Oral Argument Scheduled for February 27, 2012

No. 11-5349

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN LAROQUE, ET AL.,

APPELLANTS,

V.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (NO. 10-561 (JDB))

CORRECTED BRIEF FOR INTERVENORS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Intervenor-Appellees certify that:

1. Parties:

All parties, intervenors, and amici appearing before the district court are listed in the Appellant's Brief.

2. Rulings Under Review:

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

3. Related Cases:

This case has previously been before this Court in Case No. 10-5433. All related cases are listed in the Appellant's Brief.

CORPORATE DISCLOSURE STATEMENT OF THE INTERVENOR-APPELLEE NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP

The North Carolina State Conference of Branches of the NAACP is a § 503(c)(4) affiliate of the National Association for the Advancement of Colored People, Inc., which is a not-for-profit corporation organized under the laws of New York and does not issue shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

* Authorities upon which we chiefly rely are marked with asterisks

STATEMENT OF ISSUES

1. Whether the 2006 reauthorization and extension of Section 5 of the Voting Rights Act exceeds Congress' enforcement powers under the Fourteenth and Fifteenth Amendments;
2. Whether the 2006 amendments to Section 5 exceed Congress' enforcement powers under the Fourteenth and Fifteenth Amendments;
3. Whether the 2006 amendments to Section 5 violate the Equal Protection Clause of the Fourteenth Amendment;
4. Whether Plaintiffs' standing extends to the "discriminatory purpose" amendment, 42 U.S.C. s. 1973(c)(c).
5. Whether Section 5 of the VRA is a racial classification subject to strict scrutiny, or a "race neutral" law subject to rational basis scrutiny?

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS AND CASE

In 1965, Congress passed the Voting Rights Act ("VRA"), P.L. 89-110, 42 U.S.C. §§ 1973–1973aa-6, in order to combat racial discrimination in voting and to enforce the Fifteenth Amendment, which prohibits the denial of the right to vote

"on account of race, color, or previous condition of servitude."[1] South Carolina v. Katzenbach, 383 U.S. 301, 308, 315 (U.S. 1966). The VRA was passed pursuant to § 2 of the Fifteenth Amendment, which authorizes Congress to enforce §1 of the Amendment. Id. at 308.

Since its passage, the VRA has been reauthorized and amended by Congress multiple times, most recently in 2006,[2] and has withstood various legal challenges to its constitutionality. Katzenbach, 383 U.S. at 337 (upholding Section 5 after 1965 enactment); Georgia v. United States, 411 U.S. 526, 535 (1973) (upholding the constitutionality of the 1970 extension of Section 5); City of Rome v. United States, 446 U.S. 156, 183 (1980) (upholding Section 5 after 1975 reauthorization); Lopez v. Monterey Cnty., 525 U.S. 266, 282-83 (1999) (upholding Section 5 after 1982 reauthorization). Accord, County Council of Sumter County, S.C. v. United States, 555 F. Supp. 694, 707 n. 13 (D.D.C. 1983); Giles v. Ashcroft, 193 F. Supp. 2d 258, 263 (D.D.C. 2002); Janis v. Nelson, 2009 WL 5216902 at *8 (D.S.D. 2009) (rejecting a challenge to the constitutionality of Section 5); Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. 2008), vacated and

[1] "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV §§ 1, 2.

[2] The VRA was amended in 1970, P.L. 91-285, 1975, P.L. 94-73, 1982, P.L. 97-205, 1992, P.L. 102-344, and 2006 P.L. 109-246; H.R. 9. The VRA was reauthorized in 1970 for five years, in 1975 for seven years, in 1982 for twenty-five years, and 2006 for twenty-five years. JA 226.

remanded on other grounds sub. nom. by 129 S. Ct. 2504 (2009); Shelby Cnty. v. Holder, No. 10-cv-561 (D.D.C. 2011), 2011 WL 4375001.

Section 5 of the VRA suspends all proposed voting changes in jurisdictions with a history of racially discriminatory voting practices, pending pre-clearance by federal authorities to determine whether use of the regulations would perpetuate voting discrimination. Katzenbach, 383 U.S. at 316. In the 2006 reauthorization of the VRA, Congress amended Section 5 by adding to § 1973c three new subsections which abrogated two Supreme Court decisions that "misconstrued Congress's original intent . . . and narrowed the protections" of Section 5: Reno v. Bossier Parish, 528 U.S. 320 (2000) (Bossier II), and Georgia v. Ashcroft, 539 U.S. 461 (2003). Pub.L. 109-246, §2, July 27, 2006, 120 Stat. 577.

Subsection (c) restored the VRA's original criteria for determining whether new voting regulations should be pre-cleared. In Bossier II, the Supreme Court held that voting changes must have a discriminatory and retrogressive purpose in order to be denied pre-clearance. Bossier II, 528 U.S. at 341. By adding Subsection (c) to the VRA, Congress clarified that denial of preclearance may be based on finding of any discriminatory purpose. 42 U.S.C. 1973c(c).

Subsections (b) and (d) addressed what test should be used to determine whether a voting change had a prohibited retrogressive effect under Section 5's "effects" prong. In Georgia v. Ashcroft, the Supreme Court instituted a complex

"totality of the circumstances" test for determining whether a voting change had a prohibited retrogressive effect under Section 5's "effects" prong. 539 U.S. at 479-80. In response, subsections (b) and (d) reshaped the test to focus on whether voting changes diminish the ability of minorities "to elect their preferred candidates of choice." Pub.L. No. 109-246, §§ 5(b), (d), 120 Stat. at 581; 42 U.S.C. §§ 1973c(b), (d).

After the reauthorization and amendments to the Voting Rights Act, in November of 2008, voters in Kinston, North Carolina, passed a referendum that would have replaced the city's partisan electoral system with a nonpartisan system. JA 8. Under the current partisan system, candidates who wish to run in the city's general election must either receive 40% of the vote in a party primary or obtain signatures from 4% of all registered voters. JA12. Under the nonpartisan system contemplated by the referendum, a candidate would only be required to file a candidacy notice and pay a filing fee. LaRoque v. Holder, 650 F.3d 777, 778-84 (D.C. Cir. 2011) (LaRoque II). No candidate would be affiliated with any political party on the ballot. JA 5, 8.

Because Kinston, a city in Lenoir County, North Carolina, is a covered jurisdiction under Section 5 of the VRA, it was required to submit the referendum for preclearance before implementation. JA 222. In a letter date August 17, 2009, the Justice Department denied preclearance for the referendum based on the fact

that eliminating party affiliation on the ballot would "likely reduce the ability of blacks to elect candidates of choice." JA 44-46. The Justice Department explained that, in its view, the limited success of Kinston African Americans in electing candidates of choice, most of whom have been black, has relied upon "crossover voting" by whites. JA 46. In Kinston city elections, a majority of white Democrats support white Republicans over black Democrats; however, "a small group of white Democrats maintain strong party allegiance" and vote along party lines, regardless of candidates' race. JA 46. Citing this voting dynamic, the Justice Department determined that eliminating party affiliation on the ballot would cause black candidates to lose a significant amount of white crossover votes due to the high degree of racial polarization in Kinston elections, thereby reducing the ability of blacks to elect candidates of choice. JA 46.

The Justice Department further observed that the loss of party-provided financial and social resources would contribute to the reduction in blacks' ability to elect candidates of choice. JA 46. Because changing Kinston's elections from partisan to nonpartisan would likely eliminate parties' roles in the elections, the Justice Department predicted that parties would be likely to cease providing campaign support and other assistance for black candidates. JA 46. Without this support, the Justice Department reasoned that minorities may lag behind their

white counterparts in campaign spending and lose opportunities to connect with voters who may otherwise be unreachable. JA 46.

After the City Council decided not to pursue judicial preclearance, Plaintiffs brought a facial constitutional challenge to Section 5. JA 5, 34. Plaintiffs are voters, prospective candidates, and Kinston Citizens for Non-Partisan Voting, an unincorporated membership association. JA 5-7. In November 2011, as a result of the Department of Justice's objection, and the resultant continuation of nonpartisan elections, African-Americans were able to, for the first time, achieve fair representation, commensurate with their population in the city. JA 221 (Patterson 2nd Declaration).

