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, ET AL.

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

BRIEF FOR THE FEDERAL APPELLEE

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QUESTIONS PRESENTED

1. Whether appellant, a municipal utility district, is statutorily eligible under 42 U.S.C. 1973b(a) to terminate its coverage under Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973c.

2. Whether Congress acted within its authority to enforce the constitutional prohibition against discrimination in voting when it reauthorized Section 5 of the VRA in 2006, on the basis of an extensive record demonstrating that, despite considerable progress under Section 5's remedial framework, discrimination against minority voters continues to be a problem in covered jurisdictions and that Section 5 remains a valuable tool in preventing, remedying, and deterring such discrimination.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-183) is reported at 573 F. Supp. 2d 221.

JURISDICTION

The judgment of the district court was entered on May 30, 2008 (J.S. App. 184-185). A notice of appeal was filed on July 8, 2008 (J.S. App. 186-192), and the jurisdictional statement was filed on September 8, 2008. This Court noted probable jurisdiction on January 9, 2009. The jurisdiction of this Court rests on 42 U.S.C. 1973b(a)(5) and 28 U.S.C. 1253.

STATEMENT

1. The Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, has stood as part of our law for over 40 years. Its "direct result" has been "[s]ignificant prog-

ress * * * in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577. Yet "vestiges of discrimination in voting continue to exist[,] as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process"; the "continued evidence of racially polarized voting in each of the jurisdictions covered * * * demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the" VRA. § 2(b)(2) and (3), 120 Stat. 577. These findings were made by a unanimous Senate, a nearly unanimous House of Representatives (390-33), and signed into law by President Bush. J.S. App. 18.

The 2006 reauthorization continued this Nation's sacred commitment to eradicating the effects of its darkest days. In 1965, one hundred years after Appomattox, Congress enacted the VRA after thorough assessment of the intervening history. Congress intended "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). While much progress has been made over the last four decades, Congress in 2006 acknowledged the still painful reality that this blight has not yet been eradicated. Indeed, "[t]he record compiled by Congress demonstrates that, without the continuation of the [VRA's] protections, racial and language mi-

nority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization § 2(b)(9), 120 Stat. 578.

This case concerns Section 5 of the VRA, which provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect" on its coverage date, it must first obtain preclearance. 42 U.S.C. 1973c(a). A covered jurisdiction may seek preclearance for a voting change from the Attorney General or the United States District Court for the District of Columbia. *Ibid.* Preclearance may be granted only if the jurisdiction demonstrates that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. *Ibid*.

Section 5 is limited geographically and temporally. It applies only to "areas where voting discrimination has been most flagrant." *South Carolina*, 383 U.S. at 315. As originally enacted, Section 5 applied to most southern States. 28 C.F.R. Pt. 51 App. When Congress reauthorized Section 5 in 1975, it amended the coverage formula to include jurisdictions with a demonstrated history of discrimination against language minority voters, including the State of Texas. See Act of Aug. 6, 1975 (1975 Amendments), Pub. L. No. 94-73, Title II, 89 Stat. 400; 40 Fed. Reg. 43,746 (1975).

Since its enactment, the VRA's "bailout" mechanism has permitted jurisdictions to bring a declaratory judgment action in the District Court for the District of Columbia to terminate their coverage. VRA § 4(a), 79 Stat.

438. Prior to 2006, Congress had reviewed and amended the bailout provisions on various occasions. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 315; 1975 Amendments § 101, 89 Stat. 400; Voting Rights Act Amendments of 1982 (1982 Amendments), Pub. L. No. 97-205, § 2, 96 Stat. 131.

2. Appellant is a municipal utility district in Travis County, Texas, with an elected board of directors. J.S. App. 18. Because the State of Texas is a covered jurisdiction, appellant is subject to Section 5. See 28 C.F.R. Pt. 51 App.; 28 C.F.R. 51.6. Since 2004, appellant's elections have been conducted jointly with other political entities by Travis County, pursuant to a joint election agreement. J.A. 398-399, 410. Whereas appellant's annual cost of preclearance compliance averaged $223 before 2004, it approaches zero since the 2004 agreement. J.A. 270, 279.

3. Eight days after Congress reauthorized Section 5 in 2006, appellant brought this action in the District Court for the District of Columbia, seeking a bailout or a declaration that Section 5 is unconstitutional. J.S. App. 19. As required by 42 U.S.C. 1973b(a)(5), a three-judge district court was convened. Several individuals and entities intervened as defendants.

The district court granted summary judgment to appellees. J.S. App. 1-183. The court first rejected appellant's claim that it was statutorily eligible to bail out of Section 5 coverage. *Id.* at 20-30. The court noted that the VRA permits only States and their "political subdivisions" to seek bailout, and that the term "political subdivision" includes only counties or other local governmental entities that conduct voter registration when counties do not. *Id.* at 21; see 42 U.S.C. 1973c(a).

The district court then considered appellant's argument that Congress exceeded its constitutional authority when it reauthorized Section 5. J.S. App. 30-153. The court found at the outset that appellant's challenge was essentially facial in nature. *Id.* at 31-32, 144. The court then observed that this Court "has articulated two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." *Id.* at 32. In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Court held that when Congress exercises its authority to enforce the Fourteenth Amendment, it has no power to "make a substantive change" in the constitutional standard, and that the Court will therefore look for "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-520. But the district court also noted that *South Carolina* applied a more deferential standard for evaluating Congress's exercise of its Fifteenth Amendment authority. J.S. App. 35.

The district court concluded that *South Carolina* provided the appropriate standard for evaluating the continuing validity of VRA Section 5, but applied both standards out of an abundance of caution. J.S. App. 45-50, 118-119. After engaging in a thorough review of the "massive amount of evidence Congress collected," the court found "no doubt that despite the 'undeniable' political progress made by minorities, 'Congress could rationally have concluded' that it was necessary to extend section 5." *Id.* at 118 (quoting *City of Rome* v. *United States*, 446 U.S. 156, 177, 181 (1980)). The court also held that, under *Boerne*'s congruence-and-proportionality standard, Congress had acted well within its constitutional authority. *Id.* at 118-144.

SUMMARY OF ARGUMENT

This case concerns the intersection of two central aspects of the Constitution: the right to vote and the Reconstruction Amendments' prohibitions against racial discrimination. This Court has described voting as the right "preservative" of all others. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). For more than four decades, the VRA has embodied the Nation's solemn commitment to protect this right, which is the cornerstone of our democracy. Accordingly, this Court has upheld the very provision at issue here, Section 5 of the VRA, on four separate occasions. *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 177-178 (1980); *Georgia* v. *United States*, 411 U.S. 526, 534-535 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 337 (1966).

In upholding Section 5 of the VRA, the Court has observed that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," and has specifically held that "Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States" in enacting Section 5. *South Carolina*, 383 U.S. at 324. The Court has repeatedly highlighted the lengthy congressional deliberations and factfinding that preceded the VRA's enactment and has singled out the geographic and temporal limitations of the Act to emphasize its remedial nature. The 2006 reauthorization was likewise the product of extensive legislative consideration, and it retains the limiting features that ensure the statute is targeted where it is most necessary.

I. One of the features of Section 5 of the VRA that this Court has emphasized as embodying the provision's carefully tailored remedial framework is its "bailout"

mechanism. Notably, Congress has expanded that feature since the VRA's enactment to increase the number of jurisdictions eligible for bailouts. Nevertheless, appellant here seeks a further expansion that the statutory text will not bear. The district court correctly held that only a "political subdivision" as defined in the statute may bail out of coverage. Appellant concedes that it does not satisfy that statutory definition, and its request to bail out was properly denied.

II. a. Appellant's attack on the constitutionality of VRA Section 5's reauthorization also fails. Appellant asserts that there is a conflict between the VRA and this Court's recent pronouncements regarding Congress's Fourteenth Amendment enforcement powers in a line of cases beginning with *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). But nothing in *Boerne* retreats from what this Court repeatedly has said about Section 5 of the VRA. To the contrary, *Boerne specifically reaffirmed* the constitutionality of this provision, singling it out as a paradigmatic example of Congress's appropriate exercise of its enforcement authority. *Id.* at 532-533. As this Court has recognized, the VRA, unlike the statute at issue in *Boerne*, was not an attempt to redefine constitutional rights or to encroach upon the Court's power to say what the law is, but rather represents Congress's response to a century of rampant discrimination that denied the voting rights of racial minorities in direct violation of the explicit mandate of the Fifteenth Amendment.

Appellant, at bottom, attempts to set up a strict dichotomy between the deferential review this Court applied in *South Carolina* and its progeny and the more searching congruence-and-proportionality review in *Boerne*. But that dichotomy is false. In both lines of

cases, the Court is answering the same question: Is Congress enforcing constitutional protections through appropriate means? In *Boerne*, the Court articulated the congruence-and-proportionality analysis to discern whether Congress was enforcing an established right—as it is empowered to do under the Constitution—or whether it was attempting to redefine the Fourteenth Amendment's meaning—a power vested in the judicial Branch. 521 U.S. at 529-536. But both lines of cases agree that where, as here, Congress seeks to enforce a right that is at the core of the protection afforded by the Reconstruction Amendments, this Court's review of the appropriateness of Congress's chosen method of protection is highly deferential.

B. The 2006 reauthorization did not transmute VRA Section 5 from a remedy to a redefinition of constitutional rights. Appellant does not even challenge the few substantive changes Congress made. Most importantly, Congress maintained all of the features of Section 5 that this Court has singled out as demonstrating its remedial nature, including its limited application to those jurisdictions with the worst histories of racial discrimination in voting, a sunset date for the provision as a whole, and a mechanism by which States or political subdivisions that have fully complied with Congress's remedy can terminate the provision's coverage.

