IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA,

Plaintiff,

v.

UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General,

Defendants,

FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*,

Defendant-Intervenors,

KENNETH SULLIVAN, *et al.*,

Defendant-Intervenors,

NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA,

Defendant-Intervenors.

No. 1:11-cv-1428-CKK-MG-ESH

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO FLORIDA'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

For the reasons discussed below, Intervenors' respectfully request that this Court uphold the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

The Supreme Court has ruled four times that Section 5 is constitutional. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (upholding the preclearance remedy and the coverage formula set forth in Section 4 of the Act, 42 U.S.C. § 1973b); *Georgia v. United States*, 411 U.S. 526, 535 (1973) (1970 reauthorization); *City of Rome v. United States*,
446 U.S. 156, 177-78, 180-82 (1980) (upholding Section 5's "effect" prohibition and the 1975 reauthorization); and *Lopez v. Monterey County*, 525 U.S. 266, 282-85 (1999) (upholding application of Section 5 to enactments by partially covered states).

Most recently, in *Shelby County v. Holder*, 2012 WL 1759997 (May 18, 2012), the D.C. Circuit upheld the 2006 reauthorization. Specifically, the Circuit Court answered in the affirmative the two key issues identified by the Supreme Court in *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009): "whether section 5's burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem." 2012 WL 1759997, at *7 (hereinafter "*Shelby* at *__").[1] In light of this ruling, this Court must reject Florida's facial challenge to the 2006 reauthorization.

Florida's other constitutional challenges likewise are without validity, for the

[1]Because the Court resolved *Northwest Austin* on statutory grounds, it did not rule on plaintiff's constitutional challenge to the 2006 reauthorization, and thus vacated this Court's determination that the 2006 reauthorization is constitutional. 573 F. Supp. 2d 221 (2008).

reasons set forth below.[2]

LEGAL STANDARD

In its June 5, 2012 Order (Dkt. 106), this Court specified that "the parties' future briefing shall apply the analytic framework set forth in *Shelby County*." In that case, the D.C. Circuit determined that the "congruence and proportionality" standard, first articulated by the Supreme Court in *Boerne v. Flores*, 521 U.S. 507, 520 (1997), governs a review of the constitutionality of Section 5. *Shelby* at * 7.[3] The court also set forth the following principles to guide the application of *Boerne* to the Voting Rights Act:

First. The Supreme Court's *Katzenbach* and *City of Rome* decisions remain highly relevant since they "tell us a great deal about '[t]he evil that § 5 is meant to address,' . . . as well as the types of evidence that are probative of 'current needs.'" *Id.* at *8.

Second. "[R]acial discrimination in voting [is] one of the gravest evils that Congress can seek to redress," *id. a*t *9, since the right to vote is fundamental and racial discrimination is constitutionally highly suspect. Accordingly, "[w]hen Congress seeks to combat racial discrimination in voting . . . it acts at the apex of its power." *Id.*

[2] Florida's coverage claims involving *Lopez* do not require any extended discussion since, as the State concedes, the Supreme Court held that Congress constitutionally may require that preclearance be obtained by voting changes enacted by a state which itself is not covered but which includes covered counties. The State's claim that "*Lopez* should be limited to its facts" is simply an effort by the State to have this Court substitute Justice Kennedy's concurring opinion in *Lopez* for the majority opinion.

[3] The D.C. Circuit explained that the Supreme Court in *Northwest Austin* had sent "a powerful signal that congruence and proportionality is the appropriate standard of review." At *7.The court did not, however, definitively hold that *Boerne* controls, and noted the alternative "rational means" standard articulated in *Katzenbach*.383 U.S. at 324. The D.C. Circuit did not undertake a separate rationality review since the *Boerne* standard is "arguably more rigorous," at *7, and the 2006 reauthorization passed muster under *Boerne*. Intervenors similarly do not undertake a rationality review here, for the same reason.

Third. The post-*Boerne* "congruence and proportionality" cases also provide important guidance. In *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004), the Supreme Court upheld Fourteenth Amendment legislation "in the face of a rather sparse legislative record." *Id.* at *8. And the Court struck down such legislation in other cases only "where the legislative record revealed a virtually complete absence of evidence of unconstitutional state conduct." *Id.* (internal quotation marks omitted). Still, courts reviewing Section 5's constitutionality are "obligated to undertake a review of the [legislative] record more searching than the review in *Hibbs* and *Lane*." *Id.* at *9.

Fourth. Although a *Boerne* review is searching, "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.* at *10, *quoting Boerne*. This follows from the "respect [owed Congress] 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." *Id.* (internal quotation marks omitted). After reviewing the evidence Congress relied upon to reauthorize Section 5 in 2006, the D.C. Circuit reemphasized that the "job" of the courts is only "to ensure that Congress's judgment is reasonable and rests on substantial probative evidence." *Id.* at *21.

ARGUMENT

I. Florida's Challenge to the 2006 Amendments Should be Rejected

In reauthorizing Section 5 in 2006, Congress amended Section 5 to clarify the

scope of the Section 5 "purpose" and "effect" standards. Specifically, Congress decided to "overrule the Supreme Court's decisions in *Georgia v. Ashcroft*, 539 U.S. 461, 479-80 . . . (2003), . . . and *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 . . . (2000) (*Bossier II*)." *Id.* at *4. In so doing, Congress generally re-established the standards that existed for many years prior to *Ashcroft* and *Bossier II*.[4]

Prior to *Shelby County*, this Court held that Congress acted within its constitutional authority in adopting these amendments, and that the amendments are consonant with equal protection. *LaRoque v. Holder*, 2011 WL 6413850 (Dec. 22, 2011), *vacated as moot*, 2012 WL 1760281 (D.C. Cir. May 18, 2012). Judge Bates' carefully reasoned analysis is not precedent due to the *vacatur* but nonetheless should inform this Court's analysis of Florida's parallel challenge.

A. *Shelby County* Precludes a Facial Challenge to the Amendments

In *Shelby County*, the D.C. Circuit held that constitutional claims against the 2006 substantive amendments do not "satisf[y] the standards for mounting a facial constitutional challenge." *Shelby* at *30. The court explained that "the amendments . . . are implicated only in a subset of cases. Specifically, the amendment overturning *Bossier II* is implicated only in cases involving a discriminatory but nonretrogressive purpose . . .; the amendments overturning *Georgia v. Ashcroft* . . . are implicated primarily in redistricting cases . . . ." *Id.* Because of the limited application of the amendments,

[4] As part of the 2006 reauthorization legislation, Congress included the following explanatory finding: "The effectiveness of [Section 5] has been significantly weakened by the . . . decisions in Reno v. Bossier Parish II and Georgia v. Ashcroft, which have misconstrued Congress' original intent . . . and narrowed the protections afforded by section 5 . . . ." Pub. L. 109-246, § 2(b)(6), 120 Stat. 577, 578 (2006).

conducting a facial review "would lead [the courts] into the very kind of speculation and anticipation of constitutional questions that require courts to disfavor facial challenges." *Id.* (internal quotation marks and brackets omitted).[5] Thus, under *Shelby County*, Florida may not assert a facial challenge to the 2006 amendments.

B. **Florida May Not Pursue An As-Applied Challenge to the 2006 Amendments**

An as-applied challenge to the 2006 amendments is also not proper here.

