No. 12-96

IN THE
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

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

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

BRIEF FOR RESPONDENT-INTERVENORS EARL CUNNINGHAM, HARRY JONES, ALBERT JONES, ERNEST MONTGOMERY, ANTHONY VINES, AND WILLIAM WALKER

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

CORPORATE DISCLOSURE STATEMENT

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No law better embodies our Constitution's aspiration for a "more perfect union" than the Voting Rights Act of 1965 ("VRA" or "Act"). This aspiration remains essential today because racial discrimination in voting is "not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes[.]" *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality opinion).

During its 2006 reauthorization review, Congress assembled a "virtually unprecedented legislative record," Pet'r Cert. Appendix ("PA") 114a, closely examining the evidence to determine whether Section 5 of the Act is still needed. This analysis was careful, detailed, and included a wide range of views. Congress received more testimony and information about the voting experience, both in and outside the jurisdictions covered by Section 5, than it had during any prior reauthorization.

This brief examines the 2006 Congressional record. That record establishes three key points, which make clear that Section 5's "current burdens" remain "justified by current needs." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

First, Section 5 remains essential to safeguard our democracy from racial discrimination. The record documents hundreds of examples of persistent unconstitutional efforts by covered States and localities to deny or abridge the right to vote on account of race, including widespread efforts to circumvent

remedies imposed for prior VRA violations, which were only blocked by Section 5. *See* Part II, *infra*.

Second, case-by-case litigation under Section 2 of the VRA is time-consuming, costly, and permits racial discrimination to take root in the electoral process before it can be remedied. It was reasonable for Congress to conclude that Section 2 litigation is an inadequate response to the persistent and adaptive problem of racial discrimination in voting in certain parts of our country. *See* Part III, *infra*.

Third, racial discrimination in voting remains concentrated in the jurisdictions that have historically been covered by Section 5. The evidence of ongoing voting discrimination in Alabama specifically, and the covered jurisdictions generally, exceeds, by many orders of magnitude, that in the non-covered jurisdictions. Shelby County studiously avoids this evidence; instead, it selectively points to individual jurisdictions outside of Alabama that it asserts should not be covered. This argument fails for two reasons: (1) this Court's precedent makes clear that Congress need not act with surgical precision; and (2) settled rules of constitutional adjudication prohibit Shelby County from basing its challenge on the rights or interests of other jurisdictions that are not parties to this litigation. *See* Part IV, *infra*.

At its core, Shelby County's attack rests on the premise that, in reauthorizing Section 5, Congress presumed racial animus in voting persists even though it "has been hibernating for two generations." Br. 39. The record is to the contrary. It reveals that, notwithstanding undeniable progress, striking voting discrimination continues and is concentrated in

the covered jurisdictions. Congress has power "to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain" in order to ensure "that opportunity is not denied on account of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

Our political freedoms are not self-sustaining; they must be maintained from one generation to the next. Section 5 makes this commitment tangible. Racial discrimination in voting poses a unique threat to our democracy. That threat can and must be met.

ARGUMENT

I. CONGRESS CAREFULLY EXERCISED ITS CONSTITUTIONAL AUTHORITY TO REMEDY AND DETER RACIAL DISCRIMINATION IN VOTING.

In evaluating whether (and, if so, where) the "blight of racial discrimination in voting" currently persists, *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966), Congress "approached its task seriously and with great care," PA13a (citations and internal quotation marks omitted). This assessment did not assume a need for Section 5's continuity but rather vigorously tested it. Over ten months in 2005-06, the House and Senate Judiciary Committees held a combined 21 hearings, receiving testimony from over 90 witnesses—including state and federal officials, litigators, scholars, and private citizens—both for and against reauthorization, and

compiled a 15,000 page record. PA291a.[1] Representative Sensenbrenner (R-WI), then-Chair of the House Judiciary Committee, described this record as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a Member of this body." 152 Cong. Rec. 14,230 (2006).

In the end, Congress determined—by the overwhelming vote of 390-33 in the House and 98-0 in the Senate[2]—that voting discrimination persists in the covered jurisdictions, and that without Section 5, "minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." Pub. L. No. 109-246, 120 Stat. 578, § 2(b)(9) (2006). Congress therefore extended Section 5 for 25 years. Sensitive to the possibility of changed circumstances, Congress further committed to reconsidering the continuing need for Section 5 in 15 years. 42 U.S.C. § 1973b(a)(7), (8).

As part of its review, Congress also concluded that other temporary provisions of the VRA—*i.e.*, Sections 6, 7, and 9, which authorized federal examiners to register voters in covered jurisdictions—were no longer necessary, given "[s]ubstantial progress" with respect to "minority citizens register[ing] to vote." H.R. Rep. 109-478, at 6 (2006).

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[1] Hearings for the 2006 reauthorization were held between October 18, 2005 and July 13, 2006. Specific hearings are cited herein by date.

[2] *See* 152 Cong. Rec. 14,303-304, 15,325 (2006).

We discuss the record of persistent voting discrimination in the covered jurisdictions, and its concentration in the covered compared to the non-covered jurisdictions, in Parts II.B and IV.B, *infra*. In light of this record, it was reasonable for Congress to determine that Section 5, and the provision in Section 4(b) defining Section 5's geographic scope, remain necessary to remedy and deter racial discrimination in voting. That is the end of the constitutional inquiry under this Court's precedents.

The Fourteenth and Fifteenth Amendments "empower[] 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce" them. *Nw. Austin*, 557 U.S. at 205 (citation omitted). Congress's "conclusions are entitled to much deference," *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), particularly with respect to measures addressing racial discrimination in voting. In enacting such measures, Congress acts "at the apex of its power" because voting discrimination implicates both the principal object of the Reconstruction Amendments—the prohibition against racial discrimination—and the need to protect the most fundamental right, the right to vote. PA19a; *see also Tennessee v. Lane*, 541 U.S. 509, 561, 564 (2004) (Scalia, J., dissenting) (recognizing that "racial discrimination by the States [is] distinctively violative of the principal purpose of the Fourteenth Amendment," and explaining, "I shall henceforth apply the permissive *McCulloch* [*v. Maryland*, 17 U.S. 316 (1819)] standard to congressional measures designed to remedy racial discrimination by the States").

This power to remedy racial discrimination in

voting encompasses the authority to draw distinctions between States: "'The doctrine of the equality of States does not bar remedies for local evils,'" *Nw. Austin*, 557 U.S. at 203 (citation, alterations, and emphasis omitted), so long as the distinctions have "some basis in practical experience," *Katzenbach*, 383 U.S. at 331.

Therefore, although Section 5 "imposes substantial federalism costs," *Nw. Austin*, 557 U.S. at 202 (citations and internal quotation marks omitted), these costs are permissible because the Reconstruction Amendments are "grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty found to be intended by the Framers." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). As this Court has stated, "the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however[.]" *Lopez v. Monterey Cnty.*, 525 U.S. 266, 284-85 (1999); *see also id.* at 282 (citing *City of Rome v. United States*, 446 U.S. 156, 179 (1980)).

Of course, this Court must remain vigilant to ensure that Congress does not impermissibly interfere with state sovereignty by redefining the substance of the rights provided by the Reconstruction Amendments or by imposing unreasonable remedies. Here, Congress did neither. The 2006 reauthorization is valid enforcement legislation under *Northwest Austin*, *Boerne*, *Rome*, and *Katzenbach*. *See*, *e.g.*, *Boerne*, 521 U.S at 518 ("[M]easures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place[] on the States.").

II. SECTIONS 4(B) AND 5 REMAIN JUSTIFIED BY CURRENT NEEDS.

This Court sustained the original enactment of Section 5 and its geographic scope because there was "evidence of actual voting discrimination in a great majority of the [covered jurisdictions]." *Katzenbach*, 383 U.S. at 329. "No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment." *Id.* When the statute was reauthorized in 1970, 1975, and 1982, "[t]he coverage formula remained the same" (except for an expansion in 1975), and this Court upheld each reauthorization "against constitutional challenges, finding that circumstances continued to justify the provisions." *Nw. Austin*, 557 U.S. at 200 (citing, *inter alia*, *Rome*, 446 U.S. 156, and *Lopez*, 525 U.S. 266).

In 2006, Congress studied the problem of voting discrimination in the covered jurisdictions—as well as in the non-covered jurisdictions, *see* Part IV.B—more carefully than it had in 1965, or in any other reauthorization. As enacted in 1965, Section 5 covered three different categories of jurisdictions: three States (Alabama, Mississippi, and Louisiana), where courts had repeatedly found "substantial voting discrimination"; three others (Georgia, South Carolina, and portions of North Carolina), where there was "more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department"; and a "few remaining States and political subdivisions," where there was no clear evidence of discrimination in the record before Congress. *Katzenbach*, 383 U.S. at 329-30.

In 2006, as discussed below, Congress considered, in greater detail, the current conditions throughout the covered jurisdictions, and learned that substantial voting discrimination persists in the "great majority" of those areas. *Id*. at 329.

A. The 2006 reauthorization record reveals widespread unconstitutional conduct in the covered jurisdictions.

As the District Court explained, the "virtually unprecedented legislative record" reveals "extensive evidence of recent voting discrimination" in the covered jurisdictions. PA114a. Enforcement of the two core provisions of the VRA—(i) Section 5 objections or judicial preclearance denials, and (ii) Section 2 litigation—remedied or deterred nearly 1,300 discriminatory voting measures in the covered jurisdictions during the reauthorization period (1982 to 2006). *See* PA44a (noting over 620 objections, 25 judicial preclearance denials, and over 650 successful Section 2 suits). And voting discrimination, by its nature, reverberates broadly and deeply. A single invidious act can harm numerous citizens; therefore, a single Section 5 objection or Section 2 suit can vindicate the rights of "thousands of voters." PA208a.

Shelby County describes the voting discrimination in the record in misleading and sanitized terms, designed to minimize the gravity of this unique constitutional harm. Before turning to a state-by-state description of the record, we address Shelby County's key errors about the nature of the record.

1. Vote Dilution: old poison in new bottles

Most voting discrimination during the reauthori-

zation period involved purposeful efforts to dilute the weight of minority citizens' votes. Shelby County maintains that Section 5 cannot be justified based on purposeful vote dilution evidence. *See* Br. 19-20. That position is contrary to the very purpose of the Reconstruction Amendments and the VRA.

