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

United States Court of Appeals
for the District of Columbia Circuit

SHELBY COUNTY, ALABAMA

Plaintiff-Appellant,

— v. —

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

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
NO. 1:10-CV-00651
HONORABLE JOHN D. BATES, DISTRICT JUDGE

BRIEF OF INTERVENORS-APPELLEES EARL CUNNINGHAM, HARRY JONES, ALBERT JONES, ERNEST MONTGOMERY, ANTHONY VINES, WILLIAM WALKER, BOBBY PIERSON, WILLIE GOLDSMITH, SR., MARY PAXTON-LEE, KENNETH DUKES, THE ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., AND BOBBY LEE HARRIS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Intervenors-Appellees certify that:

1. Parties

All parties, intervenors, and amici appearing before the district court are listed in the Appellant's Brief. In addition to the amici identified by Appellant, the New York Law School Racial Justice Project and the Constitutional Accountability Center have filed briefs as *amici curiae* and the State of New York has filed a Notice of intention to participate as *amicus curiae* in this Court.

2. Rulings Under Review

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

3. Related Cases

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

CORPORATE DISCLOSURE STATEMENT OF INTERVENOR-APPELLEE ALABAMA STATE CONFERENCE OF THE NAACP, INC.

There is no parent corporation or any publicly held corporation that owns 10% or more of the stock of the Alabama State Conference of the NAACP, Inc. ("Alabama NAACP").

The National Association for the Advancement of Colored People ("NAACP") was founded in 1909 and is the nation's oldest, largest, and most widely recognized grassroots based civil rights organization. The mission of the NAACP is to ensure the political, educational, social, and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among citizens of the United States; to remove all barriers of racial discrimination through democratic processes; and to seek enactment, enforcement, and the proper construction of federal, state, and local laws securing civil rights. The purpose of the Alabama NAACP is to implement the mission of the NAACP within Alabama. The NAACP has worked to protect voter registration, voter education, get out the vote efforts, election protection, census participation, and redistricting. The Alabama NAACP has approximately 2700 members who are residents of the state of Alabama.

Respectfully submitted,

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*Authorities upon which Intervenors-Appellees chiefly rely are marked with asterisks.

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GLOSSARY OF ABBREVIATIONS

Br.	Brief For Appellant Shelby County
DOJ	Department of Justice
JA	Joint Appendix
LULAC	League of United Latin American Citizens
RFRA	Religious Freedom Restoration Act
VRA	Voting Rights Act

STATEMENT OF THE ISSUES

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

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Shelby County appeals the District Court's dismissal of its facial challenge to the 2006 reauthorization of Sections 4(b) and 5 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. §§ 1973b(b), 1973c. The 2006 reauthorization was a signal legislative event, described by then-Chair of the House Judiciary Committee, Representative James Sensenbrenner, as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a Member of this body." 152 Cong. Rec. H5143 (daily ed. July 13, 2006).

Congress deliberated in 2005 and 2006 knowing that, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980), the Supreme Court strongly affirmed the constitutionality of both the

preclearance remedy and the extension of that remedy to a set of identified jurisdictions with histories of voting discrimination, and specifically rejected attacks on federalism grounds. Congress further knew that, in *Rome*, the Supreme Court approved Congress's decision to reauthorize Section 5 in 1975 based in substantial part on covered jurisdictions' efforts to dilute minority voting power in response to the VRA's prohibition on discriminatory barriers to voter registration.

Congress thus, after review of the exhaustive record, extended Sections 5 and 4(b) for 25 years, concluding that:

> The record compiled by Congress 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.

Pub. L. No. 109-246, § 2(b)(9), 120 Stat. 577, 578 (2006). In so doing, Congress sought to enforce core protections of the Fourteenth and Fifteenth Amendments, and acted at the peak of its enforcement authority. Congress made no attempt to redefine constitutional protections, as occurred in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and other cases in which the Supreme Court has found legislation lacking congruence and proportionality to a pattern of constitutional violations.

The District Court undertook a meticulous analysis of the record, under a standard of review that harmonized *Katzenbach*, *Rome* and the *Boerne* cases. The Court correctly found that Congress is entitled to substantial deference regarding

its assessment of the evidence, and its conclusions about appropriate legislative remedies, as held by *Katzenbach* and *Rome*, and later validated by *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004).

Shelby County paints the *Boerne* cases as eviscerating the enforcement powers Congress is expressly granted by the Reconstruction Amendments, arguing for a standard of review so constrictive that it would negate much of *Katzenbach* and *Rome*. But as the District Court found, far from questioning *Katzenbach* and *Rome*, the *Boerne* cases represent an elaboration of the earlier precedents, repeatedly invoke *Katzenbach* and *Rome*, and single out Section 5 as the exemplar of congruent and proportional remedial legislation. Shelby County thus bears a heavy burden in mounting its facial challenge.

The District Court found ample evidence to justify Congress's finding that Section 5 continues to serve current needs in the covered jurisdictions. The District Court credited a substantial record of recent and ongoing voting discrimination in the covered jurisdictions, including hundreds of Section 5 objections, hundreds of successful Section 2 lawsuits, strong racially polarized voting patterns, and continuing disparities regarding voter registration and the election of minorities to office. Moreover, numerous covered jurisdictions showed patterns of repeated discriminatory conduct. This record provided Congress with both direct and

circumstantial evidence of intentional discrimination. The District Court correctly rejected Shelby County's efforts to define away entire classes of evidence—such as findings of minority vote dilution and Section 5 objections—which the Supreme Court held in *Rome* are directly relevant to the reauthorization of Section 5.

Finally, the District Court found that the evidence before Congress supports the continued distinction between the covered and non-covered jurisdictions. Shelby County is reduced to quibbling with the evidence that Congress relied upon in this regard, and arguing that Congress exceeds its enforcement powers unless it fits coverage so tightly as to effectively eliminate the possibility of any overinclusion or underinclusion. That view, however, is one that the Supreme Court expressly has rejected, *Katzenbach*, 383 U.S. at 330, taking into account that the VRA includes mechanisms for ongoing tailoring of Section 5 through the bailout and bail-in provisions of Sections 4(a) and 3(c), 42 U.S.C. § 1973a(c).

The District Court's painstaking review of the record, under applicable Supreme Court precedent, correctly led it to reject Shelby County's misreading of the evidence and the law. This judgment must be affirmed.

LEGAL STANDARD

"An appellate court reviews a grant of summary judgment *de novo*, applying the same standard as governed the district court's decision." *America's Cmty. Bankers v. F.D.I.C*, 200 F.3d 822, 831 (D.C. Cir. 2000). Facial challenges

such as this one are disfavored. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Shelby County's burden is therefore a demanding one: it must "establish that no set of circumstances exists under which [Section 5] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks "a plainly legitimate sweep." *Wash. State Grange*, 552 U.S. at 449 (citations and internal quotation marks omitted). In facial challenges, "courts should n[ot] … formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 450 (citations and internal quotation marks omitted).

ARGUMENT

I. CONGRESS'S BROAD ENFORCEMENT AUTHORITY UNDER THE RECONSTRUCTION AMENDMENTS REQUIRES A DEFERENTIAL STANDARD OF REVIEW ON THE LIMITED ISSUE OF CURRENT NEEDS

Shelby County has a heavy burden in its claim that Congress exceeded its powers in 2006 in reauthorizing Sections 5 and 4(b) of the VRA. The Enforcement Clauses of the Fourteenth and Fifteenth Amendments expressly delegate to Congress the authority to protect against racial discrimination in voting. The constitutional questions here are limited by Supreme Court precedent upholding the remedial nature and framework of Section 5. Furthermore, the deferential standard of review applied in *Katzenbach* and *Rome* remains in place, especially in light of the fact that the *Boerne* cases consistently cite *Katzenbach* and *Rome* with

approval, and have repeatedly emphasized that Congress retains "full remedial powers [under the Reconstruction Amendments] to effectuate the constitutional prohibition against racial discrimination in voting." *Katzenbach*, 383 U.S. at 326.[1]

Such deference remains appropriate when applying the *Boerne* cases directly, the central holding of which is that Congress oversteps its authority only when it ventures beyond the sweep of its enforcement power by creating new constitutional rights and prohibitions. That concern is not present here. In enacting and reauthorizing Section 5, Congress clearly has sought to enforce the express constitutional prohibition on discrimination in voting.

Shelby County also premises a substantial portion of its challenge on a meaningless distinction between evidence of barriers to ballot access, and evidence of minority vote dilution, citing the supposedly limited reach of the Fifteenth Amendment. But Shelby County's argument is not only foreclosed by *Rome*, it is pointless, as the Fourteenth Amendment clearly reaches vote dilution concerns, and Congress's authority to reauthorize Section 5 derives from both the Fourteenth and Fifteenth Amendments. Moreover, Congress also may rely upon evidence of the existence of polarized voting and minority vote dilution in adopting measures to enforce the Fifteenth Amendment.

[1] The Attorney General agrees that a deferential standard of review applies, characterizing it as a continuation of the rationality standard of review set forth in *Katzenbach*. DOJ Br. at 14-19.

A. The Constitutionality of the Section 5 Preclearance Remedy and Its Application to Specified Jurisdictions Has Been Upheld by the Supreme Court on Four Separate Occasions

"[T]he Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Fifteenth Amendment]." *Katzenbach*, 383 U.S. at 326. The Reconstruction "Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty," *Rome*, 446 U.S. at 179, most particularly to enable the federal government to prevent, deter, and remedy acts of racial discrimination in voting. With Section 5 of the VRA, Congress appropriately sought to "banish the blight of racial discrimination in voting," by utilizing the authority granted to it by the Reconstruction Amendments "to effectuate, by 'appropriate' measures the constitutional prohibition on racial discrimination in voting." *Katzenbach*, 383 U.S. at 308.

On four occasions between 1966 and 1999, the Supreme Court has upheld the constitutionality of Section 5. *Katzenbach*, 383 U.S. at 335; *Georgia v. United States*, 411 U.S. 526, 532 (1973); *Rome*, 446 U.S. at 178, 179-80, 182; *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283-84 (1999). These decisions affirmed the fundamental proposition that Congress can appropriately "shift the advantage of time and inertia from the perpetrators of the evil to its victims," *Katzenbach*, 383 U.S. at 328, by means of the Section 5 preclearance remedy, applied to a specified

set of jurisdictions with a history of voting discrimination and a record of recent, ongoing discrimination.

Katzenbach rejected the claim that Section 5 was an unconstitutional deviation from federalism principles. At the heart of the Court's holding was the Court's delineation of the nature and scope of Congress's "clear" Fifteenth Amendment authority. *Id.* at 324. Congress is "chiefly responsible for implementing [Fifteenth Amendment] rights," and, accordingly, "[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.* (emphasis added). Although States ordinarily exercise plenary authority over matters "wholly within the domain of state interest," that authority must give way when state power is "'used as an instrument for circumventing a federally protected right.'" *Id*. at 325. Thus, Section 5 preclearance is a "permissibly decisive" remedy for addressing Congress's determination that jurisdictions with a significant history of discrimination would "try … maneuvers in the future" to minimize or cancel out the electoral opportunities for minority citizens. *Id*. at 335. As discussed *infra* pgs. 61-63, *Katzenbach* further rejected the claim that Congress inappropriately selected certain jurisdictions for coverage while not selecting others.

After the 1970 reauthorization was sustained in *Georgia*, *Rome* rejected a federalism challenge to the 1975 reauthorization, holding that Congress has full

authority to reauthorize the Section 5 remedy, based upon its determination that the covered jurisdictions may continue to minimize or cancel out the electoral opportunity of minority citizens. *Rome*, 446 U.S. at 180-82. *Rome*, in particular, governs this case because the Court conducted a detailed review of the congressional authority to *reauthorize* Section 5, the very question presented here. Far from rejecting or casting doubt upon the *Katzenbach* and *Rome* analyses, the *Boerne* cases consistently have embraced *Katzenbach* and *Rome* as models for understanding Congress's authority under the Reconstruction Amendments. *See, e.g.*, *Boerne*, 521 U.S. at 518, 527.

