No. _____

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

-v.-

MICHAEL B. MUKASEY, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDING

Northwest Austin Municipal Utility District No. 1 is the only appellant. The appellees are Michael B. Mukasey in his official capacity as Attorney General of the United States and these additional appellees that intervened as defendants below: the Austin Branch of the NAACP; Jovita Casares; David, Gabriel, and Lisa Diaz; Angie Garcia; Winthrop and Yvonne Graham; Nathaniel Lesane; Nicole and Rodney Louis; People for the American Way; Jamal, Marisa, and Wendy Richardson; the Texas State Conference of NAACP Branches; Travis County, Texas; and Ofelia Zapata.

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OPINION BELOW

The district court's opinion, reported at 557 F.Supp.2d 9, is reprinted at App.1-183.[1]

[1] Citations to the Appendix are in the form App.___. Citations to pleadings below are in the form Dkt. No. ___. Citations to exhibits to appellant's summary judgment motion below are in the form SJEx.___ at ___:___.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 1 and 5 of the Fourteenth Amendment; the Fifteenth Amendment; Section 4 of the Voting Rights Act, 42 U.S.C. §1973*b*; and Section 5 of the Voting Rights Act, 42 U.S.C. §1973*c*, are reprinted in the Appendix.

STATEMENT

This appeal puts before the Court the most federally invasive law in existence, a provision recently reimposed on certain parts of the country premised only on an unjustified presumption that those state and local governments are systematically incapable of fulfilling their constitutional and statutory obligation to respect the voting rights of all. And, in reimposing that invasive federal preemptive oversight on local voting changes, Congress used a formula first instituted in 1965 and that has not been updated since 1975. In other words, Congress reenacted an unparalleled federal veto over law- and policymaking by certain States and localities without any meaningful evaluation of whether the

circumstances originally used to justify the law continue to exist and without any reconsideration of the geographic areas of the country in which it might constitutionally be reimposed. The three-judge district court has failed to hold Congress to any meaningful constitutional standard and, further, has erroneously interpreted the bailout provision, the only statutory escape from preclearance, so narrowly as to essentially write it out of existence for countless jurisdictions with demonstrably clean records of protecting voting rights.

This case concerns the constitutionality of §5 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577, and the application of §4(a) of that act, which is intended to provide relief from §5's strictures for qualifying jurisdictions. Section 5 requires certain States and localities to "preclear" any change affecting voting, however minute, with the federal government, usually through the Executive, before it goes into effect. Section 4(a), at least in theory, provides covered jurisdictions demonstrating a ten-year history of compliance with statutory and constitutional mandates the opportunity to "bail out" from §5 coverage.

The Court and commentators have long recognized §5 as a uniquely intrusive "inversion of the normal federal-state relationship." Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 216 (2007). Congress first enacted

§5 as part of the 1965 VRA as a temporary, emergency measure expiring in five years. The Court upheld that enactment as a constitutionally valid response to Congress's knowledge "that some of the States covered by §4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). In the more than four decades since, the Nation has made undeniable progress in ensuring the voting rights of citizens of all races. Yet the original five-year "emergency" preclearance measure has been reenacted several times, without substantial change, most recently in 2006 for another 25 years.

In 2006, Congress made no specific findings of the pervasive, purposeful gamesmanship that animated the original §5; nor could it have upon a record containing no evidence of such a pattern. Reflecting the backward-looking nature of §5, the 2006 enactment failed even to update the formula for its geographical coverage, which continues to rely only on data from the 1972 presidential election or earlier. Since *Katzenbach*, the Court has further elaborated the standard for determining whether a prophylactic remedy is a valid exercise of Congress's enforcement powers under the Reconstruction Amendments. The 2006 enactment of §5 does not come close to meeting that standard.

Before the 2006 enactment, several commentators questioned whether an unchanged §5 could remain constitutional. *E.g.*, Persily, Options and Strategies for Renewal of Section 5 of the Voting Rights Act, 49 How. L.J. 717, 725 (2006). But political realities resulted in a law "virtually unchanged from the original version," Persily, Promise, *supra*, at 207-211, and it is no constitutional defense that the unchanged §5 was "the best of the politically feasible alternatives," *id.* at 209.

Nowhere is §5's lack of congruence and proportionality more evident than in §5's application to plaintiff-appellant Northwest Austin Municipal Utility District Number One. The district, established on previously undeveloped land in the late 1980s, has no history of voting-related discrimination, nor even been accused of it. Yet its effort to take advantage of the bailout statute drew the fire of ten national and regional advocacy groups, which were permitted to intervene on behalf of themselves or individuals they recruited and none of which identified a single problem with the district's elections or VRA compliance, even after months and countless lawyer hours in extensive discovery.

The bailout mechanism first enacted in 1982 contains the only, slim hope of rendering §5 congruent and proportional. Applied as intended, §4(a) could lift the outmoded burden of §5 from compliant jurisdictions like the district. But the Justice Department has employed a constricted interpretation of §4(a)—now adopted by the district court—that makes

bailout unachievable for the vast majority of thousands of covered jurisdictions. Just as the district court's constitutional analysis miscomprehended the Court's standard for evaluating remedial legislation developed from *Katzenbach* onward, that court's statutory interpretation ignored the import of *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978), and *Dougherty County, Ga., Board of Educ.* v. *White*, 439 U.S. 32 (1978). Those cases interpreted a restrictive definition of "political subdivision" as serving only to describe the types of political subunit—counties, parishes, or other subunits if they register voters—that can be covered by §5 separately from their States. Thus, as used in §5's preclearance requirement—and, necessarily, in numerous other contexts throughout the VRA, including the bailout provision—"political subdivision" carries its ordinary meaning, encompassing subunits like the district. But, relying on inconclusive legislative history and a statutory sentence fragment not remotely sufficient to abrogate *Sheffield* and *Dougherty County*'s cabining of the restrictive "political subdivision" definition, the district court denied access to bailout for the district and, as a practical matter, almost every other covered jurisdiction.

