No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellees.

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

BRIEF FOR INTERVENORS-APPELLEES RODNEY AND NICOLE LOUIS, *ET AL.*; LISA AND DAVID DIAZ, *ET AL.*; ANGIE GARCIA, *ET AL.*; AND PEOPLE FOR THE AMERICAN WAY

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QUESTIONS PRESENTED

1. Whether a municipal utility district that does not register voters is a "political subdivision" eligible to invoke the bailout provision in Section 4(a) of the Voting Rights Act when the Act's plain language limits such "political subdivision[s]" to counties, parishes, and entities "which conduct[ ] registration for voting."

2. Whether Congress acted within the scope of its enforcement powers under the Fourteenth and Fifteenth Amendments when, in light of an extensive legislative record of persistent unconstitutional discrimination against minority voters in covered jurisdictions and compelling evidence that a failure to renew Section 5 would result in backsliding of the progress that has been made, Congress reauthorized Section 5 of the Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Intervenors-Appellees, NAACP Legal Defense and Educational Fund, Inc., Mexican American Legal Defense and Educational Fund, Inc., Texas RioGrande Legal Aid, Inc., and People for the American Way Foundation, certify that each are non-profit corporations with no parent companies, subsidiaries or affiliates that have issued shares to the public.

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SUMMARY OF ARGUMENT

No statute in our history embodies America's commitment to democracy more clearly than the Voting Rights Act. Since 1965, Congress and five Presidents have acted to create or preserve this statutory framework designed to prevent racially discriminatory barriers that deny or abridge our citizens' right to vote.

This case is the latest in a line of challenges to the Act's constitutionality. All have been rejected by the Court. The foundation of this Appellant's attack is the contention that the country no longer needs Section 5, the heart of the Voting Rights Act, to be the inclusive democracy that we strive to become, and that racial discrimination no longer poses a significant threat to that aspiration. This argument cannot be reconciled with the evidence.

While there has certainly been progress, as a plurality of this Court noted just last week: "[s]till, racial discrimination and racially polarized voting are not ancient history. Much 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,* 556 U.S. ___ (2009), slip op. at 21 (Kennedy, J.). In 2006, Congress too observed measurable progress in our nation's efforts to ameliorate voting discrimination, but found substantial continuing intentional discrimination. After careful review of a record exceeding 15,000 pages, Congress determined that condoning racial discrimination in voting, with knowledge of its

persistence and effects, erodes our Constitution's promise of full citizenship.

Precedent does not support Appellant's attempt to substitute its judgment for that of Congress. This Court's decisions from *South Carolina v. Katzenbach* to *City of Boerne v. Flores* and its progeny leave no doubt that Section 5 remains constitutional. Specifically, this Court has already determined that, faced with ongoing discrimination against minority voters, Congress can, consistent with the Constitution, adopt the Section 5 prophylaxis, and any remaining question about whether Congress should have reauthorized the remedy is properly regarded as legislative and not constitutional in nature.[1]

ARGUMENT

Resolution of Appellant's constitutional challenge turns in large part on the gravity of the harm Congress addressed through Section 5. *See, e.g., City of Boerne v. Flores,* 521 U.S. 507, 529-31 (1997); *Tennessee v. Lane*, 541 U.S. 509, 523 (2004). This brief speaks to that question.

After an overview of the Voting Rights Act ("VRA or Act") of 1965 and the first three reauthorizations, we discuss the extensive record before Congress in 2006. *See* Part I. A-B, *infra*. That record revealed

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[1] We adopt the Intervenors-Appellees NAACP, *et al.*'s arguments concerning bailout and the deferential review that guides consideration of the 2006 reauthorization. In this brief, we show that Section 5 easily satisfies *Boerne*'s congruence-and-proportionality framework.

invidious and persistent discrimination in the covered jurisdictions, as well as Section 5's imperative role in turning the promise of inclusive democracy into a reality. Far from working a substantive redefinition of constitutional rights, Section 5 is well within Congress's authority to remedy and deter core violations of the Fourteenth and Fifteenth Amendments. In these circumstances, application of this Court's precedents is straightforward, and Appellant's invitation for this Court to second-guess Congress's weighing of the evidence should be rejected. *See* Part II, *infra*.

I. THE VOTING RIGHTS ACT: 1965 TO 1982

A. The Voting Rights Act was Enacted and Reauthorized in the Face of Widespread Discrimination

The abrupt end of Reconstruction in 1877 offers a bitter lesson about the consequences of failed political will to sustain comprehensive voting rights for minority voters. Following the demise of Reconstruction, States and localities in the Old Confederacy engaged in decades of "unremitting and ingenious defiance of the Constitution," by promulgating numerous measures designed either to prevent Blacks from voting, or to cancel out the effect of the Black vote. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Those schemes reduced minority participation to insignificance. It was eighty years before Congress responded with legislation. Beginning in 1957, Congress enacted three statutes designed to facilitate case-by-case voting litigation, but these "new laws [did] little to

cure the problem of voting discrimination." *Id.* at 313. This case-by-case method was ineffective because voting suits are "unusually onerous to prepare," litigation is "exceedingly slow," and, following favorable judicial decisions, some jurisdictions enacted new "discriminatory devices not covered by the federal decrees." *Id.* at 314.

March 7, 1965 marked the beginning of the end for this piecemeal approach. That day, millions of Americans had their television programs interrupted with images of Alabama law enforcement officers brutally assaulting Black men, women, and children on the Edmund Pettus Bridge in Selma, Alabama. The demonstrators were peacefully protesting a state trooper's killing of a young Black man during a voter registration event. *See* David J. Garrow, *Protests at Selma* 61-62 (1978). A week later, President Johnson delivered a speech before a special joint session of Congress. He began:

> I speak tonight for the dignity of man and the destiny of Democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of this country, to join me in that. At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.

President Johnson described the now infamous tactics employed to prevent Blacks from voting in the

South, and shared his first-hand experience witnessing discrimination against Mexican Americans in Texas. He urged the passage of a new voting rights act, but recognized: "even if we pass this bill the battle will not be over."[2]

Congress responded by enacting the Voting Rights Act of 1965, a milestone in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett*, 556 U.S. ___, slip op. at 6.

Section 5 lies at the heart of the Act. *See Katzenbach*, 383 U.S. at 315. It requires covered States and political subdivisions to obtain preclearance of voting-related changes from either the Department of Justice (DOJ) or a three-judge panel of the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a) (2006). Preclearance will be granted as long as the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. . . ." *Id.* The statute's purpose prong prevents the implementation of voting-related changes that were motivated by intent to discriminate against minority citizens. *See id.* §1973c(c).[3] The effect prong prevents retrogression:

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[2] President Lyndon B. Johnson, Address to Congress on the Voting Rights Act: We Shall Overcome (Mar. 15, 1965), *available at* www.historyplace.com/speeches/johnson.htm.

[3] This purpose standard was used by DOJ to evaluate preclearance submissions between 1965 and 2000, but was rejected in favor of a retrogressive purpose standard by this

it ensures that minority voters are no worse off under the new law or practice compared to the previous (benchmark) one. *See Beer v. United States*, 425 U.S. 130, 141 (1976).

Like several other parts of the VRA, Section 5 has a sunset provision. In 1970 and 1975, Congress reauthorized Section 5 for five and seven years, respectively, after reviewing evidence that, while the Act had led to significant progress, discrimination against minority voters persisted in the covered jurisdictions. *See, e.g.*, S. Rep. No. 94-295, at 13-15 (1975). In addition, in 1975, the record before Congress documented numerous examples of racial discrimination in voting against Latinos, Asian Americans, American Indians, and Alaska Natives. *Id.* at 25-27, 31. In Texas, for example, Mexican Americans suffered discrimination "in ways similar to the myriad forms of discrimination practiced[ ] against blacks in the South." *Id.* at 25. Congress extended Section 5's protections to these voters, and also altered the coverage formula, which led to Texas's inclusion as a covered State.

In 1982, Congress again learned that discrimination in the covered jurisdictions persisted. H.R. Rep. No. 97-227, at 19 (1981); S. Rep. No. 97-417, at 12-14 (1982). A large bipartisan majority of Congress reauthorized Section 5 for 25 years, and

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Court in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000) ("*Bossier II*"). In the 2006 reauthorization, Congress restored the pre-*Bossier II* definition of the purpose prong. *See* 42 U.S.C. § 1973c(c).

President Reagan signed the reauthorization into law. Pub. L. No. 97-205 § 2(b)(8) (1982).

B. Congress Carefully Examined the Evidence During the 2006 Reauthorization Process and Determined that Section 5 Remains Necessary

In determining whether Section 5 was still needed to remedy and deter unconstitutional discrimination against minority voters in 2006, Congress approached its task with great care. The House and Senate Judiciary Committees held a combined 21 hearings over 10 months, receiving testimony from over 90 witnesses—including state and federal officials, litigators, scholars, and private citizens—both for and against reauthorization.[4] Throughout the process, the record was "open and available for all groups of all opinions" to present their views to Congress. *May 4, 2006 Hearing*, at 70.

Congress deliberated "long and hard over months and months of internal debate." *Id.* at 74. Representative James Sensenbrenner, then-Chair of the House Judiciary Committee, explained that the 2006 reauthorization of the VRA was based on "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

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[4] *See* H.R. Rep. No. 109-478, at 5 (2006); 152 Cong. Rec. S7967-S7968 (daily ed., July 20, 2006). Hearings were held by the House and Senate Judiciary Committees between October 18, 2005 and July 13, 2006. Specific hearings are cited herein by date.

serve as a Member of this body." 152 Cong. Rec. H5143-02 (daily ed. July 13, 2006).

After this careful review, Congress found that significant progress has been made in combating discrimination against minority voters. Pub. L. No. 109-246 § 2(b)(1) (2006). However, "[d]espite [this] progress, the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." *Id.* § 2(b)(7).

In light of the foregoing, Congress concluded—by a 390-33 vote in the House and a 98-0 vote in the Senate[5]—that certain temporary provisions of the VRA were no longer needed,[6] and that Section 5 was among those provisions still necessary to prevent minority citizens from being "deprived of the opportunity to exercise their right to vote, or [having] their votes diluted, undermining the significant gains made by minorities in the last 40 years." *Id.* § 2(b)(9). Accordingly, Congress passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006, which extended Section 5 for 25 years, and which further committed Congress to reconsider the need for this remedy in 15 years. *See* 42 U.S.C. § 1973b(a)(7), (8).

