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 OF AMERICA, ET AL.,

Appellees.

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

APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Whether §4(a) of the Voting Rights Act, which permits "political subdivisions" of a State covered by §5's requirement that certain jurisdictions preclear changes affecting voting with the federal government to bail out of §5 coverage if they can establish a ten-year history of compliance with the VRA, must be available to any political subunit of a covered State when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the VRA and no statutory text abrogates that interpretation with respect to §4(a).

2. Whether, under the Court's consistent jurisprudence requiring that remedial legislation be congruent and proportional to substantive constitutional guarantees, the 2006 enactment of the §5 preclearance requirement can be applied as a valid exercise of Congress's remedial powers under the Reconstruction Amendments when that enactment was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting-rights guarantees in jurisdictions covered only on the basis of data 35 or more years old, or even when considered under a purportedly less stringent rational-basis standard.

PARTIES TO THE PROCEEDINGS

Northwest Austin Municipal Utility District Number One is the only appellant. The appellees are Eric H. Holder, Jr., in his official capacity as Attorney General of the United States and these additional appellees that intervened as defendants below: the Austin Branch of the NAACP; Jovita Casares; David, Gabriel, and Lisa Diaz; Angie Garcia; Winthrop and Yvonne Graham; Nathaniel Lesane; Nicole and Rodney Louis; People for the American Way; Jamal, Marisa, and Wendy Richardson; the Texas State Conference of NAACP Branches; Travis County, Texas; and Ofelia Zapata.

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OPINION BELOW

The district court's opinion, reported at 573 F.Supp.2d 221, is reprinted at J.S.App.1-183.

JURISDICTION

The district court had jurisdiction under 42 U.S.C. §§1973*b* and 1973*l*. The district court issued its judgment on May 30, 2008, and a notice of appeal was timely filed. This Court has jurisdiction under 42 U.S.C. §1973*b*(a)(5) and 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution; the Fifteenth Amendment to the United States Constitution; Sections 4, 42 U.S.C. §1973*b*, and 5, 42 U.S.C. §1973*c*, of the Voting Rights Act, as amended, are reprinted at J.S.App.193-208.

STATEMENT OF THE CASE

In the past 44 years, nearly every facet of voting rights has changed in America. Voter registration, voter turnout, and representation in electoral offices have increased dramatically among African Americans, Hispanics, and other minorities. The country has its first African-American president, who received a larger percentage of the white vote than each of the previous two Democratic presidential nominees.

About the only thing that has not changed is §5 of the Voting Rights Act, which—based on an illegitimate presumption of resolute intransigence and endemic discriminatory animus—continues to impose an unparalleled federal intrusion on the contemporary generation in certain parts of the country. Even the data that determines the geographic sweep of §5's preclearance regime has not changed in 37 years. Congress had the opportunity, and obligation, in 2006 to reexamine §5's continued appropriateness, or at least update the coverage formula. It made no serious effort to do so.

The record Congress amassed in 2006, though voluminous in quantity, is not of the quality to demonstrate that §5 remains a valid exercise of Congress's enforcement powers. Congress cannot continue to impose the most intrusive inversion of our federalist structure on jurisdictions identified based solely on decades-old data when every indication demonstrates that the original emergency has now passed.

At the very least, jurisdictions like appellant Northwest Austin Municipal Utility District Number One that can demonstrate a history of respect for the voting rights of all residents must be allowed to remove the burden of federal preclearance. Congress made that opportunity available by statute, but the constricted reading of the bailout provision employed by the Attorney General and now adopted by the district court will prevent them from being able to even make the attempt. A working bailout

mechanism is the only possible means of trimming §5's overbroad coverage to anything resembling a constitutionally appropriate scope.

1. The VRA and the 2006 Reenactment of §5

Congress enacted the landmark Voting Rights Act of 1965 "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Before that enactment, "Congress explored with great care the problem of racial discrimination in voting," with extensive committee hearings and floor debate. *Id.*, at 308-309. The Act's primary substantive provision was the permanent, nationally applied §2, which closely tracked the Fifteenth Amendment's guarantee against denial or abridgment of the right to vote because of race or color. 42 U.S.C. §1973.

The Act's most unprecedented—still unparalleled—provision was §5, requiring certain jurisdictions to preclear changes affecting voting through either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. §1973*c* (Supp. 4 v.2 1965-1969). Section 5 was always acknowledged as a "substantial departure . . . from ordinary concepts of our federal system." Hearings on S. 407 *et al.* Before the Subcomm. on Const. Rights of the S. Comm. on the Judiciary, 94th Cong. 536 (1975) (testimony of J. Stanley Pottinger). But, in addition to

a coverage formula intended to restrict §5's applicability to States and localities with a demonstrable history of purposeful discriminatory conduct up to at least 1964, Congress provided that §5 coverage would lapse after five years. 42 U.S.C. §1973*b* (Supp. 4 v.2 1965-1969).

The Court upheld that original enactment as a constitutionally valid response to Congress's determination "that some of the States covered by §4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," making case-by-case enforcement of voting rights impossible. *Katzenbach*, 383 U.S., at 335. Explaining the need for §5, Attorney General Katzenbach likened the voting-rights problem in *all* the areas covered by §5 to similar problems involving school desegregation:

> "The justification for (the approval requirements) is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. * * * (A)s the Chairman may recall * * * at the time of the initial school desegregation, * * * the legislature passed I don't know how many laws in the shortest period of time. Every time the judge issued a decree, the legislature * * * passed a law to frustrate that decree." *Allen* v. *State*

Board of Elections, 393 U.S. 544, 567-568 (1969) (quoting Katzenbach's House testimony).[1]

In 1970, Congress extended §5 for an additional five years, and in 1975 for seven more. 42 U.S.C. §1973*b*(a) (1970); 42 U.S.C. §1973*b*(a) (1976). 1975 also marked the last time the §4(b) coverage formula was updated. 42 U.S.C. §1973*b*(b) (1976).[2] Meanwhile, the Court had taken an expansive view of §5, finding it applied to all manner of state and local changes that could have even an arguable effect on voting. *Allen*, 393 U.S., at 566-567. In 1978, the Court confirmed that §5 also applies broadly to require any political subunit within a covered jurisdiction to submit changes for preclearance, despite a more restrictive definition of "political subdivision" elsewhere in the Act. *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 118 (1978).

In 1982, Congress reenacted §5 again, this time with a 25-year lifespan. 42 U.S.C. §1973*b*(a)(8)

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[1] Katzenbach's testimony demonstrates the district court's error in asserting that "the [1965] record contained no evidence that *all* covered jurisdictions had engaged in such behavior." J.S.App.129.

[2] In 1976, Justice Marshall noted that "[o]riginally, the Act was intended to be in effect for only five years. While it has been twice extended, each extension was also for only a few years; five more years in 1970, and seven more years in 1975," and "[t]he Act's limited term is proof that Congress intended to secure prompt, and not gradual, relief." *Beer* v. *United States*, 425 U.S. 130, 152 (1976) (Marshall, J., dissenting).

(1988). Congress also amended §4(a), the "bailout" provision, intending to provide political subdivisions within covered States a mechanism for removing themselves from §5 coverage and a corresponding incentive to make constructive efforts to improve voter accessibility within their jurisdictions. 42 U.S.C. §1973*b*(b) (1988). To bail out, political subdivisions needed to demonstrate ten years' compliance with the VRA and meet other substantive requirements. *Ibid.* Congress initially expected a large number, perhaps the majority, of covered jurisdictions to be eligible for bailout, but the anticipated flood of bailout litigation never materialized. See S. Rep. No. 97-417, at 59 (1982); H.R. Rep. No. 97-227, at 39 (1981); Williamson, The 1982 Amendments to the Voting Rights Act, 62 Wash. U. L.Q. 1, 30-33 (1984). Since 1982, only fifteen jurisdictions have successfully bailed out, all of them in Virginia. Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php#note1.

As the 1982 extension of §5 was about to expire, Congress began gathering evidence regarding the need to further extend §5. Volumes of testimony and documentary evidence were amassed, but virtually all of it focused on attempts to demonstrate that racial discrimination as a general matter has not been completely eradicated.[3] Congress paid little, if any,

[3] *E.g.*, H.R. Rep. No. 109-478, at 34 (2006) (labeling polarized voting as "the clearest and strongest evidence" of continued discrimination); 2 Fannie Lou Hamer, Rosa Parks, and Coretta

attention to the actual concern motivating §5—the practice prevalent before 1965 of certain jurisdictions purposefully evading judicial enforcement of constitutional guarantees. Several witnesses attempted to direct Congress's attention to the constitutional problems with reenacting §5—especially a §5 that otherwise remains substantively unchanged from the 1965 original—on the contemporary record.[4] Congress was informed that, at the very least, updates to the coverage formula or amendments to the bailout provision were needed to render §5 a congruent and proportional response to contemporary problems.[5]

Scott King Voting Rights Act Reauthorization and Amendments Act of 2006: Hearing on H.R. 9 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 47-49 (2006) [hereinafter May 4 Hearing] (statement of Karen Narasaki); 1 Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 18 (2006) [hereinafter Evidence of Continued Need] (statement of Bill Lann Lee); *id.,* at 26-28 (statement of Nadine Strossen).

[4] *E.g.*, May 4 Hearing, at 20-22, 24-25 (statement of Roger Clegg); Understanding the Benefits and Costs of Section 5 Preclearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 125-129, 134-136 (2006) [hereinafter Benefits and Costs] (responses of Nathaniel Persily).

[5] *E.g.*, Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 91-92 (2005) (statement of Gerald Hebert); 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn); 152 Cong. Rec. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood).