Of course, the question Congress faced in 2006 was not whether to impose the remedial framework of Section 5 preclearance as an initial matter, but whether to retain the remedy already in place. The immense record amassed by Congress provides ample evidence that Section 5 has played, and continues to play, a critical role in preventing and deterring discriminatory electoral changes. It has, moreover, helped to preserve the hard-

won progress minority voters have achieved over recent decades in having their electoral voices heard.

ARGUMENT

I. ONLY THE STATE OF TEXAS OR TRAVIS COUNTY MAY APPLY TO TERMINATE APPELLANT'S COVERAGE UNDER SECTION 5

Appellant contends (Br. 2, 14-26) that, because it has not engaged in any voter discrimination, it is entitled to terminate its Section 5 coverage. That argument is foreclosed both by the VRA's text and by decisions of this Court.

A. The Text Of Section 4(a) Forecloses Appellant's Argument That It Is Entitled To Seek Termination of Coverage

As originally enacted in 1965, Section 4(a) permitted only two categories of jurisdictions to seek bailout: (1) designated States, and (2) "political subdivision[s]" separately designated for coverage where the State had not been. VRA § 4(a), 79 Stat. 438 (42 U.S.C. 1973b(a)(1) (Supp. I 1965)). Section 14(c)(2) of the Act has always defined a "political subdivision" to be "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). Appellant acknowledges (Br. 21) that it does not qualify under either of the two original bailout categories. See J.A. 419-420, 437.

Instead, appellant (Br. 15-19) looks to the 1982 Amendments for support. In 1982, Congress added a third type of jurisdiction eligible for bailout: "any political subdivision of [a covered] State * * * though such

[coverage] determinations were not made with respect to such subdivision as a separate unit." § 2(b)(2), 96 Stat. 131 (42 U.S.C. 1973b(a)(1)). That expansion permitted a "political subdivision" within a designated State to apply for termination. Appellant, however, does not qualify under this new category.

As noted above, Section 14(c)(2) of the VRA defines the term "political subdivision" as "any county or parish" or certain other entities that "conduct[] registration for voting" when the county does not. 42 U.S.C. 1973*l*(c)(2). Because appellant is not a "political subdivision" as so defined, the district court correctly held that appellant is ineligible to seek bailout. J.S. App. 20-30. See *Burgess* v. *United States*, 128 S. Ct. 1572, 1577 (2008).

That conclusion is confirmed by the statutory structure. The 1982 Amendments added the new category of "political subdivision[s]" eligible to bail out as a clause within the first sentence of Section 4(a), situated between the clauses that identify the two categories that were originally eligible—a designated State and a designated "political subdivision." See 42 U.S.C. 1973b(a)(1). As discussed above, it is undisputed that the latter reference to designated "political subdivision[s]" reaches only subdivisions as defined in Section 14(c)(2). Congress is presumed to have intended "political subdivision" to have the same meaning in the new clause. *Brown* v. *Garner*, 513 U.S. 115, 118 (1994). Indeed, Congress modified the new reference to "political subdivision" with the phrase "though such [coverage] determinations were not made with respect to such subdivision as a separate unit," 42 U.S.C. 1973b(a)(1), thereby confirming that it refers only to a "political subdivision" of

a type as to which a coverage determination *could* have been made under Section 4(b), 42 U.S.C. 1973b(b).

Moreover, the 1982 Amendments provide that the "State or political subdivision" seeking bailout must demonstrate that both it and "all governmental units within its territory" have complied with Section 5. 42 U.S.C. 1973b(a)(1)(D), (E), (F), and (a)(3). This language establishes that smaller "governmental units" are covered under Section 5 because they are part of a covered State or "political subdivision." See *United States* v. *Board of Comm'rs*, 435 U.S. 110, 127 (1978) (*Sheffield*) ("The reference to 'State' in § 5 includes political units within it."); *id.* at 129 ("[A]ll political units within" designated political subdivisions are covered). It further indicates that those smaller "governmental units" are not themselves eligible to bail out.

The legislative history of the 1982 Amendments confirms that only a "political subdivision" that satisfies Section 14(c)(2)'s definition qualifies under the new category. H.R. Rep. No. 227, 97th Cong., 1st Sess. 2 (1981) (*1981 House Report*) ("The standard for bail-out is broadened to permit political subdivisions, as defined in Section 14(c)(2), in covered states to seek bail out although the state itself may remain covered."); S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) (*1982 Senate Report*). That history reflects Congress's determination that "[t]owns and cities within counties may not bailout separately" because, "[a]s a practical matter * * * we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits." *Id.* at 57 n.192, 69; *1981 House Report* 41.

Longstanding regulations implementing the VRA, 52 Fed. Reg. 486 (1987), which are entitled to "substantial deference," *Lopez*, 525 U.S. at 281, similarly provide

that, aside from designated States and separately covered "political subdivision[s]," only "political subdivision[s]"—as defined in Section 14(c)(2) of the Act—within fully covered States may apply for bailout. 28 C.F.R. 51.2, 51.5. Because Congress made no change when it reauthorized the VRA in 2006, it is presumed to have endorsed that interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

B. This Court's Decisions Confirm That Appellant's Section 5 Coverage Status Depends On That Of The State Or County In Which It Is Located

Brushing aside all relevant interpretive sources to the contrary, appellant argues (Br. 17-20) that under this Court's decisions in *Sheffield* and *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978), the definition of "political subdivision" in Section 14(c)(2) applies only to coverage determinations under Section 4(b). Those decisions hold that Section 5's preclearance requirements apply not only to the designated "State" or "political subdivision," but to any governmental unit within such a designated entity. See *Sheffield*, 435 U.S. at 127; *Dougherty County*, 439 U.S. at 44 (applying *Sheffield* to school board). According to appellant (Br. 20), *Sheffield* and *Dougherty County* necessarily rested on the conclusion that a smaller governmental unit like appellant is a "political subdivision" of a designated State as that phrase is used in Section 5, 42 U.S.C. 1973c(a), and that, by parity of reasoning, appellant is also a "political subdivision" eligible to apply for termination under Section 4(a)(1), 42 U.S.C. 1973b(a)(1).

The Court rejected appellant's reading of *Sheffield* in *City of Rome*. It explained that *Sheffield* "*did not hold* that cities such as Rome are 'political subdivisions'

under §§ 4 and 5." *City of Rome,* 446 U.S. at 168 (emphasis added). To the contrary, *Sheffield* held that, in light of the statutory structure and purposes, "§ 5's preclearance requirement for electoral changes by a covered 'State' reached all such changes made by political units in that State." *Ibid.*; see *Sheffield*, 435 U.S. at 127 ("[T]he reference to 'State' in § 5 includes political units within it.").

Appellant places considerable weight on a footnote in *Sheffield* commenting that "Congress's 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 130 n.18. On that basis, appellant argues (Br. 18-21) that *Sheffield* held that the statutory definition of "political subdivision" in Section 14(c)(2) does not apply beyond Section 4(b) and that Congress would therefore have understood the definition not to control when it used that term in the 1982 expansion of Section 4(a)'s bailout provision. But appellant misreads *Sheffield*. Footnote 18 merely reiterated the Court's conclusion that the definition of "political subdivision" in Section 14(c)(2) does not "*limit*[] the scope of § 5." 435 U.S. at 126 (emphasis added). In other words, even though governmental units such as appellant are not "political subdivision[s]" as defined in the Act, the Act reaches them because the "reference to 'State' in § 5 includes political units within it." *Id.* at 127.

Even if *Sheffield*'s footnote 18 were ambiguous, *City of Rome* made clear that *Sheffield* "did not hold that cities * * * are 'political subdivisions' under §§ 4 and 5," or that the phrase "political subdivision" as used in those sections has any meaning other than that given by Section 14(c)(2). 446 U.S. at 168; *id.* at 168 n.5 (quoting statutory definition of "political subdivision"). Most sig-

nificantly, whereas *Sheffield* "did not even discuss the bailout process," *City of Rome* specifically held that a "city is not a 'political subdivision' for purposes of § 4(a) 'bailout.'" *Id.* at 168. Thus, when Congress enacted the 1982 Amendments, it necessarily understood that the statutory definition of "political subdivision" would apply to that phrase in the amended Section 4(a).

Appellant insists (Br. 23-26) that the Court must nonetheless interpret Section 4(a) to permit jurisdictions smaller than counties to apply for bailout or risk imperiling the constitutionality of Section 5. The canon of constitutional avoidance "has no application in the absence of statutory ambiguity," *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001), and, as explained above, Section 4(a) is not ambiguous.

In any event, reading the statute according to its terms does not raise a serious constitutional question. See pp. 15-55, *infra*. This Court has never suggested that the constitutionality of Section 5 was dependent upon every jurisdiction subject to preclearance being provided an avenue to bail out. Indeed this Court has upheld Section 5 when the bailout standard was far stricter than it is now, and even in the face of a constitutional challenge in *City of Rome* by an entity subject to Section 5 that could *not* seek bailout. *City of Rome*, 446 U.S. at 167; *id.* at 193 (Stevens, J., concurring). The text of both the Fourteenth and Fifteenth Amendments refer to "any State," and Congress therefore may properly choose to exercise its enforcement power at that level, or at a level that encompasses "political subdivision[s]" as defined in the VRA, but not still smaller governmental units.

II. AS THIS COURT HAS REPEATEDLY HELD, SECTION 5 OF THE VRA IS "APPROPRIATE LEGISLATION" TO ENFORCE THE CONSTITUTION'S EXPRESS PROHIBITION AGAINST RACIAL DISCRIMINATION IN VOTING

Beginning in *South Carolina*, this Court has upheld the constitutionality of Section 5 of the VRA on four separate occasions. See p. 6, *supra*. Appellant insists that this Court's decision in *Boerne* alters the Court's conclusions. But *Boerne* itself took great care to single out Section 5 of the VRA as the paradigmatic example of Congress's appropriate use of the enforcement power. 521 U.S. at 518, 525-526 (noting Court's continuous recognition of necessity for VRA's "strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination").