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[5] *See* 152 Cong. Rec. H5143-H5207 (daily ed. July 13, 2006).

[6] *See* H.R. Rep. No. 109-478, at 61-62 (repealing provisions relating to federal examiners).

The factual findings underlying Congress's decision to reauthorize Section 5 are unassailable. The record demonstrates that, while minority voters have made significant progress, unconstitutional discrimination remains all too common. Since 1982, there have been well over one thousand discriminatory electoral practices in the covered jurisdictions that were blocked by either Section 5 or Section 2 of the VRA, hundreds of which clearly involved intentional discrimination.

Under Section 5, DOJ interposed over 620 objections between 1982 and the 2006 reauthorization. J.S.App. 66. Appellant claims that the vast majority of Section 5 objections "do not signify the purposeful discrimination required for a constitutional violation." Br. at 63. But the evidence before Congress showed the opposite: 60% of all objections between 1980 and 2000 were based, at least in part, on purposeful (and thus unconstitutional) discrimination. *November 1, 2005 Hearing*, at 180-81.[7]

Yet, even this powerful remedy does not completely block abridgments of the right to vote. In

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[7] Similarly, amicus Scharf-Norton Center's speculation about the number of objections based on DOJ enforcing an impermissible maximization approach, *see* Br. at 10-12 (discussing *Miller v. Johnson*, 515 U.S. 900, 927 (1995)), is divorced from the actual record. A review of the objection letters reveals that a very small number of objections (almost exclusively from the early 1990s) were even arguably based on a maximization theory. *See October 25, 2005 (History) Hearing*, at 225-2595 (copies of post-1982 objections).

the nine States fully covered by Section 5, plaintiffs also brought 653 successful Section 2 lawsuits between 1982 and 2006 (a number that includes settled cases). *See* App. Br. at 48. Although Section 2 does not require a finding of purposeful discrimination, much of the evidence offered in Section 2 cases is also probative of unconstitutional conduct. *Compare Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) *with Rogers v. Lodge*, 458 U.S. 613, 616-28 (1982). Moreover, because of this statutory remedy, courts need not reach constitutional questions in most voting rights cases. *See*, *e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006) ("*LULAC*").

Therefore, Congress reasonably concluded that, in the covered jurisdictions, the hundreds of successful Section 2 suits evidenced the ongoing need for remedial legislation. *See* Pub. L. No. 109-246 §2(b)(4)(C), (8). Notwithstanding Appellant's conclusory assertion to the contrary, (Br. at 48), however, Congress also reasonably found 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. Congress learned that Section 2 suits are among the most complex and resource intensive of all actions brought in federal court, taking an average of at least two to five years with costs running into the millions of dollars. *See, e.g.*, *May 10, 2006 Hearing*, at 96; *May 9, 2006 Hearing*, at 141; *May 17, 2006 Hearing*, at 20, 80. 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. *See October 18, 2005 Hearing*, at 13; 43-44; *May 16, 2006 Hearing*, at 6. 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.

In addition to Section 5 objection letters and Section 2 litigation, Congress studied several other probative categories of evidence, which are discussed in detail by the District Court. These include: over 100 successful Section 5 enforcement actions to compel the submission of voting changes that jurisdictions never submitted for preclearance; over 200 voting changes withdrawn in response to DOJ letters requesting more information about a proposed voting change (MIRs); more than two dozen denied or withdrawn requests for judicial preclearance; and evidence of discrimination documented by the over 300 federal election observers assigned by the Attorney General each year since 1982 based on "a reasonable belief that minority citizens are at risk of being disenfranchised," through, *inter alia*, "harassment and intimidation inside polling locations," H. R. Rep. No. 109-478, at 44. *See* J.S.App. 84-93.

And, as the District Court also explained, in addition to these quantitative measures of ongoing discrimination, Congress received compelling evidence that "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes," H.R. Rep. No. 109-478, at 24. *See* J.S.App. 108-12.

The District Court canvassed numerous specific examples of intentional discrimination against minority voters. *See*, *e.g.*, J.S.App. 155-83. But that by no means exhausted the evidence presented to Congress. There are hundreds of additional examples that the District Court did not discuss in its thorough opinion.

Below we provide a sample of the record evidence of discrimination in the covered jurisdictions since 1982, drawn primarily from Section 5 objection letters. Most of these examples are not included in the District Court's opinion. An Addendum to this brief references over one hundred Section 5 objection letters cited herein,[8] the vast majority of which are based at least in part on discriminatory purpose (hereinafter discriminatory-purpose objections).[9]

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[8] Pursuant to Rule 32(3), we have submitted a request to lodge these objection letters with the Court. The letters are also available at http://naacpldf.org/Sec5.pdf.

[9] Section 5 places the burden of proof on the covered jurisdiction. A review of all of the objection letters since 1982, however, reveals almost no discriminatory-purpose objections that were interposed because DOJ lacked evidence about the jurisdiction's motive or because that evidence was in equipoise. *See October 25, 2005 (History) Hearing*, at 225-2595. In each objection letter we discuss, DOJ conducted a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," as required by *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), in cases where the burden of establishing purposeful racial discrimination is on the plaintiff. Specifically, these discriminatory-purpose objection letters include one or more of the following circumstances probative of intentional discrimination under *Arlington Heights*: (1) a pattern of

Three important themes emerge from this summary. First, despite unquestionable progress since 1965, voting discrimination in covered jurisdictions has proven a persistent threat to the rights guaranteed by the Fourteenth and Fifteenth Amendments. As was the case in prior reauthorizations, *see, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 180-181 (1980), Congress learned in 2006 that gains in minority registration often lead to the use of sophisticated forms of purposeful discrimination designed to cancel out minority voting strength. *See generally Allen v. State Bd. of Elections,* 393 U.S. 544, 565 (1969) (recognizing that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."). Notably, numerous jurisdictions have enacted multiple discriminatory voting laws since 1982.

Second, the scope of discrimination against minority voters is illustrated not only by the large number of examples, but also by the circumstances surrounding each individual act. Many incidents of discrimination that appear localized actually involve intentionally discriminatory actions taken by both local officials and the State. Moreover, a single objection or MIR can deter numerous discriminatory

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decisionmaking inexplicable on race-neutral grounds; (2) contemporary records of decisionmakers' views; (3) departures from normal procedural or substantive practices; and (4) the historical background and specific sequence of events leading up to a voting change. *See id.* at 266-67.

voting regulations. *See*, *e.g.*, October 18, 2005 Hearing, at 1250.

Third, as this Court noted in a recent case arising from Texas, minority voters are often the most likely to face discrimination when they are gaining numerical strength and on the verge of exercising newfound political power. *See LULAC*, 548 U.S. at 440 ("In essence, the State took away [Latinos'] opportunity [to elect a candidate of choice] because they were about to exercise it.").

The experience in Texas, where Appellant is located, is a microcosm of the discrimination common in covered jurisdictions. We begin there.

1. Substantial Voting Discrimination Persists in Texas

As this Court observed in 2006:

> Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. . . . The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 Amendments to the Voting Rights Act.

LULAC, 548 U.S. at 439-440 (quoting with approval lower court opinion).

Although there has been progress since 1975, the promise of the Fifteenth Amendment has not been

realized. While the overall rate of DOJ objections may be relatively small, (*See* App. Br. at 52), the quantity and nature of objections in Texas alone establishes that minority voters continue to face persistent intentional discrimination in exercising their fundamental right to vote.

Between the 1982 reauthorization and 2004, DOJ interposed 105 objections to discriminatory voting changes in Texas—ten of which were statewide. *See* J.S.App. 68, 71. At the local level, Section 5 objections prevented the implementation of discriminatory electoral changes in 72 Texas counties where over two-thirds of the State's minority population resides. Dkt. No. 100-12, Ex. 8 ("Texas Report"), at 22-23. Twenty-eight counties, utilizing various strategies to obstruct minority participation, have drawn multiple Section 5 objections in this period. *Id.* Furthermore, an additional 60 submissions from Texas jurisdictions were either withdrawn in response to an MIR or denied judicial preclearance, and Texas plaintiffs also brought 29 successful Section 5 enforcement actions. *See* J.S.App. 87, 90. In addition to all of this activity under Section 5, between 1982 and 2004, more than 150 Section 2 suits were resolved on behalf of minority voters in Texas, leading 142 jurisdictions to alter discriminatory voting practices. Texas Report, at 34.[10]

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[10] We note that, notwithstanding the assertions of several amici, *see*, *e.g.*, Southeastern Legal Foundation Amicus Br. at 28, a majority of successful suits in the study of Section 2 cases presented to Congress originated in the covered jurisdictions.

The examples underlying these statistics shed light on the nature of recent voting discrimination at both the state and local level.

Texas's redistricting plans for its House of Representatives have drawn Section 5 objections after each decennial census since the State was covered in 1975. *October 25, 2005 Hearing*, at 2177-80, 2319-23, 2518-23. In the most recent of those objections (2001), DOJ found the State's redistricting plan retrogressive because it eliminated three Latino-majority districts. Moreover, the plan fragmented Latino voters in a manner that "deviates from the State's traditional redistricting principles[.]" *Id.* at 2521. Following the 1990 Census, DOJ likewise determined that, not only was Texas's state house redistricting retrogressive, lawmakers deliberately packed or fragmented residentially compact Latino populations to minimize the number of Latino-majority districts. *See id.* at 2321-22.

Similarly, this Court concluded that Texas's 2003 congressional redistricting plan violated Section 2, and noted that it "bears the mark of intentional

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October 18, 2005 Hearing, at 974. (Amici's contrary understanding is based on one confusing sentence in the study. *See id.*). Indeed, that study found that plaintiffs in covered jurisdictions have a notably higher rate of success in Section 2 suits than do plaintiffs in non-covered jurisdictions. *Id.*; *see also May 9, 2006 Hearing*, at 44; Ellen Katz, *Final Report of the Voting Rights Initiative*, 39 U. Mich. J. L. Reform 639, 655-56 (2006). These differences between the covered and non-covered jurisdictions are particularly noteworthy given that the Section 5 prophylaxis deters a substantial amount of discrimination in the covered jurisdictions.

discrimination [against Latino voters] that could give rise to an equal protection violation." *LULAC*, 548 U.S. at 440. Because of the slower pace of the Section 2 remedy, however, the 2004 congressional elections had already taken place under the illegal plan. Even after this Court's decision, Latino voters were forced to bring a successful Section 5 enforcement action when state officials, without requesting preclearance, attempted to curtail early voting in the special election held in the remedial district. *See LULAC v. Texas*, No. 06-1046 (W.D. Tex. Dec.1, 2006).