Congress, nevertheless, reenacted §5 essentially unchanged in 2006, extending it for another 25 years. 42 U.S.C. §1973*b*(a)(8). The 2006 enactment will not expire until 2031, 66 years after §5 was originally enacted as a five-year emergency measure. Congress did not update the coverage formula at all, and it still relies on data from 1972 and earlier. 42 U.S.C. §1973*b*(b). Congress also left the bailout provision unchanged from the 1982 version. 42 U.S.C. §1973*b*(a).

2. Northwest Austin Municipal Utility District Number One

The district is a municipal utility district created under Texas law around 1987 to perform certain governmental functions, including bond issuance for infrastructure construction and tax assessment to service bond indebtedness, for a neighborhood built on previously undeveloped land. See Tex. Water Code §54.239; SJEx.2. It is located within the City of Austin and Travis County, but it is independent of both and subject only to the State's supervision. See Tex. Water Code §54.239.

The district is governed by a board of five directors, who are elected to staggered four-year terms in biannual nonpartisan elections. Voters choose two or three candidates, depending on the number of director positions up for election, and the candidates with the highest vote totals are elected. See, *e.g.*, SJExs.6, 7, 9, 37.

Under Texas law, the district does not register voters but is responsible for its elections. Before 2004, the district's elections were held at private residences. Those polling places were precleared and never the subject of discrimination-related complaints, but the board eventually desired to hold elections at a more convenient public location, like the neighborhood school. See SJEx.12, at 33; SJEx.28, at 63; SJEx.35, at 50. While inquiring about holding elections at the school, the district learned that it could contractually delegate the conduct of its elections to Travis County and put district elections on the countywide ballot. SJEx.28, at 57-59, 65-66.

That arrangement would also benefit voters by allowing them to go to a single, convenient, public location to vote in all local elections at the same time and by permitting the district to utilize Travis County's election apparatus, including minority and language-minority election officials and precinct workers and extensive early-voting opportunities. SJEx.28, at 57-59, 65-66; J.A.90-92. With preclearance, the district has contracted with Travis County to conduct its elections since 2004. SJEx.9.

The district has always complied with §5's requirements, seeking and getting preclearance from the Attorney General when it changed election practices and procedures. SJExs.2-9. The Attorney General has never interposed an objection to any of the district's preclearance submissions. J.A.390. No election-related lawsuit has ever been filed against the district. *Ibid.* No one has complained about or

questioned any voting or election procedure used by the district. The intervenors in this case uniformly testified that they could not identify any problem with or complaint about the district's elections. See J.A.73-76, 118-121, 126-129, 139-141, 150, 165-166, 179-185, 199-200, 212-214, 224-226, 234-236, 245-246, 248-249, 322, 336, 349, 352, 367-368, 381.

3. The District Seeks Bailout or a Declaration Regarding §5's Constitutionality.

On August 4, 2006, the district filed suit seeking a declaration that the district had met the bailout requirements of §4 of the VRA or, in the alternative, that the reenactment of §5 was an unconstitutional exercise of congressional authority. The district moved for summary judgment, submitting ample evidence that it meets the substantive criteria for bailout required under 42 U.S.C. §1973*b*(a)(1). *E.g.*, J.A.388-391. Cross-motions for summary judgment were filed by the Attorney General and by several organizations and individuals who had been permitted to intervene despite their inability to identify any grievance beyond a philosophical objection to the district's suit.

In a May 30, 2008 opinion, the three-judge panel denied the district's motion for summary judgment and granted those of the Attorney General and defendant-intervenors. J.S.App.1-154. The court did not reach the question whether the district satisfied the bailout criteria, having held that the district was not a political subdivision eligible for bailout. It further

held, as its primary holding on §5's constitutionality, that the proper standard for reviewing legislation enforcing the Fifteenth Amendment was the purportedly rational-basis review articulated in *Katzenbach* and that the preclearance requirement of §5 met that standard. The court held, alternatively, that even reviewed under the purportedly different congruence-and-proportionality test of *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the preclearance mechanism was constitutional. J.S.App.1-154. The district timely appealed, and the Court noted probable jurisdiction.

SUMMARY OF THE ARGUMENT

The VRA's bailout mechanism was intended to incentivize jurisdictions, especially at the local level, to improve voting accessibility and to narrow the scope of §5's geographic coverage to any remaining pockets of recalcitrance. The statute is supposed to effectuate that purpose by making bailout available to "political subdivisions" within covered States. Although the VRA contains a restrictive definition of "political subdivision" that excludes most subunits smaller than counties, the Court has held that this restrictive definition applies only for the purpose of identifying entities that may be subject to separate coverage under §4(b) and does not define "political subdivision" elsewhere in the Act. Fragments of legislative history, which are countered by assertions that bailout is intended to be available to any covered jurisdiction, cannot abrogate the Court's statutory interpretation.

The district is a political subdivision within the ordinary meaning of the term and under Texas state law. Interpreting the §4(a) bailout provision to permit the district access to bailout is necessary to fulfill bailout's purpose and mitigate constitutional problems with §5. The district court's interpretation makes bailout a virtual nullity in all but a very few covered jurisdictions, apparently all in Virginia. Moreover, that interpretation reorders state government by putting counties in control of entities not subject to their authority under state law. If bailout is unachievable, it cannot reduce §5's overbroad geographic coverage.

In any event, the 2006 enactment of §5 must be subjected to a meaningful evaluation to determine whether its extraordinary prophylactic remedy is a constitutionally valid exercise of Congress's enforcement power under the Reconstruction Amendments. The enforcement clauses of the Fourteenth and Fifteenth Amendments are substantively identical. The Court has never suggested that the standard for evaluating Congress's exercise of the enforcement power under either clause is different and less stringent.

Section 5 sweeps far beyond purposeful discrimination, unnecessarily requiring federal vetting of vast numbers of constitutionally benign state and local changes. That unparalleled federal veto was originally enacted to address a specific, acute problem—the gamesmanship by which recalcitrant States and localities formerly attempted to stay one step ahead

of federal decrees. The preemptive §5 can only be justified as a response to such a problem; purposeful discrimination that has ripened into a constitutional violation is adequately addressed by direct prohibitions like §2. Absent evidence that case-by-case adjudication remains an unviable method of enforcing constitutional guarantees, §5 cannot be employed simply because a blunt instrument is easier to wield than a litigation scalpel.

The record Congress amassed in 2006 does not demonstrate that covered jurisdictions continue to attempt to evade enforcement. Such voting discrimination as remains is isolated in time and place, neither confined to nor prevalent in covered jurisdictions, and can be remedied in the courts. The evidence on which Congress and the district court relied fails to establish that conditions in covered jurisdictions are anything like those to which §5 might be tailored. The record instead demonstrates the progress that has been made in overcoming voting discrimination in America over the past four decades.

In addition to being the most serious compromise of our federalist structure on the statute books, §5 exceeds the bounds of any tailored remedy in several other ways. Especially given Congress's failure to update the coverage formula last amended in 1975, §5's geographic boundaries bear no rational relationship to the locus of any problems that may persist. Nor does Congress recognize any meaningful time limit on §5, as it appears to believe it may extend the

once five-year provision into perpetuity on ever more stale evidence. Finally, §5 remains expansive in subject matter, not confining itself to such issues as redistricting but continuing to apply to the most minute and obviously benign changes like moving a polling place from a private garage to a public school.

ARGUMENT

I. THE BAILOUT PROVISION SHOULD BE INTERPRETED TO PERMIT THE DISTRICT TO MAKE USE OF IT.

A. Bailout Was Intended to Be a Functional Mechanism That Incentivized Compliance and Limited §5's Coverage to Problem Areas.

The original VRA's bailout provision, essentially, provided a way for States or separately covered political subdivisions to demonstrate, before the original §5 lapsed in five years, that they had been covered by mistake. Under the coverage formula in §4(b), only jurisdictions that "maintained on November 1, 1964, any test or device," as defined in the Act, were intended to be covered. 42 U.S.C. §1973*b*(b) (Supp. 4 v.2 1965-1969). Under the original §4(a), a jurisdiction could bail out if it could show that it had not, in fact, done so for at least five years. 42 U.S.C. §1973*b*(a) (Supp. 4 v.2 1965-1969). "[T]he original bailout mechanism made no provision for local political subdivisions within a state covered in its entirety

to seek termination of coverage independently of the state," which "may have had the effect of providing little incentive for compliance at the local level." Williamson*, supra*, at 30. That lack of incentive for local jurisdictions to improve, which contributed to freezing potentially discriminatory systems in place, was regarded as a significant weakness of the VRA. See *id.*, at 31.

When, in 1982, Congress extended §5 for the third time, this time for 25 years, it intended the new bailout mechanism to provide an incentive for covered regions to improve from the local level up. See *id.,* at 32. Congress plainly expected that a large number of subdivisions would be almost immediately able to show ten years' worth of compliance and constructive effort, making them eligible to escape §5 coverage, and, accordingly, delayed the effective date of the new bailout mechanism until 1984 so the Department of Justice could brace for the expected onslaught. *Id.*, at 33; see S. Rep. No. 97-417, at 59; H.R. Rep. No. 97-227, at 39.

B. The Statutory Text Accords with Congress's Purpose, Making Bailout Available to "Political Subdivisions" in Covered States.

Section 4(a) says clearly that "any political subdivision of" any covered State can seek a bailout

declaration. 42 U.S.C. §1973*b*(a)(1) (2006).[6] The district is in a covered State. See Voting Rights Act Amendments of 1975: Partial List of Determinations, 40 Fed. Reg. 43750 (1975).

