No. 12-96



In The
# Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

*Petitioner,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

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

## BRIEF OF *AMICI CURIAE* JURISDICTIONS THAT HAVE BAILED OUT IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

LUCY PHILLIPS
205 Academy Drive
Abingdon, VA 24210
(276) 525-1370

*Counsel for Amicus Curiae Washington County, VA*

CLAYWARD C. CORRY, JR.
117 S. Battleground Avenue
Kings Mountain, NC 28086
(704) 739-3696

*Counsel for Amicus Curiae Kings Mountain, NC*

J. GERALD HEBERT
*Counsel of Record*
PAUL S. RYAN
TARA MALLOY
MEGAN MCALLEN
CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
(202) 736-2200
ghebert@campaignlegalcenter.org

*Counsel for Amici Curiae*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## STATEMENT OF INTEREST[1]

*Amici curiae* are several jurisdictions[2] (hereafter "*Amici* Bailed Out Jurisdictions") that over the last decade have bailed out from coverage under Section 5 of the Voting Rights Act of 1965 ("Act"), 42 U.S.C. §§ 1973, *et seq.* *Amici* Bailed Out Jurisdictions have a special interest in the bailout issues raised in this case and a unique perspective on these issues. Each jurisdiction has gone through the bailout process, each has been found eligible to bail out by the United States Department of Justice and the D.C. courts, and each has secured a bailout judgment.

*Amici* Bailed Out Jurisdictions believe that their views about the bailout process and how it actually works will inform the Court in a way none of the existing parties can do. Indeed, except for Respondents Holder, *et al.*, and *amicus curiae* Merced County, California, none of the other parties or *amici* has ever been a party to a bailout lawsuit or has sought a bailout since the most recent amendments to the bailout process in 1982. *Amici* speak from the standpoint of jurisdictions that, for roughly 45 years, have

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[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief. Correspondence from counsel of record for Petitioner and Respondents consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] *Amici curiae* herein are the City of Kings Mountain, North Carolina; Washington County, Virginia; and Larnie M. Flannagan, General Registrar of Voters, Essex County, Virginia.

made preclearance submissions under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and have successfully availed themselves of the bailout option. *Amici* therefore can offer a unique perspective on the operation of the bailout provisions and the actual procedures and costs associated with the process.

## SUMMARY OF ARGUMENT

Congress enacted the Voting Rights Act of 1965 ("1965 Act"), Pub. L. No. 89-110, 79 Stat. 437, codified as amended at 42 U.S.C. §§ 1973, *et seq.*, to remedy "the blight of racial discrimination in voting" that had taken root in the country's electoral process. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). To this end, Congress crafted provisions requiring certain jurisdictions to "preclear" changes to their voting practices and procedures, 1965 Act § 5, 79 Stat. 439, and then "reverse-engineered" the coverage formula so that the preclearance requirements would cover those jurisdictions where there was evidence of voting discrimination. *Id.* § 4(b), 79 Stat. 438. Congress understood, however, that application of the objective criteria in the coverage formula had the potential to capture areas that had not engaged in discriminatory voting procedures. The bailout mechanism was designed to address this possible overbreadth by allowing jurisdictions to terminate their coverage by demonstrating that they had not used a test or device for a discriminatory purpose. *Id.*, § 4(a), 79 Stat. 438.

Although the bailout provisions have undergone revision and significant liberalization in subsequent amendments to the Act, their fundamental objective remains the same: to ensure that the Act is tailored to impose current burdens only where there are current needs. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (*NAMUDNO*). The bailout mechanism adds a dynamic element to the Act's coverage, allowing the geographic scope of Section 5 to be modified on an ongoing basis, according to the real-time submissions of covered jurisdictions. Bailout is thus an integral part of the coverage formula and, as this Court has recognized, provides further assurance that "Congress' means are proportionate to [its] ends." *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

Petitioner denies that there is a "nexus" between bailout under the current Act and the coverage formula, but this claim is contradicted by the structure and history of the bailout provisions. Pet. Br. at 57. The current requirements of the bailout provisions reflect the criteria of the coverage formula: both inquire as to the use of discriminatory "tests or devices," and look to voter registration rates and voter turnout. 42 U.S.C. § 1973b(a), (b). *See* Section I.B. *infra*. Furthermore, throughout the history of the Act, jurisdictions in different states of varying sizes, political compositions and demographics have successfully bailed out of Section 5, belying Petitioner's contention that bailout serves to tailor the scope of

the coverage formula "only at the margin." Pet. Br. at 54-55. *See* Section I.A. *infra*.

Petitioners also claim that the bailout option is in fact illusory, and too burdensome and expensive for most jurisdictions to achieve. Pet. Br. at 54. But this is decidedly not the experience of *amici*.

*Amici* Bailed Out Jurisdictions found the bailout process both administratively feasible and cost-effective. *Amici* simply had to gather the necessary information and data supporting bailout from records we maintained in the ordinary course of business, submit these materials to the U.S. Department of Justice, and publicize the bailout in our community media and post offices. After we were notified by the Department of Justice that our jurisdiction had met the bailout requirements, our legal counsel filed suit and the necessary bailout papers in court. As for expense, our experience is that the total cost of obtaining a bailout was approximately $5,000, which includes staff time gathering the relevant data and the filing of bailout documents in court. *See* Section II *infra*.

Further, contrary to Petitioner's suggestion, bailout is also achievable even if a jurisdiction discovers during the bailout process that one or more of its political subunits is not in full compliance with the Act. In the course of the bailout process, numerous jurisdictions have discovered that some of their political subunits had inadvertently failed to timely submit minor voting changes for Section 5 review, but

were able to resolve this issue with a prompt pre-clearance submission of the changes to the Department of Justice. *See* Section III *infra*.

In any event, even if petitioners had raised valid objections to the bailout mechanism, any argument that specific criteria are unduly burdensome should be brought in an as-applied challenge, where specific facts can be developed, rather than a facial challenge to the statute as a whole.

For all these reasons, this Court should again uphold Section 5 and the Act's coverage formula.

