ORAL ARGUMENT SCHEDULED JANUARY 19, 2012

11-5256

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

_____

SHELBY COUNTY, ALABAMA,

Plaintiff-Appellant

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, et al.,

Defendants-Appellees

_____

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

_____

BRIEF FOR THE ATTORNEY GENERAL AS APPELLEE

_____

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Attorney General, as appellee, certifies that:

1. Parties

All parties, intervenors, and amici appearing before the district court are listed in the Appellant's Brief. In addition to the amici identified by Appellant, the Constitutional Accountability Center has filed a Notice of Consent to file a brief as amicus curiae in this Court.

2. Rulings Under Review

Reference to the rulings at issue appears in the Appellant's Brief.

3. Related Cases

This case has not previously been before this Court or any other court. All related cases are listed in the Appellant's Brief.

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GLOSSARY

FMLA –Family Medical Leave Act

J.A. – Joint Appendix

LULAC –League of United Latin American Citizens

RFRA – Religious Freedom Restoration Act

VRA – Voting Rights Act

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the 2006 Reauthorization of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, is appropriate legislation to enforce the Fourteenth and Fifteenth Amendments.

2. Whether Congress's decision in 2006 to continue covering the same jurisdictions under Section 5 was an appropriate exercise of its authority to enforce the Fourteenth and Fifteenth Amendments.

STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum to Appellant's Brief.

STATEMENT OF THE CASE

This is a facial challenge to the constitutionality of the 2006 Reauthorization of Sections 4(b) and 5 of the Voting Rights Act (VRA). 42 U.S.C. 1973b(b), 1973c; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§4-5, 120 Stat. 577-581 (2006 Reauthorization). On cross-motions for summary judgment, the district court granted judgment to the Attorney General and the defendant-intervenors, ruling that both provisions are appropriate legislation to enforce the prohibitions on voting discrimination in the Fourteenth and Fifteenth Amendments. Joint Appendix (J.A.) 481-632.

A. The Voting Rights Act

Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965 Act), "to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966).

1. The Fifteenth Amendment, which prohibits racial discrimination in voting, was ratified in 1870. *South Carolina*, 383 U.S. at 310. "The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2508 (2009) (*Northwest Austin II*). Initial federal enforcement of the Amendment was short-lived, and in 1894, most of the federal enforcement provisions were repealed. *South Carolina*, 383 U.S. at 310. Beginning in 1890, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began systematically disenfranchising black citizens by adopting literacy tests applicable to black citizens, while using devices such as the grandfather clause, property qualifications, and good character tests to enable illiterate whites to vote. *Id.* at 310-311. Before and during this process of disenfranchisement, jurisdictions throughout the South used dilutive devices to minimize the effectiveness of the votes cast by black citizens who remained eligible to register and vote. J.A. 485-486.

Federal voting rights legislation enacted in 1957, 1960, and 1964 did "little to cure the problem." *South Carolina*, 383 U.S. at 313. Voting rights litigation was "unusually onerous" and "exceedingly slow." *Id*. at 324. Even when litigation was successful, voting officials "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or "defied and evaded court orders." *Ibid*.

2. In 1965, after nearly a century of widespread deprivation of minority voting rights in the South, Congress enacted the VRA to address the deficiencies in earlier voting rights legislation. *South Carolina*, 383 U.S. at 309.

Section 5 of the VRA provided that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain administrative preclearance from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 1965 Act, §5, 79 Stat. 439. In either case, preclearance could be granted only if the jurisdiction demonstrated that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.*

Rather than identifying by name the jurisdictions that would be subject to Section 5, Congress described them in objective terms in Section 4(b) as those

jurisdictions that: (1) maintained a prohibited test or device on November 1, 1964; and (2) had registration or turnout rates below 50% of the voting age population in November 1964. 1965 Act, §4(b), 79 Stat. 438. These criteria encompassed Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and 39 counties in North Carolina. 28 C.F.R. Pt. 51 App. The VRA also included a "bail-in" provision, under which a jurisdiction found to have violated the voting guarantees of the Fourteenth or Fifteenth Amendment could be subjected to preclearance requirements, and a "bailout" provision, under which a jurisdiction could terminate coverage by showing it had not discriminated. 1965 Act, §§3(c), 4(a), 79 Stat. 437-438.

The Supreme Court upheld the constitutionality of Sections 4(b) and 5 in *South Carolina*, 383 U.S. at 323-337, finding that these and other temporary provisions of the Act were valid exercises of Congress's authority under Section 2 of the Fifteenth Amendment.

3. Congress reauthorized Section 5 in 1970 for five years, in 1975 for seven years, and in 1982 for 25 years. J.A. 494; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (1970 Reauthorization); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975 Reauthorization); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982 Reauthorization).

The 1970 Reauthorization amended Section 4(b) to include jurisdictions that maintained a prohibited test or device on November 1, 1968, and had voter registration or turnout of less than 50% of eligible residents in the presidential election of 1968. Tit. I, 84 Stat. 315. The 1975 Reauthorization amended Section 4(b) to include jurisdictions that maintained a prohibited test or device on November 1, 1972, and had voter registration or turnout of less than 50% of voting age residents in the presidential election of 1972. Tit. II, 89 Stat. 401. The 1975 Reauthorization also expanded the definition of "test or device" to include a practice of providing voting materials only in English in jurisdictions in which at least 5% of the voting age population were members of a single-language minority. Tit. II, 89 Stat. 401-402; see 40 Fed. Reg. 43,746 (Sept. 23, 1975).

The Supreme Court reaffirmed the constitutionality of Section 5 after each reauthorization. *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *City of Rome* v. *United States*, 446 U.S. 156, 172-182 (1980); *Lopez* v. *Monterey Cnty*., 525 U.S. 266, 282-285 (1999).

4. In 2006, Congress reauthorized Section 5 for 25 years. Congress made statutory findings that, while "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters * * * as a direct result of the Voting Rights Act, * * * vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority

voters from fully participating in the electoral process." 2006 Reauthorization, §2(b)(1) & (2), 120 Stat. 577. Congress further found that "continued evidence of racially polarized voting" in the covered jurisdictions "demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection" of the VRA; that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment"; and that "without the continuation of the [VRA] protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years. *Id*. §2(b)(3), (7), (9), 120 Stat. 577-578.

The constitutionality of the 2006 Reauthorization was upheld in *Northwest Austin Municipal Utility District Number One* v. *Mukasey*, 573 F. Supp. 2d 221, 235-283 (D.D.C. 2008) (*Northwest Austin I*). That judgment was reversed by the Supreme Court, which resolved the case on statutory grounds and did not reach the constitutional question. *Northwest Austin II*, 129 S. Ct. at 2508, 2513-2517.

B. Plaintiff

Plaintiff Shelby County has been subject to Section 5 since 1965, when the State of Alabama was designated for coverage. J.A. 69-70.

Shelby County and subjurisdictions within its territory, including the City of Calera, were defendants in statewide litigation under Section 2 of the VRA filed in the late 1980's. J.A. 71. *Dillard* v. *Crenshaw County*, 640 F. Supp. 1347, 1356-1360 (M.D. Ala. 1986), found that the Alabama legislature had intentionally discriminated against African-American voters by authorizing counties to switch from single-member districts to at-large voting, prohibiting single-shot voting in at-large elections, and requiring numbered posts in at-large elections. In 1990, both Shelby County and Calera resolved the claims against them in the *Dillard* litigation through consent decrees providing for elections from single-member districts. J.A. 72. In 2007, both cases were dismissed after Alabama enacted legislation authorizing the voting changes. *Ibid.*

Less than a year later, Calera adopted a redistricting plan that eliminated the only majority-black, single-member district in the City, a district it had adopted pursuant to its consent decree in *Dillard*. J.A. 72-73. Calera submitted the redistricting plan for Section 5 review in March 2008, along with 177 annexations made between 1995 and 2007, but not previously submitted. *Ibid.* The Attorney General objected to the changes in August 2008. J.A. 72-73, 125-127.

Despite the Attorney General's objection, Calera conducted an election in August and a run-off election in October 2008, using the unprecleared voting changes, and resulting in the defeat of the lone African-American member of the

City Council. J.A. 73-74. The United States brought a Section 5 enforcement action against Calera, and the dispute was temporarily resolved through a consent decree that provided for an interim change in the method of election, pending the results of the 2010 Census, and for a new special election. *Ibid.*

C. Proceedings Below

Shelby County brought this facial challenge to the constitutionality of the 2006 Reauthorization of Sections 4(b) and 5. J.A. 29-49. On cross-motions for summary judgment, the district court entered judgment for the Attorney General and defendant-intervenors, ruling that both provisions are appropriate legislation to enforce the Fourteenth and Fifteenth Amendments. J.A. 481-632.

1. The district court first ruled that the 2006 Reauthorization could be upheld only if it was a congruent and proportional legislative response to unconstitutional voting discrimination. J.A. 519-545. Although recognizing that the Supreme Court previously had subjected the VRA to rational basis review, the district court rejected the notion that the rational basis review applied by the Court in *South Carolina*, 383 U.S. at 324; *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656 (1966); and *Rome*, 446 U.S. at 175-177, was a distinct standard from the congruence and proportionality review articulated in *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). J.A. 519-522, 524-530. Rather, the district court concluded, *Boerne* had "merely explicated and refined the one standard of review that has

always been employed to assess legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments." J.A. 521; see J.A. 522.

2. In applying congruence and proportionality analysis, the district court first "identif[ied] * * * the scope of the constitutional right at issue." J.A. 545 (quoting *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5, the district court explained, protects a fundamental right – the right to vote – and prohibits discrimination on the basis of race – a suspect classification. J.A. 546. Thus, Congress was acting at the height of its powers to enforce the Fourteenth and Fifteenth Amendments when it enacted the 2006 Reauthorization, and it was "'easier for Congress to show a pattern of state constitutional violations' * * * since 'racial classifications and restrictions on the right to vote * * * are presumptively invalid.'" J.A. 546 (quoting *Northwest Austin I*, 573 F. Supp. 2d at 270).

The court next concluded that Congress had identified sufficient evidence of unconstitutional voting discrimination to justify the 2006 Reauthorization. J.A. 547-621. The district court found evidence of the continued need for Section 5 in the continued disparities between white and minority voter registration and turnout rates in the covered jurisdictions, and the continued underrepresentation of minorities in elected positions in those jurisdictions, particularly in statewide offices, J.A. 552-559, both factors considered by the Supreme Court in *Rome*, J.A.

552. The district court also found evidence of voting discrimination, including intentional discrimination, by the covered jurisdictions in the number and type of Section 5 objections interposed by the Attorney General, J.A. 559-571; the responses of submitting jurisdictions to the Attorney General's requests for more information, J.A. 571-573; the number of unsuccessful actions brought by covered jurisdictions seeking judicial preclearance of proposed voting changes, J.A. 573-577; the number and nature of successful enforcement actions brought to require recalcitrant jurisdictions to submit proposed voting changes, J.A. 577-581; successful litigation under Section 2 of the Voting Rights Act in the covered jurisdictions, J.A. 581-588; the dispatch of federal observers to monitor elections in covered jurisdictions, J.A. 588-592; evidence of racially-polarized voting and vote-dilution techniques in the covered jurisdictions, J.A. 592-598; and evidence that Section 5 deters voting discrimination by covered jurisdictions, J.A. 598-601.

SUMMARY OF ARGUMENT

Sections 4(b) and 5 of the VRA are subject to rational basis review. Both provisions operate at the intersection of a citizen's most fundamental right and the most constitutionally invidious form of discrimination. The Supreme Court consistently has applied rationality review to all legislation enacted to enforce the prohibitions on race discrimination of the Thirteenth, Fourteenth, and Fifteenth Amendments. The Court's application of congruence and proportionality analysis

outside this context provides no occasion to overturn the Court's consistent application of rationality review to Section 5 in the past.