A subunit like a utility district unquestionably falls within the ordinary meaning of "political subdivision." See, *e.g.*, Black's Law Dictionary 1159 (6th ed. 1991); accord, *e.g.*, *Branson Sch. Dist. RE-82* v. *Romer*, 161 F.3d 619, 628 (CA10 1998) (a school district was a "political subdivision"). And the district is considered a political subdivision under Texas law. See Tex. Const., Art. XVI, §59(a), (b); Tex. Water Code §54.011; *Bennett* v. *Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); cf. *Dougherty County, Ga. Board of Educ.* v. *White*, 439 U.S. 32, 43 & n.13 (1978) (school board

[6] More fully, §4(a) provides:

> "no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section." 42 U.S.C. §1973*b*(a)(1) (2006).

was "a political subdivision under state law"). Indeed, the Texas Election Code expressly denotes governmental units that hold elections as "political subdivision[s]" of the State. *E.g.*, Tex. Elec. Code §41.005. Accordingly, the 1988 preclearance submission relating to the district's creation identified "[t]he change affecting voting" as "a result of the creation of the District as a political subdivision of the State of Texas." SJEx.3.

The Court "give[s] the words of a statute their '"ordinary, contemporary, common meaning,"' absent an indication Congress intended them to bear some different import." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000); cf. *Lopez* v. *Monterey County*, 525 U.S. 266, 278-279 (1999) (turning to dictionary definitions to interpret "administer" in §5). The statutory text contains no indication that Congress intended "political subdivision" to bear anything other than its ordinary meaning in §4(a) because the only possible statutory source for a definition of "political subdivision" that would exclude subunits like the district—the definition of "political subdivision" in §14(c)(2)—was confined by this Court to a different context before the current version of §4(a) was enacted.

Section 14(c)(2) of the Act provides that "[t]he term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. §1973*l*(c)(2). The Court, however, has twice

held that §14(c)(2) does not make "political subdivision" a defined term throughout the VRA and, rather, §14(c)(2) is relevant only to identifying those subdivisions that can be subject to coverage determinations separately from their States. Determining the reach of §14(c)(2), *Sheffield* explained that "Congress' *exclusive* objective in §14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under §4(b)." 435 U.S., at 131, n.18 (emphasis added).

Accordingly, §14(c)(2) limits "political subdivision" only as the term is used in §4(b), the coverage formula, 42 U.S.C. §1973*b*(b), and not as used in §5 or in §4(a), which contains the bailout provision. *Sheffield*, 435 U.S., at 120-122 (stating that "§4(a) imposes a duty on *every entity* in the covered jurisdictions having power over the electoral process, *whether or not the entity registers voters*" and rejecting the "conclusion that §5 should apply only to counties and to the political units that conduct voter registration" (emphasis added)); see also *United States* v. *Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 554-555 (CA5 1980) ("[T]he Supreme Court has held that [§14(c)(2)'s] definition limits the meaning of the phrase 'State or political subdivision' only when it appears in certain parts of the Act, and that it does not confine the phrase as used elsewhere in the Act."). *Dougherty County* confirms the effect of *Sheffield*'s rationale on the application of §14(c)(2). *Dougherty County* recognized that "Section 5 applies to all changes affecting voting made by 'political

subdivision[s]' of States designated for coverage pursuant to §4 of the Act," 439 U.S., at 43 (alteration in original), and held that *Sheffield* "squarely foreclosed" a school board's contention that it was not a political subdivision because §14(c)(2) applied and because the board did not register voters. *Id.*, at 44. Although the school board did not register voters—indeed, did not even conduct elections—it was a political subdivision under the Act for purposes outside the coverage limitation imposed by §14(c)(2). *Ibid.*

Sheffield's limitation of §14(c)(2)'s application was necessary if the Act was to have Congress's intended effect of eradicating devices limiting access to voting at whatever governmental level they may be employed. See *Sheffield*, 435 U.S., at 120-121 (noting that "[t]he congressional objectives plainly required that §4(a) apply throughout each designated jurisdiction" and that "[i]f it did not have this scope, the covered States . . . could have easily circumvented §4(a) by, *e.g.*, discontinuing the use of literacy tests to determine who may register but requiring that all citizens pass literacy tests at the polling places before voting"); *id.*, at 122 ("The terms of the Act and decisions of this Court clearly indicate that §5 was not intended to apply only to voting changes occurring within the registration process."). Indeed, because "political subdivision" is used to denote the scope of numerous provisions, were the §14(c)(2) definition not cabined to the context of coverage determinations, much of the VRA's substantive protection would be

eviscerated. "The usage 'in a political subdivision,' which occurs in §4(a) and in many other sections of the Act, see, *e.g.*, 42 U.S.C. §§1973*a*(a)-(c) (1970 ed., Supp. V), would be nonsensical if 'political subdivision' denoted only specific functional units of state government." *Sheffield*, 435 U.S., at 128, n.15. The Court recognized that applying §14(c)(2)'s definition too broadly would have permitted States to circumvent many of the Act's protections. See *id.*, at 121-122. And applying the definition throughout would distort the VRA in other ways.

It would make no sense to treat the district as a "political subdivision" that can seek judicial preclearance, 42 U.S.C. §1973*c*(a), or to which the Attorney General may assign observers or that may petition for observers' removal, *id.*, §§1973*a*, 1973*f*(a)(1)-(2), 1973*k*(c), but not treat it as a "political subdivision" for bailout purposes. "Political subdivision" is used to denote relevant governmental subunits in numerous provisions, to identify, for example, entities that are bound by §2's substantive prohibition of discrimination, *id.*, §1973, are prohibited from using discriminatory voting requirements or prerequisites and tests or devices, *id.*, §§1973(a), 1973*b*(a)(1), are prohibited from using voting qualifications or prerequisites to deny language minorities the right to vote, *id.*, §1973*b*(f)(2), and are required to provide non-English election information, *id.*, §1973*b*(f)(4).

When it added "any political subdivision of [a covered] State . . . , though such determinations were not made with respect to such subdivision as a

separate unit" to the list of jurisdictions that could pursue bailout, 42 U.S.C. §1973*b*(a)(1), Congress made no change to §§4(a) or 14(c)(2) to incorporate §14(c)(2)'s restrictive definition of "political subdivision" into §4(a). The post-comma phrase "though such determinations were not made with respect to such subdivision as a separate unit" is simply clarifying language, responsive to *City of Rome* v. *United States*, 446 U.S. 156 (1980), in which the Court recognized that the earlier bailout provision made bailout unavailable to any political subdivisions that were not separately covered. *Id.*, at 167-168. Instead of invoking coverage eligibility, Congress stated simply that bailout is available to all political subdivisions in a covered State regardless whether they were separately covered. The phrase in no way limits the term "any political subdivision" to only subdivisions that could be separately covered. Had Congress, despite its intent to expand bailout, wanted to apply §14(c)(2) to the bailout context, it could easily have expressly limited bailout to subdivisions to which a coverage determination could have been made.

The district court also relied on legislative history, in particular statements in the 1982 House and Senate reports. Those statements do suggest what the enacted statutory text does not—that the revised §4(a) would incorporate §14(c)(2), limiting bailout to counties, parishes, or other units that register voters. See H.R. Rep. No. 97-227, at 2; S. Rep. No. 97-414, at 2, 57, n.192, 69. But such statements are insufficient to override the statutory text, which

must be interpreted in light of the Court's earlier cabining of the §14(c)(2) definition to the coverage context. See, *e.g.*, *Reno* v. *Bossier Parish Sch. Board*, 520 U.S. 471, 483-484 (1997) ("Congress has made it sufficiently clear that a violation of §2 is not grounds in and of itself for denying preclearance under §5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments . . . does not change our view."); *Georgia* v. *United States*, 411 U.S. 526, 533 (1973) (concluding that Congress's failure to make substantive changes to §5 indicated Congress's agreement with the Court's broad interpretation of that section).

Congress is presumed to take cognizance of the Court's prior interpretations of statutes. See *Williams,* 529 U.S., at 434; *N.L.R.B.* v. *Amax Coal Co.,* 453 U.S. 322, 329 (1981). Congress may abrogate those interpretations only by amending statutes. See *Bossier Parish*, 520 U.S., at 484 ("We doubt that Congress would depart from the settled interpretation of §5 and impose a demonstrably greater burden on the jurisdictions covered by §5 . . . by dropping a footnote in a Senate Report instead of amending the statute itself."). In any event, the isolated statements suggesting that bailout would be limited to counties conflict with numerous clear statements indicating bailout was intended to be a workable, frequently used procedure available to "*any* covered jurisdiction." H.R. Rep. No. 109-478, at 93 (emphasis added); see also, *e.g.*, *id.*, at 25, 58, 61; S. Rep. No. 97-417, at 48, 53, n.182, 59; H.R. Rep. No. 97-227, at 39.

C. Interpreting §4(a) to Include All Political Subdivisions in Covered States Mitigates §5's Constitutional Infirmity.

In addition to being required by the statutory text as informed by the Court's precedent, an interpretation of §4(a) making bailout available to all political subunits in covered States is required to mitigate the constitutional problems posed by §5. As discussed further below, the 2006 enactment of §5 is not a congruent and proportional exercise of Congress's enforcement power under the Reconstruction Amendments, in part because the coverage formula relies on decades-old data that cannot rationally identify contemporary offenders. The Court upheld the original §5 in part because "the remedy was directed only to those States in which Congress found that there had been discrimination." *United States* v. *Morrison*, 529 U.S. 598, 626-627 (2000). The same cannot be said of the 2006 enactment of §5. A workable bailout process is the only possible way of removing compliant jurisdictions from §5's overbroad coverage.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Att'y Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909); cf. *Miller* v. *Johnson*, 515 U.S. 900, 926-927 (1995) (finding it unnecessary to reach serious constitutional questions posed by an Attorney General interpretation of §5 when the VRA

should not be interpreted in the manner urged by the Attorney General). The most natural interpretation of §4(a)—especially given the Court's limiting interpretation of §14(c)(2)—makes the bailout mechanism available to all political subdivisions within covered States. That interpretation of §4(a) is also the only interpretation that minimizes constitutional concerns.