When voting is polarized along racial lines, jurisdictions can implement electoral schemes, such as at-large elections, annexations, or racially gerrymandered districts, to discriminate against minority voters. This Court recognized over four decades ago that such "dilution of voting power" can "nullify [minority voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

Vote dilution has been described as "second-generation" discrimination to distinguish it from vote denial (*e.g.*, "first-generation" registration barriers). But there is nothing new about it. From Reconstruction to the present, covered jurisdictions have repeatedly turned to vote dilution to undermine minority gains in registration and turnout. *See* PA4a. These tactics "are in fact decades-old forms of gamesmanship," PA28a, a way of "pour[ing] old poison into new bottles," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 329, 366 (2000) (Souter, J., concurring in part, dissenting in part).

It is axiomatic that purposeful schemes to nullify votes cast by Black voters because they are Black (or of any other racial group) violate the Equal Protection Clause. *See*, *e.g.*, *League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399, 440

(2006); *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982).[3] As such, they are proper subjects of Congressional action to enforce the Reconstruction Amendments. Indeed, "Congress relied on evidence of these purposefully dilutive mechanisms in each of its prior reauthorizations of Section 5." PA252a. And this Court has expressly upheld the reauthorization of Section 5 on that basis. *See Rome*, 446 U.S. at 181 (sustaining the 1975 reauthorization because, although Black registration had risen dramatically since 1965, there remained a prevalence of "'measures [that] dilute increasing minority voting strength'") (quoting H.R. Rep. No. 94-196, at 10-11 (1975)).[4]

2. Section 5 objections and Section 2 litigation are probative of unconstitutional conduct.

The Court of Appeals recognized that "to sustain section 5, the record must contain evidence of a pattern of constitutional violations." PA33a (internal quotation marks and citation omitted). After "thoroughly scrutinizing the record," PA 48a, the Court of Appeals determined that, contrary to Shelby

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[3] The Fifteenth Amendment prohibits the denial or *abridgment* of the right to vote on account of race, making clear that purposeful vote dilution likewise violates the Fifteenth Amendment.

[4] Shelby County acknowledges that *Rome* considered the "'number and nature of [Section 5] objections'" to be "'reliable evidence of actual voting discrimination,'" Br. 27 (alteration in original) (citations omitted), but it ignores that "a substantial majority" of those Section 5 objections concerned vote dilution, *April 10, 1975 Hearing*, at 123-24 (Katzenbach).

County's assertions, Br. 35-36, the evidence from Section 5 objections and Section 2 litigation is highly probative of a widespread pattern of persistent unconstitutional conduct.[5]

At least 423 Section 5 objections between 1980 and 2004 were based, at least in part, on discriminatory intent. PA33a.[6] Congress's reliance on this evidence was entirely consistent with *Katzenbach*, which held that Congress may properly rely on "evidence [of discrimination] adduced by the Justice Department," 383 U.S. at 330, and *Rome*, which sustained the 1975 reauthorization based largely on evidence adduced through Section 5 objections, 446 U.S. at 181.

Successful Section 2 litigation is also probative of unconstitutional conduct. As the Court of Appeals explained, Section 2's "'results test' . . . requires consideration of factors very similar to those used to es-

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[5] Shelby County mischaracterizes the decision below, claiming the Court of Appeals inappropriately deferred to Congress as to the probative value of this evidence. Br. 34. But Shelby County cites a section of the opinion addressing the deference owed Congress in the choice of remedies, not whether evidence is probative of unconstitutional conduct. *Id.*

[6] Such objections are almost always premised on affirmative evidence of discriminatory purpose, and not the failure by submitting jurisdictions to disprove intent. *See generally* Part II.B, *infra*. Although Shelby County contends that these objections were based on DOJ's improper "maximization" approach to minority representation, Br. 35, a review of the Section 5 objection letters since 1982 reveals that a very small number—almost exclusively from the early 1990s—were even arguably based on a maximization theory. *See October 25, 2005 (History) Hearing*, at 225-2595.

tablish discriminatory intent based on circumstantial evidence." PA37a (citations omitted). Moreover, "courts will avoid deciding constitutional questions if, as is the case in virtually all successful section 2 actions, the litigation can be resolved on narrower grounds." *Id.* (citations and internal quotation marks omitted).[7]

B. A state-by-state review of the evidence reveals substantial ongoing discrimination in the great majority of covered jurisdictions.

The record establishes that discrimination continues to infect the democratic process in the covered jurisdictions and that this discrimination resists case-by-case efforts at remediation. Shelby County's assertions that there is no evidence of covered jurisdictions attempting to circumvent a previous voting remedy by implementing a new discriminatory tactic, *see* Br. 20, 33, are false. The record is replete with such evidence, including over a dozen circumvention examples in Alabama alone. This discrimination by state and local actors demeans the liberty and equality rights of full citizenship, and, therefore, corrodes our democracy.

A representative, but not exhaustive, selection of the many "modern instances" of "substantial voting discrimination presently occur[ing] in certain sections of the country" follows. *Boerne*, 521 U.S. at

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[7] Congress also considered other sources of evidence that the Court of Appeals deemed probative of purposeful discrimination. *See* PA35a-36a (more information requests); *id.* at 38a-40a (federal observers); *id.* at 40a-41a (Section 5 enforcement litigation).

530; *Katzenbach*, 383 U.S. at 328. The overwhelming majority of these examples come from the Congressional record; we also include a sample of voting discrimination that has occurred since the Act's reauthorization. Because this case arises out of Alabama, and because the record of ongoing discrimination in that State is a sufficient basis for rejecting Shelby County's facial challenge to Section 5's geographic scope, *see* Part IV.A, *infra*, we begin there.

1. Alabama

Alabama undeniably "earned its spot on § 5's original coverage list." Br. of Alabama as Amicus Curiae in Supp. of Pet'r, at 2.

The record before Congress in 2006 makes clear that voting discrimination persists in Alabama. During the reauthorization period, nearly 240 discriminatory voting laws in Alabama were blocked by Section 5 objections (46) or remedied by Section 2 litigation (192). *July 13, 2006 Hearing*, at 367, 371; *March 8, 2006 Hearing*, at 251. Alabama had the highest rate of successful Section 2 suits per resident of any State in the country. PA53a. White polling officials used racial epithets to describe Black voters in the presence of federal observers, including a poll worker who said: "'[N]iggers don't have principle enough to vote and they shouldn't be allowed.'" PA243a (citation omitted); *see also* PA194-95a. African Americans constitute over a quarter of Alabama's population,[8] yet Alabama has no Black

[8] *See* U.S. Census Bureau, *State Quick Facts*, *Alabama*, http://quickfacts.census.gov/qfd/states/01000.html.

statewide elected officials. Nearly all Black officials are elected from majority-minority districts. *July 13, 2006 Hearing*, at 388-89.

This Court twice found purposeful racial discrimination in Alabama during the reauthorization period. In *City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987), the Court affirmed the district court's finding that Pleasant Grove engaged in "racially motivated" annexations—meaning the City annexed areas that had or were likely to have white voters, but refused to annex areas with Black voters. This was not an isolated incident but consistent with the City's "unambiguous opposition to racial integration." *Id.* at 465.

Two years earlier, this Court invalidated a provision of Alabama's Constitution, which disfranchised citizens for misdemeanors "involving moral turpitude," and had been applied to bar plaintiffs from voting for life because they had presented a bad check. *Hunter v. Underwood*, 471 U.S. 222, 224 (1985). Writing for the Court, then-Justice Rehnquist explained that the "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233.

Other courts found intentional discrimination in voting in Alabama during the reauthorization period. *See, e.g.*, *Harris v. Siegelman*, 695 F. Supp. 517, 525 & n.6 (M.D. Ala. 1988) (holding that Alabama's appointment of poll workers unconstitutionally discriminated against Blacks, and noting compelling evidence that "white poll officials continue to harass and intimidate black voters"); *Brown v. Bd. of*

Sch. Comm'rs, 706 F.2d 1103, 1106-07 (11th Cir. 1983) (finding the Alabama legislature intentionally discriminated against Black voters in Mobile County).

Purposeful discrimination by Alabama lawmakers persists to the present day. In *United States v. McGregor*, 824 F. Supp. 2d 1339, 1347 (M.D. Ala. 2011), the court found "compelling evidence that political exclusion through racism remains a real and enduring problem in [Alabama]," "entrenched in the high echelons of state government." The court rejected testimony by several white Alabama state legislators as lacking credibility, finding they were motivated by "pure racial bias" as they sought to "reduc[e] African-American voter turnout." *Id.* at 1345. Several white legislators and their interlocutors were caught on tape comparing Black voters to "illiterate[s]" and "Aborigines." *Id.*

Section 5 objections have revealed a similar pattern of discriminatory intent in Alabama. In 1991, the Department of Justice ("DOJ") objected to Alabama's Congressional redistricting plan. The State, which had also drawn a Section 5 objection during the previous redistricting cycle, failed to provide a plausible nonracial explanation for fragmenting concentrated Black populations. The evidence indicated that the "underlying principle of the Congressional redistricting was a predisposition on the part of the state political leadership to limit black voting potential to a single district." *October 25, 2005 (History) Hearing*, at 385.

Many other Section 5 objections blocked racial gerrymanders and other measures designed to seg-

regate voters along racial lines. *See*, *e.g.*, *id.*, at 319-20 ("racially based" deannexation promulgated by the Alabama legislature for the City of Prichard was "specially designed to restrict participation . . . to white voters"); *id.* at 330-31 (Roanoke's districting plan "essentially segregates the City into two parts by creating an overwhelmingly white three-member district and a heavily black two-member district"); *id.* at 341 (Mayor of Dothan acknowledged that a districting plan was rejected because there was a "'strong feeling in the white community'" that it "would allow blacks too much of an electoral opportunity").

Circumvention and the Dillard *litigation*

One of the most significant voting developments in Alabama during the reauthorization period was the *Dillard* litigation. That litigation, and the response to it, is a microcosm of the defiance that persists in Alabama, and in the covered jurisdictions more broadly.

In *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1357 (M.D. Ala. 1986), the court recognized that "[f]rom the late 1800s through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." These barriers included vote dilution schemes, which were enacted as early as the 1870s when Black men temporarily secured the right to vote. *See id.* at 1358. They became even more pervasive in the middle of the twentieth century, when, in the wake of this Court's ban on all-white primaries in 1944, and federal civil rights laws enacted in the 1950s and 1960s,

many counties—working in conjunction with the Alabama legislature—adopted at-large elections intended to dilute Black enfranchisement. *Id.* at 1356-57.

