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 OF THE UNITED STATES, *et al.*,

Appellees.

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

INTERVENOR-APPELLEES' MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether a municipal utility district that does not register voters is a "political subdivision" eligible to invoke the bailout provision in Section 4(a) of the Voting Rights Act when the Act's plain language limits such "political subdivision[s]" to counties, parishes, and entities "which conduct[] registration for voting."

2. Whether Congress acted within the scope of its enforcement powers under the Fourteenth and Fifteenth Amendments when in 2006, in light of an extensive legislative record of persistent unconstitutional discrimination against minority voters in covered jurisdictions and years of experience with the Voting Rights Act indicating that a failure to renew Section 5 would result in loss of advancements made in the elimination of discrimination against minority voters, Congress reauthorized Section 5 of the Act.

CORPORATE DISCLOSURE STATEMENT

Three of the intervenor-appellees, the Austin Branch of the NAACP, the Texas State Conference of NAACP Branches, and People for the American Way, are nongovernmental corporations. They have no parent corporations and no stock.

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INTERVENOR-APPELLEES' MOTION TO AFFIRM

Pursuant to this Court's Rule 19.6, the intervenor-appellees (*i.e.*, all appellees other than the Attorney General of the United States) respectfully move for affirmance of the judgment of the district court.

INTRODUCTION

Along with a statutory claim that is precluded by the plain language of the Voting Rights Act (VRA or Act), this case presents a challenge to the constitutionality of Section 5 of the Act, which this Court has already sustained on four occasions. *See South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Georgia* v. *United States*, 411 U.S. 526 (1973); *City of Rome* v. *United*

States, 446 U.S. 156 (1980); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999). Those decisions make clear that Appellant's constitutional challenge also fails, as do *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and its progeny, which point to Section 5 as the model of valid legislation enforcing the Fourteenth and Fifteenth Amendments.

Since Section 5's initial enactment in 1965 as a temporary provision, Congress on four occasions has revisited the Act and concluded that, while Section 5 has proven indispensable to breaking down century-old obstacles to political participation by racial minorities, the need for Section 5 to dismantle those barriers remained. Congress reached that conclusion most recently in 2006, when, after holding over twenty hearings and compiling a record exceeding 15,000 pages (J.S.App. 127), Congress determined that discrimination against minority voters persists in covered jurisdictions and that Section 5 should again be extended. James Sensenbrenner, then-Chairman of the House Judiciary Committee, described the process that resulted in the 2006 reauthorization as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in [the] 27 1/2 years" he had served there. 152 Cong. Rec. H5143, H5143 (daily ed. July 13, 2006). After reviewing the massive legislative record, the district court concluded that Congress acted well within the scope of its enforcement authority in reauthorizing Section 5. That conclusion is plainly correct.

Appellant's central argument as to why Section 5 is now invalid is not only wrong, but illogical. Appellant argues (J.S. 4, 32-35) that Section 5 could be validly reauthorized *only* if jurisdictions subject to its requirements were still engaging in "gamesmanship"—that is,

defying court rulings by enacting unconstitutional voting laws *seriatim*—as some jurisdictions did before being subjected to coverage. In other words, Section 5 could be reauthorized only if it had failed.

The district court sensibly rejected this assertion, which is unsupported by any decision of this Court, and concluded that there is "no basis" for questioning Congress's judgment in reauthorizing Section 5. J.S.App. 143. Given the legislative record of ongoing discrimination, that conclusion is unassailable—whatever the standard of review applicable to a constitutional challenge against Section 5, an issue that in this case is entirely academic. The district court's judgment should be summarily affirmed.

STATEMENT

I. THE VOTING RIGHTS ACT

A. The Origins And Operation Of Section 5

Congress's judgment in 2006 that there was a need to reauthorize Section 5 must be understood in light of the historical experience that led to the Act's original enactment. After the ratification of the Fourteenth and Fifteenth Amendments, which were intended to ensure equality of citizenship without regard to race, and which expressly granted Congress enforcement authority, certain States and localities began defying those constitutional mandates by instituting laws and practices designed to prevent minority citizens from voting. *Katzenbach*, 383 U.S. at 311.

After nearly a century of massive disenfranchisement of racial minorities, Congress enacted the Civil Rights Acts of 1957, 1960, and 1964, each of which sought to "facilitat[e] case-by-case litigation" against voting discrimination. *Katzenbach*, 383 U.S. at 313.

This incremental approach proved ineffective. *Id.* at 314. Concluding that "the unsuccessful remedies which it had prescribed … would have to be replaced by sterner and more elaborate measures," *id.* at 309, Congress enacted the Voting Rights Act of 1965. *See* Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 *et seq.*).

Section 5—the "heart" of the Act, *Katzenbach*, 383 U.S. at 315—requires certain jurisdictions to obtain "preclearance" before implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c. To obtain preclearance, a jurisdiction must either submit the proposed change to the Department of Justice (DOJ) for an administrative determination or file a declaratory judgment action in the United States District Court for the District of Columbia. *Id.*; 28 C.F.R. § 51.10. In either forum, the jurisdiction must show 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 language-minority status. 42 U.S.C. § 1973c; 28 C.F.R. § 51.52.

Only certain States and "political subdivisions"—a term defined by Section 14(c)(2) of the Act—are covered by Section 5. A jurisdiction is covered if, during the 1964, 1968, or 1972 presidential election, (a) the jurisdiction maintained a "test or device" for voting or registration, and (b) the jurisdiction had less than a 50% voter registration rate, or fewer than 50% of registered voters actually voted in the presidential election. 42 U.S.C. § 1973b(b). If a jurisdiction is covered, then all governmental units within that jurisdiction are also subject to preclearance requirements. 28 C.F.R. § 51.6. Texas has been a covered jurisdiction since 1975, *see* 40

Fed. Reg. 43,746, 43,746 (Sept. 23, 1975), when the coverage formula was amended to ensure protection of "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage," *see* 42 U.S.C. § 1973*l*(c)(3), after Congress found that tests and devices had been used to disenfranchise those minority voters much as they had been used to prevent African-Americans from voting, S. Rep. No. 94-295, at 25-27 (1975). Because of Texas's statewide coverage, all political subunits in Texas, including Appellant, are subject to the preclearance requirement.

