No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ELLEN D. KATZ AND THE VOTING RIGHTS INITIATIVE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

The Voting Rights Initiative ("VRI") at the University of Michigan Law School is a faculty-student collaborative research venture under the direction of Professor Ellen D. Katz. In 2005, VRI undertook a comprehensive analysis of all cases involving claims brought under Section 2 of the Voting Rights Act since 1982 that resulted in one or more decisions published in a federal reporter or available on Westlaw or Lexis—a total of 763 decisions in 331 lawsuits. Each case was evaluated and catalogued based on a variety of factors, including whether it involved a jurisdiction "covered" under Section 5, the substantive outcome, the specific challenged practices, and any relevant judicial findings under the so-called "Senate Factors" analysis.

VRI published a final report of its findings and analysis in 2006 (the "VRI Study" or "Katz Study"), and made its entire database available on line in a searchable form (the "VRI database").[2] "The aim of

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[1] The parties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* Ellen Katz, with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, & Anna Weisbrodt, *Documenting Discrimination In Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 Mich. J.L. Reform 643 (2006) ["VRI Study"]; VRI Database Master List (2006), *available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls ["VRI database"]. The research design and methodology are summarized in the VRI Study at 652-54.

th[e] report and the accompanying website [was] to contribute to a critical understanding of current opportunities for effective political participation on the part of those minorities the Voting Rights Act seeks to protect." VRI Study at 645.

The VRI Study (in draft form) and database were part of a 15,000-page evidentiary record that Congress considered when it reauthorized Section 5 of the Voting Rights Act in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 ["2006 Act"]; *see also* Pet. App. 265a-66a. The study was cited in the House and Senate Reports, and discussed in various committee hearings.[3] Both the District Court and the Court of Appeals below relied on the VRI Study and database in upholding the constitutionality of the 2006 reauthorization of Section 5's preclearance requirement in the covered jurisdictions. *See* Pet. App. 130a, 232a-40a; *id.* at 49a (describing the VRI Study as "the most concrete evidence comparing covered and non-covered jurisdictions in the legislative record"); *id.* at 36a-38a, 49a-51a, 54a-60a.

Petitioner Shelby County, some of its supporting *amici*, and the dissent below, on the other hand, have

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[3] *See, e.g.*, H.R. Rep. No. 109-478, at 53 (2006); S. Rep. No. 109-295, at 13, 65 (2006); *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. 964-1124 (2005) (reprinting full draft of VRI Study); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 29, 43-45, 159-60, 212 & n.14 (2006); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Judiciary Comm.*, 109th Cong., 2d Sess. 48-52 (2006).

either criticized aspects of the VRI Study, denied its relevance, or relied on it as purported evidence that Section 5 preclearance is no longer justified in at least some covered jurisdictions. *Id.* at 90a-97a (Williams, J., dissenting); Pet. Br. 36, 46-52; *see also* n.9 *infra*.

Amici curiae Professor Katz and VRI have an interest in ensuring an accurate description and interpretation of their study's findings and underlying data. Based on their familiarity with the relevant Section 2 data, *amici* respectfully offer their views on those data and the implications of those data for the constitutionality of reauthorized Section 5.

SUMMARY OF THE ARGUMENT

I. This Court has identified two questions about Section 5's continued constitutionality—whether the "current burdens" it imposes are "justified by current needs," and whether its "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). The VRI Study and database shed important light on both questions.

First, the VRI Study and database demonstrate that Section 2 claims have been more likely to succeed in covered than in non-covered jurisdictions. As the Court of Appeals emphasized, "although covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation since 1982." Pet. App. 49a. The per capita Section 2 success rate in covered jurisdictions is "nearly four times the rate in non-covered jurisdictions." *Id.* at 49a-50a. These disparities are even greater in Section 2 challenges to local voting requirements and procedures. The dis-

parities have endured over time, and persist at both the trial and appellate levels.

Second, courts have been much more likely in covered than in non-covered jurisdictions to make factual findings documenting certain conditions that are frequently associated with voting discrimination. Courts in covered jurisdictions have made more of these so-called "Senate Factor" findings (and have been more likely to make such findings) with respect to *eight out of the nine Senate Factors*. These factors are "virtually identical" to those considered in determining whether discrimination is "intentional." *Id.* at 37a. "[T]he differences in judicial findings in Section 2 lawsuits in covered and non-covered jurisdictions suggest real differences operating on the ground," showing that many of the evils Congress set out to address through Section 5 preclearance remain disproportionately concentrated in covered jurisdictions. VRI Study at 734.

As the Court of Appeals emphasized, these results are "particularly dramatic given that Attorney General objections block discriminatory laws before they can be implemented and that section 5 deters jurisdictions from even attempting to enact such laws, thereby reducing the need for section 2 litigation in covered jurisdictions." Pet. App. 38a. Hundreds of proposed election changes in covered jurisdictions have been blocked by U.S. Department of Justice ("DOJ") objections; hundreds more have been withdrawn or modified in the course of Section 5 review; many others have been rejected in Section 5 litigation; and countless others were never even proposed given Section 5's deterrent effects. In a counterfactual world in which Section 5 had never existed, at least some of these election changes would have gone

into effect and ripened into Section 2 violations. Section 5 therefore has blocked and deterred many Section 2 violations from ever taking place in covered jurisdictions.

Nevertheless, covered jurisdictions have produced a disproportionate share of Section 2 violations, even after nearly a half-century of federal preclearance review, objections, and enforcement actions. Far from evidence that Section 5 is no longer needed, this discrepancy is strong evidence of Section 5's continued importance in the effort to secure voting rights in the covered jurisdictions.

II. Petitioner, its *amici*, and the dissent below have misconstrued and misapplied the VRI Study and database. Their methodological arguments are either wrong or irrelevant. And their argument that many "covered jurisdictions appear indistinguishable from their uncovered peers," *id.* at 93a (Williams, J., dissenting), overlooks that these "covered states appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary," *id.* at 59a-60a. As the Court of Appeals observed, "had section 5 not been in effect, one would expect significantly more discrimination in [covered jurisdictions] than in the non-covered states with the worst records." *Id.* at 60a. And in any event, none of the criticisms leveled against the VRI Study call into question its fundamental insight that, on a per capita basis, successful reported Section 2 suits are much more concentrated in the covered jurisdictions.