The 2006 Reauthorization of Section 5 must be upheld even under congruence and proportionality review. Section 5 protects the right to be free from voting discrimination based on race or national origin guaranteed by the Fourteenth and Fifteenth Amendments. Because such discrimination is presumptively unconstitutional, it was easier for Congress to identify a pattern of unconstitutional voting discrimination in the covered jurisdictions. Moreover, Congress's judgment that Section 5 preclearance remains necessary is entitled to deference because its authority is "enhanced" when it exercises its enforcement authority under these Amendments to prohibit race discrimination in voting. *Oregon* v. *Mitchell*, 400 U.S. 112, 129 (1970) (Black, J.).

Congress found that Section 5 preclearance remains necessary to protect minority voting rights in the covered jurisdictions. This finding was supported by ample evidence of voting discrimination, including intentional discrimination, documented in Congress's detailed review of Section 5 enforcement since 1982, Section 2 litigation, federal-observer coverage, evidence of vote dilution and racially-polarized voting, continued disparities in registration and turnout data as well as numbers of minority elected officials, and evidence that Section 5 deters voting discrimination by the covered jurisdictions. In identifying a pattern of

discrimination, Congress was not limited to evidence of gamesmanship and strategies designed to deny minority citizens the right to register and vote. Covered jurisdictions began to use dilutive techniques to limit the effectiveness of minority voters soon after Reconstruction and continued to use these techniques throughout the 20th Century, including after the enactment of the VRA. Section 5 was appropriately designed to combat vote dilution from its initial enactment, and the continued existence of vote dilution is highly relevant evidence of a continuing pattern of discrimination.

The 2006 Reauthorization of Section 5 is a congruent and proportional legislative response to this continuing pattern of voting discrimination in the covered jurisdictions. The Supreme Court previously upheld the preclearance requirement, while acknowledging its federalism costs, and has held out Section 5 as an example of congruent and proportional legislation. Further, Section 5 is limited in important ways. It applies only to laws relating to voting, and only in jurisdictions with the worst records of discrimination. It will expire after 25 years. And it includes provisions to cure any over- or underinclusiveness in the coverage provisions.

Section 4(b) is congruent and proportional legislation to enforce the Fourteenth and Fifteenth Amendments for three reasons. First, it describes the jurisdictions with the worst historical records of discrimination. Second, the

evidence before Congress established both that Section 5 preclearance remained necessary in the covered jurisdictions, and that voting discrimination was more prevalent in the covered jurisdictions than elsewhere. Third, courts and covered jurisdictions may fine-tune the scope of Section 5's coverage to account for changing circumstances by relying on the bail-in and bailout provisions in Sections 3(c) and 4(a). Thus, the list of jurisdictions subject to preclearance is not static, and covered jurisdictions do not remain subject to Section 5 merely on the basis of their original coverage designation.

ARGUMENT

"[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [a court] is called on to perform.'" *Northwest Austin II*, 129 S. Ct. at 2513; *Salazar* v. *Buono*, 130 S. Ct. 1803, 1820 (2010) ("Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality."). In this case, plaintiff seeks to mount the most difficult of all constitutional challenges, contending that 2006 Reauthorization of the VRA is unconstitutional on its face – that is, that it is unconstitutional in all its applications. *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449-450 (2008).

I

SECTIONS 4(b) AND 5 OF THE VOTING RIGHTS ACT ARE SUBJECT TO RATIONAL BASIS REVIEW

Congress is empowered to "enforce" the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments through "appropriate legislation." U.S. Const. Amend. XIII, §2; Amend. XIV, §5; Amend. XV, §2. The Supreme Court's construction of these provisions has been consistent: when Congress is enforcing the Reconstruction Amendments' prohibition on race discrimination, the Court reviews the appropriateness of that legislation under a rational basis standard. In upholding Sections 4(b) and 5 in *South Carolina*, 383 U.S. at 324, the Court began its analysis with "one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." See *Rome*, 446 U.S. at 177; *Georgia*, 411 U.S. at 535; *Lopez*, 525 U.S. at 282-285; *Morgan*, 384 U.S. at 652-656 (upholding Section 4(e) of the VRA as appropriate legislation to enforce the Fourteenth Amendment); *Jones* v. *Mayer Co.*, 392 U.S. 409, 440 (1968) (Thirteenth Amendment).

Plaintiff contends and the district court concluded that the 2006 Reauthorization nonetheless should be subject to congruence and proportionality analysis. Appellant's Br. 15 (citing *Boerne*, 521 U.S. at 520); J.A. 519-545. But the Supreme Court has applied the congruence and proportionality analysis

developed in *Boerne* only to legislation enacted to enforce Fourteenth Amendment rights outside the context of race or national origin discrimination. Because Section 5 enforces the Fourteenth and Fifteenth Amendments' core prohibition on race discrimination in voting, it is subject to rational basis review. Notably, in *Lopez*, 525 U.S. at 282-285, which followed *Boerne* by two years, the Court relied on *South Carolina* and *Rome* to reaffirm the constitutionality of Section 5 without suggesting that its intervening decision in *Boerne* required a different analysis.

1. As the district court correctly concluded, J.A. 523-524, the terms "enforce" and "appropriate legislation" have the same meaning in the Fourteenth and Fifteenth Amendments. But the substantive scope of the two Amendments differs significantly. The Fifteenth Amendment simply prohibits race discrimination in voting. U.S. Const. Amend. XV, §1. Although the Fourteenth Amendment's Equal Protection Clause also prohibits racial discrimination in voting, the Amendment reaches much more broadly and covers a diverse array of rights, prohibiting States from infringing citizens' privileges and immunities; from denying them life, liberty, or property without due process; and from denying them equal protection of the laws. U.S. Const. Amend. XIV, §1. This broader reach of the Fourteenth Amendment, combined with the very different levels of constitutional scrutiny applied to the different rights secured by the Amendment, means that legislation enacted to enforce the Fourteenth Amendment, *outside the*

core prohibitions on race discrimination, may be subjected to closer judicial scrutiny to ensure that it is appropriate enforcement legislation. Cf. *Tennessee* v. *Lane*, 541 U.S. 509, 561-562 (2004) (Scalia, J., dissenting).

It was in this context that the Supreme Court articulated the "congruence and proportionality" standard in *Boerne*, 521 U.S. at 520, which invalidated, in part, the Religious Freedom Restoration Act (RFRA). Congress enacted RFRA "in direct response to" a Supreme Court ruling that the First Amendment does not exempt citizens from adhering to neutral, generally applicable laws that impose a substantial burden on their exercise of religion. *Boerne*, 521 U.S. at 512-516. Through RFRA, Congress sought to overturn that constitutional ruling by providing a statutory remedy for those alleging that their religious rights were burdened by such neutral laws. *Id*. at 515-516. *Boerne* recognized that Congress may do more in exercising its Fourteenth Amendment authority than merely prohibit what the Amendment itself prohibits. *Id.* at 517-518. But it also reiterated the constitutional norm that it is for the Court, not Congress, to determine what constitutional provisions mean. *Id.* at 519. Acknowledging that the line between enforcement of a constitutional right and its substantive redefinition is not always "easy to discern," the Court described legislation falling on the appropriate enforcement side of that line as exhibiting "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that

end." *Id.* at 519-520. In articulating this analysis, *Boerne* did not disturb the "fundamental principle" underlying the Court's analysis of Section 5 and other provisions of the VRA, that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina*, 383 U.S. at 324.

Because RFRA targeted practices that were presumed valid under the Constitution, the *Boerne* Court did not afford RFRA the same presumption of validity it had afforded to earlier legislation enacted to enforce the provisions of the Fourteenth and Fifteenth Amendments. Instead, the Court applied a less deferential standard, including more exacting scrutiny of the legislative record documenting a pattern of violations of the right Congress sought to protect. The Court found that record lacking. "In contrast to the record which confronted Congress and the Judiciary in the voting rights cases," the Court wrote, "[t]he history of [religious] persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Boerne*, 521 U.S. at 530.

Following *Boerne*, the Court applied congruence and proportionality analysis when reviewing other legislation through which Congress sought to protect Fourteenth Amendment rights outside the Amendment's core prohibition of race discrimination. In *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356

(2001), the Court closely scrutinized the evidence of state-sponsored employment discrimination on the basis of age and disability, respectively, classifications subject only to rational basis review. In both cases, the Court again found the evidentiary record lacking. *Kimel*, 528 U.S. at 89; *Garrett*, 531 U.S. at 368-369.

2. Unlike the statutes at issue in *Boerne*, *Kimel*, and *Garrett*, Sections 4(b) and 5 of the VRA enforce protections at the core of the Fourteenth and Fifteenth Amendments. The primary purpose of both Amendments is to prohibit race discrimination. *Oregon*, 400 U.S. at 126 (Black, J.) ("Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race."); see *Ex parte Virginia*, 100 U.S. 339, 344-345, 347 (1879); *Lane*, 541 U.S. at 561-562 (Scalia, J., dissenting). And both Amendments protect the fundamental right to vote. *South Carolina*, 383 U.S. at 325; *Morgan*, 383 U.S. at 647.

In addressing legislation enacted in this context, the Court consistently has applied rational basis review. *South Carolina*, 383 U.S. at 324; *Morgan*, 384 U.S. at 651 (Congress may "exercise its discretion in determining whether" legislation is needed); *Rome*, 446 U.S. at 175-177. In "determining whether and what legislation is needed to secure the guarantees" of the Fourteenth and Fifteenth Amendments, the Constitution assigns to Congress the task of "assess[ing] and weigh[ing] the various conflicting considerations." *Morgan*, 384 U.S. at 651, 653.

And "[i]t is not for [the Court] to review the congressional resolution of these factors. It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.* at 653; see also *Civil Rights Cases*, 109 U.S. 3, 14 (1883); *South Carolina*, 383 U.S. at 325-326 (the declaration in Section 2 of the Fifteenth Amendment that "Congress shall have the power to enforce this article by appropriate legislation," indicates "that Congress was to be chiefly responsible for implementing the rights created in [Section] 1" of the Amendment).

The application of congruence and proportionality analysis in the very different circumstances presented in *Boerne* and its progeny – judging the appropriateness of legislation enacted outside the heartland of the Reconstruction Amendments – thus provides no occasion for this Court to overturn the Supreme Court's consistent application of rationality review to Section 5 in the past:

> With its greater deference to Congress, [rationality review] is proper here because, put simply, this case implicates Congress's express constitutional authority to remedy *racial* discrimination in *voting*. None of the *City of Boerne* cases involved two such essential rights, much less any rights so close to the core objectives of the Civil War Amendments. We thus have no basis for reading those cases as overturning the Court's longstanding rule * * * that "against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."

Northwest Austin I, 573 F. Supp. 2d at 245-246 (quoting *South Carolina*, 383 U.S. at 324).

II

THE 2006 REAUTHORIZATION OF SECTION 5 IS APPROPRIATE LEGISLATION TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

In any event, the 2006 Reauthorization is a congruent and proportional legislative response to evidence of continued voting discrimination in the covered jurisdictions.

As *Boerne* explained, the Court has described Congress's power to enforce the Reconstruction Amendments "in broad terms":

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.'

521 U.S. at 517-518 (quoting *Ex parte Virginia*, 100 U.S. at 345-346); see *South Carolina*, 383 U.S. at 327. In *South Carolina*, the Court explained that this articulation echoed the language it had used to describe Congress's power under the Necessary and Proper Clause:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 326 (quoting *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819)).