As the district court emphasized, Section 5 of the VRA is justified under the strictest reading of *Boerne*, and therefore *a fortiori* under the more deferential terms in which this Court has characterized its review of that Section in the past. J.S. App. 118-119. Indeed, even when applying *Boerne*'s congruence-and-proportionality test, the Court has compared other statutes to VRA Section 5's example. See, *e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 519 n.4 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 737-738 (2003); *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373 (2001) (characterizing Section 5 as a "detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified"). Indeed, the Court in *Lopez* specifically quoted *Boerne* in the course of upholding Section 5 of the VRA. 525 U.S. at

282-283 (quoting *Boerne*, 521 U.S. at 518). What was permissible in *Lopez* is permissible today, particularly in the wake of the updated, and near-unanimous, judgment by both political Branches in 2006 that Section 5 remains necessary to prevent violations of the Fourteenth and Fifteenth Amendments.

A. The Court Applies A Deferential Standard Of Review When Congress Is Enforcing, Not Reinterpreting, Constitutional Guarantees At The Heart Of The Reconstruction Amendments

1. Congress's authority to enforce the Reconstruction Amendments' voting guarantees is as broad as that under the Necessary and Proper Clause

The text of the Fourteenth and Fifteenth Amendments vests Congress with the "power to enforce" their substantive protections "by appropriate legislation." U.S. Const. Amend. XIV, § 5; *id.* Amend. XV, § 2. See also *id.* Amend. XIII, § 2. Those words were the deliberate product of the Reconstruction Amendments' Framers' recognition that the Fifteenth Amendment's prohibition on States denying "[t]he right of citizens * * * to vote * * * on account of race," *id.* Amend. XV, § 1, and the Fourteenth Amendment's protections against racial discrimination would require broad new legislative powers.

The Amendments' enforcement provisions constitute "'a positive grant of legislative power' to Congress" that this Court has consistently described in "broad terms." *Boerne*, 521 U.S. at 517 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). *Boerne* itself quoted this Court's early pronouncement:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [Reconstruction] amend-

> ments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 517-518 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879)).

The use of the word "appropriate" in the Amendments' enforcement clauses is significant. As *Ex parte Virginia* suggested, and *South Carolina* made explicit, 383 U.S. at 326-327, that phrasing echoed Chief Justice Marshall's classic statement in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), of Congress's broad authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch, 17 U.S. (4 Wheat.) at 421. Accordingly, "the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution." *Ibid.*

Those who adopted the Reconstruction Amendments were deeply familiar with *McCulloch* and relied on it in invoking Congress's new powers. See Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne *v.* Flores *and the Original Understanding of Section 5*, 109 Yale L.J. 115 (1999). Most notably, Congress relied on *McCulloch* in enacting Sec-

tion 1 of the Civil Rights Act of 1866, pursuant to the Thirteenth Amendment's enforcement clause. Ch. 31, 14 Stat. 27 (42 U.S.C. 1982). As this Court pointed out, the legislation's floor manager, Representative Wilson, "recalled the celebrated words of Chief Justice Marshall in *McCulloch*" in "urging that Congress had ample authority to pass the pending bill." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968). Wilson quoted *McCulloch*, 17 U.S. (4 Wheat.) at 423:

> Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground.

Cong. Globe, 39th Cong., 1st Sess. 1118 (1866). See *id.* at 1836 (Rep. Lawrence) ("[T]he degree of necessity is a question of legislative discretion, not of judicial cognizance.") (citation omitted).

This Court, consistent with *McCulloch*'s broad standard, has repeatedly reaffirmed that Congress is "entitled to much deference" in "determin[ing] whether and what legislation is needed to secure the guarantees" of the Reconstruction Amendments. *Boerne*, 521 U.S. at 536 (quoting *Morgan*, 384 U.S. at 651). The Constitution commits to Congress the task of "assess[ing] and weigh[ing] the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by" the federal legislation.

Morgan, 384 U.S. at 653. As this Court's precedents explain, deference to Congress is highest when it enforces the core protections of the Reconstruction Amendments. "It is not for [the Court] to review the congressional resolution of these factors. It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Ibid.*; see *Civil Rights Cases*, 109 U.S. 3, 14 (1883).

So, for example, this Court's decisions have consistently applied *McCulloch* in examining the scope of Congress's powers under the enforcement clauses in the Reconstruction Amendments to address racial discrimination. "Congress' authority under § 2 of the Fifteenth Amendment" is "no less broad than its authority under the Necessary and Proper Clause." *City of Rome*, 446 U.S. at 175; *Jones*, 392 U.S. at 439 (Thirteenth Amendment "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*.'") (quoting *Civil Rights Cases*, 109 U.S. at 20); *South Carolina*, 383 U.S. at 326 (*McCulloch* provides the "basic test to be applied in a case involving § 2 of the Fifteenth Amendment"); see also *Lane*, 541 U.S. at 561 (Scalia, J., dissenting) (noting the "expansive" construction given the enforcement clauses with respect to measures directed against "*racial discrimination*"). Accordingly, with respect to Section 5 of the VRA, the Court has specifically upheld Congress's power to reach "voting practices that have only a discriminatory effect." *Lopez*, 525 U.S. at 266 (quoting *City of Rome*, 446 U.S. at 175); see *South Carolina*, 383 U.S. at 334.

Even outside the context of racial discrimination, Congress "is not confined to * * * merely parrot[ing] the precise wording of the" constitutional prohibition

itself. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). Rather, it may "prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Ibid.* For example, Congress may "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent." *Lane*, 541 U.S. at 520.

2. **Boerne** ***recognizes that substantial deference is owed to legislation that enforces, and does not reinterpret, core constitutional guarantees***

a. Appellant dismisses (Br. 39) *McCulloch* as "dictum," contending that *Boerne* requires legislation to be struck down if not "carefully tailored to the temporal, geographic, and other contours of predicate violations of substantive rights" protected by those Amendments. *Id.* at 37. But *Boerne* and succeeding cases held only that Congress lacks the authority, under the guise of enforcing the Fourteenth Amendment, to "substantively redefine the States' legal obligations." *Kimel*, 528 U.S. at 88-89; see *Boerne*, 521 U.S. at 532. Those cases did not involve legislation, such as the VRA, aimed at remedying and deterring violations of the core constitutional right, explicitly set forth in the Fifteenth Amendment itself, that the right to vote not be "denied or abridged * * * on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV, § 1.[1]

[1] The district court correctly concluded that VRA Section 5 is Fifteenth Amendment legislation. J.S. App. 51-56. The "language minorities" protected by the 1975 Amendments include specified groups recognized as having race or color characteristics: "American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. 1973*l*(c)(3). This Court has described such groups as "racial." See *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2747 n.2 (2007) (describing "racial breakdown" among "Asian-Ameri-

It is one thing when Congress acts to overrule a constitutional decision of this Court. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (It is the judiciary's power "to say what the law is."). It is quite another when Congress accepts this Court's decisions as defining the parameters of a constitutional right and then acts to prevent violations of that right. In the latter situation, Congress is enforcing a substantive guarantee as defined by this Court, and the only question is whether Congress's means are "appropriate." When Congress acts in that sphere, *McCulloch* affords broad deference to its judgments about what remedies are appropriate.[2] See *City of Rome*, 446 U.S. at 175; *Morgan*, 384 U.S. at 651 (Congress is entitled "to exercise its discretion in determining whether" legislation is needed); *South Carolina*, 383 U.S. at 326; see also *Lane*, 541 U.S. at 561 (Scalia, J., dissenting). *Boerne* recognized, for example, that when Congress adheres to *stare decisis* (as it did in

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can," "African-American," "Latino," and "Native-American" groups); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 439 (characterizing Latinos as "a racial group"). To the extent VRA Section 5 sweeps more broadly than the Fifteenth Amendment, it lies within the core of the Fourteenth Amendment, which likewise prohibits state-sponsored discrimination on bases such as national origin and language, especially with respect to such fundamental rights as voting. See, *e.g.*, *Morgan*, 384 U.S. at 646-647 (upholding protection under Section 5 of the Fourteenth Amendment of voting rights of Spanish-speaking citizens educated in Puerto Rico).

[2] As explained, pp. 52-54, *infra*, Congress made the prophylactic choice of requiring preclearance in covered jurisdictions after receiving evidence that individual lawsuits could not adequately address or deter constitutional violations, and because Congress believed it would be too difficult for courts in individual cases, acting *ex post*, to distinguish between discriminatory intent and discriminatory effect. Congress was not thereby redefining a right; it was simply acting to protect against the constitutional wrongs that this Court has already identified.

reauthorizing the VRA), it is not redefining a right. See *Boerne*, 521 U.S. at 536.

b. *Boerne* addressed a concern that arises in the context of the Fourteenth Amendment's broad protections of, *inter alia*, "equal protection" and "life, liberty, or property." U.S. Const. Amend. XIV, § 1. Because such protections are phrased at a high level of generality, encompassing or incorporating a broad array of constitutional rights (some protected by strict scrutiny and others by rational basis review), legislation purporting to enforce them can raise the question whether Congress has attempted to "decree the substance of the Fourteenth Amendment's restrictions" rather than "enforce" them. *Boerne*, 521 U.S. at 519. The congruence-and-proportionality test arose out of such circumstances, providing a method to determine whether Congress has crossed "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.* at 519-520; see *Lane*, 541 U.S. at 539 (Rehnquist, C.J., dissenting).