ARGUMENT

I. THE VRI STUDY AND DATABASE REINFORCE THE CONTINUING NEED FOR SECTION 5 IN THE COVERED JURISDICTIONS.

The VRI Study and database were simply one part of a massive evidentiary record that was before Congress when it reauthorized Section 5 in 2006.[4] Moreover, VRI used "conservative[]" methodology that *understates* the continuing disparities between covered and non-covered jurisdictions in opportunities for racial and language minorities to participate equally in the political process and elect candidates of their choice. VRI Study at 655; *see* Pet. App. 54a ("the Katz data on published cases is necessarily underinclusive" of all Section 2 litigation).

Nevertheless, the VRI Study and database provide powerful evidence in support of Congress's reauthorization of Section 5. An analysis of Section 2 litigation outcomes, and of the factual findings that support those outcomes, suggests that minority voters have continued to be more likely to confront obstacles

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[4] During the 2006 reauthorization and amendment process, Congress held 22 hearings, heard testimony from 92 witnesses, and "amassed a 15,000-page legislative record." Pet. App. 266a. That record "consisted of thousands of pages of testimony, reports, and data regarding racial disparities in voter registration, voter turnout, and electoral success; the nature and number of section 5 objections; judicial preclearance suits and section 5 enforcement actions; successful section 2 litigation; the use of 'more information requests' and federal election observers; racially polarized voting; and section 5's deterrent effect." *Id*. at. 12a; *see also* H.R. Rep. No. 109-478, at 5, 11-12 (summarizing the legislative history); S. Rep. No. 109-295, at 2-4 (same).

to political participation in covered jurisdictions than elsewhere.

A. Section 2 Litigation Outcomes and Judicial Findings Are Relevant to the Constitutionality of Reauthorized Section 5.

Section 2 of the Voting Rights Act prohibits, on a nationwide and permanent basis, the imposition or 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, or [language minority status]." 42 U.S.C. § 1973(a). A violation of Section 2 occurs when the challenged requirement or procedure objectively results in minority voters having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). As the Court of Appeals observed, this "results test" is relevant here because, among other reasons, it "requires consideration of factors very similar to those used to establish discriminatory intent based on circumstantial evidence." Pet. App. 37a (citing *Rogers v. Lodge*, 458 U.S. 613, 623-27 (1982)).

If, in some parallel universe, there were no longer any geographic disparities in voting rights discrimination against racial and language minorities—if the repeatedly reaffirmed need for Section 5 preclearance in certain covered jurisdictions had simply "gone away"—one would expect Section 2 litigation outcomes to be roughly uniform throughout the country. If pockets of voting discrimination were no longer concentrated in certain jurisdictions, one would ex-

pect the volume and results of Section 2 litigation to be roughly the same in covered and non-covered jurisdictions. In this counterfactual world, a Section 2 plaintiff would be no more likely to prevail in Alabama than in any other State. Judicial findings of continued voting discrimination against racial and language minorities would be spread fairly evenly, not concentrated in certain portions of the country.

Indeed, for several reasons, one would expect the absolute number of Section 2 violations in this hypothetical world to be much *greater* in non-covered jurisdictions than in covered ones. Since less than a quarter of Americans live in covered jurisdictions, we would expect a much larger number of successful Section 2 outcomes in non-covered jurisdictions, which contain three-quarters of our population, including most African Americans, Latinos, and Native Americans. *See* Pet. App. 49a; Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power 183, 211 & n.138 (A. Henderson ed., 2007) [Katz, *Not Like the South?*].

The disparities become even more pronounced when one considers the relative number of political subdivisions in covered and non-covered jurisdictions. By a lopsided margin, covered jurisdictions contain far fewer local governmental units—*e.g.*, county governments, townships, and independent school districts—than the non-covered ones.[5] Assuming those

[5] As of 2007, the covered jurisdictions accounted for just 13.3% of the political subdivisions in the United States, while non-covered jurisdictions contained 86.7% of such subdivisions. Thus, despite having roughly a quarter of the nation's popula-

units regulate voting and election practices with similar intensity, this disparity suggests that the covered jurisdictions should be the source of far *fewer* practices that could become the basis for a Section 2 lawsuit. Thus, whether examined in light of differences in population or the number of local governmental units, one would expect a much higher number of Section 2 violations in the non-covered jurisdictions if, in a counterfactual world, there were no longer geographic disparities in voting rights discrimination against racial and language minorities.

In addition, any effort to compare covered with non-covered jurisdictions must consider Section 5's role as an *operational* statute, one that has actively been blocking and deterring retrogressive or otherwise discriminatory voting changes for the past two generations. Although Sections 2 and 5 are not coextensive, they outlaw many of the same practices and conduct. "Where they overlap, preclearance should block implementation of the offensive practice and eliminate the need for plaintiffs to challenge it under section 2. . . . [I]f [covered] jurisdictions have been 'cured,' they should account for fewer successful

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tion, covered jurisdictions had less than a sixth of its local governmental units. *See* U.S. Census Bureau, *2007 Census of Governments*, http://www.census.gov/govs/cog/ (last visited Jan. 29, 2013); U.S. Census Bureau, *Vintage 2007: State Tables*, http://www.census.gov/popest/data/historical/2000s/vintage_2007/index.html (last visited Jan. 29, 2013). These figures do not include the covered townships in Michigan and New Hampshire because of the difficulty in determining which local governmental units serve those jurisdictions. As of 2007, fully covered States accounted for just 12.3% of the total local governmental units nationwide. U.S. Census Bureau, *2007 Census of Governments*, http://www.census.gov/govs/cog/ (last visited Jan. 29, 2013).

section 2 lawsuits than noncovered ones, where section 5 does not operate." Ellen D. Katz, *Mission Accomplished?*, 117 Yale L.J. Pocket Part 142, 145-46 (2007) [Katz, *Mission Accomplished?*]; *see also* Katz, *Not Like the South?*, at 211.