Discriminatory purpose. Prior to *Bossier Parish II*, the Section 5 "purpose" standard was applied to bar voting changes adopted with any discriminatory purpose, *i.e.*, Section 5 prohibited both an intent to retrogress minority electoral opportunity, and a discriminatory but non-retrogressive purpose. *LaRoque*, at *3; H. Rep. 109-478, at 66-67 (2006) ("2006 House Report").[6] In *Bossier Parish II*, the Supreme Court heldthat Section 5 prohibits only retrogressive purposes. *LaRoque*, at *3. Congress disagreed, and amended Section 5 to provide that Section 5 "purpose" "include[s] any discriminatory purpose." 42 U.S.C. § 1973c(c).

No issue as to non-retrogressive purpose is presented in this case. The evidence demonstrates that Florida sought to limit, and thus retrogress, minority voters' access to the ballot. Florida therefore may not litigate an as-applied challenge to subsection (c).

---

[5] The D.C. Circuit did not discuss whether Shelby County could make out an as-applied challenge since the suit did not include a preclearance claim.

[6] The issue of non-retrogressive intent typically arose in the redistricting reviews.*E.g.*,*Bossier II*, 528 U.S. at 323 (intent only could have been non-retrogressive since both the new plan and the existing plan did not include any black-majority districts); *Busbee v. Smith*, 549 F. Supp. 494 (1982), *aff'dmem.*, 459 U.S. 1166 (1983) (State had non-retrogressive intent since it fragmented Atlanta's large black community while increasing the black percentage in the district at issue).

Discriminatory effect. Prior to *Georgia v. Ashcroft*, retrogression analyses of redistricting plans and election method changes focused on the effect on minority voters' ability to elect candidates of their choice. *LaRoque*, at *4; 2006 House Report, at 69. In *Ashcroft*, the Supreme Court adopted a new multi-factor retrogression test for reviewing redistricting plans. *LaRoque*, at *4.Congress disagreed, and amended Section 5, adding new subsections (b) and (d), so as "to restore the simpler, ability to elect analysis articulated in [prior caselaw]." *Id*. *Accord* 2006 House Report, at 70-71. The retrogression analysis of ballot access changes was not affected.

This case involves restrictions on ballot access, and does not raise any issue as to minority voters' "ability to elect" candidates of their choice. Accordingly, Florida may not raise an as-applied challenge to the "ability to elect" standard here.

C. Congress' Amendments to the Purpose and Effect Standards Are Constitutional

Alternatively, this Court should uphold the 2006 amendments if it concludes that the constitutional questions have been properly raised in this case.

Discriminatory purpose. In *LaRoque*, Judge Bates applied *Boerne* to subsection (c) and concluded that: "Given the substantial evidence that Congress amassed for the necessity of an amendment to Section 5, and the narrowness of the amendment Congress chose, the Court finds that subsection (c) lies comfortably within Congress's enforcement powers." *LaRoque*, at *26. Florida asserts that subsection (c) imposed new burdens, but as Judge Bates discussed, the revised Section 5 "purpose" standard merely restored the pre-*Bossier II* constitutional "purpose" standard in the context of Section 5's well-

established burden-shifting scheme. *Id.* at *19,26.[7]

Retrogressive effect.Judge Bates similarly concluded that new subsections (b) and (d) "represent a congruent and proportional response to the problem of intentionally dilutive techniques," *id.* at *42, after conducting an exhaustive review of the 2006 legislative record, the *Ashcroft* standard, and the 2006 amendments. Florida claims that the legislative record did not support the amendments, but merely cites to an argument rejected in *Shelby County*. Br. at 46 (referencing br. at 21-22). Florida also complains that the 2006 amendments establish a "rigid standard" for reviewing redistricting plans and "make it more difficult for covered jurisdictions to secure preclearance" of such plans. *Id*. at 45. However, as Judge Bates explained, the "ability to elect" standard allows for significant flexibility, and the 2006 legislative history included substantial evidence that the *Ashcroft* standard was difficult to administer, and created compliance problems for covered jurisdictions as well. *LaRoque*, at * 32-35, 40-41.

Finally, after reviewing the Supreme Court's equal protection case law, the "ability to elect" standard, and the 2006 congressional record, Judge Bates concluded that subsections (b) and (d) do not violate equal protection because they "are narrowly tailored to respond to the historical and ongoing problems of voting discrimination identified by Congress." *Id.* at 51.

II. The 1975 Expansion of Section 4(b) Coverage Was Constitutional

[7]Florida speculates that the amendment might lead the Justice Department to apply a "maximization policy" in reviewing redistricting plans, but ignores that the Attorney General has specifically rejected that. 76 Fed. Reg. 21239, 21249 (2011), *amending* 28 C.F.R. 51.59(b).

In 1975 Congress reauthorized Section 5 for an additional seven years, and amended Section 4(b) of the Voting Rights Act to expand the coverage formula based upon past discrimination against "language minorities." Specifically, Section 4(b) coverage was expanded to include states or political subdivisions that employed English-only elections in 1972, but only if they had single language minority populations of five percent or more in 1970, and only if they further showed depressed levels of participation by voting age citizens in the 1972 Presidential election. In addition to finding a need for federal observers, Congress specifically found the need for the Section 5 preclearance remedy in such jurisdictions:

> [I]n light of the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities, the Committee acted to extend the preclearance mechanism of Section 5 of the Voting Rights Act to the newly covered jurisdictions. The exhaustive case by case approach of the pre-1965 period proved to be inadequate and futile in dealing with the magnitude of the voting problems confronting blacks. The pervasive voting discrimination which now affects language minorities in certain areas throughout the Nation requires the application of the Section 5 remedy. That procedure has been in force for ten years and a whole body of administrative law has developed around it. As a method which has shown a marked degree of success, it is appropriate to adopt it to the present task.

1975 H. Rep. at 26-27; 1975 S. Rep. at 35[8] The1975 amendment resulted in several new covered jurisdictions (hereinafter, "1975 jurisdictions"). *See* 28 C.F.R. Pt. 51 App.

A. Florida's Claim as to the 1975 Coverage Amendment is Moot

Congress has twice reauthorized coverage of the 1975 jurisdictions, in 1982 and

[8] The Senate and House reports are identical in their discussion of the coverage amendment. *Compare* 1975 H. Rep. 22-29 with 1975 S. Rep. 30-37. Intervenors cite to the Senate report.

2006. It is the 2006 reauthorization of Section 4(b) and Section 5 that must form the basis for any future claim involving Florida's coverage. Neither Florida nor any other 1975 jurisdiction is subject to any conceivable claim based upon the 1975 coverage amendments. Because the 1975 reauthorization is so highly attenuated from the current legislation and cannot give rise to any future claim, the Court cannot afford meaningful relief on this claim and should treat Florida's constitutional challenge to the 1975 reauthorization as moot. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Even if Florida's claim is not strictly moot on Article III grounds, the Court nonetheless should deem it moot under the doctrine of prudential mootness. *See, e.g., Penthouse International v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991).