By contrast, it makes no constitutional sense to interpret §4(a) restrictively for bailout purposes only, making bailout unachievable for the vast majority of covered jurisdictions. To bail out, a covered jurisdiction must establish that itself and any entities within its territory meet detailed substantive criteria, like ten years' worth of compliance with §5—including timely submission of voting-related changes for preclearance—coupled with constructive efforts to improve electoral access within the same time period. 42 U.S.C. §1973*b*(a)(1)(D). In most covered States, including Texas, restricting bailout to the county level makes the bailout procedure practically unworkable. For example, the territory of Travis County, in which the district is located, includes at least 107 geographically smaller governmental units. J.A.87-88.

Under the district court's interpretation, however, the only way bailout could ever be achieved is if Travis County researched activities of each of those entities for the prior ten years. That monumental task would be further complicated because in most States, including Texas, counties have no authority to compel entities like utility districts to comply with

preclearance or even to share information with the county about past compliance. See Tex. Water Code Ch. 54; SJEx.14, at 23. As a result, it would be practically impossible for most counties to establish that every internal subunit meets the statutory conditions for bailout, see Williamson, *supra*, at 42[7]—the Hotel California problem.[8]

Unlike most States, Virginia structures its local government so that counties and independent cities do not contain large numbers of smaller governmental units. See Va. Code §15.2-1500(A). That idiosyncrasy explains why, of thousands of subdivisions covered by §5, only 15 have successfully bailed out since 1982, all of them counties or independent cities in Virginia. Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php#note1. One of the very few counties outside Virginia that has even attempted to bail out, Kings County, California, abandoned the effort after difficulties arose because some entities within its territory no longer even existed and because the county had no authority to compel §5 compliance by existing entities. Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of

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[7] Although Professor Williamson appears to have fallen into the trap of reading the §14(c)(2) definition into §4(a), his analysis of the problems such an interpretation generates remains sound.

[8] The Eagles, Hotel California (Asylum Records 1976) ("You can check out any time you like, but you can never leave.").

2006, at 273 & n.62 (Henderson ed., 2007). Section 4(a) should be interpreted to comport with the intent to make bailout not a Virginia-only remedy but a procedure "within the reach" of *all* compliant covered jurisdictions. H.R. Rep. No. 109-478, at 58.

Moreover, under the district court's interpretation, §4(a) interferes with and reorders state government in States like Texas by granting counties political control over jurisdictions that are not under their authority according to state law. The district, for example, was created under the Texas Constitution, see Tex. Const., Art. XVI, §59(a), (b), and operates exclusively under the supervision of the State, not Travis County. See Tex. Water Code §§54.012, 54.013(a), 54.0161, 54.5161. But under the district court's interpretation of §4(a), the VRA interposes Travis County between the district and the State of Texas by granting Travis County the discretion to determine when the district may terminate its preclearance obligations. Such an extraordinary invasion of the States' sovereign authority to organize their own governments only exacerbates the congruence and proportionality problems already presented by §5. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

II. THE 2006 ENACTMENT OF §5 EXCEEDED CONGRESS'S ENFORCEMENT POWERS.

Section 5 was originally enacted and justified as an emergency response to a very specific constitutional dilemma—the recalcitrance of a generation of officials that made case-by-case enforcement of voting rights impossible. That emergency no longer exists, and there is no indication it will recur. The voting-rights problems Congress identified in the 2006 record do not justify §5 and, rather, are quickly and fully remedied by §2 and other substantive prohibitions. Contemporary defiance of the type that justified §5 is rare, if it exists at all, and cannot justify renewing §5 for yet another generation. Congress's refusal to revisit the coverage formula and instead continue to rely on circumstances that existed between 1964 and 1972 shows its complete failure to conduct any meaningful comparative evaluation.

A. The Court Has Articulated a Consistent Standard for Whether Prophylactic Remedies Validly Enforce the Reconstruction Amendments.

The district court, in its primary rationale for rejecting the district's constitutional challenge, misread this Court's precedent as applying a different, less exacting standard for reviewing Congress's exercise of its Fifteenth Amendment enforcement power than to exercises of its Fourteenth Amendment enforcement power. Contrary to the district court's premise, this Court recognizes that the enforcement

clauses of the Fourteenth and Fifteenth Amendments are "virtually identical." *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373, n.8 (2001). Accordingly, *Boerne* drew explicitly on *Katzenbach*'s analysis of Congress's remedial powers under §2 of the Fifteenth Amendment in addressing the substantively identical §5 of the Fourteenth Amendment. *Boerne*, 521 U.S., at 519-520, 525-527. Nor do *Boerne* or its progeny purport to apply a standard differing from that applied in *Katzenbach* or, even earlier, in the *Civil Rights Cases*, 109 U.S. 3 (1883).

1. The Court's Standard Evaluates Whether Measures Properly Enforce Substantive Guarantees.

The authority conferred on Congress by each of the Reconstruction Amendments is limited to the power to "enforce" their substantive guarantees through "appropriate legislation." U.S. Const., Amdts. 13, §2; 14, §5; 15, §2; see *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-439 (1968) (discussing Thirteenth Amendment enforcement power). "[T]he same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power." *Kimel* v. *Fla. Board of Regents*, 528 U.S. 62, 81 (2000). The power to enforce, in the sense of the constitutional text, is the power to compel observance of or obedience to the rights secured by the amendments. See *Griffin* v. *Breckenridge*, 403 U.S. 88, 105

(1971); *Civil Rights Cases*, 109 U.S., at 11-14; see also American Heritage Dictionary 592 (4th ed. 2006).[9]

Congress's enforcement of individual rights typically takes the form of either direct proscription or a mechanism by which the right-holder can bring suit. *E.g.*, 42 U.S.C. §2000*e*-2(a) (proscribing certain discriminatory practices by government employers); *id.*, §2000*e*-5(f) (providing cause of action to enforce right to equal protection through suit against government employer). When Congress goes beyond proscribing constitutional violations—as with §5 of the VRA—the Court has demanded that Congress demonstrate that direct proscription is insufficient to effectively safeguard substantive rights. "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a *somewhat* broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S., at 81 (emphasis added). It does not include the authority to regulate a grossly broader swath of constitutionally benign conduct with little demonstrated correlation to actual constitutional violations.

"As broad as the congressional enforcement power is, it is not unlimited." *Oregon* v. *Mitchell*, 400

[9] Accord N. Webster, American Dictionary of the English Language 396 (1860) ("To put in execution; to cause to take effect; as, to enforce the laws"); J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To enforce a law' ").

U.S. 112, 128 (1970) (Black, J.). "Legislation which alters the meaning of" a constitutional clause "cannot be said to be enforcing the Clause," *Boerne*, 521 U.S., at 519, and neither can legislation that alters the enduring structural principles that undergird the division between federal and state power. "[T]he power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Mitchell*, 400 U.S., at 128 (Black, J.). Prophylactic legislation enacted to enforce the substantive guarantees of the Reconstruction Amendments must be clearly related to remedying violations of those guarantees. And the more a prophylactic measure intrudes on the scope of other constitutional provisions and principles, the more critical it is that the measure fit as closely as possible to a valid remedial objective.

In several cases, the Court has explained that when Congress enacts prophylactic legislation under the Reconstruction Amendments it must "identify conduct transgressing the . . . substantive provisions" it seeks to enforce and "tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid Postsecondary Educ. Expense Board* v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999). Congress must compile a legislative record that demonstrates a "history and pattern" of constitutional violations of the right Congress purports to enforce. *Garrett*, 531

U.S., at 368; accord *Nev. Dept. of Human Res.* v. *Hibbs*, 538 U.S. 721, 729 (2003). And Congress must confront evidence of a pattern of *purposeful* discrimination to demonstrate constitutional violations under either the Fourteenth or Fifteenth Amendment. See *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993); *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion). The legislative measures selected must not be "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S., at 532. As the Court has repeatedly said, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

When evaluating an enactment under the Reconstruction Amendments' enforcement power, a reviewing court must identify the "metes and bounds of the constitutional right in question," *Garrett*, 531 U.S., at 368, with "some precision," *id.*, at 365. Then the court asks "whether Congress identified a history and pattern," *id.*, at 368, of "widespread and persisting deprivation[s]" of the relevant right, *Boerne*, 521 U.S., at 526. Finally, the court determines whether the statutory remedy is congruent and proportional to the constitutional right Congress is purporting to enforce. *Garrett*, 531 U.S., at 372.

2. *Katzenbach*, *Boerne*, and Other Cases Articulate a Consistent Standard That Applies to §5.

Contrary to the district court's premise, in evaluating the original enactment of §5, *Katzenbach* acknowledged and respected the same limitations on Congress's enforcement authority recognized in later cases, including *Boerne* and its progeny. Consistently, the Court has inquired whether Congress amassed a legislative record substantiating the existence, scope, and contours of the problem it sought to address in order to justify prophylactic legislation. See *Katzenbach*, 383 U.S., at 308 ("Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting."); accord *Garrett*, 531 U.S., at 368 (examining "whether Congress identified a history and pattern of unconstitutional [conduct]"); *Jones*, 392 U.S., at 426-430 (surveying and evaluating the legislative record justifying the 1866 enactment of 42 U.S.C. §1982 as a measure intended to enforce the Thirteenth Amendment by eliminating badges and incidents of slavery, including evidence justifying applying §1982 nationwide).

As the Court made plain in *Boerne*, a single standard of review has been uniformly applied in a line of cases evaluating prophylactic enforcement legislation that stretches unbroken from the *Civil Rights Cases*. *Boerne*, 521 U.S., at 524-527 (noting that "[a]lthough the specific holdings of these early cases might have been superseded or modified, their treatment of Congress' §5 power as corrective or

preventive, not definitional, has not been questioned" (internal citations omitted)). *Boerne* treats *Katzenbach* itself as paradigmatic. *Id.*, at 525-526. *Boerne* and cases following it do no more than elaborate and clarify the standard for reviewing Congress's efforts to enforce the Reconstruction Amendments that has for more than a century served to ensure Congress does not work substantive alterations in the constitutional fabric.