Although it is impossible to pinpoint how an alternative world would have looked in the absence of Section 5, there can be no genuine dispute that preclearance has dramatically reduced the number of potential Section 2 violations in covered jurisdictions. Congress found in the 2006 Act that, pursuant to Section 5 and related provisions, there have been hundreds of federal objections "interposed" against attempted election changes in covered jurisdictions; hundreds more requests for additional information (so-called "MIRs") "followed by voting changes withdrawn from consideration by [covered] jurisdictions"; numerous DOJ enforcement actions that "prevented election practices . . . from being enacted to dilute minority voting strength"; many failed attempts by covered jurisdictions to obtain declaratory judgments preclearing proposed voting changes; and "tens of thousands of Federal observers" monitoring election practices in covered jurisdictions. 2006 Act § 2(b)(4)-(5), (8); *see* Pet. App. 31a-46a, 131a-32a, 206a-31a, 240a-45a (all cataloguing the extensive Section 5 enforcement efforts in covered jurisdictions since 1982). These enforcement measures blocked or mitigated many voting practices that otherwise would have resulted in even more Section 2 litigation in the covered jurisdictions.

The impacts of Section 5 preclearance cannot be measured in the numbers of federal objections, MIRs, or enforcement actions alone. As the House Judiciary Committee emphasized, Section 5 has deterred cov-

ered jurisdictions "from even attempting to enact discriminatory voting changes" because officials understand that "'submitting discriminatory changes is a waste of taxpayer time and money.'" H.R. Rep. No. 109-478, at 24 (citation omitted).

> "Section 5's reach in preventing discrimination is broad. Its strength lies not only in the number of discriminatory voting changes it has thwarted, but can also be measured by the submissions that have been withdrawn from consideration, the submissions that have been altered by jurisdictions in order to comply with the [Voting Rights Act], or in the discriminatory voting changes that have never materialized." *Id.* at 36.

See also S. Rep. No. 109-295, at 11, 14 (describing Section 5's deterrent effect); *Nw. Austin*, 557 U.S. at 205 (quoting district court finding that the legislative record "demonstrat[ed] that section 5 prevents discriminatory voting changes" by "quietly but effectively deterring discriminatory changes") (citation and internal quotation marks omitted); *South Carolina v. United States*, No. 12-203, 2012 WL 4814094, at *21 (D.D.C. Oct. 10, 2012) (Bates, J., concurring) (discussing the "vital function" that Section 5 preclearance review played in causing South Carolina to make its proposed voter photo ID law less restrictive through the addition of "key ameliorative provisions," changes that "were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act").

If these targeted federal enforcement measures were operating in a world in which "governmental officials in each jurisdiction ha[d] equal propensity to engage in conduct prohibited by Section 2," one would expect to find far more Section 2 cases and violations

in *non-covered* jurisdictions, "where, by definition, preclearance does not operate." Katz, *Not Like the South?*, at 211. And given the differences in population and numbers of political subdivisions between covered and non-covered jurisdictions, *see* pp. 8-9 *supra*, one would expect this disparity in Section 2 outcomes to be even greater.

As next shown, just the opposite is true—Section 2 claims have been much more likely to succeed in *covered* jurisdictions, and eight of the nine "Senate Factors" associated with voting discrimination have been more likely to be found in covered than in non-covered jurisdictions.

B. Section 2 Litigation Outcomes and Judicial Findings Support the Continued Need for Section 5 Preclearance.

1. There Are Proportionately Many More Successful Section 2 Outcomes in Covered than in Non-Covered Jurisdictions.

The Court of Appeals pointed to "two key findings" in the VRI Study "suggesting that racial discrimination in voting remains 'concentrated in the jurisdictions singled out for preclearance.'" Pet. App. 49a (citing *Nw. Austin*, 557 U.S. at 203):

- "[A]lthough covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation since 1982." *Id.* When the data are adjusted to reflect population differences, "the rate of successful section 2 cases in covered jurisdictions (.94 per million residents) is *nearly four times* the rate in non-

covered jurisdictions (.25 per million residents)." *Id.* at 49a-50a (emphasis added).

- "[T]he study found higher success rates in covered jurisdictions than in non-covered jurisdictions"—42.5% versus 32.2%. *Id.* at 51a; *see* VRI Study at 656.

These disparities in litigation success rates are even more pronounced in challenges to local (especially county) voting requirements and procedures—*e.g.*, a plaintiff success rate of 55.3% in covered counties versus only 36.4% in non-covered counties. *See* App. C *infra*. The number of proposed changes submitted by local governments "far outpaces the number of submissions from state governments," and federal objections to proposed local changes "far outnumber" objections to state changes.[6] "Even in this context, where preclearance operates most vigorously to block electoral changes, covered jurisdictions still are the subject of more successful Section 2 challenges than are noncovered jurisdictions, where preclearance is not screening out any of the challenges to local practices." Katz, *Not Like the South?*, at 211-12.

These disparities in Section 2 outcomes between covered and non-covered jurisdictions persist at both the trial and appellate levels. The appellate disparity is particularly striking:

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[6] Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion To Scuttle Section 5 of the Voting Rights Act*, 84 Neb. L. Rev. 605, 612-13 (2005). It has been argued that Section 5 "has had its greatest impact, success, and necessity" at the local level, and that "protection of minority voting rights in local government represents section 5's most important modern-day function." *Id.* at 610, 612.