Congress provided for flexibility in the scope of the Act's coverage in two respects. First, Congress included a procedure for exemption from Section 5's preclearance obligations: the "so-called 'bailout' provision." *Rome*, 446 U.S. at 167. A jurisdiction eligible to bailout may do so by showing, in a declaratory judgment action in the United States District Court for the District of Columbia, that it has satisfied certain statutory criteria over the preceding ten-year period. 42 U.S.C. § 1973b(a)(1). The district court here noted that "every one of the fourteen jurisdictions to have applied since 1984 has, with the Attorney General's support, succeeded in terminating coverage." J.S.App. 140. Second, a court can "bail-in" a non-covered jurisdiction—*i.e.*, subject the jurisdiction to preclearance requirements—if the court finds "that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred" within that jurisdiction. 42 U.S.C. § 1973a(c); *see, e.g.*, *Jeffers* v. *Clinton*, 740 F. Supp. 585, 594, 600 (E.D. Ark. 1990).

B. This Court's Prior Decisions Sustaining Section 5, As Initially Enacted And Reauthorized

Shortly after the VRA's enactment, South Carolina challenged the statute, including Section 5, asserting that Congress had exceeded its authority to enforce the Fifteenth Amendment. This Court rejected that challenge in *Katzenbach*, holding that the Act was justified by the exceptional history of voting discrimination in covered jurisdictions. 383 U.S. at 334.

Congress reauthorized Section 5 in 1970 and again in 1975 and 1982. Subsequent to each of those three reauthorizations, a jurisdiction challenged Section 5 as reauthorized, and this Court sustained Section 5's constitutionality.

"Following the dramatic rise in registration" after the 1965 passage of the Act, "a broad array of dilution schemes were employed to cancel the impact of the new black vote." S. Rep. No. 97-417, at 6 (1982). "Their common purpose and effect [was] to offset the gains made at the ballot box under the Act." *Id.* Against this backdrop, Congress reauthorized Section 5 in 1970. In a challenge brought after the 1970 reauthorization, this Court reaffirmed Section 5's constitutionality. *Georgia* v. *United States*, 411 U.S. at 535.

Following the 1975 reauthorization, the City of Rome, Georgia, argued that, even if the preclearance requirements were constitutional in 1965, by 1975 "they had outlived their usefulness." *Rome*, 446 U.S. at 180. The Court disagreed. Reviewing the legislative record of past and ongoing voting discrimination against racial minorities, the Court concluded that the 1975 reauthorization was well within Congress's constitutional enforcement powers. *See id.* at 180-182.

Before the VRA was set to expire in 1982, Congress again considered whether to reauthorize Section 5. Congress did so, noting that a pattern of ongoing discrimination and widespread opposition to equal voting rights persisted despite the previous reauthorizations. *See* H.R. Rep. No. 97-227, at 13-20 (1981). Texas particularly embodied this pattern: though Texas was not covered until 1975, by 1982 DOJ had interposed almost as many Section 5 objections for Texas jurisdictions as it had for those of any other State. H.R. Rep. No. 109-478, at 73 (2006).

Since the 1982 reauthorization (and the 1997 *Boerne* decision), this Court has again reaffirmed Section 5's constitutionality—even as applied to a separately covered county in a non-covered State making a voting change mandated by state law. *Lopez*, 525 U.S. at 282. In other recent cases not directly involving Section 5, the Court has repeatedly noted Section 5's constitutionality. *See* p. 22, *infra* (discussing the *Boerne* cases).

C. The 2006 Reauthorization

From October 2005 to July 2006, Congress held 21 hearings to consider whether Section 5's protections remained necessary in the covered jurisdictions. H.R. Rep. No. 109-478, at 5; S. Rep. No. 109-295, at 2-4 (2006). Congress's investigation produced a legislative record over 15,000 pages in length. J.S.App. 13-15, 127.

Notwithstanding Section 5's prophylactic protections, the record showed significant continuing and purposeful efforts by covered jurisdictions to discriminate against minority voters. This discrimination took many forms, including discriminatory methods of election (J.S.App. 95, 100-102, 156-158, 169-173), racially selective annexations (J.S.App. 84-85, 165-167, 174-178), dis-

criminatory polling place changes (J.S.App. 178-179, 181-183), election cancellations (J.S.App. 165-167), redistricting for the purpose of preventing minority voters from electing the candidates of their choice (J.S.App. 79-80, 100, 155-157, 159-165, 167-169, 180-181), and the adoption of other strategies designed to prevent minority voters from casting ballots and minority candidates from winning election (J.S.App. 92-93, 95-100, 102). From 1980 to 2000, the Attorney General issued objection letters concerning 421 voting changes that appeared to be motivated by discriminatory purpose. J.S.App. 114.[1] The record showed that DOJ had interposed more objections to Section 5 submissions since the 1982 reauthorization than before. J.S.App. 66, 76-77.

Congress also considered "more information requests" ("MIRs"), letters from DOJ asking jurisdictions seeking preclearance for additional information about proposed changes. H.R. Rep. No. 109-478, at 40. Since 1982, MIRs led jurisdictions to alter or withdraw proposed voting changes in over 800 instances. *Id.* at 40-41 & n.92.

Congress also heard testimony regarding Section 5's deterrent effects. J.S.App. 109-110. Describing preclearance as a "vital prophylactic tool[]," the House Judiciary Committee concluded that in a number of instances, "the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21, 24.

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[1] The appendix to the district court's opinion (J.S.App. 155-183) includes numerous examples of DOJ objection letters issued between 1982 and 2005 on the basis of discriminatory intent in covered jurisdictions.

The need for reauthorization was also apparent from discrimination documented through parts of the Act other than Section 5. The record showed that each year between 1982 and 2006, the Attorney General had, in response to reports of actual or likely intimidation of minority voters, appointed over 300 federal observers to monitor minority voters' access to polling places in covered jurisdictions. J.S.App. 103-104. The congressional record also included evidence of purposeful discrimination unveiled through litigation brought under Section 2. J.S.App. 95-103.[2]

Based on the legislative record, Congress found that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment … [and that] without the continuation of the [Act's] protections, 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." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (the "VRARA"), Pub. L. No. 109-246, § 2(b)(7), (9), 120 Stat. 577, 578. With the reauthorization legislation receiving overwhelming, bi-

[2] Section 2, "the Act's basic prohibition against racial discrimination in voting" (J.S.App. 93), is a permanent provision that contains a nationwide ban on imposition of any "voting qualification or prerequisite to voting, or standard, practice, or procedure … which results in a denial or abridgment of the right … to vote on account of race or color" or membership in a language minority group. 42 U.S.C. §§ 1973(a), 1973b(f)(2).

partisan support,[3] Congress extended Section 5's protections for another 25 years, through 2031. *See id.* § 4, 120 Stat. 580.