The district is a political subdivision of Texas, located within the boundaries of the City of Austin and Travis County but independent of both. It performs certain governmental functions including bond issuance for infrastructure construction and

assessment of taxes to service bond indebtedness. It is under direct supervision by the State through the Texas Commission on Environmental Quality; neither the city nor county exercises supervisory authority over the district. See Tex. Water Code §54.239; SJEx.14, at 17-18.

The district is governed by a five-member board; directors are elected to staggered four-year terms in biannual nonpartisan elections. Candidates do not run for a particular place; voters vote for two or three candidates, depending on the number of positions up for election, and the candidates with the highest vote totals are elected. See, *e.g.*, SJExs.6, 7, 9, 37.

Although Travis County controls voter registration under Texas law, the district is responsible for its own elections. Before 2004, the elections were held at private residences. Although those polling places were precleared and never the subject of discrimination-related complaints, the board eventually decided it was important to hold elections at a more convenient public location, like the neighborhood elementary school. See SJEx.12, at 33; SJEx.28, at 63; SJEx.35, at 50. For the 2004 election, the district learned that not only was it now possible to hold elections at the school but the district could also contract with Travis County to put district elections on the larger county ballot and delegate to the county the task of conducting the district's elections. SJEx.28, at 57-59, 65-66.

Since 2004, with preclearance, the district has contracted with the county to conduct its elections. See SJEx.9. This contractual arrangement benefits voters by allowing them to go to a single, public, convenient location to cast ballots in all local elections at the same time and permitting the district to tie into Travis County's substantial election apparatus, with its minority and language-minority election officials and workers and extensive early-voting opportunities. SJEx.28, at 57-59, 65-66; SJEx.14, at 58, 67.

From its inception, the district has complied with §5's requirements, seeking and obtaining approval from the Attorney General when it changed its election practices and procedures. SJExs.2, 3, 4, 5, 6, 7, 8, 9. The Attorney General has never interposed an objection to any of the preclearance submissions. SJEx.1. No election-related lawsuit has ever been filed against the district. *Id.* Indeed, through its entire history, nobody has ever complained about or questioned voting or election procedures used by the district; nor has any intervenor identified a single complaint about the district's elections. See Dkt. No. 107, at 8, n.2.

On August 4, 2006, the district filed suit in the United States District Court for the District of Columbia under 42 U.S.C. §1973*b* and 28 U.S.C. §2201, seeking a declaration that the district had met the bailout requirements of §4 of the VRA or, in the

alternative, that §5 was an unconstitutional exercise of congressional authority. Dkt. No. 1.

A three-judge panel of the district court, in an opinion issued May 30, 2008, denied the district's motion for summary judgment and granted those of the defendants. App.1-154. The court held (1) that the district was not a political subdivision eligible for bailout under §4 of the VRA, and so did not reach the question whether the district satisfied the bailout criteria; (2) that the proper standard for reviewing legislation enforcing the Fifteenth Amendment was the purportedly rational-basis review articulated in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and the preclearance requirement of §5 met that standard; and (3) that even reviewed under the purportedly different congruence-and-proportionality test of *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the preclearance mechanism passed muster given the record assembled by Congress in reenacting §5. The district timely appealed. App.186.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court should note probable jurisdiction and recognize that the uniquely intrusive upending of federalist principles that is §5 cannot be constitutionally justified on the record Congress amassed in 2006, which was devoid of evidence of a persisting pattern of electoral gamesmanship. At a minimum, the Court should confirm that, when §4(a)

is interpreted in light of the Court's precedent and constitutional necessity, a political subdivision like the district is eligible to pursue bailout.

The Court should resolve any lingering question lower courts may have that its jurisprudence since *Katzenbach* establishes and elaborates a consistent standard for evaluating congressional attempts to enforce the Reconstruction Amendments through prophylactic remedies that encompass constitutionally benign activity by the States and their subdivisions. The Court should unequivocally establish that the Fifteenth Amendment's enforcement clause no more gives Congress the power as against the States to redefine substantive constitutional rights than does the Fourteenth Amendment's. The Court should find that the 2006 enactment of §5, which consigns broad swaths of the Nation to apparently perpetual federal receivership based on 40-year-old evidence, fails its congruence-and-proportionality test, particularly if no practical bailout mechanism permits compliant jurisdictions relief from §5's strictures.

I. THE STATUTORY TEXT, THIS COURT'S PRECEDENT, AND CONSTITUTIONAL NECESSITY COMPEL THE CONCLUSION THAT POLITICAL SUBDIVISIONS LIKE THE DISTRICT ARE ELIGIBLE FOR BAILOUT.

The district court, to which any covered jurisdiction must resort to obtain bailout, has definitively declared that it will not entertain

bailout requests from the vast majority of covered jurisdictions. Without this Court's correction, bailout thus becomes a dead letter, unable to incentivize compliance by covered jurisdictions, provide relief to already compliant jurisdictions, or trim §5's contours to make it constitutional. To give effect to the statutory text, maintain consistency with the Court's precedent, and harmonize congressional intent with constitutional imperative, the Court should reverse the district court's holding that political subdivisions like the district cannot pursue bailout. Under §4(a) of the VRA, any political subdivision that is obligated to comply with §5 preclearance must be eligible to take advantage of statutory bailout procedures. By improperly interjecting into §4(a) the limited definition of "political subdivision" from §14(c)(2),[2] a definition relevant only to determining which jurisdictions may be targeted for separate coverage, the district court erroneously interpreted §4(a) as precluding jurisdictions like the district from pursuing bailout as "political subdivisions" unless they conduct voter registration. Because that artificially restrictive interpretation of §4(a) conflicts with prior interpretation of the VRA and gives rise to serious constitutional concerns, the district court's decision must be reversed.

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[2] Section 14(c)(2) defines "political subdivision" as any "county or parish," or "any other subdivision of a State which conducts registration for voting." 42 U.S.C. §1973*l*(c)(2) (2006).