> "Appellate courts in covered jurisdictions were both more likely to reverse denials of liability and less likely to reverse violations than were courts in non-covered regions. In other words, defendants were more likely to win on appeal in non-covered regions, while plaintiff-appeals were more likely to succeed in covered regions. This suggests that trial judges in covered jurisdictions, if anything, appear to have read section 2 too restrictively, and that the violations identified in covered regions are more clear and less vulnerable to challenge than those found elsewhere." Ellen D. Katz & Anna Baldwin, *Why Counting Votes Doesn't Add Up: A Response to Cox and Miles' Judging the Voting Rights Act*, 108 Colum. L. Rev. Sidebar 23, 26 (2008) [Katz & Baldwin, *Why Counting Votes Doesn't Add Up*].

As the Court of Appeals emphasized, this statistically significant and continuing disparity between successful Section 2 outcomes in covered and non-covered jurisdictions is "particularly dramatic given that Attorney General objections block discriminatory laws before they can be implemented and that section 5 deters jurisdictions from even attempting to enact such laws, thereby reducing the need for section 2 litigation in covered jurisdictions." Pet. App. 38a. Though the precise impact of Section 5 preclearance cannot be quantified, consider that, while Georgia had only three successful published Section 2 cases between 1982 and 2004, the State and its subdivisions during this same period were the subject of 83 Section 5 objections, 17 successful DOJ enforcement actions, and numerous MIRs that resulted in the withdrawal of 90 proposed voting changes. *Id.* at 58a-59a. Likewise, South Carolina had only three successful published Section 2 cases

during this time but was the subject of 74 Section 5 objections, 10 successful DOJ enforcement actions, and numerous MIRs resulting in the withdrawal or abandonment of 77 proposed voting changes. *Id.* at 59a.

Though not all of these blocked changes would have ripened into constitutional or Section 2 violations if allowed to proceed, surely some would have sparked additional Section 2 litigation. It is not difficult to imagine far more than merely three successful published Section 2 cases in Georgia and another three in South Carolina if the federal government had not blocked and narrowed hundreds of proposed voting changes in those States. As the Court of Appeals recognized, that is what makes the evidence in the VRI Study and database "particularly dramatic"—a disproportionate share of Section 2 violations have occurred in covered jurisdictions, even as federal preclearance reviews, objections, and enforcement actions have continued to prevent voting rights violations that otherwise would have been addressed in Section 2 litigation. This is a testament to the tenacity of voting discrimination in covered jurisdictions, not evidence that Section 5 is no longer needed.

2. The "Senate Factors" Findings Collected in the VRI Study and Database Reinforce the Continued Need for Section 5 Preclearance.

Looking beyond litigation outcomes to the findings of fact made by judges in Section 2 litigation, the VRI Study shows that courts in covered jurisdictions have been much more likely to document certain conditions linked to voting discrimination than courts in non-covered jurisdictions. The so-called "Senate

Factors" analysis spelled out in the 1982 Senate Report provides courts with a structured but non-exhaustive checklist of nine factors to consider in determining whether a challenged practice results in racial and language minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see* S. Rep. No. 97-417, at 28-29 (1982); *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (pointing to the 1982 Senate Report as "the authoritative source for legislative intent" of the 1982 amendments); 478 U.S. at 43-46.[7]

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[7] The non-exhaustive factors spelled out in the 1982 Senate Report include (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process"; (2) "the extent to which voting in the elections of the state or political subdivision is racially polarized"; (3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group"; (4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process"; (5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process"; (6) "whether political campaigns have been characterized by overt or subtle racial appeals"; (7) "the extent to which members of the minority group have been elected to public office in the jurisdiction"; (8) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"; and (9) "whether the policy underlying the state or political subdivision's use of

As shown in Appendix B to this brief, courts in covered jurisdictions made more affirmative "Senate Factor" findings (and were more likely to make such findings) with respect to *eight out of the nine Senate Factors*. That is a striking disparity if, as Shelby County insists (Pet. Br. 46), there are no longer any meaningful differences in minority voting opportunities between covered and non-covered jurisdictions. Specifically:

- "Courts in covered jurisdictions have both found and been more likely to find at levels that are statistically significant: acts of official discrimination that compromise voting rights, the use of devices that 'enhance[]' opportunities for discrimination against minority voters, and a lack of success by minority candidates." Katz, *Not Like the South?*, at 187 (footnote omitted).
- "Courts in covered jurisdictions have also found and been more likely to find a lower level of minority voter registration and turnout, contemporary voting opportunities shaped by the continuing effects of discrimination in various socio-economic realms, racial appeals in campaigns, and tenuous justifications underlying challenged practices, although these differences between covered and noncovered jurisdictions are not statistically significant." *Id.*
- "In roughly equal numbers and proportions, courts in covered and noncovered jurisdictions have found racially exclusive slating processes

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such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep. No. 97-417, at 28-29.

> and nonresponsive elected officials. Courts in both types of jurisdictions also found legally significant racial bloc voting in a roughly equal number of lawsuits, but courts in covered jurisdictions documented voting patterns that were more extremely polarized by race at a rate that is statistically significant." *Id.* at 187-88.

Some of the measured disparities in the VRI database are not statistically significant, though several are. Yet even where the numbers are roughly equivalent, that *itself* is significant evidence supporting the continued need for Section 5 preclearance review. In the counterfactual world posited by Shelby County, the particularized "Senate Factors" findings should be overwhelmingly concentrated in *non-covered* jurisdictions given that (1) those jurisdictions contain more than three-quarters of the country's population, including the majority of its racial and language minorities; (2) they also contain over five-sixths of the country's local governmental units; and (3) non-covered jurisdictions, by definition, have not been subjected to two generations of federal preclearance review, objections, MIRs, enforcement litigation, and federal monitoring. Given these considerations, one would expect to find many more instances of the Senate Factors in non-covered jurisdictions than in covered jurisdictions. But just the opposite is true with respect to eight out of nine Senate Factors (all but Factor 4, candidate slating processes).

The VRI Study and database also show that, in several instances, courts in covered jurisdictions were more likely, at statistically significant levels, to make findings of serious racial and language discrimination in voting.