## ARGUMENT

### I. THE HISTORY OF BAILOUTS UNDER THE VOTING RIGHTS ACT DEMONSTRATES THE CAREFUL TAILORING OF THE ACT.

When Congress first enacted the 1965 Act, it understood that the coverage formula might capture areas that had not engaged in racially discriminatory voting procedures. *See* H.R. Rep. No. 89-439, at 15 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2445. The ability of jurisdictions to bail out was meant to address that potential overbreadth by affording any jurisdiction "an opportunity to exempt itself" from the coverage formula. *Id.*[3] The bailout provision has thus

[3] The potential for under-inclusivity of the coverage formula was tackled by the so-called "pocket trigger," which allows for additional jurisdictions to be subjected to the preclearance

(Continued on following page)

always been central to the Act's tailoring and Petitioner has acknowledged this. Pet. Br. at 3.

### A. Throughout the History of the Voting Rights Act, Bailout Has Helped Ensure That the Coverage Formula Reflected Changing Needs.

Underscoring the connection between bailout and the Act's tailoring, bailout was originally conceived as the means by which the preclearance requirements would expire for covered jurisdictions.

The bailout provision of the Voting Rights Act of 1965 provided that an exemption would be granted upon a decision by a three-judge panel of the U.S. District Court for the District of Columbia that the jurisdiction had not used a voting test or device for the purpose or with the effect of discriminating on the basis of race for the preceding five years. 1965 Act § 4(a), 79 Stat. 438. There was no automatic expiration for Section 5 in the original enactment. Because the Act suspended the use of *any* voting test or device in the covered jurisdictions – regardless of racially discriminatory intent or effect – once five years passed after enactment, the covered jurisdictions would

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requirements upon a finding of Fifteenth Amendment violations by a federal court. 1965 Act, § 3(c), 79 Stat. 437; *see also* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L. J. 1992, 2006-09 (2010).

automatically meet the bailout requirements. Thus, when Congress enacted the Act in 1965, it assumed that jurisdictions would be able to bail out at the conclusion of five years. The required five-year non-discrimination showing was subsequently extended to 10 years in the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, and then to 17 years in the 1975 Amendments, Act of Aug. 6, 1975 (1975 Amendments), Pub. L. No. 94-73, Tit. I, 89 Stat. 400.

In the first two years of the Act's existence, three counties in Arizona, one county in North Carolina and one in Idaho, and the State of Alaska all bailed out. *See Apache Cnty. v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966) (Arizona); *Gaston Cnty. v. United States*, 288 F. Supp. 678, 694-95 (D.D.C. 1968) (referencing the bailouts of Wake County, North Carolina; Elmore County, Idaho; and the State of Alaska). Each was able to show that the test or device that had led to coverage under Section 5 in 1965 either was no longer in use or had been applied without a racially discriminatory purpose and effect.

The changes to the coverage formula in 1970 brought the three counties in Arizona, the one in Idaho, and four jurisdictions in Alaska back under the Act's preclearance requirements, and newly covered an additional five counties in Arizona, two counties in California, three counties in New York and one in Wyoming, and towns in Connecticut, Massachusetts, Maine, and New Hampshire. *See* 36 Fed. Reg. 5,809 (Mar. 27, 1971); 39 Fed. Reg. 16,912 (May 10, 1974);

*see also* Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. L. J. 379, 395-96 (1985). Shortly thereafter, Alaska and New York bailed out the jurisdictions within their boundaries. *New York v. United States*, 65 F.R.D. 10, 11 (D.D.C. 1974) (discussing Bronx, Kings and New York Counties), *aff'd on other grounds sub. nom. NAACP v. New York*, 413 U.S. 345 (1973). New York's success, however, was short-lived. After a federal court in New York found that the once-covered counties had discriminated against Puerto Rican voters, *see Torres v. Sachs*, 381 F. Supp. 309, 312-13 (S.D.N.Y. 1974), the counties were recovered and have remained subject to the preclearance requirements ever since.

In 1975, the coverage formula under Section 4 of the Act was revised to include and protect language minority groups. 1975 Amendments, § 203, 89 Stat. 401-402. As a result, counties in California, Colorado, Florida, Arizona, New Mexico, North Carolina, Oklahoma, and South Dakota, townships in Michigan, and the entire states of Texas, Arizona, and Alaska became subject to Section 5's requirements. *See* 40 Fed. Reg. 43,746 (Sept. 23, 1975) (Arizona was covered statewide because of the prevalence of Spanish language minorities and at the county level to protect American Indian language minorities); 41 Fed. Reg. 34,329 (Aug. 13, 1976); 40 Fed. Reg. 49,422 (Oct. 22, 1975); 41 Fed. Reg. 783 (Jan. 5, 1976). For those jurisdictions, bailout required a showing that for the last 10 years, they had not conducted English-only elections

for the purpose or with the effect of discriminating against voters based on race, color or membership in a language minority group. 1975 Amendments, § 201, 89 Stat. 400. The newly covered counties in New Mexico and Oklahoma quickly bailed out, since they were able to show that their language minority populations were also fluent in English. *City of Rome v. United States*, 446 U.S. 156, 198 n.8 (1980) (referencing bailout actions brought by New Mexico and Oklahoma); *see also* Hancock & Tredway, *supra*, at 403. Successful bailouts in the late 1970s and early 1980s also retailored the amended coverage formula by exempting the covered jurisdictions in Maine, Wyoming, Massachusetts, and Connecticut from the preclearance requirements. Hancock & Tredway, *supra*, at 403. Each jurisdiction proved that for 17 years before the bailout lawsuit, it had not employed a voting test or device for the purpose or with the effect of discriminating on the basis of race.

The 1982 Amendments to the Voting Rights Act strengthened the relationship between the bailout provisions and the coverage formula's tailoring. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. The 2006 reauthorization of the Act retained the bailout provisions as amended in 1982 and they remain in place today. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

Since 1982, bailout has not been tied to the duration of the preclearance provisions. Moreover, the

bailout option is no longer limited to only those jurisdictions that have never engaged in racially discriminatory voting practices in the first place. Instead, the 1982 Amendments established bailout as the means by which once-bad actors could show that they had taken action to eliminate discriminatory voting practices and procedures, and had taken affirmative steps to afford equal opportunity for all voters in their jurisdiction. Thus, the bailout provisions specifically address the discriminatory conditions that had led to coverage in the first place.