B. Congress' Authority for the 1975 Coverage Amendment

Congress enacted the 1975 amendments to enforce both the Fourteenth and Fifteenth Amendments. Each specifically-defined "language minority group" which might trigger coverage under the amended Section 4(b) was considered a racial group that would qualify for protection under both the Fourteenth and Fifteenth Amendments.[9]

[9] "The Fourteenth Amendment is added as a constitutional basis for these voting rights amendments. The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group protected under the Fifteenth Amendment. However, the enactment of the expansion amendments under the authority of the Fourteenth as well as the Fifteenth Amendment, would doubly insure the constitutional basis for the Act." 1975 S. Rep. at 47-48. Furthermore, the Fourteenth Amendment provides for strict scrutiny review of racial discrimination in voting above and beyond the analysis in *Dunn v. Blumstein*, 405 U.S. 330

Congress knew, even before it began to take testimony and receive evidence during the 1975 reauthorization process, that in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court had affirmed the constitutionality of the 1970 amendment to the Voting Rights Act that temporarily suspended literacy tests nationwide. *Oregon v. Mitchell* in turn had relied heavily upon *Katzenbach v. Morgan*, 384 U.S. 641 (1966), for the power of Congress to prohibit English-only elections.[10] Congress also knew that the Supreme Court had recognized the linkage between racial discrimination in education and racially discriminatory literacy tests in *Gaston County v. United States*, 393 U.S. 285 (1969). Furthermore, Congress knew that the Supreme Court in 1973 had affirmed a finding of unconstitutional discrimination against both Mexican-Americans and African-Americans involving the State of Texas' redistricting plan for its house of representatives premised on an extensive history of racial discrimination in Texas affecting the right to vote. *White v. Regester*, 412 U.S. 755 (1973).

Of course, Congress also was well aware of the fact that the Supreme Court had rejected facial challenges to the constitutionality of the coverage mechanism and the Section 5 preclearance remedy in *Katzenbach* and *Georgia v. United States*. Therefore, when Congress received evidence of voting discrimination against language minority citizens in states and political subdivisions outside the then-covered areas, it had a solid

---

(1972). *See* Br. at 30; *Rogers v. Lodge*, 458 U.S. 613 (1983).

[10] "The *Morgan* case has enormous significance for the bill now before us. The Court approved the exercise of Congressional power to enfranchise language minorities who are being denied the right to vote because of their inability to read or understand English. In that instance, Congress suspended the New York statute requiring the ability to understand English as a prerequisite for voting as it applied to Puerto Rican residents." 1975 S. Rep. at 36.

basis in law to protect those populations by application of the preclearance remedy.

C. The 1975 Expansion of Section 4(b) Coverage was Congruent and Proportional to Evidence of Extensive Discrimination Against Language Minority Citizens

Congress based the 1975 amendments upon an extensive legislative record. The relevant House committee conducted hearings for 13 days in 1975; the Senate committee also conducted hearings for a total of seven days in 1975.[11] Congress received an extensive study by the U.S. Commission on Civil Rights entitled "Ten Years After," which examined voting discrimination both in and outside the then-covered jurisdictions. *See* 1975 H. Rep. at 16; 1975 S. Rep. at 24; 1975 House App. 2 at 969-1466.

Congress determined that there was a widespread problem as to the use of English-only elections as applied to American Indians, Alaskan Natives, Asian Americans and persons of Spanish heritage. Congress decided that it was "obligated" to act "[b]ecause so many states and counties have not responded to the situation confronting the language minority citizens." 1975 S. Rep. at 39. In addressing the problem of English-only elections in jurisdictions with substantial language minority populations, Congress distinguished between jurisdictions with "serious" discrimination problems, to be subjected to Section 4(b) coverage, and those with "less severe voting difficulties," to be covered under new Section 203, 42 U.S.C. § 1973-aa1a :

[11] The House and Senate witnesses included congressional sponsors of the legislation and other members of Congress, the Assistant Attorney General for Civil Rights, representatives of the United States Commission on Civil Rights, state and local officials, private citizens, as well as members of civic associations with special interest in the Voting Rights Act. The Senate Subcommittee also solicited the views of all state election officials affected by the proposed legislation. 1975 H. Rep. at 4; 1975 S. Rep. at 10.

> The Subcommittee, although cognizant of the extent of voting discrimination against these language minorities, was nonetheless aware that the problems were not uniform in their severity across the nation. Therefore, in expanding the Act, two distinct triggers were developed to identify areas with differing magnitude of barriers to full participation by language minorities in the political process.

1975 S. Rep. at 31. Congress linked the special remedies applicable to Section 4(b) coverage to unequal educational opportunities and physical, economic and political intimidation.[12]

Congress correctly recognized that educational discrimination against language minorities touched upon the right to vote, especially in the context of English-only elections, in the same way that educational discrimination against African-Americans touched upon their right to vote in the context of literacy tests. See *Gaston County v. United States*, *supra*. Thus, Congress properly noted and relied upon the record of educational discrimination against language minorities. Beyond this important evidence, however, Congress had much more evidence that language minority citizens in non-covered areas were subject to other forms of voting discrimination.

Congress received extensive testimony and other evidence documenting voting discrimination in the non-covered jurisdictions, including Texas.[13]Texas had a history of

[12] "All of the special remedies of the Voting Rights Act are extended to citizens of language minority groups based on their right to vote under the Fourteenth and Fifteenth Amendments. The Congress finds that those minority citizens are from environments in which the dominant language is other than English. These language minorities experience voting discrimination and exclusion caused by unequal educational opportunities and by acts of physical, economic and political intimidation." 1975 S. Rep. at 46.

[13]*See Graves v. Barnes*, 343 F. Supp. 704, 724-729 (W.D. Tex. 1972) (summarizing discrimination against African-Americans and Mexican Americans in Texas); 1975 S. Rep. at 29-30 (discussing "overwhelming evidence of voting discrimination against language

racial discrimination in voting including the "white primary," *Smith v. Allwright*, 321 U.S. 649 (1944).[14] The 1975 hearings showed that far from being a thing of the past, voting discrimination against African-Americans and Mexican-Americans in Texas was an ongoing problem.

Looking beyond Texas, the Civil Rights Commission Report *Ten Years After* provided Congress with extensive evidence of official discrimination against language minority voters in Arizona.[15] The report described a federal court's findings of racial gerrymandering by an Arizona legislative redistricting plan, in which the the Navajo reservation was divided "to destroy the possibility that the Navajo . . . might be successful in electing [persons] to the legislature." *Ten Years After,* quoting *Klahr v. Williams*, 339 F. Supp. 922, 929 (D. Ariz. 1972).[16] 1975 House App. 2 at 1230.

---

minorities"). Florida doubly misses the mark when it asserts that "[t]he remaining evidence reported by Congress relates almost exclusively to the experience of Mexican-Americans in Texas." Br. at 31. Not only was there significant record evidence of discrimination from outside Texas, but Texas constituted a significant majority of both the population, and the number of counties, added to Section 4(b) coverage as a result of the 1975 amendments. Likewise, when Florida argues that the "remaining evidence reported by Congress" is "not evidence of a *widespread* pattern of interference with language minority citizens' right to ballot access." *id*., it both casts the inquiry too narrowly by focusing only upon ballot access, and fails to recognize that Texas comprised a "widespread" share of the newly-covered populations and jurisdictions.

[14]*See also United States v. Texas*, 252 F. Supp. 234, 245 (W.D. Tex. 1966) (three-judge court) (striking down the State's poll tax on right to vote grounds despite finding that "[a] primary purpose of the 1902 Amendment to the Texas Constitution making payment of a poll tax a pre-condition to the right to vote was the desire to disenfranchise the Negro and the poor white supporters of the Populist Party.").