An example of entrenched resistance to minority voting rights at the local level involves the extraordinary efforts by county officials in Waller County, over three decades, to prevent students at the historically Black Prairie View A & M University from voting. Litigation from the late 1970s—including a decision from this Court—established that Prairie View A & M students had a right to vote in county elections. Nonetheless, in the 1990s and 2000s, local officials indicted students, or threatened them with prosecution, for voting in such elections. J.S.App. 90, 92; *March 8, 2006 Hearing*, at 185-86. Then, in 2004, the county commissioners' court, aware that students would be on break the day of the primary election, voted to reduce early voting dramatically, and did not submit this change for Section 5 preclearance.[11] The county only abandoned this newest effort to suppress Black turnout when

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[11] This very same commissioners' court had drawn a Section 5 objection in 2002 for enacting a retrogressive redistricting plan. *October 25, 2005 (History) Hearing*, at 2524-27.

the university chapter of the NAACP brought a Section 5 enforcement action. *See* J.S.App. 92; *March 8, 2006 Hearing*, at 185-86. Given this record, Appellant's claim that voting discrimination in Waller County was a "one-off" occurrence, (Br. at 46), is untenable.

The City of Seguin was similarly creative in attempting to thwart minority participation, but, contrary to Appellant's suggestion, (Br. at 54-55), Section 5 played a critical remedial role. Between 1978 and 1993, Latino plaintiffs filed three separate successful lawsuits, using Section 5, Section 2, and the Equal Protection Clause, to challenge Seguin's malapportioned, multi-member, or otherwise dilutive districting plans.[12] *See* Texas Report, at 36-37. A 1993 settlement led to the creation of eight single-member districts. *Id.* at 29. Then, after the 2000 census revealed that Latinos had become a majority in five of the eight city council districts, Seguin

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[12] In jurisdictions with racially polarized voting, at-large elections or multi-member districts tend to minimize the voting strength of minority groups by permitting the majority to elect all of the representatives. *See, e.g., Rogers*, 458 U.S. at 616.

In 2006, Congress learned that racially polarized voting is more severe in covered than in non-covered jurisdictions, and that racial appeals (e.g., a candidate emphasizing the race of his opponent by publishing his opponent's picture, sometimes darkened, in his campaign literature) are more common in covered than non-covered jurisdictions—indeed, the evidence before Congress showed that racial appeals are still routinely employed in biracial elections in some covered jurisdictions. *See, e.g., October 20, 2005*, at 84-85; *May 9, 2006 Hearing*, at 44; *May 17, 2006 Hearing*, at 17.

blocked Latinos from electing a majority of council members by dismantling a Latino-majority district. After the Attorney General indicated that preclearance was unlikely, Seguin withdrew its proposal but promptly closed the candidate filing period to prevent any Latino candidate from competing in the district. Seguin did not submit this change for preclearance, but a successful Section 5 enforcement suit caused the city to reopen its candidate filing period. *See* J.S.App. 92-93.

Three other recent examples from Texas illustrate the need for both Section 5 and Section 2. Until 1990, Freeport elected its four-member city council in at-large elections by plurality vote. That year, the first and only Latino-preferred candidate was elected by a slim plurality, and the city responded by enacting a majority-vote requirement. *October 25, 2005 Hearing*, at 2291-92; 2528-30.[13] DOJ objected, finding that the change was retrogressive. *Id.* at 2292. Shortly thereafter, the city settled a separate Section 2 case by agreeing to adopt single-member districts; over the next decade, Latino voters were able to elect candidates of choice in two out of four

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[13] Devices such as majority-vote requirements (which often result in run-off elections and prevent a plurality of voters from electing a candidate of choice); numbered posts (which require head-to-head contests for each seat); and anti-single-shot voting prohibitions (which prevent minority voters from concentrating their votes on a single candidate in multiple-candidate elections) enhance the tendency for multimember or at-large districts to minimize the voting strength of minorities. *See*, *e.g.*, *Thornburg*, 478 U.S. at 37; *Rogers*, 458 U.S. at 616-17; *White v. Regester*, 412 U.S. 755, 766-67 (1973).

council districts. *Id.* at 2528-30. In 2002, however, Freeport drew a retrogression objection for attempting to reinstitute at-large elections. *Id.*

Similarly, in 2001, the Haskell Consolidated Independent School District, which encompasses Haskell, Knox, and Throckmorton Counties, attempted to return to at-large elections after having settled, just seven years earlier, a Section 2 suit by agreeing to implement single-member districts. *October 25, 2005 Hearing*, at 2513-17. In interposing an objection, DOJ explained that the data did not support the race-neutral reason proffered by the district for the retrogressive plan (that voter turnout was higher under an at-large system). *See id.* at 2515. Furthermore, DOJ rejected the district's suggestion that the minority community should wait until after the new system took effect to challenge it, because that proposition "ignored the essential purpose of Section 5, which is to ensure that gains achieved by minority voters not be subverted by retrogressive changes." *Id.*

DOJ objected to Bailey County's 1991 retrogressive redistricting plan, and interposed a second objection the following year, when the county held a special election using the objected-to district boundaries. *See id.* at 2362-63, 2409. Then, in July 1993, the county drew a third objection when it attempted to evade a settlement in a separate voting suit by reducing the number of justice of the peace and constable districts from four to one. *See id.* at 2416-18.

Faced with this evidence, Congress's assessment of the important and continuing interplay between Sections 5 and 2 was well-founded.

Other types of examples abound. While Appellant argues that moving a polling place is a "minute and obviously benign change[ ]," (Br. at 14), this Court has recognized that the selection of a polling place affects whether "[t]he abstract right to vote . . . becomes a reality at the polling place on election day." *Perkins v. Matthews,* 400 U.S. 379, 387 (1971). Three examples from Texas prove the point.

In 2006, the North Harris Montgomery Community College District, which comprises two counties and an area of more than 1,000 miles, proposed to reduce the number of polling sites from 84 to 12. *May 16, 2006 Hearing*, at 60-61. Objecting to these reductions as retrogressive, DOJ explained that the site with the smallest proportion of minority voters would serve 6,500 voters, while the site with the largest proportion of minority voters (which was 79.2% Black and Hispanic) would serve over 67,000 voters. *Id.*

In 1994, Marion County drew an objection when it provided pretextual reasons for relocating a polling place to a venue that was less accessible for Black residents; the county was apparently motivated, at least in part, by a desire to thwart recent Black political participation. J.S.App. 178-79.

And, in 1991, a water district in Lubbock County enacted polling place changes that required voters in predominately African-American neighborhoods to travel to remote venues, while their counterparts in predominately white neighborhoods were assigned to

centrally located polling places. The district presented implausible nonracial reasons for the change, which was promulgated shortly after a settlement in a Section 2 suit forced the district to abandon at-large elections. *See October 25, 2005 Hearing*, at 2300-03; J.S.App. 72-73.

The evidence before Congress also revealed other types of discrimination designed to suppress minority turnout in Texas. For example, hearings conducted by the NAACP after the 2000 and 2002 elections documented various forms of intimidation and misinformation against Black voters. *March 8, 2006 Hearing*, at 138-39. In one particularly horrendous example, in 2000, a campaign worker for the first Black candidate to make the general election ballot in over 100 years in Wharton County (which has drawn six Section 5 objections since 1982) had her home set on fire, and a burnt picture of the Black candidate thrown on her property, after receiving calls about what would happen to her if she did not remove "the N-word sign out of her yard." *Id.*; *see also id.* at 2998-3002; *October 25, 2005 (History) Hearing*, at 216-17. Local law enforcement officers did little to investigate this election-related incident except requiring the victim to take a polygraph. *See March 8, 2006 Hearing*, at 3000-05. *See also* J.S.App. 104-05 (documenting additional polling-place discrimination against Black and Latino voters in Texas).

This type of discrimination is particularly significant given that, as Appellant concedes, Texas continues to suffer the greatest registration disparity between Anglos and Hispanics of all the wholly covered States. Br. at 50 (observing 16-point

difference between Anglos and Hispanics; also noting 5-point difference between Anglos and Blacks).

The adoption of discriminatory annexations, methods of election, and redistricting plans has also been common in Texas. DOJ interposed discriminatory-purpose objections in 1999 and 1997 respectively to racially selective annexations—i.e., purposeful efforts to use annexations to increase the white percentage of the population—by the cities of Lamesa (its second Section 5 objection in six years) and Webster. *See October 25, 2005 (History) Hearing*, at 216; 2505-07; J.S.App. 176-78. In 1994, an independent school district in Limestone County drew a discriminatory-purpose objection when it adopted a new method of election that appeared calculated to minimize Black voting strength; the district had disregarded the plan unanimously recommended by a fifteen member tri-racial study committee and provided pretextual reasons for the plan it selected. *See October 25, 2005 (History) Hearing*, at 2437-40. Other examples of purposefully discriminatory methods of election remedied by either Section 2 or Section 5 occurred in: Refugio County (1991); Dallas (1990); Frio and Medina Counties (1988); Colorado and Austin Counties (1988); Midland (1986); and Terrell (1983). *See id.* at 2304-06; 2247-48, 2249-50; J.S.App. 100-102.

In 1992, Galveston and Terrell Counties each drew objections to their purposefully discriminatory redistricting plans. Galveston County provided pretextual reasons for a plan that fragmented minority voters across multiple districts, *see October 25, 2005 (History) Hearing*, at 2344-45, while Terrell County (which had drawn a separate method-of-

election objection just six years earlier) provided no plausible nonracial explanation for adopting a plan that diminished Latinos' voting strength even though the Latino-share of the county's population had increased from 43% to 53%, *see id.* at 2359-60.

