No. 08-322

In the Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE, APPELLANT

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL, ET AL.

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

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant, a municipal utility district, is statutorily eligible to bail out of coverage under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether Congress permissibly exercised its authority under the Fifteenth Amendment when it reauthorized Section 5 in 2006 after determining that covered jurisdictions continue to discriminate against minority voters and that Section 5 remains effective in preventing and remedying such discrimination.

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OPINION BELOW

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

JURISDICTION

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

STATEMENT

1. Congress enacted the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973 *et seq.*, in order "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for

nearly a century." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the VRA, 42 U.S.C. 1973, sets out a basic prohibition on discrimination: It makes it unlawful for any State to impose a "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a).

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

Like several other provisions of the VRA, Section 5 is limited both geographically and temporally, and it applies only to "areas where voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. at 315. Specifically, Section 5 applies only to "covered jurisdictions," which were originally defined as those jurisdictions that, as of November 1, 1964, employed a "test or device" to restrict voting (such as a literacy test), and in

which fewer than 50% of voting-age residents were registered to vote as of that date or actually voted in the presidential election that year. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 438; see 28 C.F.R. Pt. 51 App. (listing covered jurisdictions). In 1975, Congress amended the coverage formula to include jurisdictions with a demonstrated history of discrimination against language-minority voters. See Act of Aug. 6, 1975 (1975 Amendments), Pub. L. No. 94-73, §§ 201 *et seq.*, 89 Stat. 400.

Since its enactment, the VRA has included a mechanism under which certain jurisdictions covered by Section 5 may bring a declaratory-judgment action in the District Court for the District of Columbia in order to terminate their coverage. See VRA § 4(a), 79 Stat. 438. Congress has reviewed and amended that "bailout" mechanism on various occasions. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 315; 1975 Amendments § 101, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization), Pub. L. No. 109-246, § 5, 120 Stat. 580. The current "bailout" provision permits certain covered jurisdictions, including political subdivisions, to escape Section 5 coverage if they can demonstrate that they have not discriminated against minority voters during the previous ten years. 42 U.S.C. 1973b(a). The VRA defines a "political subdivision" to be "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. 1973*l*(c)(2).

Congress most recently reexamined the VRA in 2006. It found that, as "a direct result of" the VRA, "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters." 2006 Reauthorization § 2(b)(1), 120 Stat. 577. Nevertheless, "vestiges of discrimination in voting continue to exist," and in the absence of continued enforcement of Section 5, "racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their vote diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(2) and (9), 120 Stat. 577, 578. Congress therefore reauthorized Section 5, but it enacted a sunset clause that will eliminate Section 5 coverage in 25 years. § 4, 120 Stat. 580.

2. Appellant is a municipal utility district in Travis County, Texas, that conducts elections to select the members of its board of directors. J.S. App. 18. Because the State of Texas is a covered jurisdiction, appellant is subject to the preclearance requirements of Section 5. See 28 C.F.R. Pt. 51 App.; 28 C.F.R. 51.6.

Eight days after Congress reauthorized Section 5 in 2006, appellant brought this action in the United States District Court for the District of Columbia, seeking permission to bail out of coverage under Section 5, or, in the alternative, a declaration that Section 5 is unconstitutional. J.S. App. 19. As required by 42 U.S.C. 1973b(a)(5), a three-judge district court was convened to hear appellant's claims. Several individuals and entities intervened as defendants in the case, and the parties filed cross-motions for summary judgment. J.S. App. 19-20.

3. After hearing oral argument, the three-judge district court granted summary judgment to appellees.

J.S. App. 1-183. The court first rejected appellant's claim that it was statutorily eligible to bail out of Section 5 coverage. *Id.* at 20-30. The court noted that only States and their "political subdivisions" may seek bailout, and it determined that the statutory definition of the term "political subdivisions" includes only counties or other local governmental entities that conduct voter registration when counties do not. *Id.* at 21; see 42 U.S.C. 1973c. Since appellant is not a county and the county conducts voter registration, J.S. App. 22, the court determined that it could not bail out of Section 5 coverage.

The district court then considered appellant's argument that Congress exceeded its constitutional authority when it reauthorized Section 5. J.S. App. 30-153. The court found at the outset that this challenge was essentially facial in nature as raised in this case. *Id.* at 31-32, 144. The court then recognized that this Court "has articulated two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." *Id.* at 32. In *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997), the Court held that when Congress exercises its authority to enforce the Fourteenth Amendment, see U.S. Const. Amend. XIV, § 5, there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." And in *Katzenbach*, the Court set out a more deferential standard for evaluating Congress's exercise of its Fifteenth Amendment authority to protect voting rights: "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S. at 324; accord *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999); see U.S. Const. Amend. XV, § 2.

The district court concluded that *Katzenbach* provided the appropriate standard for evaluating the continuing validity of Section 5. J.S. App. 45. After engaging in a thorough review of the "massive amount of evidence Congress collected," the court stated that there was "no doubt that despite the 'undeniable' political progress made by minorities, 'Congress could rationally have concluded' that it was necessary to extend section 5." *Id.* at 118 (quoting *City of Rome* v. *United States*, 446 U.S. 156, 177, 181 (1980)). The court went on to determine that, under the *City of Boerne* congruence-and-proportionality standard, Congress had acted within its constitutional authority as well when it reauthorized Section 5. *Id.* at 118-144.

