No. 12-96

In The
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL, et al.,
Respondents.

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

BRIEF FOR RESPONDENT-INTERVENOR BOBBY LEE HARRIS

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
JON M. GREENBAUM
Counsel of Record
ROBERT A. KENGLE
MARK A. POSNER
MAURA EILEEN O'CONNOR
1401 New York Avenue, NW
Suite 400
Washington, D.C. 20005
(202) 662-8315
jgreenbaum@
lawyerscommittee.org

JOHN M. NONNA
PATTON BOGGS LLP
1185 Avenue of the Americas
30th Floor
New York, NY 10036
(646) 557-5172

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITY

INTRODUCTION

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, requires federal review before any change affecting voting may be implemented by covered States and political subdivisions. As a result, thousands of voting changes determined as having the purpose and/or effect of denying or abridging the right to vote on account of race have been blocked before they could be implemented. In this manner, Section 5 has played – and is continuing to play – an indispensable role in promoting and protecting political participation by racial minorities. This Court four times has upheld this unique exercise of congressional power against constitutional challenge, first after Section 5 originally was enacted and then following Congress' reauthorization of Section 5 in 1970, 1975, and 1982. In so doing, this Court has recognized that Congress' legislative determinations are owed substantial deference when Congress exercises its enforcement powers under the Reconstruction Amendments to combat racial discrimination in voting. Accordingly, this Court has not disturbed Congress' judgment that the ongoing risk of discrimination in the covered areas required reauthorization of Section 5.

During the most recent reauthorization process, Congress engaged in an exhaustive fact-finding mission. It held twenty-one hearings and compiled more than 15,000 pages of record. This record revealed extensive contemporary discrimination in the areas subject to Section 5 review (*i.e.*, discrimination which occurred after the most recent preceding reauthorization in 1982),

including more than 600 objections by the Attorney General. This contemporary discrimination reflects an unbroken pattern of discrimination in the covered jurisdictions that both existed prior to the enactment of Section 5 and continued from 1965 through 1982. At the same time, the record compiled by Congress in 2006 did not indicate a remotely comparable pattern of discrimination in the non-covered jurisdictions. For these reasons, Congress reauthorized Section 5 and retained the existing coverage provisions.

There has been undeniable progress since 1965 in terms of minority registration and turnout in the covered areas. From the start, however, that progress has been met with the adoption of dilutive voting practices that sought to negate the gains. That pattern continued after 1982 and, as a consequence, the evidence of contemporary discrimination is extensive in the great majority of the covered areas (Alabama, Georgia, Louisiana, Mississippi, the 40 covered counties of North Carolina, South Carolina, and Texas), and negates the instant facial challenge to the statute. Moreover, the opportunity for "clean" jurisdictions to bail out of coverage and for courts to "bail in" other jurisdictions provides even closer tailoring. To the extent that any constitutional issues remain that cannot be addressed via those statutory provisions, covered jurisdictions also may file "as applied" challenges, as two covered States recently have done.

For these reasons, this Court should once again uphold the constitutionality of Section 5 and the Act's geographic coverage provisions.

STATEMENT OF THE CASE

I. Section 5 And Related Provisions

The Voting Rights Act of 1965, as amended, enforces the constitutional prohibitions on racial discrimination in voting contained in the Fourteenth and Fifteenth Amendments. The statute "reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Congress adopted the Voting Rights Act after nearly a century of state-enforced disenfranchisement of African-Americans and other racial minorities, principally in the former Confederate States, and the failure of case-by-case litigation to dismantle the discriminatory regimes. *Id.* at 328. Congress designed the Act to provide "stringent . . . remedies for voting discrimination where it persists on a pervasive scale, and [to] strengthen[] existing remedies for pockets of voting discrimination elsewhere in the country." *Id.* at 308.

A. The Section 5 Preclearance Requirement

Section 5 of the Act requires certain States, and political subdivisions of other States, to obtain federal preclearance whenever they "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" which differs from the prior provision that was in effect, or which differs from the provision in effect on the jurisdiction's coverage date (November 1, 1964; November 1, 1968; or November 1, 1972). 42 U.S.C. § 1973c(a). *See Riley v. Kennedy*,

553 U.S. 406, 421 (2008). Without preclearance, voting changes in the covered jurisdictions are unenforceable. *Clark v. Roemer*, 500 U.S. 646, 654-55 (1991); 28 C.F.R. § 51.10.

To obtain preclearance, a jurisdiction may file a *de novo* declaratory judgment action in the United States District Court for the District of Columbia, or an administrative request to the United States Attorney General. In either forum, the jurisdiction must show that its voting change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or [language minority status]." 42 U.S.C. § 1973(a).[1] The Section 5 "purpose" standard applies to "any discriminatory purpose." 42 U.S.C. § 1973c(c). The "effect" standard prohibits backsliding, *i.e.*, it bars any change "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

Section 5 limits the preclearance obligation to changes affecting voting, 42 U.S.C. § 1973c(a), *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992), but is comprehensive within that sphere. *Id.* at 502-03, 509; *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969).

---

[1] The Act defines "language minority group" to include "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 1973*l*(c)(3).

Section 4 of the Act, 42 U.S.C. § 1973b, establishes two prerequisites for jurisdictions to be covered by Section 5 today, and includes a third coverage factor. First, it is necessary, but not sufficient, that the jurisdictions satisfy the coverage criteria set forth in Section 4(b), 42 U.S.C. § 1973b(b). These criteria are that a jurisdiction must have maintained a "test or device" for registration or voting at the time of the 1964, 1968, or 1972 presidential election, and less than 50 percent of the eligible voters registered or voted in the same election.[2] These criteria identify the areas where, historically, "voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. at 315.

Second, coverage exists today based on Congress having conducted several periodic reviews of the preclearance remedy, and its decision in each instance that electoral conditions in the covered areas merited an extension of coverage for an additional period of years. Section 4, as originally enacted and subsequently reauthorized, has continuously included a sunset provision, which stipulated that coverage would terminate on a date certain, subject to Congress enacting extension legislation. Coverage originally was to sunset in 1970, and then in 1975, 1982, and 2007; Congress

---

[2] The statute defines "test or device" to include literacy tests, "understanding" tests, "moral character" tests, and similar procedures. 42 U.S.C. § 1973b(c). The term also includes the use of English-only election procedures in the 1972 presidential election where a language minority citizen group constituted more than five percent of the citizen voting age population. 42 U.S.C. § 1973b(f)(3).

reauthorized coverage for additional periods of years in 1970, 1975, 1982, and 2006.[3] Under the 2006 Amendments, Section 4 coverage will expire in 2031. 42 U.S.C. § 1973b(a)(8).

Third, Section 4 allows qualifying covered jurisdictions to exempt themselves from coverage ("bail out"), by means of a declaratory judgment action filed in the District Court for the District of Columbia, naming the Attorney General as the defendant. The current bailout provisions (which were enacted in 1982, and became effective in 1984[4]) require a showing that an individual jurisdiction's electoral processes have been free of discrimination for a period of ten years. 42 U.S.C. § 1973b(a)(1)-(6). Bailout may be sought by an entire State, an individual county or parish, or an individual city or other political subjurisdiction. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211 (2009). Congress must "reconsider" coverage and bailout provisions in 2021. 42 U.S.C. § 1973b(a)(7).

Pursuant to these coverage provisions, nine States currently are subject to the Section 5 preclearance requirement – Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Six of these States

---

[3] Pub. L. No. 89-110, 79 Stat. 437, 438, § 4(a) (1965); Pub. L. No. 91-285, 84 Stat. 314 § 3 (1970); Pub. L. No. 94-73, 89 Stat. 400, §§ 101, 201 (1975) ("1975 Amendments"); Pub. L. No. 97-205, 96 Stat. 131, § 2(b) (1982) ("1982 Amendments"); Pub. L. No. 109-246, 120 Stat. 577, 580, § 4 (2006) (2006 Amendments").

[4] 1982 Amendments, § 2(b).

(Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) are covered today pursuant to the 1965 coverage criteria, and the four subsequent reauthorizations. The other three States (Alaska, Arizona, and Texas) are covered today pursuant to the 1975 coverage criteria, and the two subsequent reauthorizations.[5]

Portions of seven other States also currently are covered – California (three counties), Florida (five counties), Michigan (two townships), New Hampshire (ten towns), New York (three counties), North Carolina (40 counties), and South Dakota (two counties).[6] Thus, only North Carolina, among the partially covered States, has a substantial portion of the State covered geographically.

To date, a total of 236 individual jurisdictions have bailed out under the current procedure, in 38 separate actions.[7] All of these bailouts were granted with the Attorney General's consent.[8]

---

[5] Section 5 Covered Jurisdictions, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Jan. 24, 2013).

[6] Note 5*, supra*, and note 7, *infra*. New Hampshire has filed for bailout on behalf of its covered towns, and a proposed consent decree is pending review by the district court. *New Hampshire v. Holder*, 1:12-cv-1854 (D.D.C.).

[7] Jurisdictions currently bailed out, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited Jan. 24, 2013). See also App. 136a-139a. Several jurisdictions also bailed out under the previous bailout standards. App. 133a-136a.

[8] Note 7, *supra*.

B. Other Voting Rights Act Provisions

The Act currently includes one other remedy whose coverage is limited to the areas specified by Section 4. That provision, in Section 8, 42 U.S.C. § 1973f, authorizes the Attorney General to monitor the administration of elections by sending polling place observers.

The Act originally included two other such remedies: a five-year suspension of the use of any "test or device" for registration or voting (*i.e.*, the procedures which, combined with a low participation rate, also triggered coverage); and authority granted to the Attorney General to assign federal examiners to conduct voter registration. *Katzenbach*, 383 U.S. at 315-16. In 1975, Congress permanently banned the "test or device" procedures nationwide. 42 U.S.C. § 1973aa.[9] Congress repealed the examiner procedure as part of the 2006 Amendments.[10]

Section 3(a) of the Act, 42 U.S.C. § 1973a(a), provides that a court, in a voting discrimination lawsuit, may extend observer coverage to a jurisdiction not covered by Section 4 "for such period of time . . . as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment." Section 3(c) provides similar authority to a court to order a preclearance remedy "for such period as it may deem

---

[9] 1975 Amendments, § 102.