Where those concerns are not present, there is no occasion for heightened review to identify instances of congressional redefinition of substantive constitutional provisions. In contrast to the full present-day sweep of the Fourteenth Amendment, for example, the Fifteenth Amendment's text tightly focuses on race and voting. That focus by its nature constrains Congress's enforcement to the intersection of those subjects, thereby rendering the concerns addressed in *Boerne* inapposite. The Thirteenth Amendment likewise has a closely circumscribed substantive prohibition. And the Court has recognized that Congress possesses broad discretion in enforcing the Thirteenth Amendment, and upheld, one

hundred years after the Civil War, 42 U.S.C. 1982's broad prohibitions against racial discrimination in private property transactions because Congress had identified "badges and incidents" of slavery and "it is for Congress to adopt such appropriate legislation as it may think proper." *Jones*, 392 U.S. at 440, 441 (quoting Cong. Globe, 39th Cong., 1st Sess. at 322 (remarks of Sen. Trumbull)).[3]

Accordingly, from *South Carolina* forward, this Court has not invalidated legislation for straying beyond Congress's enforcement power when such legislation concerned ensuring the rights of racial minorities that the Thirteenth and Fifteenth Amendments specify and this Court has recognized. See *Jones*, 392 U.S. at 437-444 (Thirteenth Amendment, private property discrimination); *Georgia*, 411 U.S. at 538 & n.9 (Fifteenth Amendment, voting); *City of Rome*, 446 U.S. at 173-178 (same); *Lopez*, 525 U.S. at 282-287 (same). Similarly, when Congress has acted to prohibit racial discrimination respecting fundamental rights under the Fourteenth Amendment, where this Court subjects State action to the strictest of scrutiny, Congress's enforcement legislation has been upheld. See *Morgan*, 384 U.S. at 652-658 (Fourteenth Amendment, voting); *Oregon* v. *Mitchell*, 400 U.S. 112, 118 (1970) (opinion of Black, J.) (Fourteenth and Fifteenth Amendments, voting).

On the other hand, where the Court has struck down legislation as beyond Congress's Fourteenth Amendment enforcement power, the Court was not only examining legislation that was outside of the heartland of the Reconstruction Amendments, but also was facing a situ-

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[3] Appellant recognizes (Br. 28, 32) that Thirteenth Amendment cases, and *Jones* in particular, should guide the Court in this case.

ation in which the Court found that Congress was attempting to "make a substantive change in the governing law." *Boerne*, 521 U.S. at 519. In *Boerne*, for example, the Court concluded that the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, was enacted "in direct response to" this Court's decision in *Employment Division of Human Resources* v. *Smith*, 494 U.S. 872 (1990), and attempted a "substantive alteration" of *Smith*'s First Amendment holding. *Boerne*, 521 U.S. at 512, 534.

The Court has similarly invalidated attempts to subject States to private damages claims under a national regulatory scheme, where the Court had already held that the Constitution permitted States to engage in the targeted conduct. In *Kimel*, for example, the Court noted that Congress attempted to "elevate[] the standard for analyzing age discrimination to heightened scrutiny" and thereby "substantively redefine the States' legal obligations with respect to age discrimination." 528 U.S. at 88-89. Similarly, in *Garrett*, the Court noted with respect to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12111 *et seq.*, that Congress had attempted "to rewrite the Fourteenth Amendment law laid down by this Court in [*City of*] *Cleburne* [v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)]." *Garrett*, 531 U.S. at 374; see also *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640-643 (1999).

c. Even when applying the congruence-and-proportionality standard, the Court has never invalidated a statute securing rights that this Court's decisions recognize as entitled to heightened protection. For example, the Court has upheld Acts of Congress remedying gender discrimination and the denial of judicial access,

which receive heightened Fourteenth Amendment protection. In *Hibbs*, the Court upheld the family leave provisions of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, as appropriate means of enforcing the Fourteenth Amendment's prohibition against "gender-based discrimination." *Hibbs*, 538 U.S. at 728. The Court explained that, because Congress was enforcing a right subject to heightened constitutional review, it was "easier" for Congress to demonstrate the need for legislation enforcing that right. *Id.* at 736. Similarly in *Lane*, the Court upheld Title II of the ADA, 42 U.S.C. 12131 *et seq.*, as applied to the right of citizens with disabilities to have access to courts, a right subject to heightened constitutional protection. *Lane*, 541 U.S. at 528-529.[4]

Thus, the Court does not subject every statute that enforces the Reconstruction Amendments to a form of heightened review. As this Court explained in *Hibbs*, 538 U.S. at 736, where Congress targets state action that is presumptively invalid—*e.g.* state action that infringes on rights subject to heightened constitutional protection—the Court applies a deferential standard of

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[4] While *Hibbs* and *Lane* provoked vigorous dissents, it is notable that the dissenters emphasized other aspects of the legislation that, in the dissenters' view, indicated that the statutes were not genuine responses to constitutional violations but rather attempts to rewrite the constitutional protections themselves. See *Hibbs*, 538 U.S. at 756 (Kennedy, J., dissenting) (citing as "proof * * * that this is an entitlement program, not a remedial statute," the fact that the FMLA did not prohibit facially discriminatory leave policies, as long as those policies satisfied the federal floor applicable to private employers); *Lane*, 541 U.S. at 549-551 (Rehnquist, C.J., dissenting) (stressing ADA Title II's breadth as evidence it was an "attempt to legislatively 'redefine the States' legal obligations' under the Fourteenth Amendment") (quoting *Kimel*, 528 U.S. at 88).

review. In such cases, the Court examines whether Congress reasonably determined there was a need for such legislation, but does not reexamine the historical evidence on which Congress relied to make an independent determination of that need. Compare *South Carolina*, 383 U.S. 308-315, *Morgan*, 384 U.S. at 651-656, *City of Rome*, 446 U.S. at 181-182, *Hibbs*, 538 U.S. at 729-736, and *Lane*, 541 U.S. at 524-529, with *Boerne*, 521 U.S. at 530-531, *Kimel*, 528 U.S. at 89-91, and *Garrett*, 531 U.S. at 368-372.[5]

Nor does the Court need to engage in heightened review respecting each feature of a remedial scheme once the Court has recognized in a prior decision concerning the statute that Congress has not attempted, as a substantive matter, to redefine the constitutional standard. For example, this Court did not invoke "congruence and proportionality" in upholding Section 5 of the VRA when its constitutionality was last before this Court, even though its decision post-dated *Boerne* by two years. See *Lopez*, 525 U.S. at 282-285.

3. Section 5 of the VRA does not redefine substantive constitutional standards, but rather remedies and deters violations of core constitutional rights

a. This Court has recognized in *South Carolina*, *City of Rome*, and *Lopez* that Section 5 of the VRA does not redefine constitutional rights. Nothing in the 2006 reauthorization calls those previous decisions into ques-

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[5] In *United States* v. *Georgia*, 546 U.S. 151 (2006), the Court upheld Title II of the ADA as applied to actual constitutional violations without even inquiring whether Congress was responding to a pattern of constitutional violations, because the Court recognized that Congress's authority to provide "remedies against the States for *actual* violations of" the Constitution was clear. *Id.* at 158.

tion. *Boerne* itself termed Section 5 of the VRA "remedial," and also recognized that Congress "must have wide latitude in determining" whether it is enforcing a constitutional right. 521 U.S. at 520, 526.

The Fifteenth Amendment contains but one prohibition: governments may not discriminate on the basis of race with respect to voting. Racial discrimination with respect to the "fundamental" right to vote is also among the core interests of the Fourteenth Amendment, receiving the strictest scrutiny. See *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (citation omitted). "Above all else, the framers of the Civil War Amendments intended to deny States the power to discriminate against persons on account of their race." *Mitchell*, 400 U.S. at 126 (opinion of Black, J.); see *South Carolina*, 383 U.S. at 309, 329 (noting the "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution"); *City of Rome*, 446 U.S. at 182 (1975 VRA extension responds to "the perpetuation of 95 years of pervasive voting discrimination").

Thus, Section 5 of the VRA operates at the intersection of a citizen's most fundamental right in our democracy and the most constitutionally invidious form of governmental discrimination. It is, moreover, limited in geographic scope "to those regions of the country where voting discrimination had been most flagrant," affects only the "discrete" issue of voting, and allows covered jurisdictions to terminate coverage if they can demonstrate compliance with the remedial scheme. *Boerne*, 521 U.S. at 532-533; 42 U.S.C. 1973b(a); see pp. 32-40, *infra*. Those limitations plainly demonstrate that the Act is designed to remedy and prevent violations of the constitutional right, not to substantively redefine the

meaning of the Constitution itself. If Congress sought to redefine a constitutional right, it would hardly do so through a statute that applies to only 9 covered States and 66 individual political subdivisions, is temporally limited, and provides for termination of coverage.

b. Appellant does not seriously contend that Section 5 redefines a substantive constitutional rule. Indeed, although appellant challenges the reauthorization of VRA Section 5 on the ground that the *procedural* preclearance requirement is overly intrusive on States and local governments, appellant does not challenge the *substantive* standard by which election changes are reviewed under Section 5. See Br. 38; pp. 55-57, *infra*.

To the contrary, appellant characterizes Section 2 of the VRA as "mirror[ing] § 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." Br. 38. Section 2 prohibits the application of any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973(a). Section 5, in turn, requires covered jurisdictions to show that any change to an existing voting "qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" when compared to standards and procedures previously in place. 42 U.S.C. 1973c(a).

Although "[t]he inquiries under §§ 2 and 5 are different," *Bartlett* v. *Strickland*, No. 07-689 (Mar. 9, 2009), slip op. 20 (plurality opinion), appellant does not contend that any such differences between them render Section

5 an impermissible "attempt to substantively redefine the States' legal obligations," *Kimel*, 528 U.S. at 88-89. Both Section 2 and Section 5 are "prophylactic" enforcement measures. See *Lane*, 541 U.S. at 520. Each, for example, reaches voting laws that have a discriminatory "result[]" or "effect," 42 U.S.C. 1973(a), 1973c(a), whereas the Constitution has been construed to prohibit only state action with a discriminatory intent, see, *e.g.*, *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion). Because of the difficulties inherent in proving intentional discrimination, however, a law that prohibited only intentional discrimination would of necessity *under*enforce the constitutional right, *i.e.*, leave some instances of intentional discrimination unremedied because intent could not be proved. Thus, on the same day *City of Mobile* was decided, the Court made clear that, "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *City of Rome*, 446 U.S. at 175; see *Bush* v. *Vera*, 517 U.S. 952, 990-991 (1996) (O'Connor, J., concurring). At least with respect to racial discrimination, then, there has never been any question that such prophylactic legislation is permissible to enforce the guarantees of the Reconstruction Amendments. See *Lane*, 541 U.S. at 560-563 (Scalia, J., dissenting).