When Black citizens brought suit in the 1980s, purposefully discriminatory at-large elections operated throughout Alabama, and "continue[d] . . . to have their intended racist effect." *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1468 (M.D. Ala. 1988). The *Dillard* litigation ultimately encompassed over 180 cities, counties, and school boards employing at-large election systems tainted by racially discriminatory purpose. *July 13, 2006 Hearing*, at 373; *see also Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. at 1461. Over 170 jurisdictions ultimately entered consent decrees agreeing to adopt new methods of election. *July 13, 2006 Hearing*, at 373-74.

Over the next twenty years, however, numerous jurisdictions, including Shelby County and one of its largest municipalities, attempted to circumvent these decrees.

In one notorious example, prior to the first election under the new voting system in North Johns, the Town's white mayor helped every candidate other than the two Black candidates comply with new filing requirements. *Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1473-75 (M.D. Ala. 1989). In seeking assistance from the town clerk, one Black candidate was referred to an office that had no forms and whose staff suggested that he did not have to file. *Id.* at 1475. After the two Black candidates won, the mayor refused to swear them in, and the

town clerk sued to prevent them from taking office. *Id.* The district court found that "North Johns . . . intentionally discriminated against [the Black candidates] because of their race." *Id.* at 1476.

Like North Johns, the City of Greensboro conceded that its at-large elections were unlawful as part of the *Dillard* litigation. *See July 13, 2006 Hearing*, at 263-64. While the implementation of a remedial plan was pending, and after the 1990 Census revealed that the City had become majority Black, Greensboro attempted to circumvent the federal decree with a new discriminatory plan. To ensure Black voters would be limited to electing only two of five council members, the City "fragmented black population concentrations in order to lower the black percentage in [the swing council district]." *October 25, 2005 (History) Hearing*, at 395; *July 13, 2006 Hearing*, at 264. Two separate objections in 1992 and 1994 were required to block this quota-based discrimination. *October 25, 2005 (History) Hearing*, at 394, 412. In a separate incident in 1992, poll officials in Greensboro attempted to close a polling place to prevent Black workers at a local fish plant from voting before polls closed. *July 13, 2006 Hearing*, at 264; *see also id.* at 379-80 (describing efforts by Chilton County, the home of an active Ku Klux Klan, to circumvent *Dillard* in 2003).

Other jurisdictions in Alabama attempted to circumvent *Dillard* through racially selective annexations. After *Dillard* litigation invalidated the City of Foley's at-large elections, the City drew objections in 1989 and 1993 for its "practice of annexing areas that can be expected to contain predominantly white

population, while discouraging the annexation of areas of predominantly black population." *October 25, 2005 (History) Hearing*, at 406; *see also Dillard v. City of Foley*, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995) (approving new consent decree prohibiting racially selective annexations). Similarly, a combination of a *Dillard* consent decree and two Section 5 objections in the early 1990s remedied racially selective annexations promulgated by Valley, an "irregularly shaped" city which carved white residential areas out of Chambers County. *October 25, 2005 (History) Hearing*, at 358, 364-65, 367-68; *July 13, 2006 Hearing*, at 376-77; *see also id*. at 376 (similar racially selective annexations in the City of Camden).

Shelby County

For decades, Shelby County relied on at-large elections to minimize Black political influence, and it initially denied Section 2 liability in the face of *Dillard* litigation. After trial, it settled by instituting, among other things, single-member districts. *Dillard v. Crenshaw Cnty.*, 748 F. Supp. 819, 821-22 (M.D. Ala. 1990). Shortly thereafter, the County Commission attempted to abandon the settlement agreement, but the court adopted a special master's recommendation approving it. *Id.* Six of the County's municipalities, including the City of Calera, likewise abandoned at-large elections as a result of *Dillard* consent decrees. Joint Appendix ("JA") 41a.

More recently, in 2008, Section 5 prevented Calera from circumventing *Dillard*. The City submitted a redistricting plan that eliminated the sole majority-Black district, and it also conceded that it had

already adopted 177 annexations without seeking preclearance. PA147a. DOJ interposed an objection, but the City disregarded it and held an election based on the unprecleared changes. The election resulted in the defeat of the sole Black member of the City Council. PA148a. DOJ then brought a Section 5 enforcement action, which resulted in a consent decree that finally remedied Calera's circumvention of the *Dillard* decree. *Id*. Defendant-Intervenors are five Black ministers from Shelby County and an elected official who represents the district eliminated and ultimately restored by virtue of Section 5.

Another Shelby County jurisdiction, the City of Alabaster, also engaged in repeat violations, drawing an objection for its discriminatory annexations in 2000, after Section 5 blocked similar efforts in the 1970s. *July 13, 2006 Hearing*, at 386 n.98; *see also October 25, 2005 (History) Hearing*, at 435-37.

Selma revisited

Attempts to evade case-by-case remedies were not limited to *Dillard* jurisdictions. In separate litigation, federal courts found that the at-large election schemes in Dallas County violated Section 2. *United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433, 1435-37 (11th Cir. 1988) (referring to prior opinions). The Dallas County seat is Selma, which is recognized as the birthplace of the Voting Rights Act.

Dallas County repeatedly attempted to circumvent the court's rulings. First, in 1986, without an opportunity for public comment, the County promulgated a districting plan for its County Commission that fragmented cohesive Black neighborhoods and

split an existing precinct. DOJ interposed an objection, explaining "the circumstances here suggest that the county commission's actions were motivated, at least in significant part, by racial considerations." *October 25, 2005 (History) Hearing*, at 311; *see also id.* at 328 (objection to County Board of Education redistricting plan, which "concentrate[d]" Black voters into one supermajority-minority district to "minimize[] the opportunity for blacks to participate equally in the political process").

Undeterred, the County next implemented a voter purge which, had it not been blocked by Section 5, would have allowed citizens to be disfranchised "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." *Id.* at 356. Citing the factors for intentional discrimination from *Village of Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 252 (1977), DOJ rejected this discriminatory purge. *October 25, 2005 (History) Hearing*, at 356.

Finally, after the 1990 Census revealed that the Black population of Dallas County increased from 54.5% to 57.8% and the Black population of Selma increased from 52.1% to 58.4%, the County and City attempted to impose racial quotas to prevent Blacks from electing candidates of choice to a majority of seats on governing bodies. *July 13, 2006 Hearing*, at 378-79. Between 1992 and 1993, DOJ interposed five objections, two for the City Council and three for the County School Board, to stop these quotas. *October 25, 2005 (History) Hearing*, at 388-93, 397-405. DOJ determined that the City was "motivated by the

desire to confine black population concentrations into a predetermined number of districts, and thus ensure a continuation of the current white majority on the council." *Id.* at 392. This concerted effort to abridge the voting rights of the Black majority in Selma and Dallas County illustrates that voting discrimination is often particularly intense as minority voters are poised to make inroads in elected bodies. *See also*, *LULAC*, 548 U.S. at 440; *infra* at 27 (discussing Kilmichael, Mississippi).

Similar to Dallas County, Tallapoosa County repeatedly failed to comply "with legal requirements (constitutional, statutory, and court mandated) designed to protect the right to vote and to ensure minority voters . . . an equal electoral opportunity," prompting a Section 5 enforcement action, a Section 5 objection, and Section 2 litigation. *October 25, 2005 (History) Hearing*, at 429. These measures finally brought about, in 1994, a Section 2 consent decree that led to the election of the first Black County Commissioner in the twentieth century. *Id.* at 430. But in 1998, Tallapoosa County flouted the consent decree and adopted a new plan "calculated to minimize participation by the public in general, and the black community in particular." *Id.* at 431.

This pattern was repeated in other areas, including Marengo County, *id.* at 308 (Section 5 objection to attempts to circumvent a Section 2 remedy by adopting "contorted" districts), and Greene County, *id.* at 294-96 (objection to circumvention of a court-ordered remedy).

The experience in Alabama, and Shelby County itself, demonstrates that Section 5 has been a neces-

sary engine of progress in the face of tangible and persisting threats to minority voting. Section 5 is not an anachronism, but an essential contemporary safeguard.

2. Comparable persistent and adaptive discrimination in numerous covered States

Beyond Alabama, the record before Congress demonstrates that voting discrimination remains an "insidious and pervasive evil" in other covered States. *Katzenbach*, 383 U.S. at 309. In five of the eight other wholly-covered States, Section 5 objections and Section 2 litigation blocked over 100 discriminatory voting laws per State. Much of the prohibited conduct involved a pattern of successive discriminatory acts, which, but for the Section 5 remedy, would have abridged the right to vote of hundreds of thousands of citizens at the state or local level.

Texas

Between the 1982 reauthorization and 2006, the VRA blocked more than 300 discriminatory voting laws in Texas (105 objections, *March 8, 2006 Hearing*, at 272; and 206 successful Section 2 actions, *id.* at 251). Violations occurred repeatedly at both the state and local level, with Texas and 28 of its counties drawing multiple Section 5 objections. *Voting Rights in Texas: 1982-2006* ("Texas Report"), at 16 (June 2006), *available at* http://www.protectcivilrights.org/pdf/voting/TexasVRA.pdf.

Texas has drawn an objection to each of its decennial State House redistricting plans, and in most cycles at least one additional statewide plan, since it

became covered in 1975. *See October 25, 2005 (History) Hearing*, at 2177-80; Texas Report at 48. In 2003, Texas engaged in a mid-decade Congressional redistricting. Just as Latinos in one Congressional district "were poised to elect their candidate of choice," Texas "took away the Latinos' opportunity because Latinos were about to exercise it." *LULAC*, 548 U.S. at 438, 440. This Court noted that Texas's plan "bears the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440.

Section 5 thwarted Texas's subsequent efforts to evade the Section 2 remedy adopted as a result of *LULAC*. In 2006, Texas attempted to curtail early voting in the *LULAC* remedial district, but it was blocked by a Section 5 enforcement action. *See* Orders and Pls.' Mot. to Dismiss, *LULAC v. Texas*, No. 06-cv-1046 (W.D. Tex. Dec. 5, 2006), ECF Nos. 6, 8, 9. Last year, a three-judge court unanimously concluded that Texas's latest Congressional redistricting plan and its State Senate plan were "enacted with discriminatory purpose," *Texas v. United States*, Civ. No. 11-1303, 2012 WL 3671924, at *18, *26 (D.D.C. Aug. 28, 2012), based on, *inter alia*, evidence that Texas once again sought to prevent Latino voters from electing a candidate of their choice in the *LULAC* remedial district. The court also found evidence that Black and Latino representatives were excluded from the decisionmaking process, and that majority-minority districts were stripped of their economic centers and district offices, whereas "[n]o such surgery was performed on" majority-white districts. *See id.* at *16, *19-*21.

