12-95

No. 12-

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fifteenth Amendment and thus violated the Tenth Amendment and Article IV of the United States Constitution.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Shelby County, Alabama.

Respondents are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States, and Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, Alabama State Conference of the National Association for the Advancement of Colored People, and Bobby Lee Harris.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shelby County, Alabama ("Petitioner") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is available at 679 F.3d 848 and is reprinted in the Appendix ("App.") at 1a-110a. The opinion of the United States District Court for the District of Columbia is available at 811 F. Supp. 2d 424 and is reprinted at App. 111a-291a.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its decision on May 18, 2012. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment to the United States Constitution, 42 U.S.C. § 1973b, and 42 U.S.C. § 1973c are reprinted in the Appendix.

INTRODUCTION

Article IV and the Tenth Amendment reserve to the States the power to regulate elections. Notwithstanding, the Fifteenth Amendment authorizes Congress to enforce

against the States that amendment's guarantee of the right to vote free from discrimination on account of race, color or previous condition of servitude. It is this Court's duty to ensure that Congress appropriately remedies Fifteenth Amendment violations without usurping the States' sovereign powers. Shelby County asks the Court to protect this important federalism interest.

Congress invoked its Fifteenth Amendment enforcement authority to pass the Voting Rights Act of 1965 ("VRA") "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The VRA established a network of prophylactic remedies designed to remedy unconstitutional voting discrimination. Among them, Section 2 creates a private right of action to enforce the Fifteenth Amendment and prophylactically bans any state practice that even unintentionally "results in a denial or abridgment" of voting rights. 42 U.S.C. § 1973(a). Congress also outlawed literacy tests, poll taxes, and other ballot-access restrictions being used to disenfranchise African-Americans, Pub. L. No. 94-73, § 102, 89 Stat. 400 (1975); 42 U.S.C. § 1973h, and passed a "bail in" provision that could subject any jurisdiction found to have violated constitutionally-protected voting rights to judicially-supervised preclearance, *id.* § 1973a(c). None of these enactments is challenged here.

Rather, this Petition puts at issue Congress' decision in 2006 to reauthorize until 2031 the preclearance obligation of Section 5 of the VRA under the pre-existing coverage formula of Section 4(b) of the VRA. The preclearance regime is "one of the most extraordinary remedial

provisions in an Act noted for its broad remedies" and a "substantial departure ... from ordinary concepts of our federal system; its encroachment on state sovereignty is significant and undeniable." *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). Section 5's preclearance obligation goes far "beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Nw. Austin*"). By singling out particular jurisdictions for coverage, Section 4(b) "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* at 203.

This Court has twice upheld the preclearance regime against facial constitutional challenge under then-prevailing conditions in covered jurisdictions. *Katzenbach*, 383 U.S. at 303; *City of Rome v. United States*, 446 U.S. 156 (1980). In 1966, the Court held that preclearance was an "uncommon exercise of congressional power" that would not have been "otherwise appropriate" but for the "exceptional conditions" and "unique circumstances" then documented by Congress. *Katzenbach*, 383 U.S. at 334-35. The Court upheld Section 4(b)'s coverage formula because it accurately captured "the geographic areas where immediate action seemed necessary" and where "local evils" had led to significant Fifteenth Amendment violations. *Id.* at 328-29. The 1975 reauthorization was upheld given the "limited and fragile" progress that had been made in the decade since the VRA's enactment. *Rome*, 446 U.S. at 182.

More recently, addressing the 2006 reauthorization, the Court recognized that "[s]ome of the conditions" that it "relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Nw. Austin*, 557 U.S. at 202. Moreover, the "evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* at 203. Because Congress has not since acted to rectify these problems, the constitutional validity of Sections 5 and 4(b) must now be resolved.

This Petition is the ideal vehicle to settle these important issues. Because the District Court for the District of Columbia ("DDC") has exclusive jurisdiction over challenges to the VRA's constitutionality, 42 U.S.C. § 1973*l*(b), and in light of the comprehensive decisions and dissent below, there is nothing to be gained from further vetting. Moreover, Congress has shown no interest in revisiting these issues in the wake of *Northwest Austin* and the Executive's recent refusals to preclear voting changes considered routine in non-covered jurisdictions underscores the severity of the burden that the preclearance regime imposes on covered jurisdictions. Delaying review of these unsettled issues to a future case will only make the situation worse.

The Court is understandably reluctant to decide avoidable constitutional questions. But the Court's "duty as the bulwark of a limited constitution against legislative encroachments" requires it to definitively settle important federalism questions when they are squarely presented. *Nw. Austin*, 557 U.S. at 205. The Court should grant the Petition.

STATEMENT OF THE CASE

A. History of the Voting Rights Act

1. The Voting Rights Act of 1965

The VRA included numerous judicially enforceable provisions (including Section 4(a)'s suspension of tests and devices) that directly confronted voting practices then employed throughout the South to infringe Fifteenth Amendment rights. But given deplorable conditions, Congress determined that even "sterner and more elaborate measures" were required. *Katzenbach*, 383 U.S. at 309. "After enduring nearly a century of systematic resistance to the Fifteenth Amendment," *id.* at 328, Congress was aware that adverse judgments would only lead offending states to adopt new discriminatory devices and local officials to defy court orders or simply close their registration offices, *id.* at 314.

To foreclose continuing and systematic evasions of constitutional guarantees, Section 5 required a "covered jurisdiction" to obtain preclearance before implementing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1,

1964." Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965). The Department of Justice ("DOJ") or the DDC could not preclear any change that had either "the purpose" or "the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).

Section 5 was a radical solution to "a particular set of invidious practices that had the effect of undo[ing] or defeat[ing] the rights recently won by nonwhite voters." *Miller v. Johnson*, 515 U.S. 900, 925 (1995); *Beer v. United States*, 425 U.S. 130, 140 (1976). Unlike a traditional litigation remedy targeting specific acts of voting discrimination, Section 5 suspended all voting changes pending preclearance to prevent recalcitrant "jurisdictions from circumventing the direct prohibitions imposed by provisions such as §§ 2 and 4(a)." *Nw. Austin*, 557 U.S. at 218 (Thomas, J.) (concurring in the judgment in part and dissenting in part).

Section 4(b) relied on a formula to identify the jurisdictions subject to preclearance. A state or political subdivision became subject to preclearance if it "maintained on November 1, 1964, any test or device" prohibited by Section 4(a) and "less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964" or "less than 50 per centum of such persons voted in the presidential election of November 1964." *Id.* § 4(b), 79 Stat. at 438. As a political subdivision of Alabama, Shelby County became a covered jurisdiction under this formula. App. 123a-124a.[1]

1. Also, Section 3(c) created a bail-in mechanism whereby federal courts could impose preclearance on any non-covered jurisdiction found to have violated the Fourteenth or Fifteenth

The Court upheld Section 5 as constitutional because of a demonstrated history of "widespread and persistent discrimination" and "obstructionist tactics." *Id.* at 328. "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act." *Id.* at 329. Especially given the massive racial disparity in registration and turnout rates, "Congress had every reason to conclude that States with a history of disenfranchising voters based on race would continue to do all they could to evade the constitutional ban on voting discrimination." *Nw. Austin*, 557 U.S. at 221 (Thomas, J.). Preclearance—an "uncommon exercise of congressional power"—appropriately enforced the Fifteenth Amendment only because of the "exceptional conditions" and "unique circumstances" that Congress had documented. *Katzenbach*, 383 U.S. at 334-35.

The Court upheld Section 4(b)'s coverage formula on the same legislative record because it appropriately enforced the Fifteenth Amendment "in both practice and theory." *Id.* at 330. The formula was sound in theory because "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average" pointed to the "widespread and persistent" use of discriminatory tactics to prevent African-Americans from voting and the clear threat of continuing evasion. *Id.* at 330-31. The formula was sound in practice because it accurately captured those

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Amendments. 42 U.S.C. § 1973a(c). The VRA also included a "bailout" provision that allowed a covered jurisdiction to terminate coverage by making a requisite showing (subject to a "claw back" mechanism). Pub. L. No. 89-100, § 4(a), 79 Stat. at 438.

jurisdictions where "reliable evidence of actual voting discrimination" was so severe and distinctive that the disparate application of preclearance was constitutionally justified. *Id.* at 329.

2. The 1970, 1975, and 1982 Reauthorizations

Congress had "expected that within a 5-year period Negroes would have gained sufficient voting power in the States affected so that special federal protection would no longer be needed." H.R. Rep. No. 91-397 (1969). In 1970, however, Congress reauthorized the temporary provisions of the VRA for five years, Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970), in order "to safeguard the gains in negro voter registration thus far achieved, and to prevent future infringements of voting rights based on race or color," H.R. Rep. No. 91-397, 1970 U.S.C.C.A.N. at 3281.

The 1970 reauthorization expanded the coverage formula to include any jurisdiction that had maintained a prohibited "test or device" on November 1, 1968, and had voter registration on that date or turnout in the 1968 presidential election of less than 50 percent. Pub. L. No. 91-285, § 4, 84 Stat. at 315. The statute also extended Section 4(a)'s ban on the use of any prohibited "test or device" to non-covered jurisdictions for a period of five years. *Id.* § 6, 84 Stat. at 315.

In 1975, Congress reauthorized the VRA for seven more years, Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975), further expanding coverage to any jurisdiction that had maintained a prohibited "test or device" on November 1, 1972, and had voter registration on that date

or turnout in the 1972 presidential election of less than 50 percent, *id.* § 202, 89 Stat. at 401. Congress also extended the preclearance obligation to certain States and political subdivisions that provided electoral materials only in English in order to protect language minority groups. *Id.* § 203, 89 Stat. at 401-02, and it made permanent the nationwide ban on discriminatory "tests or devices." *Id.* § 201, 89 Stat. at 400.

The Court upheld the 1975 reauthorization of Section 5, finding that a "[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions" and that, "though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions." *Rome*, 446 U.S. at 180-81. Only ten years removed from Section 5's enactment, the Court rejected what it viewed as a request to overrule the *Katzenbach* decision. *Id.* at 180.

In 1982, Congress reauthorized the VRA for another 25 years. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982). Although this reauthorization was not challenged facially, the Court became concerned that interpreting the discriminatory "purpose" preclearance requirement too broadly would exacerbate federalism costs "perhaps to the extent of raising concerns about § 5's constitutionality." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier Parish II*"). The Court also grew concerned with the intrusiveness of the "effect" prong and adopted a standard geared more toward a "minority group's opportunity to

participate in the political process" and less toward "the comparative ability of a minority group to elect a candidate of its choice." *Georgia v. Ashcroft*, 539 U.S. 461, 479-80 (2003). This interpretation ensured that the "effect" prong more closely tracked the constitutional standard, and it avoided the serious equal-protection problems associated with focusing preclearance on minority electoral success. *Id.* at 491 (Kennedy, J., concurring).

3. The 2006 Reauthorization

In 2006, Congress reauthorized the VRA for another 25 years without easing the preclearance burden or updating the coverage formula. Congress found "that the number of African-Americans who are registered and who turn out to cast ballots ha[d] increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass[ed] those of white voters." H.R. Rep. No. 109-478, at 12 (2006). It also found that "the disparities between African-American and white citizens who are registered to vote ha[d] narrowed considerably in six southern States covered by the temporary provisions ... and ... North Carolina." *Id.* Thus, "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA ha[d] been eliminated." *Id.*

Congress nevertheless increased the already-significant federalism burden preclearance imposes on covered jurisdictions by overruling *Bossier Parish II* and *Ashcroft*. Pub. L. No. 109-246, 120 Stat. 577 (2006). Under the amended preclearance standard, Section 5's "purpose" prong now requires the denial of preclearance if the

voting change was made because of "any discriminatory purpose," 42 U.S.C. § 1973c(c), and the "effect" prong requires denial of preclearance whenever the change "diminish[es] the ability of [minority] citizens ... to elect their preferred candidates of choice," *id.* § 1973c(b), (d).

Congress justified retaining (and indeed expanding) preclearance by finding that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." Pub. L. No. 109-246, §2(b)(2), 120 Stat. at 577. These "second generation barriers" included: racially polarized voting; various Section 5 preclearance statistics; "section 2 litigation filed to prevent dilutive techniques from adversely affecting minority voters; the enforcement actions filed to protect language minorities; and the tens of thousands of Federal observers dispatched to monitor polls in jurisdictions covered by the [VRA]." *Id.*

The constitutionality of the 2006 reauthorization was immediately challenged in *Northwest Austin*. While relying on the canon of constitutional avoidance to resolve that appeal on statutory grounds, the Court concluded that the VRA's "preclearance requirements and its coverage formula raise serious constitutional questions" in light of the dramatic changes in the covered jurisdictions. *Nw. Austin*, 557 U.S. at 204. In particular, Section 5 "imposes current burdens and must be justified by current needs," and Section 4(b)'s "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 203. The Court added that "[t]hese federalism concerns

are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another. Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere." *Id.*

B. Proceedings Below

1. On April 27, 2010, Shelby County filed suit seeking resolution of the "serious constitutional questions" left open by *Northwest Austin*. In a 151-page opinion, the District Court granted summary judgment to Respondents. App. 111a-291a. It ruled that the constitutionality of Sections 5 and 4(b) must be judged under the congruence-and-proportionality standard of *City of Boerne v. Flores*, 521 U.S. 507 (1997), App. 161a-162a, but upheld both statutory provisions under that standard, App. 279a-280a, 290a. Shelby County timely appealed.

2. By a 2-1 vote, the D.C. Circuit affirmed. Writing for the majority, Judge Tatel concluded that "*Northwest Austin* sets the course for our analysis," thus requiring that Section 5's "'current burdens'" be justified by "'current needs'" and Section 4(b)'s "'disparate geographic coverage [be] sufficiently related to the problem that it targets'" in order to justify its departure from the fundamental principle of "'equal sovereignty.'" App. 14a-15a (quoting *Nw. Austin*, 557 U.S. at 203). In addition, the majority read *Northwest Austin* as "sending a powerful signal that [*Boerne*'s] congruence and proportionality [test] is the appropriate standard of review," App. 16a, and it purported to evaluate the constitutionality of Sections 5 and 4(b) under that standard.

The majority next considered the nature of the evidence that the legislative record needed to document in order to justify retaining the preclearance obligation for another 25 years. Rejecting Shelby County's argument that preclearance was appropriate only in the face of obstructionist tactics, the majority concluded that Congress need not document "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment" to reauthorize Section 5. App. 24a. Per the majority, the question was not "whether the legislative record reflects the kind of 'ingenious defiance' that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate." App. 26a.

The majority also disagreed with Shelby County's argument that Congress could not rely on vote dilution evidence to establish the constitutional necessity of the preclearance regime since the VRA enforces the Fifteenth Amendment. App. 27a-28a. Acknowledging that "neither the Supreme Court nor this court has ever held that vote dilution violates the Fifteenth Amendment," App. 27a, the majority concluded that Section 5 also enforces the Fourteenth Amendment, which "prohibits [intentional] vote dilution," App. 27a.

"Having resolved these threshold issues," App. 29a, the majority held that the legislative record was sufficient to sustain Section 5. It found that "the record contains numerous 'examples of modern instances' of racial discrimination in voting," App. 29a (quoting *Boerne*, 521 U.S. at 530), and that "several categories of evidence in the record support Congress's conclusion

that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that Section 5 preclearance is still needed," App. 31a. Finally, the majority dealt with the absence of widespread evidence of voting suppression by finding that Section 5's so-called "blocking" and "deterrent" effect bolstered Congress' reauthorization decision. App. 47a. The majority held that Congress' determination was "reasonable" and thus "deserves judicial deference." App. 68a, 48a.

The majority also upheld Section 4(b). App. 48a-66a. It rejected the argument that the coverage formula is irrational in theory because it relies on outmoded election data and creates an obvious mismatch between its first-generation triggers and the second-generation evidence in the legislative record. App. 56a. The majority found this "argument rests on a misunderstanding of the coverage formula" because "Congress identified the jurisdictions it sought to cover ... and then worked backward, reverse-engineering a formula to cover those jurisdictions." App. 56a. In its view, "Shelby County's real argument is that the statute ... no longer actually identifies the jurisdictions uniquely interfering with the right Congress is seeking to protect through preclearance." App. 57a.

The majority found Section 4(b)'s constitutionality "present[ed] a close question." App. 58a. The majority further acknowledged that, according to the Katz Study of Section 2 litigation included in the legislative record, of the ten fully covered (or almost fully covered) states, five "are about on par with the worst non-covered jurisdictions" and two "had no successful published section 2 cases at all." App. 58a. But relying on a post-enactment declaration that the United States submitted to the district court, the majority found that several covered States "appear to be

engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." App. 59a. The Court reasoned that these states "appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary." App. 59a-60a. Last, the majority concluded that bail-in and bail-out alleviated any remaining concerns with the coverage formula. App. 61a-65a.

3. Judge Williams dissented, finding that Section 4(b)'s criteria for coverage are defective whether "viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?)." App. 70a. While "sometimes a dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder ... Congress hasn't proven so adept." App. 70a.

According to Judge Williams, that Section 4(b) must be "sufficiently related to the problem it targets" means that "[t]he greater the burdens imposed by § 5, the more accurate the coverage scheme must be." App. 71a. He found several aspects of the preclearance regime troubling. First, Section 5 creates severe federalism problems by "mandat[ing] anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to [DOJ] officialdom to seek approval of any and all proposed voting changes." App. 71a. Second, Section 5's "broad sweep" applies "without regard to kind or magnitude" of the voting change. App. 72a. Third, the 2006 amendments to the preclearance standard increased Section 5's federalism burden and "not only disregarded

but flouted Justice Kennedy's concern" that the statute created serious equal-protection problems. App. 73a.

Judge Williams agreed that "[w]hether Congress is free to impose § 5 on a select set of jurisdictions also depends in part ... on possible shortcomings in the remedy that § 2 provides for the country as a whole." App. 77a. But he added that "it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay" because "plaintiffs' costs for § 2 suits can in effect be assumed by [DOJ]" and where DOJ does not step in, "§ 2 provides for reimbursement of attorney and expert fees for prevailing parties." App. 77a (citing 42 U.S.C. § 1973*l*(e)). Further, courts can "use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." App. 77a-78a.

Against this backdrop, Judge Williams concluded that "a distinct gap must exist between the current levels of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to § 5's harsh remedy, even if one might find § 5 appropriate for a subset of that group." App. 78a. He found a negative correlation "between inclusion in § 4(b)'s coverage formula and low black registration or turnout," noting that "condemnation under § 4(b) is a marker of higher black registration and turnout." App. 83a. This was true for minority elected officials in the covered and noncovered jurisdictions as well. App. 85a.

"[S]econd generation" evidence in the record did not alter the picture. Judge Williams determined that "a number of factors undermine any serious inference" from federal election observer data. App. 87a. He also found that the Katz Study further undermined the formula,

especially when looking at the Section 2 data on a state-by-state basis. App. 91a-93a. "The five worst uncovered jurisdictions ... have worse records than eight of the covered jurisdictions .... Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered .... A formula with an error rate of 50% or more does not seem 'congruent and proportional.'" App. 93a. Judge Williams rejected the McCrary declaration's survey of "purportedly successful, but unreported § 2 cases" as unreliable. App. 93a.

Judge Williams attributed no significance to the purported "blocking" or "deterrent effect" of preclearance because Section 5 objections are not a fair proxy for successful Section 2 lawsuits and "the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin*'s insistence that 'current burdens ... must be justified by current needs' would mean little if § 5's supposed deterrent effect were enough to justify the current scheme." App. 94a. Judge Williams also concluded that the problems with the coverage formula could not be solved "by tacking on a waiver procedure such as bailout." App. 101a (citation and quotation omitted).

Judge Williams ultimately concluded that "[b]ased on any of the comparative data available to us, and particularly those metrics relied on in *Rome*, it can hardly be argued that there is evidence of a 'substantial' amount of voting discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in *Katzenbach*." App. 96a. Accordingly, "there is little to suggest that § 4(b)'s coverage formula continues to capture jurisdictions with especially high levels of voter discrimination." App. 104a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the D.C. Circuit "decided an important question of federal law that has not been, but should be, settled by this Court" and it did so "in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

I. The Constitutional Issues Presented In This Case Are Of Public Importance And Should Be Settled Now By This Court.

1. "[The] Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991). For covered jurisdictions, Section 5 arrests that sovereign authority as to "all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 557 U.S. at 202. Placing a jurisdiction in federal receivership raises fundamental questions of state sovereignty; and doing so selectively, absent compelling justification, unconstitutionally departs from the "historic tradition that all the States enjoy 'equal sovereignty.'" *Id.* at 202-03. In short, Congress' 2006 decision to reauthorize the VRA's preclearance regime for another 25 years "raise[s] serious constitutional questions" under any applicable standard. *Id.* at 204.

Congress compounded the problem by expanding the grounds for denying preclearance at a time when the "conditions that [the Court] relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* ha[d] unquestionably improved." *Id.* at 202. Preclearance must now be denied unless a covered jurisdiction can prove both

the absence of "any discriminatory purpose" and that the voting change will not diminish a minority group's "ability to elect" a favored candidate even if it would not interfere with any voter's "effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. The new preclearance standard thus "aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination." App. 75a (Williams, J., dissenting).

2. These federalism concerns are not academic. The preclearance regime has an outsized effect on the basic operation of state and local government. Based on the experience of covered jurisdictions between 1982 and 2007, Section 5 will foreclose the implementation of more than 100,000 electoral changes (more than 99% of which will be noncontroversial) unless and until they are precleared by federal officials in Washington, D.C. S. Rep. No. 109-295, at 13-14 (2006). Because of this prior restraint, a covered jurisdiction must either go "hat in hand to [DOJ] officialdom to seek approval," App. 71a, or embark on expensive litigation in a remote judicial venue if it wishes to make any change to its election system. It should be no surprise, then, that states such as Florida, Texas, and Alaska have joined Shelby County in challenging the 2006 reauthorization.[2]

These constitutional challenges arise, in significant part, in response to DOJ's needlessly aggressive exercise of preclearance authority. For example, DOJ

2. *See Florida v. United States*, No. 11-cv-1428-CKK-MG-ESH (D.D.C.) (Doc. 54); *Texas v. Holder*, No. 12-cv-128-RMC-DST-RLW (D.D.C.) (Doc. 25); *Samuelsen v. Treadwell*, No. 12-cv-00118-RRB-AK-JKS (D. Alaska) (Doc. 25).

has refused to preclear the Texas and South Carolina voter identification laws notwithstanding *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). As Judge Williams explained, there is simply no legitimate reason why "voter ID laws from South Carolina and Texas [should] be judged by different criteria ... from those governing Indiana" when "Indiana ranks 'worse' than South Carolina and Texas in registration and voting rates, as well as in black elected officials" and there is no other obvious basis for placing South Carolina and Texas, but not Indiana, in federal receivership. App. 103a.

Similarly, Florida (which must obtain preclearance of statewide legislation because five of its 62 counties are covered jurisdictions) has been forced into preclearance litigation to prove that reducing early voting from 14 days to 8 days is not "discriminatory,"[3] when states such as Connecticut, Rhode Island, and Pennsylvania have no early voting at all.[4] Such questionable preclearance denials raise serious concerns about whether Section 5's mission has strayed from ensuring that discriminatory tactics do not disenfranchise minority voters to providing DOJ with a convenient and efficient means of imposing its preferred electoral system on the covered jurisdictions.

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3. DOJ opposed preclearance even though Florida still provided the same total number of early voting hours (96 hours) by expanding evening hours and mandating additional weekend hours. *Florida v. United States*, No. 11-cv-1428-CKK-MG-ESH (D.D.C.) (Doc. 54).

4. National Conference of State Legislatures: Absentee and Early Voting (July 22, 2011), *available at* http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx (last visited July 20, 2012).

3. Only this Court, the ultimate guardian and arbiter of the division of powers that lies at the heart of our constitutional system, *Boerne*, 521 U.S. at 528-29, can settle these important issues. Although previous decisions reviewing the VRA's constitutionality are instructive, there must be a contemporaneous assessment of whether Section 5's "current needs" justify its "current burdens" and whether Section 4(b)'s "departure from the fundamental principle of equal sovereignty" remains "sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. "Past success alone ... is not adequate justification to retain the preclearance requirements." *Id.* at 202. These constitutional issues will continue to fester until they are definitively settled.

For understandable reasons, this Court "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Id.* at 205. But this prudent separation-of-powers doctrine presupposes that the political branches will respond when the Court expresses concern over whether a federal law will withstand constitutional scrutiny upon further review. *Mistretta v. United States*, 488 U.S. 361, 408 (1989) ("Our principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest.").

Yet in the more than three years after *Northwest Austin*, Congress held not one hearing, proposed not one bill, and amended not one law in response to the concern that Sections 5 and 4(b) cannot be constitutionally justified based on the record compiled in 2006. And instead of judiciously exercising its statutory authority in order to avoid confrontation, DOJ's actions have magnified

the burdens and inequities of the modern preclearance regime. *Supra* at 19-20.

This Court's intervention is therefore warranted. Because Congress' Fifteenth Amendment enforcement authority "is not unlimited," this Court must "determine if Congress has exceeded its authority under the Constitution." *Boerne*, 521 U.S. at 536. Both in this setting and in others, this Court has traditionally granted review whenever a serious challenge to Congress' enforcement authority arises. *See, e.g.*, *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). This case should not be an exception to that rule.

4. Shelby County's challenge provides an ideal vehicle for resolving the constitutionality of Sections 5 and 4(b). Unlike in *Northwest Austin*, Shelby County neither requested nor is eligible for bailout. App. 11a. Shelby County's challenge is based on the 2006 legislative record and no other evidence is constitutionally cognizable. *Infra* at 34a. There is no justiciability problem. App. 296a-297a. The decision below is binding precedent in the D.C. Circuit, the only Circuit in which this issue may be adjudicated, *supra* at 4, and its decision will provide the basis for this or any future review by the Court. The unresolved issues were thoroughly explored in the district court opinion and the majority and dissenting court of appeals opinions.

In acting on Shelby County's Petition, this Court must decide whether to allow the split decision below to stand as binding nationwide precedent or to acknowledge the importance of the issues presented and settle them.

Shelby County believes that the choice is obvious. The burdens imposed on it and other covered jurisdictions will continue until the constitutional issues left unanswered in *Northwest Austin* are definitively resolved by this Court. Indeed, the issues Shelby County raises inevitably will be presented to this Court until this cloud of uncertainty is lifted. The time to settle them is now.

II. Review Is Required Because The Court Of Appeals Incorrectly Decided These Important And Unsettled Constitutional Issues.

A. The court of appeals wrongly upheld Sections 5 and 4(b) by distorting *Boerne*'s "congruent and proportional" test.

1. The lower courts agreed that whether the preclearance regime remains "appropriate" enforcement legislation must be judged under the *Boerne* framework. App. 16a, 160a-161a. Under *Boerne*, the court must first "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, it must "examine whether Congress identified a history and pattern" of constitutional violations. *Id.* at 368. Third, it must find "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

2. While conceding the applicable standard, the majority deferred to Congress in ways alien to the *Boerne* line of decisions. The majority described its "job" as merely "to ensure that Congress's judgment is reasonable and rests on substantial probative evidence." App. 47a. But it confused the standard by which courts

review legislation enacted under Congress' Article I powers with review of Fifteenth Amendment remedial authority. Congress' enforcement authority under the Reconstruction Amendments is not substantive—it is strictly remedial. *Boerne*, 521 U.S. at 527. Treating the judicial task as akin to deferential review of Article I authority or administrative agency actions, App. 47a, abdicates the Court's duty to patrol "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Boerne*, 521 U.S. at 519.

The majority acknowledged that a "more searching" review of the legislative record is needed given Section 5's unprecedented burdens. App. 21a. But it honored this obligation in the breach, applying an overly deferential standard of review that infected every aspect of its analysis and thus effectively abandoning "vital principles necessary to maintain separation of powers and the federal balance." *Boerne*, 521 U.S. at 536.

3. Sections 5 and 4(b) are no longer constitutional under a proper application of *Boerne*. To reauthorize Section 5, Congress was required to document the kind of "widespread and persisting" pattern of Fifteenth Amendment violations that made the preclearance obligation constitutional in the first place: evasionary alteration of discriminatory voting laws to circumvent minority victories hard-won through traditional litigation. *Beer*, 425 U.S. at 140. It did not. *Nw. Austin*, 557 U.S. at 226-29 (Thomas, J.). And even if it were "possible to squeeze out of [the congressional record] a pattern of unconstitutional discrimination by the States," *Garrett*, 531 U.S. at 372, the preclearance obligation—especially given the burdensome amendments to the standard—"is

so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *Boerne*, 521 U.S. at 532.

Section 4(b) likewise fails under *Boerne*. Its formula is not proportional because coverage is no longer "placed only on jurisdictions" in which there is "intentional racial discrimination in voting." *Id.* at 533. The registration, turnout, and minority elected officials statistics previously relied on by this Court to justify selective coverage reveal no difference between covered and non-covered jurisdictions. *Infra* at 27. And even the "second generation barriers to voting" are not concentrated in the covered jurisdictions. *Id.* at 32-34. The formula also lacks congruence because of the complete mismatch between its triggers and the kind of evidence relied on by Congress to reauthorize the preclearance obligation. *Id.* at 30. Congress must ensure a close fit between the reasons for imposing preclearance and the formula employed for choosing the jurisdictions subject to that obligation. Because Congress clearly failed to do so here, Section 4(b)'s coverage formula fails congruence-and-proportionality review. App. 70a, 93a, 97a (Williams, J.).

B. The court of appeals should not have upheld Section 5's preclearance obligation under any applicable legal standard.

1. Irrespective of the standard of review, to reauthorize preclearance for another 25 years the 2006 Congress needed to document "exceptional conditions" that could "justify legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S. at 335. Section 5's

constitutionality has always depended on a legislative showing that "current burdens" imposed on the covered jurisdictions by this extreme remedy are "justified by current needs." *Nw. Austin*, 557 U.S. at 203.

2. Contemporaneous evidence of systematic interference with the right to register and vote has always been required to trigger Fifteenth Amendment remedial authority. *Katzenbach*, 383 U.S. at 329 (legislative record was filled with "reliable evidence of actual voting discrimination"); *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("Congress may impose prophylactic § 5 legislation" when "there has been an identified history of relevant constitutional violations."). Here, Congress relied on "second generation" barriers that are not even remotely probative of intentional interference with the right to register and vote—let alone the kind of systematic violations that previously justified Section 5. *Nw. Austin*, 557 U.S. at 228 (Thomas, J.); App. 97a (Williams, J.). The majority should not have relied on this evidence to sustain Section 5.

Moreover, much of this evidence involved alleged vote dilution. App. 26a-29a. Because the Fifteenth Amendment has been the exclusive basis for upholding Section 5, however, *Katzenbach*, 383 U.S. at 308-10, 324-29; *Rome*, 446 U.S. at 180-82, the legislative record must document disenfranchisement—not vote dilution. *Miller*, 515 U.S. at 937-38. This Court has "never held that vote dilution violates the Fifteenth Amendment." *Bossier Parrish II*, 528 U.S. at 334 n.3. The majority incorrectly relied on evidence involving redistricting, annexations, at-large elections, and other practices that affect the weight of the vote once cast—not access to the ballot.

3. At most, the legislative record shows scattered and limited interference with Fifteenth Amendment voting rights in some covered jurisdictions. In *Katzenbach*, the Court relied on the compelling record of widespread infringement of voting rights coupled with a recent and deplorable history of "ingenious defiance" of traditional judicial remedies. 383 U.S. at 309. To sustain Section 5, this Court concluded that there must be current evidence in the legislative record of "systematic resistance to the Fifteenth Amendment." *Id.* at 328, 335.

No such record now exists. "Things have changed in the South .... Blatantly discriminatory evasions of federal decrees are rare." *Nw. Austin*, 557 U.S. at 202. Voter registration and turnout "now approach parity" and "minority candidates hold office at unprecedented levels." *Id.* at 202 (citing H.R. Rep. No. 109-478, at 12-18). "The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute." *Id.* at 229 (Thomas, J.).

To fill this gap, the majority went beyond the legislative record to speculate that the lack of evidence of discriminatory practices in the covered jurisdictions arose not from changed attitudes, but from Section 5's so-called deterrent effect. App. 42a-44a. Speculative deterrence is plainly insufficient to impose preclearance on the covered jurisdictions. Congress needed to find that Section 5 was justified under actual conditions uniquely present in the covered jurisdictions; it could not proceed from an unsubstantiated and unbounded assumption that the covered jurisdictions have a latent desire to discriminate

that does not exist elsewhere in the country. Congress is not entitled to reauthorize Section 5 for another 25 years based "on outdated assumptions about racial attitudes in the covered jurisdictions." *Nw. Austin*, 557 U.S. at 226 (Thomas, J.); App. 94a (Williams, J.).

4. The court of appeals sought to avoid these record infirmities by holding that Congress did not need to document the kind of "unremitting and ingenious defiance of the Constitution" catalogued in *Katzenbach*. 383 U.S. at 309. In its view, Section 5 could be sustained so long as the legislative record showed the "inadequacy of case-by-case litigation" under Section 2. App. 26a. But it was not the ordinary costs and burdens associated with traditional litigation that rendered Section 2 inadequate in 1965. It was the covered States' "obstructionist tactics" and "systematic resistance to the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 328. Unrelenting defiance was the reason *why* case-by-case litigation was futile and Section 5 was justifiable as a last resort. Absent evidence that the systematic disenfranchisement of minority voters that made case-by-case enforcement impossible still exists, there is no constitutional basis for upholding Section 5. Congress' interest in preserving the administrative ease of preclearance is not a basis for retaining it.

In any event, nothing in the legislative record suggests that Section 2 litigation is inadequate today. The discriminatory tests and devices that once made case-by-case litigation futile have been permanently banned by Congress. *Supra* at 9. In addition, "the majority of § 5 objections today concern redistricting," App. 99a (Williams, J.), and Section 2 is an effective vehicle for challenging redistricting changes—especially statewide

decennial redistricting plans—the principal target of those urging reauthorization, App. 26a, 99a. Moreover, there is no evidence in the legislative record that adverse Section 2 judgments are being evaded or designed around by recalcitrant jurisdictions.

Unlike Section 5's intrusive and selective suspension of all voting changes, Section 2 creates a nationwide private right of action allowing direct challenge to discriminatory voting laws and bases its remedy on proven violations. Especially in conjunction with Section 3's bail-in mechanism, *infra* at 35, Section 2 is now the "appropriate" prophylactic remedy for any pattern of discrimination documented by Congress in 2006.

C. The court of appeals should not have upheld Section 4(b)'s coverage formula under any applicable legal standard.

1. Section 4(b) is unconstitutional whether *Boerne* applies or not. Under *Katzenbach*, the coverage formula must be "rational in both practice and theory." 383 U.S. at 330. In *Northwest Austin*, the Court doubted the formula's constitutionality because "the evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance" and because "[t]he statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." 557 U.S. at 203; *Lane*, 541 U.S. at 564 (Scalia, J. dissenting) (allowing a prophylactic remedy to be imposed only "on those particular States" where the problem exists). The decision below cannot be squared with any of this Court's decisions.

2. Congress constitutionally justified Section 5's reauthorization based on evidence different from that it had previously relied upon; but Congress irrationally failed to tie coverage under Section 4(b) to that evidence. The majority sidestepped this problem by suggesting that the formula's theoretical irrationality is not "Shelby County's real argument." App. 57a. That is wrong; the issue was briefed extensively both in the district court and on appeal. App. 292a-293a. The majority dodged this "theory" challenge because there is no answer to it. The coverage formula relies on decades-old voting data and there is a serious mismatch between its triggers, which are based on ballot-access interference, and the "second generation" barriers in the record, which relate only to the weight of a vote once cast. App. 98a (Williams, J.).

The majority's nearest approach to this issue was asserting that, because the formula "continues to identify the jurisdictions with the worst problems," it "is rational in theory." App. 57a. But that is an argument for rationality in practice—not theory. In fact, the majority disclaimed the need to defend the formula on a theoretical level, concluding that the coverage triggers "were never selected because of something special that occurred in [the identified] years" and that "tests, devices, and low participation rates" were not Congress' main targets; they were "proxies for pernicious racial discrimination in voting." App. 56a-57a. But this is pure revisionism. *Katzenbach* held that the "the misuse of tests and devices ... was the evil for which the new remedies were specifically designed" and that "a low voting rate [was] pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S. at 330-31. Thus, the

Court found a rational connection between the triggers for coverage and the problems that the preclearance was devised to remedy. Bypassing this question admits that it has no answer.

3. The majority's defense of the coverage formula at a practical level fares no better. As Judge Williams explained, of the four types of evidence in the legislative record for which comparative data exist:

> one (voter registration and turnout) suggests that the coverage formula completely lacks any rational connection to current levels of voter discrimination, another (black elected officials), at best does nothing to combat that suspicion, and, at worst, confirms it, and two final metrics (federal observers and § 2 suits) indicate that the formula, though not completely perverse, is a remarkably bad fit with Congress's concerns.

App. 95a.

Such a legislative record cannot possibly show that voting discrimination is "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203. Had Congress studied the issue, it might have reconsidered the formula. But although it was alerted to the problem, Congress never seriously studied the comparative records of covered and non-covered States. The Continuing Need for Section 5 Preclearance: Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2d. Sess., at 200-01 (May 16, 2006) (testimony of Pildes) (noting that the issue was never "addressed in any detail in the [Senate] hearings ... or in the House" and "little

evidence in the [legislative] record examines whether systematic differences exist between the currently covered and non-covered jurisdictions"). Congress cannot selectively impose preclearance if it fails to seriously study whether the identified problem is concentrated in the targeted jurisdictions.

4. Presumably aware that most of the comparative evidence in the legislative record could not be relied on to uphold Section 4(b), the majority focused on the Katz Study of Section 2 litigation. App. 49a-51a. The majority conceded that the study showed that the bulk of the covered States are no different from their non-covered counterparts, App. 58a, but it then resorted to manipulating the Katz data. First, it considered only a carefully selected slice of the data—Section 2 cases resulting in outcomes described as "favorable to minority plaintiffs," a characterization that vastly overstates the significance of this evidence, App. 93a-94a (Williams, J.), especially considering that Congress cited only the "continued filing of Section 2 cases in covered jurisdictions," Pub. L. No. 109-246, §2(b)(4)(C), 120 Stat. at 577. The Katz Study indicates that many of these Section 2 cases involved no finding of intentional discrimination, were not resolved on the merits, or both; it also indicated that some of the "outcomes" deemed "favorable to minority voters" merely reflected changes in voting laws.

Second, the majority primarily reviewed this slice of data by aggregating it into "covered" and "non-covered" categories, a mode of analysis that fails to afford equal dignity to each sovereign State subject to coverage. *Nw. Austin*, 557 U.S. at 203. Even viewed in this skewed manner, however, the data fails to show a meaningful

difference between covered and noncovered jurisdictions. According to the Katz Study, there were more Section 2 lawsuits filed, as well as more resulting in a finding of intentional discrimination, in non-covered jurisdictions. Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), http://sitemaker.umich.edu/voting rights/files/masterlist.xls. And even if "successful" Section 2 lawsuits were the appropriate barometer, a 56% to 44% divide between covered and non-covered jurisdictions, especially given the limited number of cases overall, cannot justify retaining this outmoded coverage formula.

Third, the majority failed to properly review the Katz data state-by-state—the only mode of analysis that comports with the principle of equal sovereignty. Had it done so, the majority could never have found that the formula was actually capturing "the jurisdictions with the worst problems." App. 57a. If successful Section 2 litigation is the best measure of where the "worst problems" exist, then the coverage formula is both overinclusive—sweeping in states like Arizona and Alaska, which had no successful Section 2 cases—and underinclusive—omitting states like Montana, Arkansas, Delaware, Rhode Island, Hawaii, and Illinois, which had more successful Section 2 cases than South Carolina, Florida, Virginia, Texas, and Georgia. What the majority labeled a "close question," App. 58a, is in fact not close at all.

The majority examined the Katz data state-by-state only after supplementing it with the results of a post-enactment study that it conceded should be "approach[ed] ... with caution," App. 54a, because it was conducted during this litigation and was partially dependent on extra-record evidence collected by different groups and

pursuant to different methods than the Katz Study, App. 93a-94a (Williams, J.). But the study should have been disregarded entirely. The law's constitutionality must be measured against the legislative record alone. App. 299a-303a; *Coleman*, 132 S. Ct. at 1336-37; *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008).

Looking for precedential support, the majority attempted to analogize the 2006 record to the 1965 record, suggesting the two were similar. App. 60a. But the 1965 record included a category of States where "federal courts ha[d] repeatedly found substantial voting discrimination," a second category where "there was more fragmentary evidence of recent voting discrimination," and a third category where the use of tests and devices and low voter turnout justified coverage, "at least in the absence of proof that they ha[d] been free of substantial voting discrimination in recent years." *Katzenbach*, 383 U.S. at 329-30. In contrast, the 2006 record could not possibly result in any States falling within the first category, and at most only three States in the second category, "leav[ing] six fully covered states (plus several jurisdictions in partially covered states) in category three, many more than in 1966, when only two fully covered states (Virginia and Alaska) were not included in either category one or two." App. 97a. (Williams, J.).

5. The majority also relied on bail-out and bail-in to solve the massive problems with the coverage formula. But even setting aside the fact that the majority relied on

bailout figures inflated by post-reauthorization evidence,[5] only about 1% of all covered jurisdictions have bailed out since 1982. Bailout thus is "only the most modest palliative to § 5's burdens," App. 101a (Williams, J.), especially because bailed-out jurisdictions remain subject to the VRA's clawback provision for 10 years, *supra* at 6 n.1. Were bailout sufficient to save such an ill-fitting coverage formula, Congress could just randomly select jurisdictions for coverage so long as any unlucky jurisdiction could obtain some measure of relief from a federal court. Surely the "fundamental principle" of equal sovereignty requires more. *Nw. Austin*, 557 U.S. at 203.

Finally, judicial bail-in actually undermines the coverage formula's constitutionality. Bail-in is a narrower, more appropriate means of imposing preclearance because it is triggered by a prior judicial finding of unconstitutional voting discrimination, 42 U.S.C. § 1973a(c), and because it can be applied nationally. Unlike the outdated coverage formula, then, Section 3's bail-in mechanism does not "depart[] from the fundamental principle of equal sovereignty" by treating some States differently from others, *Nw. Austin*, 557 U.S. at 203.

* * *

Sections 5 and 4(b) of the VRA were essential to putting an end to "ingenious defiance" of Fifteenth Amendment voting rights in the covered jurisdictions. They were designed to overcome egregious discriminatory conditions that had persisted for 95 years and had made

5. Approximately one-third of all bailouts occurred in the wake of *Northwest Austin*, App. 63a, and thus were not in the legislative record before Congress in 2006 and cannot support the validity of Congress' judgment, *see supra* at 34.

case-by-case litigation and the ban on abusive tests and devices insufficient to overcome the rampant electoral gamesmanship that had plagued the South. In 1965, Congress built the kind of legislative record that is needed to sustain a prophylactic remedy as invasive and novel as preclearance and crafted a coverage formula that was sound in theory and in practice. In 2006, Congress did neither. It is now incumbent upon this Court to review the decision below and settle the issues arising from Congress' failure to fulfill its obligation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 20, 2012

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED MAY 18, 2012

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

No. 11-5256

SHELBY COUNTY, ALABAMA,

Appellant,

v.

ERIC H. HOLDER, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,

Appellees.

January 19, 2012, Argued
May 18, 2012, Decided

JUDGES: Before: TATEL and GRIFFITH, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge TATEL. Dissenting opinion filed by Senior Circuit Judge WILLIAMS.

OPINION BY: TATEL

Dissenting opinion filed by Senior Circuit Judge WILLIAMS

OPINION

Appendix A

TATEL, *Circuit Judge*: In *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009), the Supreme Court raised serious questions about the continued constitutionality of section 5 of the Voting Rights Act of 1965. Section 5 prohibits certain "covered jurisdictions" from making any change in their voting procedures without first demonstrating to either the Attorney General or a three-judge district court in Washington that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a). The Supreme Court warned that the burdens imposed by section 5 may no longer be justified by current needs and that its geographic coverage may no longer sufficiently relate to the problem it targets. Although the Court had no occasion to resolve these questions, they are now squarely before us. Shelby County, Alabama, a covered jurisdiction, contends that when Congress reauthorized section 5 in 2006, it exceeded its enumerated powers. The district court disagreed and granted summary judgment for the Attorney General. For the reasons set forth in this opinion, we affirm.

I.

The Framers of our Constitution sought to construct a federal government powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence. They feared not state government, but centralized national government, long the hallmark of Old World monarchies. As a result, "[t]he powers delegated by the . . . Constitution

to the federal government, are few and defined," while "[t]hose which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45 (James Madison). Close to the people, state governments would protect their liberties.

But the experience of the nascent Republic, divided by slavery, taught that states too could threaten individual liberty. So after the Civil War, the Reconstruction Amendments were added to the Constitution to limit state power. Adopted in 1865, the Thirteenth Amendment prohibited involuntary servitude. Adopted three years later, the Fourteenth Amendment prohibited any state from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] to any person within its jurisdiction the equal protection of the laws," and granted Congress "power to enforce" its provisions "by appropriate legislation." U.S. Const. amend. XIV. Finally, the Fifteenth Amendment declared that "[t]he right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude" and vested Congress with "power to enforce this article by appropriate legislation." U.S. Const. amend. XV.

Following Reconstruction, however, "the blight of racial discrimination in voting . . . infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). As early as 1890, "the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia" began

employing tests and devices "specifically designed to prevent Negroes from voting." *Id.* at 310. Among the most notorious devices were poll taxes, literacy tests, grandfather clauses, and property qualifications. *See Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 428 (D.D.C. 2011); *see also Katzenbach*, 383 U.S. at 310-11. Also widely employed, both immediately following Reconstruction and again in the mid-twentieth century, were "laws designed to dilute black voting strength," including laws that "gerrymandered election districts, instituted at-large elections, annexed or deannexed land . . . and required huge bonds of officeholders." *Shelby Cnty.*, 811 F. Supp. 2d at 429 (internal quotation marks omitted).

The courts and Congress eventually responded. The Supreme Court struck down grandfather clauses, *Guinn v. United States*, 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915), and white primaries, *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944). Congress "enact[ed] civil rights legislation in 1957, 1960, and 1964, which sought to 'facilitat[e] case-by-case litigation against voting discrimination.'" *Shelby Cnty.*, 811 F. Supp. 2d at 430 (alteration in original) (quoting *Katzenbach*, 383 U.S. at 313). But Congress soon determined that such measures were inadequate: case-by-case litigation, in addition to being expensive, was slow—slow to come to a result and slow to respond once a state switched from one discriminatory device to the next—and thus had "done little to cure the problem of voting discrimination." *Katzenbach*, 383 U.S. at 313. Determined to "rid the country of racial discrimination in voting," *id.* at 315, Congress passed the Voting Rights Act of 1965.

Unlike prior legislation, the 1965 Act combined a permanent, case-by-case enforcement mechanism with a set of more stringent, temporary remedies designed to target those areas of the country where racial discrimination in voting was concentrated. Section 2, the Act's main permanent provision, forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Applicable nationwide, section 2 enables individuals to bring suit against any state or jurisdiction to challenge voting practices that have a discriminatory purpose or result. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986).

Reaching beyond case-by-case litigation and applying only in certain "covered jurisdictions," section 5—the focus of this litigation—"prescribes remedies . . . which go into effect without any need for prior adjudication." *Katzenbach*, 383 U.S. at 327-28. Section 5 suspends "all changes in state election procedure until they [are] submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." *Nw. Austin*, 129 S. Ct. at 2509. A jurisdiction seeking to change its voting laws or procedures must either submit the change to the Attorney General or seek preclearance directly from the three-judge court. If it opts for the former and if the Attorney General lodges no objection within sixty days, the proposed law can take effect. 42 U.S.C. § 1973c(a). But if the Attorney General lodges an objection, the submitting jurisdiction may either request reconsideration, 28 C.F.R. § 51.45(a), or seek a de

novo determination from the three-judge district court. 42 U.S.C. § 1973c(a). Either way, preclearance may be granted only if the jurisdiction demonstrates that the proposed change to its voting law neither "has the purpose nor . . . the effect of denying or abridging the right to vote on account of race or color." *Id.*

Prior to section 5's enactment, states could stay ahead of plaintiffs and courts "'by passing new discriminatory voting laws as soon as the old ones had been struck down.'" *Beer v. United States*, 425 U.S. 130, 140, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976) (quoting H.R. Rep. No. 94-196, at 57-58 (1975)). But section 5 "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim." *Katzenbach*, 383 U.S. at 328. It did so by placing "the burden on covered jurisdictions to show their voting changes are nondiscriminatory *before* those changes can be put into effect." *Shelby Cnty.*, 811 F. Supp. 2d at 431. Section 5 thus "pre-empted the most powerful tools of black disenfranchisement," *Nw. Austin*, 129 S. Ct. at 2509, resulting in "undeniable" improvements in the protection of minority voting rights, *id.* at 2511.

Section 4(b) contains a formula that, as originally enacted, applied section 5's preclearance requirements to any state or political subdivision of a state that "maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election." *Shelby Cnty.*, 811 F. Supp. 2d at 432 (citing Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 ("1965 Act")). Congress chose these criteria carefully. It knew precisely which

states it sought to cover and crafted the criteria to capture those jurisdictions. *Id.* (citing testimony before Congress in 2005-2006). Unsurprisingly, then, the jurisdictions originally covered in their entirety, Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, "were those southern states with the worst historical records of racial discrimination in voting." *Id.*

Because section 4(b)'s formula could be both over- and underinclusive, Congress incorporated two procedures for adjusting coverage over time. First, as it existed in 1965, section 4(a) allowed jurisdictions to earn exemption from coverage by obtaining from a three-judge district court a declaratory judgment that in the previous five years (i.e., before they became subject to the Act) they had used no test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." 1965 Act § 4(a). This "bailout" provision, as subsequently amended, addresses potential overinclusiveness, allowing jurisdictions with clean records to terminate their section 5 preclearance obligations. Second, section 3(c) authorizes federal courts to require preclearance by any non-covered state or political subdivision found to have violated the Fourteenth or Fifteenth Amendments. 42 U.S.C. § 1973a(c). Specifically, courts presiding over voting discrimination suits may "retain jurisdiction for such period as [they] may deem appropriate" and order that during that time no voting change take effect unless either approved by the court or unopposed by the Attorney General. *Id.* This judicial "bail-in" provision addresses the formula's potential underinclusiveness.

Appendix A

As originally enacted in 1965, section 5 was to remain in effect for five years. In *South Carolina v. Katzenbach*, the Supreme Court sustained the constitutionality of section 5, holding that its provisions "are a valid means for carrying out the commands of the Fifteenth Amendment." 383 U.S. at 337. Congress subsequently renewed the temporary provisions, including sections 4(b) and 5, in 1970 (for five years), then in 1975 (for seven years), and again in 1982 (for twenty-five years). In each version, "[t]he coverage formula [in section 4(b)] remained the same, based on the use of voting-eligibility tests [or devices] and the rate of registration and turnout among all voters, but the pertinent dates for assessing these criteria moved from 1964 to include 1968 and eventually 1972." *Nw. Austin*, 129 S. Ct. at 2510. In 1975 Congress made one significant change to section 4(b)'s scope: it amended the definition of "test or device" to include the practice of providing only English-language voting materials in jurisdictions with significant non-English-speaking populations. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401-02 (codified at 42 U.S.C. § 1973b(f)(3)). Although not altering the basic coverage formula, this change expanded section 4(b)'s scope to encompass jurisdictions with records of voting discrimination against "language minorities." *See Briscoe v. Bell*, 432 U.S. 404, 405, 97 S. Ct. 2428, 53 L. Ed. 2d 439 (1977). The Supreme Court sustained the constitutionality of each extension, respectively, in *Georgia v. United States*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973), *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980), and *Lopez v. Monterey County*, 525 U.S. 266, 119 S. Ct. 693, 142 L. Ed. 2d 728 (1999).

Significantly for the issue before us, the 1982 version of the Voting Rights Act made bailout substantially more permissive. Prior to 1982, bailout was extremely limited: no jurisdiction could bail out if it had used discriminatory voting tests or practices when it first became subject to section 5, even if it had since eliminated those practices. *Shelby Cnty.*, 811 F. Supp. 2d at 434. By contrast, after 1982 the Act allowed bailout by any jurisdiction with a "clean" voting rights record over the previous ten years. *Id.* The 1982 reauthorization also permitted a greater number of jurisdictions to seek bailout. Previously, "only covered states (such as Alabama) or separately-covered political subdivisions (such as individual North Carolina counties) were eligible to seek bailout." *Id.* After 1982, political subdivisions within a covered state could bail out even if the state as a whole was ineligible. *Id.*

Setting the stage for this litigation, Congress extended the Voting Rights Act for another twenty-five years in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ("2006 Act"). In doing so, it acted on the basis of a legislative record "over 15,000 pages in length, and includ[ing] statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination." *Shelby Cnty.*, 811 F. Supp. 2d at 435 (internal quotation marks omitted). Congress also amended section 5 to overrule the Supreme Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461, 479-80, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003) (which held that "any assessment of the retrogression of a minority group's effective exercise of

the electoral franchise depends on an examination of all the relevant circumstances" and that "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice"), and *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("*Bossier II*") (which held that "the 'purpose' prong of § 5 covers only retrogressive dilution"). *See* 2006 Act § 5 (codified at 42 U.S.C. § 1973c(b)-(d)).

The 2006 Act's constitutionality was immediately challenged by "a small utility district" subject to its provisions. *See Nw. Austin*, 129 S. Ct. at 2508. After finding the district ineligible for bailout, the three-judge district court concluded that the reauthorized Voting Rights Act was constitutional. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 283 (D.D.C. 2008). On appeal, the Supreme Court identified two "serious . . . questions" about section 5's continued constitutionality, namely, whether the "current burdens" it imposes are "justified by current needs," and whether its "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 129 S. Ct. at 2512-13. But invoking the constitutional avoidance doctrine, *id.* at 2508, 2513, the Court interpreted the statute to allow any covered jurisdiction, including the utility district bringing suit in that case, to seek bailout, thus avoiding the need to resolve the "big question," *id.* at 2508: Did Congress exceed its constitutional authority when it reauthorized section 5? Now that question is squarely presented.

II.

Shelby County filed suit in the U.S. District Court for the District of Columbia, seeking both a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional and a permanent injunction prohibiting the Attorney General from enforcing them. *Shelby Cnty.*, 811 F. Supp. 2d at 427. Unlike the utility district in *Northwest Austin*, Shelby County never sought bailout, and for good reason. Because the county had held several special elections under a law for which it failed to seek preclearance and because the Attorney General had recently objected to annexations and a redistricting plan proposed by a city within Shelby County, the County was clearly ineligible for bailout. *See id.* at 446 n.6. As the district court—Judge John D. Bates—recognized, the "serious constitutional questions" raised in *Northwest Austin* could "no longer be avoided." *Id.* at 427.