The 1982 Amendments also shortened to 10 years (from 17 years in the 1975 Amendments) the time frame for states and political subdivisions to show that they no longer engaged in discriminatory voting practices and afforded equal opportunities for all persons to register and to vote. 1982 Amendments, § 2, 96 Stat. 131-32. This reduction dramatically expanded the number of jurisdictions potentially eligible for bailout.[4] The revised bailout standard provided additional incentives for jurisdictions to

[4] Showing non-discrimination in voting required that for 10 years prior to filing a bailout lawsuit, the jurisdiction and all political subunits of government within its boundaries had not used a test or device for the purpose or with the effect of denying or abridging the right to vote on account of race, color, or membership in a minority language group; had not been subject to a final judgment or entered into a settlement that resulted in the jurisdiction abandoning the use of a voting practice challenged on grounds of racial discrimination; and had not received an objection to or denial of preclearance for a submitted voting change. *See* 42 U.S.C. § 1973b(a)(1).

comply with the Act and to take "positive steps to increase the opportunity for full minority participation in the political process." S. Rep. No. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179.[5] It also expanded the jurisdictions that could seek bailout by allowing counties or cities with voter registration responsibilities within a covered state to seek bailout on their own. *Id.*

When the Act was amended in 1982 to permit local governments to bail out, the Congress rightly believed that "[a] substantial number of counties may be eligible to bail out when the new procedure goes into effect." *Id.* at 60, 1982 U.S.C.C.A.N. at 238. Indeed, one voting rights expert "presented a chart compiled by the Joint Center for Political Studies . . . show[ing] a reasonable projection of 25 percent of the counties in the major covered states being eligible to file for bailout on the basis of their compliance with the objective criteria in the compromise bill." *Id.* And the Assistant Attorney General for the Civil Rights Division at the time, William Bradford Reynolds, testified to the same effect; his projected number of jurisdictions eligible to bail out in 1982 was "virtually identical to those in the Joint Center's estimate." *Id.*

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[5] Specifically, jurisdictions seeking bailout must show that they have eliminated voting procedures and methods of election that "inhibit or dilute equal access to the electoral process"; have "engaged in constructive efforts to eliminate intimidation and harassment" of voters; and have engaged in other efforts such as expanding voter registration opportunities and appointing minority election officials. 42 U.S.C. § 1973b(a)(1)(F).

Despite these projections, not a single jurisdiction sought to bail out in the 13 years after the 1982 Amendments took effect on August 5, 1984. From *Amici* Bailed Out Jurisdictions' own experiences, the explanation for this is two-fold. First, most covered jurisdictions were unaware of bailout and many remain so. Second, those few jurisdictions that were aware of the bailout option perceived it as too costly and too cumbersome (neither of which is true, as we explain below).

In 1997, the City of Fairfax, Virginia, became the first covered jurisdiction to bail out under the criteria set forth in the 1982 Amendments. Between 1997 and 2009, another 69 jurisdictions, all in Virginia, likewise bailed out.[6]

In 2009, this Court decided *NAMUDNO*, interpreting the Act's bailout provisions to permit any and all political subdivisions subject to preclearance to seek a bailout. 557 U.S. at 211. Prior to 2009, it was believed that only those covered jurisdictions that

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[6] The 69 jurisdictions (not including NAMUDNO) that bailed out between 1984 and 2009 under the 1982 bailout provisions are listed on the website of the Respondent. *See* U.S. Dep't of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited Jan. 31, 2013). While the decision in *NAMUDNO* referred to just 17 bailed out jurisdictions between 1982 and 2009, *see* 557 U.S. at 211, that figure represented only the cities and counties that registered voters which had bailed out under the 1982 criteria, and failed to include all the political subdivisions within those 17 counties and cities that had bailed out with them. *Id.*

registered voters (i.e., counties and cities[7]) could seek a bailout. *See, e.g.*, *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 573 F. Supp. 2d 221, 231-35 (D.D.C. 2008); Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provision*, 62 Wash. U. L. Q. 1, 40 (1984).

Since this Court's decision in *NAMUDNO*, the number and rate of jurisdictions seeking and obtaining a bailout has increased dramatically in several respects. *See* Appendix A.[8] First, since 2009, including NAMUDNO, almost twice as many political subdivisions have bailed out (127) than in the entire period from 1982 to 2009 (69). *See id.*; *see also* http://www.justice.gov/crt/about/vot/misc/sec_4.php. Second, the pace of bailouts has increased substantially since the 2009 *NAMUDNO* decision, as more political subunits are now bailout eligible and there is greater public knowledge of bailout availability due to the decision. Indeed, in addition to those jurisdictions that have bailed out since 2009 listed in Appendix A, more than a dozen jurisdictions are presently pursuing a bailout in the U.S. District Court for the District of Columbia or in a pre-filing process with the Department of

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[7] Virginia is the only one of the 16 covered states in which cities register voters. In the remaining states, registration is conducted at the county level.

[8] For the Court's convenience, *amici* have prepared a chart listing all of the bailouts since the 1982 Amendments to the Voting Rights Act went into effect.

Justice.[9] Third, the geographic range of jurisdictions seeking or obtaining a bailout has expanded from just one state before 2009 (Virginia) to jurisdictions in six states since 2009 (Alabama, California, Georgia, North Carolina, Texas, and Virginia). *See* Appendix A. Since the amended bailout standard took effect in 1984, not a single eligible jurisdiction seeking bailout has been rejected. *See, e.g., Shelby Cnty. v. Holder*, 679 F.3d 848, 882 (D.C. Cir. 2012).[10]

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[9] The following California jurisdictions have bailout lawsuits pending in the U.S. District Court for the District of Columbia: Browns Valley Irrigation District and City of Wheatland. *See* Consent Judgment and Decree (proposed), *Browns Valley Irrigation District v. Holder*, No. 12-01597 (D.D.C. Jan. 2, 2013), and *City of Wheatland v. Holder*, No. 13-54 (D.D.C. filed Jan. 14, 2013). *Amici* herein are aware of the following additional jurisdictions currently seeking bailout and in negotiations with the Department of Justice: Yuba County (CA) Water Agency; Linda County (CA) Water District; Olivehurst (CA) Public Utility District; North Yuba County (CA) Water Agency; Isle of Wight County, VA; Hanover County, VA; City of Falls Church, VA.