II. PROCEDURAL HISTORY

The Northwest Austin Municipal Utility District Number One (the District, or Appellant) is a local governmental entity located within the City of Austin and Travis County, Texas. Since the District's formation in the 1980s, Travis County—not the District—has always conducted the voter registration of individuals who reside in the District. J.S.App. 18, 22.

Complying with Section 5 has imposed only a nominal burden on the District. The monetary cost amounts, on average, to just $233 per year. Nor has compliance with Section 5 caused the District any delay in implementing voting changes. All changes that the District has submitted have been precleared by the DOJ. The District has not identified any proposed voting change that it has decided to forego because the contemplated change would have required a preclearance submission. J.S.App. 152-153.

Nonetheless, eight days after the VRARA became law, the District filed this case, seeking bailout or, in the alternative, a declaration that Section 5 exceeds Congress's authority under the Fifteenth Amendment. J.S.App. 19. Travis County, eleven individuals residing in the District, three individuals residing elsewhere in Texas, and three organizations intervened as defen-

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[3] *See* 152 Cong. Rec. S7949, S8012 (daily ed. July 20, 2006) (unanimous approval in Senate); 152 Cong. Rec. H5143, H5207 (daily ed. July 13, 2006) (House vote of 390-33).

dants. A three-judge panel of the United States District Court for the District of Columbia heard the case.

In a comprehensive opinion addressing both of the District's claims, the district court granted the Attorney General's and the intervenors' motions for summary judgment and denied the District's cross-motion for summary judgment. First, the court held that the District was ineligible to bail out from its preclearance obligations under Section 5 because it is not a "political subdivision" eligible to initiate a bailout action. The court determined that Congress intended the term "political subdivision" in the bailout provision to carry the definition supplied in Section 14(c)(2) of the Act, which encompasses only counties, parishes, and other subdivisions within a State that—unlike the District—register voters. J.S.App. 20-30.

Second, the court rejected the District's constitutional challenge. The court concluded that *Katzenbach* sets forth a rational-basis standard under the Fifteenth Amendment that governs this challenge. J.S.App. 32-33. The court nonetheless thoroughly evaluated the statute under both the rational-basis test and the congruence-and-proportionality test described in *Boerne*.

Applying the rational-basis test, the court concluded that "given the extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend section 5 for another twenty-five years was rational and therefore constitutional." J.S.App. 2.

The court likewise held that Section 5 as reauthorized in 2006 passes muster under *Boerne*'s three-step congruence-and-proportionality test. J.S.App. 2, 143-144. Applying the first step—identification of the constitutional right at issue—the court noted that the two

rights enforced by Section 5—the right to be free of official racial discrimination and the right to vote—each receives the highest level of judicial scrutiny. J.S.App. 122. Addressing *Boerne*'s second step—the record of constitutional violations—the court emphasized that the 2006 legislative record was comparable to the record Congress compiled during the 1975 reauthorization and far more extensive than the records supporting other statutes sustained under the *Boerne* framework. J.S.App. 124-128. As to the third *Boerne* step—the congruence and proportionality of the statutory scheme—the court pointed to Section 5's limiting features, including its targeted coverage of only those jurisdictions with the most severe histories of discrimination in voting, its bailout and bail-in provisions for tailoring coverage, and its limited time frame. J.S.App. 133-134. Accordingly, the court held that whether judged under the rational-basis or congruence-and-proportionality standards, Section 5 remains constitutionally sound.

ARGUMENT

As the district court held, the VRA's plain language establishes that Appellant is ineligible to bail out of Section 5. The district court also properly concluded, based on its close review of this Court's decisions and the 2006 reauthorization's extensive legislative record, that Section 5 remains constitutional. The district court's judgment should therefore be summarily affirmed.

I. APPELLANT IS NOT ELIGIBLE FOR BAILOUT

The VRA's text and legislative history, the Attorney General's implementing regulations, and this Court's decisions, especially *Rome*, all compel the con-

clusion that Appellant is not eligible to bail out from Section 5.

A. The Statute's Text And Structure Show Appellant Is Ineligible For Bailout

Under the VRA as originally enacted, only covered States and separately covered "political subdivisions"—for example, counties that were designated for coverage when their parent State was not—were eligible for bailout. During the 1982 reauthorization, Congress amended the bailout provision to expand bailout eligibility to "political subdivisions" not separately designated for coverage. *See* 42 U.S.C. § 1973b(a)(1). Thus, since 1982, unlike before, a county in a fully covered State (such as Texas) has been eligible to bail out of coverage independently of the State. The scope of this expansion is unambiguous. Today, as in 1982, Section 14(c)(2) of the VRA defines "political subdivision" to mean "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, … any other subdivision of a State which conducts registration for voting." *Id.* § 1973*l*(c)(2). Because the District is neither a county nor a parish, and because Travis County conducts registration for the District, Section 14(c)(2)'s plain language makes clear that the District is not a "political subdivision" eligible for bailout.[4]

As the district court explained, Section 4(a) of the Act confirms that Congress intended Section 14(c)(2)'s definition of "political subdivision" to govern which ju-

[4] When Congress defines a term in a statute, courts must employ that definition. *See, e.g.*, *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). Thus, the District's citations to a dictionary and to Texas law (*see* J.S. 14) are inapposite.

risdictions other than States may seek bailout. J.S.App. 24-25. As amended in 1982, Section 4(a) makes eligible for bailout "any political subdivision of [a covered] State … *though [coverage] determinations were not made with respect to such subdivision as a separate unit.*" 42 U.S.C. § 1973b(a)(1) (emphasis added). Because only entities that satisfy the Section 14(c)(2) definition of "political subdivision" can be separately designated for coverage, this language demonstrates that Congress was applying the Section 14(c)(2) definition of "political subdivision" in Section 4(a).

Therefore, the District's contention that Congress intended "political subdivision" in Section 4(a) to refer to any governmental unit is plainly incorrect. Indeed, if Congress had intended the term "any political subdivision" in Section 4(a) to mean any jurisdiction within a State, Congress would have simply provided that "any political subdivision" could seek bailout. Under the District's reading, the language in Section 1973b(a)(1) following "any political subdivision of [a covered] State" would be surplusage.