Addressing these questions in a thorough opinion, the district court upheld the constitutionality of the challenged provisions and granted summary judgment for the Attorney General. After reviewing the extensive legislative record and the arguments made by Shelby County, the Attorney General, and a group of defendant-intervenors, the district court concluded that "Section 5 remains a 'congruent and proportional remedy' to the 21st century problem of voting discrimination in covered jurisdictions." *Id.* at 428. Responding to the Supreme Court's concerns in *Northwest Austin*, the district court found the record evidence of contemporary discrimination in covered jurisdictions "plainly adequate to justify

section 5's strong remedial and preventative measures," *id.* at 492 (internal quotation marks omitted), and to support Congress's predictive judgment that failure to reauthorize section 5 "'would leave minority citizens with the inadequate remedy of a Section 2 action,'" *id.* at 498 (quoting H.R. Rep. No. 109-478, at 57 (2006)). This evidence consisted of thousands of pages of testimony, reports, and data regarding racial disparities in voter registration, voter turnout, and electoral success; the nature and number of section 5 objections; judicial preclearance suits and section 5 enforcement actions; successful section 2 litigation; the use of "more information requests" and federal election observers; racially polarized voting; and section 5's deterrent effect. *Id.* at 465-66.

As to section 4(b), the district court acknowledged that the legislative record "primarily focused on the persistence of voting discrimination in covered jurisdictions—rather than on the comparative levels of voting discrimination in covered and non-covered jurisdictions." *Id.* at 507. Nonetheless, the district court pointed to "several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement"—including the disproportionate number of successful section 2 suits in covered jurisdictions and the "continued prevalence of voting discrimination in covered jurisdictions notwithstanding the considerable deterrent effect of Section 5." *Id.* at 506-07. Thus, although observing that Congress's reauthorization "ensured that Section 4(b) would continue to focus on those jurisdictions with the

worst *historical* records of voting discrimination," *id.* at 506, the district court found this continued focus justified by *current* evidence that discrimination remained concentrated in those juridictions. *See id.* (explaining that Congress did not renew the coverage formula to punish past sins, but rather because it found "substantial evidence of contemporary voting discrimination by the very same jurisdictions that had histories of unconstitutional conduct"). Finally, the district court emphasized that Congress had based reauthorization not on "a perfunctory review of a few isolated examples of voting discrimination by covered jurisdictions," but had "'approached its task seriously and with great care.'" *Id.* at 496 (quoting *Nw. Austin*, 573 F. Supp. 2d at 265). Given this, the district court concluded that Congress's predictive judgment about the continued need for section 5 in covered jurisdictions was due "substantial deference," *id.* at 498 (internal quotation marks omitted), and therefore "decline[d] to overturn Congress's carefully considered judgment," *id.* at 508. Our review is de novo. *See McGrath v. Clinton*, 666 F.3d 1377, 1379 (D.C. Cir. 2012) ("We review the district court's decision to grant summary judgment de novo.").

On appeal, Shelby County reiterates its argument that, given the federalism costs section 5 imposes, the provision can be justified only by contemporary evidence of the kind of "'unremitting and ingenious defiance'" that existed when the Voting Rights Act was originally passed in 1965. Appellant's Br. 8 (quoting *Katzenbach*, 383 U.S. at 309). Insisting that the legislative record lacks "evidence of a systematic campaign of voting discrimination and gamesmanship by the covered jurisdictions," Shelby

County contends that section 5's remedy is unconstitutional because it is no longer congruent and proportional to the problem it seeks to cure. *Id.* at 8-9; *see also City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). In addition, Shelby County argues, section 4(b) contains an "obsolete" coverage formula that fails to identify the problem jurisdictions, and because the jurisdictions it covers are not uniquely problematic, the formula is no longer rational "'in both practice and theory.'" Appellant's Br. 11-12 (quoting *Katzenbach*, 383 U.S. at 330).

III.

Northwest Austin sets the course for our analysis, directing us to conduct two principal inquiries. First, emphasizing that section 5 "authorizes federal intrusion into sensitive areas of state and local policymaking that imposes substantial federalism costs," the Court made clear that "[p]ast success alone . . . is not adequate justification to retain the preclearance requirements." 129 S. Ct. at 2511. Conditions in the South, the Court pointed out, "have unquestionably improved": racial disparities in voter registration and turnout have diminished or disappeared, and "minority candidates hold office at unprecedented levels." *Id.* Of course, "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act." *Id.* at 2511-12. But "the Act imposes current burdens," and we must determine whether those burdens are "justified by current needs." *Id.* at 2512.

Second, the Act, through section 4(b)'s coverage formula, "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.* (internal quotation marks omitted). And while equal sovereignty "'does not bar . . . remedies for local evils,'" *id.* (omission in original) (quoting *Katzenbach*, 383 U.S. at 328-29), the Court warned that section 4(b)'s coverage formula may "fail[] to account for current political conditions"—that is, "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." *Id.* These concerns, the Court explained, "are underscored by the argument" that section 5 may require covered jurisdictions to adopt race-conscious measures that, if adopted by noncovered jurisdictions, could violate section 2 of the Act or the Fourteenth Amendment. *Id.* (citing *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) ("[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.")). To be sure, such "[d]istinctions can be justified in some cases." *Id.* But given section 5's serious federalism costs, *Northwest Austin* requires that we ask whether section 4(b)'s "disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*

Before addressing *Northwest Austin's* two questions, we must determine the appropriate standard of review. As the Supreme Court noted, the standard applied to legislation enacted pursuant to Congress's Fifteenth Amendment power remains unsettled. *See id.* at 2512-13 (noting, but declining to resolve the parties' dispute

over the appropriate standard of review). Reflecting this uncertainty, Shelby County argues that the "congruence and proportionality" standard for Fourteenth Amendment legislation applies, *see City of Boerne*, 521 U.S. at 520, whereas the Attorney General insists that Congress may use "any rational means" to enforce the Fifteenth Amendment, *see Katzenbach*, 383 U.S. at 324. Although the Supreme Court declined to resolve this issue in *Northwest Austin*, the questions the Court raised—whether section 5's burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem—seem to us the very questions one would ask to determine whether section 5 is "congruen[t] and proportional[] [to] the injury to be prevented," *City of Boerne*, 521 U.S. at 520. We thus read *Northwest Austin* as sending a powerful signal that congruence and proportionality is the appropriate standard of review. In any event, if section 5 survives the arguably more rigorous "congruent and proportional" standard, it would also survive *Katzenbach's* "rationality" review.

Of course, this does not mean that the Supreme Court's prior decisions upholding the Voting Rights Act are no longer relevant. Quite to the contrary, *Katzenbach and City of Rome* tell us a great deal about "[t]he evil that § 5 is meant to address," *Nw. Austin*, 129 S. Ct. at 2512, as well as the types of evidence that are probative of "current needs," *id.* Moreover, *City of Boerne* relied quite heavily on *Katzenbach* for the proposition that section 5, as originally enacted and thrice extended, was a model of congruent and proportional legislation. *See City of Boerne*, 521 U.S. at 525-26, 530 (relying on *Katzenbach* to explain

how the Court evaluates remedial legislation under the Fourteenth and Fifteenth Amendments); *see also id.* at 532-33 (describing characteristics of the Voting Rights Act, as analyzed by *Katzenbach* and *City of Rome*, that made it congruent and proportional).

We can likewise seek guidance from the Court's Fourteenth Amendment decisions applying the congruent and proportional standard to other legislation. In those cases, the Court made clear that the record compiled by Congress must contain evidence of state "conduct transgressing the Fourteenth Amendment's substantive provisions," *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1333, 182 L. Ed. 2d 296 (2012), and that invasions of state interests based on "abstract generalities," *id.* at 1337, or "supposition and conjecture," *id.* at 1336, cannot be sustained. Once satisfied that Congress has identified a pattern of constitutional violations, however, the Court has deferred to Congress's judgment, even in the face of a rather sparse legislative record. In *Nevada Department of Human Resources v. Hibbs*, for example, the Court upheld the constitutionality of the family-care provision of the Family and Medical Leave Act, which allows eligible employees to take up to twelve weeks of unpaid leave, and "creates a private right of action to seek both equitable relief and money damages against any employer (including a public agency)." 538 U.S. 721, 724, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003) (internal quotation marks omitted). Although evidence of discriminatory leave policies by state governments was hardly extensive, *see Tennessee v. Lane*, 541 U.S. 509, 528-29, 124 S. Ct. 1978, 158 L. Ed. 2d 820 & n.17 (2004) (describing the limited

evidence relied upon in *Hibbs*, "little of which concerned unconstitutional state conduct"), the Court deferred to Congress's "reasonabl[e] conclu[sions]," *Hibbs*, 538 U.S. at 734, and held that the evidence was "weighty enough to justify" prophylactic legislation, *id.* at 735. Similarly, in *Lane* the Court considered whether Congress had authority under the Fourteenth Amendment to pass Title II of the Americans with Disabilities Act, which prohibits public entities, including states, from discriminating on the basis of disability in their services, programs, and activities. 541 U.S. at 513. Looking into the record and noting the long history of state discrimination against disabled individuals, the Court found it "not difficult to perceive the harm that Title II is designed to address." *See id.* at 524-25. It held, again with great deference to Congress's take on the evidence, that the record, "including 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," made "clear beyond peradventure" that Title II was appropriate prophylactic legislation, *id.* at 529and this despite the fact that the record included only two reported decisions finding unconstitutional state action of the precise type at issue, *see id.* at 544 (Rehnquist, C.J., dissenting). By contrast, the Court has found that Congress exceeded its Fourteenth Amendment authority where the legislative record revealed a "virtually complete absence" of evidence of unconstitutional state conduct. *Id.* at 521 (majority opinion) (citing *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999)); *see also City of Boerne*, 521 U.S.

at 530 (legislative record "lack[ed] examples of modern instances" of the targeted constitutional violations); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

We read this case law with two important qualifications. First, we deal here with racial discrimination in voting, one of the gravest evils that Congress can seek to redress. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) ("[The right to vote] is regarded as a fundamental political right, because preservative of all rights."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) ("racial classifications [are] constitutionally suspect and subject to the most rigid scrutiny" (citation omitted) (internal quotation marks omitted)). When Congress seeks to combat racial discrimination in voting—protecting both the right to be free from discrimination based on race and the right to be free from discrimination in voting, two rights subject to heightened scrutiny—it acts at the apex of its power. *See Hibbs*, 538 U.S. at 736 (noting that it is "easier for Congress to show a pattern of unconstitutional violations" when it enforces rights subject to heightened scrutiny); *Lane*, 541 U.S. at 561-63 (Scalia, J., dissenting) ("Giving [Congress's enforcement powers] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the [Reconstruction Amendments] a priority

of attention that [the Supreme] Court envisioned from the beginning, and that has repeatedly been reflected in [the Court's] opinions."). Expressly prohibited by the Fifteenth Amendment, racial discrimination in voting is uniquely harmful in several ways: it cannot be remedied by money damages and, as Congress found, lawsuits to enjoin discriminatory voting laws are costly, take years to resolve, and leave those elected under the challenged law with the benefit of incumbency.

Second, although the federalism costs imposed by the statutes at issue in *Hibbs* and *Lane* (abrogating sovereign immunity to allow suits against states for money damages) are no doubt substantial, the federalism costs imposed by section 5 are a great deal more significant. To be sure, in most cases the preclearance process is "routine" and "efficient[]," resulting in prompt approval by the Attorney General and rarely if ever delaying elections. *See Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Propery Rights of the S. Comm. on the Judiciary*, 109th Cong. 312-13 (2006) (testimony of Donald M. Wright, North Carolina State Board of Elections) (stating that most preclearance submissions "take only a few minutes to prepare" and that the Justice Department cooperates with jurisdictions to ensure that "preclearance issue[s] d[o] not delay an election"). But section 5 sweeps broadly, requiring preclearance of every voting change no matter how minor. Section 5 also places the burden on covered jurisdictions to demonstrate to the Attorney General or a three-judge district court here in Washington

that the proposed law is not discriminatory. Given these significant burdens, in order to determine whether section 5 remains congruent and proportional we are obligated to undertake a review of the record more searching than the Supreme Court's review in *Hibbs* and *Lane*.

Although our examination of the record will be probing, we remain bound by fundamental principles of judicial restraint. Time and time again the Supreme Court has emphasized that Congress's laws are entitled to a "presumption of validity." *City of Boerne*, 521 U.S. at 535. As the Court has explained, when Congress acts pursuant to its enforcement authority under the Reconstruction Amendments, its judgments about "what legislation is needed . . . are entitled to much deference." *Id.* (internal quotation marks omitted). Even when applying intermediate scrutiny, the Court has accorded Congress deference "out of respect for its authority to exercise the legislative power," and in recognition that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195, 196, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) (internal quotation marks omitted) (rejecting a First Amendment challenge to the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act). And critically for our purposes, although *Northwest Austin* raises serious questions about section 5's constitutionality, nothing in that opinion alters our duty to resolve those questions using traditional principles of deferential review. Indeed, the Court reiterated not only that "judging the constitutionality of an Act of Congress is 'the gravest and

most delicate duty that [a court] is called on to perform,'" *Nw. Austin*, 129 S. Ct. at 2513 (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48, 48 S. Ct. 105, 72 L. Ed. 206, 1928-1 C.B. 324 (1927) (Holmes, J., concurring)), but also that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it," *id.*

A.

Guided by these principles, we begin with *Northwest Austin's* first question: Are the current burdens imposed by section 5 "justified by current needs"? 129 S. Ct. at 2512. The Supreme Court raised this question because, as it emphasized and as Shelby County argues, the conditions which led to the passage of the Voting Rights Act "have unquestionably improved[,] . . . no doubt due in significant part to the Voting Rights Act itself." *Id.* at 2511. Congress also recognized this progress when it reauthorized the Act, finding that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated." H.R. Rep. No. 109-478, at 12. The dissent's charts nicely display this progress. Racial disparities in voter registration and turnout have "narrowed considerably" in covered jurisdictions and are now largely comparable to disparities nationwide. *Id.* at 12-17; *see also* Dissenting Op. at 12-13 figs.I & II. Increased minority voting, in turn, has "resulted in significant increases in the number of African-Americans serving in elected offices." H.R. Rep. No. 109-478, at 18; *see also* Dissenting Op. at 15 fig.III. For example, in the six states fully covered by

the 1965 Act, the number of African Americans serving in elected office increased from 345 to 3700 in the decades since 1965. H.R. Rep. No. 109-478, at 18.

But Congress found that this progress did not tell the whole story. It documented "continued registration and turnout disparities" in both Virginia and South Carolina. *Id.* at 25. Virginia, in particular, "remain[ed] an outlier," S. Rep. No. 109-295, at 11 (2006): although 71.6 percent of white, non-Hispanic voting age residents registered to vote in 2004, only 57.4 percent of black voting age residents registered, a 14.2-point difference. U.S. Census Bureau, Reported Voting and Registration of the Total Voting-Age Population, at tbl.4a, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html (last visited May 9, 2012). Also, although the number of African Americans holding elected office had increased significantly, they continued to face barriers to election for statewide positions. Congress found that not one African American had yet been elected to statewide office in Mississippi, Louisiana, or South Carolina. In other covered states, "'often it is only after blacks have been first appointed to a vacancy that they are able to win statewide office as incumbents.'" H.R. Rep. No. 109-478, at 33 (quoting Nat'l Comm'n on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005, at 38 (2006) ("Nat'l Comm'n Report")).

Congress considered other types of evidence that, in its judgment, "show[ed] that attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future." *Id.* at 21. It heard accounts

of specific instances of racial discrimination in voting. It heard analysis and opinions by experts on all sides of the issue. It considered, among other things, six distinct categories of evidence: (1) Attorney General objections issued to block proposed voting changes that would, in the Attorney General's judgment, have the purpose or effect of discriminating against minorities; (2) "more information requests" issued when the Attorney General believes that the information submitted by a covered jurisdiction is insufficient to allow a preclearance determination; (3) successful lawsuits brought under section 2 of the Act; (4) federal observers dispatched to monitor elections under section 8 of the Act; (5) successful section 5 enforcement actions filed against covered jurisdictions for failing to submit voting changes for preclearance, as well as requests for preclearance denied by the United States District Court for the District of Columbia; and (6) evidence that the mere existence of section 5 deters officials from even proposing discriminatory voting changes. Finally, Congress heard evidence that case-by-case section 2 litigation was inadequate to remedy the racial discrimination in voting that persisted in covered jurisdictions.

Before delving into the legislative record ourselves, we consider two arguments raised by Shelby County that, if meritorious, would significantly affect how we evaluate that record.

First, Shelby County argues that section 5 can be sustained only on the basis of current evidence of "a widespread pattern of electoral gamesmanship showing systematic resistance to the Fifteenth Amendment."

Appellant's Br. 23. According to the County, the preclearance remedy may qualify as congruent and proportional only "when it addresses a coordinated campaign of discrimination intended to circumvent the remedial effects of direct enforcement of Fifteenth Amendment voting rights." *Id.* at 7. We disagree. For one thing, how could we demand evidence of gamesmanship of the sort present at the time of *Katzenbach* given that section 5 preclearance makes such tactics virtually impossible? Equally important, Shelby County's argument rests on a misreading of *Katzenbach*. Although the Court did describe the situation in 1965 as one of "unremitting and ingenious defiance of the Constitution," *Katzenbach*, 383 U.S. at 309, nothing in *Katzenbach* suggests that such gamesmanship was necessary to the Court's judgment that section 5 was constitutional. Rather, the critical factor was that "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting." *Id.* at 328; *see also id.* at 313-15 (explaining why laws facilitating case-by-case litigation had "proved ineffective"). In *City of Rome*, the Court, while recognizing that "undeniable" progress had been made, sustained section 5's constitutionality without ever mentioning gamesmanship of any kind, 446 U.S. at 181-82; it relied instead on racial disparities in registration, the low number of minority elected officials, and the number and nature of Attorney General objections, *id.* at 180-81. Reinforcing this interpretation of *Katzenbach* and *City* of Rome, the Supreme Court explained in *City of Boerne* that "[t]he [Voting Rights Act's] new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, and the slow, costly character of case-by-case litigation," 521 U.S. at 526

(citation omitted). The Court reiterated the point in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 373, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001): "In [enacting the Voting Rights] Act . . . Congress also determined that litigation had proved ineffective . . . ."

This emphasis on the inadequacy of case-by-case litigation makes sense: if section 2 litigation is adequate to deal with the magnitude and extent of constitutional violations in covered jurisdictions, then Congress might have no justification for requiring states to preclear their voting changes. Put another way, what is needed to make section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate. Given this, the question before us is not whether the legislative record reflects the kind of "ingenious defiance" that existed prior to 1965, but whether Congress has documented sufficiently widespread and persistent racial discrimination in voting in covered jurisdictions to justify its conclusion that section 2 litigation remains inadequate. If it has, then section 5's "substantial federalism costs" remain justified because preclearance is still needed to remedy continuing violations of the Fifteenth Amendment.

Second, Shelby County urges us to disregard much of the evidence Congress considered because it involves "vote dilution, going to the weight of the vote once cast, not access to the ballot." Appellant's Br. 26. Specifically, the County faults Congress for relying on selective annexations, certain redistricting techniques, at-large elections, and other practices that do not prevent

minorities from voting but instead "dilute minority voting strength," 2006 Act § 2(b)(4)(A). According to the County, because the Supreme Court has "never held that vote dilution violates the Fifteenth Amendment," *Bossier II*, 528 U.S. at 334 n.3, we may not rely on such evidence to sustain section 5 as a valid exercise of Congress's Fifteenth Amendment enforcement power.

It is true that neither the Supreme Court nor this court has ever held that intentional vote dilution violates the Fifteenth Amendment. But the Fourteenth Amendment prohibits vote dilution intended "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *City of Mobile v. Bolden*, 446 U.S. 55, 66, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980); *see also, e.g., Shaw v. Reno*, 509 U.S. 630, 641, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993). Although the Court's previous decisions upholding section 5 focused on Congress's power to enforce the Fifteenth Amendment, the same "congruent and proportional" standard, refined by the inquiries set forth in *Northwest Austin*, appears to apply "irrespective of whether Section 5 is considered [Fifteenth Amendment] enforcement legislation, [Fourteenth Amendment] enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments." *Shelby Cnty.*, 811 F. Supp. 2d at 462 (footnote omitted); *see also City of Boerne*, 521 U.S. at 518 (suggesting that Congress's "power to enforce the provisions of the Fifteenth Amendment" is "parallel" to its power to enforce the Fourteenth Amendment). Indeed, when reauthorizing the Act in 2006, Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. *See* H.R. Rep.

No. 109-478, at 90 ("[T]he Committee finds the authority for this legislation under amend. XIV, § 5 and amend. XV, § 2."); *id.* at 53 & n.136 (stating that Congress is acting under its Fourteenth and Fifteenth Amendment powers in reauthorizing the Voting Rights Act). Accordingly, like Congress and the district court, we think it appropriate to consider evidence of unconstitutional vote dilution in evaluating section 5's validity. *See City of Rome*, 446 U.S. at 181 (citing Congress's finding that "[a]s registration and voting of minority citizens increase[], other measures may be resorted to which would dilute increasing minority voting strength" as evidence of the continued need for section 5 (internal quotation marks omitted)).

Consideration of this evidence is especially important given that so-called "second generation" tactics like intentional vote dilution are in fact decades-old forms of gamesmanship. That is, "as African Americans made progress in abolishing some of the devices whites had used to prevent them from voting," both in the late nineteenth century and again in the 1950s and 1960s, "[o]fficials responded by adopting new measures to minimize the impact of black reenfranchisement." *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 141-43 (2006) ("*Evidence of Continued Need*"). These measures—"well-known" tactics such as "'pack[ing]'" minorities into a single district, spreading minority voters thinly among several districts, annexing predominately white suburbs, and so on—were prevalent "forms of vote dilution" then, and Congress determined that these persist today. *Id.* Specifically, Congress found that while "first generation barriers"—flagrant attempts to deny access to the polls

that were pervasive at the time of *Katzenbach*—have diminished, "second generation barriers" such as vote dilution have been "constructed to prevent minority voters from fully participating in the electoral process." 2006 Act § 2(b)(2) (congressional findings). Although such methods may be "more subtle than the visible methods used in 1965," Congress concluded that their "effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." H.R. Rep. No. 109-478, at 6.

Having resolved these threshold issues, we return to the basic question: Does the legislative record contain sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy? Reviewing the record ourselves and focusing on the evidence most probative of ongoing constitutional violations, we believe it does.

To begin with, the record contains numerous "examples of modern instances" of racial discrimination in voting, *City of Boerne*, 521 U.S. at 530. Just a few recent examples:

- Kilmichael, Mississippi's abrupt 2001 decision to cancel an election when "an unprecedented number" of African Americans ran for office, H.R. Rep. No. 109-478, at 36-37 (internal quotation marks omitted);

• Webster County, Georgia's 1998 proposal to reduce the black population in three of the education board's five single-member districts after the school district elected a majority black school board for the first time, *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong. 830-31 (2006) ("*History, Scope, and Purpose*");

• Mississippi's 1995 attempt to evade preclearance and revive a dual registration system "initially enacted in 1892 to disenfranchise Black voters" and previously struck down by a federal court, H.R. Rep. No. 109-478, at 39;

• Washington Parish, Louisiana's 1993 attempt to reduce the impact of a majority-African American district by "immediately creat[ing] a new at-large seat to ensure that no white incumbent would lose his seat," *id.* at 38;

• Waller County, Texas's 2004 attempt to reduce early voting at polling places near a historically black university and its threats to prosecute students for "illegal voting," after two black students announced their intent to run for office, *Evidence of Continued Need* 185-86.

The legislative record also contains examples of overt hostility to black voting power by those who control the electoral process. In Mississippi, for instance, state legislators opposed an early 1990s redistricting plan that would have increased the number of black majority districts, referring to the plan publicly as the "black plan" and privately as the "nigger plan," *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22 (2006) ("*Modern Enforcement*") (internal quotation marks omitted); *see also* S. Rep. No. 109-295, at 14. In Georgia, the state House Reapportionment Committee Chairman "told his colleagues on numerous occasions, 'I don't want to draw nigger districts,'" H.R. Rep. No. 109-478, at 67 (quoting *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982)). The district court pointed to numerous additional examples of intentional discrimination in the legislative record. *See Shelby Cnty.*, 811 F. Supp. 2d at 472-76, 477-79, 480-81, 481-85, 485-87; *see also Nw. Austin*, 573 F. Supp. 2d at 258-62, 289-301.

In addition to these examples of flagrant racial discrimination, several categories of evidence in the record support Congress's conclusion that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed. We explore each in turn.

First, Congress documented hundreds of instances in which the Attorney General, acting pursuant to section 5, objected to proposed voting changes that he found would have a discriminatory purpose or effect. Significantly,

Congress found that the absolute number of objections has not declined since the 1982 reauthorization: the Attorney General interposed at least 626 objections during the twenty-two years from 1982 to 2004 (an average of 28.5 each year), compared to 490 interposed during the seventeen years from 1965 to 1982 (an average of 28.8 each year). *Evidence of Continued Need* 172; *see also* S. Rep. No. 109-295, at 13-14 (finding 754 objections between 1982 and the first half of 2006).

Formal objections were not the only way the Attorney General blocked potentially discriminatory changes under section 5. Congress found that between 1990 and 2005, "more information requests" (MIRs) prompted covered jurisdictions to withdraw or modify over 800 proposed voting changes. *Evidence of Continued Need* 2553, 2565; H.R. Rep. No. 109-478, at 40-41. Although MIRs take no position on the merits of a preclearance request, Congress had evidence indicating that the Attorney General sometimes uses them to "send signals to a submitting jurisdiction about the assessment of their proposed voting change" and to "promot[e] compliance by covered jurisdictions." *Evidence of Continued Need* 2541. Congress found that because "[t]he actions taken by a jurisdiction [in response to an MIR] are often illustrative of [its] motives," the high number of withdrawals and modifications made in response to MIRs constitutes additional evidence of "[e]fforts to discriminate over the past 25 years." H.R. Rep. No. 109-478, at 40-41.

Shelby County contends that section 5 objections and MIRs, however numerous, "do[] not signal intentional

voting discrimination" because they represent only the Attorney General's opinion and need not be based on discriminatory intent. Appellant's Br. 30-31; *see also id.* at 32. Underlying this argument is a fundamental principle with which we agree: to sustain section 5, the record must contain "evidence of a pattern of constitutional violations," *Hibbs*, 538 U.S. at 729, and voting changes violate the constitution only if motivated by discriminatory animus, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997) ("*Bossier I*"). Although not all objections rest on an affirmative finding of intentional discrimination, the record contains examples of many that do. *See Nw. Austin*, 573 F. Supp. 2d at 289-301 (appendix providing examples of objections based on discriminatory intent). Between 1980 and 2004, the Attorney General issued at least 423 objections based in whole or in part on discriminatory intent. *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 180-81 (2005) ("*Preclearance Standards*"). Moreover, in the 1990s, before the Supreme Court limited the Attorney General's ability to object based on discriminatory but nonretrogressive intent, *see Bossier II*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (limiting the scope of section 5's purpose prong in a decision overturned by the 2006 Act), "the purpose prong of Section 5 had become the dominant legal basis for objections," *Preclearance Standards* 177, with seventy-four percent of objections based in whole or in part on discriminatory intent, *id.* at 136. Although it is true that objections represent "only one side's opinion," Appellant's Br. 30, Congress is entitled to rely upon the Attorney

General's considered judgment "when it prescribes civil remedies . . . under [section] 2 of the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 330 (explaining that "Congress obviously may avail itself of information from any probative source," including evidence "adduced by the Justice Department"). In fact, in *City of Rome* the Supreme Court considered objections to be probative evidence of unconstitutional voting discrimination. *See* 446 U.S. at 181.

Shelby County also points out that the percentage of proposed voting changes blocked by Attorney General objections has steadily declined—from a height of 4.06 percent (1968-1972) to 0.44 percent (1978-1982) to 0.17 percent (1993-1997) and to 0.05 percent (1998-2002). An *Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 219 (2006) ("*Introduction to the Expiring Provisions*"). But the most dramatic decline in the objection rate—which, as the district court observed, "has always been low," *Shelby Cnty.*, 811 F. Supp. 2d at 470—occurred in the 1970s, before the Supreme Court upheld the Act for a third time in *City of Rome*. *See Introduction to the Expiring Provisions* 219. Also, the average number of objections per year has not declined, suggesting that the level of discrimination has remained constant as the number of proposed voting changes, many likely quite minor, has increased. *See* H.R. Rep. No. 109-478, at 22 (showing increase in the annual number of voting changes submitted for preclearance, from 300-400 per year in the early 1970s to 4000-5000 per year in the 1990s and 2000s). As the

district court pointed out, there may be "many plausible explanations for the recent decline in objection rates." *See Shelby Cnty.*, 811 F. Supp. 2d at 471. Even in the six years from 2000 to 2006, after objection rates had dropped to their lowest, Attorney General objections affected some 660,000 minority voters. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 58 (2006) ("*Continuing Need*"). Ultimately, Congress believed that the absolute number of objections represented the better indicator of the extent of discrimination in covered jurisdictions. This judgment —whether to accord greater weight to absolute numbers or to objection rates—is precisely the kind that a legislature is "far better equipped" than a court to evaluate, *Turner Broad.*, 520 U.S. at 195 (internal quotation marks omitted).

As for MIRs, we agree with Shelby County that they are less probative of discrimination than objections. An MIR does not represent a judgment on the merits, and submitting jurisdictions might have many reasons for modifying or withdrawing a proposed change in response to one. But the record contains evidence from which Congress could "reasonabl[y] infer[]," *id.* (internal quotation marks omitted), that at least some withdrawals or modifications reflect the submitting jurisdiction's acknowledgement that the proposed change was discriminatory. *See Evidence of Continued Need* 178 (stating that a jurisdiction's decision to withdraw a proposed changes in response to an MIR "is frequently a tacit admission of one or more proposed discriminatory changes"); *id.* at 809-10 (explaining that after the Attorney General requested more information on a redistricting

plan containing only two majority-black districts, the jurisdiction withdrew the proposal and ultimately adopted a redistricting plan with three majority-black districts); H.R. Rep. No. 109-478, at 41 (explaining that Monterey County's proposal to reduce the number of polling places received preclearance only after the County withdrew five polling place consolidations in response to an MIR). Given this, Congress reasonably concluded that some of the 800-plus withdrawals and modifications in response to MIRs "reflect[]" "[e]fforts to discriminate over the past 25 years." H.R. Rep. No. 109-478, at 40.

The second category of evidence relied on by Congress, successful section 2 litigation, reinforces the pattern of discrimination revealed by objections and MIRs. 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 practices in at least 825 counties. *Evidence of Continued Need* 208, 251. Shelby County faults the district court for relying on evidence of successful section 2 litigation "even though 'a violation of Section 2 does not require a showing of unconstitutional discriminatory intent.'" Appellant's Br. 34 (quoting *Shelby Cnty.*, 811 F. Supp. 2d at 481). The County's premise is correct: although the Constitution prohibits only those voting laws motivated by discriminatory intent, section 2 prohibits all voting laws for which "'based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class.'" *Bartlett v. Strickland*,

556 U.S. 1, 10-11, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (quoting 42 U.S.C. § 1973(b)). In practice, however, this "results test," as applied in section 2 cases, requires consideration of factors very similar to those used to establish discriminatory intent based on circumstantial evidence. *Compare Gingles*, 478 U.S. at 36-37 (listing factors considered under the results test), *with Rogers v. Lodge*, 458 U.S. 613, 623-27, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982) (relying on virtually identical factors to affirm a finding of intentional discrimination). Also, as the district court pointed out, "courts will avoid deciding constitutional questions" if, as is the case in virtually all successful section 2 actions, the litigation can be resolved on narrower grounds. *Shelby Cnty.*, 811 F. Supp. 2d at 482; *see also, e.g., White v. Alabama*, 74 F.3d 1058, 1071 n.42 (11th Cir. 1996) ("Because we dispose of the district court's judgment on the ground that it violates the Voting Rights Act, we need not, and indeed, should not, discuss whether the judgment violates the Equal Protection Clause."). This explains why the legislative record contains so few published section 2 cases with judicial findings of discriminatory intent, *see* Dissenting Op. at 26; *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 986-87 (2005) ("*Impact and Effectiveness*") (report by Ellen Katz et al.)—courts have no need to find discriminatory intent once they find discriminatory effect. But Congress is not so limited. Considering the evidence required to prevail in a section 2 case and accounting for the obligation of Article III courts to avoid reaching constitutional questions unless necessary, we think Congress quite reasonably concluded

that successful section 2 suits provide powerful evidence of unconstitutional discrimination. In addition, as with Attorney General objections, we cannot ignore the sheer number of successful section 2 cases—653 over 23 years, averaging more than 28 each year. This high volume of successful section 2 actions is particularly dramatic given that Attorney General objections block discriminatory laws before they can be implemented and that section 5 deters jurisdictions from even attempting to enact such laws, thereby reducing the need for section 2 litigation in covered jurisdictions. *See Continuing Need* 26 (explaining that section 5 "makes the covered jurisdiction[s] much 'cleaner' than they would have been without Section 5 coverage").

Third, Congress relied on evidence of "the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions." 2006 Act § 2(b)(5). Specifically, 300 to 600 observers were dispatched annually between 1984 and 2000, H.R. Rep. No. 109-478, at 44, amounting to 622 separate dispatches (most or all involving multiple observers) to covered jurisdictions, *Evidence of Continued Need* 180-82; *see also* 42 U.S.C. § 1973f(a)(2) (authorizing dispatch of federal observers to covered jurisdictions based upon either "written meritorious complaints from residents, elected officials, or civic participation organizations," or the Attorney General's judgment that observers are necessary to enforce the Fourteenth or Fifteenth Amendment). Of these, sixty-six percent were concentrated in five of the six states originally covered by section 5—Alabama, Georgia, Louisiana, Mississippi, and South Carolina. H.R.

Rep. No. 109-478, at 44. In some instances, monitoring by federal observers "bec[ame] the foundation of Department of Justice enforcement efforts," as in Conecuh County, Alabama, and Johnson County, Georgia, where reports by federal observers enabled the federal government to bring suit against county officials for discriminatory conduct in polling locations, ultimately resulting in consent decrees. *Id.*; *see also Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 42-43 (2006) ("*Sections 6 and 8*"). As Congress saw it, this continued need for federal observers in covered jurisdictions is indicative of discrimination and "demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations." H.R. Rep. No. 109-478, at 44.

Shelby County insists that the Attorney General's decision to dispatch federal observers "indicates only that . . . there might be conduct with the effect of disenfranchising minority citizens, which might or might not be purposeful discrimination." Appellant's Br. 35-36. As the district court explained, however, "observers are not assigned to a particular polling location based on sheer speculation; they are only dispatched if 'there is a *reasonable* belief that minority citizens are at risk of being disenfranchised.'" *Shelby Cnty.*, 811 F. Supp. 2d at 486 (quoting H.R. Rep. No. 109-478, at 44). Indeed, the Justice Department conducts pre-election investigations in order

to identify jurisdictions where federal observers are likely to be necessary. *See Sections* 6 *and* 8, at 37-39 (explaining that the Justice Department conducts pre-election surveys and field investigations to identify jurisdictions where federal observers will be needed). The record shows that federal observers in fact witnessed discrimination at the polls, sometimes in the form of intentional harassment, intimidation, or disparate treatment of minority voters. *See id.* at 30-31 (describing discriminatory treatment and harassment of minorities by poll officials in Alabama); *id.* at 34 (describing discriminatory treatment of minority voters in Texas and Arizona); *id.* at 43 (describing the exclusion of African Americans from service as poll workers in Johnson County, Georgia). Thus, although the deployment of federal observers is hardly conclusive evidence of unconstitutional discrimination, we think Congress could reasonably rely upon it as modest, additional evidence of current needs.

Fourth, Congress found evidence of continued discrimination in two types of preclearance-related lawsuits. Examining the first of these—actions brought to enforce section 5's preclearance requirement—Congress noted that "many defiant covered jurisdictions and State and local officials continue to enact and enforce changes to voting procedures without the Federal Government's knowledge." H.R. Rep. No. 109-478, at 41. Between 1982 and 2004, at least 105 successful section 5 enforcement actions were brought against such jurisdictions. *Evidence of Continued Need* 250. Shelby County believes that successful section 5 enforcement actions are "not reliable evidence of intentional voting discrimination" because

"[t]he most that a section 5 enforcement action can establish . . . is that a voting change—and quite possibly a nondiscriminatory voting change—was not properly submitted for preclearance." Appellant's Br. 34. But the legislative record does contain evidence that at least some of the 105 successful section 5 enforcement suits were initiated in response to attempts by covered jurisdictions to implement purposefully discriminatory laws without federal oversight. *See Shelby Cnty.*, 811 F. Supp. 2d at 480 (describing section 5 actions against Mississippi and Waller County, Texas, "in which the unprecleared voting changes appeared to have been motivated by discriminatory animus"); *Evidence of Continued Need* 176 (explaining that after a section 5 enforcement suit forced Mississippi to submit its dual registration law for preclearance, the Attorney General objected based on the law's racially discriminatory purpose and effect). Therefore, Congress could reasonably have concluded that such cases, even if few in number, provide at least some evidence of continued willingness to evade the Fifteenth Amendment's protections, for they reveal continued efforts by recalcitrant jurisdictions not only to enact discriminatory voting changes, but to do so in defiance of section 5's preclearance requirement.

In addition to section 5 enforcement suits, Congress found evidence of continued discrimination in "the number of requests for declaratory judgments [for preclearance] denied by the United States District Court for the District of Columbia." 2006 Act § 2(b)(4)(B). The number of unsuccessful judicial preclearance actions appears to have remained roughly constant since 1966: twenty-five

requests were denied or withdrawn between 1982 and 2004, compared to seventeen between 1966 and 1982. *Evidence of Continued Need* 177-78, 275. Shelby County does not contest the relevance of this evidence.

Finally, and bolstering its conclusion that section 5 remains necessary, Congress "f[ound] that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 24. In Congress's view, "Section 5's strong deterrent effect" and "the number of voting changes that have never gone forward as a result of [that effect]" are "[a]s important as the number of objections that have been interposed to protect minority voters against discriminatory changes" that had actually been proposed. *Id.* As Congress explained, "'[o]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result.'" *Id.* (quoting Nat'l Comm'n Report 57). For this reason, the mere existence of section 5 "'encourage[s] the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.'" *Id.* (quoting Laughlin McDonald, The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union 15 (2006)). Congress considered testimony that section 5 has had just this effect on state and local redistricting processes. *See* H.R. Rep. No. 109-478, at 24 (describing section 5's "critical"

influence on the Georgia legislature's redistricting process, which culminated in a plan that was precleared with no objection by the Attorney General (internal quotation marks omitted)); *Evidence of Continued Need* 362-63 (explaining how concerns about obtaining preclearance prevented Fredericksburg, Virginia, from eliminating an African American majority district). In other words, Congress had "some reason to believe that without [section 5's] deterrent effect on potential misconduct," the evidence of continued discrimination in covered jurisdictions "might be considerably worse." S. Rep. No. 109-295, at 11.

Shelby County argues that Congress's finding of deterrence reflects "'outdated assumptions about racial attitudes in the covered jurisdictions'" that we should not "indulge[]." Appellant's Br. 38 (quoting *Nw. Austin*, 129 S. Ct. at 2525 (Thomas, J., concurring in judgment in part and dissenting in part)). We agree that evaluating section 5's deterrent effect raises sensitive and difficult issues. As the dissent rightly points out, the claimed effect is hard to measure empirically and even harder to consider judicially. Dissenting Op. at 24. We also agree with the dissent that section 5 could not stand based on claims of deterrence alone, nor could deterrence be used in some hypothetical case to justify renewal "to the crack of doom," *id.* But the difficulty of quantifying the statute's deterrent effect is no reason to summarily reject Congress's finding that the evidence of racial discrimination in voting would look worse without section 5—a finding that flows from record evidence unchallenged by the dissent. As explained above, Congress's deterrent effect finding rests on evidence of current and widespread voting discrimination, as well as on testimony indicating that section 5's mere

existence prompts state and local legislators to conform their conduct to the law. And Congress's finding—that is, a finding about how the world would have looked absent section 5—rests on precisely the type of fact-based, predictive judgment that courts are ill-equipped to second guess. *See Turner Broad.*, 520 U.S. at 195 ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress." (internal quotation marks omitted)).

This brings us, then, to Congress's ultimate conclusion. After considering the entire record, including

- 626 Attorney General objections that blocked discriminatory voting changes;
- 653 successful section 2 cases;
- over 800 proposed voting changes withdrawn or modified in response to MIRs;
- tens of thousands of observers sent to covered jurisdictions;
- 105 successful section 5 enforcement actions;
- 25 unsuccessful judicial preclearance actions;
- and section 5's strong deterrent effect, i.e., "the number of voting changes that have never gone forward as a result of Section 5," H.R. Rep. No. 109-478, at 24;

Congress found that serious and widespread intentional discrimination persisted in covered jurisdictions and that "case-by-case enforcement alone . . . would leave minority citizens with [an] inadequate remedy." *Id.* at 57. In reaching this conclusion, Congress considered evidence that section 2 claims involve "intensely complex litigation that is both costly and time-consuming." *Modern Enforcement 96; see also Introduction to the Expiring Provisions* 141 (describing a Federal Judicial Center study finding that voting rights cases require nearly four times more work than an average district court case and rank as the fifth most work-intensive of the sixty-three types of cases analyzed); *City of Boerne*, 521 U.S at 526 (noting the "slow costly character of case-by-case litigation" under section 2). It heard from witnesses who explained that "it is incredibly difficult for minority voters to pull together the resources needed" to pursue a section 2 lawsuit, particularly at the local level and in rural communities. *Modern Enforcement 96; see also History, Scope, and Purpose* 84 (explaining that voters "in local communities and particularly in rural areas . . . do not have access to the means to bring litigation under Section 2"). Such testimony is particularly significant given that the vast majority of section 5 objections (92.5 percent from 2000 to 2005) pertained to local voting changes. *See* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 Neb. L. Rev. 605, 612-13 (2005); *see also id.* at 616 ("[S]ection 2 cases are much less likely to be filed when it comes to redistricting in smaller jurisdictions[.]"). Congress also heard testimony that during the time it takes to litigate a section 2 action

—often several years—proponents of a discriminatory law may enjoy its benefits, potentially winning elections and gaining the advantage of incumbency before the law is overturned. *Impact and Effectiveness* 43-44. Given all of this, and given the magnitude and persistence of discrimination in covered jurisdictions, Congress concluded that case-by-case litigation—slow, costly, and lacking section 5's prophylactic effect—"would be ineffective to protect the rights of minority voters." H.R. Rep. No. 109-478, at 57.

According to Shelby County, "[e]valuation of the probative evidence shows there is no longer systematic resistance to the Fifteenth Amendment in the covered jurisdictions that cannot be solved through case-by-case litigation." Appellant's Br. 38. Congress, however, reached a different conclusion, and as explained above, the County has offered no basis for thinking that Congress's judgment is either unreasonable or unsupported by probative evidence. The dissent accuses us of "overstat[ing] the inadequacies of § 2, such as cost and the consequences of delay." Dissenting Op. at 8. But the conclusion that section 2 is inadequate is Congress's, not ours. The dissent believes that the costs of section 2 actions can "be assumed by the Department of Justice," *id.*, but it cites nothing in the record to support such speculation. The dissent also believes that "courts may as always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by adjudicative delay." *Id.* at 8-9. But Congress knows that plaintiffs can seek preliminary injunctions and reasonably determined that this possibility—that plaintiffs with few resources

litigating a fact-intensive section 2 case will be able to satisfy the heavy burden required for preliminary injunctive relief—was insufficient to alleviate its concerns about the inadequacy of section 2 actions.

The point at which section 5's strong medicine becomes unnecessary and therefore no longer congruent and proportional turns on several critical considerations, including the pervasiveness of serious racial discrimination in voting in covered jurisdictions; the continued need for section 5's deterrent and blocking effect; and the adequacy of section 2 litigation. These are quintessentially legislative judgments, and Congress, after assembling and analyzing an extensive record, made its decision: section 5's work is not yet done. Insofar as Congress's conclusions rest on predictive judgments, we must, contrary to the dissent's approach, apply a standard of review even "more deferential than we accord to judgments of an administrative agency." *Turner Broad.*, 520 U.S. at 195. Given that we may not "displace [an agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951), we certainly cannot do so here. Of course, given the heavy federalism costs that section 5 imposes, our job is to ensure that Congress's judgment is reasonable and rests on substantial probative evidence. *See Turner Broad.*, 520 U.S. at 195 ("In reviewing the constitutionality of a statute . . . [o]ur sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." (internal quotation marks

omitted)). After thoroughly scrutinizing the record and given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance, we, like the district court, are satisfied that Congress's judgment deserves judicial deference.

B.

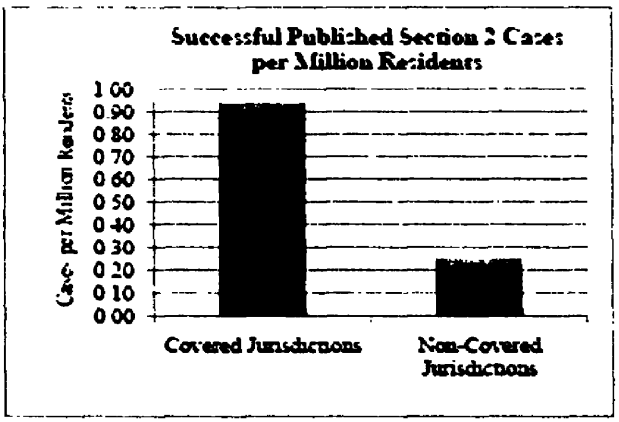
Having concluded that section 5's "current burdens" are indeed justified by "current needs," we proceed to the second *Northwest Austin* inquiry: whether the record supports the requisite "showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 129 S. Ct. at 2512. Recall that this requirement stems from the Court's concern that "[t]he Act . . . differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'" *Id.* "The evil that § 5 is meant to address," the Court observed, "may no longer be concentrated in the jurisdictions singled out [by section 4(b)] for preclearance." *Id.*

Before examining the record ourselves, we emphasize that the Act's disparate geographic coverage—and its relation to the problem of voting discrimination—depends not only on section 4(b)'s formula, but on the statute as a whole, including its mechanisms for bail-in and bailout. Bailout functions as an integral feature of section 4's coverage scheme: jurisdictions are subject to section 5 only if (1) they are captured by section 4(b), and (2) they have not bailed out, meaning that they have failed to demonstrate a clean voting record as defined

in section 4(a). *See* 42 U.S.C. §§ 1973b(a), 1973c(a). In addition, jurisdictions not captured by section 4(b) but which nonetheless have serious, recent records of voting discrimination, may be "bailed in"—i.e., subjected to section 5 preclearance—pursuant to section 3(c). *See* 42 U.S.C. § 1973a(c). Therefore, the question before us is whether the statute as a whole, not just the section 4(b) formula, ensures that jurisdictions subject to section 5 are those in which unconstitutional voting discrimination is concentrated.

The most concrete evidence comparing covered and noncovered jurisdictions in the legislative record comes from a study of section 2 cases published on Westlaw or Lexis between 1982 and 2004. *Impact and Effectiveness* 964-1124 (report by Ellen Katz *et al.*). Known as the Katz study, it reached two key findings suggesting that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance," *Nw. Austin*, 129 S. Ct. at 2512. First, the study found that of the 114 published decisions resulting in outcomes favorable to minority plaintiffs, 64 originated in covered jurisdictions, while only 50 originated in non-covered jurisdictions. Thus, although covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation since 1982. *Impact and Effectiveness* 974; *see also* H.R. Rep. No. 109-478, at 53. When the Katz data is adjusted to reflect these population differences (based on the Census Bureau's 2004 population estimates, the most recent data then available to Congress), the rate of successful section 2 cases in covered jurisdictions (.94 per million residents)

is nearly four times the rate in non-covered jurisdictions (.25 per million residents), as illustrated in the chart below. *See* Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), http://sitemaker.umich.edu/votingrights/files/masterlist.xls; U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/historical/2000s/vintage_2004/state.html (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/counties/totals/2004/CO-EST2004-01.html (last visited May 9, 2012); U.S. Census Bureau, Population Estimates: Minor Civil Divisions: 2000 to 2004, available at http://www.census.gov/popest/data/cities/totals/2004/SUB-EST2004-5.html (last visited May 9, 2012).

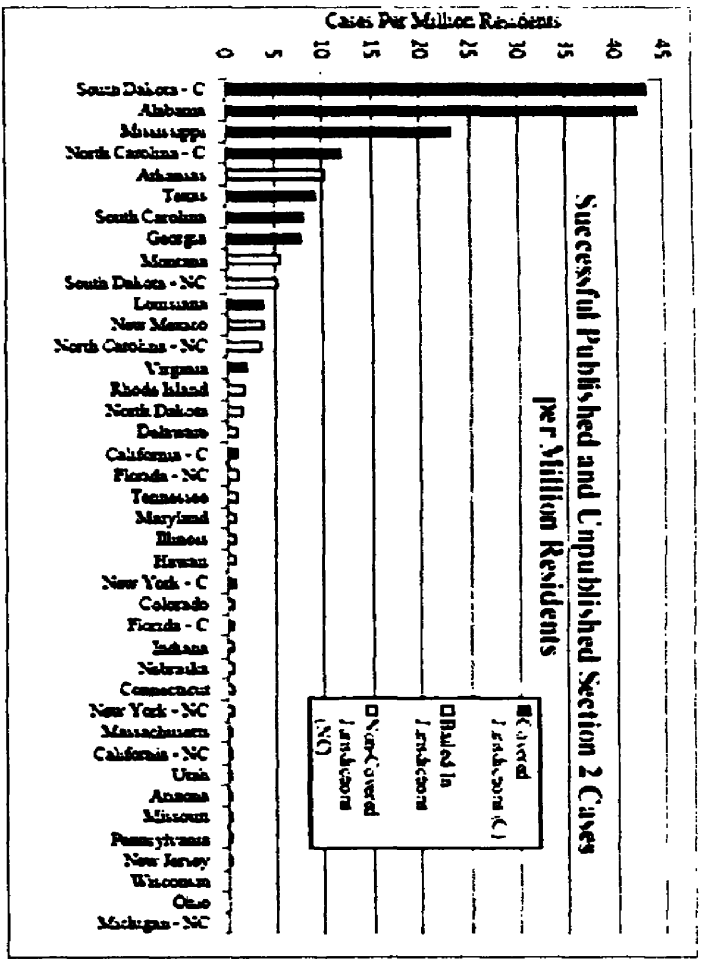


Second, the study found higher success rates in covered jurisdictions than in non-covered jurisdictions. Specifically, 40.5 percent of published section 2 decisions in covered jurisdictions resulted in favorable outcomes for plaintiffs, compared to only 30 percent in non-covered jurisdictions. *Impact and Effectiveness* 974.

The difference between covered and non-covered jurisdictions becomes even more pronounced when unpublished section 2 decisions—primarily court-approved settlements—are taken into account. As the Katz study noted, published section 2 lawsuits "represent only a portion of the section 2 claims filed or decided since 1982" since many claims were settled or otherwise resolved without a published opinion. *Id.* at 974. According to data compiled by the National Commission on the Voting Rights Act and Justice Department historian Peyton McCrary, there have been at least 686 unpublished successful section 2 cases since 1982, amounting to a total of some 800 published and unpublished cases with favorable outcomes for minority voters. *See* Decl. of Dr. Peyton McCrary 13 ("McCrary Decl."). Of these, approximately 81 percent were filed in covered jurisdictions. *Id.* When this data is broken down state-by-state, separately identifying covered and non-covered portions of partially covered states, the concentration of successful section 2 cases in the covered jurisdictions is striking. Of the eight states with the highest number of successful published and unpublished section 2 cases per million residents—Alabama, Mississippi, Arkansas, Texas, South Carolina, Georgia, and the covered portions of South Dakota and North Carolina—all but one are covered. *See* Supp. Decl.

of Dr. Peyton McCrary 3-7; U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/historical/2000s/vintage _2004/state.html (last visited May 9, 2012); U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: April 1, 2000 to July 1, 2004, *available at* http://www.census.gov/popest/data/counties/totals/2004/CO-EST2004-01.html (last visited May 9, 2012); U.S. Census Bureau, Population Estimates: Minor Civil Divisions: 2000 to 2004, *available at* http://www.census.gov/popest/data/cities/totals/2004/SUB-EST2004-5.html (last visited May 9, 2012). The only exception is Arkansas, which, though not captured by section 4(b), was subjected to partial preclearance pursuant to a 1990 federal court order, i.e., "bailed in." *See Jeffers v. Clinton*, 740 F. Supp. 585, 601-02 (E.D. Ark. 1990). Similarly, of the fourteen states with the highest number of successful published and unpublished section 2 cases per million residents —the eight listed above, plus Montana, Louisiana, New Mexico, Virginia, and the non-covered portions of South Dakota and North Carolina—eleven are either covered, including the seven states originally covered by the 1965 Act, or were bailed in for some period (Arkansas and New Mexico). *See* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2010 & nn.100-01 (2010) (discussing bail-in of Arkansas and New Mexico). This data is displayed in the chart on the following page.

Appendix A


Successful Published and Unpublished Section 2 Cases
per Million Residents
Cases Per Million Residents
0
5
10
15
20
25
30
35
40
45
South Dakota - C
Alabama
Mississippi
North Carolina - C
Arkansas
Texas
South Carolina
Georgia
Montana
South Dakota - NC
Louisiana
New Mexico
North Carolina - NC
Virginia
Rhode Island
North Dakota
Delaware
California - C
Florida - NC
Tennessee
Maryland
Illinois
Hawaii
New York - C
Colorado
Florida - C
Indiana
Nebraska
Connecticut
New York - NC
Massachusetts
California - NC
Utah
Arizona
Missouri
Pennsylvania
New Jersey
Wisconsin
Ohio
Michigan - NC
Covered Jurisdictions (C)
Ruled In Jurisdictions
Not Covered Jurisdictions (NC)

Shelby County objects to the use of unpublished section 2 data, pointing out that although Congress considered the National Commission's analysis of unpublished cases in *covered* jurisdictions, the legislative record does not contain McCrary's analysis of unpublished cases in *non-covered* jurisdictions. We agree that there are reasons to approach this data with caution: McCrary prepared his analysis after the 2006 reauthorization, and because his data regarding unpublished cases in non-covered jurisdictions was collected separately from the data on unpublished cases in covered jurisdictions, we cannot be certain that the data collection methods were identical. That said, the Supreme Court has considered post-enactment evidence to find at least one law congruent and proportional, *see Lane*, 541 U.S. at 524-25 nn. 6-9 & 13 (citing articles and cases published ten or more years after the Americans with Disabilities Act was enacted, as well as recent versions of statutes and regulations), and here a majority of the unpublished cases from non-covered jurisdictions (as well as all from covered jurisdictions) appears in the legislative record, *see* McCrary Decl. 10. Also, while the Katz data on published cases is necessarily underinclusive, *see Impact and Effectiveness* 974 (explaining that the published cases analyzed by the Katz study "represent only a portion" of all section 2 actions), Shelby County has identified no errors or inconsistencies in the data analyzed by McCrary. Indeed, McCrary points out that even if his methodology identified only half of the unpublished cases in non-covered jurisdictions, "there would still be *393 more* settlements resolved favorably for minority voters in" covered jurisdictions. McCrary Decl. 11. For these reasons, although we would not rely solely on the combined published and unpublished data, we think it provides helpful additional evidence that corroborates the

disparities in the level of discrimination between covered and non-covered jurisdictions revealed by the published data.