This Court has not once applied the kind of heightened scrutiny appellant seeks when reviewing the particularities of remedial legislation adopted by Congress to prevent further unconstitutional racial discrimination. Although appellant challenges preclearance as a "severe intrusion on state sovereignty," Br. 42, Section 5 is a permissible means to enforce the fundamental guarantees of the Fourteenth and Fifteenth Amendments, which themselves necessarily reordered the federal-

state balance. In *Lopez*, for example, the Court acknowledged that the Act exacts federalism costs by "authoriz[ing] federal intrusion into sensitive areas of state and local policymaking," but held that the "Act was passed pursuant to Congress' authority under the Fifteenth Amendment, and [the Court has] likewise acknowledged that the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez*, 525 U.S. at 282. As the Court in *Lopez* noted, moreover, this Court had repeatedly "upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States." *Id.* at 283.

B. Section 5's Preclearance Requirement Is An Appropriate Means Of Enforcing The Constitutional Prohibition Against Racial Discrimination In Voting

Whether the Court applies the test articulated in *Boerne*, or deems it unnecessary to do so because the Court has already and repeatedly upheld the VRA as appropriate legislation to enforce the narrow but critical protections of the Fifteenth Amendment, the 2006 reauthorization of Section 5 qualifies as appropriate enforcement legislation designed to redress a problem that infects the root of our democracy.

Under *Boerne*'s congruence-and-proportionality test, the Court first identifies "the constitutional right at issue" that Congress is enforcing. *Garrett*, 531 U.S. at 365. Here, that is the right set forth in the very text of the Fifteenth Amendment—that the right to vote not be abridged on the basis of race or color. The Court then "examine[s] whether Congress identified a history and pattern of unconstitutional" violations of that right, and, if so, whether Congress's remedy is "congruent and pro-

portional to the targeted violation." *Id.* at 368, 374. The district court correctly concluded that the 2006 reauthorization is appropriate enforcement legislation, even if reviewed under the *Boerne* standard. J.S. App. 118-144.

With respect to the VRA, the relevant "historical experience" of unconstitutional discrimination in voting, *South Carolina*, 383 U.S. at 308, is both that which Congress considered during the VRA's enactment and previous extensions and the additional evidence it gathered for the 2006 reauthorization. Although appellant asks this Court to disregard as irrelevant the century-long denial pre-VRA of minorities' most fundamental right to vote in some parts of the Nation, Congress properly declined to do so. Congress began with the set of jurisdictions with the worst histories of unconstitutional racial discrimination in voting. Section 5 of the VRA has always been uniquely limited to the worst offenders, see *id.* at 317-318, and Congress appropriately maintained that focus (while using a bailout process to ensure a proper fit between the remedial scheme and underlying violations).

Congress then assessed the current evidence to determine whether Section 5 had fully accomplished its remedial purposes. Congress reasonably concluded that the evidence before it did not establish that Section 5's protections were no longer needed. The record reflects many recent instances of election changes undertaken with a discriminatory intent. Many others, where intent may have been hard to discern, nonetheless violated the remedial scheme's prohibition against adopting election changes with discriminatory effects. There was, moreover, evidence that Section 5 had prevented or deterred many other discriminatory election changes.

Naturally, the record supporting Section 5's reauthorization in 2006 reflected the considerable progress that has been made since 1965—progress due in large part to Section 5 itself. Nonetheless, "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett*, slip op. 21 (plurality opinion).

1. Section 5's remedial nature is demonstrated by its uniquely limited scope

In *South Carolina*, the Court stressed two features that demonstrated Section 5's remedial nature: (1) it covers only those jurisdictions with the worst records of unconstitutionally disenfranchising minority citizens; and (2) to remedy any "overbreadth," jurisdictions could terminate coverage if they could demonstrate an absence of substantial discrimination that predated the statute's enactment. 383 U.S. at 329-331. Indeed, the Court has stressed that "limitations of this kind," while not required, demonstrate Section 5's remedial nature. *Boerne*, 521 U.S. at 533. Congress maintained those limitations in 2006, including a "bailout" provision substantially expanded since *South Carolina*.

a. Section 5 is geographically limited to those areas with the worst histories of unconstitutional voter discrimination

Congress specifically limited Section 5's coverage to target only those jurisdictions with the worst records of unconstitutionally disenfranchising minority citizens. As the Court detailed in *South Carolina*, Congress found evidence of "an insidious and pervasive evil which had perpetuated itself in certain parts of our country through unremitting and ingenious defiance of the Con-

stitution." 383 U.S. at 309. Although appellant urges the Court to disregard that history and maintains that Congress was required to redetermine the geographic reach of Section 5 based solely on new evidence, Congress properly focused its attention on those jurisdictions with the most egregious histories of constitutional violations and on whether the evidence demonstrated that Section 5's remedial protections were no longer necessary.

i. Each of the States originally covered by Section 5 had "enacted tests [that were] still in use which were specifically designed to prevent Negroes from voting." *South Carolina*, 383 U.S. at 310. Literacy tests were supplemented by "grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter," all of which were administered in a discriminatory manner. *Id.* at 311-312. Blacks with college degrees were precluded from registering to vote, while white illiterates were permitted to do so. *Id.* at 312 nn.12-13. Covered jurisdictions also had histories of white primaries, improper challenges, and racial gerrymandering. *Id.* at 311. Congress started with this reliable "evidence of actual voting discrimination" in certain jurisdictions. *Id.* at 330; S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 13-14 (1965) (*1965 Senate Report*). Congress then "evolved" a formula to identify the worst offenders, based on whether the jurisdiction had employed "tests and devices for voter registration" and had a particularly low voting rate. *South Carolina*, 383 U.S. at 329-330.

This Court has recognized that the coverage formula was essentially reverse-engineered to capture those jurisdictions "where voting discrimination had been most

flagrant." *Boerne*, 521 U.S. at 533. To correct for any under- or over-inclusiveness, Congress provided that additional jurisdictions could be subjected to a preclearance requirement upon a sufficient showing of unconstitutional voting discrimination, 42 U.S.C. 1973a(c), and, as discussed above, Congress provided that designated jurisdictions could terminate coverage under the bailout mechanism, 42 U.S.C. 1973b(a).

When Congress extended Section 5 to protect language minority voters, Congress took particular note of the history of discrimination against such citizens in Texas. The Senate Report documented Texas's "long history of discriminating" against black and Mexican-American citizens "in ways similar to the myriad forms of discrimination practiced against blacks in the South." S. Rep. No. 295, 94th Cong., 1st Sess. 25 (1975) (*1975 Senate Report*). The report chronicled Texas's discriminatory history, including restrictive registration devices, white primaries, poll taxes, intimidation schemes, and vote dilution techniques. *Id.* at 25-26. Such conduct included "acts of physical, economic, and political intimidation when [minority] citizens [did] attempt to exercise the franchise." *Id.* at 26. Texas was designated for coverage under Section 4(b) of the VRA on September 23, 1975, and it and all of the political entities within it became subject to Section 5 as a result. 40 Fed. Reg. at 43,746; *Sheffield*, 435 U.S. at 127; see *Briscoe* v. *Bell*, 432 U.S. 404, 405-406 (1977) (declining to review Texas's designation for coverage, but noting Congress had before it "'overwhelming evidence' showing 'the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities'") (quoting *1975 Senate Report* 30, 35); *City of Rome*, 446 U.S.

at 193 (Stevens, J., concurring) (finding it "clear that remedies for discriminatory practices that were widespread within a State may be applied to every governmental unit within the State even though some of those local units may have never engaged in purposeful discrimination themselves").

ii. When Congress extended the sunset date for Section 5 in 2006, it retained the covered-jurisdiction limitation. Appellant assails Congress's decision not to amend the coverage formula, claiming it is "based on proxies from 1972 or earlier." Br. 58. But, as described above, a jurisdiction's coverage is not simply the result of mechanical application of "proxies." To the contrary, Congress identified appropriate jurisdictions based on their extensive records of discrimination against minority voters.[6] Appellant's more fundamental contention is that Congress in 2006 should have examined all 50 States—and their subdivisions—anew. But neither logic nor the law requires Congress or this Court to turn a blind eye to the grave history of constitutional violations in covered jurisdictions to which the VRA responds.

There is nothing in this Court's precedents to suggest that Congress must continually justify the remedial legislation it adopts under the Reconstruction Amendments' enforcement clauses with fresh evidence of continued unconstitutional conduct on the part of the

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[6] Congress never intended the original coverage formula to serve as an ongoing "measure of an adequate level of political enfranchisement" of minority voters, such that when the criteria no longer applied, it would establish that "the discriminatory efforts had been sufficiently eradicated to warrant removing the safeguards which made the improvement possible." *Joint View of 10 Members of the Judiciary Committee Relating to Extension of the Voting Rights Act of 1965*, 115 Cong. Rec. 5521 (1970).

States. Neither the FMLA nor ADA Title II, upheld in *Hibbs* and *Lane*, has an expiration date, nor is one required. *Boerne*, 521 U.S. at 533. Indeed, it would be odd to require proof of ongoing constitutional violations in order to demonstrate that it is "appropriate" to keep enforcement legislation in place, as such evidence would tend to show that existing legislation was ineffective.

