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 OF *AMICUS CURIAE* STATE OF ALASKA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MARGARET PATON-WALSH
Counsel of Record
JOANNE M. GRACE
RUTH BOTSTEIN
STATE OF ALASKA
1301 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-6612
margaret.paton-walsh@alaska.gov

Counsel for Amicus
State of Alaska

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OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Alaska is a covered jurisdiction under the formula set out in § 4(b) of the Voting Rights Act ("VRA"). 42 U.S.C. § 1973b(b). For this reason, Alaska must comply with § 5 of the VRA, which requires it to seek approval from the Department of Justice for every proposed change to its election procedures—ranging from implementation of new state redistricting plans to grammatical changes to forms. 42 U.S.C. § 1973c. Over the past thirty years, the Alaska Division of Elections has made nearly 500 preclearance submissions, some major, some minor, to secure this federal approval for changes to state laws and practices. Alaska faces challenges unique to its own territory, including remote precincts inaccessible by roads, severe weather, and a small population spread over a vast area. These and other challenges often create issues that require quick and practical resolutions—not always covered in existing, precleared law—by state officials who understand which practices are sensible and likely to succeed. But because it is covered by § 5, Alaskan officials have been frustrated in their efforts to best serve the Alaskan public by attorneys in Washington, D.C. who most likely have never set foot in this state.

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[1] Consistent with Rule 37.2, counsel for the State of Alaska gave more than ten days' notice of the state's intent to file this *amicus* brief to the counsel of record for all parties.

But § 5's impact on Alaska extends far beyond the administrative burden and loss of local control over elections. It requires the state to engineer election districts based on factors related to race, which both offends state and federal constitutional prohibitions against race discrimination and compromises the Alaska Constitution's neutral, non-partisan principles of redistricting. Further, § 5 interferes with Alaska's ability to conduct timely and orderly elections. Indeed, it so significantly impeded Alaska's ability to create new districts after the 2010 census that the state was not able to finalize a redistricting plan in time for the 2012 elections and nearly had to postpone them.

Alaska has been subject to § 5's burdensome federal oversight despite a dearth of evidence before Congress—either in 1965 when Congress enacted § 5 or as it has subsequently reauthorized it—that the state has a record of voting discrimination that would justify any remedial measures, much less the oppressive federal control effected by § 5. As a result, the state has recently filed suit in the United States District Court for the District of Columbia challenging the constitutionality of § 5. *See State of Alaska v. Holder*, 1:12-cv-01376-RLW (D.D.C.). Grant of this petition could resolve the important question of law at the heart of Alaska's lawsuit.

ARGUMENT

This Court Should Grant Certiorari Because § 5 Imposes an Extraordinary Burden on Covered Jurisdictions Without Sufficient Evidence that They Have Serious and Established Records of Intentional Voting Discrimination, as Alaska's Experience Demonstrates.

Section 5 of the VRA as reauthorized in 2006 implicates important principles of federalism and equal sovereignty and, perhaps even more significantly, the appropriate application of the Reconstruction Amendments upon whose authority it relies. This Court has already expressed concern about, but has not ruled on, § 5's constitutionality. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) ("The Act's preclearance requirements and its coverage formula raise serious constitutional questions . . . ."). Because § 5 significantly interferes with the elections of covered jurisdictions such as Alaska, the Court should grant certiorari in this case and determine § 5's constitutionality.

Section 5's crippling effect on Alaska's effort to redistrict in 2010, described below, illustrates the extraordinary burden that it imposes. But as a "remedy," § 5 is not a rational means—much less a congruent and proportional one—to resolve any actual problem, as Congress did not have before it in 2006 any record of voting discrimination by Alaska.

I. Section 5 Has Significantly Interfered With Alaska's Ability to Conduct Timely and Efficient Elections, as Illustrated by its 2010 Redistricting Process and the 2012 Election Cycle.