A. The District Court Adopted an Interpretation of §4(a) That Fails to Comport with the Natural Reading of the Text or This Court's Interpretation.

This Court has held, twice, that the definition of "political subdivision" used in §14(c)(2) is restricted to determining which jurisdictions are eligible for separate coverage. *Sheffield* rejected the argument that the term "political subdivision," as used throughout the entirety of the VRA refers only to those entities specifically enumerated in §14(c)(2) of the Act. 435 U.S., at 128-129 & n.15, 130-131 & n.18. *Sheffield* considered whether §5 of the VRA applied to all political entities, or only those "political subdivisions" defined in §14(c)(2). *Ibid*. Rejecting the premise that Congress meant for such a sweeping statute to encompass only those "political subdivisions" within §14(c)(2)'s definition, *Sheffield* recognized that "Congress' *exclusive* objective in §14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under §4(b)." *Id.*, at 131, n.18 (emphasis added). Explaining the logical necessity of confining §14(c)(2)'s definition to matters of coverage, *Sheffield* explained that the term's usage in §4(a) and many other sections of the Act "would be nonsensical if 'political subdivision' denoted only specific functional units of state government." *Id*., at 129, n.15. Under *Sheffield*'s interpretation, §14(c)(2)'s definition limits the meaning of the term "political subdivision" only as the term is used in the §4(b) coverage formula, not as used in §5, §4(a), which

contains the bailout provision, or any other provision of the VRA. See *United States* v. *Uvalde Consol. Indep. Sch. Dist.,* 625 F.2d 547, 554-555 (CA5 1980). That is, §14(c)(2)'s definition "was intended to operate *only* for purposes of determining which political units in nondesignated States may be separately designated for coverage under §4(b)." *Sheffield*, 435 U.S., at 128-129 (emphasis added).

Reaching a contrary interpretation, the district court acknowledged *Sheffield*'s holding that §5 of the VRA applies to all political subunits but denied the very logic compelling that result, dismissing *Sheffield*'s core rationale as "dictum." App.24. Although *Sheffield* emphasized the "territorial reach" of §5, 435 U.S., at 126, *Dougherty County* dispels any notion that *Sheffield*'s statements that §14(c)(2) serves only one purpose were mere dicta. The district court virtually ignored *Dougherty County*, which directly addresses whether "'political subdivision[s]' of States designated for coverage" are "political subdivisions" for purposes of complying with §5, reiterating that any political subunit of a covered State could fit within the usage of "political subdivision" in §5 because "once a State has been designated for coverage, §14(c)(2)'s definition of political subdivision has no 'operative significance in determining the reach of §5.'" 439 U.S., at 43-44 (alteration in original, quoting *Sheffield*, 435 U.S., at 126). *Sheffield* "squarely foreclosed" an argument based on applying §14(c)(2)'s definition outside the

coverage context. *Id.*, at 44. The school board was required to preclear under §5 because it was "a *political subdivision* within a covered State," *id.*, at 45 (emphasis added), not merely because it was within the territory of a covered State. Similarly, absent some legislative change expanding §14(c)(2)'s application, that definition cannot—consistently with *Sheffield* and *Dougherty County*—be applied to bar a political subdivision of a covered State, like the district, from pursuing bailout under §4(a).

Because the Court has determined that Congress had but one purpose in the initial authoring of §14(c)(2)—limiting which jurisdictions could be separately designated for coverage—and Congress has since reenacted the VRA without relevant change, no indication is present that Congress intended for "political subdivision" to carry any meaning besides its ordinary, contemporary, or common meaning in §4(a). See *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000); *Lopez* v. *Monterey County*, 525 U.S. 266, 278-279 (1999). The district fits easily within the common meaning of "political subdivision" in two respects: it is "a division of a state that exists primarily to discharge some function of local government," Black's Law Dictionary 535 (2d Pocket ed. 2001); accord Black's Law Dictionary 1159 (6th ed. 1991), and it is a "political subdivision" under state law, see Tex. Const., Art. XVI, §59(a), (b); Tex. Water Code §54.011; *Bennett* v. *Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex.

1954); *McMillan* v. *Nw. Harris County Mun. Util. Dist. No. 24*, 988 S.W.2d 337, 340 (Tex. App. 1999); see also *Dougherty County*, 439 U.S., at 43, n.13.

The district court relied largely on conflicting legislative history for its conclusion that, in 1982, Congress rejected the Court's precedent cabining §14(c)(2)'s definition of "political subdivision" to "the designation process." *Sheffield*, 435 U.S., at 129, n.16. If Congress intended to make such a departure from settled law, it did so in surprising fashion: Congress left the language of §14(c)(2) exactly the same, never voicing a specific intent to override judicial interpretations. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988). When the judiciary has taken affirmative measures to define terms, "it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." *Williams*, 529 U.S., at 434; see also *N.L.R.B.* v. *Amax Coal Co.,* 453 U.S. 322 (1981). Congress's failure to change the relevant text of the VRA indicates congressional acquiescence in the Court's interpretations. See, *e.g.*, *Georgia* v. *United States*, 411 U.S. 526 (1973).

Legislative history cannot supplant the Court's statutory interpretation when Congress has not altered the language of the statute to reflect a new meaning.[3] *Reno* v. *Bossier Parish Sch. Board*, 520 U.S. 471, 483-484 (1997) ("Given our longstanding interpretation of §5, . . . we believe Congress made it sufficiently clear that a violation of §2 is not grounds in and of itself for denying preclearance under §5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments does not change our view." (internal citation omitted)). In particular, the Court has expressed doubt that "Congress would depart from the settled interpretation" of a VRA provision "by dropping a footnote in a Senate Report instead of amending the statute itself" when the change would impose "a demonstrably greater burden" on jurisdictions covered by the Act. *Id*., at 484.