[15]Several Arizona counties had been covered under Section 5 as a result of the 1970 Amendments to Section 4(b).

[16] The report also described a lawsuit in which an Arizona district court enjoined a duly elected Navajo candidate in Apache County from taking office on the grounds that Indians living on reservations could not hold political office in the state; that decision was reversed by the state

The *Ten Years After* report included a field investigation in Arizona's November 1974 election. Prior to the 1974 election, the Arizona attorney general assured the Department of Justice that bilingual assistance would facilitate Arizona's elimination of straight-ticket voting. However, "[d]espite assurances from Arizona officials which were accepted by the Department of Justice that bilingual election workers would be available where they were needed, visits by a Commission staff member to several polling sites in November 1974 revealed that there were few, if any, bilingual workers in most precincts. . . . [O]nly one of the election supervisors in the eight predominantly Chicano precincts visited was bilingual." 1975 House App. 2 at 1099-1100.[17]

The report similarly documented a mix of adjudicated constitutional violations and reports of discrimination from affected language minority voters in California. The California Supreme Court found that the State's English-language literacy requirement for voting was a violation of the equal protection clause in *Castro v. California*, 85 Cal. Rptr. 20, 466 P.2d 244, 258 (1970). *See* 1975 House App. 2 at 1007. The report also documented disparate effects on language minorities with respect to purge procedures, *id*. at1070, and poll worker hiring, *id*. at1097-1098. The report noted that a climate of fear

---

supreme court. *Shirley v. Superior Court*, 109 Ariz. 510, 513 P.2d 939 (1973), *cert. den*.415 U.S. 917 (1974). *See Ten Years After* at 166;1975 House App. 2 at 1149.

[17] In the section titled "Access to Voters at the Polling Place" the *Ten Years After* report described how state "statutory prohibitions of campaigning within a certain distance of polling places are enforced in a way that discriminates against minority candidates." 1975 House App. 2 at 1128-1130 (Pima County had been covered since 1970). The report also discussed Arizona's discriminatory purging procedures, *id*. at 1068-1069; the "common" problem of minority voters being misinformed that their name did not appear on poll lists, *id*. at1086-1087; overcrowding at minority polling places, *id.* at 1094; and lack of notice of polling place changes to minority voters, *id*. at1091-1092.

and intimidation about voting affected Mexican-American residents of Monterey County, California. *Id.* at 1184-1185.

Florida quotes, out of context, testimony by Assistant Attorney General Pottinger, claiming that "DOJ found the record 'not compelling' and concluded that it did not make 'a strong case . . . of widespread deprivations of the right to vote of non-English speaking persons.'" Br. at 33. But Mr. Pottinger confirmed "there are indeed problems that exist here" and stated that his remarks "should not be construed as casting a cloud on the constitutionality of expansion of the special remedies of the act to other jurisdictions." *Hearing before the Subcomm. On Constitutional Rights of the Senate Comm. On the Judiciary*, 94th Cong. 1st Sess. At 543-44 (testimony of J. Stanley Pottinger, Jr., Asst. Attorney Gen. for Civil Rights).

Congress designed the trigger mechanism for Section 4(b) coverage to correspond closely with the evidence before it.[18]As much as -- if not more than -- in 1965, Congress knew at the time of its 1975 hearings the likely results of the Section 4(b) coverage changes. *See* 1975 H. Rep. at 63;1975 S. Rep. at 32, 66. Florida provides no evidence to support its claim that that Congress failed to "reverse-engineer" the 1975 coverage to ensure that it fit the areas of greatest concern. *See* Br. at 39. Indeed, as noted previously, Congress expressly found that Section 4(b) coverage would apply "the prohibition and remedies for those jurisdictions with the more serious problems." 1975 S. Rep. at 31.

[18] The formula for designating new Section 4(b) coverage for language minorities was fitted into the basic structure used in 1965 and 1970, except that English-only elections counted as tests or devices if a single language minority group's share of the citizen voting age population exceeded 5 percent, and there was depressed voter participation in the November 1972 general election among voting age citizens -- either in terms of voter registration or voter turnout.

Accordingly, because Congress acted upon a record demonstrating a pattern of unconstitutional discrimination affecting language minority citizens in certain states and political subdivisions, and tailored the expansion of Section 5 coverage to capture those jurisdictions, taking care to apply less stringent remedies where appropriate, "Congress's judgment [was] reasonable and rest[ed] on substantial probative evidence." *Shelby* at *21, and the 1975 expansion of coverage was congruent and proportional.

III. Section 5 Coverage Remains Justified By "Current Needs" in the Jurisdictions Originally Added to Section 5 Coverage in 1975

Florida next challenges the inclusion of the 1975 jurisdictions in the 2006 reauthorization. Florida raises two separate arguments: (1) that the 2006 record of discrimination against language minorities was insufficient to reauthorize Section 5 coverage in the 1975 jurisdictions, Br. at 34; and (2) that the 2006 record did not demonstrate that discrimination against language minorities is concentrated in the 1975 jurisdictions, *id.* at 39. Insofar as these claims are challenges to Sections 5 and 4(b), they are foreclosed by the ruling in *Shelby County*.

Florida's arguments that Sections 5 and 4(b) are unconstitutional as applied to all 1975 jurisdictions rest on two flawed assumptions. First, Florida improperly attempts to limit the range of evidence this Court can consider to that against language minorities alone. But Congress's decision to reauthorize Section 5 was properly based on ongoing discrimination against *all* racial and ethnic groups throughout the covered jurisdictions.

Second, Florida improperly tries to limit the range of probative evidence to judicial findings of intentional discrimination, seeking to exclude the full range of

evidence of intentional discrimination that the D.C. Circuit found probative in *Shelby County*. Indeed, this evidence of ongoing intentional discrimination demonstrates that Congress acted appropriately in maintaining Section 5 coverage in the 1975 jurisdictions.

A. Congress's Decision to Reauthorize of Section 5 Coverage in the 1975 Jurisdictions Was Based on the Recent Record of Voting Discrimination Against Minorities in Those Jurisdictions

Florida incorrectly assumes that the express statutory "triggers" under Section 4(b) are the fundamental rationale for Section 5 coverage. As the D.C. Circuit explained, however, the:

> coverage 'triggers' under section 4(b) were never selected because of something special that occurred in those years. . . . Instead, Congress identified the jurisdictions that it sought to cover—those for which it had evidence of actual voting discrimination—and then work backward, reverse-engineering a formula to cover those jurisdictions.

Shelby County, at *25 (internal citations and quotation marks omitted).*See also Boerne*, 521 U.S. 507, 533 (1997) (noting that the preclearance requirement "was placed only on jurisdictions with a history of intentional discrimination in voting").

Thus, in arguing that this "formula's methodology" for identifying jurisdictions for continuing Section 5 coverage is flawed, Br. at 37-38, Florida's position "rests on a misunderstanding of the coverage formula." *Shelby County* at *25. When Congress reauthorized Section 5 in 2006, it did not look to the precise statutory factors that originally triggered coverage of particular jurisdictions, but instead "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." *Shelby County v. Holder*, 811 F.Supp.2d 424, 505 (D.D.C.

2011).