Cities in Texas have frequently used racial gerrymanders and annexations to discriminate against minority voters. In *Williams v. City of Dallas*, 734 F. Supp. 1317, 1409 (N.D. Tex. 1990), for example, the court held that the City's districting plan "intentionally packs and cracks the African-American population with the effect of diluting their vote for the purpose of maintaining the political power of whites." In a 1997 objection, DOJ explained that the City of Webster's "annexation [policies] appear to have been tainted . . . by an invidious racial purpose": The City manager "actually stated that the reason Block 101B would not be annexed was because of its ethnic composition." *October 25, 2005 (History) Hearing*, at 2492, 2490.

The City of Seguin was more creative. It adopted an eight-member districting plan in response to three separate lawsuits between 1978 and 1993, which challenged its discriminatory methods of election. After the 2000 Census revealed that Latinos had become a majority in five of eight districts, the City proposed dismantling a Latino-majority district. When DOJ indicated preclearance was unlikely, the City withdrew its request but, without seeking preclearance, manipulated the filing period to prevent any Latino/a candidate from competing in the district. A Section 5 enforcement action was required to block this blatant discrimination. Texas Report at 30.

The City of Freeport and the Haskell Consolidated School District (covering three counties) provide additional examples of circumvention. DOJ interposed objections in 2002 and 2001 respectively

when these jurisdictions attempted to return to at-large elections, which they had abandoned in settling Section 2 litigation. *October 25, 2005 (History) Hearing*, at 2528-30; *id.* at 2513-17; *see also id.* at 2300-03 (1991 objection where, shortly after a Section 2 suit forced a water district in Lubbock County to abandon at-large elections, the district enacted a polling place change requiring voters in predominately Black neighborhoods to travel to remote venues, and it proffered pretextual reasons for the change).

Mississippi

In Mississippi, more than 175 discriminatory voting laws were blocked between 1982 and 2006 (112 objections, *March 8, 2006 Hearing*, at 1711; and 67 successful Section 2 cases, *id.* at 251). No Black candidate has been elected to statewide office since Reconstruction in Mississippi, which has the highest Black population percentage in the country. *Id.* at 1711, 1717. Twenty-five Mississippi counties drew repeated Section 5 objections during the reauthorization period, including seven counties with four or more objections. *Id.* at 1714.

Discrimination and circumvention have been blatant at the state level. In 1991, Mississippi's House and Senate redistricting plans drew Section 5 objections, because, *inter alia*, the redistricting process was "characterized by overt racial appeals." *October 25, 2005 (History) Hearing*, at 1412. Legislators referred to one plan on the House floor as the "black plan" and, privately, the "nigger plan." *March 8, 2006 Hearing*, at 1718-19.

That same year, the Fifth Circuit affirmed a Section 2 remedy ending Mississippi's dual-registration requirement for municipal and non-municipal elections. The requirement had been adopted nearly 100 years earlier as part of the "Mississippi Plan" to deny Black people the right to vote; it was amended and reenacted in 1984. The law still had its intended effect. Many Blacks—who disproportionately lacked access to automobiles or telephones—were not registered because of the burdens of the dual registration system. *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1249-55 (N.D. Miss. 1987), *aff'd sub nom.*, *Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991). In 1995, Mississippi *again* tried to establish a dual registration system, and it refused to seek preclearance until ordered by this Court. *Young v. Fordice*, 520 U.S. 273 (1997). This effort to evade a Section 2 remedy, which had been "couched in racially charged terms," was blocked by Section 5. *October 25, 2005 (History) Hearing*, at 1603.

Intentional discrimination and circumvention have also been common at the local level in Mississippi. In Kilmichael, the white mayor and all-white Board of Aldermen sought to take the extraordinary step of cancelling elections in 2001, just as Blacks, who following the 2000 Census had become a majority of the City, were on the verge of electing a candidate of choice for the first time. A Section 5 objection prevented Kilmichael from doing so. *Id*. at 1616-19.

Elsewhere in Mississippi, a court determined that Chickasaw County's redistricting plan—which was drawn so that all districts were majority-white—

violated Section 2. *Gunn v. Chickasaw Cnty.*, 705 F. Supp. 315, 322, 324 (N.D. Miss. 1989). The County then attempted three separate times—in 1990, 1993, and 1995—to circumvent the Section 2 decree, with new discriminatory plans aimed at the same goal of minimizing Black political influence. Section 5 objections were necessary each time. *March 8, 2006 Hearing*, at 1715-16.

Similar events took place in Oxford, *October 25, 2005 (History) Hearing*, at 1609 (Section 5 objection blocking 1998 redistricting plan, annexation, and cancelation of an election, with the "purpose [of] maintain[ing] and strengthen[ing] white control of a City on the verge of becoming majority black"), and McComb, *id.* at 1613-14 (objection blocking a 1999 polling place change in this largely segregated City with no readily available public transportation, which would have forced minority voters to walk over four miles).

Louisiana

Over 110 discriminatory voting laws were blocked in Louisiana during the reauthorization period (96 objections, *March 8, 2006 Hearing*, at 1611; and 17 successful Section 2 cases, *id.* at 251). Section 5 blocked more than half (33) of Louisiana's 64 parishes from engaging in serial voting rights violations. *Id.* at 1612.

As of 2006, "not one redistricting plan for the Louisiana House of Representatives had ever been precleared as originally submitted." *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 251 (D.D.C. 2008) (citation omitted). After the

2000 Census, Louisiana officials established a quota for white representation in their House plan, intentionally eliminating a majority-Black district on the theory that "white voters in Orleans Parish were entitled to proportional representation, though African Americans elsewhere were not." *March 8, 2006 Hearing*, at 1607-08, 1621-22. Ten years earlier, Louisiana's House redistricting plan selectively applied redistricting criteria with the same "purpose of minimiz[ing] the voting strength of a minority group." *Id.* at 1613.

Louisiana also discriminated against voters of color at the local level. For example, in 2001, Louisiana enacted legislation facilitating a redistricting plan for the St. Bernard Parish School Board. A court found that the plan, which eliminated the only district where Black voters had an opportunity to elect a candidate of choice, violated Section 2. *Id.* at 1618 (citing *St. Bernard Citizens for Better Gov't v. St. Bernard Parish Sch. Bd.*, No. 02-2209, 2002 U.S. Dist. LEXIS 16540 (E.D. La. Aug. 28, 2002)). In the course of the litigation, a white state senator, Lynn Dean, the highest ranking public official in the Parish who was involved in the voting change, testified that he uses the term "nigger," and "ha[d] done so recently." *Id.*, at 1618; *see also St. Bernard Citizens for Better Gov't*, 2002 U.S. Dist. LEXIS 16540, at *33. Louisiana also drew eight objections between 1988 and 1994 related to its efforts to implement at-large or multi-member elections for circuit court judges in numerous parishes, and it even held at-large elections for judgeships without seeking preclearance. *See October 25, 2005 (History) Hearing*,

at 853-54, 897-98, 904-05, 911-916, 926-46, 953-55, 1000-02, 1037-40, 1086-89, 1095-97.

The reauthorization record likewise documents repeated attempts by local governments in Louisiana to employ racial gerrymanders and other measures designed to segregate voters on the basis of race. For example, in 2002, Section 5 objections prevented DeSoto Parish and the City of Minden from enacting redistricting plans that officials admitted were intentionally designed to limit or reduce Black political influence. *Id.* at 1157-60 (DeSoto Parish); *id.* at 1150-52 (Minden). In Shreveport, six objections between 1994 and 1997 were required to prevent racially selective annexations that would have ensured that the City remained majority-white. *Id.* at 1086-89, 1113-18, 1123-30. Similarly, four objections were required between 1991 and 1994 to block East Carroll Parish's attempts to pack African-American voters—who constituted a majority of the Parish—into a minority of school board districts. *Id.* at 985-86, 1013-1015, 1032-33, 1083-85.[9]

Georgia

More than 150 discriminatory voting laws in Georgia were blocked during the reauthorization period (including 91 objections, *March 8, 2006 Hearing*, at 1502; and 69 successful Section 2 cases, *id.* at

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[9] For a fuller description of the extent and nature of voting discrimination in Louisiana, which was presented to Congress, see *Voting Rights in Louisiana: 1982-2006* (Mar. 2006), *available at* http://www.protectcivilrights.org/pdf/voting/LouisianaVRA.pdf. *See also* n.20, *infra*.

251). In addition, 11 counties were successfully sued multiple times under Section 2. *Id.* at 1524.

In Georgia, where the chair of the state legislature's redistricting committee infamously told his colleagues, "I don't want to draw nigger districts," PA31a (citations and internal quotation marks omitted), numerous counties sought to use racial quotas to dilute Black voting power; Section 5 stopped them. For example, in 2001, the City of Albany adopted "explicit redistricting criteria . . . 'maintain[ing] ethnic ratios,'" intended to "limit black political strength in the city." *October 25, 2005 (History) Hearing*, at 847 (citation omitted).

Similarly, Augusta drew a Section 5 objection in 1987, because its "annexation policy center[ed] on a racial quota system requiring that each time a black residential area [was] annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's black population percentage." *Id.* at 642. Augusta went so far as to conduct door-to-door surveys to identify white residential areas for annexation. *See id.* The next year, the City settled Section 2 litigation and adopted a new method of election. *March 8, 2006 Hearing*, at 1516 n.78.

Two more Section 5 objections, however, were necessary to prevent the City from circumventing the settlement, through: (1) a consolidation with the majority-white surrounding county, where the "primary . . . motivation" was to respond to "the prospect that the City, which has a black population majority, finally would have an election system that fairly reflected black voting strength," *October 25, 2005 (His-*

tory) Hearing, at 662; and (2) a "calculated [effort] to take advantage of [a voting schedule] that would suppress the black turnout," *id.* at 655. In 2012, yet another attempt to reschedule elections in Augusta-Richmond to a date with expected low Black turnout led to a DOJ objection, because the "pretextual reasons" for the change suggested that it was "adopted, at least in part, with a discriminatory purpose." DOJ, Objection Ltr., Dec. 21, 2012, http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122112_ga.pdf.

Similar events transpired in the City of Millen. After litigation required Millen to abandon at-large elections, *March 8, 2006 Hearing*, at 1524 n.120, the City proposed delaying the election in a majority-Black City Council district, leaving that district unrepresented for two years, *October 25, 2005 (History) Hearing*, at 744. The City then proposed moving a polling place to an inaccessible location in a predominantly white neighborhood outside the City limits. DOJ concluded that the selection of the new polling location "appears to be designed, in part, to thwart recent black political participation." *Id.* at 816.