The section 2 data, moreover, does not tell the whole story. As explained above, Congress found that section 5, which operates only in covered jurisdictions, deters or blocks many discriminatory voting laws before they can ever take effect and become the target of section 2 litigation. "Section 5's reach in preventing discrimination is broad. Its strength lies not only in the number of discriminatory voting changes it has thwarted, but can also be measured by the submissions that have been withdrawn from consideration, the submissions that have been altered by jurisdictions in order to comply with the [Voting Rights Act], or in the discriminatory voting changes that have never materialized." H.R. Rep. No. 109-478, at 36. Accordingly, if discrimination were evenly distributed throughout the nation, we would expect to see fewer successful section 2 cases in covered jurisdictions than in non-covered jurisdictions. *See Continuing Need* 26 (explaining that section 5 "makes the covered jurisdiction[s] much 'cleaner' than they would have been without Section 5 coverage"). Yet we see substantially more.

Shelby County makes two main arguments in response to this evidence. First, citing *Katzenbach's* finding that the coverage formula was "rational in both practice and theory," 383 U.S. at 330, it contends that section 4(b) is irrational because it relies on "decades-old data." Appellant's Br. 59. "It cannot be constitutional,"

Shelby County insists, "to rely on decades-old voting data to establish current voting discrimination." *Id.* In addition, the County claims that in 1965 Congress was concerned with "first-generation" barriers—tests and devices that denied access to the ballot—and crafted the coverage formula to capture states that erected such barriers and had low registration rates. But in 2006, although Congress was more concerned with "second-generation" barriers—vote dilution techniques that weaken "minority voting effectiveness"—it retained a coverage formula aimed at first-generation problems. Thus, Shelby County concludes, "[t]here is a serious mismatch between the conduct targeted by Congress and the factors that trigger coverage under Section 4(b)." *Id.* at 60.

This argument rests on a misunderstanding of the coverage formula. As the district court explained, the election years that serve as coverage "triggers" under section 4(b) "were never selected because of something special that occurred in those years." *Shelby Cnty.*, 811 F. Supp. 2d at 505. Instead, Congress identified the jurisdictions it sought to cover—those for which it had "evidence of actual voting discrimination," *Katzenbach*, 383 U.S. at 329—and then worked backward, reverse-engineering a formula to cover those jurisdictions. *See id.* (explaining that "Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act" and that it "eventually evolved" a formula "to describe these areas"). The coverage formula relied on tests and devices "because of their long history as a tool for perpetrating the evil," and

voting rates because "widespread disenfranchisement must inevitably affect the number of actual voters." *Id.* at 330. In other words, Congress chose the section 4(b) criteria not because tests, devices, and low participation rates were all it sought to target, but because they served as accurate proxies for pernicious racial discrimination in voting. The question, then, is not whether the formula relies on old data or techniques, but instead whether it, together with bail-in and bailout, continues to identify the jurisdictions with the worst problems. If it does, then even though the formula rests on decades-old factors, the statute is rational in theory because its "disparate geographic coverage" remains "sufficiently related to the problem that it targets." *Nw. Austin*, 129 S. Ct. at 2512.

Of course, Shelby County's real argument is that the statute fails this test, i.e., that it no longer actually identifies the jurisdictions "uniquely interfering with the right Congress is seeking to protect through preclearance." Appellant's Br. 62. The County points out that Congress never made a finding that racial discrimination in voting was "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 129 S. Ct. at 2512. The County also argues that the Katz study is at best inconclusive, for some non-covered states, such as Illinois and the non-covered portions of New York, had more successful published section 2 lawsuits than did several covered states. In any event, it claims, "aggregated statistics showing slightly more Section 2 litigation with 'favorable outcomes' in covered jurisdictions as a group is not a rational basis for subjecting individually-targeted States to another 25 years of preclearance." Appellant's Br. 70.

Shelby County's first point—that Congress failed to make a finding—is easily answered. Congress did not have to. *United States v. Lopez*, 514 U.S. 549, 562, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Congress "normally is not required to make formal findings" in order to legislate). The proper question is whether the record contains sufficient evidence to demonstrate that the formula continues to target jurisdictions with the most serious problems. *See Nw. Austin*, 129 S. Ct. at 2512. This presents a close question. The record on this issue is less robust than the evidence of continued discrimination, *see supra* Part III.A, although this is in part due to the difficulty of comparing jurisdictions that have been subject to two very different enforcement regimes, i.e., covered jurisdictions are subject to both sections 2 and 5 while non-covered jurisdictions are subject only to section 2. And although the Katz data in the aggregate does suggest that discrimination is concentrated in covered jurisdictions, just three covered states—Alabama, Louisiana, and Mississippi—account for much of the disparity. The covered states in the middle of the pack—North Carolina, South Carolina, Virginia, Texas, and Georgia—are about on par with the worst non-covered jurisdictions. And some covered states—Alaska and Arizona—had no successful published section 2 cases at all.

As explained above, however, this data presents an incomplete picture of covered jurisdictions. When we consider the Katz data in conjunction with other record evidence, the picture looks quite different. For instance, although Georgia had only three successful published section 2 cases between 1982 and 2004, during that

time the state had 66 successful unpublished section 2 cases, 83 section 5 objections, and 17 successful section 5 enforcement actions. *Evidence of Continued Need* 250-51, 272. In addition, between 1990 and 2005, jurisdictions in Georgia withdrew 90 proposed voting changes in response to MIRs. *Id.* at 2566. South Carolina is similar. Although the state had only 3 successful published section 2 cases, it had 30 successful unpublished section 2 cases, 74 section 5 objections, and 10 successful section 5 enforcement actions, as well as 26 voting changes withdrawn in response to MIRs and 51 changes that could not lawfully be implemented for failure to respond to MIRs. *Id.* at 250-51, 272, 2566. South Carolina, moreover, is one of the covered states that not only has continued racial disparities in voter registration and turnout, but that has never elected an African American to statewide office. *See supra* p. 22. Accordingly, even if only a relatively small portion of objections, withdrawn voting changes, and successful section 5 enforcement actions correspond to unconstitutional conduct, and even if there are substantially more successful unpublished section 2 cases in non-covered jurisdictions than the McCrary data reveals, these middle-range covered jurisdictions appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests. In fact, the discrepancy between covered and non-covered jurisdictions is likely even greater given that, as Congress found, the mere existence of section 5 deters unconstitutional behavior in the covered jurisdictions. That is, the middle-range covered states appear comparable to some non-covered jurisdictions only because section 5's deterrent and

blocking effect screens out discriminatory laws before section 2 litigation becomes necessary. Had section 5 not been in effect, one would expect significantly more discrimination in North Carolina, South Carolina, Virginia, Texas, and Georgia, all covered by section 5, than in the non-covered states with the worst records. *See* S. Rep. No. 109-295, at 11 (suggesting that "without the Voting Rights Act's deterrent effect," the evidence of discrimination in the covered jurisdictions "might be considerably worse").

To be sure, the coverage formula's fit is not perfect. But the fit was hardly perfect in 1965. Accordingly, *Katzenbach's* discussion of this issue offers a helpful guide for our current inquiry, particularly when we consider all probative record evidence of recent discrimination—and not just the small subset of section 2 cases relied upon by the dissent, *see* Dissenting Op. at 25-26. In 1965, the formula covered three states in "which federal courts ha[d] repeatedly found substantial voting discrimination" —Alabama, Louisiana, and Mississippi, *Katzenbach*, 383 U.S. at 329, the same three states that, notwithstanding more than forty years of section 5 enforcement, still account for the highest rates of published successful section 2 litigation, as well as large numbers of unpublished successful section 2 cases, section 5 objections, federal observer coverages, and voting changes withdrawn or modified in response to MIRs. But the 1965 formula also "embrace[d] two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of recent voting discrimination mainly adduced by the

Justice Department and the Civil Rights Commission." *Id.* at 329-30. Today, the middle-range covered jurisdictions —North Carolina, South Carolina, Virginia, Texas, and Georgia—look similar: although the legislative record contains fewer judicial findings of racial discrimination in these states, it contains at least fragmentary evidence, in part based on Attorney General objections, that these states continue to engage in unconstitutional racial discrimination in voting. Finally, the 1965 formula swept in several other jurisdictions—including Alaska, Virginia, and counties in Arizona, Hawaii, and Idaho—for which Congress apparently had no evidence of actual voting discrimination. *See id.* at 318, 329-30. Today, the Act likewise encompasses jurisdictions for which there is some evidence of continued discrimination—Arizona and the covered counties of California, Florida, and New York, *see Evidence of Continued Need* 250-51, 272—as well as jurisdictions for which there appears little or no evidence of current problems—Alaska and a few towns in Michigan and New Hampshire.

Critically, moreover, and as noted above, in determining whether section 5 is "sufficiently related to the problem that it targets," we look not just at the section 4(b) formula, but at the statute as a whole, including its provisions for bail-in and bailout. Bail-in allows jurisdictions not captured by section 4's coverage formula, but which nonetheless discriminate in voting, to be subjected to section 5 preclearance. Thus, two non-covered states with high numbers of successful published and unpublished section 2 cases—Arkansas and New Mexico—were subjected to partial preclearance under

the bail-in provision. *See Jeffers*, 740 F. Supp. at 601-02; Crum, 119 Yale L.J. at 2010 & n.101 (citing *Sanchez v. Anaya*, No. 82-0067M, slip op. at 8 (D.N.M. Dec. 17, 1984)). Federal courts have also bailed in jurisdictions in several states, including Los Angeles County, California; Escambia County, Florida; Thurston County, Nebraska; Bernalillo County, New Mexico; Buffalo County, South Dakota; Charles Mix County, South Dakota; and the city of Chattanooga, Tennessee. *See Crum*, 119 Yale L.J. at 2010 & nn.102-08.

Bailout plays an even more important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting. As the Supreme Court explained in *City of Boerne*, the availability of bailout "reduce[s] the possibility of overbreadth" and helps "ensure Congress' means are proportionate to [its] ends." 521 U.S. at 533; *see also Katzenbach*, 383 U.S. at 329 ("Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years."). As of May 9, 2012, having demonstrated that they no longer discriminate in voting, 136 jurisdictions and sub-jurisdictions had bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts. U.S. Dep't of Justice, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_list (last visited May 9, 2012) ("DOJ Bailout List"). In fact, by ruling in *Northwest Austin* that any jurisdiction covered by section 5 could seek bailout—a

development unmentioned by the dissent—the Supreme Court increased significantly the extent to which bailout helps "ensure Congress' means are proportionate to [its] ends," *Boerne*, 521 U.S. at 533. *See Nw. Austin*, 129 S. Ct. at 2516 (holding that "all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit"). Not surprisingly, then, the pace of bailout increased after *Northwest Austin*: of the successful bailout actions since 1965, 30 percent occurred in the three years after the Supreme Court issued its decision in 2009. *See* DOJ Bailout List, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout_ list. Also, the Attorney General "has a number of active bailout investigations, encompassing more than 100 jurisdictions and subjurisdictions from a range of States." Br. for Att'y Gen. as Appellee at 47-48, *LaRoque v. Holder*, No. 11-5349, 679 F.3d 905, 2012 U.S. App. LEXIS 10026 (D.C. Cir. May 18, 2012).

The importance of this significantly liberalized bailout mechanism cannot be overstated. Underlying the debate over the continued need for section 5 is a judgment about when covered jurisdictions—many with very bad historic records of racial discrimination in voting—have changed enough so that case-by-case section 2 litigation is adequate to protect the right to vote. Bailout embodies Congress's judgment on this question: jurisdictions originally covered because of their histories of discrimination can escape section 5 preclearance by demonstrating a clean record on voting rights for ten years in a row. *See* 42 U.S.C. § 1973b(a)(1) (bailout criteria). As the House Report states, "covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions

that have a genuinely clean record and want to terminate coverage have the ability to do so." H.R. Rep. No. 109-478, at 25. Bailout thus helps to ensure that section 5 is "sufficiently related to the problem that it targets," *Nw. Austin*, 129 S. Ct. at 2512.

Shelby County complains that bailout helps only "at the margins," Appellant's Br. 53; *see also* Dissenting Op. at 29, and the dissent emphasizes that only about 1 percent of covered jurisdictions and subjurisdictions have applied for bailout, Dissenting Op. at 29. But absent evidence that there are "clean" jurisdictions that would like to bail out but cannot meet the standards, the low bailout rate tells us nothing about the effectiveness of the bailout provision. *See Shelby Cnty.*, 811 F. Supp. 2d at 500-01 (describing "several plausible explanations for th[e] failure to seek bailout," including "the minimal administrative cost associated with preclearance, and the fact that covered jurisdictions see no need to avoid the preclearance requirement"). As the dissent concedes, since 1982 no bailout application has been denied, Dissenting Op. at 29, and Congress considered evidence that the bailout criteria "are easily proven for jurisdictions that do not discriminate in their voting practices." *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (2005). The dissent speculates that "opaque standards" may prevent bailouts, Dissenting Op. at 29, but neither it nor Shelby County specifically challenges Congress's definition of what constitutes a clean jurisdiction or how the Attorney

General is applying the bailout criteria. In fact, as noted above, Shelby County never even tried to bail out and has brought only a facial challenge. If something about the bailout criteria themselves or how the Attorney General is applying them is preventing jurisdictions with clean records from escaping section 5 preclearance, those criteria can be challenged in a separate action brought by any adversely affected jurisdiction. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (explaining that in a facial challenge, "[t]he fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid").

This, then, brings us to the critical question: Is the statute's "disparate geographic coverage . . . sufficiently related to the problem that it targets"? *Nw. Austin*, 129 S. Ct. at 2512. Of course, if the statute produced "a remarkably bad fit," Dissenting Op. at 25, then we would agree that it is no longer congruent and proportional. But as explained above, although the section 4(b) formula relies on old data, the legislative record shows that it, together with the statute's provisions for bail-in and bailout—hardly "tack[ed] on," *id.* at 30 (internal quotation marks omitted), but rather an integral part of the coverage mechanism—continues to single out the jurisdictions in which discrimination is concentrated. Given this, and given the fundamental principle that we may not "strik[e] down an Act of Congress except upon a clear showing of unconstitutionality," *Salazar v. Buono*, 130 S. Ct. 1803, 1820, 176 L. Ed. 2d 634 (2010) (plurality opinion), we see no principled basis for setting aside the district court's

conclusion that section 5 is "sufficiently related to the problem that it targets," *Nw. Austin*, 129 S. Ct. at 2512.

C.

We turn, finally, to the dissent's argument that section 5 "requires a jurisdiction not only to engage in some level of race-conscious decisionmaking, but also on occasion to sacrifice principles aimed at depoliticizing redistricting." Dissenting Op. at 4; *see also Nw. Austin*, 129 S. Ct. at 2512 (explaining that "federalism concerns are underscored by the argument that . . . 'considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5'" and that "[a]dditional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere" (quoting *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring))). According to the dissent, this concern and the burden imposed by section 5 are aggravated by the amendments to section 5 Congress added in conjunction with the 2006 reauthorization. Dissenting Op. at 5-7; *see also* 2006 Act § 5.

The dissent's thoughtful arguments face a serious obstacle. Shelby County neither challenges the constitutionality of the 2006 amendments or even argues that they increase section 5's burdens, nor does it argue that section 5 requires covered jurisdictions to undertake impermissible considerations of race. These issues, in other words, are entirely unbriefed, and as we have repeatedly made clear, "appellate courts do not sit as

self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177, 230 U.S. App. D.C. 80 (D.C. Cir. 1983). Where, as here, "counsel has made no attempt to address the issue, we will not remedy the defect, especially where, as here, important questions of far-reaching significance are involved." *Id.* (internal quotation marks omitted).

Even were they not forfeited, the dissent's concerns would not have satisfied the standards for mounting a facial constitutional challenge. Such a challenge, the Supreme Court has made clear, is "the most difficult . . . to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. Yet the amendments, as well as the Supreme Court's concern that section 5 may sometimes require otherwise impermissible race-conscious decisionmaking, are implicated only in a subset of cases. Specifically, the amendment overturning *Bossier II* is implicated only in cases involving a discriminatory but non-retrogressive purpose, *see* 42 U.S.C. § 1973c(c); the amendments overturning *Georgia v. Ashcroft*, like the Supreme Court's concern about race-conscious decisionmaking, are implicated primarily in redistricting cases where section 5 seems to require consideration of race as a "'predominant factor.'" *See Nw. Austin*, 129 S. Ct. at 2512 (quoting *Georgia v. Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring)); 42 U.S.C. § 1973c(b), (d). In other words, even assuming the dissent is correct, it would not have established that "no set of circumstances exists under which the Act would be valid," *Salerno*, 481

U.S. at 745. Indeed, addressing the dissent's arguments would lead us into the very kind of "speculation" and "anticipat[ion]" of constitutional questions that require courts to "disfavor[]" facial challenges. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (internal quotation marks omitted).

IV.

In *Northwest Austin*, the Supreme Court signaled that the extraordinary federalism costs imposed by section 5 raise substantial constitutional concerns. As a lower federal court urged to strike this duly enacted law of Congress, we must proceed with great caution, bound as we are by Supreme Court precedent and confined as we must be to resolve only the precise legal question before us: Does the severe remedy of preclearance remain "congruent and proportional"? The legislative record is by no means unambiguous. But Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments, which entrust Congress with ensuring that the right to vote—surely among the most important guarantees of political liberty in the Constitution—is not abridged on account of race. In this context, we owe much deference to the considered judgment of the People's elected representatives. We affirm.

So ordered.

WILLIAMS, *Senior Circuit Judge*, dissenting: Section 5 of the Voting Rights Act imposes rather extraordinary burdens on "covered" jurisdictions—nine states (and every jurisdiction therein), plus a host of jurisdictions scattered through several other states. See Voting Section, U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/ab out/vot/sec_5/covered. php (last visited May 9, 2012) (listing the covered jurisdictions). Unless and until released from coverage (a process discussed below), each of these jurisdictions must seek the Justice Department's approval for every contemplated change in election procedures, however trivial. See 42 U.S.C. § 1973c. Alternatively, it can seek approval from a three-judge district court in the District of Columbia. See *id.* Below I'll address the criteria by which the Department and courts assess these proposals; for now, suffice it to say that the act not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation.

Section 4(b) of the act states two criteria by which jurisdictions are chosen for this special treatment: whether a jurisdiction had (1) a "test or device" restricting the opportunity to register or vote and (2) a voter registration or turnout rate below 50%. See 42 U.S.C. § 1973b(b). But § 4(b) specifies that the elections for which these two criteria are measured must be ones that took place *several decades ago*. The freshest, most recent data relate to conditions in November 1972—34 years before Congress extended the act for another 25 years (and thus 59 years before the extension's scheduled expiration). See

id. The oldest data—and a jurisdiction included because of the oldest data is every bit as covered as one condemned under the newest—are another eight years older. See *id.*

Of course sometimes a skilled dart-thrower can hit the bull's eye throwing a dart backwards over his shoulder. As I will try to show below, Congress hasn't proven so adept. Whether the criteria are viewed in absolute terms (are they adequate in themselves to justify the extraordinary burdens of § 5?) or in relative ones (do they draw a rational line between covered and uncovered jurisdictions?), they seem to me defective. They are not, in my view, "congruent and proportional," as required by controlling Supreme Court precedent. My colleagues find they are. I dissent.

* * *

Although it is only the irrational coverage formula of § 4(b) that I find unconstitutional, it is impossible to assess that formula without first looking at the burdens § 5 imposes on covered jurisdictions. Any answer to the question whether § 4(b) is "sufficiently related to the problem it targets," *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 2512, 174 L. Ed. 2d 140 (2009), that is, whether it is "congruent and proportional," must be informed by the consequences triggered by § 4(b). (I agree with the majority that *Northwest Austin* "send[s] a powerful signal that congruence and proportionality is the appropriate

standard of review." Maj. Op. at 16.)[1] The greater the burdens imposed by § 5, the more accurate the coverage scheme must be. If, for example, § 5 merely required covered jurisdictions to notify the Justice Department of an impending change in voting procedures, without giving the Department power to delay or thwart implementation, even a rather loose coverage formula would likely appear proportional.

But § 5 requires much more than notice. For covered jurisdictions, it mandates anticipatory review of state legislative or administrative acts, requiring state and local officials to go hat in hand to Justice Department officialdom to seek approval of any and all proposed voting changes. See 42 U.S.C. § 1973c(a). Since its inception, even supporters of the Voting Rights Act have recognized that the preclearance regime was particularly "strong medicine" for a particularly extreme problem. *Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 110 (1965) (statement of Rep. Chelf). When it first upheld the VRA, the Supreme Court recognized it as a "complex

1. Given such a standard, I cannot understand how we could apply *Salerno's* "no set of circumstances" test, see Maj. Op. at 61-62, quite apart from the test's questionable continued vitality, see, *e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). Suppose Congress had actually designed the coverage formula by having the chair of the Senate Judiciary Committee throw darts at a map and had included every jurisdiction where a dart landed. Would we be expected to reject a facial challenge simply on a showing that the behavior of *one* covered jurisdiction was so blatantly unconstitutional as to cry out for application of § 5?

scheme of stringent remedies" and § 5 in particular as an "uncommon exercise of congressional power." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 334, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). And only a few years ago the Supreme Court reminded us that the federalism costs of § 5 are "substantial." *Northwest Austin*, 129 S. Ct. at 2511.

A critical aspect of those costs is the shifted burden of proof (a matter I'll discuss below in the realm of its most significant application). So too is the section's broad sweep: § 5 applies to any voting change proposed by a covered jurisdiction, without regard to kind or magnitude, and thus governs many laws that likely could never "deny or abridge" a "minority group's opportunity to vote." See 42 U.S.C. § 1973c(a); *Allen v. State Bd. of Elections*, 393 U.S. 544, 566, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969) ("The legislative history on the whole supports the view that Congress intended to reach any state enactment, which altered the election law of a covered State in even a minor way."). This obvious point is underscored by the miniscule and declining share of covered jurisdictions' applications that draw Justice Department objections—with only five objections for every *ten thousand* submissions between 1998 and 2002. See Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 192 & fig.3 (2005) (noting that the Department's objection rate has "been falling steadily" ever since the early years of the VRA and equaled 0.05% between 1998 and 2002). In the vast majority of cases, then, the overall effect of § 5 is merely to delay implementation of a perfectly proper law.

Of course the most critical features of § 5 are the substantive standards it applies to the covered

jurisdictions. Whether a proposed voting change can be precleared turns on whether it would have a retrogressive effect on minority voters. See *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976). In practice this standard requires a jurisdiction not only to engage in some level of race-conscious decisionmaking, but also on occasion to sacrifice principles aimed at depoliticizing redistricting. Suppose a covered jurisdiction sought to implement what we may loosely call "good government" principles. It might, for example, delegate the task of redistricting to a computer programmed to apply criteria such as compactness, contiguity, conformity to existing political boundaries, and satisfaction of one person, one vote requirements. Despite these worthy goals, the resulting plan, if it happened to reduce the number of majority-minority districts, would fail preclearance, as the government acknowledged at oral argument. See Tr. of Oral Arg. at 37-38. As Justice Kennedy cautioned in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003), "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment . . . seem to be what save it under § 5." *Id.* at 491 (Kennedy, J., concurring); see also *Miller v. Johnson*, 515 U.S. 900, 927, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (noting that Justice Department's "implicit command that States engage in presumptively unconstitutional race-based districting brings the Act . . . into tension with the Fourteenth Amendment").

Unfortunately, when Congress passed the 2006 version of the VRA, it not only disregarded but flouted Justice Kennedy's concern. New subsections (b) and (d) were added to § 5 to overturn *Georgia v. Ashcroft*,

thereby restricting the flexibility of states to experiment with different methods of maintaining (and perhaps even expanding) minority influence. The *Georgia* Court had prescribed a holistic approach to § 5, instructing courts confronting a proposed voting change "not [to] focus solely on the comparative ability of a minority group to elect a candidate of its choice,"[2] 539 U.S. at 480 (majority opinion), but also to consider the "extent to which a new plan changes the minority group's opportunity to participate in the political process" writ large, *id.* at 482. *Georgia* thus gave covered jurisdictions an opportunity to make trade-offs between concentrating minority voters in increasingly safe districts and spreading some of those voters out into additional districts; the latter choice, the Court pointed out, might increase the "substantive representation" they enjoy and lessen the risks of "isolating minority voters from the rest of the State" and of "narrowing [their] political influence to only a fraction of political districts." *Id.* at 481; see also Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1729 (2004) (expressing concern that § 5's "narrow focus on securing the electability of minority candidates could compromise the range of political accords available to minority voters and thereby, under conditions of mature political engagement, actually thwart minority political gains"); David Epstein & Sharyn O'Halloran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 AM. J. POL. SCI. 367, 390-

2. The discourse revolving around § 5 invariably assumes that members of a minority have virtually identical interests and preferences. I follow that pattern here, reserving for the end of the opinion consideration of how such an assumption relates to the real world and to the 15th Amendment.

92 (1999) (noting that overreliance on majority-minority districts means that "moderate senators will likely be replaced by extremists," undermining the ability to create "biracial coalitions [which] are a key to passing racially progressive policies"). In so doing, the Court recognized that a minority group might in fact "achieve greater overall representation . . . by increasing the number of representatives sympathetic to the interests of minority voters," rather than merely by electing the maximum possible number of representatives dependent on securing a majority of minority votes. 539 U.S. at 483.

As amended, the act forecloses this choice. Preclearance now has an exclusive focus—whether the plan diminishes the ability of minorities (always assumed to be a monolith) to "elect their preferred candidates of choice," irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration—and thus less of the political isolation that concentration spawns. See 42 U.S.C. § 1973c(b); *id.* § 1973c(d); see also *Texas v. United States*, — F. Supp. 2d —, 831 F. Supp. 2d 244, 2011 U.S. Dist. LEXIS 147586, 2011 WL 6440006, at *4 (D.D.C. Dec. 22, 2011) (interpreting the amended law to overturn *Georgia*). The amended § 5 thus not only mandates race-conscious decisionmaking, but a particular brand of it. In doing so, the new § 5 aggravates both the federal-state tension with which *Northwest Austin* was concerned and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination.

Another 2006 amendment makes the § 5 burden even heavier. Section 5 prohibits preclearance of laws that have the "purpose" of "denying or abridging the right to vote

on account of race or color." 42 U.S.C. § 1973c(a). The Court had interpreted "purpose" to be consistent with § 5's effects prong, so that the term justified denying preclearance *only* to changes with a "retrogressive" purpose, rather than changes with either that or a discriminatory purpose. See *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("*Bossier II*"). The 2006 amendments reversed that decision, specifying that "purpose" encompassed "*any* discriminatory purpose." 42 U.S.C. § 1973c(c) (emphasis added). This broadening of the § 5 criteria may seem unexceptionable, but the Court had previously found that assigning covered jurisdictions the burden of proving the *absence* of discriminatory purpose was precisely the device that the Department had employed in its pursuit of maximizing majority-minority districts at any cost: "The key to the Government's position, which is plain from its objection letters if not from its briefs to this court . . . , is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create [an additional] majority-minority district." *Miller*, 515 U.S. at 924. By inserting discriminatory purpose into § 5, and requiring covered jurisdictions affirmatively to prove its absence, Congress appears to have, at worst, restored "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting," *id.* at 927, and at best, "exacerbate[d] the substantial federalism costs that the preclearance procedure already exacts," *Bossier II*, 528 U.S. at 336.

The majority correctly notes that Shelby did not argue that either of these amendments is unconstitutional. See Maj. Op. at 61. Neither do I. Appellant does argue however

that § 4(b) is unconstitutional, that is, that § 4(b) is not a congruent and proportional response to the problem currently posed by voting discrimination. To answer that question one must necessarily first assess the severity of the consequences of coverage under § 4(b) (i.e., subjection to § 5 as it exists today). See *supra* at p. 2.

Whether Congress is free to impose § 5 on a select set of jurisdictions also depends in part, of course, on possible shortcomings in the remedy that § 2 provides for the country as a whole. That section creates a right to sue *any* jurisdiction to stop voting practices that "result[] in a denial or abridgement" of the right to vote "on account of race or color." 42 U.S.C. § 1973(a). Doubtless the section is less drastic a remedy than § 5 (and thus by some criteria less effective). But it is easy to overstate the inadequacies of § 2, such as cost and the consequences of delay. Compare Maj. Op. at 41-42. Unlike in most litigation, plaintiffs' costs for § 2 suits can in effect be assumed by the Department of Justice by its either exercising its authority to bring suit itself, see, e.g., *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), or by intervening in support of the plaintiff, as it often does. See, e.g., *Brown v. Bd. of School Comm'rs*, 706 F.2d 1103, 1107 (11th Cir. 1983). So far as Departmental resource constraints are concerned, narrowing § 5's reach would, as a matter of simple arithmetic, enable it to increase § 2 enforcement with whatever resources it stopped spending on § 5. For those cases where the Justice Department still fails to intervene, § 2 provides for reimbursement of attorney and expert fees for prevailing parties. See 42 U.S.C. § 1973l(e). Finally, as to the risk that discriminatory practices may take hold before traditional litigation has run its course, courts may as always use the standard remedy

of a preliminary injunction to prevent irreparable harm caused by adjudicative delay. See *Perry v. Perez*, 132 S. Ct. 934, 942, 181 L. Ed. 2d 900 (2012).

Indeed, the ubiquitous availability of § 2 is of course a reminder that § 5 was created for the specific purpose of overcoming state and local resistance to federal antidiscrimination policy. When the Supreme Court first upheld the act in 1966, it found that § 5 was necessary because "case-by-case litigation," now governed by § 2, was "inadequate to combat the widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328. While § 2 was tailored to redress actual instances of discrimination, § 5 was crafted to overcome a "century of systematic resistance to the Fifteenth Amendment" and ongoing "obstructionist tactics." *Id.*

But life in the covered jurisdictions has not congealed in the 48 years since the first triggering election (or the 40 years since the most recent). "[C]urrent burdens . . . must be justified by current needs," *Northwest Austin*, 129 S. Ct. at 2512, and the burden imposed by § 5 has only grown heavier in those same years.

In order for § 4(b) to be congruent and proportional then, the disparity in current evidence of discrimination between the covered and uncovered jurisdictions must be proportionate to the severe differential in treatment imposed by § 5. Put another way, a distinct gap must exist between the current levels of discrimination in the covered and uncovered jurisdictions in order to justify subjecting the former group to § 5's harsh remedy, even if one might find § 5 appropriate for a subset of that group.

* * *

I now turn to assessing the evidence used to justify the § 4(b) coverage formula. The parties have offered no sophisticated statistical analysis of voting discrimination in the covered and uncovered jurisdictions, and what follows does not purport to fill the sophistication gap.

The data considered are drawn from the evidence the parties have cited, as well as the more general set compiled by Congress, especially data the Supreme Court has previously found important. For instance, when it upheld the preclearance regime in 1980, the Supreme Court noted both the "significant disparity" that still existed between African—American and white voter registration rates, and the fact that the number of black elected officials in covered jurisdictions "fell far short of being representative" of the number of African-Americans residing in covered jurisdictions. *City of Rome v. United States*, 446 U.S. 156, 180-81, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980). Beyond voter registration and black elected officials, the parties point us to comparative, state-by-state data detailing the number of federal observers sent into states to oversee elections, plus the number of successful § 2 lawsuits. I take each of these in turn.

Voter Registration and Turnout

Section 4(b)'s coverage formula is keyed to two indicators of voter access: voter turnout and the use of tests and devices in voter registration. See 42 U.S.C. § 1973b(b). In 1966 the Supreme Court characterized the VRA as "specifically designed" to remedy the "misuse of tests and devices" that characterized the "widespread and persistent discrimination" at the time. *Katzenbach*, 383 U.S. at 331. Section 5 was thus meant, at the very least, to

ensure that members of minority groups had equal access to the voting booth.

Figures I and II[3] focus on this central problem. The two charts compare white and black registration and turnout rates in the 2004 election, using state-by-state estimates from the U.S. Census Bureau. See U.S. Census Bureau, Reported Voting and Registration of the Total Voting-Age Population, at tbl.4a, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2004/tables.html. Each chart takes the number of non-Hispanic whites who registered or turned out as a proportion of the total citizen voting-age population ("CVAP") and compares that ratio to the same ratio for the black population, i.e., it displays *the ratio of these two ratios* for each state. Thus the greater the ratio (and the further to the left on the chart), the greater the racial disparity. The chart excludes states where the Census Bureau was unable to make reliable estimates of black registration and turnout rates (presumably because the black population was too small to get a sufficient sample).[4]

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3. All the charts exclude Michigan and New Hampshire, both partially covered states, because the few small townships covered constitute only a minute portion of those states and, as far as I can tell, have never been the subject of a § 5 action.

4. The only covered jurisdictions excluded are Alaska, New Hampshire, and South Dakota. Of those, only Alaska is a fully covered state. The other states excluded for want of data are Hawaii, Idaho, Iowa, Kansas, Maine, Montana, Nebraska, New Mexico, North Dakota, Oregon, Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

Appendix A

FIGURE I:
Ratio of White Registration Rate to African-American Registration Rate
(2004)

[(Number of White Registered Voters/White Voting-Age Pop.)/
(Number of Black Registered Voters/Black Voting-Age Pop.)]

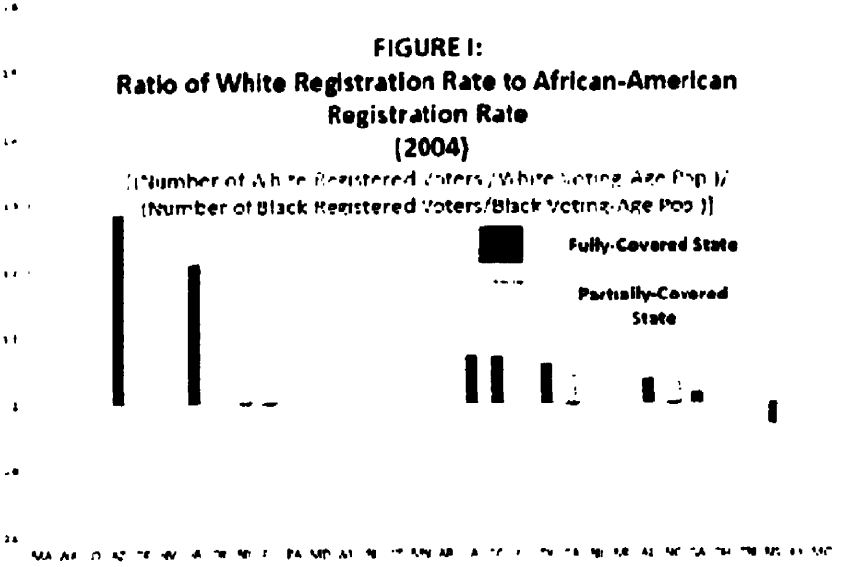
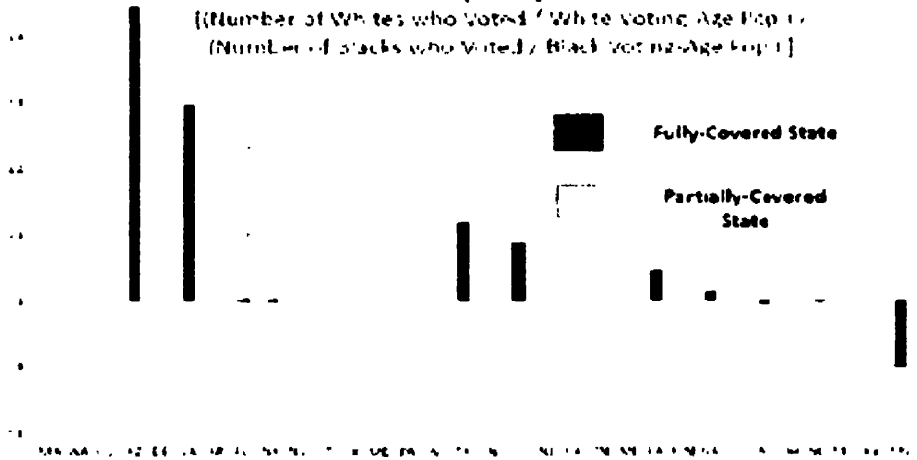


FIGURE II:
Ratio of White Turnout Rate to African-American Turnout Rate (2004)

[(Number of Whites who Voted / White Voting Age Pop.) / (Number of Blacks who Voted / Black Voting-Age Pop.)]



There appears to be no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout. Quite the opposite. To the extent that any correlation exists, it appears to be negative—condemnation under § 4(b) is a marker of higher black registration and turnout. Most of the worst offenders—states where in 2004 whites turnedout or were registered in significantly higher proportion than African-Americans—are not covered. These include, for example, the three worst—Massachusetts, Washington, and Colorado. And in Alabama and Mississippi, often thought of as two of the worst offenders, African-Americans turned out in greater proportion than whites.

Black Elected Officials

The other metric that the *Rome* Court considered was the number of black elected officials. Figure III uses U.S. Census Bureau data from 2000 and a state-by-state breakdown of such officials from that same year and displays the number of African-Americans who had been elected to office as a proportion of their share of the total CVAP in a given state. See David A Bostis, Joint Ctr. for Pol. & Econ. Studies, *Black Elected Officials: A Statistical Summary 2000, available at* http://www.jointcenter.org/research/black-elected-officials-a-statistical-summary-2000; U.S. Census Bureau, Voting-Age Population and Voting-Age Citizens, at tbls.1-1 & 1-3, *available at* http://www.census.gov/population/www/cen2000/briefs/phc-t31/index.html. Thus, the higher the percentage (and accordingly the further to the right on the chart), the closer African-Americans' share of elected positions is to equaling their share of the CVAP. States where the African-American share of CVAP was less than 3% are excluded.

Appendix A

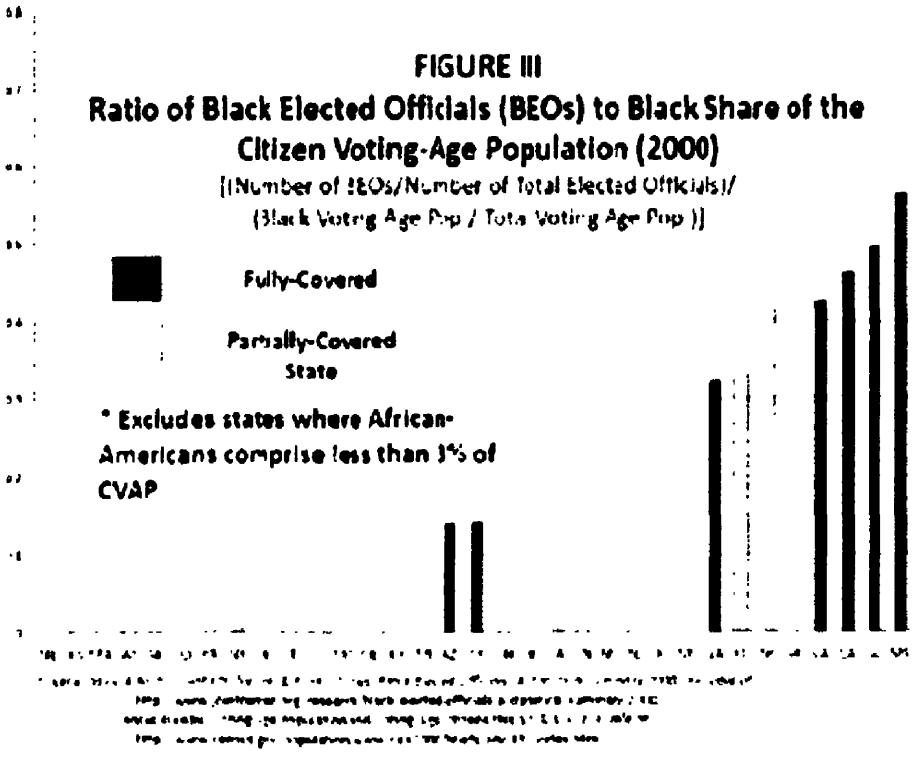


FIGURE III
Ratio of Black Elected Officials (BEOs) to Black Share of the Citizen Voting-Age Population (2000)
[(Number of BEOs/Number of Total Elected Officials)/
(Black Voting Age Pop / Total Voting Age Pop)]
Fully-Covered
Partially-Covered
State
* Excludes states where African-Americans comprise less than 3% of CVAP

Again the results are the inverse of § 4(b)'s presuppositions. Covered jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones. Of the ten states with the highest proportion of black elected officials relative to population, eight are covered states, with the top five all being fully covered states (Virginia, Louisiana, South Carolina, Mississippi, and Alabama). Nor can the poor scores achieved by some uncovered states be chalked up to small black populations. Illinois, Missouri, Delaware and Michigan, where African-Americans comprise at least 10% of the CVAP, all fall to the left (i.e., on the worse side) of every one of the states fully covered by § 4(b). While the relatively high number of black officeholders in covered states might be taken as a testament to § 5's *past* success, no one could credibly argue that the numbers are proof of the coverage scheme's continued rationality.

In upholding § 5, the district court acknowledged that the number of black elected officials had increased but found the nature of the positions insufficient, pointing particularly to the nationwide disparity between the black proportion of the population (11.9%) and the number of black officials elected to *statewide* office (5%). *Shelby County v. Holder*, 811 F. Supp. 2d 424, 468-69 (D.D.C. 2011). It is unclear how this supports singling out the covered jurisdictions. Of the 35 black officials holding statewide elective office in the whole country in 2000 (including 2 from the U.S. Virgin Islands), nearly a third (11) came from fully covered states, Bostis, *supra*, at 24 tbl.7A, a proportion roughly equivalent to these jurisdictions' share of the nation's African-American citizen voting-age population (about 33%), see U.S. Census Bureau, Voting-Age Population and Voting-Age

Citizens, *supra*, at tbl.1-3. Of course one might expect that the higher average African-American share of the population in the covered states would lead to a higher share of statewide elected officials. But if on that account one thinks there has been a shortfall in the covered states, it might be caused in part by the Justice Department's policy of maximizing majority-minority districts, with the concomitant risks of "isolating minority voters from the rest of the State" and "narrowing [their] political influence to only a fraction of political districts." *Georgia v. Ashcroft*, 539 U.S. 461, 481, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003). If African-American candidates primarily face solidly African-American constituencies, and thus develop political personas pitched overwhelmingly to the Democratic side of the aisle, it would hardly be surprising that they might face special obstacles seeking statewide office (assuming, of course, racially-polarized voting, as § 5 does). See Epstein, *supra*, at 390-92.

Federal Observers

Section 8 of the VRA authorizes the Department to send federal observers to covered jurisdictions in order to enter polling places and monitor elections if "necessary to enforce the guarantees of the 14th or 15th amendment." 42 U.S.C. § 1973f(a)(2)(B). Additionally, § 3(a) permits a court to authorize the appointment of federal observers in any political subdivision, whether covered or uncovered, if the court finds it "appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment." *Id.* § 1973a(a); see also *id.* § 1973f(a)(1). In an extensive report, the National Commission on

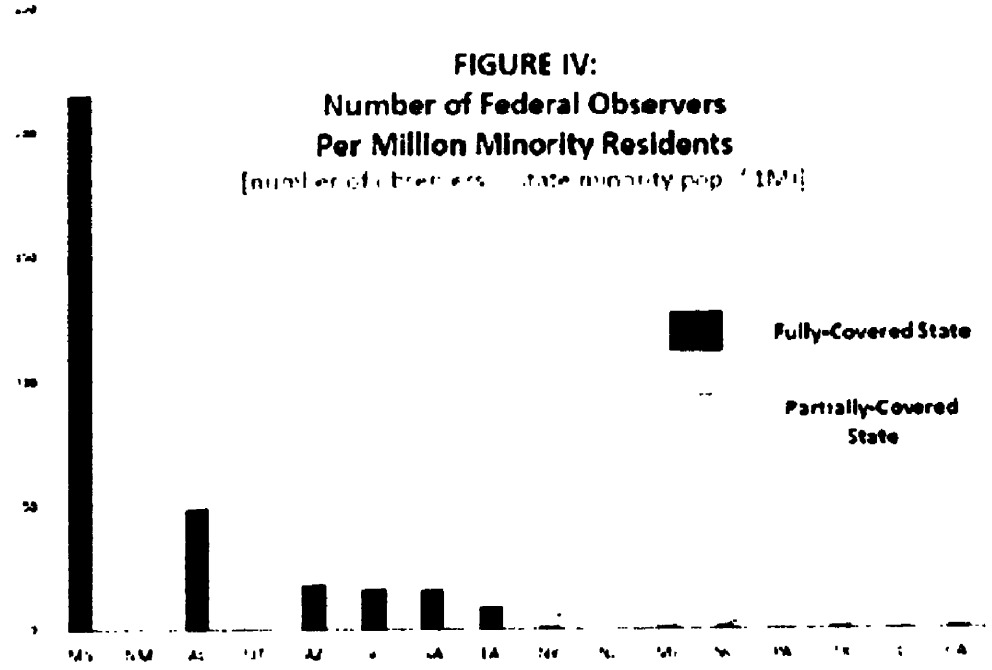
the Voting Rights Act mapped the number of occasions these observers had been assigned to states in the 22-year period between the prior VRA authorization (1982) and the 2004 election. See Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 61 & Map 10B (Feb. 2006) ("Nat'l Comm'n Report"). Figure IV shows the state-by-state distribution of observer coverages per million minority residents, where the minority population is calculated by subtracting the non-Hispanic white population from the total 2004 population, as estimated by the U.S. Census Bureau. See U.S. Census Bureau, Annual Estimates of the Population for Race Alone and Hispanic or Latino Origin for the United States and States: July 1, 2004, *available at* http://www.census.gov/popest/data/historical/2000s/vintage_2004/state.html.

Superficially, Figure IV supports § 4(b), indicating that observers are being sent to covered states more often than to uncovered ones. Six of the "worst" eight states are covered ones. But a number of factors undermine any serious inference. First, the National Commission report explains that it has captured "each occasion when federal observers are detailed to a jurisdiction *covered by Section 5 or Section 203*." Nat'l Comm'n Report at 60 (emphasis added). The apparent implication is that the Commission didn't purport to collect data for jurisdictions not covered by either of those sections; if so, the data are useless for comparative purposes. Indeed, testimony before Congress suggests that the Civil Rights Division simply doesn't use "observers" for uncovered states, preferring instead to send its own staff lawyers to monitor elections "[i]n

areas of the country where Federal observers cannot be sent" (presumably meaning, "cannot be sent without the necessity and deterrent of getting court approval"). *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 109th Cong. 196 (2005) (statement of Bernard Schlozman). In fact, when calling this to Congress's attention, a Department official noted that the "the great bulk of . . . recent enforcement cases since, say 1993, have involved jurisdictions (e.g., Massachusetts, California, New York, New Jersey, Florida, Washington, and Pennsylvania) where there is no statutory authority to send Federal observers." *Id.*

Appendix A

FIGURE IV:
Number of Federal Observers
Per Million Minority Residents



Even if we were to assume the National Commission's figures to be complete, and thus that every federal observer between 1982 and 2004 was sent to a jurisdiction already covered under *some* part of the VRA (either § 5 or § 203), this suggests another limitation on the data's relevance: The same Department that administers § 5 preclearance also decides where to send observers, so it is unsurprising that the covered states, which are already in the Department's sights, would also receive the most observers. Finally, § 3 forces the Justice Department to go to court for authorization to assign observers to uncovered areas, while § 8 imposes no such hurdle for the covered ones, undermining further the data's already questionable value.

Successful Section 2 Lawsuits

The final metric for which comparative data exist is reported, successful § 2 lawsuits. Appellees point us to a comprehensive list of reported, post-1982 § 2 cases compiled by Professor Ellen Katz and the Voting Rights Initiative at the University of Michigan Law School. See Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006) ("Katz Master List"), *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls. Relying on these data, the district court noted that more than 56% of successful § 2 suits from 1982 to 2006 have been filed in covered jurisdictions, although those jurisdictions comprise only a quarter of the nation's population. See *Shelby County*, 811 F. Supp. 2d at 506.

But the persuasive power of this statistic dissolves when we disaggregate the data by state. Figure V looks at each state's number of successful § 2 lawsuits between 1982 and 2005, per million residents, using the same 2004 U.S. Census Bureau population estimates used above. Because Professor Katz's database helpfully informs us whether each lawsuit was located in a covered or uncovered jurisdiction, it is possible to break out the covered portions of partially covered states from the uncovered portions:[5] A "(C)" below the state's abbreviation indicates that the data pertain only to the covered portion of that state, and an "(NC)" indicates the opposite. Because one successful case in a covered portion of South Dakota in 24 years produced a ratio of 43 cases for every hypothetical million residents, the covered portions of South Dakota are excluded in order to avoid distorting the chart's scale.

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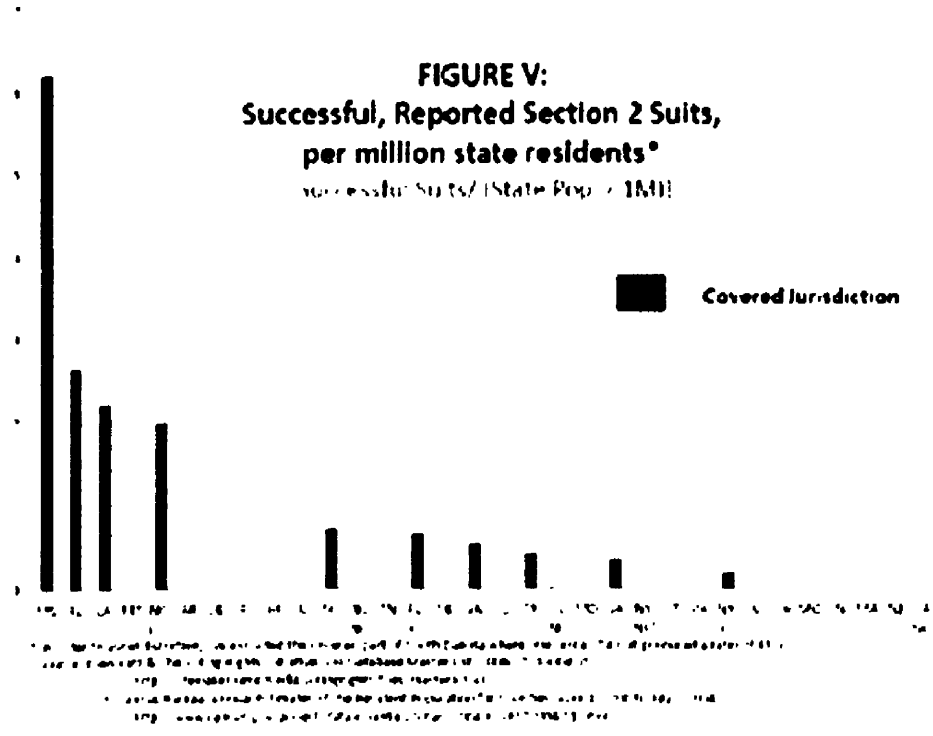
5. In order to separately calculate the populations of the covered portions of partially covered states (namely, New York, California, North Carolina, and Florida), Chart V uses the county-specific population estimates from the U.S. Census Bureau. See U.S. Census Bureau, Annual Estimates of the Resident Population for Counties: April 1, 2000 to July 1 2004, http://www.census.gov/pope st/data/counties/totals/2004/CO-EST2004-01.html (linking to county-specific data for these states and others); Voting Section, U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited May 9, 2012).

Appendix A

FIGURE V:
Successful, Reported Section 2 Suits,
per million state residents*



Like the federal observer data discussed above, Figure V suggests that a more narrowly tailored coverage formula —capturing only Mississippi, Alabama, and Louisiana, and possibly the covered portions of South Dakota and North Carolina—might be defensible. But beyond these, the covered jurisdictions appear indistinguishable from their uncovered peers. The five worst uncovered jurisdictions, including at least two quite populous states (Illinois and Arkansas), have worse records than eight of the covered jurisdictions: the six covered states appearing to the right, plus two fully covered states—Arizona and Alaska—which do not appear on the chart at all because there has been *not one* successful § 2 suit in those states in the whole 24-year period. Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered (five if we add back in the covered portion of South Dakota). A formula with an error rate of 50% or more does not seem "congruent and proportional."

To bolster these numbers, the majority relies on an account of purportedly successful, but unreported § 2 cases, numbers that it rightly notes one should "approach . . . with caution." Maj. Op. at 50. Indeed, beyond the serious concerns about these data already elucidated by the majority (e.g., completely different groups gathered the data regarding covered and uncovered jurisdictions), we also have almost no information for how Mr. McCrary and his staff identified particular cases as "successful" or not. All we know is that he required "some evidence" that the case was "resolved" under § 2 and "some reference" to settlement. Joint Appendix 95. And the inference of "success" from evidence of possible settlements seems

exceptionally weak, for both the unreported cases in the covered jurisdictions compiled by the National Commission and those from the uncovered jurisdictions compiled by Mr. McCrary. It overlooks not only the range of outcomes embraced in the concept of settlement but also the strategic factors, including legal fees and reputational risk, that go into a jurisdiction's decision to settle.

Additionally, defenders of the coverage scheme point to two circumstances that might also artificially reduce § 2 figures for the covered states, namely the "blocking" effect of actual § 5 vetoes, and the deterrent effect of jurisdictions' having to seek preclearance. As to blocking, there seems little basis to infer that many of the 626 objections spread over 24 years were substitutes for successful § 2 suits. Any such inference is undermined by the Department's ability to almost costlessly "Just Say No," the allocation of the burden of proof to the jurisdiction, the legal fees that fighting the Department will entail, and the difference in the substantive standards governing § 2 and § 5 proceedings.

As to the imputed deterrence, it is plainly unquantifiable. If we assume that it has played a role, how much should we inflate the covered states' figures to account for it, and which covered states? Given much weight, the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin's* insistence that "current burdens . . . must be justified by current needs," 129 S. Ct. at 2512, would mean little if § 5's supposed deterrent effect were enough to justify the current scheme. See Tr. of Oral Arg. at 28, *Northwest*

Austin Municipal Utility Dist. No. One v. Holder, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009) (No. 08-322) (statement of Chief Justice Roberts) ("Well, that's like the old—you know, it's the elephant whistle. You know, I have this whistle to keep away the elephants. . . . Well, there are no elephants, so it must work.").

* * *

To recap, of the four metrics for which comparative data exist, one (voter registration and turnout) suggests that the coverage formula completely lacks any rational connection to current levels of voter discrimination, another (black elected officials), at best does nothing to combat that suspicion, and, at worst, confirms it, and two final metrics (federal observers and § 2 suits) indicate that the formula, though not completely perverse, is a remarkably bad fit with Congress's concerns. Given the drastic remedy imposed on covered jurisdictions by § 5, as described above, I do not believe that such equivocal evidence can sustain the scheme.