The question before this Court, therefore, is not whether the express statutory "triggers" for coverage remain appropriate, but simply whether Section 4(b)'s scope of coverage continues to identify the jurisdictions with the worst problems. If it does, the statute is rational in theory because its 'disparate geographic coverage' remains 'sufficiently related to the problem that it targets.'" *Shelby County* at *25 (quoting *Nw. Austin*, 129 S.Ct. at 2512).

As explained below, the evidence relevant to that determination includes: (i) evidence of discrimination against members of all minority groups; and (ii) a wide range of evidence, beyond the coverage triggers themselves, that is indicative of ongoing intentional racial discrimination.

B. Congress May Rely on Evidence of Voting Discrimination against Members of All Minority Groups in Maintaining the Scope of Section 5 Coverage

In determining whether Section 5 remains warranted by "current needs" in the 1975 jurisdictions, *Nw. Austin*, 129 S.Ct. at 2512, this Court may take into account evidence of voting discrimination against all covered racial and ethnic minority groups. There is simply no basis for Florida's claim that Congress was precluded from considering evidence of discrimination against African Americans when it decided to reauthorize Section 5. *See* Br. at 30.

Racial or ethnic discrimination, however, constitutes the same constitutional injury, regardless of which minority group is the target. *Cf. Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (in a case of Arab-American plaintiff, holding that a

ban on racial discrimination protects "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry. Such discrimination is racial discrimination . . . whether or not it would be classified as racial in terms of modern scientific theory."). Here, voting discrimination against all minority groups constitutes the same discrimination on account of "race [or] color" prohibited by the Fifteenth Amendment. As the three-judge court explained in *Northwest Austin*,

> [A]t its core, this is a Fifteenth Amendment case: while Congress cited the Fourteenth Amendment when it adopted the Act's protections for language minorities in 1975 and extended them in 2006, it could have relied solely on its Fifteenth Amendment authority.

Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F.Supp.at 243-44.[19] Indeed, in 1975, Congress received testimony "stat[ing] firmly ... that Congress has the power under [section] 2 of the 15th Amendment to enact legislation protecting the voting rights of [Mexican-Americans] or Puerto Ricans." *Id*. at 245 (quoting Extension of the Voting Rights Act of 1965, Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 94th Cong. 700 (Apr. 29, 1975) (exhibit to testimony of J. Stanley Pottinger)). *See also* Alexander Keyssar, *The Right to Vote* 265 (2000) ("[T]he 'language minority' formulation was, in effect, a means of redefining race to include other groups who had been victims of discrimination.").

[19] The history of the Fifteenth Amendment itself confirms that its protections were not intended to apply to African Americans alone, but rather extended to groups described as "language minorities" within the context of the Voting Rights Act, *see Nw. Austin*, 573 F.Supp.2d at 245, and the Supreme Court's "decisions strongly suggest that such minorities, at least as defined in the Act, qualify as racial groups." *Id.* at 244 (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Rice v. Cayetano*, 528 U.S. 495, 512, 514 (2000); and *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970)).

Accordingly, Congress may rely on evidence of discrimination against all minority groups in deciding whether to require Section 5 coverage in a particular area. Congress made a reasoned judgment that discrimination against language minorities *and* African Americans justified the maintenance Section 5 coverage in the 1975 jurisdictions.

C. Congress Properly Concluded in 2006 That Ongoing Discrimination in the 1975 Jurisdictions Demonstrates a Continuing Need for Section 5 Coverage

In determining that there is a current need for Section 5 in those jurisdictions originally brought into coverage in 1975, Congress relied on multiple categories of evidence that the Supreme Court and/or the D.C. Circuit in *Shelby County* deemed probative of ongoing intentional discrimination, including: voting and elections statistics; Section 5 objections and more information requests (MIRs); Section 5-related litigation; litigation under Section 2 of the VRA; and evidence of Section 5's deterrent effect.

Florida seeks to dismiss the majority of this evidence, arguing that Section 5 can only be sustained on the basis of evidence of "direct interference with the right to vote through violence, intimidation, and electoral gamesmanship." Br. at 17-18. The D.C. Circuit, however, has rejected that argument. *Shelby County*, 2012 WL 1759997 at *12. *See also Nw. Austin,* 129 S. Ct. at 2513 ("The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it.").

As demonstrated below, Congress made a reasoned determination that Section 5 coverage remains necessary in the 1975 jurisdictions based on multiple categories of evidence indicative of ongoing intentional discrimination in those areas, which

demonstrated that case-by-case litigation would be inadequate to protect the right to vote free from racial discrimination.

Section 5 objections and more information requests. The 2006 reauthorization record contained evidence of hundreds of discriminatory voting changes in the 1975 jurisdictions that were blocked through formal Section 5 objections and "more information requests" (MIRs). In 2006, "Congress documented hundreds of instances in which the Attorney General, acting pursuant to section 5, objected to proposed voting changes he found would have discriminatory purpose of effect," *Shelby County*, 2012 WL 1759997, at *15. Specifically, of the 626 Section 5 objections during the reauthorization period, "at least 423 were based in whole or in part on *discriminatory intent*." *Id.* (emphasis added). 136 were lodged in the 1975 jurisdictions. *See Nw. Austin*, 573 F.Supp.2d at 284. The Attorney General also blocked over 800 more voting changes through MIRs, with one 1975 jurisdiction, "Texas[,] stand[ing] as the covered jurisdiction most affected by MIRs." *Nw. Austin*, 573 F.Supp.2d at 255.

Florida argues that objections are not probative of Section 5's continuing need because they are not direct evidence of discriminatory intent, *see* Br. at 19. The D.C. Circuit rejected that position, however, observing that hundreds of objections in the record were based on the Attorney General's finding of discriminatory intent. *See* 2012 WL 1759997, at *15. Crucially, the D.C. Circuit held that "Congress is entitled to rely upon the Attorney General's considered judgment 'when it prescribes civil remedies … under [section] 2 of the Fifteenth Amendment." *Id.* (quoting *Katzenbach*, 383 U.S. at 330).While Florida questions the probative value of MIRs, the controlling opinion in

Shelby County rejected that position as well. *See id.*at *16.

The significance of the fact that scores of discriminatory voting changes in the 1975 jurisdictions were blocked by Section 5 objections and MIRs is heightened by two factors: (1) many of these jurisdictions drew successive objections as repeat offenders engaging in multiple attempts to intentionally violate minority voting rights, demonstrating that "case-by-case litigation is inadequate," *Shelby County*, 2012 WL, at *12; and (2) each of the discriminatory voting changes blocked by a Section 5 objection can have wide-ranging impacts, as "a single objection can often affect thousands of voters." *Shelby County*, 811 F.Supp.2d at 470.

For instance, six objections to Texas preclearance submissions of statewide redistricting plans served to protect 359,978 African-American and Hispanic voters. *Id.* at 471. In 2006, Congress learned that, since Texas became a covered state in 1975, *every* redistricting plan for Texas's House of Representatives had drawn a Section 5 objection. *October 25, 2005 (History) Hearing*, at 2177-80, 2319-23, 2518-23. This discriminatory conduct was not limited to the Texas House redistricting plans. In 2003, just as Latinos in one congressional district were "poised to elect their candidate of choice," Texas engaged in a mid-decade Congressional redistricting, "t[aking] away the Latinos' opportunity because Latinos were about to exercise it." *LULACv. Texas*, 548 U.S. 399, 438, 440 (2006). The Supreme Court found that the plan violated Section 2 of the Voting Rights Act, and "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440. Even after the Supreme Court's decision, state officials, without requesting preclearance, attempted to curtail early voting in the special

election held in the remedial district, and were only deterred by a Section 5 enforcement action. *SeeLULAC v. Texas*, No. 06-cv-1046 (W.D. Tex.).