Where a State has been found to have engaged in systematic constitutional violations, it is the province of *Congress* under the enforcement clauses to determine when the evidence is sufficient to demonstrate that the remedial scheme is no longer warranted. Congress has authority not only to remedy past constitutional violations, but to "prevent and deter" further ones. *Hibbs*, 538 U.S. at 728; see *Boerne*, 521 U.S. at 518-519. Once Congress has established a remedial framework for jurisdictions with demonstrated records of constitutional violations, it may reasonably rely, for its decision to maintain that framework, on evidence of likely future unconstitutional conduct far less compelling than existed when it first imposed the remedial and preventive measures.

By way of analogy, in the judicial context, the Court has held that once a constitutional violation is found, the presumption shifts and the burden is on the violator to "demonstrate[] its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992). Such a showing requires not only compliance with the Constitution's direct requirements, but also "full and satisfactory compliance with the [court's remedial] decree." *Id.* at 491, 499.

Congress is, of course, not constrained by the institutional limitations that this Court has recognized con-

strain judicial supervision of school districts, but the analogy is nonetheless instructive. Indeed, what is permissible for the judiciary is *a fortiorari* within the power of Congress when it exercises its textually committed enforcement power under the Reconstruction Amendments. Congress found that the covered jurisdictions were the worst constitutional violators, a determination this Court sustained. Congress could permissibly therefore shift the presumption in favor of retaining the remedial scheme it adopted until the evidence demonstrates it is no longer necessary. An especially heavy burden must be imposed on a party seeking to have declared unconstitutional the continuation of a congressionally imposed remedy that this Court has specifically upheld four times as a permissible prophylactic measure against constitutional violations that undermine the very foundations of democracy.

As discussed more fully below, see pp. 41-51, *infra*, Congress determined in 2006, based on an extensive record, that, while VRA Section 5 had been responsible for "[s]ignificant progress" in covered jurisdictions, the remedial scheme had not yet fulfilled its mission. 2006 Reauthorization § 2, 120 Stat. 577. Congress determined that there is sufficient ongoing discrimination to warrant continued Section 5 coverage. Significantly, the evidence before Congress established that there is still more voting discrimination in covered jurisdictions than in non-covered jurisdictions, even excluding evidence arising out of the Section 5 preclearance process itself.

Contrary to appellant's assertion (Br. 59-60), Congress did engage in a "meaningful comparison between previously covered jurisdictions and noncovered ones." Congress examined a study of reported Section 2 suits filed throughout the country between 1982 and 2005,

conducted by the University of Michigan Voting Rights Initiative. *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 2d Sess. 125-126, 202-204 (2006) (*Continued Need*), The study revealed that 57% of the 117 cases with outcomes favorable to minority voters were filed in jurisdictions covered by Section 5, although those jurisdictions comprised less than one-quarter of the Nation's population in 2000. *Id.* at 125-126, 202-203. Thus, covered jurisdictions were subject to *more than twice* their proportional share of successful Section 2 suits, notwithstanding decades of close monitoring by the Attorney General through Section 5. Testimony also revealed that racial bloc voting is more pervasive in covered jurisdictions than in non-covered jurisdictions. *The Continuing Need for Section 5 Pre-clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 48 (2006).[7]

b. Section 5 is temporally limited, and the bailout provision allows jurisdictions demonstrating compliance to terminate coverage

While Congress recognized the continuing need for Section 5 in covered jurisdictions, it also provided for that process ultimately to come to an end. The 2006 reauthorization, like the original VRA and each extension, includes both a sunset date for Section 5 itself and a process by which individual States and political subdivisions may terminate coverage.

The 2006 reauthorization provided that Section 5 would terminate in 25 years and that Congress would reconsider Section 5 after 15 years. 42 U.S.C.

[7] A study of the 2008 election further indicates that racially polarized voting persists in covered jurisdictions. See Persily Br. 5.

1973b(a)(7) and (8). Those provisions ensure that Congress will take a fresh look at the remedial scheme as a whole to determine whether evidence of compliance with the Constitution and the statutory remedy are sufficient to demonstrate that Section 5's preclearance requirement is no longer appropriate. See *Eldred* v. *Ashcroft*, 537 U.S. 186, 208 (2003) (regarding lengthy copyright extension, courts are "not at liberty to second-guess congressional determinations and policy judgments of this order"). And, of course, Congress is free to remove or modify Section 5 at any earlier date.

Moreover, the 2006 VRA reauthorization retained the bailout mechanism—a feature that this Court has repeatedly highlighted as indicative of Section 5's remedial nature and tailored reach. See *South Carolina*, 383 U.S. at 331; *Briscoe*, 432 U.S. at 411; *Boerne*, 521 U.S. at 533. Notably, the bailout provisions are considerably broader now than when the VRA was first upheld in *South Carolina*.

From the VRA's enactment in 1965 until 1984, only jurisdictions that had been specifically designated under Section 4(b)'s coverage formula were eligible to seek bailout. 42 U.S.C. 1973b(a) and (b) (Supp. I 1965). In 1982 (effective in 1984), Congress expanded bailout eligibility to "political subdivision[s]" of designated States that were not separately designated. 1982 Amendments § 2(b)(2), 96 Stat. 131 (42 U.S.C. 1973b(a)(1)).

In addition, the bailout standard was amended in 1982 to make it substantially more permissive. Until 1984, when the expanded provisions took effect, a bailout required a jurisdiction to demonstrate that it had not engaged in discrimination since *before* the VRA's enactment in 1965. See, *e.g.*, 42 U.S.C. 1973b(a) (1982) (requiring no discrimination for 19 years). The 1982

Amendments now permit bailout if the jurisdiction can demonstrate that it has complied with the remedial scheme in the previous ten years, 42 U.S.C. 1973b(a)(1), thereby creating "an incentive" for covered jurisdictions to comply. *1982 Senate Report* 46, 59. By looking at the previous ten years, the bailout provision focuses on any *recent* discriminatory actions, thereby helping ensure the targeted application of Section 5's preclearance requirement.

Appellant claims (Br. 60) that the current bailout standard is now "of no practical use." As the district court observed, however, every political subdivision to apply for a bailout in the past quarter-century has received one. J.S. App. 12. Appellant's assertion that the bailout is unavailable to any county outside Virginia (Br. 24-26) is disproved by the facts of its own State. As the district court found, one of the Virginia jurisdictions that successfully bailed out has almost as many governmental subunits as the median number of subunits for Texas's political subdivisions. J.S. App. 140. Appellant's assertions are particularly unconvincing since Travis County conducts elections on behalf of the various political units within the County, including appellant, J.A. 398, and would therefore be in a position to gather the requisite information if it believed bailout was warranted. In any event, neither Texas nor Travis County has complained that Section 5 is too burdensome or that bailout is too restrictive. In fact, Travis County has intervened to defend Section 5's constitutionality.

2. Congress amassed an extensive record demonstrating ongoing discrimination against minority voters in covered jurisdictions

Before reauthorizing Section 5 in 2006, Congress conducted an extensive investigation into the operation and effect of the VRA over the previous 40 years. Congress held 21 separate hearings, heard from 86 witnesses, and gathered over 15,000 pages of evidence to discern the extent to which discrimination against minority voters continues in jurisdictions covered by Section 5. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 5, 11 (2006) (*2006 House Report*); S. Rep. No. 295, 109th Cong., 2d Sess. 2-4, 10 (2006).

Cognizant that Section 5 had been in operation since 1965, Congress examined not only the degree to which discrimination against minority voters persists in covered jurisdictions, but also the extent to which Section 5 has already been effective at remedying, preventing, and deterring such discrimination. Although Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters" since 1965, Congress also determined that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the" Fifteenth Amendment, as evidenced by "second generation barriers constructed to prevent minority voters from fully participating in the electoral process." 2006 Reauthorization § 2(b)(1), (2) and (7), 120 Stat. 577-578; see *2006 House Report* 6. Those findings are entitled to substantial deference. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).

In deciding whether to reauthorize Section 5 in 2006, Congress was not writing on a blank slate. Since Sec-

tion 5's enactment in 1965, Congress has repeatedly re-examined whether Section 5 is an effective and appropriate remedy, and this Court has upheld both its enactment and subsequent reauthorizations. In investigating whether minority voters in covered jurisdictions continued to face discrimination in 2006, Congress relied primarily on the same evidentiary sources on which Congress previously relied, and which this Court approved in *South Carolina* and *City of Rome*.

Because the VRA has been in operation for some time, there is no logic in appellant's insistence that reauthorization is proper only if the extent and types of voting discrimination that exist today exactly mirror the extent and types of voting discrimination that led to its enactment in 1965. In 2006, Congress was not deciding whether to enact Section 5 in the first instance, but whether to retain it. As the district court detailed, Congress found had before it evidence that Section 5 continues to be necessary and appropriate.

a. Section 5 enforcement

The strongest evidence of the continued need for Section 5 arises from the operation of the provision itself. In upholding Section 5 in *City of Rome*, this Court credited Congress's conclusion that "[t]he recent objections entered by the Attorney General * * * clearly bespeak the continuing need for this preclearance mechanism." 446 U.S. at 181 (quoting H.R. Rep. No. 196, 94th Cong. 1st Sess. 10 (1975) (*1975 House Report*)).

The 2006 record demonstrates that Section 5 continues to play an active role in preventing and deterring constitutional violations and maintaining the progress achieved over the past 40 years. The number of objections interposed by the Attorney General to prevent

discriminatory voting changes in covered jurisdictions has not dwindled, as one might expect had Section 5 outlived its usefulness. Since Section 5 was reauthorized in 1982, the Attorney General had interposed more than 750 objections, *2006 House Report* 21-22; *id.* at 36, and his objections prevented implementation of more than *2400 discriminatory voting changes*. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 104-2595 (2005) (*History, Scope, & Purpose*) (reproducing objections).[8] Although the annual rate of objections from 1968-1982 was slightly higher than the rate from 1982 to the present, *Continued Need* 172, the rate in several southern States actually *increased* in the post-1982 time period, *id.* at 60 (Louisiana); *id.* at 37 (2/3 of objections in Mississippi interposed after 1982). The record demonstrates that Section 5 continues to serve a critical role in achieving the still-elusive goal of eliminating racial discrimination in voting.

