ORAL ARGUMENT SCHEDULED FOR JANUARY 19, 2012
No. 11-5256

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELBY COUNTY, ALABAMA,
Appellant,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Frank C. Ellis
WALLACE, ELLIS, FOWLER & HEAD
113 North Main Street
Columbiana, AL 35051
TEL: (205) 669-6783

Bert W. Rein*
William S. Consovoy
Thomas R. McCarthy
Brendan J. Morrissey
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
TEL: (202) 719-7000
E-MAIL: brein@wileyrein.com

Dated: November 1, 2011

* *Counsel of Record*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellant Shelby County, Alabama, certifies as follows:

(A) Parties and Amici

Shelby County, Alabama, was the Plaintiff in the court below and is the Appellant in this Court.

Eric H. Holder, Jr., Attorney General of the United States, was the Defendant in the court below and is an Appellee in this Court.

Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris were Defendant-Intervenors in the court below and are Appellees in this Court.

The Constitutional Accountability Center participated as amicus curiae in the court below and is not a party in this Court. As of November 1, 2011, Mountain States Legal Foundation will participate as Amicus Curiae for Appellant and New York Law School Racial Justice Project will participate as Amicus Curiae for Appellees.

(B) Rulings Under Review

The ruling under review is an Order (1) granting Defendant Attorney General's motion for summary judgment; (2) granting the motions for summary

judgment filed by the Defendant-Intervenors; and (3) denying Plaintiff Shelby County's motion for summary judgment. The Order was issued on September 21, 2011, by Judge John D. Bates and was entered as Docket Number 84 in the court below. The Order is reproduced in the Joint Appendix at JA 632. A Memorandum Opinion explaining the Order was also issued on September 21, 2011, and was entered as Docket Number 83 in the court below. The opinion has not yet been published in the Federal Supplement, but it is available on Westlaw at 2011 WL 4375001. The Memorandum Opinion is reproduced in the Joint Appendix at JA 481.

(C) Related Cases

This case has not previously been before this Court or any other court. There are four related cases pending in the United States District Court for the District of Columbia. *See LaRoque v. Holder*, 10-cv-561-JDB (D.D.C); *State of Arizona v. Holder*, 11-cv-1559-JDB (D.D.C.); *State of Florida v. United States*, 11-cv-1428-CKK-MG-ESH (D.D.C.); *State of Georgia v. Holder*, 11-cv-01788-RBW-DST-BAH (D.D.C.).

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MISCELLANEOUS

GLOSSARY

ADA	Americans with Disabilities Act
Def.	Defendant
DOJ	Department of Justice
FMLA	Family Medical Leave Act
JA	Joint Appendix
Mem.	Memorandum
MIR	More Information Requests
Mot.	Motion
Opp.	Opposition
Pl.	Plaintiff
RFRA	The Religious Freedom Restoration Act of 1993
S.J.	Summary Judgment
Supp.	Supplemental
VRA	Voting Rights Act
VRARAA	Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

STATEMENT OF JURISDICTION

Plaintiff-Appellant Shelby County brought a facial constitutional challenge to Sections 5 and 4(b) of the Voting Rights Act of 1965 ("VRA"), as reauthorized and amended in 2006. *See* 42 U.S.C. § 1973c; *id.* § 1973b(b). The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On September 21, 2011, the district court entered final judgment granting summary judgment to Defendant-Appellee Attorney General of the United States. Shelby County's notice of appeal was timely filed on September 23, 2011. JA 633. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether Sections 4(b) and/or 5 of the Voting Rights Act exceed Congress's enforcement authority under the Fourteenth and Fifteenth Amendments to the United States Constitution and violate the Tenth Amendment and Article IV of the United States Constitution.

STATUTES AND REGULATIONS

Section 4(b) and Section 5 of the Voting Rights Act are reproduced in an addendum to this brief.

STATEMENT OF FACTS

In 2006, Congress extended Section 5 of the VRA for an additional twenty-five years. 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 (2006) ("VRARAA"). Section 5 forbids certain "covered" States and political subdivisions from implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless the change has been "precleared" by the Department of Justice ("DOJ") or the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973c(a). Section 4(b) determines which States and political subdivisions are covered. It subjects a jurisdiction to "preclearance" if it maintained a prohibited "test or device" on November 1, 1964, 1968, or 1972, and had voter registration on that date or turnout in the 1964, 1968, or 1972 presidential elections of less than 50 percent. *Id*. § 1973b(b).

The constitutionality of the 2006 reauthorization was immediately put at issue. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) ("*Nw. Austin*"). While the Supreme Court ultimately resolved *Northwest Austin* on statutory grounds, it emphasized that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of the dramatic changes in the covered jurisdictions since 1965. *Id*. at 2513. Section 5 "imposes current burdens and must be justified by current needs" and Section 4(b)'s "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate coverage is sufficiently related to the problem it targets." *Id*. at 2512. The Supreme Court cautioned that "[t]he evil that § 5 is meant to

address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id*.

To have these serious constitutional questions definitively addressed, Shelby County filed suit on April 27, 2010, facially challenging the constitutionality of Sections 5 and 4(b). JA 29-51. Shelby County filed a motion for summary judgment shortly thereafter, and the Attorney General responded by seeking discovery under Rule 56(f) of the Federal Rules of Civil Procedure. The district court rejected the motion, ruling: (1) Shelby County is currently burdened by Section 5 and thus has standing to facially challenge the statute; (2) discovery would be unnecessary because "resolving a facial challenge to the 2006 extension of the VRA is limited to assessing whether 'the 2006 legislative record contain[s] sufficient evidence of contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years"; and (3) "bailout" issues do not arise here because Shelby County does not seek and is not eligible for bailout. *Shelby County v. Holder*, 270 F.R.D. 16, 18-21 (D.D.C. 2010) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008), *rev'd on other grounds*, 129 S. Ct. 2504 (2009)).

The District Court set a briefing schedule "for the filing of dispositive motions, which generated over 1,000 pages of briefs and exhibits and culminated in a lengthy motions hearing on February 2, 2011." JA 514. Two days after oral argument, the Court ordered the parties "to submit additional briefing" on "the following question: in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it 'rational in both practice and theory,' *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), for Congress to preserve the existing coverage formula in Section 4(b) of the Act?" JA 25. The order encouraged the parties "to address each aspect of the question separately—that is, to explain both why Section 4(b) is or is not rational 'in practice' and why Section 4(b) is or is not rational 'in theory.'" *Id.*

In a 151-page opinion, the District Court denied Shelby County's motion and granted the Attorney General's cross-motion for summary judgment. JA 481-631. The court first ruled that the constitutionality of Sections 5 and 4(b) must be judged under the congruence and proportionality standard set forth in *City of Boerne v. Flores*, 521 U.S. 507 (1997). JA 483. "*Boerne* merely explicated and refined the one standard of review that has been employed to assess legislation enacted pursuant to *both* the Fourteenth and Fifteenth Amendments." JA 521; *see also* JA 522 ("*Boerne*'s congruence and proportionality framework reflects a refined version of the same method of analysis utilized in [*South Carolina v.*

Katzenbach, 383 U.S. 301 (1966)], and hence provides the appropriate standard of review to assess Shelby County's facial constitutional challenge to Section 5 and Section 4(b).").

The district court held that, under this standard, Section 5 remains a 'congruent and proportional remedy' to the 21st century problem of voting rights discrimination in covered jurisdictions." JA 484. The court also held that "Section 4(b)'s disparate geographic coverage remains 'sufficiently related' to the problem that it targets" principally because it subjects to preclearance "those jurisdictions with the worst *historical* records of voting discrimination," and "although the legislative record is primarily focused on the persistence of voting discrimination in covered jurisdictions—rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions—the record does contain several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement." JA 628-29. Shelby County timely appealed. JA 633.

SUMMARY OF THE ARGUMENT

The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," U.S. Const.

amend. XV, § 1, and empowers Congress "to enforce this article by appropriate legislation," *id*. § 2. Congress enacted the VRA "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S. at 308. Many provisions of the VRA—including Section 2, which created a private cause of action, and Section 4(a), which prevented covered jurisdictions from using certain voting tests and devices—directly confronted indisputably discriminatory state and local voting practices that infringed 15th Amendment rights.

More radically, Section 5 reallocated power over election practices from state and local authorities to the federal government. Section 5 forbids the implementation of all voting changes in jurisdictions covered by Section 4(b) unless federal officials are satisfied that the changes do not undermine minority voting rights. Because "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991) (citations and internal quotation marks omitted), Section 5 imposes "substantial federalism costs," *Nw. Austin*, 129 S. Ct. at 2511 (citation and quotations omitted). As an unprecedented use of federal enforcement power under the Fifteenth Amendment, Section 5 was constitutionally justified because of the "exceptional conditions" and "unique circumstances" that existed in the covered jurisdictions in 1965,

Katzenbach, 383 U.S. at 334-35, namely the "unremitting and ingenious defiance of the Constitution," *id*. at 308. Before the enactment of Section 5, those jurisdictions were able to "stay[] one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976). Simply put, "case-by-case litigation was inadequate to combat [the] widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 335. What troubled the Supreme Court in *Northwest Austin* was that "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." 129 S. Ct. at 2511.

For Section 5 to remain "appropriate" enforcement legislation under the Fifteenth Amendment, there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. The constitutional "injury to be prevented or remedied" by Section 5 is the deprivation of minorities' right to freely register and vote. The preclearance remedy is "congruent" to that injury when it addresses a coordinated campaign of discrimination intended to circumvent the remedial effects of direct enforcement of Fifteenth Amendment voting rights. "Section 5 was directed at preventing a particular set of invidious practices that had the effect of undo[ing] or

defeat[ing] the rights recently won by nonwhite voters." *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (internal quotation marks omitted) (emphasis added). Given the federalism costs of preclearance, a documented record of "unremitting and ingenious defiance" of Fifteenth Amendment rights was needed to provide the necessary constitutional foundation for Section 5. *Katzenbach*, 383 U.S. at 309. Congress clearly met this burden in 1965 by documenting voting interference and electoral gamesmanship making case-by-case enforcement of the Fifteenth Amendment impossible. *Id*. at 335.

Congress's 2006 extension of Section 5 must equally be supported by a finding of systematic and recurring discrimination. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001). "[T]he [VRA] imposes current burdens and must be justified by current needs." *Nw. Austin*, 129 S. Ct. at 2511-12. Those current needs must respond to intentional interference with the right to register and cast a ballot, recognizing that the findings previously endorsed as "reliable evidence of actual voting discrimination," *Katzenbach*, 383 U.S. at 328, included deplorable acts of violence, intimidation, and gamesmanship that were reflected in voter registration and turnout statistics, *id.* at 310-16; *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

Contrary to the district court's conclusion, JA 545-621, the 2006 record contains no evidence of a systematic campaign of voting discrimination and

gamesmanship by the covered jurisdictions. In fact, Congress acknowledged that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." VRARAA, § 2(b)(1), 120 Stat. at 577. Statistical evidence in the legislative record verified this conclusion. By 2006, the 50% disparity in voter registration between whites and African-Americans from the 1960s had been virtually eliminated. S. Rep. No. 109-295 at 11 (2006). Moreover, African-American voter turnout in the 2004 presidential election was actually higher than white turnout in three fully-covered states and was within 5% in two others. *Id.* Also, "the number of African-American elected officials serving in the original six [covered] States … increased by approximately 1000 percent since 1965, increasing from 345 to 3700." H.R. Rep. No. 109-478 at 18 (2006). Because the legislative record before Congress in 2006 lacked the current evidence of coordinated discrimination needed to justify reauthorization of the preclearance obligation, Section 5 is no longer "congruent and proportional" to the voting discrimination it addresses.