[10] Shelby County also makes the argument that even if a covered jurisdiction can satisfy the bailout criteria, "it remains subject to Section 5's 'clawback' provision, which essentially requires a jurisdiction to continue to satisfy the statutory criteria for bailout for an additional ten-year period before becoming fully non-covered." Pet. Br. at 56 (internal citations omitted). It is worth noting that there has not been a single instance of the "clawback" provision being invoked since the 1982 Amendments went into effect. *See Voting Rights Act: Evidence of Continuing Need: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, at 2864, 109th Cong. (Mar. 8, 2006) (Hebert).

Equally impressive is the fact that, since this Court's 2009 decision in *NAMUDNO*, jurisdictions of all sizes and varying racial compositions have bailed out. For example, for the first time since the 1982 Amendments went into effect, a State has now sought a bailout on behalf of its covered towns and townships. On November 15, 2012, the State of New Hampshire, sought a bailout for its covered political subunits. *See New Hampshire v. Holder*, No. 12-01854 (D.D.C. filed Nov. 15, 2012) (three-judge court).[11] If the State succeeds, less than twenty percent of jurisdictions covered by the 1970 Amendments to the Act will remain subject to the preclearance requirement. Of the remaining covered jurisdictions, three bailed out but were recovered because of a subsequent finding of racial discrimination in a related case, and all but four have received objections from the Attorney General to proposed voting changes

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[11] New Hampshire filed its bailout lawsuit in the D.C. district court on November 15, 2012. On December 21, 2012, the State and the United States Attorney General filed a joint motion to approve a consent judgment and decree granting New Hampshire and its covered towns with a bailout. Consent Judgment and Decree (proposed), *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Dec. 21, 2012). The parties asked the three-judge court to wait thirty days to enter the consent judgment and decree, during which time New Hampshire and its covered towns could publicize the bailout settlement, as required by 42 U.S.C. § 1973b(a)(4). New Hampshire and its covered towns and townships publicized the settlement and filed a report with the Court on January 22, 2013, advising the Court that it had publicized the bailout settlement as required by the Act. Status Rpt., *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Jan. 22, 2013).

submitted for preclearance. J. Gerald Hebert & Renata E. B. Strause, *The Future of the Voting Rights Act*, 64 Rutgers L. Rev. 953, 969 (2012).

In 2012, Merced County, California, successfully obtained a bailout for itself and 84 political subunits in the County, making it the jurisdiction with the most political subdivisions to bail out in one action.[12] Thus, in that one bailout action, Merced County achieved a bailout for itself and more political subunits (84) than had bailed out in the 27 years prior to this Court's 2009 decision in *NAMUDNO*.

Jurisdictions with sizeable minority populations also have bailed out since 2009, including at least two majority-minority political subdivisions: the City of Manassas Park, Virginia, which bailed out in 2011; and Prince William County, Virginia, which bailed out in 2012.[13] Fourth, a jurisdiction with one of the

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[12] Merced County has filed a brief *amicus curiae* in this case explaining its unique experience with the bailout provisions. *See* Brief of Merced County, California As *Amicus Curiae* In Support of No Party at 36-37 (Jan. 2, 2013).

[13] According to the consent decree granting Manassas Park a bailout, the City's population as reported in the 2010 census was 32.5% Hispanic, 13.5% black and 9.9% Asian. *See* Consent Judgment and Decree, *City of Manassas Park v. Holder*, C.A. No. 11-749 (D.D.C. Aug. 3, 2011), *available at* http://www.justice.gov/crt/about/vot/misc/manassas_pk_cd.pdf. The consent decree granting Prince William County's bailout describes the County's population, as reported in the 2010 census, as 20.3% Hispanic, 20.6% black, 8.6% Asian, and 0.5% Native American. *See* Consent Judgment and Decree, *Prince William Cnty. v.*

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largest populations of any of the counties subject to the Act's preclearance requirements of (Prince William County) has now bailed out. According to its bailout agreement, the County's population exceeded 400,000 persons. *See* Consent Judgment and Decree, *Prince William Cnty. v. Holder*, No. 12-14 (D.D.C. Apr. 10, 2012), *available at* http://www.justice.gov/crt/about/vot/misc/prince_wm_cd.pdf.

As the foregoing history attests, numerous jurisdictions in multiple states have availed themselves of the bailout option, and the process has been achievable for jurisdictions with varying sizes, political subdivisions and racial compositions. Bailout has thus not only benefitted the individual jurisdictions that can show a record of non-discrimination, but it has also provided an effective mechanism for tailoring the statute to impose current burdens only where there are current needs.

### B. Petitioner's Attempts to Refute the "Nexus" Between Bailout and the Coverage Formula Are Unavailing.

Petitioner first argues that the bailouts that have occurred since *NAMUDNO* "cannot support the validity of Congress's judgment" in the 2006 reauthorization because they were not part of the legislative record. Petition for Writ of Certiorari at 34-45 & n.5;

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*Holder*, No. 12-14 (D.D.C. Apr. 10, 2012), *available at* http://www.justice.gov/crt/about/vot/misc/prince_wm_cd.pdf.