While the time, hassle, and expense of preparing and submitting preclearance submissions for review and approval by the DOJ undeniably place significant administrative burdens on covered jurisdictions, § 5's negative impacts run much deeper than logistical troubles. Alaska's 2010 redistricting experience is a paradigmatic example. Section 5 prevented Alaska from redistricting according to legitimate, non-discriminatory principles of fair representation; forced it to abandon fundamental principles enshrined in its own constitution; and nearly required it to postpone its elections.

After the 2010 decennial census, the Alaska Redistricting Board redrew all of Alaska's electoral districts, as required by Alaska's Constitution. ALASKA CONST., art. VI., §§ 1, 2, 8. The Alaska Constitution identifies specific traditional redistricting principles that combat the natural tendency toward partisanship in the redistricting process: electoral districts must be contiguous, compact, and relatively socio-economically integrated. ALASKA CONST., art. VI, § 6; *In re 2011 Redistricting Cases*, 274 P.3d 466, 467 (Alaska 2012); *Hickel v. Southeast Conference*, 846 P.2d 38, 44-47 (Alaska 1992); *Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1360-61 (Alaska 1987). These requirements were designed to combat gerrymandering and to "help to ensure that the election

district boundaries fall along natural or logical lines rather than political" ones, ensuring public trust in the redistricting process. *Hickel*, 846 P.2d at 45; *see also 2011 Redistricting Cases*, 274 P.3d at 467-68.

But the Alaska Redistricting Board must compromise these principles in order to comply with § 5, vastly complicating the redistricting process. Although Alaska law requires that these foundational redistricting principles yield only to the extent necessary for compliance with the VRA, *2011 Redistricting Cases*, 274 P.3d at 467-68; *Hickel*, 846 P.2d at 51 n.22—a limitation consistent with this Court's admonition that a jurisdiction may not unnecessarily depart from traditional redistricting principles to create districts using race as "the predominant, overriding factor," *Miller v. Johnson*, 515 U.S. 900, 920-22 (1995); *see also Bush v. Vera*, 517 U.S. 952, 958-59 (1996)—in practice the preclearance process has essentially displaced these state constitutional requirements.

For example, in 2011 the redistricting board attempted to ensure that Alaska's new plan would secure § 5 preclearance by first drawing several districts along racial lines to maintain minority voting strength. *2011 Redistricting Cases*, 274 P.3d at 467. The Alaska Supreme Court found that this approach frustrated the court's ability to determine whether the plan compromised state constitutional principles of contiguity, compactness, and relative socio-economic integration beyond the minimum extent necessary to secure preclearance. *Id.* Yet even after the board redrew the plan with closer consideration

of these constitutional requirements, neither the board nor the court could set aside the overriding concern that the DOJ would deny preclearance and indefinitely delay Alaska's scheduled elections. *In re 2011 Redistricting Cases*, 2012 WL 2478214 (Alaska) (Winfree, J., and Stowers, J., dissenting) (includes majority order dated May 10, 2012) [hereinafter *2011 Redistricting* Dissents].

Over strenuous dissents, the Alaska Supreme Court eventually approved an interim plan that is plainly inconsistent with the state constitution's requirements, but that may have been necessary to ensure preclearance by the DOJ. *Id.* As one Alaska Supreme Court justice remarked, "[T]he court blinked in the face of threats of VRA objections to DOJ." *Id.* at *7 (Stowers, J., dissenting). The specter of DOJ disapproval and the state's overarching responsibility to provide a timely election for Alaskans therefore produced an interim redistricting plan for Alaska that violates its own core constitutional principles.