ARGUMENT

The constitutionality and scope of Section 5 of the VRA is undeniably important, but the three-judge district court's unanimous, correct, and careful disposition of the questions presented does not warrant plenary review here. The district court's conclusion that appellant is not statutorily eligible to terminate its Section 5 coverage is mandated by the text and history of the VRA's bailout provision as well as the Attorney General's longstanding interpretation of that provision. The court's determination that Congress acted within its constitutional authority when it reauthorized Section 5 in 2006 is also correct. Congress collected extensive evidence demonstrating that discrimination against minority voters continues to exist in covered jurisdictions and that Section 5 remains an effective means of preventing, deterring, and remedying that discrimination. Congress's factual findings are entitled to substantial deference, see *Turner Broad. Sys.* v. *FCC*, 520 U.S. 180,

195-196 (1997), and the three-judge district court carefully reviewed and upheld those findings. The facial nature of appellant's attacks on the constitutionality of Section 5 (see J.S. App. 31-32) also increases the burden that appellant shoulders in seeking to invalidate Section 5 and reinforces the validity of the district court's conclusion in this case. Accordingly, this Court should summarily affirm the judgment of the district court.

A. Appellant Is Statutorily Ineligible To Bail Out Of Section 5 Coverage

1. Section 4(a) of the VRA, 42 U.S.C. 1973b(a), permits three types of jurisdictions to bail out of Section 5 coverage: (1) States designated for coverage in their entirety under the Act's coverage formula, (2) counties separately designated for coverage, and (3) "any political subdivision of [a covered] State * * * though such [coverage] determinations were not made with respect to such subdivision as a separate unit." 42 U.S.C. 1973b(a)(1). Appellant insists (J.S. 10-23) that it is a "political subdivision" of Texas and therefore qualifies under the third component of the bailout provision. That is incorrect. Section 14(c)(2) of the VRA defines the phrase "political subdivision" to be "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. 1973*l*(c)(2). Appellant admits (J.S. 6-7) that it is not a county or a parish and that the county conducts voter registration. Appellant therefore is not a "political subdivision," and the district court correctly held that it is ineligible to seek bailout. J.S. App. 20-30.

Appellant claims (J.S. 11) that the VRA's statutory definition of "political subdivision" does not apply to Section 4(a) because, in its view, the definition is "relevant only to determining which jurisdictions may be targeted for separate coverage." Appellant offers no textual support for that view, and it is inconsistent with the settled rule that, when a statute specifically defines a particular term, that definition is controlling for purposes of that statute. See *Burgess* v. *United States*, 128 S. Ct. 1572, 1577 (2008).

2. The text of the VRA unambiguously compels the district court's interpretation, and there is accordingly no need to proceed further. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001). But in any event, the legislative history reinforces what is apparent from the VRA's plain language. As originally enacted, the VRA permitted only two types of jurisdictions to bail out of Section 5 coverage: States designated for coverage in their entirety, and counties separately designated for coverage. VRA § 4(a), 79 Stat. 438. In 1982, Congress amended the bailout provision by expanding the substantive standard for bailout and by expanding the number of jurisdictions eligible to apply for a bailout to include "political subdivisions" within wholly covered States. 42 U.S.C. 1973b(a).

The legislative history of the 1982 amendments confirms that the newly added category of jurisdictions eligible to apply for bailout includes only jurisdictions in fully covered States that satisfy Section 14(c)(2)'s definition of "political subdivision." The committee reports explained that "[t]he standard for bail-out is broadened to permit political subdivisions, *as defined in Section 14(c)(2)*, in covered states to seek bail out although the state itself may remain covered." H.R. Rep. No. 227,

97th Cong., 1st Sess. 2 (1981) (*1981 House Report*) (emphasis added); accord S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982) (*1982 Senate Report*). The committees consistently described the jurisdictions newly eligible to seek bailout as "counties" in fully covered States, see *1981 House Report* 32; *1982 Senate Report* 44; *id.* at 45, 57, 60, and contemplated that jurisdictions smaller than counties could seek bailout only when counties did not conduct voter registration, see *1981 House Report* 39; *1982 Senate Report* 69. Indeed, the reports explained that Congress had specifically decided not to permit jurisdictions smaller than counties to bail out because of the burden that could result from the filing of thousands of such cases. See *1982 Senate Report* 57 n.192 ("Towns and cities within counties may not bailout separately" because, "[a]s a practical matter * * * we could not expect that the Justice Department or private groups could remotely hope to monitor and to defend the bailout suits."); see *id. at* 69; *1981 House Report* 41.

Appellant attempts (J.S. 16 n.3) to dismiss the 1982 legislative history as "inconclusive," and it notes (J.S. 17) that a few general passages in the 1982 legislative history and the subsequent 2006 legislative record suggested that bailout was encouraged. As the district court noted, however, none of the passages cited by appellant "even hints that political subdivisions outside section 14(c)(2)'s definition would qualify for bailout." J.S. App. 26. There is no reason to depart from the statute's plain language.