*see also* Pet. Br. at 53 ("The statute's constitutionality must be measured against the legislative record alone."). Shelby County misses two key points. First and foremost, all of the bailouts that have occurred subsequent to 2006 – both before and after the *NAMUDNO* decision – are the predictable and intended result of the 1982 bailout provisions retained by the 2006 Reauthorization. This evidence is clearly relevant to this Court's review of the coverage formula. Congress has always intended for the bailout provision to be linked to the coverage formula. Because the bailout mechanism is the means by which the coverage formula is tailored and updated on an ongoing basis, its operation is critical to an evaluation of Congress's tailoring of the Act. Second, in avoiding the constitutional question in *NAMUDNO*, the Court interpreted the Act to allow smaller subunits to bail out. Although Congress did not consider the bailout of those particular types of jurisdictions as part of the tailoring mechanism in 1965 or 1982, by making bailout available to smaller jurisdictions, the Court lessened the *current burdens* imposed by the Act. In making a determination about Section 5's constitutionality, this Court should reject the arguments of those, like Petitioner, urging the Court to ignore the impact of its *NAMUDNO* decision expanding bailouts in assessing the constitutional validity of the Voting Rights Act.[14] Ultimately, the Court will

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[14] Since Congress factored the *prospective* availability of bailout into its decision to reauthorize the Act in 2006, it is

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have to evaluate whether its interpretation of the bailout provisions in *NAMUDNO* is working – which *amici* here contend it is – and should remain in place. Both the post-2006 and post-*NAMUDNO* bailouts, therefore, are relevant in making that assessment.

Petitioner also incorrectly casts the bailout process as unrelated to Congress's decision to subject the covered jurisdictions to Section 5 preclearance requirements in the first place. *See* Pet. Br. at 22. But the bailout criteria are directly tied to the coverage formula in fundamental ways. The original coverage formula focused on jurisdictions with discriminatory "tests or devices" as a prerequisite to registering to vote, along with depressed voter registration rates and voter turnout. *See* 1965 Act, § 4(b), 79 Stat. 438. The current bailout criteria specifically require a showing that there has been no test or device applied by the covered jurisdiction "for the purpose or with the effect of denying or abridging the right to vote on account of race or color[,]" and contain other

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misleading to characterize information about post-2006 bailouts as "post-enactment evidence" – but either way, the lower court was right to consider it. To determine the scope of Congress's authority under its Fourteenth Amendment enforcement powers, this Court has considered post-enactment evidence, as have multiple circuit courts. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 524-25 & nn.6-8, 11, 13-14 (2004); *cf. Gonzales v. Raich*, 545 U.S. 1, 19 n.28, 21 n.31 (2005). *See also Adarand Constructors, Inc. v. Staples*, 228 F.3d 1147, 1166 (10th Cir. 2000); *Contractors' Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993).

provisions requiring the jurisdiction seeking bailout to show that it has "expanded opportunity for convenient registration and voting for every person of voting age" and to "present 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. 42 U.S.C. §§ 1973b(a)(1)(A), (1)(F)(iii), (2). Thus, the key to obtaining a bailout is to present a ten-year record of non-discriminatory voting practices and procedures, based on an objective set of facts prescribed in the bailout statute. A covered jurisdiction that has a clean record of non-discriminatory voting procedures over a ten-year period will likely also be able to produce, as *amici* here have done, facts that show "expanded opportunity for registration and voting" and be quite likely bailout eligible. Thus, it is incorrect to say that the bailout provisions are unrelated to the coverage formula.

Finally, Petitioner claims that the bailout criteria are improper, subjective and onerous. As we note *infra*, that has not been the experience of jurisdictions like ours that have undergone the bailout process. Equally important, arguments about specific applications of the bailout criteria should be made in an as-applied challenge, not in the facial challenge that Petitioner has mounted here. Petitioner has not limited its constitutional attack to the factual circumstances in

Shelby County, but rather asks this Court to strike down Section 5 in all its applications.[15] This Court has made clear that "[t]o succeed in a typical facial attack, [a challenger] would have to establish 'that no set of circumstances exists under which [the challenged law] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal citations omitted). Petitioner's arguments regarding the difficulty of the bailout process or its burdens on the County are more properly the subject of an as-applied challenge rather than the facial one it brings here.

## II. THE SPECIFIC BAILOUT EXPERIENCES OF *AMICI* CONFIRM THE VIABILITY OF THE BAILOUT MECHANISM.

### A. The Bailout Process Is Both Administratively Feasible And Readily Achievable.

As we explain below, the process of obtaining a bailout is neither administratively difficult nor burdensome.

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[15] In view of recent decisions in the U.S. District Court for the District of Columbia finding that covered jurisdictions recently engaged in purposeful discrimination with respect to their statewide redistricting plans, *see, e.g.*, *Texas v. United States*, No. 11-1303, ___ F. Supp. 2d ___, 2012 WL 3671924, at *76 ¶150 (D.D.C. Aug. 28, 2012) (three-judge court) (concluding that "the record demonstrates purposeful discrimination in the re-drawing of [Senate District] 10"), *appeal pending*, No. 12-496 (S. Ct.) (filed Oct. 19, 2012), it is difficult to see how Section 5 could be found unconstitutional in *all* of its applications.

Once *amici* herein decided to explore bailout under the Voting Rights Act, the first step was to assemble data and information from our offices to determine if we met the bailout criteria set forth in the Act. Because the Act permits the Attorney General to "consent[ ] to an entry of judgment . . . upon a showing of objective and compelling evidence," 42 U.S.C. § 1973b(a)(9), *amici* provided the Attorney General with the voting and election data we had assembled.

The data and information we gathered included documents that we maintain in the ordinary course of business or that was easily obtainable, such as the number of voters in each voting precinct, the number of voters who turned out at the polls in past elections, and the number of minority persons who have worked at the voter registration office, electoral board, or served as poll officials. We also gathered past election results, particularly for those elections that involved minority candidates. Finally, we assembled information on the various ways people in our communities may register to vote. Often, voter registration procedures and other information relating to voting and elections in *amici*'s possession are set forth on our governmental websites and thus instantly accessible.

We also regularly maintain in our files correspondence we have sent to and received from the United States Department of Justice regarding Section 5 preclearance. These preclearance letters were a useful starting point to showing we have complied in

a timely fashion with the preclearance requirements under the Act.