Section 5 prevented many other intentionally discriminatory measures throughout Georgia, in places such as Webster County, *id.* at 831 (2000 objection blocking school board's attempt to redraw districts, after an election in which voters elected a third Black board member for the first time, because the board's reasons were "merely pretexts for intentionally decreasing the opportunity of minority voters to participate in the electoral process"), and Effingham

County, *March 8, 2006 Hearing*, at 1508 (1992 objection blocking County from adding at-large seats to a single-member district plan, which previously had been adopted in response to a Section 2 lawsuit, where nonracial explanations were "tenuous"). And Georgia itself was blocked three times in 1990-1991 from switching to at-large elections for superior court judges, where "substantial information . . . suggest[ed a] racially discriminatory purpose." *October 25, 2005 (History) Hearing*, at 675; *see also id.* at 684-86, 695-97.

South Carolina

More than 100 discriminatory voting laws were blocked in South Carolina during the reauthorization period (74 objections, *March 8, 2006 Hearing*, at 272; and 33 successful Section 2 cases, *id.* at 251). Once again, Section 5 was needed to prevent repeated attempts to undermine Section 2 remedies.

In *United States v. Charleston County*, 316 F. Supp. 2d 268, 286-89 n.23 (D.S.C. 2003), the court found that Charleston County's at-large system for County Council elections violated Section 2, and it also made several findings of intentional discrimination concerning "intimidation and harassment" of Black voters by poll workers. The following year, DOJ objected under Section 5 when South Carolina enacted legislation for Charleston County School Board elections, which adopted "'an exact replica'" of the at-large system for the County Council that had been found to violate Section 2. PA237a (citation omitted). *March 8, 2006 Hearing*, at 175-76. This was the culmination of a series of efforts by the County's state legislative delegation to alter the

method of election for, or reduce the powers of, the Charleston County School Board after the 2000 election resulted in Black people gaining a majority of seats on the Board for the first time in history. *Charleston Cnty.*, 316 F. Supp. 2d at 290 n.23. Notably, although the earlier Section 2 litigation lasted several years and cost millions of dollars, Section 5 brought a prompt end to this brazen effort at circumvention to again abridge the voting rights of Charleston County's Black citizens. *March 8, 2006 Hearing*, at 176.

Similarly, after a successful Section 2 action challenging at-large districts for the Spartanburg County Board of Education, and following the first-ever election of Black candidates to that body, the state legislature voted to disband the Board and devolve its powers to an appointed panel. DOJ objected, as "[t]he sequence of events . . . g[ave] rise to an obvious inference of discriminatory purpose." *October 25, 2005 (History) Hearing*, at 2042.

There were many other instances of intentional discrimination relating to local government bodies, including in: Union County, where the circumstances of a 2002 redistricting plan promulgated by the state legislature for the County "implie[d] an intent to retrogress," *id.* at 2086; the Town of North, where, in 2003, "race appear[ed] to be an overriding factor in how the town responds to annexation requests," *March 8, 2006 Hearing*, at 1954-55 (citation and internal quotation marks omitted); and Marion and Lee Counties, both of which placed quotas in 1993 on how many Black residents could be included in districts that would determine majority control of

government bodies, *October 25, 2005 (History) Hearing*, at 1992-95, 1996-99.

Other South Carolina jurisdictions requiring a combination of Section 2 (or constitutional) litigation and at least one Section 5 objection or enforcement action to remedy discrimination, included: Hemingway (most recent objection in 1994); Orangeburg (1992); Town of Johnson (1992); and Richland County (1988). *See March 8, 2006 Hearing*, at 1970, 1033-39, 1015-17, 1963-64.

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In sum, the record demonstrates that hundreds of discriminatory acts took place during the reauthorization period—not only in Alabama but also in each of five other fully-covered States. A substantial number of these instances of discrimination reflected serial violations of minority voting rights—often at precisely the moment when minority voters were on the verge of exercising political power.

3. Significant voting discrimination also persists in additional jurisdictions.

Congress also received substantial evidence of ongoing discrimination in most of the remaining covered jurisdictions—indeed, significantly more than the "fragmentary" evidence of discrimination for several States reviewed by this Court in *Katzenbach*, 383 U.S. at 329-30. Again, the record in each of these States reveals serial efforts to prevent minority citizens from full participation in our democracy.

North Carolina

Over 75 discriminatory voting laws were blocked

in North Carolina's covered counties between 1982 and 2006 (43 objections, *March 8, 2006 Hearing*, at 270-73, and 36 successful Section 2 cases, *id.* at 1762-65).

"As black voter registration increased [in North Carolina], other official forms of discrimination were enacted." *Id*. at 1756. Indeed, during the reauthorization period, DOJ interposed four separate discriminatory-purpose objections to method-of-election changes adopted by North Carolina for covered counties. *See October 25, 2005 (History) Hearing*, at 1711-13, 1736-40, 1772-73, 1787-90.

One of those counties, Pitt County, later entered a consent decree resolving a separate Section 2 challenge to its method of election. But just last year, DOJ interposed a discriminatory purpose objection to a new state law changing the method of election for the Board of the Pitt County School District, citing the "County's history of challenges . . . under the Voting Rights Act" and noting that the "manner in which the change was adopted was a complete departure from the normal procedure." DOJ, Objection Ltr., Apr. 30, 2012, http://www.justice.gov/crt/about/vot/sec_5/ltr/l_ 043012_nc.php.

Similar examples abound. In 2002, Harnett County attempted to eliminate its sole majority-Black district, which had been created as part of a Section 2 remedy. *October 25, 2005 (History) Hearing,* at 1837-40. In 1993, only two months after settling a Section 2 challenge to its at-large elections, the Mt. Olive Board of Commissioners abandoned a redistricting plan to which the parties had agreed, offering pretextual explanations and going so far as

to "petition[a] court to prohibit [the board's sole Black member] from participating in board discussions or voting on the method of election issues raised by the Section 2 litigation." *Id.* at 1824. And in 1987, after previously agreeing to abandon at-large elections in response to a Section 2 suit, Bladen County took "extraordinary measures to adopt an election plan which minimizes minority voting strength." *Id.* at 1762. Section 5 prevented each of these attempts at circumvention.

Evidence of serial voting rights problems, which were only remedied by Section 2, Section 5, or a combination of the two, also exists for Beaufort County (2002), Anson County (1992), Onslow County (1987), Wilson County (1986), and Elizabeth City (1986). *See March 8, 2006 Hearing*, at 1746, 1783, 1746, 1749, 1748, 1775, 1733-34, and 1987; *see also id.* at 1747, 1750, 1763, 1769 (noting withdrawal of preclearance submissions between 1991 and 2001 by Edgecombe, Halifax, and Martin Counties, which had each been subject to a prior Section 5 objection).

Arizona

Twenty discriminatory voting laws were blocked in Arizona during the reauthorization period (18 objections, *id.*, at 1416; and two successful Section 2 cases, *id.* at 251). Since 1982, DOJ has also deployed more than 1,200 observers to Arizona to ensure and protect the ability of American Indian and Latino voters to participate in elections. *Id.* at 1412.

As of 2006, Arizona had drawn Section 5 objections to at least one of its statewide redistricting plans every decade since it became a fully covered

State. In 2002, DOJ concluded that Arizona's legislative redistricting plan not only dismantled three majority-Latino districts, but that circumstances "raised concerns [that one redistricting decision] may also have been taken, at least in part, with a retrogressive intent." *October 25, 2005 (History) Hearing*, at 500. Ten years earlier, DOJ similarly concluded that Arizona's redistricting plan discriminated against Latino voters and that the State offered "[i]nsufficient nonracial explanations" for rejecting non-discriminatory alternatives. *Id.* at 476-77.

The record also reflects that race and ethnicity continue to affect minority access to the polls in Arizona. In 2004, for example, Latino voters experienced widespread discrimination through intimidation and mass challenges, including poll workers asking minority voters (but not Anglo voters) for identification. *March 8, 2006 Hearing*, at 3979-80.

South Dakota

Following a 1975 proclamation from South Dakota's attorney general against complying with Section 5, the State implemented over 600 voting changes affecting covered counties without seeking preclearance, many of which impermissibly compromised Native American voters' rights. *Id.* at 1990-91, 2005. Native American voters were forced in 2002 to file a Section 5 enforcement lawsuit resulting in a consent decree, which finally ended 26 years of noncompliance. *Id.*

Two years later, a court held that South Dakota's 2001 legislative redistricting plan, which packed Native American voters into a single district where they

constituted 90% of the voting-age population, violated Section 2. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 980, 1052 (D.S.D. 2004), *aff'd*, 461 F.3d 1011 (8th Cir. 2006). The court also noted hostile and intimidating treatment by poll workers, as well as discriminatory comments made by state legislators, including a 2002 statement by one legislator who, referring to Native Americans, stated, "I'm not sure we want that sort of person in the polling place." *Id*. at 1026 (citation and internal quotation marks omitted); *see also* PA237a-238a.

Virginia

Thirty discriminatory voting laws were blocked in Virginia during the reauthorization period (15 objections, *March 8, 2006 Hearing*, at 272; and 15 successful Section 2 cases, *id*. at 251).

This discrimination again included serial voting rights violations. In 2001, despite racially polarized voting, Northampton County sought to move from six single-member districts—three of which were majority-minority—to three majority-white dual-member districts. DOJ objected, concluding that the County's stated justification for the proposal was inaccurate and that it inexplicably abandoned consideration of non-retrogressive alternatives. *October 25, 2005 (History) Hearing*, at 2584-87. The County responded with two more retrogressive plans, which drew objections in May and October 2003. *See id*. at 224, 2592-95; *see also March 8, 2006 Hearing*, at 2040.

Similarly, in 1993, Newport News drew a discriminatory-purpose objection when it attempted to

implement at-large elections for its school board—its second method-of-election objection in four years. *October 25, 2005 (History) Hearing*, at 2573-75. The next year, the City entered a consent decree wherein it "admitted that the at-large system violated section 2 as well as the Fourteenth and Fifteenth Amendments." *Nw. Austin*, 573 F. Supp. 2d at 261 (citation and internal quotation marks omitted).