Notably, the Court in *Rome* upheld Congress's inclusion of an "effects" test in Section 5 because Congress had acted "rationally" and therefore "appropriate[ly]." 446 U.S. at 177. This principle remains settled law. *Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

In *Lopez*, decided after *Boerne*, the Court expressly reaffirmed *Katzenbach* and *Rome* in rejecting yet another federalism challenge to Section 5. 525 U.S. at 282-83. The Court explained that Section 5 "by its nature, intrudes on state

sovereignty. The Fifteenth Amendment permits this intrusion, however[.]" *Id*. at 284-85. Finally, in *Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504, 2510, 2512 (2009), the Court did not disturb these precedents, leaving open questions only as to whether Sections 5 and its scope of coverage remain appropriate in light of "current needs."

B. Congress Is Entitled to Substantial Deference Because Section 5 Is Remedial Legislation Enforcing Bedrock Constitutional Rights

1. Both the Fourteenth and Fifteenth Amendments Provide Congress With Enforcement Authority for Section 5

Congress's authority to reauthorize Section 5 derives from both the Fourteenth and the Fifteenth Amendments, each of which prohibits racial discrimination in voting.

The constitutionality of Section 5 traditionally has been analyzed under—and upheld pursuant to—the Fifteenth Amendment's express guarantee that "the right of citizens of the United States to vote shall not be denied or abridged by … any State on account of race [or] color." *Lopez*, 525 U.S. at 294 n.5. But it also is well established that the Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination in voting by state and local governments. *See, e.g. Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973). The fact that the Supreme Court's decisions upholding the constitutionality of Section 5 have relied on the Fifteenth Amendment is best understood as a function

of jurisprudential historical development, and does not reflect an absence of authority under the Fourteenth Amendment.[2] There is no authority for the proposition that Section 5 is not a valid exercise of Congress's Fourteenth Amendment powers. Indeed, both the Fourteenth and Fifteenth Amendments prohibit racial discrimination in voting, and both Amendments grant Congress "the power to enforce" this prohibition "by appropriate legislation." U.S. Const. amend. XIV, § 5 & amend. XV, § 2. It follows, therefore, that both Amendments empower Congress to enact legislation to remedy this evil.[3]

The question here, accordingly, is whether the 2006 reauthorization of Section 5 was "appropriate legislation" that "enforce[s]" these two Amendments. The District Court harmonized two distinct lines of Supreme Court decisions addressing the standard of review, one which focuses on Congress's Fourteenth Amendment authority (the *Boerne* decisions), and a second line that focuses on Congress's Fifteenth Amendment authority (principally, *Katzenbach* and *Rome*). The Court concluded that there is "one standard of review that has always been

[2] In 1966, when the Court in *Katzenbach* first addressed the constitutionality of the Voting Rights Act, constitutional rulings regarding discrimination in voting generally relied on the Fifteenth Amendment. *E.g., La. v. United States*, 380 U.S. 145, 153 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); *Smith v. Allwright*, 321 U.S. 649, 666 (1944). However, beginning in the 1970s, the Supreme Court built upon its one-person, one-vote rulings under the Fourteenth Amendment to hold that a different form of vote dilution – one that denies minority voters the opportunity to elect candidates of choice – also violates the Fourteenth Amendment. *See White v. Regester*, *supra.*

[3] This conforms to Shelby County's definition of the issue presented, as set forth in its Complaint, Br. at 1, and to Congress's own definition of the legal authority under which it has acted. JA542.

employed to assess legislation enacted pursuant to *both* the Fourteenth and Fifteenth Amendments," JA521, and that the *Boerne* cases should be understood as providing "a refined version of the same method of analysis" employed in *Katzenbach*, JA522. Indeed, *Katzenbach* and *Rome* are the only decisions in which the Supreme Court has conducted a comprehensive analysis of the facial validity of Section 5, and thus necessarily provide guiding principles which continue to govern this case.

As discussed above, the Supreme Court in *Katzenbach* emphasized that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," 383 U.S. at 324, and reiterated this standard in *Rome.* Furthermore, as discussed immediately below, the *Boerne* cases likewise provide that Congress must be accorded substantial deference when it legislates to remedy racially discriminatory voting practices. Accordingly, this Court owes substantial deference to Congress's determinations in 2006, regardless of how the standard of review may be labeled.

2. Section 5 Does Not Attempt to Redefine the Substance of Constitutional Rights, Unlike the Statutes Struck Down in the *Boerne* Cases

In stark contrast to Section 5, the statutes that have been invalidated in *Boerne* and its progeny were not designed to *enforce* the Reconstruction Amendments but to *redefine the substance* of those Amendments. The Supreme

Court has consistently explained that this is the underlying question that the congruence and proportionality test first set forth in *Boerne* is designed to answer.

For example, in *Kimel*, the Court identified a line between "appropriate remedial legislation," which is constitutional, and the legislation which "effects a substantive redefinition of the Fourteenth Amendment," which is unconstitutional. 528 U.S. at 81. In the case of the former, Congress's enforcement powers include the authority to prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* (emphasis in original) (quoting *Boerne*, 521 U.S. at 518). On the other side of that line lie efforts to "decree the *substance* of the Fourteenth Amendment's restrictions on the States.… [Congress] has been given the power 'to enforce,' not the power to determine *what constitutes* a constitutional violation." *Id.* Recognizing that "[t]he line between the two" is not easy to discern which makes the distinction "often difficult", the Court stated that "Congress must have wide latitude in determining where [that line] lies." *Id.* Quoting *Boerne*, the Court in *Kimel* stated that remedial legislation evidences "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. *Boerne* does not call for courts to assess such concerns in the abstract; instead, the issue is whether the statutory scheme is "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent,

unconstitutional behavior.'" *Lane*, 541 U.S. at 533 (quoting *Boerne*, 521 U.S. at 532).

Thus, to prevail, Shelby County bears the heavy burden of demonstrating that between 1999, when the Court in *Lopez* reaffirmed the constitutionality of Section 5 as remedial legislation for the fourth time against constitutional challenge, and 2006, Section 5 was transformed from remedial legislation to legislation that substantively redefines the Constitution. But Shelby County cannot recast Section 5 as a substantive redefinition of established Fourteenth and Fifteenth Amendment protections, as the application of *Boerne*'s three-step congruence and proportionality framework makes clear.

The first step in a *Boerne* review is an identification of the constitutional rights or prohibitions that Congress sought to enforce by the challenged legislation. *Lane*, 541 U.S. at 522. The Court's level of review is highly sensitive to the nature of the constitutional protection at issue. Where Congress seeks to protect a constitutional right entitled to even moderately heightened scrutiny, the Court has been deferential. Conversely, the Court has undertaken a more stringent evaluation of the evidence on which Congress relied where the constitutional right Congress seeks to protect merely requires a rational basis review. In *Lane*, the Supreme Court explained that its post-*Boerne* holdings in *Hibbs*, *Kimel*, and *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), may be differentiated on this

basis: "We explained [in *Hibbs*] that because the [Family and Medical Leave Act] was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, '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." 541 U.S. at 528-29 (citation omitted).

Moreover, the concerns that arose in the *Boerne* line of cases are most likely to arise in the context of legislation based on the broad and somewhat diffuse terms of the Fourteenth Amendment. The Court's decisions recognize that, without some limiting principle, the Equal Protection Clause might be used to justify remedial legislation that is only minimally tethered to actual constitutional protections or problems. Furthermore, the Fourteenth Amendment functions as the basis on which numerous other rights may be applied against the States. Thus, the Court determined in *Garrett* that it was necessary to take a close look at Congress's legislative predicate for remedying disability discrimination and, in *Kimel,* that a similar review was needed regarding Congress's remedy for age discrimination.

These principles, applied to this case, demonstrate that a deferential standard of review applies. First, in reauthorizing Section 5, Congress was acting at the zenith of its constitutional enforcement authority. Section 5 addresses *both* the quintessential suspect classification (race) *and* the quintessential civil right (the

right to vote). *Johnson v. California*, 543 U.S. 499, 509 (2005) (racial discrimination by state actors goes to the core of the Reconstruction Amendments, and receives the strictest judicial scrutiny); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "preservative" of all other rights). Accordingly, "it was easier for Congress to show a pattern of state constitutional violations" in deciding to reauthorize Section 5. *Lane*, 541 U.S. at 529 (internal quotation marks omitted), Second, Section 5 enforces undisputed constitutional rights against undisputed constitutional evils. Thus, the concerns that led to closer scrutiny in several of the *Boerne* cases, as to Congress seeking to enforce broad and diffuse constitutional rights, do not exist here.

Shelby County rejects this analytic framework, claiming instead that it is belied by the Supreme Court's decision in *Boerne* itself, because *Boerne* involved a statute that sought to enforce a fundamental right (religious freedom). Br. at 17. The legislation at issue in *Boerne*, however, was a paradigmatic example of Congress attempting to redefine rather than enforcing constitutional rights. As the Court explained in *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), the First Amendment does not provide for the use of a compelling state interest test when judging how laws of general applicability affect particular religious practices. Congress disagreed and, despite the fact that the congressional record revealed not a single issue of a facially neutral law motivated by religious

discrimination in the previous 40 years, sought to reverse the constitutional interpretation of *Smith* by enacting the Religious Freedom Restoration Act. *Boerne*, 521 U.S. at 530, 512. Thus, the legislation went far beyond an effort to prevent or deter potential First Amendment violations, and was not entitled to substantial deference. *Lane*, 541 U.S. at 520 (explaining that *Boerne* invalidated RFRA because the statute's "very purpose" was to "work a 'substantive change in constitutional protections'") (quoting *Boerne*, 521 U.S. at 529, 532).

C. Congress Was Entitled to Rely on a Broad Array of Evidence in Deciding to Reauthorize Section 5

1. In Enacting Remedial Legislation, Congress May Consider Evidence from Any Probative Source

In *Katzenbach* and *Rome* the Court determined that "the validity of enforcement legislation is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 541 U.S. at 523 (quoting *Katzenbach*, 383 U.S. at 308). This corresponds to the second step of a "congruence and proportionality" analysis: an examination of the "gravity of the harm [the challenged legislation] seeks to prevent." *Id*.

Generally, the "historical experience" must involve a "pattern of unconstitutional discrimination." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001). Beyond that, however, the nature and scope of the evidence Congress may rely upon is open-ended, and the Supreme Court has not limited

Congress to considering, for example, only adjudicated constitutional violations. As explained in *Katzenbach*, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source." 383 U.S. at 330. This is particularly true where Congress has acted to enforce constitutional rights which trigger heightened scrutiny of state action. In *Hibbs* and *Lane*, for example, the Court upheld Congress's remedies notwithstanding the fact that Congress had relied, to a significant extent, upon indirect evidence of a pattern of unconstitutional discrimination by the States, including discrimination by private actors.[4]

Shelby County attempts to distinguish *Hibbs* and *Lane* by arguing that those cases involved "overt" or "naked" discrimination. Br. at. 18-19. But when enacted with discriminatory intent, a facially neutral law is just as unconstitutional as a facially discriminatory one, *see*, *e.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985), and Congress plainly may remedy and deter unconstitutional conduct of either variety. For example, in upholding the FMLA, Supreme Court in *Hibbs* specifically recognized that "Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways." 538

[4] In *Lane*, the Supreme Court concluded that there was a pattern of unconstitutional disability discrimination, placing significant weight on a survey concerning access to public buildings across the country, and the testimony of individual persons with disabilities as to their experiences. 541 U.S. at 527. Similarly the *Hibbs* record "contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States," but instead "related primarily to the practices of private-sector employers and the Federal Government." *Id.* at n.16.

U.S. at 732. Indeed, the same was true with respect to the measures that motivated the enactment of Section 5 in 1965: poll taxes, literacy tests and other devices used to discriminate in 1965 were facially race-neutral.

Shelby County also asserts that the historical experience required to reauthorize Section 5 must reflect a "pattern of electoral gamesmanship," Br. at 23, and a "coordinated campaign of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 54. There is no place in *Katzenbach* or *Rome* where the Court suggested in any way that congressional authority to enact or reauthorize Section 5 is dependent on Congress identifying violations of this nature. But, as discussed *infra* pgs. 26-37, the congressional record revealed precisely such a pattern of serial violations of minority voting rights in the covered jurisdictions.