First, Section 5 *prevents* constitutional violations. Significantly, Congress learned that a sizeable portion of the Attorney General's objections were interposed because a jurisdiction had acted with a discriminatory purpose. Intentional discrimination against minority voters is exactly the type of action the Fourteenth and Fifteenth Amendments empowered Congress to prevent. Examples of intentional discrimination blocked by

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[8] The Department of Justice tracks the number of individual changes objected to in each objection letter. See *2006 House Report* 21-22; *id.* at 36; J.S. App. 82. A list of objections can be found at Civil Rights Div., U.S. Dep't of Justice, *About Section 5 of the Voting Rights Act* (last modified Jan. 2, 2008) <http://www.usdoj.gov/crt/voting/sec_5/obj_ activ.htm>.

the Section 5 preclearance process run the gamut of voting changes and types of jurisdictions.

One example illustrates the point. In 2001, the Attorney General interposed an objection regarding Kilmichael, Mississippi, after the all-white incumbent town governance tried to cancel an election shortly after black citizens had become a majority. *History, Scope, & Purpose* 1616-1619. When the citizens of Kilmichael finally voted, they elected the town's first African-American mayor and three African-American aldermen. *2006 House Report* 37. Other examples are legion. See, *e.g.*, *History, Scope & Purpose* 830-833 (2000 objection to redistricting plan for Webster County, Georgia, school board undertaken to "intentionally decreas[e] the opportunity of minority voters to participate in the electoral process" after majority black board was elected); *id.* at 1606-1612 (1998 objection to redistricting plan for Grenada, Mississippi, adopted with "purpose to maintain and strengthen white control of a City on the verge of becoming majority black").

Sometimes, Section 5 objections worked in tandem with other remedial provisions of the VRA to prevent constitutional violations. One example involved Mississippi's dual registration system, under which citizens were required to register separately for different elections. The dual system was a relic of the State's 1890 constitutional convention and was adopted "for the purpose of disfranchising blacks." *Continued Need* 176. In 1987, a federal court found that the system violated Section 2 of the VRA because it was "adopted for a discriminatory purpose and had a discriminatory effect, accounting, in part, for the 25 percentage-point difference in the registration rates of blacks and whites." *Ibid.* But, after passage of the federal National Voter Registration

Act of 1993, 42 U.S.C. 1973gg *et seq.*, Mississippi reinstituted a dual registration system. The Department of Justice objected in 1997, "finding that the state's new dual system was racially discriminatory both in purpose and effect." *Continued Need* 368.

Section 5 suits by private individuals can also play a critical role in preventing constitutional violations. County officials in Waller County, Texas, had for decades worked to prevent students at the historically black Prairie View A&M University from voting. When two students decided to run for local office in 2004, the white district attorney threatened the predominantly black student body with felony prosecution if they voted —even though a federal court had upheld the students' right to vote in local elections. *Continued Need* 185; *United States* v. *Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), aff'd, 439 U.S. 1105 (1979). The district attorney relented after the NAACP brought suit. Yet, only a month before the election, county officials drastically reduced early voting near campus—knowing that many students would be on spring break on election day and therefore needed to vote early. The county did not submit the change for preclearance, but the scheme was nonetheless derailed when the NAACP filed a Section 5 enforcement action. *Continued Need* 185-186.

Second, Section 5 effectively *deters* unconstitutional discrimination. *2006 House Report* 24 ("As important as the number of objections that have been interposed to protect minority voters against discriminatory changes, is the number of voting changes that have never gone forward as a result of Section 5."). Congress heard repeatedly that "Section 5 has a strong deterrent effect" that has prevented jurisdictions from implementing

or enacting discriminatory voting changes. *Continued Need* 34.

One tangible way in which Congress found that Section 5's deterrent effect can be observed is in the "administrative mechanism, known as a 'more information request'" (MIR). *2006 House Report* 40. In some instances, an MIR causes the jurisdiction to alter its proposed change after concluding "that the change would be objected to as violating the Act if it were not withdrawn." *Continued Need* 124; *History, Scope, & Purpose* 93-94. Since 1982, more than 205 voting changes have been withdrawn in response to such information requests. *2006 House Report* 41. A recent study of the efficacy of MIRs at deterring discriminatory voting practices concluded that MIRs were particularly effective during the period 1999-2005, deterring many times more changes than formal objections did. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 221 (2006). The study found that the "largest impact of MIRs was in Texas." *Id.* at 220.

Third, Section 5 *safeguards* the progress minority voters have achieved since 1965. Even where the Attorney General made no explicit finding of discriminatory purpose, Section 5's preclearance process has prevented hundreds of voting changes that would have eroded that progress. In Texas, for example, Latinos reached one-third of the State's total population by 2001. The state legislative redistricting board proposed a redistricting plan for the State House of Representatives that would have minimized Latino voting strength by eliminating four existing majority-Latino districts, while adding only one such district. The Attorney General interposed

an objection to the proposed plan, and Latino voters in Texas accordingly maintained four majority districts and the opportunity to elect representatives of their choice. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. 19 (2005) (*Impact & Effectiveness*); *History, Scope, & Purpose* 2518-2523.

Finally, Section 5's protection *is comprehensive*. The preclearance process prevents the implementation of discriminatory voting changes in every form and at every level of government. The Justice Department has interposed objections to a range of voting changes, including annexations, education requirements, election dates, polling locations, majority-vote requirements, statewide and local redistricting, staggered terms, and numbered posts. *History, Scope, & Purpose* 1696-2595 (objection letters, 1978 through mid-2003); *Continued Need* 335, 402-404. Those objections have prevented discriminatory changes affecting voting at all levels of government and touching every aspect of voters' participation in the democratic process. See, *e.g.*, *id.* at 62-66, 335.

When a Section 5 objection prevents implementation of a discriminatory voting change at the statewide level, it protects hundreds of thousands of minority voters. Since 1982, the Attorney General has interposed an objection to a statewide redistricting plan in every fully covered State, thereby preventing discrimination against millions of minority voters. J.S. App. 69. In Louisiana, for example, "since 1965, not one single Louisiana State House of Representatives redistricting plan[,] as initially submitted to the Justice Department

for review, has been precleared." *Impact & Effectiveness* 16.

b. Additional evidence of voter discrimination

In 2006, Congress also relied on evidence of ongoing discrimination derived from outside the Section 5 preclearance process, including efforts to enforce other provisions of the VRA, statistical data, and testimony about particular abuses. See *South Carolina*, 383 U.S. at 330 ("Congress obviously may avail itself of information from any probative source."). These are the same sources previous Congresses relied on enacting and reauthorizing Section 5. *1981 House Report* 7-8, 17-18, 20-21; *1975 House Report* 7, 12, 16-24; *1975 Senate Report* 13-15, 20-21, 25-31; *1965 Senate Report* 3-12. Section 5 cannot prevent every discriminatory voting practice in covered jurisdictions, because it applies only to electoral *changes* and often cannot reach the discretionary actions of officials such as individual poll workers. But such discrimination is nonetheless relevant to Congress's determination that there is an ongoing need for Section 5.

i. Section 8 of the VRA, 42 U.S.C. 1973f, permits the Attorney General to deploy federal observers to monitor elections in a particular "locale because racial tensions are high and efforts to discriminate may occur." *Continued Need* 124. The Attorney General certifies the need for such observers "only when there is a reasonable belief that minority citizens are at risk of being disenfranchised" by tactics such as "harassment and intimidation inside polling locations." *2006 House Report* 44. In each year between 1984 and 2000, the Justice Department sent out between 300 and 600 individual observers. *Continued Need* 13. In 2004, the Department dispatched nearly 2000 monitors to over 100 jurisdictions. See

Modern Enforcement of the Voting Rights Act: Hearing Before the Senate Judiciary Comm., 109th Cong., 2d Sess. 9 (2006). In many covered States, the rate of observer coverage since 1982 has met or exceeded the rate of observer coverage between 1965 and 1982. *Continued Need* 79-80. Congress learned of many forms of racial discrimination reported by observers, including discriminatory statements made by poll workers. *Id.* at 184.

Congress also found that "[e]vidence of continued discrimination includes * * * the continued filing of section 2 cases that originated in covered jurisdictions." 2006 Reauthorization § 2(b)(4)(C), 120 Stat. 577-578. Analysis of reported Section 2 cases reveals widespread judicial findings of serious voting discrimination against minority voters in covered jurisdictions. See, *e.g.*, *Continued Need* 14 (North Carolina), 340 (South Dakota); *id.* at 251, 283-287 (maps and table showing number of county-level voting practices altered as a result of Section 2 litigation in, *e.g.*, Alabama (275), Texas (274), Georgia (76), Mississippi (74), and North Carolina (56)); *History, Scope, & Purpose* 78 (Texas, North Carolina, Alabama).

One prominent example was the subject of this Court's decision only three Terms ago in *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399 (2006), which found that Texas adopted a congressional districting plan in 2003 bearing "the mark of intentional discrimination that could give rise to an equal protection violation" by purposefully diminishing the voting strength of a cohesive language minority community. *Id.* at 440. The Court found that the State's intentional splitting of that cohesive minority population "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that

was becoming increasingly politically active and cohesive," and that "the State took away the Latinos' opportunity" to elect their candidate of choice precisely "because Latinos were about to exercise it." *Id.* at 439-440.