The Supreme Court's initial review of the formula in 1966 provides a model for evaluating such an imperfect correlation. It assessed the evidence of discrimination before it and divided the covered jurisdictions into three categories: (1) a group for which "federal courts have repeatedly found substantial voting discrimination"; (2) another group "for which there was more fragmentary evidence of recent voting discrimination"; and (3) a third set consisting of the "few remaining States and political subdivisions covered by the formula," for which there was

little or no such evidence of discrimination, but whose use of voting tests and low voter turnout warranted inclusion, "at least in the absence of proof that they have been free of substantial voting discrimination in recent years." *Katzenbach*, 383 U.S. at 329-30. In that original review, the Supreme Court placed three states (Alabama, Mississippi, and Louisiana) in category one, another three (Georgia, South Carolina, and the covered portions of North Carolina) in category two, and finally two fully covered states (Virginia and Alaska) plus a few counties in Hawaii, Idaho, and Arizona, in category three.

The evidence adduced above yields a far worse fit than the data reviewed in *Katzenbach*. Indeed, one would be hard-pressed to put any of the covered jurisdictions into *Katzenbach's* first category. Based on any of the comparative data available to us, and particularly those metrics relied on in *Rome*, it can hardly be argued that there is evidence of a "substantial" amount of voting discrimination in any of the covered states, and certainly not at levels anywhere comparable to those the Court faced in *Katzenbach*. In terms of successful § 2 law suits, only three covered states—Mississippi, Louisiana, and Alabama—plus uncovered Montana—have more than two successful suits per million residents over the past quarter-century (excluding of course the covered portion of South Dakota, which scores high only because with such a small population the *one* suit there produces a high ratio per hypothetical million); in fact, these three states are the only ones with more than 10 successful suits in

the 24 years between 1982 and 2006.[6] See Katz Master List. And of course, even this number may be artificially large since a successful § 2 suit does not necessarily entail a finding of unconstitutional behavior (i.e., intentionally discriminatory acts); indeed, the Katz Study itself reports only 12 findings of intentional discrimination in the covered jurisdictions over the same two-and-a-half decades, and on my reading of the cases Professor Katz lists, there are even fewer. See, e.g., *Brown v. Bd. of School Comm'rs*, 706 F.2d 1103, 1107 (11th Cir. 1983) (listed in both the Senate and Katz reports as a case finding discriminatory intent, but the case finds such intent only as to an electoral system enacted *in 1876*).

Even assuming that these small numbers would qualify as "fragmentary evidence" adequate to place those three in *Katzenbach's* second category, that leaves six fully covered states (plus several jurisdictions in partially covered states) in category three, many more than in 1966, when only two fully covered states (Virginia and Alaska) were not included in either category one or two. See *Katzenbach*, 383 U.S. at 318, 329-30. A coverage scheme that allows two or three of the worst offenders to drag down other covered jurisdictions, whose continued inclusion is merely a combination of historical artifact and Congress's disinclination to update the formula, can hardly be thought "congruent and proportional." See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 208-09 (2007)

6. I exclude North Carolina here because four of its ten successful suits were located in uncovered portions of the state. See Katz Master List.

(concluding that any "debate over the coverage formula" would "likely have led to the complete unraveling" of the VRA's 2006 reauthorization campaign); *id.* at 208 ("The most one can say in defense of the formula is that it is the best of the politically feasible alternatives . . . ."). Congress's inability to agree on a currently coherent formula is not a good reason for upholding its extension of an anachronism.

Moreover, the Court in 1966 relied on rather a natural inference from the data available. The tight relationship between the two trigger criteria (i.e., voter turnout and the use of voting "tests and devices") and evidence of discrimination in the states in categories one and two, made it logical to suppose that Congress reasonably inferred a comparable fit for the remaining covered jurisdictions for which direct evidence of discrimination was missing (i.e., those in category three). But today the trigger criteria have lost any inherent link to the key concern. The newest triggering data hark back to 1972, 34 years before the current formula was enacted, and nearly 60 years before the current act expires. Indeed, if the formula were to be updated to use more recent election data, it would cover only Hawaii. See 152 CONG. REC. H5131, H5181 (daily ed. July 13, 2006).

More critically, the Court's acceptance of the § 4(b) formula in 1966 was explicitly based on certain reasonable understandings of § 5's focus. Explaining why it saw no serious problem in the challengers' claim of underinclusiveness—§ 4(b)'s exclusion of localities *not* employing "tests or devices" but showing evidence of voting

discrimination by other means—the Court observed that Congress had learned that persistent discrimination "has typically entailed the misuse of tests and devices, and this was the evil *for which the new remedies were specifically designed.*" *Katzenbach*, 383 U.S. at 331 (emphasis added). Despite § 5's language imposing preclearance on all manner of voting rules not within the act's definition of "tests or devices," the Court understandably saw the act as focused on, or in its words "specifically designed" for, rooting out "the misuse of tests and devices." But § 5 litigation no longer centers at all on "tests and devices." Instead, the majority of § 5 objections today concern redistricting. See Peyton McCrary et al., *The Law of Preclearance: Enforcing Section 5, in* THE FUTURE OF THE VOTING RIGHTS ACT 20, 25 tbl.2.1 (David Epstein et al. eds., 2006) (redistricting objections comprised only 17% of Justice Department objections in the 1970s; in the '90s, they constituted 52% of all objections). Accordingly, quite apart from the trigger criteria's hopeless fossilization, the intrinsic link between them and their consequences has ceased to exist.

Nor is the coverage formula materially helped by the VRA's bailout provision. Although *Katzenbach* did note that § 4(a)'s bailout provision might alleviate concerns about overinclusiveness, see 383 U.S. at 331, its ability to act as a reliable escape hatch is questionable. In its original form, § 4(a) essentially permitted bailout for any jurisdiction that had not used a voting "test or device" in the previous five years. See Voting Rights Act of 1965, Pub. L. 89-110, § 4(a), 79 Stat. 437, 438. This in effect *excluded* any covered jurisdiction whose record was not

clean as of the date of initial enactment, and until 1982 the later reenactments' language continued that effect (i.e., allowed access to bailout only for those jurisdictions with clean records as of the VRA's initial adoption). While the majority correctly notes that the 1982 amendments relaxed that constraint, see Maj. Op. at 9, those same amendments tightened the remaining substantive standards. A covered jurisdiction can now obtain bailout if, and only if, it can demonstrate that, during the preceding *ten* years, it has (simplifying slightly): (1) effectively engaged in no voting discrimination (proven by the absence of any judicial finding of discrimination or even a Justice Department "objection" (unless judicially overturned)); (2) faithfully complied with § 5 preclearance; (3) "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process"; and (4) engaged in "constructive efforts to eliminate intimidation and harassment of persons exercising rights protected" under the act and "in other constructive efforts, such as the expanded opportunity for convenient registration." 42 U.S.C. § 1973b(a)(1). Perhaps because of these opaque standards, actual bailouts have been rare; only 136 of the more than 12,000 covered political subdivisions (i.e., about 1%) have applied for bailout (all successfully). Appellant's Reply Br. 37; Voting Section, U.S. Dep't of Justice, Terminating Coverage Under the Act's Special Provisions, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout (last visited May 9, 2012) (listing successful bailouts). Moreover, a successful action under § 4(a) does not actually end federal oversight of bailed-out jurisdictions; for a decade after bailout, the court "retain[s] jurisdiction" just in case the Justice Department

or "any aggrieved person" wishes to file a motion "alleging that conduct has occurred which . . . would have precluded" bailout in the first place. 42 U.S.C. § 1973b(a)(5).

All of this suggests that bailout may be only the most modest palliative to § 5's burdens. One scholar hypothesizes that bailout may "exist[] more as a fictitious way out of coverage than [as] an authentic way of shoring up the constitutionality of the coverage formula." Persily, *supra*, at 213. In fairness, the same scholar also entertains various other explanations, including the possibility that the eligible jurisdictions are just the ones for whom § 5 poses only a very light burden, see *id.* at 213-14, and ultimately concludes that no one knows which theory "best explains the relative absence of bailouts," *id.* at 214. Regardless of the reason for the trivial number of bailouts, irrational rules—here made so by their encompassing six states and numerous additional jurisdictions not seriously different from the uncovered states—cannot be saved "by tacking on a waiver procedure" such as bailout. *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561, 267 U.S. App. D.C. 253 (D.C. Cir. 1988); cf. *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 571, 360 U.S. App. D.C. 202 (D.C. Cir. 2004).

Finally the government argues that because the VRA is meant to protect the fundamental right of racial minorities (i.e., a suspect classification), a heightened level of deference to Congress is in order. Appellees' Br. 22-23. Purportedly supporting this proposition is Chief Justice Rehnquist's statement in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003), that when a statute is designed to

protect a fundamental right or to prevent discrimination based on a suspect classification, "it [is] easier for Congress to show a pattern of state constitutional violations." *Id.* at 736. But the passage simply makes the point that where a classification is presumptively invalid (e.g., race), an inference of *unlawful* discrimination follows almost automatically from rules or acts that differentiate on the presumptively forbidden basis, whereas for classifications judged under the "rational basis" test, such as disability or age, "Congress must identify, *not just the existence of age—or disability-based state decisions*, but a widespread pattern of irrational reliance on such criteria." *Id.* at 735 (emphasis added). This special element of race or other presumptively unconstitutional classifications has no bearing on review of whether Congress's remedy "fits" the proven pattern of discrimination. To hold otherwise would ignore completely the "vital principles necessary to maintain separation of powers and the federal balance" that the Court held paramount in *Boerne* (which of course also involved a fundamental right, namely the right to practice one's religion). *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

* * *

A current political dispute—state adoptions of voter identification requirements—highlights the oddity of § 4(b). In 2005, the state of Indiana enacted a law requiring its citizens to present a government-issued photo identification before voting. Against a variety of legal challenges, the Supreme Court upheld the law. See

Crawford v. Marion County Election Bd., 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008). In 2011, Texas and South Carolina both passed similar laws. See Gina Smith, *Haley Signs Voter ID Bill into Law*, THE STATE, May 18, 2011; Sommer Ingram, *Gov. Rick Perry Signs Voter ID Bill into Law*, ASSOC. PRESS, May 27, 2011, available at http://www.yumasun.com/articles/perry-51036-monitortx-rick-austin.html. But because of those states' inclusion under § 4(b), they had to look to Justice Department attorneys in Washington to seek further approval. In the end, the Department blocked both laws. See Jerry Markon, *S.C.'s Voter ID Law Rejected*, WASH. POST, Dec. 24, 2011, at A4; Daniel Gilbert, *Election 2012: Texas Law Requiring Voter IDs Is Blocked*, WALL ST. J., Mar. 13, 2012, at A4.

Why should voter ID laws from South Carolina and Texas be judged by different criteria (at a minimum, a different burden of persuasion, which is often critical in cases involving competing predictions of effect) from those governing Indiana? A glimpse at the charts shows that Indiana ranks "worse" than South Carolina and Texas in registration and voting rates, as well as in black elected officials (Figures I, II and III). As to federal observers, Indiana appears clearly "better"—it received *none* (Figure IV). As to successful § 2 suits South Carolina and Texas are "worse" than Indiana, but all three are below the top ten offenders, which include five uncovered states (Figure V). This distinction in evaluating the different states' policies is rational?

Despite a congressional record of over 15,000 pages and 22 hearings, *Shelby County*, 811 F. Supp. 2d at 496, there is little to suggest that § 4(b)'s coverage formula continues to capture jurisdictions with especially high levels of voter discrimination. To the extent that the answer is, as the district court suggested, that Congress wished to "continue to focus on those jurisdictions with the worst *historical* records of voting discrimination," *id.* at 506, such an overwhelming focus on historical practices appears foreclosed by *Northwest Austin's* requirement that current burdens be justified by current needs.

It goes without saying that racism persists, as evidenced by the odious examples offered by the majority, see Maj. Op. at 27-29. But without more evidence distinguishing current conditions in the covered jurisdictions from those in the uncovered ones, § 4(b)'s coverage formula appears to be as obsolete in practice as one would expect, in a dynamic society, for markers 34-to-59 years old. Accordingly, I dissent.

* * *

The analysis above is my sole basis for finding § 4(b) of the VRA unconstitutional and thus for dissenting from the court's opinion. I need not and do not reach the constitutionality of § 5 itself. But before concluding, I want to address a critical aspect of § 5, and of some of the cases interpreting earlier versions of that section. I address it first simply as a matter of language—specifically the use of language to obscure reality—and then in relation to the words and political philosophy of the 15th Amendment.

Though unnecessary to my dissent's outcome, the troubling tension between the act's encouragement of racial gerrymandering and the ideals embodied in the 15th Amendment seems worthy of attention.

Section 5(b) makes unlawful any voting practice or procedure with respect to voting "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect *their preferred candidates of choice.*" 42 U.S.C. 1973c(b) (emphasis added). And of course similar phrasing has been included in § 2 since 1982. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b)) (prohibiting policies that prevent minority groups' equal opportunity "to elect representatives of their choice.").

The language (or a close equivalent) seems to have originated in one of the Court's earliest opinions on § 5, though only as an offhand phrase in its explanation of how a shift from district to at-large voting might dilute minority impact: "Voters who are members of a racial minority might well be in the majority in one district, but a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). But the use of such language became troubling in *Georgia v. Ashcroft*, where the Court said that in the application of § 5 "a court should not focus *solely* on the comparative ability of a minority group to elect a candidate of its choice." 539 U.S. 461, 480, 123 S. Ct. 2498, 156 L. Ed.

2d 428 (2003) (emphasis added). The "solely" of course indicates *approval* of such a consideration as one among several criteria for compliance with § 5.

Implied from the statutory "their" is necessarily a "they." In the context of a statute speaking of impingements on citizens' voting "on account of race or color," and indeed in the universally accepted understanding of the provision, the "they" are necessarily members of minority groups. But in what sense do minority groups as such have a "preferred candidate"? Individuals, of course, have preferred candidates, but groups (unless literally monolithic) can do so only in the limited sense that a *majority* of the group may have a preferred candidate. Thus, when the provision is translated into operational English, it calls for assuring "the ability of a *minority group's majority* to elect their preferred candidates."

This raises the question of what happened to the minority group's *own minority*—those who dissent from the preferences of the minority's majority?

Of course in any polity that features majority rule, some people are bound to be outvoted on an issue or a candidate and thus to "lose"—on that round of the ongoing political game. Such losses are a necessary function of any system requiring less than unanimity (which would be hopelessly impractical). And in an open society that allows people freely to form associations, and to design those associations, some people obviously will be members of associations whose representatives from time to time express, in their name, opinions they do not share. But

that again is a necessary function of having associations free to adopt a structure that empowers their leadership to speak with less than unanimous backing.

But the implied "they" of § 5 is not a polity in itself; nor is it an association freely created by free citizens. Quite the reverse: It is a group constructed artificially by the mandate of Congress, entirely on the lines of race or ethnicity.

On what authority has Congress constructed such groups? Purportedly the 15th Amendment to the Constitution. But that says that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

It is hard to imagine language that could more clearly invoke universal individual rights. It is "citizens" who are protected, and they are protected from any denial of their rights that might be based on the specified group characteristics—race, color, or previous condition of servitude. The members of Congress who launched the amendment, said Senator Willard Warner, "profess to give to each individual an equal share of political power." CONG. GLOBE, 40th Cong., 3d Sess. 861 (1869).

The 15th Amendment was a pivot point in the struggle for universal human rights. The roots of the struggle are deep and obscure. Many trace the concept to the three great monotheistic religions, Judaism, Christianity, e.g., MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS (2004)

(noting the contributions of these three traditions, among others). No matter how spotty the actual performance of those religions' adherents may have been over the centuries, the idea of a single God, claiming the allegiance of all mankind, surely implies a recognition of the dignity and worth of all humans, undistorted by local group loyalties historically linked to local gods. Perhaps the Enlightenment, though in tension with organized religion, has a better title; it is clearly the immediate root of the French Declaration of the Rights of Man and of the Citizen. But at all events the 15th Amendment states a clear national commitment to universal, individual political rights regardless of race or color.

Of course conventional political discourse often uses such terms as "the black vote," "the youth vote," "the senior vote," etc. But those who use these terms—politicians, their consultants, pundits, journalists—know perfectly well that they are oversimplifications, used to capture general political tendencies, *not* a justification for creating or assuming a political entity that functions through a demographic group's "majority." The Supreme Court has recognized that these generalizations are no such justification. In *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), it confronted racial gerrymandering that took the form of including in one district persons separated by geographic and political boundaries and who "may have little in common with one another but the color of their skin." *Id.* at 647. Such a plan:

> bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible stereotypes.

Id.

The pre-Enlightenment history of continental Europe included just such entities—"estates," whose members voted separately from those of the other estates. Most famously, separately elected representatives of the nobility, the clergy, and the "common" people gathered in 1789 in the French Estates-General. For the last time. By the middle of that year, the Estates-General had ceased to exist. By transforming itself into a National Assembly, it precipitated the French Revolution and the permanent abolition of voting by estates, ultimately throughout Europe. The 15th Amendment can be traced back to that basic development. Section 5's mandate to advance "the ability of any citizens of the United States on account of race or color . . . to elect *their preferred candidates of choice*" is a partial retreat to pre-Revolutionary times, an era perhaps now so long past that its implications are forgotten.

None of this is to suggest that the country need for a minute countenance deliberate voting rule manipulations

aimed at reducing the voting impact of any racial group, whether in the form of restrictions on ballot access or of boundary-drawing. And in judicial proceedings to stamp out such manipulations, it would of course be no defense for the perpetrators to say that they sought only to downweight a minority's *majority*. But a congressional mandate to assure the electoral impact of any minority's majority seems to me more of a distortion than an enforcement of the 15th Amendment's ban on abridging the "right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude." Preventing intentional discrimination against a minority is radically different from actively encouraging racial gerrymandering in favor of the minority (really, the majority of the minority), as § 5 does. Assuming there are places in which a colorblind constitution does not suffice as a "universal constitutional principle," *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 788, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (opinion of Kennedy, J.), the voting booth should not be one of them.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DECIDED SEPTEMBER 21, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-0651 (JDB)

Shelby County, ALABAMA,

Plaintiff,

v.

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

Defendant.

September 21, 2011, Decided

JUDGES: JOHN D. BATES, United States District Judge.

OPINION BY: JOHN D. BATES

MEMORANDUM OPINION

Appendix B

Section 5 of the Voting Rights Act of 1965 ("the Act") prevents certain "covered" jurisdictions from implementing any change to voting practices or procedures unless and until the jurisdiction demonstrates to federal authorities that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Praised by some as the centerpiece of the most effective civil rights legislation ever enacted, Section 5 has been condemned by others as an impermissible federal encroachment on state sovereignty. In 2009, the Supreme Court addressed Congress's 2006 extension of Section 5 and, although avoiding the merits of a facial constitutional challenge to Section 5's "preclearance" obligation, nonetheless expressed concern about the provision's continued vitality, noting that "[t]he Act's preclearance requirements and its coverage formula raise serious constitutional questions." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 2513, 174 L. Ed. 2d 140 (2009) ("*Nw. Austin II*").

Today, those serious constitutional questions can no longer be avoided. Shelby County, Alabama ("Shelby County" or "plaintiff"), a jurisdiction covered by Section 4(b) of the Act, 42 U.S.C. § 1973b(b), has brought this suit against the Attorney General ("defendant") seeking a declaratory judgment that Section 5 and Section 4(b) are facially unconstitutional, and a permanent injunction prohibiting defendant from enforcing these provisions. Compl. ¶¶ 1, 44(a)-(b). Specifically, Shelby County alleges that Section 4(b)'s coverage formula and Section 5's preclearance obligation for covered jurisdictions exceed

Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, and violate the principle of "equal sovereignty" embodied in the Tenth Amendment and Article IV of the U.S. Constitution. *Id.* ¶¶ 36-43.

This Court is mindful that "judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that [it] is called on to perform.'" *Nw. Austin II*, 129 S. Ct. at 2513 (*quoting Blodgett v. Holden*, 275 U.S. 142, 147-48, 48 S. Ct. 105, 72 L. Ed. 206, 1928-1 C.B. 324 (1927) (Holmes, J., concurring)). That duty is all the more sensitive where, as here, the challenged statute seeks to enforce the core Fifteenth Amendment prohibition against denial of the franchise on the basis of race. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. Yet 95 years after the Amendment's ratification, the struggle for the realization of this constitutional guarantee was far from complete. See H.R. Rep. No. 89-439, at 2439 (1965). In 1965, literacy tests, poll taxes, and other devices were still being "widely used" in certain regions of the country as part of "a calculated plan to deprive Negroes of their right to vote." *Id.* at 2443. When traditional litigation proved ineffective to counter "those determined to circumvent the guarantees of the 15th Amendment," *Id.* at 2441, Congress decided that "the wrong to our citizens is too serious -- the damage to our national conscience is too great not to adopt more effective measures than exist today," *Id.* at 2442. Hence, almost a century after the Fifteenth Amendment was ratified, Congress passed

the Voting Rights Act of 1965 -- with Section 5 at its core -- in order "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." *Allen v. State Bd. of Elections*, 393 U.S. 544, 556, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). Congress reauthorized the Act three times (in 1970, 1975 and 1982), and the Supreme Court upheld each reauthorization against constitutional challenges. *See Nw. Austin II*, 129 S. Ct. at 2510.

Certainly, today Section 5's continued constitutionality "must be judged with reference to the historical experience which it reflects." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). But the Supreme Court has also made clear that history alone cannot provide a valid basis for upholding Section 5 indefinitely; rather, "the Act imposes current burdens and must be justified by current needs." *Nw. Austin II*, 129 S. Ct. at 2512. This Court has now carefully reviewed the extensive 15,000-page legislative record that Congress amassed in support of its 2006 reauthorization of Section 5 and Section 4(b). It is, of course, Congress that is charged in the first instance under the Fifteenth Amendment with formulating the legislation needed to enforce it. *Id.* at 2513. Bearing in mind both the historical context and the extensive evidence of recent voting discrimination reflected in that virtually unprecedented legislative record, the Court concludes that "current needs" -- the modern existence of intentional racial discrimination in voting -- do, in fact, justify Congress's 2006 reauthorization of the preclearance requirement imposed on covered jurisdictions by Section 5, as well as the preservation of the traditional coverage formula

embodied in Section 4(b). Applying the standard of review articulated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), this Court finds that Section 5 remains a "congruent and proportional remedy" to the 21st century problem of voting discrimination in covered jurisdictions.

BACKGROUND

I. The History of the Voting Rights Act of 1965

The Voting Rights Act of 1965 "was designed by Congress to banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308. Although the Fifteenth Amendment guaranteed African-American citizens the right to vote as early as 1870, southern states quickly responded by creating a series of voting qualifications and devices to perpetuate black disenfranchisement. *See Id.* at 310-311; *see also* H.R. Rep. No. 89-439, at 2439-40. None of this new voting legislation mentioned race on its face, but it was nonetheless "motivated entirely and exclusively by a desire to exclude the Negro from voting." H.R. Rep. No. 89-439, at 2443, 2451. Southern states imposed poll taxes, which disproportionately burdened African-Americans as a result of their comparatively lower incomes. *See Id.* at 2451-53. They enacted literacy requirements as a precondition to voting "based on the fact that as of 1890 . . . more than two-thirds of the adult Negroes [in southern states] were illiterate while less than one-quarter of the adult whites were unable to read or write." *Katzenbach*, 383 U.S. at 311. And they adopted alternate tests, such as

grandfather clauses and property qualifications, in order to "assure that white illiterates would not be deprived of the franchise." *Id.*

Not only were these tests intentionally discriminatory in their design, but southern voting officials were given unfettered discretion to administer them in a discriminatory fashion. Officials would refuse to accept poll taxes from blacks seeking to pay them, or would withhold poll tax exemption certificates from otherwise-qualified black applicants. *See* H.R. Rep. No. 89-439, at 2452. They would provide whites with "easy versions" of literacy tests or excuse them altogether, but demand that blacks pass "difficult versions . . . without the slightest error." *Katzenbach*, 383 U.S. at 312-13. Other voting qualifications -- including the infamous "good-morals requirement" and "constitutional interpretation" tests -- were so inherently "vague and subjective" that they "constituted an open invitation to abuse at the hands of voting officials." *Id.*

In addition to these methods of direct disenfranchisement, southern officials before 1965 also enacted laws designed to dilute black voting strength, if and when blacks were able to register and cast ballots. Specifically, southern officials "gerrymandered election districts, instituted at-large elections, annexed or deannexed land as it fit their racial and partisan interests, and required huge bonds of officeholders." J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 678-79 (2008); *see also To Examine the Impact and Effectiveness*

of the Voting Rights Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 1138 (Oct. 18, 2005) ("*Impact and Effectiveness*") (Chandler Davidson and Bernard Grofman, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* (Princeton University Press 1994)). These tactics aimed at reducing the ability of blacks to elect candidates of their choice -- sometimes referred to as "[d]isenfranchisement by indirection" -- were widely employed throughout the South in the late nineteenth century, and they reemerged during the "Second Reconstruction" of the mid-twentieth century as well. *See* 1 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 142 (Mar. 8, 2006) (hereinafter, "1 *Evidence of Continued Need*") (National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (Feb. 2006) (hereinafter, "Nat'l Comm'n Report")); *see also An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 206 (May 9, 2006) ("*Introduction to Expiring Provisions*") (prepared statement of Chandler Davidson).

The Supreme Court eventually responded to these attempts to evade the requirements of the Reconstruction Amendments by striking down some of the most egregious practices used to impede blacks from effectively exercising their right to vote. *See Katzenbach*, 383 U.S. at 311-12 (internal citations omitted). The Court invalidated grandfather clauses in 1915, *see Guinn v. United States*,

238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915); *Myers v. Anderson*, 238 U.S. 368, 35 S. CT. 932, 59 L. ED. 1349 (1915); outlawed the so-called "white primary" in 1944, *see Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944); and condemned racial gerrymandering in 1960, when the city of Tuskegee, Alabama, attempted to transform its square-shape into "a strangely irregular twenty-eight-sided figure," which had the effect of removing "from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident," *Gomillion v. Lightfoot*, 364 U.S. 339, 341, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).[1]

Congress also responded to southern states' sophisticated disenfranchisement strategies by enacting civil rights legislation in 1957, 1960, and 1964, which sought to "facilitat[e] case-by-case litigation against voting discrimination." *Katzenbach*, 383 U.S. at 313. But it soon became apparent that "case-by-case" litigation would not be sufficient to protect African-Americans' access to the ballot. *See* H.R. Rep. No. 89-439, at 2440-41. Not only was litigation expensive and slow, but even where it proved successful, southern officials would often ignore court orders, "close[] their registration offices to freeze the voting rolls," or "merely switch[] to discriminatory devices not covered by the federal decrees." *Katzenbach*, 383 U.S. at 314. As Congress explained, "[b]arring one

1. Reversing the lower court's dismissal of the case, the Supreme Court emphasized that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion*, 364 U.S. at 342 (internal quotation marks and citation omitted).

contrivance too often has caused no change in result, only in methods." H.R. Rep. No. 89-439, at 2441. Hence, in 1965 Congress decided that "sterner and more elaborate measures" were needed to combat the "insidious and pervasive evil which had been perpetrated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309.

To craft these measures effectively, the Senate and House Committees on the Judiciary held hearings for nine days, during which they discussed 122 proposed voting rights bills and heard testimony from 67 witnesses. *See Id.*; *see also* H.R. Rep. No. 89-439, at 2438. The House debated the legislation for three full days, while the Senate discussed the Act for almost a month. *See Katzenbach*, 383 U.S. at 308. Ultimately, when it came time to vote, "the verdict of both chambers was overwhelming": the Voting Rights Act of 1965 passed by a margin of 328-74 in the House, and 79-18 in the Senate. *Id.*; *see also* Voting Rights Act of 1965 ("1965 Act"), Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 et seq.).

The Act's basic prohibition against racial discrimination in voting is contained in Section 2, which provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. Although Section 2 echoes the language of the Fifteenth Amendment, at least since 1982 it has been interpreted to prohibit a broader category of

conduct than that which the Amendment itself proscribes, as it forbids all electoral practices with discriminatory "results," not just those enacted with a discriminatory purpose. Compare *City of Mobile v. Bolden*, 446 U.S. 55, 62, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (holding that Section 2 merely restates "the prohibitions already contained in the Fifteenth Amendment" and that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation") with S. Rep. No. 97-417, at 28 (1982) (explaining Congress's intent to amend Section 2 in response to City of Mobile to make clear that a plaintiff can establish a Section 2 violation "without proving any kind of discriminatory purpose"). Other provisions of the Voting Rights Act ban poll taxes, 42 U.S.C. § 1973h, prohibit voter intimidation and coercion, 42 U.S.C. § 1973i(b), and establish civil and criminal sanctions for the deprivation of rights secured by the Act, 42 U.S.C. § 1973j.

In addition to these permanent provisions -- which apply nationwide -- the Act sets forth "a complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant." *Katzenbach*, 383 U.S. at 315. These targeted provisions are temporary, and only apply to jurisdictions that are "covered" under Section 4(b). For example, Section 4(a) of the Act bans the use of voting tests in all covered jurisdictions, *see* 42 U.S.C. § 1973b(a), while Section 8 authorizes the Attorney General to send federal observers to enter polling places and monitor elections in covered jurisdictions when "necessary to enforce the guarantees of the 14th or 15th

Amendment," 42 U.S.C. § 1973f(a)(2); *see also* H.R. Rep. No. 109-478, at 91 (2006).[2]

Section 5, however, remains the most innovative -- and the most controversial -- of the Act's targeted, temporary provisions. Under Section 5, a covered jurisdiction cannot make any changes to its voting qualifications, standards, practices, or procedures unless those changes are first "submitted to and approved by a three-judge Federal District Court in Washington, D.C., or the Attorney General." *See Nw. Austin II*, 129 S. Ct. at 2509; 42 U.S.C. § 1973c. Preclearance under Section 5 will only be granted if a jurisdiction can show that its proposed voting change "neither 'has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.'" *Nw. Austin II*, 129 S. Ct. at 2509 (*quoting* 42 U.S.C. § 1973c(a)).

Section 5 constituted a direct response to the "common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976). Prior to 1965, such novel methods of minority disenfranchisement would continue to operate "until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too,

2. Under Section 3(a) of the Act, federal observers may also be assigned to non-covered jurisdictions where it is deemed "appropriate to enforce the voting guarantees of the Fourteenth or fifteenth Amendment." *See* 42 U.S.C. § 1973a(a); *see also* H.R. Rep. No. 109-478, at 91.

was discriminatory." *Id.* But with the passage of Section 5, Congress "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim," *Katzenbach*, 383 U.S. at 328. Rather than requiring minority voters to sue to challenge discriminatory voting practices after their implementation, Section 5 places the burden on covered jurisdictions to show their voting changes are nondiscriminatory before those changes can be put into effect. *See Id.*

If a jurisdiction covered by Section 5 chooses to submit its proposed electoral change to the Attorney General for preclearance, and the Attorney General does not interpose an objection to the change within 60 days, the change may be implemented as proposed. *See* 42 U.S.C. § 1973c(a); *see also City of Rome v. United States*, 446 U.S. 156, 170, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980). If the Attorney General does interpose an objection, the submitting jurisdiction "may at any time request the Attorney General to reconsider an objection," *see* 28 C.F.R. § 51.45(a), or it may institute a declaratory judgment action before a three-judge panel of this Court, seeking "*de novo* consideration of whether the method of election violates rights protected by the Voting Rights Act or the Constitution," *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 706-07 (D.D.C. 1983) (three-judge court); *see also City of Rome v. United States*, 450 F. Supp. 378, 381-82 (D.D.C. 1978) (three-judge court), *aff'd*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980) (explaining that "even if . . . the Attorney General objects to certain proposed electoral changes, the applicant-jurisdiction can always seek . . . a declaratory judgment

from a three-judge court in this District . . ."); 28 C.F.R. § 51.11 (noting that "[s]ubmission to the Attorney General does not affect the right of the submitting authority to bring an action in the U.S. District Court for the District of Columbia for a declaratory judgment"). However, if the jurisdiction does not receive federal preclearance from either the Attorney General or a three-judge panel of this Court, the change to its voting practice or procedure may not be implemented.

Section 4(b) establishes the formula that determines which jurisdictions are subject to Section 5's preclearance requirements (and the other temporary provisions of the Act). As originally enacted, a jurisdiction was "covered" under Section 4(b) if it maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election. *See* 1965 Act § 4(b).[3] Congress found that the combined presence of one of these "tests or devices" and low voter registration or turnout in a particular jurisdiction made it "a strong probability that low registration and voting are a result of racial discrimination in the use of such tests." H.R. Rep. No. 89-439, at 2444. The jurisdictions originally covered by this formula were Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.

3. A voting "test or device" was defined by statute as a requirement that a person "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." *Id.* § 4(c).

Appendix B

See 28 C.F.R. pt. 51 app. Thirty-nine counties in North Carolina and one county in Arizona also qualified for coverage as separately designated political subdivisions. *Id.*

It was no coincidence that the six states originally covered in their entirety by Section 4(b) -- and therefore subject to preclearance under Section 5 -- were those southern states with the worst historical records of racial discrimination in voting. The drafters of the Act purposefully designed its coverage formula "to pick up the core Southern states that had been bastions of Jim Crow." Introduction to the Expiring Provisions 221 (statement of Samuel Issacharoff). As one scholar has explained, "those who wrote the legislation knew the states they wanted to 'cover' and, by a process of trial and error, determined the participation level that would single them out." 1 *Voting Rights Act: Section 5 of the Act - History, Scope, and Purpose, Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 68 (Oct. 25, 2005) ("1 *History, Scope, & Purpose*") (Abigail Thernstrom, *Whose Votes Count? Affirmative Action and Minority Rights* (Harvard University Press 1987)). The reverse-engineered, percentage-based "trigger" for coverage under the Act was, in other words, "a formally neutral device for capturing a more historically based truth." *The Continuing Need for Section 5 Pre-Clearance, Hearing before the S. Comm. on the Judiciary*, 109th Cong. 99 (May 16, 2006) ("*Continuing Need*") (responses of Pamela S. Karlan to questions submitted by Senators Leahy, Kennedy, Kohl, Cornyn, and Coburn) ("Karlan Responses").

But Congress also recognized the potential that Section 4(b)'s coverage formula would be over- or under-inclusive, and hence created mechanisms whereby jurisdictions could "bail out" of or "bail-in" to Section 5's requirements. *See* 1965 Act § 4(a), § 3(c). In order to successfully "bail out" under the version of Section 4(a) now in effect, a jurisdiction must obtain a declaratory judgment from a three-judge court confirming that "for the previous ten years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations." *Nw. Austin II*, 129 S. Ct. at 2509. The jurisdiction must also show "that it has 'engaged in constructive efforts to eliminate intimidation and harassment of voters,' and similar measures." *Id.* (*quoting* 42 U.S.C. § 1973b(a)(1)(A)-(F)). By the same token, a court can require a jurisdiction to "bail-in" to the requirements of Section 5 if it finds that "violations of the Fourteenth or fifteenth Amendment justifying equitable relief have occurred within the territory of such State or political subdivision." 42 U.S.C. § 1973a(c). Specifically, a court presiding over a voting discrimination suit against a state or political subdivision may retain jurisdiction over the suit "for such a period as it may deem appropriate," and may, during that time, require that the defendant-jurisdiction be subject to preclearance. *Id.*

Shortly after Congress enacted the Voting Rights Act, South Carolina brought suit challenging the constitutionality of Section 5's preclearance requirement, Section 4(b)'s coverage formula, and several of the Act's other temporary provisions, on the grounds that they

exceeded Congress's Fifteenth Amendment enforcement authority and violated "[t]he doctrine of the equality of the states." *Katzenbach*, 383 U.S. at 323, 328. Rejecting these arguments, the Supreme Court explained that "[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 325. Although recognizing that Section 5 "may have been an uncommon exercise of congressional power," the Court noted that "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334. With respect to the coverage formula in Section 4(b), the Court found that Congress had considered "reliable evidence of actual voting discrimination in a great majority of the States . . . affected by the . . . Act," and had created a formula that was "relevant to the problem of voting discrimination." *Id.* at 329. "No more was required," the Court said, "to justify the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.* at 330.

Although Section 5 was originally intended to be in effect for only five years, Congress has reauthorized Section 5 on four occasions -- first in 1970 (for five years), then in 1975 (for seven years), again in 1982 (for 25 years), and most recently in 2006 (for 25 years). *See Nw. Austin II*, 129 S. Ct. at 2510. When Section 5 was reauthorized in 1970 and again in 1975, Section 4(b)'s coverage formula was amended each time, first to include (1) jurisdictions that maintained a voting test or device as of November 1, 1968, and had less than 50% voter registration or turnout in the 1968 presidential election; and then to add (2) jurisdictions that maintained a voting test or device as of November 1,

1972, and had less than 50% voter registration or turnout in the 1972 presidential election. *See* Pub. L. No. 91-285, 84 Stat. 314, 315 (1970) ("1970 Amendments"); Pub. L. No. 94-73, 89 Stat. 400, 401 (1975) ("1975 Amendments"). In the 1975 Amendments, Congress also added Section 4(f) to the Act, which bars voting discrimination against language minorities and expands the definition of "test or device" in Section 4 to include the provision of English-only voting materials in jurisdictions where more than 5% of the voting-age population are members of a single language minority. *See* 1975 Amendments § 203, 89 Stat. at 401-02 (codified as amended at 42 U.S.C. § 1973b(f)).

Five years after the enactment of the 1975 Amendments, the Supreme Court was again confronted with a challenge to the constitutionality of Section 5, and confirmed that the provision's reauthorization constituted a permissible exercise of Congress's Fifteenth Amendment enforcement authority. *See City of Rome*, 446 U.S. at 182. Just as Shelby County has argued here with respect to the 2006 reauthorization of Section 5, Rome, Georgia, argued there that "even if the Act and its preclearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975, when Congress extended the Act for another seven years." 446 U.S. at 180. The Supreme Court, however, declined Rome's "invitation to overrule Congress' judgment that the 1975 extension was warranted." *Id.* Acknowledging the significant gains that had been made in minority political participation since 1965, the Court nonetheless expressed concern that "[a]s registration and voting of minority citizens increases [*sic*], other measures may be

resorted to which would dilute increasing minority voting strength." *Id.* at 181 (*quoting* H.R. Rep. No. 94-196, at 10-11 (1975)). The Court emphasized that the Voting Rights Act had been enacted to remedy nearly a century of racial discrimination in voting, and that the 1975 extension of the Act's temporary provisions occurred just ten years after the Act's passage. *Id.* at 182. Thus viewed, the Court found "Congress's considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination" to be both "unsurprising and unassailable." *Id.*

Two years after *City of Rome*, Congress reauthorized Section 4(b) and Section 5 a third time, and in so doing liberalized the procedures for bailout in several significant ways. Prior to 1982, only covered states (such as Alabama) or separately-covered political subdivisions (such as individual North Carolina counties) were eligible to seek bailout -- even though all political subdivisions within covered states were required to seek preclearance for their proposed electoral changes. *See Nw. Mun. Util. Dist. No. One v. Holder*, 573 F. Supp. 2d 221, 227-28 (D.D.C. 2008) ("*Nw. Austin I*"), *rev'd and remanded, Nw. Austin II*, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). After the 1982 Amendments, political subdivisions within covered states (such as, for example, Shelby County) could themselves petition for bailout. *See* Pub. L. No. 97-205 § 2(b)(2), 96 Stat. 131, 131 ("1982 Amendments") (codified as amended at 42 U.S.C. § 1973b(a)(1)). Moreover, the 1982 Amendments changed the substantive criteria for bailout so that jurisdictions with "clean" voting rights

records over the previous ten years were bailout-eligible; under prior versions of the Act, there had been no such "bailout opportunity for jurisdictions that eliminated discriminatory voting tests and practices that [had been] used at the time of initial coverage." *Nw. Austin I*, 573 F. Supp. 2d at 228 (internal quotation marks and citation omitted) (brackets in original). In this manner, the 1982 Amendments created an incentive for "those jurisdictions with post-1965 histories of discrimination . . . to improve their voting rights records." *Id.*

The 1982 Amendments also extended the Act's temporary provisions for the longest period of time to date. Whereas the 1970 and 1975 Amendments had extended the Act's temporary provisions for only five and seven years, respectively, the 1982 Amendments extended Section 5 and Section 4(b) for a full 25 years. *See Nw. Austin II*, 129 S. Ct. at 2510. The 1982 Amendments did not, however, change the coverage formula in Section 4(b). *See* 1982 Amendments, 96 Stat. at 131-133.

II. The 2006 Reauthorization of Section 5 and Section 4(b)

As a result of the 25 year extension imposed by the 1982 Amendments, Section 5 and the Act's other temporary provisions were set to expire in 2007. Hence, in the fall of 2005, the House Committee on the Judiciary began to examine "the effectiveness of the temporary provisions of the VRA over the last 25 years" in order to determine whether another renewal of the Act's temporary provisions was warranted. *See* H.R. Rep. No.

109-478, at 5. The result was "one of the most extensive legislative records in the Committee on the Judiciary's history." *Id.*

From October 2005 through May 2006, the House Judiciary Committee held ten oversight hearings and two legislative hearings before the Subcommittee on the Constitution, at which it heard from 46 witnesses and assessed over 12,000 pages of testimony, documentary evidence, and statistical analyses. *Id.* The Subcommittee on the Constitution received and incorporated into the legislative record lengthy reports from several civil rights organizations and voting rights scholars, including: (1) a report by the ACLU's Voting Rights Project, assessing 293 cases involving allegations of voting discrimination since 1982, *see* 1 *Evidence of Continued Need* 378-1270 (Laughlin McDonald and Daniel Levitas, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Act Litigation, 1982-2006* (Mar. 2006)) (hereinafter, "ACLU Report"); (2) a report by the National Commission on the Voting Rights Act, compiling evidence of voting discrimination since 1982 based on testimony gathered at ten field hearings across the country, as well as "governmental, legal, media and scholarly sources," *see Id.* at 121 (Nat'l Comm'n Report); and (3) a study conducted by Professor Ellen Katz and the Voting Rights Initiative of the University of Michigan Law School, which analyzed 323 post-1982 lawsuits that raised claims under Section 2 of the Voting Rights Act, *see Impact and Effectiveness* 974 (Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (Nov. 2005)) (hereinafter, "Katz Study").

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The Senate Judiciary Committee held nine of its own hearings to discuss the reauthorization of the Act's temporary provisions, at which it, too, received testimony from 46 witnesses, including experienced civil rights litigators, law professors, and Department of Justice attorneys. *See* S. Rep. No. 109-295, at 2-4, 10 (2006). All told, the legislative record compiled by the two houses is over 15,000 pages in length, and includes "statistics, findings by courts and the Justice Department, and first-hand accounts of discrimination." *See Id.* at 10. On the basis of this extensive record, Congress determined that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th Amendment." *See* Pub. L. No. 109-246, § 2(b)(7), 120 Stat. 577, 578 (2006) ("2006 Amendments"). Despite the effectiveness of Section 5 in deterring some attempts at voting discrimination, the House Judiciary Committee found that "instances of discrimination and efforts to discriminate against minority voters continue, thus justifying reauthorization of the VRA's temporary provisions." H.R. Rep. No. 109-478, at 24-25.

As evidence of continued discrimination in voting, Congress pointed to the "hundreds of objections" to voting changes that were interposed by the Attorney General since 1982; the number of voting changes withdrawn from consideration after so-called "more information requests" from the Attorney General; the number of "section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982," in which the Department has sought to compel jurisdictions to submit

their voting changes for preclearance; the number of requests for preclearance that have been denied by three-judge panels of this Court; the "continued filing of section 2 cases" in covered jurisdictions; the existence of racially polarized voting "in each of the jurisdictions covered by the expiring provisions" of the Act; and "the tens of thousands of Federal observers dispatched to monitor polls" in covered jurisdictions. *See* 2006 Amendments § 2(b)(3)-(4), (8), 120 Stat. at 577-78. Such evidence, Congress found, "demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Amendments § 2(b)(9), 120 Stat. at 578.

Hence, Congress passed H.R. 9 -- entitled the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 -- which reauthorized Section 5 (and the coverage formula in Section 4(b)) for another 25 years. *See* 2006 Amendments § 4; 42 U.S.C. § 1973b(a)(8). The congressional support for the Act's 2006 reauthorization was even more "overwhelming" than it had been for the Act's passage in 1965. Whereas the 1965 Act passed by a vote of 328 to 74 in the House and 79 to 18 in the Senate, *see Katzenbach*, 383 U.S. at 309, the 2006 Amendments passed by a vote of 390 to 33 in the House and 98 to 0 in the Senate, *see* 152 Cong. Rec. H5207 (daily ed. July 13, 2006); 152 Cong. Rec. S8012 (daily ed. July 20, 2006). President George W. Bush then signed the bill into law on July 27, 2006. *See* 120 Stat. at 581.

Appendix B

In addition to extending the operation of Section 5, the 2006 Amendments made two substantive changes to the Act's preclearance standard. First, Congress clarified its intent with respect to the meaning of the word "purpose" in Section 5 in response to the Supreme Court's decision in *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("*Bossier II*"). Section 5, by its terms, only allows a voting change to be precleared if the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *See* 42 U.S.C. § 1973c(a). Prior to *Bossier II*, this provision was interpreted to bar preclearance of voting changes that either (1) were enacted with a discriminatory purpose; or (2) had a discriminatory, *retrogressive* effect -- i.e., changes that worsened the position of minority voters relative to the status quo. *See Bossier II*, 528 U.S. at 324 (explaining that a redistricting plan only has a prohibited discriminatory "effect" under Section 5 if it is retrogressive); *Beer*, 425 U.S. at 141 (noting that "the purpose of s[ection] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"). In *Bossier II*, however, the Supreme Court -- for the first time -- held that the "purpose" prong of Section 5 only prohibits electoral changes that are enacted with a discriminatory and retrogressive purpose. *See* 528 U.S. at 341. In other words, after *Bossier II*, a redistricting plan that was passed for purely discriminatory reasons (such as to purposefully avoid the creation of a new majority-minority district), but that was not intended to make minority voters any worse off than

they had been under the preexisting plan (which, say, had no majority-minority districts), would not run afoul of Section 5's "purpose" prong. *See Id.* (holding that Section 5 "does not prohibit preclearance of a redistricting plan with a discriminatory but nonretrogressive purpose").

Bossier II thus had the effect of reading the "purpose" prong "almost entirely out of Section 5." *See Voting Rights Act: Section 5 - Preclearance Standards, Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. 12 (Nov. 1, 2005) (hereinafter, "*Preclearance Standards*") (prepared statement of Mark A. Posner) (hereinafter, "Posner Prepared Statement"). As was the case prior to *Bossier II*, if a jurisdiction enacted an electoral change that reduced the ability of minority voters to elect candidates of their choice, the change would be denied preclearance under Section 5's "effects" prong (because it would have a retrogressive effect). Under *Bossier II*, then, the "purpose" prong would only serve as an independent bar to discriminatory voting changes where a jurisdiction "intend[ed] to cause retrogression, but then, somehow, messe[d] up and enact[ed] a voting change that [did] not actually cause retrogression to occur (the so-called 'incompetent retrogressor')." *Id.*

In 2006, the House Judiciary Committee explained that *Bossier II*'s limitation of the "purpose" prong had been inconsistent with Congress's intent that Section 5 prevent not only purposefully retrogressive discriminatory voting changes, but also those "[v]oting changes that 'purposefully' keep minority groups 'in their place.'" *See* H.R. Rep. No. 109-478, at 68. Accordingly,

as part of the 2006 Amendments, Congress restored the pre-*Bossier II* "purpose" standard by adding a provision to the statute that defined "purpose" in Section 5 to mean "any discriminatory purpose." *See* 2006 Amendments § 5(c), 120 Stat. at 581; 42 U.S.C. § 1973c(c) (emphasis added).

In a similar vein, Congress also responded to the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003), which had altered the preexisting standard for determining whether a voting change had a prohibited retrogressive effect under Section 5's "effects" prong. Prior to *Georgia v. Ashcroft*, the standard for assessing whether an electoral change violated the Section 5 "effects" test was "whether the ability of minority groups to participate in the political process and to elect their choices to office is . . . diminished . . . by the change affecting voting." *Beer*, 425 U.S. at 141 (*quoting* H.R. Rep. No. 94-196, at 10). In *Georgia v. Ashcroft*, however, the Court endorsed a less rigid, "totality of the circumstances" analysis for examining retrogressive effects, explaining that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." 539 U.S. at 479. In reauthorizing the Act in 2006, Congress expressed concern that the *Georgia v. Ashcroft* framework had introduced "substantial uncertainty" into the administration of a statute that was "specifically intended to block persistent and shifting efforts to limit

the effectiveness of minority political participation." *See* H.R. Rep. No. 109-478, at 70 (internal quotation marks and citation omitted). Hence, in an attempt to restore the simpler, "ability to elect" analysis articulated in *Beer*, *see Id.* at 71, Congress added new language to the Act, stating that all voting changes that diminish the ability of minorities "to elect their preferred candidates of choice" should be denied preclearance under Section 5. *See* 2006 Amendments § 5(b), 120 Stat. at 581; 42 U.S.C. § 1973c(b).

For present purposes, even more significant than the substantive changes that Congress made in 2006 to Section 5's preclearance standard were the proposed changes that Congress considered -- but ultimately, did not make -- to Section 4(b)'s coverage formula. During the 2006 reauthorization hearings, there was extensive discussion of the potential need to revise the Act's coverage formula to take account of changed circumstances since 1975, when the formula had last been updated. Several Senators asked members of the academic community whether they believed Section 4(b)'s "trigger" should be based on voter registration and turnout data from the 2000 and 2004 presidential elections, rather than data from the 1964, 1968, and 1972 elections. *See, e.g.*, *Continuing Need* 48-49 (responses of Anita S. Earls to questions submitted by Senators Coburn, Cornyn, Leahy, and Kohl) ("Earls Responses"); *Id.* at 76, 85-86 (responses of Ronald Keith Gaddie to questions submitted by Senators Kohl, Cornyn, and Coburn) ("Gaddie Responses"); *Id.* at 99-100, 103-04 (Karlan Responses); *Id.* at 110-12 (responses of Richard H. Pildes to questions submitted by Senators Specter, Cornyn, Coburn, and Kohl) ("Pildes Responses");

Introduction to Expiring Provisions 36, 38 (responses of Richard L. Hasen to questions submitted by Senators Specter, Cornyn, and Sessions) ("Hasen Responses"); *Id.* at 76 (responses of Samuel Issacharoff to questions submitted by Senators Specter, Sessions, and Cornyn) ("Issacharoff Responses").

Many voting rights scholars expressed the view that some sort of "updated trigger is called for." *See, e.g.*, *Continuing Need* 85 (Gaddie Responses); *Introduction to Expiring Provisions* 36 (Hasen Responses) (explaining that "*Congress should update the coverage formula* based on data indicating where intentional state discrimination in voting on the basis of race is *now* a problem or likely to be one in the *near future*"); *Introduction to Expiring Provisions* 13 (statement of Samuel Issacharoff) (noting that a trigger based on "voter turnout figures from 1964 . . . risks appearing constitutionally antiquated by the proposed next expiration date of 2032"). But almost all agreed that updating the formula on the basis of voter turnout and registration data from the 2000 and 2004 presidential elections would be ill-advised. As one law professor explained, such a proposal "rest[s] on a fundamental misperception of the triggers," since Congress "did *not* pick the 1964, 1968, or 1972 elections as triggers because it thought something distinctive happened in any of those elections." *See Continuing Need* 99 (Karlan Responses). Rather, the use of election data from those years -- in conjunction with the presence of a prohibited voting test or device -- had served only as a proxy for identifying those "jurisdictions that had a long, open, and notorious history of disenfranchising minority

citizens and diluting their voting strength whenever they did manage to register and cast ballots." *Id.*; *see also Continuing Need* 110 (Pildes Responses). For this reason, most scholars who testified before Congress were skeptical as to whether "tinkering with the coverage dates is necessarily the best way to make the Act more current." *Introduction to Expiring Provisions* 76 (Issacharoff Responses); *see also Continuing Need* 110 (Pildes Responses) (stating that "[m]echanically updating the coverage formula in this way would . . . not tie coverage appropriately to where problems are occurring today").

Nevertheless, the only Amendment that was ultimately offered as a possible means of making Section 4(b)'s coverage formula more "current" proposed to do just that. Specifically, Representative Charlie Norwood of Georgia introduced an Amendment that would have created a "rolling test" for coverage based on voter turnout in the three most recent presidential elections. *See* H. R. Rep. No. 109-554, at 2 (2006). Under the Norwood Amendment, a jurisdiction would only be subject to preclearance if it had "a discriminatory test in place or voter turnout of less than 50% in any of the three most recent presidential elections." *See Id.*

The House's reaction to the Norwood Amendment was overwhelmingly negative. Representative James Sensenbrenner, Chairman of the House Judiciary Committee, decried the Amendment, claiming that it "not only guts the bill, but turns the Voting Rights Act into a farce." *See* 152 Cong. Rec. H5181 (daily ed. July 13, 2006). Although over 1,000 counties still would have been

subject to preclearance under the Norwood Amendment's proposed formula, Hawaii would have been the only state covered in its entirety -- even though Hawaii has no discernible history of voting discrimination. *See* 152 Cong. Rec. H5179-81. Opponents of the Amendment condemned such results as evidence of the Amendment's "absurdity," and expressed concern that by severing Section 4(b)'s "connection to jurisdictions with proven discriminatory histories," the Amendment would place Section 5 in constitutional jeopardy. *See* 152 Cong. Rec. H5181.

Ultimately, the Norwood Amendment was defeated, and the existing coverage formula in Section 4(b) remained intact. *See* 152 Cong. Rec. H5204; *see also* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 254-55 (2007) (describing the debate over the Norwood Amendment). Under that formula, which remains in existence today, a jurisdiction is subject to preclearance if it maintained a voting test or device in 1964, 1968, or 1972, and had voter turnout or registration below 50% in that year's presidential election. *See* 42 U.S.C. § 1973b(b). Currently, there are 16 states covered in whole or in part by Section 4(b), and therefore subject to preclearance under Section 5. *See* 28 C.F.R. pt. 51, app. Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered in their entirety, while portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota are also covered. *Id.*

III. Northwest Austin

Shortly after the 2006 Amendments became effective, a Texas municipal utility district brought suit, seeking to bail out of the Act's requirements or, in the alternative, to challenge Section 5 on its face as "an unconstitutional overextension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment." *See Nw. Austin I*, 573 F. Supp. 2d at 230 (internal quotation marks and citation omitted). Because the plaintiff-district sought a declaratory judgment that it was eligible for bailout, a three-judge panel of this Court was convened to hear the case. *See Id.* (*citing* 42 U.S.C. § 1973b(a)(5)). The court first concluded that the district was not a "political subdivision" under Section 14(c)(2) of the Act, and thus could not petition for bailout pursuant to Section 4(a), which only authorizes states and "political subdivisions" to seek bailout. *See Id.* at 230-35; *see also* § 1973b(a)(1).