The final data we collected and provided to the U.S. Attorney General to support our bailout request was information tending to show that all persons within our jurisdictions enjoy an equal opportunity to participate effectively in the political process. To do this, *amici* simply gathered publicly available census data available on the Internet; the method of election (e.g., at-large or from districts) for our jurisdiction and for all elective bodies within our borders; and the location and convenience of voter registration sites and polling place locations for our voters. Other relevant data we assembled that shed light on the level of minority participation included identification of minority candidates who ran in recent elections, election results showing how minority candidates fared in elections, and the number of minority group members who have worked either in the voter registration office or served as poll workers.

Attorneys in the U.S. Department of Justice then conducted an independent investigation of *amici*'s compliance with the bailout criteria. The Justice Department attorneys visited *amici*'s offices, reviewed our voting and elections records, and conducted interviews of local leaders within minority communities.

As required by the Act, *amici* informed the public of our intentions to seek bailout. The statute's formal notice requirement is minimal; jurisdictions must publicize their intentions to file a bailout lawsuit

in the local media and post offices. *See* 42 U.S.C. § 1973b(a)(4).

After the community had been notified of the jurisdiction's intent to seek a bailout, we filed our bailout lawsuits in the U.S. District Court for the District of Columbia. Although prior agreement by the Justice Department to a jurisdiction's eligibility is *not* required before filing, it significantly reduces the cost of the bailout suit compared to more typically adversarial litigation. *See* J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power 268 (Ana Henderson ed., 2007). The bailout process is thus transparent, workable and straightforward.

Petitioner here argues that the requirements of the bailout process are too difficult to meet. Our experience, and the experiences of other jurisdictions that have successfully bailed out, clearly shows the Petitioner's understanding of the bailout process is incorrect. *See, e.g.*, Brief of *Amici Curiae* Jurisdictions That Have Bailed Out Under the Voting Rights Act in Support of Appellees, *NAMUDNO v. Holder*, 557 U.S. 193 (2009), 2009 WL 815227.

Moreover, as noted *supra*, any challenge to specific criteria as too onerous would be properly brought on an as-applied challenge, where specific facts can be developed, rather than a facial challenge to the statute as a whole.

### B. The Bailout Process is Affordable and Cost-Effective.

Further reducing the cost of bailout is the simple rule that when a county or a city bails out, all political subunits within the jurisdiction are bailed out at the same time. Thus, the one-time cost of a bailout for a county – estimated at less than $5,000 for most counties – and all its political subunits is affordable and cost-effective in the long run. The cost is even lower for smaller jurisdictions such as towns and municipal utility districts – often as low as $2,500. *See Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong. 106 (2005) (statement of J. Gerald Hebert, former Acting Chief, Civil Rights Division, U.S. Dep't of Justice) (explaining the typical cost of a bailout), *available at* https://bulk.resource.org/gpo.gov/hearings/109h/24034.pdf; *see also* Duncan Adams, *Localities Seek Voting Rights Act Bailout*, Roanoke Times, Jan. 16, 2011, http://www.roanoke.com/news/roanoke/wb/273946 (noting combined $5,000 cost of bailout for two jurisdictions).

Moreover, multiple counties have been permitted to bail out despite the existence of previously implemented, but unsubmitted voting changes, which ensures that the opportunity to bail out is still available to non-discriminatory subunits that have been somewhat less than exact in their prior administrative upkeep. *See, e.g.*, Brief of *Amici Curiae* Jurisdictions

That Have Bailed Out, *NAMUDNO*, 2009 WL 815227 at *17-*18; *see also* Consent Judgment and Decree ¶ 36, *Prince William Cnty. v. Holder*, No. 12-14 (D.D.C. Apr. 10, 2012) (indicating bailout despite late submission of changes for preclearance).

The experience of Prince William County, Virginia, shows that even relatively large counties can bail out successfully at low cost and without dedicating significant administrative resources to the process. To date, the County is the largest jurisdiction in population ever to bail out (over 400,000 persons). *See* Corey Dade, *Communities Find Relief From Voting Rights Act*, NPR News (Aug. 11, 2012), http://m.npr.org/news/front/158381541?singlePage=true ("Prince William County, Va. . . . [with] 419,000 population. . . . became the largest jurisdiction in the nation to bail out."); *see also* U.S. Census Bureau, 2010 Demographic Profile: Prince William County, Va., http://www.census.gov/popfinder/?fl=51153.

Despite its large size, Prince William County was not required to hire any additional staff to gather the necessary information and the County's Voter Registrar reported that, although the bailout "process took a little over a year" from start to finish, she "only worked intensely on the project for a two-week period." *See Virginia County Successfully 'Bails Out' of Voting Rights Act Preclearance Requirements*, RedistrictingOnline.org (Apr. 12, 2012), http://redistrictingonline.org/VApwcbailout041212.html (noting the statement of the County Registrar of Voters that no additional staff was hired to complete the bailout).

"Local officials may mistakenly believe that bailing out is not cost-effective or is administratively difficult." J. Gerald Hebert, *Bailout Under the Voting Rights Act*, *in* America Votes! 319, 326 (Benjamin E. Griffith ed., 2008). As for costs, when a local government jurisdiction seeking a bailout is willing to gather the data on its own rather than pay outside counsel to do so, "the legal fees for the entire process of obtaining a bailout are less than $5000." *Id.* Total costs for a bailout are even smaller if the local government seeking bailout does not contain any other political subunits. But even for large bailed out jurisdictions, like the State of New Hampshire, the financial cost of the bailout is both affordable and cost-effective, since it eliminates the administrative and legal costs of making preclearance submissions.

## III. *AMICI* SUPPORTING PETITIONER HAVE MADE INCORRECT FACTUAL ASSERTIONS REGARDING THE BAILOUT PROVISIONS.

Petitioner and several of the *amici* supporting Petitioner have made arguments that are factually incorrect with respect to bailout.