On January 30, 2012, the Department of Justice notified the City of Kinston that based on its review of information presented to it in a submission seeking preclearance of a proposed change to nonpartisan elections for the Lenoir County Board of Education, the Department would reconsider its objection to see if there had be a "substantial change in operative fact" that would warrant withdrawal of that objection. Doc. No. 1355574 (Jan. 30, 2012). On February 10, 2012, the Department of Justice formally withdrew its objection and precleared the Kinston referendum, allowing future elections to be conducted as nonpartisan elections. Doc. No. 1357866 (Feb. 10, 2012).

SUMMARY OF ARGUMENT

When presented with a vast amount of evidence documenting the persistent efforts by some state actors—notably, in jurisdictions covered by Section 5 of the Voting Rights Act—Congress acted carefully to ensure that the precious right to vote free from racial discrimination, as guaranteed by the Fifteenth Amendment, was enforced. Congress reauthorized Section 5 for a limited period of time, and amended it to ensure that it effectively targeted the bad practices documented during the legislative process. Congress neither exceeded its enumerated powers under the Fifteenth Amendment nor violated the Equal Protection Clause of the Fourteenth Amendment when it reauthorized and amended this vital voting rights law.

ARGUMENT

I. STANDARD OF REVIEW

A lower court's grant or denial of summary judgment for a party is reviewed "de novo" by an appellate court, using the same standard as lower court in analyzing whether any party is "entitled to judgment as a matter of law." Dist. of Columbia Hosp. Ass'n v. Dist. of Columbia, 224 F.3d 776, 779 (D.C. Cir. 2000). In a facial challenge such as the present action, Plaintiffs-Appellants must demonstrate that there are no set of circumstances under which the challenged law would be valid. United States v. Salerno, 481 U.S. 739, 745 (1987).

II. STANDING

The issue of standing in the present action has already been extensively litigated and argued. This Court found that Plaintiff Nix, as a candidate for City Council, had standing to challenge the 2006 reauthorization of Section 5 as exceeding Congress' enumerated powers under the Fifteenth Amendment. LaRoque II, 650 F.3d at 792. The standing of one plaintiff was sufficient for the action to proceed. Id. The District Court, on remand from this Court, found that Plaintiff Nix had standing to challenge one of the 2006 Amendments to the Act, relating to the restoration of the "retrogressive effect" analysis to its pre-Georgia v. Ashcroft standard. JA 228-29, 249. The District Court found that Plaintiff Nix did not have standing to challenge the other amendment, which restored the "purpose" prong of Section 5 to its pre-Bossier II standard. JA 226-28, 241. Despite this finding, the District Court analyzed the merits of the challenge to the "purpose" Amendment in the event that this Court disagrees with its standing analysis. JA 300, 302-03.

The doctrine of standing determines whether a litigant "is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). To establish such entitlement, a plaintiff must allege a "personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on

his behalf." Id. *at* 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)) (internal quotation marks omitted); see also Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972). The requisite "personal stake" which establishes standing must be proven by the existence of three elements: (1) an "injury in fact," which is "an invasion of a legally protected interest which is (a) concrete and particularized," and (b) "actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and, finally, (3) redressability, which is a likelihood "that the injury will be redressed by a favorable decision" by the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

Specifically, in order to satisfy the concrete and particularized injury requirement, the Plaintiff must be affected "in a personal and individual way." A Plaintiff must allege more than merely a "generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws." Id. at 561 n.1, 573. On appeal of the District Court's grant of the motion to dismiss for lack of standing, this Court found that Plaintiff Nix had suffered a sufficiently personal injury because Section 5's general preclearance procedure and the suspension of the referendum required him to spend more time and effort to qualify as a candidate, and denied him the electoral advantage of eliminating party-line straight-ticket voting, which favors

Democratic candidates. LaRoque II, 650 F.3d at 786. On remand, the District Court further found that this same injury was also sufficient to establish Article III standing to challenge the amendment relating to the "retrogressive effect" standard. JA 240.

However, the District Court found that Plaintiffs could not establish standing to challenge the "purpose" (subsection (c)) amendment because that amendment could not be causally linked to Plaintiff Nix's injury. JA 241. The Attorney General denied preclearance based on the fact that eliminating party affiliation on the ballot would "likely reduce the ability of blacks to elect candidates of choice." JA 44-46. The Department of Justice did not claim that a racially discriminatory purpose motivated the referendum; in fact, the Department indicated that it understood "the motivating factor" for the change to be "partisan." JA 46. The Department objected specifically because it could not "conclude that the city sustained its burden of showing that the proposed changes do not have a retrogressive effect." JA 45. There is no causal link between the Attorney General's objection to subsection (c), which provides that "[t]he term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose," and the denial of preclearance which lead to Nix' injury. 42 U.S.C.A. § 1973c. Plaintiffs failed to offer any evidence that the Attorney General relied on subsection (c) in interposing its objection referendum. JA 241. For these reasons,

there is no "causal connection" between Nix's injuries and subsection (c), and thus Nix does not have Article III standing to challenge this amendment. Lujan, 504 U.S. at 560.

The District Court made another finding preserved for review in this action, and that was that the 2006 amendments were severable from the general preclearance procedure and requirement. JA 245-47. This affected the redressability prong for establishing Nix's standing to challenge the amendments. JA 247. If the amendments were struck as unconstitutional, but Nix's injury could not be redressed by that outcome because the preclearance requirement still remained, Nix would have failed to satisfy Article III standing requirements. Again, though, the District Court proceeded with its merits analysis in case this Court disagreed with its standing analysis on this front. JA 247-50.

The District Court was correct in concluding that Plaintiff Nix lacks standing to challenge the 2006 Amendments because he failed to show that his injury will be redressed if the Court finds those amendments unconstitutional. Section (a), the general preclearance requirement, satisfies the threefold test for severability. A portion of the statute is severable if it is: (1) constitutionally valid; (2) capable of functioning independently and (3) consistent with Congress' basic objectives in enacting the statute. United States v. Booker, 543 U.S. 220, 258-259 (2005).

Section (a) of Section 5 meets all three of these requirements. Thus Plaintiff Nix has failed to show that his alleged injury can have any redress in this action.

Section (a)'s general preclearance requirement is both constitutionally valid and functions independently of Sections (b) and (c). The language of Section (a) is largely the same as the previous version of Section 5 and outlines the preclearance procedures for any voting qualification, or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect. This provision functions independently of Sections (b) and (c), which only expand the scope of preclearance review to additional forms of discrimination. Section (a) has been repeatedly upheld as constitutional by the Supreme Court. See Katzenbach, 383 U.S. at 337; Georgia v. United States, 411 U.S. at 535; City of Rome, 446 U.S. at 183; Lopez, 525 U.S. at 282-283.

Additionally, Congress intended for Sections (b) and (c) to be severable. "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." Ayotte v. Planned Parenthood, 546 U.S. 320, 330 (2006) (citations omitted). Chapter 42, Chapter 20, Subchapter I-A "Enforcement of Voting Rights" contains a separability (severability) clause, which indicates that if any part of the Act [42 U.S.C. §§ 1973 et. seq.] is found unconstitutional, the remainder of the Voting Rights Act of 1965 will not be affected by such determination. 42 U.S.C. § 1973p.

The severability clause in the Act shows plainly that Congress intended for the Act to remain in force in any one of the provisions were found invalid. As the District Court noted, the Court must assume that Congress affirmatively intended for the severability clause to apply to when it reauthorized and amended Section 5. JA 246.

Appellants' argument that, without the Amendments, Congress would discard Section (a) ignores the fact that the preclearance requirement of Section (a) remains its own provision. Sections (b) and (c) only strengthen the general preclearance requirement that powers Section 5. This Court must ask, "Would the legislature have preferred what is left of its statute to no statute at all? " Ayotte, 546 U.S.at 330 (2006). Appellants' answer that Congress, by bolstering the main provision of Section 5 with provisions that authorize the restored, full review of voting changes, would prefer that the law not exist if left to stand in its earlier form ignores the critical fact that Section (a) is an emphatic reauthorization for the continuing need for preclearance in covered jurisdictions.

Finally, the standing analysis has now fundamentally changed since this Court reviewed the matter and since the District Court issued its decision on December 22, 2011. As discussed, supra p.6, on Friday, February 10, 2012, the Department of Justice withdrew its objection and precleared the referendum changing Kinston municipal elections to non-partisan. A plaintiff must have

standing at every step of litigation. Davis v. F.E.C., 554 U.S. 724, 732-33 (2008) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (internal citations omitted). Due to the Attorney General's preclearance of the referendum, Appellants, particularly Nix, no longer have standing to prosecute this action. When Nix runs for election in 2013, as he has proclaimed is his intention to do so, he will be able to run in a non-partisan system. JA 251.