The court then proceeded to address the merits of the plaintiff's facial constitutional challenge to the 2006 reauthorization of Section 5. *Nw. Austin I*, 573 F. Supp. 2d at 235-79. The court began by identifying the types of evidence of voting discrimination upon which Congress had relied in deciding to reauthorize Section 5 in 2006, which included evidence of (1) racial disparities in voter registration and turnout; (2) the number of minority elected officials; (3) objections to proposed voting changes under Section 5; (4) "more information requests" by the Attorney General in response to Section 5 preclearance submissions; (5) judicial preclearance suits brought by covered jurisdictions; (6) Section 5 enforcement actions

brought by the Attorney General; (7) Section 2 litigation; (8) the dispatch of federal election observers; (9) racially polarized voting; and (10) Section 5's deterrent effect. *Id.* at 247. In a lengthy opinion replete with citations to the legislative record, the court analyzed each of these categories of evidence to determine whether there was sufficient proof of "contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years." *Id.* at 265. Concluding that the legislative record did, in fact, contain "extensive contemporary evidence of intentional discrimination," *Id. at* 266, the court decided there was "no basis for overturning Congress's judgment that preclearance - 'a vital prophylactic tool[]' - remains necessary," *Id.* at 279 (*quoting* H.R. Rep. No. 109-478, at 21).

On appeal, however, the Supreme Court reversed and remanded. In a decision that has since been criticized by some as "a questionable application of the doctrine of 'constitutional avoidance,'" *see* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181 (2009); *see also* Ellen Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 992-93 (2009) (describing the Court's "statutory construction" of the bailout provision in *Nw. Austin II* as "contrived"), Justice Roberts, writing for an eight-justice majority, sidestepped the "big question" of Section 5's constitutionality by instead resolving the case on narrower, statutory grounds, *see Nw. Austin II*, 129 S. Ct. at 2508. Specifically, the Court found that the plaintiff-district qualified as a "political

subdivision" eligible to petition for bailout -- even though it did not register voters and was therefore not a political subdivision as that term is defined in Section 14(c)(2) of the Act. *See* 42 U.S.C. § 1973l(c)(2) (defining "political subdivision" to include "any county or parish" or "any other subdivision of a State which conducts registration for voting").

According to the Court, "the statutory definition of 'political subdivision' in § 14(c)(2) does not apply to every use of the term 'political subdivision' in the Act." *Nw. Austin II*, 129 S. Ct. at 2515. Rather, the Court explained, the phrase "political subdivision" in Section 4(a) has a "broader" meaning than that set forth in Section 14(c)(2), and hence "all political subdivisions - not only those described in § 14(c)(2) - are eligible to file a bailout suit" under Section 4(a). *Id.* at 2515-17 (emphasis added). As a political subdivision of Texas "in the ordinary sense of the term," the plaintiff-district was thus eligible to seek bailout. *Id.* at 2513. And because the district had framed its constitutional challenge to the 2006 reauthorization of Section 5 "as being 'in the alternative' to its statutory argument" for bailout, the majority saw no need to resolve the merits of the district's constitutional challenge. *Id.*

But the majority did take the opportunity to voice some concerns about the constitutionality of Section 5 and Section 4(b), and thereby presaged future challenges to Section 5 like that raised here by Shelby County. The Court in *Nw. Austin II* emphasized the substantial "federalism costs" imposed by Section 5, as well as the "dramatic improvements" in minority voter turnout and

registration since the Act's passage. *Id.* at 2511. "Things have changed in the South," the Court wrote, explaining that minorities now register and vote at rates that "approach parity" with those of non-minorities, and that minority candidates "hold office at unprecedented levels." *Id.* The Court conceded that these "improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success," but made clear that "[p]ast success alone . . . is not adequate justification to retain the preclearance requirements." *Id.*

The Court also raised concern about the continued constitutionality of the Act's coverage formula, noting that it is "based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions." *Id.* at 2512. The Court cited the fact that the "racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide." *Id.* Although the Court did not specify the precise nature of the differences between covered and non-covered jurisdictions that would be constitutionally necessary to justify Section 5's continued selective application, it did state that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 2512.

After identifying "serious constitutional questions" raised by the Act's coverage formula and preclearance requirement, however, the majority refrained from answering them. *Id.* at 2513. But Justice Thomas did not.

Writing separately as the lone dissenter, he explained that he would have "decided the constitutional issue presented" and concluded "that the lack of current evidence of intentional discrimination with respect to voting renders § 5 unconstitutional." *Id.* at 2517, 2519 (Thomas, J., concurring in judgment in part, dissenting in part). According to Justice Thomas, "the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible." *Id.* at 2524. He went on to explain that this kind of extensive intentional discrimination in voting -- which led the Court to uphold the constitutionality of Section 5 on prior occasions -- "no longer exists," *citing* the high minority voter registration rates in states such as Alabama, Louisiana, and Mississippi. *Id.* at 2525. Justice Thomas dismissed evidence of the so-called "second generation barriers" to voting upon which Congress had relied, noting that evidence of Section 5 enforcement actions, Section 2 suits, and federal observer coverage "bears no resemblance to the record initially supporting § 5, and is plainly insufficient to sustain such an extraordinary remedy." *Id.* at 2526. With respect to evidence of intentional voting discrimination contained in the 2006 legislative record and cited by the three-judge court, Justice Thomas found that these "discrete and isolated incidents" fell short of a "coordinated and unrelenting campaign to deny an entire race access to the ballot." *Id.* "Perfect compliance with the Fifteenth Amendment's substantive command is not now - nor has it ever been the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment," he explained. *Id.*

IV. Shelby County, Alabama

Echoing the arguments of Justice Thomas, Shelby County brought this suit on April 27, 2010, asserting that "it is no longer constitutionally justifiable for Congress uto arbitrarily impose on Shelby County and other covered jurisdictions disfavored treatment by forcing them to justify all voting changes to federal officials in Washington, D.C. for another twenty five years." *See* Compl. ¶ 35. Shelby County's history under the Voting Rights Act is extensive and forms a relevant backdrop to this case. As a political subdivision of Alabama, Shelby County has been subject to preclearance since 1965, based on the Attorney General's determination that Alabama used a prohibited voting test or device on November 1, 1964, and had voter turnout of less than 50% in the 1964 presidential election. *See* 28 C.F.R. pt. 51 app.; 30 Fed. Reg. 9897 (Aug. 7, 1965); *see also* 42 U.S.C. § 1973b, § 1973c, § 1973l(c)(2); Compl. ¶¶ 28-29. From 1965 to the filing of this suit, the Department of Justice has received at least 682 preclearance submissions from Shelby County and jurisdictions located wholly or partially within Shelby County. *See* Def.'s Mot. for Summ. J. ("Def.'s Mot.") [Docket Entry 54], Ex. 4, Decl. of Robert S. Berman ("Berman Decl.") ¶ 4. Shelby County itself has submitted at least 69 proposed voting changes to the Attorney General for preclearance. *Id.* ¶ 5.

Since 1965, the Department has lodged objections to five proposed voting changes submitted by jurisdictions located wholly or partially within Shelby County. *Id.* ¶ 8. Shelby County was also a defendant in the so-called

Dillard litigation in the 1980s, in which black residents of Alabama challenged the at-large system used to elect Alabama county commissioners as a violation of Section 2 of the Voting Rights Act. *See Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1352-54 (M.D. Ala. 1986); *see also Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988) (reviewing history of *Dillard* litigation); *Dillard v. Crenshaw Cnty.*, 748 F. Supp. 819, 821-23 (M.D. Ala. 1990) (describing Shelby County's involvement in *Dillard*). Although Shelby County was not one of the original nine defendants in *Dillard*, *see Dillard*, 640 F. Supp. at 1352, the plaintiffs in *Dillard* eventually raised claims against a total of 183 Alabama cities, counties, and school boards that employed at-large methods of election, including Shelby County, *see Dillard*, 686 F. Supp. at 1461.

In the original *Dillard* lawsuit, the court concluded that the Alabama legislature had "engaged in a pattern and practice of using at-large election systems as an instrument for race discrimination." 640 F. Supp. at 1361. The court explained that the challenged at-large electoral systems had been created against the backdrop of Alabama's "unrelenting historical agenda, spanning from the late 1800's to the 1980's, to keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave." *Id.* at 1357. Moreover, the court noted, the Alabama legislature had "consistently enacted at-large systems for local governments during periods when there was a substantial threat of black participation in the political process." *Id.* at 1361. When viewed in light of the state's "undisputed history of racial discrimination,"

it became clear that the creation of at-large methods of election -- which did, in fact, have an "adverse racial impact" -- "was not adventitious but rather racially inspired." *Id.* Hence, the court found that preliminary injunctive relief with respect to the counties then defending their at-large election systems was warranted. *Id.* at 1373.

Despite the adverse judgment against the other Alabama counties with at-large electoral systems in place, Shelby County continued to deny that its at-large method for electing county commissioners violated Section 2, and the related case against it proceeded to trial. *See Dillard*, 748 F. Supp. at 822. While the case was under su bmission, however, Shelby County entered into a consent decree with the plaintiffs, under which it agreed to change its at-large electoral system to a "single-member district scheme" with one majority-black district. *Id.*

Most recently, on August 25, 2008, the Attorney General objected to a redistricting plan and 177 annexations submitted by the city of Calera, located within Shelby County. *See* Berman Decl. ¶¶ 9-10; *Id.*, Att. A. Calera's redistricting plan and annexations would have eliminated the city's sole majority-black district, which had been created pursuant to the consent decree in *Dillard*, and which had elected an African-American councilman for the past 20 years. *See* Berman Decl., Att. A. In its preclearance submission to the Attorney General, Calera conceded that it had, in fact, already adopted the 177 annexations without receiving advance preclearance for them. *See Id.*; *see also* Berman Decl. ¶ 9. After the Attorney General lodged an objection to the

annexations and the city's 2008 redistricting plan, Calera nonetheless proceeded to conduct elections based on these unprecleared voting changes. *See* Berman Decl. ¶ 11; *Id.*, Att. B ("Calera Compl.") ¶ 18.; *Id.*, Att. C ("Calera Consent Decree") at 3. The elections held under the objected-to plan and annexations resulted in the defeat of the African-American incumbent councilman. *See Id.*, Att. D.

The Attorney General responded by bringing a Section 5 enforcement action, seeking to prohibit Calera from certifying the results of its elections "based on the district boundaries and electorate to which the Attorney General ha[d] interposed a timely objection unless and until preclearance under Section 5 . . . is obtained." Calera Compl. at 7. The case was temporarily resolved through a consent decree, and the Attorney General subsequently withdrew his objection to the 177 annexations. *See* Calera Consent Decree; *see also* Berman Decl. ¶ 15; *Id.*, Att. F. The Attorney General did not, however, withdraw his objection to the 2008 redistricting plan. *See* Berman Decl. ¶ 15; *Id.*, Att. F.

Because of the Attorney General's objection to Calera's proposed voting changes, Shelby County argues that it is not eligible for bailout. Compl. ¶ 34(b) (*citing* 42 U.S.C. § 1973b(a)(1)(E)).[4] As a result of its alleged ineligibility

4. Shelby County also maintains that it is ineligible for bailout because it held several special elections under the authority of Act 65-816 (the "Planning Act" of 1965) between 1965 and 2003. *See* Compl. ¶ 34(a)(i)-(iii). During that time, the Planning Act had not been precleared by the Department of Justice. *Id.* ¶ 34(a)(ii)-(iii). Under Section 4(a), a covered jurisdiction is only eligible for bailout

for bailout and the 2006 reauthorization of Section 5, Shelby County claims that it now "will have to regularly seek preclearance in the near future" -- a process that, historically, has required the expenditure of "significant taxpayer dollars, time, and energy." *See Id.* ¶¶ 32-33; Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") [Docket Entry 5], Decl. of Frank C. Ellis, Jr. ("Ellis Decl.") ¶¶ 7-8.

Shelby County does not challenge any specific application of Section 5 to one of its proposed voting changes; rather, it seeks a declaration that Section 5 and Section 4(b) are facially unconstitutional, as well as a permanent injunction prohibiting the Attorney General from enforcing these provisions. *See* Compl. ¶¶ 1, 44(a)-(b). In Count I, Shelby County alleges that in reauthorizing Section 5 "for another twenty-five years in 2006, Congress lacked the evidence of intentional discrimination that warranted the enactment of the VRA in 1965 and its extensions in 1970, 1975, and 1982." *Id.* ¶ 38(c). Hence, Shelby County argues, because there is neither "'congruence and proportionality' . . . nor even a 'rational relationship' between the evidence compiled in support of the latest extension of Section 5 and the burdens imposed by that provision . . . Section 5 . . . exceeds Congress's authority under the Fourteenth and Fifteenth

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if it has complied "with the requirement that no change covered by . . . [Section 5] has been enforced without preclearance." *See* 42 U.S.C. § 1973b(a)(1)(D). Because Shelby County held special elections under the authority of the Planning Act (*i.e.*, "enforced" the Act) without first receiving preclearance, Shelby County maintains that it is also ineligible for bailout pursuant to 42 U.S.C. § 1973b(a)(1)(D).

Amendments," *Id.* ¶ 38(d) (internal citations omitted), "and, therefore, violates the Tenth Amendment and Article IV of the Constitution," *Id.* ¶ 37. In Count II, Shelby County similarly challenges the constitutionality of the 2006 reauthorization of Section 4(b)'s coverage formula, arguing that "Congress's reliance . . . on voting practices, voter registration data, and presidential election data from 1964, 1968, and 1972 as the trigger for the preclearance obligation of Section 5 is not an 'appropriate' means of enforcing the Fifteenth Amendment." *Id.* ¶ 42(a). Because "Section 4(b)'s coverage formula is not 'sufficiently related to the problem that it targets,'" Shelby County maintains that Section 4(b), like Section 5, exceeds Congress's Fourteenth and Fifteenth Amendment enforcement authority, and violates the principle of equal sovereignty embodied in the Tenth Amendment and Article IV. *Id.* ¶ 43(c).

Shortly after filing its complaint, Shelby County filed a motion for summary judgment. Several civil rights groups and Shelby County residents responded by filing motions seeking to intervene as defendants, which the Court granted. *See* 8/25/10 Order [Docket Entry 29]. Defendant and defendant-intervenors then asked the Court to deny Shelby County's summary judgment motion as premature, or, in the alternative, to grant limited discovery pursuant to Fed. R. Civ. P. 56(f). Denying the request, this Court found that there was no need for discovery on any of the three issues upon which discovery was sought. With respect to the first issue -- Shelby County's standing to sue -- the Court explained that no discovery was warranted since defendant "was unable to articulate any

reason why a covered jurisdiction subject to Section 5's preclearance requirement - such as Shelby County - would lack standing to bring this type of action." *Shelby Cnty. v. Holder*, 270 F.R.D. 16, 18 (D.D.C. 2010). The Court next rejected defendant's contention that discovery was needed to determine whether Shelby County was, in fact, eligible for bailout, since Shelby County did not seek bailout. *Id.* at 19. Finally, the Court held that there was no need for discovery on Shelby County's constitutional challenge because it was purely facial -- not "as applied" -- and it therefore must "rise or fall on the record that Congress created when it extended [the Voting Rights Act's temporary provisions] in 2006." *Id.* at 21. Accordingly, the Court set a schedule for the filing of dispositive motions, which generated over 1,000 pages of briefs and exhibits and culminated in a lengthy motions hearing on February 2, 2011.

* * * * *

This Court does not write on a clean slate in assessing plaintiff's facial constitutional challenge to the 2006 reauthorization of Section 5 and Section 4(b). To date, one Supreme Court Justice has declared that he would strike down Section 5 as an unconstitutional exercise of Congress's Fifteenth Amendment enforcement power, *see Nw. Austin II*, 129 S. Ct. at 2517-27 (Thomas, J., concurring in judgment in part, dissenting in part), while several other Justices have voiced concerns about the continued vitality of the Act's coverage formula, *See, e.g.*, *Nw. Austin II* Oral Arg. Tr. at 36 (Apr. 29, 2009) (Alito, J., asking, "[w]ouldn't you agree that there is

[sic] some oddities in this coverage formula"); *Id.* at 22 (Kennedy, J., inquiring whether there is "anything in the record" addressing whether "these States that are now covered . . . are markedly different from the noncovered jurisdictions"), and about the apparent never-ending nature of the preclearance obligation, which was originally intended to last only through 1970, but which is now scheduled to last through 2032, *Id.* at 32 (Roberts, C.J., stating with respect to Section 5, "at some point it begins to look like the idea is that this is going to go on forever"). At the same time, a three-judge panel of this Court, after undertaking an exhaustive review of the legislative record, concluded that there was sufficient evidence of modern-day, intentional discrimination in voting to justify Congress's 2006 reauthorization of the preclearance obligation on covered jurisdictions for another 25 years. *See Nw. Austin I*, 573 F. Supp. 2d at 221-83. Keeping all these views in mind, the Court will undertake its own assessment of the legislative record in order to determine whether Congress exceeded its enforcement authority under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) in 2006.

DISCUSSION

I. Threshold Issues

Three threshold issues are presented by this suit: (1) plaintiff's Article III standing; (2) plaintiff's eligibility for bailout; and (3) the facial rather than as-applied nature of plaintiff's claims. These three issues were, to some extent, already addressed in the prior Memorandum Opinion in this case. *See Shelby Cnty.*, 270 F.R.D. at 18-

21. Nevertheless, given the "well-established principle . . . that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," *Nw. Austin II*, 129 S. Ct. at 2513 (*quoting Escambia Cnty. v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984)), the Court will briefly revisit each of these issues to explain why none provides a valid basis for avoiding the merits of the facial constitutional challenge raised here.

A. Standing

To establish the "irreducible constitutional minimum of standing," a plaintiff must allege (1) an "injury in fact" that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks and citations omitted). As a jurisdiction covered by Section 4(b), Shelby County maintains that it must expend "significant taxpayer dollars, time, and energy to meet its obligations under Section 5 of the VRA." Ellis Decl. ¶ 7. Shelby County's expenditure of time and money to ensure compliance with Section 5 constitutes a "concrete and particularized" injury that is caused by the continued operation of the statute, and that would be redressed by a decision declaring Section 5 facially unconstitutional and permanently enjoining its enforcement.

The mere fact that Shelby County does not challenge any specific objection to one of its proposed electoral changes does not serve to render its claims "conjectural or hypothetical" for purposes of Article III. *See LaRoque v. Holder*, 650 F.3d 777, 397 U.S. App. D.C. 93, 2011 U.S. App. LEXIS 13907, 2011 WL 2652441, at *10 (D.C. Cir. 2011) (noting that a plaintiff need only demonstrate a "'substantial probability' of imminent injury" to establish Article III standing to bring a facial constitutional challenge to Section 5). Because Shelby County is a jurisdiction subject to Section 5, it will be forced to expend resources obtaining preclearance for all of its future electoral changes, absent a decision from this Court granting its requested relief.[5] Shelby County therefore has alleged an injury that is both "credible and immediate, and not merely abstract or speculative." *See Navegar, Inc. v. United States*, 103 F.3d 994, 998, 322 U.S. App. D.C. 288 (D.C. Cir. 1997); *see also Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) (permitting plaintiff to challenge the legality of his potential arrest under a criminal trespass statute where the plaintiff alleged threats of prosecution that were neither imaginary nor speculative). Accordingly, Shelby County has standing to pursue its facial constitutional challenges to Section 5 and Section 4(b).

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5. In fact, Shelby County represented to the Court in July 2011 that it was in the process of completing its decennial redistricting plan, and that it would need to expend time and resources preparing a preclearance submission for the plan as early as last month, in the event that the Court denied its motion for summary judgment. *See* Notice to the Court [Docket Entry 79].

B. Bailout

Unlike the Texas municipal utility district in Nw. Austin, Shelby County has not framed its constitutional challenge "as being 'in the alternative' to its statutory argument" for bailout. *Nw. Austin II*, 129 S. Ct. at 2513. Indeed, Shelby County has expressly chosen not to petition for bailout, based on its determination that such a petition would be futile. *See* Compl. ¶ 34. Because Shelby County has not sought bailout under Section 4(a), a finding that Shelby County was bailout-eligible would not obviate the need for this Court to assess the merits of Shelby County's constitutional challenge, as was the case in *Nw. Austin II*. The Supreme Court's finding in *Nw. Austin II* that the plaintiff-district was eligible for bailout served to "afford [the plaintiff-district] all the relief it s[ought]," *see 129 S. Ct. at 2513*; here, however, a determination that Shelby County was eligible for bailout would only relieve Shelby County of its preclearance obligation if defendant or this Court could somehow "force Shelby County to accept bailout," which, as defendant correctly concedes, cannot be done. *See Shelby Cnty., 270 F.R.D. at 19.*[6]

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6. Although the Court did not permit discovery into the question of Shelby County's bailout-eligibility, it is clear -- based on undisputed facts in the record -- that Shelby County is not eligible for bailout. Under Section 4(a)(1)(E), a jurisdiction is only eligible for bailout if, during the ten years preceding its bailout request, "the Attorney General has not interposed any objection . . . with respect to any submission by or on behalf of the plaintiff *or any governmental unit within its territory.*" 42 U.S.C. § 1973b(a)(1)(E) (emphasis added). The Attorney General concedes that, in 2008, he interposed an objection to the proposed redistricting plan

C. The Facial Nature of Plaintiff's Challenge

Finally, it is important to remember that Shelby County's suit presents only a facial -- and not an as-applied -- challenge to the constitutionality of the 2006 reauthorization of Section 5 and Section 4(b). The "distinction between 'as-applied' and 'facial' challenges is that the former ask only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case," *Sanjour v. E.P.A.*, 56 F.3d 85, 92 n.10, 312 U.S. App. D.C. 121 (D.C. Cir. 1995), whereas the latter ask the court to conclude that "'no set of circumstances exists under which [the statute] would be valid,' or that the statute lacks any 'plainly legitimate sweep,'" *United States v. Stevens*, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010) (internal citations omitted). When

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and annexations submitted by the city of Calera, a "governmental unit" within Shelby County. *See* Def.'s Mot. at 8; Berman Decl. ¶¶ 9-10. As a result of this objection, Shelby County would not be eligible for bailout under Section 4(a)(1)(E), even if -- like the Texas municipal utility district in *Nw. Austin II* -- it had chosen to pursue such a course as an "alternative" to its facial constitutional challenge. Similarly, Shelby County concedes that it held several special elections under the authority of Act 65-816 (the "Planning Act" of 1965) between 1965 and 2003. *See* Compl. ¶ 34(a)(i)-(iii). During that time, the Planning Act had not been precleared by the Department of Justice. *Id.* ¶ 34(a)(ii)-(iii). Under Section 4(a), a covered jurisdiction is only eligible for bailout if it has complied "with the requirement that no change covered by . . . [Section 5] has been enforced without preclearance." *See* 42 U.S.C. § 1973b(a)(1)(D). Because Shelby County held special elections under the authority of the Planning Act, Shelby County is also ineligible for bailout under 42 U.S.C. § 1973b(a)(1)(D).

a plaintiff brings both a facial and an as-applied challenge to a statute, "the court must 'determine first whether the law is constitutional as applied to the challenging party's conduct, and then only if the as-applied challenge fails, . . . determine whether it is necessary to consider the facial challenge.'" *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 188 n.10 (D.D.C. 2010) (internal citations omitted); *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (explaining that "for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first").

Here, however, Shelby County has made clear that it is only seeking to challenge the constitutionality of Section 5 and Section 4(b) on their face, and not as they have been applied to Shelby County in any particular instance. *See, e.g.*, Compl. ¶ 1 (seeking a declaratory judgment that Section 4(b) and Section 5 "are facially unconstitutional") (emphasis added); Pl.'s Mot. at 17 n.2 (describing plaintiff's challenge as facial); *Shelby Cnty.*, 270 F.R.D. at 19 (finding that discovery was "unwarranted" because "Shelby County brings only a facial challenge"). Because Shelby County has chosen not to raise an as-applied challenge -- and indeed, has explicitly waived its right to bring such a challenge, *see Shelby Cnty.*, 270 F.R.D. at 19 -- the Court's consideration of Shelby County's facial challenge is not premature. *See Stevens*, 130 S. Ct. at 1587 n.3 (rejecting contention that the Court's consideration of a facial constitutional challenge was "premature" where "the constitutional argument [wa]s a general one" and

there was no "separate attack on a defined subset of the statute's applications").

II. Standard of Review

The Court must first determine the appropriate standard of review to use in evaluating whether Congress exceeded its enforcement authority under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 and Section 4(b) in 2006.[7] The Attorney General, relying on cases in which the Supreme Court has previously assessed the constitutionality of Section 5, argues that "when Congress is legislatively enforcing the Fifteenth Amendment's prohibition on race discrimination with respect to voting, the Court reviews the appropriateness of that legislation under a deferential rationality standard."

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7. In addition to challenging the 2006 reauthorization of Section 5 and Section 4(b) as exceeding Congress's Fourteenth and Fifteenth Amendment enforcement authority, Shelby County argues that Section 5 and Section 4(b) impermissibly intrude on state sovereignty in violation of the Tenth Amendment and Article IV of the Constitution. *See* Compl. ¶¶ 39, 41, 43. The Supreme Court, however, has repeatedly rejected such federalism-based challenges to Section 5, recognizing that the Reconstruction Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *See City of Rome*, 446 U.S. at 179; *see also Lopez v. Monterey Cnty.*, 525 U.S. 266, 282, 119 S. Ct. 693, 142 L. Ed. 2d 728 (1999) (noting that "the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States"). To the extent that Section 5 and Section 4(b) constitute "appropriate" remedial enforcement legislation, then, their encroachment on state sovereignty is permissible.

See Def.'s Mot. at 12 (*citing Katzenbach*, 383 U.S. at 324; *City of Rome*, 446 U.S. at 175-77; *Georgia v. United States*, 411 U.S. 526, 535, 93 S. Ct. 1702, 36 L. Ed. 2d 472 (1973); *Lopez*, 525 U.S. at 282-85). Shelby County, on the other hand, urges this Court to apply the "congruence and proportionality" framework first articulated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. at 520, to assess legislation enacted pursuant to § 5 of the Fourteenth Amendment, asserting that *Boerne* "applies just the same in Fifteenth Amendment cases" because "[t]he enforcement clauses of the Fourteenth and Fifteenth Amendments are co-extensive." *See* Pl.'s Mot. at 19; *see also* Pl.'s Reply in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Reply") at 2 (explaining that "[t]he Supreme Court has made clear that all enforcement legislation is subject to congruence and proportionality review, and it has specifically relied on the voting rights cases in adopting and applying this test").

The parties in Nw. Austin engaged in the same dispute regarding the proper standard of review to apply in assessing the constitutionality of Section 5. *See Nw. Austin II*, 129 S. Ct. at 2512. Although the Supreme Court ultimately declined to resolve the issue, *see Id.*; but *see Id.* at 2524-25 (Thomas, J., concurring in judgment in part, dissenting in part) (suggesting that *Boerne* provides the framework for reviewing the constitutionality of Section 5), the three-judge court below held that "*Katzenbach*'s rationality standard governs this case," *Nw. Austin I*, 573 F. Supp. 2d at 241.

That court described *Katzenbach*'s "rationality standard" and *Boerne*'s "congruence and proportionality

test" as "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." 573 F. Supp. 2d at 235-36. After summarizing what it characterized as "these two lines of cases," the court said that "the time has come to choose between them." 573 F. Supp. 2d at 241. The court ultimately "chose" *Katzenbach* for two reasons (although it went on to find that Section 5 passed muster under both *Katzenbach* and the congruence and proportionality framework outlined in *Boerne*). First, the court noted that *City of Rome*, which had "applied *Katzenbach*'s rationality test," constituted controlling precedent directly on point. *Id.* Although *City of Rome* pre-dates *Boerne*, the *Nw. Austin I* panel reasoned that because neither *Boerne* nor any case since had questioned the standard of review utilized in *City of Rome*, that standard had not been overruled. *See Id.* at 242. Hence, the court concluded that the type of review enunciated in *Katzenbach* and employed in *City of Rome* still governed the plaintiff's challenge to the 2006 extension of Section 5, even assuming that *Boerne* had "cast some doubt" on *Katzenbach* and *City of Rome*. *Id.* at 246. Second, the court pointed to the fact that *Boerne* involved a challenge to Congress's enforcement authority under § 5 of the Fourteenth Amendment, *Id.* at 517, whereas *Katzenbach* and *City of Rome* involved challenges to Section 5, which, "at its core," constitutes legislation enacted under § 2 of the Fifteenth Amendment, *Id.* at 243-44. "Even if the *City of Boerne* cases changed the test for *all* statutes enacted pursuant to the Fourteenth Amendment," the court explained, "those cases leave the Fifteenth Amendment standard untouched." *Id.* at 243.

This Court respectfully disagrees. A close analysis of the Voting Rights Act cases, *Boerne*, and cases following *Boerne* reveals that the Supreme Court has not left the standard of review for Fifteenth Amendment enforcement legislation "untouched"; moreover, it has not established a "distinct standard" for evaluating Fourteenth Amendment enforcement legislation different from that traditionally employed in the Fifteenth Amendment context. Rather, *Boerne* merely explicated and refined the one standard of review that has always been employed to assess legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments. *See* Appellant's Br., *Nw. Austin II*, 2009 WL 453246, at *33 (Feb. 19, 2009) (explaining that "*Boerne* and the cases following it do no more than elaborate and clarify the standard for reviewing Congress's efforts to enforce the Reconstruction Amendments"). The question is not, then, whether this Court, as "a district court bound by Supreme Court precedent," should follow "*Katzenbach* and *City of Rome* even if . . . the *City of Boerne* cases cast some doubt on those cases," *Nw. Austin I*, 573 F. Supp. 2d at 246. If this Court viewed *Boerne* and its enunciation of the congruence and proportionality test as merely "casting doubt" on *Katzenbach* and *City of Rome*, it would, indeed, still be obligated to follow those earlier cases, and leave to the Supreme Court "the prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Rather, the question is whether, given the elaboration of the *Katzenbach* standard that was undertaken by the Supreme Court in *Boerne*, this Court should nonetheless adhere to the standard as first articulated in *Katzenbach*, simply because the *Boerne* elaboration occurred in the

Fourteenth Amendment context, not the Fifteenth. Such a course would, in this Court's view, constitute a misunderstanding of *Boerne*. This Court will therefore review the Supreme Court's evolving descriptions of the nature of Congress's enforcement powers under the Reconstruction Amendments, as explicated in *Katzenbach*, *Boerne* and later cases, to show that *Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*, and hence provides the appropriate standard of review to assess Shelby County's facial constitutional challenge to Section 5 and Section 4(b).

A. The "Virtually Identical" Enforcement Clauses of the Fourteenth and Fifteenth Amendments

Section 5 of the Fourteenth Amendment provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," U.S. CONST. amend. XIV, § 5, while § 2 of the Fifteenth Amendment states that "Congress shall have power to enforce this article by appropriate legislation," U.S. CONST. amend. XV, § 2.[8] Given the nearly identical language and similar origin of these two Reconstruction Amendments, there would seem to be "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment, and

8. In this Opinion, the Court uses "Section 5" to refer to Section 5 of the Voting Rights Act, and "§ 5" to refer to the enforcement clause of the Fourteenth Amendment. Similarly, the Court uses "Section 2" to refer to Section 2 of the Voting Rights Act, and § 2 to refer to the enforcement clause of the Fifteenth Amendment.

the Supreme Court has not held to the contrary." *Mixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir. 1999); *see also Hayden v. Pataki*, 449 F.3d 305, 331 n.5 (2d Cir. 2006) (finding "no indication in Supreme Court precedent, or in logic, that the Congress and the legislatures that enacted and ratified the Fourteenth and Fifteenth Amendments intended that they be 'enforced' in different ways").

In fact, the Supreme Court has repeatedly emphasized -- both before, in, and after *Boerne* -- that the nature of the enforcement power conferred by § 5 of the Fourteenth Amendment is "virtually identical" to that conferred by § 2 of the Fifteenth Amendment. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001); *see also Boerne*, 521 U.S. at 518 (comparing Congress's Fourteenth Amendment enforcement authority to its "parallel power to enforce the provisions of the Fifteenth Amendment"); *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966) (explaining that "Section 2 of the Fifteenth Amendment grants Congress a similar power to [that of § 5 of the Fourteenth Amendment]," as both sections permit Congress to "enforce by 'appropriate legislation' the provisions of that Amendment"); *Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 742 n.1, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003) (Scalia, J., dissenting) (noting that "Section 2 of the Fifteenth Amendment is practically identical to § 5 of the Fourteenth Amendment"); *Lopez*, 525 U.S. at 294 n.6 (Thomas, J., dissenting) (explaining that while "*City of Boerne* involved the Fourteenth Amendment enforcement power, we have always treated the nature of the enforcement powers conferred by the Fourteenth and

Fifteenth Amendments as coextensive"); *City of Rome*, 446 U.S. at 208 n.1 (Rehnquist, J., dissenting) (stating that "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive").

Hence, when the Supreme Court in *Katzenbach* first examined whether Congress's enactment of the Voting Rights Act exceeded its power to "enforce" the Fifteenth Amendment "by appropriate legislation," the Court looked for guidance to *Ex Parte Virginia* -- a case involving Congress's parallel enforcement power under § 5 of the Fourteenth Amendment. *See Katzenbach*, 383 U.S. at 326-27 (*citing Ex Parte Virginia*, 100 U.S. 339, 345-46, 25 L. Ed. 676 (1879)). In *Ex Parte Virginia*, the Supreme Court assessed the nature of Congress's power under the enforcement clauses of the Thirteenth and Fourteenth Amendments,[9] and explained that "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex Parte Virginia*, 100 U.S. at 346. *Quoting* this language, the Supreme Court in *Katzenbach* rejected the contention that § 2 of the Fifteenth Amendment permits Congress to "do no more

9. Section 1 of the Thirteenth Amendment abolishes slavery, and § 2 provides, in terms identical to those in § 2 of the Fifteenth Amendment, that "Congress shall have power to enforce this article by appropriate legislation." *See* U.S. CONST. amend. XIII.

than to forbid violations of the Fifteenth Amendment in general terms." 383 U.S. at 327. Rather, the Court explained, § 2 of the Fifteenth Amendment -- like § 5 of the Fourteenth Amendment -- provides Congress with "full remedial powers" to enforce the Amendment by "appropriate" legislation; that is, to pass legislation to make the Amendment's protections "'fully effective.'" *See Id.* at 326 (*quoting Ex Parte Virginia*, 100 U.S. at 345).

According to the Court in *Katzenbach*, "[t]he basic test to be applied in a case involving s[ection] 2 of the Fifteenth Amendment" is the same as that to be applied "in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *Id.* As Chief Justice Marshall said in *McCulloch v. Maryland*: "'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" *Id.* (*quoting McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 421, 4 L. Ed. 579 (1819)).

After setting forth Congress's Fifteenth Amendment enforcement authority in these broad terms, the Supreme Court in *Katzenbach* proceeded to engage in a careful analysis of whether Section 5 and Section 4(b) constituted "appropriate" enforcement legislation, as that word is defined in *McCulloch v. Maryland* and *Ex Parte Virginia*. With respect to the coverage formula in Section 4(b), the Court acknowledged that Congress had confined the Act's most stringent remedies -- such as preclearance -- to "a small number of States and political subdivisions which in

most instances were familiar to Congress by name." *See Katzenbach*, 383 U.S. at 328. The decision to target only certain sections of the country and not others was based on "evidence of actual voting discrimination" in these areas, and the Court found it "acceptable" for Congress to "limit its attention to the geographic areas where immediate action seemed necessary." *Id.* at 328-29. "Legislation need not deal with all phases of a problem in the same way," the Court explained, "so long as the distinctions drawn have some basis in practical experience." *Id.* at 331. Because the distinctions drawn by the coverage formula in Section 4(b) had such a basis, the Court found that the formula was "rational in both practice and theory." *See Id.* at 330.

The Court also concluded that Section 5's preclearance requirement constituted a "permissibly decisive" response to the problem of states "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 335. Given the "voluminous" legislative record amassed by Congress during its consideration of the Act, *Id.* at 308, which contained ample evidence of "obstructionist tactics" in covered jurisdictions, *Id.* at 328, the Court noted that "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself," thereby justifying the need for a prophylactic measure like Section 5, *see Id.* at 334-35. The Court determined, then, on the basis of the evidence of voting discrimination in the record, that Congress had "exercised its powers under the Fifteenth Amendment in an appropriate manner" when it enacted Section 5 and Section 4(b). *Id.* at 324.

The same year that it decided *Katzenbach*, the Supreme Court had occasion to re-examine the nature of Congress's enforcement authority under § 5 of the Fourteenth Amendment, and in so doing made clear that the test for reviewing exercises of Congress's Fourteenth and Fifteenth Amendment enforcement powers is the same. *See Katzenbach v. Morgan*, 384 U.S. at 651.[10] In *Katzenbach v. Morgan*, the Supreme Court addressed a Fourteenth Amendment challenge to Section 4(e) of the Voting Rights Act, which guaranteed the right to vote to persons educated in Puerto Rico who satisfied certain educational criteria but who could not read or write English. Registered voters in New York challenged Section 4(e) insofar as it forbid New York from enforcing its state election laws, which made the ability to read and write English a precondition to voting. *See Id.* at 643-45. Rejecting this challenge, the Supreme Court explained that § 5 of the Fourteenth Amendment is a "positive grant of legislative power," which permits Congress to "enforce" the Amendment by enacting legislation to prevent state action even if that state action would not otherwise be "prohibited by the provision of the Amendment that Congress sought to enforce." *Id.* at 648. Because there was a "basis" upon which Congress could have found that New York's application of its English literacy requirement to deny the right to vote to non-English speakers educated in Puerto Rico "constituted invidious discrimination in violation of the *Equal Protection Clause*," *Id.* at 656, Congress was entitled to respond to this state-sponsored

10. The Court uses the shorthand "*Katzenbach*" to refer to *Katzenbach v. South Carolina*, but employs the full case name for *Katzenbach v. Morgan*.

discrimination by passing Section 4(e), even assuming that Section 4(e) would prevent some applications of New York's state election law that did not, in and of themselves, violate the substantive provisions of the Fourteenth Amendment, *see Id.* at 648.

The Supreme Court in *Katzenbach v. Morgan* explained the nature of Congress's Fourteenth Amendment enforcement power with reference to South Carolina v. *Katzenbach*, noting that § 2 of the Fifteenth Amendment "grants Congress a similar power to enforce by 'appropriate legislation' the provisions of that Amendment; and we recently held . . . that '[t]he basic test to be applied in a case involving s[ection] 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States'": namely, the test identified in *McCulloch v. Maryland. Id.* at 651 (internal citations omitted). Hence, the Court confirmed, the meaning of "appropriate," as stated in *McCulloch v. Maryland* and *Ex Parte Virginia*, governs Congress's enforcement authority under both § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. *See Id.*

When the Supreme Court next addressed a facial challenge to the constitutionality of Section 5 in *City of Rome*, it again held that *McCulloch v. Maryland* and *Ex Parte Virginia* provide the basic framework for assessing whether legislation is "appropriate" under § 2 of the Fifteenth Amendment. *See City of Rome*, 446 U.S. at 174-75. The Court also elaborated on its discussion in *Katzenbach v. Morgan* by describing the precise nature

of Congress's authority to "enforce" the Reconstruction Amendments. According to the Court, "even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination," *Id.* at 173, Congress may, under the authority vested in it by § 2, "prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination," *Id.* at 176.

As one scholar has pointed out, this "reference to 'past discrimination' suggests that Congress is authorized to prohibit [discriminatory] effects only if the Court believes it is reasonable to infer discriminatory *purposes* in the past." Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 80 (2003). In other words, *City of Rome* implies that Congress may exercise its § 2 enforcement powers by prohibiting electoral practices that do not themselves violate § 1 of the Fifteenth Amendment only as a means of "attacking the perpetuation of earlier, purposeful racial discrimination." *See City of Rome*, 446 U.S. at 177 (describing the Supreme Court's holding in *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970)) (emphasis added). But *City of Rome* made clear that when Congress does legislate pursuant to § 2 of the Fifteenth Amendment in response to earlier, purposeful voting discrimination, such legislation need only be "'appropriate' as that term is defined in *McCulloch v. Maryland* and *Ex Parte Virginia*." *Id.* at 177. The Supreme Court in *City of Rome* thus framed the specific question before it as whether, in re-authorizing Section 5 in 1975, "Congress could *rationally* have concluded

that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Id.* (emphasis added).

To answer this question, the Court looked to the evidence upon which Congress had relied in deciding to reauthorize Section 5 in 1975. *See Id.* at 180-82. The Court noted that Congress had given "careful consideration to the propriety of readopting § 5's preclearance requirement" and had considered evidence such as racial disparities in voter registration, the number of minority elected officials, and "the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General." *Id.* at 181. After considering such evidence, Congress "not only determined that § 5 should be extended for another seven years," but gave Section 5 a "ringing endorsement," explaining that Section 5 had been largely responsible for the increased minority political participation in the ten years since the Voting Rights Act's passage, and for ensuring that such progress was not "'destroyed through new procedures and techniques.'" *Id.* (*quoting* H.R. Rep. 94-196, at 10-11). *Citing* Congress's finding that Section 5 was "necessary to preserve the 'limited and fragile' achievements of the Act and to promote further amelioration of voting discrimination," the Court found that, based on the evidence in the congressional record, the 1975 extension of Section 5 "was plainly a constitutional method of enforcing the Fifteenth Amendment." *Id.* at 182.

B. *Boerne's* Refinement of *Katzenbach* and *City of Rome*

Then came *City of Boerne*. There, the Supreme Court addressed a challenge to the Religious Freedom Restoration Act ("RFRA"), a statute that Congress had enacted pursuant to § 5 of the Fourteenth Amendment, and which prohibited states from imposing a "substantial burden" on the free exercise of religion unless they could show that the burden was (1) in furtherance of a "compelling" governmental interest; and (2) the "least restrictive means" of furthering that interest. 521 U.S. at 515-16. The Court in *Boerne* began its analysis of RFRA by *quoting* the familiar passage from *Ex Parte Virginia* on the meaning of "appropriate" § 5 enforcement legislation. *See Id.* at 517-18. After noting that *Ex Parte Virginia* had only outlined "the scope of Congress' § 5 power in . . . broad terms," *Id.* at 517, the Court proceeded to expand on these "broad terms" by confirming what *Katzenbach v. Morgan* and *City of Rome* had already made clear: namely, that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518.

But the Court in *Boerne* went on to explain that Congress's power under § 5 is not unlimited. "Legislation which alters the meaning of the *Free Exercise Clause* cannot be said to be enforcing the Clause," the Court said, since Congress "has been given the power 'to enforce,'" but "not the power to determine what

constitutes a constitutional violation." *Id.* at 519. The Court acknowledged that there is a fine line "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," and it explained that while Congress "must have wide latitude in determining where [the line] lies," ultimately it is for the Court to decide whether Congress has overstepped the bounds of its authority by attempting to "decree the substance of the Fourteenth Amendment's restrictions on the States." *Id. at 519-20.* Hence, the Court concluded, in order for legislation to be upheld as a valid exercise of Congress's § 5 power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*

But in making this statement, the Supreme Court in *Boerne* did not purport to overrule *Katzenbach*, nor did it seek to distinguish between the standards of review to be applied in the Fourteenth and Fifteenth Amendment enforcement contexts. To the contrary, the Court cited *Katzenbach* as a paradigmatic example of a case that had "revolve[d] around the question whether § 5 legislation can be considered remedial," *see Boerne*, 521 U.S. at 525 (*citing Katzenbach*, 383 U.S. at 308) -- despite the fact that *Katzenbach* involved § 2 legislation, not § 5 legislation. The *Boerne* Court also discussed *Katzenbach v. Morgan* and *City of Rome* in great detail, *See, e.g., Boerne* 521 U.S. at 527-28, 533, without providing any indication that it was departing from the method of analysis it had used to assess Congress's exercise of its Fourteenth and Fifteenth Amendment enforcement authority in

those cases. Instead, the Supreme Court in *Boerne* cited *Katzenbach v. Morgan* and *City of Rome* as illustrative of the principle that Congress may, consistent with § 5, enact "strong remedial and preventative measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *See Boerne*, 521 U.S. at 526. Because it had previously upheld challenged provisions of the Voting Rights Act only on the basis of actual evidence of unconstitutional voting discrimination by states, *see Id.* at 526-28, the Court found no reason to view its Voting Rights Act jurisprudence under § 2 of the Fifteenth Amendment as inconsistent with the pronouncement that "[t]he appropriateness of remedial measures must be considered in light of the evil presented," *Id.* at 530 (*citing Katzenbach*, 383 U.S. at 308).

Applying this standard to RFRA, however, the Court decided that RFRA was "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532. In reaching this conclusion, the Court found a comparison between RFRA and the Voting Rights Act to be "instructive." *Id.* at 530. Whereas the Voting Rights Act had been passed on the basis of an extensive legislative record replete with instances of state-sponsored voting discrimination in violation of the Fifteenth Amendment, RFRA's legislative record lacked "examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* Indeed, the record contained no documented episodes of religious persecution that had occurred in the past 40

years. *Id.* And unlike the Voting Rights Act -- which was limited both in terms of the "discrete class of laws" that it affected (voting laws) and in the states that it covered (those where "constitutional violations were most likely") -- RFRA's "[s]weeping coverage" displaced laws in every state, "of almost every description and regardless of subject matter." *Id.* at 532. Finally, while Section 5 of the Voting Rights Act was enacted as a temporary provision, with a procedure by which jurisdictions could bail out of its requirements, RFRA had "no termination date or termination mechanism." *Id.* at 532-33.

The Supreme Court in *Boerne* made clear that a statute need not contain these kinds of limiting features in order to be sustained as congruent and proportional § 5 legislation. *Id.* at 533. But it explained that where "a congressional enactment pervasively prohibits *constitutional* state action in an effort to remedy or to prevent *unconstitutional* state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Id.* (emphasis added). Given the lack of any such limitations in RFRA, together with the absence of any recent documented instances of religious persecution in the legislative record, the Court in *Boerne* held that "RFRA cannot be considered remedial, preventative legislation." *Id.* at 532. "Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." *Id.* at 534-35.

After *Boerne*, the Supreme Court continued to refine the congruence and proportionality framework in a

series of cases addressing whether Congress had validly abrogated state sovereign immunity pursuant to § 5 of the Fourteenth Amendment. *See Nw. Austin I*, 573 F. Supp. 2d at 240-41. In the first of these cases, the Court struck down the Patent and Plant Variety Protection Remedy Clarification Act, which subjected states to patent infringement suits, on the ground that Congress had failed to identify any "pattern of patent infringement by the States, let alone a pattern of constitutional violations" that could justify the Act as an appropriate remedial measure under § 5. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999). Instead, Congress appeared to have enacted the legislation only in "response to a handful of instances of state patent infringement that do not necessarily violate the Constitution." *Id.* at 645-46. The Act also did not contain any of the "various limits that Congress [had] imposed in its voting rights measures," which the Court deemed "particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Id.* at 647. Accordingly, given both the insufficient historical record of constitutional violations and the broad scope of the Act's coverage, the Court found "it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment." *Id.*

The following year in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), the Court similarly held that Congress's abrogation of state sovereign immunity in the Age Discrimination in Employment Act, which permitted suits for money

damages against state employers alleged to have discriminated on the basis of age, exceeded Congress's authority under § 5. While reaffirming that "Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct" than that which the Amendment itself proscribes, 528 U.S. at 81, the Court nonetheless found that Congress had exceeded this enforcement power by failing to identify "any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation," *Id.* at 88.

Then, in *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001), the Court again applied congruence and proportionality review to strike down § 5 enforcement legislation, finding that the provision of Title I of the Americans with Disabilities Act ("ADA") that permitted individuals to sue states for money damages exceeded Congress's Fourteenth Amendment enforcement authority. *See* 531 U.S. at 374. As in *Boerne*, the Supreme Court in *Garrett* compared the legislative record amassed by Congress in support of the ADA with that considered by Congress in enacting the Voting Rights Act. Whereas Congress in passing the Voting Rights Act had documented "a marked pattern of unconstitutional action by the States," *Id.*, Congress in enacting the ADA had cited only "half a dozen examples" of state-sponsored discrimination against the disabled, *Id.* at 369. These incidents fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Id.* at 370. The Court also

contrasted the ADA's sweeping nation-wide mandate "for the elimination of discrimination against individuals with disabilities" with the Voting Rights Act's more "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Id.* at 373 (internal quotation marks and citation omitted). This comparison of the ADA to the Voting Rights Act made clear "[t]he ADA's constitutional shortcomings." *Id.*

But after using congruence and proportionality review to strike down four separate pieces of § 5 enforcement legislation, the Court most recently held that two statutes enacted pursuant to Congress's Fourteenth Amendment enforcement authority were, in fact, congruent and proportional. *See Hibbs*, 538 U.S. at 724; *Tennessee v. Lane*, 541 U.S. 509, 533-34, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). In *Hibbs*, the Court upheld the constitutionality of the family-care provision of the Family and Medical Leave Act ("FMLA"), and in *Lane* the Court found that Title II of the ADA -- as applied to claims by the disabled alleging that they had been denied access to the courts because of their disability -- constituted a valid exercise of Congress's § 5 enforcement power. *See Hibbs*, 538 U.S. at 724; *Lane*, 541 U.S. at 533-34. Significantly, both statutes sought to protect a class or right that receives heightened judicial scrutiny: namely, "suspect gender classifications (the FMLA) and the fundamental right of access to the courts (ADA Title II)." *See Nw. Austin I*, 573 F. Supp. 2d at 241. As a result, "'it was easier for Congress to show a pattern of state constitutional violations' than in *Garrett*

or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review." *Lane*, 541 U.S. at 529 (*quoting Hibbs*, 538 U.S. at 736). Given the nature of the classification at issue, the Court in *Hibbs* compared the showing needed to uphold the FMLA to that necessary to sustain the Voting Rights Act. Congress was "similarly successful" in demonstrating a pattern of unconstitutional conduct in the voting rights context, the *Hibbs* Court explained, because racial classifications, like gender classifications, "are presumptively invalid," so "most of the States' acts of race discrimination violated the Fourteenth Amendment." *Hibbs*, 538 U.S. at 736.

After *Hibbs*, *Lane*, and the other cases that have applied and clarified *Boerne*, it is now clear that the standard for reviewing Congress's enactment of remedial, prophylactic legislation under § 5 of the Fourteenth Amendment involves three steps. *See Nw. Austin I*, 573 F. Supp. 2d at 268-69. First, the court must "identify the constitutional right or rights that Congress sought to enforce" when it enacted the challenged legislation. *Lane*, 541 U.S. at 522; *see also Garrett*, 531 U.S. at 365 (explaining that the court must "identify with some precision the scope of the constitutional right at issue"); *Fla. Prepaid*, 527 U.S. at 652 (noting that "the first step of the inquiry . . . is to determine what injury Congress sought to prevent or remedy with the relevant legislation"). Second, it must "examine whether Congress identified a history and pattern of unconstitutional [conduct] by the States" that justified the enactment of the remedial measure. *Garrett*, 531 U.S. at 368. Finally, the court must decide whether the challenged legislation

constitutes "an appropriate response" to the identified "history and pattern" of unconstitutional conduct, *Lane*, 541 U.S. at 530 -- in other words, whether is it "congruent and proportional to the targeted violation," *Garrett*, 531 U.S. at 374; *Hibbs*, 538 U.S. at 737.

C. *Boerne* Governs Challenges to Congress's Enforcement Power Under Both § 2 of the Fifteenth Amendment and § 5 of the Fourteenth Amendment

The only remaining question, then, is whether, notwithstanding the Court's articulation and refinement of the congruence and proportionality framework in the context of challenges to Congress's enforcement power under § 5 of the Fourteenth Amendment, a different standard of review nonetheless governs Congress's exercise of its "parallel power" to enforce § 2 of the Fifteenth Amendment. Although *Boerne* and "the cases that define the limits of Congress's enforcement power have focused primarily on that power as granted by Section 5 of the Fourteenth Amendment," this Court agrees with the Second Circuit's determination that there is "no significant reason to conclude that the scope of the enforcement power under the two Amendments is different." *See Hayden*, 449 F.3d at 331 n.5.

To begin with, the language of the enforcement clauses of the Fourteenth and Fifteenth Amendments is almost identical, as they both reference Congress's ability to enforce the Amendment through the enactment of "appropriate" legislation. *See Id.*; *compare* U.S. CONST.

amend. XIV, § 5 ("Congress shall have the power to enforce, by appropriate legislation, the provisions of this article") *with* U.S. CONST. amend. XV, § 2 ("Congress shall have power to enforce this article by appropriate legislation"). Moreover, the two Amendments have similar origins and histories. *See, e.g.*, Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 725 n.5 (1998) (explaining that "because the two Amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the [*Boerne*] analysis surely carries over" to the Fifteenth Amendment context). And perhaps most importantly, the Supreme Court has expressly "equated Congress's enforcement power under the two Amendments" on a number of occasions, both before and after *Boerne*. *See Hayden*, 449 F.3d at 331 n.5 (citing *Garrett*, 531 U.S. at 373 n.8; *Boerne*, 521 U.S. at 517-18; *Katzenbach v. Morgan*, 384 U.S. at 650-51).

Far from implying that the Fourteenth and Fifteenth Amendments were intended to be "'enforced' in different ways," *Hayden*, 449 F.3d at 331 n.5, *Boerne* itself is also best read to mean that the nature of Congress's enforcement powers under the two Amendments is the same. In *Boerne*, the Supreme Court relied on the Voting Rights Act as upheld in *Katzenbach* and *City of Rome* as a paradigmatic example of legislation that satisfies the congruence and proportionality test, contrasting the Voting Rights Act with RFRA in order to illustrate RFRA's constitutional deficiencies. *See, e.g.*, 521 U.S. at 518, 525-26, 530-33. Shelby County is correct to point out that *Boerne*'s

repeated reliance on *Katzenbach* and *City of Rome* -- both of which were decided under § 2 of the Fifteenth Amendment -- would be "misplaced," *see* Pl.'s Mot. at 19, to say the least, if § 5 enforcement legislation "were to be judged against an entirely different constitutional metric" than that applicable to § 2 enforcement legislation, *see* Pl.'s Reply at 12; *see also* Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1191 (2001) (stating that *Boerne* "strongly suggests that Section 2 measures designed to enforce the Fifteenth Amendment are subject to stringent congruence and proportionality analysis as well"); Mark A. Posner, *Time is Still On its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 89 (2006) (noting that *Boerne* "strongly intimated that the same analysis applies when assessing Congress's authority under the two Amendments to enact prophylactic legislation").

Boerne's characterization of *Katzenbach* as a case that "revolve[d] around the question whether *§ 5 legislation* can be considered remedial," *see Boerne*, 521 U.S. at 525 (emphasis added), also cannot be reconciled with the contention that different modes of analysis govern judicial review of § 5 and § 2 enforcement legislation. Again, this is because the Court in *Katzenbach* upheld the challenged provisions of the Voting Rights Act not as a valid exercise of Congress's power under § 5 of the Fourteenth Amendment, but as "a valid means of carrying out the commands of the Fifteenth Amendment."

Katzenbach, 383 U.S. at 337. Indeed, the Supreme Court in *Katzenbach* never even mentioned § 5 of the Fourteenth Amendment. To the extent that *Katzenbach* "revolve[d] around" the issue of what constitutes appropriate § 5 legislation, then, it could only be because the test for determining the validity of § 5 legislation is the same as that for determining the validity of § 2 legislation.