3. The district court's interpretation of Section 4(a) is also consistent with regulations adopted by the Attorney General to implement the VRA. Those regulations provide that, aside from fully covered States and separately covered counties, only "political subdivisions"—as

defined in Section 14(c)(2) of the Act—within fully covered States may apply for bailout. 28 C.F.R. 51.2, 51.5. The regulations reflect an interpretation of the statute that is entitled to "substantial deference." *Lopez*, 525 U.S. at 281. Moreover, Congress was aware of the Attorney General's interpretation of Section 4(a) when it reauthorized the VRA in 2006, yet it made no change to that portion of the statute. J.S. App. 27-28. In reauthorizing the VRA, Congress should be presumed to have been aware of and endorsed the existing administrative interpretation that bailout is limited to States, counties, and statutorily defined "political subdivisions." See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

4. In support of its argument that this Court should ignore the statutory definition of "political subdivision," appellant principally relies (J.S. 12-14) on this Court's decisions in *United States* v. *Board of Commissioners*, 435 U.S. 110 (1978) (*Sheffield*), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978) (*Dougherty County*). Neither case dealt with the bailout provision at all, let alone held that the definition of "political subdivision" in Section 14(c)(2) does not apply to the portion of the statute governing bailout. Moreover, as explained above, the relevant portion of Section 4(a) was not even added to the statute until 1982, four years after those cases were decided. Thus, the cases shed no light on the question presented here.

In both *Sheffield* and *Dougherty County*, the Court considered the extent to which jurisdictions located within fully covered States are subject to the preclearance requirement of Section 5. Section 5 requires any covered "State or political subdivision" to preclear all changes affecting voting, 42 U.S.C. 1973c, and the defendant jurisdiction in each case argued that it was nei-

ther a "State" nor a "political subdivision." *Sheffield*, 435 U.S. at 117; *Dougherty County*, 439 U.S. at 43-44. The Court in *Sheffield* rejected that argument—but *not*, as appellant suggests (J.S. 12-13), based on a conclusion that Section 14(c)(2)'s definition of "political subdivision" did not apply to Section 5. Instead, for purposes of establishing Section 5's coverage, the Court held that the term "State," as used in Section 5, "includes political units within it." 435 U.S. at 127; see *id.* at 129 n.17 ("We believe that the term 'State' can bear a meaning that includes all state actors within it."). Indeed, the Court emphasized that "the meaning of the term 'political subdivision' has no operative significance" for that purpose, because "the only question is the meaning of '[designated] State.'" *Id.* at 126 (alteration in original). The Court in *Dougherty County* held the same. 439 U.S. at 44.

Appellant places almost the full weight of its argument on the *Sheffield* Court's passing comment that "Congress's exclusive objective in § 14(c)(2) was to limit the jurisdictions which may be separately designated for coverage under § 4(b)." 435 U.S. at 130 n.18. That statement was dictum because, as noted above, the Court made clear that the meaning of the term "political subdivision" was irrelevant to its holding. Moreover, as the Court observed in *City of Rome*, *Sheffield* "did not even discuss the bailout process" and "did not hold that cities * * * are 'political subdivisions.'" *City of Rome*, 446 U.S. at 167-169 & n.5. In any event, the statement in *Sheffield* cannot be read to preclude the application of Section 14(c)(2) to statutory provisions that did not even exist at the time.

Finally, appellant insists (J.S. 12-23) that the Court must interpret Section 4(a) to permit jurisdictions

smaller than counties to apply for bailout or risk imperiling the constitutionality of Section 5. The canon of constitutional avoidance "has no application in the absence of statutory ambiguity," and, as explained above, Section 4(a) is not ambiguous. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). In any event, reading the statute according to its terms does not raise a serious constitutional question. See pp. 25-27, *infra*.

B. Section 5 Is Constitutional

This Court has upheld the constitutionality of Section 5 on four separate occasions. *Lopez*, 525 U.S. at 282-285; *City of Rome*, 446 U.S. at 177-178; *Georgia* v. *United States*, 411 U.S. 526, 535 (1973); *Katzenbach*, 383 U.S. at 308, 337. When it reauthorized Section 5 in 2006, Congress relied on the same types of evidence establishing the need for the legislation that previous Congresses had relied on in enacting and reauthorizing Section 5—evidence examined and approved by this Court in *Katzenbach* and *City of Rome*. Based on its extensive investigation into the state of voting rights in covered jurisdictions and throughout the country, Congress determined that Section 5 has been effective at preventing, remedying, and deterring some voting discrimination, finding: "Significant progress has been made in eliminating first generation barriers experienced by minority voters," and "[t]his progress is the direct result of the" VRA. 2006 Reauthorization § 2(b)(1), 120 Stat. 577. At the same time, however, Congress also found that, "[d]espite the progress made by minorities under the [VRA], the evidence before Congress reveals that 40 years has not been a sufficient amount of time to elimi-

nate the vestiges of discrimination following nearly 100 years of disregard." § 2(b)(7), 120 Stat. 578.

Based on its meticulous review of the factual record, the three-judge district court correctly held that, under either the *Katzenbach* or the *City of Boerne* standard, the reauthorization of Section 5 was a permissible exercise of Congress's authority under the Fifteenth Amendment and therefore is constitutional on its face. J.S. App. 45. Appellant argues (J.S. 24-25) that this Court should grant plenary review to clarify which of those legal standards courts should use in evaluating Congress's exercise of its Fifteenth Amendment authority. That issue does not warrant this Court's review here, however, because the three-judge district court correctly determined that the reauthorization of Section 5 was constitutional under either the *City of Boerne* standard urged by appellant or *Katzenbach*'s rationality standard. J.S. App. 118-153. The three-judge district court's unanimous upholding of Congress's fact findings, which themselves are entitled to substantial deference, see *Turner Broad. Sys.*, 520 U.S. at 195-196, does not warrant plenary review. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

1. The *City of Boerne* standard requires "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. The first step in that analysis is "to identify with some precision the scope of the constitutional right at issue." *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). Section 5 was enacted as part of an effort to protect the right of all citizens to vote without discrimination on the basis of race or membership in a language minority group. This Court has repeatedly held that the right to vote is "fun-

damental" and is "preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886)). For that reason, classifications affecting the right to vote are subject to strict scrutiny. See *Dunn* v. *Blumstein*, 405 U.S. 330, 337 (1972). And of course all governmental classifications on the basis of race, including any such classifications that deprive individuals of their right to vote, are also subject to strict scrutiny. See, *e.g.*, *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-482 (1997).