For all the district court's attention to legislative history, which was an unnecessary and inappropriate consideration in light of the clearly worded statute

[3] The 1982 legislative history the district court cites is inconclusive at best. Although the Congressional Record includes statements suggesting some Congress members thought bailout would be limited to counties, it also includes many statements conflicting with that interpretation. *E.g*., S. Rep. No. 97-417, at 48 ("Even if a *small community*, without a large legal staff, was unsure of its obligations, it could have asked the State Attorney General's office for guidance." (emphasis added)).

further informed by this Court's interpretation,[4] the district court failed to consider the most relevant legislative history available: that from the 2006 enactment of the VRA. See *Sheffield*, 435 U.S., at 135, n.25 (legislative histories of 1970 and 1975 reenactments relevant to meaning of §5 drafted in 1965 as Court was "construing, not the 1965 enactment of §5, but a 1975 re-enactment"). The legislative history from the 2006 enactment evinces an unambiguous intent to grant all jurisdictions subject to the preclearance requirements the right to bail out of those requirements through compliance with the statutory conditions. For example, a 2006 House Report noted that "covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so." H.R. Rep. No. 109-478, at 25. The House Report specified that "[t]he expiring provisions of the Voting Rights Act allow *any covered jurisdiction to remove itself from coverage* if it can demonstrate a 'clean record' on discrimination over the previous 10 years." H.R. Rep. No. 109-478, at 93 (emphasis added).

[4] The best evidence of Congress's purpose is the statutory text adopted by both Houses of Congress and signed by the President. *W. Va. Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 98 (1991).

To the extent the district court relied on the statute's actual text, it misread that text to reach a result contradicting Congress's intention of expanding bailout. Until 1982, §4(a) limited bailout eligibility to covered states and separately covered subdivisions. The district court correctly noted that in 1982, Congress expanded eligibility to include "any political subdivision of [a covered] State . . . , though [the coverage] determinations were not made with respect to such subdivision as a separate unit." App.24. Despite the fact that §14(c)(2) is mentioned nowhere in §4(a), the district court concluded that because Congress did not "stop at the comma" but went on to add the phrase "though [the coverage] determinations were not made with respect to such subdivision as a separate unit," Congress meant for the term "political subdivision" to acquire the definition articulated in §14(c)(2). App.24-25.

The district court's interpretation is incorrect because the language following the comma is clarifying rather than limiting. Section 4(a) had previously tied separate coverage to bailout eligibility; so the added language was necessary to clarify that subdivisions within a covered state now had the same right as the separately-covered subdivisions to bail out. The added language simply did not expand the reach of §14(c)(2)—the only possible source of a constricted definition of "political subdivision" that would exclude political subunits like the district. Yet the added language is not mere

"surplusage," App.25, because it serves the vital purpose of clarification. Had Congress wished to limit §4(a) to those subdivisions defined by §14(c)(2), Congress could have easily rewritten the statute to that effect. Because Congress did not, Congress's express statutory intent was only to extricate the concept of separate coverage from the requirements for bailout eligibility, not to abrogate the Court's cabining of §14(c)(2)'s definition of "political subdivision." Because the 2006 and 1982 enactments intended to expand access to bailout, the statute cannot be interpreted so as to make bailout an unworkable and rarely used process.

B. The District Court's Interpretation of §4(a) Cannot Stand Alongside Its Further Conclusion That §5 Is a Constitutional Exercise of Congress's Remedial Power.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," it is the Court's duty "to adopt the latter." *United States ex rel. Attorney Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). Rather than adopting a "reasonable construction"—indeed, the only construction that can be squared with the text, judicial precedent, and congressional purpose—that might "save [the] statute from unconstitutionality," *Hooper* v. *California*, 155 U.S. 648, 657 (1895), the district court adopted an

interpretation fraught with constitutional concerns. Simply put, the district court's interpretation makes bailout legally and practically unachievable for the vast majority of covered jurisdictions, exacerbating the overinclusiveness that contributes to §5's being an unconstitutional exercise of remedial power. At a minimum, the Court should reject the district court's constriction of the bailout statute, which makes bailout unavailable to the district and thousands of other entities, including most counties covered by §5.

As discussed further below, the district court's holding on §5's constitutionality conflicts with the Court's consistent view that Congress has the power to enforce prophylactic remedies under the Fourteenth or Fifteenth Amendments only to the extent the statute maintains "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S., at 518. The 2006 enactment of §5 reimposed without significant modification a decades-old prophylactic remedy that in no way matched the scope of the injury it purported to remedy upon numerous jurisdictions with no history of VRA violations within the past 30 years. The statute would be irretrievably overbroad and unconstitutional if bailout were restricted only to counties, parishes, and entities that register voters, denying recourse to the thousands of municipalities and special-purpose districts otherwise qualified to escape preclearance. The concern that the statute is not congruent and proportional might, however, be

somewhat diminished if all jurisdictions with clean records can bail out. See *Boerne*, 521 U.S., at 533. But the district court adopted an interpretation ensuring §5 remains far too broad and incongruent to withstand constitutional scrutiny.

Restricting bailout eligibility to a county level makes bailout practically unworkable and unachievable in most States, including Texas. A county seeking bailout must prove that every city, town, school district, or other governmental entity within its boundaries has, for ten years, fully complied with all statutory conditions for bailout. Under the district court's interpretation, for the district to bail out, Travis County—the county in which the district is geographically located but that has no political control over the district—would have to research the activities of at least 107 geographically smaller government units for the previous ten years. SJEx.14 at 7. That monumental task would be complicated by the reality that in most states, including Texas, counties have no authority to compel entities like MUDs to comply with preclearance requirements or even to share information with the county about their compliance. See, *e.g.*, Tex. Water Code ch. 54 (providing that MUDs operate under the authority of the State of Texas and that counties have no binding control over a MUD's creation or operation). That Congress provided jurisdictions with a vehicle for bailout means nothing unless Congress also handed over the keys.

Aside from the practical impossibility of bailout under the district court's interpretation, the district court's version of §4(a) heightens the federalism burden inherent in the preclearance-bailout regime by impermissibly reordering state government. Specifically, under the district court's interpretation, §4(a) interposes Travis County between the district and the State of Texas—the district's only supervisory authority under state law.