[10] 2006 Amendments, § 3(c).

appropriate" to remedy "violations of the fourteenth or fifteenth amendment."

Section 2 of the Act, 42 U.S.C. § 1973, provides for a right of action, on behalf of the Attorney General or private litigants, to challenge a voting practice on the ground that it has a discriminatory purpose, or in certain circumstances, has a discriminatory "result[]." *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986).

II. This Court's Prior Decisions Upholding Section 5

This Court has upheld the constitutionality of Section 5 in four separate decisions preceding Congress' 2006 reauthorization of the statute. These decisions both have affirmed that Congress appropriately may "shift the advantage of time and inertia from the perpetrators of the evil [voting discrimination] to its victims," *Katzenbach*, 383 U.S. at 328, by requiring that a specified subset of jurisdictions obtain Federal preclearance for their voting changes, and that Congress appropriately may supersede a prior decision to sunset the remedy by reauthorizing coverage based on a finding of an ongoing, current need.

First, in *South Carolina v. Katzenbach*, the Court upheld the remedies Congress chose to "aim[] at areas where voting discrimination has been most flagrant." *Id.* at 315. This included the preclearance provision, the then-temporary suspension of "tests" and "devices," and the use of federal registration examiners. The Court also upheld the Section 4 coverage criteria. *Id.* at 337.

As to Section 5 preclearance, the Court affirmed Congress' predictive judgment that the remedy was needed because the "States [identified by the Section 4 coverage formula] might try . . . maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.* at 335. That judgment, in turn, was based on Congress' considered determination that "some of the States covered by § 4(b) of the Act 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." *Id.*

The Court held that the Section 4 "coverage formula is rational in both practice and theory," and therefore is permissible. *Id.* at 330. In "theory," the coverage criteria appropriately identify jurisdictions with a history of "flagrant" voting discrimination, since the criteria involve past use of a discriminatory "test or device," and low minority political participation associated with that use. The formula "is rational in . . . practice" since Congress identified "actual voting discrimination in a great majority" of the areas to be covered before adopting the criteria. *Id.* at 329-30.

Following Congress' 1970 reauthorization of Section 5, the Court summarily rejected a second challenge, "for the reasons stated at length" in *Katzenbach*. *Georgia v. United States*, 411 U.S. 526, 535 (1973).

The third challenge arose in *City of Rome v. United States*, 446 U.S. 156 (1980), after Congress

reauthorized Section 5 in 1975, and also extended the coverage formula to the 1972 presidential election and to certain jurisdictions' use of English-only elections. The Court rejected Rome's claim that Congress lacked the authority to reauthorize Section 5, *id.* at 180-82; the city's challenge to the constitutionality of the Section 5 effect standard; *id.* at 177, and the city's claim that Section 5 violates principles of federalism. *Id.* at 179-80.

As to reauthorization, the Court observed that Congress had given "careful consideration to the propriety of readopting § 5's preclearance requirement." *Id.* at 181. The Court then highlighted Congress' "ringing endorsement" of the "'continuing need for [the] preclearance mechanism'" based on Congress' finding that, "'[a]s [minority] registration and voting . . . increase[],'" the covered areas may adopt "'other measures'" to "'dilute increasing minority voting strength.'" *Id.* (quoting H.R. Rep. No. 94-196 (1975)). The Court also noted that Congress found some continuing problems with disparities between minority and white registration rates, and the limited success of minority candidates. *Id.* at 180.

Most recently, the Court upheld the constitutionality of Section 5 in *Lopez v. Monterey County*, 525 U.S. 266 (1999). The Court rejected a challenge by the State of California, which is not covered by Section 5, that Congress had violated principles of federalism by requiring preclearance of voting changes enacted by the State insofar as changes are implemented by a covered county in that State. *Lopez*, 525 U.S. at 282.

III. Congress' 2006 Reauthorization Of Section 5

In 2006, Congress voted overwhelmingly to supplant the 2007 sunset date for Section 4 coverage established by the 1982 Amendments, and to thus reauthorize Section 5. On July 27, 2006, President Bush signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 into law. Congress enacted the reauthorization to effectuate its authority under both the Fourteenth and Fifteenth Amendments. H.R. Rep. No. 109-478, at 53, 90 (2006) ("House Report").

Prior to enacting the reauthorization, the House and Senate conducted extensive hearings to evaluate the current status of voting discrimination in the country. The House held 12 hearings, received live testimony from 46 witnesses, and received written testimony from the Justice Department and other organizations and witnesses. The House also received two comprehensive reports from private organizations which documented ongoing voting discrimination in the covered areas, and separate reports for 11 of the 16 wholly or partially covered States which documented ongoing discrimination on a state-specific basis. *Id*. at 5. The Senate held nine hearings encompassing the testimony of 46 witnesses. S. Rep. No. 109-295, at 10 (2006). In total, Congress compiled a record of "over 15,000 pages." Pet. App. 131a.

Based on this record, Congress made the predictive judgment that "without the continuation of

the Voting Rights Act of 1965 protections, racial and language minorities 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 Amendments, § 2(b)(9).

In particular, Congress found that, subsequent to Section 5's 1982 reauthorization, the Attorney General interposed "hundreds of objections" to block discriminatory voting changes. *Id.* § 2(b)(4)(A). "[S]uch objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." House Report at 21.

Congress also relied upon multiple other categories of evidence. These included further evidence relating to Section 5 submissions and the enforcement of Section 5; information relating to Section 2 litigation; information regarding repeated dispatches of federal observers to monitor elections in covered jurisdictions; and information relating to the current electoral conditions in the covered areas. 2006 Amendments § 2(b)(3), (4), & (5). Congress also found that Section 5 has been a "vital prophylactic tool[]" that has "deterred covered jurisdictions from even attempting to enact discriminatory voting changes." House Report at 21, 24.

IV. *Nw. Austin v. Holder*

Following Congress' 2006 reauthorization of Section 5, a municipal utility district in Texas challenged the constitutionality of Section 5 and, in

the alternative, sought to bail out. The United States District Court for the District of Columbia, sitting as a three-judge court, upheld the statute and, as to bailout, held that only counties, parishes, and other political subunits which conduct voter registration are the types of subjurisdictions eligible to bail out under Section 4. Since the utility district did not conduct voter registration, the court denied the bailout request as well. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (2008).

On appeal, this Court held that Section 4 allows all types of covered subjurisdictions to seek bailout, and thus found that the utility district was eligible. 557 U.S. 193, 211 (2009). Since the district had pled its two claims in the alternative, the Court did not reach the constitutional question. *Id*. at 206.

Although the Court did not resolve the constitutional issue, it identified two principal questions for consideration in a future challenge to the constitutionality of the 2006 reauthorization. First, the Court stated that Section 5 "imposes current burdens and must be justified by current needs." *Id.* at 203. In this regard, the Court noted that, on the one hand, "[s]ome of the conditions that we relied upon in upholding this statutory scheme . . . have unquestionably improved. Things have changed in the South." *Id.* at 202. On the other hand, however, "[t]hese improvements are no doubt due in significant part to the Voting Rights Act itself" and "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.* at 202-03.

Second, the Court stated that "the fundamental principle of equal sovereignty requires a showing that [Section 5's] disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. The Court noted the possibility that voting discrimination "may no longer be concentrated in the jurisdictions singled out for preclearance." *Id.* The disparate coverage implicates "federalism concerns," including "an argument that the preclearance requirements in one State would be unconstitutional in another," and potential "tension between §§ 2 and 5" of the Act limited to the covered States. *Id.*

SUMMARY OF ARGUMENT

The Fourteenth and Fifteenth Amendments grant Congress broad authority, as against the States, to remedy racial discrimination in voting. This authority, in turn, merits substantial deference by this Court to Congress' factual determinations regarding the continuing need for the preclearance remedy, and Congress' determinations regarding the areas of the country where this remedy still is needed.

Prior to reauthorization, Congress compiled a massive record evidencing a substantial and ongoing pattern of voting discrimination in the covered areas. This record, on the other hand, revealed only fragmentary evidence of discrimination elsewhere in the country.

The 2006 reauthorization fully satisfies the two principal inquiries this Court identified in *Nw.*

Austin. Congress based reauthorization on a proper finding of "current needs," and Section 5's limited geographic coverage remains "sufficiently related to the problem that it targets." 557 U.S. at 203.

ARGUMENT

I. The Reconstruction Amendments Grant Congress Broad Authority To Remedy Racial Discrimination In Voting

Under this Court's decisions in *Katzenbach* and *Rome*, and also under this Court's construction of Congress' Fourteenth Amendment authority in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and subsequent cases, Congress' exercise of its Fourteenth and Fifteenth Amendment authority to remedy racial discrimination in voting is subject to a highly deferential standard of review.

A. Congress Acts at the Zenith of Its Authority When Enacting Voting Rights Legislation

In enacting the Voting Rights Act to "rid the country of racial discrimination in voting," *Katzenbach*, 383 U.S. at 315, Congress legislated at the zenith of its constitutional authority. The Voting Rights Act addresses both the quintessential suspect classification (race), *Johnson* v. *California*, 543 U.S. 499, 509 (2005), and the quintessential civil right (the right to vote), *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). Two separate amendments to the Constitution, moreover, grant Congress the power to legislate in this sphere. The Fifteenth Amendment

expressly prohibits racial discrimination in voting. The Fourteenth Amendment's Equal Protection Clause also has been construed for at least 40 years to prohibit racial discrimination in voting. *E.g. Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973).