Thus, Congress may enact legislation that "deters or remedies constitutional violations * * * even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976)).

A. Section 5 Protects Rights Guaranteed By The Fourteenth And Fifteenth Amendments

The first step in congruence and proportionality analysis is "to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Section 5 protects the right to vote free from discrimination on the basis of race or national origin, a right guaranteed by both the Fourteenth and Fifteenth Amendments. The Supreme Court consistently has described Section 5 as legislation enacted to enforce the Fifteenth Amendment. *South Carolina*, 383 U.S. at 324-327; *Rome*, 446 U.S. at 173-178; *Georgia*, 411 U.S. at 534; *Lopez*, 525 U.S. at 269. But the Court also upheld Section 4(e) of the Voting Rights Act, protecting certain Spanish-language voters, as appropriate legislation to enforce the Fourteenth Amendment. *Morgan*, 384 U.S. at 643-646. And when Congress extended the protections of Section 5 to language-minority voters in 1975, it relied

upon the Fourteenth Amendment as well as the Fifteenth Amendment. J.A. 543-544; H.R. Rep. No. 196, 94th Cong., 1st Sess. 27-29 (1975) (1975 House Report).[1]

Plaintiff asserts (Appellant's Br. 26-29) that, as applied to racial minorities, Section 5 does not enforce the protections of the Fourteenth Amendment because it enforces the protections of the Fifteenth Amendment. But plaintiff cannot deny that the Fourteenth Amendment prohibits intentional discrimination in voting on the basis of race. And there is no barrier to Congress's relying on more than one source of legislative authority to support a statute. The district court was therefore correct in concluding, J.A. 543-545, that the 2006 Reauthorization enforces rights protected by both Amendments.

Even under congruence and proportionality analysis, a less exacting review of the legislative record is necessary when Congress enforces a right at or near the core of the Fourteenth Amendment's protections. In *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), the Court held that application of

[1] National-origin groups and language-minority voters are protected as racial groups under the Fifteenth Amendment. See *Northwest Austin I*, 573 F. Supp. at 243-244; J.A. 543-544. The "language minorities" protected by the 1975 Amendments include specified groups recognized as having race or color characteristics: "American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. 1973*l*(c)(3). The Supreme Court has described such groups as "racial." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. One*, 127 S. Ct. 2738, 2747 n.2 (2007); *LULAC* v. *Perry*, 548 U.S. 399, 439 (2006). But this Court need not resolve this question. To the extent Section 5 sweeps more broadly than the Fifteenth Amendment, it lies within the core of the Fourteenth Amendment. See *Morgan*, 384 U.S. at 643-646.

the Family and Medical Leave Act (FMLA) to the States was an appropriate means of enforcing the Fourteenth Amendment's prohibition of sex discrimination. Because Congress was enforcing a right subject to heightened scrutiny, the Court stated it was "easier" for Congress to demonstrate the need for the legislation, just as it had been when Congress enacted Section 5 of the VRA to remedy and prohibit race discrimination in voting. *Id*. at 736 (citing *South Carolina*, 383 U.S. at 308-313). The same was true in *Lane*, 541 U.S. at 528, where the Court upheld the application of Title II of the Americans with Disabilities Act to protect the right of citizens with disabilities to access the courts, a right subject to heightened constitutional protection.

Because Section 5 targets race discrimination in voting, Congress acted at the pinnacle of its powers to enforce the Fourteenth and Fifteenth Amendments when it enacted the 2006 Reauthorization. See J.A. 546. Thus, not only was it "easier" for Congress to demonstrate the need for the Reauthorization, *Hibbs*, 538 U.S. at 746, but Congress's determination that the Reauthorization was necessary and appropriate is entitled to added judicial deference. *Oregon*, 400 U.S. at 129 ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.") (citation omitted).

B. Congress Identified A Pattern Of Constitutional Violations By The Covered Jurisdictions

The next step in congruence and proportionality analysis is to determine "whether Congress had evidence of a pattern of constitutional violations" by the jurisdictions covered by Section 5. *Hibbs*, 538 U.S. at 729. Before reauthorizing Section 5 in 2006, Congress held 21 hearings, heard from dozens of witnesses, and amassed more than 15,000 pages of evidence of ongoing voting discrimination in covered jurisdictions. J.A. 496-497. Although a robust recitation of that evidence is not possible here due to space limitations, both the district court in this case and the three-judge panel in *Northwest Austin* carefully examined the full record and correctly concluded that it was sufficient to justify the 2006 Reauthorization. J.A. 547-613; *Northwest Austin I*, 573 F. Supp. 2d at 247-279, 283-299. In challenging those well-considered conclusions, plaintiff attempts to eliminate entire categories of evidence from consideration rather than arguing that, taken as a whole, the record is insufficient to establish a continuing justification for Section 5. But the district court correctly considered all of the evidence before Congress and correctly concluded that there was abundant evidence to support Congress's determination that the 2006 Reauthorization of Section 5 was appropriate.

1. The Legislative Record Contains Substantial Evidence Of Ongoing Voting Discrimination In Covered Jurisdictions

As the district court recognized, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source." J.A. 547 (quoting *South Carolina*, 383 U.S. at 330). While "some evidence of purposeful voting discrimination is needed to sustain Section 5," Congress could infer such intentional discrimination from circumstantial evidence. J.A. 547-548. Moreover, "Congress is not bound by the standards of proof applicable in judicial proceedings 'when it prescribes civil remedies * * * under s[ection] 2 of the Fifteenth Amendment." J.A. 548 (quoting *South Carolina*, 383 U.S. at 330).

In enacting and reauthorizing Section 5, Congress repeatedly has found that jurisdictions covered by Section 5 have engaged in a pattern of suppressing and diluting the voting strength of minority citizens. In making these findings, previous Congresses relied first on the number and types of Section 5 objections interposed by the Attorney General. See, *e.g.*, S. Rep. No. 417, 97th Cong., 2d Sess. 10-12 (1982) (1982 Senate Report); H.R. Rep. No. 227, 97th Cong., 1st Sess. 11-13 (1981) (1981 House Report); 1975 House Report 9-10; S. Rep. No. 295, 94th Cong., 1st Sess. 16-18 (1975) (1975 Senate Report); H.R. Rep. No. 397, 91st Cong., 1st Sess. 6-8 (1969) (1969 House Report). Second, they relied on the Justice Department's deployment of observers to monitor elections in covered jurisdictions. 1981 House Report 20-21; 1975 House Report 12; 1975 Senate

Report 20-21; 1969 House Report 6. Third, they examined the inadequacies of other legislative remedies for voting discrimination. S. Rep. No. 162 (Pt. 3), 89th Cong., 1st Sess. 5-9 (1965) (1965 Senate Report); H.R. Rep. No. 439, 89th Cong., 1st Sess. 8-11(1965) (1965 House Report). Fourth, they relied on direct evidence of discrimination: anecdotal evidence and evidence from litigation demonstrating that racial and language-minority citizens faced voting discrimination in covered jurisdictions. 1981 House Report 17-20, 26-28; 1975 House Report 16-24; 1975 Senate Report 25-30; 1965 Senate Report 3-5, 9-12; 1965 House Report 11-13. Finally, they found that registration rates of racial and language-minority citizens lagged behind those of white citizens in some covered jurisdictions. 1981 House Report 7-8; 1975 House Report 7; 1975 Senate Report 13-15. In 2006, Congress relied on these same sources and types of evidence.

a. Section 5 Enforcement

In 2006, Congress found "[e]vidence of continued discrimination" in "the hundreds of [Section 5] objections interposed" by the Attorney General, proposed voting changes withdrawn from consideration by covered jurisdictions following requests for more information by the Attorney General, "section 5 enforcement actions," and requests for judicial preclearance that were denied. 2006 Reauthorization, §2(b)(4)(A) & (B), 120 Stat. 577-578.

The legislative record supports this finding. See J.A. 559-581, 603-604. Congress heard evidence that, since 1982, the Attorney General had issued 754 objection letters. J.A. 564; see H.R. Rep. No. 478, 109th Cong., 2d Sess. 21-22, 36 (2006) (2006 House Report); *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 1686-2595 (2005) (*History, Scope, and Purpose*) (copies of objection letters from 1982 through mid-2003). Covered jurisdictions withdrew more than 205 proposed voting changes in response to requests for more information from the Attorney General. 2006 House Report 40-41; see *Northwest Austin I*, 573 F. Supp. 2d at 254-255; *Evidence of Continued Need* 1846-1848. The Attorney General and private plaintiffs brought more than 100 successful enforcement actions to prevent covered jurisdictions from implementing voting changes that had not been precleared. *Voting Rights Act: Evidence of Continued Need: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 2d Sess. 13 (2006) (*Evidence of Continued Need*); *id.* at 250; *History, Scope, and Purpose* 2839-2841, 2848-2850; see 42 U.S.C. 1973c, 1973j(f). And in 25 instances, covered jurisdictions unsuccessfully sought judicial preclearance. *Evidence of Continued Need* 177-178, 235, 270; J.A. 573-574.

In sum, nearly 1,100 submissions were denied either judicial or administrative preclearance, were blocked by Section 5 enforcement actions, or were withdrawn following requests for more information from the Attorney General. Moreover, Section 5 blocked the implementation of discriminatory electoral changes throughout the covered jurisdictions. *Evidence of Continued Need* 273.

This level of Section 5 activity exceeds that which the Supreme Court found to be more than sufficient to justify the 1975 Reauthorization of Section 5. See *Rome*, 446 U.S. at 181; see 1975 House Report 10-11 (163 objections interposed by Attorney General between 1965 and 1975); J.A. 603.

Plaintiff seeks to discount the significance of the Section 5 objections, first, on the ground that the number of objections has fallen in recent years. Appellant's Br. 29, 41-43. As the district court recognized, however, the rate of objections has always been low. J.A. 559-560. Moreover, whatever the *rate* of objections, the sheer *number* of discriminatory voting changes blocked and the numbers of voters affected by the Section 5 preclearance process are "strong evidence that Section 5 has remained a 'vital prophylactic tool' in 'protecting minority voters from devices and schemes that continue to be employed by covered States and jurisdictions." J.A. 562 (quoting 2006 House Report 21). A single objection may encompass more than one voting change, and a single voting change may affect many

thousands of voters. 2006 House Report 22; J.A. 560-562. Just between 2000 and 2006, for example, Section 5 objections protected 663,503 minority voters from discriminatory voting changes, including 96,143 minority voters in South Carolina and nearly 359,978 minority voters in Texas. J.A. 562.

The decline in the rate of objections is also evidence of the deterrent effect of Section 5. The House Committee found that this deterrent effect was "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes." 2006 House Report 24. As the district court detailed, Congress heard expert testimony about and specific examples of this effect. J.A. 598-601; *Northwest Austin I*, 573 F. Supp. 2d at 264-265.

Plaintiff also contends that objections interposed by the Attorney General and denials of judicial preclearance do not evidence intentional discrimination. Appellant's Br. 30-31. But the evidence before Congress established that the number of objections based upon discriminatory purpose increased from the 1970's to the 1990's, and that 43% of all objections interposed by the Attorney General in the 1990's were based on intent alone, with another 31% based on a combination of intent and effect. J.A. 565.