It is also significant that the Supreme Court in *Boerne* did not purport to overrule *Katzenbach v. Morgan*, or the half-century of precedent that has treated the nature of the enforcement power conferred by the Fourteenth and Fifteenth Amendments as coextensive. *See Katzenbach v. Morgan*, 384 U.S. at 651 (explaining that *McCulloch v. Maryland* and *Ex Parte Virginia* provide the definition of what constitutes "appropriate" enforcement legislation in both the Fifteenth and Fourteenth Amendment contexts). The Supreme Court in *Boerne* began its analysis by *quoting Katzenbach v. Morgan*'s acknowledgment that "'§ 5 is 'a positive grant of legislative power.'" *Boerne*, 521 U.S. at 517 (quoting *Katzenbach v. Morgan*, 384 U.S. at 651). And it then recited the traditional articulation of "the scope of Congress' § 5 power" as laid out in *Ex Parte Virginia*, thereby suggesting that the congruence and proportionality framework was a mere elaboration of those "broad terms." *See Boerne*, 521 U.S. at 517-18.

Under *Katzenbach* and *City of Rome*, *Ex Parte Virginia*'s definition of "appropriate" legislation under the Thirteenth and Fourteenth Amendments also governs what constitutes "appropriate" legislation under the Fifteenth Amendment. *See Katzenbach*, 383 U.S. at 326;

City of Rome, 446 U.S. at 174-75. Hence, the Supreme Court's elaboration of *Ex Parte Virginia* in *Boerne* would seem to apply just the same in the Fifteenth Amendment context, at least in the absence of any indication that *Katzenbach* and *City of Rome* were incorrect to rely on a § 5 case in delineating the scope of Congress's § 2 power. But the Supreme Court in *Boerne* gave no such indication. In fact, it suggested just the opposite, by itself relying almost exclusively on § 2 cases in delineating the scope of Congress's § 5 power. *See* Karlan, 39 WM. & MARY L. REV. at 725 n.5 (noting that "most of the cases Justice Kennedy cited relied on Congress's use of its enforcement power under Section 2 of the Fifteenth Amendment").

The Supreme Court's failure in *Boerne* to announce any departure from *Katzenbach* and *City of Rome* can be explained by the fact that the congruence and proportionality test does not constitute a novel alternative to the standard of review employed in those earlier cases; rather, it reflects a more detailed articulation of the same standard that the Court has always applied to assess Congress's exercise of its Fifteenth Amendment enforcement power. In *Katzenbach*, the Court began with the first step of the *Boerne* framework, determining "what injury Congress sought to prevent or remedy" when it enacted the challenged provisions of the Voting Rights Act. *Fla. Prepaid*, 527 U.S. at 652; *see Katzenbach*, 383 U.S. at 308 (explaining that the Act was designed "to banish the blight of racial discrimination in voting"). The Court then proceeded to the second step of *Boerne*, looking to whether Congress had "identified a history and pattern of unconstitutional [conduct] by the States,"

Garrett, 531 U.S. at 368. In so doing, the Supreme Court made clear that the "constitutional propriety" of the Act "must be judged with reference to the historical experience it reflects," *Katzenbach*, 383 U.S. at 308, and it pointed to historical evidence of state-sponsored voting discrimination in the legislative record to justify the need for the Act, *id.* at 310 (describing states' use of tests and devices that were "specifically designed to prevent Negroes from voting"). Although the Court in *Katzenbach* did not use the words "congruent" and "proportional" when assessing the challenged provisions of the Act, it did closely analyze whether Section 5 and Section 4(b) constituted "an appropriate response" to the "history and pattern" of unconstitutional voting discrimination that Congress had identified, *see Lane*, 541 U.S. at 530. So, too, did the Court in *City of Rome* engage in a *Boerne*-like analysis, upholding the 1975 reauthorization of Section 5 only after describing the evidence of voting discrimination upon which Congress had relied in reauthorizing the Act's temporary provisions. *See City of Rome*, 446 U.S. at 182 (finding that "at least another 7 years of statutory remedies" was "necessary to counter the perpetuation of 95 years of pervasive voting discrimination").

To the extent that the analysis undertaken in *Katzenbach* and *City of Rome* was somewhat less rigorous than that applied in cases since *Boerne*, that may only be a reflection of the fact that where a remedial statute is designed to protect a fundamental right or to prevent discrimination based on a suspect classification, it is "easier for Congress to show a pattern of state constitutional violations," as required at the second step

of *Boerne*. *See Hibbs*, 538 U.S. at 736; *Lane*, 541 U.S. at 529. Because Section 5 seeks to protect the right to vote -- a "fundamental political right," *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) -- and to prohibit discrimination based on race -- an "immediately suspect" classification, *see Johnson v. California*, 543 U.S. 499, 509, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) -- the showing needed to substantiate Section 5 was easier to make in *Katzenbach* and *City of Rome* than in *Kimel* or *Garrett*, which involved classifications subject to less stringent levels of constitutional scrutiny. *See Nw. Austin I*, 573 F. Supp. 2d at 241.

The Attorney General relies heavily on *Lopez*, a Section 5 case decided shortly after *Boerne*, in arguing that congruence and proportionality review does not govern Shelby County's challenge to the constitutionality of Section 5. *See* Def.'s Reply in Supp. of Def.'s Mot. for Summ. J. [Docket Entry 67] at 6. But such reliance is unwarranted. In *Lopez*, the Supreme Court examined an as-applied challenge to Section 5 brought by Monterey County, California, a political subdivision covered by Section 4(b). *See Lopez*, 525 U.S. at 282. Monterey County alleged that Section 5 did not apply to its implementation of a voting change required by state law, since enactment of the change was non-discretionary and California -- the source of the change -- was not itself a covered jurisdiction subject to Section 5. *Id.* Rejecting this argument, the Court held that "the Act's preclearance requirements apply to measures mandated by a noncovered State to the extent that these measures will effect a voting change in a covered county." *Id.* at 269. The Court then briefly

addressed the plaintiff's contention that Section 5 was unconstitutional to the extent that it was interpreted to apply "to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere." *Id.* at 283. Citing *Katzenbach* and *City of Rome*, the Court explained that it had previously upheld Section 5 as a valid exercise of Congress's Fifteenth Amendment enforcement authority -- despite its "intrusion into areas traditionally reserved to the States" -- and that no different result was required just because Section 5 "is held to cover acts initiated by non-covered States." *Id.* The Court then referenced *Boerne* as having held that Congress may, under the Fourteenth Amendment, "intrude[] into legislative spheres of autonomy previously reserved to the States." *Id.* (quoting *Boerne*, 521 U.S. at 518). Nowhere in *Lopez* did the Supreme Court mention either "congruence and proportionality" or "rational basis" review, or purport to apply either standard to Section 5. To the extent that *Lopez* cuts in either direction, then, the Court regards it as reaffirming that *Katzenbach*, *City of Rome*, and *Boerne* are consistent in their evolving descriptions of Congress's enforcement power under the Fourteenth and Fifteenth Amendments.

Because the Court finds no basis upon which to differentiate between the standards of review to be applied in the Fourteenth and Fifteenth Amendment enforcement contexts, it need not decide whether the 2006 reauthorization of Section 5 and Section 4(b) constituted an exercise of Congress's Fourteenth or Fifteenth Amendment enforcement authority, or a kind of hybrid legislation enacted pursuant to both Amendments. Shelby

County correctly points out that to date "[t]he Fifteenth Amendment has been the exclusive basis for upholding Section 5." *See* Pl.'s Reply at 47, 49 n.15; *see also City of Rome*, 446 U.S. at 173; *Katzenbach*, 383 U.S. at 327; *Allen*, 393 U.S. at 588 (Harlan, J., concurring in part, dissenting in part) (explaining that "Congress consciously refused to base s[ection] 5 of the Voting Rights Act on its powers under the Fourteenth Amendment"). But in adopting the Act's protections for language minorities in 1975 and then extending them in 2006, Congress expressly relied on its Fourteenth Amendment enforcement power as well, since the Fifteenth Amendment speaks only of discrimination on the basis of "race." *See Nw. Austin I*, 573 F. Supp. 2d at 243-44; *see also* S. Rep. No. 94-295, at 814-15 (1975) (explaining that "[t]he Fourteenth Amendment is added as a constitutional basis for these voting rights Amendments" in order to "doubly insure the constitutional basis for the Act," even though the Department of Justice has taken the position that "'language minorities' are members of a 'race or color' group protected under the Fifteenth Amendment"); 42 U.S.C. § 1973aa-1a (finding that, because "citizens of language minorities have been effectively excluded from participation in the electoral process," it is necessary to prescribe remedial measures "to enforce the guarantees of the Fourteenth and fifteenth Amendments").

Some have argued that this reliance on the Fourteenth Amendment was unnecessary, and that Congress "could have relied solely on its Fifteenth Amendment authority" in extending the Act's protections to language minorities, since the Supreme Court has "strongly suggested" that

language minorities "qualify as racial groups" within the meaning of the Fifteenth Amendment. *See, e.g., Nw. Austin I*, 573 F. Supp. 2d at 243-44. Regardless, there are additional reasons to question whether Section 5 can still be viewed as pure Fifteenth Amendment enforcement legislation. Section 5 is designed to combat not only outright denials of the right to vote, but also vote dilution -- "defined as a regime that denies to minority voters the same opportunity to participate in the political process and to elect representatives of their choice that majority voters enjoy." *Bossier II*, 528 U.S. at 359 (Souter, J., concurring in part, dissenting in part). Although there is an argument that measures that dilute minorities' voting strength violate the Fifteenth Amendment's guarantee against "abridgment" of the right to vote, *see id.*, the Supreme Court thus far has "dealt with vote dilution only under the Fourteenth Amendment," *id.*, and has "never held that vote dilution violates the Fifteenth Amendment," *Bossier II*, 528 U.S. at 334 n.3. To the extent that the Attorney General seeks to rely on evidence of vote dilution to justify the 2006 reauthorization of Section 5, then, it might be necessary to find that Section 5 constitutes valid Fourteenth Amendment -- as opposed to Fifteenth Amendment -- enforcement legislation. But again, this issue need not be decided, in light of the Court's conclusion that *Boerne* provides the proper mode of analysis to assess challenges to Congress's enforcement power under both § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. Hence, irrespective of whether Section 5 is considered § 2 enforcement legislation, § 5

enforcement legislation,[11] or a kind of hybrid legislation enacted pursuant to both Amendments, it can only be upheld if it is "congruent and proportional" to the problem of unconstitutional racial discrimination in voting.

III. Application of *Boerne* to the 2006 Extension of Section 5

A. The Scope of the Constitutional Right At Issue

The first step in determining whether the 2006 extension of Section 5 passes muster under *Boerne* is "to identify with some precision the scope of the constitutional right at issue." *See Garrett*, 531 U.S. at 365; *see also Lane*, 541 U.S. at 522. Where a statute is designed to protect a fundamental right or to prevent discrimination based on a suspect classification, it is "easier for Congress to show a pattern of state constitutional violations," as required at the second step of the *Boerne* analysis. *See Hibbs*, 538 U.S. at 736. In other words, Congress is more likely to be able to identify unconstitutional state action

11. In *Hibbs*, the Supreme Court noted that it had previously upheld "certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' § 5 power, including the literacy test ban and preclearance requirements for changes in States' voting procedures." *Hibbs*, 538 U.S. at 737-38. In support of this proposition, however, the Supreme Court cited only one case that dealt with preclearance requirements, and that case -- *Katzenbach* -- upheld Section 5 as a valid exercise of Congress's § 2 power, not its § 5 power. *See id.* (citing *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828; *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L. Ed. 2d 272; *Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769).

justifying remedial, prophylactic enforcement legislation when it seeks to protect against discrimination based on a classification like gender, "which triggers heightened scrutiny," *see Hibbs*, 538 U.S. at 736, than when it seeks to protect against discrimination based on a trait such as disability, which "incurs only the minimum 'rational-basis' review," *see Garrett*, 531 U.S. at 366. This is because "the heightened level of constitutional scrutiny" that accompanies a suspect classification or a fundamental right means that "the historical problems" identified by Congress with respect to that class or right are more likely to amount to constitutional violations, and a history of constitutional violations is a necessary predicate for the enactment of remedial enforcement legislation under the Reconstruction Amendments. *See* Posner, 10 N.Y.U. J. LEGIS. & PUB. POL'Y at 87. It is for this reason that "the Court gives Congress significant leeway to craft broad remedial prohibitions when fundamental rights or protected classes are at stake." *Nw. Austin I*, 573 F. Supp. 2d at 270.

Significantly, Section 5 not only seeks to protect the right to vote -- a "fundamental political right, because [it is] preservative of all rights," *Yick Wo*, 118 U.S. at 370 -- but also seeks to protect against discrimination based on race, "the classification of which we have been the most suspect," *see M.L.B. v. S.L.J.*, 519 U.S. 102, 135, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (Thomas, J., dissenting). Because Section 5 is designed to protect "*both* the quintessential suspect classification (race) *and* the quintessential civil right (the franchise)," defendant-intervenors are correct that Congress acted at the

"zenith of its constitutional enforcement authority" when it reauthorized Section 5 in 2006. *See* Harris Def.-Ints.' Mot. for Summ. J. ("Harris Mot.") [Docket Entry 55] at 22; *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 176 (2007) (explaining that Congress "acted at the apex of its power to enforce the guarantees of the post-Civil War Amendments" when it enacted the Voting Rights Act). Just as in *Hibbs* and *Lane*, then, it is "easier for Congress to show a pattern of state constitutional violations" justifying the need for Section 5 than when Congress seeks to enforce rights subject to lesser levels of constitutional review, since "racial classifications and restrictions on the right to vote - like gender discrimination (*Hibbs*) and access to the courts (*Lane*) - are 'presumptively invalid.'" *Nw. Austin I*, 573 F. Supp. 2d at 270 (quoting *Hibbs*, 538 U.S. at 736).

B. Evidence of Unconstitutional Voting Discrimination in the Legislative Record

Having determined "the metes and bounds of the constitutional right[s] in question," the core issue is whether Congress succeeded in identifying "a history and pattern" of unconstitutional, state-sponsored voting discrimination to justify the 2006 reauthorization of Section 5. *See Garrett*, 531 U.S. at 368. Shelby County argues that the evidence of so-called "second generation barriers" to voting upon which Congress relied in 2006 when it re-authorized Section 5 -- including evidence of racially polarized voting, preclearance statistics, the continued filing of Section 2 cases, and the dispatch of

federal observers -- cannot justify the extension of Section 5, since "none of this evidence comes close to proving the existence of pervasive, intentional discrimination." *See* Pl.'s Mot. at 32. Instead, Shelby County contends, there are only two types of evidence that can be used to establish the constitutional necessity of Section 5: "(1) *direct* evidence of widespread, intentional voting discrimination and gamesmanship; and (2) registration data, turnout statistics, and the election of minorities to public office." Pl.'s Reply at 37 (emphasis added). This argument is flawed in several respects.

To begin with, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source." *Katzenbach*, 383 U.S. at 330. To be sure, there must be an established "pattern of constitutional violations" in order to justify remedial, prophylactic legislation like Section 5, *see Fla. Prepaid*, 527 U.S. at 640, and discriminatory intent is a necessary element of a Fourteenth or Fifteenth Amendment violation, *see, e.g.*, *City of Mobile*, 446 U.S. at 62, 67. Shelby County is therefore correct that some evidence of purposeful state-sponsored voting discrimination is needed to sustain Section 5. But Shelby County is incorrect to suggest that such evidence must be "direct." *See* Pl.'s Reply at 37. To the contrary, the Supreme Court has repeatedly recognized that unconstitutional "discriminatory intent need *not* be proved by direct evidence." *See Rogers v. Lodge*, 458 U.S. 613, 618, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982) (emphasis added) (citing *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229,

242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)). Rather, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. at 242. Moreover, as the Supreme Court in *Katzenbach* made clear, Congress is not bound by the standards of proof applicable in judicial proceedings "when it prescribes civil remedies against other organs of government under s[ection] 2 of the Fifteenth Amendment." *See Katzenbach*, 383 U.S. at 330. Because the discriminatory effects of a challenged practice can constitute "powerful evidence of the intent with which it was adopted or maintained," *Continuing Need* 186 (prepared statement of Pamela S. Karlan), this Court would be remiss if it were to limit its examination of the legislative record to judicially proven instances of discriminatory intent.

Shelby County's suggestion that circumstantial evidence of voting discrimination cannot justify the 2006 reauthorization of Section 5 is also belied by *City of Rome*. There, in upholding the 1975 extension of Section 5, the Supreme Court pointed to no recent "direct" evidence of intentional voting discrimination by covered jurisdictions. Instead, it found that Section 5's reauthorization was justified based on the country's history of intentional discrimination in voting, together with more recent circumstantial evidence of continued voting discrimination, which included evidence of racial disparities in voter registration and turnout, the number of minority elected officials, and the nature and number of Section 5 objections. *See City of Rome*, 446 U.S. at

181. Clearly, then, such evidence is -- at the very least -- relevant in assessing whether Section 5 remains "justified by current needs." *Nw. Austin II*, 129 S. Ct. at 2512.

Not only is Shelby County incorrect to suggest that Section 5 can only be sustained on the basis of recent "direct" evidence of intentional voting discrimination, but it is also wrong to suggest that Congress lacked such evidence when it reauthorized Section 5 in 2006. Having examined the 2006 legislative record, this Court -- like the three-judge court in *Nw. Austin I* -- has found ample evidence of purposeful voting discrimination by covered jurisdictions. The record describes one instance in which Mississippi state legislators opposed a redistricting plan that would have given African-Americans an increased opportunity to elect representatives of their choice, referring to the plan "on the House floor as the 'black plan' and privately as 'the n-plan.'" S. Rep. No. 109-295, at 14. On another occasion, Georgia's Chair of its House Reapportionment Committee told his colleagues in the Georgia legislature that he was uncertain as to the outcome of the state's redistricting process, "because the Justice Department is trying to make us draw nigger districts and I don't want to draw nigger districts." *See Busbee v. Smith*, 549 F. Supp. 494, 501 (D.D.C. 1982); *see also* H.R. Rep. No. 109-478, at 67; *Voting Rights Act: The Judicial Evolution of the Retrogression Standard, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 54 (Nov. 9, 2005) (prepared statement of Laughlin McDonald). In Shelby County's home state of Alabama, there were reports of voting officials "closing the doors on African-American voters

before the . . . voting hours were over," *see* 1 *Evidence of Continued Need* 182 (Nat'l Comm'n Report), and of white voting officials using racial epithets to describe African-American voters in the presence of federal observers, *see* S. Rep. No. 109-295, at 130, 132. In both Texas and South Carolina, witnesses described various kinds of intimidation and harassment being directed at blacks at the polls, *see* 1 *Evidence of Continued Need* 138 (Nat'l Comm'n Report); S. Rep. No. 109-295, at 307, 311, while one witness from Virginia testified that "hate literature" had been distributed in his neighborhood, threatening to "lynch" African-Americans who voted in particular ways, *see* S. Rep. No. 109-295, at 355. All these examples of intentional voting discrimination took place not in the 1950s or 1960s, but in the 1980s, 1990s, and 2000s.

Yet Shelby County argues that even this kind of evidence carries little weight, as it is merely "anecdotal" and such "anecdotal examples of intentional discrimination" cannot justify the continued operation of Section 5. *See* Pl.'s Reply 39. Again, this Court disagrees. As Professor Theodore Arrington explained in his 2006 testimony before the Senate Judiciary Committee, "[t]he examination of specific cases cannot be dismissed as mere anecdotes," because "anecdote is the singular of data." *Continuing Need* 26 (responses of Theodore S. Arrington to questions submitted by Senators Cornyn, Coburn, Leahy, Kennedy, and Kohl) ("Arrington Responses"); *see also Understanding the Benefits and Costs of Section 5 Pre-Clearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 19 (May 17, 2006) ("*Benefits and Costs*") (testimony of Drew S. Days III) (explaining that

to characterize "examples that are quite concrete . . . violations of the Voting Rights Act . . . as anecdotes, I think, is really to miss the point" since these "so-called anecdotes go right to the very heart of the matter"). Taken together, the large collection of anecdotes in the legislative record constitutes a valid form of data that must be assessed and weighed -- not dismissed as "isolated examples" of voting discrimination, *see* Pl.'s Reply at 39.

Anecdotes are by no means the only form of data in the legislative record that shows the continued existence of unconstitutional voting discrimination by covered jurisdictions. One study relied on by Congress found that 89% of the 209 objections to redistricting plans in the 1990s were based, at least in part, on discriminatory intent. *See Preclearance Standards* 181 (Peyton McCrary et al., "The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act") (hereinafter, "McCrary Study"). In other words, the Justice Department determined that discriminatory purpose was a motivating factor in no less than 186 of the redistricting plans proposed by covered jurisdictions during the 1990s. *Id.* at 177, 181. Another study in the legislative record identified 24 lawsuits involving more than one hundred instances of intentionally discriminatory conduct in voting since 1982. *See Impact and Effectiveness* 986 (Katz Study). Such evidence can hardly be dismissed as "anecdotal."

Ultimately, an assessment of all the evidence in the legislative record confirms that Congress was, in fact, responding to what it reasonably perceived to be a

continuing history and pattern of unconstitutional conduct by covered jurisdictions when it reauthorized Section 5 in 2006. Although some scholars voiced concern during the 2006 reauthorization hearings that "the Act has been so effective it will be hard to produce enough evidence of *intentional discrimination by the states* so as to justify the extraordinary preclearance remedy for another 25 years," *see, e.g.*, *Introduction to Expiring Provisions* 216 (prepared statement of Richard L. Hasen) ("Hasen Prepared Statement"); *id.* at 221 (prepared statement of Samuel Issacharoff) ("Issacharoff Prepared Statement"), Congress succeeded in doing just that. Despite the marked improvements in minority political participation over the last several decades -- due, in large part, to the effectiveness of the Voting Rights Act -- the 2006 legislative record reveals that, just as in 1975, "'a bleaker side of the picture yet exists.'" *City of Rome*, 446 U.S. at 180 (internal citations omitted).

This Court will begin, as did the three-judge court in *Nw. Austin I*, by examining the three types of evidence relied on by the Supreme Court in *City of Rome* when it upheld the 1975 reauthorization of Section 5 -- evidence of (1) racial disparities in voter registration (and turnout); (2) the number of minority elected officials; and (3) the nature and number of Section 5 objections. The Court will then assess the other types of evidence cited by Congress when it reauthorized Section 5 in 2006, including evidence of (4) more information requests; (5) Section 5 preclearance suits; (6) Section 5 enforcement actions; (7) Section 2 litigation; (8) the dispatch of federal observers; (9) racially polarized voting; and (10) Section 5's deterrent effect. In

the course of its review, the Court will call particular attention to the evidence of intentional, state-sponsored voting discrimination contained in the legislative record, keeping in mind that there must be "a history and pattern of unconstitutional [conduct] by the States" to justify a remedial, prophylactic measure like Section 5. *See Garrett*, 531 U.S. at 368.

1. Minority Voter Registration and Turnout

Shelby County points to the "dramatic rise in African-American voter registration and turnout rates" since 1965 as evidence that Section 5's protections are no longer constitutionally justified. *See* Pl.'s Reply at 44; *see also* Pl.'s Mot. at 25-26. It is true that there has been a substantial increase in black voter registration and turnout in the South since the Voting Rights Act was first enacted. *See* 1 *Evidence of Continued Need* 156-57 (Nat'l Comm'n Report). In 1964, the year before the Act's passage, the black voter registration rate was only 32% in Louisiana, 23% in Alabama, and a meager 6.7% in Mississippi. *Id.* In each of these states, the white voter registration rate was at least 50 percentage points higher than the corresponding rate for blacks. *See Katzenbach*, 383 U.S. at 313. Only ten years later, however, black voter registration rates in the South had already increased substantially -- no doubt as a result of the Act's prohibition of those tests and devices that had previously been employed to deny blacks access to the ballot. *See* S. Rep. No. 94-295, at 779. In Mississippi, for example, the percentage of blacks who were registered to vote multiplied almost tenfold in the seven years following the Act's passage, jumping from 6.7% in 1964 to 63.2% in 1971-1972. *Id.*

But in spite of these significant improvements, the Supreme Court in *City of Rome* remained troubled by the "[s]ignificant disparity" that "persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions." 446 U.S. at 180. In 1975, black voter registration rates in Alabama, Louisiana, and North Carolina continued to lag behind those of whites by as much as 23.6, 16, and 17.8 percentage points, respectively. *See* S. Rep. No. 94-295, at 779. Hence, while "the *City of Rome* Court acknowledged the dramatic progress the South had made since 1965," it still "found the evidence of continued discrimination sufficient to justify the 1975 extension" of the Act's temporary provisions. *See Nw. Austin I*, 573 F. Supp. 2d at 247. After *City of Rome*, then, the question is not whether there has been substantial improvement in minority voter registration and turnout since the Act's passage in 1965 (or even since the Act's reauthorization in 1975 or 1982), but whether, in spite of this substantial improvement, there remained significant racial disparities in voter registration and turnout when Congress reauthorized Section 5 in 2006. *See id.*

Just as in 1975, Congress in 2006 did find that significant disparities persisted between minority and non-minority voter registration and turnout in several jurisdictions subject to preclearance under Section 5. In Virginia, for example, Congress reported that the black voter registration rate in 2004 was almost 11 percentage points behind the corresponding rate for whites, while the racial disparity in voter turnout was even greater, with only 49% of blacks turning out to vote, as compared to

63% of whites. *See* H.R. Rep. No. 109-478, at 25. Similarly, in Texas, Congress found a 20 percentage point gap in voter registration between whites and Hispanics, *id.* at 29, with an even greater gap in voter turnout, *see* S. Rep. No. 109-295, at 11. Nationwide, the 2004 voter registration and turnout rates for Hispanics were approximately half the corresponding rates for whites, with only 34.3% of Hispanics registering and 28% turning out to vote, as compared to 67.9% and 60.3% for whites. *Id.* Although the difference between black and white voter registration and turnout rates was less significant, blacks nationwide still registered and turned out to vote at rates below those of whites in 2004, with only 64.3% of blacks registering, and 56.1% of blacks turning out to vote. *Id.*

Moreover, as the three-judge court in *Nw. Austin I* pointed out, these statistics understate the true disparities between minority and non-minority voter registration and turnout. That is because in computing the voter registration and turnout rates for whites, Congress included Hispanics. *See Nw. Austin I*, 573 F. Supp. 2d at 248. Given the low registration and turnout rates of Hispanic voters, the inclusion of these voters in the "white" category served to lower the overall white voter registration and turnout rates reported by Congress, thereby reducing the true disparity between black and white voter registration and turnout (as well as the disparity between Hispanic and white voter registration and turnout). *See id.*; *see also* Persily, 117 YALE L.J. at 197 (explaining that "once Hispanics are taken out of the white category the picture changes considerably"). For instance, Congress reported that in five of the 16 states

covered in whole or in part by Section 4(b) (California, Georgia, Mississippi, North Carolina, and Texas), voter registration and turnout in 2004 was *higher* among blacks than whites. *See* S. Rep. No. 109-295, at 11. But when black voter registration and turnout rates are compared to the rates for *non-Hispanic* whites, only one of these states (Mississippi) had higher black than white voter registration and turnout in 2004. *See Nw. Austin I*, 573 F. Supp. 2d at 248. In each of the other states covered in whole or in part by Section 4(b) for which comparative data was available, voter registration was lower for blacks than for non-Hispanic whites. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004 tbl. 4a., Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States, *available at* http://www.census.gov/population/www/socdemo/voting/cps2004.html (hereinafter, "2004 U.S. Census Bureau Report") (last visited September 19, 2011); *see also* S. Rep. No. 109-295, at 11 (relying on 2004 U.S. Census Bureau Report).[12]

In many covered states, the disparities between black and non-Hispanic white voter registration and turnout were stark: in both Arizona and Florida, for example,

12. In North Carolina and Alabama, for which the 2004 voter *registration* rate for blacks was lower than the rate for non-Hispanic whites, the voter *turnout* rate for blacks was higher than the rate for non-Hispanic whites. *See* 2004 U.S. Census Bureau Report. Aside from North Carolina, Alabama and Mississippi, all of the remaining 14 states covered in whole or in part by Section 4(b) had lower voter registration *and* turnout rates for blacks than for non-Hispanic whites. *See id.*

voter turnout rates among non-Hispanic whites were more than 20 percentage points higher than voter turnout rates among blacks, while in Louisiana and Texas, voter registration rates among non-Hispanic whites were more than five percentage points higher than voter registration rates among blacks. *See* 2004 U.S. Census Bureau Report. When the data for non-Hispanic whites are used, the disparities between black and white voter registration and turnout rates in Virginia become even more pronounced than those reported by Congress. Whereas Congress found that Virginia had a 10.8 percentage point racial disparity in voter registration and a 14 percentage point racial disparity in voter turnout, *see* H.R. Rep. No. 109-478, at 25, the racial disparities become 14.2 and 16.6 percentage points, respectively, when black voter registration and turnout rates are compared to the rates for non-Hispanic whites. *See* 2004 U.S. Census Report.

The 2004 disparities between Hispanic and white voter registration also become more severe when Hispanics are taken out of the "white" category. Although Congress reported a 20 percentage point gap in voter registration between Hispanics and whites in Texas in 2004, *see* H.R. Rep. 109-478, at 29, the gap increases to 32.1 percentage points when the rate for Hispanics is compared to the rate for non-Hispanic whites, *see* 2004 U.S. Census Report. Even greater gaps between Hispanics and non-Hispanic whites existed in other covered jurisdictions, with Hispanics in Arizona, California and Virginia registering in 2004 at rates more than 40 percentage points lower than the corresponding rates for non-Hispanic whites. *See id.* In Georgia and North Carolina, the racial disparities in

registration rates between Hispanics and non-Hispanic whites were the highest of any covered jurisdictions, with only 9.6% of Hispanics registering to vote in Georgia and 13.4% of Hispanics registering to vote in North Carolina, as compared to 68% and 73.2% of non-Hispanic whites, respectively -- in other words, there was almost a 60 percentage point gap in voter registration between Hispanics and non-Hispanic whites in both Georgia and North Carolina. *See id.*

As the three-judge court in *Nw. Austin I* explained, these disparities in voter registration and turnout are "comparable to the disparity the *City of Rome* Court called 'significant.'" 573 F. Supp. 2d at 248 (quoting *City of Rome*, 446 U.S. at 180). In *City of Rome*, the Court deemed as "significant" the 16, 17.8, and 23.6 percentage point disparities in voter registration rates then-existing between blacks and whites in Louisiana, North Carolina, and Alabama. *See* S. Rep. No. 94-295, at 779; *City of Rome*, 446 U.S. at 180. In 2004, there were 14.2, 17.8, and 19.2 percentage point disparities between black and white voter registration rates in Virginia, Arizona, and Florida, respectively (using the data for non-Hispanic whites). *See* 2004 U.S. Census Report. Moreover, there were far greater gaps between Hispanic and non-Hispanic white voter registration rates than even those held "significant" in *City of Rome*, with disparities nearing 60 percentage points in two covered jurisdictions. *See id.*

2. Minority Elected Officials

Shelby County next points to the dramatic increase in the number of African-American elected officials since

1965 as proof that Section 5 has outlived its usefulness. *See* Pl.'s Mot. at 27-28; Pl.'s Reply at 46-47. Again, however, the number of African-American elected officials had already risen substantially by the time that Section 5 was reauthorized in 1975. Whereas there were only 72 black elected officials in the 11 southern states when the Voting Rights Act was first passed in 1965, there were 963 black elected officials in the seven southern states subject to preclearance by 1974, including 68 black state legislators. *See* S. Rep. No. 94-295, at 780. Yet the Supreme Court in *City of Rome* did not regard this progress as fatal to the 1975 reauthorization of the Act's temporary provisions. Although the Court recognized that "the number of Negro elected officials had increased since 1965," *see City of Rome*, 446 U.S. at 180, the Court nonetheless heeded Congress's advice "not to be misled by sheer numbers." *See* S. Rep. No. 94-295, at 780. Instead, it examined the *nature* of the positions to which African-Americans had been elected, and found that "most held only minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions." *See City of Rome*, 446 U.S. at 181.

As of 2000, 35 African-Americans held statewide office -- certainly an improvement from 1975 -- but the percentage of statewide elected officials who were African-American (5%) was still significantly below the African-American proportion of the voting-age population (11.9%). *See* 1 *Evidence of Continued Need* 156-58 (Nat'l Comm'n Report); H.R. Rep. No. 109-478, at 33. The House Committee on the Judiciary found that in Mississippi,

Louisiana, and South Carolina -- all of which have been subject to preclearance since 1965 -- no African-American had ever been elected to statewide office. *See* H.R. Rep. No. 109-478, at 33. And in Alabama, only two African-Americans had ever been elected to statewide office as of 2006. *See* S. Rep. No. 109-295, at 133 (citing *Benefits and Costs* 97 (responses of Fred D. Gray to questions submitted by Senators Cornyn, Leahy, Coburn, and Kennedy) ("Gray Responses")).

Congress also heard evidence in 2006 that blacks were under-represented in state legislatures in the South based on their percentage of the population. Specifically, the House Committee on the Judiciary reported that in Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, blacks comprised 35% of the population, but only 20.7% of the state legislators. *See* H.R. Rep. 109-478, at 33. The House Committee on the Judiciary similarly found that the number of Latino elected officials had "failed to keep pace with [their] population growth." *See id.* at 33-34. Shelby County objects to the Court's reliance on such evidence in assessing the continued need for Section 5, arguing that "proportional representation is not a constitutional aim." *See* Pl.'s Reply at 46. That may be true. But in upholding the constitutionality of the 1975 reauthorization of Section 5 in *City of Rome*, the Supreme Court noted that the percentage of black elected officials in covered jurisdictions still fell short of their total percentage of the population. *See City of Rome*, 446 U.S. at 181. Following *City of Rome*, then, it is at least relevant that the percentage of minority elected officials continued to lag behind the minority percentage of the population when Congress reauthorized Section 5 in 2006.

3. Section 5 Objections

The Supreme Court in *City of Rome* cited "[t]he recent objections entered by the Attorney General . . . to Section 5 submissions" as a clear indication of the "*Continuing Need* for this preclearance mechanism." 446 U.S. at 181 (quoting H.R. Rep. No. 94-196, at 10-11). So, too, did Congress in 2006 point to the "hundreds of objections interposed" by the Attorney General in recent years as "[e]vidence of continued discrimination in voting" that warranted the reauthorization of Section 5. *See* 2006 Amendments § 2(b)(4)(A), 120 Stat. at 577. Shelby County, however, argues that objection-related data cannot sustain the constitutionality of Section 5 for two reasons. First, Shelby County points to the fact that the number of Section 5 objections "has become exceedingly small" over the past several decades, as the Attorney General objected to less than 1% of all preclearance submissions between 1982 and 2004. *See* Pl.'s Reply at 56 (internal citations omitted). Second, Shelby County contends that objections are not "legitimate proxies for the type of purposeful discrimination needed to reauthorize Section 5." Pl.'s Mot. at 32. Both of these contentions are somewhat misleading.

With respect to Shelby County's first argument, it is undeniable that the percentage of preclearance submissions resulting in an objection -- which has always been low -- has continued to decline steadily over time. *See* 1 *Evidence of Continued Need* 197 (Nat'l Comm'n Report). Whereas the Justice Department objected to 4.06% of all preclearance submissions from 1968 to 1972, the objection rate dropped in each successive five-year

interval between 1972 and 2002, reaching a low of .05% during the 1998 to 2002 time-frame. *See Introduction to Expiring Provisions* 219 (attachment to Hasen Prepared Statement). Since 2002, the objection rate has remained below 1%, with the Justice Department issuing only eight objection letters in response to 4,628 preclearance submissions in 2003, three objection letters in response to 5,211 preclearance submissions in 2004, and one objection letter in response to 4,734 preclearance submissions in 2005. *See* S. Rep. No. 109-295, at 13-14.

The decline in objection rates does not tell the full story, however. Notwithstanding the low rates of objections in recent years, the Justice Department still objected to more than 700 proposed voting changes between 1982 and 2006. *See* H.R. Rep. No. 109-478, at 21; S. Rep. No. 109-295, at 13. Moreover, the National Commission on the Voting Rights Act reported that more objections were interposed by the Attorney General between 1982 and 2004 than between 1965 and 1982, with nine of the 16 states covered by Section 4(b) receiving more objections after 1982 than before. *See* 1 *Evidence of Continued Need* 172-73 (Nat'l Comm'n Report); *see also* H.R. Rep. No. 109-478, at 21. To be sure, the two time-periods (1965 to 1982 and 1982 to 2004) are not equal in length, but it remains true that a substantial number of objections have been lodged since the 1982 reauthorization of Section 5. According to the National Commission on the Voting Rights Act, the Justice Department objected to an average of more than four preclearance submissions *per month* from August 1982 through December 2004. *Id.* at 172.

It is also significant to recall that a single objection can often affect thousands of voters, as objections are lodged not only in response to small-scale electoral changes such as the moving of a polling place, but also in response to large-scale changes such as state-wide redistricting plans. *See Continuing Need* 58 (Earls Responses). For example, in Alabama, the Justice Department objected to 39 preclearance submissions from 1982 through 2004, *see* 1 *Evidence of Continued Need* (Nat'l Comm'n Report) 259 (Map 5C), but these 39 objections included an objection to a congressional redistricting plan and several objections to county-wide redistricting plans, *see* 1 *History, Scope, & Purpose* 109-17 (appendix to statement of Bradley J. Schlozman, Complete Listing of Objections Pursuant to Sections 3(c) and 5 of the Voting Rights Act of 1965). In Louisiana, the Justice Department objected to 88 voting changes between 1982 and 2004, *see* 1 *Evidence of Continued Need* (Nat'l Comm'n Report) 264 (Map 5F), including *every* Louisiana House of Representatives redistricting plan that was submitted for preclearance. Indeed, from the passage of the Voting Rights Act in 1965 through its reauthorization in 2006, "[n]o Louisiana House of Representatives redistricting plan . . . has been precleared as initially submitted." *Introduction to Expiring Provisions* 152 (responses of Theodore M. Shaw to questions submitted by Senators Specter, Cornyn, Leahy, Kennedy, and Schumer) ("Shaw Responses").

Alabama and Louisiana are by no means unique among covered jurisdictions with respect to the receipt of objections in response to their redistricting plans. Even though redistricting plans accounted for only 2.4% of the

preclearance submissions from 1982 through 2004, they accounted for 16.4% of the Section 5 objections during that time-frame. *See* U.S. Commission on Civil Rights, *Voting Rights Enforcement & Reauthorization: The Department of Justice's Record of Enforcing the Temporary Voting Rights Act Provisions* 33 (May 2006), *available at* http://www.usccr.gov/pubs/051006VRAStatReport.pdf (last visited September 19, 2011). Given that many of these redistricting plans were state- or county-wide, it is perhaps unsurprising that Section 5 objections from 2000 through May 2006 have aided an estimated 663,503 minority voters. *Continuing Need* 58 (Earls Responses). According to data compiled by one expert, a mere nine objections to South Carolina preclearance submissions during this time-frame served to protect 96,143 African-American voters, while six objections to Texas preclearance submissions served to protect 359,978 African-American and Hispanic voters. *Id.* Irrespective of the decline in objection rates, then, there is strong evidence that Section 5 has remained a "vital prophylactic" tool in "protecting minority voters from devices and schemes that continue to be employed by covered States and jurisdictions." H.R. Rep. No. 109-478, at 21.

There are many plausible explanations for the recent decline in objection rates, aside from the optimistic one urged by Shelby County -- *i.e.*, that "the discriminatory agenda of the covered jurisdictions that existed in 1965 . . . no longer exists," Pl.'s Mot. at 29. To begin with, Section 5 submissions (and associated objections) are always greatest in the years immediately following redistricting cycles, which occur at the beginning of the decade. *See*,

e.g., *Continuing Need* 54 (Earls Responses); *Introduction to Expiring Provisions* 165-66 (Shaw Responses). It is therefore to be expected that the number of preclearance submissions -- and hence, objections -- would be low in a mid-decade year like 2005. *See Continuing Need* 54 (Earls Responses).

In addition, many have speculated that the Supreme Court's 2000 decision in *Bossier II* is at least partially responsible for the post-2000 decline in objection rates. *See, e.g., id.* at 54, 69-70; *Preclearance Standards* 14 (Posner Prepared Statement); 1 *Evidence of Continued Need* 198-99 (Nat'l Comm'n Report). As previously explained, the Supreme Court in *Bossier II* "held that discriminatory purpose under Section 5 no longer is co-extensive with the ordinary meaning of discriminatory purpose or with the meaning of discriminatory purpose under the Fourteenth and Fifteenth Amendments." *See Preclearance Standards* 12 (Posner Prepared Statement). Instead, in *Bossier II* the Supreme Court found that discriminatory purpose under Section 5 encompasses only "the intent to cause retrogression." *Id.* Therefore, in order to object to a voting change under the "purpose" prong of Section 5 after *Bossier II*, the Justice Department needed to find "not simply that the jurisdiction officials' purpose was to discriminate, but that it was to make the situation for minorities worse than before - i.e., that the officials intended to 'retrogress.'" 1 *Evidence of Continued Need* (Nat'l Comm'n Report) 198. The difficulty of proving that state officials intended to retrogress could explain the decline in purpose-based objections (and hence, total objections) in the wake of *Bossier II*. As one voting rights

lawyer has pointed out, if the *Bossier II* interpretation of "discriminatory purpose" had applied prior to 2000, it would have required the Justice Department to preclear even the redistricting plan proposed by the notorious Georgia "state legislator who openly declared his opposition to drawing a 'nigger district,'" because the plan -- though motivated by an unabashed intent to discriminate -- was not retrogressive. *Id.* at 199.

Other potential explanations for the recent decline in objection rates include under-enforcement of Section 5 by the Justice Department, which some former attorneys in the Voting Section believe to be the case, *see* 1 *Evidence of Continued Need* 197-98 (Nat'l Comm'n Report); *Continuing Need* 54 (Earls Responses) (suggesting that there have been "circumstances where the Department should have objected, but failed to"), or the possibility that the Justice Department has increasingly relied on "more information requests" and other types of informal communications with covered jurisdictions -- rather than objection letters -- as the primary means of preventing discriminatory voting changes, *Continuing Need* 57 (Earls Responses). Finally, even if the decline in objection rates does reflect increased compliance with the Voting Rights Act on the part of covered jurisdictions, as some have suggested, *See, e.g.*, 1 *History, Scope, & Purpose* 12 (prepared statement of Bradley J. Schlozman) (stating that the "tiny objection rate reflects the overwhelming - indeed, near universal - compliance with the Voting Rights Act by covered jurisdictions"), that is not necessarily indicative of a widespread change in racial attitudes. Rather, it could just as easily mean that "covered jurisdictions

have accepted Section 5 as a principle they *must* comply with whenever they make a voting change, like it or not, and they have developed procedures for substantially increasing the likelihood of preclearance." 1 *Evidence of Continued Need* 200 (Nat'l Comm'n Report).

But whatever the explanation for the declining objection rate in recent years, the fact remains that the Justice Department issued 754 objection letters between 1982 and 2006, *see* S. Rep. 109-295, at 13, many of which were based on findings of discriminatory intent, *see Nw. Austin I*, 573 F. Supp. 2d at 221. Shelby County is correct that not all objection letters "involve actual intentional discrimination," *see* Pl.'s Reply at 58, given that Section 5 prohibits a "somewhat broader swath of conduct," *see Kimel*, 528 U.S. at 81, than the Fifteenth Amendment itself proscribes. But the Attorney General only denies preclearance to a voting change under Section 5 if he cannot conclude that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *See* 42 U.S.C. § 1973c(a). In its attempt to minimize the significance of the objection-related data in the legislative record, Shelby County ignores the substantial number of objections that the Attorney General has made under Section 5's "purpose" prong in recent years -- even though, as the *Nw. Austin I* three-judge court recognized, these intent-based objections "provide particularly salient evidence of potentially unconstitutional state action." 573 F. Supp. 2d at 252.

According to one study in the legislative record, as many as 43% of all Section 5 objections in the 1990s were

based solely on discriminatory intent, while another 31% of objections were based at least in part on discriminatory intent. *See Preclearance Standards* 136, 180 tbl. 2 (McCrary Study). In other words, "the intent prong was involved in a remarkable 74 percent of all objections in that decade." *Id.* Congress also heard testimony that until *Bossier II* was decided, "the clear trend line, from the 1970s to the 1980s to the 1990s, was that discriminatory purpose increasingly was the basis on which Section 5 objections were being interposed." *Id.* at 13 (Posner Prepared Statement). From 1980 to 2000, the Attorney General lodged as many as 421 objections that were at least partially based on discriminatory intent, with 234 of those objections based *solely* on discriminatory intent. *Id.* at 180 tbl. 2 (McCrary Study). Purpose-based objections were particularly prevalent in the redistricting context, as approximately 80% of the Justice Department's objections to post-1990 redistricting plans were based on discriminatory intent. *Id.* at 13 (Posner Prepared Statement). In light of this data, the House Committee on the Judiciary had ample support for its conclusion in 2006 that the voting changes being sought by covered jurisdictions "were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21.

The legislative record contains countless examples of objection letters since 1982 in which the Justice Department has denied preclearance to a jurisdiction's proposed voting change because the jurisdiction failed to establish the absence of a discriminatory purpose for its change. For instance, in 2001, the all-white Board of

Aldermen in Kilmichael, Mississippi, cancelled a general election three weeks before it was scheduled to occur -- with no notice to the community -- after Census data showed that the town had recently become majority African-American, and after a significant number of African-Americans had been qualified as candidates in the aldermen and mayoral races. *See* H.R. Rep. No. 109-478, at 36-37; *Continuing Need* 60, 67 (Earls Responses); S. Rep. No. 109-295, at 225, 230-32; 1 *History, Scope, & Purpose* 1617 (appendix to statement of Bradley J. Schlozman, Copies of Objection Letters, by State, from 1980 to October 17, 2006) (hereinafter, "Schlozman Appendix"). The Justice Department objected to the town's decision to cancel the election, noting the suspicious "context in which the town [had] reached its decision" -- that is, "only after black persons had become a majority of the registered voters" and "only after the qualification period for the election had closed, and it [had] bec[o]me evident that there were several black candidates for office." 1 *History, Scope, & Purpose* 1617 (Schlozman Appendix). Because "[t]he town's purported non-racial rationales for the decision d[id] not withstand scrutiny," *id.*, the Justice Department forced Kilmichael to reschedule the election, whereupon the town elected its first African-American mayor, as well as three African-American aldermen, *see* H.R. Rep. No. 109-478, at 37.

The year after it objected to Kilmichael's cancelled election, the Justice Department objected to a redistricting plan proposed by the city of Albany, Georgia, based on its determination that Albany, too, had not "carried its burden of showing that its proposed plan was not designed

with the intent to limit and retrogress the increased black voting strength." *See* 1 *History, Scope, & Purpose* 846 (Schlozman Appendix). The Justice Department examined Albany's history of redistricting with respect to Ward 4, which, it found, revealed an "intent to maintain Ward 4 as a district that remains at the . . . level of 70 percent white, thus eliminating any ability of black voters to elect a candidate of choice in this district." *Id.* After the black population in Ward 4 doubled from 20% to 40% during the 1980s, Albany adopted a redistricting plan that reduced the Ward's population to 30% black. Then, after the black population in Ward 4 increased from 30% to almost 51% during the 1990s, the city sought preclearance for another redistricting plan that would have reduced the population in Ward 4 to 30% black. *Id.* at 846-47. The Justice Department objected to the proposed plan, noting that "implicit" in the plan was "an intent to limit black political strength in the city to no more than four districts." *Id.* at 847.

Another intent-based objection was lodged against the 2001 redistricting plan proposed by Milden, Louisiana, in which the city "explicitly decided to eliminate one of the three existing majority minority districts," even though "it was not compelled to redraw the district," and had been "presented with an alternative that met all of its legitimate criteria while maintaining the minority community's electoral ability." *Id.* at 1150-52. The Justice Department interposed yet another intent-based objection to a redistricting plan submitted by Sumter County, South Carolina, that same year, after the county council "explicitly decided to . . . eliminate one of the four

existing majority minority districts" despite the fact that the district's elimination had been "easily avoidable." *See* 2 *Voting Rights Act: Section 5 of the Act - History, Scope, and Purpose, Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2082-84 (Oct. 25, 2005) (hereinafter, "2 *History, Scope, & Purpose*") (Schlozman Appendix). In explaining the basis of its objection, the Justice Department noted that the county had not been forced to redraw the district and that it had rejected an alternative, non-retrogressive plan. *Id.* at 2083-84. Under the circumstances, the Justice Department was unable to conclude "that the action in question was not motivated by a discriminatory intent to retrogress." *Id.* at 2084.

These are just a few examples of the post-1982 objections to redistricting plans that have been lodged -- at least in part -- on the basis of discriminatory intent. There are many others. *See, e.g.*, 1 *History, Scope, & Purpose* 433 (Schlozman Appendix) (objecting to 1998 redistricting plan by Tallapoosa County, Alabama, because "the history of the instant redistricting process and its results raise serious concerns that the county . . . purposely impaired the ability of black voters to elect a candidate of choice"); *id.* at 412 (objecting to Greensboro, Alabama's 1993 redistricting plan on the ground that "the opportunity for black voters to elect a representative of their choice . . . appears to have been constrained deliberately"); *id.* at 1410 (objecting to Mississippi's 1991 statewide legislative redistricting plan where it appeared "that the proposed plan is calculated not to provide black voters in the Delta with the equal opportunity for representation required by the Voting

Rights Act"); *id.* at 830 (objecting to 2000 redistricting plan for Webster County, Georgia's board of education, where the plan was created shortly after the county had elected its first majority-black board, and the county's proffered reasons for the plan appeared to be "merely pretexts for intentionally decreasing the opportunity of minority voters to participate in the electoral process"); *id.* at 1611 (objecting to 1997 redistricting plan by Grenada, Mississippi, based on "substantial direct and circumstantial evidence of discriminatory purpose"); *id.* at 1516 (refusing to withdraw objection to Greenville, Mississippi's 1991 redistricting plan, which "appeared to have been motivated by a desire on the part of white city councilmembers to retain white control of the city's governing body," and explaining that since the plan's proposal, "white city officials [have] continue[d] to engage in race-based decisionmaking and to design schemes the purpose of which is to avoid black control of city government").

The Justice Department's intent-based objections over the last few decades have not been limited to redistricting plans. On several occasions, the Justice Department has suspected that discriminatory purpose was a motivating factor in a covered jurisdiction's change of a polling location. In 1992, for example, the Justice Department objected to Johnson County, Georgia's decision to move a polling place from the county courthouse to the American Legion. In its objection letter, the Justice Department noted that the American Legion had "a wide-spread reputation as an all-white club with a history of refusing membership to black applicants" and that "the American

Legion hall, itself, is used for functions to which only whites are welcome to attend." *Id.* at 727. Given its reputation and history, the American Legion created an obviously "hostile and intimidating" atmosphere for black voters, and had "the effect of discouraging black voters from turning out to vote." *Id.* Because Johnson County failed to meet its burden of proving that its relocation of the polling place had neither a discriminatory purpose nor effect, the Justice Department denied preclearance to the proposed change. *See id.*; *see also* 2 *History, Scope, & Purpose* 2428 (Schlozman Appendix) (objecting to 1994 polling place change by Marion County, Texas, where the change "appear[ed] to be designed, in part, to thwart recent black political participation"); *id.* at 2579 (objecting to 1999 polling place change by Dinwiddie County, Virginia, in part because "the sequence of events leading up to the decision to change the polling place . . . tends to show a discriminatory purpose"); *id.* at 2302 (objecting to 1991 polling place change proposed by district in Lubbock County, Texas, where polling "site selections . . . would seem calculated to discourage turnout among minority voters").

So, too, has the Justice Department denied preclearance to jurisdictions' proposed changes to their methods of election where there has been reason to believe that the changes were racially inspired. For instance, the Justice Department objected to Bladen County, North Carolina's 1987 attempt to change its method of election for its board of county commissioners from at-large elections to three double-member and one at-large district. Although the Justice Department found

that the change would not have a retrogressive effect, it nonetheless denied preclearance to the change based on its inability to conclude "that the proposed election system is free from discriminatory purpose." *Id.* at 1761. According to the Justice Department, the evidence presented by the county demonstrated that "the responsible public officials [had] desired to adopt a plan which would maintain white political control to the maximum extent possible and thereby minimize the opportunity for effective political participation by black citizens." *Id.* at 1762. Indeed, the Justice Department explained, "it appears that the board undertook extraordinary measures to adopt an election plan which minimizes minority voting strength." *Id.* A similar intent-based objection was interposed in response to Wilson County, North Carolina's 1986 change to its system for electing county commissioners, in light of the Justice Department's determination that the county's method of election had been purposefully "designed and intended to limit the number of commissioners black voters would be able to elect." *Id.* at 1731.

The legislative record also contains examples of objection letters issued in response to jurisdictions' proposed annexations, in which the Justice Department has denied preclearance based on its inability to conclude that the annexation was free from discriminatory animus. In 1990, for example, the Justice Department objected to the decision by Monroe, Louisiana, to annex certain wards for the Monroe City Court, explaining that the annexations would have reduced the black percentage of the City Court's jurisdiction from 48.4% to 39.2%. 1 *History, Scope, & Purpose* 927 (Schlozman Appendix). The

Justice Department also expressed concern regarding the timing of the annexations, noting that one of the annexed wards "had been eligible to be added to the City Court jurisdiction since at least 1970," but that there had been "little or no interest in implementing this change until immediately prior to the 1984 City Court primary election, which we understand was marked by the presence of the first black candidate for the City Court." *See* 1 *History, Scope, & Purpose* 927-28 (Schlozman Appendix); *see also* H.R. Rep. No. 109-478, at 23. Similarly, the Justice Department in 1997 objected to the annexations proposed by the city of Webster, Texas, where "the city's annexation choices appear[ed] to have been tainted, if only in part, by an invidious racial purpose." 2 *History, Scope, & Purpose* 2492 (Schlozman Appendix).

Given these and the many other intent-based objections in the 15,000-page legislative record, the House Committee on the Judiciary had good reason to conclude in 2006 that Section 5 was still fulfilling its intended function of preventing covered jurisdictions from implementing voting changes "intentionally developed to keep minority voters and candidates from succeeding in the political process." H.R. Rep. No. 109-478, at 36.

4. More Information Requests

In reauthorizing Section 5 in 2006, Congress did not rely only on objection letters to evaluate the continued existence of voting discrimination by covered jurisdictions; it relied as well on so-called "more information requests" ("MIRs") by the Attorney General. *See* H.R. Rep. No.

109-478, at 40; 2006 Amendments § 2(b)(4)(A), 120 Stat. at 577. An MIR is a formal letter issued in response to a preclearance submission when the submission contains insufficient information for the Attorney General to determine whether the proposed voting change violates Section 5. *See* H.R. Rep. No. 109-478, at 40. When a covered jurisdiction receives an MIR, it can either (1) supply the requested information; (2) withdraw the proposed voting change; (3) submit a new proposed change that supersedes the prior change; or (4) choose not to respond. *Id.*; *see also* 2 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2545 (Mar. 8, 2006) (hereinafter, "2 *Evidence of Continued Need*") (Luis Ricardo Fraga & Maria Lizet Ocampo, *The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests*) (hereinafter, "Fraga & Ocampo Study"). In its 2006 examination of MIRs, the House Committee on the Judiciary found that "[t]he actions taken by a jurisdiction [in response to an MIR] are often illustrative of a jurisdiction's motives." H.R. Rep. No. 109-478, at 40. In particular, a covered jurisdiction's decision to withdraw its proposed change, submit a superseding change, or not respond to an MIR frequently constitutes a "tacit admission" that its originally-proposed change was, in fact, discriminatory. *See* 1 *Evidence of Continued Need* 178 (Nat'l Comm'n Report).