Further, the contention that the District—and every other subunit of a covered State such as Texas—qualifies as a "political subdivision" runs counter to the bailout provision's text in additional ways. Section 4(a) provides that, in addition to States and "political subdivision[s]" within covered jurisdictions, "any political subdivision with respect to which [coverage] determinations have been made as a separate unit" may seek bailout. 42 U.S.C. § 1973b(a)(1). Because governmental entities that do not register voters cannot be separately covered under Section 5, *see id.* §§ 1973b(b), 1973*l*(c)(2), the term "political subdivision" in this latter clause must refer only to counties, parishes, and entities that register voters—*i.e.*, "political subdivisions"

under Section 14. The District's interpretation of the bailout provision thus rests on the dubious proposition that Congress silently intended the term "political subdivision" to have two different meanings within Section 4(a).

Moreover, Section 4(a) provides that the showing required for bailout must be made by the applicant "State or political subdivision and all governmental units within its territory." 42 U.S.C. § 1973b(a)(1)(D), (F). This language makes clear that Congress distinguished "political subdivision[s]" from other "governmental units," and reflects Congress's assumption that jurisdictions seeking bailout would have "governmental units," not themselves eligible for bailout, within their boundaries. The District is precisely such a governmental unit.

B. The Legislative History And Longstanding Administrative Regulations Confirm Appellant Is Ineligible For Bailout

As the district court observed (J.S.App. 25-26), the 1982 reauthorization's legislative history confirms that political subunits of States (other than counties and parishes) that do not conduct voter registration are ineligible for bailout. The House Report stated that the "standard for bail-out is broadened to permit political subdivisions, *as defined in Section 14(c)(2)* … to bail out although the state itself may remain covered." H.R. Rep. No. 97-227, at 2 (1981) (emphasis added); *see also id.* at 39; S. Rep. No. 97-417, at 2, 69 (1982) (similar language). The Senate Report explained that permitting bailout only by Section 14(c)(2) "political subdivisions" reflects a "logistical limit"—because if every subcounty level political subunit were eligible to seek separate bailout, "we could not expect that the Justice

Department or private groups could remotely hope to monitor and to defend the bailout suits." S. Rep. No. 97-417, at 57 n.192. [5]

The District argues that the 1982 legislative history should be disregarded in favor of the 2006 legislative history. J.S. 16-17. But because Congress most recently amended the standards governing bailout eligibility during the 1982 reauthorization, that legislation is the appropriate focus of inquiry. *See*, *e.g.*, *Rome*, 446 U.S. at 169 (referring to the 1965 legislative history to construe the bailout provision in 1980). And Congress surely did not intend to broaden the class of jurisdictions eligible for bailout when it made no alteration to that text in 2006. *See Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 484 (1997). In any event, the 2006 legislative history confirms that the District is ineligible to bailout independently of Texas or Travis County. During the reauthorization hearings, two witnesses specifically urged Congress to expand bailout eligibility to include entities other than "political subdivisions." *See* J.S.App. 28. Congress, however, left the provision governing the entities eligible to seek bailout unchanged.

Similarly unavailing is the District's reliance (J.S. 17) on a single statement from the 2006 legislative history that "[t]he expiring provisions of the Voting Rights Act allow any covered jurisdiction to remove

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[5] The district court correctly rejected Appellant's contention that under the narrower reading of the bailout provision, only jurisdictions in Virginia—which according to Appellant, are uniquely structured to have few subunits—would have a realistic opportunity to bailout. *See* J.S.App. 139-140 (noting that one Virginia jurisdiction that successfully bailed out had a number of subunits "almost identical to Texas's median" number of subunits per county).

itself from coverage," H.R. Rep. No. 109-478, at 93. The District is subject to Section 5 not because of any independent coverage determination, but because it is a political subunit that lies within the State of Texas, a covered jurisdiction. *See Rome*, 446 U.S. at 166. Thus, it is Texas—not the District—that is the relevant "covered jurisdiction" within the meaning of the passage upon which the District relies.

The Attorney General's regulations implementing the bailout provision confirm this reading. In place since 1987, *see* 52 Fed. Reg. 486, 490-500 (Jan. 6, 1987), those regulations adopt Section 14(c)(2)'s definition of "[p]olitical subdivision"—distinguishing between "political subdivision[s]" (counties, parishes, and local governments that register voters), which are eligible to seek bailout, and "political subunits," which are not. *Compare* 28 C.F.R. §§ 51.2, 51.5 *with id.* § 51.6. The "substantial deference" this Court generally affords the Attorney General's interpretation of Section 5, *Lopez*, 525 U.S. at 281, is particularly appropriate in this context because Congress amended the Act against the backdrop of those longstanding regulations, but left the provision governing the scope of entities eligible for bailout unchanged. *See* J.S.App. 27-28

C. The Decisions Relied On By Appellant Are Inapposite

In arguing that it qualifies as a "political subdivision" for bailout purposes, the District relies (J.S. 12-15) on statements in *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978). Those decisions, however, concern the scope of Section 5's application, not Section 4(a) bailout. *Sheffield* held that Section 5 applies to all gov-

ernmental units located within any jurisdiction designated for coverage under Section 5, not just subunits meeting Section 14's definition of "political subdivision." The Court reasoned that Section 5's coverage parallels the scope of the Act's suspension of tests and devices, which applies "*in* any [designated] State … or *in* any [designated] political subdivision," 435 U.S. at 120 (quoting § 4(a) (alterations in original))—thus reaching tests imposed by governmental units located within covered states or political subdivisions, not just tests imposed *by* covered states or political subdivisions. *See id.* at 120-134. *Dougherty County* reiterated *Sheffield*'s conclusion that Section 14's definition of "political subdivision" does not exempt any unit within a covered jurisdiction from compliance with Section 5. 439 U.S. at 43-47. As the district court concluded (J.S.App. 28-29), because neither *Sheffield* nor *Dougherty County* addresses bailout, those decisions say nothing about which jurisdictions are eligible to *seek* bailout.