The district court summarized numerous examples of objections based on discriminatory purpose. J.A. 565-571; see also *Northwest Austin I*, 573 F. Supp. 2d at 289-301. In addition to those examples, the Attorney General objected in

1987 to a change in the method of election for the board of commissioners of Bladen County, North Carolina, finding that "the board undertook extraordinary measures to adopt an election plan [that] minimizes minority voting strength" to "maintain white political control to the maximum extent possible." *History, Scope, and Purpose* 1760-1763. In another instance, the Attorney General concluded that a proposed polling place change was "calculated to discourage turnout among minority voters and * * * undermine the electoral opportunities created by" a new election system put in place in response to a Section 2 suit. *History, Scope, and Purpose* 2300-2303. And shortly before the adoption of the 2006 Reauthorization, the Attorney General objected to a jurisdiction's proposal to eliminate 86% of its polling places, such that the precinct with the highest proportion of minority voters would have to serve more than ten times the number of voters as the precinct with the lowest proportion of minority voters. Letter from Wan J. Kim to Renee Smith Byas (May 5, 2006) (re: North Harris Montgomery Community College District), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_050506.pdf.

Plaintiff contends that such objections nonetheless provide unreliable evidence of discriminatory purpose because they are based on "only 'one side's opinion'" and there was "no opportunity for 'a trial or a formal hearing.'" Appellant's Br. 30 (citation omitted). That assertion is curious in light of the fact that a covered jurisdiction may seek judicial preclearance in the first instance or

following the Attorney General's denial of preclearance. See 42 U.S.C. 1973c(a). Moreover, as the district court recognized, Congress is not limited to adjudicated facts when it legislates. J.A. 548.

Plaintiff also challenges the reliability of the Attorney General's objections during the 1990's, claiming that some unspecified portion were based upon legal standards invalidated by the Supreme Court in *Miller* v. *Johnson*, 515 U.S. 900 (1995). But the standard at issue in *Miller* concerned the application of the preclearance standard to redistricting plans. *Id.* at 903. And, as the summaries above and in the district court opinion indicate, the "intent-based objections have not been limited to redistricting plans." J.A. 568-569. Moreover, a closer look at the yearly data on Section 5 submissions and objections indicates that the decline in the number of objections in the mid-1990's was likely due to the winding down of the redistricting cycle, rather than the decision in *Miller*. As the number of redistricting submissions fell, so too did the number of objections. 2006 House Report 22.

Congress also heard evidence that Section 5 has prevented hundreds of voting changes since 1982 that would have eroded the progress minority voters have made since 1965. Because preventing such back-sliding is one of the key purposes of Section 5, these objections are particularly relevant. In Texas, for example, Latinos reached one-third of the State's total population by 2001. The

State proposed a redistricting plan for the state House of Representatives that would have reduced the voting strength of the growing Latino population by eliminating four existing majority-Latino districts, while adding only one such district. The Attorney General objected to the proposed plan, and Latino voters in Texas accordingly maintained the opportunity to elect representatives of their choice in the four districts. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 19 (2005) (*Impact and Effectiveness*); *History, Scope, and Purpose* 2518-2523. Similarly, the Attorney General objected to the House and Senate redistricting plans in Arizona in 2002 because the State "pared down Latino majority districts so they no longer provided the opportunity to elect Latino candidates of choice." *History, Scope, and Purpose* 87; *id.* at 496-501. The Attorney General also objected to Florida's 2002 statewide House redistricting plan because the plan would have made it "impossible" for Hispanic voters in a covered county to elect their candidate of choice. *History, Scope, and Purpose* 524-529.

Section 5 also played an important role in 2003 in preventing Chilton County, Alabama, from repealing changes it had adopted in 1988 to resolve its part of the *Dillard* litigation, and that had resulted in the election of an African-American commissioner. *Evidence of Continued Need* 53; *Renewing the*

Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Judiciary Comm., 109th Cong., 2d Sess. 379-380 (2006) (*Renewing the Temporary Provisions*); see pp. 7-8, *supra*. The Attorney General refused to consider the plan for preclearance unless the County was released from its obligations under the consent decree in *Dillard*. *Ibid.*; see also pp. 7-8, *supra* (Calera).

Judicial denials of preclearance also support Congress's finding. See J.A. 575-577. The district court summarized Louisiana's unsuccessful effort to seek judicial preclearance for its 2001 legislative redistricting plan, in which state officials "intentionally 'obliterated' [a] majority-black district in order to achieve what they characterized as 'proportional' representation in Orleans Parish," without creating a comparable district elsewhere. J.A. 576.

The House Committee found that submitting jurisdictions' responses to the Attorney General's requests for more information "are often illustrative of a jurisdiction's motives." 2006 House Report 40. Plaintiff erroneously contends that there is no evidence in the record to support this finding. Appellant's Br. 32. But Congress received a study finding that, between 1990 and 2005, requests for more information "affected more than 800 additional voting changes that were submitted for preclearance, compelling covered jurisdictions to either alter the

proposal or withdraw it from consideration altogether." 2006 House Report 40-41; see *Evidence of Continued Need* 1847-1848, 2567. And Congress received evidence that a request for more information sometimes caused the jurisdiction to withdraw or alter its proposed change after concluding that the change would result in an objection. *Id.* at 124.

Witnesses also testified that Section 5 enforcement actions often signify that the defendant jurisdiction is resistant to complying with the Act, refusing to submit covered changes for preclearance. *Evidence of Continued Need* 87. As the House Committee noted, "[p]erhaps the most egregious example of non-compliance" with Section 5 occurred in South Dakota, where, in the mid-1970s, the State's Attorney General described Section 5 as "a facial absurdity" and advised against compliance with it. 2006 House Report 42; J.A. 578. Despite enforcement actions in 1978 and 1979, the State enacted or implemented more than 600 voting changes but submitted fewer than ten for preclearance between 1976 and 2002. *Evidence of Continued Need* 172-173; 2006 House Report 42. It was not until a Section 5 enforcement action in 2002 that the State agreed to comply with the law by submitting election changes affecting voters in the covered counties for preclearance. *Ibid.* A court subsequently found that the State had systematically discriminated against Native American voters for many years. *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976, 1023-1024 (D.S.D. 2004); see J.A. 578.

The district court summarized other examples of enforcement actions that helped to prevent covered jurisdictions from disenfranchising African-American voters in Waller County, Texas and the State of Mississippi. J.A. 578-580.

b. Section 2 Litigation

Congress found that "[e]vidence of continued discrimination includes * * * the continued filing of section 2 cases * * * in covered jurisdictions." 2006 Reauthorization, §2(b)(4)(C), 120 Stat. 577-578; see also *id.* §2(b)(8), 120 Stat. 578. The House Committee also emphasized the importance of reauthorization to protect the gains minority voters had won through Section 2 litigation. 2006 House Report 53. The legislative record supports these findings.

The legislative record includes two comprehensive studies of Section 2 cases since the 1982 Reauthorization. The Katz Study surveyed reported Section 2 decisions nationwide and found that more than 56% of Section 2 cases with favorable outcomes for minority plaintiffs were filed in covered jurisdictions. *Impact and Effectiveness* 974. As the Katz Study stated, this record of reported Section 2 cases understated the extent of Section 2 litigation because it did not include cases with favorable settlements or unreported findings of liability. *Ibid.* A second study, by the National Commission on the Voting Rights Act (National Commission Study), compiled a list of both reported and unreported Section 2 cases with outcomes favorable to minority voters in the eight southern states fully

covered by Section 5, plus North Carolina. *Evidence of Continued Need* 125-126. This study identified 653 such cases affecting 825 different jurisdictions. *Ibid*.; J.A. 85. [2]

The record before Congress also identified at least 14 Section 2 cases with findings of intentional discrimination since 1982. J.A. 581-582. This number is not insignificant. But because Section 2 does not require a finding of intentional discrimination, it is not surprising that courts would not make such findings unnecessarily after concluding that a challenged voting practice violated Section 2. See Appellant's Br. 41-42; see also J.A. 583-584 (instances in which courts found a violation of Section 2 and thus declined to decide whether a jurisdiction had engaged in unconstitutional intentional discrimination).

The large number of Section 2 cases where minority plaintiffs were successful – even without findings of intentional discrimination – is highly significant because the standard for proving a violation of Section 2 is designed to identify facially neutral practices that are likely to be intentionally discriminatory. The court in a Section 2 case must find, "based on the totality of circumstances * * * that the political processes leading to nomination or election in the State or

[2] Plaintiff's focus on numbers of cases filed is overinclusive since it includes non-meritorious actions, while its focus on reported decisions is underinclusive because it does not include actions in which plaintiffs achieved success through unreported decisions or settlements. See Appellant's Br. 65-66.

political subdivision are not equally open to participation by members of a class of citizens * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973. The "totality of circumstances" includes: whether there is a history of official discrimination in the jurisdiction, the extent of racially-polarized voting, whether the jurisdiction has used "voting practices or procedures that may enhance the opportunity for discrimination against the minority group," whether minorities have been excluded from a candidate slating process, the success of minority political candidates, "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," and "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Thornburgh* v. *Gingles*, 478 U.S. 30, 36-37 (1986) (quoting 1982 Senate Report 28-29).

These components of the totality of circumstances analysis are the very factors that led the Supreme Court to uphold a finding of intentional, and thus unconstitutional vote dilution in *Rogers* v. *Lodge*, 458 U.S. 613, 624-627 (1982). And it is settled law that the discriminatory results of an official action and the historical background of the decision to take an action are important aids in identifying purposeful discrimination. See *Village of Arlington Heights* v.

Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). Thus, Congress could infer from the large number of successful Section 2 cases that there was ongoing intentional voting discrimination in the covered jurisdictions. Cf. *Rome*, 446 U.S. at 177 ("Congress could rationally have concluded that * * * electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination.").

The district court summarized examples of Section 2 decisions providing evidence of continuing intentional discrimination, including efforts to disenfranchise minority voters. J.A. 584-588; see also *Northwest Austin I*, 573 F. Supp. 2d at 259-262. In another example, the Supreme Court found that part of a congressional districting plan adopted by Texas in 2003 bore "the mark of intentional discrimination that could give rise to an equal protection violation" by purposefully diluting the voting strength of a cohesive minority community. *LULAC* v. *Perry*, 548 U.S. 399, 440 (2006). And, as explained above, in 1986, a district court in Alabama enjoined the continued use of at-large election schemes adopted by Alabama for discriminatory reasons. *Dillard*, 640 F. Supp. at 1360. Notably, on at least two occasions, Section 5 was instrumental in preserving the gains made as a result of *Dillard*. See pp. 32-33, *supra*.

c. Federal Observer Coverage Since 1982

Congress also found evidence of continued voting discrimination in "the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the Voting Rights Act." 2006 Reauthorization §2(b)(8), 120 Stat. 577-578. The legislative record supports this finding.

Section 8 of the VRA authorizes the dispatch of observers to monitor elections when efforts to deny or abridge the right to vote are likely. 42 U.S.C. 1973f(a)(2). The House Committee found that "observers are assigned to a polling location only when there is a reasonable belief that minority citizens are at risk of being disenfranchised." 2006 House Report 44; J.A. 589. Since 1982, the Justice Department has sent several thousand observers to monitor elections in more than 600 jurisdictions. *Evidence of Continued Need* 124. Two-thirds of the elections covered during this period were in five of the six States originally covered by Section 5: Alabama (67 elections), Georgia (57 elections), Louisiana (15 elections), Mississippi (250 elections), and South Carolina (23 elections); and in many covered States, the rate of observer coverage since 1982 met or exceeded the rate of coverage prior to 1982. *Id*. at 78-80.