The Court in *Katzenbach* well understood that in light of the extraordinary authority assumed in §5 to preemptively veto state laws, the "constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." 383 U.S., at 308. *Katzenbach* further acknowledged that the type of evidence needed to justify preclearance differs in kind from that which justifies substantive prohibitions like §2. Section 5, *Katzenbach* recognized, was supported specifically by evidence of the "exceptional conditions" present in 1965 that could "justify legislative measures *not otherwise appropriate*." *Id.*, at 334 (emphasis added); accord *Miller*, 515 U.S., at 926-927. Section 5 thus could not be "appropriate legislation," U.S. Const., Amdt. 15, §2, to enforce the Fifteenth Amendment without evidence of a clear symmetry between an existing problem and that extraordinary remedy. See *Katzenbach*, 383 U.S., at 335 ("Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."); see also *Boerne*, 521 U.S., at 530 ("The appropriateness of remedial

measures must be considered in light of the evil presented."); cf. Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 97 ("[T]he power of Congress comes into play only when the precondition of a denial of equal protection of the laws by a state has been met. Congress' view that the precondition has been met should be persuasive, but it cannot be decisive.").

Katzenbach further acknowledged that prophylactic legislation that purports to enforce the Fifteenth Amendment's provisions but in fact extends far beyond the scope of predicate constitutional violations would be invalidated. "[W]hen the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment." *Katzenbach*, 383 U.S., at 326; see *Boerne*, 521 U.S., at 527 ("Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law."). *Katzenbach* itself thus refutes the district court's mistaken suggestion that "the basic concerns animating the *Boerne* cases do not apply to legislation designed to prevent racial discrimination in voting." J.S.App.47.

Additionally, *Rome*'s upholding of the 1975 reenactment of §5 is equally consistent with *Katzenbach* and later cases. Although §5 may have quelled the immediate emergency when first enacted, there was no question the emergency prevailed as late as 1965, and the Court found "unsurprising and unassailable" the conclusion that ten years had not been long

enough to ensure that recalcitrant jurisdictions would not revert to their former ways and that another seven years of §5 was warranted. *Rome*, 446 U.S., at 182. But four decades is time enough for generations of officials to pass from power, for individuals to migrate into and out of covered jurisdictions, for others to be born and come of voting age, and for attitudes and mores to change. *Rome* nowhere suggests that Congress in 2006 or later could continue to rely on the 1965 emergency without a searching reevaluation of whether case-by-case adjudication remains insufficient to enforce substantive voting-rights guarantees. See *Boerne*, 521 U.S., at 533 (finding it significant that the renewal upheld in *Rome* lapsed in only seven years).

3. The Court Continues to Require a Demonstrated Fit Between Remedy and Substantive Right.

Neither *Hibbs* nor *Tennessee* v. *Lane*, 541 U.S. 509 (2004), relaxes the standard for evaluating Congress's attempts to exercise its enforcement power. Those cases simply reinforce the unsurprising point that, when Congress addresses matters involving a fundamental right or suspect class, constitutional violations by state actors are more likely to have occurred and a congressional record extensive enough to justify prophylactic legislation will generally be easier to amass. See *Hibbs*, 538 U.S., at 736; *Lane*, 541 U.S., at 524. And if predicate constitutional violations are more numerous, more widespread, and

more varied, a broader remedy may be constitutionally valid.

Hibbs and *Lane* do not change the constitutional text limiting Congress's power. Even when Congress addresses a fundamental right or suspect classification—as when it addresses racial discrimination in voting—Congress cannot base remedies on assumptions about predicate violations but must still amass a relevant record. See, *e.g.*, *Lane*, 541 U.S., at 528 (lauding the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"). When more fundamental rights are at stake, the constitutional problem may be larger, but the process of comparing the scope and nexus of the prophylactic to the constitutional problem cannot be more lax. See *id.*, at 530-533; *Hibbs*, 538 U.S., at 737-740.

Hibbs and *Lane* demonstrate why evidence Congress adduced of recent occurrences of voting-related discrimination may justify the continued existence of substantive provisions like §2 of the VRA, but they do not abrogate Congress's need to justify the far different, broader, and extraordinary remedy of §5. The district court failed to comprehend this distinction, erroneously suggesting that any time Congress may enact substantive prohibitions under the amendments it may also inject the federal government into state and local legislative processes by, for example, creating a federal bureaucracy with veto authority over state and local architectural designs or

leave policies. But Congress cannot employ a mechanism like §5, which reaches far beyond the scope of predicate constitutional violations and impinges on other constitutional principles, when that mechanism is not carefully tailored to the temporal, geographic, and other contours of predicate violations of substantive rights enshrined in the Fourteenth and Fifteenth Amendments.

B. Section 5 Is Not a Valid Exercise of Congress's Enforcement Powers.

1. Section 5 Is Not Tailored to Remedy a Demonstrable Record of Contemporary "Ingenious Defiance" in Covered Jurisdictions.

Congress's stated purpose in the 2006 VRA is "to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577. Section 1 of the Fifteenth Amendment states the constitutional guarantee: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amdt. 15, §1. That guarantee has been described more specifically as a guarantee against "*purposefully* discriminatory denial or abridgment by government of the freedom to vote."

Mobile, 446 U.S., at 65 (plurality opinion) (emphasis added); accord *Myers* v. *Anderson*, 238 U.S. 368, 379 (1915); *Guinn* v. *United States*, 238 U.S. 347, 363-365 (1915). To the extent Congress also intended to enforce the Fourteenth Amendment's Equal Protection Clause, that guarantee has also been characterized as a guarantee against purposeful discrimination. See *Mobile*, 446 U.S., at 66 (plurality opinion).

Section 2 of the VRA, which mirrors §1 of the Fifteenth Amendment, and the Act's other permanent substantive provisions aim directly at the heart of the actual discrimination the Constitution forbids. See, *e.g.*, 42 U.S.C. §§1973, 1973*a*, 1973*h*, 1973*i*. Section 5 was created to address the distinct issue that conditions in certain jurisdictions as of 1965 made enforcement through §2 and other substantive provisions impossible. Accordingly, §5 goes far beyond directly addressing purposeful discrimination. The archetypal prophylactic, §5 preempts *every* change related to voting—however minute or benign—in covered jurisdictions and subjects them to federal review. *Allen*, 393 U.S., at 566-567.

Section 5 thus sweeps far past purposeful discrimination to ensnare and preempt a massive number of constitutionally benign state voting enactments and practices. In its 2006 incarnation, it no longer does so on a temporary, emergency basis, nor is its effect circumscribed to all or only those jurisdictions for which there was evidence of present-day discrimination. Cf. *Katzenbach*, 383 U.S., at 315 (noting that the 1965 enactment was aimed "at areas where

voting discrimination has been most flagrant" through the time of its passage). Section 5 accordingly poses precisely the risk addressed by *Boerne*, that in enacting prophylactic legislation to prevent and remedy purported violations, Congress would instead rewrite the substantive scope of the Reconstruction Amendments and impermissibly reweigh the balance of state and federal power. See *Boerne*, 521 U.S., at 519 ("Congress does not enforce a constitutional right by changing what the right is."); cf. Bickel, *supra*, at 101 (reliance in the voting rights cases on Justice Marshall's dictum in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (1819), "de-emphasized altogether too much Marshall's caveat that the means chosen must also not be prohibited, and must 'consist with the letter and spirit of the constitution' ").

Section 5 ultimately rests on a presumption of bad faith, specifically a presumption that covered jurisdictions are inclined to enact purposefully discriminatory measures at a rate that could not be dealt with by ordinary litigation. As the Court has recognized, the original "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer* v. *United States*, 425 U.S. 130, 140 (1976). "Section 5 was directed at preventing a particular set of invidious practices that had the effect of 'undo[ing] or defeat[ing] the rights recently won by nonwhite voters.' " *Miller*, 515 U.S., at 925. "That is, the courts and Congress could ban

familiar disfranchising devices only to confront novel ones devised by southern states bent on evading the law." A. Thernstrom, Whose Votes Count?: Affirmative Action and Minority Voting Rights 21-22 (1987) (quoting NAACP executive director Roy Wilkins). When Congress originally created §5, it found specifically that (1) racial discrimination in voting was "an *insidious and pervasive evil* which had been perpetuated in certain parts of our country through *unremitting and ingenious defiance* of the Constitution," and (2) previous congressional measures had been "unsuccessful remedies." *Katzenbach*, 383 U.S., at 309 (emphasis added); see *Miller*, 515 U.S., at 925-926.

Section 5, in other words, cannot be justified simply on a record of discrimination in general. Instead, there must be a showing—as in *Katzenbach*—of a systematic pattern of covered jurisdictions recently engaging in concerted efforts to game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting once old barriers are judicially deemed unenforceable (or at least a meaningful demonstration that jurisdictions would have reverted to those practices had §5 not been reenacted). See *Miller*, 515 U.S., at 925; *Allen*, 393 U.S., at 567-568. Section 2 of the VRA, like other substantive prohibitions in federal law, is the remedy for ripened constitutional violations. Section 5 addresses a particular, different problem—the deliberate gamesmanship by which officials attempted to stay one step ahead of courts, making case-by-case adjudication of violations impossible.

See, *e.g.*, *Allen*, 393 U.S., at 567-568 (quoting Attorney General Katzenbach's testimony); Transcript of Oral Argument, at 47, *Riley* v. *Kennedy*, 128 S.Ct. 1970 (2008) (No. 07-77) (argument by Pamela S. Karlan) (comparing the §5 problem to a "game of Whac-A-Mole"). Circumstances in which case-by-case adjudication cannot keep up with a vicious circle of unconstitutional conduct present the only conceivably justifiable basis for inverting the traditional concept that constitutional violations are not ripe for prosecution until they have already occurred or are at least imminent. See *Beer*, 425 U.S., at 140.