Even more troubling, the explicit command of § 5 that changes may not "diminish[ ]" a minority group's ability "to elect their preferred candidates of choice," 42 U.S.C. § 1973c(d), required the redistricting board to act in apparent defiance of both state and federal constitutional prohibitions against race discrimination. *See, e.g.*, *2011 Redistricting* Dissents at *3 (Alaska 2012) (Stowers, J., dissenting) (noting "the tension between complying strictly with the Alaska Constitution (which prohibits discrimination based on race, even when discrimination may promote a

minority's ability to maintain its historical, numerical level of representation in the Alaska Legislature) and the contrary requirement of the federal Voting Rights Act (which mandates that in states subject to VRA oversight, a minority's historical, numerical level of representation in the legislature may not be diminished by a redistricting plan because this could be considered illegally retrogressive under federal law)" (citations omitted)); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) ("Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5."). Section 5 therefore required Alaska to compromise its core redistricting principles far beyond the extent necessary under § 2's substantive non-discrimination standards.

The intrusive effect of § 5 then continued, hindering the state's ability to hold timely elections in 2012. Despite expedited judicial procedures built into Alaska law, *see* ALASKA CONST., art. VI, § 11 (providing that challenge to redistricting plan must be filed within thirty days of plan's adoption and that courts give redistricting cases priority over everything else); ALASKA R. APP. PROC. 216.5 (establishing deadlines for expedited appeals in redistricting cases), litigation over the plan did not produce an order finally designating an interim plan until May 22, 2012. The board submitted this plan to the DOJ for preclearance three days later, requesting expedited review.

Alaska was then placed in an untenable position. The state was obligated under state and federal law

to meet statutory election deadlines, covering a full schedule of preparatory tasks such as candidate filing, eligibility challenges, ballot printing, and absentee ballot mailings. At the same time, § 5 prohibited it from performing any preparations dependent on the redistricting plan before the plan was precleared. Whatever the state chose to do—prepare for the election or not prepare for the election—would violate the law. The state faced massive disruption and disenfranchisement if primary elections were not held as scheduled, but delaying preparations pending preclearance of the redistricting plan would have altered many state law deadlines. Those changes themselves would have required preclearance, and the DOJ gives itself expansive timelines for considering preclearance requests. 28 C.F.R. § 51.9.[2] With no good choices available, Alaska moved forward with preparatory steps for the election without prior approval of the DOJ.

A week after the candidate filing deadline, on June 7, 2012, private parties sued the Alaska Division of Elections for implementing the plan without preclearance. *Samuelsen v. Treadwell*, No. 3:12-cv-00118-RBB-AK-JKS (D. Alaska). They demanded an injunction prohibiting any further election preparations

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[2] This regulation allows the DOJ sixty days to respond to a preclearance submission. The sixty-day clock can be reset by the DOJ at any time with a request for more information. Multiple such requests are permitted. As a result, a jurisdiction can never be sure how long the preclearance process will take.

until the DOJ precleared the redistricting plan. They did not allege that the redistricting plan violated the substantive requirements of the Fourteenth or Fifteenth Amendments, or that the plan was discriminatory toward minority voters; they sued on the sole ground that the state was implementing an unprecleared change in election procedures and therefore was in violation of § 5. *Id.* at Docket 1. The lawsuit was eventually mooted by DOJ's early preclearance of the interim plan, two days before the state's deadline to mail advanced absentee ballots. Had the plaintiffs succeeded in obtaining the injunction and had the DOJ not precleared the plan when it did, Alaska likely would not have been able to hold a timely 2012 primary or general election. Thus, even though the plaintiffs did not allege that the redistricting plan actually abridged or denied the right to vote of any Alaskans, this § 5 litigation jeopardized Alaska's ability to hold timely elections.

As Alaska's recent experience illustrates, § 5's requirements—and the extended review period permitted the DOJ for preclearance—can place jurisdictions in impossible situations. Because *every proposed change*, no matter how minor, and no matter the reason for it, must be submitted at least 60 days before it needs to be implemented, § 5 requires states like Alaska to either abandon hope of a timely election cycle or risk a technical § 5 violation that could trigger the kind of federal court enforcement action that was filed against Alaska. Similarly, covered jurisdictions often are unable to respond to unexpected developments

that occur close to elections, because they must wait for federal permission to do so or violate § 5. *See, e.g.*, *Rudolph v. Treadwell*, Case No. 3:10-cv-00268-RRB (D. Alaska) (Docket 1) (alleging state's compliance with Alaska Supreme Court Order less than a week before election violated § 5 because DOJ had not yet precleared court-ordered change).