2. Congress Properly Relied on Evidence of Vote Dilution in Deciding to Reauthorize Section 5

Many of the examples of voting discrimination in the legislative record illustrate "the persistence of measures that are intentionally designed to 'dilute minority voting strength.'" JA595. There were literally hundreds of examples of such purposeful discrimination by covered jurisdictions between 1982 and 2005, including scores of instances where the same covered jurisdictions engaged in repeated efforts to discriminate against minority voters. *See infra* pgs. 26-37. This evidence directly undermines the proposition at the heart of Shelby County's case:

that the record contained only isolated instances of recent voting discrimination in the covered jurisdictions. *See, e.g.*, Br. at 9, 16, 37, 45. Consequently, Shelby County seeks to bypass this evidence, contending that there is a bright-line distinction between "evidence of interference with the right to vote, as opposed to evidence concerning the weight of that vote," Br. at 25-26, and that measures by covered jurisdictions designed to prevent minority voters from electing candidates of choice are categorically irrelevant to Section 5's constitutionality.

That position, however, is foreclosed by *Rome*, which upheld the 1975 reauthorization of Section 5 based specifically on evidence of "'measures … which would dilute increasing minority voting strength.'" 446 U.S. at 181 (quoting H.R. Rep. No. 94-196, at 10-11 (1975)). *See also id.* at 183-84. Without referencing any authority, Shelby County asserts that the Court's decision in *Rome* was not based on evidence of vote dilution. Br. at 27-28. But in *Rome*, the Court made clear that its decision was based on "'the number and nature of objections interposed by the Attorney General." *Id* at 181. Between 1965 and 1975, a "substantial majority of objections" were to "obstacles [that] … make it difficult for a black to win elective office … in the areas of redistricting and reapportionment." *April 10, 1975 Hearing*, at 123-24 (N. Katzenbach).[5] *See also Briscoe v. Bell*, 432 U.S. 404, 405-406 (1977) (noting the 1975 reauthorization record consisted of "'overwhelming

[5] Specific hearings on the reauthorizations of the Voting Rights Act that were held before the House and Senate Judiciary Committees are cited herein by date.

evidence' showing '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'"). There can therefore be no doubt that the legislative record deemed sufficient in *Rome* consisted largely of vote dilution evidence.

Even before *Rome*, the Court in *Allen v. State Board of Elections* made clear 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. . . . This type of change could therefore nullify [minority voters'] ability to elect the candidate of their choice *just as would prohibiting some of them from voting*." 393 U.S. 544, 569 (1969) (emphasis added). *Allen* held that Section 5 prohibits dilutive techniques, *id.*, and, as the *Boerne* line of cases make clear, in enacting remedial legislation, Congress appropriately may rely on evidence relating to the full range of constitutional injuries it seeks to address through the challenged legislation. *See, e.g.*, *Hibbs*, 538 U.S. 730-31. Thus, as the district observed, starting with the initial enactment of Section 5, and through every subsequent reauthorization—each of which has been upheld on constitutional challenge—"Congress relied on evidence of these purposefully dilutive mechanisms…." JA598.

Allen also disproves Shelby County's assertion that vote dilution schemes are a recent innovation that "bear[] no resemblance" to the techniques that necessitated the original enactment of Section 5. Br. at 10. The timing of *Allen*—

decided in 1969, only four years after the VRA was enacted in 1965—makes plain that dilutive techniques are directly traceable to so-called "first generation" barriers. *Cf. Shaw v. Reno*, 509 U.S. 630, 640-41 (1993) (observing that, shortly after passage of the VRA, "it soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices.… [to] reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice'"). "[S]econd generation," JA597, barriers are precisely what their name implies: a successive iteration of discriminatory efforts to prevent minorities from exercising political power, the quintessential example of "gamesmanship." *See* JA547 (describing history of dilutive tactics); Department of Justice ("DOJ') Br. at 48-56 (same).

Nevertheless, Shelby County asserts that vote dilution is irrelevant to the constitutionality of Section 5 because, in Shelby County's view, intentional efforts to dilute minority voting power are a violation only of the Fourteenth but not the Fifteenth Amendment. Br. at 24, 27. But even if its argument were not foreclosed by *Rome*, that distinction would make no difference here. Congress was authorized under the Fourteenth Amendment to rely on evidence of vote dilution as one basis on which to reauthorize Section 5. As the District Court noted, Shelby County provides no reason why Congress would not have equal authority under the Fourteenth Amendment to prescribe remedial legislation to combat voting

discrimination, JA544-45, DOJ Br. at 48-49, nor can it, given its argument that the scope of Congress's remedial powers is identical under both Amendments. Br. at 15.

And, even taking the Fifteenth Amendment in isolation, Shelby County's position ignores that Amendment's plain text, which prohibits the not only the "den[ial]" of the right to vote, but also the "abridge[ment]" of it.[6] While the Supreme Court has not directly addressed this question, its pronouncements strongly suggest that race-based efforts to interfere with the weight of the vote violate the Fifteenth Amendment. *See, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("The Fifteenth Amendment prohibits a State from denying *or abridging* a Negro's right to vote…. If a State … *weighted* … the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable.") (emphasis added); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion).[7]

[6] "Abridge" is defined as "to reduce or diminish," *see Black's Law Dictionary* at 2 (2d pocket ed. 1996). Shelby County's interpretation of the Fifteenth Amendment violates a basic "canon of interpretation, … [that courts] are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous." *Hurtado v. California*, 110 U.S. 516, 534 (1884) (interpreting the Fourteenth Amendment).

[7] Contrary to Shelby County's argument, redistricting to "dilute the weight of the minority vote," Br. at 28-29, necessarily involves excluding certain minority individuals from voting in a particular constituency—which is precisely what Tuskegee, Alabama had done in *Gomillion*, and which undeniably violates the Fifteenth Amendment.

Under Shelby County's view, in determining whether to reauthorize Section 5, Congress should have ignored instances where covered legislatures repeatedly passed redistricting plans calculated to prevent Black or Latino voters from electing candidates of choice, such as one notable incident in which legislators rejected an alternative redistricting plan as containing "nigger districts," *October 25, 2005 (Need) Hearing*, at 80. That is not, and has never been, the law.

D. Congress is Entitled to Substantial Deference in the Specific Remedy Chosen

Step three in the Supreme Court's "congruence and proportionality" analysis involves an assessment of whether Congress's chosen remedy is "an appropriate response" to the harms Congress identified. *Lane*, 541 U.S. at 530. As the District Court correctly held, this analytic step also reiterates the Court's approach in *Katzenbach* and *Rome*. JA541.

Section 5 clearly remains "an appropriate response" to the ongoing pattern of discrimination in voting revealed by the 2006 reauthorization. In *Boerne*, the Court highlighted Section 5's geographic restrictions; its limitation to "a discrete class of state laws, *i.e.*, state voting laws"; the provision that covered jurisdictions may "bail out" of coverage when the requisite showing can be made; and its termination date as important indicators that the "means" Congress has chosen in Section 5 "are proportionate to ends legitimate under [the Reconstruction Amendments]." 521 U.S. at 532-33. All of these limitations remain in place.

Furthermore, the only goal of Section 5 is to enforce the express constitutional prohibition on race discrimination in voting. This stands in stark contrast to the laws at issue in *Hibbs* and *Lane*—which created new substantive obligations concerning family leave and disability access, and a private cause of action for money damages with respect to those new benefits. *See Hibbs*, 538 U.S. at 744-45 (Kennedy, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 751 (1999). Whether Congress's authority is considered from the perspective of *Katzenbach* and *Rome*, or the *Boerne* refinements on that mode of analysis, Congress is entitled to substantial deference in selecting the means by which "the blight of racial discrimination in voting," may be remedied and deterred. *Katzenbach*, 383 U.S. at 308.

II. THE LEGISLATIVE RECORD ESTABLISHES THE CONSTITUTIONALITY OF SECTION 5

Congress's decision to reauthorize Section 5 was based on a record demonstrating a "pattern of constitutional violations on the part of the States in this area." *Hibbs*, 538 U.S. at 729. The District Court considered ten categories of evidence from the legislative record which bear, directly or indirectly, on the persistence of ongoing intentional voting discrimination in covered jurisdictions. Moreover, instances of repetitive violations of minority voting rights pervade the legislative record, further demonstrating the need for remedies that go beyond case-by-case enforcement.

A. The Legislative Record Is Replete with Evidence of Repetitive Violations of Minority Voting Rights

The legislative record contains scores of serial violations of minority voting rights by covered jurisdictions. What follows are illustrative, but far from exhaustive, examples of those repetitive violations, which, along with other evidence discussed *infra* pgs. 38-52, illustrate the nature, frequency and severity of voting discrimination that persists throughout covered jurisdictions, and leave no doubt Section 5 remains "appropriate" remedial legislation.

The discussion below reveals three important themes. *First*, despite undeniable progress since the 1960s, many of the same jurisdictions with the worst discriminatory records prior to 1982 have continued to engage in discriminatory practices throughout the reauthorization period. *Second*, covered jurisdictions have resorted to a variety of strategies for accomplishing the same discriminatory ends, pouring "'old poison into new bottles.'" JA597 (citation omitted). *Third*, covered jurisdictions have frequently engaged in multiple acts of discrimination to minimize minority electoral opportunity at the moment that minority political power is emerging.

1. Examples of Repetitive Violations Initiated at the State Level

Texas Redistricting. Overall, six objections to Texas preclearance submissions of statewide redistricting plans served to protect 359,978 African-American and Hispanic voters during the reauthorization period. JA562. For

example, 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. Following objections after the 1980 and 1990 Censuses, DOJ found the State's post-2000 House redistricting plan retrogressive because it eliminated three Latino-majority districts, and fragmented Latino populations in a manner that "deviates from the State's traditional redistricting principles[.]" *Id.* at 2521. This discriminatory conduct was not limited to the Texas House 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." *LULAC v. 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. But 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. *See LULAC v. Texas*, No. 06-cv-1046 (W.D. Tex.). Most recently, Texas was denied summary judgment in preclearance litigation for its post-2010 House, Senate, and

Congressional redistricting plans. *Texas v. Holder*, No. 11-cv-1303, Dkt. No. 106 at 2, (D.D.C. Nov. 8, 2011).

Louisiana Redistricting. Congress likewise learned "that not one redistricting plan for the Louisiana House of Representatives had ever been precleared as originally submitted." *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 251 (D. D.C. 2008); *see also* JA561. As to the post-2000 plan, in, *La. House of Representatives v. Ashcroft*, No. 02-cv-62 (D.D.C.), Louisiana officials admitted that they had intentionally "obliterated" a majority-Black district in order to enhance electoral opportunities for white voters, in a manner that violated the state's own redistricting principles. JA575-77; *March 8, 2006 Hearing*, at 1607-08. Ten years earlier, Louisiana had similarly discriminated against Blacks in its house redistricting by selectively applying redistricting criteria. *October 25, 2005 (History) Hearing*, at 951-52.

Arizona Redistricting. Congress also learned that Arizona had drawn Section 5 objections to its statewide legislative redistricting plans after each decennial census since it became a fully covered state in 1975. In 2001, DOJ concluded that aspects of Arizona's legislative redistricting plan were intentionally retrogressive for Latino voters. *Id.* at 500. Ten years earlier, DOJ similarly concluded that Arizona's redistricting plan following the 1990 Census discriminated against Latino voters, and that the State had provided pretextual reasons for rejecting non-

discriminatory alternatives. *Id.* at 476, 481-82. Likewise, after the 1980 Census, the State could not offer a plausible non-discriminatory reason for enacting a redistricting plan that was retrogressive for American Indian voters. *Id.* at 454-55.

Mississippi's Dual Registration System. In the 1980s, Black voters challenged Mississippi's dual registration requirement for municipal and non-municipal elections, which had been enacted during the late 1800s as part of the "Mississippi Plan" to deny Blacks the right to vote. The district court invalidated the requirement under Section 2, finding that it still had its intended discriminatory consequences: many Blacks were not registered because the burdens of the dual registration system fell more heavily on Black citizens, who disproportionately lacked access to automobiles or telephones. *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1251-55 (N.D. Miss. 1987). Then, just four years after the Fifth Circuit affirmed that decision, 932 F.2d 400 (5th Cir. 1991), the State once again established a dual registration system—this time for state versus federal elections—and refused to seek preclearance until so ordered by the Supreme Court. *Young v. Fordice*, 520 U.S. 273 (1997). DOJ ultimately denied preclearance, noting that the system's racially discriminatory effects "were not just foreseeable but almost certain to follow." *October 25, 2005 (History) Hearing*, at 1603. *See also* JA579-80.