As this Court held in *Katzenbach*, Congress' role is central in establishing remedies for discrimination in voting, and Congress has broad authority to legislate on this issue. As between Congress and the judiciary, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Fifteenth Amendment]." *Katzenbach*, 383 U.S. at 326. And, "[a]s against the reserved powers of the States, Congress may use *any* rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324 (emphasis added). Although States generally exercise plenary authority over matters "'wholly within the domain of state interest,'" that authority must give way when state power is "'used as an instrument for circumventing a federally protected right.'" *Id.* at 325 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

In subsequent cases, this Court has reaffirmed the primacy of congressional authority to remedy racial discrimination in voting. In *Rome*, the Court rejected a federalism challenge to Section 5 because "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments by 'appropriate legislation.'" 446 U.S. at 179. Then, in *Lopez v. Monterey County*, the Court

again ruled that Congress' power to remedy racial discrimination in voting trumps the federalism concern: "In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however . . . ." 525 U.S. at 284-85.

In addition, the Court in *Rome* reaffirmed that, as between federal and state authority in this area, Congress' power is extensive in that the Reconstruction Amendments authorize Congress to employ "any rational means" to remedy voting discrimination. Thus, the Court upheld the Section 5 "effect" standard because Congress "could rationally have concluded" that this is an appropriate remedy to address "the risk of purposeful discrimination" by jurisdictions with a history of voting discrimination. 446 U.S. at 177. The Court further explained that it had relied upon the same standard in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in unanimously upholding Congress' nationwide suspension of literacy tests in 1970. 446 U.S. at 176-77.

B. The *Boerne* "Congruence and Proportionality" Standard Likewise Recognizes Congress' Central Role in Safeguarding Fundamental Constitutional Rights

In *City of Boerne v. Flores*, this Court held that when Congress legislates pursuant to the Fourteenth Amendment, "[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. Previously, it has been posited that, in

ruling on Section 5, this Court would need to choose between that standard and *Katzenbach's* "any rational means" formulation. *Nw. Austin*, 557 U.S. at 204.

A review of this Court's decisions demonstrates, however, that the *Katzenbach* and *Boerne* formulations are part of a single framework for evaluating congressional authority to enact civil rights remedies. As the district court stated, there is "one standard of review that has always been employed to assess legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments," Pet. App. 161a, and "*Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*." Pet. App. 162a.

Moreover, when Congress acts to remedy racial discrimination in voting, *Boerne* and subsequent cases reaffirm the centrality of Congress' role, and its broad authority to enact voting discrimination remedies as against the reserved powers of the States. This is so because the *Boerne* standard was specifically built upon, and incorporates the holdings in, *Katzenbach*, *Rome*, and *Oregon v. Mitchell*. It also is so because the manner in which the "congruence and proportionality" standard functions is sensitive to the nature of the constitutional right Congress is seeking to enforce.

1. As applied by this Court in *Boerne* and subsequent decisions, the "congruence and proportionality" analysis involves three steps. The first "is to identify with some precision the scope of

the constitutional right at issue." *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *accord*, *Tennessee v. Lane*, 541 U.S. 509, 522 (2004). The second is to examine the nature and scope of "injury to be prevented or remedied," *Boerne*, 521 U.S. at 520, to determine whether "Congress identified a history and pattern of unconstitutional . . . discrimination." *Garrett*, 531 U.S. at 368. *Accord*, *Lane*, 541 U.S. at 523. Third and finally, the "means adopted" by Congress are reviewed to determine whether they are "appropriate," *i.e.*, whether they are congruent and proportional to the identified discrimination. *Garrett*, 531 U.S. at 372; *accord*, *Lane*, 541 U.S. at 530.

In relying heavily on *Katzenbach*, *Rome*, and *Oregon v. Mitchell*, *Boerne* made no distinction between Congress' Fourteenth and Fifteenth Amendment authority. 521 U.S. at 518-19, 525-27. Moreover, in *Boerne* and subsequent "congruence and proportionality" cases the Court repeatedly has pointed to Section 5 of the Voting Rights Act as a model for how Congress may constitutionally exercise its enforcement authority under the Fourteenth Amendment. *See Garrett*, 531 U.S. at 373; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 647 (1999); *Boerne*, 521 U.S. at 532-33.

In addition, *Boerne's* three steps essentially recapitulate the analytic framework the Court relied upon in *Katzenbach*. There, the Court premised its ruling on Congress' broad Fifteenth Amendment authority, 383 U.S. at 324-26 (*Boerne* step one); the "historical experience which [the Voting Rights Act]

reflects," *id.* at 308 (*Boerne* step two); and the appropriateness of the remedies enacted by Congress in light of the discrimination Congress sought to remedy and prevent, *id. at* 333-37 (*Boerne* step three). *See also Lane*, 541 U.S. at 523 (identifying *Boerne* step two by quoting the *Katzenbach* "historical experience" formulation); *Garrett*, 531 U.S. at 373 (Congress appropriately exercised its Fifteenth Amendment authority in the Voting Rights Act because it both "documented a marked pattern of unconstitutional conduct by the States" and enacted "a detailed but limited remedial scheme").

Thus, *Boerne* and *Katzenbach* – and their "congruence and proportionality" and "any rational means" standards – are inextricably bound together. This Court neither set forth the *Boerne* standard as something separate and apart from *Katzenbach*, *Rome*, and *Oregon v. Mitchell*, nor did the Court praise these Fifteenth Amendment decisions only to bury them. It follows, therefore, that when Congress enacts voting discrimination remedies, including the 2006 reauthorization of Section 5, Congress exercises its constitutional authority subject to the "congruence and proportionality" standard. At the same time, the application of this standard to voting rights legislation is informed by this Court's rulings in *Katzenbach*, *Rome*, and *Oregon v. Mitchell*. Thus, as against the reserved powers of the States, Congress has broad authority to use "any rational means" in achieving a congruent and proportional remedy for racial discrimination in voting.

2. As a general matter, *Boerne* reaffirmed that Congress' legislative authority under the

Reconstruction Amendments has a wide scope, although it is also subject to important limitations. The Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power 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." 521 U.S. at 518. Furthermore, "Congress must have wide latitude" in exercising its Fourteenth Amendment authority. *Id.* at 520. Congress remains within the scope of this enforcement power so long as it does not attempt "to decree the substance of the Fourteenth Amendment's restrictions on the States," *id.* at 519, since Congress "has been given the power 'to enforce' [the Fourteenth Amendment], not the power to determine what constitutes a constitutional violation." *Id.*

Congress possesses a particularly "wide latitude" of remedial authority as against the States when it enforces fundamental or significant rights, such as the right to be free from racial discrimination in voting, whereas greater judicial scrutiny of congressional action is merited when Congress seeks to enforce other equal protection rights. As the Court explained in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-36 (2003), and reaffirmed in *Lane*, 541 U.S. at 528-29, this Court's decisions upholding congressional enactments as "congruent and proportional" under the Fourteenth Amendment involved legislation where the constitutional right is substantial and where state authority therefore is

limited, as reflected in the heightened level of judicial review applicable to state action.[11] Contrastingly, this Court's decisions holding that Congress had exceeded its Fourteenth Amendment authority involved legislation where the Constitution allows the States a much wider range of authority, as reflected in the use of rational-basis review.[12]

---

[11] In *Lane*, the Court upheld the provisions of the Americans With Disabilities Act as applied to the "fundamental [due process] right of access to the courts." 541 U.S. at 533-34, In *Hibbs*, the Court upheld provisions of the Family and Medical Leave Act dealing with gender discrimination. 538 U.S. at 736. In *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012), the Court found that a different provision of the Family and Medical Leave Act was not properly enacted pursuant to the Fourteenth Amendment, but that provision, the Court found, did not concern gender discrimination.

[12] *Garrett* held that the employment discrimination provisions of the Americans With Disabilities Act were not properly enacted pursuant to the Fourteenth Amendment, emphasizing the limited scope of the equal protection right involved. 531 U.S. at 367. In *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000), the Court ruled that the Age Discrimination in Employment Act was outside Congress' Fourteenth Amendment authority, and also highlighted the discretion accorded the States in this area.

This Court's decision in *Boerne* is not to the contrary. Although the Court was reviewing a statute (the Religious Freedom Restoration Act) that sought to enforce a fundamental right (religious freedom), Congress had explicitly sought to redefine the substance of that right by imposing a standard on the States which this Court, in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), had previously rejected as not being the proper construction of the First Amendment.

The Fourteenth Amendment – unlike the Fifteenth Amendment – is the vehicle through which numerous rights may be applied against the States. Accordingly, it is important in defining the overall scope of Congress' Fourteenth Amendment authority to distinguish statutes which seek to enforce rights at the core of the Amendments from those which may only minimally be tethered to actual constitutional protections or problems.

C. Facial Challenges Are Disfavored

Shelby County has an especially heavy burden here given its claim that Sections 5 and 4(b) are facially invalid. This Court recently has emphasized that facial challenges to voting legislation are disfavored. In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), the Court rejected a facial challenge to the State of Washington's new primary system, emphasizing that "a plaintiff can only succeed in a facial challenge by 'establishing that no set of circumstances exists under which [the statute] would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Likewise, in *Crawford v. Marion County Election Board*, 553 U.S. 181, 200 (2008), the Court rejected a facial challenge to Indiana's voter identification law, explaining that "[g]iven the fact that petitioners have advanced a broad attack on the constitutionality of [the statute], seeking relief that would invalidate the statue in all its applications, they bear a heavy burden of persuasion."

This principle also applies to the review of federal legislation enacted pursuant to the Reconstruction Amendments. As Justice Scalia noted in his dissenting opinion in *Hibbs*, *Salerno* stands for the proposition that the State of Nevada could not successfully challenge Congress' decision to apply a provision of the Family and Medical Leave Act to all States if it were shown that that provision "was *facially* valid – *i.e.*, that it could constitutionally be applied to *some* jurisdictions." 538 U.S. at 743 (emphasis in original).

II. The Post-1982 Record Shows Continuing Pervasive Voting Discrimination In The Covered States

The second step in the *Katzenbach*/*Boerne* analysis (following examination of the constitutional rights at issue) requires consideration of the "historical experience which [the challenged statute] reflects." *Katzenbach*, 383 U.S. at 308. Here, this requires an examination of the enforcement history of the Voting Rights Act following the 1982 reauthorization of Section 5.