Observers are often sent to covered jurisdictions because minority voters have faced discrimination in such jurisdictions in recent elections. For example, observers were sent to Greensboro, Alabama, after white election officials

attempted, in 1992, to close the doors of polling places to prevent black voters from entering. *Evidence of Continued Need* 182-183, 302. In 1990, the Attorney General sent observers to Pike County, Georgia, for a special election because the originally scheduled election had been enjoined after the city held an illegal after-hours voter registration session open only to white voters. *Id.* at 3533. In 1993, the Attorney General sent observers to Humphreys County, Mississippi after finding that polling place officials had harassed black voters and denied illiterate black voters assistance from a person of their choice. *Id.* at 3578. In 1996, the Attorney General sent observers to Galveston and Jefferson Counties in Texas because minority voters had been harassed by white poll watchers at previous elections. *Id.* at 3642-3643. The district court provided additional examples. J.A. 589-592; see *Northwest Austin I*, 573 F. Supp. 2d at 262-263.

d. Evidence Of Vote Dilution

Congress found that "[p]resent day discrimination" includes "dilutive techniques" that "adversely affect[] minority voters." 2006 Reauthorization, §2(b)(8), 120 Stat. 577-578. The legislative record supports this finding.

Congress heard multiple examples of discriminatory voting practices implemented to dilute the voting strength of minority citizens. *Evidence of Continued Need* 20; *id.* at 123; *Voting Rights Act: The Continuing Need for Section 5: Hearing Before Subcomm. on the Constitution of the House Judiciary*

Comm., 109th Cong., 1st Sess. 11 (2005) (*Continuing Need for Section 5*). Congress also heard that vote dilution occurred throughout covered jurisdictions. *Evidence of Continued Need* 14, 251, 340; *Continuing Need for Section 5* at 4-5; *History, Scope, and Purpose* 78. And the results of Section 2 cases further documented the extent of vote dilution in the covered jurisdictions. See pp. 35-38, *supra*.

e. Widespread Racially-Polarized Voting

Congress found that "continued evidence of racially-polarized voting in each of the" covered jurisdictions "demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." 2006 Reauthorization, §2(b)(3), 120 Stat. 577. Plaintiff complains (Appellant's Br. 36-37) that the existence of racially-polarized voting does not demonstrate a continued need for Section 5 because racially-polarized voting is not state action. That argument misses the point. Section 5 prohibits governmental entities from implementing voting changes that discriminate against minority voters, and Congress heard extensive testimony that racially-polarized voting is a necessary precondition for vote dilution techniques to have their intended discriminatory effect. The Supreme Court repeatedly has explained the central role played by racial-bloc voting in diluting the effectiveness of minority

voting strength. See, *e.g*., *Rome*, 446 U.S. at 183-184; *Rogers*, 458 U.S. at 616; *Gingles*, 478 U.S. at 46-51.

Indeed, the House Committee concluded that racially-polarized voting ranked as "the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process." 2006 House Report 34. The Committee found that "the degree of racially-polarized voting in the South is increasing, not decreasing," and that it "shapes electoral competition" in covered jurisdictions. *Ibid*. The Committee noted that in some covered States, such as Mississippi, Louisiana, and South Carolina, which have large African-American populations, African-American voters have yet to elect an African American to an at-large statewide office, despite several attempts. *Id.* at 33.

Those findings are supported by the record. J.A. 592-598. Congress heard testimony that, as a result of racially-polarized voting, majority-minority districts are essential to enable minority voters to elect candidates of their choice. *Evidence of Continued Need* 18; *id*. at 88-89 (polarized voting persists and most minority legislators are elected from majority minority districts); *id*. at 95; see *Rome*, 446 U.S. at 183-184 (explaining interplay between racial bloc voting, at-large elections, and majority vote requirement). Without those districts, drawn as a result of the VRA, many of the limited gains in the number of elected minority officials would

not have been realized. See *id.* at 365-366; *Continuing Need for Section 5* at 49. In Mississippi, no black candidate was elected to Congress for the first 85 years of the 20th century, and the "only reason" a black citizen was finally elected to Congress was "the enforcement of Section 5 of the Voting Rights Act by the Justice Department and litigation under" Section 2. *Evidence of Continued Need* 365.

Congress also heard that racially-polarized voting takes place in both partisan and nonpartisan elections, *Evidence of Continued Need* 355, and at every level of government, *id*. at 210, and that the existence of racial polarization among voters has not abated in the years since the Voting Rights Act was enacted, *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act*: *Hearing Before House Judiciary Comm.*, 109th Cong., 1st Sess. 84 (2005) (*Scope and Criteria for Coverage*). Witnesses testified that racially-polarized voting not only exists between black and white voters, but affects Latino voters, Asian American voters, and Native American voters as well. *Continuing Need for Section 5* at 50; *Evidence of Continued Need* 27-28, 96, 213-214; 2006 House Report 34. And numerous judicial decisions throughout covered jurisdictions have documented the prevalence of racial bloc voting. *Evidence of Continued Need* 404-409; *LULAC*, 548 U.S. at 427; *Colleton Cnty. Council* v.

McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002); *Bone Shirt*, 336 F. Supp. 2d at 1036.

f. Registration And Turnout Of Minority Voters

Congress acknowledged that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters," and that this progress was manifested by increased minority voter registration and turnout, and the election of minority officials. 2006 Reauthorization, §2(b)(1), 120 Stat. 577. "This progress," Congress found, "is the direct result of the Voting Rights Act of 1965." *Ibid*. Congress reached the same conclusions prior to reauthorizing Section 5 in previous decades. See 1969 House Report 3-4 (noting increases in registration rates of black voters and the number of minority citizens elected to public office because of the VRA); 1975 Senate Report 13-15; 1975 House Report 6; 1981 House Report 7-11; 1982 Senate Report 4-6; see also *Rome*, 446 U.S. at 180-181 (noting effectiveness of the remedy and the resulting progress in participation by minority voters). But, as in previous decades, Congress concluded based on the record before it that Section 5 was still needed to protect "the significant gains made by minorities in the last 40 years." 2006 Reauthorization §2(b)(9), 120 Stat. 578. The legislative record supports these findings.

The House Committee found that, while disparities between white and minority registration and turnout had narrowed or even been eliminated in some

covered states by 2004, disparities persisted in others. 2006 House Report 12-17, 25-31; see J.A. 553-554. In Virginia, for example, white voter registration exceeded black voter registration by 11 points, and the gap between white and black turnout was 14 points. J.A. 553-554. In Texas, white voter registration exceeded Hispanic registration by 20 points. *Ibid.* In addition, Congress learned that "there remains an enormous gap in political participation" between language minority citizens and citizens whose primary language is English. *Evidence of Continued Need* 13; *id.* at 68 (violations of language-minority provisions in Florida); *id.* at 309 (Texas); *id*. at 348 (California); *id.* at 1313 (Alaska); *id*. at 1379 (Arizona); *id*. at 4090 (New York). In 2004, only 41.5% of Latinos in Texas were registered to vote, compared to 61.5% of white citizens. 2006 House Report 29. Even when citizenship is taken into account, the gap between white and Hispanic registration rates in Texas was 16 points. *Northwest Austin I*, 573 F. Supp. 2d at 248.

Moreover, as the district court found, the data in the House Report understated the disparities because it compared registration and turnout rates for blacks to rates for whites, rather than for *non-Hispanic* whites. J.A. 554; *Northwest Austin*, 573 F. Supp. 2d at 248; J.A. 83-84. When the correct data are used, 2004 black registration and turnout rates in the covered States exceed the rates for whites only in Mississippi. J.A. 555. In Texas, for example, according to

the House Report, black registration and turnout exceeded white registration and turnout by 7 and 5 percentage points, respectively. 2006 House Report 12. But use of the correct data reverses the gap: non-Hispanic white registration and turnout exceeded black registration and turnout by 5 and 8 points, respectively. J.A. 84. The correct data also revealed larger gaps between non-Hispanic white and Hispanic registration, increasing the disparity to 32 points in Texas, more than 40 points in Arizona, California, and Virginia, and almost 60 points in Georgia and North Carolina. J.A. 556.

Congress also learned of recent efforts to interfere with minority voters' ability to cast their votes. The district court summarized some of these. J.A. 569, 578-580. In addition, in two Georgia counties, "there were efforts to wrongfully challenge Latino voters *en masse* in the 2004 election cycle." *Evidence of Continued Need* 93. Asian-American voters were told at polling places, "[i]f you can't speak English, you shouldn't be voting." *Id.* at 350. A Latina voter in Arizona was told in 2000 to "go back to Mexico and learn English" and was prevented from voting when she told a poll worker that she did not speak English. *Id.* at 3980. Congress heard testimony that many of the same sorts of discriminatory activities that have occurred throughout the South to prevent black citizens from voting also "occurred in Texas, but w[ere] targeted to the Mexican-American community." *Scope and Criteria for Coverage* 12.

g. Minority Elected Officials

The House Committee also found that minority elected officials remained underrepresented in the covered jurisdictions. 2006 House Report 32-34. "For example, in States such as Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, where African Americans make up 35 percent of the population, African Americans comprised only 20.7 percent of the total number of State legislators." *Id.* at 33. As the Committee noted, the Supreme Court relied upon such disparities in upholding the 1975 Reauthorization of Section 5. *Id.* at 32; see *Rome*, 446 U.S. at 180-181 ("[T]hough the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions."). The Committee found that in 2000, only 35 African Americans held statewide office, and many of these officials had been initially appointed to their offices. 2006 House Report 33. The Committee also found substantial disproportions between the numbers of language-minority elected officials and the language-minority populations. *Id.* at 32-34.

2. Plaintiff's Challenges To The Sufficiency Of The Record Are Unavailing

Taken together, the evidence described above establishes a pattern of voting discrimination, including unconstitutional intentional discrimination, sufficient to

justify the 2006 Reauthorization of Section 5. J.A. 601-613; *Northwest Austin I*, 573 F. Supp. 2d at 270-274. Plaintiff argues that the record was not sufficient because it includes evidence of intentional discrimination outside the narrow context of voter registration and the actual casting of votes, and because it does not demonstrate that covered jurisdictions continued to engage in the same degree of "gamesmanship" they engaged in prior to 1965. But Congress enacted the extraordinary remedy of Section 5 to stop covered jurisdictions from continuing to discriminate on the basis of race in all aspects of voting, and it did so by eliminating the jurisdictions' opportunity to engage in "gamesmanship."

a. First, plaintiff is wrong in contending that the only relevant evidence is that relating to outright denial or interference with the right to register and cast a vote. Appellant's Br. 7-8, 24, 26-27. The premise of this contention is plaintiff's assertion that the Fifteenth Amendment protects only the right to cast a ballot. Appellant's Br. 16. Plaintiff is correct that the Supreme Court has not yet determined whether a State's intentional dilution of racial minorities' votes violates the Fifteenth Amendment. But it is beyond dispute that such intentional discrimination and other practices intended to limit the effectiveness of minority voters at least violates the Fourteenth Amendment. *Rogers*, 458 U.S. at 617. It is irrelevant that Congress cited the Fourteenth Amendment only as the source of its authority to enact the language-minority provisions of the VRA. Appellant's Br.

16 n.2. "The constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise," *Woods* v. *Cloyd W. Miller Co*., 333 U.S. 138, 144 (1948).[3]

Moreover, voting discrimination in the covered jurisdictions was not limited, historically, to disenfranchisement of minority citizens. See J.A. 485-486. As explained below, those jurisdictions also employed such devices as at-large elections, majority vote requirements, racial gerrymandering, and anti-single shot requirements to limit the effectiveness and dilute the votes of minorities long before enactment of the Voting Rights Act. Those practices are no less intentional discrimination than prohibiting minorities from registering to vote. And ending such practices, just as much as ending the blatant disenfranchisement of minority voters, was an appropriate goal of the original enactment and subsequent reauthorizations of Section 5.