Senate Factor 1 (acts of official discrimination). Courts in covered jurisdictions identified evidence of a "history of official discrimination" touching the right to vote in 58.1% of their Section 2 cases that considered at least one of the Senate Factors. By contrast, courts in non-covered jurisdictions identified such a history in only 38.2% of opinions identifying at least one Senate Factor. Katz, *Not Like the South?*, at 194 n.40; VRI Study at 675-97. The findings document a broad and troubling range of official efforts to harass, intimidate, and interfere with voting rights in covered jurisdictions. VRI Study at 678-85. Note that Senate Factor 1 is not met simply by a history of official discrimination; that discrimination must "touch[]" the contemporary, "present-day ability of [minority voters] to participate in the political process." *Id.* at 676, 696. Thus it is especially significant that most findings of official discrimination were concentrated in covered jurisdictions.

Senate Factor 2 (racially polarized voting). Evidence of racially polarized voting "bear[s] heavily on the issue of purposeful discrimination," because such polarization "allows those elected to ignore [minority] interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race." *Rogers v. Lodge*, 458 U.S. at 623. Courts in covered and non-covered jurisdictions have found evidence of legally significant racially polarized voting in roughly the same number of lawsuits. Katz, *Not Like the South?*, at 195-96. But "courts in covered jurisdictions have documented racial polarization in specific elections that was more extreme than have courts in noncovered ones, and have done so at rates that are statistically significant." *Id.* at

196. ("Extreme" polarization is defined as white bloc voting of 80% or more in minority-white elections.) Although 40.9% of the elections documented in *non-covered* jurisdictions found extreme white bloc voting, fully 80.7% of the elections documented in *covered* jurisdictions involved this extreme degree of racial polarization. *See id.* at 196-97. Congress in its statement of "Congressional Purpose and Findings" emphasized that the "continued evidence of racially polarized voting in each of the [covered] jurisdictions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection" of Section 5. 2006 Act § 2(b)(3).

Senate Factor 3 (use of discrimination-enhancing practices). This factor considers the "extent to which the state or political subdivision has used . . . voting practices or procedures that may enhance the opportunity for discrimination" against racial and language minorities. S. Rep. No. 97-417, at 29. The VRI Study found that 63.5% of the cases finding Senate Factor 3 arose in covered jurisdictions, as opposed to only 36.5% in non-covered jurisdictions. VRI Study at 698. Courts in covered jurisdictions were thus nearly *twice* as likely to make this kind of finding as courts in non-covered jurisdictions. *See id.*; Katz, *Not Like the South?*, at 197.

Senate Factor 7 (lack of minority candidate success). Courts in covered jurisdictions also have been more likely to document a longstanding lack of success by minority candidates—56.7% of cases making this finding involved covered jurisdictions while only 43.3% involved non-covered jurisdictions. VRI Study at 718. "Nearly one in two courts in covered jurisdictions found a lack of candidate success, compared to less than one in three courts in

noncovered jurisdictions." Katz, *Not Like the South?*, at 202; *see* VRI Study at 717-22.

These disparities in key Senate Factors findings are all the more remarkable given that covered jurisdictions during this period were subject to ongoing federal preclearance, objections, MIRs, enforcement proceedings, and monitoring, while non-covered jurisdictions were not. If opportunities for minority political participation were uniform nationwide, one would have expected to find many more Section 2 violations and many more Senate Factor findings documenting voting discrimination in non-covered than in covered jurisdictions. The only fair prediction is that, if Section 5 preclearance were eliminated, the disparities between covered and non-covered jurisdictions documented in the VRI Study would become even more pronounced.

II. PETITIONER, ITS *AMICI*, AND THE DISSENT BELOW MISCONSTRUE THE VRI STUDY AND DATABASE.

The authors of the VRI Study consistently have acknowledged that it "of course" evaluates "only a portion of the Section 2 claims filed or decided since 1982"—many claims having been either dropped, settled, or decided without any decision ever being published in a federal reporter or on Westlaw or Lexis. VRI Study at 654. The study is thus "conservative[]" in its documentation of Section 2 violations. *Id.* at 655. As Professor Katz has emphasized, the available data "suggest[] that a fuller accounting of section 2 litigation would reveal an even greater proportion and number of successful plaintiff outcomes in covered jurisdictions than in noncovered ones." Katz, *Mission Accomplished?*, at 146.

That is precisely the conclusion reached by the Court of Appeals below. Based on its analysis of Section 2 cases that involved both published and unpublished decisions, the court emphasized that covered jurisdictions "appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." Pet. App. 59a; *see also id.* at 54a-55a (unpublished Section 2 decisions "provide[] helpful additional evidence that corroborates the disparities in the level of discrimination between covered and non-covered jurisdictions revealed by the [VRI Study's] published data").

Although the methodology and conclusions of the VRI Study are conservative and "necessarily under-inclusive," *id.* at 54a, the dissenting judge below, petitioner Shelby County, and several *amici* raise various objections to the study. None is well taken.

Relevance objections. Shelby County argues that, "[o]f the data in the Katz Study, intentional-discrimination findings should be the only relevant statistic[.]" Pet. Br. 48 n.10. It parses these findings and declares that they demonstrate *more* "intentional discrimination" now exists in non-covered jurisdictions than in covered ones. *Id.* at 47-48.

This argument fails for many reasons. Because Section 2 uses a "results test" that does not require proof of discriminatory intent, it tends to understate the true extent of intentional discrimination. "[C]ourts have no need to find discriminatory intent once they find discriminatory effect." Pet. App. 37a. Indeed, courts have a duty to *avoid* addressing constitutional issues where they can resolve the case on narrower statutory grounds, which further "explains why the legislative record contains so few published section 2

cases with judicial findings of discriminatory intent." *Id.*; *see Escanaba Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (declining to decide whether evidence of discriminatory intent was sufficient to establish a Fourteenth Amendment violation where challenged system also violated Section 2); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (deciding case under Section 2 while noting that the challenged practice "bears the mark of intentional discrimination").