Similarly, in 1994, DOJ interposed an objection to an apportionment plan by the Gonzales County Underground Water Conservation District. The district avoided creating any districts where minority voters would have an opportunity to elect candidates of choice through "gross[ ] malapportion[ment]"—one district with nearly half the minority population was more than two-and-a-half times the size of any other district. *See id.* at 2458. Notably, this objection, like several others interposed between 1982 and 2004, was aimed at a small utility district—evidence that political subunits similar in size to Appellant implement discriminatory voting changes.

Simply put, the record before Congress demonstrates that, notwithstanding progress, intentional discrimination against minority voters remains a widespread and persistent problem in Texas.

But for Section 5, the vast majority of the incidents described in this section would have come out differently, and, as a result, the ability of African Americans and Latinos to participate in our democracy would have been severely impaired.

2. Substantial Voting Discrimination Persists in Other Covered Jurisdictions

Texas is not an anomaly.[14] The evidence before Congress showed ongoing discrimination against minority voters throughout the covered jurisdictions. As noted, when Congress considered the need for Section 5 in 2006, there had been over 600 Section 5 objections, over 600 successful Section 2 suits, over 200 submissions withdrawn due to MIRs, and over 100 Section 5 enforcement suits since the previous reauthorization. In nine of the wholly or partially covered States, more objections were interposed since the 1982 reauthorization than between 1965 and 1982. J.S.App. 66-68. And "as in 1975, the legislative record reveals that the Attorney General interposed objections to a wide variety of electoral changes proposed by governments at all levels." *Id.* at 69. Between 1982 and 2004, each fully covered State drew at least two statewide objections, with most fully covered States drawing many more. *See id.* at 71. At the local level, objections were particularly numerous in areas with large minority populations. *See id.* at 72, 74-75.

In the following pages, we discuss representative examples of discrimination against minority voters in covered jurisdictions outside of Texas divided into the following categories: (1) registration and Election Day voting; (2) methods of election; (3) annexations and

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[14] *See generally March 8, 2006 Hearing*, at 104-290 (report by the National Commission on the Voting Rights Act), *available at* http://www.votingrightsact.org/report/finalreport.pdf.

de-annexations; (4) redistricting; (5) polling place changes; and (6) other types of discrimination. A final category discusses jurisdictions that have had multiple acts of discrimination deterred by Section 5, or by some combination of Sections 2 and 5.

Registration and Voting

Due in large part to the VRA, minority registration has increased dramatically in the covered jurisdictions. Still, in 2006, Congress reviewed considerable evidence of purposeful discrimination designed to suppress minority registration and turnout.

Almost 100 years after Mississippi enacted a dual-registration requirement for municipal and non-municipal elections as part of the "Mississippi Plan" to deny Blacks the right to vote, that requirement still had its intended discriminatory consequences: many Blacks were not registered because the burdens of the complex dual-registration system (including limited access to registration sites) fell more heavily on Black citizens, who disproportionately lacked access to automobiles or telephones. *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1251-55 (N.D. Miss. 1987). Black voters brought a lawsuit challenging the system, and, in 1987, a federal district court found that the dual-registration law had been enacted for a discriminatory purpose, continued to have a discriminatory effect, and violated Section 2 of the VRA. *See id.* at 1268. The Fifth Circuit affirmed in 1991. *See Mississippi State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Then, just four years later, the State

once again established a dual-registration system (this time for state vs. federal elections), ostensibly for the purpose of complying with the National Voter Registration Act. *See* J.S.App. 78-79. Mississippi refused to seek preclearance. *See id.* Individual voters then brought a Section 5 enforcement action, and this Court unanimously held that preclearance was required. *See Young v. Fordice*, 520 U.S. 273 (1997).

In the wake of *Young*, the State finally submitted its dual-registration system for preclearance, and DOJ applied the *Arlington Heights* test to interpose a discriminatory-purpose objection. *See October 25, 2005 (History) Hearing*, at 1603-04. DOJ noted that the racially discriminatory effects of this system "were not just foreseeable but almost certain to follow." *Id.* at 1603. Moreover, proposals supported by election officials that would have mitigated this discriminatory impact were "rejected under somewhat unusual circumstances," with state officials offering "insubstantial" reasons for their opposition and in some cases couching it in racially charged terms. *Id.* [15]

Notwithstanding Appellant's mischaracterization of the record, (Br. at 44), the entrenched discrimination illustrated by Mississippi's dual-registration system lasted over a century, and was

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[15] For another example of a Jim Crow voting law that was not invalidated until after the 1982 reauthorization, *see Hunter v. Underwood*, 471 U.S. 222 (1985).

only remedied by the combined enforcement of Sections 5 and 2.

Congress also learned in 2006 that race continues to affect minority voting access in other ways. In 2004, Long and Atkinson Counties in Georgia required Latino registered voters, whose citizenship had been challenged because of their Spanish surname, to attend a hearing to establish citizenship; the registrar in Atkinson County facilitated the challenge process by supplying a segregated list of registered voters with Spanish surnames. *See October 18, 2005 Hearing*, at 474-78. Long County later entered into a settlement agreement with DOJ based on the county's handling of these mass challenges. *March 8, 2006 Hearing*, at 1531. Latinos in Arizona also experienced widespread discrimination when attempting to vote in 2004; poll workers asked Latinos (but not Anglos) for identification, trucks with megaphones were parked outside of heavily-Latino precincts and the drivers warned residents that they would be deported if they wrongfully registered to vote, and police cars circled around polling places. *See id.* at 3979-80.

Black voters likewise continue to face widespread intimidation and harassment. In 2005, literature was disseminated in Black neighborhoods in Danville, Virginia, threatening to lynch African Americans and warning that if residents "'didn't vote a certain way certain things could happen to you.'" *Id.* at 2045. In 2003, a federal court found "significant evidence of intimidation and harassment" by poll managers in predominately minority precincts in Charleston County, South Carolina that "never occurred at predominately white polling places."

United States v. Charleston County, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004) (Wilkinson, J.). During New York City's 1993 mayoral election, off-duty police officers, with guns in view, blanketed polling sites in Black communities. *October 18, 2005 Hearing*, at 62. The previous year, poll workers in Hale County, Alabama closed a polling place early so that Black voters from a local fish processing plant could not vote; Congress learned that similar tactics were common in the county. *See March 8, 2006 Hearing*, at 302. And in North Carolina's 1990 Senate election, 125,000 Black voters were mailed postcards on the eve of the election stating, incorrectly, that they could not vote if they had moved within 30 days of the election. *March 8, 2006 Hearing*, at 1737. Two years later, DOJ obtained a consent decree banning this practice. *See id.* & n.70.

Congress also heard examples of voter fraud designed to prevent Blacks from gaining political power, and of severe discrimination against potential Black poll workers. In McCormick County, South Carolina, the clerk of the County Board of Registrars pleaded guilty to rigging a 1994 state house election in favor of the long-time white incumbent, who was running against an African-American challenger. *Id.* at 1973. The year before, DOJ settled Section 2 lawsuits against five Georgia counties that had discriminated against potential Black poll workers. *Id.* at 1526 & n.129. Similarly, Alabama's intentionally discriminatory laws and processes caused "black persons [to be] grossly underrepresented among poll officials, with the result that polling places across the state continue to be

viewed by many blacks as areas circumscribed for whites and off-limits for blacks." *Harris v. Graddick*, 593 F. Supp. 128, 133 (M.D. Ala. 1984); *see Harris v. Siegelman*, 695 F. Supp. 517, 526 (M.D. Ala. 1988).

Methods of Election

Even more common than these ongoing efforts to suppress minority registration and turnout are efforts to cancel out the impact of the minority vote, by, as one example, the adoption of discriminatory methods of election.

In 2004, the South Carolina legislature enacted a law effectively prohibiting single-shot voting and adding a majority-vote requirement to Charleston County's at-large school board elections, notwithstanding: (1) a judicial finding only months earlier that this method of election for Charleston's county council illegally diluted minority voting strength in violation of Section 2, and (2) evidence that elected officials understood the retrogressive nature of the change. *See March 8, 2006 Hearing*, at 175-76. Indeed, this change was the culmination of a series of efforts by the Charleston County state legislative delegation to alter the method of election for, or reduce the powers of, the Charleston County school board after the 2000 election resulted in Blacks gaining a majority of seats on the board for the first time in history. *See United States v. Charleston County*, 316 F. Supp. 2d at 290 n.23. DOJ interposed an objection. J.S.App. 172. Thus, once again, Sections 5 and 2 worked in tandem to remedy discrimination against minority voters, but while the Section 5 objection had immediate impact, the Section 2 litigation lasted several years and cost

millions of dollars. *March 8, 2006 Hearing*, at 175-76.

Another example of a State facilitating discrimination by local jurisdictions arises out of Louisiana. In 2001, Louisiana enacted legislation allowing the electors of St. Bernard Parish to reduce the size of the parish school board from eleven single-member districts to five single-member districts and two at-large seats. *Id.* at 1618. A federal court found that the proposed plan violated Section 2 because, unlike the existing plan, it did not include any African-American opportunity districts—that is, a district where Black voters have an opportunity to elect candidates of choice. *Id.* During a hearing in the case, a white state senator, Lynn Dean, offered testimony that exhibits the racial animus that some elected officials still harbor. *Id.* at 1693-94. When asked whether he had heard the word "nigger" used in the parish, Dean testified that "he uses the term himself, ha[d] done so recently, that he does not necessarily consider it a 'racial' term and that it is usable in jest, as well." *Id.* Dean's interest in and influence over the composition of the parish's school board stemmed from his service on that body for 10 years prior to his election to the state senate. *Id.* at 1618.

Northampton County, Virginia provides another recent example of a jurisdiction enacting consecutive discriminatory methods of election. In 2001, despite racially polarized voting, the county proposed switching from six single-member districts, three of which were majority-minority, to three dual-member districts, all with majority-white voting-age populations. DOJ objected to this plan, concluding

that the county's stated justification was inaccurate, and that it had inexplicably abandoned consideration of non-retrogressive alternatives. *See October 25, 2005 (History) Hearing*, at 2484-86. The county responded with two more retrogressive plans, which drew objections from DOJ in May and October 2003. *See id.* at 224, 2592-95; *March 8, 2006 Hearing*, at 2040.