The district court nevertheless upheld Section 5 as responsive to "vote dilution" evidence and other so-called "'second generation barriers'" to voting. JA 112-18. But the Fifteenth Amendment is directed at the problem of actual

disenfranchisement, not minority vote dilution, which is a Fourteenth Amendment concern that implicates the weight of the vote, not the ability to cast it. *Miller*, 515 U.S. at 937-38. Neither "dilutive techniques" nor any effort to remedy them bears on whether minorities are able to freely register and vote. As a result, vote dilution simply is not "reliable evidence of actual voting discrimination" within the meaning of the Fifteenth Amendment. *Katzenbach*, 383 U.S. 329.

Of equal importance, "second generation barriers" bear no resemblance to the unrelenting campaign of discrimination needed to "justify legislative measures not otherwise appropriate." *Id*. at 334. For example, Congress relied on evidence of racially polarized voting, VRARAA, § 2(b)(3), 120 Stat. at 577, which is not evidence of discrimination (much less intentional discrimination) by covered jurisdictions, *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 64-65 (1980). Congress also relied on federal preclearance statistics, VRARAA, § 2(b)(4)-(5), 120 Stat. at 578, that only undermine the case for reauthorization given DOJ's minimal objection rate to preclearance submissions in recent years, S. Rep. No. 109-295 at 13. And Congress based reauthorization on the existence of Section 2 litigation, VRARAA, §2(b)(4)(C)-(D), 120 Stat. at 578, even though Section 2 does not require proof of intentional discrimination and the legislative record identified only twelve published cases between 1982 and 2006 finding intentional, race-based voting discrimination by any covered jurisdiction, half of which involved

discrimination against white voters, S. Rep. No. 109-295 at 13. This kind of evidence plainly is insufficient to justify a measure as constitutionally intrusive as Section 5. Indeed, if preclearance can be reauthorized based on the existence of "second generation barriers," then Congress's ability to limit state and local control over elections is limitless.

In any event, the district court erred irrespective of whether these "second generation barriers" are considered reliable evidence of Fifteenth Amendment voting discrimination. Congress was required to document "systematic resistance to the Fifteenth Amendment" by "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 328, 335. But there is no evidence that *any* covered jurisdiction is engaging in the type of gamesmanship and subterfuge that made case-by-case enforcement futile. None of the isolated instances of voting discrimination and dilutive techniques identified by the district court come even close to measuring up to this standard.

But even if preclearance remains "appropriate" for some jurisdictions, the retention of Section 4(b)'s obsolete coverage formula is constitutionally indefensible. "[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." *Nw. Austin*, 129 S. Ct. at 2512. The district

court upheld the coverage formula, finding that it identifies jurisdictions with historical records of intentional discrimination and purportedly responds to the "second generation barriers" relied on by Congress to reauthorize Section 5. JA 621-29. As shown in the supplemental briefs submitted to the district court after oral argument, retaining this archaic coverage formula is irrational "in both practice and theory." *Katzenbach*, 383 U.S. at 330.

The coverage formula is irrational in theory for at least two reasons. First, the formula is keyed to decades-old data that has no demonstrated connection to present-day circumstances. The discriminatory tests and devices invoked in Section 4(b) have been permanently banned for over 35 years and the rates of minority registration and voting in 1964, 1968, and 1972 are totally different from current reality. The district court offered no explanation for why it was rational in theory to use this outmoded voting data as a trigger for coverage. Second, a coverage formula predicated on registration and turnout statistics is responsive to "first generation" interference with an individual's ability to register and cast a vote—not "second generation" barriers that allegedly dilute the weight of that vote. In short, "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Nw. Austin*, 129 S. Ct. at 2512.

The coverage formula also is irrational in practice. The formula, which is tied to disparities in registration and turnout, fully covers seven States; however, Hawaii (which is not covered) is the only State that would have been subject to preclearance if the statutory benchmarks had been tied to the last three presidential elections prior to the 2006 reauthorization instead of election data from 1964, 1968, and 1972. Moreover, the "second generation barriers" Congress relied on to reauthorize Section 4(b) are not "concentrated in the jurisdictions singled out for coverage." *Id*. Vote dilution and racially polarized voting occur in covered and non-covered jurisdictions alike. If Congress were serious about subjecting to preclearance jurisdictions where such conditions exist, States like New York, Illinois, and Tennessee would have been subjected to coverage instead of many (if not most) of the covered jurisdictions.

Accordingly, the coverage formula cannot be sustained merely because the covered jurisdictions have a long-past history of voting discrimination and because Congress was able to uncover some "second generation barriers" there. The Supreme Court made clear that because the statute must be justified by current needs," a reviewing court must determine whether "the evil § 5 is meant to address" is "concentrated in the jurisdictions singled out for coverage." *Id*. Such "'carefully considered'" statements "'must be treated as authoritative.'" *Comcast v. FCC*, 600 F.3d 642, 650 (D.C. Cir. 2010) (quoting *United States v. Oakar*, 111

F.3d 146, 153 (D.C. Cir. 1997)). Given the Supreme Court's admonition in *Northwest Austin*, the legislative record makes clear that the "unique circumstances" that prompted Congress to impose preclearance on the covered jurisdictions no longer exist.

There can be no question that the VRA ushered in long-overdue changes in electoral opportunities for minorities throughout the Deep South. But Shelby County should not be subject to Section 5 based on voting data more than four decades old. Shelby County supports vigorous enforcement of the Fifteenth Amendment and the many provisions of the VRA that directly enforce the Amendment's ban on voting discrimination; however, as demonstrated below, Section 5's preclearance obligation and Section 4(b)'s stale coverage formula are no longer constitutionally justifiable.

ARGUMENT

I. STANDARD OF REVIEW

"Both because the District Court granted a motion for summary judgment," and because the question presented "relates to a purely legal issue," the decision below is reviewed *de novo*. *Cope v. Scott*, 45 F.3d 445, 450 (D.C. Cir. 1995) (citations omitted). The issue on appeal is which party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Am. Ass'n of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.*, 911 F.2d 786, 789 (D.C. Cir. 1990).

II. SECTION 5 OF THE VRA IS NO LONGER WITHIN CONGRESS'S AUTHORITY TO ENFORCE THE FIFTEENTH AMENDMENT.

Whether Section 5 continues to appropriately enforce the Fifteenth Amendment must be determined under the framework set forth in *City of Boerne v. Flores*, 521 U.S. 507 (1997).[1] JA 519-45. First, the court must "identify with some precision the scope of the constitutional right at issue." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). Second, the court must "examine whether Congress identified a history and pattern of unconstitutional" government action. *Id*. at 368. Third, the court must determine whether there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. Section 5 can no longer withstand constitutional review under this standard.

[1] The district court disagreed with the three-judge panel in *Northwest Austin*, which had concluded that *Boerne* applies only to Fourteenth Amendment enforcement legislation. *Nw. Austin*, 573 F. Supp. 2d at 241-56. The Attorney General defended the three-judge panel's conclusion before the Supreme Court, *see* Brief of Federal Appellee at 20-24, *Nw. Austin*, 129 S. Ct. 2504 (S. Ct. filed March 18, 2009), but has since abandoned it, *see* Mem. in Opp. To Pl.'s Mot. for S.J. & In Supp. of Def.'s Mot. for S.J. at 14 (Doc. 53) (Nov. 15, 2010) ("[T]he terms 'enforce' and 'appropriate legislation' have the same meaning in each amendment."). Any attempt to resurrect that argument on appeal, therefore, would be foreclosed.

A. That Section 5 Enforces the Fifteenth Amendment Did Not Make It "Easier" For Congress to Document a Widespread Pattern of Discrimination.

Section 5 enforces the Fifteenth Amendment. *Katzenbach*, 383 U.S. at 308-10; *City of Rome*, 446 U.S. at 180-82; *Nw. Austin*, 129 S. Ct. at 2508-09, 2511-13; *Nw. Austin*, 573 F. Supp. 2d at 243. The Fifteenth Amendment outlaws "purposefully discriminatory denial or abridgment by government of the freedom to vote." *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion). The freedom to vote means the right to freely cast a ballot. *Rice v. Cayetano*, 528 U.S. 495, 512-14 (2000); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000) ("*Bossier Parish II*"); *Polish A. Congress v. City of Chicago*, 211 F. Supp. 2d 1098, 1107 (N.D. Ill. 2002); *Williams v. Orange County, Fla.*, 783 F. Supp. 1348, 1354 (M.D. Fla. 1992).[2]

The district court agreed, but found that the Fifteenth Amendment's enforcement of two fundamental rights—"the right to vote" and "protect[ion] against discrimination based on race"—made it "'easier for Congress to show a pattern of state constitutional violations … since racial classifications and

[2] Congress referenced the Fourteenth Amendment when reauthorizing Section 5 only as support for its decision to extend preclearance to voting changes affecting "language minorities." *Nw. Austin*, 573 F. Supp. 2d at 243-45. This Court's reliance on the Fourteenth Amendment thus would raise the additional question of whether there is sufficient evidence of pervasive discrimination against language minorities to support the reauthorization—a thorny question that the district court made no attempt to answer.

restrictions on the right to vote … are presumptively invalid.'" JA 546-47 (quoting *Nw. Austin*, 573 F. Supp. 2d at 270) (other citation omitted). But *Boerne* itself illustrates why the district court's reliance on the "fundamental" nature of the rights protected by the Fifteenth Amendment to engage in a "somewhat less rigorous" analysis of Section 5 was mistaken. JA 541.

The Religious Freedom Restoration Act of 1993 ("RFRA") protected the free exercise of religion, *Boerne*, 521 U.S. at 519, a right certainly no less "fundamental" than the one protected by the Fifteenth Amendment, *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Yet it was not easier for Congress to document a pattern of unconstitutional discrimination there because RFRA targeted "laws of general applicability which place incidental burdens on religion." *Boerne*, 521 U.S. at 530-31.

So too here. Section 5 does not target overtly discriminatory voting laws; that is the function of the Fifteenth Amendment, which is "self-executing" and not dependent on "further legislative specification," *Katzenbach*, 383 U.S. at 325, and other provisions of the VRA, including Section 2, *infra* at 20-21. Section 5 was enacted to prevent the implementation of facially-neutral state laws that "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Thus, it was no "easier" for Congress to document a pattern of voting

discrimination in reauthorizing Section 5 than it was in *Boerne* to document a pattern of infringement on the free exercise of religion based on the discriminatory effect of neutral state laws. In both cases, it is "difficult to maintain" that the laws targeted by the prophylactic federal remedy "are examples of legislation enacted or enforced due to animus or hostility to the burdened … practices or that they indicate some widespread pattern of … discrimination in this country." *Boerne*, 521 U.S. at 531.

The district court's reliance on *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004), to conclude otherwise thus was mistaken. JA 61-62, 65-66. In those cases, it was "easier" for Congress to identify a pattern of unconstitutional discrimination because it relied on instances of overt disability and gender-based discrimination to justify the need for Title II of the Americans with Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA"). *Hibbs*, 538 U.S. at 729; *Lane*, 541 U.S. at 521. Because such nakedly discriminatory classifications "are presumptively invalid, most of the States' acts of … discrimination violated the Fourteenth Amendment." *Id*. at 736. Had Congress similarly relied on overt interference with the right to vote in extending Section 5 (as it did in 1965), it may well have been easier to document a pattern of unconstitutional discrimination. But Congress could not do so. It relied on facially neutral laws, which do not presumptively discriminate on the basis of

race. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 240-41 (1976).