Such significant interference with state elections and state sovereignty can be justified only by an egregious record of intentional voting discrimination. But as described below, Congress plainly lacked sufficient evidence that Alaska had such a record in 2006 when it most recently reauthorized § 5.

II. Congress Reauthorized § 5's Application to Alaska in 2006 Without the Requisite Evidence that the State Has a Record of Voting Discrimination.

The D.C. Circuit majority and some commentators have touted the extensive record of voting discrimination in the covered jurisdictions amassed by Congress for the Act's 2006 reauthorization. *See, e.g.*, *Shelby County, Alabama v. Holder*, 679 F.3d 848, 857 (D.C. Cir. 2012); KRISTEN CLARKE, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385 (2008). But this aggregated evidence obscures the irrationality of the scope of § 5 coverage, a point that again is particularly well illustrated by Alaska. The record supporting the 2006 reauthorization shows that Congress could

have had no basis to conclude that Alaska's record on voting discrimination was so egregious as to warrant § 5 coverage. And that reality illuminates the bankruptcy of the entire § 5 formula. Congress simply declined to reconsider the appropriate reach of this extraordinary intrusion on an area of traditional state concern.

In affirming § 5's constitutionality, the circuit court majority in this case discussed a variety of evidence that Congress had before it in 2006, including voter registration and turnout statistics; the number of minority elected officials; racially polarized voting; successful § 2 lawsuits; DOJ objections to preclearance submissions; DOJ requests for additional information; the deployment of federal observers tasked with monitoring elections; and § 5 enforcement actions. *Shelby County*, 679 F.3d at 863. It reviewed this evidence because it acknowledged that to survive constitutional scrutiny, § 5's burdens likely must be "congruent and proportional to the injury to be prevented," *id.* at 859 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (alterations omitted)), and this data purportedly evidenced the threat of current injury. Even assuming that evidence is relevant, *but see* Pet. 26-28, 30-34, the court employed a sleight of hand when assessing it: the court aggregated the data across all covered jurisdictions so that a problem in one could be attributed to all, rather than treating each state individually. This aggregated perspective obscures the fundamental flaws in the coverage formula and conceals the irrationality of

continuing to designate covered jurisdictions based on decades-old data.

Alaska illustrates the shortcoming of this methodology. If Congress had considered information specific to Alaska rather than aggregated statistics, it would have seen that Alaska's coverage is unjustified. Although Alaska does not collect information about the race of voters and therefore can only estimate minority registration and turnout rates, the best available estimates show that Alaska Natives vote at rates comparable to non-Natives. *Samuelsen v. Treadwell,* No. 3:12-cv-00118-RBB-AK-JKS, at Docket 26, Exhibits N, O. These estimates are consistent with the state's strong record of electing Alaska Natives to state office, which compares favorably with most non-covered jurisdictions. In 2006, when the VRA was reauthorized, seven Alaska Native legislators sat in a body of sixty, making the ratio of the proportion of Alaska Native legislators (11.6%) against the Alaska Native share of voting-age population (13.7%) almost one-to-one (.847).

Similarly, the record before Congress in 2006 showed that a successful § 2 lawsuit had never been filed in Alaska; the DOJ had objected to only one preclearance submission in more than thirty years; only one § 5 lawsuit had ever been filed in Alaska (against the Municipality of Anchorage, a jurisdiction over whose elections the state exercises no control), and no federal observers had ever been certified for an election in Alaska. Thus, the evidence before Congress of Alaska's record on relevant matters does not provide a rational basis for § 5 coverage of the

state, much less a congruent and proportional response to any actual problem. *See Shelby County,* 679 F.3d at 859.