It is significant, then, that between 1982 and 2003, at least 205 proposed voting changes were withdrawn by covered jurisdictions after receipt of an MIR. *Id.*; *see also* H.R. Rep. No. 109-478, at 41. According to

one study in the legislative record, MIRs resulted in a total of 855 withdrawals, superseding changes, and "no responses" by covered jurisdictions from 1990 through 2005. *See* 2 *Evidence of Continued Need* 2553 (Fraga & Ocampo Study). To be sure, not all of these withdrawals, superseding changes, or "no responses" represent concessions on the part of the covered jurisdiction that its initially-proposed voting change had an impermissible discriminatory purpose or effect. It is plausible that covered jurisdictions choose to withdraw their proposed electoral changes or not respond to MIRs for other reasons -- for example, because "responding is more costly than not implementing the change." *See, e.g., Continuing Need* 113 (Pildes Responses). But Shelby County is wrong to characterize voluntary withdrawals or "no responses" to MIRs as showing only that "bureaucratic hurdles to preclearance erected by DOJ have deterred covered jurisdictions from making nondiscriminatory voting changes." *See* Pl.'s Mot. at 46. Although it is unlikely that all withdrawals, superseding changes, and "no responses" represent successfully-thwarted attempts by covered jurisdictions to implement purposefully discriminatory voting changes, Congress found that, together "[t]he increased number of objections, revised submissions, and withdrawals over the last 25 years are strong indices of continued efforts to discriminate." H.R. Rep. No. 109-478, at 36; *see also Continuing Need* 112-13 (Pildes Responses) (explaining the need for "more qualitative information on the *reasons* jurisdictions respond as they do [to MIRs] to know what percentage of these responses in fact do signal changes that would have violated the VRA," but recognizing the likelihood that at least "some of these non-

responses reflect the fact that the jurisdiction's proposed change would have violated the VRA").

5. Judicial Preclearance Suits

Even more probative of the continued existence of voting discrimination than withdrawals or "no responses" to MIRs, however, are the lawsuits in which a three-judge court has denied preclearance to a covered jurisdiction's proposed voting change. As previously explained, a covered jurisdiction may *seek* a declaratory judgment from a three-judge panel of this Court that its proposed voting change has neither a discriminatory purpose nor effect instead of submitting its change to the Attorney General for preclearance. *See, e.g., Nw. Austin II*, 129 S. Ct. at 2509; 42 U.S.C. § 1973c. Although most jurisdictions choose the latter route, some have filed declaratory judgment actions seeking approval of their proposed voting changes since the passage of the Voting Rights Act in 1965. *See Nw. Austin I*, 573 F. Supp. 2d at 255. Forty-two of these declaratory judgment actions have been unsuccessful -- meaning that the three-judge court either denied preclearance to the proposed change, the jurisdiction withdrew the change, the case was dismissed, or a consent decree that cured the problem was reached. *See* 1 *Evidence of Continued Need* 177, 235 (Nat'l Comm'n Report). Of these 42 unsuccessful declaratory judgment actions, 25 occurred after 1982. *Id.* at 178, 270.

Most importantly, as the three-judge court in *Nw. Austin I* pointed out, "the legislative record contains several examples of judicial decisions denying preclearance

that reveal evidence of intentional discrimination." 573 F. Supp. 2d at 255. In one particularly egregious example, which occurred shortly before the 1982 reauthorization of Section 5, a three-judge panel of this Court denied preclearance to Georgia's proposed 1981 congressional redistricting plan based on its finding that the plan had a discriminatory purpose under Section 5. *See* 1 *Evidence of Continued Need* 503-508 (ACLU Report); *Busbee*, 549 F. Supp. at 517. Georgia began its congressional redistricting process after the 1980 census showed that the state's ten existing districts -- all of which were majority-white with the exception of the Fifth District -- had become severely malapportioned. Under the leadership of Joe Mack Wilson, Chair of the state's House Reapportionment Committee, Georgia created a redistricting plan that maintained its nine majority-white districts, and split the large, contiguous black population of the Atlanta metropolitan area between the Fourth and Fifth Districts, thereby ensuring that blacks would still comprise a majority of the Fifth District, but would only constitute 46% of the registered voters there. *See Busbee*, 549 F. Supp. at 498-99. Because Georgia's plan increased the percentage of blacks in the Fifth District, however, it was not retrogressive, and therefore "technically . . . [did] not have a discriminatory effect, as that term has been construed under the Voting Rights Act." *Id.* at 516-17.

The three-judge court nonetheless denied preclearance to the plan based on its conclusion that the plan had been "the product of purposeful racial discrimination." *See id.* at 517-18. In reaching this determination, the court made an express finding that "Representative Joe Mack

Wilson is a racist." *Id.* at 500. The court cited Wilson's now-infamous statement that he did not want to draw "nigger districts," *id.* at 501, as well as testimony from other Georgia legislators, who conceded that they, too, had intentionally sought to "keep the Fifth District 'as white as possible . . . but just within the limits . . . to satisfy the Voting Rights Act . . . .'" *Id.* (internal citation omitted). As one state legislator explained, "'the motivation of the House leadership' in creating the Fifth District . . . was to 'increase [the percentage of the black population] just enough to say they had increased it [and] so that it would look like they had increased it, but they knew they had not increased it enough to elect a black." *Id.* (internal citation omitted). Another state senator admitted that he had felt obliged to vote for the plan because he "[didn't] want to have to go home and explain why I . . . was the leader in getting a black elected to the United States Congress." *Id.* at 514 (internal citation omitted). These "[o]vert racial statements," together with Georgia's history of racial discrimination in voting, and the absence of any legitimate non-racial reasons for the redistricting plan, convinced the three-judge court that the plan had been enacted with a discriminatory purpose, and hence had "'no legitimacy at all under our Constitution or under (Section 5).'" *Id. at 517* (alteration in original) (quoting *City of Richmond v. United States*, 422 U.S. 358, 378-79, 95 S. Ct. 2296, 45 L. Ed. 2d 245 (1975)).

In another, more recent declaratory judgment action, the Louisiana House of Representatives sought preclearance for its 2001 statewide redistricting plan, which eliminated a majority-black district in Orleans

Parish, and failed to create a comparable district anywhere else in the state. *See* Def.'s Mot. at 37; *Nw. Austin I*, 573 F. Supp. 2d at 256; *Continuing Need* 28 (Arrington Responses); *Introduction to Expiring Provisions* 152 (Shaw Responses); *Reauthorization of the Act's Temporary Provisions: Policy Perspectives and Views from the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 42-44 (June 21, 2006) (hereinafter, "*Policy Perspectives*") (responses of Debo Adegbile to questions submitted by Senators Kennedy, Leahy, Cornyn, and Coburn) (hereinafter, "Adegbile Responses"). In the course of defending their plan, Louisiana officials admitted that they had intentionally "'obliterated'" the majority-black district in order to achieve what they characterized as "proportional" representation for white voters in Orleans Parish. *See* Def.'s Br. in Supp. of Mot. for Summ. J., *La. House of Reps. v. Ashcroft*, Civ. A. No. 02-62 (D.D.C. Jan. 17, 2003); *see also Policy Perspectives* 43 (Adegbile Responses). But in selectively applying the theory of "proportional representation" to advantage only white voters in a particular area of the state, Louisiana officials ignored the fact that it was the black population in Orleans Parish, not the white population, that had increased during the preceding decade. *See Continuing Need* 28 (Arrington Responses). Moreover, the state made no attempt to remedy blacks' statewide under-representation in proportion to their percentage of the population, despite its avowed desire to achieve proportional representation for white voters in a particular area of the state. *See* Def.'s Br. in Supp. of Mot. for Summ. J., *La. House of Reps. v.*

Ashcroft, Civ. A. No. 02-62 (D.D.C. Jan. 17, 2003); *Policy Perspectives* 43 (Adegbile Responses); *Nw. Austin I*, 573 F. Supp. 2d at 256. Although the suit ultimately settled on the eve of trial when Louisiana agreed to restore the majority-black district, it nonetheless constitutes a recent example of a covered jurisdiction's thwarted attempt to enact a voting change with the express purpose of diminishing black electoral opportunity. *See Policy Perspectives* 43 (Adegbile Responses); *Introduction to Expiring Provisions* 152 (Shaw Responses). The case also illustrates the need to look beyond preclearance-related data in assessing the continued prevalence of intentional voting discrimination by covered jurisdictions, as the suit's eventual resolution through a settlement agreement means that "there is no firm objection statistic or declaratory judgment ruling that resulted from the litigation." *Introduction to Expiring Provisions* 152 (Shaw Responses).

6. Section 5 Enforcement Suits

Yet another type of evidence that Congress relied on as illustrative of the continued existence of voting discrimination by covered jurisdictions was section 5 enforcement actions undertaken by the Justice Department in covered jurisdictions since 1982. *See* 2006 Amendments § 2(b)(4)(A), 120 Stat. at 577. The Voting Rights Act authorizes the Justice Department -- as well as private citizens -- to bring suit under Section 5 to compel a covered jurisdiction to submit its proposed voting change for preclearance. *See Nw. Austin I*, 573 F. Supp. 2d at 256. Since 1982, there have been at least 105 successful Section

5 enforcement actions in which a covered jurisdiction has either been ordered to submit its proposed voting change for preclearance, or has voluntarily agreed to do so after a Section 5 enforcement suit was filed. *See* 1 *Evidence of Continued Need* 186 (Nat'l Comm'n Report). Based on its review of these cases, the House Committee on the Judiciary found that the failure by covered jurisdictions to submit voting changes for preclearance under Section 5 often reflects more than a mere oversight. "[C]overed jurisdictions continue to resist submitting voting changes for preclearance," the Committee noted in its 2006 report, explaining that "many defiant covered jurisdictions and State and local officials continue to enact and enforce changes without the Federal Government's knowledge." *See* H.R. Rep. No. 109-478, at 41.

Historically, the most "defiant" of all the covered jurisdictions has been South Dakota, where former South Dakota Attorney General William Janklow notoriously described the preclearance requirement as "a facial absurdity" and advised against compliance, remarking, "I *see* no need to proceed with undue speed to subject our State laws to a 'one-man' veto by the United States Attorney General." *Id.* at 42. In accordance with Janklow's advice, South Dakota sought preclearance for less than five of the more than 600 voting changes that it enacted between 1976 and 2002. *Id.* Many of these voting changes "negatively impacted" the state's Native American population, some of whom eventually filed an enforcement action to compel the state to submit its voting changes for preclearance. *Id.* The suit resulted in a consent decree, under which South Dakota finally agreed to fulfill its obligations under Section 5. *Id.*

Appendix B

The legislative record contains many examples of Section 5 enforcement suits initiated in response to covered jurisdictions' implementation of voting changes without preclearance, including several examples of suits in which the unprecleared voting changes appeared to have been motivated by discriminatory animus. For instance, a Section 5 enforcement action was filed in response to Prairie View, Texas's attempt to reduce the availability of early voting during its racially-charged 2004 elections in Waller County. After two black students from historically black Prairie View A&M University announced their intent to run for local office (one for the Waller County Commissioners' Court, the county's governing body), the white district attorney threatened to prosecute all Prairie View A&M students who voted in the elections, claiming that the students were not legal residents of the county. *See* 1 *Evidence of Continued Need* 185 (Nat'l Comm'n Report); *id.* at 300 (Highlights of Hearings of the Nat'l Comm'n on the Voting Rights Act) (hereinafter, "Nat'l Comm'n Hearing Highlights"). Shortly thereafter, the county sought to reduce the availability of early voting at the polling places that were located closest to the Prairie View A&M campus. This reduction in early voting opportunities would have made it much more difficult for students to vote in the election's primary, because it was scheduled to take place during the university's spring break, and students therefore had to vote in advance if they planned to be out of town during their vacation. 1 *Evidence of Continued Need* 186 (Nat'l Comm'n Report). The university chapter of the NAACP filed suit under Section 5, seeking to enjoin Waller County from making this change to its voting practices without first receiving

preclearance, which prompted the county to agree to restore the early voting opportunities that had previously been in place. *Id.* As a result, five times as many Prairie View A&M students were able to vote in the primary, in which the African-American student seeking election to the County Commissioners' Court won a narrow victory. *Id.*

Another Section 5 enforcement suit was brought in 1995 when Mississippi sought to revive its dual voter registration system, which had originally been enacted "as part of the 'Mississippi Plan' to deny blacks the right to vote following the Constitutional Convention of 1890." *Operation Push v. Allain*, 674 F. Supp. 1245, 1251 (N.D. Miss. 1987), *aff'd sub nom.*, *Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *see also* S. Rep. No. 109-295, at 223; 1 *Evidence of Continued Need* 176 (Nat'l Comm'n Report); H.R. Rep. No. 109-478, at 39. In 1987, a federal district court invalidated a revised version of Mississippi's dual registration system that the state had adopted in 1984, based on evidence that the revised system, like the original one, "result[ed] in a denial or abridgment of the right of black citizens in Mississippi to vote and participate in the electoral process." *Operation Push*, 674 F. Supp. at 1253. Nevertheless, Mississippi proceeded to implement yet another dual registration system in 1995, purportedly in an attempt to comply with the requirements of the National Voter Registration Act ("NVRA") of 1993. *See* H.R. Rep. No. 109-478, at 39. State officials "refused to submit the change for preclearance" despite the fact that Mississippi's "maintenance of two registration systems had previously been struck down as discriminatory." *Id.*

Private plaintiffs responded with a Section 5 enforcement action, as did the United States, and the two cases were consolidated before a three-judge court. *See Young v. Fordice*, 520 U.S. 273, 280, 117 S. Ct. 1228, 137 L. Ed. 2d 448 (1997). The case eventually reached the Supreme Court, which unanimously held that Mississippi was required to submit its dual registration system for preclearance. *Id.* at 291. Once compelled to *seek* preclearance, Mississippi received an objection, based on the Attorney General's inability to find that "the State's submitted NVRA procedures are not tainted by improper racial considerations." *Preclearance Standards* 83 (appendix to statement of Brenda Wright). As the Attorney General explained, the state's decision "to implement the requirements of the NVRA in a manner that would cause the State to revert to a form of dual registration" was "particularly noteworthy," given that "it occurred only a few years after a federal court had found that a similar requirement had led to pronounced discriminatory effects on black voters." *Id.*

Of course, the reasons behind a failure to *seek* preclearance under Section 5 are not always easy to discern. And there is no data in the legislative record revealing the percentage of successful Section 5 enforcement actions that have ultimately resulted in a denial of preclearance on the basis of discriminatory intent. But as demonstrated by Mississippi's 1995 attempt to revive its dual registration system, at least some of the 105 successful Section 5 enforcement suits since 1982 have been initiated in response to covered jurisdictions' voting changes that were subsequently found to be purposefully discriminatory.

7. Section 2 Litigation

Section 2 of the Voting Rights Act prohibits the imposition of any voting practice or procedure "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. Although a violation of Section 2 does not require a showing of unconstitutional discriminatory intent, "Section 2 cases have documented evidence that reveals a wide range of unconstitutional conduct by state and local officials." *See Impact and Effectiveness* 971 (Katz Study). Based on its review of several studies of Section 2 cases in the legislative record, the Senate Judiciary Committee identified six reported Section 2 cases that resulted in either a judicial decision or a consent decree reflecting that a covered jurisdiction had unconstitutionally discriminated against minority voters. *See* S. Rep. No. 109-295, at 13, 65. A study conducted by Professor Ellen Katz and the Voting Rights Initiative of the University of Michigan Law School identified an additional eight published Section 2 cases since 1982 in which a court determined that a covered jurisdiction had engaged in intentional discrimination against minority voters. *See Impact and Effectiveness* 986-91 (Katz Study); *see also Nw. Austin I*, 573 F. Supp. 2d at 258. Hence, as the three-judge court in *Nw. Austin I* explained, Congress "knew of a combined total of fourteen judicial findings of intentionally discriminatory or unconstitutional state action" by covered jurisdictions since 1982 when it chose to reauthorize Section 5 in 2006. 573 F. Supp. 2d at 258.

The *Nw. Austin I* court recognized that 14 "is not a great number of cases," especially when compared

to the 421 intent-based objection letters lodged by the Attorney General during this time-frame. *See id.* But the court offered two explanations for the "relative scarcity" of judicial findings of intentionally discriminatory or unconstitutional conduct by covered jurisdictions. First, given Section 5's effectiveness in deterring covered jurisdictions from enacting discriminatory voting changes in the first place, it is understandable that there would not be many Section 2 cases challenging such practices. In other words, because most intentionally discriminatory voting practices are blocked by Section 5 prior to their implementation, they are unlikely to be the subject of a subsequent Section 2 challenge. *See id.* (citing *Introduction to Expiring Provisions* (Shaw Responses 160)); *see also Continuing Need* 143 n.18 (Earls Responses). Second, both the Senate Judiciary Committee and Professor Katz's study examined only *reported* Section 2 cases. Yet as Professor Katz acknowledged, "[t]hese lawsuits, of course, represent only a portion of the Section 2 claims filed or decided since 1982," given the high number of Section 2 cases that settle or are resolved without a published opinion. *See Impact and Effectiveness* 974 (Katz Study); *see also Continuing Need* 143 (Earls Responses). Indeed, according to one witness who testified before the Senate Judiciary Committee, there have been 66 reported cases of Section 2 violations since 1982 in the nine states that are "substantially covered" by Section 5, but there have been 587 *unreported* cases documenting such violations -- i.e., more than eight times as many unreported cases than reported cases revealing Section 2 violations by covered jurisdictions. *See Continuing Need* 143 (Earls Responses). It is to be expected, then, that an analysis of

intentional or unconstitutional discrimination based solely on reported Section 2 cases would "seriously understate[] the findings." *Id.*

Finally, it is significant to recall that courts will avoid deciding constitutional questions if a case can be resolved on narrower, statutory grounds. *See, e.g., Nw. Austin II*, 129 S. Ct. at 2508. Courts therefore tend to refrain from finding that a jurisdiction engaged in unconstitutional voting discrimination if there is another basis upon which to invalidate the jurisdiction's challenged voting practice -- e.g., if the voting practice is found to violate the Section 2 "results" test. *See Continuing Need* 143-44, 144 n.19 (Earls Responses); *see also Escambia Cnty. v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984) (declining to decide whether evidence of discriminatory intent was adequate to support finding that at-large system of elections violated the Fourteenth Amendment, given the lower court's conclusion that the system also violated Section 2); *White v. Alabama*, 74 F.3d 1058, 1071 n.42 (11th Cir. 1996) (explaining that "[b]ecause we dispose of the district court's judgment on the ground that it violates the Voting Rights Act, we need not, and indeed, should not, discuss whether the judgment violates the Equal Protection Clause"); *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 306-07 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004) (acknowledging that "the General Assembly's adoption of the at-large system raises suspicions," but refusing to "disparage" those who enacted the system by finding a constitutional violation absent more "compelling evidence" of discriminatory intent, and instead, enjoining the at-large system as a violation

of Section 2). As Professor Pamela Karlan explained during her 2006 testimony before the Senate Judiciary Committee, "when courts decide cases on [Section 2] effects test reasons, they don't reach the question whether there is also a discriminatory purpose. But let me tell you from my own experience that if we had to show discriminatory purpose in lots of these cases, we could do it." *Continuing Need* 6 (statement of Pamela S. Karlan). As a result, many instances of unconstitutional voting discrimination likely escape formal judicial condemnation.

Still, there have been at least 14 reported Section 2 cases involving judicial findings of intentional or unconstitutional voting discrimination by covered jurisdictions since 1982. *See Nw. Austin I*, 573 F. Supp. 2d at 258. Because the three-judge court in *Nw. Austin I* described most of these Section 2 decisions in great detail, *see* 573 F. Supp. 2d at 259-62, this Court will not endeavor to repeat the facts of all those cases here. But since Section 2 cases do offer very "powerful evidence of continuing intentional discrimination," *id.* at 259, a few such cases warrant mention, one of which was not addressed by *Nw. Austin I*.

In 2003, a federal district court assessing a Section 2 challenge to Charleston County, South Carolina's at-large method of elections for its County Council declined to find that the system had been adopted with an unconstitutional discriminatory purpose, but nonetheless enjoined the system as a violation of Section 2. *See Charleston Cnty.*, 316 F. Supp. 2d at 306. In so doing, the court noted that county officials had engaged in many other forms of purposeful

voting discrimination in recent years. *See id.* at 290 n.23; *see also Impact and Effectiveness* 987-88 (Katz Study). The court described the persistent problem of white poll officials "intimidating and harassing" black voters in need of assistance at the polls, and quoted one member of the Charleston County Election Commission, who said that she had "received complaints from African-American voters concerning rude or inappropriate behavior by white poll officials in every election between 1992 and 2002." *See id.* at 287 n.23. At one point, the official harassment of elderly black voters at the polls became so egregious that it "prompted a Charleston County Circuit Court to issue a restraining order against the Election Commission requiring its agents to cease interfering with the voting process." *Id.* at 288 n.23.

The court in *Charleston Cnty.* also noted two "recent episodes" of racial discrimination in voting that it found particularly troubling. In the first, which occurred in 1991, the Charleston County Council decided to "reduce[] the salary for the Charleston County Probate Judge . . . following the election of the first and only African-American person elected to that position." *Id.* at 289 n.23. That same judge had been forced to sue to have his election upheld by the South Carolina Supreme Court, and even after the court affirmed the validity of the election, the judge had to *seek* Justice Department intervention in order to be sworn into office. *Id.* at 289-90 n.23. The second episode occurred after the 2000 Charleston County School Board elections, in which African-Americans won a majority of the seats on the board for the first time in the county's history. The county immediately responded

by sponsoring "several pieces of legislation to alter the method of election for the school board." *Id.* at 290 n.23. None of the five African-American members of the board were consulted regarding their views on the change to the board's method of election, *id.*, and every African-American member of the legislative delegation voted against the proposed change, S. Rep. No. 109-295, at 309. It later became apparent that the change would have the effect of making the school board's method of election "an exact replica of the old County Council structure" that the court in *Charleston Cnty.* had struck down as a violation of Section 2. *See Continuing Need* 27-28 (Arrington Responses); *see also* S. Rep. No. 109-295, at 309. This method of election was subsequently denied preclearance by the Attorney General. *Continuing Need* 28 (Arrington Responses).

In a Section 2 case not discussed by the three-judge court in *Nw. Austin I*, Native American residents of South Dakota challenged the state's 2001 legislative redistricting plan as diluting Native American voting strength in violation of Section 2. *See Bone Shirt v. Hazeltine*, 2004 DSD 18, 336 F. Supp. 2d 976 (D.S.D. 2004); *see also Impact and Effectiveness* 988-89 (Katz Study). In assessing the plaintiffs' Section 2 challenge, the court described several recent instances of intentional state-sponsored voting discrimination against Native Americans in South Dakota. *See Bone Shirt*, 336 F. Supp. 2d at 1023-26. For example, in 2002 the state passed a law requiring photo identification as a prerequisite to voting. When concerns were raised about the effect of the law on the state's Native American population, one state legislator responded: "I'm

not sure we want that sort of person in the polling place." *Id.* at 1026 (internal quotation marks and citation omitted). Another legislator conceded that the measure had been passed as a means of "retaliating" against the recent rise in registration among Native American voters, after the Native American vote had proven particularly significant in a close senate race. *Id.* The court also described a 2003 challenge to a redistricting plan by Buffalo County, South Dakota, which had "confined virtually all of the county's Indian population to a single district containing approximately 1500 people." *Id.* at 1024. When members of the Crow Creek Sioux Tribe brought suit, alleging that the plan had been "drawn and maintained for a discriminatory purpose," the parties reached a settlement agreement, "with the county admitting that the plan was discriminatory." *Id.* The court in *Bone Shirt* went on to list many other reports of intentional voting discrimination against Native Americans in South Dakota, including cases in which local poll officials "refused to register Indians," or "refused to provide them with enough voter registration cards to conduct a voter registration drive." *Id.*

The legislative record describes several other Section 2 cases since 1982 that contain judicial findings of purposeful voting discrimination by covered jurisdictions. *See Impact and Effectiveness* 975-76, 987-94 (Katz Study). Two such cases from Shelby County's home state of Alabama warrant specific mention. Following the *Dillard* litigation, *see supra* pp. 29-30, in which Alabama residents challenged the at-large electoral systems used by many cities, counties, and school boards throughout

the state (including in Shelby County), the town of North Johns admitted that its at-large system for electing commissioners violated Section 2 and entered into a consent decree, under which it agreed to implement a new electoral system with five single-member districts. *See Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1473 (M.D. Ala. 1989). When two African-American candidates for office sought "to take advantage of the new court-ordered single-member districting plan," *id.* at 1476, the mayor refused to provide them with the necessary financial disclosure forms that he had provided to all of the other candidates, and that all candidates were required to complete in order to run for office under state law. *Id.* at 1474-76; *Impact and Effectiveness* 990 (Katz Study). The two African-American candidates nonetheless remained on the ballot without completing the forms, and proceeded to win their respective elections, whereupon the mayor refused to swear them into office. *North Johns*, 717 F. Supp. at 1475. The candidates then filed suit under Section 2, alleging purposeful discrimination and seeking a court order certifying them as duly-elected members of the town council. *Id.* at 1476. Granting this request, the federal district court found "that North Johns, through its mayor, intentionally discriminated against [the candidates] because of their race." *Id.* The court explained that the election of the two candidates would have resulted in a majority-black town council, and that the mayor had "acted as he did in order to prevent this result, or at least not to aid in achieving it." *Id.* The court was "convinced that, but for [the candidates'] race, [the mayor] would have acted toward them as he acted toward other candidates; he would have provided to them, in a timely manner, the [necessary] information and forms." *Id.*

Similarly, a federal district court in *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988), found that intentional discrimination persisted in Alabama as late as the 1980s. In assessing a Section 2 class action filed by black residents of the state, who alleged that the manner in which poll officials had been appointed violated Section 2, the court described how Alabama's "history of racial inhumanity continues into today." 695 F. Supp. at 525. Specifically, the court found that "white poll officials continue to harass and intimidate black voters," and it went on to cite "numerous instances" in which "white poll officials refused to help illiterate black voters or refused to allow them to vote, where they refused to allow black voters to cast challenged ballots, and where they were simply rude and even intimidating toward black voters." *Id.* Although acknowledging that these occurrences are "much less frequent today than in the past," the court found that "their impact is still dramatic and widespread in the black community in light of this state's not-so-distant history of open and violent discrimination." *Id.*

8. Dispatch of Federal Observers

Additional evidence of intentional state-sponsored discrimination against minority voters is revealed by the continued dispatch of federal observers to covered jurisdictions. Under Section 8, the Attorney General may send federal observers to monitor any state or local elections when "necessary to enforce the guarantees of the 14th or 15th amendment."[13] *See* 42 U.S.C. § 1973f(a)

13. Under the original version of the Act, federal observers could only be sent to monitor elections in jurisdictions for which

(2). Between 1982 and 2006, 300 to 600 federal observers were assigned annually to observe elections in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 44; S. Rep. No. 109-295, at 96. Five of the six states originally covered by Section 5 -- Louisiana, Georgia, Alabama, South Carolina, and Mississippi -- accounted for 66% of the 622 total federal observer coverages[14] during this time-frame, 1 *Evidence of Continued Need* 181 (Nat'l Comm'n Report), with Mississippi alone accounting for 40% of all such coverages, H.R. Rep. No. 109-475, at 44. In reauthorizing Section 5 in 2006, Congress cited the "tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions" during the past 25 years as evidence of "the continued need for [the] Federal oversight" provided by the temporary provisions of the Voting Rights Act. *See* 2006 Amendments § 2(b)(5), 120 Stat. at 578.

"federal examiners" had been appointed. *See* 1965 Act *§ 8*. Federal examiners "in the early days of the Act were empowered to help register minority voters," 1 *Evidence of Continued Need* 179, and could be dispatched either to jurisdictions that were covered by Section 4(b), or to non-covered jurisdictions that were subject to coverage by federal court order, *see* 1965 Act §§ 3(a), *6*. When Congress reauthorized the Act's temporary provisions in 2006, it repealed the sections of the Act pertaining to federal examiners, and amended Section 3(a) of the Act to authorize the direct assignment of federal observers to non-covered jurisdictions where "appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U.S.C. § 1973a(a); *see also* H.R. Rep. No. 109-478, at 91.

14. For purposes of this Opinion, each occasion when federal observers are dispatched to a jurisdiction is referred to as one "observer coverage," although several individual observers may have been present.

Shelby County attempts to minimize the significance of this evidence, however, by arguing that the dispatch of federal observers "indicates only that it was predicted that there *might* be conduct with the effect of disenfranchising minority citizens, which *might* or *might not* be purposeful discrimination." Pl.'s Mot. at 35. As a technical matter, Shelby County is correct. But observers are not assigned to a particular polling location based on sheer speculation; they are only dispatched if "there is a *reasonable* belief that minority citizens are at risk of being disenfranchised." H.R. Rep. No. 109-478, at 44 (emphasis added); *see also* 1 *Evidence of Continued Need* 180 (Nat'l Comm'n Report) (explaining that "observers are sent because there are *reasonable* grounds in the opinion of the Department of Justice to expect discrimination on Election Day") (emphasis added). It may be that some of the 622 observer coverages since 1982 have ultimately proven unnecessary, but the legislative record reveals many instances of intentional voter discrimination at the polls, where the presence of federal observers has been needed to protect access to the ballot for racial and language minorities.

Congress heard testimony from Alabama state senator Bobby Singleton as to the importance of federal observers in preventing the intimidation of black voters at the polls in Alabama. *See* 1 *Evidence of Continued Need* 182 (Nat'l Comm'n Report). Singleton described one incident in 1992 in which he was taken to jail after attempting to prevent white poll officials from "closing the doors on African-American voters . . . whom they did not want to come in, [because] [they] . . . would have made a difference in the . . . votes on that particular day."

Id. at 298 (Nat'l Comm'n Hearing Highlights). Barry Weinberg, former Deputy Chief of the Voting Section of the Civil Rights Division of the Justice Department, similarly described the harassment of black voters by white poll officials in Alabama, including one instance in which a local poll official remarked in the presence of a federal observer that "niggers don't have principle enough to vote and they shouldn't be allowed." *See Voting Rights Act: Sections 6 and 8 - The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (Nov. 15, 2005) (prepared statement of Barry H. Weinberg). Weinberg also described various forms of discrimination faced by language minority voters at the polls, who have sometimes "been denied the ballot because they identified their street name according to common Spanish usage rather than the formal English name." *Id.* at 34. On other occasions, prospective Hispanic voters have been "admonished not to use Spanish when talking in the polling places," or have been asked to provide "on-the-spot evidence of their citizenship before being given a ballot," even though such evidence is not required from Caucasian voters. *Id.* The legislative record describes one such example of discrimination against Latinos in Arizona, in which men wearing "military or tool belts" and black T-shirts reading "U.S. Constitutional Enforcement" approached Latinos waiting in line to vote, demanding proof of citizenship. *See* 3 *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3976 (Mar. 8, 2006) (hereinafter, "3 *Evidence of Continued Need*") (Arizona Report for the Nat'l Comm'n on the Voting Rights Act).

Congress heard evidence that in 1990, on the eve of an election marked by the presence of an African-American candidate for one of North Carolina's Senate seats, 125,000 African-American voters in North Carolina received postcards falsely informing them that if they had moved within thirty days they could not vote. *See* 2 *Evidence of Continued Need* 1755 (appendix to statement of Wade Henderson). As recently as 2004, a sheriff in Alamance County, North Carolina, "took a list of registered voters in his county that had Spanish surnames, and said publicly that he would send deputies to the homes of each of those voters to verify that they were citizens." *Continuing Need* 18 (testimony of Anita S. Earls). That same year, there were reports of police being stationed outside polling sites in an "overwhelmingly Latino" area of Texas -- a more subtle, yet "familiar form of voter intimidation." *See* S. Rep. No. 109-295, at 344.

The record contains several other examples of state-sponsored discrimination against minority voters in Texas, including the 2004 closing of a polling place in a predominantly-black precinct, despite the fact that "voters remained in line" and the closing was "contrary to state law." *Id.* at 343. There were additional reports of minority voters "being turned away from their polling locations and asked to return at a later time" for no apparent reason. *Id.* And during the Southern Regional Hearing of the National Commission of the Voting Rights Act, Professor Vernon Burton testified that there had been "various kinds of intimidation and misinformation" directed at black voters in Texas during the 2000 and 2002 elections, as well as "late change[s] of polling places; dropping individuals from

poll lists without cause; [and] not allowing individuals to file challenge ballots." *See* 1 *Evidence of Continued Need* 298 (Nat'l Comm'n Hearing Highlights). Professor Burton went on to describe a particularly disturbing incident in Wharton County, Texas, in which the home of a campaign staff treasurer for an African-American candidate for sheriff was burned. *Id.* As Professor Burton explained, the incident occurred shortly after the treasurer had received "'threatening calls saying what would happen to her if she did not get [the candidate's] - and we won't use the N word - sign out of her yard.'" *Id.*

9. Racially Polarized Voting and Vote Dilution

Congress also relied on evidence of racially polarized voting in reauthorizing Section 5 in 2006, noting that the persistence of racially polarized voting "in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protections of the [Act]." *See* 2006 Amendments § 2(b)(3), 120 Stat. at 577. Racially polarized voting "occurs when voting blocs within the minority and white communities cast ballots along racial lines." H.R. Rep. No. 109-478, at 34. The House Committee on the Judiciary in 2006 found that the continued existence of racially polarized voting presented a "serious concern," *id.*, for two reasons. First, racially polarized voting effectively creates an "election ceiling" for minority voters, as it renders them "powerless" to elect candidates of their choice in non-majority-minority

districts. *Id.* Second, "[t]he potential for discrimination in environments characterized by racially polarized voting is great." *Id.* at 35. That is because, as the three-judge court in *Nw. Austin I* explained, racially polarized voting is "a necessary precondition for vote dilution to occur," since it is racially polarized voting that "enables the use of devices such as multi-member districts and at-large elections that dilute the voting strength of minority communities." *See* 573 F. Supp. 2d at 263 (internal quotation marks and citations omitted). In other words, where minorities and non-minorities tend to prefer different candidates, the ability of minorities to elect their candidates of choice can be intentionally reduced through the adoption of a wide variety of dilutive techniques, including the manipulation of district boundaries, the enactment of discriminatory annexations, and the implementation of majority-vote requirements. *See* 2 *Evidence of Continued Need* 1721 (appendix to statement of Wade Henderson).

Hence, Congress was concerned by the evidence in the legislative record indicating that "the degree of racially polarized voting in the South is increasing, not decreasing." 1 *Evidence of Continued Need* 215 (Nat'l Comm'n Report). Congress heard testimony that in Shelby County's home state of Alabama, there were 35 black representatives serving in the state legislature, only one of whom had been elected from a majority-white district. *See Benefits and Costs* 97 (Gray Responses). Evidence in the congressional record also revealed "high degree[s]" of racially polarized voting in South Carolina and Louisiana. *See* H.R. Rep. No. 109-478, at 35. As one expert on voting trends in Louisiana testified, "the racial differences in candidate preferences

are pervasive across offices. It doesn't matter whether the office at issue is state Representative, state Senator, Governor, Mayor, District Attorney, or Public Service Commissioner. It could be for a position as Recorder of Mortgages or Register of Conveyances"; regardless of the nature of the elected position, "[r]acially polarized voting remains pronounced and pervasive in Louisiana." *Voting Rights Act: The Continuing Need for Section 5, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong 59 (Oct. 25, 2005) (hereinafter, "*Continuing Need for Section 5*") (prepared statement of Richard Engstrom).

A report in the legislative record on voting rights in Mississippi confirmed that racially polarized voting remained pronounced and pervasive there as well, with blacks in Mississippi "overwhelmingly tend[ing] to vote for blacks and whites almost unanimously vot[ing] for whites in most black versus white elections." *See* 2 *Evidence of Continued Need* 1721 (appendix to statement of Wade Henderson) (internal quotation marks omitted). Moreover, the report explained, "[n]o black candidate has won election to Congress or the state legislature from a majority-white district in Mississippi." *Id.* at 1722. And Mississippi is by no means unique among southern states in this respect. Another study in the legislative record found that during the 1980s and 1990s, "not a single black candidate won a majority-white district in the South." *Benefits and Costs* 69 (responses of Drew S. Days III to questions submitted by Senators Cornyn, Coburn, Kennedy, Leahy, and Schumer). According to the National Commission on the Voting Rights Act, only 8% of all black

U.S. representatives in 2000 were elected from majority-white districts. 1 *Evidence of Continued Need* 159 (Nat'l Comm'n Report).

Shelby County objects to this Court's reliance on evidence of racially polarized voting in assessing the continued need for Section 5, arguing that racially polarized voting constitutes private conduct, not "governmental discrimination -- the only type of discrimination Congress is empowered to remedy under the Fifteenth Amendment." *See* Pl.'s Mot. at 31. But Shelby County fails to recognize the close link between racially polarized voting and intentional, state-sponsored minority vote dilution. It is only because of the continued existence of racially polarized voting that covered jurisdictions can structure their electoral processes so as to intentionally diminish the ability of minority voters to elect candidates of their choice. *See Continuing Need* for Section 5 59 (prepared statement of Richard Engstrom). Although the persistence of racially polarized voting -- in and of itself -- does not provide evidence of unconstitutional voting discrimination by covered jurisdictions and their officials, the persistence of measures that are intentionally designed to "dilute minority voting strength" does provide such evidence, and these measures can only be effective in areas that are marked by racially polarized voting.

Shelby County argues, however, that the Attorney General is incorrect to rely even on evidence of intentional minority vote dilution in justifying the 2006 reauthorization of Section 5, since "Section 5 enforces the Fifteenth Amendment" and "claims alleging purposeful vote

dilution are cognizable under the Equal Protection Clause of the Fourteenth Amendment - not under the Fifteenth Amendment." *See* Pl.'s Reply at 47. The Supreme Court has never "explicitly decided[] that the Fifteenth Amendment applies to dilution claims." *See Bossier II*, 528 U.S. at 359 n.11 (Souter, J., concurring in part, dissenting in part); *see also supra* pp. 63-64. But the Court in *City of Rome* relied on evidence of minority vote dilution in upholding the constitutionality of the 1975 reauthorization of Section 5 as a valid exercise of Congress's Fifteenth Amendment enforcement authority. *See* 446 U.S. at 181 (*quoting* Congress's finding that "'[a]s registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength'") (internal citation omitted). Regardless of whether intentional state-sponsored minority vote dilution violates the Fifteenth Amendment, then, Shelby County's argument that such evidence cannot be used to sustain the 2006 reauthorization of Section 5 is directly refuted by *City of Rome*.[15]

15. In *City of Rome*, Justice Rehnquist, joined by Justice Stewart in dissent, voiced concerns as to the majority's reliance on evidence of vote dilution in justifying the 1975 reauthorization of Section 5, arguing that any "disparate impact associated with nondiscriminatory electoral changes . . . result[ing] from bloc voting" cannot establish "congressional power to devise an effective remedy for prior constitutional violations." *Id.* at 217 (Rehnquist, J., dissenting). But Justice Rehnquist's objection to the use of such evidence stemmed from the fact that, in *City of Rome*, the city had proven that its dilutive electoral changes were not purposefully discriminatory. *Id.* at 214. Justice Rehnquist went on to explain that where states seek "to prevent the participation of blacks in local government by measures other than outright denial of the

Appendix B

Shelby County's position on the irrelevance of intentional dilutive measures is also at odds with the history and purpose of Section 5. According to Shelby County, the so-called "second generation barriers" to voting that "do not interfere with the right to vote, but instead limit the effectiveness of that vote," cannot be used to justify Section 5's constitutionality, *see* Pl.'s Reply at 21, because Section 5 was intended to combat only those tactics that were aimed at direct disenfranchisement, rather than indirect "dilutive mechanisms," *id.* at 48. But Section 5 never had such a limited purpose. To the contrary, Congress specifically designed the preclearance requirement in order to prohibit covered jurisdictions from implementing any and all discriminatory voting changes, regardless of the form they might take. *See, e.g.*, *Continuing Need* 41 (Earls Responses) (explaining that "Section 5 was not intended merely to increase minority registration rates, but rather to make sure that covered jurisdictions did not put in place . . . a host of other practices that would negate or dilute the voting strength of newly enfranchised black voters."). Prior to the enactment of Section 5, covered jurisdictions were able to perpetuate minority disenfranchisement by adopting new, deceptive

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franchise," Congress can "of course remedy and prevent such purposeful discrimination." *Id.* (emphasis added). Here, Shelby County has not proven -- nor even alleged -- that all instances of state-sponsored minority vote dilution in the legislative record are free from discriminatory animus. Hence, even under the more limited view of Congress's enforcement authority endorsed by Justice Rehnquist in *City of Rome*, the evidence of purposefully dilutive measures in the 2006 legislative record could provide valid grounds for the reauthorization of Section 5.

discriminatory techniques as soon as the old ones had been struck down. Although the primary focus of Section 5 in 1965 may have been those techniques that were being used to prevent blacks from entering polling places and casting ballots, "the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles." *See Bossier II*, 528 U.S. at 366 (Souter, J., concurring in part, dissenting in part). It is for this reason that the Supreme Court in Allen held that Section 5 bars not only those voting changes that interfere with minorities' access to the ballot, but also those changes that interfere with the weight of the ballots cast. *See Allen*, 393 U.S. at 569 (recognizing that "[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"); *see also Continuing Need* 36 (Arrington Responses) (explaining that the Act has always been "about more than just the mere ability to cast a vote . . . The vote must be counted and must count").

Although Shelby County seeks to portray "second generation barriers" to voting as novel creations of the 1980s and 1990s, such dilutive measures have long been employed by covered jurisdictions as a means of intentionally discriminating against minority voters. *See, e.g.*, *Evidence of Continued Need* 209 (explaining that vote dilution "consists of mechanisms employed by whites since the First Reconstruction in the nineteenth century"); *Introduction to Expiring Provisions* 206 (prepared statement of Chandler Davidson) (noting that dilutive tactics were "widely used in the Nineteenth Century when black males could vote" and "began to be used once

more in the mid-Twentieth Century, particularly after the abolition of the white primary, as increasing numbers of blacks began to be able to exercise the franchise"). Indeed, Congress relied on evidence of these purposefully dilutive mechanisms in each of its previous reauthorizations of Section 5. *See* H.R. Rep. No. 109-478, at 36. In its 2006 report, the House Committee on the Judiciary specifically found that the voting changes being sought by covered jurisdictions -- which included "enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements" -- "resemble[d] those techniques and methods used in 1965, 1970, 1975, and 1982." *Id.* This Court sees no reason, then, why the continued existence of these dilutive techniques, as well as the continued existence of racially polarized voting -- a necessary precondition for such techniques to be effective -- cannot support the 2006 reauthorization of Section 5.

10. Section 5's Deterrent Effect

Any assessment of the persistence of intentional voting discrimination by covered jurisdictions must also take into account "the number of voting changes that have never gone forward as a result of Section 5." *See* H.R. Rep. No. 109-478, at 24. In 2006, the House Committee on the Judiciary found that Section 5 has deterred covered jurisdictions "from even attempting to enact discriminatory voting changes," as covered jurisdictions

"'tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result.'" *Id.* (quoting 1 *Evidence of Continued Need* 177 (Nat'l Comm'n Report)). In light of Section 5's substantial deterrent effect, any evaluation of the continued existence of purposeful voting discrimination by covered jurisdictions cannot be based solely on the number of intent-based objections lodged by the Attorney General, or the number of lawsuits in which a three-judge court has denied preclearance to a covered jurisdiction's racially-motivated voting change. Rather, the assessment of the continued need for Section 5 must also account for those intentionally discriminatory voting changes that have been abandoned by covered jurisdictions prior to the formal preclearance process, simply as a result of Section 5's existence.

Congress in 2006 heard testimony from a number of voting rights practitioners and scholars as to how Section 5 has prevented the enactment of discriminatory voting changes "'under the radar screen [in ways] that may not appear easily in statistics.'" *See Nw. Austin I*, 573 F. Supp. 2d at 264 (quoting *Introduction to Expiring Provisions* 17 (testimony of Theodore Shaw)). As one civil rights lawyer in Alabama testified, "Section 5 provides a powerful deterrent . . . and based on my experience, I strongly believe that the continued Section 5 coverage in Alabama is not only necessary but it is imperative." *Benefits and Costs* 4 (statement of Fred D. Gray). Other witnesses similarly expressed the view that "[t]he number of objections does not capture the Act's tremendous deterrent effect."

Continuing Need 100 (Karlan Responses); *id.* at 141 (prepared statement of Anita S. Earls); *Introduction to Expiring Provisions* 166 (Shaw Responses); *Impact and Effectiveness* 66 (prepared statement of Joseph D. Rich). One witness interpreted the decline in objection rates not as an indication that Section 5 is no longer needed, but as a sign of Section 5's success in preventing covered jurisdictions from submitting discriminatory voting changes for preclearance in the first place. As she explained, "[i]f there was an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but that it is sufficiently serving its purpose and must be renewed." *Continuing Need* 68 (Earls Responses).

The three-judge court in *Nw. Austin I* provided "several concrete examples" of cases in which "formal objections were unnecessary to thwart discriminatory voting changes," because the mere existence of Section 5 served to deter covered jurisdictions from "proposing certain changes once they realized the proposals would prompt objections." *See* 573 F. Supp. 2d at 265. Several witnesses highlighted the significance of Section 5 not just as a deterrent to the enactment of discriminatory voting changes, but also as a kind of "bargaining chip" for minority voters, ensuring that minority political participation remains a "central consideration" in the structuring of electoral processes. *See Continuing Need* 190-91 (prepared statement of Pamela S. Karlan); *see also Impact and Effectiveness* 66 (prepared statement of Joseph D. Rich).

Unfortunately, it is simply not possible to determine the number of purposefully discriminatory voting changes that have been deterred by Section 5. *See, e.g.*, *Continuing Need* 114 (Pildes Responses) (noting that "the extent to which the existence of § 5 creates an effective deterrent effect is extremely difficult, perhaps impossible, to quantify"); *Introduction to Expiring Provisions* 73 (Hasen Responses) (explaining that the magnitude of Section 5's "deterrent effect cannot be quantified from the record"). Nor is it possible to determine -- at least to any reasonable degree of certainty -- whether, in the absence of Section 5, covered jurisdictions would resort to a host of unconstitutional, discriminatory voting practices. *See Introduction to Expiring Provisions* 39-40 (Hasen Responses); *see also Nw. Austin I*, 573 F. Supp. 2d at 267 (recognizing that "no one can know for sure what would happen if section 5 were allowed to expire"). Nevertheless, in examining whether Section 5 remains "justified by current needs," *Nw. Austin II*, 129 S. Ct. at 2512, it is significant to recall Congress's finding in 2006 that the preclearance requirement has continued to deter covered jurisdictions from even attempting to adopt discriminatory voting changes in the first place. *See* H.R. Rep. No. 109-478, at 24. It therefore seems fair to assume that the instances of intentional voting discrimination documented in the legislative record represent only a fraction of those instances that otherwise would have occurred in the absence of Section 5, given the number of "discriminatory voting changes that have never materialized" as a result of the preclearance requirement. *See id.* at 36.

C. Section 5 as a Congruent and Proportional Response to a Continuing History and Pattern of Unconstitutional Conduct by Covered Jurisdictions

1. A Continuing History and Pattern of Unconstitutional Conduct

Having reviewed the evidence of unconstitutional voting discrimination in the 2006 legislative record, the Court must now answer the central question posed by this case: "does the 2006 legislative record contain sufficient evidence of contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years?" *See Nw. Austin I*, 573 F. Supp. 2d at 265. In other words, did Congress possess the requisite "evidence of a pattern of constitutional violations on the part of the States," *Hibbs*, 538 U.S. at 729, which is needed to satisfy the second step of the three-part *Boerne* analysis? For several reasons, this Court agrees with the three-judge court in *Nw. Austin I* that "the 2006 legislative record is plainly adequate to justify section 5's 'strong remedial and preventive measures.'" 573 F. Supp. 2d at 271 (quoting *Boerne*, 521 U.S. at 526).

First, the legislative record amassed by Congress in support of the 2006 reauthorization of Section 5 is at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in *City of Rome*. *See Nw. Austin I*, 573 F. Supp. 2d at 265-66, 270-71. In *City of Rome*, the Supreme Court looked to three types of

evidence in evaluating whether Section 5 remained justified by current needs: evidence of (1) continued racial disparities in voter registration; (2) the number of minority elected officials; and (3) the nature and number of Section 5 objections. In 1975, there were 16, 17.8, and 23.6 percentage point disparities in voter registration rates between blacks and whites in Louisiana, North Carolina, and Alabama -- disparities that the Supreme Court characterized as "significant." *See* S. Rep. No. 94-295, at 779; *see also City of Rome*, 446 U.S. at 180. In 2004, there were 14.2, 17.8, and 19.2 percentage point disparities in voter registration rates between blacks and non-Hispanic whites in Virginia, Arizona, and Florida, and disparities of over 40 percentage points in voter registration rates between Hispanics and non-Hispanic whites in Arizona, California, Virginia, Georgia, and North Carolina. *See* 2004 U.S. Census Report. These disparities are certainly comparable to those deemed "significant" by the Supreme Court in *City of Rome*.

With respect to minority elected officials, in 2006, just as in 1975, Congress recognized the significant progress that had been made as far as the number of African-American elected officials in covered jurisdictions, but also found that African-Americans remained under-represented in state legislatures in the South based on their percentage of the population. *See* H.R. Rep. No. 109-478, at 33. Congress additionally found that three of the covered states that had never elected a black representative to statewide office as of 1975 (Mississippi, Louisiana, and South Carolina) still had never elected a black representative to statewide office as of 2006. *Id.*

Appendix B

In terms of the objection-related statistics in the legislative record -- the third category of evidence relied on by the Supreme Court in *City of Rome* -- Congress in 2006 acknowledged that the objection rate had been lower in recent years than in the years immediately prior to the 1975 reauthorization of Section 5. But Congress also received evidence indicating that the objection rate has always been below 5%, *see Introduction to Expiring Provisions* 219 (attachment to Hasen Prepared Statement), and that there were still more than 700 objections lodged by the Attorney General since 1982, *see* H.R. Rep. No. 109-478, at 21, with more objections lodged after 1982 than before, *see* 1 *Evidence of Continued Need* 172-73 (Nat'l Comm'n Report). In light of this data, the House Committee on the Judiciary had good reason to conclude that the evidence of voting discrimination in the 2006 legislative record still "resemble[d]" the evidence before Congress when it reauthorized Section 5 in 1975. *See* H.R. Rep. No. 109-478, at 6. This "resemblance" of the 2006 legislative record to the 1975 legislative record is critical, given that *Boerne* and later cases applying the congruence and proportionality framework have repeatedly cited the legislative record at issue in *City of Rome* as containing precisely the kind of evidence needed to sustain remedial, prophylactic enforcement legislation like Section 5. *See Nw. Austin I*, 573 F. Supp. 2d at 271 (*citing Boerne*, 521 U.S. at 530; *Fla. Prepaid*, 527 U.S. at 640; *Garrett*, 531 U.S. at 369, 373-74).

In addition to the three categories of evidence relied on by the Supreme Court in *City of Rome*, Congress in 2006 identified several other forms of evidence that bear

directly on the persistence of unconstitutional voting discrimination by covered jurisdictions. As previously mentioned, one study in the legislative record revealed that there were 421 objections lodged between 1982 and 2006 in which the Attorney General denied preclearance to a covered jurisdiction's proposed voting change based on his inability to find that the change was not motivated by a racially discriminatory purpose. *See Preclearance Standards* 180 tbl. 2 (McCrary Study). Another study found that 205 voting changes were withdrawn by covered jurisdictions after receipt of an MIR, thereby suggesting that the covered jurisdiction may have known that its change could not withstand federal scrutiny. *See* 1 *Evidence of Continued Need* 178 (Nat'l Comm'n Report). There were 25 unsuccessful judicial preclearance suits filed since 1982, including some in which preclearance was denied on the basis of discriminatory intent. *See Nw. Austin I*, 573 F. Supp. 2d at 266. And there were at least 105 successful Section 5 enforcement actions between 1982 and 2006, some of which led to the abandonment of unprecleared voting changes by covered jurisdictions, while others led to intent-based denials of preclearance after covered jurisdictions were forced to submit their voting changes for federal review. *See* 1 *Evidence of Continued Need* 185-86 (Nat'l Comm'n Report); *see also Preclearance Standards* 83 (appendix to statement of Brenda Wright). From 1982 to 2006, there were tens of thousands of federal observers dispatched to monitor elections in covered jurisdictions, *see* 2006 Amendments § 2(b)(3)-(4), (8), 120 Stat. at 577-78, many of whom played a key role in preventing the attempted intimidation and harassment of minority voters at the polls, *see* H.R. Rep.

No. 109-478, at 44. And perhaps most importantly, there were at least 14 reported Section 2 cases since 1982 involving judicial findings of intentional or unconstitutional voting discrimination by covered jurisdictions. *Nw. Austin I*, 573 F. Supp. 2d at 258. As the three-judge court in *Nw. Austin I* pointed out, "all this evidence becomes even more compelling given Congress's finding that section 5's preclearance requirement has deterred covered jurisdictions from even attempting to implement an unknown and unknowable number of [voting] changes." *Id.* at 266.

It is noteworthy that the evidence of unconstitutional voting discrimination in the 2006 legislative record far exceeds the evidence of unconstitutional discrimination found sufficient to uphold the challenged legislation in both *Hibbs* and *Lane*. *See Nw. Austin I*, 573 F. Supp. 2d at 271. In *Hibbs*, a male employee of the Nevada Department of Human Resources brought suit under the FMLA after he was discharged for failing to return to work because he had been caring for his ailing wife. Nevada contended that Congress had exceeded its Fourteenth Amendment enforcement authority by abrogating state sovereign immunity in the FMLA. Rejecting this challenge, the Supreme Court held that Congress "had evidence of a pattern of constitutional violations on the part of the States in this area," which justified enactment of the remedial § 5 legislation. 538 U.S. at 729. In so holding, the Supreme Court relied on just four pieces of evidence:

> (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities

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

Lane, 541 U.S. at 528 n.17 (citation omitted) (summarizing *Hibbs*, 538 U.S. at 728-33).

In other words, the Supreme Court upheld the challenged provision of the FMLA as responsive to a documented history and pattern of unconstitutional conduct by the states, based solely on (1) a survey that found discriminatory parental leave practices by *private*-sector employers, not state employers; and (2) three other forms of evidence of employers' discriminatory practices with respect to *parental* leave, despite the fact that the FMLA provision at issue provided for *family* leave, not parental leave. *See Hibbs*, 538 U.S. at 746-48 (Kennedy, J., dissenting). The majority concluded that evidence relating to parental leave was "relevant because both parenting and family leave provisions respond to 'the same gender stereotype: that women's family duties trump

those of the workplace.'" *Id.* at 748 (quoting 538 U.S. at 731 n.5). But as Justice Kennedy pointed out in dissent, "the question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment . . . [but] whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave." *Id.* at 749.