Accordingly, Congress was not entitled to presume that the facially-neutral voting laws ensnared by Section 5 intentionally discriminated on the basis of race. As in *Boerne*, Congress instead needed to document that the evidence placed in the legislative record *in fact* was the product of intentional discrimination within the meaning of the Fifteenth Amendment. Only after doing so could Congress make a reasoned determination as to whether the legislative record documented a pattern of widespread discrimination justifying a preclearance remedy. Unlike in *Hibbs* and *Lane*, there was nothing easy about this task.

B. Congress Could Not Identify a Widespread Pattern of "Ingenious Defiance" of the Fifteenth Amendment Such That Case-By-Case Litigation Would Be Futile.

1. Congress was required to document a widespread pattern of "ingenious defiance" of the Fifteenth Amendment.

Before exercising its authority under the Fifteenth Amendment, Congress must document "a pattern of unconstitutional discrimination on which [the enforcement] legislation must be based." *Garrett*, 531 U.S. at 370. By a "pattern," the Court was referring to discrimination that is "'widespread and persisting,'" *Boerne*, 521 U.S. at 526, "significant," *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000), and "pervasive," *Hibbs*, 538 U.S. at 756. Congress also must compile evidence "of the sort" indicating the need for the particular prophylactic legislation

Congress has chosen. *Id*.; *see, e.g.*, *Kimel*, 528 U.S. at 90; *Hibbs*, 538 U.S. at 735; *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (Black, J.). As the Court has explained, "identifying the targeted constitutional wrong or evil is … a critical part" of determining whether prophylactic enforcement legislation is appropriate. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999); *Hayden v. Pataki*, 449 F.3d 305, 332 (2d Cir. 2006) (Walker, J., concurring). In the case of Section 5, such "an extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992), demands evidence demonstrating the existence of "exceptional conditions," *Katzenbach*, 383 U.S. at 334.

The district court nevertheless concluded that only "*some* evidence of purposeful state-sponsored voting discrimination is needed to sustain Section 5." JA 547 (emphasis added). That is wrong on two levels. First, Congress was required to compile far more than "some" evidence of voting discrimination; it needed to document "abundant evidence of States' systematic denial" of the right to vote. *Garrett*, 531 U.S. at 373. Second, documenting "some" voting discrimination, while it may justify the creation of private rights of action under

Section 2 or specified prohibitions of discriminatory practices,[3] does not justify the most invasive Reconstruction Amendment enforcement remedy Congress has ever enacted. *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting).

"Section 5 … was enacted for a different purpose: to prevent covered jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a)." *Nw. Austin*, 129 S. Ct. at 2520 (Thomas, J., concurring in the judgment in part and dissenting in part); *Reno v. Bossier Parrish Sch. Bd.*, 520 U.S. 471, 477 (1997) ("*Bossier Parrish I*") (explaining that Section 5 has a more "limited purpose" and "combats different evils" than Section 2). "Section 5 was directed at preventing a *particular set of invidious practices* that had the effect of undo[ing] or defeat[ing] the rights recently won by nonwhite voters." *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (emphasis added). This "particular set of invidious practices" was the subtle and continuous alteration of discriminatory voting laws to circumvent the force and effect of hard-won victories in Fifteenth Amendment litigation. *Beer*, 425 U.S. at 140 (explaining that it was the "common practice in some jurisdictions of staying one step ahead of the federal courts by

[3] *See, e.g.*, Pub. L. No. 94-73, 89 Stat. 400, § 201 (1975) (permanently banning discriminatory voting "tests or devices"); 42 U.S.C. § 1973i(a) ("No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote … or willfully refuse to tabulate, count, and report such person's vote.").

passing new discriminatory voting laws as soon as the old ones had been struck down"). After all, that is why Section 5 suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 129 S. Ct. at 2511. Only that extraordinary remedy could neutralize "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309.

The pattern of discrimination that originally justified Section 5, therefore, was not "some" voting discrimination in the covered jurisdictions. It was the widespread pattern of unyielding and duplicitous behavior that made the preclearance obligation constitutionally appropriate: "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting" because of, most prominently, "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 335; *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (explaining that Congress "feared that that the mere suspension of existing tests would not completely solve the problem, given the history some States had of simply enacting new and slightly different requirements with the same discriminatory effect"); House Committee Hearings at 5 (1965) (Statement of the Honorable Nicholas deB. Katzenbach, Attorney General of the United States) ("Three times since 1956, Congress … has adopted the

alternative of litigation, of seeking solutions in our judicial system. But three times since 1956, we have seen that alternative tarnished by evasion, obstruction, delay, and disrespect.").

To satisfy this aspect of the *Boerne* analysis, Congress needed to document a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment in the covered jurisdictions that was incapable of being redressed through case-by-case litigation. *Katzenbach*, 383 U.S. at 328 ("After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims."); *City of Rome*, 446 U.S. at 181 ("Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable."). In fact, "the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible." *Nw. Austin*, 129 S. Ct. at 2524 (Thomas, J., concurring in the judgment in part and dissenting in part).

2. Only evidence documenting state-sponsored interference with the right to register to vote and cast a ballot is probative of "ingenious defiance" of the Fifteenth Amendment.

Because the Fifteenth Amendment prohibits interference with the ability to register to vote and cast a ballot, only evidence probative of interference with *that* right is relevant to the constitutional inquiry described above. In *Katzenbach* and *City of Rome*, the Court relied on evidence of widespread, intentional, and direct interference with the right to vote through violence, intimidation, and electoral gamesmanship. *Katzenbach*, 383 U.S. at 310-16; *City of Rome*, 446 U.S. at 182. In both cases, the Court also relied on registration data, turnout statistics, and the election of minorities to public office, all of which the Court considered reasonable barometers for verifying the pervasive nature of the voting discrimination and gamesmanship identified in the legislative record. *Katzenbach*, 383 U.S. at 313, 329-30; *City of Rome*, 446 U.S. at 180-81. In *City of Rome*, the Court further examined the "number and nature of [Section 5] objections interposed by the Attorney General" between 1965 and 1975. *Id*. at 181. This was all considered "reliable evidence of actual voting discrimination" in the covered jurisdictions. *Katzenbach*, 383 U.S. 329.

The district court declined to limit itself to this type of evidence in assessing whether Congress documented systematic defiance of the Fifteenth Amendment. In particular, the district court relied on: vote dilution evidence; preclearance

statistics; so-called "more information requests" ("MIRs"); Section 5 enforcement suits; Section 2 litigation; the dispatch of federal election observers; racially polarized voting; and Section 5's alleged "deterrent" effect. JA 549-601. As explained below, none of these are "reliable" indicators of "actual" interference with the right to cast a ballot.

As an initial matter, the district court misunderstood Shelby County as arguing that only "direct" evidence may be used to evaluate the need for Section 5. JA 548 (quoting Pl.'s Reply at 37). To be sure, the Supreme Court has made clear that evidence documenting direct and flagrant interference with the right to vote provides the strongest basis for a sweeping remedy like preclearance. *Infra* at 48-49. But that does not make circumstantial evidence irrelevant. In pointing to registration and turnout data from previous elections in *Katzenbach* and *City of Rome*, the Supreme Court certainly was relying on "circumstantial evidence of voting discrimination." JA 548. "[A] low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Katzenbach*, 383 U.S. at 330. Shelby County has *never* questioned the legitimacy or relevance of *this* type of circumstantial evidence to support a finding of pervasive voting discrimination.

Shelby County has instead argued that Congress needed to compile meaningful evidence of interference with the right to vote, as opposed to evidence

concerning the weight of that vote once cast. *Infra* at 26-29. As the district court noted, "'Congress obviously may avail itself of information from any probative source.'" JA 547 (quoting *Katzenbach*, 383 U.S. at 330). But the issue here is not the "source" of the evidence in the legislative record. It is whether the sources on which Congress relied are "probative"—*i.e.*, actually demonstrate interference with the voting right guaranteed by the Fifteenth Amendment.

Vote Dilution. Almost every example of intentional discrimination that the district court referenced involved redistricting. JA 549, 551, 560-63, 565-69, 574-76, 586. While this evidence theoretically might suggest interference with the ability to freely register and cast a ballot, virtually every example relied on by the district court did not involve interference with that right. Rather, the redistricting cases documented in the legislative record and catalogued by the district court predominantly involve claims of vote dilution, going to the weight of the vote once cast, not access to the ballot. *Miller*, 515 U.S. at 937-38. The Supreme Court thus has "never held that vote dilution violates the Fifteenth Amendment." *Bossier Parrish II*, 528 U.S. at 334 n.3; *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982); *Bolden*, 446 U.S. at 66. Because the Fifteenth Amendment has been the exclusive basis for upholding Section 5, *Katzenbach*, 383 U.S. at 308-10, 324-29; *City of Rome*, 446 U.S. at 180-82; *Nw. Austin*, 129 S. Ct. at 2508-09, 2511-13, this Court

would be breaking new constitutional ground by endorsing the district court's reliance on vote dilution evidence to uphold Section 5.

The district court incorrectly concluded that this issue "need not be decided" because "*Boerne* provides the proper mode of analysis to assess challenges to Congress's enforcement power under both § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment." JA 544-45. That both Fourteenth and Fifteenth Amendment enforcement legislation are reviewed under the same analytical framework does not mean that evidence applicable to a violation of one may be used to uphold legislation enforcing the other. If it could, then the Fifteenth Amendment would have no independent value as *all* discrimination on the basis of race is prohibited by the Fourteenth Amendment. The Supreme Court has foreclosed this line of argument. *Rice*, 528 U.S. at 522 ("The question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality requirement of the Fifteenth Amendment…. The Fifteenth Amendment has independent force and meaning.").

The district court also concluded that the Supreme Court "relied on evidence of minority vote dilution" in *City of Rome*. JA 595. But in *City of Rome*, the Court merely quoted from one passage in a Senate committee report predicting that jurisdictions might implement practices that "dilute increasing minority voting strength" in the absence of preclearance. 446 U.S. at 181 (citation and quotation

omitted). Nowhere did the Court in *City of Rome* point to vote dilution evidence as sufficient to uphold Section 5. One quotation from a committee report, without more, cannot decide an important constitutional issue that was hotly debated (and left unresolved) twenty years later in *Bossier Parrish II*.

The district court also relied on *Allen v. State Bd. of Election*, 393 U.S. 544 (1969), which held that Section 5 prevents the implementation of dilutive voting changes. JA 597-98. But Section 5 prevents the implementation of all sorts of voting changes that would not violate the Fifteenth Amendment. *See, e.g.*, *LaRoque v. Holder*, 650 F.3d 777, 782-83 (D.C. Cir. 2011). As a result, it does not necessarily follow that a voting practice is probative of a Fifteenth Amendment violation because it has a "retrogressive effect on the ability of black candidates to elect their preferred candidates." *Id*. at 782. Section 5 is a *prophylactic* remedy that goes beyond the violations that support its enactment. To support extension of the preclearance requirement, Congress was obligated to document evidence of widespread interference with the right protected by the Fifteenth Amendment. Vote dilution is not such evidence.