South Carolina's Backlash to the Growth of Minority Voting Power. After the 2000 election, African Americans obtained a majority of seats on the Charleston County school board for the first time in history, but that watershed moment was met with efforts in the state legislature to alter the method of election for, or reduce the powers of, the board. *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003). Then, in 2003, a federal court held that Charleston's at-large method of electing county councilmembers violated Section 2 of the VRA, and also noted "significant evidence of intimidation and harassment" by poll managers over several decades in predominately minority precincts, which "never occurred at predominately white polling places." *Id.*, *aff'd*, 365 F.3d 341 (4th Cir. 2004); *see* JA584-55. Nevertheless, the following year, the South Carolina legislature enacted legislation requiring a return to the same method of election that had been declared illegal only a year earlier. *March 8, 2006 Hearing*, at 175-76. DOJ objected under Section 5 and quickly blocked the discriminatory change. Notably, however, the earlier Section 2 litigation lasted several years and cost millions of dollars. *Id.*

Similar events took place in South Carolina during the preceding decade. In the mid-1990s, after Section 2 litigation resulted in a consent decree that changed the method of electing school board members in Spartanburg, South Carolina, the South Carolina legislature responded by abolishing the board. *October 25, 2005*

(History) Hearing, at 2041-43. In interposing a Section 5 objection, DOJ found that "[t]he sequence of events surrounding the adoption of [the law abolishing the board] gives rise to an obvious inference of discriminatory purpose." *Id*. at 2042. Nonetheless, South Carolina attempted to abolish the board again the next year by de-funding it; this gamesmanship was only stopped by another discriminatory-purpose objection under Section 5. *Id*. at 2051.

Repetitive discriminatory practices at the statewide level were not isolated incidents. Indeed, nearly all covered states engaged in serial discriminatory acts at the state level. *Nw. Austin*, 573 F. Supp. 2d at 285 (Map 5B, listing states subject to multiple statewide objections during the reauthorization period); JA585-86 (South Dakota); JA588 and *October 25, 2005 (History) Hearing*, at 264-66, 385-87 (Alabama); *id.* at 1183-86 (Mississippi).

2. Examples of Repetitive Violations at the Local Level

The record also included hundreds of examples of discriminatory voting changes in counties and cities, particularly in areas with high percentages of minority voters. *See, e.g.*, *Nw. Austin*, 573 F. Supp. 2d at 251 (maps 5F and 5G, showing geographic breadth of local objections in Louisiana and Mississippi, and concentrations in areas with large minority populations); *July 13, 2006 Hearing*, at 250-68 (J. Greenbaum, discussing numerous examples of repetitive violations at

the local level throughout covered states). What follows are several illustrative examples.

Seguin, Texas. The City finally abandoned discriminatory methods of election after three separate lawsuits between 1978 and 1993. 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 any Latino candidate from competing in the district. Only a Section 5 enforcement 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).

Northampton County, Virginia. DOJ interposed three objections between 2001 and 2003 to prevent the County from implementing a retrogressive redistricting plan. *October 25, 2005 (History) Hearing*, at 224, 2484-86, 2592-95; *March 8, 2006 Hearing*, at 2040. Despite racially polarized voting, the County sought to switch from six single-member districts, three of which were majority-minority, to three dual-member districts, all with majority-white voting-age populations. In objecting to the plan, DOJ noted that the county's stated

justification was inaccurate, and that it had inexplicably abandoned consideration of non-retrogressive alternatives. *October 25, 2005 (History) Hearing*, at 2484-86.

Selma, Alabama. After the 1990 Census revealed that Selma's Black population had grown to 58%, the City enacted a redistricting plan whose aim was to deny Blacks an opportunity to elect a majority of city councilmembers, by packing Black voters into four of nine council districts (three over 90% Black). *Id.* at 391. DOJ objected, finding the City was "motivated by the desire to confine Black population concentrations into a predetermined number of districts, and thus ensure a continuation of the current white majority on the council." *Id.* at 392. Selma then submitted yet another intentionally discriminatory redistricting plan designed to "fragment[] black population concentrations" to prevent Blacks from electing a majority of councilmembers, but was again blocked by a Section 5 objection. *Id*. at 403.

Mt. Olive, North Carolina. Two months after agreeing in 1993 to settle a Section 2 lawsuit challenging the town's use of at-large elections, the town abandoned the agreed-upon remedy, and adopted a new discriminatory plan. DOJ interposed a discriminatory-purpose objection, concluding that the town's justification appeared pretextual, and noting town officials' extraordinary efforts to

prohibit the only Black town commissioner from participating in the decision-making process. *Id*. at 1823-24.[8]

Selective annexations. Congress learned that covered jurisdictions continue to use the tactic of selective annexations to prevent minority voters from electing candidates of choice. It took *six* Section 5 objections between 1994 and 1997 to prevent Shreveport, LA from implementing such annexations. *March 8, 2006 Hearing*, at 1615-17. Similarly, after Foley, Alabama abandoned at-large elections in response to a Section 2 suit, it implemented a policy of encouraging annexation petitions from majority-white jurisdictions and discouraging them from majority-Black jurisdictions—a policy only blocked by a Section 5 objection. *October 25, 2005 (History) Hearing*, at 406; *see also Dillard v. City of Foley*, 926 F. Supp. 1053, 1059 (M.D. Al. 1995) (describing prior Section 2 suit).[9]

[8] For similar examples of repetitive efforts at minority vote dilution through redistricting and method-of-election changes, and/or efforts to prevent minorities from voting at all, *see, e.g.*, JA566-67 (Albany, GA) (most recent effort at discrimination in 2001); JA578-79 (Waller County, TX) (2004); JA587 (North Johns, AL) (1989); *October 25, 2005 (History) Hearing*, at 397-99, 388-90, 327-29, 310-12 (Dallas County, AL) (1992); at 743-45 (Millen, GA) (1993); at 815-17 (Jenkins, GA) (1995); at 1344-45, 1330-31, 1265-67 (Yazoo County, MS) (1986); at 1980-82, 2003-05 (Johnston, SC) (1993); at 1013-15, 985-86 (East Carroll Parish, LA) (1992); at 2300-03 (Lubbock County, TX) (1991); at 2513-17 (Haskell School District, TX) (2001); at 2359-60 (Terrell County, TX) (1992); at 2362-63, 2409, 2416-18 (Bailey County, TX) (1993); at 2573 (Newport News, VA) (1993); *March 8, 2006 Hearing*, at 138-39, 2998-3005 (Wharton County, TX) (2000).

[9] For other similar examples, *see, e.g.*, *October 25, 2005 (History) Hearing*, at 216 (second objection in 6 years in Lamesa, TX); at 2028-30 (Hemingway, SC); at 642-43 (Augusta, GA's "racial quota system" of annexations); *Nw. Austin*, 573 F. Supp. 2d at 294, 297-98 (describing 2003 and 1998 objections in Town of North, South Carolina and Grenada, Mississippi).

Coordination between state and local officials. Local and state officials often worked together to violate minority voting rights. For example, in Hampton County, SC, local and state officials collaborated to block minority candidates from obtaining office on the local school board of trustees. In 1982, the South Carolina legislature abolished the County School Board, devolving its duties to two separate trustee boards for two separate school districts (one predominantly white, and one predominantly Black). *NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166 (1985). The State delayed submission of this change under Section 5 for several months. *Id.* at 180. Then, while Section 5 review was pending, Hampton County, without seeking preclearance, opened the candidate filing period for elections for the boards of trustees. *Id.* at 171. Several experienced Black school board members opted not to qualify for election, declining to lend credibility to the illegal implementation of an unprecleared voting change. *October 25, 2005 (History) Hearing*, at 1905. Preclearance was ultimately obtained, but then, once again refusing to seek preclearance, the County scheduled its elections, without re-opening its candidate qualifying period, thus preventing a number of candidates who enjoyed substantial support in the Black community from running. *Id.* The Supreme Court unanimously held that preclearance was required, *Hampton County*, 470 U.S. at 182, after which DOJ interposed an objection. *October 25, 2005 (History) Hearing*, at 1905.

As in each of the examples described above, discriminatory efforts in numerous other covered jurisdictions were only blocked by multiple objections under Section 5, or at least one Section 5 objection and one Section 5 enforcement action;[10] or a combination of Section 2 (or constitutional) litigation and at least one Section 5 objection or enforcement action.[11] Thus, although "gamesmanship" has never been a constitutional requirement for remedial legislation like Section 5, *see*, DOJ Br. at 56-57, Shelby County's assertion that "there is no evidence that *any*

[10] These jurisdictions, with the year of the most recent Section 5 action in parenthesis, include McComb, MS (2005); Iberville Parish, LA (2003); DeSoto Parish, LA (2002); Minden, LA (2002); Point Coupee Parish, LA (2002); Alabaster, AL (2000); St. Martinville, LA (1997); Shreveport, LA, (2002); Monroe County, MS (1995); Chickasaw County, MS (1995); Barnwell, SC (1994); St. Landry, LA (1994); Madison Parish, LA (1993); West Feliciana Parish, LA (1993); Lafayette Parish, LA (1993); East Carroll Parish, LA (1993); Batesburg, SC (1993); Sunflower County, MS (1992); Bolivar County, MS (1991); Leflore County, MS (1991); Morehouse Parish, LA (1992); Yazoo County, MS (1986). Since the VRA was reauthorized in 2006, Randolph County, Georgia and Fayetteville, North Carolina have joined this group of jurisdictions with multiple Section 5 actions since the 1982 reauthorization. *See October 25, 2005 (History) Hearing*, at 435-39 (Alabama examples); *March 8, 2006 Hearing*, at 1618-20, 1667-69, 1651-54; *October 25, 2005 (History) Hearing*, at 1027, 1058-60, 1074-76, 1132 (Louisiana examples); *March 8, 2006 Hearing*, at 714-15; *October 25, 2005 (History) Hearing*, at 159-72; *May 10, 2006 Hearing*, at 91 (Mississippi examples); *March 8, 2006 Hearing*, at 1030-31; *October 25, 2005 (History) Hearing*, at 188-91, 1873-75, 2032-48 (South Carolina examples).

[11] These jurisdictions include Albany, Georgia (2003); Harnett County, NC (2002); Washington Parish, LA (1999); Tallapoosa, AL (1998); Granville County, NC (1996); Chickasaw County, MS (1995); Foley, AL (1995); Hemingway, SC (1994); Clay County, GA (1993); Calhoun County, GA (1992); Orangeburg, SC (1992); Edgefield County, SC (1992); Navajo and Apache Counties, AZ (1989); Richland County, SC (1988); Pitt County, NC (1988); Bladen County, NC (1987); Wilson County, NC (1986); Marengo County, AL (1986); Elizabeth City, NC (1986). *See October 25, 2005 (History) Hearing*, at 310-12, 429-34; *Dillard*, 926 F. Supp. 1053 (Alabama examples); *March 8, 2006 Hearing*, at 1407-08 (Arizona); *March 8, 2006 Hearing*, at 634-35, 652-56, 686-90, 1526 n.129; *October 25, 2005 (History) Hearing*, at 138 (Georgia examples); *March 8, 2006 Hearing*, at 1616, 1653 (Louisiana examples); *March 8, 2006 Hearing*, at 1715-16 (Mississippi); *March 8, 2006 Hearing*, at 1790-91; 1752-53, 1797-98; 1773-77; 1748; 1733-34 (North Carolina examples); *March 8, 2006 Hearing*, at 1970, 1033-39; 1015-17; 1964-65 (South Carolina examples).

covered jurisdiction is engaging in the type of gamesmanship and subterfuge that ma[k]e case-by-case enforcement futile," Br. at 11, is flatly refuted by the record.

Along with other evidence in the record, examples like these leave no doubt that it was appropriate for Congress to conclude that "case-by-case enforcement" through "Section 2 would be ineffective to protect the rights of minority voters[.]" H.R. Rep. No. 109-478, at 57 (2006). Congress's legislative judgment is entitled to deference, *see infra* pg. 53, and was supported by the record. Congress learned that Section 2 suits are among the most complex and resource intensive of all actions brought in federal court, often taking five years or more, with costs running into the millions of dollars. *See, e.g.*, *May 10, 2006 Hearing*, at 96 (R. McDuff); *May 9, 2006 Hearing*, at 141 (L. McDonald); *May 17, 2006 Hearing*, at 20, 80 (A. Derfner). Moreover, Section 2 allows the discriminatory practice to go into effect (often for several election cycles), and candidates who win election under a discriminatory plan gain the substantial advantages of incumbency. *October 18, 2005 Hearing*, at 43-44 (multiple witnesses). Finally, Congress learned that minority voters at the local level (especially in rural communities) generally lack access to the resources and expertise necessary for successful Section 2 litigation. *October 25, 2005 (History) Hearing*, at 84 (A. Earls).