Moreover, Section 2's results test "requires consideration of factors very similar"—the Court of Appeals termed them "virtually identical"—"to those used to establish discriminatory intent based on circumstantial evidence." Pet. App. 37a; *see also Rogers v. Lodge*, 458 U.S. at 622-27 (upholding finding of intentional discrimination based on satisfaction of precursors to the Senate Factors).[8] The Senate Factors findings are thus highly relevant to the Section 5 inquiry. And notwithstanding the focus on *results* rather than *intent*, many reported Section 2 decisions have included "judicial findings of inten-

[8] In upholding a finding of intentional voting discrimination, this Court in *Rogers* pointed to evidence of "bloc voting along racial lines"; the absence of minority electoral success; "the impact of past discrimination on the ability of blacks to participate effectively in the political process"; practices that "had prevented blacks from effectively participating in Democratic Party affairs and in primary elections"; the "unresponsive[ness] and insensitiv[ity]" of elected officials "to the needs of the black community"; "the depressed socio-economic status" of the minority community; the "sheer geographic size" of the electoral district; and the use of a "majority vote requirement." 458 U.S. at 626-27. These considerations that helped to establish intentional discrimination in *Rogers* are the same as Senate Factors 1-5 and 7-8. *See* n.7 *supra*.

tional or unconstitutional voting discrimination by covered jurisdictions since 1982," including in petitioner's home state of Alabama. Pet. App. 235a; *see id.* at 235a-40a; VRI Study at 683-85.

Here again, the Section 2 numbers would be much worse in covered jurisdictions in the absence of Section 5 preclearance review. "[B]ecause most intentionally discriminatory voting practices are blocked by Section 5 prior to their implementation, they are unlikely to be the subject of a subsequent Section 2 challenge." Pet. App. 233a. As the Court of Appeals concluded, the continuing volume of successful Section 2 claims in covered jurisdictions is "particularly dramatic" given the ongoing vigorous enforcement of Section 5 preclearance review. Pet. App. 38a. The absence of even more extensive voting discrimination in covered jurisdictions does not suggest that the need for Section 5 preclearance review has passed, but that Section 5 "is fulfilling its most basic mission." Katz, *Not Like the South?*, at 210. "A record of pervasive unconstitutional conduct should not be expected since the legislation at issue was put in place to remedy precisely such conduct. Indeed, to require such a record would mean that only ineffective statutes are entitled to reauthorization." *Id.* at 185.

Methodological objections. The Court of Appeals believed the VRI Study is *underinclusive*, and that covered jurisdictions "appear to be engaged in much more unconstitutional discrimination compared to non-covered jurisdictions than the Katz data alone suggests." Pet. App. 59a. Shelby County, several of its supporting *amici*, and the dissent below disagree. They argue that the VRI Study is *overinclusive*, that

it misclassifies some Section 2 litigation outcomes, and that it relies on the wrong data.

Collectively, these critics quibble with VRI's characterization of a grand total of four decisions out of the 763 it analyzed. These objections to about one-half of one percent of the decisions analyzed hardly undermine confidence in the VRI Study or its conclusions. Neither petitioner, its *amici*, nor the dissent below explain how any revised classification of these four decisions would meaningfully change the conclusions of the study in any way. And in any event, *amici* respectfully submit that at least three—if not all four—of the challenged decisions were properly classified in the original study.[9]

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[9] The dissent below cited *Brown v. Board of School Comm'rs*, 706 F.2d 1103 (11th Cir. 1983), as a case that did not involve *modern-day* "discriminatory intent." Pet. App. 97a (Williams, J., dissenting). With respect, although the challenged at-large system had first been enacted in 1876, the district court found "a *present* purpose to dilute the black vote . . . through intentional state legislative *inaction*." *Brown v. Moore*, 428 F. Supp. 1123, 1139 (S.D. Ala. 1976) (emphasis added); *see also id.* at 1133-34 (discussing modern Board's "lack of cooperation and dilatory practices"). The Eleventh Circuit affirmed without qualification the district court's conclusion that "the at-large election system had been adopted *and maintained* for the purpose of diluting black voting strength." 706 F.2d at 1104, 1107 (emphasis added).

Petitioner chides the VRI Study for having included as a "successful" Section 2 case the decision in *Fayetteville, Cumberland Cty. Black Dem. Caucus v. Cumberland Cty.*, No. 90-2029, 1991 WL 23590 (4th Cir. Feb 28, 1991) (per curiam); *see* Pet. Br. 36 n.8. *Amici* believe the outcome in this case was correctly scored as a "success." Plaintiffs challenged the use of five-member, at-large elections for county commissioners. During the course of the litigation, the county abandoned the challenged system, adopted a new seven-member, single-district

The State of Texas in its *amicus* brief criticizes the Court of Appeals' decision for "*refus[ing]* to acknowledge or cite" a particular academic article that, according to Texas, "dismantled" the VRI Study. *See* Texas *Amicus* Br. at 22-23 (emphasis added) (citing Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum. L. Rev. 1 (2008)). Texas itself fails to "acknowledge or cite" a published

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commissioner system, and obtained Section 5 preclearance from the DOJ. Plaintiffs nevertheless pursued their challenge, and the Fourth Circuit language quoted by petitioner concerns plaintiffs' remaining claims against the new, precleared system. Given the evident causal link between plaintiffs' Section 2 claim and the defendant's abandonment of the challenged system and adoption of a new, precleared system, VRI believes this case is properly scored as a "successful" Section 2 outcome.

Amicus American Unity Legal Defense Fund also splits hairs with VRI's interpretations of *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992), and *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996). *See* AULDF *Amicus* Br. at 21 n.8 and 27 n.16. AULDF concedes that *Wesch* "may represent a successful § 2 challenge," *id.* at 21 n.8, and rightly so: In response to the Section 2 claim, the State of Alabama "agree[d] that a significant African American Congressional district should be created" pursuant to a plan the Court found would "provide[] African-Americans a reasonable opportunity to elect a candidate of their choice." 785 F. Supp. at 1498-99. VRI thus fairly scored this decision as a Section 2 "success."