Ultimately, the district court obscured the important difference between redistricting to intentionally disenfranchise minority voters, *see, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Dillard v. Crenshaw Cnty*, 640 F. Supp. 1347 (M.D. Ala. 1986), and redistricting in ways that dilute the weight of the minority

vote. As *Gomillion* illustrates, only the former violates the Fifteenth Amendment. There, the Supreme Court confronted "a proposal to redraw the boundaries of Tuskegee, Alabama, so as to exclude all but 4 or 5 of its 400 black voters without excluding a single white voter." *Bossier Parrish II*, 528 U.S. at 334 n.3. But the conclusion "that the proposal would deny black voters the right to vote in municipal elections, and therefore violated the Fifteenth Amendment, had nothing to do with racial vote dilution, a concept that does not appear in … voting rights opinions until nine years later." *Id.*; *Dillard*, 640 F. Supp. at 1358 (finding that redistricting, annexation, and other techniques were being used "to disenfranchise black persons").

Preclearance statistics. As noted above, the Supreme Court has previously looked to the "number and nature" of Section 5 objections to determine whether covered jurisdictions were continuing to invent "new procedures and techniques" to avoid compliance with the Fifteenth Amendment. *City of Rome*, 446 U.S. at 181. But modern preclearance statistics are "poor proxies for intentionally discriminatory state action in voting, for a number of reasons." Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 Ohio St. L.J. 177, 190 (2005). As an initial matter, their statistical significance is questionable given that there is no real volume of objections on which to rely. *Infra* at 41-43.

However, "[t]he problem with using objections as evidence of intentional state discrimination is … even worse" than simply their virtual nonexistence. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciar*y, 109th Cong., 2d Sess., at 216 (May 9, 2006) ("Introduction to the Expiring Provisions") (testimony of Richard L. Hasen). A preclearance objection does not signal intentional voting discrimination. Instead, the existence of an objection may simply represent the fact that "the evidence as to the purpose or effect of the change is conflicting." 28 C.F.R. § 51.52(c). And, even where the Attorney General concludes that the voting change does have a discriminatory purpose, it is only "one side's opinion" about that fact because there is no opportunity for "a trial or a formal hearing." *Section 5 – Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong., 1st Sess., at 29-30 (Nov. 1, 2005) (testimony of Roger Clegg). Reliance on objection rates, accordingly, requires the assumption that if DOJ "thinks that a jurisdiction acted with discriminatory purpose, that is proof that it acted with discriminatory purpose." *Id*. Such assumptions are not accepted "as a general matter [in] our legal system." *Id*. at 30.

Moreover, for many years during the relevant time period, the Attorney General objected to voting changes based purely on retrogression—and not based

on whether the change was motivated by discrimination. *Ashcroft*, 501 U.S. at 480. Therefore, objection rates include objections to changes that unintentionally and inadvertently reduced the weight of the minority vote. Complicating matters further, recent objection rates encompass objections that were premised on legal standards later invalidated by the Supreme Court. In the 1990s, DOJ followed a "'black-maximization' policy" under which it would deny preclearance on the ground that failure to maximize majority-minority districts was intentionally discriminatory. *Miller*, 515 U.S. at 917-19; Introduction to the Expiring Provisions at 216 (testimony of Richard L. Hasen) (explaining that DOJ followed a "policy of objecting to certain state actions that were perfectly constitutional"). Not surprisingly, in 1994, the year before *Miller*, DOJ issued 61 objection letters; in 1996, the year after *Miller*, DOJ issued just 7. S. Rep. No. 109-295 at 13; H.R. Rep. No. 109-478 at 22. DOJ preclearance statistics thus are not a legitimate proxy for the type of purposeful discrimination necessary to justify reauthorization of Section 5.[4]

[4] Although the district court also relied on judicial preclearance suits, it was only able to identify 25 "successful" suits since 1982, including those in which "the jurisdiction withdrew the change, the case was dismissed, or a consent decree that cured the problem was reached." JA 573-74. Tellingly, the district court only identified *two* such suits involving allegations of intentional discrimination—and one of those was settled. JA 574-76.

MIRs. The district court found it probative that, "between 1982 and 2003, at least 205 proposed voting changes were withdrawn by covered jurisdictions after receipt of an MIR" and that "MIRs resulted in a total of 855 withdrawals, superseding changes, and 'no responses' by covered jurisdictions." JA 572. Of course, an MIR is not evidence of intentional voting discrimination. MIRs are sent to "enhance[] the information that it has available to assess a proposed change." 2 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. at 2546 (Mar. 8, 2006) ("Evidence of Continued Need"). By definition, then, MIRs merely are evidence that DOJ has "insufficient information … to enable" it "to make a [preclearance] determination." H.R. Rep. No. 109-478 at 40. If DOJ had sufficient proof that the proposed change was intentionally discriminatory, there would be no reason to request more information.

Indeed, the district court agreed that "not all" of these responses "represent concessions on the part of the covered jurisdiction that its initially-proposed voting changes had an impermissible discriminatory purpose or effect" and that it "is plausible that the covered jurisdictions choose to withdraw their proposed changes or not respond … because responding is more costly than not implementing the change." JA 572. In fact, there is *no* evidence in the legislative record that *any* of the withdrawals or other responses to MIRs were admissions of discrimination.

Although the district court accepted speculation that "some" of the responses to MIRs were evidence of intentional discrimination, JA 573, unfounded speculation about the reasons why covered jurisdictions have withdrawn preclearance requests is not the kind of reliable evidence of intentional discrimination (if it is evidence at all) that can sustain Section 5.

Section 5 Enforcement Suits. The district court credited Congress's reliance on the "at least 105 successful Section 5 enforcement actions" since 1982 as evidence of intentional discrimination. JA 577. But the accuracy of this data is not entirely clear. The term "successful" includes voluntary submissions for preclearance after the preclearance action was filed. *Id*. And the data underlying the relevant testimony indicates that the number of Section 5 enforcement actions *filed* "by the Department or in which it joined as a plaintiff intervenor or amicus curiae" between 1966 and 2004 was just 107. 1 Evidence of Continued Need at 186. Thus, "it is not known how many *successful* Section 5 enforcement actions have been filed, either by the Department of Justice or private citizens." *Id*. (emphasis in original).

In any event, the district court acknowledged that "the reasons behind a failure to seek preclearance under Section 5 are not easy to discern" and that "there is no data in the legislative record revealing the percentage of successful Section 5 enforcement actions that have ultimately resulted in the denial of preclearance on

the basis of discriminatory intent." JA 580-81. The most that a Section 5 enforcement action can establish, therefore, is that a voting change—and quite possibly a nondiscriminatory voting change—was not properly submitted for preclearance. These failures may result from a mistaken understanding of the VRA's requirements, a good faith belief that the change was not subject to preclearance, *Lopez v. Monterey Cnty*, 525 U.S. 266, 278 (1999), or a principled objection to Section 5's federal oversight, H.R. Rep. No. 109-478 at 41-44.[5] Because they certainly need not result from an intention to evade Section 5 for racially discriminatory reasons, this too is not reliable evidence of intentional voting discrimination.

Section 2 litigation. The district court devotes considerable attention to Section 2 litigation, JA 581-88, even though "a violation of Section 2 does not require a showing of unconstitutional discrimination," JA 581; *Bossier Parrish I*, 520 U.S. at 482. Because "§ 2 [does] not have an intent component," *id*., this evidence cannot demonstrate the persistence of systematic voting discrimination. *Id*. Moreover, the study of Section 2 litigation relied on by the district court

[5] None of the noted examples of such non-compliance, including the "most defiant" example of the former South Dakota Attorney General describing preclearance as a "'facial absurdity,'" JA 578, establishes that a jurisdiction's failure to comply with Section 5's preclearance obligation was driven by discriminatory intent. It proves no more than that certain jurisdictions disagreed with the idea of pervasive federal oversight.

focused on cases with "outcomes favorable to minority voters." JA 627. But this phrase vastly overstates the significance of this evidence. Many of these Section 2 cases involved no finding of intentional discrimination, were not resolved on the merits, or both; and some of the "outcomes" deemed "favorable to minority voters" actually were not favorable judicial outcomes at all, but merely reflected changes in voting laws. Ellen Katz & The Voting Rights Initiative, VRI Database Master List ("VRI Master List") (cited in *To Examine the Impact & Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 974, 1019-20 (Oct. 18, 2005)).[6]

Federal election observers. The dispatching of observers is a prophylactic measure aimed at a broad swath of potential conduct, including but certainly not limited to intentional voting discrimination. The presence of an observer in a covered jurisdiction reflected no more than "a reasonable belief that minority citizens [were] at risk of being disenfranchised." H.R. Rep No. 109-478 at 44. This evidence, therefore, indicates only that it was predicted that there might be conduct with the effect of disenfranchising minority citizens, which might or might

[6] Moreover, to the extent that Section 2 litigation has been successful in the last 25 years, it proves not that Section 5 remains necessary, but that it is no longer needed because jurisdictions subject to adverse judgments in traditional litigation are no longer ignoring federal decrees. Again, it was the inability of case-by-case litigation to stem voting discrimination that was the impetus for Section 5. *Katzenbach*, 383 U.S. at 328.

not be purposeful discrimination. To conclude that observer dispatch evidence reliably proves the existence of pervasive intentional discrimination in the covered jurisdictions would be pure speculation.

The district court conceded that "[a]s a technical matter, Shelby County is correct," but chose to credit this evidence because DOJ's predictive assessment that observers are needed must be "reasonable." The notion that DOJ must have a "reasonable" belief that observers are needed does not, however, make reliance on aggregate statistical evidence any less speculative given the many reasons other than intentional discrimination why they might be sent. The district court attempted to cure this problem by pointing to a few examples where election observers witnessed voting discrimination. *Id*. at 111-12. But the fact that they "observed" practices they believed to be discriminatory on a few occasions over a 25-year period does not convert irrelevant statistical data into reliable evidence of the need for preclearance.

Racially polarized voting. Congress referred to racially polarized voting, which "occurs when voting blocs within the minority and white communities cast ballots along racial lines" as the "clearest and strongest evidence" of the need to reauthorize Section 5. H.R. Rep. No. 109-478 at 34; VRARAA, § 2(b)(3), 120 Stat. at 577. But individual voting patterns are not evidence supporting Congress's reauthorization of Section 5. Because the Fifteenth Amendment "relates solely to

action 'by the United States or by any state,' and does not contemplate wrongful individual acts," *James v. Bowman*, 190 U.S. 127, 135 (1903), racially polarized voting is not governmental discrimination—the only type of conduct Congress is empowered to remedy under the Fifteenth Amendment, *Terry v. Adams*, 345 U.S. 461, 473 (1953). Nor is it evidence of intentional discrimination—state-sponsored or otherwise.

The district court conceded this point, JA 595, but concluded that polarized voting was reliable evidence of intentional voting discrimination because its existence, while the result of private choice, allows covered jurisdictions to "structure their electoral processes so as to intentionally diminish the ability of minority voters to elect candidates of their choice." JA 595 (citation omitted). In other words, it is a background condition that creates an opportunity for jurisdictions to engage in vote dilution. *Id*. But vote dilution is not a concern of the Fifteenth Amendment. *Supra* at 26-29. In any event, "had Congress truly understood" that racially polarized voting was pertinent because it served as a predicate for "unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings." *Garrett*, 531 U.S. at 371. There is none. *See, e.g.*, H.R. Rep. No. 109-478 at 34.

Section 5's deterrent effect. The district court relied heavily on the alleged "deterrent effect" of Section 5. JA 598-601. Indeed, this rationale was decisive in

that it provided a convenient explanation for the lack of evidence in the legislative record. *Infra* at 45-46. But Congress's reliance on Section 5's alleged deterrent effect necessarily presupposes that the covered jurisdictions have a latent desire to discriminate that does not exist elsewhere in the country. The district court should not have indulged Congress's "outdated assumptions about racial attitudes in the covered jurisdictions." *Nw. Austin*, 129 S. Ct. at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part).