That a few jurisdictions have achieved bailout is no indication that the district court's version of §4(a) is sufficiently robust to render §5 a congruent and proportional remedy. Rather, the fact that bailout has been achieved only by fourteen jurisdictions, all in Virginia, demonstrates the practical impossibility of bailing out for the majority of covered counties outside Virginia. Unlike most States, Virginia uniquely structures its local government so that counties and independent cities contain few, if any, smaller governmental units. See Va. Code §15.2-1500(A). Nothing in the legislative history or text of the 1982 or 2006 enactments suggests that Congress intended the bizarre result that bailout be a remedy exclusive to Virginia.

Moreover, the suggestion that Congress could not have intended to make entities like the district eligible for bailout because permitting non-county political subdivisions to seek bailout would create a crushing number of filings proves too much. If thousands of political subdivisions in covered jurisdictions can satisfy the bailout requirements,

justice—and the Constitution—demand that they be entitled to bailout. Further, the prospect of numerous small entities petitioning for bailout one at a time is not nearly as farfetched or judicially onerous as that of a State seeking bailout on behalf of all the thousands of jurisdictions within its borders at one time, which §4(a) indisputably contemplates.

II. IN ANY EVENT, §5'S PRECLEARANCE REQUIREMENT CANNOT CONSTITUTIONALLY BE APPLIED TO THE DISTRICT.

A. The District Court's Confusion over the Proper Standard for Reviewing Congress's 2006 Reenactment of §5 Demonstrates the Need for the Court to Confirm the Standard for Legislation Enforcing the Fourteenth and Fifteenth Amendments.

In 1966, the Court upheld the original enactment of §5 as "an uncommon exercise of congressional power" justifiable as an extraordinary response to an extraordinary problem employing "legislative measures not otherwise appropriate." *Katzenbach*, 383 U.S., at 334. A scant 14 years later, the Court refused to overrule *Katzenbach*'s holding that the original enactment of §5 was constitutional in light of the extraordinary circumstances that *Katzenbach* had found essential to that determination. *City of Rome* v. *United States*, 446 U.S. 156, 174-178 (1980). At the same time, it upheld a modest seven-year extension of §5 given Congress's findings that progress in

the ten years since the Voting Rights Act's original passage had been "limited and fragile." *Id.*, at 180-181.

The Court has subsequently elaborated on its test for evaluating whether an act is an appropriate exercise of Congress's powers to remedy and prevent state violations of rights secured by the Reconstruction Amendments. Drawing explicitly on *Katzenbach*'s analysis of Congress's "remedial" powers under §2 of the *Fifteenth* Amendment, *Boerne*, addressing the substantively identical §5 of the *Fourteenth* Amendment, articulated a more refined methodology for making that determination. *Boerne*, 521 U.S., at 519-520; see also *id.*, at 525-527. Specifically, *Boerne* explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," *id.*, at 520, and laid down a three-step analytical process for courts to follow in determining the constitutional validity of prophylactic legislation enacted pursuant to §5 of the Fourteenth Amendment or §2 of the Fifteenth Amendment, see, *e.g.*, *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368, 372 (2001).

The Court should use this case to confirm that one standard applies to enactments under the Fourteenth or Fifteenth Amendments and that core federalism principles require rigorous adherence to that standard. Emboldened by the fact that the Court has not expressly applied the congruence-and-proportionality test to a Fifteenth Amendment enactment after *Boerne*, the district court proceeded

to analyze preclearance's constitutionality from two fatally flawed premises. First, ignoring that *Boerne* expressly relied on, affirmed, and elaborated on *Katzenbach*'s analysis, the district court imagined the two cases imposed completely different standards. Relatedly, ignoring that *Boerne*'s Fourteenth Amendment analysis relied on *Katzenbach*'s Fifteenth Amendment analysis, the court concluded that *Katzenbach*'s purportedly different and presumably less stringent standard applied to Fifteenth Amendment enforcement powers.

Mistakenly viewing *Katzenbach* and *Boerne* as "articulat[ing] two distinct standards for evaluating the constitutionality of laws enforcing the [Reconstruction] Amendments," App.32, the district court gave three reasons for applying what it saw as *Katzenbach*'s "earlier and less demanding test," App.33, rather than the purportedly "more restrictive congruence and proportionality test" of *Boerne*, App.46. First, the court asserted that *Boerne* and cases following it "never state that *Katzenbach*'s and *City of Rome*'s more deferential standard no longer governs constitutional challenges to statutes aimed at racial discrimination in voting." App.46. Second, the court believed that "the basic concerns animating the *City of Boerne* cases do not apply to legislation designed to prevent racial discrimination in voting." App.47. Finally, it viewed *Boerne*'s elaboration of the *Katzenbach* standard as limited to legislation enacted pursuant to §5 of the Fourteenth Amendment and

simply inapplicable to measures like the VRA enforcing the Fifteenth Amendment. App.50-55.

None of those reasons provides a valid basis for refusing to apply the congruence-and-proportionality standard this Court has mandated for evaluating congressional power to enforce the guarantees of the Reconstruction Amendments. First, as already discussed, the congruence-and-proportionality test is not a "distinct standard" in opposition to *Katzenbach*'s more deferential one, App.32-33, but rather a further elaboration of the same standard. Second, because §5 sweeps far beyond the purposeful discrimination necessary to violate either the Fifteenth or Fourteenth Amendments to ensnare and preempt a massive number of constitutionally benign state voting enactments, it poses precisely the risk addressed by *Boerne*, that in enacting prophylactic legislation to prevent and remedy purported violations, Congress would instead rewrite the substantive scope of the Reconstruction Amendments. See *Boerne*, 521 U.S., at 519 ("Congress does not enforce a constitutional right by changing what the right is."). The district court's contrary conclusion rests on an overly broad view of the purportedly unconstitutional conduct §5 prevents—"racial discrimination," rather than *purposeful* racial discrimination—and a conflation of §5 with the entirety of the VRA. App.48-49. And finally, the Court has never indicated that the congruence-and-proportionality test is not equally applicable to both the Fourteenth and Fifteenth

Amendments. See *Garrett*, 531 U.S., at 373, n.8; *Boerne*, 521 U.S., at 518; see also *Lopez*, 525 U.S., at 294, n.6 ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive.").