In 2005 and 2006, the House and Senate conducted multiple hearings related to Section 5 reauthorization and amassed a substantial record. This record demonstrates that racial discrimination in voting continues to "persist[] on a pervasive scale," *Katzenbach*, 383 U.S. at 308, in the areas subject to the Section 4 coverage criteria.

A. Congress Properly Focused Its 2005-2006 Review Upon The Post-1982 Record of Discrimination

While the "constitutional questions" presented by Congress' reauthorization of Section 5 are "serious," *Nw. Austin*, 557 U.S. at 204, the reauthorization question which Congress confronted in 2006 also was a limited one given that this Court broadly has upheld the Section 5 remedy in its prior decisions. This Court has affirmed the preclearance remedy's basic constitutional underpinnings, first in *Katzenbach*, 383 U.S. at 329-31, 334-35 and then in *Rome*, 446 U.S. at 180-82. The Court likewise has upheld the various means by which the preclearance remedy operates. *Katzenbach*, 383 U.S. at 335; *Rome*, 446 U.S. at 177-78; and *Allen v. State Board of Elections*, 393 U.S. at 566.

In these circumstances, Congress appropriately focused its review on the enforcement of the Act's nondiscrimination remedies (particularly Section 5) during the period following the then most recent Section 5 reauthorization in 1982, and on current electoral conditions, to evaluate the ongoing need for Section 5. This was the logical and straightforward approach to determining whether Section 5 continues to be needed, since a valuable predictor of an ongoing special risk of voting discrimination in the Section 4 jurisdictions is the nature and extent of such discrimination in the recent past. Moreover, this was exactly the approach

Congress followed in 1975, which this Court upheld in *Rome*.[13]

B. Congress Appropriately Relied on Extensive Evidence of Vote Dilution in the Covered Areas

In 2006, Congress also appropriately relied on extensive evidence that covered jurisdictions are continuing to adopt voting changes which discriminatorily dilute minority voting strength, *i.e.*, discrimination affecting minority voters' opportunity to elect their preferred candidates to office, notwithstanding their ability to register and vote. 2006 Amendments, § 2(b)(2); House Report at 36-40. In the presence of racially polarized voting, dilutive devices include at-large elections and gerrymandered election districts.

Congress' focus on vote dilution was a continuation of a longstanding concern dating back to shortly after the Act first was adopted. By 1969, as a result of the Act's prohibition of discriminatory tests and devices for voter registration and voting, and use of the authority in the Act to deploy federal examiners to register voters, Congress found that minority participation rates had increased

---

[13] One distinction between what occurred in 2005-2006 and 1975 is that, in 1975, Congress found that the evidence supported expanding coverage to additional areas. *See Briscoe v. Bell*, 432 U.S. 404, 405-06 (1977) (noting that Congress extended coverage based on its finding of substantial discrimination against language minority citizens, including use of dilutive devices).

substantially and covered jurisdictions were now instituting dilutive practices. H.R. Rep. No. 91-397, at 7 (1969). Congress acknowledged the progress in minority participation rates in reconsidering the preclearance remedy in 1975. *Rome*, 446 U.S. at 180. Congress again found at that time, however, that notwithstanding this progress, and indeed specifically because of it, Section 5 still was needed to prevent covered areas from implementing changes that would dilute minority voters' increasing voting strength. *Id.* at 181.

Shelby County disputes Congress' continuing reliance in 2006 on evidence of vote dilution. According to the County, Congress was constitutionally permitted to reauthorize Section 5 only if the evidence showed that covered areas are denying minority voters access to the ballot to the same extent as when Section 5 was enacted in 1965. County Br. 19-20, 27-29, 41.

The County claims that the Section 4 coverage criteria support its position. The County notes that the criteria involve ballot access factors, and argues that "there is a serious mismatch between the problem that Congress targeted [in 2006, *i.e.*, vote dilution] and the triggers for coverage under Section 4(b)'s coverage formula." County Br. 41. The County further argues that Congress could not rely on vote dilution in reauthorizing Section 5 because this Court previously has upheld Section 5 under the Fifteenth Amendment, and vote dilution assertedly violates the Fourteenth, but not the Fifteenth, Amendment. County Br. 19-20, 32.

The County's position is plainly at odds with the provisions of the Voting Rights Act, and with this Court's Section 5 decisions and Fourteenth Amendment jurisprudence. As this Court explained in *Rome*, the problems Congress targeted through Section 5 go well beyond issues of ballot access, to include the electoral circumstances in the covered areas *after* minority voters largely have obtained access to the ballot. Thus, as this Court held in *Allen v. State Board of Elections*, Section 5 "reach[es] any state enactment which alter[s] the election law of a covered State in even a minor way." 393 U.S. at 566. The Court in *Allen* specifically rejected the notion that Section 5 only was meant to address issues of voter registration, *id.* at 564-65, and held that Section 5 covers changes involving at-large voting because "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 569.

The County offers no reason why Congress should now be constitutionally precluded from relying on vote dilution of the type prohibited by the Fourteenth Amendment. The Amendment grants extensive authority to Congress to "enforce" its provisions through "appropriate legislation." *Boerne*, 521 U.S. at 517-18. This extensive authority is sufficient to permit Congress to rely on that Amendment, and consequently evidence of vote dilution, in reauthorizing Section 5.[14]

---

[14] This Court's prior reliance only on the Fifteenth Amendment in upholding Section 5 may best be understood as merely reflecting the historical development of this Court's voting discrimination jurisprudence. At the time *Katzenbach*

At bottom, Shelby County's argument is both nonsensical and directly contrary to *Rome*. The County essentially contends that Congress had the authority to reauthorize Section 5 in 2006 only if it found that the Act had been a failure. In *Rome*, the Court specifically upheld Congress' reliance – indeed, primary reliance – on vote dilution discrimination in deciding to reauthorize Section 5 in 1975.

C. Pervasive Voting Discrimination Has Continued in the Covered Areas

Congress relied upon a broad and extensive array of post-1982 evidence to conclude that voting discrimination is continuing in the Section 4 areas (*i.e.*, those portions of the country which also have a history of pervasive discrimination), and that these areas, accordingly, continue to present a special risk of enacting discriminatory voting changes in the future. This evidence included: 1) Section 5 objections interposed by the Attorney General in response to administrative preclearance submissions; 2) Section 5 submissions withdrawn or modified after

---

was decided, that jurisprudence generally was grounded upon the Fifteenth Amendment. *E.g., Louisiana v. United States*, 380 U.S. 145, 153 (1965); *Gomillion v. Lightfoot*, 364 U.S. at 346; *Smith v. Allright*, 321 U.S. 649, 666 (1944). Beginning in the 1970s, the Court established that the Fourteenth Amendment also establishes an important bar to voting discrimination, when the Court extended that Amendment's one-person, one-vote rulings to vote-dilution discrimination. *E.g.*,*White v. Regester*, *supra.*

the Attorney General sent a written request for additional information to the submitting jurisdiction; 3) denials of requests for Section 5 declaratory judgments; 4) successful actions to enforce Section 5 where covered jurisdictions sought to implement a voting change without preclearance; 5) Section 5's deterrent effects; 6) successful cases brought in the covered areas under Section 2 of the Act; 7) observer coverages; and 8) the electoral conditions in the covered areas, including racially polarized voting, and continuing problems in some areas with low minority voter registration rates and the extent to which minorities are elected to office. 2006 Amendments, § 2(b); House Report at 25-45, 52-53.

1. Congress relied upon appropriate categories of evidence.

Congress must premise the exercise of its Reconstruction Amendments authority upon evidence of a pattern of unconstitutional conduct by the States. *Hibbs*, 538 U.S. at 728; *Garrett*, 531 U.S. at 368. This evidence, however, may take a variety of forms, may broadly identify the relevant problems, and is not limited to court decisions which directly find instances of constitutional violations. *Lane*, 541 U.S. at 529 (holding that Congress properly relied upon "judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services."); *Hibbs*, 538 U.S. at 729-32 (holding that Congress properly relied on an older history of court-sanctioned gender discrimination, and more current

evidence, including surveys of private-employer and public-employer leave practices, and testimony of individual experts regarding leave practices). *See also Katzenbach*, 383 U.S. at 330 ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

The post-1982 evidence upon which Congress relied, without exception, was probative of the need to prevent and deter violations of the Fourteenth and Fifteenth Amendments. The Voting Rights Act, in Section 5 and its other remedial provisions, endeavors to stop or prevent discriminatory conduct before it ripens to the extent that a court would find that intentional discrimination is occurring. As this Court held in *Katzenbach* and *Rome*, and reaffirmed in *Lopez*, the Voting Rights Act properly may "guard against [practices] that give rise to a discriminatory effect in [the Section 4] jurisdictions," *Lopez*, 525 U.S. at 283, as one method of addressing "the risk of purposeful discrimination" by those "jurisdictions with a demonstrable history of intentional racial discrimination in voting." *Rome*, 446 U.S. at 177.

In particular, the evidence relating to the operation of the preclearance requirement after the 1982 reauthorization – especially, the Section 5 objections, but also the "more information" withdrawals and modifications, Section 5's deterrent effect, the district court preclearance denials, and the Section 5 enforcement actions – provided Congress with significant information regarding a continuing need for Section 5. Section 5 directly addresses discriminatory intent, and appropriately also prohibits changes that will have a discriminatory

effect. Indeed, in *Rome* this Court upheld Congress' substantial reliance on Section 5 objections in the 1975 reauthorization. 446 U.S. at 181.[15]

Successful Section 2 suits similarly are probative of unconstitutional conduct even when they do not involve a judicial finding of intentional discrimination. Much of the evidence relevant to finding Section 2 liability also is probative of unconstitutional conduct, although the Section 2 "results" standard does not require such a finding. *Compare Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (Section 2) *with Rogers*, 458 U.S. at 616-28 (constitutional test).