B. The District Court Correctly Found That There Is "Extensive Evidence of Recent Voting Discrimination in th[e] Virtually Unprecedented Legislative Record"[12]

The District Court considered ten separate categories of evidence from the legislative record, each of which is probative of the ongoing need for Section 5 to remedy and deter continuing voting discrimination in covered jurisdictions.

1. Registration and Turnout Rates. The legislative record demonstrated "stark" disparities between Black and non-Hispanic white participation rates in many covered states, ranging from registration disparities of five percentage points in Louisiana and Texas and 14 points in Virginia, to turnout disparities of more than 20 points in Arizona and Florida. JA555-56. The record also showed "far greater gaps between Hispanic and non-Hispanic white voter registration rates," including a 32-point gap in registration rates in Texas, and over 40 points in Arizona, California, and Virginia. *Id.* The District Court found that these disparities were "comparable to the disparity the *Rome* Court called 'significant'" and deemed demonstrative of the ongoing need for Section 5. JA556 (quoting *Nw. Austin*, 573 F. Supp. 2d at 248).

2. Minority Elected Officials. The District Court found it "relevant that the percentage of minority elected officials continued to lag behind the percentage of the population," both with respect to statewide office and in state legislatures.

[12] JA483.

JA558-59. The record before Congress showed that "[i]n States such as Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, where African-Americans make up 35 percent of the population, African-Americans made up only 20.7 percent of the total number of State legislators." H.R. Rep. No. 109-478, at 33. The record also revealed a disproportionately lower number of Latino and Asian-American elected officials. *Id.* at 33-34.

Shelby County contends that "[t]he constitutionally relevant question" is the nature of the positions held by minorities, Br. at 40, but the 2006 record showed that *no* African American had been elected to statewide office in three covered states (Louisiana, Mississippi, and South Carolina), and only two had ever been elected in Alabama. JA558. *See also Nw. Austin*, 573 F. Supp. 2d at 249 (citing H.R. Rep. No. 109-478, at 18); *July 13, 2006 Hearing*, at 388-89.

Although minorities have seen more electoral success in recent years than in the 1960's, this was also true at the time of *Rome*, when the Court noted "undeniable" progress in this regard. 446 U.S. at 181 (internal quotation marks omitted). Moreover, Shelby County fails to acknowledge that the vast majority of minority elected officials in covered jurisdictions are elected from majority-minority districts, many of which owe their existence to the VRA. *See*, *e.g.*, H.R. Rep. 109-478 at 34; *March 8, 2006 Hearing*, at 222-223 (Report of the National Commission on the Voting Rights Act); *June 21, 2006 Hearing*, at 183-87 (D.

Canon, noting that "only 49 of 8,047 [or 0.61%] elections in white-majority U.S. House districts have provided black winners since 1966").

Of course, proportionality is neither a constitutional nor a statutory requirement, but the Supreme Court has made clear that minority electoral success in covered jurisdictions which falls "far short of being representative of the number of [minorities] residing in the covered jurisdictions," is *probative* of the ongoing need for Section 5. *Rome*, 446 U.S. at 181. And, notwithstanding Shelby County's suggestion that this is no longer the law, Br. at 40, the Supreme Court continues to deem a lack of minority electoral success relevant in determining whether a state's voting practices are discriminatory. *See LULAC*, 548 U.S. at 436; *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1994).

3. Section 5 Objections. The legislative record revealed over 700 Section 5 objections between 1982 and 2006, JA564-65, with objections being lodged throughout covered jurisdictions. *See Nw. Austin*, 573 F. Supp. 2d at 284 (Map 5A, listing number of objections by state). Alabama alone was subject to 39 objections, including objections to a congressional redistricting plan and several county-wide redistricting plans. JA561. The significance of these numbers is heightened by the fact that "a single objection can often affect thousands of voters." JA560.

Although Shelby County argues that, for many years, the Attorney General "objected to voting changes purely on retrogression," and not discriminatory

intent, Br. at 30-31, the record actually revealed that two-thirds of the objections during the reauthorization period were based in whole or in part on discriminatory intent. JA564-65. *See also* JA565-71 (describing objections where facts indicated discriminatory intent); *Nw. Austin*, 573 F. Supp. 2d at 289-301 (appendix listing "examples of objection letters based on discriminatory or retrogressive intent" from throughout covered jurisdictions). And, in any event, objections based on retrogression alone provide a probative source of information as to the continuing need for Section 5, as the Supreme Court held in *Rome* that the Section 5 retrogression standard is specifically premised on Congress's valid finding that retrogressive "electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination." 446 U.S. at 177.

Shelby County makes much of the low *rate* of objections, Br. at 42, but, as the district court noted, the objection rate "has *always* been low." JA559 (emphasis added). *See also Nw. Austin,* 573 F. Supp. 2d at 250-51 (observing that low objection rate "hardly means Section 5 has outlived its usefulness," and noting that the nature of objections and types of submissions are far more telling of ongoing problems in covered jurisdictions) (citing, *inter alia*, *Rome*, 446 U.S. at 181). In

fact, the objection rate fell most dramatically in the years immediately prior to *Rome*. *May 9, 2006 Hearing*, at 219 (R. Hasen).[13]

Contrary to Shelby County's assertions, it is the "number and nature" of objections, and not the rate, that is the relevant metric here. *Rome*, 446 U.S. at 181. As the District Court noted, any one discriminatory voting change potentially may affect "thousands of voters," JA560. Such discrimination does not become less odious simply because other, non-discriminatory changes have also been implemented. In *Lane*, for instance, the Court looked strictly at "the sheer volume" of discriminatory conduct, and not at the *rate* of discrimination, in determining that remedial legislation was justified. 541 U.S. at 528. Thus, regardless of the objection rate, the fact remains that there were hundreds of objections in the record, most involving discriminatory intent, and many involving statewide voting changes that implicated the voting rights of tens of thousands of people. *See* JA560-62; *Nw. Austin*, 573 F. Supp. 2d at 285 (Map 5B, listing statewide objections).

[13] The District Court also explained that there were many plausible explanations for the decline in objection rates in the years leading up to the 2006 reauthorization, including: (1) the end of the decennial redistricting cycle; (2) the Supreme Court's ruling in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), which temporarily limited the scope of the discriminatory purpose prong of Section 5; (3) under-enforcement by DOJ; (4) DOJ's increased reliance on "more information" requests instead of objections; and (5) the effectiveness of Section 5 in deterring discriminatory conduct. JA562-64. Far from mere "speculat[ion]," Br. at 43, the District Court's observations were based on substantial testimony in the legislative record.

Shelby County also asserts that the probative value of objections is "questionable," Br. at 29, noting that objections are made without a trial or formal hearing, and that they may be lodged where the evidence is conflicting (because jurisdictions bear the burden of proof under Section 5). But "Congress obviously may avail itself of information from *any* probative source," in determining what remedial legislation is appropriate under the Reconstruction Amendments. *Katzenbach*, 383 U.S. at 330 (emphasis added). As noted above, *Rome*, 446 U.S. at 181-82, specifically held that Section 5 objections are one such probative source.

And while the burden of proof under Section 5 lies with the submitting jurisdiction (as it did when *Rome* was decided), Shelby County does not even attempt to identify a single objection by DOJ where the evidence was conflicting or in equipoise. DOJ utilizes precisely the same preclearance standards as the District of Columbia District Court in making its preclearance determinations, 28 C.F.R. § 51.52, including the same test employed by courts where a plaintiff bears the burden of proof to demonstrate discriminatory intent under *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266 (1977).[14]

Shelby County also speculates that some Section 5 objections were invalid, based on assumptions about DOJ's purported "maximization" approach during the 1990s, Br. at 30, 43 n.7 (discussing *Miller v. Johnson*, 515 U.S. 900, 927 (1995)),

[14] *See, e.g., October 25, 2005 (History) Hearing*, at 1603-04 (applying *Arlington Heights* standard to Mississippi's repeated efforts to re-implement its dual registration system).

but those assertions are divorced from the actual record. Shelby County notes that the number of objections dropped between 1994 and 1996 (the year after *Miller* was decided), but does not even attempt to identify objections that were purportedly problematic, or to demonstrate that a substantial number of the objections in 1994 (or earlier) were based on an impermissible policy of maximization. In fact, only a very small number were even arguably based on a maximization theory. *See October 25, 2005 (History) Hearing*, at 225-2595 (copies of post-1982 objections).

As the District Court noted, the mid-decade decline in objections between 1994 and 1996 is hardly surprising given that, as the decade progresses and the redistricting cycle winds down, the number of objections typically declines. JA562. And the number of objections actually declined most significantly in 1995 (from 61 objections in 1994 to 19 in 1995),[15] *see* S. Rep. No. 109-295, at 13 (2006), even though *Miller* was not decided until the *end* of the Court's 1994-1995 term.

4. More Information Requests. The District Court found that hundreds of proposed voting changes were withdrawn in response to a "More Information Request" (MIR) from the Department of Justice (with estimates ranging from at least 205 and up to 855), and that these withdrawals were probative of ongoing voting discrimination. JA572. One study in the record showed that MIRs

[15] Shelby County's source lists objection statistics by year, but does not break them down by month.

"enhanced the deterrent effect of Section 5," and blocked six times as many discriminatory changes as Section 5 objection letters. *June 13, 2006 Hearing*, at 213, 226 (Report of L. Fraga and M. Ocampo, noting ratio of MIR outcomes to objections from 1982 to 2005).

Shelby County does not dispute these numbers, arguing instead that Congress's findings as to the probative value of MIRs amount to "unfounded speculation." Br. at 33. But the evidence before Congress shows otherwise. An MIR "signal[s] to a submitting jurisdiction that [DOJ] has concerns regarding the potentially discriminatory intent or effect of a proposed change." *Id.* at 212. Jurisdictions can respond by providing information that establishes that the change is non-discriminatory, *or* they can (1) withdraw the requested change "because it is discriminatory"; (2) file a "new or amended non-discriminatory voting plan"; or (3) offer no response. H.R. Rep. No. 109-478, at 40. Congress heard testimony explaining that, in each of those three instances, the "MIR-induced outcome" is highly probative of discrimination. *See June 13, 2006 Hearing*, at 210-226 (L. Fraga and M. Ocampo).

Congress then found that these outcomes "are often illustrative of a jurisdiction's motives," and concluded that the increased number of revised submissions and withdrawals during the last 25 years represents "strong [evidence] of continued efforts to discriminate." H.R. Rep. No. 109-478, at 40, 36. As two

District Courts have recognized, Congress's factual finding on this point is eminently reasonable. *See* JA572-73; *Nw. Austin*, 573 F. Supp. 2d at 254-55.

5. Judicial Preclearance Suits. There were 25 declaratory judgment actions in which a covered jurisdiction failed to obtain preclearance between 1982 and 2005, including several examples of judicial decisions denying preclearance that reveal evidence of intentional discrimination. *See* JA574; *Nw. Austin*, 573 F. Supp. 2d at 255-56 (describing examples).

6. Section 5 Enforcement Suits. Congress also relied on evidence concerning 105 successful Section 5 enforcement suits. JA577. Although Shelby County quibbles with the precise figure, Br. at 33-34, Congress reasoned that the evidence regarding Section 5 enforcement actions demonstrated that many covered jurisdictions willfully attempt to enact and enforce voting changes without the knowledge of the federal government, and, as the District Court concluded, it was reasonable to conclude that this defiance was indicative of discriminatory intent. *See* JA578. Indeed, the District Court noted several notorious "examples of suits in which the unprecleared voting change appeared to have been motivated by discriminatory animus." *Id.* (listing examples); *Nw. Austin*, 573 F. Supp. 2d at 257 (additional examples); DOJ Br. at 34 (describing South Dakota litigation).

7. Section 2 Litigation. The legislative record contained 14 electronically reported Section 2 cases involving findings of intentional discrimination in covered

jurisdictions, and a total of over 650 Section 2 cases in the covered jurisdictions resolved favorably for plaintiffs since 1982. JA581-82. On an annual basis, this translates to *over 25 successful suits every year* in covered jurisdictions.