This case presents the perfect vehicle for the Court to confirm beyond equivocation, for the guidance of Congress and the lower courts, that its well-elaborated congruence-and-proportionality standard applies to Congress's remedial enactments under either amendment. Further, this case provides the opportunity to make clear that the test applies with unmitigated force to a new enactment of a previously enacted remedial provision, especially when the temporary, "emergency" nature of the provision's previous incarnations was critical to the Court's finding those enactments were congruent and proportional remedies.

B. The 2006 Enactment of §5 Does Not Satisfy the Congruence-and-Proportionality Standard.

In addition to clarifying that the standard elaborated in *Katzenbach*, *Boerne*, and their progeny is a single standard that applies to §5, the Court should hold that the 2006 reenactment of §5 does not satisfy that standard. The Court has repeatedly held that when Congress legislates to enforce the Reconstruction Amendments it may not rewrite their substantive scope. The distinction between

"prophylactic legislation" that purports to preempt or remedy constitutional violations and "substantive redefinition of the . . . right at issue" must be respected. *Kimel* v. *Fla. Board of Regents*, 528 U.S. 62, 81 (2000); see *Boerne*, 521 U.S., at 520.

For prophylactic legislation to constitute a valid exercise of congressional power, rather than an invalid redefinition of constitutional rights, Congress must "identify conduct transgressing the . . . substantive provisions" it seeks to enforce and "tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid Postsecondary Educ. Expense Board* v. *Coll. Sav. Bank*, 527 U.S. 627, 639 (1999). To justify prophylactic legislation under that standard, Congress must compile a "legislative record" that demonstrates a "history and pattern" of constitutional violations of the right Congress purports to enforce. *Garrett*, 531 U.S., at 368; accord *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 729 (2003). Considered in light of that record, the legislative measures selected must not be "so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S., at 532. Put most simply, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

In decisions elaborating the congruence-and-proportionality standard after *Boerne*, a three-part process has emerged for

evaluating congressional action to enforce the Reconstruction Amendments. First, a reviewing court must identify the "metes and bounds of the constitutional right in question," *Garrett*, 531 U.S., at 368, with "some precision," *id.*, at 365. Then, the court must ask "whether Congress identified a history and pattern," *id.*, at 368, of "widespread and persisting deprivation[s]" of the relevant right, *Boerne*, 521 U.S., at 526. Finally, the court must determine whether the statutory remedy is congruent and proportional to the constitutional right Congress purports to enforce. *Garrett*, 531 U.S., at 372.

1. Section 5 Is Not Appropriate Prophylactic Legislation If It Is Not Congruent and Proportional to Violations of the Right to Be Free of Purposeful Discrimination in Voting.

In reenacting §5 in 2006, Congress clearly stated its purpose was "to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution." Pub. L. No. 109-246, §2(a), 120 Stat. 577. The Fifteenth Amendment sets forth the basic guarantee of the constitutional right to vote free of discrimination: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The substantive right guaranteed by the Fifteenth Amendment and invoked by Congress in reauthorizing the VRA is one only against "purposefully discriminatory denial or abridgment by government of the freedom to vote." *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980) (plurality op.). To the extent the VRA could also be justified as legislation enforcing a distinct guarantee of the Equal Protection Clause of the Fourteenth Amendment, the substantive right protected by that constitutional guarantee is likewise against purposeful, governmental racial discrimination. See *id.*, at 66; *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993). In either case, the constitutional violations for which §5 could be justified as either prophylaxis or remedy require *purposeful* discrimination, that is, measures implemented with both the intent and effect of denying access to the ballot because of the voter's race or color.

Section 5—by design—sweeps far beyond such direct violations of the Fifteenth and Fourteenth Amendment guarantees. Section 5 is paradigmatic prophylactic legislation, preventing enforcement of unconstitutional voting changes before any voter's rights are violated by prohibiting covered governmental entities from putting into practice any changes to voting laws or practices without prior federal approval. See *Connor* v. *Waller*, 421 U.S. 656, 656 (1975) (*per curiam*). But only a vanishingly small proportion of enactments subject to preclearance is found to abridge the right to be free from discrimination in voting; the vast majority of activity

triggering §5's preclearance requirement is constitutionally benign.

In order to justify this massive overbreadth in light of §5's clear intrusion onto traditional state legislative prerogatives, Congress had to adduce a legislative record sufficient to demonstrate a nexus between requiring thousands of covered jurisdictions to seek federal permission for every change affecting voting, however minute, though virtually all such changes will be found benign, and preventing purposeful discrimination in voting based on race or color. Congress did not do so.

2. In Reenacting §5, Congress Failed to Identify Relevant Constitutional Violations Sufficient to Form a History or Pattern of Discrimination.

The §5 prophylaxis "stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws." Persily, Promise, *supra*, at 177. It injects the federal government directly into the heart of the legislative and administrative processes of state and local governments, imposing a presumption of constitutional guilt on broad swaths of the country to preempt state and local legislative acts. No other provision judged under the congruence-and-proportionality standard has ever reached so far; the invasion of state sovereign

interests worked by §5 is far deeper than a mere abrogation of sovereign immunity or prescription of standards of conduct by state governments. To justify such extremity and its extension for another 25 years, one might anticipate Congress would seek to provide evidence of present-day actions by state and local governments that show the continued existence of the extraordinary circumstances that *Katzenbach* held necessary to support the initial imposition of §5 for only five years. Congruence and proportionality may not require that conditions in 2006 exactly mirrored those in 1965, but Congress needed some evidence before it that circumstances were at least remotely similar. See *Garrett*, 531 U.S., at 369. The record compiled by Congress in passing the 2006 reauthorization of §5, however, while voluminous, is woefully inadequate to satisfy the constitutional standard.