White presents a closer question. There, the Eleventh Circuit vacated a stipulated final judgment that would have changed Alabama's system for electing state appellate judges. But the Eleventh Circuit did not reject the *substance* of the Section 2 claim, simply the specific remedy the parties proposed—a federal court order that Alabama increase the size of its appellate courts. 74 F.3d at 1072-73. The Eleventh Circuit remanded to the three-judge district court for further proceedings. *Id.* at 1075; *see White v. Alabama*, 922 F. Supp. 552, 555 (M.D. Ala. 1996) (noting subsequent March 18, 1996 federal preclearance of state expansion of its appellate courts).

response to this article that detailed the many errors in the Cox and Miles objections. *See* Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 23.

Texas argues that the Cox and Miles article "show[s] that there has been a distinct downward trend in the rate of successful claims brought by section 2 plaintiffs since 1982." Texas *Amicus* Br. at 22-23. This is hardly news; the VRI Study itself emphasized that "[c]ourts identified violations of Section 2 more frequently between 1982 and 1992 than in the years since." VRI Study at 656. Of the total violations identified in the VRI database, "courts found 46.7% of them during the 1980s, 38% during the 1990s, and 15.2% since then." *Id.* at 656; *see also* App. A *infra*.

Yet despite this decline, Section 2 plaintiffs in covered jurisdictions continued to win lawsuits at a greater rate than their counterparts in non-covered jurisdictions. In the first half of the study, for example, plaintiffs in covered jurisdictions won 54% of their cases, while plaintiffs in non-covered jurisdictions won in 46%. In the second half, plaintiffs in covered jurisdictions won 28% of their cases, while plaintiffs in non-covered jurisdictions won in 22%. Although the 2000-05 data were more equivocal, suggesting a rough equivalence of outcomes, those data must be adjusted to reflect (1) the population disparities between covered and non-covered jurisdictions; (2) the disparities in relative numbers of political subdivisions; and (3) the blocking and deterrence effects of Section 5 preclearance review in covered jurisdictions. These combined factors should have reduced the number of successful Section 2 outcomes in covered jurisdictions. Thus, even if the disparity in comparative success rates had narrowed in recent

years, a rough equivalence of outcomes between jurisdictions would still be evidence of the continued need for, not obsolescence of, Section 5. *See* pp. 8-12 *supra*.[10]

Texas also points to the Cox and Miles article in arguing that "[t]he higher rate of claimant success in covered jurisdictions appears only at the trial level," and that "section 2 claimants in covered jurisdictions are *less successful at the appellate level* than claimants in non-covered jurisdictions." Texas *Amicus* Br. at 23 (emphasis added). Just the opposite is true. As discussed above, the appellate courts included in the VRI database were "both more likely to reverse denials of liability and less likely to reverse violations than were courts in non-covered jurisdictions"; plaintiffs fared much better on appeal in covered than in non-covered areas. Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 26. "This suggests that . . . violations identified in covered regions are more clear and less vulnerable to challenge than those found elsewhere." *Id.*; *see* pp. 13-14 *supra*.

The Cox and Miles article is off base because it measured individual judges' votes, not individual case outcomes. That methodology tells us virtually nothing: a single-judge district court judgment "might represent a violation so patent that appeal would have been futile, and yet it yields but one vote compared with the four produced by a closer case affirmed on appeal [by a three-judge panel]." Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 24-25. The VRI database contains many such un-

[10] In addition, "the pace of litigation following post-census redistricting suggests that data from partial decades, and indeed, the early part of any decade may not be representative of the decade as a whole." Katz, *Mission Accomplished?*, at 144 n.14.

appealed single-judge decisions; "[t]hat these appeals did not materialize hardly suggests that covered jurisdictions have fewer voting rights problems than non-covered ones." *Id.* at 26; *see id.* at 26 n.10 ("Our claim has consistently been that these judgments, and the findings that support them, matter far more than the number of times individual judges happen to cast liability votes in the course of a section 2 lawsuit."). Counting individual judges rather than case outcomes also skews the analysis because "three-judge trial panels decided more than four times as many section 2 cases in non-covered jurisdictions than in covered ones." *Id.* at 27.[11] "Judge-counting," in short, adds nothing to the analysis other than error and confusion.

Disaggregation objections. The dissent below argued that, when the VRI data are "disaggregate[d] by state," some of the covered jurisdictions "appear undistinguishable from their uncovered peers" in terms of successful, reported Section 2 cases. Pet. App. 91a-93a (Williams, J., dissenting). Shelby County echoes this theme: "the nine fully-covered States are only 5 of the top 10" States in "adjudicated Section 2 violations," "non-covered Illinois had more Section 2 lawsuits filed since 1982 than all but three fully-covered States," and so forth. Pet. Br. 47.

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[11] Such panels are convened to hear challenges to statewide and congressional redistricting plans. Many more such challenges were filed in non-covered jurisdictions, "precisely because section 5 does not operate in these regions." Katz & Baldwin, *Why Counting Votes Doesn't Add Up*, at 27. In covered jurisdictions, "section 5 objections and adjustments made in anticipation of such objections vastly reduced the likelihood that separate section 2 challenges would follow. No such screening occurred in non-covered jurisdictions; hence many more three-judge trial panels were convened." *Id.*

These arguments fail for many reasons. To begin, this Court has emphasized that "[i]t is irrelevant" to the constitutional issues that "there is evidence of voting discrimination" in some non-covered jurisdictions. *South Carolina v. Katzenbach*, 383 U.S. 301, 330-31 (1966). "Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Id.* at 331.