Successful Section 2 suits are probative of unconstitutional conduct even when they do not result in a formal judicial finding of intentional discrimination. Although Section 2 does not require such a finding, much of the evidence relevant to finding Section 2 liability is also probative of unconstitutional conduct. *Compare Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (setting forth test for liability under Section 2) *with Rogers*, 458 U.S. at 616-28 (setting forth test for unconstitutional discrimination); *see also LULAC*, 548 U.S. at 440 (in finding a Section 2 violation, noting that statewide redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation"). The Section 2 results standard is designed to be probative of intentional discrimination while avoiding "placing local judges in the difficult position of labeling their fellow public servants 'racists.'" *United States v. Blaine Cnty.*, 363 F.3d 897, 908 (9th Cir. 2004). *See also* S. Rep. No. 97-417, at 36 (1982); *May 16, 2006 Hearing*, at 6 (P. Karlan); DOJ Br. at 36-38.

Thus, as the District Court noted, "many instances of unconstitutional voting discrimination likely escape from judicial condemnation" in Section 2 suits because courts "avoid deciding constitutional questions if a case can be resolved

on narrower, statutory grounds." JA583-88 (citing cases). *See also LULAC*, 548 U.S. at 440; *Nw. Austin*, 573 F. Supp. 2d at 259-62 (examples of section 2 litigation). It was plainly appropriate for Congress to rely on the hundreds of successful Section 2 suits in the covered jurisdictions since 1982 as probative of ongoing intentional discrimination. *Katzenbach*, 383 U.S. at 330 ("Congress obviously may avail itself of information from any probative source").

Relying on a post-enactment document, S. Rep. 109-295,[16] Shelby County attempts to avoid this evidence by asserting that "half [of the cases in the record finding intentional discrimination] … involved discrimination against white voters." Br. at 10-11. But this is a misstatement of the actual record. This "Report"—which was *not* endorsed by a majority of the Senate Judiciary Committee, *see* 152 Cong. Rec. S8372 (daily ed. July 27, 2006)—was incorrect, as there were *no* cases of intentional discrimination against white voters. All of the cases referred therein actually involved claims under *Shaw*, 509 U.S. 630, which are "analytically distinct" from claims of intentional racial discrimination against a particular voter or group, *Miller*, 515 U.S. at 911; *Shaw* claims are based on the conclusion that *all* voters, of *all races*, may be harmed when race is unnecessarily the predominant factor in districting decisions. *Id*. at 911-13.

[16] *See* S. Rep. 109-295, at 55 ("post-passage legislative history is a contradiction in terms").

8. Federal Observers. "Between 1982 and 2006, 300 to 600 federal observers were assigned annually to observe elections in covered jurisdictions." JA589. This figure is significant because observers can be deployed by the Attorney General "'only when there is a reasonable belief that minority citizens are at risk of being disenfranchised,' often through 'harassment and intimidation inside polling locations.'" *Nw. Austin*, 573 F. Supp. 2d at 262 (quoting H.R. Rep. No. 109-478, at 44).

The record was replete with evidence of the need for federal monitors to prevent malfeasance at the polls. In one particularly troubling incident in Alabama, an African-American State Senator was arrested and taken to jail after attempting to prevent white poll workers in Hale County from "closing the doors on African-American voters." JA590 (quoting *March 8, 2006 Hearing*, at 298). Congress learned that similar tactics were common in the County. *See March 8, 2006 Hearing*, at 302 (Nat'l Comm'n on VRA). Other egregious examples are discussed by the Attorney General. DOJ Br. at 39-40.

9. Racially Polarized Voting and Vote Dilution. In reauthorizing Section 5 in 2006, Congress found that "[t]he continued evidence 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 protection of the Voting Rights Act of 1965."

Pub. L. 109-246, § 2(b)(3), 120 Stat. 577. Moreover, as the District Court noted, the record revealed "the persistence of racially polarized voting" ("RPV") in covered jurisdictions, and that RPV is increasing, not decreasing. JA592-93. H.R. Rep. 109-478, at 34.

Although not state action, RPV is relevant because it is one of the factors that must be taken into account under both Sections 2 and 5 in evaluating whether a voting provision—which is state action—is discriminatory. *See, e.g.*, *Rome*, 446 U.S. at 183; *City of Port Arthur v. United States*, 459 U.S. 159, 163 (1982); *Thornburg*, 478 U.S. at 47. As the District Court observed, measures to dilute minority voting strength "can only be effective in areas that are marked by racially polarized voting." JA595. *See also Nw. Austin*, 573 F. Supp. 2d at 263 (RPV is "a necessary precondition for vote dilution") (citing H.R. Rep. 109-478, at 34-35). Indeed, officials in jurisdictions that implement voting changes are highly likely to be aware of, and are sometimes motivated by, their expected discriminatory impact in the context of RPV. *See, e.g.*, *Rogers*, 458 U.S. at 623 (explaining that the existence of RPV "bear[s] heavily on the issue of purposeful discrimination [because v]oting along racial lines allows those elected to ignore black interests without fear of political consequences"); *October 25, 2005 (Need) Hearing*, at 52-

53 (D. Engstrom, explaining that RPV is a necessary condition for vote dilution); *May 16, 2006 Hearing*, at 127 (T. Arrington) (same).[17]

Accordingly, the Supreme Court recently emphasized that the continuing prevalence of racial polarization indicates that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009).

10. Section 5's Deterrent Effect. Congress found that "[a]ny 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.'" JA598 (quoting H.R. Rep. 109-478, at 24). The District Court concluded that Section 5 has a "substantial deterrent effect," such that it is "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." JA598, JA601 (emphasis added); *see 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'

[17] And, the Court has continued to sustain remedial legislation based in part on evidence concerning discrimination by private actors in the *Boerne* line of cases. *See, e.g., Hibbs*, 538 U.S. at 730-31. Hibbs record "contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States," but instead the evidence before Congress "related primarily to the practices of private-sector employers and the Federal Government." Id. at 527 n.16.

by 'quietly but effectively deterring discriminatory changes.'") (quoting *Nw. Austin*, 573 F. Supp. 2d at 264).

Shelby County seeks to dismiss this evidence by mischaracterizing the District Court's opinion. The District Court did not "rest[] on the absence of evidence of voting discrimination as the proof that preclearance is needed." Br. at 45. Rather, the Court noted that, notwithstanding significant progress, the record revealed that discrimination against minority voters remains widespread in the covered jurisdictions even with the Section 5 protection in place, and would have been even worse without Section 5. JA598-99. This is not only a matter of common sense, it was also amply supported by specific evidence in the record, including testimony from scholars and practitioners, as well as specific concrete examples documenting Section 5's deterrent effect. *See* JA599; *Nw. Austin*, 573 F. Supp. 2d at 264-65.

* * *

In sum, Congress reasonably determined that the overwhelming evidence of ongoing voting discrimination in the covered jurisdictions meant that Section 5 remains necessary to remedy and deter discrimination against minority voters. As the District Court concluded, the legislative record is "at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in *City of Rome*." JA601. Moreover, 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*." JA604-05 (emphasis added). *See also* JA607-08; *Nw. Austin*, 573 F. Supp. 2d at 271 (the evidence of discrimination in *Hibbs* and *Lane* "pales in comparison to the extensive record Congress compiled when extending section 5").

As explained above, in reviewing this substantial record of ongoing voting discrimination in covered jurisdictions, Congress's predictive judgments are entitled to substantial deference. "The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Nw. Austin,* 129 S. Ct. at 2513. *See also* JA483. A court does not review *de novo* the evidence before Congress—which is "far better equipped than the judiciary to amass and evaluate … vast amounts of data"—to decide whether, in the court's view, Congress's determinations were "correct"; to the contrary, a court's "*sole* obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.…' [S]ubstantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency." *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195, 211 (1997) (emphasis added).

III. THE LEGISLATIVE RECORD ESTABLISHES THE CONSTITUTIONALITY OF SECTION 4(B)

The coverage provision today remains "rational in both practice and theory," just as it was when initially adopted in 1965. *Katzenbach*, 383 U.S. at 330. The record supported Congress's decision to reauthorize the Section 4(b) coverage provision because: *first*, the covered jurisdictions—*i.e.*, jurisdictions with significant histories of voting discrimination—were continuing to suffer from persistent and ongoing racial discrimination in voting; and, *second*, generally, voting discrimination in the covered areas is markedly worse than in the non-covered areas. Consistent with its constitutionally delegated role, Congress identified those jurisdictions that, in its view, were most likely to continue to have ongoing problems with discrimination. Congress's coverage criteria remain "sufficiently related" to the problem of voting discrimination, *Nw. Austin*, 129 S. Ct. at 2512, and thus remain "appropriate legislation" for "enforc[ing]" the prohibitions of the Fourteenth and Fifteenth Amendments.

A. The Rationale Underlying Section 4(b) Is Constitutionally Sound

1. The Coverage Criteria

The jurisdictions now subject to Section 5 are covered due to the conjunction of the following criteria: (1) they are identified for coverage by the Section 4(b) coverage provision, enacted in 1965 and amended in 1970 and 1975; (2) they have remained covered following the periodic reviews conducted by

Congress in 1970, 1975, 1982 and 2006, required under Section 4, in which Congress determined that preclearance continues to be needed in these jurisdictions; and (3) they have not "bailed out" under Section 4(a).

Section 4 coverage: Congress designed the Section 4 coverage provision to identify those states and political subdivisions that it knew to have histories of persistent and widespread discrimination in voting. JA491. As explained in *Katzenbach*, Congress essentially engineered the formula so as to capture those particular jurisdictions: Congress began its legislative "work with reliable evidence of actual voting discrimination" in particular states and political subdivisions, and the coverage formula then "evolved to describe these areas." 383 U.S. at 329. Thus, the District Court explained that the coverage formula was "'a formally neutral device for capturing a more historically based truth.'" JA491.

The coverage provision identifies those states and political subdivisions which: (1) maintained a voting "test or device"[18] as of November 1964, 1968, or 1972; and (2) at the same time, had a low registration or turnout rate (below half of the voting age population (1964, 1968) or citizen voting age population (1972)). When adopted, these criteria were considered "relevant to the problem of voting

[18] The term "test or device," as adopted in 1965 and relied upon in 1970, included practices such as literacy and moral character tests. Pub. L. 89-110, § 4(c), 79 Stat. 437, 438 (1965); Pub. L. No. 91-285, §6, 84 Stat. 314, 315 (1970). For the 1975 determinations, Congress also included jurisdictions that implemented English-only elections where at least five percent of the citizen voting age population belonged to a single language-minority group. Pub. L. No. 94-73, § 203, 89 Stat. 400, 401-02 (1975).

discrimination," *Katzenbach*, 383 U.S. at 329, and thus "appropriate," because voting tests and devices had a "long history as a tool for perpetuating the evil [of voting discrimination]," *id*. at 330, and efforts to disenfranchise voters "obvious[ly]… affect[s] the number of actual voters." *Id.*

Congress's periodic reviews: Congress has ensured that coverage remains justified "by current needs," *Nw. Austin*, 129 S. Ct. at 2512, by including in the 1965 enactment, and each subsequent reauthorization, sunset provisions requiring Congress to periodically re-evaluate the scope of coverage. Section 5 initially was to terminate in 1970, and then, successively, in 1975, 1982, and 2007; the current reauthorization will expire in 2031.[19] Jurisdictions remain covered today only because Congress concluded, after each reassessment, that there was a continuing need for this remedy in these jurisdictions.

Section 4 bailout provision: From the outset, Congress has "[a]cknowledg[ed] the possibility of overbreadth," and thus has provided in Section 4 "for termination of special statutory coverage at the behest of [covered] States and political subdivisions." *Katzenbach*, 383 U.S. at 331. Originally, bailout

[19] The Section 4 coverage provisions as adopted in 1965, and extended in 1970 and 1975, did not include explicit sunset dates, but the provisions were written to provide that covered areas generally would be entitled to bail out after a set period of time (*i.e.*, in 1970, 1975, and then 1982), which had the same effect as a sunset date. Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (1965); Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (1970); Pub. L. No. 94-73, §§ 101, 201, 89 Stat. 400-01 (1975). Both the 1982 extension, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133 (1982), and the 2006 extension, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580, have included explicit sunset dates, codified in Section 4(a)(8).

was designed to identify any jurisdictions wrongly covered at the outset by the formula.[20] In 1982, Congress "substantial[ly] liberalize[d]" the bailout provision by amending it to focus on recent electoral conditions (*i.e.*, "current needs"), *Nw. Austin*, 129 S. Ct. at 2512, while expanding the range of jurisdictions separately eligible for bailout to over 900, DOJ Br. at 74. That number has expanded multi-fold following the Supreme Court's ruling in *Northwest Austin*, which permits all covered jurisdictions and their political subunits to seek bailout. *See* 129 S. Ct. at 2516-17.