The District seizes on two statements in *Sheffield* that, according to the District's out-of-context interpretation, establish that the Section 14(c)(2) definition of "political subdivision" does not apply to the bailout provision in Section 4(a) of the Act. J.S. 12-13. That argument is foreclosed by *Rome*, in which this Court explained that "*Sheffield* … did *not* hold that cities [that do not register voters] are 'political subdivisions' under §§4 and 5." 446 U.S. at 168 (emphasis added); *see also* J.S.App. 28-29. The Court also concluded that, "under the express statutory language," the City of Rome, which did not register voters, was "not a 'political subdivision' for purposes of § 4 'bailout.'" 446 U.S. at 168; *see also id.* at 168 & n.5 (recognizing that § 14(c)(2) defines "political subdivision" for purposes of

the Act). Although the 1982 reauthorization amended Section 4 to allow bailout by a "political subdivision" that had not itself been the subject of a coverage designation, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131, 131, that legislation did nothing to repudiate the *Rome* Court's teaching that Section 14's definition of "political subdivision" governs the term's meaning in the bailout provision. Nor, as the district court explained (J.S.App. 20-26, 30), did the 1982 reauthorization extend bailout eligibility to the great number of jurisdictions that lie within States and political subdivisions.

Finally, the District's reliance (J.S. 21) on this Court's cases applying the constitutional avoidance canon is misguided. Saving constructions are appropriate only when there are "competing plausible interpretations of a statutory text" and one "alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). As detailed above, Congress's intent not to extend bailout eligibility to those political subunits that do not conduct voter registration—such as the District—is clear. And as set forth in Part II, *infra*, the reauthorization of Section 5 was unquestionably within Congress's remedial power.

II. SECTION 5 REMAINS CONSTITUTIONAL

Confronted with a substantial record demonstrating that discrimination against minority voters remains a serious problem in covered jurisdictions and that the incidence of such discrimination would be greater but for Section 5, Congress reauthorized Section 5 in 2006. This Court's precedents—both those decisions that directly uphold the constitutionality of Section 5 and those that identify Section 5 as the model of permissible enforcement legislation—confirm that in doing so, Congress acted well within its enforcement authority.

Appellant does not dispute that *Katzenbach*, *Rome*, and *Lopez* are good law (J.S. 23-27) and offers no new doctrinal arguments explaining how Section 5 might now be invalid. Appellant argues that the district court applied an inappropriately lenient standard of review to the reauthorization of Section 5, and that the reauthorization should be tested under what it describes as the more demanding scrutiny required by *Boerne*. But the standard of review is ultimately of no moment here because Section 5 is clearly valid under the *Boerne* framework. J.S.App. 143-144. Thus, this case presents no question with respect to the appropriate standard for reviewing constitutional challenges to Section 5, *see Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) ("summary affirmance is an affirmance of the judgment only"), nor any other question warranting plenary review.

A. This Court Has Repeatedly Confirmed Section 5's Constitutionality

1. This Court has repeatedly upheld Section 5 against constitutional challenge. After Congress enacted the VRA, the Court held in *Katzenbach* that Section 5 was an "appropriate means for carrying out Congress' constitutional responsibilit[y]" to prohibit racial discrimination in voting. 383 U.S. at 308. In so concluding, the Court highlighted two important historical points. First, the record assembled by Congress before the Act's passage showed a hundred-year history of pervasive official racial discrimination in voting in certain parts of the country. *Id.* at 308-315. Second, through the post-Civil War Amendments, "the power of Congress [was] enlarged," so that Congress could guarantee the rights these amendments granted. *Id.* at 325.

This Court reaffirmed Section 5's constitutionality in *Georgia* v. *United States* after the 1970 reauthorization. 411 U.S. at 535. Following Congress's 1975 reauthorization, Rome, Georgia, brought another challenge, asserting that, even if the preclearance requirements were constitutional when enacted, "they had outlived their usefulness by 1975." *Rome*, 446 U.S. at 180. Reiterating that the Reconstruction Amendments were "designed as an expansion of federal power and an intrusion on state sovereignty," *id.* at 179, the Court concluded that the reauthorization was well within Congress's Fourteenth and Fifteenth Amendment enforcement powers, *id.* at 181-182.

In *Lopez*, this Court again held that Section 5 is appropriate enforcement legislation—even as applied to "nondiscretionary" actions by counties to implement "acts initiated by non-covered states." 525 U.S. at 282-283. Quoting *Boerne*, the Court reaffirmed that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Id.*

In 2006, prior to Congress's vote on Section 5's reauthorization, this Court again underscored Section 5's validity when all eight Justices who reached the issue held that compliance with Section 5 is a compelling state interest for the purpose of applying strict scrutiny. *See League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 475 n.12, 485 n.2, 518-519 (2006) ("*LULAC*"). These precedents informed Congress's 2006 reauthorization.

2. Although this Court has consistently upheld Section 5—including in one case relying on *Boerne*—the District argues that *Boerne* made a sharp break with the past and that, under that decision, Section 5 is unconstitutional because it is not a congruent and proportional exercise of Congress's enforcement powers. But this Court's decisions applying *Boerne* have consistently pointed to Section 5 as a model of the proper use of congressional enforcement powers. In *Boerne* itself, the Court cited the VRA, including Section 5, as the leading example of valid enforcement legislation. 521 U.S. at 525-527. The Court thus used Section 5 as a point of distinction from the statute before it—the Religious Freedom Restoration Act—which the Court stated was "so out of proportion" to any possible objective of enforcing a constitutional provision that it could only be understood as an attempt to work a "substantive change in constitutional provisions." *Id.* at 532. The Court's decisions following *Boerne* have likewise distinguished Section 5 from various statutes held invalid. *See Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373-374 (2001); *United States* v. *Morrison*, 529 U.S. 598, 626 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999).

This Court's favorable citation of Section 5 in *Boerne* and its progeny is unsurprising. *Boerne*'s congruence-and-proportionality test is directed at a particular concern—the possibility that Congress might try to engage in a substantive redefinition or expansion of constitutional rights, *Boerne*, 521 U.S. at 519-529; *see also Garrett*, 531 U.S. at 365; *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). The congruence-and-proportionality test guides courts in determining whether legislation deters and remedies violations of

constitutional rights (and is thus valid) or attempts to redefine them (and is thus invalid). *Boerne*, 521 U.S. at 519. Because official racial discrimination in voting indisputably violates the Fourteenth and Fifteenth Amendments, legislation designed to prevent and remedy that evil raises no specter of congressional redefinition of those constitutional provisions.

Nothing in the 2006 record suggests that Congress set out to redefine the substance of the Fourteenth or Fifteenth Amendment when it reauthorized Section 5. The district court thus appropriately applied the teachings in the *Boerne* cases that expressly distinguish Section 5 from statutes that substantively redefine rights, and also properly recognized the import of other controlling precedents that are embraced rather than displaced in that line of cases. "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *Boerne*, 521 U.S. at 536.