Two objections from the 1990s further illustrate that Sections 2 and 5 of the VRA are both needed to remedy discrimination by covered jurisdictions. In July 1993, plaintiffs agreed to settle a Section 2 lawsuit challenging Mt. Olive, North Carolina's use of at-large elections for the town's board of commissioners. Two months later, the board abandoned the redistricting plan to which the parties had agreed, and promulgated a new discriminatory plan. DOJ interposed a discriminatory-purpose objection, concluding that the board's justification for adopting the new plan appeared pretextual. *October 25, 2005 (History) Hearing*, at 1823-24. The racial animus underlying the board's conduct was confirmed by its extraordinary efforts to freeze the only Black member of the board out of the decisionmaking process: "the board petitioned [a] court to prohibit her from participating in board discussions or voting on the method of election issues raised by the Section 2 litigation." *Id.* at 1824.

In 1993, Newport News, Virginia drew a discriminatory-purpose objection when it attempted to implement at-large elections for its school board—its second method-of-election objection in four years. *Id.* at 2573. Then, in 1994, the city entered into a consent decree in parallel suits brought by Black

voters and the United States, in which it acknowledged discriminating against African Americans in violation of Section 2 and the Fourteenth and Fifteenth Amendments through its system of at-large city council elections. *See* J.S.App. 102. Thus, far from proving that Section 5 is unnecessary as Appellant contends, (Br. at 47-48), the repeated efforts of Newport News to discriminate against minority voters were only remedied through two Section 5 objections and one Section 2 lawsuit.

Other jurisdictions failed even to submit for preclearance method-of-election changes that adversely affected Black voters. Indeed, as this Court unanimously stated in *Clark v. Roemer*, 500 U.S. 646 (1991):

> [T]he State of Louisiana failed to preclear . . . judgeships as required by § 5. It received official notice of the defect in July, 1987 [when individual citizens filed a Section 5 enforcement action], and yet three years later, it had still failed to file for judicial preclearance. . . . It scheduled elections for the unprecleared seats in the fall of 1990 even after the Attorney General had interposed objections under § 5. In short, by the fall 1990 election, Louisiana had with consistency ignored the mandate of § 5.

Id. at 655. *See also May 10, 2006 Hearing*, at 139 (enforcement action under similar circumstances in Mississippi).

The Addendum to this brief references additional discriminatory-purpose objections to method-of-election changes designed to minimize minority voting strength in: Monterey County, CA (2002); Gaffney, SC (1996); Greenville, MS (1995); North Carolina (1990, 1987, 1986, and 1984 for changes affecting covered counties); Chambers County, AL (1990); Anderson County, SC (1990); Lancaster, SC (1989); Bladen County, NC (1987); Cottonport, LA (1987); Wilson County, NC (1986); Newberry County, SC (1984) and Greenville, VA (1982). In each case, the jurisdiction's discriminatory intent was revealed by one or more of the following circumstances: (1) evidence of discrimination by state or local officials in the deliberative process; (2) unexplained departures from neutral legislative practices; or (3) the jurisdiction's failure to provide any non-pretextual, nonracial justification for its plan. *See October 25, 2005 (History) Hearing*, at 3319-22; 2053-56; 1516-21; 1788, 1771-13, 1736-40, 1712; 358-59; 1963-65; 1952-54; 895-96; 1738; 1731-32; 1894-95; 2549-51.

Redistricting

During the 2006 reauthorization process, Congress received extensive evidence of purposefully discriminatory redistricting plans enacted by covered jurisdictions since 1982—many of which were remedied by Section 5. This evidence spanned numerous covered jurisdictions, many of which drew multiple objections for discriminatory redistrictings, at both the state and local levels.

"In one particularly stark example, Congress heard testimony that not one redistricting plan for the Louisiana House of Representatives had ever

been precleared as originally submitted." J.S.App. 70. After the 2000 Census, Louisiana sought judicial preclearance for its state house redistricting plan, but acknowledged that it intentionally increased electoral opportunities for white voters at the expense of such opportunities for African-American voters. During the judicial preclearance litigation, the three-judge court criticized the State for "blatantly violating important procedural rules" and for a "radical mid-course revision in [its legal] theory"; the court noted that the State's conduct bordered on sanctionable. *La. House of Reps., et al., v. Ashcroft*, No. 02-0062 at 1, 2 (D.D.C. Feb. 13, 2003) (three-judge court). On the eve of trial, Louisiana withdrew the preclearance action, and restored an African-American opportunity district after evidence emerged that the plan the State had submitted for preclearance violated the State's own redistricting principles. *See March 8, 2006 Hearing*, at 1608.

Ten years earlier, Louisiana had similarly discriminated against Blacks in its state house redistricting. Then, Louisiana did not consistently apply its stated redistricting criteria; rather, it applied those criteria when doing so would deprive Black voters of an opportunity district and departed from those criteria when doing so would deprive Black voters of an opportunity district. *See October 25, 2005 (History) Hearing*, at 951-52.

Similarly, Mississippi drew a discriminatory-purpose objection to its redistricting plan for the state senate following the 1990 Census, which was similar to an objection DOJ interposed to its congressional redistricting plan following the 1980 census. *See id.* at 1183-86; J.S.App. 79. In both

circumstances, DOJ concluded that the plan was calculated to minimize Black voting strength in the Delta region; after the 1990 census, legislators privately referred to an alternative plan that would have increased the number of majority-Black districts as the "nigger plan." J.S.App. 80.

Like Mississippi, Alabama drew statewide redistricting objections from DOJ after both the 1980 and 1990 Census. In 1991, the State failed to provide a plausible nonracial explanation for fragmenting concentrated Black populations, and DOJ had reason to believe that the "underlying principle of the Congressional redistricting was a predisposition on the part of the state political leadership to limit Black voting potential to a single district." *October 25, 2005 (History) Hearing*, at 385-86. After the 1980 Census, the State "systematically reduc[ed] the influence which Black voters . . . enjoy" in ten urban legislative districts and eliminated entirely four Black-majority districts in rural counties. *See id.* at 264-65. DOJ determined that the State's districting choices "do not appear to have been necessary to any legitimate governmental interest" and were not applied neutrally throughout the State. *Id.* at 265.[16]

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[16] In his amicus brief, Governor Bob Riley concedes that Alabama "earned its spot on §5's original coverage list," but argues that by renewing the State's coverage in 2006, "Congress wrongly equated Alabama's modern government, and its people, with their Jim Crow ancestors." Governor Riley Amicus Br. at 1-2. Governor Riley, however, fails to recognize that the Congressional standard was not simply improvement (which is undeniable) but equality (which remains elusive).

Arizona has drawn Section 5 objections to its statewide legislative redistricting plans after each decennial census since it was first covered. In 2001, DOJ concluded that the legislative redistricting plan was not only retrogressive for Latino voters, but in addition the circumstances surrounding the drawing of at least one district "raised concerns that [the districting decision] may have also been taken, at least in part, with a retrogressive intent." *Id.* at 500.[17] DOJ similarly concluded that the proposed

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Particularly misplaced is Governor Riley's suggestion—which relies wholly on post-reauthorization evidence—that race has lost its salience in Alabama elections. *Id.* at 9-11. Congress in 2006 learned that Alabama has no Black officials elected statewide, and virtually all Black officials are elected from majority-minority districts. *See July 13, 2006 Hearing*, at 388-89. Although not before Congress, the 2008 Presidential election results confirm the existence of extreme racial polarization in Alabama. President Obama received support from only 10% of white voters in Alabama—his worst showing among the 50 states. Nathaniel Persily, *et al.* Amicus Br. at 11-12. Shortly before the election, one Alabama resident predicted of Obama: "'He's going to tear up the rose bushes and plant a watermelon patch . . . .'" Adam Nossiter, *For Some, Uncertainty at Racial Identity*, N.Y. Times, Oct. 4, 2008, at A21.

[17] That an Independent Redistricting Commission (IRC) proposed this plan does not weaken the force of this objection. *Cf.* Scharf-Norton Amicus Br. at 2-3. A purposefully retrogressive redistricting plan is no less discriminatory because it was initially proposed by an IRC. Furthermore, contrary to the Scharf-Norton Center's suggestion, *id.*, the retrogressive-effect prong of Section 5 simply requires that minority voters have an equal opportunity to elect candidates of choice as they did in the benchmark plan; it does not forbid competitive elections.

redistricting plan following the 1990 Census discriminated against Latino voters, and that the State provided pretextual reasons for rejecting non-discriminatory alternatives. *Id.* 476, 481-82. 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.* 454-55.

Congress also learned of South Dakota's discrimination against Indian voters in its 2001 legislative redistricting plan. *May 9, 2006 Hearing*, at 86 (*citing Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004)). In *Bone Shirt*, American Indians were packed into a single district where they constituted 90 percent of the voting-age population. 336 F. Supp. 2d at 1048. After rejecting the State's argument that "non-tenuous policies" supported this packing and noting that the state legislature's redistricting committee received almost no input from the Indian community, a court held that the statewide redistricting violated Section 2. *See id.* at 1047-48. Tellingly, only two years earlier, American

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For a similar reason, the contention of amicus Thernstrom, *et al.*, that amendments to Section 5 will "preserve[] in amber until 2031 all extant majority-minority districts . . . regardless of changes in voting patterns," is false. Br. at 4; *see id.* at 26-28. The ability-to-elect standard, codified at 42 U.S.C. § 1973c(b), does not require the maintenance of majority-minority districts regardless of voting patterns. If racially polarized voting declines, the elimination of majority-minority districts will not be retrogressive because minority voters will have an equal opportunity to elect candidates of choice in majority-white districts. *See*, *e.g.*, *March 8, 2006 Hearing*, at 301-02.

Indians in the State's covered counties successfully sued South Dakota for enacting hundreds of voting changes between 1976 and 2002 and failing to submit them for preclearance. *October 25, 2005 (Continuing Need) Hearing*, at 131.

In recent years, numerous cities, counties, and other local jurisdictions have also promulgated racially discriminatory redistricting plans. In the opinion below, the District Court described Section 5 objections that prevented the enforcement of redistricting plans motivated by a discriminatory (or after 2000 retrogressive, *see* note 3, *supra*) purpose in: Delhi, LA (2005); Ville Platte, LA (2004); Pittsylvania County, VA (2002); Albany, GA (2002); Webster County, GA (2000); Grenada, MS (1998); Tallapoosa County, AL (1998); and Greensboro, AL (1994). J.S.App. 155-83.