Florida has similarly drawn repeat objections to statewide voting changes. For instance, Florida received objections for statewide redistricting plans during both of the redistricting cycles that took place during the reauthorization period. First, Florida's 1992 Senate redistricting plan drew an objection after it was found to have been drawn with the "purpose of protecting white incumbents" in Tampa, by splitting politically cohesive minority populations in the area. *Evidence of Continuing Need*, March 8, 2006, at 1465-66. Then, in 2002, the DOJ objected to Florida's House redistricting plan, which would have "ma[d]e it impossible" for Hispanic voters in Collier County to continue to elect candidates of their choice. *Id.* at 1466. Florida also drew two statewide objections for seeking, "even in the face of a documented discriminatory impact on minority voters," to adopt changes to absentee balloting procedures that made it more difficult for voters to receive assistance, and placed a heavy emphasis on literacy skills. *Id.* at 1467-68.

Section 5 has also been crucial in blocking repetitive voting rights violations at the local level in the 1975 jurisdictions. For instance, it took three separate lawsuits between 1978 and 1993 to compel the City of Seguin, TX to finally abandon discriminatory methods of election. However, after the 2000 Census revealed that Latinos had become a majority in five of eight districts, the City responded by dismantling a Latino-majority district. When DOJ indicated preclearance was unlikely, the City withdrew its proposal but, without seeking preclearance, manipulated the candidate filing period to prevent Latino candidates from competing. Only a Section 5 action deterred this blatant

discrimination. Perales, *Voting Rights in Texas, 1982-2006, Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales*, No. 06-cv-1364 (D.D.C.), Dkt. No. 100-12, Ex. 8 at 36; *July 13, 2006 Hearing*, at 357 (Texas); and *LULAC v. City of Seguin*, No. 02-cv-369 (W.D. Tex. Apr. 16, 2002) (TRO). *See also Nw. Austin*, 573 F.Supp.2d at 257-58.

The three-judge court in *Nw. Austin* also pointed to other examples of intentionally discriminatory voting changes in the 1975 jurisdictions that were only blocked by Section 5 objections or MIRs. For example, the City of Webster, TX, drew a Section 5 objection for intentionally discriminatory annexations that sought to draw in white neighborhoods while excluding Black neighborhoods, expressly "because of the racial/ethnic makeup of the persons who reside [there]." *Id.* at 298-99.These and the hundreds of other objections and MIRs demonstrate that the record before Congress revealed a pattern of unconstitutional conduct and repetitive minority voting rights violations in the 1975 jurisdictions.

Preclearance-related lawsuits. Congress determined that evidence of intentional discrimination from preclearance-related lawsuits—namely, declaratory judgment actions and Section 5 enforcement suits—also demonstrated the continuing need for Section 5 coverage in the 1975 jurisdictions.

Notwithstanding Florida's unsubstantiated claim to the contrary, *see* Br. at 20, the D.C. Circuit has ruled that Section 5 enforcement suits are probative of the ongoing need for Section 5, because "at least some of the 105 successful Section 5 enforcement suits [during the reauthorization period] were initiated in response to attempts by covered jurisdictions to implement *purposefully discriminatory laws* without federal oversight."

See Shelby County, 2012 WL 1759997, at *19 (emphasis added). Congress reasoned that many covered jurisdictions willfully attempt to enact and enforce voting changes without the knowledge of the federal government, and at least some of those "voting changes that were subsequently found to be purposefully discriminatory." *See Shelby County*, 811 F.Supp.2d at 480-81.

Many of these enforcement actions took place in the 1975 jurisdictions. In fact, of the 60 enforcement actions in which DOJ participated, more than one-third (22) arose in the 1975 jurisdictions. *SeeNw. Austin*, 573 F.Supp.2d at 289. The D.C. Circuit highlighted one of these cases as an example of a "modern instance[] of racial discrimination in voting": Waller County, TX's efforts in 2004 to reduce early voting at polling places near a historically black university, and its threats—without any lawful basis—to criminally prosecute students for "illegal voting," after two Black students announced their intent to run for office. *Shelby County*, 2012 WL 1759997, at *14 (citing Evidence of Continued Need 185–86).*See also* 811 F.Supp.2d at 480.

Section 5 declaratory judgment actions are probative of the continuing need for Section 5, which Florida does not dispute. There were 25 cases in which judicial preclearance was denied during the reauthorization period (representing a nearly 50 percent increase from the previous 25-year period). *See Shelby County*, 2012 WL 1759997 at *19. Of these 25 suits, over one quarter (7) occurred in 1975 jurisdictions. *SeeEvidence of Continuing Need* at 270 (Map 6).[20]

[20] Preclearance was denied in six (6) declaratory judgment actions arising from Texas, and from one (1) declaratory judgment action arising from California's covered counties.

Section 2 litigation. The 2006 reauthorization record contained evidence of 653 cases brought under Section 2 of the VRA in which minority plaintiffs obtained favorable outcomes in the covered jurisdictions, a statistic that the D.C. Circuit found "reinforces the pattern of discrimination revealed" by the other categories of evidence described above. *Shelby County*, 2012 WL 1759997 at *17 (citing *Evidence of Continuing Need* 208, 251 [**full cite**]. For its part, Florida disputes the probative value of this evidence on the grounds that Section 2 liability does not require a finding of discriminatory intent, *see* Br. at 21, but the D.C. Circuit has rejected that position, observing that the "results test" for liability under Section 2 "requires consideration of the factors very similar to those used to establish discriminatory intent based on circumstantial evidence." *Id.* at (citing *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (listing factors under results test) and *Rogers v. Lodge*, 458 U.S. 613, 623-27 (1982) (test for intentional discrimination). Thus, although Section 2 cases rarely include a formal finding of intent—precisely because Section 2's results standard de-necessitates a direct inquiry into intent, *seeUnited States v. Blaine Cnty.*, 363 F.3d 897, 908 (9th Cir. 2004)—the factors for Section 2 liability are designed to be *probative* of intentional discrimination.

Many of these successful Section 2 cases took place in the 1975 jurisdictions. For example, a study by Professor Ellen Katz and the Voting Rights Initiative at the University of Michigan (hereinafter "Katz Study"), identified 114 electronically-reported successful Section 2 cases during the reauthorization period. *SeeOctober 18, 2005 Hearing*, at 974. Of these 114 cases, the majority (56%), 64, originated in the covered jurisdictions.