Indeed, much of the evidence presented to Congress about Alaska in 2006 related to issues irrelevant to § 5 coverage, such as higher poverty rates or poorer educational outcomes among minorities. *Samuelsen v. Treadwell,* No. 3:12-cv-118-RBB-AK-JKS, at Docket 25, Exhibit E. But § 5 coverage must be based on evidence of current state discrimination, as "the Act imposes current burdens and must be justified by current needs." *Nw. Austin*, 557 U.S. at 203. And the evidence must be related to *voting* discrimination. Generalized evidence of disparities in life outcomes is insufficient to justify the federal infringement on state sovereignty represented by § 5. As this Court explained, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related *to the problem that it targets.*" *Id.* (emphasis added). Extending § 5 coverage based on problems such as poverty would stretch federal power well beyond the limits of congruence and proportionality.

Alaska also starkly demonstrates that the VRA's bailout provision is "no more than a mirage." *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in part and dissenting in part). The circuit court in this case acknowledged the concern that the VRA imposes § 5's burdens on jurisdictions that no longer are the root of "[t]he evil that § 5 is meant to address," *Shelby County*, 679 F.3d at 873 (quoting *Nw. Austin*, 557

U.S. at 203), but the court dismissed this concern based in part on the VRA provision allowing jurisdictions to bail out if they can demonstrate a clean voting record under § 4(a), 42 U.S.C. § 1973b. *Shelby County*, 679 F.3d at 873-74. But the bailout provision cannot preserve § 5's constitutionality for two reasons: the standards for bailing out require absolute perfection, and failure can result from circumstances beyond the control of the covered jurisdiction.

To qualify for bailout, a jurisdiction must show that during the previous ten years: (A) it has not used a test or device with the purpose or effect of denying or curtailing the right to vote because of race or color; (B) no federal court has found that the right to vote has been denied or curtailed because of race or color anywhere in the jurisdiction; (C) federal examiners have not been certified to the jurisdiction; (D) it has complied with § 5; and (E) the DOJ has not objected to any preclearance submission. 42 U.S.C. §§ 1973b(a)(1)(A)-(E). In addition, the "jurisdiction also has the burden of presenting 'evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.' 42 U.S.C. § 1973b(a)(2)." *Nw. Austin*, 557 U.S. at 214 (Thomas, J., concurring in part and dissenting in part).

Under this standard, a single misstep in any of a wide variety of categories precludes a jurisdiction from qualifying for a bailout for the next *ten years*,

and even after successfully bailing out, a jurisdiction must maintain its perfect record for another *ten years* to avoid the claw-back provision of 42 U.S.C. § 1973b(a)(5).[3] Moreover, bailout can be unobtainable to a jurisdiction based on conduct of election authorities over which it has no control. *See* 42 U.S.C. § 1973b(a)(1)(D) (providing that for a jurisdiction to qualify for bailout, all of its sub-jurisdictions must also have perfect records). For example, Alaska's ability to bail out was blocked by the actions of the Municipality of Anchorage, which in 2002 violated § 5 by failing to submit a change to its charter before its mayoral election. *See Luper v. Municipality of Anchorage*, 268 F. Supp. 2d 1110, 1111 (D. Alaska 2003). The state has no jurisdiction or authority to govern municipal elections, yet under the VRA, the sins of the municipality are visited upon the state. Similarly, a jurisdiction is unable to qualify for a bailout if the Attorney General certifies the jurisdiction for federal observers, 42 U.S.C. §§ 1973b(a)(1)(C), 1973f, a decision that is unreviewable, *United States v. State of Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966), *aff'd*, 386

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[3] 42 U.S.C. § 1973b(a)(5) provides, in part:

> The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection.

U.S. 270 (1967). Section 5 thus provides that a jurisdiction could remain under the exhaustive, unrelenting scrutiny of a federal agency for an indefinite period, based on an unwarranted and unreviewable decision by that same agency.