In applying the *City of Boerne* standard, this Court has recognized that where, as here, Congress targets conduct that is subject to heightened constitutional scrutiny, it is "easier for Congress to show a pattern of state constitutional violations," and therefore Congress has greater flexibility in crafting appropriate remedies. *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003); *Tennessee* v. *Lane*, 541 U.S. 509, 528-529 (2004); see *id.* at 564 (Scalia, J., dissenting) ("[C]ongressional measures designed to remedy racial discrimination by the States" are reviewed under a "permissive" standard.). As explained below, Congress amassed abundant evidence of constitutional violations, and it crafted a remedy that is congruent and proportional to those violations.

2. Before reauthorizing Section 5, Congress conducted an extensive investigation into the operation of the Voting Rights Act over the previous 40 years. Congress held 22 separate hearings, heard from 86 witnesses, and gathered tens of thousands of pages of evidence. See H.R. Rep. No. 478, 109th Cong., 2d Sess. 5, 11 (2006) (*2006 House Report*); S. Rep. No. 295, 109th Cong., 2d Sess. 2-4 (2006). Realizing that Section 5 had

been in operation for several decades, Congress examined not only the degree to which discrimination against minority voters persists in covered jurisdictions, but also the extent to which Section 5 has been effective at remedying, preventing, and deterring such discrimination. Although Congress recognized that "[s]ubstantial progress has been made" and that "[d]iscrimination today is more subtle than the visible methods used in 1965," it also found that discrimination continues to result in "a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." *2006 House Report* 6. Those findings are amply supported by the record before Congress and are entitled to respect.

a. As detailed in the district court's thorough opinion, Congress found that covered jurisdictions continue to adopt, employ, and perpetuate techniques to suppress and dilute the vote of minority citizens. The record includes evidence of discrimination throughout covered jurisdictions perpetrated at every level of government. For example, since 1982, the Attorney General has interposed more than 750 Section 5 objections to more than 2400 proposed voting changes based on findings that those changes were discriminatory.[*] In response to the Attorney General's request for more information from jurisdictions submitting changes, an additional

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[*] These totals include the number of objections interposed by the Attorney General as well as the number of denials of judicial preclearance by the District Court for the District of Columbia. The Department of Justice tracks the number of individual changes objected to in each objection letter. See *2006 House Report* 21-22; *id.* at 36. A list of the Attorney General's objections can be found at Civil Rights Div., U.S. Dep't of Justice, *About Section 5 of the Voting Rights Act* (visited Nov. 26, 2008) <http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php>.

1100 proposed changes have been abandoned or modified—an outcome that is "often illustrative of a jurisdiction's motives." *2006 House Report* 40; see J.S. App. 81-83; *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 219 (2006) (statement of Luis Ricardo Fraga & Maria Lizet Ocampo, Stanford Univ.).

The Department of Justice has sent thousands of election observers to monitor more than 750 elections in covered jurisdictions based on findings that there is a risk of discrimination against minority voters in those jurisdictions. J.S. App. 103-106; *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. 13 (2006) (*Evidence of Continued Need*) (statement of Bill Lann Lee, Chair, Nat'l Comm'n on the VRA); *id.* at 124 (statement of the Nat'l Comm'n on the VRA). In covered States, plaintiffs have been successful in more than 650 lawsuits under Section 2 of the VRA—that is, lawsuits in which they have shown "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a); see J.S. App. 95; *Evidence of Continued Need* 125-126. Racially polarized voting has continued to pervade elections in covered jurisdictions, and it is more prevalent there than in non-covered jurisdictions. J.S. App. 106-108. Finally, significant gaps in registration rates between minority citizens and white citizens continue to exist in some covered jurisdictions. J.S. App. 59-63; *2006 House Report* 25-34.

Beyond the quantitative evidence, Congress also gathered thousands of pages of testimony and docu-

ments from citizens, advocates, and officials chronicling the ongoing problems of vote suppression, voter intimidation, and vote dilution throughout covered jurisdictions. Examples of vote suppression and voter intimidation presented to Congress in 2006 included several instances of minority voters' being threatened with arrest or prosecution for voting, *Evidence of Continued Need* 3619-3620, 3979 (statements from reports of Nat'l Comm'n on the VRA), poll workers' telling language-minority voters that they should not be voting if they do not speak English, *id.* at 350, 3980 (statements from reports of Nat'l Comm'n on the VRA), large-scale efforts to challenge minority voters' registration, *id.* at 93-94 (statement of Joe Rogers, Nat'l Comm'n on the VRA), and misinformation campaigns designed to prevent minority voters from getting to the polls, *id.* at 3548 (statement from report of Nat'l Comm'n on the VRA). Examples of vote dilution included the adoption and implementation of techniques such as dilutive redistricting plans, discriminatory annexations, anti-single-shot rules, majority run-off requirements, and at-large election systems. *Id.* at 20 (statement of Nadine Strossen, President, ACLU); *id.* at 123 (statement from report of Nat'l Comm'n on the VRA).