One notable Section 2 case from these jurisdictions is *NAACP v. Harris*, No. 01-0120-CIV-GOLD (S.D. Fla. July 6, 2001), which challenged Florida's flawed voter list maintenance procedures, problems of spoiled ballots, and other shortcomings that disproportionately affected minority voters, including thousands of African-American voters in Hillsborough County who were erroneously purged from the voter rolls before the 2000 federal election. *See* Evidence of Continuing Need, March 8, 2006 Hearing, at 1491-92. The case was settled favorably for the plaintiffs

Election statistics. Although election-related statistics are not themselves direct evidence of discriminatory intent, the Supreme Court in *City of Rome* held the 1975 reauthorization of Section 5 was constitutional in part on the basis of such statistics, including: (i) turnout and registration disparities between whites and minorities, *see* 446 U.S. at 180; and (ii) statistics concerning the relative dearth of minority elected officials, *see Shelby County*, 811 F.Supp.2d at 469 (citing *City of Rome*, 446 U.S. at 181). The 2006 reauthorization record demonstrated that the 1975 jurisdictions continue to suffer from disparities along these metrics comparable to those found sufficient to sustain Section 5's constitutionality in *City of Rome*.

There are substantial registration and turnout gaps between whites and minorities in the 1975 jurisdictions. For instance there were substantial registration and turnout disparities between whites and Blacks in Arizona and partially-covered Florida. As of 2004, there were voter registration disparities between Blacks and non-Hispanic whites in Arizona and Florida of 17.8 and 19.2 percentage points, respectively. *See Shelby County*, 811 F.Supp.2d at 466-67. In both states, the turnout rates among non-Hispanic whites

were "more than 20 percentage points higher than turnout rates among blacks." *Id.*

Disparities were even worse between whites and Latinos throughout several of the 1975 jurisdictions. In Arizona and partially-covered California, there was a greater than 40 point Latino to white registration rate gap, *see Shelby County*, 811 F.Supp.2d at 468, whereas partially-covered Florida had a Latino to white registration gap of 31 points, and a turnout gap of 24 points, *see Nw. Austin*, F.Supp.2d at 248. These disparities in the Latino and white registration and turnout rates are clearly "comparable to the [16 to 23.1 percentage point] disparit[ies] the *City of Rome* Court found 'significant.'" *Shelby County*, 811 F.Supp.2d at 468 (quoting *Nw. Austin*, F.Supp.2d at 248 (in turn quoting 446 U.S. at 180)). Moreover, Congress found that, despite some improvements, "the number of Latinos and Asian Americans elected to office nationwide 'has failed to keep pace with [the] population growth' of those two communities." *Nw. Austin*, F.Supp.2d at 249 (quoting H.R. Rep. No. 109-478, at 33 (2006)).

Section 5's deterrent effect.Congress concluded that the reauthorization record was all the more remarkable because voting discrimination remains persistent in the covered jurisdictions—including the 1975 jurisdictions—even though those jurisdictions have been subject to Section 5's "strong medicine." *Shelby County*, 2012 WL 1759997, at *21. S*ee also Nw. Austin*, 129 S. Ct. at 2513 ("The District Court also found that the record 'demonstrat[ed] that section 5 prevents discriminatory voting changes' by 'quietly but effectively deterring discriminatory changes.'") (quoting*Nw. Austin*, 573 F. Supp. 2d at 264). Despite the fact that in many cases, "Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes," *Id*. at *19 (quoting H.R.

Rep. No. 109-478, at 24), the 1975 jurisdictions still engaged in hundreds of acts of voting discrimination during the reauthorization period. The D.C. Circuit held that Congress's determination that the covered jurisdictions would have experienced even *more* voting discrimination but for the presence of Section 5 constitutes "precisely the type of fact-based, predictive judgments that courts are ill-equipped to second guess." *Id.* at * 20 (citing *Turner Broad.v. v. FCC*, 520 U.S. 180, 195 (1997)).

D. The 1975 Jurisdictions Are Properly Identified for Continuing Coverage

The evidence described above conclusively demonstrates that the Section 5 remains appropriate in the 1975 jurisdictions, and that, therefore, the Section 4(b) coverage provisionremains "sufficiently related" to the problem of voting discrimination. *Nw. Austin*, 129 S. Ct. at 2512. Nonetheless, Florida argues that Section 4(b)'s coverage provision is unconstitutional because it fails to single out jurisdictions with the highest prevalence of discrimination against language minorities. *See* Br. at 39-40. Florida's argument is unavailing for the following three reasons.

First, like its argument that the record of discrimination in the 1975 jurisdictions is insufficient to merit Section 5 coverage, Florida's argument here rests on the erroneous assumption that Congress's 2006 reauthorization coverage in the those areas was predicated on evidence of language minority discrimination alone. Rather, as demonstrated above, Congress's Section 5 coverage decision was based on evidence that discrimination against all minorities was a more significant problem throughout the covered jurisdictions than in the non-covered jurisdictions, a decision sustained by the D.C. Circuit. 2012 WL 1759997, at *29 ("[T]he legislative record shows that [the Section

4(b) coverage provision] … continues to single out the jurisdictions in which discrimination is concentrated.").

Second, the D.C. Circuit has already sustained the 2006 reauthorization with respect to the 1975 jurisdictions, observing that "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." *Shelby County*, 2012 WL 1759997, at *27 (citing Evidence of Continued Need [**full cite**] 250–51, 272).*Compare with Katzenbach* at 383 U.S. 329-30 (upholding the coverage provision based on evidence of voting discrimination—not in *all* the covered jurisdictions, but only in the "majority of States and political subdivisions" subjected to coverage, including jurisdictions where evidence of voting discrimination was "more fragmentary"). And, as the D.C. Circuit noted, several of 1975 jurisdictions experienced among the highest rates of successful Section 2 litigation. *See* 2012 WL at *__ (graph showing that the covered jurisdictions in South Dakota experienced the highest rate of successful Section 2 cases on a per capita basis, while Texas experienced the sixth highest rate). Given this reality, the continued application of Section 5 coverage remains appropriate in those areas. As the Supreme Court has observed, "'[t]he doctrine of equality of the States … does not bar … remedies for local evils,'" *Nw. Austin*, 129 S. Ct. at 2512 (quoting *Katzenbach*, 383 U.S. at 328-29), so long as the distinctions have "*some basis* in practical experience." *Katzenbach*, 383 U.S.at 328-29, 330-31 (emphasis added).

Third, Florida ignores entirely that it and all jurisdictions may seek bail out from Section 5's coverage under the "significantly liberalized bailout mechanism" post-

Northwest Austin, the importance of which "cannot be overstated," and "helps to ensure that section 5 is 'sufficiently related to the problem that it targets.'" *Id.* at *28 (quoting *Nw. Austin*, 129 S.Ct. at 2512). Ultimately, if Florida's contention is that one or more particular jurisdictions were inappropriately singled out for Section 5 coverage in 2006 and otherwise cannot obtain bailout, such a claim should be brought by those jurisdictions as an as-applied challenge to its own coverage by the jurisdiction itself, or as a challenge to the bailout requirements. *Cf.id.* at *29 (holding that, if "something about the bailout criteria are themselves … preventing jurisdictions with clean records from escaping section 5 preclearance, those criteria can be challenged in a separate action by any adversely affected jurisdiction."). Of course, Florida has offered no such evidence here, and there is no basis for holding that the coverage provision as a whole—or that portion of the coverage provision applicable to the 1975 jurisdictions—is unconstitutional.

IV. Congress May Broadly Prohibit Discrimination in the 1975 Jurisdictions

The requirement that Florida and other 1975 jurisdictions must demonstrate non-discrimination against both African Americans and language minorities in order to obtain preclearance is a congruent and proportional exercise of Congress's Fourteenth and Fifteenth Amendment authority for two reasons. First, as noted above, the legislative record demonstrated ongoing voting discrimination against members of all minorities groups throughout the 1975 jurisdictions. It follows, then, that broad remedial legislation protecting all minorities from discrimination is an "appropriate" exercise of Congressional enforcement power.