None of Nix's injuries, including increased cost and decreased likelihood of winning as an unaffiliated candidate in a partisan election, JA 240, are traceable to the objections interposed by the Attorney General, are any longer in existence. Partisan affiliation will no longer play a role in Kinston municipal elections, and thus the burdens Nix complained of will no longer impede his campaigning. Furthermore, any injury that Nix already sustained has already been redressed by the Attorney General's withdrawal of the objection. Doc. No. 1357866 (Feb. 10, 2012). A decision by this Court on the constitutionality of the 2006 reauthorization and amendments to Section 5 of the Voting Rights will have no impact on Nix's injury. Neither Nix nor any other Plaintiff can establish the Article III standing requirements necessary to continued prosecution of this challenge. Thus, because Appellants no longer have standing to pursue this cause of action, this Court should dismiss the instant case.

III. CONGRESS ACTED WITHIN ITS ENFORCEMENT POWERS UNDER THE FIFTEENTH AMENDMENT WHEN IT REAUTHORIZED SECTION 5 IN 2006

A. Under the Boerne/Katzenbach Analysis, the 2006 Reauthorization Was Both Rationally Related to a Legitimate Congressional Concern and Was a Proportional and Congruent to Response to the Problem Identified

Congress' 2006 determination that racial and language minorities remain subject to racial discrimination in voting is amply supported by the legislative record and is entitled to great deference by this Court. United States Dept. of Labor v. Triplett, 494 U.S. 715, 721 (1990) (recognizing the "heavy presumption of constitutionality to which a 'carefully considered decision of a coequal and representative branch of Government' is entitled"). Indeed, in recently considering and declining to decide a challenge to the constitutionality of Section 5, the Supreme Court again acknowledged that "[t]he Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 129 S. Ct. 2504, 2513 (2009).

In this light, the District Court carefully approached the standard of review that would apply to its consideration of this constitutional challenge: the more relaxed "rationality" review set forth by the Supreme Court in South Carolina v. Katzenbach or the allegedly more demanding "proportionality and congruence"

standard set forth in City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).[3] The Supreme Court in Katzenbach applied a very deferential standard of review, and, in upholding Section 5, found that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting." Katzenbach, 383 U.S. at 324. After that case, the Supreme Court consistently applied the rationality standard in reviewing challenges to reauthorizations of the Voting Rights Act, including Lopez, which was decided in 1999. Georgia v. United States, 411 U.S. at 535; City of Rome, 446 U.S. at 178; Lopez, 525 U.S. at 282-38.

In Boerne, a 1997 case, the Supreme Court struck down the Religious Freedom Restoration Act as exceeding Congress' enforcement powers under the Fourteenth Amendment. Boerne, 521 U.S. at 532, 536. Although the Court acknowledged the deference that must be paid to legislative enactments, it required "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. at 520. The District Court in Nw. Austin held that the deferential Katzenbach applied, but the lower court in this action disagreed. Shelby.JA 520-21. The court below did note, though, that while it believed that the Boerne analysis was the proper one to apply to assess legislation

[3] The District Court did not specifically address this Count of Plaintiffs' claims, as it viewed it as resolved by the Shelby Cnty. v. Holder decision. Thus, this discussion refers almost entirely to the District Court's September 21, 2011, decision in that case.

enacted pursuant Fifteenth Amendment as well as the Fourteenth Amendment, that the Boerne standard "merely explicated and refined" and "elaborat[ed]" the Katzenbach standard. Shelby.JA 521-22.

Intervenor-Appellees continue to hold that Katzenbach standard applies, and that even if the Boerne standard applies, that standard does not substantively constitute a more exacting constitutional review. However, Section 5 withstands constitutional scrutiny regardless of the test applied, so Intervenor-Appellees will focus on applying the Boerne analysis to the legislative record before Congress in 2006 and the steps that Congress took at that time to enforce the Fifteenth Amendments' voting protections.

Boerne first requires an identification, "with some precision," of the constitutional right at stake. Board of Trustees of Univ. of Ala. v. Garrett, 531 US 356, 365 (2001); see also, Tennessee v. Lane, 541 U.S. 509, 522 (2004). The second step of the Boerne analysis requires Congress to show a "pattern of state constitutional violations," a task that is much easier where a fundamental right or discrimination based on a suspect classification is involved. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003). Finally, a reviewing court must decide if the legislation at issue is an "appropriate response" to the identified problem—that is, is it "congruent and proportional" to the problem. Lane, 541 U.S. at 530; Garrett, 531 U.S. at 374; Hibbs, 538 U.S. at 737.

B. The Right to Vote is the Constitutional Right at Issue

The first step of the Boerne analysis reinforces the deference with which courts should review Section 5 of the Voting Rights Act. The precise constitutional right at issue is the fundamental right to vote free from discrimination, as guaranteed by the Fifteenth Amendment. Moreover, the discrimination involved is directed toward a suspect classification—racial and language minorities. Thus, Congress used remedial, prophylactic enforcement legislation to protect both a treasured constitutional right and a historically disenfranchised group from further discrimination.

C. During the Reauthorization, Congress Identified a Consistent Pattern of Constitutional Violations in Covered Jurisdictions

After identifying the constitutional right at issue, the next step in the Boerne analysis considers whether the legislative record contains "evidence of a pattern of constitutional violations." Hibbs, 538 U.S. at 729. As the lower court recognized, during the reauthorization process in 2006, Congress found "ample evidence of purposeful voting discrimination by covered jurisdictions." Shelby.JA 549. Congress categorized the types of evidence before it that justified the 2006 reauthorization, and the Court below agreed with the District Court in Northwest Austin that the whole of that evidence was "plainly adequate to justify Section 5's 'strong remedial and preventative measures.'" Shelby.JA 601.

The District Court found that Congress had before it findings of evidence of continued violations of minority rights in the following forms: (1) the increased filing of Section 2 cases in covered jurisdictions, Shelby.JA 581-88; (2) the issuance of Section 5 objections or judicial denials of preclearance, Shelby.JA 559-71; (3) the issuance of More Information Requests, Shelby.JA 571-73; (4) the filing of enforcement actions, Shelby.JA 577-81; (5) documentation of persistent racially polarized voting in covered jurisdictions, Shelby.JA 592-98; and (6) evidence accrued from federal observers dispatched to monitor elections in covered jurisdictions, Shelby.JA 588-92. The court below also gave weight to other evidence before Congress, including (7) disparities in minority voter registration and turnout, Shelby.JA 552-57; and (8) the election of minority officials, Shelby.JA 557-59. Finally, the lower court was persuaded that Congress had before it amply sufficient evidence to support retention of the coverage formula. Shelby.JA 601.

1. Section 2 Cases in Covered Jurisdictions

Evidence before Congress during the 2006 reauthorization indicated that a disproportionate number of successful Section 2 lawsuits originate in covered jurisdictions. Shelby.JA 627-28. Section 2 of the Voting Rights Act prohibits any voting practice or procedure which "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. §

1973. Proving discriminatory intent in violation of the Fourteenth Amendment is not necessary for a Section 2 lawsuit to succeed, but many cases involve evidence or findings of such unconstitutional discriminatory intent. Thus, evidence of the number of Section 2 cases and the nature of the evidence presented in those cases is relevant to determining whether Congress had evidence before it in 2006 of a pattern of state unconstitutional conduct.

Appellants' argument that there is no meaningful difference between covered and non-covered jurisdictions directly contradicts many of Congress' findings, especially as it relates to Section 2 lawsuits. Specifically, Congress found that 653 successful Section 2 cases had been filed in covered jurisdictions since the last reauthorization in 1982. Shelby.JA 258-59. In reviewing Section 2 litigation country-wide, Ellen Katz found that 56% of all successful Section 2 litigation was filed in the fourteen states that are covered in whole or part by Section 5. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (Oct. 18, 2005), at 974. This enormous disparity in minority voting rights violations in covered and non-covered jurisdictions certainly justifies a distinction between the two groups.

In fourteen of those cases from covered jurisdictions, the judicial fact-finder made specific findings of unconstitutional, intentional discrimination. S. Rep. No.