Based on the evidence it collected, Congress concluded that, although measurable progress has been made towards eliminating discrimination against minority voters in covered jurisdictions, that progress is largely attributable to the enforcement of Section 5, combined with Section 5's significant deterrent effect. *2006 House Report* 21-24. In other words, Congress found reliable evidence that Section 5 has been working. But it also determined that some progress was not enough. Section 5 was enacted "to rid the country of

racial discrimination in voting," *Katzenbach*, 383 U.S. at 315, not merely "to reduce racial discrimination in voting to what some view as a tolerable level," 152 Cong. Rec. S7976 (daily ed. July 20, 2006) (statement of Sen. Feingold). As it had with prior reauthorizations, moreover, Congress concluded that further enforcement of Section 5 is necessary in order to preserve the fragile gains that minority voters have made. See *2006 House Report* 57; see also *City of Rome*, 446 U.S. at 181-182.

b. Appellant's principal attack on the adequacy of the legislative record is its claim that Congress erred in focusing on evidence of ongoing discrimination against minority voters in covered jurisdictions. Appellant asserts (J.S. 33) that Congress enacted Section 5 for the sole purpose of preventing covered jurisdictions from engaging in "gamesmanship" whereby they used changes in voting practices to evade judgments invalidating earlier practices. According to appellant (J.S. 32-34), the only type of evidence that could be relevant to Congress's decision to reauthorize Section 5 would be evidence that covered jurisdictions continue to engage in such gamesmanship. Both the factual and the legal premises of that argument are flawed.

As an initial matter, it is not true that Congress enacted Section 5's preclearance mechanism solely in response to gamesmanship by covered jurisdictions. J.S. App. 128-130. Although this Court recognized in *Katzenbach* that "some" covered States had engaged in such behavior, 383 U.S. at 314, 335, the Court repeatedly stated that it was the cumbersome nature of case-by-case adjudication of voting cases that prompted Congress to adopt the preclearance mechanism, *id.* at 314, 327-328. In other words, the propensity of some States covered by Section 5 to engage in the type of games-

manship described by appellant was only one aspect of the larger failure of traditional legislative bans on discrimination in voting. See *id.* at 313-314 (reviewing Congress's multiple previous failed efforts to "cope with the problem by facilitating case-by-case litigation against voting discrimination"); cf. *Lane*, 541 U.S. at 526 (reviewing failed prior legislative attempts to address disability discrimination).

In any event, even if appellant were correct that Section 5 was enacted primarily to target gamesmanship by covered jurisdictions, appellant's argument overlooks that Section 5's preclearance mechanism removes the opportunity for covered jurisdictions to continue to engage in such behavior. Although Congress did find evidence of some attempts by covered jurisdictions to evade the nondiscrimination mandate of Section 5, J.S. App. 131, the limited evidence of gamesmanship simply demonstrates that Section 5 has been doing its job. Congress need not demonstrate the ineffectiveness of its chosen remedy before it may continue to employ that remedy to address ongoing discrimination. *Id.* at 128-132.

c. Appellant also offers three specific challenges to the evidence relied upon by Congress, describing the rate of Section 5 objections as "vanishingly small" (J.S. 30), questioning Congress's concern with the prevalence of racially polarized voting (J.S. 34), and complaining that Congress relied too much on "second generation" barriers to full minority participation (J.S. 35). The district court properly concluded that those challenges lack merit.

First, although the Attorney General has objected to a relatively low *percentage* of preclearance requests, that has always been the case. The district court found

that the overall trend throughout the life of Section 5 has been a declining rate of objections, J.S. App. 64-67, but that observation is entirely consistent with Congress's conclusion that Section 5 has been successful at deterring efforts to discriminate against minority voters. It does not prove that there is no longer a need for Section 5's deterrent effect. See *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 66 (2005) (*Impact and Effectiveness*) (statement of Joseph D. Rich, Lawyers' Comm. for Civil Rights Under Law) ("[T]he most important impact of Section 5 is its deterrent effect on discriminatory voting changes.").

Moreover, the percentage of preclearance requests that draw objections does not paint a complete picture. Over the years, the Attorney General has interposed hundreds upon hundreds of objections to a wide variety of voting changes, including annexations, education requirements, election dates, polling locations, majority vote requirements, statewide and local redistricting, staggered terms, and numbered posts. *Evidence of Continued Need* 402-404 (statement from report of Voting Rights Project, ACLU); see *id.* at 335 (statement from report of Nat'l Comm'n on the VRA); *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 1696-2595 (2005) *(History, Scope, & Purpose*) (correspondence from Civil Rights Div., U.S. Dep't of Justice). Since 1982, the Attorney General has interposed an objection to at least one statewide redistricting plan in every fully covered State and in most partially covered States. In Louisiana, for instance,

"since 1965, not one single Louisiana State House of Representatives redistricting plan as initially submitted to the Justice Department for review, has been precleared." *Impact and Effectiveness* 16 (statement of Marc Morial, President, Nat'l Urban League).