Second, even if the record of discrimination in the 1975 jurisdictions had been limited to language minorities alone, Congress is in no way prevented from enacting broad remedial legislation designed to protect members of all minority groups on that basis. Indeed, anti-discrimination statutes are usually based on universally-applicable principles that protect members of all minority groups from discrimination. *See Al-Khazraji*, 481 U.S. at 613 ("[A] distinctive physiognomy is not essential to qualify for [statutory protection against racial discrimination]."). *Cf. Bakke*, 438 U.S. at 292-93 ("[I]t [i]s no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority.… The guarantees of equal protection … are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.") (internal quotation marks and citation omitted); *Hernandez v. Texas*, 347 U.S. 475, 477, 479 (1954) (holding that the Fourteenth Amendment "is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro," and that discrimination against Mexican Americans is "prohibited by the Fourteenth Amendment.").

Because all forms of racial discrimination are pernicious, Congress is permitted to rely on evidence of discrimination against any racial minority groups in order to enact broad legislation prohibiting discrimination against members of all minority groups. This is not to suggest that members of all racial minorities are fungible, "[b]ut community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Hernandez*, 347 U.S. at

478. The reality is that different minority groups may be the victims of discrimination at different points in history, and anti-discrimination statutes are framed broadly to protect against unconstitutional discrimination.

Florida, citing no authority in support of its position, nevertheless asks this Court to adopt a rule providing that, where Congress adduces evidence of discrimination against one minority group, it may only enact legislation prohibiting discrimination against that particular group, rather than broad prophylactic legislation designed to prevent discrimination against all minorities. The Supreme Court, however, has never held that, in order to enact legislation broad remedial legislation aimed at preventing a certain type of discrimination categorically, Congress must adduce evidence of discrimination aimed at each sub-group that would be protected under that legislation. Rather, Congress is empowered to enact legislation aimed at racial discrimination in voting where there is substantial evidence that such discrimination exists. There need not be a one-for-one correspondence between the evidence of discrimination in the record and the specific sub-groups protected under the statute.

Indeed, in *City of Port Arthur v. United States*, 459 U.S. 159 (1982), the Supreme Court affirmed a this Court's decision conditioning preclearance of a Texas city's annexations and redistricting plan on the elimination of a majority vote requirement, which the Court found to have been included in previous discriminatory plans for "the illicit purpose of preventing black candidates from winning election." The Court did not question the applicability of Section 5 to a language minority jurisdiction on the basis of its discrimination against African-Americans.

Nor have the Supreme Court's post-*Boerne* cases adopted a restrictive rule such as Florida proposes. *Tennessee v. Lane*, 541 U.S. at 513-14, 524-27 (upholding Title II of Americans with Disabilities Act in part on evidence addressing exclusion of individuals with "visual impairments and hearing impairments from jury service," although the case dealt with wheelchair access at a courthouse); *Hibbs*, 538 U.S. 721 at 729 (upholding Family and Medical Leave Act in part on the basis of historical evidence of employment discrimination against women, such as "state laws prohibiting women from practicing law and tending bar," and not only discrimination against working parents).

The rule proposed by Florida—under which all anti-discrimination legislation must specify with precision the specific racial or ethnic groups that are intended as its beneficiaries, to the exclusion of all others—would result in a patchwork of remedial laws aimed at benefiting one or two minority groups at a time from discrimination, rather than universally-applicable laws protecting all individuals from discrimination on the basis of race. Indeed, under Florida's view, because the legislative record before Congress in 1965 primarily consisted of evidence of discrimination against African Americans, Section 5, as originally enacted, could only prohibit voting discrimination aimed at African Americans, but not against members of other minority groups. Section 5, however, was routinely applied even before 1975 to prevent discriminatory voting changes targeted at minority groups other than African Americans, and rightfully so. *Nw. Austin*, 573 F. Supp. 2d at 245.[21]

[21] Florida's position also begs the question of how thinly Congress should be required to slice minorities into sub-groups when acting remedial legislation. If, for instance, Congress

In sum, Congress has always enacted broad remedial legislation to protect members of all minority groups, in recognition of the Constitution's broad anti-discrimination principles, which apply universally to prohibit discrimination against members all minority groups. Section 5 is no different from essentially every federal anti-discrimination statute in it universal application to members of all minority groups.

---

adduces evidence of discrimination against one particular Latino or Asian-American subgroup (for example, Mexican-Americans or Japanese-Americans), but not against another (*e.g.*, Puerto Ricans or Chinese-Americans), would Congress, in Florida's view, be required to *exclude* the latter groups from the statute's protections? Drawing these kinds of distinctions between different racial and minority ethnic groups for the purposes of enacting enforcement legislation, as Florida proposes, has no logical stopping point.

Respectfully submitted on June 25, 2012,

/s/ Randall C. Marshall
Randall Marshall
Julie Ebenstein
American Civil Liberties Union Foundation of Florida, Inc.
4500 Biscayne Blvd. Ste. 340
Miami, FL 33137
Tel: (786) 363-2700
Fax: (786) 363-1108
rmarshall@aclufl.org

Arthur B. Spitzer
American Civil Liberties Union of the Nation's Capital
1400 20th St. NW, Ste. 119
Washington, D.C. 20036
Tel: 202-457-0800
Fax: 202-452-1868
art@aclu-nca.org

M. Laughlin McDonald
American Civil Liberties Union Foundation, Inc.
230 Peachtree St. NW
Ste. 1440
Atlanta, GA 30303-1227
Tel: (404) 523-2721
lmcdonald@aclu.org

Estelle H. Rogers
Project Vote
1350 Eye St., NW, Ste. 1250
Washington, DC 20005
Tel: 202-546-4173 x.310
Fax: 202-629-3754
erogers@projectvote.org

Counsel for the Sullivan Group

/s/ Dale E. Ho
Debo P. Adegbile
Ryan P. Haygood
Dale E. Ho
Natasha M. Korgaonkar
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson St., Ste. 1600
New York, NY 10013
Tel: (212) 965-2200
dho@naacpldf.org

Counsel for the NAACP Group

/s/ Nicholas S. Sloey
Daniel C. Schwartz
Rodney F. Page
Alec W. Farr
Daniel T. O'Connor
Nicholas S. Sloey
Ian L. Barlow
Bryan Cave LLP
1155 F St. NW, Ste. 700
Washington, D.C. 20004
Tel: (202) 508-6000
Fax: (202) 508-6200
dcschwartz@bryancave.com

Jon M. Greenbaum
Mark A. Posner
Lawyers' Committee for Civil Rights Under Law
1401 New York Ave. NW
Ste. 400
Washington, D.C. 20005
Tel: (202) 662-8389
Fax: (202) 628-2858
mposner@lawyerscommittee.org

Wendy Weiser
Diana Kasdan
Lee Rowland
The Brennan Center for Justice at NYU School of Law
161 Ave. of the Americas
Fl. 12
New York, NY 10013-1205
Tel: (646) 292-8310
Fax: (212) 463-7308
lee.rowland@nyu.edu

Counsel for the NCLR Group