In addition, petitioner is located in a State that consistently ranks near the top of all States in Section 2 violations—whether measured in terms of total filings, successful filings, successful filings per capita, successful filings per local governmental unit, successful filings per million minority members, or other metrics. Even if some covered jurisdictions might be entitled to an exemption from preclearance on the theory that their compliance track records "appear indistinguishable from their uncovered peers," Pet. App. 93a (Williams, J., dissenting), Shelby County, Alabama is not one of those jurisdictions. Under any metric of voting discrimination, petitioner is readily "[]distinguishable from [its] uncovered peers." *Id.*

Indeed, the disaggregated data confirm that the top tier of States in Section 2 violations (under any metric) is consistently dominated by covered jurisdictions. There is a core of covered jurisdictions—especially Alabama, Mississippi, and Louisiana—that nearly always rank among the top five violators in all categories. Even the dissent conceded that it "might be defensible" to continue Section 5 preclearance in these three States, "and possibly the covered portions of South Dakota and North Carolina" as well. Pet. App. 93a (Williams, J., dissenting).

Covered States like South Dakota, Texas, North Carolina, and Virginia often join the top tier of Section 2 violators depending on the choice of metric (South Dakota has the most successful Section 2 outcomes per million people, Texas is Number 4 in successful Section 2 cases, and so forth). Under some metrics—such as number of filings and successful suits per local governmental unit—the top tier is especially dominated by covered jurisdictions. Beyond this, disaggregation reveals a situation in which covered jurisdictions always dominate the top tier of Section 2 violators; are almost always concentrated in the bottom third of compliant States; and almost never appear in the top half of compliant States under any metric.

Moreover, even where "covered jurisdictions appear indistinguishable from their uncovered peers" in terms of some Section 2 metrics—where "the middle-range covered states appear comparable to some non-covered jurisdictions," Pet. App. 59a—that does not mean the need for Section 5 has now gone away. To the contrary, as the Court of Appeals emphasized, Section 5 itself explains why there now is an apparent equivalence among some covered and non-covered States in terms of Section 2 outcomes:

> "[A]s Congress found, the mere existence of section 5 deters unconstitutional behavior in the covered jurisdictions. That is, the middle-range covered states appear comparable to some non-covered jurisdictions only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary. Had section 5 not been in effect, one would expect significantly more discrimination in North Carolina, South Carolina,

Virginia, Texas, and Georgia, all covered by section 5, than in the non-covered states with the worst records." *Id.* at 59a-60a.

CONCLUSION

The VRI Study and database demonstrate that, in the nearly quarter of a century leading up to the 2006 reauthorization of Section 5, Section 2 plaintiffs were substantially more likely to succeed in covered than in non-covered jurisdictions, and were significantly more likely to encounter practices and conditions associated with voting discrimination. These disparities would have been even worse in the absence of Section 5's ongoing role in blocking and deterring potential constitutional and Section 2 violations in covered jurisdictions. Congress reasonably relied on this and other evidence in finding that, "[d]espite the progress made by minorities" since 1965, "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Act § 2(b)(7). The decision below accordingly should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Total Lawsuits and Success in Voting Rights Act Section 2 Litigation, 1982–2005

Covered Jurisdictions

Year Decided	Total Lawsuits	Success	% Success
1980s	59	35	59.3%
1990s	72	27	37.5%
2000s	29	6	20.7%
Grand Total	160	68	42.5%

Noncovered Jurisdictions

Year Decided	Total Lawsuits	Success	% Success
1980s	41	21	51.2%
1990s	84	23	27.4%
2000s	46	11	23.9%
Grand Total	171	55	32.2%

Overall[a]

Year Decided	Total Lawsuits	Success	% Success
1980s	100	56	56.0%
1990s	156	50	32.1%
2000s	75	17	22.7%
Grand Total	331	123	37.2%

[a] The chi-square value analyzing the contingency table with covered/noncovered jurisdictions versus successful/unsuccessful grand total is 3.782 (df = 1, p = 0.052).

Source: Reproduced from Table 8.1 in Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation and Power 215 (A. Henderson ed. 2007); *see also* VRI Database Master List (2006), available at http://sitemaker.umich.edu/votingrights/files/masterlist.xls.

APPENDIX B

Senate Factor Findings in Post–1982 Section 2 Litigation, of All Suits Considering Factors

	Covered Jurisdictions		Noncovered Jurisdictions		
Total Lawsuits	160	100%	171	100%	
Considered Factors	105	65.6%	131	76.5%	
Of Suits Considering Factors:					$p > \chi 2$
Found Factor 1	61	58.1%	50	38.2%	0.002
Found Factor 2	52	49.5%	53	40.5%	0.164
Found Factor 3	33	31.4%	19	14.5%	0.002
Found Factor 4	4	3.8%	6	4.6%	0.975
Found Factor 5	45	42.9%	43	32.8%	0.113
Found Factor 6	18	17.1%	15	11.5%	0.210
Found Factor 7	51	48.6%	39	29.8%	0.003
Found Factor 8	10	9.5%	10	7.6%	0.604
Found Factor 9	13	12.4%	10	7.6%	0.222
All *Gingles* Factors	30	28.6%	38	29.0%	0.941

Source: Reproduced from Table 8.2 in Ellen D. Katz, *Not Like the South?,* at 216; *see also* VRI Database Master List (2006).

APPENDIX C

Local v. State Government Challenges Under Section 2, 1982–2005[a]

		Covered Jurisdictions			Noncovered Jurisdictions	
Level of Gov't	Total	Success		Total	Success	
State	38	11	28.9%	58	15	25.9%
Local	122	57	46.7%	113	40	35.4%
County	47	26	55.3%	44	16	36.4%
City/Town	54	25	46.3%	55	20	36.4%
School[b]	21	6	28.6%	14	4	28.6%
Total	160	68	42.5%	171	55	32.2%

Level of Gov't	Test of Difference[c] $p > \chi 2$
State	0.739
Local	0.078
County	0.070
City/Town	0.292
School[b]	0.703
Total	0.052

[a] This figure displays the governing body challenged. Where suits challenged multiple governments, the highest level is counted.

[b] The chi-square value for this level of government is Yates continuity-corrected.

[c] Chi-square values for each level of government analyze contingency tables for covered/noncovered jurisdictions versus successful/unsuccessful results.

Source: Reproduced from Table 8.3 in Ellen D. Katz, *Not Like the South?,* at 217; *see also* VRI Database Master List (2006).