Significantly, Congress determined that many objections reflected the Attorney General's finding that a jurisdiction had acted with a discriminatory purpose or with the specific intent to limit minority voting strength. J.S. App. 76-81, 155-183. Between 1980 and 2000, the Attorney General interposed 421 objections based wholly or partially on discriminatory intent. *Id.* at 76-77; see *id.* at 155-183 (appendix to district court's opinion setting out examples of such objection letters). One recent study of Section 5 objections found a "consistent increase over time of objections based on the purpose prong." Peyton McCrary et al., *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race & Law 275, 297 (2006). Such purposeful discrimination is at the core of the Fifteenth Amendment prohibition. See *Bossier Parish Sch. Bd.*, 520 U.S. at 481.

Second, appellant dismisses (J.S. 34) Congress's finding that racially polarized voting persists at a high rate throughout covered jurisdictions. According to appellant, because racial polarization is not state action, it is not properly the target of Congress's authority to enforce the Fifteenth Amendment. Appellant misunderstands the significance of Congress's finding. As the district court explained, racially polarized voting is a necessary precondition for vote dilution techniques to have their intended discriminatory effect. J.S. App. 106. Thus, Congress's finding that racial bloc voting contin-

ues throughout covered jurisdictions bolsters its determination that Section 5 continues to be needed.

Third, in dismissing Congress's reliance on evidence of second-generation barriers to full participation by minority voters, appellant ignores the history of voting discrimination in the United States. Throughout the life of Section 5, Congress has found that, as first-generation barriers to registration and participation began to fall away, second-generation barriers to minority voters' fair opportunity to elect the candidates of their choice arose in order to counteract the gains minority voters had made. See, *e.g.*, H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969); S. Rep. No. 295, 94th Cong., 1st Sess. 27-28 (1975); H.R. Rep. No. 196, 94th Cong., 1st Sess. 18-19 (1975); *1981 House Report* 17-18; *1982 Senate Report* 6-7. Congress's conclusion in 2006 that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process" is consistent with the conclusions of every previous Congress to reauthorize Section 5. 2006 Reauthorization § 2(b)(2), 120 Stat. 577. Appellant offers no reason why such barriers should not be of concern to Congress. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342 (1960) (explaining that the Fifteenth Amendment prohibits "sophisticated as well as simple-minded modes of discrimination") (quoting *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939)).

3. As the district court found, Section 5 has several limiting features that ensure its congruence and proportionality to the constitutional violations identified by Congress. J.S. App. 133-143. Indeed, in recent years, this Court itself has held up Section 5 as the epitome of congruence and proportionality. See, *e.g.*, *Lane*, 541

U.S. at 519 n.4; *Hibbs*, 538 U.S. at 737-738; *Garrett*, 531 U.S. at 373; *City of Boerne*, 521 U.S. at 526. Three of Section 5's limits are particularly significant: (1) Section 5 covers only those jurisdictions with the worst records of discrimination; (2) jurisdictions may escape coverage if they can demonstrate that they no longer discriminate against minority voters; and (3) Section 5 contains an expiration date.

a. Congress specifically limited Section 5's coverage to target only those jurisdictions with the worst records of unconstitutionally disenfranchising minority citizens. This Court upheld the statute's original coverage formula in *Katzenbach*, 383 U.S. at 328-333, and upheld the statute as amended in 1975 in *City of Rome*, 446 U.S. at 173-178, 180-182; see *Lopez*, 525 U.S. at 283-284. Congress was justified in continuing to rely on the coverage determinations made between 1965 and 1975 after finding, based on reliable evidence, that discrimination in voting against racial and language minority citizens continues in covered jurisdictions.

Appellant takes aim at Congress's decision not to amend the coverage formula, claiming (J.S. 37) that the scope of Section 5 coverage "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." That assertion ignores the historical context that led to Section 5's adoption. Congress chose to cover particular jurisdictions based on their extensive records of discriminating against minority voters. In developing the original coverage formula in 1965, Congress first examined the problem of voting discrimination in the country and found the worst records of such discrimination in a number of southern States. S. Rep. No. 162, 89th Cong.,

1st Sess. Pt. 3, at 13-14 (1965). Congress determined that those jurisdictions "share[d] two characteristics * * * : the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Katzenbach*, 383 U.S. at 330. Congress extracted those two objective indicia of discrimination and used them to craft the coverage formula. When Congress extended the reach of Section 5 in 1975 to protect language minority voters, it employed the same method, first identifying the worst offenders and then adjusting the coverage formula to describe elements of the offenders' behavior.

In order to fine-tune the coverage formula, Congress took careful measures to ensure that Section 5's coverage would be neither underinclusive nor overinclusive. Section 3(c) permits the Attorney General or any "aggrieved person" to ask a federal court to determine that a jurisdiction not covered by Section 5 be subject to the same preclearance requirement upon a showing of sufficient violations of the Fourteenth and Fifteenth Amendments. 42 U.S.C. 1973a(c). Conversely, as explained below, Section 4(a) of the VRA permits qualifying jurisdictions to seek termination of their coverage in certain circumstances.