109-295, at 13, 65; *Impact and Effectiveness*, 986-91; Nw. Austin, 573 F. Supp. 2d at 258. And these fourteen cases are truly just the tip of the iceberg. First, in many of those cases, reviewing courts declined to confront constitutional issues because of definitive statutory violations. See, e.g., Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984); White v. Alabama, 74 F.3d 1058, 1071 n. 42 (11th Cir. 1996); United States v. Charleston Cnty., 316 F. Supp. 2d 268, 306-07 (D.S.C. 2004), aff'd, 365 F.3d 341 (4th Cir. 2004); LULAC v. Perry, 548 U.S. 399, 440 (2006). Thus, in many cases, there was indeed substantial evidence of unconstitutional conduct, but the reviewing court used constitutional avoidance to decide the case more narrowly. Second, a number of Section 2 cases are settled or resolved without published opinion, and many of those cases also contain evidence of unconstitutional discrimination. Shelby.JA 582. Third, even when no explicit judicial finding of intent, Congress may still consider probative the evidence of unconstitutional conduct that was offered in Section 2 cases. A number of highly experienced voting rights attorneys testified before Congress, and shared stories and evidence from Section 2 cases they litigated. Shelby.JA 103. This testimony contributed to Congress' conclusion that this pattern of unconstitutional conduct was widespread and not encapsulated merely by the number of cases decided on that particular issue. This Court, in its review, should consider the entirety of the evidence before Congress relating to Section 2 litigation.

2. Section 5 Objections and Judicial Denials of Preclearance

When considering whether Section 5 of the Voting Rights Act was still needed to enforce the voting guarantee of the Fifteenth Amendment, Congress reviewed the number and basis of objections interposed by the Department of Justice, as well as the cases in which a three-judge panel denied preclearance to a proposed voting change. H.R. Rep. No. 109-378, at 36; Nw. Austin, 573 F. Supp. 2d at 255. Under Section 5, of course, a jurisdiction may either submit its proposed voting change to the Attorney General, or it may seek a declaratory judgment from a three-judge panel in the federal District Court for the District of Columbia that the change has neither a discriminatory purpose nor retrogressive effect. 42 U.S.C. § 1973c. While submission to the Attorney General is much more common, an objection interposed by the Attorney General or a denial of declaratory judgment by a three-judge panel end in the same result—a finding that the jurisdiction failed to carry its burden of showing that the change did not have a discriminatory effect or was not motivated by a discriminatory purpose. Shelby.JA 574. Congress considered these findings of violations of Section 5 as indicators that the law was still needed. Pub. L. 109-246, § 2(b)(4)(A), 120 Stat. at 577.

The Attorney General objected to more than seven hundred proposed voting changes between 1982 and 2006. Shelby.JA 564-65. In fact, the Attorney General interposed more objections between 1982 and 2005 than the office did between

1965 and 1982. *Evidence of Continuing Need*, Vol. I, 173-73. One study before Congress indicated that from 2000 to 2006, the six-year period preceding the reauthorization, 663,502 minority voters were protected by Section 5 objections. *Evidence of Continuing Need*, Vol. I, at 58.

Different studies that were part of the legislative record review different time frames, but one conclusion is clear: discriminatory intent was a distinct element in a large number of objections interposed between 1982 and the reauthorization. One witness testified that from 1980 to 2000, up to 421 of the objections interposed by the Attorney General were based, at least in part, on discriminatory intent, and 234 of those objections were based entirely on intent. *Voting Rights Act: Section 5 – Preclearance Standards*, Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 2nd Sess., Vol. I (Mar. 8, 2006), at 136, 180 tbl. 2. A McCrary study indicated that 43% of all objections in the 1990s were based solely on intent, and another 31% were based, in part on intent. Id.

While it is true that the overall rate of objections in recent years has decreased, the District Court first pointed out a plethora of reasons why that fact might be misleading and second explained why that fact did not negate a finding of a continuing need for Section 5's protections. The lower court noted that the Supreme Court's ruling in Bossier II temporarily but significantly limited

objections based on intent, the natural end of redistricting for the decade, the increase in More Information Requests, and a number of other reasons. JA 260-62. Significantly, the lower court, like the three-judge district court in Northwest Austin, found that the mere change in rate of objections is no indication of whether Section 5 is still needed, because the types of objections and the number of voters they affect are much more relevant to that question. Shelby.JA559; Nw. Austin, 573 F. Supp. 2d at 250-51.

The resolution of Section 5 proceedings in the judicial setting also supports Congress' findings based on objections. Since the enactment of the Voting Rights Act, there have been forty-two instances in which the jurisdiction has failed to obtain a declaratory judgment from a three-judge panel, and 25 of these cases have occurred since 1982. Shelby.JA 574. Congress considered probative of the continuing need for Section 5 the judicial determinations in a number of these cases that intentional discrimination was a motivating factor of the jurisdiction. Nw. Austin I, 573 F. Supp. 2d at 255 (citing, as one example, City of Pleasant Grove v. United States, 479 U.S. 462, 464-65 (1987)). The Supreme Court itself recognized that "objections entered by the Attorney General" are indisputable evidence of the "continuing need for the preclearance mechanism," and Congress, during the reauthorization, developed a substantial record on this front. City of Rome, 446 U.S. at 81.

3. Issuance of More Information Requests

In addition to actual objections under Section 5, Congress considered other relevant actions authorized by the statute during the reauthorization process. Under Section 5, the Attorney General is also authorized to issue "More Information Requests," known as "MIR"s, when the jurisdiction has not submitted enough information for the Attorney General to determine whether the submitted change warrants preclearance. Shelby.JA 571. Upon receiving the formal MIR, the jurisdiction may provide the requested information, withdraw the change, submit a different change, or not respond at all. Shelby.JA 572. Congress explicitly found that the jurisdiction's response to the MIR was often indicative of the proposed change's motivation. H.R. Rep. No. 109-478, at 40. Thus, a review of MIRs and the jurisdictions' responses was relevant to determining whether Section 5 continued to be a necessary law.

In the period under review, the Attorney General issued hundreds of More Information Requests where the jurisdiction had failed to submit enough evidence for the Attorney General to determine whether the proposed change was enacted with discriminatory purpose or would have a retrogressive effect. Indeed, one witness during the reauthorization hearings testified that it seemed to voting rights practictioners that MIRs were being increasingly used as the mechanism to prevent discriminatory voting changes, rather than actual objections. *Voting Rights Act:*

Evidence of Continuing Need: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong., Vol. I (Mar. 8, 2006), at 57. Between 1982 and 1003, at least 205 proposed voting changes were withdrawn from consideration by the Attorney General after the Attorney General issued a More Information Request. H.R. Rep. No. 109-478, at 41. According to another study, these requests resulted in a total of 885 withdrawals, changes, or lack of responses on the part of the jurisdiction. *Evidence of Continuing Need*, Vol. II, at 2553. The court below concluded that Congress had ample justification for its conclusion that the "increased number of objections, revised submissions, and withdrawals over the last 25 years are strong indices of continued efforts to discriminate." H.R. Rep. No. 109-478, at 36.

4. Section 5 Enforcement Actions

The number and nature of Section 5 enforcement actions were another type of evidence in the legislative record, relied upon by Congress as illustrative of a continuing constitutional problem relating to minority voting rights. The Voting Rights Act creates a private right of action for citizens seeking to compel a covered jurisdiction to submit its proposed voting change for preclearance. See Nw. Austin, 573 F. Supp. 2d at 256. The Department of Justice may also initiate such an action. Id. Between 1982 and 2006, there were at least 105 successful Section 5 enforcement actions, resulting in either the jurisdiction voluntarily submitting the

change for preclearance after commencement of the lawsuit or a court ordering the jurisdiction to make the requisite submission. *Evidence of Continuing Need*, Vol. I, at 186. The House Committee on the Judiciary found that avoidance of the preclearance process was indicative of a continuing intent by some jurisdictions to undermine or evade federally-imposed minority voting rights protections. See H.R. Rep. No. 109-478, at 41.

Indeed, racially discriminatory motivations also can be deduced from this type of evidence. For example, the white District Attorney in Waller County, Texas (home to the historically black university Prairie View A&M), publicly threatened to prosecute all Prairie View A&M students who voted in elections after two black students announced that they were running for local office. The primary elections were scheduled during the school's spring break, and the county, without preclearance moved to reduce the availability of early voting at polling places near the university. The NAACP filed an enforcement action, which resulted in the county agreeing to abandon the proposed change. *Evidence of Continuing Need*, Vol. I, at 185-86. This incident, described in detail to Congress, is certainly an example of how looking at enforcement action revealed to Congress strong evidence of persistent racially discriminatory activity in a covered jurisdiction, and this incident was far from the only one in the legislative record.