3. Congress failed to document a widespread pattern of systematic resistance that would make case-by-case enforcement of the Fifteenth Amendment impossible.

Evaluation of the probative evidence shows there is no longer systematic resistance to the Fifteenth Amendment in the covered jurisdictions that cannot be solved through case-by-case litigation. Congress acknowledged that "significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected officials." VRARAA, §2(b)(1), 120 Stat. at 577; H.R. Rep. No. 109-478 at 12 (concluding that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated"). These "first generation barriers" were the dominant evidence that Congress used to justify Section 5 in 1965, *supra* at 25-26, and such barriers are

the proper target of Fifteenth Amendment enforcement. Significantly, Congress concluded that "first generation barriers" could no longer provide a constitutional justification for imposing preclearance on the covered jurisdictions. *Nw. Austin*, 129 S. Ct. at 2511 ("Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.").

The district court agreed "that there has been a substantial increase in black voter registration and turnout in the South since the [VRA] was first enacted," JA 552 (citation omitted), but concluded that "significant disparities" persist in Texas, Florida, and Virginia, JA 553-57. The district court overstated their significance. In Texas, while there is a registration and turnout gap between whites and Hispanics, Texas' Hispanic registration and turnout rates are higher than the national average and the registration rate is more than ten points higher than in California, a non-covered state with a large Hispanic population. S. Rep. No. 109-295 at 11. Likewise, in Florida, most of which is not covered by Section 5, the Hispanic registration and turnout rate is higher than the national average. *Id*. The fact that perhaps one fully-covered state, Virginia, has registration and turnout data that lags slightly behind cannot provide a constitutional basis for reauthorizing Section 5 in its current form, especially absent a contention that the current

disparity is the product of racial discrimination. Just as the massive statistical disparity that existed in 1965 verified Congress's judgment that systematic discrimination was occurring, the fact that "turnout and registration rates now approach parity" in the covered jurisdictions compels the opposite conclusion. *Nw. Austin*, 129 S. Ct. at 2511.

The district court also minimized the extraordinary gains in the election of minority officials by focusing on the "nature of the positions to which African-Americans had been elected," JA 557, and the fact that "the percentage of black elected officials in covered jurisdictions still fell short of their total percentage of the population," JA 559 (citing *City of Rome*, 446 U.S. at 181). As to the nature of the positions occupied by minority officeholders, the district court was mistaken. H.R. Rep. No. 109-478 at 18 (2006) ("As of 2004, 43 African-Americans currently serve in the United States Congress …. At the State level, more than 482 African-Americans serve in State legislatures, with thousands more African-Americans serving in county, township, and other locally elected positions."). And, whatever may have been true when *City of Rome* was decided, the Supreme Court has since made clear that proportional representation is not a constitutional mandate. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004). The constitutionally relevant question is whether minority elected officials remain relegated to "relatively minor positions."

City of Rome, 446 U.S. at 180. The legislative record definitively proves the contrary. S. Rep. No. 109-295 at 9.

Statistical preclearance evidence, to the extent it is relevant, further confirms the absence of a widespread pattern of discrimination in the covered jurisdictions. Between 1982 and 2004, only 0.74% of all preclearance submissions resulted in an objection (752 of 101,440 submissions). S. Rep. No. 109-295 at 13. Even more significantly, the objection rate has been steadily declining. In 1982, the objection rate was 2.32% of all preclearance submissions. *Id*. By 2003, the rate had fallen to 0.17%, and the rates in 2004 and 2005 were 0.06% and 0.002%, respectively. *Id*. The only period that saw an uncharacteristic increase was the 1990s, and that is entirely explained by the fact that DOJ had adopted the policy (later rejected by the Supreme Court) that it would object to any proposed change that failed to maximize the number of majority-minority districts. *Supra* at 31. Those objections thus were not made because DOJ had identified evidence of intentional discrimination.

The district court found that the "decline in objection rates does not tell the full story, however," JA 560, given that DOJ "still objected to more than 700 proposed voting changes between 1982 and 2006" and that there had been more objections lodged "between 1982 and 2004 than between 1965 and 1982." JA 566. But these observations do not alter the picture. Those "more than 700" objections

were out of 101,440 submissions—an objection rate of 0.74%. H.R. Rep. No. 109-478 at 22. It is telling that so few of the submissions have been objectionable during the past 30 years. *Cf. Garrett*, 531 U.S. at 370. And the most recent evidence in the legislative record undermines the argument ever further. Between 2003 and 2006, DOJ objected to 13 preclearance submissions, including only one objection in each of the two years preceding Section 5's reauthorization. S. Rep. No. 109-295 at 13; H.R. Rep. No. 109-478 at 22. This evidence cannot justify preclearance of all voting changes. Indeed, even if all these objections prevented intentionally discriminatory voting changes, which is highly unlikely, Section 2 litigation clearly suffices to counteract that evil.

The comparison between the pre-1982 and post-1982 time periods also is inapt because "the two time-periods … are not equal in length." JA 560. Moreover, there were more than six times as many submissions between 1982 and 2004 (101,400) than between 1965 and 1982 (15,416). H.R. Rep. No. 109-478 at 22. For this reason, annual rates are a much more appropriate comparison, and they clearly show a precipitous decline in objections. And once legally flawed objections are taken into account, the objection rate approaches nil. Manipulation of the preclearance statistics cannot obscure the fact that DOJ objected to *one*

preclearance submission in each of the two years preceding Section 5's reauthorization.[7]

The district court also speculated that there were "many plausible explanations for the recent decline in objection rates, aside from the optimistic one urged by Shelby County." JA 562. According to the district court, it could be because objection rates are highest following redistricting cycles, JA 561, or because of the Supreme Court's decision in *Bossier Parrish II*, JA 562-63, or because of "under-enforcement" by DOJ, JA 563. That speculation is no more or less plausible than the reasons suggested by Shelby County and cannot meet the Supreme Court's demand for *evidence* of widespread discrimination under the *Boerne* framework.

The other statistical evidence on which the district court relied also does not show a pattern of widespread voting discrimination in the covered jurisdictions. For example, the district court was able to identify only a miniscule number of Section 2 cases resulting in a finding of intentional discrimination by a covered

[7] The district court also relied on a report that, between 1980 and 2000, DOJ lodged 234 objections "based *solely* on discriminatory intent." JA 565 (emphasis in original) (citation omitted). As noted above, however, DOJ's view that a voting change was made for intentionally discriminatory reasons is not the same thing as the change actually being made for such reasons. Indeed, 151 of these objections (approximately 65% of them) were lodged during the 1990s when DOJ followed its since-invalidated "black maximization" policy. The district court thus vastly overstates the number of objections based on discriminatory intent.

jurisdiction. Congress "'knew of a combined total of fourteen judicial findings of intentionally discriminatory or unconstitutional state action' by covered jurisdictions since 1982," which "'is not a great number of cases.'" JA 581-82 (quoting *Nw. Austin*, 573 F. Supp. 2d at 258). The district court found that these statistics are misleading "given the high number of Section 2 cases that settle or are resolved without a published opinion." JA 582. But the legislative record includes little evidence with respect to unreported Section 2 cases. Nor did the district court examine any such evidence, let alone determine whether (and how many of) these cases included allegations (let alone judicial findings) of intentional discrimination. Thus, reliance on this evidence is again speculative.

Because neither "first generation barriers" nor any of the statistical evidence showed a pattern of voting discrimination, the district court focused on particular instances of intentional discrimination. JA 98-100, 104-08. But these instances, however deplorable, do not compare to the pattern of violence, intimidation, and gamesmanship that led to the enactment of the Section 5 in 1965. *Nw. Austin*, 129 S. Ct. at 2521-23 (Thomas, J., concurring in the judgment in part and dissenting in part). Moreover, describing these incidents in great detail (sometimes the same incident more than once) does not make them statistically significant. "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." *Id.* at 2526.

The constitutionally relevant question is not whether there is *some* voting discrimination in the covered jurisdictions. It is whether the covered jurisdictions are engaging in the kind of gamesmanship that would make case-by-case litigation futile and thus make a prior restraint like Section 5 the only viable remedy. *Supra* at 19-23. The district court did not seek to demonstrate that *any* of the incidents described at length in the opinion fit that pattern. Nor could it. There is no evidence in the legislative record that any covered jurisdiction has engaged in "systematic resistance to the Fifteenth Amendment" by "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 328, 335. "The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute." *Nw. Austin*, 129 S. Ct. at 2526 (Thomas, J., concurring in the judgment in part and dissenting in part).

In the end, the district court paradoxically rested on the absence of evidence of voting discrimination as the proof that preclearance is needed for another 25 years. JA 598-601. At every turn, the district court assumed that the lack of evidence was the result of Section 5's alleged "deterrent" effect. *See, e.g.*, JA 497,

582, 604, 607-08, 613, 629-30. But there is no evidence in the legislative record suggesting that the 1965 discriminatory agenda of the covered jurisdictions existed has been in hibernation for two generations—the legislative record reflects that it no longer exists. Congress is not entitled to blindly assume that racial attitudes from 45 years ago persist today. Congress was required to produce a legislative record of a continuing pattern of voting discrimination to justify extension of a sweeping remedy like preclearance. It clearly did not.

C. Preclearance Lacks Congruence And Proportionality To the Evidence of Fifteenth Amendment Violations Documented In the 2006 Legislative Record.

Even if it were "possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States," *Garrett*, 531 U.S. at 372, preclearance "is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *Boerne*, 521 U.S. at 535. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id*. at 530 (citing *Katzenbach*, 383 U.S. at 308, 334). Section 5 is an "uncommon exercise of congressional power" that was considered constitutionally appropriate because of the "exceptional conditions" and "unique circumstances" that led to its enactment in 1965. *Katzenbach*, 383 U.S. at 334-35.

Because such conditions no longer exist, Congress failed to "justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 334; *Nw. Austin*, 129 S. Ct. 2525-27 (Thomas, J., concurring in the judgment in part and dissenting in part).

Like RFRA, Section 5's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions" regarding any change in voting laws. *Boerne*, 521 U.S. at 532. Moreover, there is no "reason to believe that many of the laws" subject to preclearance have a "significant likelihood of being unconstitutional." *Id*. And it is plainly insufficient that Section 5 "avoid[s] the difficulty of proving" that race-neutral voting laws have "the unconstitutional object" of interfering with the Fifteenth Amendment right to vote. *Id*. at 529. "In most cases, the state laws to which [Section 5] applies are not ones which will have been motivated by [voting discrimination.]" *Id*. at 534-35. Section 5 "cannot be considered remedial, preventive legislation, if those terms are to have any meaning." *Id*. The record compiled by Congress may be sufficient for *some* prophylactic remedy—such as Section 2—but it is woefully insufficient to impose a remedy as sweeping as Section 5. None of the district court's reasons for concluding otherwise have merit.

First, in the district court's view, the 2006 legislative record compares favorably to the 1975 legislative record that was sustained in *City of Rome*. JA

548-49, 602-03. But that is incorrect. The registration and turnout disparities that existed in 1975 have been eliminated. In Alabama and Louisiana, for example, the registration disparity dropped from 19.3% and 20.9% respectively in 1975 to .9% and 4.0% in 2006. S. Rep. No. 109-295 at 11; H.R. Rep. No. 94-196 (1975). And in Mississippi, the registration gap was 9.4% in 1975; by 2006, African-American registration *exceeded* white registration by 3.8%. *Id*. Also, there were dramatic changes in the number of minority elected officials. The number of African-American elected officials in the covered jurisdictions jumped from 963 to 3700—an increase of about 372%—between 1975 and 2006. S. Rep. No. 94-295 at 14; H.R. Rep. No. 109-478 at 18. In addition, there was a sharp decline in Section 5 objections. Between 1971 and 1974, DOJ's objection rate ranged from 3% to 4%. H. Rep. No. 94-196, at 8-9. Between 1982 and 2005, however, the objection rate dropped to 0.74%. *Supra* at 41. For all these reasons, the evidence before the Supreme Court in *City of Rome* was materially different from the evidence presented to Congress in 2006.