Counties in Alabama, for example, switched back and forth between at-large and district elections in the nineteenth and twentieth centuries, depending on the strength of the black vote. *Dillard*, 640 F. Supp. at 1358. In 1894, after white

[3] Nor does *Rice* v. *Cayetano*, 528 U.S. 495, 522 (2000), foreclose reliance on the Fourteenth Amendment as a source of Congress's authority. Appellant's Br. 27. *Rice* simply distinguished between the one-person, one-vote requirement of the Fourteenth Amendment and the prohibition of race discrimination in voting of the Fifteenth Amendment, holding that a legal standard applicable to one was not applicable to the other.

Democrats had regained power and "redeemed" the State, but before black voters had been fully disenfranchised, many Alabama counties adopted at-large elections to dilute the black vote. *Ibid.*; see *Impact and Effectiveness* 1148. Later, after the State's 1901 Constitutional Convention had completed the process of disenfranchising black voters, Alabama "counties increasingly moved toward single-member districts; since most black persons could no longer vote, the use of single-member districts was obviously fairly 'safe.'" *Dillard*, 640 F. Supp. at 1358; see *Renewing The Temporary Provisions* 372-373; *Impact and Effectiveness* 1149.

In the 20th Century, after the Supreme Court struck down a variety of more blatant discriminatory techniques, and Congress enacted voting rights legislation in 1957, 1960, and 1964, see *South Carolina*, 383 U.S. at 311-313, Alabama counties, with the authorization of the state legislature, again began to adopt at-large election schemes, *Dillard*, 640 F. Supp. at 1356-1359. "Since black voters once again posed a threat to total control of the electoral process by white persons, single-member districts were abandoned and at-large systems were put into place." *Id*. at 1359; see *Evidence of Continued Need* 143; *Impact and Effectiveness* 1139, 1146; *id*. at 1150 (anti-single shot voting restrictions and numbered post requirements).

Other covered States enacted similar voting schemes designed to dilute the votes of minority voters, during both the 19th and 20th Centuries. *Evidence of*

Continued Need 142 (Texas); *id.* at 143 (North Carolina); *Impact and Effectiveness* 1161 (Georgia); *id.* at 1205 (North Carolina); *id.* at 1223-1224 (South Carolina); *id*. at 1244 (Texas); *id*. at 1263 (Virginia); *Gingles* v. *Edmisten*, 590 F. Supp. 345, 360 (1984), rev'd in part on different grounds, *Thornburgh* v. *Gingles*, 478 U.S. 30 (1986); *Impact and Effectiveness* 1139, 1206-1207 (North Carolina); *id.* at 1139-1140, 1163-1164 (Georgia); *id.* at 1140 (Texas, Mississippi, Virginia); *id*. at 1197 (Mississippi); *id.* at 1225 (South Carolina).

After the enactment of the VRA, numerous covered jurisdictions again enacted legislation that facilitated vote dilution. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 550 (1969) (1966 legislation authorizing Mississippi counties to change from single-member districts to at-large elections); *Rome*, 446 U.S. at 160 (1966 state legislation altering the method of electing the City Commission by reducing the number of wards, imposing a majority vote requirement, and adopting staggered terms and numbered posts); *Perkins* v. *Matthews*, 400 U.S. 379, 389 (1971) (noting testimony before Congress that "State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the [VRA] which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters") (citation omitted); *Impact and Effectiveness* 1167-1168 (Georgia counties switched to at-large elections following enactment of the VRA); *id.* at 1183 (Louisiana); *id.* at

1196-1197 (Mississippi); *id.* at 1208 (North Carolina); *id.* at 1227-1228 (South Carolina).

In *Allen*, the Supreme Court recognized that Section 5 was aimed not only at practices that disenfranchised minority voters, but also at techniques that reduced the effectiveness of minority votes. The Court explained that Congress enacted Section 5 because it "feared 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." *Allen*, 393 U.S. at 548. After reviewing the text and legislative history of the 1965 Act, the Court held that Congress intended Section 5 to apply to dilutive techniques, such as changes from district to at-large elections: "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'" *Id*. at 565-566 (footnote omitted). The Court recognized that dilutive techniques were just the sort of "new rules" that the covered States had adopted in the past "for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the

remedies for voting discrimination contained in the Act itself." *Id*. at 566 n.30 (quoting *South Carolina*, 383 U.S. at 335).

Plaintiff criticizes the district court's (and Congress's) reliance on evidence of so-called "second generation" barriers to minority voters' nondiscriminatory opportunity to participate in democracy. See Appellant's Br. 9-13. But before every previous reauthorization, Congress noted that, although the VRA's prohibition on the use of tests and devices combined with Section 5's preclearance requirement had been successful at reducing barriers to minority participation, covered jurisdictions turned to other means, including dilutive mechanisms, to minimize the effectiveness of minority voters. See, *e.g.*, 1969 House Report 7 ("as Negro voter registration has increased under the Voting Rights Act, several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat Negro and Negro-supported candidates") (citing, *inter alia*, U.S. Comm'n on Civil Rights, *Political Participation*, 21-84 (1968)).[4] The 1969 House Report also took note of recent objections interposed by the Attorney General, including objections to at-large elections in Mississippi and Louisiana. *Ibid.* "[W]ith discrimination in registration and at the voting booth blocked," the

[4] *Political Participation*, submitted to Congress in May 1968, reported on the use of redistricting to restrict black participation in the political process as early as 1877 in North Carolina, as well as in Mississippi and Alabama after the enactment of the VRA. *Political Participation* 7, 21-39, 171-172.

Committee concluded, reauthorization of Section 5 was necessary to prevent such changes in voting practices. *Id.* at 8. Two years later, the Supreme Court once again upheld the constitutionality of Section 5, and applied it to a statewide redistricting plan, emphasizing that "voting includes 'all action necessary to make a vote effective.'" *Georgia*, 411 U.S. at 533 (quoting *Allen*, 393 U.S. at 565-566).

In 1975, Congress again learned that, as "registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength." 1975 House Report 10; see also 1975 Senate 16. In particular, the House and Senate Committees cited recent objections interposed by the Attorney General to at-large election plans, majority voting requirements, and discriminatory redistricting plans. 1975 House Report 10; 1975 Senate Report 16-17. The House and Senate Reports noted that one-third of the Attorney General's objections involved redistricting plans and emphasized the need to extend Section 5 to prevent discrimination during redistricting following the next Census. 1975 House Report 10-11; 1975 Senate Report 18.

The Supreme Court specifically relied on this review of Section 5 objections and evidence of vote dilution when it upheld the 1975 Reauthorization in *Rome*, 446 U.S. at 180-182. In plaintiff's view, *Rome* did little more than rely upon the evidence compiled in 1965 and determine that it was too soon to dispense with the preclearance obligation. Appellant's Br. 48-49. This characterization cannot be

squared with the decision. After reviewing the legislative record compiled by Congress when it reauthorized the Act in 1975, the Court acknowledged the gains in both minority voter participation and the election of minority officials. 446 U.S. at 180-181. But the Court explained that Congress had decided to reauthorize Section 5 "[a]fter examining information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General." *Id.* at 181. The Court quoted from the House Report: "The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. *As registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength*." *Ibid.* (quoting 1975 House Report 10) (emphasis added). Plaintiff is simply wrong in contending that the Court did not rely on evidence of vote dilution in upholding the 1975 Reauthorization. Appellant's Br. 27-28.

Again in 1982, Congressional Committees examining the enforcement of Section 5 noted the continued progress made, particularly in minority registration and participation and in the election of minority officials. 1981 House Report 7; 1982 Senate Report 10. The Senate Report explained that "[t]he initial effort to implement the Voting Rights Act focused on registration," and that "[m]ore than a million black citizens were added to the voting rolls from 1965 to 1972." 1982

Senate Report 6. "But registration is only the first hurdle to full effective participation in the political process. * * * Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote." *Ibid.*; see 1981 House Report 18 (explaining that a variety of procedures are used, in combination with racially-polarized voting, to dilute "emerging minority political strength," and noting that "many of these devices were used to limit political participation of newly enfranchised blacks more than a century ago"). "Congress anticipated this response," the Senate Committee wrote, and the Section 5 preclearance process was "designed to halt such efforts." *Ibid.* A review of the Attorney General's objections, the Senate Report stated, "reflects the fact that, since the adoption of the Voting Rights Act, covered jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices that dilute the minority vote." 1982 Senate Report 10. "The continuing problem with reapportionments," the Senate Report stated, "is one of the major concerns of the Voting Rights Act." *Id.* at 12 n.31.

b. Nor was Congress limited, in considering the 2006 Reauthorization, to evidence of "the kind of gamesmanship that would make case-by-case litigation futile." Appellant's Br. 45. As the discussion above indicates, Congress did not limit its consideration to such practices before previous reauthorizations. Moreover, in *South Carolina*, the Supreme Court recognized that "some" of the

covered States "had resorted to 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." 383 U.S. at 335. But the Court did not find that such conduct was universal among the covered States. Indeed, the Court acknowledged that Section 5 would also apply to States for which the evidence of "recent voting discrimination" was only "fragmentary." *Id.* at 329-330. Moreover, the Court found such "obstructionist tactics" relevant "because of the inordinate amount of time and energy" required to overcome them, thus rendering case-by-case litigation "inadequate." *Id.* at 328. Similarly, in 2006, Congress heard evidence that Section 2 litigation was inadequate to protect minority voting rights, see *Northwest Austin I*, 573 F. Supp. at 273, and the House Committee specifically found that litigation was an "inadequate remedy." 2006 House Report 57.

Further, in reviewing the legislative record underlying the 1975 Reauthorization in *Rome*, the Supreme Court did not rely on any contemporaneous evidence of the kind of obstructive tactics plaintiff contends are required to sustain the 2006 Reauthorization. Rather, in holding that the preclearance requirement remained appropriate, the Court noted the "century of obstruction" that had preceded enactment of the VRA, and examined evidence of disparities in voter registration and turnout rates, numbers of minority elected officials, and the

number and types of objections interposed by the Attorney General since that enactment. See 446 U.S. at 180-182.

More fundamentally, Congress chose Section 5's preclearance mechanism precisely because preclearance renders such gamesmanship impossible. As the Supreme Court recognized in *South Carolina*, Congress adopted the preclearance mechanism because it "had reason to suppose" that covered jurisdictions would continue to resort "to 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" if Congress adopted a more traditional after-the-fact remedy. 383 U.S. at 334-335. But by preventing covered jurisdictions from implementing voting changes without obtaining a determination that such changes are not discriminatory, Congress simply removed the opportunity for such gamesmanship by covered jurisdictions. If such behavior had continued through 2006, that would have been an indication that Section 5 is not the effective remedy Congress knows it to be. *Northwest Austin I*, 573 F. Supp. 2d at 274.

3. The Record Before Congress In 2006 Is Stronger Than Other Records Found Sufficient To Justify Other Enactments

As the district court recognized, the evidence compiled by Congress before enacting the 2006 Reauthorization was at least as strong as that before the Court in *Rome*, and far exceeded that underlying the statutes upheld by the Court in *Hibbs* and *Lane*. J.A. 601-613; see also *Northwest Austin I*, 573 F. Supp. 2d at 270-272.