B. Section 5 Is A Congruent And Proportional Response To A Pattern Of Constitutional Violations In Covered Jurisdictions

When considered in light of this Court's numerous decisions sustaining or favorably analyzing Section 5, as well as the record before Congress of ongoing, persisting discrimination against minority voters, Appellant's *Boerne*-based challenge to the 2006 reauthorization raises no issue worthy of plenary review. As the district court recognized, the *Boerne* framework entails three inquiries. J.S.App. 120-121. First, the court must

determine "whether a challenged statute implicates a fundamental right or protected class." J.S.App. 45; *see Tennessee* v. *Lane*, 541 U.S. 509, 522 (2004); *Garrett*, 531 U.S at 365. Second, the court must examine the "gravity of the harm [the legislation] seeks to prevent," *Lane*, 541 U.S. at 523, "guided by the principle that the propriety of any § 5 legislation 'must be judged with reference to … historical experience.'" *Florida Prepaid*, 527 U.S. at 639-640. Third, the court must evaluate whether the statutory scheme is congruent and proportional to the record before Congress and to the risk of future harm (and therefore properly considered a remedial or preventive measure), or whether, instead, the legislation is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532. Section 5, as the district court concluded in its thorough analysis of the legislative record under *Boerne*, readily satisfies this test.

1. In enacting Section 5, Congress acted at the height of its enforcement powers

This Court has twice applied the congruence-and-proportionality test to legislation protecting classes or constitutional rights that implicate heightened judicial scrutiny. In both cases, the Court upheld the law. *See Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 728-729, 735-736 (2003) (Family Medical Leave Act is valid remedial legislation designed to combat gender discrimination); *Lane*, 541 U.S. at 533 (Title II of the ADA, as applied to courthouse access, is a reasonable prophylactic measure). By contrast, the Court has struck down statutes targeting classifications that receive only rational-basis review. *See Kimel*, 528 U.S. at

83-84 (age classifications); *Garrett*, 531 U.S. at 366-367 (Title I of the ADA). These cases show that, when the right or class at issue receives heightened scrutiny, Congress can more readily demonstrate the need for enforcement legislation. *See* J.S.App. 45.

Congress acted at the zenith of its enforcement authority in reauthorizing Section 5. Section 5 remedies and deters conduct subject to strict judicial scrutiny in two respects. First, Section 5 addresses racial discrimination by state actors, conduct that receives the strictest judicial scrutiny. *See, e.g.*, *Johnson* v. *California*, 543 U.S. 499, 509 (2005). Second, Section 5 addresses infringements upon the right to vote, which, as a right "preservative" of all others, is "fundamental," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), such that "any alleged infringement of [it] … must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Because racial discrimination in voting is prohibited by both the Fourteenth and Fifteenth Amendments, laws targeting such unconstitutional conduct raise few of the concerns that the Court has indicated are presented by measures that rest on the Fourteenth Amendment alone. As the district court observed, there is a greater risk that Congress might use its Fourteenth Amendment enforcement power to "redefine substantive rights" because the Fourteenth Amendment "functions as a vehicle through which various rights … apply to the States." J.S.App. 48. Thus, in contrast to *Boerne*, where this Court found constitutionally troublesome the broad sweep of RFRA, which was applicable to virtually every action by every State and political subunit, this Court has never suggested that the VRA, which is focused specifically on racial discrimination in voting, raises com-

parable constitutional concerns. Indeed, this Court's precedents are to the contrary.

2. Extensive evidence demonstrates the continuing need for Section 5

Jurisdictions covered by Section 5, including Texas, have "a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to … vote." *LULAC*, 548 U.S. at 439 (internal quotation marks omitted). Congress in 2006 found, after an extensive investigation, that minority voters in covered jurisdictions continue to encounter discrimination and that this discrimination would have been far more severe if not for Section 5.

The legislative record, as the district court recognized, easily justified Congress's 2006 reauthorization under this Court's precedents. The *Rome* Court sustained the 1975 reauthorization based on its analysis of three categories of evidence: (1) racial disparities in registration, (2) minority electoral representation, and (3) DOJ Section 5 objections. *See* 446 U.S. at 180-182. Congress received similar evidence in each category in 2006. As in 1975, Congress in 2006 found significant racial disparities in registration rates in two fully covered States and one partially covered State. J.S.App. 59-62. In 2006, as in 1975, "gains by minority candidates remain[ed] uneven, both geographically and by level of office." J.S.App. 63. For example, no African-American had ever been elected to statewide office in Mississippi, Louisiana, or South Carolina, despite their significant African-American populations. H.R. Rep. No. 109-478, at 33.

DOJ objections also showed persistent efforts to discriminate against minority voters. DOJ interposed more objections between 1982 and 2004 (626) than be-

tween 1965 and 1982 (490)—including challenges to at least one statewide change in every fully covered State and most partially covered States. J.S.App. 66, 69-71. Discriminatory changes made by local governmental entities drew hundreds of objections. Such objections were particularly numerous in areas with high percentages of minority residents. J.S.App. 68, 72-75. Between 1980 and 2000, 421 objections were based in whole or in part on state actors' intentional discrimination against minority voters. J.S.App. 76-77.

These intentionally discriminatory acts took many forms, and were often egregious. Recent examples at both the state and local level are illustrative. Mississippi drew an objection for reviving its intentionally discriminatory dual registration system, which the State refused to submit for preclearance until this Court's decision in *Young* v. *Fordice*, 520 U.S. 273 (1997), forced it to do so. J.S.App. 78-79. Texas drew a statewide objection based on intentional discrimination when the State created a judgeship using electoral methods that the legislature knew prevented minority citizens from electing candidates of choice. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2430-2432 (Oct. 25, 2005).

At the local level, in the decade prior to the 2006 reauthorization, DOJ objections blocked purposefully discriminatory annexations in Texas, South Carolina, and Mississippi and forestalled intentionally discriminatory redistricting plans by local legislative bodies in Louisiana, Alabama, Georgia, and Virginia. J.S.App. 155-156, 159-167, 174-178, 180-181. In 2000, DOJ objected to a redistricting plan devised by Webster County, Georgia that would have reduced African-

American voting power after the county elected its first majority-black school board; the Attorney General found the purported justifications for the change pretextual. J.S.App. 160-161. Similarly, DOJ interposed an objection when Kilmichael, Mississippi took the extraordinary step in 2001 of cancelling local elections after African-Americans became a majority of the town's population and an "unprecedented number" of African-Americans sought office. J.S.App. 78.