To qualify as enforcement of substantive constitutional rights, the broad, prophylactic §5 would have to be tailored to "remedying or preventing such conduct." *Fla. Prepaid*, 527 U.S., at 639. Congress cannot be shown to have tailored its scheme without demonstrating the requisite "history and pattern," *Garrett*, 531 U.S., at 368; accord *Hibbs*, 538 U.S., at 729; *Fla. Prepaid*, 527 U.S., at 640, of gamesmanship by those jurisdictions targeted by the coverage formula. See *Lane*, 541 U.S., at 531 (upholding the validity of remedial legislation "as it applies to the class of cases" at issue); *Morrison*, 529 U.S., at 626 (invalidating VAWA's civil-remedy provision in part because it "applie[d] uniformly throughout the Nation," including to States with no history of discriminating against victims of gender-motivated violence); *Fla. Prepaid*, 527 U.S., at 647 (same with regard to the Patent Act and patent infringement). In other words, Congress needed to ask whether state and

local governments in covered jurisdictions remain generally so hellbent on depriving minorities of their voting rights that they presumptively cannot be trusted to enact fair voting practices and procedures without the federal Executive looking over their shoulder (and to answer that question in the affirmative). Congress did neither in reenacting §5.

Section 5 presents the most severe intrusion on state sovereignty in federal law, and the 2006 enactment cannot be upheld on the record adduced by Congress. The Court has made clear that the federalism costs exacted by §5 must be taken seriously and can only be justified by a real, specific problem. *Miller* explained that the Court's belief that "the federalism costs exacted by §5 preclearance could be justified by those extraordinary circumstances" identified in *Katzenbach* did not mean §5 could be justified in every circumstance. *Miller*, 515 U.S., at 926-927. Imposing such an extreme measure demands a clear demonstration that it remains a needed and justifiable emergency remedy, separate and distinct from the general justification for the VRA's core substantive provisions.

2. Section 5 Is Not Tailored to an Existing Pattern of Discrimination.

The 2006 legislative record does not demonstrate a pattern of actual or anticipated gamesmanship in covered jurisdictions that could justify the reenactment of §5. There is no evidence that conditions are

remotely similar to those justifying §5 in 1965 nor—importantly in assessing renewal of a four-decade-old remedy—that officials in covered jurisdictions would revert to the conduct of their forebears if §5 were allowed to expire. Cf. *Riley*, 128 S.Ct., at 1987 (Stevens, J., dissenting) ("Even though many of those changes are, at least in part, the consequence of vigorous and sustained enforcement of the VRA, it may well be true that today the statute is maintaining strict federal controls that are not as necessary or appropriate as they once were."). Instead, the record establishes that voting discrimination, both private and state action, persists in haphazard and uncoordinated instances in covered and uncovered jurisdictions alike that do not justify federal oversight designed to thwart repetitive and systematic avoidance of judicial decrees concerning voting rights.

Though the record is voluminous, the district court identified only three examples of efforts to actively evade enforcement of voting rights. Those instances fall far short of demonstrating a "history and pattern," *Garrett*, 531 U.S., at 368, to which such an expansive prophylactic as §5 could be tailored. And the contrast between the incidents identified by the district court and widespread pre-1965 tactics like fraudulent literacy tests, see, *e.g.*, Thernstrom, Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 Geo. J.L. & Pub. Pol'y, 41, 44 (2007), demonstrates the utter hollowness of the 2006 record in that regard. Any attempt to suggest otherwise dishonors the extraordinary achievements of the past four

decades and simply ignores the reality of today's America.

The district court cast Mississippi's attempt to implement the National Voter Registration Act as an example of gamesmanship. J.S.App.78-79, 131. In the district court's view, Mississippi's failure to adopt the Act's procedures for federal elections as the State's own for state elections, see *Young* v. *Fordice*, 520 U.S. 273, 279-280 (1997), was an effort to thwart a federal court's ruling eight years earlier striking down Mississippi's dual registration system, see *Operation PUSH* v. *Allain*, 674 F.Supp. 1245 (ND Miss. 1987), aff'd *sub nom. Operation PUSH* v. *Mabus*, 932 F.2d 400 (CA5 1991). Even assuming that Mississippi's actions in 1995 were an effort to avoid the court's 1987 ruling, which is not obvious, an eight-year gap between state actions hardly constitutes a pattern, let alone a problem that cannot effectively be addressed through litigation.

The court also considered *Dillard* v. *Town of North Johns*, 717 F.Supp. 1471 (MD Ala. 1989), an example of iterative state action, in this case to avoid the effects of a consent decree. J.S.App.131. As a result of other litigation, the town agreed to replace its at-large electoral system with single-member districts. *Dillard*, 717 F.Supp., at 1473. Following the agreement, but before the election, Alabama, with preclearance, applied its financial disclosure laws to candidates for municipal office. *Ibid.* The mayor of North Johns received the newly required forms and assisted white candidates with them. *Id.*, at

1474-1475. The mayor refused to assist two African-American candidates, and the court found that the town, through only its mayor, intentionally discriminated against those candidates. *Id.*, at 1475-1476. Not only were these the isolated actions of a single person, but they were successfully addressed through §2 litigation. *Ibid.* Section 5 would not have prevented the mayor's actions because he would not have submitted them for preclearance. This isolated, 20-year-old incident is no evidence that covered jurisdictions today continue to require federal oversight.

Finally, the court credited the events in Waller County, Texas as an example of gamesmanship. J.S.App.131. In 1978, a district court permanently enjoined the Waller County registrar's practice of presuming students of Prairie View A&M University, a historically black college, were not residents and requiring them to complete a registration questionnaire not required of other citizens. *United States* v. *Texas*, 445 F.Supp. 1245, 1261 (SD Tex. 1978), aff'd *sub nom. Symm* v. *United States*, 439 U.S. 1105 (1979). In 2004, the Waller County district attorney threatened to prosecute illegal voters, and he specifically identified students who he said were not entitled to a "special definition of 'domicile' for voting purposes." Evidence of Continued Need, at 1241-1242 (appendix to statement of Nadine Strossen). The Texas Secretary of State and Attorney General immediately informed the district attorney that he could not block registration and that no residency presumption could be applied to students that was not applied

to all voters in Texas. *Id.*, at 1242-1243. The NAACP and students filed suit, but, as the ACLU noted, "[g]iven the unambiguous position taken by the state, the law suit was quickly settled." *Id.*, at 1243. Later, county commissioners reduced the amount of time for early voting, which affected students who would have been on spring break on election day. J.S.App.92. The NAACP filed suit, and the county restored the full early voting period. *Ibid.*

The years-long gap between such incidents demonstrate that this is not an example of a jurisdiction systematically avoiding the rulings of the federal courts. And the swift actions of state officials and effectiveness of private litigation demonstrate that §5 is unnecessary to remedy these one-off occurrences, as the VRA itself recognizes. See 42 U.S.C. §1973*b*(d).[10]

Because the district court could cull from the legislative record only three highly debatable "examples" of gamesmanship supporting reauthorization of

[10] Moreover, incidents involving student-voter registration often bear no hint of racial discrimination. "Overly restrictive or vague residency requirements in state law confuse both election officials and students seeking to register alike. Because of this confusion, college students across the country have received false or misleading information on their eligibility to vote and the consequences of registering to vote." Ensuring the Right of College Students to Vote: Hearing Before the Subcomm. on Elections of the Comm. of H. Admin., 110th Cong. (2008) (statement of Rep. Robert Brady); see, *e.g.*, Evidence of Continued Need, at 1240-1241 (appendix to statement of Nadine Strossen).

§5, it relied on other evidence to justify extending it until 2031. Although acknowledging that "*section 2* contains the Act's basic prohibition against racial discrimination in voting," J.S.App.93 (emphasis added), the district court treated §2 litigation as evidence of the continued need for the far different §5 remedy. J.S.App.93-95. The court acknowledged, however, that Congress knew of only 14 §2 cases over the 23 years between 1982 and 2005 containing findings of intentional discrimination. J.S.App.93. Recognizing that this is not a large number, the court nevertheless asserted that those cases "offer powerful evidence." J.S.App.95. But of the eight cases the court specifically discussed, five involved events that occurred before 1990.[11]

Two of the three remaining examples of §2 litigation cited as evidence of §5's necessity involved challenges to districting schemes that had received §5 preclearance. See *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 480 (2006) (Stevens, J., dissenting) (*LULAC*); *United States* v. *Charleston County*, 316 F.Supp.2d 268, 274 (DSC 2003). The final example cited also highlights why §5 is no longer justified. In *Pegram* v. *City of Newport News*, No.

[11] See *Williams* v. *City of Dallas*, 734 F.Supp. 1317, 1325 (ND Tex. 1990); *Dillard*, 717 F.Supp., at 1475; *League of United Latin American Citizens* v. *Midland Indep. Sch. Dist.*, 648 F.Supp. 596, 597 (WD Tex. 1986); *Harris* v. *Siegelman*, 695 F.Supp. 517, 520 (MD Ala. 1988); *Political Civil Voters Org.* v. *City of Terrell*, 565 F.Supp. 338, 340-341 (ND Tex. 1983).

4:94cv79 (ED Va. Nov. 4, 1994), private litigants sued over a city's at-large electoral scheme, and within three months the city agreed to adopt a new multi-district plan before the next elections. Evidence of Continued Need, at 1114 (appendix to statement of Nadine Strossen).

The court also noted that many §2 cases never result in a final judgment because many end in settlements. J.S.App.94. Indeed, Congress heard testimony that in the nine covered States, 653 claims have resulted in various forms of relief. An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 159 (2006) [hereinafter Introduction to Expiring Provisions] (written response of Theodore Shaw). Those cases demonstrate not that §5 is still needed but the opposite, that §2 litigation effectively addresses claims of voting discrimination, and often the resolution does not require long, expensive litigation, as appellees have argued. *Ibid.* (many §2 lawsuits "are resolved through pre-trial settlement or . . . are dismissed because the jurisdiction adopted a remedial plan"). Like the Newport News case, those cases are examples of jurisdictions coming to satisfactory resolutions of possible constitutional violations, not fervently attempting to evade judicial correction.

