of a voting change "unless and until" the D.C. district "court enters [a] judgment" awarding judicial preclearance. 42 U.S.C. § 1973c(a). Under the lone exception for administrative preclearance, a change can be implemented "without [a judicial] proceeding *if* [it] has been submitted by the [covered jurisdiction] to [DOJ] *and* [DOJ] has *not* interposed an objection *within sixty days after such submission* [or] affirmatively indicated that such objection will not be made." *Id.* (emphases added). But that exception is unavailable here, because DOJ *did* "interpose an objection within sixty days" of Kinston's final "submission," *see* Pet.App. 457a, which means that Section 5's plain text continues to bar the referendum. And critically, Section 5 *omits* any authority for DOJ to "reconsider" or "withdraw" an objection *denying* preclearance, whereas it expressly *includes* authority for DOJ "to reexamine" a prior "affirmative indication" that it would be *granting* preclearance, so long as that reexamination occurs "during the … sixty day period." 42 U.S.C.

§ 1973c(a). Congress' "disparate" statutory treatment of reexamination authority must be "presumed" to be "intentional[] and pupose[ful]." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The D.C. Circuit did not even attempt to reconcile DOJ's unilateral "withdrawal" of its objection with Section 5's plain text or the *Russello* presumption. *See* Pet.App. 4a-5a. Instead, the court blindly "defer[red]" to a DOJ regulation asserting non-textual "reconsideration" authority, because the court believed that there was "no reason … why [DOJ] should be unable to withdraw an objection." *See id.* But the reason is obvious: as this case vividly illustrates, it would seriously exacerbate the electoral uncertainty that Section 5 creates in covered jurisdictions if DOJ could *unilaterally* undo *long-final* objections. *See id.* 467a-470a (giving Kinston 11 days notice before "withdrawing" an objection that had been in place for almost 2.5 years). That is particularly true because Congress might well have feared that new Administrations, with different voting-rights philosophies, could engage in blanket "withdrawals" of prior objections, thereby disrupting settled protections of minority voters and settled expectations of covered jurisdictions.[6]

[6] Nor does DOJ's lack of unilateral "withdrawal" authority disable it from considering changed circumstances where appropriate: it can always ask the jurisdiction to make a new "submission" of a previously-rejected change, thereby restarting the 60-day clock for administrative preclearance. *See* Pet.App. 5a; 42 U.S.C. § 1973c(a). Far from the "pointless exercise[]" criticized by the D.C. Circuit, Pet.App. 5a, requiring DOJ to involve state and local jurisdictions before unexpectedly changing their laws respects federalism and precludes wholesale "withdrawals" by new Administrations.

Significantly, the court with the authority to resolve whether nonpartisan elections have been precleared for Kinston is the local federal court in North Carolina. *Allen v. State Bd. of Elections*, 393 U.S. 544, 557-60 (1969). Thus, minority voters in Kinston who doubt DOJ's pretextual analysis or otherwise oppose nonpartisan elections could sue there to enjoin the referendum's implementation due to the lack of preclearance. *Id.* at 554-57. And the D.C. Circuit could not possibly conclude that a future *Allen* court cannot reasonably be expected to disagree with its atextual statutory interpretation.

In sum, the D.C. Circuit clearly and seriously erred by holding that this case is moot even though DOJ did not remotely carry its heavy burden of proving that Section 5 can no longer "reasonably be expected" to impose further injury on Nix's candidacy. For such a threshold justiciability error, the normal course under *Adarand* would be to summarily reverse and remand the merits for initial consideration in the D.C. Circuit. But given the unusual need for a prompt merits decision in this Court due to the pendency of *Shelby County* and the serious federalism issues at stake, this Court instead should: either (1) summarily reverse on mootness while granting on the merits; or (2) simply grant on both questions presented. Although either disposition would be appropriate in these circumstances, Petitioners respectfully submit that the first one has the important virtue of enabling plenary review to focus cleanly on the momentous constitutional issues at stake (so long as reversing on mootness does not delay granting on the merits).

CONCLUSION

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

Respectfully submitted,

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