In addition to the three categories of evidence the Court relied on in *Rome* to uphold the 1975 reauthorization, Congress in 2006 also reviewed other significant types of evidence. Congress noted the frequency with which covered jurisdictions brought unsuccessful declaratory judgment actions attempting to preclear proposed changes. In one striking example, in 2001, Louisiana sought judicial preclearance (in a suit ultimately withdrawn) of a redistricting plan that was purposefully designed to diminish electoral opportunities for black voters and increase the electoral strength of white voters. In addition, the record showed that many other such suits led to judicial rulings that deemed the changes at issue purposefully discriminatory. J.S.App. 84-88.

Further, Congress received evidence of continued non-compliance with Section 5, including at least 105 successful private Section 5 enforcement suits since 1982. J.S.App. 114. As recently as 2004, such a suit derailed an attempt by a Texas jurisdiction to disenfranchise students at a historically black university. J.S.App. 90-92.

Congress also received evidence of official harassment of minority voters, including instances in Texas of police officers being stationed near polls in Hispanic

neighborhoods to intimidate voters, and singling out minorities for illegal scrutiny and harassment. S. Rep. No. 109-295, at 342-345. And the 2006 reauthorization was under consideration in Congress when this Court determined that a recent redistricting effort by Texas "bears the mark of intentional discrimination that could give rise to an equal protection violation." *LULAC*, 548 U.S. at 440.

In addition, Congress recognized that a jurisdiction's decision to withdraw a preclearance submission in response to a DOJ request for more information is often "illustrative of a jurisdiction's motives." H.R. Rep. No. 109-478, at 40. Congress thus concluded that the 855 instances in which proposed voting changes were withdrawn following such requests suggest continuing purposeful discrimination. J.S.App. 81-83. Texas has led the nation in such withdrawals. J.S.App. 83.

Section 5 has also had a substantial deterrent effect. J.S.App. 108-112. As Congress's investigation revealed, Section 5 is responsible for many "discriminatory voting changes … hav[ing] never materialized." H.R. Rep. No. 109-478, at 36. Therefore, Congress concluded—and appropriately took into account, *see Boerne*, 521 U.S. at 532-533 (citing *Rome*, 446 U.S. at 177)—that a repeal of Section 5 would lead to considerable backsliding.

When compared to the records assembled in *Hibbs* and *Lane*, the sufficiency of the 2006 reauthorization record is apparent. J.S.App. 125-128. The 2006 record documents "the very kind of intentional discrimination the dissenters in *Hibbs* and *Lane* thought missing in those cases but present in *Katzenbach* and *City of Rome*." J.S.App. 127; *see Hibbs*, 538 U.S. at 756 (Ken-

nedy, J., dissenting); *Lane*, 541 U.S. at 547-548 (Rehnquist, C.J., dissenting); *see also id.* at 564 (Scalia, J., dissenting) (requiring an "identified history of relevant constitutional violations").

In *Hibbs*, this Court upheld the FMLA "based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional conduct." *See Lane*, 541 U.S. at 528 & n.17 (discussing *Hibbs*, 538 U.S. at 728-733). In *Lane*, the principal evidence consisted of "testimony from persons with disabilities who described the physical inaccessibility of local courthouses." *Id.* at 527. As the district court here recognized, the 2006 reauthorization record "dwarfs those considered adequate in *Hibbs* and *Lane*." J.S.App. 143. In contrast to the "few reports and limited testimony from a handful of witnesses" in those cases, the voluminous 2006 reauthorization record "includes numerous studies by voting rights experts, testimony from dozens of witnesses describing racial discrimination in voting by covered jurisdictions, and hundreds of judicial and Attorney General findings of unconstitutional discrimination against minority voters." J.S.App. 126-127.

The District nonetheless insists that this record is inadequate, arguing that the remedy chosen by Congress—preclearance—can only be justified by evidence that covered jurisdictions are engaging in the same "gamesmanship" practiced before 1965, and that such evidence was lacking in 2006. J.S. 32-35. This argument is untenable.

Contrary to the District's contention (J.S. 32-33), neither *Katzenbach* nor any of this Court's later decisions upholding Section 5 has ever held that evidence of gamesmanship is necessary to sustain Section 5. The

ingenious evasion of federal-court enforcement of the Fifteenth Amendment noted in *Katzenbach* was but one part of a much larger problem—the inadequacy of the case-by-case method to eliminate persistent voting discrimination in jurisdictions where resistance was particularly firmly rooted. *See* 383 U.S. at 313-315, 328; *see also* J.S.App. 128. The District likewise ignores *Rome*, which "found Congress's reauthorization of Section 5 constitutional without ever mentioning stratagems, gamesmanship, or anything of the sort." J.S.App. 130; *see Rome*, 446 U.S. at 178-183. And as Congress found in 2006, "case-by-case enforcement alone is [still] not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." H.R. Rep. No. 109-478, at 57.

Moreover, as recounted by the district court, the 2006 record includes evidence of precisely the kind of gamesmanship by covered jurisdictions Appellant posits is necessary to sustain Section 5. *See* J.S.App. 128-131.[6] And, given that the purpose of Section 5 is to prevent discriminatory voting measures from being implemented, it is unsurprising that there is less overt gamesmanship today than in 1965. J.S.App. 132. That Section 5 has reduced but not eliminated overt gamesmanship does not weigh against the statute's constitutionality; if it did, only ineffective remedies could satisfy *Boerne*.

Appellant's other arguments are also unavailing. First, the District emphasizes improvements in regis-

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[6] *See also, e.g.*, 152 Cong. Rec. S7745, S7745-7749 (daily ed. July 18, 2006) (statement of Senator Leahy enumerating several "repeat offender[]" jurisdictions).

tration rates in some covered jurisdictions. J.S. 33. But as noted above, the 2006 record of racial disparities in registration resembles that reviewed in *Rome*. J.S.App. 59-62; p. 26, *supra*.

Second, the District argues that the DOJ objection rate is too low to justify Section 5's reauthorization. J.S. 34. But as the court below explained, "the objection rate has always been low, and the sharpest declines occurred before *City of Rome*." J.S.App. 66. The nature and quantity of the evidence of persistent widespread unconstitutional discrimination in covered jurisdictions—including the more than 600 objections since 1982—is more than adequate to justify Section 5. *See* J.S.App. 66-77; pp. 7-9, 26-29, *supra*.