Lastly, the assignment of federal observers also is relevant. Section 8 of the Act authorizes the Attorney General to send observers based on his receipt of "written meritorious complaints . . . that efforts to [discriminatorily] deny or abridge the right to vote under the color of law . . . are likely to occur," or that in his "judgment . . . the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment." 42 U.S.C. § 1973f(a).

---

[15] Judge Williams, in his dissenting opinion, suggested that objections may have little probative value because covered jurisdictions have the burden of proof, and because the Attorney General assertedly may object "almost costlessly." Pet. App. 94a. But this is contrary to *Rome*. Moreover, it ignores that the Attorney General's exercise of authority is constrained by a detailed set of procedural rules and substantive requirements, 28 C.F.R. pt. 51, and, as a practical matter, the availability of judicial preclearance review.

2. Congress legislated based on a record of widespread, substantial, and ongoing voting discrimination.

The 2005-06 legislative record unquestionably showed a massive amount of ongoing voting discrimination in the covered areas, involving repeated, varied, and widespread patterns of voting discrimination.

Each individual instance of voting discrimination in the covered areas since 1982 tells a story of a denial or abridgment of the franchise which was prevented or remedied by the Voting Rights Act. In this regard, the court of appeals and district court discussed numerous examples of discriminatory voting practices since 1982. Pet. App. 29a-31a (court of appeals) & 213a-245a (district court). *See also Nw. Austin*, 573 F. Supp. 2d at 258-62, 289-301.

On a categorical basis, the evidence of ongoing discrimination presented to Congress may be summarized as follows:

a. *Section 5 Objections.* The Attorney General interposed at least 626 Section 5 objections between 1982 and 2006. Pet. App. 32a (at least 626); House Report at 36 (more than 700); *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong., vol. 1, at 259 (Mar. 8, 2006)

("March 8, 2006 Hearing") (listing number of objections by State).[16] An individual objection may affect thousands of minority voters, Pet. App. 208a-209a, and hundreds of thousands of minority voters benefitted from objections interposed to statewide voting changes. March 8, 2006 Hearing at 260 (listing statewide objections).

In evaluating the significance of the post-1982 objections, their "number and nature" is what is relevant. *Rome*, 446 U.S. at 181. *See also Lane*, 541 U.S. at 528 (citing "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities"). Over 600 objections, involving a greater number of voting changes, plainly is very substantial in light of the tremendous investment of public and private resources which would have been required to replicate that result through the filing of individual lawsuits.[17]

Approximately two-thirds of the post-1982 objections were based in whole or in part on

---

[16] That information is set forth in a report submitted to Congress during the reauthorization hearings by the National Commission on the Voting Rights Act. The full report appears at 104-290 of the March 8, 2006 Hearing.

[17] It follows, therefore, that the fact that the rate of objections is low is of minimal significance. Shelby County argues otherwise, but provides no support for its claim that the rate is the relevant metric. County Br. 29-30. Furthermore the objection rate "has always been low," Pet. App. 34a (internal quotation marks omitted), and "the most dramatic decline in the objection rate . . . occurred in the 1970s, before [this] Court upheld the Act . . . in *City of Rome*." *Id*.

discriminatory intent. Pet. App. 33a. The district court discussed several of the "countless examples" (Pet. App. 213a) of intent objections, Pet. App. 213a-220a, and concluded that these objections provided "ample support" for the House Judiciary Committee's "conclusion in 2006 that the voting changes being sought by covered jurisdictions 'were calculated to keep minority voters from fully participating in the political process.'" Pet. App. 213a (quoting House Report at 21). [18]

b. *Other sources of information regarding Section 5 enforcement*:

i. *More Information Requests*. Congress found that covered jurisdictions withdrew from review or modified hundreds of proposed voting changes following a written "more information request" by the Attorney General. House Report at 40-41. Congress found that these actions were "often illustrative of a jurisdiction's motives," *id.* at 40, and provided additional probative information of "[e]fforts to discriminate" by covered jurisdictions. *Id. See also id.* at 41 (discussing an example of a withdrawal of polling place consolidations by Monterey County,

[18] In *Miller v. Johnson*, 515 U.S. 900, 927 (1995), this Court found that, in objecting to Georgia's post-1990 congressional redistricting plan, the Attorney General had misapplied the Section 5 "purpose" standard. This conclusion also was reached as to a handful of other redistricting objections. *E.g.*, *Shaw v. Hunt*, 517 U.S. 899, 911-12 (1996) (North Carolina congressional plan). The County notes *Miller*, but provides no basis to conclude that the problem extended beyond those specific cases. County Br. 30.

California).[19] Both the district court, Pet. App. 220a-223a, and the court of appeals, Pet. App. 32a, 35a-36a, agreed that Congress reasonably relied, in part, on this evidence, although these more information requests "are less probative of discrimination than objections." Pet. App. 35a.

ii. *Judicial Preclearance Suits*. Between 1982 and 2005, there were 25 declaratory judgment actions in which preclearance was denied by three-judge panels of the District of Columbia District Court or the jurisdiction withdrew the request. Pet. App. 41a-42a.

Most recently, in August 2012, three additional declaratory judgment actions – involving statewide voting changes of substantial consequence – resulted in preclearance denials. *Texas v. Holder*, 2012 U.S. Dist. LEXIS 127119 (Aug. 30, 2012) (Texas voter ID law had a retrogressive effect) (appeal filed); *Texas v. United States*, 2012 U.S. Dist. LEXIS 121685 (Aug. 28, 2012) (Texas' post-2010 congressional redistricting plan had a discriminatory purpose and a retrogressive effect; its post-2010 state House plan was retrogressive; and its post-2010 state Senate plan had a discriminatory purpose) (jurisdictional statement filed on appeal); *Florida v. United States*, 2012 U.S. Dist. LEXIS 115647 (Aug.

[19] As the court of appeals further explained, "Congress had evidence indicating that the Attorney General sometimes uses [more information requests] to send signals to a submitting jurisdiction about the assessment of their proposed voting change and to promote compliance by covered jurisdictions." Pet. App. 33a.

16, 2012) (Florida law reducing the number of days of early voting was retrogressive). Preclearance was obtained in a fourth case last year, *South Carolina v. United States*, 2012 U.S. Dist. LEXIS (Oct. 10, 2012) (South Carolina voter ID law), but only after the State significantly liberalized its construction of the statute during the litigation (see discussion *infra*).

iii. *Section 5 Enforcement Suits*. Congress found that "many defiant covered jurisdictions . . . continue to enact and enforce changes to voting procedures without the Federal Government's knowledge." House Report at 41. Specifically, 105 successful suits were brought against covered jurisdictions for failing to seek preclearance for post-coverage voting changes. Pet. App. 41a. While some of these suits may have involved innocent error, the record also reflects that some involved efforts by covered areas to implement discriminatory changes, notwithstanding the preclearance requirement.[20]

iv. *Section 5's Deterrent Effect*. Congress determined that "Section 5 deterred covered jurisdictions from even attempting to enact

---

[20] The district court discussed two examples of enforcement suits where the underlying voting change was, or appeared to be, discriminatory. In Waller County, Texas, county officials sought to reduce the availability of early voting for local African American university students, without preclearance, after two of the students announced their candidacies for local office. An enforcement suit was filed, and the county then agreed to abandon the change. Pet. App. 229a-230a. The second example concerned a Mississippi statewide registration change, and is discussed *infra*, note 38.

discriminatory voting changes. . . . 'Once officials . . . become aware of logic of preclearance, they tend to understand that submitting discriminatory changes is [pointless], because the chances are good that an objection will result.'" House Report at 24 (quoting report of the National Commission on the Voting Rights Act).

The important role that deterrence can play is well illustrated by the recent district court decision granting preclearance to South Carolina's voter ID provision. As explained by the district court, its decision rested heavily on certain provisions that were amended into the law, and state officials' subsequent liberal construction of those provisions. 2012 U.S. Dist. LEXIS 146187, at *21-22. As two of the three judges further explained in a concurring opinion, testimony at trial showed that "key ameliorative provisions were added during th[e] legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions . . . subsequently presented to this Court were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act." *Id.* at *71. Accordingly, this process "demonstrates the continuing utility of Section 5 . . . in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.* at *72.

c. *Section 2 litigation.* "The record shows that between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some 653 section 2 suits filed in covered jurisdictions, providing relief from discriminatory voting changes in at least 825

counties." Pet. App. 36a. These included more than 60 decisions in favor of plaintiffs identified in a study submitted to Congress by Michigan law professor Ellen Katz, of all Section 2 decisions (throughout the country) between 1982 and 2004 available on Westlaw or Lexis ("Katz Study"). Pet. App. 49a. The other nearly 600 successful Section 2 lawsuits involved unreported cases which were compiled in a report prepared by the National Commission on the Voting Rights Act. Pet. App. 54a.[21] This large number of successful Section 2 suits is especially notable given that the Section 2 results test involves consideration of evidence which also may be strongly indicative of discriminatory intent.

---

[21] Both the reported and unreported plaintiff-favorable cases included court decisions and settlements. While settlements typically do not include findings of discrimination, all the cases required jurisdictions to alter some aspect of their electoral system in a manner favorable to minority voters, and thus were indicative of ongoing problems relating to discrimination in voting. *See Lane*, 541 U.S. at 529 (survey and anecdotal information supports Congress' exercise of its Fourteenth Amendment authority).