Ultimately, however, the decision in *City of Rome* did not turn on this circumstantial evidence of discrimination. Rather, the Court upheld Section 5 because it simply did not trust the changes suggested by the statistical evidence only a decade removed from Bloody Sunday. As the Court explained:

> Ten years later, Congress found that a 7-year extension of the Act was necessary to preserve the *'limited and fragile'* achievements of the

> Act and to promote further amelioration of voting discrimination. *When viewed in this light*, Congress's considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable.

City of Rome, 446 U.S. at 182 (emphasis added).

But constitutional justification can no longer be found in this high level of distrust. By any measure, the improvements in the covered jurisdictions are no longer limited and fragile. The legislative record includes no evidence that terminating the preclearance obligation of Section 5 would cause covered jurisdictions to again engage in a coordinated effort to deprive minorities of the right to vote. Reauthorization of Section 5 without such evidence amounts to a legislative conclusion that the citizens and elected officials of the covered jurisdictions have an incurable racial animus.

Second, the district court concluded that the legislative record compares favorably to those reviewed by the Supreme Court in *Hibbs* and *Lane*. JA 602-08. As an abstract matter, that is far from certain. But even if it does, the comparison ignores fundamental differences in the types of prophylactic remedies imposed by Congress under its enforcement authority. In *Hibbs* and *Lane*, the Court was assessing the congruence and proportionality of a remedy far less intrusive than preclearance. By imposing affirmative anti-discrimination obligations on state and local governments, Title II of the ADA and the FMLA followed in the path of

Sections 4(a) and 201 of the VRA, which directly outlawed discriminatory voting tests and devices. But Section 5 does not directly ban any discriminatory state law or practice. Rather, Section 5's preclearance obligation is a prophylaxis in a category all its own. *Nw. Austin*, 129 S. Ct. at 2511; *Bd. of Comm'rs of Sheffield*, 435 U.S. at 131 (Stevens, J., dissenting) ("[Section 5 is] one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a 'substantial departure … from ordinary concepts of our federal system'; its encroachment on state sovereignty is significant and undeniable.").

In the FMLA, for example, Congress prohibited employers, including state and local governments, from denying employees "12 work weeks of unpaid leave annually for any of several reasons, including the onset of a 'serious health condition' in an employee's spouse, child, or parent." *Hibbs*, 538 U.S. at 724 (quoting 29 U.S.C. § 2612(a)(1)(C)). But Congress did not suspend the right of state and local governments to make changes to their employee leave policies "until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 129 S. Ct. at 2511. Congress instead created a private right of action allowing individuals to seek both equitable relief and monetary damages for violations of the statute's anti-discrimination mandate.

Similarly, in Title II of the ADA, Congress created a private right of action for equitable relief and monetary damages to enforce the statute's ban on disability discrimination "in the provision or operation of public services, programs, or activities." *Lane*, 541 U.S. at 517. But Congress did not suspend the right of state and local governments to make physical changes to their public facilities until the blueprints and architectural drawings had been precleared by federal officials. This vast difference in the nature and breadth of the prophylactic remedies involved precludes reliance on *Hibbs* and *Lane*.

Third, the district court found significance in the number of hearings Congress held and the size of the legislative record. JA 609-10. But it was not the size of the record that was decisive in *Katzenbach*; it was the "reliable evidence of actual voting discrimination" that made the difference. 383 U.S. at 329. *Garrett* illustrates the point. The legislative record Congress assembled in support of Title I of the ADA included 17 hearings, 5 committee markups, 63 public forums across the country, 8,000 pages of transcripts, oral and written testimony by the Attorney General of the United States, Governors, State attorneys general, State legislators, and 300 examples of discrimination by State governments. 149 Cong. Rec. S5411, S5427 (daily ed. Apr. 28, 2003) (remarks of Sen. Tom Harkin); *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting) (describing the "vast legislative record"). Despite the voluminous record, the legislation exceeded Congress's enforcement authority

because Congress had "assembled only … minimal evidence of unconstitutional state discrimination in employment against the disabled." *Id*. at 370. The present case is no different. The legislative record does not contain evidence that covered jurisdictions continue to systematically deny minorities the right to vote or that they would reinitiate such a campaign in the absence of preclearance. Neither the size of the legislative record nor the number of hearings held by Congress can overcome this fatal defect.

Fourth, the district court relied on the fact that Congress was reauthorizing "legislation that had already been in effect for more than 40 years" because "that history was [not] irrelevant to the constitutional analysis." JA 610. But that is directly contrary to the Supreme Court's instructions. *Nw. Austin*, 129 S. Ct. at 2511 ("Past success alone … is not an adequate justification to retain the preclearance requirements); *id*. at 2525 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose."). Moreover, such reasoning would logically support reauthorization indefinitely, a result that cannot possible be squared with the Constitution or the purposes of remedial legislation. Section 5 can only be sustained by identifying "modern instances" of voting discrimination sufficiently widespread to make preclearance a congruent and proportional remedy. *Boerne*, 521 U.S. at 530.

Section 5 "imposes current burdens and must be justified by current needs." *Nw. Austin*, 129 S. Ct. at 2512.

Fifth, the district court found that limiting features of the preclearance regime made it congruent and proportional. In particular, the court focused on the 25-year extension and the bailout mechanism. JA 614-19. But neither can save Section 5. The 25-year extension makes the 2006 reauthorization far different than the 1975 reauthorization sustained in *City of Rome*. As noted above, that 7-year extension was seen as necessary to sustain the tenuous gains achieved in Section 5's first ten years of operation. In contrast, there is no evidence in the legislative record that retaining preclearance until 2031 achieves any testable objective. Indeed, Section 5's 25-year expiration date is meaningless if isolated instances of discrimination or the so-called "second generation barriers" provide a sufficient basis for upholding the preclearance obligation. The covered jurisdictions will remain in federal receivership forever if this is the standard they must meet to be freed of the preclearance obligation. And the bailout regime only works at the margins; it is incapable of solving the massive problems with Section 4(b)'s coverage formula—the issue to which it is relevant. *Infra* at 73.

Sixth, the district court concluded that Section 2 is "insufficient to protect minority voting rights" because it takes place after-the-fact, takes too long, places a financial burden on the plaintiff, and requires the plaintiff to prove discrimination

instead of forcing the covered jurisdiction to disprove it. JA 619. But the fact that Section 2 litigation shares the attributes of traditional civil litigation does not make case-by-case enforcement futile or Section 5 preclearance of all voting changes appropriate. There is simply no evidence of covered jurisdictions engaging in a coordinated campaign "of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Katzenbach*, 383 U.S. at 335. Section 5 is a constitutionally suspect remedy that is justifiable only as a last resort. *Id*. at 328; *Nw. Austin*, 129 S. Ct. at 2508-09.

Thus, absent evidence that the systematic disenfranchisement of minority voters that made case-by-case enforcement futile still exists, Congress's interest in the sheer efficiency of Section 5 is not a basis for upholding it. If it were, preclearance would be a constitutionally appropriate remedy irrespective of the level of evidence in the legislative record; Congress's reasons for preferring it would apply regardless of whether the legislative record demonstrated the existence of minimal or massive voting discrimination. Indeed, under the district court's theory, a preclearance requirement could be imposed to counteract any manner of Reconstruction Amendment constitutional violations. The Supreme Court has always justified Section 5 as a response to a problem that existed uniquely in the covered jurisdictions. *See, e.g.*, *Miller*, 515 U.S. at 925-26; *Beer*,

425 U.S. at140; *Katzenbach*, 383 U.S. at 335. Congress's preference for federal supervision of state and local voting practices cannot override the principles of federalism at the core of our constitutional regime.

Last, the district court inappropriately deferred to Congress's "predictive judgment" as to the need to reauthorize Section 5. JA 612-13. The courts must ensure that Congress does not use its enforcement authority to alter the substance of the Reconstruction Amendments. *Boerne*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."). Accordingly, the federal courts should not retreat from their "duty as the bulwar[k] of a limited constitution against legislative encroachments." *Nw. Austin*, 129 S. Ct. at 2513 (citation and quotations omitted). For if Congress can dictate the probative value of the evidence in the legislative record, "it is difficult to conceive of a principle that would limit congressional power." *Boerne*, 521 U.S. at 529.[8]

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[8] The district court also emphasized that reauthorization of Section 5 received "overwhelming" support in Congress. JA 18. But popularity has never been the measure of a law's fidelity to the Constitution. *See, e.g.*, *Boerne*, 521 U.S. at 511 (invalidating RFRA, which passed the House on voice vote and the Senate 97-3); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones Act of 1990, which passed the House 313-1 and the Senate on voice vote). While "it is the business of legislators and executives to be popular … it is the business of judges to be indifferent to unpopularity." *Republican Party of Minn. v. White*, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).

III. SECTION 4(B) OF THE VRA NO LONGER APPROPRIATELY ENFORCES THE FIFTEENTH AMENDMENT.

The district court concluded that Section 5's geographic scope was one of the statute's key limiting features. JA 620-21. But Section 4(b)'s coverage formula is the most blatantly unconstitutional aspect of the preclearance regime. The formula, unchanged since 1975, premises coverage on whether states and political subdivisions maintained prohibited tests or devices in 1964, 1968, and 1972, and whether those jurisdictions had low voter registration or turnout in those election cycles. 42 U.S.C. § 1973b(b). Even if the 2006 legislative record demonstrated the necessity of preclearance for some jurisdictions, Section 4(b)'s formula is no longer a congruent means of selecting those most likely to engage in unconstitutionally retrogressive behavior through 2031.

The "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." *Nw. Austin*, 129 S. Ct. at 2512. The district court concluded that the Supreme Court "did not explicate" the "showing needed" to make this determination. JA 622. But the Court could not have been clearer: Section 4(b)'s coverage formula is constitutionally problematic because it "is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions" in the covered jurisdictions and because "[t]he evil that § 5 is meant to address may no longer be

concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 129 S. Ct. at 2512. The Supreme Court expected the lower courts to squarely address those issues—not ignore them based on the mistaken conclusion that previous decisions had not required such an inquiry. JA 622-23. In this circuit, such "carefully considered" statements "'must be treated as authoritative.'" *Comcast*, 600 F.3d at 650 (citation and quotation omitted).

In any event, there is nothing novel about this inquiry. It is mandated by *Katzenbach*. There, the Court found the coverage formula constitutional only after reviewing the legislative record and concluding that the formula appropriately enforced the Fifteenth Amendment "*in both practice and theory*." 383 U.S. at 330 (emphasis added). That is presumably why two days after oral argument, the district court ordered the parties "to submit additional briefing" on "the following question: in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it 'rational in both practice and theory,' *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), for Congress to preserve the existing coverage formula in Section 4(b) of the Act?" JA 25-26. Thus, whether framed in these terms, or in the terms of *Northwest Austin*, the same two questions must be answered: (1) Does the formula's trigger for coverage correspond to the problem Congress is employing its enforcement authority to remedy? (2) Is the formula in fact capturing those jurisdictions where the problem Congress is remedying

uniquely exists such that the departure from the principle of equal sovereignty can be constitutionally justified? As explained below, the current coverage formula fails both tests.