Finally, the District suggests that only unconstitutional conduct that prevents minorities from registering to vote—not unconstitutional conduct that prevents minorities from participating in the political process—can justify Section 5. J.S. 34-35. That argument likewise conflicts with *Rome*, which upheld Section 5 based on evidence of the latter variety. *See, e.g.*, 446 U.S. at 181-182.[7] In sum, under this Court's well-established precedents, the 2006 record provides robust support for Congress's judgment that Section 5 remains necessary to remedy and deter unconstitutional discrimination against minority voters.

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[7] Appellant argues (J.S. 35-36) that *Katzenbach* and *Rome* do not end the inquiry because those decisions could not have considered the 2006 record. But the district court never suggested otherwise; rather, it relied, appropriately, on *Rome* because the Court there upheld the 1975 reauthorization based upon certain types of evidence, and the 2006 reauthorization's record contains similar types and quantities of evidence.

3. Section 5 appropriately deters and remedies voting discrimination

As the district court explained, under this Court's precedents, the greater the level of scrutiny applicable to a right and the stronger the record of violations, the more deference Congress receives in crafting enforcement schemes. J.S.App. 44, 121 (citing *Hibbs*, *Lane*, *Kimel*, and *Garrett*). Given the rights at stake and the substantial record of violations before Congress in 2006, Section 5 remains a congruent and proportional response to the evil its protections are designed to remedy and prevent—racial discrimination in voting in those jurisdictions where, historically, such unconstitutional conduct has been particularly entrenched.[8]

The numerous steps Congress has taken to limit Section 5's federalism costs confirm that Section 5 is properly designed to prevent and remedy unconstitutional State conduct—and is not an improper effort by Congress to redefine substantive rights. Section 5 is temporary,[9] affects a discrete class of laws and prac-

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[8] Section 5 prohibits voting changes in covered jurisdictions that are purposefully discriminatory (and thus unconstitutional), as well as voting changes that will have a retrogressive effect on voting and political participation by minority citizens. Congress may seek to prevent or remedy unconstitutional discrimination by prohibiting conduct that is discriminatory in effect. *Rome*, 446 U.S. at 173, 175; *see also Boerne*, 521 U.S. at 518.

[9] Like the 1982 reauthorization sustained by this Court in *Lopez*, the 2006 reauthorization extended Section 5 for 25 years. As the district court recognized, the 2006 Congress had good reasons for its "quintessentially legislative judgment" as to the duration of the reauthorization. J.S.App. 117. Congress determined that, because most Section 5 activity occurs during the redistricting that follows each decennial census, a renewal covering only one census cycle would provide jurisdictions with no incentive to make a clean

tices, is confined to jurisdictions where voting discrimination historically has been most pervasive and flagrant, and has an escape hatch from coverage. *Compare Boerne*, 521 U.S. at 532-533. Moreover, unlike most statutes invalidated under the *Boerne* framework, Section 5 includes no provision authorizing recovery of money damages from State treasuries. Section 5 thus plainly is not a substantive entitlement program masquerading as remedial legislation. *See Hibbs*, 538 U.S. at 754-757 (Kennedy, J., dissenting). Rather, Section 5 is a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment." *Garrett*, 531 U.S. at 373.

In light of Congress's continued tailoring of the statute in the 2006 reauthorization, it is unsurprising that not a single witness for any governmental entity testified against reauthorization. To the contrary, a coalition of organizations representing the interests of thousands of elected State and local officials advocated for Section 5's reauthorization. *See* 152 Cong. Rec. H5143, H5146 (daily ed. July 13, 2006).

Appellant argues that Section 5 is unduly intrusive on State sovereignty because it requires covered jurisdictions to obtain preclearance for voting changes. J.S. 31-32, 39. But as the Court has explained, "the Reconstruction Amendments by their very nature contemplate some intrusion into areas traditionally reserved to the States," and thus the Court has "specifically upheld the constitutionality of § 5 against a challenge that this

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record that would entitle them to bailout and would provide an insufficient record for a future Congress to evaluate the continued need for Section 5. J.S.App. 116-117, 143.

provision usurps powers reserved to the States." *Lopez*, 525 U.S. at 282-283.

Appellant's challenge to Section 5's coverage formula (J.S. 36-38) is also unavailing. The District misunderstands the role of registration and turnout statistics in establishing which jurisdictions are covered. Congress employed those data as tools for identifying jurisdictions with particularly egregious histories of discrimination, where especially forceful measures against voting discrimination were deemed necessary. *See Boerne*, 521 U.S. at 532-533. In 2006, as in every prior reauthorization, Congress determined, following a review of the evidence of continuing discrimination in those covered jurisdictions, that Section 5 remained necessary to remedy and deter unconstitutional conduct in them.

This Court, moreover, has already rejected the District's contention (J.S. 38) that Congress was required to adjust its coverage formula based on a comparison between covered and non-covered jurisdictions. *See Katzenbach*, 383 U.S. at 330-331; *see also Rome*, 446 U.S. at 180-182 (upholding Section 5 based exclusively on evidence of ongoing discrimination in covered jurisdictions). In any event, Congress in enacting the VRARA received evidence showing that the differences between covered and non-covered jurisdictions were significant, and that discrimination remains an especially salient problem in covered jurisdictions. *See* J.S.App. 138 (describing this evidence). The District's challenge ignores this evidence, as well as the role of the Act's bailout and bail-in mechanisms. These mechanisms allow for the contraction and expansion of coverage to ensure that Section 5 coverage continues to be reasonably tailored to those jurisdictions where racial discrimination has been particularly entrenched.

CONCLUSION

The district court's comprehensive opinion leaves no doubt that (a) Appellant is not eligible to bail out of coverage under Section 5, and (b) Section 5 remains valid as a measure designed by Congress to remedy a long history of unconstitutional discrimination in voting in covered jurisdictions, including Texas, and to prevent the recurrence of such discrimination. Those conclusions follow inexorably from four decades of this Court's decisions examining Section 5, and from the substantial record of ongoing discrimination reviewed by Congress in 2006. Appellant's submission fails to show that the district court's decision is flawed in either its application of this Court's precedents or its analysis of the legislative record. Accordingly, the judgment of the district court should be summarily affirmed.

Respectfully submitted.

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