For example, *Amicus Curiae* Cato Institute claims that the Respondent Attorney General has treated Shelby County differently than the State of New Hampshire. *See* Brief of *Amicus Curiae* Cato Institute In Support of Petitioner at 15-16 (Jan. 2, 2013). Cato asserts that Respondent has not permitted Shelby County to bail out because it failed to submit one

voting change for preclearance, while permitting New Hampshire to bail out even though the State or its towns implemented a number of changes without preclearance. *Id.* This is incorrect in several respects.

First, Shelby County has never sought a bailout. The County appears ineligible, however, not because it failed to *submit* one voting change, but because a jurisdiction within its borders (the City of Calera) was the subject of a Section 5 *objection* within the last 10 years for a blatant violation of the Voting Rights Act. The City of Calera had submitted 177 annexations along with a proposed redistricting plan for preclearance. But these annexations had occurred in the 13 years prior to the submission of the redistricting plan, and the City had failed to submit any for preclearance. Furthermore, as the Attorney General found, the proposed redistricting plan "would eliminate the city's sole majority African-American district." *See* U.S. Dept. of Justice, Civil Rights Division, Letter to Dan Head, Esq. (Aug. 25, 2008), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_082508.php. Other findings made by the Attorney General in the Calera objection letter strongly suggest the presence of a racially discriminatory intent. *Id.* Attempts to equate the situations of Shelby County and the State of New Hampshire are thus simply not credible.

Second, Petitioner claims that "[b]ailout eligibility requires not only that a covered jurisdiction have a ten-year record of perfect compliance with statutory bailout criteria, but also that all of its

subjurisdictions have the same spotless record." Pet. Br. at 54. This argument is apparently made to show that covered jurisdictions cannot obtain a bailout if just one of its political subdivisions fails to make a timely submission over a ten-year period. This is wrong. Jurisdictions seeking a bailout have, for decades, been permitted by the Attorney General to bail out even if they have implemented unprecleared voting changes, provided they make the requisite submission before bailout and provided the failure to make the timely preclearance submission was due to oversight or inadvertence. Examples of covered jurisdictions that have bailed out despite having a number of unprecleared changes (that were submitted and precleared before bailout) are listed in the *amicus curiae* brief filed in this case by Merced County, California. *See* Brief of Merced County at 36-37.

Similarly, the argument that a State or a County is unable to obtain a bailout because they lack the ability to bring non-compliant political subunits within their borders into compliance with Section 5 is also wrong and shows a fundamental misunderstanding of how the bailout process actually works. Though it may be "challeng[ing]," a large jurisdiction can obtain a bailout even if there are dozens of subjurisdictions within it and those political subunits are independent of the larger jurisdiction. *See* Brief of Merced County at 20.

First, in all of our experiences with bailout, we easily gathered data that we felt supported a bailout for all covered political subdivisions within our

borders. We then notified the Justice Department that we wanted to bail out and the Department then conducted its own investigation to verify our bailout eligibility. Sometimes, in gathering data on our own and upon independent investigation by the Justice Department, we discovered that a political subunit within our jurisdiction had inadvertently failed to make a timely preclearance submission of a voting change. In every instance when that happened, the voting change was promptly submitted and precleared, and the bailout process proceeded to a successful conclusion. The opportunity to bail out following submission of these previously unsubmitted voting changes gave the bailed out jurisdictions the opportunity to show that the failure to make a Section 5 submission was an oversight or due to inadvertence, and not a desire to evade compliance with the preclearance provisions or hide discriminatory voting procedures from federal authorities.

For example, in New Hampshire, the State and a number of covered towns, townships or unincorporated places within the state had failed to make timely submission of a number of voting changes. When these voting changes were identified by the State, the State promptly submitted them and obtained the requisite preclearance. During the course of reviewing the records of the covered political subunits in New Hampshire, Justice Department attorneys also identified changes relating to voting and these changes were promptly submitted for preclearance. In all instances, the changes were minor

and had not been submitted due to inadvertence and oversight. These events did not disqualify New Hampshire from proceeding with its bailout, nor did such unprecleared past voting changes stop the Respondent Attorney General from consenting to the bailout application in the D.C. district court. *See* Consent Judgment and Decree (proposed), *New Hampshire v. Holder*, No. 12-01854 (D.D.C. Dec. 21, 2012).

Respondent Attorney General applied the same standards to New Hampshire that it has applied for decades to other jurisdictions that have bailed out. In Shenandoah County, Virginia, for example, which bailed out in 1999, it was discovered during the course of gathering information for the bailout that the County itself and a number of towns within the County had failed to submit voting changes for preclearance review. *See* Consent Judgment and Decree, *Shenandoah Cnty. v. Reno*, No. 99-992 (D.D.C. Oct. 15, 1999), *available at* http://www.justice.gov/crt/about/vot/misc/shenandoah_cd.pdf. The County had failed to submit one special election for preclearance review, and four towns within the County had failed to submit over 30 annexations for Section 5 review. But Shenandoah County encountered no difficulty in bringing the political subunits into compliance with Section 5 of the Voting Rights Act by making submissions for their political subunits *nunc pro tunc*. Merced County, California, also obtained a bailout in 2012, despite the presence of previously unprecleared voting changes. *See* Brief of Merced County at 14

(stating there were thirteen previously unsubmitted voting changes). Upon preclearance of these previously unsubmitted changes by the Attorney General, and on the basis of other information supplied by Shenandoah County and Merced County demonstrating compliance with the Act, the Attorney General consented to those bailouts and the D.C. district court entered consent judgments granting each county a bailout.

The Attorney General's approach to processing bailout applications is consistent with the statute and congressional intent. Congress has made clear in Section 4 of the Voting Rights Act that "[n]othing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section." 42 U.S.C. § 1973b(a)(9).

As our own bailouts prove, showing the lack of a preclearance objection over a ten-year period is not a problem for the vast majority of jurisdictions subject to preclearance under the Act. Many covered jurisdictions within the 16 fully- or partially-covered states have not had a single objection over the last 10 years, have not been involved in any voting rights litigation during that time period, and could well be bailout eligible today. These potentially bailout-eligible jurisdictions include big cities in the Deep South with

a long history of discrimination, such as Birmingham, Alabama; Jackson, Mississippi; New Orleans, Louisiana; and Richmond, Virginia, to name just a few.