Thus, Section 4 includes a flexible and multifaceted set of provisions that tailor coverage to the jurisdictions where the preclearance remedy continues to be needed.

2. Congress in 2006 Employed an Appropriate Coverage Theory

Shelby County claims that coverage lacks a proper theoretical foundation by focusing exclusively and, thus, mistakenly, on the role played by the coverage formula in determining which jurisdictions are covered today. Br. at 58 ("the decades-old data coverage formula bears no relation whatsoever to current conditions"). The County's argument ignores that coverage has only continued subject to Congress's periodic reassessments, which have never been tied to participation rates in older elections, but rather have always been based on the

[20] See citations to the 1965 enactment, and the 1970 and 1975 amendments in the prior footnote. Several jurisdictions made the requisite showing and bailed out. S. Rep. No. 97-417, at 45.

current record of *ongoing* voting discrimination. As was reiterated to Congress in 2006, "depressed turnout and registration levels were an indicator [in 1965] of the larger problem of entrenched discrimination in voting … and not the end itself." *May 17, 2006 Hearing*, at 33 (D. Days). *See also id*. at 73 (A. Derfner); *id*. at 130 (N. Persily).

Thus, Congress, in 2006, relied on the same coverage theory upheld in *Rome*, *i.e.*, that Congress may reauthorize coverage in the areas identified by the original coverage formula where its periodic reviews disclose a record of ongoing voting discrimination. As Representative Sensenbrenner explained, Congress's decision to retain the existing coverage provision was, "not predicated on [participation] statistics alone," but rather "on recent and proven instances of discrimination in voting rights compiled in the … 12,000-page record." 152 Cong. Rec. H5181-82 (daily ed. July 13, 2006) (internal quotation marks omitted).

Congress therefore rejected a proposed amendment to "update" the coverage provision based on recent turnout statistics, which would have produced irrational results: for example, leaving Hawaii, a state that has "no discernable history of voting discrimination," JA503 (citing 152 Cong. Rec. H5179-81 (daily ed. July 13, 2006)), as the only state covered in its entirety, *see* Br. at 13, "turn[ing] the Voting Rights Act into a farce." 152 Cong. Rec. at H5181 (daily ed. July 13, 2006) (Rep. Sensenbrenner). Congress considered a range of different views on this proposal

and opted to maintain the existing coverage provision, a decision that was supported by the vast majority of witnesses, including past and former federal officials, leading academics, and advocates [21]

Shelby County also claims that, to reauthorize coverage, Congress must exclusively rely on evidence of discrimination that matches "the factors that trigger coverage under Section 4(b)," Br. at 60, namely, evidence relating to voter participation rates and the use of tests or devices. This is plainly wrong. First, the County's argument cannot be squared with the Supreme Court's decision in *Rome*, which, as discussed *supra* pgs. 20-21, specifically endorsed Congress's reliance on a broad range of discrimination evidence, including evidence of vote dilution. Second, as discussed *supra* pgs. 57-58, the coverage provision does not merely seek to ascertain where ballot access problems have occurred. *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983) ("[T]he preclearance requirements … had a much larger purpose than to increase voter registration … to more than 50 percent."). Instead, Congress identified jurisdictions for coverage because of their significant histories of voting

[21] *See, e.g.*, *May 9, 2006 Hearing*, at 76 (S. Issacharoff), 160-61 (T. Shaw); *May 10, 2006 Hearing*, at 62 (W. Kim), 74 (N. Landreth), 86 (R. McDuff); *May 16, 2006 Hearing*, at 41-42 (A. Earls), 99 (P. Karlan), 110 (R. Pildes); *May 17, 2006 Hearing*, at 32 (D. Days), 73-74 (A. Derfner), at 135 (N. Persily); *June 21, 2006 Hearing*, at 117 (D. Wright); *June 21, 2006 Hearing*, at 56 (D. Adegbile); *July 13, 2006 Hearing*, at 29-30 (J. Avila), 50-51 (S. Ifill). Other witnesses testified in favor of changes in the scope of coverage, *see May 10, 2006 Hearing*, at 52 (G. Coleman); *May 16, 2006 Hearing*, at 76 (R. Gaddie); *May 17, 2006 Hearing*, at 138-39 (A. Thernstrom); *June 21, 2006 Hearing*, at 104-05 (G. Reynolds); *id.* at 112 (C. Swain); *July 13, 2006 Hearing*, at 45 (M. Carvin).

discrimination which, in turn, creates a likelihood of renewed discrimination in a variety of forms, necessitating the preclearance remedy. Finally, Shelby County sets out a standard that is impossible to satisfy: Congress cannot show the continuing existence of the exact same "factors that trigger coverage under Section 4(b)," because one set of those factors—the use of a voting test or device—has been banned altogether under VRA. 42 U.S.C. § 1973b(4)(f)(4)(prohibition on English-only elections in jurisdictions covered, in part, due to their prior use of such elections), § 1973aa (nationwide prohibition on other voting tests and devices). No such showing was required in *Rome*, and no such showing is required here.

B. Congress Properly Concluded that the Legislative Record Contains Substantial Evidence that Voting Discrimination Remains More Prevalent In Covered Jurisdictions than in Non-Covered Jurisdictions

1. The Coverage Provision Is Neither Over-Inclusive Nor Under-Inclusive

The 2006 reauthorization record revealed the coverage provision was neither overinclusive nor underinclusive, and that sustained differences remain between covered and non-covered jurisdictions. Far from showing that covered jurisdictions have been swept up into coverage irrationally, the record demonstrated that Section 5 has been necessary to block hundreds of acts of discrimination *throughout* covered jurisdictions, through DOJ objections, withdrawals of submissions in response to MIRs, and declaratory judgment actions. *See Nw. Austin*, 573 F. Supp.

2d at 288 (Map 9, listing combined totals of voting changes blocked by Section 5 in each covered state). The record clearly shows that the problem of voting discrimination is spread amongst nearly all the covered areas, with certain states experiencing particularly high levels of discrimination (*e.g.*, Texas, Mississippi, and Georgia *each* had a combined total of over 100 voting changes blocked by Section 5). *Id.*

Katzenbach makes clear that concerns regarding overinclusivesness on the margins do not implicate the *facial* constitutionality of Section 4(b). Congress has never been required to make findings as to every single covered jurisdiction. Indeed, Congress openly acknowledged in 1965 "that there may be areas covered under the formula of Section 4 where there has been no racial discrimination…," H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2445, which did not affect the Court's ruling in *Katzenbach*. What is most important is that Section 5's geographic coverage is based on "reliable evidence of actual voting discrimination in a great *majority*" of the jurisdictions being covered. 383 U.S. at 329 (emphasis added). As shown, that standard was clearly satisfied in 2006.[22] Furthermore, that a few jurisdictions may be covered where there is no evidence of

[22] This addresses concerns raised by *amici* involving the coverage provision's application to jurisdictions with a history of discrimination against language minorities. In any event, Shelby County is not itself subject to coverage under the Act's provisions regarding language minorities and did not raise arguments concerning this aspect of the coverage provision either in the court below or in its opening brief. Any unique concerns alleged with regard to this aspect of Section 5's coverage are inappropriate for this appeal. (They are the subject of separate pending litigation pending. *See Arizona v. Holder*, No. 11-cv-01559 (D.D.C.)).

ongoing discrimination is of no constitutional significance, "at least in the absence of proof that they have been free of substantial voting discrimination in recent years." *Id.* at 330. As noted, Section 4 explicitly addresses any such circumstance, by allowing all covered jurisdictions and their sub-units to bailout if they provide precisely that type of proof.

Nor is there any evidence of the coverage provision's purported underinclusiveness. The legislative record was open for 10 months, and was "open and available for all groups of all opinions" to present their views, including numerous opponents of reauthorization who testified, and Congress repeatedly requested all interested parties to submit evidence concerning covered and non-covered jurisdictions alike. *May 4, 2006 Hearing*, at 70. Ultimately, "there [wa]s no evidence of significant and continuing violations of minority voting rights at the state and local level in non-covered jurisdictions" beyond "isolated incidents" and thus, no need to expand coverage to additional jurisdictions. *May 16, 2006 Hearing*, at 47-48 (A. Earls). *See also May 9, 2006 Hearing*, at 162 (T. Shaw); *May 17, 2006 Hearing*, at 15, 33 (D. Days).

Of course, this does not mean that there have never been problems with respect to voting discrimination outside of covered jurisdictions. But *Katzenbach* makes clear that the failure to capture every single jurisdiction with problems related to voting discrimination is "irrelevant," because "[l]egislation need not deal

with all phases of a problem in the same way." 383 U.S. at 330 (citing *Williamson v. Lee Optical*, 348 U.S. 483 (1955) and *Ry. Express Agency v. New York*, 336 U.S. 106 (1949)).[23]

2. Comparative Evidence Demonstrates that the Coverage Provision Remains Appropriate

Contrary to Shelby County's suggestions, Br. at 68, Congress has never been required to compare covered and non-covered jurisdictions along every conceivable metric. "'The 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).

Nevertheless, in 2006, Congress went beyond what it did in 1965, 1970, 1975 or 1982, by compiling comparative evidence concerning differences between covered and non-covered jurisdictions. As the District Court recognized, the record contains several categories of evidence beyond participation rates, which demonstrate that "the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the

[23] This principle makes particularly good sense in the enforcement legislation context. Given that Congress may enact nationwide legislation in response to evidence of discrimination in only certain jurisdictions, *see Hibbs*, 538 U.S. at 729-35, surely Congress may seek to confine remedial legislation to those jurisdictions where such legislation is especially needed, even if there results some level of arguable under-inclusiveness. Any other rule would require Congress to apply nationwide remedies even where the evidence reveals a need in only certain parts of the country.

preclearance requirement," such that there is "a meaningful difference in voting discrimination between covered and non-covered jurisdictions." JA627, JA629.

a. The Volume and Success Rate of Section 2 Litigation. If Shelby County were correct that there are no sustained differences between covered and non-covered jurisdictions, one would expect to see *far fewer* successful Section 2 cases in the covered jurisdictions, for a number of reasons, including:

- *Population Share*. Less than one quarter of the nation's total population lives in a covered jurisdiction. JA628.[24]

- *Section 5 Coverage*. "[P]reclearance has blocked hundreds of intentionally discriminatory changes," while also "quietly but effectively deterring" other discriminatory acts. *Nw. Austin*, 573 F. Supp. 2d at 258, 263; JA628.

- *Observer Deployments*. Federal election observers are sent more frequently to covered jurisdictions, with "[f]ive of the six States originally covered [by Section 5] … account[ing] for approximately 66 percent of all the observer coverages since 1982," H.R. Rep. 109-478, at 24-25 (2006). The District Court noted that the presence of those observers served to "protect access to the ballot for racial and language minorities." JA590.

Given these facts, the District Court properly concluded that "one would expect to see *fewer* Section 2 cases [in the covered jurisdictions]." JA628 (emphasis in original).

Remarkably, the opposite was true. Congress learned that *most* successful Section 2 cases occurred in covered jurisdictions, *see* H.R. Rep. No. 109-478, at

[24] Even using minority population as the relevant metric instead of total population reveals that covered jurisdictions have substantially less than half of the country's minority population (39% of African Americans, 32% of Latinos, and 25% of Native Americans). *See May 9, 2006 Hearing*, at 43-44 (C. Davidson).

53, and that "[p]laintiffs in covered jurisdictions also won a higher percentage of the cases decided than did those in non-covered ones." *October 18, 2005 Hearing*, at 974. *See also* DOJ Br. at 71-72 (data including non-reported cases). Adjusted for population, there were more than *three times* as many successful Section 2 cases in the covered jurisdictions than in non-covered jurisdictions. *Cf. May 16, 2006 Hearing*, at 13 (P. Karlan).