5. Persistent Racially Polarized Voting in Covered Jurisdictions

Substantial written and oral testimony that was a part of the legislative record documented the continued presence of racially polarized voting in covered jurisdictions. The House Judiciary Committee noted the significance of this evidence, saying that high levels of racially polarized voting were clear and strong evidence "of the continued resistance within covered jurisdictions to fully accepting minority citizens and their preferred candidates into the electoral process. H.R. Rep. No. 478, at 34. The Committee further noted that "[t]estimony presented indicated that 'the degree of racially polarized voting in the South is increasing, not decreasing…[and is] in certain ways re-creating the segregated system of the Old South, albeit a de facto system with minimal violence rather than the de jure system of late." Shelby.JA 253.

Racially polarized voting may not be evidence of discriminatory actions on the part of the state, but it is relevant to the retrogressive effect analysis. The presence of racially polarized voting is one of the factors considered when the Department of Justice analyzes whether a proposed change will have a retrogressive effect on the ability of minority voters to elect their candidate of choice. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 27 Fed. Reg. 76 (Feb. 9, 2011), at 7471. It affects the ability of minority voters to fully participate in the electoral process. As such, this evidence was relevant to Congress' determination that Section 5 was still necessary because

minority voters continue to be unable to equally and fairly participate in the political process.

6. Evidence from Federal Observers

The Voting Rights Act authorizes the Attorney General to send federal observers to monitor state or local elections as "necessary to enforce the guarantees of the 14th or 15th amendment."[4] 42 U.S.C. §1973f(a)(2). Tens of thousands of federal observers dispatched to observe election in covered jurisdictions documented the continuing need for Section 5, and that evidence was squarely before Congress during the reauthorization of the Voting Rights Act. Pub. L. No. 109-246, 120 Stat. 577, sec. 2(b)(4), (5).

Congress found that federal observers were certified by the Attorney General "only when there is a reasonable belief that minority citizens are at risk of being disenfranchised," and this potential disenfranchisement often occurred through "harassment and intimidation inside polling places." H.R. Rep. No. 478, at 44. Between 1982 and 2006, the Attorney General has assigned between 300 and 600 federal election observers each year, with a total of 622 coverage "events" in this time frame. Id.; Shelby.JA 589. Louisiana, Georgia, Alabama, South Carolina and Mississippi accounted for 66% of those 622 coverage events.

[4] When Congress reauthorized the Voting Rights Act in 2006, it amended unchallenged portions of the act to allow the assignment of federal observers to non-covered jurisdictions. Prior to that, federal observers could only be sent to covered jurisdictions or non-covered jurisdictions that were subject to coverage by a federal court order. Shelby.JA 588.

Shelby.JA 589. While the District Court acknowledged that not every one of those 622 coverage events may have been ultimately motivated by an intent to discriminate against voters, witnesses shared with Congress that a significant number of those instances undoubtedly were motivated by discriminatory intent. The District Court recounted several examples of such testimony, which the Court found to be evidence of state-sponsored discrimination against minority voters. Shelby.JA 590-91. Congress specifically found that "[o]bservers have played a critical role in preventing and deterring 14th and 15th amendment violations by communicating to the Department of justice any allegedly discriminatory conduct for further investigation." H.R. Rep. No. 478, at 25(2006). Thus, this type of evidence also contributed to Congress' finding of a pattern of unconstitutional state action.

7. Disparities in Minority Voter Registration and Turnout

The court below acknowledged that significant strides had been made in minority voter registration and turnout, especially in the Deep South. Shelby.JA 552. However, this improvement did not negate the evidence in front of Congress that substantial disparities still exist in these areas. For example, in Virginia, Congress found there was an 11-percentage point disparity between black and white registered voters, and a 14-percentage point disparity between black and white turned-out voters. In Texas, Congress found a 20-percentage point disparity

between white and Hispanic registered voters, and an even higher disparity in turn out.

The court below and the district court in Northwest Austin both found these disparities to be substantial and comparable to the disparities seen in cases where the Supreme Court upheld the constitutionality of Section 5. Shelby.JA 556; Nw. Austin, 573 F. Supp. 2d at 248. Under the applicable constitutional analysis, prophylactic legislation is not doomed simply because it has been working as designed—so long as there is still a demonstrable problem, as there is in the instant case—then appropriate remedial legislation survives scrutiny.

8. Election of Minority Officials

The election of minority office-holders is similar evidence to that of disparity in minority voter registration and turnout: some progress does not negate the need for further progress. The Supreme Court in City of Rome in 1975 specifically noted that progress had been made on this front, but that did not mean the Court was required to strike down Section 5 as unnecessary. City of Rome, 446 U.S. at 180.

There are still significant disparities in the election of minority officials when compared to minority populations. Shelby.JA 559. And nearly all African-Americans that are elected are elected from majority-black districts—only 8% of African-American officials are elected from majority white districts. H.R. Rep.

109-478, at 33. Congress found that in the covered states Mississippi, Louisiana, and South Carolina, African-Americans make up 35% of the population, but only 20.7% of state legislators. H.R. Rep. 109-478, at 33. While proportionality is not required to achieve the guarantees of the Fifteenth Amendment, significant disparities are evidence that there are still barriers to full participation.

9. Evidence Supporting Retention of Coverage Formula

Appellants challenge Congress' retention of the coverage formula set forth in Section 4(b) of the Act, alleging that "there is no longer any meaningful difference between the covered and non-covered jurisdictions." Appellants' Br. 32. But, as the District Court noted, this allegation is not rooted in actual evidence. In fact, the evidence before Congress that related to the coverage formula—that is, material distinctions between covered and non-covered jurisdictions as it relates to voting discrimination—amply justified unaltered retention of the formula. Shelby.JA 629. The coverage formula remained rationally related to Congress' goal of preventing voting discrimination because the evidence before Congress during the legislative process indicated that the jurisdictions under the coverage formula remained the ones with the highest risk of such discrimination. The Supreme Court itself indicated that the only thing necessary for the coverage formula to withstand constitutional scrutiny is a "basis in practical experience." Katzenbach, 383 U.S. at 331.

Despite repeated findings of justification for the coverage formula, even if there were some covered jurisdictions in which voting discrimination had lessened, or some non-covered jurisdictions in which voting discrimination problems had developed, the Voting Rights Act includes methods for correcting for this under- and over-inclusiveness, thus saving it from constitutional infirmity.

The coverage formula prescribed by the Voting Rights Act was never expected to catch every jurisdiction that, in all fairness, should be included. To bring in bad-acting jurisdictions not captured by the coverage formula, Congress included a judicial "bail-in" provision, known as the pocket trigger. Under that provision, a jurisdiction not covered may be subjected to Section 5 based upon a judicial finding that they have violated the Fourteenth or Fifteenth Amendment. The reviewing court can retain jurisdiction for such time deemed appropriate, and no voting change may be implemented without approval from the court or the Attorney General. 42 U.S.C. § 1973a(c). Over-inclusiveness can likewise be remedied through the "bailout" provision, which allows a jurisdiction with a demonstrated history of compliance with the Voting Rights Act and the Constitution to have itself removed from coverage. Shelby.JA 627. From 1982 to 2006, no jurisdiction that sought bailout was denied. Shelby.JA 279.

The District Court concluded that: "an assessment of all the evidence in the legislative record confirms that Congress was, in fact, responding to what it

reasonably perceived to be a continuing history and pattern of unconstitutional conduct by covered jurisdictions when it reauthorized Section 5 in 2006." Shelby.JA 551. Appellants' assertions to the contrary simply cannot be reconciled with the actual evidence in front of Congress.

D. The 2006 Reauthorization Was a Congruent and Proportional Response to the Evidence of Continuing Constitutional Violations

Congress' 2006 Reauthorization of Section 5 of the Voting Rights Act, including retention of the coverage formula, was a reasoned and reasonable response to the evidence before it during the legislative process. Two district courts, the court below and the district court in Northwest Austin, have now reviewed the entire record and found that the record before Congress in 2006 was "at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in City of Rome." See Shelby.JA 601; Nw. Austin, 573 F. Supp. 2d at 165-66, 270-71. Moreover, the court below correctly concluded that the disparities seen in the evidence reviewed by the Court in City of Rome were comparable to the evidence of disparities before Congress during this reauthorization. Shelby.JA 602. The lower court also concluded that the "evidence of unconstitutional voting discrimination in the 2006 legislative record far exceeds the evidence of unconstitutional discrimination found sufficient to uphold the challenged legislation in both Hibbs and Lane." Shelby.JA 604-05. Thus, even under Boerne,

the evidence before Congress and its action in response were appropriate under its Fifteenth Amendment enumerated powers.