Most importantly, justifying §5 as a remedy requires no mere showing that discrimination in voting continues to exist. Showing that this uniquely broad and intrusive prophylactic is *tailored* to constitutional violations, see *Fla. Prepaid*, 527 U.S., at 639, requires showing the persistence of a particular type of conduct—specifically, a type of gamesmanship that once made case-by-case adjudication of voting-rights violations impracticable in some regions. As *Katzenbach* explained, §5 is not targeted to discriminatory conduct in general but to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating

voting discrimination in the face of adverse federal court decrees." 383 U.S., at 335. That is, "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer* v. *United States*, 425 U.S. 130, 140 (1976). The 1965 Congress that enacted the first §5, in other words, confronted a constitutional "game of Whac-A-Mole," in which new violations popped up as soon as the Department of Justice tamped old ones down. Transcript of Oral Argument at 47, *Riley* v. *Kennedy*, 128 S.Ct. 1970 (2007) (No. 07-77) (argument by Pamela S. Karlan). It is only circumstances in which case-by-case adjudication cannot be relied upon to break a vicious cycle of unconstitutional state conduct that could justify abandoning the traditional concept of prosecuting constitutional violations when they ripen in favor of a preemptive federal veto of all related state enactments. See *Beer*, 425 U.S., at 140. Yet the record compiled by Congress actually negates the existence of such extraordinary circumstances, demonstrating, for example, that in many covered jurisdictions minority registration and turnout rates exceed both national averages and rates for white citizens. See S. Rep. No. 109-295, at 8 (2006); H.R. Rep. No. 109-478, at 12 (2006).

The 2006 congressional record simply contains no hint of pervasive, persistent gamesmanship within covered jurisdictions like that found to prevail before 1965. Even the handful of anecdotes identified by

defendants below are little evidence of even an isolated "extraordinary stratagem of contriving new rules," *Katzenbach*, 383 U.S., at 335, but rather isolated examples of the unextraordinary "stratagem" of trying to commit the same mistake repeatedly.

Neither racially polarized voting, which Congress viewed as "the clearest and strongest evidence" of "continued resistence [*sic*] within covered jurisdictions to fully accept[ing] minority citizens and their preferred candidates into the electoral process," H.R. Rep. No. 109-478, at 34, nor objections or information requests by the Department of Justice in response to preclearance submissions evidences a pattern of widespread and persisting constitutional violations relevant to the §5 remedy. Racially polarized voting, which is not state action, see *Rogers* v. *Lodge*, 458 U.S. 613, 647, n.30 (1982) (Stevens, J., dissenting), differs drastically from the plethora of pre-1965 procedural barriers that were used to deny the right to vote and is not remedied by §5 in any event. And because of the miniscule rate of objections and the significant increase in the number of submissions over time, there is "very little in the DOJ evidence that Congress could use to support a case for a renewed Section Five." Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane, 66 Ohio St. L.J. 177, 193 (2005). Nor, finally, does the handful of isolated examples of actual purposeful discrimination peppering the congressional record demonstrate the gamesmanship that §5 nominally addresses because

these instances are generally widely separated in time, involve easily preventable repetition of already objected-to conduct rather than bad-faith attempts to stay one step ahead of federal court decrees, or both. Put simply, although Congress found that racially polarized voting and other "second generation" barriers to full minority participation in voting still exist and that certain vestiges remain of the discrimination previous Congresses found, see Pub. L. No. 109-246, §2(b)(2), §§3-4, 120 Stat. 577, in 2006, Congress did not find that the same level of "first generation" barriers still exist or, more importantly, that any covered or noncovered entities have recently engaged or are likely to engage in the kind of discriminatory gamesmanship on which the original passage of §5 was grounded and to which the Court has looked in upholding the constitutionality of §5's prior enactments.

3. Section 5 Is Neither a Congruent nor Proportional Response to the Few Relevant, Congressionally Identified Violations of the Rights §5 Purports to Enforce.

"The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U.S., at 530. And the pervasiveness of even the same harm may change over time and must be assessed as of the most recent congressional

enactment of the remedial provisions. See *Garrett*, 531 U.S., at 369, n.6; *Boerne*, 521 U.S., at 530. Thus, the constitutionality of the 2006 reenactment of §5 is not settled by the Court's determinations in *Katzenbach* and *Rome* that prior incarnations of the measure were constitutionally enacted in 1965 or 1975. Nor does the Court's approbation of Congress's 1965 and 1975 actions in *Boerne* and subsequent cases suggest that the congressional authority to reenact and extend §5 in 2006 is a settled question. Rather, the constitutionality of Congress's 2006 enactment of §5 must be evaluated on its own terms, in light of conditions as they were at the time of Congress's passage of the reauthorization act, against the tailoring requirements of congruence and proportionality.

a. The Reenacted §5 Is Neither Geographically Targeted to Reach Actual Violations nor Otherwise Congruent to the Present-Day Contours of Voting Discrimination.

Congruence under *Boerne* evaluates the correspondence or tailoring of a legislative measure like §5 to the scope of the harm it seeks to address. But §5, reenacted without any revisiting of its coverage formula in light of present-day circumstances, is tailored only to the pattern of constitutional violations that existed in the 1960s and 1970s. The coverage of §5, determined by a formula initially crafted forty-one years before Congress's

reenactment, bears no more meaningful relationship to the problem of voting discrimination as it existed in 2006 than if Congress had decided covered jurisdictions by playing pin-the-tail-on-the-donkey.