Other examples abound. In 2002, DeSoto Parish and the City of Minden, Louisiana each drew retrogressive-purpose objections from DOJ for adopting redistricting plans that, by local officials' own accounts, were intentionally designed to reduce opportunities for Blacks to elect candidates of choice. *See October 25, 2005 (History) Hearing*, at 1157-60; 1150-52. Also in 2002, South Carolina drew a retrogressive-purpose objection for its apportionment of school board districts in Union County. Applying *Arlington Heights*, DOJ noted, *inter alia*, that Black residents of the county were frozen out of the deliberative process, and that the State did not explain why it had not considered available non-retrogressive plans that were consistent with its stated redistricting goals. *See id.* at 2086-87. And in 2001, DOJ interposed a retrogressive-purpose

objection when the City of Greer, South Carolina eliminated the sole minority-opportunity district for municipal elections. The evidence showed that the city proffered pretexual reasons for altering its apportionment plans to satisfy concerns raised by white citizens while quickly rejecting proposals supported by minorities. *See id.* at 2080.

Jurisdictions also frequently adopted discriminatory plans when minority communities were on the verge of exercising political power, and often more than one Section 5 objection was necessary to deter this type of discrimination. For example, the 1990 Census revealed that the Black population of Selma, Alabama grew from 52.1% to 58.4%. The city responded by packing Black voters into four districts (three of which were over 90% Black) and fragmenting Black neighborhoods across the remaining five districts. *Id.* at 391. In a 1992 objection letter, DOJ found that the city's reasons for rejecting a nondiscriminatory alternative "appear[ed] to be pretextual"; the city was actually "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 a new redistricting plan that drew an objection in 1993. While addressing some of the concerns expressed in DOJ's 1992 objection, the new plan continued to "fragment[] black population concentrations . . . in an apparent effort to limit the opportunity for black voters to elect more than four councilmembers." *Id.* at 403. Minutes from a council meeting at which the plan was adopted confirmed that the city was motivated by intentional discrimination. *Id.*

The Town of Johnston, South Carolina and East Carroll Parish, Louisiana similarly each drew consecutive discriminatory-purpose objections in the 1990s for intentionally packing African-American voters, who represented a majority of the electorate, into a minority of districts. *See id.* at 1980-82, 2003-05; 1013-15, 985-86. Similarly, Marion County and Lee County, South Carolina each drew an objection in 1993 when, faced with increases in Black population, the counties placed a quota on how many Black residents could be included in the districts that would determine majority control of the county council and school board. *See id.* at 1992-95; 1996-99.

In addition to the examples discussed above and in the District Court's opinion, DOJ objected to redistricting plans submitted by the following jurisdictions where the evidence—either in the form of explicit statements during the deliberative process or powerful circumstantial evidence (*e.g.*, freezing the minority community out of deliberations, departing from normal legislative rules, or failing to provide a non-pretextual, nonracial reason for a change)—indicated that the jurisdiction had been motivated by a discriminatory or retrogressive purpose: Sumter County, SC (2002); Orangeburg County, SC (1992); Dallas County, AL (1992 (two separate objections), 1987 & 1986); Catahoula Parish, LA (1991); Bolivar County, MS (1991); Edgefield County, SC (1987); Yazoo County, MS (1986, 1985, & 1983); Pointe Coupee Parish, LA (1983); LaSalle Parish, LA (1982) and McDonough, GA (1982). *October 25, 2005 (History) Hearing*, at 2082-84; 1983-85; 397-99, 388-90, 327-29, 310-12; 972-73; 1414-16; 1935-37; 1344-45, 1330-31, 1265-67; 884-68; 867-69; 581-83.

Annexations and De-Annexations

Since the 1982 renewal, Section 5 blocked purposefully discriminatory annexations and de-annexations by many covered jurisdictions similar to those discussed above by Lamesa and Webster, Texas. In several cases, discriminatory annexations were part of a systematic effort to prevent minority voters from electing candidates of choice. In 1993, DOJ objected (for the second time in four years) to Foley, Alabama's policy of encouraging petitions for annexation from majority-white residential areas while discouraging or rejecting petitions from predominately African-American areas; the city could offer no legitimate nonracial explanation for this policy. *See October 25, 2005 (History) Hearing*, at 406. Foley had adopted its discriminatory annexation policy shortly after a successful Section 2 challenge to its at-large elections. *See Dillard v. City of Foley*, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995) (describing court's 1989 order).

In 1994, DOJ objected to Shreveport, Louisiana's annexation of white-suburban wards to its city court jurisdiction; the annexations would have changed the population of that at-large jurisdiction from 54% to 45% African-American. Despite DOJ's initial objection, the city tried a total of five more times, twice in 1995, in 1996, and twice in 1997. Each time, DOJ informed the city that it would have no objection if Shreveport changed its at-large method of electing judges to help ameliorate the discriminatory effect of the annexations, and each time, the city refused to make that change. *March 8, 2006 Hearing*, at 1615-17.

Other purpose-based objections tell a similar story. As discussed by the District Court, Section 5 objections prevented the Town of North, South Carolina (2003) and the City of Grenada, Mississippi (1998) from implementing discriminatory annexations designed to prevent African Americans from exercising political power. J.S.App. at 165-67, 175-76. In 1994, Hemingway, South Carolina drew a purpose-based objection for its racially selective annexations. The town had initially refused to submit its annexations for preclearance and did so only after Black residents succeeded in a Section 5 enforcement action. *March 8, 2006 Hearing*, at 1065. DOJ objected, concluding that the town provided a pretextual reason for its annexation decisions; indeed, after the local regional planning agency concluded that it was more feasible for the town to annex a predominately African-American residential area than a nearby predominately white area, the town did the opposite. *See October 25, 2005 (History) Hearing*, at 2028-30. After DOJ's objection, Hemingway decided to take the unusual step of de-annexing recently annexed areas rather than annexing predominately Black areas. *October 20, 2005 Hearing*, at 83.

In 1987, Augusta, Georgia drew an objection to its pursuit of an "annexation policy center[ed] on a racial quota system requiring that each time a black residential area is annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's black population percentage." *October 25, 2005 (History) Hearing*, at 642-43. Augusta went so far as to conduct door-to-door surveys to identify white

residential areas for annexation. *See id.* DOJ withdrew its objection the following year, after the city settled Section 2 litigation, which resulted in a new method of election that was nondiscriminatory. *See March 8, 2006 Hearing*, at 1516 n.78.

In addition to the examples discussed above, DOJ interposed objections to purposefully selective annexations or de-annexations in Ahoskie, NC (1989); Prichard, AL (promulgated by the State of Alabama) (1987); Greensboro, AL (1985); and Sumter, SC (1985). *See id.* at 1781-83; 319-20; 305-06; 1915-16.

Discriminatory Polling Place Changes

As in Texas, other covered jurisdictions have attempted to suppress minority turnout by relocating polling places to intimidating or remote venues. In Jenkins County, Georgia for instance, the county proposed moving the polling place from an accessible venue inside the City of Millen to an inaccessible—and for pedestrians, potentially dangerous—location in a predominately white neighborhood outside of the city limits. (Thirty-eight percent of African-American households, compared to 4% of white households, lacked a vehicle.) The decision came shortly after a Section 2 lawsuit forced Millen to alter its method of election. *March 8, 2006 Hearing*, at 1524 n.120. After reviewing the evidence, DOJ concluded in 1995 that the county's selection of the new polling location "appears to be designed, in part, to thwart recent black political participation." *October 25, 2005 (History) Hearing*, at 816.

Applying *Arlington Heights*, DOJ reached a similar conclusion in 1999 when the council in

Dinwiddie County, Virginia chose an all-white church in the extreme eastern (and predominately white) part of a rural precinct as a polling place, thus disregarding both the recommendation of the county electoral board and the council's stated goal of finding a more centrally located polling site. *See October 25, 2005 (History) Hearing*, at 2579-83; J.S.App. 182-83. That same year, McComb, Mississippi drew an objection when it proposed moving a polling place to an inaccessible location for minority voters; the county disregarded concerns articulated during the deliberative process and made no effort to consider nondiscriminatory alternatives. *See October 25, 2005 (History) Hearing*, at 1613-14; *see also id.* at 1090-92; 726-28 (describing purposefully discriminatory polling place changes in St. Landry Parish, LA (1994) and Johnson County, GA (1992)).

Other Discrimination

Covered jurisdictions used a variety of other tactics to discriminate against minority voters. For example, some jurisdictions adopted implementation schedules intended to delay changes that would allow minority voters to elect candidates of choice. After resolution of an aforementioned Section 2 suit led the City of Millen, Georgia to switch from at-large elections to a system of double- and single-member districts in 1993, *see March 8, 2006 Hearing*, at 1524 n. 120, the city proposed delaying the election in a Black-opportunity district (the district that would permit Black voters to elect a majority of candidates of choice to the city council) until 1995, leaving that district unrepresented in the two-year interim. *See October 25 (History) Hearing*, at 743-45.

Similarly, Cleveland, Mississippi drew an objection when it obtained a state court order authorizing the abandonment of a single-member districting plan that would have given Black voters a fair opportunity to elect candidates to the school board, and the cancellation of the November 1990 election entirely. *See id.* at 1395-97, 1405-07. In addition to these examples, DOJ interposed objections under similar circumstances to implementation delays by consolidated school districts in Aiken and Saluda counties, SC (1986) and Cumberland County and Fayetteville City, NC (1985). *October 25, 2005 (History) Hearing*, at 1721-22; 1926-28.

Nor was this type of discrimination limited to the local level. Louisiana proposed to cancel the 1984 presidential preference primary, claiming the suspension was necessary because of budget issues. DOJ observed that the suspension would "undeniably reduce the opportunities for Blacks to participate meaningfully in the delegate selection process," and also noted that the timing of the proposed election cancellations came "on the heels of the announcement of the Reverend Jesse Jackson to enter the presidential race." *Id.* at 890-92.