Also weighing in favor of the appropriateness of the legislation as within Congress' enumerated powers is the fact that the Court was merely reauthorizing legislation that had been upheld against constitutional challenges on four separate occasions. See Katzenbach, 383 U.S. at 334; see also Georgia v. United States, 411 U.S.526 ; City of Rome, 446 U.S. 156; Lopez, 525 U.S. 266. Congress simply reauthorized legislation that was the most significant and effective civil rights legislation ever enacted. Shelby.JA 609-10. Based on this history, it clear that the reauthorization was not a radical attempt to expand Congressional authority and trample on states' rights. Congress, after conducting 22 hearings over the course of eight months, Shelby.JA 609, reasonably concluded that while Section 5 had allowed substantial progress in protecting minority voting rights, there was still much work left to be done.

To be sure, the evidence gathered by Congress in 2006 demonstrated the current need for Section 5. In Northwest Austin, the Supreme Court, referring to progress under the Voting Rights Act, pointed out that, "[i]t may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs." The extensive record of continuing racial

discrimination in voting demonstrates that Congress was correct to conclude that current conditions warrant the protections of Section 5. Nw. Austin, 129 S.Ct. at 2511-12.

The congruence and proportionality of Section 5 is further buttressed by the inadequacy of Section 2 of the Voting Rights Act as a remedy for discrimination in voting. One argument Appellants repeat throughout their brief is that any problems in voting "could be redressed through 'federal decrees' under Section 2 [of the Voting Rights Act]." Appellants' Br. 10. See also, id. at 24 ("ordinary anti-discrimination litigation is no longer ineffective in those [covered] jurisdictions"); 29 ("Section 2 is capable of effectively redressing [discrimination]"); 32 ("[t]here is no direct evidence . . . in Section 2 suits that renders such 'case-by-case litigation . . . inadequate' in the covered jurisdictions"); 34 (same); 35 (same); 38 (same); 73 (same); 76 (same). These arguments ignore the fact that Congress, in extending Section 5 in 2006, again concluded that "failure to reauthorize the temporary provisions, given the record established, would leave minority citizens with the inadequate remedy of a Section 2 action," which, in light of past experience, would not be "enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." H.R. Rep. No. 478, at 57.

Congress' conclusion was based on extensive testimony that Section 2

litigation places the burden of proof on the victims of discrimination rather than its perpetrators, imposes a heavy financial burden on minority plaintiffs, cannot prevent enactment of discriminatory voting measures, and allows them to remain in effect for years until litigation is concluded. See, e.g., *Voting Rights Act: Section 5 of the Act - History, History, Scope & Purpose: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong., Vol. I, at 92, 97, 101 (2005) (testimony of Nina Perales); id. at 79, 83-84 (testimony of Anita Earls); *Evidence of Continuing Need,* Vol. I, at 97 (testimony of Joe Rogers).

Federal courts have rated voting cases among the most complex tried by federal courts. According to a study conducted by the Federal Judicial Center measuring the complexity and time needed to handle matters by the district courts, voting rights cases were among the top five most complex cases and were given a weight of 3.86 compared to 1.0 for an "average" case. Federal Judicial Center, "2003-2004 District Court Case-Weighting Study," Table 1, p. 5 (2005). The only cases given a higher weight were Civil RICO, Patent, Environmental Matters, and Death Penalty Habeas Corpus.

One of the reasons vote dilution cases are so complex is because of the factors identified by the legislative history and the Supreme Court as relevant to the "totality of circumstances" analysis required by Section 2. Thornburg v. Gingles, 478 U.S. 30, 36-8 (1986). Those factors include, but are not limited to:

geographic compactness; political cohesion; legally significant racially polarized voting; the extent of any history of discrimination; the use of devices that may enhance discrimination; the existence of a candidate slating process; socio-economic disparities and their effect on political participation; racial campaign appeals; the extent of minority office holding; a lack of responsiveness to the needs of minorities; and the policy underlying the challenged practice.

Aside from being complex and time consuming, Section 2 cases impose very expensive burdens on plaintiffs. Determining geographic compactness and racially polarized voting requires the use of expert demographers and statisticians. Proof of the other Gingles factors may also require the use of expert political scientists and historians. The fees the experts charge can easily run into tens of thousands of dollars. As the District Court concluded based upon the legislative record:

> First, neither the 'small and underfinanced' voting rights bar nor the minority communities were in a position to bear the expense of frequent litigation under Section 2. Senate Hearing, 109th Cong. 95 (May 16, 2006) (responses of Pamela S. Karlan to questions of Sens. Leahy, Kennedy, Kohl, Cornyn, and Coburn). Second, in the time it took to litigate a Section 2 case, candidates who benefitted from the intentionally discriminatory voting procedures would already be incumbents and would have all the crucial advantages of incumbency in later elections. See, e.g., House Hearing, 109th Cong. 97 (Mar. 8, 2006) (statement of Joe Rogers); House Hearing, 109th Cong. 60 (Nov. 9, 2005) (statement of Rep.Tyrone L. Brooks of Georgia General Assembly). Hence, moving a large number of voting rights issues from Section 5 to Section 2 ran counter to the goal of "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims." Katzenbach, 383 U.S. at 328.

JA 260. See also Senate Hearing, Understanding the Benefits and Costs of Section 5, at 80 (2006) (responses of Armand Derfner to questions submitted by Senators Cornyn, Coburn, Leahy, Kennedy, and Schumer) (describing Section 2 cases as "expensive and time-consuming to litigate and hard to win," and refuting the position that "Section 5 is not needed because other litigation will do the job"); The Continuing Need for Section 5 Pre-Clearance: Hearing before the Sen. Comm. on the Judiciary, 109th Cong., (May 16, 2006), at 15 (testimony of Pamela S. Karlan) (explaining that Section 2 suits demand "huge amounts of resources" and that Section 2 litigation is not "an adequate substitute in any way" for Section 5).

The inherent problems with Section 2 litigation are ongoing. In Large v. Fremont County, Wyo., 709 F.Supp.2d 1176 (D. Wyo. 2010), for example, plaintiffs filed their Section 2 complaint challenging at-large elections for the Fremont County Commission in October 2005, but did not get a decision on the merits until April 2010, some five years later. The county appealed the single-member district remedy implemented by the district court, but as of this writing the court of appeals has not issued its opinion. In Levy v. Lexington County, South Carolina, 589 F.3d 708 (4th Cir. 2009), the plaintiffs filed their Section 2 complaint in September 2003, challenging at-large elections for the school board, but did not get a decision on the merits until February 2009, which was subsequently vacated and remanded for consideration of two intervening election cycles. As of this

writing, the district court has not yet rendered a decision on the merits of the plaintiffs' Section 2 claim.

The Voting Rights Act is a congressional directive for the prompt removal of all barriers to equal political participation by racial minorities. When it adopted the remedial provisions of the Act in 1965, Congress cited the "insidious and pervasive evil" of discrimination in voting and acted "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." Katzenbach, 383 U.S. at 309, 328. In the legislative history of the 1965 Act, as well as the 1970, 1975, 1982, and 2006 extensions, Congress repeatedly expressed its intent "that voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.'" NAACP v New York, 413 U.S. 345, 354 (1973) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965)). See also S.Rep. No. 417, 97th Cong., 2d Sess. 5 (1982) ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally"); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577, Section 2(b)(3)("[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and

language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965"). As the Court held in Briscoe v. Bell, 432 U.S. 404, 410 (1977), the Voting Rights Act "implements Congress' intention to eradicate the blight of voting discrimination with all possible speed." Section 2 litigation is without question time-consuming, complex, and expensive. It places the burdens of proof, costs, and delay on the victims of discrimination, and, contrary to the basic purpose of the Voting Rights Act, it does not, standing alone, provide a prompt remedy for denial of minority voting rights.