In *Lane*, the Supreme Court upheld Title II of the ADA as applied to claims by the disabled alleging that they had been denied access to the courts based on "statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services." *Lane*, 541 U.S. at 529. Significantly, however, the Supreme Court in *Lane* identified only "*two* reported cases finding that a disabled person's federal constitutional rights were violated" as a result of being denied access to the courts. *Id.* at 544 (Rehnquist, C.J., dissenting) (citing 541 U.S. at 525 n.14). Aside from those two cases, the only evidence that the Court identified with respect to "due process 'access to the courts'" violations was (1) the testimony of two witnesses before a House subcommittee as to the "'physical inaccessibility' of local courthouses," even though neither witness "reported being denied the right to be present at constitutionally protected court hearings"; and (2) a report by the ADA Task Force on the Rights and Empowerment of Americans with Disabilities, which contained "a few anecdotal handwritten reports of physically inaccessible courthouses." *Id.* at 545. As Chief Justice Rehnquist noted in dissent, these types of anecdotes do "not state a constitutional violation," since

"[a] violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding." *Id.* at 546. Yet the majority in *Lane* found this evidence sufficient to establish "a pattern of unconstitutional treatment in the administration of justice," at least when viewed against the "backdrop of pervasive unequal treatment in the administration of state services and programs." *Id.* at 524.

The evidence relied on by the Supreme Court to uphold the challenged legislation in *Hibbs* and *Lane* "pales in comparison to the extensive record Congress compiled when extending section 5." *Nw. Austin I*, 573 F. Supp. 2d at 271. Just on the subject of formal judicial findings of unconstitutional conduct, Congress in 2006 identified three times as many reported cases since 1982 in which covered jurisdictions committed unconstitutional voting discrimination against minority voters (6) than the number of cases *Lane* identified in which a state unconstitutionally denied a disabled person access to the courts (2). *Compare* S. Rep. No. 109-295, at 65 *with Lane*, 541 U.S. at 544 (Rehnquist, C.J., dissenting) (citing 541 U.S. at 525 n.14). This is particularly remarkable, as the *Nw. Austin I* court noted, "given that section 5 was actively deterring constitutional violations throughout the period under review." 573 F. Supp. 2d at 272.

But, of course, there is much more in the 15,000-page record supporting the 2006 reauthorization of Section 5. The circumstantial evidence of unconstitutional voting discrimination relied on by Congress also far outweighs the circumstantial evidence of unconstitutional discrimination

relied on by the Supreme Court in *Hibbs* and *Lane*. In *Lane*, for example, the Court cited as circumstantial evidence of unconstitutional discrimination the testimony of several disabled persons as to the physical inaccessibility of local courthouses -- even though physical inaccessibility, in and of itself, does not reflect a constitutional violation. *See* 541 U.S. at 546 (Rehnquist, C.J., dissenting) (explaining that "[w]e have never held that a person has a *constitutional* right to make his way into a courtroom without any external assistance"). By contrast, many of the examples of voting discrimination cited by Congress in support of the 2006 reauthorization of Section 5 are highly suggestive of unconstitutional conduct: whether it be Kilmichael, Mississippi's decision to cancel its 2001 local elections in which a significant number of African-Americans sought office immediately after new Census data revealed that African-Americans recently had become a majority of the town's population; Charleston County, South Carolina's sudden decision in 2000 to change the method of election for its school board to one that had recently been struck down as discriminatory, just after African-Americans won a majority of seats on the board for the first time; Alabama poll officials' 1992 attempts to "close the doors" on African-American voters before the voting hours were over; Louisiana's 2001 decision to purposefully "obliterate" a majority-black district in Orleans Parish; South Dakota's passage of a photo identification law in 2002 that state legislators conceded was adopted in order to "retaliate" against the recent rise in Native American voter registration; Mississippi's 1995 attempt to revive its dual registration system without seeking preclearance, even though prior versions of the system had all been

invalidated as discriminatory; or Waller County, Texas's suspiciously-timed reduction in voting opportunities for Prairie View A&M students immediately before a 2004 election that was marked by the presence of two black Prairie View A&M students as candidates for office. None of these incidents resulted in a formal judicial finding of unconstitutional voting discrimination. Yet each case -- and many others like them in the 15,000-page legislative record -- supports the conclusion that unconstitutional voting discrimination persists in covered jurisdictions, notwithstanding the deterrent effect of Section 5.

In evaluating whether Congress properly found a history and pattern of unconstitutional conduct sufficient to justify the 2006 reauthorization of Section 5, it is also significant to recall the deference to which Congress is entitled when it legislates to enforce the substantive guarantees of the Fifteenth Amendment. As the Supreme Court acknowledged in *Nw. Austin II*, "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." 129 S. Ct. at 2513. And as explained earlier, Congress acts at the pinnacle of its constitutional enforcement authority when it legislates to protect a fundamental right, or when it legislates to prohibit discrimination against a suspect class. *See supra* pp. 65-66. In reauthorizing Section 5 in 2006, Congress did both.

Moreover, Congress's determination that there is a continued need for Section 5 was not based on a perfunctory review of a few isolated examples of voting discrimination by covered jurisdictions. Instead, Congress

"approached its task seriously and with great care." *Nw. Austin I*, 573 F. Supp. 2d at 265. It held 22 hearings over the course of eight months, and heard testimony from 92 witnesses, including Justice Department attorneys, law professors, social scientists, and civil rights litigators. In addition to that testimony, the evidence that Congress collected consisted of statistical and other analyses, objection letters, law review articles, judicial decisions, and first-hand accounts of discrimination. Ultimately, Congress amassed a 15,000-page legislative record in support of its decision to renew Section 5 -- a record that the Supreme Court has described as "sizeable," *Nw. Austin II*, 129 S. Ct. at 2513, and that dwarfs those deemed sufficient in *Lane* and *Hibbs*. Shelby County points out that "[i]t is the quality of the evidence that matters - not the quantity of evidence." *See* Pl.'s Reply at 38. But the Supreme Court has often acknowledged the quantity of the evidence considered by Congress in the course of assessing the sufficiency of that evidence. *See, e.g.*, *Katzenbach*, 383 U.S. at 309 (describing the legislative history of the Act as "voluminous"). And surely Congress's judgment that "extending the expiring provisions of the Voting Rights Act is still necessary," S. Rep. No. 109-295, at 2, is all the more valuable given the "sheer bulk of the record showing both continued problems and significant improvements," *id.* at 15, which Congress reviewed prior to reaching its conclusion.

There are additional reasons to accord significant weight to Congress's 2006 decision to renew Section 5. First, Congress in 2006 did not enact new legislation, but instead reauthorized legislation that had already

been in effect for more than 40 years. During those 40 years, the Supreme Court upheld the constitutionality of Section 5 on four separate occasions, each time finding that "circumstances continued to justify the provision[]." *See Nw. Austin II*, 129 S. Ct. at 2510 (citing *Georgia*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed. 2d 472; *City of Rome*, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119; *Lopez*, 525 U.S. 266, 119 S. Ct. 693, 142 L. Ed. 2d 728); *see also Katzenbach*, 383 U.S. at 334. Twice, the Supreme Court has assessed facial challenges to Section 5 like the one raised here by Shelby County, and both times the Court has found that Section 5 passed constitutional muster based on evidence of continued voting discrimination by covered jurisdictions. *See Katzenbach*, 383 U.S. at 334; *City of Rome*, 446 U.S. at 182.

The Supreme Court in *Nw. Austin II* made clear that past discrimination alone cannot sustain Section 5, *see* 129 S. Ct. at 2511, but the Court by no means suggested that history was irrelevant to the constitutional analysis. In *Boerne* and the cases applying the congruence and proportionality framework since *Boerne*, the Supreme Court has acknowledged the significance of an established history of unconstitutional discrimination in evaluating the need for remedial enforcement legislation, often *citing* examples of discrimination at least several decades old in order to justify the challenged legislation. *See, e.g.*, *Lane*, 541 U.S. at 524 (describing the historical "backdrop" of discrimination against the disabled, and *citing* examples of such discrimination dating from the late 1970s); *Hibbs*, 538 U.S. at 729 (recognizing "[t]he history of the many state laws limiting women's employment opportunities,"

and providing examples of cases upholding the validity of such laws as far back as 1873); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 200 (2005) (interpreting *Lane* to mean that "old" evidence of voting discrimination could be used to support a reauthorization of Section 5).

When courts assess individual instances of alleged voting discrimination like those described in the 2006 legislative record -- for example, in the context of a Section 2 suit or a direct constitutional challenge -- they also look to historical evidence to determine whether there has been intentionally discriminatory, unconstitutional conduct. As the Supreme Court explained in *Rogers v. Lodge*, "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by the courts or made illegal by civil rights legislation, and that they were replaced by practices which, though neutral on their face serve to maintain the status quo." 458 U.S. at 625; *see also Charleston Cnty.*, 316 F. Supp. 2d at 305 (explaining that under *Arlington Heights*, "[t]he historical background of the jurisdiction's decision" must be considered in determining whether "discriminatory intent was in fact a motivating factor in a jurisdiction's enactment of legislation"). Given the significance of historical context in assessing both the general need for remedial, prophylactic enforcement legislation and whether particular instances of alleged voting discrimination do, in fact, amount to

constitutional violations, it is clear that any assessment of the continued need for Section 5 cannot be undertaken in a historical vacuum.

This Court agrees with the three-judge court in *Nw. Austin I* that Congress's "predictive judgment" as to the continued need for Section 5 warrants "particular respect," given that it was a prediction based "on experience, requiring less in the way of conjecture than when Congress enacts legislation for the first time." 573 F. Supp. 2d at 267. In reauthorizing Section 5 in 2006, Congress could not be certain as to whether unconstitutional voting discrimination would increase in the absence of Section 5, and whether, just as in 1965, private enforcement actions would once again prove insufficient to protect minorities' voting rights if Section 5 were allowed to expire. But courts "must accord substantial deference to the predictive judgments of Congress . . . particularly when, as here, those predictions are so firmly rooted in relevant history and common sense." *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 165, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)) (internal quotation marks and citations omitted). As the Supreme Court noted in *Nw. Austin II*, Congress is a co- equal Branch that is empowered under the Fifteenth Amendment "to determine in the first instance what legislation is needed to enforce it," and courts must be cautious when engaging in the grave and delicate role of assessing the constitutionality of carefully-considered legislation. *See* 129 S. Ct. at 2513. And in 2006, Congress concluded after many months of deliberation and compilation of a massive record that "a failure to reauthorize the temporary provisions [of the

Voting Rights Act], given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action," which, in light of past experience, would not be "enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." H.R. Rep. No. 109-478, at 57.

Congress's predictive judgment was based not only on the established pre-1965 history of unconstitutional state-sponsored voting discrimination in the South, but also on evidence of Section 5's substantial deterrent effect over 40 years. Most importantly, it was based on the extensive 15,000-page legislative record replete with direct and circumstantial evidence of contemporary voting discrimination by covered jurisdictions -- voting discrimination that occurred despite the existence of Section 5. This Court finds, then, that Congress satisfied its burden in 2006 of identifying a continuing "history and pattern of unconstitutional . . . discrimination by the States," *Garrett*, 531 U.S. at 368, which was sufficient to justify the reauthorization of Section 5 as remedial, prophylactic enforcement legislation.

2. The Congruence and Proportionality of Section 5

The third and final step of the *Boerne* analysis requires the Court to decide whether Section 5 still constitutes a "congruent and proportional" response to the problem that it targets. Shelby County casts Section 5 as an unduly broad remedial measure, arguing that "[l]ike RFRA, Section 5's 'sweeping coverage ensures its

intrusion at every level of government, displacing laws and prohibiting official actions' regarding any change in voting laws." Pl.'s Reply at 21 (quoting *Boerne*, 521 U.S. at 532). In a sense, Shelby County is correct: Section 5 does require covered jurisdictions to *seek* preclearance for all changes to their voting practices or procedures, regardless of how trivial or innocuous those changes may be. *See, e.g.*, *Nw. Austin II*, 129 S. Ct. at 2511 (noting that "the preclearance requirement applies broadly"). But Section 5 is nonetheless limited in meaningful ways. Indeed, the Supreme Court in *Boerne* praised Section 5 as an exemplary congruent and proportional remedy, pointing to the Act's temporal and geographic limits as a means of distinguishing it from RFRA, which lacked a "termination date or termination mechanism." *See Boerne*, 521 U.S. at 532-33. For purposes of assessing the congruence and proportionality of Section 5 as reauthorized in 2006, then, it is significant that "the limiting features of section 5 the Court believed so compelling in the *City of Boerne* cases all remain in place today." *Nw. Austin I*, 573 F. Supp. 2d at 274.

Despite Shelby County's suggestion that Section 5 has been transformed from an "emergency" provision into a "permanent" intrusion on state sovereignty, *see* Pl.'s Reply at 43, Congress in 2006 did not choose to make Section 5 permanent. Instead, it extended the preclearance requirement for 25 years, and provided for congressional reconsideration of the Act's temporary provisions in 15 years. *See* S. Rep. No. 109-295, at 5; 42 U.S.C. § 1973b(a)(7), (8). Although 25 years is longer than the 7 year extension of Section 5 upheld by the Supreme Court in *City*

of Rome, the 2006 extension is the same length as the 1982 extension. And Congress had at least two good reasons for selecting 25 years as the length of the extension. First, a renewal period of more than 20 years was needed to cover two decennial redistricting cycles. Because "most section 5 activity 'occurs during redistricting, which only happens every ten years following each census,' a shorter extension would [have] 'capture[d] only one redistricting cycle,'" which would not have provided as much "'evidence . . . to allow Congress to make the same reasoned determination regarding renewal'" that the 2006 Congress was able to make as a result of the previous 25-year renewal of Section 5 in 1982. *See Nw. Austin I*, 573 F. Supp. 2d at 267 (internal citation omitted); *see also Introduction to Expiring Provisions* 167 (Shaw Responses). Second, a shorter extension period would not have encouraged as many covered jurisdictions to *seek* bailout. Under the 1982 Amendments, a covered jurisdiction petitioning for bailout must demonstrate that it has complied with the Act's requirements for the past ten years. *See* 42 U.S.C. § 1973b(a). Any renewal of Section 5 for a period of less than ten years therefore "'would [have] completely nullif[ied] the current incentive [for] covered jurisdictions to maintain clean voting records." *Nw. Austin I*, 573 F. Supp. 2d at 267 (internal citation omitted).

For these reasons, Congress decided that "another 25 years of remedial measures (for a total of 67 years of remedial measures under the VRA until 2032) remains appropriate given the near century of discrimination the Act is designed to combat." H.R. Rep. No. 109-478, at 58. Like the three-judge court in *Nw. Austin I*, this Court

"*see*[s] no basis for questioning this quintessentially legislative judgment." 573 F. Supp. 2d at 268. Although the 25-year renewal period is substantial, the fact that Section 5 continues to be temporally limited distinguishes it from every piece of legislation that has been struck down by the Supreme Court as lacking congruence and proportionality under *Boerne*.

In addition to its termination date, Section 5 also remains limited by its termination mechanism, as jurisdictions may bailout of Section 5 coverage if they meet certain statutory requirements. *See Nw. Austin II*, 129 S. Ct. at 2509; 42 U.S.C. § 1973b(a). The Court in *Boerne* pointed to the existence of this termination mechanism, which "ensure[d] that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely," as indicative of Section 5's congruence and proportionality. *See* 521 U.S. at 533. Since *Boerne*, the bailout provision has remained in effect. *See* H.R. Rep. No. 109-478, at 55 (noting that "H.R. 9 preserves those same provisions" that were cited approvingly by the Court in *Boerne*, as covered jurisdictions may still "escape coverage by showing the danger of substantial voting discrimination has not materialized during the preceding (now ten) years"). Under 42 U.S.C. § 1973b(a), a jurisdiction may *seek* to terminate its coverage under Section 5 by filing a declaratory judgment action demonstrating that, for the past ten years, "it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations; it must also show that it has 'engaged in constructive efforts to eliminate intimidation and harassment' of voters, and similar measures." *Nw. Austin II*, 129 S. Ct. at 2509 (*quoting* §§ 1973b(a)(1)(A)-(F)).

Shelby County questions whether bailout is "a realistic option," citing the fact that only 6% of the jurisdictions originally covered by the Act have successfully bailed out since 1965. *See* Pl.'s Reply at 33. But this statistic is misleading. Since 1984 -- when the 1982 Amendments liberalizing the bailout procedure went into effect -- the Attorney General has consented to *every* bailout action that has been filed. *See* Berman Decl. ¶¶ 27, 29. Indeed, since the initiation of this lawsuit in April 2010, the Attorney General has consented to an additional seven bailout suits that have been filed by covered jurisdictions. *See* Def.'s Second Notice of Supp. Info. [Docket Entry 81] at 2; Def.'s Mot. at 72; Berman Decl. ¶ 27. Congress heard testimony during the 2006 reauthorization hearings from J. Gerald Hebert, former Acting Chief of the Civil Rights Division of the Justice Department, who, at the time of his testimony, had represented all of the covered jurisdictions to successfully bail out since 1984. *See Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 90 (Oct. 20, 2005) (hereinafter, "*Scope and Criteria*") (prepared statement of J. Gerald Hebert) (hereinafter, "Hebert Prepared Statement"). According to Hebert, the reason for the low number of successful bailout actions is not that "jurisdictions are applying and being denied" but that "jurisdictions are just not applying." *Id.*

There are several plausible explanations for this failure to seek bailout. As Professor Karlan noted during her 2006 testimony before the Senate Judiciary

Committee, it is possible that "jurisdictions have not sought bailout because they have not satisfied all the conditions . . . and *see* no point in a futile effort to bail out." *Continuing Need* 93 (Karlan Responses). This, of course, could mean that the criteria for bailout are overly rigorous; but Congress in 2006 heard testimony that "[m]ost of the factors to be demonstrated are easily proven for jurisdictions that do not discriminate in their voting practices." *See Scope and Criteria* 90 (Hebert Prepared Statement) (rejecting the contention that "the criteria [for bailout] are . . . too difficult to meet"). Accepting that the bailout requirements are appropriately tailored to identify those jurisdictions with "clean" voting rights records, which appears to be the case, *see id.* at 104 (describing the bailout requirements as "perfectly tailored"), the failure of so many covered jurisdictions to *seek* bailout likely means that these jurisdictions -- or governmental units within these jurisdictions -- have, in fact, committed voting rights violations in recent years, thereby justifying their continued coverage under the Act.

Another possible reason for the low bailout rate is the minimal administrative cost associated with preclearance, and the fact that covered jurisdictions *see* no need to avoid the preclearance requirement. Congress in 2006 heard testimony from Donald Wright, General Counsel of the North Carolina State Board of Elections, who indicated that most preclearance submissions "are routine matters that take only a few minutes to prepare using electronic submission formats" that are "readily available." *Policy Perspectives* 313 (prepared statement of Donald M. Wright). Wright characterized

the practical cost of preclearance as "insignificant" -- with the exception of redistricting submissions, which tend to be relatively infrequent -- and he went on to explain that the "consensus" among election officials in North Carolina is that Section 5 imposes "a manageable burden providing benefits in excess of costs and time needed for submissions." *Id.* Other witnesses similarly testified that the benefits of Section 5 far outweigh its costs, given that the preparation of a preclearance submission is no more than "a small administrative act." *See Benefits and Costs* 25 (testimony of Fred D. Gray); *Continuing Need* 64 (Earls Responses) (explaining that "the majority" of officials "did not find Section 5 requirements to be burdensome").[16]

Indeed, in the *Nw. Austin* litigation, six states covered in whole or in part by Section 4(b) -- Louisiana, California, North Carolina, Arizona, Mississippi, and New York -- submitted an amicus brief in which they urged the Supreme Court *not* to strike down Section 5, arguing that "the benefits of Section 5 greatly exceed the minimal burdens that Section 5 may impose on States and their

16. The Court recognizes that administrative costs of compliance are not the only costs imposed by Section 5. *See, e.g., Bossier II*, 528 U.S. at 336 (referring to "the 'substantial' federalism costs that the preclearance procedure already exacts") (quoting *Lopez*, 525 U.S. at 282). Nevertheless, an assessment of a remedial statute's practical costs is relevant in determining whether it constitutes congruent and proportional legislation. *See, e.g., Boerne*, 521 U.S. at 534 (describing the "substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power").

political subdivisions." *See* Amicus Br. for North Carolina, Arizona, California, Louisiana, Mississippi and New York, *Nw. Austin II*, 2009 WL 815239, at *2, 17 (Mar. 25, 2009). According to these states, Section 5 does not constitute "an undue intrusion on state sovereignty," because the administrative preclearance process is both "expeditious and cost-effective," and any burden that Section 5 imposes on covered jurisdictions is more than justified by Section 5's "substantial benefits." *Id.* at *1-2. Section 5's minimal administrative burden -- at least according to these six states -- stands in stark contrast to the "heavy litigation burden" imposed by RFRA. *See Boerne*, 521 U.S. at 534.[17]

In addition to the evidence indicating that the practical cost of Section 5 compliance is low, Congress in 2006 received evidence indicating that the practical cost of Section 2 litigation is high. As one expert explained during her 2006 testimony before the Senate Judiciary Committee, Section 2 litigation is both time-consuming and costly, as it requires attorneys "to assemble plaintiffs with standing, file a case and engage in discovery," and "even on an expedited schedule, trial will be months and possibly a year after the new law is put in place." *Continuing Need* 61 (Earls Responses). Section 2 litigation places a heavy burden on minority plaintiffs, who not only must fund the litigation, but also must prove that particular voting practices are, in fact, discriminatory (unlike Section 5, which shifts the burden to covered jurisdictions to prove that their voting changes are

17. No states have sought to join in Shelby County's well-publicized challenge to Section 5.

non-discriminatory). *See Katzenbach*, 383 U.S. at 328. Moreover, even if minority plaintiffs are able to satisfy this evidentiary burden, Section 2 -- unlike Section 5 -- can only eradicate discriminatory voting practices after they have already been implemented to the detriment of minority voters. *See* Def.'s Mot. at 55-57.

For all these reasons, several witnesses who testified during the 2006 reauthorization hearings speculated that in the absence of Section 5, Section 2 would prove insufficient to protect minority voting rights. *See, e.g.*, *Benefits and Costs* 80 (responses of Armand Derfner to questions submitted by Senators Cornyn, Coburn, Leahy, Kennedy, and Schumer) (describing Section 2 cases as "expensive and time-consuming to litigate and hard to win," and refuting the position that "Section 5 is not needed because other litigation will do the job"); *Continuing Need* 15 (testimony of Pamela S. Karlan) (explaining that Section 2 suits demand "huge amounts of resources" and that Section 2 litigation is not "an adequate substitute in any way" for Section 5). The inadequacy of alternative remedies like Section 2 in combating continued voting discrimination by covered jurisdictions further confirms that Section 5 is "congruent and proportional" to the problem that it targets. *Cf. Garrett*, 531 U.S. at 373 (noting that the Voting Rights Act was only enacted after "traditional litigation had proved ineffective" in the course of describing why the Act reflects an appropriately "detailed but limited remedial scheme").

Perhaps the most significant way in which Section 5 remains limited, however, is through its application

to only "those states with the most severe histories of discrimination" in voting. *See Nw. Austin I*, 573 F. Supp. 2d at 274. Since it was first enacted in 1965, Section 5 has never applied nationwide, but has always targeted specific jurisdictions with a "long history of racial disenfranchisement and dilution." *Continuing Need* 103 (Karlan Responses); *see also supra* pp. 11, 22. *Boerne* and its progeny have repeatedly highlighted Section 5's selective coverage in explaining why it constitutes appropriately tailored remedial legislation. *See, e.g.*, *Boerne*, 521 U.S. at 532-33 (comparing RFRA's nationwide application to the provisions of the Voting Rights Act upheld in *Katzenbach*, which "were confined to those regions of the country where voting discrimination had been most flagrant"); *Garrett*, 531 U.S. at 373 (explaining that the Voting Rights Act, unlike Title I of the ADA, was targeted at "those areas of the Nation where abundant evidence of States' systematic denial of [voting] rights was identified"); *Fla. Prepaid*, 527 U.S. at 647 (contrasting the "various limits" contained in the Voting Rights Act with the absence of any such limits in the Patent and Plant Variety Protection Remedy Clarification Act). And like the other limiting features of Section 5 that were lauded by the Supreme Court in *Boerne*, the coverage formula embodied in Section 4(b) remained unchanged when Congress reauthorized Section 5 in 2006.

Given that Congress preserved all of Section 5's traditional limiting features when it reauthorized Section 5 in 2006 (including its selective geographic scope, its termination date, and its termination mechanism), after it heard testimony as to the low administrative costs

imposed by preclearance and the inability of Section 2 litigation to effectively prevent unconstitutional voting discrimination, this Court sees no reason to question Congress's considered judgment that Section 5 remains congruent and proportional to the problem that it targets.[18] The question remains, however, whether the geographical limitation of Section 5 through the coverage formula of Section 4(b) is itself vulnerable to challenge.

IV. The Constitutionality of Section 4(b)

Shelby County challenges Section 4(b) on the ground that it unconstitutionally differentiates between states in violation of "the principle of equal sovereignty" embodied in the Tenth Amendment and Article IV of the Constitution, and that, like Section 5, it does not constitute "'appropriate' enforcement legislation." *See* Pl.'s Mot. at 35; Compl. ¶ 43(c). Since *Katzenbach*, it is well-established that "[t]he doctrine of the equality of States . . . does not bar [the] approach" of selectively applying remedial legislation to only those "geographic areas where immediate action seem[s] necessary." 383 U.S. at 328-29. Nevertheless, the Supreme Court in *Nw. Austin II* made clear that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *See* 129 S. Ct. at 2512. According

18. To the extent that *Katzenbach*'s rationality standard rather than *Boerne*'s congruence and proportionality test provides the proper mode of analysis, the Court finds for the same reasons that the 2006 reauthorization of Section 5 withstands scrutiny under *Katzenbach*.

to Shelby County, "the decades-old data fossilized in the coverage formula bear no relation whatsoever to 'current political conditions' in those jurisdictions'" and "the 'evils' identified by Congress as a basis for reauthorizing Section 5 are not 'concentrated in the jurisdictions singled out for preclearance.'" Pl.'s Reply at 23 (quoting *Nw. Austin II*, 129 S. Ct. at 2512). Hence, Shelby County contends, Section 4(b)'s coverage formula is no longer "sufficiently related" to the problem that it targets.

The Supreme Court in *Nw. Austin II* did not explicate the precise nature of the showing needed to determine whether Section 5's disparate geographic coverage remains "sufficiently related" to the problem that it targets. Several justices during oral argument seemed to suggest that Congress might have to undertake a comparative analysis of unconstitutional voting discrimination in covered versus non-covered jurisdictions and prove that the "States that are now covered . . . are markedly different from the noncovered jurisdictions" in order to justify Section 5's continued selective application. *Nw. Austin II* Oral Arg. Tr. at 22 (Apr. 29, 2009) (Kennedy, J.); *see also id.* at 48 (Roberts, C.J., asking whether it is counsel's "position that today southerners are more likely to discriminate than northerners"?); *id.* at 54 (Alito, J., asking counsel whether "there is no [greater] discrimination in voting in Virginia than in North Carolina or in Tennessee or in Arkansas or in Ohio"?); *id.* at 30 (Scalia, J., pressing counsel as to whether the legislative record shows only that section 5 is still "needed" in covered jurisdictions, or also that Section 5 is needed more in covered jurisdictions than in "the rest of the country"). Significantly, however,

the Supreme Court in *Katzenbach* did not conduct any detailed comparative analysis of voting discrimination in covered versus non-covered jurisdictions when it upheld Section 4(b) in 1966, nor did the Court in *City of Rome* undertake such a comparative analysis when it upheld Section 5 (and its selective application) in 1980.

Hence, the Attorney General argues that it was sufficient for Congress in 2006 to choose "to continue covering the jurisdictions that it had already subjected to the preclearance requirement and that had not bailed out . . . based on findings that voting discrimination continued to exist in those specific jurisdictions and that Section 5 preclearance remained necessary to protect minority voting rights there." Def.'s Supp. Mem. [Docket Entry 75] at 3. No comparative showing as to the precise degree of voting discrimination in covered versus non-covered jurisdictions was necessary, the Attorney General contends, given that a set of jurisdictions was lawfully subjected to preclearance in 1965 -- and in subsequent reauthorizations of the Voting Rights Act -- and Congress learned that those same jurisdictions continued to warrant coverage in 2006. *See id.* Ultimately, however, this issue need not be parsed further here, because Congress in 2006 did examine *both* (1) whether voting discrimination persisted in the jurisdictions traditionally covered by Section 4(b), and (2) whether voting discrimination remained more prevalent in these jurisdictions than in the jurisdictions not subject to preclearance under the Act. *See* Def.'s Supp. Mem. at 4.

This Court has already described in great detail the evidence in the legislative record documenting

the contemporary existence of unconstitutional voting discrimination by covered jurisdictions. In assessing whether this evidence is sufficient to justify the continued application of Section 5 to these jurisdictions, it is useful to start with *Katzenbach* -- the only Supreme Court case in which the Court has outlined the precise nature of the showing needed to sustain Section 4(b). There, South Carolina argued -- like Shelby County does here -- that the coverage formula was "awkwardly designed in a number of respects," 383 U.S. at 329, and it criticized the formula for excluding "certain localities which do not employ voting tests and devices, but for which there is evidence of voting discrimination by other means," *id.* at 330-31. But the Supreme Court dismissed these arguments as "largely beside the point." *Id.* at 329. Congress was not required to create a perfect fit between the coverage formula and the states where voting discrimination was the most prevalent, the Court explained, "so long as the distinctions drawn have some basis in practical experience." *Id.* at 331 (emphasis added).

The Court in *Katzenbach* further suggested that Congress was not even required to document evidence of unconstitutional voting discrimination in each of the states covered by Section 4(b).[19] According to the Court,

19. This view would also seem to be supported by cases like *Hibbs*, in which the Supreme Court upheld remedial enforcement legislation with nationwide application without requiring a showing of unconstitutional conduct by every state to which the legislation applied. *See, e.g., United States v. Blaine Cnty., Mon.*, 363 F.3d 897, 906 (9th Cir. 2004) (explaining that, based on *Hibbs*, "it is clear that Congress need not document evidence

Congress began working "with reliable evidence of actual voting discrimination in a *great majority of the States* and political subdivisions affected by the new remedies of the Act," and it created a formula that "was relevant to the problem of voting discrimination." *Id.* at 329 (emphasis added). That formula -- based on the presence of a voting test or device in a particular jurisdiction as well as low voter registration or turnout in that jurisdiction -- was "relevant" because of the "long history" of states using these tests and devices as a tool for perpetuating minority disenfranchisement. *See id.* at 330. Once Congress had constructed this "relevant" formula -- which was rational "in both practice and theory," *id.* -- Congress was "entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by s[ection] 4(b) of the Act," *id.* at 329, "at least in the absence of proof that

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of constitutional violations in every state to adopt a statute that has nationwide applicability"); *but see Hibbs*, 538 U.S. at 741-43 (Scalia, J., dissenting) (criticizing the majority's failure to "even attempt to demonstrate that each one of the 50 States covered by [the challenged legislation] was in violation of the Fourteenth Amendment"); *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) (stating that he "would not . . . abandon the requirement that Congress may impose § 5 prophylactic legislation only upon those particular States in which there has been an identified history of relevant constitutional violations"). It certainly would seem odd to place a higher evidentiary burden on Congress when it seeks to tailor its remedies to those states where the remedies are most needed than when it chooses to forego any attempt at tailoring, and instead simply enacts remedial legislation on a nationwide scale. On the other hand, one could argue that a higher evidentiary showing is justified in all circumstances in which Congress departs "from the fundamental principle of equal sovereignty." 129 S. Ct. at 2512.

they have been free of substantial voting discrimination in recent years," *id.* at 330.

Shelby County argues that the coverage formula is no longer "relevant" in 2006 because it is based on voter registration and turnout data that "is now 38 years old and will be 59 years old when the 2006 reauthorization expires," Pl.'s Mot. at 37, and because the "statutory coverage factors are tied to the ability to cast a ballot" whereas Section 5 today is directed primarily at so-called "second generation barriers" to voting, and not at states' attempted "interference with ballot access." Pl.'s Supp. Mem. [Docket Entry 74] at 4; *see also* Pl.'s Mot. at 38. Certainly the continued reliance on arguably outdated data is fair cause for concern. But ultimately Shelby County misses the point. As previously explained, *see supra* pp. 11, 22, the specific election years that have come to be used as "triggers" for coverage under Section 4(b) were never selected because of something special that occurred in those years; instead, they were chosen as mere proxies for identifying those jurisdictions with established histories of discriminating against racial and language minority voters. *See, e.g.*, *Continuing Need* 99 (Karlan Responses); *id.* at 110 (Pildes Responses). Notwithstanding the passage of time since the coverage formula was last updated, "[t]he identity of the jurisdictions with that pervasive history and contemporary voting discrimination has not changed." *Id.* at 103 (Karlan Responses). It is for this reason that Chairman Sensenbrenner was so vigorously opposed to the Norwood Amendment's proposed "updating" of Section 4(b) in 2006, which would have made the coverage formula dependent on voter turnout and

registration data from the three most recent presidential elections. As Chairman Sensenbrenner explained, any "updating" of the coverage formula along these lines would eviscerate Section 5, since the coverage formula "is not, and I repeat 'not' predicated on these [voter turnout and registration] statistics alone." *See* 152 Cong. Rec. H5181. In 1965, states were only covered by Section 4(b) if "they applied discriminatory voting tests. And it was this aspect of the formula that brought these jurisdictions with the most serious histories of discrimination under Federal scrutiny," Chairman Sensenbrenner explained. *Id.*

It is also this aspect of the coverage formula -- that is, its link to jurisdictions with proven histories of racial discrimination in voting -- that the Supreme Court has repeatedly cited in noting that Section 5 constitutes an appropriate congruent and proportional remedy. *See, e.g.*, *Boerne* 521 U.S. at 533 (contrasting Section 5's limited application with RFRA's nationwide scope, and noting that the preclearance requirement "was placed only on jurisdictions with a history of intentional discrimination in voting"); *Hibbs*, 538 U.S. at 741-43 (Scalia, J., dissenting) (suggesting that the Court in *City of Rome* upheld "the most sweeping provisions of the Voting Rights Act of 1965 . . . as a valid exercise of congressional power under § 2 of the Fifteenth Amendment" only because those provisions "were restricted to States 'with a demonstrable history of intentional racial discrimination in voting'") (quoting *City of Rome*, 446 U.S. at 177).

By preserving Section 4(b)'s existing coverage formula in 2006 -- under which jurisdictions are subject to

preclearance if they maintained a voting test or device in 1964, 1968, or 1972, and had voter turnout or registration below 50% in that year's presidential election, *see* 42 U.S.C. § 1973b(b) -- Congress ensured that Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of voting discrimination. At the same time, Congress did not merely extend the preclearance requirement to these jurisdictions as a "[p]unishment for long past sins," *Nw. Austin II*, 129 S. Ct. at 2525 (Thomas, J., concurring in judgment in part, dissenting in part). Rather, Congress found substantial evidence of contemporary voting discrimination by the very same jurisdictions that had histories of unconstitutional conduct, which, it concluded, justified their continued coverage under the Act. Finally, Congress found that any over- or under-inclusiveness in Section 4(b) could be remedied through use of the bailout provision in Section 4(a), and the bail-in provision in Section 3(c). *See Nw. Austin I*, 573 F. Supp. 2d at 274.

To the extent that an additional showing of a meaningful difference in voting discrimination between covered and non-covered jurisdictions was nonetheless required to demonstrate that the Act's coverage remains "sufficiently related to the problem that it targets," the legislative record does contain such evidence. For example, the study of Section 2 litigation conducted by Ellen Katz and the Voting Rights Initiative at the University of Michigan Law School found that 64 of the 114 reported Section 2 cases with outcomes favorable to minority voters were filed in covered jurisdictions. *See Impact and Effectiveness* 974 (Katz Study). Although a Section

2 violation does not require proof of unconstitutional discriminatory intent, "many of the same factors required to make a finding of intentional discrimination" are the factors used to determine whether there has been a violation of Section 2. *See* Def.'s Reply at 25; *see also Impact and Effectiveness* 986 (Katz Study). Accordingly, the fact that more than 56% of the successful Section 2 suits since 1982 have been filed in covered jurisdictions -- even though those jurisdictions contain only 39.2% of the country's African-American population, 31.8% of the Latino population, 25% of the Native American population, and less than 25% of the overall population -- suggests that unconstitutional discrimination remains more prevalent in covered than in non-covered jurisdictions. *See Impact and Effectiveness* 974; *see also Introduction to Expiring Provisions* 43-44 (responses of Chandler Davidson to questions submitted by Senators Cornyn and Leahy). The disproportionate number of successful Section 2 suits in covered jurisdictions is all the more remarkable considering that "Section 5 blocks and deters discrimination in covered jurisdictions, and, consequently, one would expect to *see fewer* Section 2 cases there." Def.-Int. Cunningham and Pierson's Supp. Mem. [Docket Entry 73] at 14.

There is also evidence in the legislative record indicating that five of the six Deep South states originally covered by Section 5 (namely, Louisiana, Mississippi, Alabama, Georgia, and South Carolina) accounted for as many as 66% of all federal observer coverages since 1982. *See* H.R. Rep. No. 109-478, at 24-25. This would certainly seem to suggest that minority voter intimidation and

harassment continues to pose a greater problem in covered than in non-covered states -- and that it continues to pose a particularly severe problem in the Deep South. In addition, Congress received evidence in 2006 suggesting that minority candidates are less likely to succeed in elections in covered than in non-covered jurisdictions, *see Impact and Effectiveness* 1008 (Katz Study) (explaining that the majority of Section 2 cases finding a lack of minority candidate success have arisen in covered jurisdictions), and that racial appeals in elections were more prevalent in covered than in non-covered jurisdictions, *see id.* at 1003 (Katz Study) (noting that 63.2% of the Section 2 suits that found political campaigns to be characterized by racial appeals arose in covered jurisdictions). Finally, there is evidence in the record indicating that racially polarized voting is much more pronounced in covered than in non-covered jurisdictions. *See Continuing Need* 48 (Earls Responses). One study that assessed elections involving both minority and white candidates found that "virtually all such elections in covered jurisdictions had levels of white bloc voting at 70% or above while less than two thirds of such elections in non-covered jurisdictions had white bloc voting at 70%." *Id.* In other words, there was a "wide divergence" in the severity of racial bloc voting in covered and non-covered jurisdictions, which reflects "an important empirical finding demonstrating that minorities have less ability to participate equally in the political process in covered jurisdictions." *Id.*

Hence, although the legislative record is primarily focused on the persistence of voting discrimination in covered jurisdictions -- rather than on the comparative

levels of voting discrimination in covered and non-covered jurisdictions -- the record does contain several significant pieces of evidence suggesting that the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement. Like the three-judge court in *Nw. Austin I*, this Court declines to second-guess Congress's 2006 determination to preserve the traditional coverage formula -- targeting those jurisdictions with proven histories of racial discrimination in voting -- which was upheld in *Katzenbach* and "discussed with approval in the *City of Boerne* cases," 573 F. Supp. 2d at 279, particularly given the 2006 legislative record demonstrating a continued prevalence of voting discrimination in covered jurisdictions notwithstanding the considerable deterrent effect of Section 5 in those jurisdictions over the preceding 25 years. Accordingly, this Court finds that Section 4(b)'s disparate geographic coverage remains "sufficiently related" to the problem that it targets.

CONCLUSION

On the eve of the 2006 reauthorization of Section 5, many academics wondered whether, given the effectiveness of Section 5 in deterring unconstitutional conduct, Congress would be able to compile a sufficient record of recent unconstitutional voting discrimination to support Section 5's continued existence; in other words, had Section 5 become "a victim of its own success." *See, e.g.*, Samuel Isaacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004). One scholar characterized this phenomenon as the "Bull Connor is Dead" problem: given the fact that

"[m]ost of the original racist elected officials are out of power," and that "those who remain in power . . . have for the most part been deterred by preclearance," would Congress be able to point toward "a record of recent state-driven discrimination . . . supporting renewal" of Section 5 in 2006? Hasen, 66 OHIO ST. L.J. at 177. Based on the evidence contained in the 15,000-page legislative record, this Court concludes that Congress did just that. Despite the effectiveness of Section 5 in deterring unconstitutional voting discrimination since 1965, Congress in 2006 found that voting discrimination by covered jurisdictions had continued into the 21st century, and that the protections of Section 5 were still needed to safeguard racial and language minority voters. Understanding the preeminent constitutional role of Congress under the Fifteenth Amendment to determine the legislation needed to enforce it, and the caution required of the federal courts when undertaking the "grave" and "delicate" responsibility of judging the constitutionality of such legislation -- particularly where the right to vote and racial discrimination intersect -- this Court declines to overturn Congress's carefully considered judgment.

For the foregoing reasons, the Court will deny Shelby County's motion for summary judgment, and grant the motions for summary judgment filed by the Attorney General and the defendant-intervenors. A separate order has been filed on this date.

/s/
JOHN D. BATES
United States District Judge
Dated: September 21, 2011

APPENDIX C — MINUTE ORDER OF U.S. DISTRICT COURT, DISTRICT OF COLUMBIA, DATED FEBRUARY 4, 2011

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

1:10-cv-00651-JDB

SHELBY COUNTY, ALABAMA

v.

HOLDER

MINUTE ORDER: On the Court's own motion, and upon consideration of the arguments of counsel at the February 2, 2011 hearing and the entire record herein, it is hereby ORDERED that the parties shall submit additional briefing by not later than February 16, 2011, which shall be limited to the following question: in considering the reauthorization of Section 5 of the Voting Rights Act in 2006, was it "rational in both practice and theory," *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966), for Congress to preserve the existing coverage formula in Section 4(b) of the Act? In answering this question, the parties are strongly encouraged to point to specific instances in the legislative record that support their position. The parties are also encouraged to address each aspect of the question separately -- that is, to explain both why Section 4(b) is or is not rational "in practice" and why Section 4(b) is or is not rational "in theory." Plaintiff's memorandum addressing this question shall not exceed fifteen (15) pages in length, and defendant's memorandum

addressing this question also shall not exceed fifteen (15) pages in length. Each defendant-intervenor may file its own memorandum addressing this question, which shall not exceed seven (7) pages in length; defendant-intervenors are, however, strongly encouraged to file a joint memorandum, not to exceed fifteen (15) pages in length, in order to avoid unnecessary duplication.

SO ORDERED.

Signed by Judge John D. Bates on 2/4/11.(lcjdb1)

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED SEPTEMBER 16, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 10-0651 (JDB)

SHELBY COUNTY, ALABAMA, PLAINTIFF,

v.

ERIC H. HOLDER, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT.

MEMORANDUM OPINION AND ORDER

Shelby County has sued Attorney General Eric Holder, seeking a declaratory judgment that Sections 4(b) and 5 of the Voting Rights Act ("VRA"), 42 U.S.C. §§ 1973b(b) and 1973(c), are unconstitutional. Shortly after filing its complaint, Shelby County moved for summary judgment. The United States, as well as defendant-intervenors -- a civil rights organization and a number of individuals -- ask the Court to deny the motion as premature, or in the alternative to grant discovery pursuant to Federal Rule of Civil Procedure 56(f).[1] The Court heard oral argument

1. Neither the government nor defendant-intervenors have offered any argument for why Shelby County's motion is premature. Indeed, a motion for summary judgment may be brought "at any time until 30 days after the close of all

on defendant's request on September 10, 2010.[2]

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by identifying those portions of "the pleadings, the discovery and disclosure materials on file, and any affidavits" which it believes demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c)(2); *see also Celotex*, 477 U.S. at 323. If a party opposing a motion for summary judgment "shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken." Fed. R. Civ. P. 56(f). "The purpose of Rule 56(f) is to prevent 'railroading' the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery." *1443 Chapin St., LP v. PNC Bank*, 258 F.R.D. 186, 187 (D.D.C. 2009) (internal quotation marks omitted). But

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discovery." Fed. R. Civ. P. 56(c)(1)(A). Accordingly, the Court will discuss only the request for discovery.

2. A final transcript of the September 10 hearing is not yet available. Accordingly, the Court is unable to offer direct citations to the oral argument.

"[t]he Rule is not designed to allow 'fishing expeditions,' and [parties] must specifically explain what their proposed discovery would likely reveal and why that revelation would advance the [party's] case." *Milligan v. Clinton*, 266 F.R.D. 17, 18-19 (D.D.C. 2010); *see also Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989) (a court "*may* deny a motion for summary judgment or order a continuance to permit discovery if the party opposing the motion adequately explains why, at that timepoint, it cannot present by affidavit facts needed to defeat the motion").

Here, Defendants argue that they need discovery for three primary reasons: (1) to determine whether Shelby County has standing to bring suit; (2) to evaluate whether Shelby County may be eligible to "bail out" from the VRA's requirements; and (3) to gather information relating to the VRA's constitutionality. The Court takes each argument in turn.

1. Standing

To establish that it has standing to bring this suit, Shelby County offers that "[i]n the last ten years, [it] has sought preclearance numerous times, expended significant taxpayer dollars, time, and energy to meet its obligations under Section 5 of the VRA, and has had at least one election delayed in order to ensure compliance with the preclearance obligations of Section 5 of the VRA." *See* Pl.'s Mot. for Summ. J. ("Pl.'s Mot.") [Docket Entry 5], Decl. of Frank Ellis, at ¶ 7. The government responds that, without discovery, it "is unable to determine whether Plaintiff has,

in fact, suffered injury in complying with Sections 4(b) and 5." Gov't's Opp'n to Pl.'s Mot. for Summ. J. ("Gov't's Opp'n") [Docket Entry 7], at 11. Hence, although the government has not yet contested Shelby County's standing, it requests discovery in order to evaluate *whether* it will do so.

The government has not shown that it needs discovery to assess Shelby County's standing. The government has offered no reason to doubt the veracity of Ellis's declaration in support of standing. *See Strang*, 864 F.2d at 861 ("Without some reason to question the veracity of affiants . . . [a party's] desire to 'test and elaborate' affiants' testimony [through Rule 56(f) discovery] falls short."). And at oral argument, the government was unable to articulate any reason why a covered jurisdiction subject to Section 5's preclearance requirement -- such as Shelby County -- would lack standing to bring this type of action.[3] Thus, neither the government nor defendant-intervenors have put forth "specified reasons" why discovery is necessary to evaluate Shelby County's standing. *See* Fed. R. Civ. P. 56(f).

2. Bailout

The government's next argument in support of its discovery request stems from the "bailout" provision of

3. Indeed, in the related case of *Laroque v. Holder*, Civ. A. No. 10-561 (D.D.C. June 14, 2010) (Gov't's Mem. in Supp. of Mot. to Dismiss), the government has stated that there is no "hindrance to [a covered jurisdiction's] assertion of any proper constitutional claim concerning the application of Section 5." *Id.* at 22.

Section 4(a) of the VRA, which "allow[s] jurisdictions with clean records to terminate their section 5 preclearance obligation." *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (Nw. Austin I)*, 573 F. Supp. 2d 221, 226 (D.D.C. 2008) (three-judge court), *rev'd on other grounds by* 129 S. Ct. 2504 (2009). Shelby County believes that it is not eligible for bailout. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. [Docket Entry 5], at 41 n.8. The government does not really contest the specifics of Shelby County's position, but states that it "does not presently know[] the degree to which Shelby County could meet or not meet each of the statutory bailout criteria under Section 4(a) of the [VRA]." Gov't's Opp'n at 10. The government suggests that if Shelby County is, in fact, eligible for bailout, granting that relief could obviate the need for any constitutional challenge. Accordingly, the government seeks discovery on this issue.[4]

Shelby County "has not," however, "sought 'bailout' from coverage pursuant to Section 4(a) of the VRA." Pl.'s Reply in Supp. of Mot. ("Pl.'s Reply") [Docket Entry 14],

4. Although the government did not press the point at oral argument, the government's motion asserts that, even if Shelby County is correct in the reasons it recites for why it is ineligible for bailout, discovery should ensue because there may be additional reasons for ineligibility. *See* Gov't's Mot. at 10 ("Whether or not one or two bailout criteria might defeat bailout . . . it is relevant for the Attorney General to be allowed to discover . . whether those are the only criteria that might keep Shelby County from bailing out, or whether there are other areas of potential non-compliance."). That is hardly a justification to embark upon broad discovery.

at 2. And the government agreed at oral argument that neither it nor this Court could force Shelby County to accept bailout. Thus, further factual investigation on this point would reveal only whether Shelby County is eligible for relief that it explicitly has not sought. The parties have pointed to no authority, and the Court is unaware of any, that would support discovery under such circumstances.

3. Constitutionality of the VRA

Shelby County's complaint seeks a declaratory judgment that Sections 4(b) and 5 of the VRA are unconstitutional. *See* Compl., Prayer ¶ 44(a). It does not request any relief specific to Shelby County itself. Accordingly, the county's suit is properly deemed a facial challenge. *See Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010) (for a challenge to be facial, "[t]he important point is that plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs"). Indeed, at oral argument Shelby County explicitly waived any as-applied challenge in this case.[5]

Because Shelby County brings only a facial challenge to the VRA, discovery into that claim is unwarranted. As a three-judge court of this district recently noted,

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5. Defendant-intervenors have expressed concerns that in prior cases challenging the constitutionality of the VRA, plaintiffs have shifted between facial and as-applied challenges as the case progressed. Their fears that the same could happen here are unfounded. The Court will permit no gamesmanship: Shelby County insists that its challenge is facial, and the Court will hold it to that assurance throughout the litigation.

a court's role in resolving a facial challenge to the 2006 extension of the VRA is limited to assessing whether "the 2006 legislative record contain[s] sufficient evidence of contemporary discrimination in voting to justify Congress's decision to subject covered jurisdictions to section 5 preclearance for another twenty-five years." *Nw. Austin I*, 573 F. Supp. 2d at 265. In other words, a court's analysis "is limited to the actual evidence Congress considered." *Id.* at 247. Because of this, no discovery is warranted in this case.[6]

The government protests that, in its summary judgment briefing, Shelby County has introduced county-specific facts that were not in the legislative record. *See* Gov't's Opp'n at 9; *see also* Pl.'s Statement of Mat'l

6. The government cites the Supreme Court's statement that "the [VRA] imposes current burdens and must be justified by current needs," *Nw. Austin Mun. Util. Dist. No. One v. Holder (Nw. Austin II)*, 129 S. Ct. 2504, 2512 (2009), as an indication that this Court should order additional discovery into present-day voting practices in Shelby County. But nothing in the Supreme Court's opinion suggests that the "current needs" to which it referred are anything other than those identified by Congress in 2006. Indeed, in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) -- a case that, like this one, turned on whether Congress exceeded its enforcement authority under the Fourteenth Amendment -- the Court assessed the constitutionality of the Age Discrimination in Employment Act ("ADEA") solely on the record created by Congress twentyfive years earlier. *See id.* at 89 ("Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem.").

Facts Not in Dispute [Docket Entry 5], at ¶¶ 4-5, 7-8. According to the government, "[w]ithout knowing the basis for the Plaintiff's assertions, the data or methodologies underlying them, or other facts related to the Plaintiff's assertions, the Attorney General cannot adequately respond to them." Gov't's Opp'n at 9.

Shelby County has explained, however, that it offered these facts "merely to buttress its already strong claim for standing." Pl.'s Reply at 13 n.1. And the county acknowledged at oral argument that, when assessing the VRA's facial constitutionality, the Court cannot rely on these facts, at least to the extent that they are not in the legislative record. Consistent with the above discussion, the Court agrees. Indeed, a contrary conclusion would be absurd. If the VRA's facial constitutionality turns -- even in part -- on present-day facts outside the legislative record, then discovery could not even properly be limited to Shelby County alone. Rather, the Court would need to consider in its analysis evidence relating to *every* covered jurisdiction and subjurisdiction. No authority requires or permits the Court to undertake such a massive factual inquiry, extending well beyond the record on which Congress relied in extending the VRA in 2006.

The government and defendant-intervenors have also pointed to several cases to support their argument that discovery is warranted on Shelby County's facial constitutional claim. They point, for example, to *Northwest Austin I*, where the plaintiff brought a constitutional challenge to the VRA, but the parties still engaged in extensive discovery. But in that case, plaintiff -- in

addition to its constitutional challenge -- sought bailout under Section 4(b) of the VRA, and also presented "two arguments . . . that could be construed as reflecting an as-applied challenge." *Nw. Austin I*, 573 F. Supp. 2d at 235. Shelby County has brought no such fact-dependent claims here. Defendant-intervenors also cite *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004), for the proposition that in assessing whether Congress has exceeded its enforcement authority under the Fourteenth Amendment, "the [Supreme] Court has not always limited itself to the legislative record alone for evidence of discrimination." Def.-Intervenors' Opp'n to Pl.'s Mot. [Docket Entry 36], at 14. In those two cases, however, the Supreme Court merely referenced state laws and prior judicial opinions, and even then only to present the historical "backdrop" of the challenged legislation. *Lane*, 541 U.S. at 524; *see Hibbs*, 538 U.S. at 729. Those cases do not, therefore, stand for the proposition that extensive fact discovery is warranted to evaluate the facial constitutionality of congressional legislation. Indeed, at oral argument the Court asked if any counsel -- who collectively have a very broad experience -- could identify a case in which the Supreme Court decided the facial constitutionality of an act of Congress based on facts unique to the specific plaintiff bringing the lawsuit. None could. Yet that is the discovery the government and defendant-intervenors seek here.

Evaluating the constitutionality of a congressional statute -- especially one as storied as the VRA -- is "the gravest and most delicate duty that this Court is called

on to perform." Nw. Austin II, 129 S. Ct. at 2513. The Court therefore must be both cautious and thorough. Nonetheless, the constitutionality of the VRA must rise or fall on the record that Congress created when it extended that act in 2006. Accordingly, it is hereby

ORDERED that [7] the government's request for discovery pursuant to Federal Rule of Civil Procedure 56(f) is **DENIED**; and it is further

ORDERED that the government and defendant-intervenors shall file an opposition to [5] Shelby County's motion for summary judgment by not later than November 15, 2010; Shelby County may file a reply in support of its motion by not later than December 15, 2010.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: September 16, 2010

APPENDIX E — RELEVANT CONSTITUTIONAL AMENDMENT & STATUTORY PROVISIONS

Fifteenth Amendment to the United States Constitution

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Appendix E

42 U.S.C. § 1973b. Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by State or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate

unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section;

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action

commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

(C) no Federal examiners or observers under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race

or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to

vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of Title 28.

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(8) The provisions of this section shall expire at the end of the twenty-five-year period following the effective date of the amendments made by the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action.

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

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

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

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

(c) "Test or device" defined

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration

for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote

of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds

that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Appendix E

42 U.S.C. § 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right

to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

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

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

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