Moreover, it is reasonable to infer that defendants decided to settle in a number of cases in large part because they were likely to lose. For example, a federal district court in Alabama, in *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986), found that the State purposefully had changed to at-large elections for local officials in order to dilute minority voting strength. After this finding, over 140 suits were filed against Alabama localities, most of whom entered into consent decrees. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry*, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary, 109th Cong. 373-74, 392-97 (2006).

d. *Federal observers*. Congress found that, between 1982 and 2006, "tens of thousands of Federal observers [were] dispatched to observe elections in covered jurisdictions." 2006 Amendments, § 2(b)(5). This involved a total of more than 600 separate dispatches. Pet. App. 38a. Congress concluded that the use of federal observers provided further "indicia of discrimination" in the covered areas. House Report at 44. Indeed, the evidence gathered by observers sometimes formed the basis for subsequent Justice Department enforcement efforts, including two successful suits to remedy discriminatory polling procedures. Pet. App. 39a.

e. *Electoral conditions in the covered areas*. Congress found that a significant circumstance in the covered areas' current electoral conditions is the ongoing prevalence of racially polarized voting. House Report at 35. Polarized voting is a necessary element of vote dilution, *Thornburg*, 478 U.S. at 47, and thus "affect[s]" the ability of "minority citizens to elect their candidates of choice" and "effectively [imposes] an election ceiling" on minority voters. House Report at 34. Accordingly, Congress concluded that "[t]he continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable." 2006 Amendments, § 2(b)(3).[22]

---

[22] Thus, while the election of minority candidates has continued to increase (particularly African Americans, but not

* * * *

In *Katzenbach*, this Court explained that what fundamentally underlaid Congress' determination that there was a need for the preclearance remedy was its finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." 383 U.S. at 328. *See also Garrett*, 531 U.S. at 373 (noting this consideration); *Boerne*, 521 U.S. at 526 (same).

In 2006, Congress found that, "given the record established," reliance on case-by-case enforcement would continue to "leave minority citizens with [an] inadequate remedy." House Report at 57. In light of the volume of discrimination indicia Congress identified in the covered areas since 1982 – involving over 600 objections and, in addition, 25 unsuccessful judicial requests, over 800 changes withdrawn or modified following more information requests, over 100 successful enforcement suits, evidence of Section 5's deterrent effect, over 600

---

so much Hispanics and Asian Americans), House Report at 18, 33-34, the continued prevalence of racially polarized voting has meant that increases have resulted, to a significant extent, from the establishment of majority-minority districts, *id.* at 34, and underrepresentation has continued at the state level. *Id.* at 33.

Congress found continuing progress in the registration and turnout rates for African Americans, House Report at 12, but that disparities between African Americans and whites remain in some covered States, such as Virginia. *Id.* at 25-27; Pet. App. 201a-202a. Very substantial disparities continue to exist for language minority citizens. *Id.* at 29; Pet. App. 202a-203a.

successful Section 2 suits, and over 600 observer dispatches – this determination by Congress was eminently reasonable.[23] Congress' determination, moreover, is further supported by the evidence it received that Section 2 litigation often is complex, costly, and time-consuming, and that minority voters may find it difficult to obtain the resources needed to support such litigation. Pet. App. 45a.

In sum, Congress reasonably found that, although Section 5 "imposes current burdens," those burdens are "justified by current needs." *Nw. Austin*, 557 U.S. at 203. As such, this is a finding to which this Court should defer under *Katzenbach*, *Rome*, and the *Boerne* decisions.

III. Section 5's Disparate Geographic Coverage Is Appropriately Related To The Problem Of Discriminatory Voting Changes

Congress' decision in 2006 to retain the existing Section 4(b) coverage provisions was a constitutionally appropriate exercise of its remedial powers. In reaching that decision Congress placed a heavy emphasis upon contemporary evidence of more than one thousand instances of voting discrimination by the covered jurisdictions. Congress' decision also was informed by pre-1982 discrimination by the

---

[23] The legislative records found wanting by this Court in recent cases were substantially smaller in scope. *Garrett*, 531 U.S. at 370; *Kimel*, 528 U.S. at 89; *Fla. Prepaid*, 527 U.S. at 645-46; *Boerne*, 521 U.S. at 530.

covered jurisdictions, and by voter registration and turnout rates and the election of minority officials in the covered jurisdictions. Congress considered in detail the possibility that conditions in the covered jurisdictions might no longer warrant the Section 5 remedy, and arrived at an informed legislative judgment that the Section 5 remedy remained necessary for the covered jurisdictions. Congress nonetheless maintained the Section 4(a) "bailout" provisions and the Section 3(c) coverage procedure, to ensure a continued good fit between the record of voting discrimination and Section 4(b) coverage throughout the course of the reauthorization period.

Because the statute's geographic coverage continues to closely track the bulk of the contemporary evidence of discrimination, and because all of the jurisdictions with the very worst records are captured for coverage, Congress did all that is constitutionally required to ensure that geographic coverage under the 2006 reauthorization remains appropriate remedial legislation.

A. The Section 5 Coverage Model Remains Appropriate to the Legislative Objectives

In *Nw. Austin v. Holder*, this Court stated that the "fundamental principle of equal sovereignty requires a showing that [Section 5's] disparate geographic coverage is sufficiently related to the

problem that it targets." 557 U.S. at 203.[24] Congress appropriately structured its reauthorization review in 2005 and 2006 to determine whether geographic coverage under Section 4(b) continues to reflect contemporary voting discrimination. This Court's established standards for a "sufficient relation" require no more than a substantial overlap between the contemporary evidence of voting discrimination and Section 5 coverage, which readily is shown below.

1. Congress did not formally state a theory of coverage in 2006, but the essential elements of Congress' approach to the coverage question can be summarized as follows.

Congress concluded that there remained a special and heightened risk that jurisdictions in the Section 4 covered areas "might try . . . maneuvers in the future" to discriminate against minority voters. *Katzenbach*, 383 U.S. at 335. This predictive judgment was based upon a history of official and pervasive voting discrimination within these jurisdictions as of their date of coverage; a more recent history of discrimination as reflected in Congress' reauthorization determinations in 1970, 1975, and 1982; and a detailed and thorough evaluation of the modern-day conditions in these jurisdictions, which showed a marked and ongoing

[24] This question corresponds to the third part of the *Boerne* analysis: whether the statute at issue is an "appropriate" response to the constitutional problem that has been identified. *Lane*, 541 U.S. at 530.

need for the preclearance remedy. If the reauthorized coverage is overinclusive, then jurisdictions may bail out by showing that their electoral processes are free of discrimination; if it is underinclusive, then federal courts may order temporary coverage as part of a remedy for a finding of voting discrimination. The congressional findings in Section 2 of the 2006 Amendments, which summarize the record of discrimination in the currently covered areas, reflect this approach to the Act's coverage provisions.

House Judiciary Committee Chair James Sensenbrenner, speaking during floor debate in opposition to a proposed amendment to Section 4(b), went to the heart of Congress' coverage theory.[25] Rep. Sensenbrenner explained that Congress' decision to retain the existing coverage provision was "not predicated on [participation] statistics alone," but rather "on recent and proven instances of discrimination in voting rights compiled in the … 12,000-page record." 152 Cong. Rec. H 5181-82 (daily ed. July 13, 2006) (internal quotation marks omitted). Rep. Sensenbrenner opposed the proposed amendment as "radically altering the coverage formula of the Voting Rights Act in a way that severs its connection to jurisdictions with proven discriminatory histories, [rendering] H.R. 9

[25] The amendment, which would have based the Section 4(b) determinations exclusively upon voter participation data from the 1996, 2000, and 2004 presidential elections, was defeated.

unconstitutional and [leaving] minority voters without the essential protections of the preclearance and the Federal observer requirements central to the VRA." *Id*. at H 5181.

The "connection to jurisdictions with proven discriminatory histories" explains why Congress never has treated reauthorization of Section 4(b) as a clean slate. Congress had worked from the "inside out" in 1970, 1975 and 1982; that is, Congress began by evaluating the continued need for coverage in the existing covered jurisdictions, then added new coverage criteria where the evidence showed that this was needed. The 2006 reauthorization appropriately followed this historical practice. It would have been both illogical and "radical[]" had Congress "wiped the slate clean" in 2006.

2. Congress' approach to coverage in 2006 did not depart from this Court's long-settled principles. This Court never has required Congress to exactingly tailor the Section 4(b) geographic coverage provisions. Moreover, Congress' 2006 coverage theory was essentially the same as the theory Congress followed in the 1975 reauthorization of Section 5, which this Court upheld in *Rome*. 446 U.S. at 180-82.[26]

Rome incorporated the coverage principles adopted by this Court in *Katzenbach*, which

---

[26] Shortly after *Rome* was decided, Congress followed the same approach to coverage for the 1982 reauthorization of Section 5. S. Rep. No. 97-417, at 9-15 (1982).

concluded that "the specific States and political subdivisions within § 4(b) of the Act were an appropriate target for the new remedies." 383 U.S. at 329. *Katzenbach* found that "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions" to be covered pursuant to the designated criteria. *Id* at 329. This included, but was by no means limited to, differences in registration and turnout rates. The formula identified three States where there was "substantial voting discrimination," and two States and portions of a third State (North Carolina) where the discrimination was "more fragmentary." *Id.* That fact pattern was sufficient for this Court to find that the 1965 coverage formula was "rational in both practice and theory." *Id.* at 330. [27]

Other aspects of *Katzenbach* made clear that this Court has not insisted upon an exact calibration

---

[27] The *Katzenbach* Court rejected South Carolina's argument that the coverage formula violated the "equality of States" doctrine. The Court held that: "The doctrine of the equality of States, invoked by South Carolina, does not bar [disparate geographic coverage], for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared." *Id.* at 328-29. This Court has continued to apply the doctrine since *Katzenbach,* under the name "equal footing doctrine," only to the terms upon which States are admitted to the Union. *See, e.g., Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-04 (1999) ("As relevant here, [the doctrine] prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union.").

of the Section 5 remedy. Potential underinclusion was "irrelevant" because "[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Id.* at 330-31. The Court also found that Congress properly "[a]cknowledged the possibility of overbreadth" through the Section 4(a) bailout procedure. *Id.* In sum, neither *Rome* nor *Katzenbach* required Congress to deploy a perfect or near-perfect coverage system.

3. *Rome* further found that Congress appropriately concluded that a "century of obstruction" of the Fifteenth Amendment by the covered areas, *combined with* the post-Act record of discrimination in the covered areas (focusing in substantial part on Section 5 objections), showed that Section 5 reauthorization was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination." 446 U.S. at 182 (internal quotation marks omitted).