Section 5 of the Voting Rights Act contains important limitations, which also lend to its congruence and proportionality. First, Section 5 remains temporally and geographically limited. Congress renewed Section 5 for another 25 year period, but they did not make it permanent. Shelby.JA 615. Also, as discussed above, jurisdictions are not cemented in or out of the umbrage of the Act—the bail-in and bailout provisions serve as a release valve in that regard. See, supra p. 33-34.

Finally, nothing about the Supreme Court's decision in the Northwest Austin case precludes a finding by this Court that Congress acted in a constitutionally acceptable and proportional manner. It is true that some Justices, in dicta in Northwest Austin, expressed some concern about the continuing constitutionality of Section 5. Nw. Austin, 129 S. Ct. at 2511-13. However, the Court employed

constitutional avoidance and decided the case on a narrower, statutory basis. Id. at 2513-17. Supreme Court precedent clearly establishes that constitutional avoidance does not necessarily implicate constitutional infirmity. Indeed, one scholar has noted that "[s]ome of the most famous exercises in modern avoidance have involved constitutional claims subsequently rejected in whole or in part when considered on the merits." Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-61 (1997). For example, in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Supreme Court avoided reaching the question of whether application of the National Labor Relations Act ("NLRA") to employees of religious schools violated the Free Exercise Clause, by finding that Congress did not intend "to bring teachers in church-operated schools within the jurisdiction of the [National Labor Relations] Board."[5] Id. at 491, 507. And, when squarely addressing the constitutionality in a case decided six years later, the Court held that the Free Exercise Clause permitted application of the NLRA to employees at a religious foundation. Tony & Susan Alamo Found. V. Secretary of Labor, 471 U.S. 290 (1985).

Similarly, in 1961 the Supreme Court avoided the question of whether a Railway Labor Act provision permitting unions to use an employee's compulsory

[5] Plaintiffs in NLRB v. Catholic Bishop posed two questions, one regarding statutory interpretation, and a second challenging the statute's constitutionality: "(a) Whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act; and (b) if the Act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the First Amendment?" NLRB, 440 U.S. at 491.

dues to support candidates and causes which the employee opposed violated the Free Speech Clause, by instead construing the challenged provision to deny "the authority to a union, over the employee's objection, to spend his money for political causes which he opposes."[6] Int'l Ass'n of Machinists v. St., 367 U.S. 740, 750 (1961). In a later case, the court held that the Free Speech Clause did permit unions to spend an employee's compulsory dues on political causes opposed by the employee, where the causes are "pertinent to the duties of the union as a bargaining representative.' Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991).

In the face of an intolerable, persistent and very demonstrable threat of state-constructed impediments to participation, Congress acted in a restrained manner to enforce the guarantees of the Fifteenth Amendment. The reasoned legislative enactments that resulted are due great deference, and should be upheld under either the Boerne or Katzenbach standard of review.

IV. Congress' 2006 Amendments to Section 5 Did Not Exceed Its Enumerated Powers Under the Fifteenth Amendment

When Congress reauthorized the Voting Rights Act in 2006, it also made two amendments to correct Supreme Court misinterpretations and return the Act to

[6] "We have therefore examined the legislative history of § 2, Eleventh in the context of the development of unionism in the railroad industry under the regulatory scheme created by the Railway Labor Act to determine whether a construction is 'fairly possible' which denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. We conclude that such a construction is not only 'fairly possible' but entirely reasonable, and we therefore find it unnecessary to decide the correctness of the constitutional determinations made by the Georgia courts. Int'l Ass'n of Machinists, 367 U.S. at 750.

its intended scope and application. Appellants challenge those amendments as exceeding Congress' enumerated powers under the Fifteenth Amendment. Specifically, the two corrections that Congress made were in response to Georgia v. Ashcroft and Bossier II. Subsections (b) and (d) of Section 5 constitute the Ashcroft "fix," and restore to the retrogression analysis a protection against diminishing the ability to elect. Subsection (c) is directed to correcting in limitation of the purpose prong in Bossier II.

As with the reauthorization and challenge to the preclearance requirement of Section 5, the same constitutional rights are at issue with the amendments: the right to vote, unencumbered by discrimination on the basis of race. The District Court again recognized given the crucial nature of the rights at stake, "Congress' enforcement powers are at its peak when it legislates to ensure that voting is free from racial discrimination." JA 253.

Plaintiffs repeatedly argue that the amendments are a dramatic expansion of the preclearance standards, and because they involve a modification of the standards as they existed just prior to the reauthorization, they are necessarily unconstitutional and irrational. Appellants' Br. 43, 58. This argument is flawed on a number of different levels. First, as Congress made clear, the amendments were correcting recent Supreme Court decisions that misinterpreted and drastically changed the scope of the preclearance review. JA 257. Congress was merely

restoring the standard to what it was each and every time that the Supreme Court has previously upheld Section 5 as a rational exercise of Congress' enforcement powers. JA 257-58. Second, as the District Court noted, the question for the reviewing Court was whether the Act (and its amendments) could be justified on the basis of the evidence in the legislative record, not on how it compares to an earlier version of the law. JA 255. And, of course, Congress is within its authority to essentially overrule the Supreme Court when the Supreme Court has erred in statutory interpretation. Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 (1994).

A Senate Report from the reauthorization discusses in detail the motivation behind amendments subsection (b) and (d), known as the Georgia v. Ashcroft "fix." Sen. Rep. 109-295, at 18-21. First, the Senate notes that the amendment merely restores the retrogression standard explained by the Court in Beer v. United States, 425 U.S. 130, 141 (1976), and fully applied since that 1976 decision. Second, this "fix" in no means creates a quota system or a maximization standard—it simply protects the "ability to elect" from unavoidable retrogression. Finally, Congress found that Georgia v. Ashcroft opened the door to increased partisan gerrymandering as a substitute for the ability of minority voters to elect a candidate of choice, and this was directly contrary to Congress' intent when it first enacted Section 5. Sen. Rep. 109-295, at 18-21.

Appellants make several illogical arguments when it comes to this amendment. First, they claim the amendment no longer targets "backsliding." Appellants' Br. 60. In fact, this is precisely what the amendment is targeted at preventing—the exchange of "ability to elect" districts for "influence" districts. A look at what happened in "influence" districts in Georgia while the Georgia v. Ashcroft decision was pending makes this crystal clear. See Richard Engstrom, *Redistricting: Influence Districts—A Note of Caution and a Better Measure*, Chief Justice Earl Warren Institute on Law and Social Policy Research Brief, University of California, Berkeley Law School (May 2011). While the judicial clearance process was underway, Georgia held its 2002 state senate elections under an interim plan, approved by the district court as "largely similar" to the 2001 enacted plan except in three districts in which the black voting age population was increased. Georgia v. Ashcroft, 2004 F. Supp. 2d 4, 15 (D.D.C. 2002), aff'd sub nom King v. Georgia, 537 U.S. 110 (2003). Of the 17 senate districts identified by Georgia as influence districts, 13 had contested elections. Republicans were elected in 3 of those contested elections. *Redistricting: Influence Districts—A Note of Caution and a Better Measure* at 4. In four of the elections in which Democrats were elected, the senators-elect switched their party affiliation to Republican prior to the convening of the legislature. Id. Thus, 7 out of 17, or 41.2%, of the so-called African-American influence districts were held by

Republicans. Id. The Democrat-controlled legislature that enacted the plan argued that the trade-off for influence districts would increase African-American control and influence in the political process, and the exact opposite occurred.

Thus, the Georgia v. Ashcroft fix was designed to prevent this kind of demonstrated back-sliding—the cracking of minority populations into districts in which they would not be able to elect candidates of their choice and candidates responsive to their needs. The amendment ensured that minority political participation would be subjected to degradation based on partisan or incumbency-protection goals.

Another unsubstantiated claim that Appellants proffer in relation to the amendment is that subsections (b) and (d) will create an "unyielding quota-floor based on past minority electoral success. Appellants' Br. 61. Department of Justice regulations interpreting Section 5 in the redistricting context make clear that some circumstances, such as population decline or migration, make retrogression unavoidable, and an objection will not be interposed in such a circumstance. *DOJ Guidance*, at 7472. Appellants criticize the Department's regulations as "loophole-laden," Appellants' Br. 69, but that disregards the burden on Appellants in a facial challenge to demonstrate that the amendments are never constitutional. Those Department regulations describe an application of the

Ashcroft "fix" that is not irrevocably tied to past minority electoral success, and as such, cannot reasonably be construed as an unconstitutional quota system.