In 1999, Dinwiddie County drew an objection to a proposal to move a polling station to an all-white church in a remote location because "[t]he sequence of events leading up to the decision to change the polling place . . . tend[ed] to show a discriminatory purpose." *October 25, 2005 (History) Hearing*, at 2581.[10]

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Shelby County asserts that there are only "isolated" instances of persistent discrimination in the covered jurisdictions and that circumvention of voting remedies has disappeared. Br. 38. These assertions ignore the "reliable evidence of actual voting discrimination" in the record. *Katzenbach*, 383 U.S. at 329. The record conclusively demonstrates that widespread intentional discrimination, and the eva-

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[10] There was also evidence of continuing discrimination in covered jurisdictions not discussed in the text. *See*, *e.g.*, *July 13, 2006 Hearing*, at 111 (2002 objection to intentionally retrogressive method-of-election change in Monterey County, California); *March 8, 2006 Hearing*, at 1466, 1497 (2002 objection to retrogressive statewide redistricting in Florida affecting Collier County); *id.* at 1348 (1993 objection to retrogressive statewide redistricting in Alaska).

sion of prior remedial measures, persists in the vast majority of covered jurisdictions. Accordingly, notwithstanding significant progress, Congress reasonably concluded that the "improvements are insufficient and . . . conditions continue to warrant preclearance." *Nw. Austin*, 557 U.S. at 203.

III. SECTION 5 IS AN "APPROPRIATE" RESPONSE TO THE RECORD OF ONGOING VOTING DISCRIMINATION.

After reviewing all of the evidence before it, Congress reasonably determined that Section 5 remains "appropriate legislation" to prevent, redress, and deter unconstitutional misconduct.

A. Case-by-case enforcement remains inadequate.

Central to Congress's determination was its conclusion that "'case-by-case enforcement alone . . . would leave minority citizens with [an] inadequate remedy.'" PA45a (alterations in original; citation omitted). As demonstrated in Part II.B, *supra*, the Congressional record is replete with evidence of serial violations of voting rights, in which jurisdictions—after having resolved Section 2 claims, or having drawn a Section 5 objection—attempted to circumvent the prior voting remedy with a new discriminatory measure.

This circumvention is one significant reason why "case-by-case litigation [is] inadequate to combat widespread and persistent discrimination in voting." *Katzenbach*, 383 U.S. at 328; *see also id.* at 313-15. But preclearance is also justified because of the

"slow, costly character of case-by-case litigation" in the voting context. *Boerne*, 521 U.S. at 526.

Section 2 suits are among the most complex and resource-intensive of all actions brought in federal court, often taking five years or more to litigate, with costs running into the millions of dollars. *See, e.g.*, *May 10, 2006 Hearing*, at 96 (McDuff); *May 9, 2006 Hearing*, at 141 (McDonald); *May 17, 2006 Hearing*, at 20, 80 (Derfner). Especially at the local level, voters of color generally lack access to the resources and expertise necessary for successful Section 2 litigation. *October 25, 2005 (History) Hearing*, at 84 (Earls). During the reauthorization period, 86.2% of Section 5 objections (539 out of 625) were made to voting changes at the local level—where elections often are less about partisan debates and more about issues such as police protection and the distribution of educational resources. *See Nw. Austin*, 573 F. Supp. 2d at 284-85 (calculation based on Maps 5A and 5B).

In sum, "[p]ermitting [an unprecleared] election to go forward would place the burdens of inertia and litigation delay on those whom the [VRA] was intended to protect." *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers).

Nor is there anything in the "the record to support . . . speculation" that DOJ could scale up its Section 2 enforcement adequately to compensate for the loss of the effective preclearance remedy. PA46a. This Court has recognized that the VRA's "laudable goal[s] could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Al-*

len, 393 U.S. at 556. Indeed, during the reauthorization period, DOJ participated as a plaintiff or intervenor in only 91 Section 2 cases, *see October 25, 2005 (History) Hearing*, at 2835-39, 2846, a small fraction of the total number of Section 2 suits during that timeframe. *See* JA51a (noting there were 800 *successful* Section 2 cases).

B. Current needs justify current burdens.

Congress also carefully considered the burdens imposed by Section 5. Absolutely no evidence was presented to support one witness's conclusory assertion, which Shelby County cites, that preclearance has cost covered jurisdictions over $1 billion. *See* Br. 25 (citing *May 10, 2006 Hearing*, at 110). In fact, Congress learned that, "in most cases the preclearance process is routine and efficient[], resulting in prompt approval by the Attorney General and rarely if ever delaying elections." PA20a (citation and internal quotation marks omitted). Even in the "infrequent" cases where "more extensive" information is required, preclearance submissions generally take little "more than half an hour." *June 21, 2006 Hearing*, at 12 (testimony by Don Wright, General Counsel, North Carolina Board of Elections).

Indeed, many election officials in covered jurisdictions recognize that Section 5 enhances the integrity of the political process and helps avoid litigation. *Id.* at 12-13; *see also May 17, 2006 Hearing*, at 94 & n.1. A joint letter from the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of

Mayors noted that, notwithstanding substantial progress, voting discrimination persists; these organizations urged Congress to reauthorize Section 5. 152 Cong. Rec. 14,232-33 (2006). In *Northwest Austin*, six fully or partially-covered States (including Arizona, which has filed an amicus brief on behalf of Shelby County in this case) informed this Court: "'[T]he benefits of Section 5 greatly exceed the minimal burdens Section 5 may impose on States and their political subdivisions.'" PA276a-77a (citation omitted).

Recent events confirm that, rather than the blunt instrument Shelby County describes, preclearance is a flexible remedy that permits States to pursue nondiscriminatory policy objectives. Texas's voter identification law—"the most stringent in the country," which a three-judge court found "imposes strict, unforgiving burdens on the poor[] and racial minorities"—was denied preclearance. *Texas v. Holder*, Civ. No. 12-128, 2012 WL 3743676, at *33 (D.D.C. Aug. 30, 2012). By contrast, South Carolina's voter identification measure was precleared for elections after November 2012, due to ameliorative features—added during preclearance—that rendered it "significantly more friendly to voters" than Texas's. *South Carolina v. United States*, Civ. No. 12-203, 2012 WL 4814094, at *15 (D.D.C. Oct. 10, 2012); *see also id.* at *22 (Bates, J., concurring) ("The Section 5 process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the voter identification law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and

local voting laws."). DOJ has also precleared photo identification laws in Arizona, Georgia, Louisiana, Michigan, and New Hampshire. Resp. Br. in Opp. to Cert. 32.

Finally, Congress learned that, contrary to the assertions of Shelby County's amici, Section 5 does not require excessive consideration of race in redistricting.[11] Section 5 does not maintain majority-minority districts reflexively or in perpetuity. The statute prevents the elimination of existing majority-minority districts only where substantial racially polarized voting exists, such that a majority-minority district remains necessary for minority voters to have an opportunity to elect a candidate of their choice. *See*, *e.g.*, *March 8, 2006 Hearing*, at 301-02; *October 18, 2005 Hearing*, at 177-79.

Moreover, although DOJ may have misinterpreted Section 5's standard in a small number of statewide redistricting objections in the early 1990s, *see* n.5, *supra*, DOJ has taken this Court's precedents in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), seriously; there has not been a single "maximization" objection since then. In the overwhelming majority of objections throughout the reauthorization period, DOJ applied the statute correctly: as a crucial tool to dismantle electoral structures long maintained to exclude too many of our fellow Americans from full en-

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[11] Shelby County forfeited any argument concerning Congress's two amendments to the Section 5 standard by failing to raise it below. PA66a-67a. In any event, those amendments are not implicated in this case. PA66a-68a.

joyment of their citizenship rights. *See generally* Part II, *supra*.[12]

None of this is to deny the federalism costs imposed by Section 5. Shelby County is correct that preclearance would not be appropriate enforcement legislation to remedy the problem of disabled persons having access to judicial services, at issue in *Lane*, or the problem of gender disparities in leave policies, at issue in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). *See* Br. 38.

But racial discrimination in voting—which demeans our democratic freedoms—is different. The records at issue in *Hibbs* and *Lane* "'pale[] in comparison'" to the record of persistent racial discrimination in voting before Congress in 2006, PA263a (citation omitted)—a record "at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in *City of Rome*," PA256a; *see also* PA260a.

Notwithstanding the powerful record demonstrating the current need for Section 5, Shelby County urges this Court to substitute its judgment for that of Congress about how best to remedy a uniquely grave and persisting constitutional problem, which long experience shows is particularly difficult to

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[12] Shelby County wrongly characterizes *Shaw* claims as involving "discrimination against white voters," which is the premise underlying its assertion that there were six instances of such discrimination in the record. Br. 32. *Shaw* claims are based on the injury caused to voters of all races when race is unnecessarily the predominant factor in districting. *See Miller*, 515 U.S. at 911-13.

eradicate in covered jurisdictions. The text of the Constitution and this Court's precedents, however, do not permit Shelby County to do so. *See Nw. Austin*, 557 U.S. at 204-05.

IV. THE GEOGRAPHIC SCOPE OF PRECLEARANCE IS PROPERLY TAILORED TO REACH ALABAMA AND THE OTHER COVERED JURISDICTIONS.

Congress reasonably reauthorized the geographic coverage provision contained in Section 4(b) of the VRA. Contrary to Shelby County's assertions, persistent voting discrimination is far more prevalent in the covered than the non-covered jurisdictions. Shelby County's facial challenge to Section 4(b) also fails for an independent, threshold reason. The record of persistent and adaptive voting discrimination in Alabama and, indeed, Shelby County, establishes that the County is properly covered by Section 5; the County cannot challenge 4(b) by arguing that it should not cover other jurisdictions not before the Court.

A. The record of discrimination in Alabama forecloses Shelby County's facial challenge.

Shelby County is covered because Alabama is a fully-covered State, and the County has not bailed out. PA145a. As discussed in Part II.B.1, *supra*, despite substantial progress, racial discrimination in voting remains a problem both in Alabama generally and Shelby County particularly. There were over 235 discriminatory measures remedied by Section 2 suits or Section 5 objections during the reauthoriza-

tion period. Alabama has the second highest rate of successful Section 2 litigation of any State in the country when considering published cases, and the highest rate in the country when considering all cases. *See* PA53a, PA92a. In light of the record, even Judge Williams, who dissented in the Court of Appeals, did not dispute that Alabama could be properly covered by Section 5. *See* PA93a.