As a result, the bailout does not function as an escape valve for states caught up by the inaccuracies of the coverage formula. Rather, it operates to create a caste system among the states, distinguishing those who have been once tainted by the reach of § 5—who must maintain a record of perfection for twenty years to escape—from the rest, who may enact legislation that covered states cannot, like voter identification laws, and whose occasional misdeeds do not immediately relegate them to endless federal micromanagement of their elections.

Indeed, many non-covered states could not pass the bailout's purity test—for example, Hawaii, *see Arakaki v. Hawaii*, 314 F.3d 1091, 1095-97 (9th Cir. 2002) (finding trustee qualification violated § 2 of VRA); Massachusetts, *see Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 315-16 (D. Mass. 2004) (finding redistricting plan diluted voting power of African-Americans in violation of VRA); Montana, *see United States v. Blaine County, Montana*, 363 F.3d 897, 909 (9th Cir. 2004) (finding county's at-large voting system violated VRA); New York, *see, e.g., United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 446-47 (S.D.N.Y. 2010) (finding village's method of electing Board of Trustees violated VRA); Ohio, *see United States v. City of Euclid*,

580 F. Supp. 2d 584, 586 (N.D. Ohio 2008) (finding city council elections violated § 2 of VRA); Pennsylvania, *see United States v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570, 577-82 (E.D. Pa. 2003) (finding county's election practices violated § 2 of VRA); Wisconsin, *see Baldus v. Members of Wis. Gov't Accountability Bd.*, 2012 WL 983685, *12-16 (E.D. Wis. Mar. 22, 2012) (finding redistricting plan violated VRA by "cracking" Latino community into two Latino influence districts); and Wyoming, *see Large v. Fremont County, Wyoming*, 709 F. Supp. 2d 1176, 1231 (D. Wyo. 2010) (finding at-large system of electing county commissioners diluted Native American voting strength in violation of VRA).

Nor does Alaska pass the test. But nothing in the Constitution or the language of the precedents justifying earlier incarnations of the VRA suggests that perfection is the appropriate standard for determining whether a state should be subject to the extraordinary federal intrusion that § 5 represents. *See Nw. Austin*, 557 U.S. at 229 (Thomas, J., concurring in part and dissenting in part) ("Perfect compliance with the Fifteenth Amendment's substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment."). To the contrary, the key inquiry is whether a jurisdiction's record reflects a problem of such magnitude—of such "exceptional conditions," *South Carolina v. Katzenbach,* 383 U.S. 301, 334 (1966)—that it cannot be dealt with through case-by-case litigation. *Shelby County*, 679 F.3d at 863-64.

Alaska's record on voting discrimination is not exceptional. Had Congress actually considered evidence specific to Alaska, it simply could not rationally have concluded in 2006 that case-by-case litigation is inadequate for a jurisdiction without a single successful § 2 lawsuit and only one DOJ objection to a preclearance submission in thirty years.[4]

Preclearance was initially imagined as a temporary measure, a five-year infringement on state sovereignty justified by the outrageous attempts of some southern jurisdictions to resist enforcement of the mandate of the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 309-14. Its reauthorization in 2006 for another twenty-five years, however, reflects not outrage at ongoing voting discrimination but a Congress unable or unwilling to re-evaluate the appropriateness of an entrenched bureaucracy of federal oversight, controlling the smallest details of election procedures in what now amounts to effectively a random selection of states and jurisdictions. The decision to renew the coverage formula for another twenty-five years was beyond Congress's authority and violated the Constitution.

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[4] Although the state of Alaska was sued under the language assistance provisions of the VRA in 2007, the case settled, *see Nick et al. v. Bethel*, No. 3:07-cv-0098-TMB (D. Alaska), and this single lawsuit only emphasizes the reality that any alleged problems of voting discrimination in Alaska can be handled through case-by-case litigation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MARGARET PATON-WALSH
Counsel of Record
JOANNE M. GRACE
RUTH BOTSTEIN
STATE OF ALASKA
1301 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-6612
margaret.paton-walsh@alaska.gov

Counsel for Amicus
State of Alaska