Appellants also claim that this amendment will require every influence district, where minority populations constitute as little as 25 percent of the district, to be protected under Section 5. Appellants' Br. 63. This is demonstrably not true. In December 2011, a three-judge panel in the District Court for the District of Columbia, empaneled to hear Texas' declaratory judgment suit seeking preclearance for its statewide redistricting plans, issued a 44-page opinion denying Texas' motion for summary judgment and thoroughly explaining the retrogression standard under the amended Section 5. Texas v. United States, No. 11-cv-1303 (D.D.C.), 2011 WL 6440006. There, the court clearly explained that a district is protected under Section 5 only if it has an extant, proven ability to elect. Id. at *33 ("Redistricting can have no retrogressive effect on an ability to elect that has not yet been realized"). While coalition or crossover districts may be protected, they will only be so if it can be demonstrated that they do have that ability to elect. Id. at *36-37. Districts in which minority voters merely influence the outcome, rather than actually elect their candidate of choice, are not protected under the amended Section 5. Thus, in application, it is clear that the amended Section 5 will not subject to federal scrutiny "virtually all districts, even with relatively small minority populations," as Appellants predict. Appellants' Br. 64.

Finally, the District Court also upheld Subsection (c), the Bossier II "fix," as constitutional legislation within Congress' enumerated powers under the Fifteenth Amendment. Specifically, the Court came to this quick conclusion because the subsection "simply repeats the prohibition of the Fourteenth Amendment," and thus "cannot also violate the Equal Protection component of the Fifth Amendment." JA 302.

V. Congress' 2006 Amendments to Section 5 Did Not Violate the Equal Protection Clause of the Fourteenth Amendment

The District Court was correct in concluding that the amendments to Section 5 of the Voting Rights did not violate the equal protection guarantee of the Fourteenth Amendment. JA 302, 313. Although the District Court arrived at the right conclusion, it applied the incorrect standard of review in that analysis. The Court viewed the 2006 amendments as a racial classification, and accordingly applied strict scrutiny. JA 300-302. The lower court engaged in that exacting constitutional analysis, and found that the amendments did survive strict scrutiny, JA 302, 313, which means that they surely would survive the correct, less exacting scrutiny that should have been applied.

The District Court dismissed Plaintiffs' claim that subsection (c) of Section 5, the Bossier II purpose "fix," violated the Equal Protection Clause for substantially the same reason it rejected the claim that it violated Congress'

enforcement powers under the Fifteenth Amendment—a statutory prohibition on intentional discrimination that simply repeats the prohibition in the Fourteenth Amendment cannot violate itself or the equal protection promises inherent in the Fifth Amendment. JA 302. Appellants' unfounded concerns over how the Department of Justice may apply this prong may only be addressed in an as-applied challenge, as the District Court correctly noted. JA 303.

In addressing the claim that subsections (b) and (d) of Section 5, enacted in response to Georgia v. Ashcroft, were unconstitutional, the court applied strict scrutiny because there was "the possibility" that they could impose "quotas and rigid minority-preference schemes," or "mandate excessive governmental race consciousness." JA 303. The court below went on to conclude that Congress had a compelling interest in remedying historical and ongoing discrimination in voting, and that this amendment was narrowly tailored because it did not require an inflexible quota and was, in fact, less race-infused than the Ashcroft standard. JA 308, 312. Thus, although applying the wrong level of scrutiny, the District Court still upheld the amendments against the equal protection challenge.

Although racial classifications are subject to strict scrutiny, see, e.g., Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995), subsections (b) and (d) are not racial classifications. Adarand involved a contracting system providing additional payments to contractors who hired minorities, which the Court held was

subject to strict scrutiny. Neither Section 5 nor its amendments set forth any such racial classifications. "A statute or policy utilizes a 'racial classification' when, on its face, it explicitly distinguishes between people on the basis of some protected category." Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999). The District Court notes that the amendments are, on their face, racially-neutral, and "[u]nlike, say a set-aside for business owned by minorities, the amendments make no textual distinction between white and minority voters." JA 300.

The District Court then moves on to rely on a Shaw/Miller approach to determining the level of scrutiny to be applied, explaining that because the amendments are "unexplainable on grounds other than race," they must be analyzed under strict scrutiny. Miller v. Johnson, 515 U.S. 900, 905 (1995). In relying on the Shaw/Miller line of cases, the District Court neglects to note that the Miller Court described this situation—where a facially neutral law could be explained only on the basis of race—as rare. Id. at 913-14. And yet, the lower court does acknowledge that a plurality of the Supreme Court, in Bush v. Vera, 517 U.S. 952 (1996), concluded that strict scrutiny does not apply when redistricting is "merely…performed with consciousness of race." Id. at 958-59; JA 301. The District Court describes this caselaw as "severely splintered," and thus seems to view applying strict scrutiny as erring on the side of caution. JA 302.

Bush v. Vera and the Shaw/Miller line of precedent focus on the review of redistricting maps for the stigmatic or expressive harm generated when government action is predominantly motivated by racial considerations. But Section 5 is not "conscious" of race in the same way that a redistricting plan is. Section 5 sets forth a mechanism by which all voting changes in all covered jurisdictions are reviewed for a negative impact on minority voting rights. Mere awareness of race does not trigger strict scrutiny. Bush, 517 U.S. at 958 ("Nor does [strict scrutiny] apply to all cases of intentional creation of majority-minority districts.") (citing DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), summarily aff'd, 515 U.S. 1170 (1995)).

In addition, the subsections do not impose special benefits upon minorities but only provide that a voting change may not be implemented in a covered jurisdiction "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section (d) is to the same effect. By their express terms, the subsections protect only against retrogression in minority voting strength. See also Beer, 425 U.S. 130. But even the retrogression standard is not absolute or inflexible. As the District Court noted, "[r]ecent guidelines issued by the Department state that retrogression may be

'unavoidable' due to 'shifts in population or other significant changes since the last redistricting.'" JA 310.

Section 2 of the Voting Rights Act, which mirrors Section 5's "on account of race or color" language, prohibits a state or political subdivision from employing any "standard, practice, or procedure . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). The statute is violated if "under the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens." Id. § 1973(b). Far from providing quotas or special benefits to minorities, Section 2 prohibits discrimination in voting and has been applied to protect whites from having their votes diluted. In United States v. Ike Brown, 561 F.3d 420, 427 (5th Cir. 2009), the court of appeals upheld a finding by the district court that the black Superintendent of Democratic Primary Elections in majority black Noxubee County, Mississippi had discriminated against white residents in the conducting of elections and had diluted their voting strength in violation of Section 2. The case demonstrates that the Voting Rights Act can be used to block discrimination against white voters, just as it is more frequently invoked to block discrimination against minority voters. Moreover, after the 1982 amendments to Section 2 of the Voting Rights Act, the Supreme Court, presumably employing

only the Katzenbach rationality review used by the lower court, summarily affirmed that the amended Section 2 was constitutional. Miss. Republican Exec. Comm. v. Brooks, 469 U.S. 1002, 1003 (1984). Thus, a similar provision, using some of the same language, was not subjected to strict scrutiny by the Supreme Court, and applying that standard here is inconsistent logically and legally.

A statute that prohibits discrimination or retrogression is fundamentally different from an affirmative action scheme or a quota system that provides special benefits to a minority group. Under the District Court's analysis a statute that prohibited "racial discrimination in housing" would be subject to strict scrutiny to the same extent as a law excluding certain racial groups from living in white neighborhoods. Indeed, under the court's analysis, the Fourteenth and Fifteenth Amendments themselves would be subject to strict scrutiny.

The Voting Rights Act, including subsections (b) and (d), is an anti-discrimination statute, not a law that favors or confers distinct advantages upon any racial group. Strict scrutiny is not the applicable standard for reviewing the constitutionality of the subsections. Regardless of the level of scrutiny applied, though, the District Court was correct in concluding that the 2006 amendments to Section 5 did not violate the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, Intervenors-Appellees respectfully request that this Court affirm the judgment below.

This, the 14th day of February, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 12,954 words, as counted suing the word-count function on Microsoft Word 2007 software.

This, the 14th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that, on February 14, 2012, I caused eight copies of the foregoing document to be filed with the clerk of this Court by hand delivery, and I electronically filed the original of the foregoing document with the clerk of this Court by using the CM/ECF system, which will serve the following counsel for Appellants and Defendant-Appellee at their designated electronic mail addresses:

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