The record before Congress indicated that between 1982 and 2006, nearly 1,100 submissions were denied either judicial or administrative preclearance, were blocked by Section 5 enforcement actions, or were withdrawn following the Attorney General's requests for more information. See pp. 26-35, *supra*. During the same period, there were 653 Section 2 cases affecting 825 covered jurisdictions with outcomes favorable to minority plaintiffs, including at least 14 reported cases with findings of intentional voting discrimination. See pp. 35-38, *supra*; J.A. 604; cf. *Lane*, 541 U.S. at 544 ("only *two* reported cases finding that a disabled person's federal constitutional rights [to access to judicial proceedings] were violated") (Rehnquist, J., dissenting); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) ("only eight patent-infringement suits prosecuted against the States in" 110 years). As explained above, the sheer number of these cases in the covered jurisdictions, even where there was no formal finding of intentional discrimination, was highly significant since the standard for proving a violation of Section 2 is designed to identify facially neutral practices that are likely to be intentionally discriminatory.

During the same period, tens of thousands of observers were sent to monitor elections in the covered jurisdictions "when there [was] a reasonable belief that minority citizens [were] at risk of being disenfranchised." 2006 House Report 44; pp. 39-40, *supra*. In addition, as the district court explained, the disparities

between registration rates for blacks and non-Hispanic whites in Virginia, Arizona, and Florida in 2004 were "comparable" to the disparities in rates for Louisiana, North Carolina, and Alabama in 1975, and disparities between registration rates for non-Hispanic whites and Hispanics in other States were even greater. J.A. 602; see pp. 44-46, *supra*. Similarly, Congress heard evidence in both 1975 and in 2006 that minority elected officials were underrepresented in state legislatures in the South and that in three States, there still had been no African American elected to statewide office. J.A. 602.

This evidence of official discrimination greatly exceeds the evidence held to be sufficient to sustain the legislation at issue in *Hibbs* and *Lane*. *Hibbs* held that application to the States of the Family Medical Leave Act (FMLA) was an appropriate exercise of Congress's Fourteenth Amendment enforcement authority. 538 U.S. at 726-740. The FMLA, enacted in 1993, requires employers, including States, to provide unpaid leave to employees to care for family members experiencing a "serious health condition." *Id.* at 724-725. Although the statute does not prohibit discrimination, the Court found that it was enacted as a prophylactic means of "protect[ing] the right to be free from gender-based discrimination in the workplace." *Id.* at 728.

In finding that there was a pattern of relevant, unconstitutional discrimination by the States, the Court first cited a series of its decisions, dating

from 1873 to 1961, documenting state policies limiting employment opportunities for women. 538 U.S. at 729. The Court then summarized the evidence before Congress of the States' reliance "on invalid gender stereotypes * * * in the administration of leave benefits." *Id.* at 730. As described by the Court in *Lane*, this evidence consisted of:

> (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the Parental and Medical Leave Act of 1986, a predecessor bill to the FMLA, that public-sector parental leave polices "'diffe[r] little'" from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report's quotation of a study that found that failure to implement uniform standards for parenting leave would "'leav[e] Federal employees open to discretionary and possibly unequal treatment.'"

541 U.S. at 529 n.17. As the dissent in *Hibbs* pointed out, the evidence before Congress related almost entirely to discrimination by private (not state) employers in the provision of parental (not family) leave. 538 U.S. at 746-748 (Kennedy, dissenting); see *Lane,* 541 U.S. at 527 n.16.

In *Lane*, the Court upheld a provision in Title II of the ADA that authorizes damages against States for discrimination against qualified individuals with disabilities in the provision of public services. 541 U.S. at 513. The Court found that, as applied in that case, the constitutional right enforced by Title II was the right of access to the courts, a right subject to heightened scrutiny. *Id.* at 522, 529.

There was substantial evidence in the legislative record of unconstitutional discrimination against and denial of fundamental rights to individuals with disabilities by the States, and evidence that many public buildings were not accessible. *Id.* at 524-527. But, as the dissent explained, the record did not establish that "disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials," *id.* at 543 (Rehnquist, dissenting), noting that there were "only *two* reported cases finding that a disabled person's federal constitutional rights [to access to judicial proceedings] were violated," *id*. at 544.

The evidence in *Hibbs* and *Lane* "pales in comparison" to the evidence before Congress when it enacted the 2006 Reauthorization. *Northwest Austin I*, 573 F. Supp. 2d at 271. The 2006 record also vastly exceeds the evidence found wanting by the Court in *Boerne*, 521 U.S. at 530; *Kimel*, 528 U.S. at 89; and *Garrett*, 531 U.S. at 369-370.

C. The 2006 Reauthorization Of Section 5 Is A Congruent And Proportional Response To Continued Voting Discrimination In The Covered Jurisdictions

Congress correctly concluded that the 2006 Reauthorization was appropriate legislation, finding that without Section 5 preclearance, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote,

or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization, §2(b)(9), 120 Stat. 577-578.

First, the Supreme Court repeatedly has held that Section 5 preclearance is an appropriate means of enforcing citizens' right to vote free of discrimination. *South Carolina*, 383 U.S. at 301; *Rome*, 446 U.S. 156; *Georgia*, 411 U.S. at 535; *Lopez*, 525 U.S. at 282-285; see J.A. 610. The Court has reached this conclusion even acknowledging the "stringent," and "inventive" nature of the remedy, *South Carolina*, 383 U.S. at 315, 327, 337, and the "substantial federalism costs" it imposes, *Lopez*, 525 U.S. at 282 (citation omitted). And the Court repeatedly has held out Section 5 as a prime example of legislation that is congruent and proportional. See *Lane*, 541 U.S. at 519 n.4; *Hibbs*, 538 U.S. at 737-738; *Garrett*, 531 U.S. at 373; *Boerne*, 521 U.S. at 526. And for good reason: the combination of the importance of the rights at stake, the extent of the record of constitutional violations, and the limits inherent in the Act make Section 5 a model of legitimate legislation.

Second, Section 5 is limited in important ways. *Boerne*, 521 U.S. at 532-533. It applies only to those jurisdictions "where voting discrimination had been most flagrant," *id.* at 533, and in which voting discrimination remained most prevalent, see pp. 70-72, *infra*. Provisions in the Act are available to cure any under- or overinclusiveness. *Boerne*, 521 U.S. at 533; *South Carolina*, 383 U.S. at

330-331; see 42 U.S.C. 1973a(c); 42 U.S.C. 1973b(a)(1); pp. 72-76, *infra*. The Act affects only "a discrete class of state laws, *i.e.*, state voting laws." *Boerne*, 521 U.S. at 533. And the preclearance requirement is limited temporally; it will expire after 25 years, and Congress is directed to reexamine it after 15 years. 42 U.S.C. 1973b(a)(7)-(8).

Third, Congress enacted Section 5 in 1965 after it learned that earlier legislative remedies were inadequate. *South Carolina*, 383 U.S. at 309; see also *Boerne*, 521 U.S. at 526; *Hibbs*, 538 U.S. at 737. And it reauthorized Section 5 in 2006 after learning that other remedies, particularly Section 2 litigation, remained unduly burdensome and inadequate to protect minority voting rights. See J.A. 619-620.

Fourth, enactment of a prophylactic remedy is an appropriate means of protecting minority citizens from voting discrimination and preserving the gains made since 1965. In *Rome*, 446 U.S. at 175-177, the Court held that "the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the Fifteenth Amendment's purposes." *Rome* also recognized that continued enforcement of Section 5 was "necessary to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination," *id.* at 182, and credited Congress's determination in 1975 that "it is largely Section 5 [that] has contributed to the gains thus far achieved in minority

political participation, and [that] serves to insure that progress not be destroyed through new procedures and techniques," *id*. at 181 (citing 1975 Senate Report 15-19); see also *Beer* v. *United States*, 425 U.S. 130, 140-141 (1976). In 2006, Congress again concluded that Section 5 prevents discrimination in voting against minority citizens, finding, based on the evidence before it, that the progress racial and language-minority voters have made in the last 40 years has resulted from enforcement of the VRA. 2006 Reauthorization, §2(b)(1), 120 Stat. 577.

Fifth, the legislative record demonstrates that compliance with Section 5 is not unduly burdensome. J.A. 617-619. Congress heard that the administrative process of preclearance through the Attorney General is "swift," *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before Senate Judiciary Comm.*, 109th Cong., 2d Sess. 10 (2006) (*Understanding the Benefits and Costs*), requires less work "than the paperwork associated with other state or federal regulations," *id*. at 81, and "is probably the most streamlined administrative process known to the federal government," *id*. at 182; see *id.* at 10. Moreover, the Attorney General makes the administrative preclearance process as efficient and as easy as possible for covered jurisdictions. J.A. 120-121.

Given the extensive evidence of continued discrimination against minority voters in the covered jurisdictions, including evidence of intentional discrimination, the 2006 Reauthorization of Section 5 was appropriate legislation.

III

REAUTHORIZATION OF SECTION 4(b) WAS AN APPROPRIATE EXERCISE OF CONGRESS'S AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS[5]

Plaintiff argues that Congress's decision in 2006 not to alter the geographic scope of Section 5 was unconstitutional. Plaintiff's argument ignores the historical context of Section 5 and mistakenly discounts the strength of the legislative record. Section 4(b) of the VRA, which identifies the jurisdictions covered by Section 5 and the other temporary provisions of the Act, is appropriate legislation for three reasons. First, it describes the jurisdictions with the worst records of voting discrimination. Second, Congress found that Section 5 preclearance remains necessary in the covered jurisdictions, and evidence before Congress demonstrated that voting discrimination remains more prevalent in the covered jurisdictions than in the rest of the nation. Finally, Section 4(b) is not the only coverage provision in the VRA. Under Sections 3(c) and 4(a), non-covered jurisdictions that discriminate may be judicially subjected to preclearance, and covered jurisdictions that do not discriminate may escape coverage by bailing out. These three

[5] Amici challenge the criteria used by the Census Bureau to designate covered jurisdictions following the 1975 expansion of Section 5 to protect language minorities. See Georgia and Arizona Amicus Br. 20-23. That claim has not been asserted by plaintiff and thus is not properly before this Court. In any event, it is doubtful that it is cognizable. See *Briscoe* v. *Bell*, 432 U.S. 404, 409-415 (1977).

provisions, together, create a flexible, workable means of applying Section 5 preclearance to the jurisdictions that continue to discriminate. Indeed, the number of bailouts has been accelerating, with 40% of all successful bailout cases under the revised criteria occurring since 2009.

1. The criteria included in Section 4(b) are often referred to as the coverage formula. But that characterization can be misleading because it suggests that Congress's primary objective in crafting Section 4(b) was to address those criteria (registration and participation rates), and that it used the formula to determine which jurisdictions should be covered by Section 5. In fact, however, the criteria in Section 4(b) were derived as a way of describing in objective terms the jurisdictions Congress knew it wanted to cover. In other words, the "formula" was "reverse-engineered" to encompass those jurisdictions with the worst records of discrimination. J.A. 491; *South Carolina*, 383 U.S. at 328 (coverage formula includes "a small number of States and political subdivisions which in most instances were familiar to Congress by name"); see 1965 House Report 13.

Congress began work with reliable evidence of voting discrimination in a great majority of the jurisdictions affected by the new remedies of the VRA, then "evolved" a formula to capture those areas. *South Carolina*, 383 U.S. at 329. The jurisdictions described by the formula had a long history of racial discrimination in voting. See 1965 House Report 13-14 ("many of the States and political

subdivisions to which the formula applies have engaged in widespread violations of the 15th amendment over a period of time," and each of "the six Southern States which appear to be covered * * * has had a general public policy of racial segregation"); *id.* at 14 (noting that Delaware (a non-covered State), also used tests or devices but had recently abandoned its policy of legal segregation).