Existing alongside the preclearance requirements of Section 5, the bailout process – as expanded by the Court in *NAMUDNO* – will continue to exempt non-discriminatory jurisdictions from the Act's special provisions, constantly tailoring the coverage formula so that current burdens meet current needs.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

J. GERALD HEBERT
*Counsel of Record*
PAUL S. RYAN
TARA MALLOY
MEGAN MCALLEN
CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
(202) 736-2200

*Counsel for Amici Curiae*

LUCY PHILLIPS
205 Academy Drive
Abingdon, VA 24210
(276) 525-1370

*Counsel for Amicus Curiae*
*Washington County, VA*

CLAYWARD C. CORRY, JR.
117 S. Battleground Avenue
Kings Mountain, NC 28086
(704) 739-3696

*Counsel for Amicus Curiae*
*Kings Mountain, NC*

## APPENDIX A

### Jurisdictions Bailed Out of Section 5 Coverage After August 5, 1984

| Jurisdiction | State | Type | Bailout Filed Date | Bailout Granted Date | Number of Elected Governmental Units Fully Within Jurisdiction | Number of Unprecleared Changes |
|---|---|---|---|---|---|---|
| Fairfax City | VA | Indep. City | Sept. 25, 1997 | Oct. 21, 1997 | 2 | 0 |
| Frederick County | VA | County | Apr. 19, 1999 | Sept. 10, 1999 | 5 | 1 |
| Shenandoah County | VA | County | Apr. 21, 1999 | Oct. 15, 1999 | 10 | 31 |
| Roanoke County | VA | County | Aug. 11, 2000 | Jan. 24, 2001 | 3 | 8 |
| Winchester City | VA | Indep. City | Dec. 22, 2000 | June 1, 2001 | 1 | 1 |
| Harrisonburg City | VA | Indep. City | Feb. 14, 2002 | Apr. 17, 2002 | 2 | 0 |
| Rockingham County | VA | County | Mar. 28, 2002 | May 24, 2002 | 9 | 1 |
| Warren County | VA | County | Aug. 30, 2002 | Nov. 26, 2002 | 3 | 7 |
| Greene County | VA | County | Sept. 8, 2003 | Jan. 19, 2004 | 3 | 1 |
| Pulaski County | VA | County | June 22, 2005 | Sept. 27, 2005 | 4 | 14 |
| Augusta County | VA | County | Sept. 30, 2005 | Nov. 30, 2005 | 3 | 3 |
| Salem City | VA | Indep. City | May 25, 2006 | July 27, 2006 | 1 | 0 |
| Botetourt County | VA | County | June 8, 2006 | Aug. 28, 2006 | 5 | 0 |
| Essex County | VA | County | Sept. 21, 2006 | Jan. 31, 2007 | 3 | 0 |
| Middlesex County | VA | County | Aug. 17, 2007 | Jan. 7, 2008 | 3 | 0 |
| Amherst County | VA | County | May 6, 2008 | Aug. 13, 2008 | 2 | 0 |
| Page County | VA | County | June 27, 2008 | Sept. 15, 2008 | 5 | 0 |
| Washington County | VA | County | June 27, 2008 | Sept. 23, 2008 | 5 | 0 |
| Northwest Austin Municipal Utility District Number One | TX | Special District | Aug. 4, 2006 | Nov. 3, 2009 | 1 | |

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| Jurisdiction | State | Type | Bailout Filed Date | Bailout Granted Date | Number of Elected Governmental Units Fully Within Jurisdiction | Number of Unprecleared Changes |
|---|---|---|---|---|---|---|
| City of Kings Mountain | NC | City | July 8, 2010 | Oct. 22, 2010 | 1 | 2 |
| City of Sandy Springs | GA | City | Sept. 7, 2010 | Oct. 26, 2010 | 1 | 0 |
| Jefferson County Drainage District Number Seven | TX | Special District | Mar. 2, 2011 | June 6, 2011 | 1 | 2 |
| Alta Irrigation District | CA | Special District | Apr. 20, 2011 | July 15, 2011 | 1 | 3 |
| City of Manassas Park | VA | Indep. City | Apr. 19, 2011 | Aug. 3, 2011 | 1 | 0 |
| Rappahannock County | VA | County | June 17, 2011 | Aug. 9, 2011 | 3 | 0 |
| Bedford County | VA | County | Mar. 8, 2011 | Aug. 30, 2011 | 2 | 0 |
| City of Bedford | VA | Indep. City | Mar. 4, 2011 | Aug. 31, 2011 | 1 | 0 |
| Culpeper County | VA | County | Aug. 16, 2011 | Oct. 3, 2011 | 3 | 3 |
| James City County | VA | County | Aug. 5, 2011 | Nov. 9, 2011 | 1 | 0 |
| City of Williamsburg | VA | City | Aug. 4, 2011 | Nov. 28, 2011 | 2 | 0 |
| King George County | VA | County | Dec. 7, 2011 | Apr. 5, 2012 | 2 | 2 |
| Prince William County | VA | County | Jan. 6, 2012 | Apr. 10, 2012 | 6 | 6 |
| City of Pinson | AL | City | Feb. 15, 2012 | Apr. 20, 2012 | 1 | 4 |
| Wythe County | VA | County | May 3, 2012 | June 18, 2012 | 4 | 0 |
| Grayson County | VA | County | May 3, 2012 | July 20, 2012 | 5 | 0 |
| Merced County | CA | County | Mar. 6, 2012 | Aug. 31, 2012 | 85 | 13 |
| Craig County | VA | County | July 18, 2012 | Nov. 29, 2012 | 3 | 0 |
| Carroll County | VA | County | July 17, 2012 | Nov. 30, 2012 | 3 | 0 |
| State of New Hampshire | NH | State | Nov. 15, 2012 | Pending | 18 | n/a |
| Browns Valley Irrigation District | CA | Special District | Sept. 26, 2012 | Pending | 1 | n/a |
| City of Wheatland | CA | City | Jan. 14, 2013 | Pending | 1 | n/a |

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