Shelby County notes that Congress made no express findings as to the greater prevalence of vote dilution schemes in covered as opposed to non-covered jurisdictions. Br. at 63. But Shelby County does not cite any previous findings—from either the initial 1965 authorization or any reauthorizations—as to the comparative quantum of any particular form of discrimination in covered as opposed to non-covered jurisdictions. In fact, as the District Court noted, in neither *Katzenbach* nor in *Rome*, did the Court "conduct any detailed comparative analysis of voting discrimination in covered versus non-covered jurisdictions." *See* JA622. What matters is that the record shows that the "statute's disparate geographic coverage is sufficiently related to the problem that it targets," *Nw. Austin*, 129 S. Ct. at 2512.

Shelby County also quibbles at the margins of the reauthorization record, by attempting to cherry-pick facts from a study of Section 2 litigation that was presented to Congress (the "Michigan Study"). For instance, Shelby County notes

that, of the ten states that had the highest numbers of Section 2 cases filed, only five were fully covered. But Shelby County omits crucial facts from the Michigan Study (which, notably, included only electronically-reported cases and thus represents only a fraction of Section 2 litigation during the reauthorization period). The top ten states in terms of electronically-reported Section 2 cases filed were as follows:

TOP TEN STATES IN NUMBER OF SECTION 2 CASES FILED[25]:				
State * Fully covered + Partially covered	**No. of Section 2 Cases Filed**	**Successful Outcomes**	**Success Rate**	**Population (in millions)[26]**
Texas *	34	9	26.5%	25.1m
Mississippi *	29	18	62.1%	3.0m
New York +	27	4	14.8%	19.4m
Alabama *	25	12	48.0%	4.8m
Florida +	23	7	30.4%	18.8m
Illinois	20	9	45.0%	12.8m
Louisiana*	17	10	58.8%	4.5m
N. Carolina +	16	6	37.5%	9.5m
California +	15	3	20.0%	37.3m
Georgia*	14	3	21.4%	9.7m

[25] *See* Voting Rights Initiative Master List, *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls.

[26] *See* U.S. Census Bureau, *State & County QuickFacts*, *available at* http://quickfacts.census.gov/qfd/index.html (hereinafter "*Census QuickFacts*").

Viewing the numbers comprehensively plainly supports the appropriateness of the coverage formula, and reveals the following facts:

- *Number of Cases Filed*.
    - Only one state on the "top ten" list is not covered by Section 5 in whole or in part: Illinois.
    - The top two states in terms of Section 2 cases filed are fully covered states: Texas (34 cases) and Mississippi (29 cases).
    - A number of fully covered states rank high on this list, despite being having relatively small populations, suggesting that discrimination is much more common in those states. For instance, Louisiana had roughly the same number of cases filed as partially covered California (17 and 15, respectively), despite a population (4.5 million) less than one-eighth the size of California's (37.3 million).
- *Success Rates.*
    - The three states with the highest success rates for plaintiffs were fully covered: Mississippi (62.1% success rate); Louisiana (58.8% success rate); and Alabama (a 48% success rate).
    - Shelby County notes that Illinois and partially covered New York had more successful Section 2 cases than some fully covered states, but ignores the fact that New York and Illinois are two of the largest states in the country (respective populations: 19.4 million; 12.4 million).
    - Even with those population disparities, New York had far fewer successful Section 2 cases (4 successful cases) than smaller, fully covered states such as Mississippi (18 cases, population 3 million), Alabama (12 cases; population 4.8 million), and Louisiana (10 cases; population 4.5 million).

In sum, the Michigan Study demonstrates that, overall, the jurisdictions with the worst records with respect to Section 2 cases are covered states.

b. Other Statistical Evidence. Congress received additional statistical evidence and reports that provided indicia of discrimination more prevalent in covered jurisdictions, including:

"*[R]acial appeals* in elections were more prevalent in covered than in non-covered jurisdictions." JA628 (citing *October 18, 2005 Hearing*, at 1003) (emphasis added). Notwithstanding the much smaller population of the covered jurisdictions, a majority of Section 2 cases with judicial findings of racial appeals originated in the covered jurisdictions. *See October 18, 2005 Hearing*, at 1003 (Michigan Study). Indeed, Congress learned from other sources that such racial appeals—including candidates' emphasizing their opponent's race by disseminating campaign literature with their *opponent's* picture, sometimes darkened—remain common in biracial elections in certain covered jurisdictions. *See, e.g.*, *May 17, 2006 Hearing*, at 17 (A. Derfner); *May 10, 2006 Hearing*, at 22-23 (R. McDuff); *May 9, 2006 Hearing*, at 44-45 (C. Davidson); *October 20, 2005 Hearing*, at 85 (A. Derfner). Racial appeals are a factor for determining liability under Section 2, *see Gingles*, 478 U.S. at 40, and thus are indicative of voting discrimination.

"*[R]acially polarized voting* is much more pronounced in covered than in non-covered jurisdictions." JA628 (emphasis added). This is true in three different respects: the frequency, severity, and trendlines with respect to RPV. First, findings of RPV are much more frequent in covered jurisdictions. The Michigan Study identified a roughly equal number of Section 2 decisions with findings of racially polarized voting in the covered as the non-covered jurisdictions, which meant that, adjusted for population, there were roughly three times as many cases with findings of racially polarized voting in the covered jurisdictions as there were in the non-covered jurisdictions. *See also May 17, 2006 Hearing*, at 13 (P. Karlan); *March 8, 2006 Hearing*, at 1754 (North Carolina Report).

Second, as the District Court observed, the "severity of racial bloc voting" was worse in covered jurisdictions. JA629. In covered jurisdictions, nearly 90% of the biracial elections analyzed by courts since 1982 involved white bloc voting of 80% or more; by contrast, in the non-covered jurisdictions, only 40% of the biracial elections involved white bloc voting of 80% or higher. *See May 16, 2006 Hearing*, at 48 (A. Earls, citing data).[27]

Third, Congress also found that the '"degree of racially polarized voting in the South is increasing, not decreasing."' H.R. Rep. No. 109-478, at 34 (citation

[27] The data were published in a separate report by the Michigan Voting Rights Initiative. *See* Ellen Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2, available at* http://sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf.

omitted). *See also May 16, 2006 Hearing*, at 102 (P. Karlan) and 131 (T. Arrington) (noting "substantial evidence" of growing RPV in covered jurisdictions, compared to non-covered); *May 17, 2006 Hearing*, at 132-33 (N. Persily) (same).

Lack of Minority Candidate Success. "Congress received evidence in 2006 suggesting that minority candidates are less likely to succeed" in covered jurisdictions. JA628. *See also October 18, 2005 Hearing*, at 1008 (noting that 49 of 85 electronically published Section 2 cases finding a lack of minority electoral success originated in the covered jurisdictions); H.R. Rep. No. 109-478, at 33-34.

c. Qualitative evidence. Testimony from numerous academics and practitioners documented persisting differences between covered and non-covered jurisdictions. *See, e.g.*, *May 9, 2006 Hearing*, at 159 (T. Shaw); *May 16, 2006 Hearing*, at 26, 28 (T. Arrington); *id.* at 55 (A. Earls); *May 17, 2006 Hearing*, at 38 (D. Days); *June 21, 2006 Hearing*, at 98 (D. Canon). Similarly, state-by-state reports concerning current conditions in 11 covered jurisdictions[28] demonstrated substantial ongoing discrimination, including literally hundreds of specific examples. *See Nw. Austin*, 573 F. Supp. 2d at 252-62, 284-301 (citing legislative record). Congress also received evidence concerning non-covered jurisdictions,

[28] *See March 8, 2006 Hearing*, at 1308-1362 (Alaska); *id.* at 1363-1453 (Arizona); *id.* at 1456-1498 (Florida); *id.* at 1499-1591 (Georgia); *id.* at 1592-1708 (Louisiana); *id.* at 1709-1727 (Mississippi); *id.* at 1728-1835 (North Carolina); *id.* at 1836-1927 (New York); *id.* 1928-1985 (South Carolina); *id.* at 1986-2029 (South Dakota); *id.* at 2030-2092 (Virginia); *July 13, 2006 Hearing*, at 103-119 (California); *id.* at 365-402 (Alabama); Perales, *Voting Rights in Texas, Nw. Austin* (No. 06-1364), Dkt. No. 100-12, Ex. 8, and *July 13, 2006 Hearing*, at 357 (Texas).

including state-by-state reports,[29] but these reports revealed no sustained efforts at voting discrimination in non-covered jurisdictions.

C. The Bailout and Bail-In Provisions Support the Congruence and Proportionality of Section 4(b)

The coverage provision is also tailored in crucial respects that confirm its constitutionality. The "bail-in" provision under Section 3(c) allows courts to "retain jurisdiction for such period as [they] may deem appropriate" and to order that no voting change take effect unless either precleared by the court or the Attorney General. 42 U.S.C. § 1973a(c). States and localities with discriminatory records including (but not limited to) Arkansas, New Mexico, and Buffalo County, South Dakota have at various times been subject to preclearance obligations pursuant to the bail-in provision. *See Jeffers v. Clinton*, 740 F. Supp. 585, 594, 600 (E.D. Ark. 1990); *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984); *Kirkie v. Buffalo Cnty.*, No. 03-cv-3011 (D.S.D.). Congress learned that bail-in resolves any concerns about underinclusiveness at the margins of the coverage provision. *See May 16, 2006 Hearing*, at 13 (P. Karlan); *id.* at 42 (A. Earls).

And, the "'bailout' provision"—which allows a far broader range of jurisdictions to terminate coverage than at the time that either *Katzenbach* or *Rome*

[29] Congress also received reports about several non-covered jurisdictions, including Arkansas, Oklahoma, Tennessee, and Wisconsin. *See May 4, 2006 Hearing*, at 132-176, 235-257; *October 25, 2005 (History) Hearing*, at 3145-3148. In stark contrast to the evidence regarding covered jurisdictions, the reports for the non-covered jurisdictions contained no evidence of widespread discrimination or repeat violations.

was decided, *see supra* pg. 57—"addresses potential statutory over-inclusiveness, allowing jurisdictions with clean records to terminate their section 5 preclearance obligation." *Nw. Austin*, 573 F. Supp. 2d at 226. Shelby County's contention that bailout is ineffective, Br. at 53, is not only inappropriate for a facial challenge to the statute as a whole, it is belied by the record. Bailout is inexpensive, and *every* jurisdiction that has sought bailout since the 1982 reauthorization has been approved. *See May 9, 2006 Hearing*, at 161 (T. Shaw); *March 8, 2006 Hearing*, at 2684 (Report by J. Hebert). As the Attorney General notes, DOJ Br. at 73-75, a number of other jurisdictions have successfully obtained bailout since 2006; no jurisdiction seeking bailout has been denied; and additional bailout applications are pending. The fact that a number of jurisdictions have not sought bailout may actually be due to the fact that many covered jurisdictions believe that the benefits of Section 5 coverage outweigh the low administrative costs of Section 5 compliance. *See* JA616-17 (citing *amicus* brief by six covered states in support of Section 5's constitutionality in *Nw. Austin*, 129 S. Ct. 2504).

The fact that Shelby County cannot bailout is due to the persistence of discrimination against Black voters in Shelby County. Specifically, the City of Calera, located in Shelby County, recently sought to implement a discriminatory redistricting plan, which resulted in the electoral defeat of Ernest Montgomery, the city council's lone African-American member. DOJ Br. at 7-8; JA307-08, ¶¶ 6-8.

Only after DOJ interposed an objection was a new redistricting plan drawn, after which Councilmember Montgomery won the seat back. JA308, ¶¶ 9-10. This history demonstrates the continuing need for Section 5, not any inadequacy in the bailout provision.

CONCLUSION

For the forgoing reasons, Defendant-Intervenors respectfully request that the Court affirm the decision below.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 17,403 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

December 8, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, I electronically filed the foregoing *Brief of Intervenors-Appellees Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, William Walker, Bobby Pierson, Willie Goldsmith, Sr., Mary Paxton-Lee, Kenneth Dukes, The Alabama State Conference of the National Association for the Advancement Of Colored People, Inc., and Bobby Lee Harris* with the Clerk of Court by using the CM/ECF system, which will serve a copy of the foregoing to the following counsel of record who are registered participants of the Court's CM/ECF system. I certify that a copy of the foregoing was served by first class mail to all counsel who are not registered participants of the Court's CM/ECF system, as indicated in the Notice of Electronic Filing.

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