Congress also continued to rely in 2006 on disparities in registration rates between minority and nonminority voters. When this Court upheld the 1975 reauthorization of Section 5 in *City of Rome*, it noted that, "largely as a result of" the VRA, registration of black voters "had improved dramatically since 1965." 446 U.S. at 180. Nevertheless, the Court credited Congress's conclusion that a significant disparity remained in at least some covered jurisdictions, including disparities of between 16 and 24 percentage points in Alabama, Louisiana, and North Carolina. *1975 House Report* 6; *1975 Senate Report* 13. Comparable disparities persisted in 2006, when Congress found gaps of between 11 and 31 points in registration and turn-out rates in Virginia, Texas, and Florida. *2006 House Report* 25, 29. In fact, as the district court found, when the statistics are adjusted to distinguish between "White Hispanic" and "White non-Hispanic" residents, the gaps are even more striking, showing that black registration rates continue to lag behind those of non-Hispanic whites in all but one covered State. J.S. App. 61.

Beyond the quantitative and statistical evidence, Congress also gathered thousands of pages of testimony and documents from citizens, advocates, and officials chronicling ongoing problems of vote suppression, voter intimidation, and vote dilution throughout covered jurisdictions. Further examples of vote suppression, far beyond what can be summarized here, included minority voters being threatened with arrest or prosecution for voting, *Continued Need* 3619-3620, 3979, poll workers

telling language minority voters that they should not be voting if they do not speak English, *id.* at 350, 3980, large-scale efforts to challenge minority voters' registration, *id.* at 93, and misinformation campaigns designed to prevent minority voters from getting to the polls, *id.* at 3548. Examples of vote dilution included techniques such as dilutive redistricting plans, discriminatory annexations, anti-single-shot rules, majority vote/run-off requirements, and at-large election systems. *Id.* at 20, 123.

The abundant evidence Congress collected demonstrated that discrimination remains a serious problem. *2006 House Report* 6. Congress also found that the progress made in combating that discrimination "is the direct result of the Voting Rights Act." 2006 Reauthorization § 2(b)(1), 120 Stat. 577. That progress was not, however, enough. Congress enacted Section 5 as part of an effort "to rid the country of racial discrimination in voting," *South Carolina*, 383 U.S. at 315, not "simply to reduce racial discrimination in voting to what some view as a tolerable level," 152 Cong. Rec. S7976 (daily ed. July 20, 2006) (Sen. Feingold). Congress determined that further enforcement of Section 5 is necessary because without its "protections, racial and language minority citizens will be deprived of the right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." 2006 Reauthorization § 2(b)(9), 120 Stat. 578. After extremely careful review, a near-unanimous majority of the people's elected representatives—including those representing jurisdictions covered by Section 5—voted to reauthorize the law. That determination is entitled to "much deference" by this Court. *Boerne*, 521 U.S. at 536.

3. Appellant's efforts to minimize the legislative record are unavailing

a. The central theme of appellant's attack is a claim that only evidence of "gamesmanship"—*i.e.*, jurisdictions evading judicial enforcement by changing discriminatory tactics—could justify Section 5. Br. 39-40. But "gamesmanship" was not the sole focus of Congress in originally enacting Section 5, and it was certainly not the focus of this Court in upholding it. The Court recognized in *South Carolina* that it was the cumbersome nature of case-by-case adjudication that prompted Congress to adopt the preclearance requirement. 383 U.S. at 314, 327-328.

Of course, Section 5's preclearance mechanism removes the opportunity for covered jurisdictions to engage in gamesmanship. Jurisdictions must now demonstrate that new voting practices are not discriminatory *before* implementing them. Although Congress did find evidence of some covered jurisdictions' attempts to evade the nondiscrimination mandate of Section 5, J.S. App. 131, the lack of additional evidence of that kind simply demonstrates that Section 5 is doing its job.

In a similar vein, appellant argues (Br. 54) that, while case-by-case adjudication was inadequate when the VRA was first enacted, litigation under Section 2 is now faster and more effective than Section 5 preclearance. Those are determinations for Congress to make. The extensive record in 2006 documented why Section 5 is an appropriate measure to remedy and prevent voting discrimination in covered jurisdictions. The same problems with case-by-case adjudication that justified Section 5 in 1965, *South Carolina,* 383 U.S. at 314; *City of Rome*, 446 U.S. at 174, exist today. Congress is not limited to sitting back while discrimination occurs and then

relegating its victims to the costly and burdensome litigation remedies available under Section 2.

Specifically, the record before Congress documented three shortcomings of Section 2 litigation. First, Section 2 is purely an after-the-fact remedy, available only to challenge voting practices and procedures already in place. Section 2 actions can take years to litigate, during which time the challenged practice remains in place no matter how discriminatory it is. If a candidate is elected under what turns out to be an illegal voting scheme, that individual will nonetheless enjoy significant advantages of incumbency. *Impact & Effectiveness* 13-14; *Continued Need* 97. In some cases, an illegal voting practice must remain in effect for several election cycles before the plaintiff can gather enough evidence to demonstrate a discriminatory effect. *History, Scope, & Purpose* 92. By contrast, under Section 5, discriminatory voting practices are prevented through a system that takes at most several months. See *id.* at 101. Moreover, it can be very difficult for all involved—the jurisdiction, candidates, and voters—when courts undo elections *ex post*. The far better solution is to ensure elections protect voting rights before they take place.

Second, Section 2 places the burden of proof on minority plaintiffs to demonstrate discrimination, while Section 5 places the burden on jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *History, Scope, & Purpose* 83; *Continued Need* 97. Jurisdictions are in a much better position than individual citizens to amass information about potential discrimination in voting procedures, without incurring undue expense.

Finally, Section 2 places a heavy financial burden on minority voters who challenge illegal election practices and schemes. See *History, Scope, & Purpose* 92, 97. Section 5, on the other hand, takes the financial burden off minority voters while placing the comparatively small financial burden associated with preclearance onto covered jurisdictions. See *id.* at 79.

The evidence presented to Congress demonstrated that compliance with Section 5 is not unduly burdensome. Congress was informed that preclearance through the Attorney General is "swift" and "streamlined." *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 10, 182 (2006). This case bears that out. Appellant's average annual expenditure on Section 5 compliance, which was only $223, now approaches zero since it entered joint election agreements with Travis County. J.A. 270, 279.

b. Appellant offers two specific challenges to the evidence relied upon by Congress, deriding the rate of Section 5 objections as "vanishingly small," Br. 52, and questioning Congress's concern with the prevalence of racially polarized voting, *id.* at 48-49. Neither point undermines Congress's determination.

As the district court found, the rate of objections interposed by the Attorney General has always been low, and the overall trend throughout the life of Section 5 has been declining, as would be expected. J.S. App. 64-67. As noted earlier, however, the rate in several southern States actually *increased* in the post-1982 time period. See p. 43, *supra*. Moreover, statistics demonstrate a "consistent increase over time of objections based on the purpose prong of Section 5." Peyton McCrary et al., *The End of Preclearance As We Know It:*

How the Supreme Court Transformed Section 5 of the Voting Rights Act, 11 Mich. J. Race & Law 275, 297 (2006).[9] Most importantly, the rate of objections alone does not reflect the degree to which such objections prevent and deter discrimination against minority voters. See pp. 41-51, *supra*.

Appellant also dismisses (Br. 49-51) Congress's finding that persistent racially polarized voting throughout covered jurisdictions leaves minority voters "politically vulnerable," 2006 Reauthorization § 2(b)(3), 120 Stat. 577, arguing that racial polarization is not state action, and therefore not relevant to the Fifteenth Amendment. Section 5 prohibits covered governmental entities from implementing voting changes that discriminate against minority voters, including discriminatory voting schemes that inhibit minority voters' opportunity to elect their candidates of choice. As the district court found, racially polarized voting is a necessary precondition for vote dilution techniques to have their intended discriminatory effect. J.S. App. 106. Thus, Congress's finding that racial bloc voting continues throughout covered jurisdictions bolsters Congress's determination that covered jurisdictions have ready means of discriminating against minority voters.

C. Amici's Challenges To The 2006 Substantive Amendments To Section 5 Are Not Properly Before The Court

Appellant does not challenge, but notes in passing (Br. 63), that Congress amended Section 5's substantive standard to provide that election changes motivated by

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[9] The number of objections based on intent decreased following *Reno* v. *Bossier Parish School Board*, 528 U.S. 320, 341 (2000). In 2006, Congress amended Section 5 to provide for denial of preclearance for intentionally discriminatory measures.

a racially discriminatory purpose will preclude preclearance, even when the changes are not retrogressive. See 42 U.S.C. 1973c(a) and (c). That change overruled this Court's statutory holding in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*), that changes motivated by discrimination, even though unconstitutional, were not a basis for denying preclearance. *Id.* at 341.[10]

Certain of appellant's amici take, as the focus of their attacks on the 2006 reauthorization, that substantive change and another, by which Congress provided that preclearance should be denied if an electoral change diminishes, on account of race, citizens' ability "to elect their preferred candidates of choice," 42 U.S.C. 1973c(b). See, *e.g.*, Thernstrom Br. 2-4; Scarf-Norton Br. 7. Amici's arguments, which rest on the premise that the substantive amendments will lead Section 5 to be applied in an unconstitutional manner, are not properly before the Court. They were neither pressed before nor passed upon by the district court, nor were they raised in appellant's jurisdictional statement.

Any challenge to the substantive amendments is, in any event, premature. Such a challenge must await a case involving the Department's application of the new provisions. To be clear, however, amici are incorrect that the amended Section 5 authorizes—let alone compels—either the Justice Department to require, or covered jurisdictions to engage in, unconstitutional redis-

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[10] The statutory change with respect to *Bossier II* makes Section 5 hew even more closely to the constitutional prohibition it enforces. Under *Bossier II*, an unconstitutional discriminatory motive was not a basis to refuse to preclear an election change. Section 5 now stands as protection against that type of constitutional violation as well.

tricting.[11] No act of Congress could "overrule" this Court's determinations of what the Constitution requires in the redistricting context, and the Department's guidance makes that clear.[12]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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[11] Appellant does not, in any event, engage in redistricting.

[12] *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5413 (2001).