A. Section 4(b)'s Coverage Formula Does Not Correlate To the Problem Congress Sought to Address When It Reauthorized Section 5 in 2006.

In *Katzenbach*, the Court found the formula constitutionally sound as a theoretical matter because its inputs—"the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average"—tied coverage to the specific problem to be addressed by the Fifteenth Amendment: the "widespread and persistent" use of intentionally discriminatory tactics to prevent minorities from voting. 383 U.S. at 330-31. Tying coverage to "the use of tests and devices for voter registration" was appropriate because "of their long history as a tool for perpetrating the evil"; tying it to low registration and voting rates was appropriate "for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Id*. at 330.

But the decades-old data coverage formula bears no relation whatsoever to current conditions. The discriminatory tests and devices targeted in Section 4(b) have been permanently banned for over 35 years, Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400 (codified at 42 U.S.C. § 1973aa),

and the rates of registration and voting in 1964, 1968, and 1972 clearly do not represent the "current political conditions" in the covered jurisdictions, *Nw. Austin*, 129 S. Ct. at 2512. The registration and turnout rates in 1964, 1968, and 1972 are only of historic interest. S. Rep. No. 109-295 at 26-27. There is not even a connection—let alone congruence and proportionality—between Congress's determination that certain jurisdictions are likely to engage in unconstitutionally retrogressive behavior from 2006 to 2031 and election data from 1964, 1968, and 1972. It cannot be constitutional to rely on decades-old voting data to establish current voting discrimination.

Moreover, the coverage formula suffers from another fundamental theoretical flaw. Although the statutory coverage factors are tied to the ability to cast a ballot, Congress did not reauthorize Section 5 based on evidence of interference with ballot access. Quite the opposite, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." VRARAA, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577, 577 (2006). The district court thus upheld the reauthorization by relying on the so-called "second generation barriers" that

Congress pointed to as evidence of current voting discrimination. *Id*. § 2(b)(2); *supra* at 25-37.

There is a serious mismatch between the conduct targeted by Congress and the factors that trigger coverage under Section 4(b). Vote dilution and the other "second generation" barriers that Congress relied on do not deny minorities access to the ballot box and thus do not "inevitably affect the number of actual voters." *Katzenbach*, 383 U.S. at 330. Dilutive techniques instead affect minority voting effectiveness. *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986); *Bossier Parrish II*, 528 U.S. at 334 n.3. It is simply not congruent to employ a formula that identifies long-past interference with the ability to cast a ballot in an effort to single out jurisdictions that uniquely employ electoral practices undermining the effectiveness of the ballot once cast. In other words, Section 4(b)'s statutory coverage triggers lack congruence to the "second generation" evidence that Congress relied on to purportedly identify the locus of current voting discrimination.

The district court conceded that "continued reliance on arguably outdated data is fair cause for concern" but nevertheless concluded that "Shelby County misses the point." JA 625. In the district court's view, "the specific election years that have come to be used as 'triggers' for coverage under Section 4(b) were never selected because of something special that occurred in those years; instead they

were chosen as mere proxies for identifying those jurisdictions with established histories of discriminating against racial and language minority voters." *Id*. (citation omitted). The district court found that preserving the "existing coverage formula … ensured that Section 4(b) would continue to focus on those jurisdictions with the worst historical records of voting discrimination." *Id*. This reasoning is severely flawed.

The district court's conclusion that Section 4(b) continues to capture the jurisdictions that Congress wishes it to capture is not a theoretical defense of the coverage formula—it is justification for why the formula could be rational in practice. *Infra* at 62-73. But the Supreme Court made clear that the coverage formula must be rational "*in both practice and theory*." *Katzenbach*, 383 U.S. at 330 (emphasis added), and contrary to the district court's assertion, the fact that the formula was rational in theory was essential to the judgment, *supra* at 58. Indeed, the district court seemingly understood this when, in asking for supplemental briefing, it encouraged the parties "to address each aspect of the question separately—that is, to explain both why Section 4(b) is or is not rational 'in practice' and why Section 4(b) is or is not rational 'in theory.'" JA 25-26. The absence of *any* reason why the coverage formula is theoretically appropriate is constitutionally fatal.

B. Section 4(b)'s Formula No Longer Singles Out For Coverage Jurisdictions Uniquely Interfering With the Right Congress Is Seeking To Protect Through Preclearance.

In *Katzenbach*, the Court found the coverage formula constitutionally sound in practice because it accurately captured those jurisdictions where there was "reliable evidence of actual voting discrimination." 383 U.S. at 329. The formula accurately captured those jurisdictions that had "misuse[d] … tests and devices" as "this was the evil for which the new remedies were specifically designed." *Katzenbach*, 383 U.S. at 331. As the Court explained, that "no States or political subdivisions [were] exempted from coverage under § 4(b) in which the record reveal[ed] recent racial discrimination involving tests and devices … confirm[ed] the rationality of the formula." *Id*.

By 2006, however, the tests and devices had been permanently banned and the measurable indicators of voting interference no longer indicated a problem that could be attributable to unconstitutional conduct: "[T]he racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide." *Nw. Austin*, 129 S. Ct. at 2512. In fact, if Congress had sought to impose preclearance based on voting data from the 1996, 2000, and 2004 presidential elections, Hawaii would have been the only covered State. 151 Cong. Rec. H5131, H5181 (daily ed. July 13, 2006). In other words, "there is considerable evidence that [the coverage formula] fails to account for current

political conditions." *Nw. Austin*, 129 S. Ct. at 2512. For this reason alone, the "disparate geographic coverage" of Section 4(b) is not "sufficiently related to the problem that it targets." *Id.*

Moreover, the "evil § 5 is meant to address" is no longer "concentrated in the jurisdictions singled out for coverage." *Id.* Congress was alerted that "identify[ing] continuing problems in the covered jurisdictions, such as racially polarized voting, in complete isolation from consideration of whether similar problems exist in non-covered sites" was constitutionally problematic. *The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d. Sess., at 200 (May 16, 2006) ("Continuing Need for Section 5 Preclearance") (testimony of Pildes). But the issue was never "addressed in any detail in the [Senate] hearings or in the House" and "little evidence in the [legislative] record examines whether systematic differences exist between the currently covered and non-covered jurisdictions." *Id.* at 200-01. It thus is unsurprising that Congress made no finding of a meaningfully greater incidence of "second generation barriers" in the covered jurisdictions. VRARAA, § 2(b)(4), 120 Stat. at 577. Congress cannot rationally exercise its enforcement authority if it does not even seriously study whether the "statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 129 S. Ct. at 2512.

Had Congress studied the issue, it would have learned that there are not any "systematic differences between the covered and the non-covered areas of the United States[;] … in fact, the evidence that is in the record suggests that there is more similarity than difference." Continuing Need for Section 5 Preclearance at 10 (testimony of Pildes) (quoted in *Nw. Austin*, 129 S. Ct. at 2512). The Section 2 and racially polarized voting statistics in the legislative record—the only "second generation barriers" that can plausibly bear on this question—confirm the obsolescence of the coverage formula.[9]

The legislative record disclosed more Section 2 lawsuits filed, as well as more Section 2 suits that resulted in findings of intentional discrimination, in non-covered jurisdictions than in covered jurisdictions. *See* VRI Master List. The Katz Study found 21 reported Section 2 lawsuits that resulted in findings of intentional discrimination in noncovered jurisdictions compared with only 12 in covered jurisdictions; the Katz Study also found 171 Section 2 suits filed in non-covered jurisdictions compared with only 160 in covered jurisdictions. *Id.*[10] Moreover, of

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[9] Section 5 preclearance actions and statistics provide no basis for a comparative analysis of covered and noncovered States for the obvious reason that non-covered jurisdictions are not subject to preclearance.

[10] *See also* Continuing Need for Section 5 Preclearance at 202 ("[T]hese [Section 2] violations are not overwhelmingly or systematically concentrated in Section 5 areas; [the Katz] report itself documents that these violations arise in many places with significant minority populations…. Since 1990, for example, there are as many judicial findings of Section 2 violations in Pennsylvania as in

the 105 instances of racially polarized voting since 1982 identified in the Katz Study, only 52 were in covered jurisdictions. *Id.*[11] At bottom, the aggregated statistics do not show more Section 2 litigation or racially polarized voting in the covered jurisdictions, let alone that such "second generation barriers" are concentrated in the jurisdictions selected for coverage.

A state-by-state comparison of Section 2 and racially polarized voting statistics confirms the irrationality of using Section 4(b)'s formula to address "second generation barriers." The Katz Study demonstrates that Congress did not single out the correct States for coverage. This is true whether one considers the

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South Carolina—and more in New York.") (testimony of Pildes); Introduction to the Expiring Provisions at 30 (May 9, 2006) ("If you look at the history of recent Section 2 litigation under the Voting Rights Act, one sees Section 2 moving more and more to areas where you have recent immigrants coming into the country, and those tend to be as likely as not, as best I can tell, places that are not under covered jurisdictions, places like Lawrence, Massachusetts, some of the smaller towns of Pennsylvania.") (testimony of Issacharoff); 151 Cong. Rec. H5182 (daily ed. July 13, 2006).

[11] *See also* Introduction to the Expiring Provisions at 29 ("[T]here are significant problems, racially polarized voting and other problems that exist across the Nation and not just in the covered jurisdictions.") (testimony of Hasen); 151 Cong. Rec. H5180 (daily ed. July 13, 2006) ("The scope of racially polarized voting is not confined to the Section 5 states or to the South, but indeed occurs in places such as Wisconsin."); *Voting Rights Act: Section 5 of the Voting Rights Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess., at 3272 (Oct. 25, 2005) ("[R]acial discrimination exists across New England in the electoral systems for local and state government. Voting patterns are racially polarized, and black voters do not have an equal opportunity to elect representatives of their choice.") (statement of Walton).

total number of Section 2 lawsuits filed or any subset thereof. For example, of the States with the highest number of Section 2 lawsuits filed since 1982, the nine covered States make up only 5 of the top 10, 6 of the top 14, and 7 of the top 26. *See* VRI Database Master List. In fact, New York had more Section 2 lawsuits filed since 1982 than all but two covered States. *Id*. Notably, one covered State (Alaska) did not have a single reported Section 2 suit filed during the entire period covered by the legislative record. *Id*. Thus, if reported Section 2 suits were a proper basis for coverage, the inclusion of Alaska would require inclusion of every State in the nation.

Similarly, of the States with adjudicated Section 2 violations, covered States make up only 5 of the top 10, 6 of the top 18, and 7 of all 25. *Id*. In particular, Illinois had more Section 2 violations than five of the covered States. *Id*. Moreover, only 4 of the 20 States with Section 2 lawsuits that resulted in findings of intentional discrimination are covered States. *Id*. And, of the 6 States with more than one finding of intentional discrimination, only 2 were covered States. *Id*. In fact, Illinois and Tennessee each had more Section 2 lawsuits that resulted in findings of intentional discrimination than all but two covered States. And, of the States with Section 2 suits with "outcomes favorable to minority voters," JA 627, covered States make up only 4 of the top 8, 5 of the top 11, and 7 of all 30. *Id*. In

fact, Illinois and New York also had more "outcomes favorable to minority voters" than 5 covered States. *Id*.