Moreover, contrary to appellant's assertion (J.S. 38), Congress did "engage in [a] meaningful comparison between covered and noncovered jurisdictions," and the evidence it amassed confirms that, even today, there is more voting discrimination in covered jurisdictions. For example, Congress examined a study of reported Section 2 lawsuits filed throughout the country between 1982 and 2005. *Evidence of Continued Need* 125-126, 202-204 (statements from report of the Nat'l Comm'n on the VRA). The study revealed that 57% of the cases

with outcomes favorable to minority voters were filed in jurisdictions covered by Section 5, even though those jurisdictions had less than one-quarter of the nation's population. *Id.* at 125-126, 202-203 (statements from report of the Nat'l Comm'n on the VRA). Thus, covered jurisdictions were subject to more than twice their proportional share of successful Section 2 suits, notwithstanding 30 or 40 years of close monitoring of those jurisdictions by the Attorney General through Section 5. Testimony also indicated that racial bloc voting is more prevalent and severe in covered jurisdictions than in non-covered jurisdictions. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 48 (2006) (statement of Anita S. Earls, Univ. of N.C.).

b. The bailout provision in Section 4(a) of the VRA further ensures the statute's congruence and proportionality. That provision permits a qualified jurisdiction to terminate Section 5 coverage if it has eliminated discrimination in voting within its boundaries over the previous ten years. See 42 U.S.C. 1973b(a). As Congress heard in testimony relating to the 2006 reauthorization, the criteria required to earn a bailout "go exactly to the issues that Congress was concerned about when it enacted the Voting Rights Act in the first place." *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. 104 (2005) (statement of J. Gerald Hebert, former Acting Chief, Civil Rights Div., U.S. Dep't of Justice).

Appellant's claim (J.S. 40) that the current bailout standard is now "illusory" rather than providing what this "Court has previously viewed as a critical safety

valve" does not account for the evolution of the bailout standard. Since the enactment of the VRA, this Court has highlighted the bailout mechanism as an important aspect of Section 5's constitutionality. See *City of Boerne*, 521 U.S. at 533; *Briscoe* v. *Bell*, 423 U.S. 404, 411 (1977); *Katzenbach*, 383 U.S. at 331. But the legitimacy and importance of the statute's bailout mechanism does not now hinge—and has not ever hinged—on the ability of *every* covered jurisdiction to seek to bail out of coverage. Between 1965 and 1982, only jurisdictions that had been specifically designated by the Attorney General and the Director of the Census as falling under the coverage formula of Section 4(b) were eligible to seek bailout—a considerably stricter standard than that faced by covered jurisdictions today. VRA § 4(b), 79 Stat. 438. Nevertheless, this Court twice upheld the statute during those years, even against challenge from a plaintiff that was not eligible to seek a bailout. *City of Rome*, 446 U.S. at 167-169; *Katzenbach*, 383 U.S. at 332. Thus, contrary to appellant's claim that today's bailout option is less permissive than that upheld by this Court in *Katzenbach* and *City of Rome*, the current bailout mechanism is open to considerably more covered jurisdictions than the previous mechanism approved by this Court.

In addition, the substantive bailout standard is substantially more permissive than it was before 1982. Under the original version of the statute, the only jurisdictions that could successfully bail out of coverage were those that could demonstrate that they should not have been covered in the first place. VRA § 4(b), 79 Stat. 438; see *Katzenbach*, 383 U.S. at 331-333. Under the current standard, however, jurisdictions eligible to seek bailout may do so if they can demonstrate that they have

changed their discriminatory practices in the previous ten years. 42 U.S.C. 1973b(a). By expanding the standard, Congress sought to create "an incentive" for covered jurisdictions to "eliminate practices denying or abridging opportunities for minorities to participate in the political process" and to "do more than simply maintain a status quo that grandfathered in pre-1965 elections laws and practices that were discriminatory." *1982 Senate Report* 46, 59. Appellant makes no effort to explain how the bailout standard available to jurisdictions now could imperil the congruence and proportionality of Section 5 while the considerably stricter pre-1982 bailout standard was held to enhance the statute's constitutionality.

c. Finally, Section 5 has always had, and continues to have, a built-in expiration date. Had Congress determined that minority citizens in covered jurisdictions now enjoy the right to vote and a fair opportunity to elect the candidates of their choice free of discrimination, on a par with minority citizens in non-covered jurisdictions, Congress would not have reauthorized Section 5. Instead, it concluded that "the temporary provisions of the VRA are still needed." *2006 House Report* 6.

Congress understood that extending Section 5 for an additional 25 years would permit future Congresses to rely on data from two more decennial redistricting cycles in evaluating whether to extend the VRA further. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. 167 (2006). After determining that there remains a vital need for Section 5, it was reasonable for Congress to extend the provision for long

enough to allow Congress to collect sufficient information to make a careful assessment about whether Section 5 is still necessary at the expiration of the current reauthorization period. The district court properly concluded that Congress's judgment that an extension of that length was appropriate is entitled to respect. Cf. *Eldred* v. *Ashcroft*, 537 U.S. 186, 208-210 (2003).