The district court and Congress also relied heavily on evidence of racially polarized voting. H.R. Rep. No. 109-478, at 34; J.S.App.106. Racially polarized voting cannot justify §5 because it is not behavior

that §5 attempts to remedy, nor that Congress has power to address. Racial bloc voting is private action, not state action. See *Rogers* v. *Lodge*, 458 U.S. 613, 647, n.30 (1982) (Stevens, J., dissenting); Pitts, Section 5 of the Voting Rights Act, 81 Denv. U. L. Rev. 225, 261 (2003). Section 5 targets state action affecting voting; and state action is the only permissible target for Congress's enforcement powers under the Fourteenth or Fifteenth Amendment. See *Morrison*, 529 U.S., at 625-626; *Shaw* v. *Hunt*, 517 U.S. 899, 909-910 (1996); *Freeman* v. *Pitts*, 503 U.S. 467, 495 (1992).

Nor is evidence of racially polarized voting the same as evidence of retrogressive vote dilution. Purposeful dilution of voting power, which nullifies the ability of minority voters "to elect the candidate of their choice," is unconstitutional. *Shaw* v. *Reno*, 509 U.S., at 640-641. But there is no constitutional guarantee of a particular outcome in a nondiscriminatory electoral process. See *LULAC*, 548 U.S., at 428. Rather, to be a constitutional violation, there must be a "voting-procedure[s] change[ ]" diluting minority voting power. *Miller*, 515 U.S., at 926. As private action wholly disconnected from voting procedures, racial bloc voting cannot justify §5.

Even the evidence cited by the district court and relied upon by Congress that has arguable relevance to §5 still fails to establish a pattern of discrimination that warrants the inversion of our federal system. For example, the court considered disparities between whites and minorities in voter registration and

turnout. J.S.App.58-60. The court noted that Congress found it significant that three States, Florida, Texas, and Virginia, had registration-rate disparities between whites and either African Americans or Hispanics ranging from 11 to 31 percentage points. J.S.App.60 (citing H.R. Rep. No. 109-478, at 25, 29). The largest gap in registration, 31 points between whites and Hispanics, and turnout, 24 points between the same groups, was in Florida, H.R. Rep. No. 109-478, at 29, most of which is not even covered by §5.

While Congress did not apply §5 to Florida, it did apply it to seven States in which African Americans are registered at a rate higher than the national average. S. Rep. No. 109-295, at 8; 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn). In Texas, the registration disparity between whites and African Americans was only five points and in Virginia it was 11 points. H.R. Rep. No. 109-478, at 25, 29. The greatest gap in registration found in a wholly covered State was 16 points between whites and Hispanics in Texas. See *ibid.* Yet Texas's percentage of Hispanic voter registration is more than ten points higher than the national average and several points higher than in California and Colorado, noncovered States with substantial Hispanic populations. Benefits and Costs, at 155 (statement of Edward Blum & Lauren Campbell). Such small disparities, especially with no showing that they are caused by purposeful state action, cannot justify imposing the most intrusive federal law on

nine States, at least some of which have a demonstrably better record than many noncovered States.

The district court recognized that Congress also looked to the number of minority officeholders for evidence that §5 is necessary. J.S.App.62-63. Yet the court dismissed the significant increases—over 1,000 percent since 1965—in the number of minorities serving in elected office in the originally covered States, H.R. Rep. No. 109-478, at 18, reasoning that the gains were "uneven, both geographically and by level of office," J.S.App.63. The court ignored minority gains in local government and focused on statewide office. *Ibid.* But given that §5 affects local governments, and that statewide politicians often emerge from the ranks of local officeholders, the number of minorities elected to local-level public office is significant. Nor did the court compare progress in covered jurisdictions to that in noncovered jurisdictions, despite evidence that covered jurisdictions are doing as well as or better than noncovered regions at electing minority officeholders. *E.g.*, 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn). That minorities are elected to local office suggests that covered jurisdictions are not thwarting voting through iterative and strategic discriminatory changes. If minorities are able to register, vote, and elect candidates of their choice to local office, the reason two[12] of the covered States

[12] Congress observed that no African Americans had been elected to statewide office in Mississippi, Louisiana, or South

have not elected a minority to statewide office must lie somewhere other than with registration and voting procedure.

Congress and the district court also placed great significance on the Attorney General's objections to voting procedure changes submitted for preclearance between 1982 and 2005. J.S.App.64-81. The court found the increase in the total number of objections after 1982 as evidence of the continuing need for §5. J.S.App.66. The overall increase in objections does not, however, account for the increase in overall submissions. Rather, the rate of objections is more revealing, and the rate decreased from .21 percent from 1983 to 1987, to .05 percent from 1998 to 2002. Introduction to Expiring Provisions, at 219 (statement of Richard L. Hasen). The rate has been even lower since 2002. 152 Cong. Rec. S7980-7981 (daily ed. July 20, 2006) (statement of Sen. Cornyn). This vanishingly small number of objections cannot support an argument that §5 is necessary. The court disregarded declining objection rates, reasoning that this Court upheld §5 in *Rome* despite a sharp decline during the preceding four years. J.S.App.66. But there is an obvious distinction between the significance of a decline from 4.06 percent to 1.31 percent in the first ten years after Congress first enacted §5,

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Carolina. H.R. Rep. No. 109-478, at 33. Louisiana has since, however, elected the country's first Indian-American governor. Another covered State, Virginia, in 1989, chose the country's first elected African-American governor, who was later elected mayor of Richmond, the former capital of the Confederacy.

and the subsequent decline, over *more than 30 years*, that has reduced the objection rate to one-hundredth of its starting point, just above the vanishing point.

The district court also credited the Attorney General's requests for more information as evidence justifying §5. J.S.App.81-83. The court reasoned that, because these requests block a change, they are evidence of repeated efforts to discriminate by avoiding federal judicial mandates. *Ibid.* Of course, as the name suggests, although they indeed block change, even the Attorney General could not determine that they were discriminatory without further information. Moreover, a jurisdiction's voluntary abandonment of a change after a more-information request—like a jurisdiction's settlement of a §2 suit—evidences an attempt to comply with constitutional guarantees, not to evade their enforcement. In any event, such requests are not evidence of the iterative, purposefully discriminatory changes §5 addresses. The fact that requiring a subset of the country's state and local governments to vet changes through the federal government may catch some violations of the VRA that would—and can—otherwise be addressed through §2 litigation remains insufficient justification for §5.

In at least one instance relied on by the court, the request for more information played no material role. Griffin, Georgia, adopted a redistricting plan following the 2000 census that left two of its six districts with an African-American majority although African Americans were 49 percent of the city's population.

Evidence of Continued Need, at 809-810 (appendix to statement of Nadine Strossen). The city sought preclearance, and the Attorney General requested more information. *Id.*, at 809. The city decided not to resubmit the plan but instead use its old malapportioned districts in the upcoming election. *Ibid.* The NAACP filed suit, asserting that the old districts violated the one-person-one-vote standard. *Ibid.* The court scheduled a hearing the next day, and at the hearing the city agreed to form six districts with three having a majority African-American voting-age population. *Ibid.* In other words, case-by-case litigation was sufficient to address instances of discrimination and dilution. Federal review accomplished nothing; private litigation was faster and more effective than §5.

Likewise, the §5 litigation cited by the court demonstrates that private action is more effective than executive review and avoids violence to fundamental notions of federalism. For example, after the 2000 census, Seguin, Texas, proposed redistricting that would have eliminated one of the existing majority-Latino districts. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 50 (2005) [hereinafter Section 5 History] (testimony of Nina Perales). The Attorney General indicated preclearance was unlikely, and the city withdrew its plan. *Ibid.* The city also closed the candidate filing period before any Latino could file in the election for that majority-minority district. *Ibid.*

MALDEF sued and successfully enjoined the election timetable. *Ibid.* Although the suit was brought under §5, §2 provided a cause of action as well. Regardless, this case demonstrates, like others, that case-by-case litigation under §2 suffices.

Section 5 litigation also includes suits brought by covered jurisdictions seeking judicial preclearance. Here too, the examples gathered by Congress and culled by the district court do not justify the reauthorization of §5 for another quarter-century. For example, the case of Pleasant Grove, Alabama, see J.S.App.84-85, involved annexation of two parcels of land, one in 1969 and the other in 1979. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 465 (1987). In fact, the Attorney General's objections to these annexations were considered by Congress in its 1981 hearings on reauthorizing the VRA. *Id.*, at 466, n.5. Actions by covered States more than 35 years ago and litigated over 20 years ago cannot establish that the extraordinary conditions justifying §5 in the past continued to exist in 2006.

Faced with a dearth of evidence of the behavior at which §5 is actually aimed, Congress and the district court relied on anecdotal evidence of §5's deterrent effect, reasoning that the effect explained the absence of evidence, while also justifying reauthorization. See J.S.App.108-110. Admittedly, §5 deters change, but there is no evidence that the majority of that change is discriminatory. The court cited three examples, but in one, the case of Seguin, Texas, federal oversight accomplished nothing, and

private litigation achieved a new districting plan. Section 5 History, at 50 (testimony of Nina Perales). In the other two examples, redistricting plans were, purportedly, altered because of the specter of §5 review. J.S.App.110-111. There is no reason, however, to believe that the prospect of §5 review alters behavior that §2 litigation would not. Indeed, the legislative record highlights the effectiveness of litigation under §2 and, in so doing, reveals that there is insufficient evidence to justify another 25 years of §5's emergency response to an extraordinary crisis.