In 1965 and 1975, the timeliness of the statistical proxies that govern §5's coverage formula—namely, voter registration and turnout, coupled with the use of literacy tests or other devices to bar minority voters—provided a meaningful geographic restriction, confining §5's effect "to those regions of the country where voting discrimination had been most flagrant." *Boerne*, 521 U.S., at 532-533. But literacy tests and other such devices have not been used by any jurisdiction in decades and are permanently and validly banned. 42 U.S.C. §1973*aa*. Worse, Congress's use of the same 34-years-stale registration and turnout figures to define the coverage formula applicable to the 2006 reenactment of §5 transforms that formerly meaningful geographic restriction into an arbitrary and meaningless one. And the divergence between the formula and present circumstances grows wider each day. Notably, this coverage formula will reach the venerable age of 66 before it next expires. See 42 U.S.C. §1973*b*(a)(8).

But Congress in 2006 made no serious effort to determine if proxy measurements of voting registration and turnout based on data gathered no later than 1972 bore any relation to conditions prevailing in the United States in 2006. Had Congress attempted to use comparable data from the 2000 and 2004 election cycles, the contours of the §5

remedy would differ drastically, particularly if the coverage formula took account of localized, rather than merely statewide, conditions. See 152 Cong. Rec. H5180 (daily ed. July 13, 2006) (statement of Rep. Norwood). Nor did Congress engage in any meaningful comparison between jurisdictions covered prior to 2006 and noncovered jurisdictions; its findings were limited instead to generalized, conclusory statements regarding "the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982." Pub. L. No. 109-246, §2(b)(5), 120 Stat. 577. Congress accordingly had no reasonable basis to conclude that jurisdictions identified by the coverage formula and subjected to the burdens of preclearance are any worse with respect to the constitutional right at issue than those jurisdictions that are not.

b. Section 5 Is Overly Intrusive in Proportion to the Volume and Intensity of Relevant Violations and Lacks Any Meaningful Time or Scope Limitations.

Congress clearly possesses "authority both to remedy and to deter violation of rights guaranteed [by the Reconstruction Amendments] by prohibiting a somewhat broader swath of conduct" than is directly forbidden by the Constitution. *Kimel*, 528 U.S., at 81. But while not every instance of remedial legislation "requires termination dates, geographic restrictions, or egregious predicates," nevertheless, when "a

congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate" under the Reconstruction Amendments. *Boerne*, 521 U.S., at 533. Section 5 has precisely such a pervasively prohibitory effect—it does not merely prohibit some voting changes that are constitutionally benign; it requires *all* changes affecting voting, broadly conceived, to be vetted by the federal government before enforcement.

Against the facts that the vast majority of activity it reaches is not unconstitutional, and that what proportion it does reach is already prohibited by §2 of the VRA, is weighed the substantial burden on constitutional values of federalism and state authority over law- and policymaking processes that lie at the very heart of the States' status as sovereign entities. Section 5 simply has no parallel as an intrusion by the federal government into the sovereignty reserved to the States in the constitutional structure. And in light of the dramatic overbreadth of its effect on constitutional enactments by state and local governments, §5 as a remedy is out of all proportion to the instances of purposeful discrimination in voting, and specifically to the nonexistent instances of modern gamesmanship in state voting laws directed at avoiding obligations imposed by the Fifteenth Amendment, that were

identified by Congress in passing the 2006 reauthorization act.

This disproportion is aggravated by the absence of any significant limitation on §5's sweep. Although §5 is geographically restricted, its arbitrarily defined coverage formula renders this limitation incongruent to present-day problems. Equally problematic, the interpretation of §4(a)'s bailout provision indulged by the district court would make bailout impossible for the vast majority of covered jurisdictions, see App.20-30, making illusory a feature the Court has previously viewed as a critical safety valve in analyzing §5's constitutionality, see *Boerne*, 521 U.S., at 533.

Nor does it appear that Congress any longer regards §5 as the temporary emergency measure it was originally enacted to be. Although the 2006 reenactment purports to set a date terminating §5's burden on state and local governments 25 years later, this is the second 25-year extension and the fourth extension overall. In aggregate, the original five-year response to the emergency circumstances of 1965 has been extended by an additional six decades, and if the anemic record Congress relied upon to justify reenactment of §5 in 2006 is held sufficient, there is no reason to believe Congress would not simply extend its lifespan in quarter-century increments in perpetuity.

If §5 may be perpetually renewed based on ever-more-stale evidence while jurisdictions like the

district remain unable to escape preclearance in any achievable manner, §5, like RFRA before it, effectively "has no termination date or termination mechanism." *Boerne*, 521 U.S., at 532. Section 5, as reenacted by Congress in 2006, is thus unconstitutionally disproportionate to the record compiled by Congress.

C. Even If Rational-Basis Review Were the Proper Standard for Evaluating Congressional Efforts to Enforce the Fifteenth Amendment, §5 Remains Constitutionally Inadequate.

Even adjudged under the district court's incorrect conception of the "less demanding" standard *Katzenbach* provides for reviewing legislation enforcing the Fifteenth Amendment, App.33, the 2006 reenactment of §5 exceeded Congress's authority. As detailed above, the 2006 Congress had no evidence of a pattern of "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees," *Katzenbach*, 383 U.S., at 335, like that amassed by Congress in 1965. Further, even if the preclearance mechanism could be viewed as a rational means of preventing generalized purposeful discrimination in voting on the basis of race or color, the scope of its 2006 application is arbitrary and irrational because the decades-stale data underlying the original coverage

formula bear no relation whatsoever to present-day conditions.

Given Congress's failure to make any meaningful comparison between present-day conditions in covered and noncovered jurisdictions, Congress had no basis derived from any rational deliberation for its evident and wrongly held belief that statistics on state and local voter registration and turnout in the 1968 and 1972 presidential elections could identify pockets of voting discrimination persisting in modern America or could exclude from §5's ambit anything close to a preponderance of jurisdictions in which such discrimination is not present. Because the 2006 reenactment of §5 perpetuated this arbitrary and irrational nationwide pattern of its application to state and local governments, §5 fails to pass muster even under the rational-basis standard of review incorrectly selected by the district court.

CONCLUSION

For these reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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