4. In objecting to the nature of Section 5's preclearance remedy, appellant also repeats arguments that have already been considered and rejected by this Court.

a. Appellant contends (J.S. 39) that Section 5 cannot be congruent and proportional because it imposes a "substantial burden on constitutional values of federalism and state authority over law- and policymaking processes that lie at the heart of the States' status as sovereign entities." Section 5 is indeed an intrusive remedy. See *Katzenbach*, 383 U.S. at 315, 327, 337. But, as this Court has recognized, such intrusiveness is permissible in this unique context in order to enforce the fundamental guarantees of the Fifteenth Amendment. See *Lopez*, 525 U.S. at 284-285 ("[T]he Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however."); *id.* at 282 ("[T]he Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States."). As this Court has stated, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" *City of Rome*, 446 U.S. at 179.

b. Appellant also contends (J.S. 38-40) that Section 5 exceeds Congress's authority because it prohibits

some voting practices that were not adopted with a discriminatory purpose and therefore do not violate the Constitution. But this Court has repeatedly affirmed Congress's general authority to "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent." *Lane*, 541 U.S. at 520. More specifically, the Court has upheld Section 5's prohibition of "voting practices that have only a discriminatory effect." *City of Rome*, 446 U.S. at 175. Enforcing a constitutional right by "prohibiting a somewhat broader swath of conduct" than is prohibited by the Constitution is a far cry from attempting to redefine a constitutional right. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). While the latter is unconstitutional, see *City of Boerne*, 521 U.S. at 532, this Court has held that the former is a legitimate means of preventing and remedying constitutional violations, see *Katzenbach*, 383 U.S. at 327. And, as this Court has repeatedly held, Section 5 falls squarely on the legitimate side of that line.

Moreover, where Congress has tried and failed to provide legislative remedies for a constitutional problem, this Court has held that Congress is justified in enacting "prophylactic measures in response." *Hibbs*, 538 U.S. at 737; see *Lane*, 541 U.S. at 531. In upholding Section 5, the Court in *Katzenbach* chronicled Congress's previous unsuccessful legislative attempts to address the problem of discrimination in voting. 383 U.S. at 309-315. Appellant argues that the existence of Section 2 of the VRA makes Section 5 unnecessary, but in reauthorizing Section 5 in 2006, Congress made extensive findings about the inadequacy of Section 2 to address voting discrimination in covered jurisdictions. As this Court noted in *Katzenbach*, Congress initially enacted Section 5 precisely because it found that case-

by-case adjudication was an inadequate means of preventing and remedying voting discrimination in covered jurisdictions. 383 U.S. at 314; see *City of Rome*, 446 U.S. at 174.

Specifically, Congress found three shortcomings of Section 2 litigation that are not present in the Section 5 preclearance system. First, Section 2 is purely an after-the-fact remedy, available only to challenge voting practices and procedures that are already in place. One witness before Congress testified that most Section 2 actions take two to five years to make their way through the court system, during which time the challenged practice remains in place no matter how discriminatory it is. *History, Scope, & Purpose* 101 (statement of Anita S. Earls). If, during that time, a candidate is elected under what turns out to be an illegal voting scheme, that person nevertheless will enjoy the significant advantage that comes with incumbency. *Impact and Effectiveness* 13-14 (statement of Rep. Kemp); *Evidence of Continued Need* 97 (statement of Joe Rogers). In some cases, a Section 2 plaintiff must allow an illegal voting practice to be in effect for several election cycles before the plaintiff can gather enough evidence to demonstrate the practice's discriminatory effect. *History, Scope, & Purpose* 92 (statement of Nina Perales, Mexican-Am. Legal Def. & Educ. Fund). By contrast, under Section 5, discriminatory voting practices are forestalled through a system that takes at most several months. *Id.* at 101 (statement of Nina Perales).

Second, Section 2 places a heavy financial burden on minority voters challenging illegal election practices and schemes. See *History, Scope, & Purpose* 92, 97 (statement of Nina Perales). Section 5, by contrast, takes the financial burden off minority voters while placing the

comparatively small financial burden associated with preclearance onto covered jurisdictions. See *id.* at 79 (statement of Anita S. Earls). That is especially important in small and rural communities where voters generally "do not have access to the means to bring litigation under Section 2 of the Act, yet * * * are often the most vulnerable to discriminatory practices." *Id.* at 84 (statement of Anita S. Earls).

Third, Section 2 leaves the burden of proof on minority plaintiffs with respect to demonstrating discriminatory effect, while Section 5 places the burden on jurisdictions to demonstrate that a proposed change will not have a discriminatory effect and was not animated by a discriminatory purpose. *History, Scope, & Purpose* 83 (statement of Anita S. Earls); *Evidence of Continued Need* 97 (statement of Joe Rogers). Jurisdictions are in a much better position than individual citizens to amass information about any potentially discriminatory effects of voting procedures or systems, without incurring undue expense. It is therefore appropriate to place the evidentiary burden on them. See *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002).

If Section 2 were in fact an adequate means of halting discrimination against minority voters in covered jurisdictions, the Attorney General would not have had to interpose more than 421 objections based on discriminatory purpose since 1982. J.S. App. 76-77. The fact that it took Section 5 to halt the implementation of so many intentionally discriminatory voting practices is powerful evidence that Congress reasonably concluded that Section 2, by itself, has not sufficiently deterred covered jurisdictions from discriminating.

5. Finally, it follows a fortiori from the foregoing discussion of the congruence-and-proportionality stan-

dard that the district court properly concluded that Congress's decision to reauthorize Section 5 was rational, and therefore constitutional, under the *Katzenbach* standard. 338 U.S. at 324; see J.S. App. 112-118. As the district court explained, there is ample evidence in the legislative record to conclude that, at a minimum, Congress "rationally * * * concluded that unless it extended Section 5, 'racial and language 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.'" J.S. App. 57 (quoting 2006 Reauthorization § 2(b)(9), 120 Stat. 578); see *id.* at 58-112 (summarizing evidence). Plenary consideration of that carefully considered and documented determination is not warranted.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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