Congress knew, in 1965, that there was not a perfect fit between the Section 4(b) criteria and the jurisdictions for which there was evidence of voting discrimination. Attorney General Katzenbach testified that "voting discrimination has unquestionably been widespread" in six of the southern States described by the formula. *Voting Rights: Hearings Before Senate Judiciary Comm.*, 89th Cong., 1st Sess. 17 (1965) (*Voting Rights*). But in South Carolina and Virginia, and in some covered counties in North Carolina, he explained, "other forms of discrimination" were merely "suggestive of voting discrimination." *Ibid.* To remedy any overbreadth in the coverage formula, Congress provided a mechanism to enable a covered jurisdiction to avoid the preclearance requirement by demonstrating, in a declaratory judgment action, that it had not used a prohibited test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" during the previous five years. 1965 Act, §4(a), 79 Stat. 438; see 1965 House Report 15; *South Carolina*, 383 U.S. at 331.

The Attorney General also acknowledged that there was evidence of voting discrimination in jurisdictions that would not be covered by the formula, including northern Florida, Tennessee, and Arkansas. *Voting Rights* 240. If constitutional violations were subsequently proven in any non-covered jurisdictions, they could become subject to the preclearance requirement pursuant to the "bail-in" provision in Section 3(c). 1965 Act, §3(c), 79 Stat. 437-439.

2. The 1964 registration and turnout data in the original coverage formula were not relevant for their own sake but because they, along with the test or device requirement, described those jurisdictions with a history of "widespread and persistent discrimination in voting." *South Carolina*, 383 U.S. at 328-329. Therefore, it should be no surprise that, in 2006, those same jurisdictions still had a record of voting discrimination warranting continued application of the preclearance requirement. As the 1965 Congress anticipated, the form of discrimination in those jurisdictions changed to a large extent. Because Congress prohibited tests and devices, discrimination no longer focused as heavily on keeping minorities from registering to vote. See *Rome*, 446 U.S. at 181 ("As registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength.") (quoting 1975 House Report 10).

Section 5 is and has always been geographically targeted at those areas with a particularly egregious history of voting discrimination. Cf. *Hibbs*, 538 U.S. at 729 (relying on cases dating from 1873 to 1961 to uphold 1993 enactment of the FMLA). The Supreme Court recognized in *South Carolina*, that, in enacting Section 5, Congress sought "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." 383 U.S. at 328. A covered jurisdiction would be required to comply with the preclearance requirement until either it bailed out or Congress determined in the course of periodically considering whether to reauthorize the law that the covered jurisdictions as a whole had sufficiently reformed that preclearance was no longer warranted. Plaintiff's suggestion (Appellant's Br. 62-63) that Congress should have crafted a new coverage formula in 2006 that incorporated registration and participation rates from recent elections reflects a misunderstanding of the task before Congress in 2006. The purpose of Section 5 has never been to impose preclearance on a fixed number of jurisdictions with the most egregious recent records of voting discrimination at the particular moment of reauthorization, wherever those jurisdictions may be. Rather, the purpose of Section 5 is to eliminate (or sufficiently ameliorate) voting discrimination in a part of the country in which history has demonstrated discriminatory practices have stubbornly enduring roots. So it is not surprising that in 2006 Congress did not devise a new formula tied to

recent election data. Rather, Congress correctly understood that it must determine whether the level of ongoing voting discrimination in covered jurisdictions was sufficient to merit an extension of Section 5.

Congress correctly determined, based on abundant evidence, that Section 5 preclearance was still necessary in the covered jurisdictions because those jurisdictions continued to engage in an unacceptable degree of discrimination in voting. See 2006 Reauthorization, §2(b)(3), (4), (5), and (8); pp. 25-47, *supra*. In addition, studies before Congress and before the district court in this case demonstrate that even with Section 5's prophylactic remedy in place, voting discrimination continues to be more prevalent in the covered jurisdictions than in non-covered jurisdictions. The Katz Study, which examined only reported decisions, found that more than 56% of the Section 2 cases with favorable outcomes for minority plaintiffs were filed in covered jurisdictions. See p. 35, *supra*. Yet these jurisdictions contained less than 25% of the nation's population, 40% of the non-Hispanic black population, and 33% of the minority population. J.A. 421. When results of unreported Section 2 actions from both covered and non-covered States are included, the disparity between the covered and non-covered jurisdictions is overwhelming: 81% of Section 2 actions with successful

outcomes for minority plaintiffs were brought in the covered jurisdictions. See J.A. 93-101, 110-116.[6]

When the data on Section 2 cases are broken down by State, a similar pattern emerges. J.A. 437-440. Only two non-covered States – Arkansas (28 cases) and Illinois (11 cases) – had more than seven such cases, while only two covered States had less than seven such cases. J.A. 438, 440.

3. Finally, as the Court recognized in upholding the original formula, there need not be a perfect fit between the coverage formula and the evidence of discrimination. *South Carolina*, 383 U.S. at 330-331. Congress "need not deal with all phases of a problem in the same way." *Id.* at 331. Thus, Congress could appropriately choose to respond to voting discrimination in non-covered states through other means, including Section 2 actions or the Section 3(c) bail-in provision. *Id.* at 330-331. And, as the Court recognized, the bailout provision of

[6] These data were obtained by identifying unreported successful Section 2 actions in the non-covered jurisdictions and adding them to the actions already included in the Katz Study and the National Commission Report. J.A. 93-96; p. 35, *supra*. Plaintiff argued below that the court should ignore this more complete data because it was not part of the legislative record. However, 61 of the 99 cases identified for this study *were*, in fact, in the legislative record. J.A. 110-116. In any event, there is no rule that limits this court's consideration to evidence that was before Congress. The Court relied on post-enactment evidence in *Lane*, 541 U.S. at 525 nn.6-9, 11, 13-14; *id.* at 526 n.15; and *Hibbs*, 538 U.S. at 733-734 & nn.6-9. Other decisions examining Congress's authority to enact legislation have also examined post-enactment evidence. See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 19 n.28, 21 n.31 (2005); *Woods*, 333 U.S. at 143 n.6.

the VRA is available to cure any over-inclusiveness in the coverage formula. *Ibid.*; *Briscoe* v. *Bell*, 432 U.S. 404, 411 (1977).

Section 3(c) provides that a jurisdiction found to have violated the voting guarantees of the Fourteenth or Fifteenth Amendment may be subjected to analogous preclearance requirements for voting changes. 42 U.S.C. 1973a(c). Courts have applied this provision to at least 17 non-covered jurisdictions, including the States of New Mexico and Arkansas (the non-covered State with the largest number of successful Section 2 actions). J.A. 433-434; *Sanchez* v. *Anaya*, C.A. No. 82-0067M (D.N.M. Dec. 17, 1984); *Jeffers* v. *Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), appeal dismissed, 498 U.S. 1129 (1991).

The bailout provision enables covered jurisdictions that have not discriminated to terminate Section 5 coverage. 42 U.S.C. 1973b(a). As originally enacted, bailout was only available to jurisdictions that could prove they had not used tests or devices for a discriminatory purpose or with a discriminatory effect since before their coverage date. 1965 Act, §4(a), 79 Stat. 438. In 1982, Congress substantially rewrote the provision to enable jurisdictions to bail out if they had complied fully with the VRA and had not engaged in voting discrimination during the most recent ten years. 1982 Reauthorization, §2(b)(5)(B), 96 Stat. 131-133; see J.A. 495, 615-618. The 1982 Reauthorization also significantly expanded the entities eligible to bail out to include subjurisdictions within fully-covered States.

Ibid. These changes were enacted to provide "incentives to the covered jurisdictions to comply with laws protecting the voting rights of minorities, and to make changes in their existing voting practices and methods of election." 1981 House Report 32. In *Northwest Austin II*, the Supreme Court held that all political subdivisions that meet the bailout criteria – not only those county-level jurisdictions that conduct voter registration – are eligible to bail out. 129 S. Ct. at 2514-2516.

Bailout activity increased markedly after *Northwest Austin II*. Overall, 65 of the roughly 943 originally-covered county-level jurisdictions (*i.e.*, those that conduct voter registration) are currently bailed out, plus many more subjurisdictions within their borders. J.A. 122, 427-430; http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout. Since 1984, when the current bailout criteria took effect, the Attorney General has consented to bailout in 30 cases, affecting 87 jurisdictions and subjurisdictions.[7] *Ibid.* Eighteen of those cases, all filed by county-level jurisdictions, occurred before *Northwest*

[7] *Northwest Austin II*, 129 S. Ct. at 2516, stated that, "[s]ince 1982, only 17 jurisdictions – out of the more than 12,000 covered political subdivisions" had bailed out. This statement does not present a complete picture because it compares the number of bailout *cases* at the time (17) to the number of covered *jurisdictions*. When a county-level jurisdiction bails out, coverage is terminated for all the subjurisdictions within its territory as well. So a single bailout case may result in termination of coverage for several jurisdictions.

Austin II, while 12 cases (from five states) occurred since that decision, including five cases brought by smaller jurisdictions that were not previously thought eligible. *Ibid.* The Attorney General continues to review the informal bailout requests of numerous jurisdictions and fully supports the use of the bailout provision to enable jurisdictions to terminate their preclearance obligations when appropriate.

The bailout criteria correspond closely to the very purpose of the Section 5 preclearance requirement. The absence for ten years of discriminatory tests or devices, Section 5 objections, unprecleared electoral changes, the assignment of federal observers, and other discriminatory voting practices, 42 U.S.C. 1973b(a)(1), is a good indicator that preclearance is no longer needed. Moreover, the criteria include an exception for violations that were "trivial, were promptly corrected, and were not repeated." 42 U.S.C. 1973b(a)(3). Requiring jurisdictions to demonstrate that governmental units within their boundaries have fully complied with Section 5 and have not discriminated is also an appropriate requirement. "[T]he Fifteenth Amendment places responsibility on the states for protecting voting rights," and States retain "significant statutory and practical control" over the election practices of counties and other subjurisdictions. 1982 Senate Report 56. In Alabama, for example, both the structure of county and municipal governments and the election procedures for counties and municipalities are

governed by state statutes. See, *e.g.*, Ala. Code §§11-3-1, 11-43-2, 17-1-3(a). Counties also often have substantial control over the conduct of elections within their boundaries, including municipal elections. In Alabama, for example, voter registration and many elections are conducted by county officials. See, *e.g.*, Ala. Code §§17-3-2, 17-8-1.

The bailout provision creates a workable process for jurisdictions seeking to terminate coverage. J.A. 616. Congress heard testimony that the average cost of obtaining bailout was approximately $5,000, and that most of the bailout criteria "are easily proven for jurisdictions that do not discriminate in their voting practices." *Scope and Criteria for Coverage* 87-90; see *Evidence of Continued Need* 2683. Congress also learned that the exception for trivial violations enabled jurisdictions to bail out even when the jurisdiction or a subjurisdiction within its territory had inadvertently neglected to submit a voting change or changes, once the changes had been submitted and cleared. *Scope and Criteria for Coverage* 91; see *Evidence of Continued Need* 2677-2682; J.A. 123.

Section 4(b) targets the jurisdictions with the worst historical records of voting discrimination. Because Congress found that the Section 5 preclearance requirement remained necessary to guarantee minority voting rights in those covered jurisdictions, its decision to continue the requirement in those jurisdictions was appropriate. Congress accomplished this by leaving the coverage formula

unchanged. The availability of the statutory bail-in and bailout provisions, together with the Attorney General's flexible administration of those provisions, is sufficient to cure any under- or overinclusiveness of the criteria in Section 4(b).

Section 4(b) thus addresses current conditions, and its "disparate geographic coverage is sufficiently related to the problem that it targets." *Northwest Austin II*, 129 S. Ct. at 2512.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 17,500 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: December 1, 2011

CERTIFICATE OF SERVICE

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