Other examples of creative discrimination include Kilmichael, Mississippi (2001) (canceling elections after the 2000 Census indicated that multiple Black aldermen and local officials could be elected during the 2001 election), *see* J.S.App. 78; *October 25, 2005 (History) Hearing*, at 1616-19; Charleston County, South Carolina (1991) (substantially reducing the salary of probate court judge following the election of the first African

American to that position), *see Charleston County*, 316 F. Supp. 2d at 286 n.23; Richland County, South Carolina (1988) (enacting a resignation requirement designed to create an economic disincentive for potential Black candidates), *see October 25, 2005 (History) Hearing*, at 1948-51; Bamberg County, South Carolina (1986) (scheduling the Democratic Primary only 21 days after the election was called, despite a state law requiring a minimum of eleven weeks, for the apparent purpose of severely disadvantaging the candidate of choice of the Black community), *see id.* at 1932-33; North Carolina (1986) (resuming an election schedule for a special primary election in a judicial district, despite DOJ's objection the month before to the method-of-election used by that district), *see id.* at 1733-35,1745-47.

The Persistent Nature of Discrimination

Notwithstanding Appellant's insistence that "gamesmanship" is a thing of the past in the covered jurisdictions, (Br. at 42, 63), the foregoing discussion documents numerous jurisdictions that have enacted new discriminatory measures after prior measures had to be abandoned.[18] Several additional examples are discussed below.

Not only did Selma, Alabama draw multiple Section 5 objections since the last reauthorization, Dallas County (where Selma is located) drew three separate objections in the 1990s for retrogressive

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[18] As discussed by Intervenors-Appellees NAACP, *et al.*, evidence of gamesmanship is not required to demonstrate the constitutionality of Congress's decision to reauthorize Section 5.

redistricting plans that appeared motivated by an attempt to limit Black electoral success. *See October 25, 2005 (History) Hearing*, at 388-90, 397-401.

Serial violations of the Act were also in evidence in Burke County, Georgia: the same county where, at least until the late 1970s, a segregated laundromat operated near the county courthouse, and, in the courthouse itself, faded paint over restroom doors did not fully conceal the words "colored" and "white." *Rogers*, 458 U.S. at 631 n.1 (Stevens, J., dissenting). In 1982, while this Court in *Rogers v. Lodge* analyzed the constitutionality of the county's at-large system for electing county commissioners, *see id.* at 614-15, Waynesboro, the county seat, was unlawfully implementing an unprecleared majority-vote requirement for its mayoral elections. *October 25, 2005 (History) Hearing*, at 788-89. DOJ had previously objected to the same majority-vote requirement in 1972. *See id.* at 788. Then, in 1977, the town reinstituted the requirement, and did not seek preclearance until 1994, which was denied as the change was retrogressive given the level of continued racially polarized voting in Burke County. *Id.* at 789.

Another noteworthy example comes from South Carolina. In 1994, the South Carolina legislature abolished the elected Spartanburg County Board of Education after Section 2 litigation resulted in a consent decree changing the method of electing members of that board from at-large elections to single-member districts. *See 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 state law]

gives rise to an obvious inference of discriminatory purpose." *Id.* at 2042.

This objection, however, did not deter the South Carolina legislature, which attempted effectively to abolish the school board again in 1995. This time, the State proposed to transfer some, but not all, of the county school board's responsibilities to seven local school districts, and to de-fund the elected school board. *See October 25, 2005 (History) Hearing*, at 2049-52. DOJ determined that "the county board retain[ed] substantial powers and duties" despite the redistribution of power to local school districts, which rendered the redistribution of authority not subject to Section 5 review under *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). *October 25, 2005 (History) Hearing*, at 2050. South Carolina's decision to de-fund the county board, however, "result[ed] in the *de facto* elimination of the county board" for at least one year, and fell within the *Presley* exception because "minority voters would lose their newly-won electoral opportunities" on the county board. *Id.* at 2050-51. Noting that the same legislator who sponsored the objected-to 1994 law sponsored this new law de-funding the local school board, and that the State could not offer a tenable nonracial justification for the law, DOJ again interposed a discriminatory-purpose objection. *See id.* at 2051.

In addition to the examples discussed above, numerous other jurisdictions were deterred by a combination of multiple Section 5 objections, or at

least one Section 5 objection and one Section 5 enforcement suit, including: McComb, MS (2005),[19] DeSoto Parish, LA (2002); Minden, LA (2002); Point Coupee Parish, LA (2002); Alabaster, AL (2000); St. Martinville, LA (1997); Shreveport, LA (1997); Monroe County, MS (1995); Chickasaw County, MS (1995); 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); and Yazoo County, MS (1986).[20] 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.[21]

Similarly, in addition to the examples discussed above, in the following jurisdictions, a combination of Section 2 (or constitutional) litigation and at least one Section 5 objection or enforcement action was necessary to remedy discrimination: Albany, Georgia

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[19] Parenthetical dates reflect the most recent Section 5 action.

[20] See *October 25, 2005 Hearing*, at 435-39 (Alabama example); *March 8, 2006 Hearing*, at 1618-20, 1667-69, 1651-54; *October 25, 2005 (History) Hearing*, at 1027, 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 (South Carolina examples).

[21] *See* Objection Nos. 2007-2233; 2006-3856, *available at* http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php.

(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); 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).[22]

Examples of jurisdictions that drew a Section 5 objection or were successfully sued under Section 2, and then later withdrew a separate preclearance submission are: Beaufort County, NC (2002); Edgecombe County, NC (2001); Pitt County, NC (1996); Prince Edward County, VA (1993); Halifax County, NC (1991); and North Martin County, NC (1991).[23]

Accordingly, while the roots of the constitutional violations that Congress examined were "decades

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[22] *See October 25, 2005 (History) Hearing*, at 429-34; 310-12; *Dillard*, 926 F. Supp. at 1053 (Alabama examples); *March 8, 2006 Hearing*, at 1407-08 (Arizona example); *March 8, 2006 Hearing*, at 686-90, 1526 n.129; 652-56; 634-35; *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 example); *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).

[23] *See March 8, 2006 Hearing*, at 1750, 2049, 2089. A list of all objections, organized by state, is available at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php

old", Br. at 2, 23, its manifestations and threats are real, specific, and continuing.

But for Section 5, the vast majority of the incidents described in this section would have come out differently, and, as a result, the ability of minorities to participate in our democracy would have been severely impaired.

* * *

Appellant also points to evidence that was not before Congress, namely, the election of Barack Obama as the country's first African-American President, to support its view that Section 5 has outlived its utility. Br. at 1. This post-reauthorization event bears little relevance to the issue of Congressional judgment in 2006. Analysis of the voting patterns during the 2008 presidential election, however, underscores the reasonableness of Congress's judgment. Consistent with the evidence before Congress in 2006, *amici curiae* Nathaniel Persily, *et al.*, observed stark racially polarized voting in the covered jurisdictions. Indeed, the results reveal an increase in the differences in voting choices between whites and minorities in the covered jurisdictions that is attributable both to the "reluctance of whites to vote for Barack Obama and the increased cohesion among minority voters." Br. at 6. The election returns from several Section 5-covered States bring into sharper focus the decisive role that race played in voting choices in the 2008 Presidential election. Obama's level of white support was 10% in Alabama, 11% in Mississippi, and 14% in Louisiana. *Id.*

More broadly, while the historically significant election of the nation's first African-American president represents a milestone that was not visible in 1965, no event, no matter how significant, can instantaneously erase the legacy of Jim Crow and its enduring effects.

C. Congress Considered the Interests of the Covered Jurisdictions

Sensitive to federalism concerns, Congress also heard evidence about the administrative burden imposed by Section 5 and found that burden modest. *See, e.g.*, *May 16, 2006 Hearing,* at 64-65; *May 17, 2006 Hearing*, at 9-11, 25. Under Section 5, the only imposition for the vast majority of proposed changes is a short suspension period for the change before it goes into effect while DOJ undertakes an administrative review that generally must be completed within 60 days. 42 U.S.C. § 1973c(a). As Don Wright, General Counsel of the North Carolina State Board of Elections testified, county officials he has worked with find that "preclearance requirements are routine and do not occupy an exorbitant amount of time, energy or resources[.]" *June 21, 2006 Hearing*, at 12. Wright continued: "I could probably knock-out a pre-clearance on a routine matter in a half hour." *Id.*

Indeed, Congress learned that Section 5 is viewed by many election officials in the covered jurisdictions as a tool that enhances the integrity of the political process and helps to avoid litigation. *June 21, 2006 Hearing*, at 12-13; *May 17, 2006 Hearing*, at 1415. Numerous organizations representing the interests of local and state governments (including covered

jurisdictions) filed a statement of unqualified support for Section 5's renewal. This letter, from the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors, stated: "While substantial progress has been made since passage of the Voting Rights Act in 1965, it has not yet resulted in the elimination of voting discrimination. Congress must renew [Section 5 and the other temporary] provisions of the Voting Rights Act." 152 Cong. Rec. H5143-02 (daily ed. July 13, 2006).

The modest administrative burden on, and benefits for, Section 5 jurisdictions were important considerations to Congress, and particularly for those members representing covered jurisdictions. Congress passed the 2006 reauthorization with overwhelming bipartisan support; the bill received unanimous support in the Senate and the support of a substantial majority of members of the House of Representatives from the covered States as well. Indeed, in this case, among the covered jurisdictions, only the Governor of Georgia filed a brief in support of Appellant.[24]

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[24] In discussing bailout eligibility, *see* Br. at 22-24, Governor Perdue fails to acknowledge that, just five months ago, plaintiffs brought a successful Section 5 enforcement action against the State of Georgia for failing to submit its new voter registration data matching system for preclearance. *See Morales v. Handel*, No. 08-3172 (N.D. Ga. Oct. 27, 2008) (three-judge court).

* * *

The history of the Voting Rights Act, and the 2006 congressional record detailed above, offer powerful evidence of the continuing need for Section 5 to remedy and deter unconstitutional discrimination in covered jurisdictions.

II. IN REAUTHORIZING SECTION 5, CONGRESS RESPECTED THE CONSTITUTIONAL BALANCE EMBODIED IN THE RECONSTRUCTION AMENDMENTS AND REFLECTED IN *BOERNE* AND ITS PROGENY

City of Boerne v. Flores, 521 U.S. 507 (1997), and its progeny, like this Court's earlier precedents, recognize that the Reconstruction Amendments grant distinctive enforcement powers to Congress. *See id.* at 517-18; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion) (Congress's enforcement powers "include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"). Thus, where Congress acts "within its sphere of power and responsibilities," *Boerne*, 521 U.S. at 535, it enjoys substantial latitude to fashion remedies, even when those remedies "intr[ude] into areas traditionally reserved to the States." *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (*citing City of Rome*, 466 U.S. at 179). Congress's broad enforcement powers, however, are not boundless. Rather, the Reconstruction Amendments create a discernible balance among the powers of Congress, those of the States, and those of this Court. *Boerne*, 521 U.S. at 522-24.