Shelby County does not, and indeed cannot, argue otherwise. Instead, it contends that the record of discrimination in other jurisdictions, especially Alaska and Arizona, is insufficient to justify coverage of those jurisdictions. *See* Br. 47-48, 50. That argument, however, is not a valid basis for Shelby County to challenge Section 4(b). A party challenging the constitutionality of a state or federal statute "must show that [the party] is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures [it]." *Heald v. District of Columbia*, 259 U.S. 114, 123 (1922). Thus, "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).[13]

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[13] The First Amendment overbreadth doctrine is an exception, grounded in the concern that third parties "'may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" *New York v. Ferber*, 458 U.S. 747, 768-69 (1982) (citation omitted). That concern is plainly not applicable here: Alaska has a constitutional challenge to its Section 5 coverage pending, and

Whether viewed as an issue of third-party standing, or an expression of the strong preference for as-applied challenges, the point is the same: Litigants may not challenge the constitutionality of a statute on the ground that it interferes with the rights or interests of third parties not before the Court. *See, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); *United States v. Raines*, 362 U.S. 17, 21 (1960).

Under these settled rules of constitutional adjudication, that Alabama is properly subject to Section 5 coverage is fatal to Shelby County's facial challenge to Section 4(b). In *Raines*, this Court held that state election officials could not challenge a provision of the Civil Rights Act of 1957 on the ground that the statute impermissibly allowed the federal government to enjoin purely private conduct. 362 U.S. at 20-25. "[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." *Id.* at 24-25.

Reaffirming *Raines*, this Court in *Lane* sustained Title II of the Americans with Disabilities Act (ADA) as valid enforcement legislation in the context presented in that particular case (*i.e.*, as applied to court access for the disabled)—while declining to consider whether Title II was constitutional as applied to other contexts not before the Court. *See*

Arizona filed such a challenge but then withdrew it. *See Alaska v. Holder*, No. 1:12-cv-01376-RLW (D.D.C); Stipulation of Dismissal, *Arizona v. Holder*, No. 1:11-cv-01559-JDB (D.D.C. Apr. 10, 2012), ECF No. 41.

Lane, 541 U.S. at 530-31 & n.19 (citing *Raines*, 362 U.S. at 24-25).

Chief Justice Rehnquist dissented on this point in *Lane*, but his reasoning provides no support to Shelby County here. He contended that the *Lane* majority "artificially constrict[ed] the scope of the statute" to make it "mirror a recognized constitutional right" (court access), even though "Title II's indiscriminate substantive provisions" applied broadly to "all 'services,' 'programs,' or 'activities' of any 'public entity.'" *Id.* at 551, 552 n.11. In Chief Justice Rehnquist's view, the appropriate question was whether all of Title II's "substantive provisions can constitutionally be applied to the . . . State" challenging it. *Id.* at 552 n.11.

That concern is not present here. Section 5 is designed to remedy racial discrimination in voting, a "recognized constitutional right." *Id.* at 551. And the record of discrimination in Alabama establishes that Section 5's substantive provisions may properly be applied to Shelby County. If, as Shelby County claims, Section 5 should not be applied in other jurisdictions that are not parties to this case, there "'will be time enough to consider [that argument] when raised by someone whom it concerns.'" *Broadrick*, 413 U.S. at 609 (quoting *United States v. Wurzbach*, 280 U.S. 396, 399 (1930) (Holmes, J.)); *see generally Hibbs*, 538 U.S. at 743 (Scalia, J., dissenting) (arguing that, if Fourteenth Amendment enforcement legislation is facially constitutional because it can be validly applied to some jurisdictions, a State may still bring an as-applied challenge contending that the statute should not be applied to it because

the State itself had not engaged in unconstitutional conduct).

This jurisprudential principle is confirmed by *United States v. Georgia*, 546 U.S. 151 (2006). In that case, the plaintiff-inmate alleged actual constitutional violations, and this Court unanimously held that Title II of the ADA was valid enforcement legislation with respect to violations of prisoners' constitutional rights, without considering whether the provision is valid in other cases. *Id.* at 158-59. *Georgia* thus reaffirms the rule that courts should only consider whether enforcement legislation is valid with respect to the parties before them. That rule is fatal to Shelby County's 4(b) challenge.

B. Substantial differences persist between covered and non-covered jurisdictions.

In any event, the evidence before Congress demonstrated that voting discrimination remains "concentrated in the jurisdictions singled out for preclearance," *Nw. Austin*, 557 U.S. at 203, which, in the aggregate, continue to have far worse problems of voting discrimination, and, individually, represent the worst voting rights offenders. As the District Court recognized, "the 21st century problem of voting discrimination remains more prevalent in those jurisdictions that have historically been subject to the preclearance requirement." PA12a.

1. Quantitative evidence

The best way to study voting discrimination in the non-covered jurisdictions is to consider suits filed under Section 2, which applies nationwide. In 2006, Congress considered a study (the "Katz Study")

documenting every single reported case filed under Section 2 in both the covered and non-covered jurisdictions.[14] *See October 18, 2005 Hearing*, at 964-1124. In no prior reauthorization had Congress considered such a comparative study of conditions in the covered and non-covered jurisdictions.

a. Successful Section 2 suits

The Katz Study revealed that, "although covered jurisdictions account for less than 25 percent of the country's population, they accounted for 56 percent of successful section 2 litigation." PA49a. It also indicated that Section 2 plaintiffs were approximately 33% more likely to succeed in suits filed in the covered jurisdictions as compared to the non-covered jurisdictions. PA51a.

Shelby County argues that the difference in the percentage of successful Section 2 suits originating from covered jurisdictions (56% of all cases) compared to non-covered jurisdictions (44%) demonstrates relative parity between them. Br. 51. But Shelby County ignores both the need to consider the relevant sizes of the covered and non-covered jurisdictions, as well as Section 5's prophylactic effect.

The non-covered jurisdictions have populations three times larger than the covered jurisdictions.[15]

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[14] By "reported" or "published" cases, we mean cases available on Westlaw or Lexis.

[15] The covered jurisdictions contain less than one quarter of the nation's total population, *October 18, 2005 Hearing*, at 974, and roughly 36% of the nation's minority population, *see May 9, 2006 Hearing*, at 43-44 (Davidson).

When controlling for the relative sizes of the covered and non-covered jurisdictions, "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)." PA49a-50a. A study of unpublished cases ("McCrary Study")[16] reveals that this actually understates the true disparity: "[A]pproximately 81 percent [of all successful Section 2 cases] were filed in covered jurisdictions," PA51a, which means that there were in fact *12 times* as many successful Section 2 cases in the covered jurisdictions on a per capita basis.[17]

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[16] Almost all of the data in the McCrary Study is found in the Congressional record (*i.e.*, all unpublished cases from the covered jurisdictions, JA42a; and 61 out of 99 unpublished cases (62%) from the non-covered jurisdictions, JA46a). Shelby County has "identified no errors or inconsistencies in the data analyzed by McCrary." PA54a. The McCrary Study simply confirms what is already clear from the Katz Study: that the per capita rate of successful Section 2 suits is dramatically higher in the covered jurisdictions.

[17] These figures include cases resolved through settlements. As Shelby County points out, settlements happen for a variety of reasons. *See* Br. 52-53. But Shelby County fails to acknowledge that one of the most important reasons is the defendant's recognition that the plaintiff's claims have a likelihood of success. For example, the approximately 170 jurisdictions that reached settlements in the *Dillard* litigation did so after a court found that at-large elections throughout Alabama had been tainted by racially discriminatory purpose. *See Dillard*, 640 F. Supp. at 1360; *see also July 13, 2006 Hearing*, at 373-74. That there were 587 unreported cases in the covered jurisdictions, compared to 99 in the rest of the country, is strong evidence confirming that voting discrimination remains concentrated in the covered jurisdictions.

This disparity is particularly striking, as one "would expect to see fewer successful section 2 cases in covered jurisdictions," PA55a, because: (i) Section 5 "blocked hundreds of intentionally discriminatory changes," *Nw. Austin*, 573 F. Supp. 2d at 258; (ii) "the mere existence of section 5 encourage[s] the legislature to ensure that any voting changes would not have a discriminatory effect," PA42a (citation and internal quotation marks omitted); and (iii) covered-jurisdiction-status facilitates the dispatch of federal election observers, who "have played a critical role preventing and deterring 14th and 15th amendment violations." H.R. Rep. No. 109-478.

In sum, although Section 5 makes an apples-to-apples comparison of covered and non-covered jurisdictions impossible, the quantitative evidence demonstrates that voting discrimination is far more prevalent in the covered jurisdictions. During the reauthorization period, in the covered jurisdictions, there were over 650 successful Section 2 suits, 620 Section 5 objections, and 25 judicial preclearance denials; in the non-covered jurisdictions, there were fewer than 150 successful Section 2 suits. *See* PA44a; JA50a-51a. In the aggregate, any fair reading of the experience in covered jurisdictions describes a more entrenched and grave threat to voters of color.

b. Racially polarized voting and racial appeals

The Katz Study also revealed that racially polarized voting ("RPV") is much more pronounced in covered than in non-covered jurisdictions. RPV is important because it is a necessary precondition for

vote dilution; as discussed, where voting in a jurisdiction is polarized along racial lines, government officials can intentionally discriminate against minority voters through racial gerrymanders or methods of election that "cancel out or minimize the voting strength of [minority voters]." *White v. Regester*, 412 U.S. 755, 765 (1973).

Adjusted for population, there are approximately three times as many Section 2 cases with RPV findings in the covered jurisdictions as in the non-covered jurisdictions.[18] Moreover, RPV was more severe in covered jurisdictions, with white bloc voting of 80% or more in nearly 90% of elections involving candidates of different races in covered jurisdictions; by contrast, only 40% of the elections involving candidates of different races in non-covered areas involved such extreme white bloc voting. *May 16, 2006 Hearing*, at 48. And Congress learned that RPV was generally increasing, not decreasing, in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 34; *May 17, 2006 Hearing*, at 132-33 (Persily). Two striking examples of RPV, "indicative of the racial cleavage that exists in Alabama to this day," were the 2003 and 2004 unsuccessful voter referenda to remove unconstitutional Jim Crow provisions of Alabama's Constitution, including poll tax language. *July 13, 2006 Hearing*, at 367, 372.

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[18] There were a roughly equal number of RPV findings in the covered and non-covered jurisdictions, *see October 18, 2005 Hearing*, at 981; given relative population size, such findings were three times more common per capita in the covered jurisdictions.

Given the much higher level of RPV in the covered jurisdictions, it is unsurprising that there were also more judicial findings of racial appeals by candidates in those jurisdictions, *see October 18, 2005 Hearing*, at 1003. Indeed, Congress learned that racial appeals—including candidates' emphasizing their opponent's race by disseminating literature with their opponent's picture, sometimes darkened—remain common in certain covered jurisdictions. *See, e.g.*, *May 17, 2006 Hearing*, at 17 (Derfner); *May 10, 2006 Hearing*, at 22 (McDuff); *May 9, 2006 Hearing*, at 44 (Davidson); *October 20, 2005 Hearing*, at 85 (Derfner).

