SUPREME COURT OF THE UNITED STATES

No. 12-96

SHELBY COUNTY, ALABAMA, PETITIONER v. ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIRORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 2013]

ALLIANCE FOR A JUST SOCIETY, with whom JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, AND JUSTICE KAGAN join dissenting.

The Alliance respectfully dissents from the majority in Tuesday's Court ruling; and joins the opinion of Justices Ginsburg, Breyer, Sotomayor and Kagan.

The question before the Court was whether Congress had the authority under the Constitution to reauthorize preclearance for another 25 years. While the Court correctly notes that Congress had the proper authority; we depart from the opinion that requires Congress the duplicative analysis of recalculating the formula.

In 2006, when reauthorization was at issue, Congress had already assembled a legislative record justifying the initial legislation. As Justice Ginsburg appropriately points out, "Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be the remedy." Dissent at 19.

Based from the conclusion of the majority Court's rationale, the need for enforcement must have magically disappeared.

Reality however, shows otherwise.

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, condition in the covered jurisdictions demonstrated that the formula was still justified by "current needs" Id., citing Northwest Austin, 557 U.S.., at 203.

In some ways, things have changed dramatically since the 1965 Voting Rights Act was passed. Voter turnout and registration rates for African Americans and Whites are almost on par in jurisdictions covered by §4, and the tests and devices blocking access to the polls have been forbidden

nationwide—all of which the majority notes are due in large part to the success of the Act itself.

While the majority contends that §4 is no longer valid due to changed conditions in those jurisdictions, the formula, specifically, is a large part of what has allowed the success of the Voter Rights Act.

If the formula is irrelevant, one would expect that the rate of successful lawsuits authorized by other parts of the Act would be more or less the same in both covered and non-covered jurisdictions. Yet, evidence has shown that racial discrimination in voting in fact is "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. at 203 (2009). For example, as the Katz study indicated, jurisdictions covered by the §4 formula account for 56% of successful §2 litigation (since 1982), even though the jurisdictions make up less than 25% of the population. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Congr., 1st Sess., pp. 964-1124 (2005).

Additionally, one would also expect, if the formula were not representative of current conditions, that the degree of racial polarization would be equivalent in covered and non-covered jurisdictions. Yet, evidence indicates rates are the highest in covered jurisdictions. H.R. Rep. No. 109-478, at 34-35.

Alliance for a Just Society joins in the opinion that §4 of the Voter Rights Act itself accounts for changing conditions. If a state can show it has complied with the Act for 10 years, and has engaged in efforts to eliminate intimidation and harassment of voters, it may bail out. 42 U.S.C. §1973b(a) (2006 ed. and Supp. V). Had Alabama complied with the Act beginning in 1973, and made efforts towards ending racially discriminative voting practices, this case would never have been presented to this Court. Instead, Alabama would have escaped subjection to pre-clearance in 1983, like nearly 200 other jurisdictions who have successfully bailed out since the Act was passed. *See* Brief for Federal Respondent 54. Jurisdictions may be added to the preclearance requirement if they violate the 14th or 15th amendment, essentially installing a bail in mechanism. The concept is simple: if a state does have racially discriminatory practices in motion with regards to voting access, a state will not be subject to preclearance.

Yet, many covered jurisdictions, including Alabama, have clearly shown they are unable to comply with measures of the Voter Rights Act. Alabama, specifically, is second only to Mississippi in the highest rates of successful §2 suits between 1982 and 2002 (679 F. 3d, at 897 (Williams, J., dissenting)). Additionally, multiple cases have occurred even as recently as 2011, in which racial discrimination was at issue. (*See Dillard v.*

Crenshaw Cty., 640 F. Supp. 1347, 1354-63 (MD Ala. 1986), holding at large election systems in several Alabama counties violated §2, and *United States v. McGregor*, 824 F. Supp. 2d. 1339, 1344-1348 (MD Ala. 2011) where an FBI investigation found Senators referring to African Americans as Aborigines, and captured their conversations aiming to quash a referendum because it might increase African-American voter turnout).

Moreover, the majority ruling ignores the enormous impact of second generation barriers inherent in so many covered jurisdictions: racial gerrymandering, and system of at large voting (just as examples). While there are not direct tests required for voting in covered states, processes diluting the African-American vote have essentially the same effect as overt discrimination. This is why Congress continued to reauthorize the Voter Rights Act in 1970 for 5 years, in 1975 for 7 years, and in 1982 for 25 years.

§4 of the Voter Rights Act is essential to ensuring that the rest of the Act is complied with. As the Court had repeatedly recognized, other solutions to racial discrimination in voting access have failed. The Act was created specifically to address the inadequacy of litigation: its often prohibitive cost and lengthy procedures yielding untimely results with serious consequences. Yet, the majority's legislation will allow states, who have shown they are incapable of complying with the Act, to enact radical racially discriminatory voting practices whose consequences cannot be fixed without additional years of litigation and elections.

The formula of §4 was the method Congress chose for good reason, and not for the court to undermine. Unfortunately, while recognizing the problem of racial discrimination in voting, the majority refused to enforce a working solution.

The United States failed for over a century to fulfill promises of Fourteenth and Fifteenth amendments, and it has yet to correct its mistakes.