The outcome is the same for racially polarized voting. Of the 105 instances of racially polarized voting, only 48 occurred in covered States. *Supra* at 65. Among those 105 instances, only 4 of the 10 States with the highest number of instances of racially polarized voting are covered. *Id*. New York, Tennessee, and Illinois each had more instances of racially polarized voting than five of the nine covered States. *Id*. And, two covered States (Arizona and Alaska) did not have a single reported suit with a finding of racially polarized voting. *Id*. Finally, of the 16 instances of racially polarized voting identified by the Katz Study as having occurred in the 2000s, only 5 (or 31%) occurred in covered States. *Id*. Put simply, "[t]here is a lot of paper, but not many facts or statistics to show why Georgia is different from Tennessee or why Texas is different from Oklahoma or why racially polarized voting in Wisconsin shouldn't be addressed with a remedy such as [Section 5]." 151 Cong. Rec. H5182 (daily ed. July 13, 2006) (remarks of Rep. Westmoreland).

The district court concluded that covered versus non-covered analysis was largely beside the point because of the coverage formula's "link to jurisdictions with proven histories of racial discrimination in voting." JA 146. In the district court's view, the formula remained appropriate because evidence showing

"contemporary voting discrimination by the very same jurisdictions that had histories of unconstitutional conducted … justified their continued coverage under the Act." JA 627. In other words, the coverage formula was constitutional simply because there was some contemporary evidence of voting discrimination in the jurisdictions that had engaged in discriminatory practices before 1964 irrespective of whether the same kind of evidence pervaded non-covered jurisdictions.

This reasoning is unsustainable. The Supreme Court was clear: because Section 5's "current burdens" must be justified by "current needs," Section 4(b)'s "disparate geographic coverage" formula demands a comparison of covered and non-covered jurisdictions to ensure that the "evil § 5 is meant to address" is "concentrated in the jurisdictions singled out for coverage." *Nw. Austin*, 129 S. Ct. at 2512. Thus, the relevant question is not whether the covered jurisdictions were appropriately targeted by Congress in 1965, or whether there are "second generation barriers" to voting in some of the covered jurisdictions. Preclearance was "appropriate" enforcement legislation only because of the "unique circumstances" that existed in the covered jurisdictions in 1965. *Katzenbach*, 383 U.S. at 334. For the coverage formula to remain constitutional through 2031, then, the 2006 legislative record must demonstrate that the nature and scope of voting discrimination in the covered jurisdictions *remains unique*. Accordingly, Section 4(b)'s "departure from the fundamental principle of equal sovereignty," *Nw.*

Austin, 129 S. Ct. at 2512, requires a careful analysis of "second generation barriers" to ensure Congress has afforded each State the sovereign dignity to which it is entitled.

The district court concluded that Congress's rejection of the Norwood Amendment, which would have updated the formula to use more current election data as a basis for coverage, demonstrates that Congress was focused on those jurisdictions that had "applied discriminatory voting tests" before they were permanently banned in 1975 because it wanted to keep those "jurisdictions with the most serious histories of discrimination under Federal scrutiny." JA 626 (citation and quotations omitted). The court was correct, but misapprehended the significance of its observation. There is no question that Congress focused its attention on those jurisdictions that were historically covered. JA 629 (acknowledging that "the legislative record is primarily focused on the persistence of voting in covered jurisdictions—rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions"). But *Northwest Austin* made clear that doing so was constitutionally inappropriate and instructed the lower courts to examine the legislative record to determine whether there was sufficient evidence of a disparity between covered and non-covered jurisdictions to justify this narrow focus.

Despite the question's importance, the opinion devoted barely more than 2 of the 151 pages to it. JA 627-29. "To the extent that an additional showing of a meaningful difference in voting discrimination between covered and non-covered jurisdictions was nonetheless required," the court concluded "the legislative record does contain such evidence." JA 627. To substantiate this assertion, the district court pointed to the Katz Study's conclusion that "64 of the 114 reported Section 2 cases with outcomes favorable to minority voters were filed in covered jurisdictions." *Id*. (citation omitted).

As previously explained, however, calling these cases "outcomes favorable to minority voters" is a highly questionable characterization of the evidence. *Supra* at 35. In any event, aggregated statistics showing slightly more Section 2 litigation with "favorable outcomes" in covered jurisdictions as a group is not a rational basis for subjecting individually-targeted States to another 25 years of preclearance. Such a narrow covered-versus-non-covered split cannot possibly provide a legitimate basis for "depart[ing] from the fundamental principle of equal sovereignty," *Nw. Austin*, 129 S. Ct. at 2512, especially given that the National Commission on the Voting Rights Act acknowledges that a "significant" number of Section 2 cases "resolved favorably to plaintiffs" occurred in non-covered jurisdictions, Evidence of Continued Need at 208. To subject a State to preclearance through 2031, it must have a record of voting discrimination

obviously distinguishable from non-covered States. The "favorable outcome" statistics do not come close to meeting this standard.

The district court also incorrectly relied on "evidence in the legislative record indicating that five of the six Deep South states originally covered by Section 5 … accounted for as many as 66% of all federal observers since 1982." JA 588. As the district court was well aware, before 2006, DOJ had the authority to send observers *only to covered jurisdictions or non-covered jurisdictions that were subject to coverage by a federal court order under Section 3 of the VRA.* JA 588 n.13; 42 U.S.C. § 1973f; 42 U.S.C. § 1973d (repealed in 2006, VRARAA, § 3, 120 Stat. at 580). Federal observer data thus may be useful in comparing covered jurisdictions or perhaps in identifying noncovered jurisdictions with the most flagrant instances of voting discrimination. But it is not useful in determining where "second generation barriers" are most prevalent.[12] The district court also

[12] Regardless, federal observer statistics only underscore the irrationality of the coverage formula. Evidence of Continued Need at 181 ("The more recent pattern of coverages among the states is somewhat different from patterns in previous maps … Map 10B shows a fairly high number in New Mexico, a state not covered by Section 5 but rather by Section 203 … On the other hand, there were relatively few in Texas."); *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program: Hearing Before the House Subcomm. on the Constitution of the Comm. on the Judiciary*, 109th Cong., 1st Sess., at 196 (Nov. 15, 2005) ("[T]he great bulk of our recent enforcement cases since, say, 1993, have involved jurisdictions (e.g., Massachusetts, California, New York, New Jersey, Florida, Washington, and Pennsylvania) where there is no statutory authority to send Federal observers.") (statement of Schlozman).

concluded that "racially polarized voting is much more pronounced in covered than in non-covered jurisdictions." JA 628. That is demonstrably incorrect. As noted above, of the 105 instances of racially polarized voting since 1982 identified in the Katz Study, only 52 were in covered jurisdictions. In addition, the district court referenced more "racial appeals" in elections held in covered jurisdictions. JA 628. But the campaign strategies of candidates for office are not a proxy for state-sponsored intentional discrimination.

At base, many (if not most) of the nine covered States would not have been covered had Congress chosen to individually identify those States with the highest incidence of "second generation barriers." But States like New York, Illinois, and Tennessee clearly would have been on that hypothetical coverage list. If Congress genuinely considered Section 2 litigation and racially polarized voting legitimate barometers for whether a State should be subject to preclearance until 2031, it would not have retained this defective formula, and it certainly would not have targeted these nine States for coverage. It simply was not rational in practice to impose preclearance on the covered jurisdictions through 2031 based on voting statistics from 1964, 1968, and 1972.

Finally, the district court concluded that the VRA's bailout provision saves the otherwise ill-fitting formula. JA 627. But bailout can no more solve the formula's severe overinclusiveness than the bail-in or "pocket trigger" provision

can solve the formula's severe underinclusiveness. Both can at best ameliorate defects in the coverage formula at the margins. By the district court's logic, Congress could dispense entirely with its obligation to build a legislative record upon which to tailor its exercise of enforcement authority and randomly select jurisdictions for coverage, but then immunize such random selection from constitutional scrutiny through bailout. This cannot be the law. The "fundamental principle" of "equal sovereignty" is surely more than a mere platitude. *Nw. Austin*, 129 S. Ct. at 2512. Bailout and bail-in cannot relieve Congress of its duty to demonstrate that Section 4(b)'s "disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*[13]

CONCLUSION

For the foregoing reasons, Shelby County respectfully requests that the Court reverse the decision below and declare Section 5 and Section 4(b) of the VRA unconstitutional.

[13] In any event, to the extent the bail-in effectively targets jurisdictions that should be covered, it actually undermines the constitutionality of Section 4(b) because it constitutes a narrower, and more appropriate, means of imposing preclearance. Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation & Dynamic Preclearance*, 119 Yale L. J. 1992, 2024 (2010) ("The pocket trigger is more likely to survive the congruence and proportionality test because it replaces an outdated coverage formula with a perfectly tailored coverage mechanism—a constitutional trigger.").

Respectfully submitted,

By: /s/ Bert W. Rein

Frank C. Ellis
WALLACE, ELLIS, FOWLER & HEAD
113 North Main Street
Columbiana, AL 35051
TEL: (205) 669-6783

Bert W. Rein*
William S. Consovoy
Thomas R. McCarthy
Brendan J. Morrissey
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
TEL: (202) 719-7000
E-MAIL: brein@wileyrein.com

Dated: November 1, 2011

* *Counsel of Record*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief is in compliance with the type-volume limitations of the Federal Rules of Appellate Procedure and the D.C. Circuit Rules because the Court on November 1, 2011 granted Shelby County's motion for an expansion of the word limits to 17,500 words for Shelby County's principal brief, and this brief contains 17,288 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), as counted using the word-count function on the 2003 version of Microsoft Word.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2003 version of Microsoft Word in 14 point Times New Roman.

Dated: November 1, 2011 /s/ Bert W. Rein

Bert W. Rein
Lead Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2011, I electronically filed the original of the foregoing document with the Clerk of this Court by using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

Robert Evans Kopp
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Email: robert.kopp@usdoj.gov

Linda Frances Thome
U.S. Department of Justice
(DOJ) Civil Rights Division, Appellate Section
PO Box 14403, Ben Franklin Station
Washington, DC 20044-4403
Email: linda.thome@usdoj.gov

Diana Katherine Flynn
U.S. Department of Justice
(DOJ) Civil Rights Division, Appellate Section
PO Box 14403, Ben Franklin Station
Washington, DC 20044-4403
Email: Diana.K.Flynn@usdoj.gov

Kristen Clarke
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson Street
16th Floor
New York, NY 10013
Email: kclarke@naacpldf.org

John Adolphus Payton
NAACP Legal Defense & Educational Fund, Inc.

99 Hudson Street
16th Floor
New York, NY 10013
Email: jpayton@naacpldf.org

Arthur Barry Spitzer
American Civil Liberties Union of the National Capital Area
1400 20th Street, NW
Suite 119
Washington, DC 20036-5920
Email: artspitzer@aol.com

Jon Marshall Greenbaum
Lawyers Committee for Civil Rights
1401 New York Avenue, NW
Suite 400
Washington, DC 20005-0000
Email: jgreenbaum@lawyerscommittee.org

John Michael Nonna
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, NY 10019-6092
Email: jnonna@dl.com

Steven J. Lechner
Mountain States Legal Founation
2596 South Lewis Way
Lakewood, CO 80227-2705
Email: lechner@mountainstateslegal.com

Deborah Nicole Archer
New York Law School
185 West Broadway
New York, NY 10013
Email: darcher@nyls.edu

I further certify that within the next two business days eight copies of the foregoing document will be filed with the Clerk of this Court by hand delivery.

Dated: November 1, 2011 /s/ Bert W. Rein

Bert W. Rein
Lead Counsel for Appellant

ADDENDUM

REPRODUCED AUTHORITIES

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42 U.S.C. § 1973b(b)

§ 1973b(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973f or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

42 U.S.C.A. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such

qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.