Rome thus recognized that post-enactment discrimination in the covered jurisdictions merits special attention and should not be considered in isolation from its historical arc. It follows, therefore, that Congress, in 2005 and 2006, had logical and powerful reasons to focus its review upon the covered jurisdictions, and to give especially close scrutiny and weight to indicia of ongoing discrimination in those jurisdictions. Indeed, this Court long has recognized that a history of discrimination is relevant to assessing current discrimination. *Rogers v. Lodge*, 458 U.S. 613, 625 (1982); *Village of*

Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 267 (1977).

Of course, the pre-1982 history of discrimination in the covered jurisdictions was not reason itself to extend Section 5 in 2006, but it provided Congress with an essential context for understanding the contemporary evidence of voting discrimination and gauging its implications for the future. Correspondingly, the absence of such a history in non-covered areas gave Congress a strong reason, absent compelling evidence to the contrary, to hold back from amending the coverage formula to extend coverage in those areas where some instances of contemporary discrimination occurred; this is especially so in light of the well-established statutory "bail-in" procedure.

4. Finally, in shaping its inquiry, Congress was aware that, in *Boerne*, this Court cited to the Section 5 termination dates, coverage formula, and bailout procedures as examples of limiting features that tend to make congressional legislation proportionate. *Boerne*, 521 U.S. at 532-33.

The Section 4 bailout procedure "reduce[s] the possibility of overbreadth," which, in turn, serves the important goal of "ensur[ing] Congress' means are proportionate to [its] ends." *Id.* at 533. Congress significantly liberalized the bailout procedure in 1982, when it amended the statutory standards to focus upon recent electoral conditions, and under *Nw. Austin*, any covered jurisdiction is eligible to pursue bailout.

Congress had strong logical and practical reasons to maintain a case-by-case approach to bailout, as opposed to enacting a blanket revision to Section 4(b). Because the right to vote free from racial discrimination is fundamental, Congress was justifiably cautious with regard to adopting any wholesale termination of Section 5 coverage that would likely excuse some undeserving jurisdictions from coverage. Because voting discrimination may take "subtle" forms, *Allen*, 393 U.S. at 565, Congress similarly had good reason to maintain an in-depth screening procedure for bailout, as set forth in Section 4.

B. The Coverage Provisions Reflect Where Voting Discrimination Currently Is Prevalent

The post-1982 record of voting discrimination in the covered and non-covered areas demonstrates that Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203.

1. First, Congress was fully justified in continuing coverage for the "great majority" of the previously covered States due to the large quantum of contemporaneous voting discrimination in each of these States. Of the nine fully-covered States and North Carolina (which is substantially covered), seven of the ten – Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas – have a very substantial, contemporary record of discrimination. In each, the Attorney General interposed more than 40 Section 5 objections after

1982. Furthermore, each has large numbers of the other types of enforcement actions Congress relied upon in 2006 to identify contemporary voting discrimination. Pet. App. 58a-60a (discussing combined numbers for Alabama, Georgia, Louisiana, Mississippi, and South Carolina); see Table below (setting forth combined objection and Section 2 data for the nine fully covered States and North Carolina's 40 covered counties).[28]

2. The relative prevalence of discrimination in the covered and non-covered areas may be compared using national data regarding the post-1982 Section 2 cases in which the plaintiff achieved favorable results.[29] These data are the primary evidence available to assess whether there is a pattern of discrimination in any non-covered State which approaches the discrimination shown in any of the seven covered States just discussed.

---

[28] The other three fully covered States, Virginia, Arizona, and Alaska, are discussed *infra*.

[29] The data for this comparison are taken from a declaration prepared by Justice Department historian Dr. Peyton McCrary ("McCrary Study") filed in the district court. App. 144a-155a. Dr. McCrary, in turn, obtained much of his data from the reauthorization record: the number of reported plaintiff-favorable Section 2 cases are from the Katz Study; and the number of unreported cases for the covered areas are from the report of the National Commission on the Voting Rights Act. Dr. McCrary obtained the number of unreported cases for the non-covered areas from a compilation he prepared post-reauthorization.

These data show that there have been more successful Section 2 cases in the covered areas after 1982. Overall, about 55% of the successful reported Section 2 cases (66 out of 121) and over 80% (644 out of 798) of the total (reported plus unreported) successful Section 2 cases occurred in the covered areas.

Moreover, two considerations skew this comparison in a manner that undoubtedly understate the degree of discrimination in the covered areas compared to the noncovered areas. First, Section 5 precludes implementation of discriminatory voting changes in the covered areas, and thus sharply reduces the number of discriminatory actions which otherwise would likely be the subject of a successful Section 2 case.[30]

Second, there are far more non-covered than covered jurisdictions, and far greater percentages of the nation's total and minority populations live in the non-covered areas. There are 34 totally non-covered States and nine fully covered States. As of the 2000 Census (the most recent at the time of the 2006 reauthorization), more than three-quarters of the

---

[30] Put differently, there would have been fewer Section 2 suits in the non-covered areas if they were subject to the preclearance requirement. For example, in Illinois, the non-covered State with the most reported Section 2 cases that were resolved favorably to plaintiffs, more than half (5 of 9) involved challenges to redistricting plans. http://www.sitemaker.umich.edu/votingrights/files/masterlist.xls (underlying data for Katz Study). If Illinois were covered, presumably some, if not all, of these would have led to an objection, and thus no Section 2 case would have been filed.

nation's total population lived in non-covered areas, as well as substantial majorities of the African American (61%), Hispanic (68%), and Native American (75%) populations. March 8, 2006 Hearing at 203. Based on these population distributions, the non-covered areas would need to have from two to four times as many successful cases in order to demonstrate that they have experienced a comparable amount of discrimination as the covered areas.

The Table set forth on the next page displays data from 1982 to 2006 for Section 2 cases which were resolved favorably to plaintiffs, and data from 1982 to 2004 for Section 5 objections, for all fully covered States, the covered areas of North Carolina, and those non-covered States which had three or more reported successful Section 2 cases.[31]

---

[31] The objection data are from the report of the National Commission on the Voting Rights Act. March 8, 2006 Hearing at 272.

State[32]	Section 2 Successful Cases (total)	Section 2 Successful Cases (reported only)	Objections
TX*	206	7	105
AL*	192	12	46
GA*	69	3	83
MS*	67	18	120
NC*	36	6	43
SC*	33	3	74
AR	28	4	-----
NC	19	4	-----
LA*	17	10	102
FL	17	6	-----
VA*	15	4	15
CA	15	3	-----
IL	11	9	-----
NY	7	4	-----
TN	6	4	-----
PA	4	3	-----
AZ*	2	0	19
AK*	0	0	2

[32] States designated with an asterisk (*) are covered by Section 5, in whole or in part. Non-covered portions of New York, North Carolina and Florida are not asterisked.

When the data are examined on a State-by-State basis, the covered jurisdictions come out on top. Looking at the reported decisions alone, the three States with the most decisions (Mississippi, Alabama, and Louisiana) are covered, as well as four of the top five (Texas), and five of the top seven (the covered portions of North Carolina). The analysis tips even more to the covered areas when all successful cases (reported and unreported) are included. The top six States all are covered (Texas, Alabama, Georgia, Mississippi, North Carolina (covered), and South Carolina). Moreover, there have been more successful Section 2 cases in Texas (206) and Alabama (192) individually than in all of the non-covered jurisdictions combined (154). Table, *supra*.

The court of appeals noted that the data for unreported cases in the covered and uncovered areas came from two different sources. Pet. App. 54a. And not every unreported settlement necessarily represented a case which would have resulted in a judgment for the plaintiff. Still, the comparison of unreported cases shows a nearly six to one (574 to 99) difference in favor of the covered areas, which comprise only 25% of the nation's population. App. 147a-154a. This is too significant to simply dismiss the results as not probative or relevant.[33]

---

[33] The court of appeals analyzed the successful Section 2 cases per million residents, comparing covered areas as a group and non-covered areas as a group regarding the numbers of reported cases. Pet. App. 50a. The court also did a State-by-State comparison for the reported and unreported cases, per

Given this record, Congress' judgment was reasonable as to the scope of Section 5 coverage.

4. Virginia is one of the three fully covered States where these various metrics show more fragmentary evidence of discrimination. Still, since 1982, the State has had 15 objections and 15 successful Section 2 cases (including four reported). Table *supra*.

---

million residents. Pet. App. 53a. These analyses show more discrimination in the covered areas overall, and that seven of the top eight States are covered.

Judge Williams, instead, did a State-by-State comparison, per million residents, that was limited to the reported cases. Pet. App. 92a. The problem with this analysis is that the overall sample size is very small (121 cases, instead of 798 if he had looked at both reported and unreported decisions). As a result, when this small number is allocated to the individual States, each State has relatively few cases, which in turn means that very small absolute differences in the number of cases may be inflated into purportedly large ratio differences when each State number is converted into a "per million residents" metric. For example, Judge Williams' figure indicates that Delaware, with one successful case, ranks seventh among the States in most discrimination (based on its ratio), yet, if there instead had been one fewer case there (*i.e.,* zero), Delaware would have shifted to being among the very least discriminatory of the States (with a ratio of zero). As a result of this skewing, Judge Williams' analysis also suggests that Delaware has a greater Section 2 problem than Texas, which does not accord with experience. In any event, Judge Williams concedes that his figure still would support coverage of Mississippi, Alabama, and Louisiana, and the covered portions of South Dakota and North Carolina. Pet. App. 93a.

Virginia and Arkansas illustrate the tailoring features of the coverage provisions at work. Since 1984 (when the current bailout provisions became effective), Virginia's local jurisdictions have filed the most successful bailout actions, with a total of 105 local entities obtaining bailout.[34]

Arkansas, the one non-covered State which had more total Section 2 plaintiff-favorable decisions than Virginia (28 to 15, Table, *supra*), was bailed in under Section 3(c) of the Act for a time after a federal district court found intentional vote dilution in a statewide redistricting plan. *Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990).