To achieve this important balance, this Court's precedents recognize that enforcement legislation may be set aside only if it substantively redefines or expands constitutional rights, such that it encroaches on powers reserved to the States or this Court. *Boerne*, 521 U.S. at 519-29 (citing, *inter alia*, *Oregon v. Mitchell,* 400 U.S. 112 (1970)); *see also Katzenbach*, 383 U.S. at 326. "The line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Boerne*, 521 U.S. at 519-20. To ensure that Congress does not exceed its broad authority, *Boerne* announced the congruence-and-proportionality test, which guides the determination of whether legislation is remedial (and valid) or substantive (and invalid). *Id.* at 519-20. Legislation satisfies the congruence-and-proportionality test unless it "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." *Id.* at 532.

The concern with the constitutional balancing reflected in *Boerne* explains why this Court consistently has pointed to Section 5 as an exemplar of remedial enforcement legislation. *See*, *e.g.*, *id.* at 530-33; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639, 640 (1999); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-38 (2003); *id.* at 756-57 (Kennedy, J., dissenting). Unlike the statutes at issue in *Boerne* and its progeny, Section 5, consistent with the "pervading purpose" of the Reconstruction Amendments, is

designed to remedy racial discrimination. *Slaughter-House Cases*, 83 U.S. 36, 71 (1873); *see also Tennessee v. Lane*, 541 U.S. 509, 562-63 (2004) (Scalia, J., dissenting).

Moreover, when Section 5 was passed in 1965, as with every subsequent reauthorization, Congress, after careful examination, identified an existing pattern of purposeful discrimination in voting and decided to combat it with a measure designed to deter some of the worst problems. Congress has approached each reauthorization with knowledge of the Act's history, but directed its attention toward an assessment of whether ongoing voting discrimination in the covered jurisdictions warranted reauthorizing the Section 5 remedy. It is not permanent but it is designed to meet a grave constitutional harm.

Finally, in stark contrast to the legislative process underlying the Religious Freedom Restoration Act (the statute at issue in *Boerne*), during the 2006 reauthorization, Congress carefully considered this Court's rulings and drew upon them as it charted its legislative course. *See*, *e.g.*, *May 4, 2006 Hearing*, at 11-12, 23-24, 39, 54-55, 58; *May 16, 2006 Hearing*, at 4-5, 21, 44-45, 90, 94; *May 17, 2006 Hearing*, at 50-54, 65-70. As recognized in *Boerne*, Congress acts appropriately by so relying on this Court's precedents. *See* 521 U.S. at 536 ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.").

A. Appellant's Disagreements With Congress's Fact-finding and Predictive Judgments Do Not Undermine Section 5's Constitutionality

It is axiomatic that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process," and that this Court affords deference to Congress's "predictive judgments." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 199 (1997). Thus, this Court does not second-guess Congress's reasonable factual determinations or predictive judgments. Rather, the Court analyzes whether the evidentiary record permits the conclusion that Congress's legislation was responsive to a constitutional harm, such that the legislation is remedial and not substantive. *See Boerne*, 521 U.S. at 530-32.

Appellant does not seriously claim that the reauthorization of Section 5 involves the substantive redefinition of a constitutional right, which is the touchstone under *Boerne*. Instead, Appellant seeks to reopen numerous debates about the evidentiary record that were fully aired before, and reasonably resolved by, Congress. Among other issues considered and addressed during ten months of hearings described *supra,* Congress carefully considered each of the following:

- Some witnesses urged that circumstances in the covered jurisdictions no longer warrant the Section 5 remedy. *May 4, 2006 Hearing*, at 20; *May 17, 2006 Hearing*, at 207; *May 10, 2006 Hearing*, at 108. But the weight of the evidence before

Congress showed that many covered jurisdictions continue to show recalcitrance even 40 years following the adoption of a powerful prophylactic remedy; indeed, numerous jurisdictions persist in adopting new discriminatory voting laws even after prior laws have been invalidated under Section 5 or 2. *See* Part I, *supra*; *October 18, 2005 Hearing*, at 18; *June 21, 2006 Hearing*, at 130-34; *June 13, 2006 Hearing*, at 235; *March 8, 2006 Hearing*, at 1606-08.

- Similarly, Congress learned that, although the rate of DOJ objections has declined, the quantity and quality of continuing objections—not to mention Section 5 enforcement actions, MIRs, and Section 5's role in deterring jurisdictions from attempting to implement discriminatory voting regulations—demonstrates that Section 5 remains necessary to remedy widespread voting discrimination in covered jurisdictions. H.R. Rep. No. 109-478, at 21-25, 53; *March 8, 2006 Hearing*, at 177; Pub. L. No. 109-246 § 2(b)(4), (5).

- Members of Congress explicitly sought to determine whether Section 2, standing alone, was sufficient to combat voting discrimination, and they learned, based on statistical evidence and testimony of witnesses who had considerable experience with both provisions, that

Section 2 is an inadequate remedy in the covered jurisdictions. *See* H.R. Rep. No. 109-478, at 57; *May 16, 2006 Hearing*, at 61; *May 17, 2006 Hearing*, at 80.

- Congress also considered the effect of Section 5 on the covered jurisdictions. The evidence demonstrated that the statute's administrative burden is modest, and that Section 5 has important benefits for covered jurisdictions. *See* Part I. C, *supra*.

As demonstrated, the record shows that Congress's conclusions on each of these evidentiary matters were well-founded. Particularly in these circumstances, Appellant's request that this Court reweigh the evidence before Congress is inconsistent with *Boerne*. Instead, it is an improper invitation to displace and to fundamentally upset the constitutional balance that *Boerne* is intended to maintain. *See Boerne*, 521 U.S. at 519-29; *cf. Lane*, 541 U.S. at 558-63 (Scalia, J., dissenting).

B. The Reauthorized Section 5 Readily Passes Muster Under *Boerne*

In light of the foregoing discussion, a straightforward application of *Boerne*'s three-step analysis leads to the unmistakable conclusion that Section 5 remains appropriate enforcement legislation under the Fourteenth and Fifteenth Amendments. *See* J.S.App. 118-144.

Under *Boerne* step one (the nature of the constitutional right), Congress acted at the zenith of its enforcement powers in reauthorizing Section 5

because the statute is targeted at the intersection of a suspect classification (race) and a fundamental right (voting). J.S.App. 120-22. Unlike several of this Court's recent applications of *Boerne*, this is decidedly not a case where the Fourteenth Amendment acts as a vehicle for incorporating a rational-basis right through which Congress effectively redefines the substance of that right to prohibit a wide swath of state conduct. *See generally Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

Boerne step two considers the legislative record of deprivations of the constitutional rights in question. *See, e.g., Kimel,* 528 U.S. at 88-89; *see also* J.S.App. 124. As discussed in Part I.B, *supra*, Congress learned in 2006 that widespread unconstitutional discrimination against minority voters persists in the covered jurisdictions. This record of ongoing discrimination is of a wholly different magnitude than the records underlying each of the statutes this Court has analyzed (whether they were upheld or invalidated) under *Boerne* and its progeny. Indeed, as the District Court recognized, the 2006 record is filled with "evidence of the very kind of intentional discrimination the dissenters in *Hibbs* and *Lane* thought missing in those cases but present in *Katzenbach* and *City of Rome*." J.S.App. 127. The scope of the 2006 record (throughout Texas and the other covered jurisdictions) is all the more remarkable because, as discussed, Congress also learned that Section 5 deterred many covered jurisdictions from even attempting to implement discriminatory measures. In sum, consistent with its

"'historical experience'" in this area, *Boerne*, 521 U.S. at 525 (quoting *Katzenbach*, 383 U.S. at 308), Congress learned that racial discrimination remains both persistent and adaptive, such that Section 5's proactive remedy is still necessary.

Finally, under *Boerne* step three, Section 5 is congruent and proportional to ongoing deprivations of core constitutional rights in the covered jurisdictions. *See Boerne*, 521 U.S. at 520, 533. Section 5, as reauthorized, forbids intentionally (and thus unconstitutional) discriminatory voting laws, as well as a subset of voting laws with a racially discriminatory effect (those that are retrogressive). These are reasonable responses to widespread evidence of unconstitutional conduct. *See United States v. Georgia*, 546 U.S. 151, 158 (2006) (unconstitutional discrimination); *Boerne*, 521 U.S. at 529 (effects discrimination) (citing, *inter alia*, *City of Rome*). Furthermore, as this Court has recognized, Section 5 includes numerous features—not present in other statutes addressed under *Boerne*—that minimize its breadth: Section 5 is geographically limited (with bail-out and bail-in provisions to expand or contract coverage as necessary); it affects a discrete class of state laws (those related to voting); and it has a termination date. *See*, *e.g.*, *Boerne*, 521 U.S. at 533. And, importantly, Section 5 does not include a private damages remedy. This ensures that lines of political accountability are clear and avoids the risk that Congress has enacted a benefit program rather than remedial legislation. *See Hibbs*, 538 U.S. at 744-45 (Kennedy, J., dissenting); *see also Alden v. Maine*, 527 U.S. 706, 751 (1999).

This is not to deny that Section 5's proactive remedy has federalism costs. The Reconstruction Amendments, however, permit the statute's "intrusion into areas traditionally reserved to the States" to address the grave problem of racial discrimination in voting. *Lopez*, 525 U.S. at 282-83 (citing *Katzenbach* and *City of Rome*). The only question raised by this case is whether, since its prior reauthorizations, Section 5 has become "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." *Boerne*, 521 U.S. at 532. The record of ongoing discrimination in the covered jurisdictions and the tailored nature of the remedy leave no doubt that Section 5 passes that test.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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March 18, 2009

ADDENDUM

JURISDICTION **PAGE NOS.**

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[1] *Voting Rights Act: Section 5 of the Act - History, Scope & Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005).

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[2] *Voting Rights Act: Evidence of Continuing Need: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006).