Section 5 may, in fact, retard some changes beneficial to voters in general or minority voters in particular. Section 5 was used, for example, to impede the Georgia legislature's attempt, overwhelmingly supported by African-American legislators, to draw district lines maximizing the influence of African-American voters. *Georgia* v. *Ashcroft*, 539 U.S. 461, 472-475 (2003). Section 5 may also impede covered States from replacing partisan judicial elections with a merit-based selection process, a reform often advocated. And §5 presents opportunities for the Executive to manipulate preclearance toward partisan ends. See *LULAC*, 548 U.S., at 480 (Stevens, J., concurring and dissenting); *Georgia*, 539 U.S., at 497 (Souter, J., dissenting).

3. Section 5 Is Not Geographically Tailored.

The Court found the original enactment of §5 an appropriate exercise of Congress's enforcement power

in part because the prophylactic was "confined to those regions of the country where voting discrimination had been most flagrant." *Boerne*, 521 U.S., at 532-533; cf. *Morrison*, 529 U.S., at 598, 626 (invalid VAWA civil-remedy provision not confined to States with discriminatory history); *Fla. Prepaid*, 527 U.S., at 647 (same for Patent Act and patent infringement). But the current incarnation of §5 imposes its unique federal intrusion on countless jurisdictions, like the district, with no demonstrated history of racially discriminatory governmental action denying or abridging the right to vote and others with no recent history of such conduct. That fact is hardly surprising given that Congress reenacted the §4(b) formula—which triggers coverage for §5—unchanged from its enactment in 1975. Compare 42 U.S.C. §1973*b*(b) with 42 U.S.C. §1973*b*(b) (1976). Congress's failure to enact an updated coverage formula with any hope of tailoring the geographical scope of §5 to the contours of any present-day problem that might exist compels the conclusion that the 2006 enactment of §5 is not a valid exercise of the enforcement power. If Congress intended to reenact legislation that effectively labels an entire swath of the country as so inherently racist that its state and local governments cannot be trusted to fairly protect the voting rights of all their citizens, it needed to make some rational effort to justify that extraordinary declaration.

The coverage formula enacted in 1965 and relying on data through the 1964 presidential election

"was relevant to the problem of voting discrimination"—in 1965—"and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered." *Katzenbach*, 383 U.S., at 329. There is no rational reason to regard the 2006 formula as relevant at all. Section 5's coverage under the 2006 enactment bears no rational geographical relationship to whatever unconstitutional voting-related conduct may exist today because it is based on proxies from 1972 or earlier. 42 U.S.C. §1973*b*(b). Section 5 today imposes a scarlet letter on residents of covered jurisdictions based on acts of their grandparents or—given our mobile society—other people's grandparents.

Notably, the 2006 enactment of §§4 and 5, premised on data already over 30 years old, will endure through 2031. 42 U.S.C. §1973*b*(a)(8). By 2031, the district, which did not even exist until the late 1980s, will continue to be burdened by requirements based on 60-year-old facts containing nothing specific to the district. Such temporally disconnected evidence cannot be used to draw legitimate territorial boundaries to a remedy to be applied so far into the future. See *Garrett*, 531 U.S., at 369, n.6; *Boerne*, 521 U.S., at 530.

The §4(b) coverage formula relies on two proxies in attempting to identify jurisdictions with histories of voting discrimination: (1) literacy tests or other devices that prohibited voting, and (2) voting registration and turnout rates. 42 U.S.C. §1973*b*(b). Both proxies are out of date and cannot show a recent

"egregious predicate[ ]," *Boerne*, 521 U.S., at 533, of unconstitutional gamesmanship. See *Garrett*, 531 U.S., at 365.

Literacy tests and other devices preventing ballot access have not been used for decades and are permanently banned. 42 U.S.C. §1973*aa*. The use of such devices so far back in time offers nothing helpful to discerning modern conditions.

Even if voting registration and turnout rates are still conceivably useful proxies, the 2006 enactment uses presidential election data from 1964, 1968, and 1972. 42 U.S.C. §1973*b*(b). Had Congress attempted to implement the possibly better proxy of using recent 2000 and 2004 presidential election data, the contours of its remedy would have looked drastically different, particularly if the formula were applied to localized conditions rather than painting States with a broad brush. Cf. Pitts, *supra*, at 280. For example, if coverage were based on voter registration and turnout under 50 percent at the county level during the 2000 and 2004 presidential elections, hundreds of currently covered counties would no longer be covered and counties in States including Maryland, Missouri, and Montana would be newly covered. 152 Cong. Rec. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood).

Congress made no serious effort to determine if proxies based on 1972 data bear any relation to conditions existing across the country in 2006. Certainly Congress made no meaningful comparison

between previously covered jurisdictions and noncovered ones. Pub. L. No. 109-246, §2(b)(5), 120 Stat. 577 (congressional findings limited to generalized, conclusory statements regarding "the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982"). Congress made no effort to evaluate circumstances in areas on the border of covered jurisdictions, where one would expect to be able to evaluate the value (or lack thereof) of continued §5 coverage. There is simply no reason to believe that statistics about voter registration and participation up to 1972 can be applied to identify intransigent state and local governments set on a path of ingenious defiance.

Moreover, the Court has previously recognized that the bailout provision was important to tailoring the geographic and temporal scope of §5. *Boerne*, 521 U.S., at 533 (noting that bailout was intended "to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth)"). If bailout is indeed unavailable to jurisdictions like the district, it is of no practical use for correcting Congress's reliance on obsolete data and restraining §5's reach.

For some time leading up to the 2006 reenactment, commentators, witnesses, and some Congress members themselves alerted Congress to the need to update the coverage formula or at least further expand the bailout mechanism if a renewed §5 had

any chance of being a valid exercise of the enforcement power. See n.5 *supra*. Congress did neither, and the untargeted, anachronistic §5 it renewed cannot stand.

4. Congress Placed No Meaningful Time Limit on §5.

Each of the two previous enactments of §5 upheld by the Court had precise termination dates, long since past. See *Rome*, 446 U.S., at 181 (noting seven-year termination date of the 1975 enactment). Those time limits were part of what made those earlier enactments constitutionally appropriate legislation when they occurred. *Boerne*, 521 U.S., at 533. But Congress's 2006 reenactment of §5—41 years after the original enactment, extending for an additional 25 years, retaining a coverage formula harking back over 35 years, and based on a record insufficient to show continuing recalcitrance in covered jurisdictions—acknowledges no meaningful time limit.

In upholding the original §5 as a provision with a five-year lifespan, *Katzenbach* characterized it as a response to an acute emergency. 383 U.S., at 334-335 (citing *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 (1934) (upholding Minnesota's mortgage relief laws as a response to the Great Depression), and *Wilson* v. *New*, 243 U.S. 332 (1917) (upholding the response to a labor dispute threatening to stop all movement in interstate commerce)). Congress cannot indefinitely continue exercising extraordinary powers

in response to an emergency with no showing the emergency persists.

5. Section 5 Is Not Meaningfully Limited in Scope.

Given the lack of any showing that §5 and its coverage formula, as enacted in 2006, are at all targeted at attempts to purposefully evade enforcement of constitutional guarantees like those that justified the original §5, such an overbroad prophylactic cannot stand. Section 5 has no meaningful limitations on its scope that could conform it to any residual purposeful discrimination that may remain.

Like RFRA, §5's "[s]weeping coverage ensures its intrusion at every level of government," *Boerne*, 521 U.S., at 532, projecting the national government's reach down to the neighborhood level. Moreover, §5 covers a vast amount of clearly constitutional government activity in two distinct senses. First, the essence of §5 is that it compels state and local governmental units to invite an arm of the national government—usually the Executive Branch—into their legislative processes. It is certainly not unconstitutional for a state legislature to pass a law or a local authority like the district to pass resolutions in a process that bypasses the federal government. Cf. *Allen*, 393 U.S., at 596 (Black, J., dissenting) (noting that "[p]roposals to give judges a part in enacting or vetoing legislation before it passed were made and rejected in the Constitutional Convention"). Second, out of tens of thousands of changes submitted for preclearance, the

percentage drawing objection from the Department of Justice is minute. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After *Tennessee* v. *Lane*, 66 Ohio St. L. J. 177, 191-192 (2005) (noting that objections were "down to 0.05% from 0.23% in the last three five-year periods" up to 2005). And the vast majority of those objections do not signify the *purposeful* discrimination required for a constitutional violation.

Moreover, in the 2006 enactment of §5, Congress has, in fact, applied a different substantive constitutional standard to covered jurisdictions than applies in the rest of the country. The Court previously held that preclearance could only be denied for vote dilution that was retrogressive, even if the Department of Justice believed it to be motivated by a discriminatory intent, and warned that extending §5 preclearance to cover non-retrogressive discrimination would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts . . . perhaps to the extent of raising concerns about §5's constitutionality." *Reno* v. *Bossier Parish Sch. Board*, 528 U.S. 320, 335-336 (2000). In the 2006 reauthorization, Congress abrogated that case's holding "by clarifying that any voting change motivated by any discriminatory purpose is prohibited under Section 5." H.R. Rep. No. 109-478, at 68.

With no record showing a contemporary predicate of discriminatory gamesmanship throughout covered jurisdictions, §5 cannot be an appropriate remedy when it touches so much activity unrelated to the constitutional guarantee against purposeful voter

discrimination. See *Kimel*, 528 U.S., at 86 (ADEA failed because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable" constitutional standard); *Fla. Prepaid*, 527 U.S., at 646 (in the Patent Act, Congress "did nothing to limit the coverage . . . to cases involving arguable constitutional violations"). Like RFRA, §5, as reenacted in 2006, is not "designed to identify and counteract state laws likely to be unconstitutional." *Boerne*, 521 U.S., at 534.

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court and render judgment that the district is entitled to use the bailout procedure or, in the alternative, that §5 cannot be constitutionally applied to the district.

Respectfully submitted,

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