Only two fully-covered States compare unfavorably to a non-covered State in terms of Section 2 litigation: Arizona and Alaska. Nonetheless, Arizona has had 19 objections, including five statewide objections (March 8, 2006 Hearing, at 259-60); two successful Section 2 cases (Table *supra*); and 40 observer coverages (March 8, 2006 Hearing, at 274). In addition, as of the 2004 election, Hispanic registration and turnout rates in State were significantly lower than the corresponding rates for white citizens.[35] As for Alaska, Congress was presented with a report regarding contemporary vote discrimination in the State. March 8, 2006 Hearing at 1308-62. After reauthorization, private

---

[34] See note 7 *supra*.

[35] U.S. Census Bureau, Voting and Registration in the Election of 2004, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html at Table 4a (last visited Jan. 24, 2012).

plaintiffs obtained a preliminary injunction entered against the State for failing to provide minority language assistance as required by the Voting Rights Act. *Nick v. Bethel*, No. 3:07-cv-0098 (D. Alaska July 30, 2008) (ECF No. 327).

Moreover, these States, and all subjurisdictions in these States, have the option of seeking bailout. Further, if they are ineligible for bailout under the Section 4 standards, any constitutional infirmity specific to the coverage of these States may be addressed via an as-applied challenge. Indeed, Alaska has an as-applied challenge pending, *Alaska v. Holder*, No. 1:12-cv-01376-RLW (D.D.C.), and Arizona recently filed, then withdrew, such a challenge. *Arizona v. Holder*, No. 1:11-cv-01559-JDB (D.D.C. Apr. 10, 2012) (stipulation of dismissal, ECF No. 41).

5. Judge Williams set forth four additional State-by-State analyses, concerning voter registration, turnout, black elected officials, and observer dispatches, in support of his conclusion that the coverage provisions are unconstitutional. None, however, do anything to undermine the evidence in favor of the current coverage provisions.

His first two figures show ratios between African American and white rates of registration and turnout. Pet. App. 81a-82a. This information, however, turns out to be a poor predictor of which jurisdictions are likely to implement discriminatory voting changes. That is not surprising given that, as discussed above, Congress found in 2006 that modern day discrimination mostly involves vote dilution,

rather than the imposition of discriminatory barriers to balloting.[36]

Among the fully covered States shown in the figures,[37] the two with the greatest racial disparities in registration and turnout (Arizona and Virginia) are the fully covered States with the fewest objections since 1982 (Table *supra*). In contrast, Mississippi – the State where the rate of black participation was highest compared to white participation – was the State with the most objections and the most successful reported Section 2 cases. *Id.*[38] Moreover, the three non-covered States with the greatest disparities (Massachusetts, Washington, and Colorado) only had a total of three reported successful Section 2 cases. App. 149a-150a.

---

[36] One likely contributing factor in this regard is that, during the last reauthorization period, Congress enacted the National Voter Registration Act of 1993, 42 U.S.C. §. 1973gg *et seq*., to increase voter participation in federal elections nationally.

[37] Judge Williams did not include Alaska because that State has a very small black population.

[38] Section 5 undoubtedly played a role in Mississippi's relatively high African American participation rates. Mississippi attempted to introduce a dual registration system in the 1990s as part of its implementation of the National Voter Registration Act of 1993. First, Mississippi tried to implement its system without preclearance until this Court held unanimously that preclearance was required. *Young v. Fordice*, 520 U.S. 273 (1997). Subsequently, the Attorney General objected to the dual registration system on both purpose and effect grounds. Pet. App. 230a-231a.

Judge Williams' third figure shows State-by-State ratios of the number of black elected officials to the black percentages of the citizen voting age population ("BCVAP"). Pet. App. 84a. The figure shows that States with substantial BCVAP also have substantial numbers of black elected officials. Conversely, all of the five States listed as having the worst representation have BCVAP of less than 10%.[39] These results show very little regarding the levels of discrimination; rather, they simply reflect Congress' finding that African Americans generally obtain election from majority-minority districts, together with the demographic fact that more majority-minority districts may be drawn where the BCVAP is large. As of 2000, 92% of African American members of Congress, 84% of African American State Senators, and 82% of African American State Representatives were elected from majority-minority districts. March 8, 2006 Hearing at 248. Furthermore, the five States with the highest ratios of black elected officials had 47 successful reported Section 2 cases as compared to three in the five States with the lowest ratios. *Compare* Pet. App. 84a *with* J.A. 147a-154a.

Finally, Judge Williams ranks States by observer dispatches per million minority residents. Pet. App. 89a. This figure shows that more observers were sent to covered than to non-covered States,

---

[39] Judge Williams also omitted 16 States where the black share of the citizen voting age population was less than 3 percent. The BCVAP for the top and bottom States were calculated from tables contained at http://www.census.gov/population/www/cen2000/briefs/phc-t31/index.html.

including six of the top eight according to Judge Williams' ranking system. *Id.*

6. The recent controversies regarding the enactment of photo identification requirements for voting have prompted the assertion that these illustrate the purported illogic of Congress' reauthorization decision. Specifically, it is claimed that it is unfair that a covered State which adopts such a provision must obtain preclearance, whereas a non-covered State may proceed with implementation.

This, however, is merely a natural consequence of applying the Section 5 remedy to areas with a history of voting discrimination. For example, Indiana, a non-covered State, immediately implemented its provision, and also successfully defended a constitutional challenge. *Crawford v. Marion County Election Board*, *supra*. Indiana lacks a history of flagrant voting discrimination, and the record is sparse of any current discrimination (one reported Section 2 case and three unreported cases favorable to plaintiffs). App. 149a. *See also Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971) (rejecting vote dilution challenge to Marion County's at-large election system).

On the other hand, Texas recently failed to obtain judicial preclearance for its photo ID law. *Supra* at 37. Texas, plainly, has a long history of pervasive voting discrimination, and litigation both before and after 2006 shows significant and continuing discrimination in the State. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006), *White v. Regester*, *supra*; *Texas v. Holder*,

supra, *Texas v. United States*, *supra*. There were 105 objections and over 200 successful Section 2 cases (7 reported) involving Texas jurisdictions since 1982 (Table *supra*).

* * * *

The bottom line is that the States with the worst records of voting discrimination are covered by Section 5. While there are a few covered States where the comparative evidence is less compelling, any overbreadth may be addressed through the bailout mechanism. And any covered jurisdiction that does not qualify for bailout because its record is not "clean" for the past ten years is not foreclosed from filing an as-applied constitutional challenge to its coverage. Under these circumstances, Shelby County's facial challenge to the coverage provisions must fail.

7. Other possible concerns identified in *Nw. Austin* regarding Section 5's disparate coverage relate to the possible existence only in the covered areas of tension between Section 2 and Section 5, and a concern about excessive reliance on race in drawing redistricting plans. As to the two statutes, it is conceivable that there could be some tension, such as if a jurisdiction were to redistrict in a certain way to avoid a Section 5 violation and that led to a Section 2 violation. However, respondent-intervenor Harris and his counsel are not aware of any such case. In the 1990s, there were instances of tension between the Court's Fourteenth Amendment jurisprudence as to the use of race in redistricting, *e.g.*, *Shaw v. Reno*, 509 U.S 630 (1993), and Section 5. But in the post-

2000 redistricting cycle, however, jurisdictions successfully balanced their obligations under the Fourteenth Amendment and Section 5 so that there were no *Shaw* violations in that cycle. Jocelyn Benson, *A Shared Existence: The Current Compatibility of the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 Neb. L. Rev. 124, 167-68 (2009). Respondent-intervenor and his counsel also are unaware of any such instances in the current redistricting cycle.

IV. Congress' 2006 Amendments To The Preclearance Standards Are Not Challenged In This Case, And Do Not Support The Claim That Congress Acted Beyond Its Constitutional Authority In Reauthorizing Section 5

Shelby County contends that Section 5's "current burdens" have been increased by two amendments to the Section 5 preclearance standards enacted by Congress in 2006. County Br. 25-27.[40] These amendments addressed two decisions by this Court following the 1982 reauthorization which construed these standards' scope. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000) (holding that the Section 5 "purpose" standard only prohibits retrogressive purpose); *Georgia v. Ashcroft*, 539 U.S. 461, 482-84 (2003) (holding that, as applied to redistricting plans, Section 5 requires consideration of minority voters' ability to elect their preferred

[40] The County does not challenge the constitutionality of these amendments.

candidates and other indicia of minority voters' electoral opportunity). Congress disagreed, and so amended Section 5 to provide that the statute prohibits "any discriminatory purpose," 42 U.S.C. § 1973c(c), and that reviews of redistricting plans and other potentially-dilutive devices should focus only on minority voters' ability to elect their preferred candidates.

The County offers this Court only speculation in support of its burdens argument. Since the County has asserted only a facial challenge, and did not seek preclearance for any voting changes, neither the district court nor the court of appeals had occasion to engage in any real-world analysis of how these revised standards operate, and whether in fact they present some unwarranted burden. Indeed, Congress' conclusion was that the revised standards actually reflect the manner in which Section 5 was long applied by the District of Columbia District Court and the Attorney General prior to the *Bossier* and *Ashcroft* decisions, and that they accordingly do not present any improper intrusion on State authority. House Report at 66-72.

In these circumstances, as the court of appeals concluded, the Court lacks the necessary concrete information to properly assess the revised standards and include them in any manner in the constitutional analysis. Accordingly, this Court should not undertake a review of the amendments in this case.

CONCLUSION

The judgment of the court of appeals and district court should be affirmed.

Respectfully submitted,

LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
JON M. GREENBAUM
Counsel of Record
ROBERT A. KENGLE
MARK A. POSNER
MAURA EILEEN O'CONNOR
1401 New York Avenue, NW
Suite 400
Washington, D.C. 20005
(202) 662-8315

JOHN M. NONNA
PATTON BOGGS LLP
1185 Avenue of the Americas
30th Floor
New York, NY 10036
(646) 557-5172