2. Shelby County's state-by-state argument is meritless.

Likely recognizing that the aggregate data documents substantially more voting discrimination in the covered jurisdictions, Shelby County contends that the Section 2 data, when disaggregated by State, shows that, "[e]ven if preclearance might remain an appropriate response to ongoing discrimination in *some* jurisdictions," other covered jurisdictions (not including Alabama) have better records than some non-covered jurisdictions. Br. 40. But, as discussed in Part IV.A, *supra*, Shelby County may not argue Section 4(b) is facially unconstitutional because it should not cover third parties not before the Court.

Moreover, Shelby County's jurisdiction-by-jurisdiction approach is foreclosed by this Court's VRA precedents. As explained in *Northwest Austin*, at issue is whether the geographic scope is "sufficiently related" to the problem of persistent voting

discrimination, not whether it is perfectly related to it or surgically precise. 557 U.S. at 203. Indeed, "the fit was hardly perfect in 1965." PA60a. *Katzenbach* sustained the coverage provision even though both Congress and the Court were aware that some non-covered areas, including Texas, Florida, Tennessee, and Kentucky, had documented histories of racial discrimination in voting, *March 19, 1965 (House) Hearing*, at 75, whereas some covered jurisdictions did not. *See Katzenbach*, 383 U.S. at 329-30. This Court explained that it is "irrelevant that the coverage formula excludes certain localities . . . for which there is evidence of voting discrimination." *Id*. at 330-31. Indeed, given that Congress may enact nationwide legislation in response to evidence of discrimination in only a minority of States, *see Hibbs*, 538 U.S. at 731, surely Congress may seek to confine remedial legislation to those jurisdictions where such legislation is especially needed, even if some level of arguable imprecision results.

In any event, Shelby County mischaracterizes the data, ranking States according to the total number of Section 2 filings or adjudicated violations in each State, Br. 47, but again failing to control for the different sizes of States. Controlling for population size, the Katz Study revealed that the four jurisdictions with the highest rates of successful Section 2 litigation were covered (South Dakota, Mississippi, Alabama, and Louisiana), as were five of the six highest. *See* PA91a-93a. When facts from the McCrary Study are included, the results are even more impressive: The eight jurisdictions with the highest per capita rates of successful Section 2 litigation, and 11 of the highest 14, are covered or have

been bailed-in to coverage. *See* PA51a-53a. All of this with Section 5 in operation.

When limiting the comparative analysis to electronically-reported cases alone, the "middle-range covered States appear comparable to some non-covered jurisdictions," but this is "only because section 5's deterrent and blocking effect screens out discriminatory laws before section 2 litigation becomes necessary." PA59-60a. In fact, "these middle-range covered jurisdictions appear to be engaged in much more unconstitutional discrimination." PA59a. For example, as the Court of Appeals explained, Georgia and South Carolina each had only three successful electronically-reported Section 2 cases between 1982 and 2004, but they each had over 70 Section 5 objections (not to mention a respective 66 and 30 unpublished Section 2 cases) during that period. PA58a-59a.[19]

3. Qualitative evidence

Throughout Congress's nearly year-long deliberative process, the legislative record was "open and available for all groups of all opinions" to present their views, *May 4, 2006 Hearing*, at 70. But there is no evidence indicating any non-covered areas experienced voting discrimination on par with the covered jurisdictions. Congress received state-by-state re-

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[19] Although the Section 2 and 5 standards are not identical, *see* PA94a (Williams, J., dissenting), both prohibit intentional discrimination. As discussed, two-thirds of Section 5 objections in the reauthorization period involved such purposeful discrimination—often involving efforts to circumvent a Section 2 remedy.

ports concerning current conditions in covered jurisdictions[20] and in several non-covered jurisdictions.[21] The difference is stark: Reports concerning the covered jurisdictions demonstrate substantial ongoing discrimination and dozens of repeat offenders; by contrast, the reports from non-covered jurisdictions do not reveal similar problems.

Voting rights experts testified that "there is a clear differentiation between covered and non-covered jurisdictions." *See, e.g.*, *May 16, 2006 Hearing*, at 55 (Earls). "Covered jurisdictions show a continuing pattern of enacting laws and procedures designed to suppress and dilute the voting strength of minority voters." *Id.* By contrast, "there is no evidence of significant and continuing violations of minority voting rights at the state and local level in non-covered jurisdictions." *Id.* at 48; *see also June 21, 2006 Hearing*, at 98 (Canon) ("[T]here is a clear difference between covered and non-covered states in terms of discrimination."). One political scientist, who served as an expert in dozens of redistricting cases, explained that, in his experience, it was far

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[20] *See March 8, 2006 Hearing*, at 1308-2092 (Arizona, Alaska, Georgia, Louisiana, Mississippi, North Carolina, New York, South Carolina, South Dakota, Virginia); *July 13, 2006 Hearing*, at 103-19, 365-402 (California, Alabama); *id.* at 357-60, and *supra* at 23 (citing Texas Report). Links to these reports are available at the following website: *Voting Rights in the States*, http://www.civilrights.org/voting-rights/vra/states.html.

[21] *See May 4, 2006 Hearing*, at 132-152 (Arkansas), 153-76 (Oklahoma), 235-57 (Tennessee); *October 25, 2005 (History) Hearing*, at 3145-3148 (Milwaukee, Wisconsin).

less common for non-covered jurisdictions intentionally to "change voting arrangements in such a fashion as to dilute minority votes in a context of [racially polarized voting]." *May 16, 2006 Hearing*, at 26, 29 (Arrington).

C. The geographic scope remains rational in theory.

Finally, Shelby County argues that the Section 4(b) coverage provision "is no longer rational in theory," Br. 40, because it is triggered by historical low registration rates, rather than by directly incorporating metrics relating to the form of discrimination most prevalent today, *i.e.*, vote dilution.

This argument misunderstands the theory behind the coverage approach. In 1965, there were several "States and political subdivisions which in most instances were familiar to Congress by name" because of their long histories of voting discrimination, and Congress "eventually evolved" (*i.e.*, reverse-engineered) Section 4(b) to "describe these areas." *Katzenbach*, 383 U.S. at 328-29; *see also* PA124a. Congress adopted a coverage approach based largely on registration and turnout rates because, at that time, "depressed turnout and registration levels" were considered "an indicator of the larger problem of entrenched discrimination in voting," but improving registration and turnout was "not the end itself." *May 17, 2006 Hearing*, at 33 (Days).

Section 5 always "had a much larger purpose than to increase voter registration." *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983). Its goal is "to banish the blight of

racial discrimination in voting"—in whatever form it appears—where it is most prevalent. *Katzenbach*, 383 U.S. at 308. For this reason, the Act permits jurisdictions to "bail out" and terminate coverage if they have clean records with respect to discrimination, not simply with respect to registration and turnout.[22]

In examining the "evidence of actual voting discrimination," *id.* at 330, Congress learned that, notwithstanding improvements, voting discrimination remains most severe in the same areas that historically have been subject to Section 5 coverage. Maintaining the preexisting scope of coverage was, therefore, a reasonable way of identifying those jurisdictions where voting discrimination is most prevalent today. As Representative Sensenbrenner explained, Congress's decision-making as to the scope of coverage was "'not' predicated on [registration] statistics," but on "recent and proven instances of discrimination in voting rights compiled in the . . . 12,000-page record." 152 Cong. Rec. 14,275 (2006).

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[22] Notably, since 1982, when the bailout criteria became "substantially more permissive," PA9a, *every* jurisdiction that has sought bailout has been approved, and no bailed-out jurisdiction has later been subjected to clawback. *See March 8, 2006 Hearing*, at 2684 (Hebert). Since this Court's decision in *Northwest Austin*, 19 cities and counties, including over 100 sub-jurisdictions, in Alabama, North Carolina, Georgia, Virginia, California, and Texas have been granted bailout. *See* DOJ, *Section 4 of the VRA*, http://www.justice.gov/crt/about/vot/misc/sec_4.php. A statewide bailout (New Hampshire) has been approved by DOJ and is pending. *See* Proposed Consent Decree and Judgment, *New Hampshire v. Holder*, 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 21, 2012), ECF No. 10-1.

It is irrelevant that the coverage trigger does not directly incorporate vote dilution metrics. This Court has held that, so long as the coverage provision identifies the correct jurisdictions in practice, it need not be based on the precise forms of discrimination necessitating coverage. In *Gaston County v. United States*, 395 U.S. 285, 291-92 (1969), the Court, speaking through Justice Harlan, explained that it was permissible for Congress to ban literacy tests in the covered jurisdictions because those areas suffered from racial disparities in education, even though the coverage triggers do not directly incorporate any measures of educational disparities. "It is of no consequence that Congress might have dealt with the effects of educational discrimination by employing a coverage formula different from the one it enacted." *Id.* at 291.

Thus, in 2006, after engaging in a lengthy debate, Congress rejected an amendment that purported to update the coverage triggers based on more recent comparative registration rates. H.R. Rep. No. 109-516, at 2 (2006). Congress determined that such efforts to "update" the coverage data would have been highly irrational. For instance, the only fully-covered State would have been Hawaii, a State without "any history of [voting] discrimination." 152 Cong. Rec. 14,277 (2006) (Rep. Case (D-HI)).

In the words of Representative Sensenbrenner, such a proposal would "sever[the coverage provision's] connection to jurisdictions with proven discriminatory histories," and "turn[] the Voting Rights Act into a farce." 152 Cong. Rec. 14,274 (2006). Over a dozen witnesses appearing before the Senate

Judiciary Committee agreed with Representative Sensenbrenner's assessment. *See, e.g.*, *May 9, 2006 Hearing*, at 76 (Issacharoff); *May 16, 2006 Hearing*, at 110 (Pildes); *May 17, 2006 Hearing*, at 135 (Persily). For these reasons, the House of Representatives voted 318 to 96 not to tie coverage to recent comparative registration rates and to maintain the preexisting coverage provision, ensuring that the worst ongoing offenders remain subject to Section 5. 152 Cong. Rec. 14,300-301 (2006).

CONCLUSION

The VRA reauthorization record contains evidence of undeniable progress, but, just as clearly, it documents persistent and adaptive voting discrimination, which remains concentrated in certain parts of the country. We do not dishonor our progress by demanding more of it. In reauthorizing the Voting Rights Act, Congress appropriately exercised its powers under the Reconstruction Amendments. The judgment of the Court of Appeals should be affirmed.

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